

Shouting from the Bottom of the Well

THE IMPACT OF INTERNATIONAL TRIALS FOR WARTIME RAPE ON WOMEN'S AGENCY

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Abstract

This article critically examines the presumption that international adjudication of wartime rape cases advances the interests of survivors. It argues that just as national women's rights advocates recognize the futility of relying on court testimony alone for the production of a narrative that reflects women's experiences, promotes their agency and addresses their need for closure and healing, international women's rights advocates should explore the limitations of international tribunals and examine complementary and alternative mechanisms. Using the landmark 'Foca case' as an illustration, the author explains that although women may still exercise agency in the context of the adversarial process, their ability to do so is stunted. Moreover, I argue that, although witnesses may actively resist the legal meta-narrative of Woman Victim, adversarial processes serve to reinforce gender essentialism and cultural essentialism. This analysis has important implications for women human rights advocates seeking to bring cases before all international courts, including the permanent International Criminal Court.

Keywords

gender and conflict, wartime rape, human rights, humanitarian law, international criminal trial for Former Yugoslavia (ICTY), Bosnia, truth commissions, law and society, impunity

The young woman sat stone-faced, staring straight ahead at the lawyer for the prosecution. She avoided eye contact with the three men accused of rape and other crimes in wartime Bosnia. She politely answered question after question in a deep monotone. She described how night after night the soldiers took her out of the room in which she was imprisoned and into the place

where the beatings and rapes took place. What exactly did they do to you? How did they rape you? How many times that night? What other women were there? What did the rapists say to you? The lawyer pressed her to remember and recount every detail. She told of being forced to dance naked before cheering soldiers and paramilitary; she remembered being sold into a kind of sex slavery and being kept in a brothel for the use of soldiers; she spoke of the man who said he would help her and then betrayed her by raping her too. She gave the names of the other girls who had been sexually abused and raped, and she stated that she never directly told her family anything. After hours of witnessing, the attorney for the prosecution asked:

Q. Can you describe why you finally decided to speak to the Tribunal?

A. Because of my future.

Q. Can you be more specific about what you mean?

A. To say what happened.

Q. And in what way is that related to your future?

A. It will make me feel better.

[Testimony, p. 2031]¹

TRIAL WITNESSES AS AGENTS?

Many survivors of wartime rape who testified or who sought to testify before the International Criminal Tribunal for the Former Yugoslavia (ICTY) believed giving testimony would help them heal. They did not view themselves as passive recipients of assistance, but as active agents of change who knowingly chose to use international advocacy as a personal and political tool (Sen 1999: 189).² They did not act as supplicants to elites who would define their rights for them and bestow them from above (see Chandler 2002: 109), but rather behaved as politically mobilized survivors who, through their actions, would influence international opinion and help shape the content of international norms (see Booth 1999: 61). In short, by 'act[ing] as bearers, protagonists or beneficiaries of the values in question', they were exercising agency (Beetham 1996: 29).

Public remembering creates an opportunity for public recognition of what happened (Minow 1998; Orr 2000); thus, many survivors hoped that witnessing could help bring closure. 'If I can hear a judge say that what happened to me happened, I think I can stop remembering so much and learn to forget.'³ Survivors hoped witnessing would create a public record that would not only help them, but their entire nation. Many survivors sought to create a historical record that would include their experiences and honor all women who survived similar atrocities in Bosnia and elsewhere. 'This [the prosecution of rape before the ICTY] is not just for us', explained one Croat woman from Sarajevo, 'it is for [the Comfort Women] from Japan too.'⁴ Some survivors wanted to look the men who raped them in the eye and accuse them publicly.

Others were less interested in facing their perpetrators, but equally invested in seeing their perpetrators held accountable. 'There will only be justice', one woman told me, 'when [the perpetrators] are in jail somewhere.'

Despite their initial faith that they could use international war crimes tribunals to their own purposes, survivors have quickly become disillusioned with the adversarial process (see Mertus 2000). The witnesses almost universally experience the trials as dehumanizing and re-traumatizing experiences. Patricia Wald, an ICTY judge, observes that participation in adversarial criminal proceedings rarely helps survivors to 'feel better'.

Many of the witnesses are physically and emotionally fragile in the aftermath of their fractured lives. They frequently break down on the stand. The accused are there in the courtroom only a few feet away. One witness openly pled with the court to stop the accused from threatening her with his eyes ... Some of the witnesses say they are relieved to testify before us. Some express a humbling confidence that we will bring justice to their suffering. Others seem to find the courtroom experience with its stress on legal niceties anti-climatic and frustrating.

(Wald 2001: 109)

Witnesses who seek supportive counseling before and during trial face the risk of defense attorneys discrediting them as being too traumatized to be credible. As the years go by, prosecutors for the tribunal face greater and greater difficulty in finding witnesses to testify (Wald 2001: 109).

While survivors and their advocates have learned about the limits of the adversarial process for survivors, the (mainly western) champions of 'universal justice' have not (see Ignatieff 2000: 201). A recent survey in the Harvard Law Review notes, 'Prosecution seems the sole presumptive response to violations of international humanitarian law' (Developments in the Law 2001: 1981). The vast majority of the literature on international criminal tribunals assumes that, as long as investigators focus specifically on sexual violence - and procedural rules are correct with adequate protections provided - the trials will serve the interests of survivors (see, for example, Levy 1994; Pratt and Fletcher 1994; Askin 1997; Chesterman 1997).

In the national context, however, scholars and activists have long recognized that survivors of sexual violence cannot expect that testifying in a rape case will be a cathartic, healing experience (see, for example, Matoesian 1993; Ward 1995; Bryden and Lengnick 1997). This literature recognizes that the narrative of a witness is contorted to suit the needs of the audience(s). Far from providing an opportunity for women's realities to be validated, it is through adversarial proceedings that '[w]omen are disempowered, their voices silenced, patriarchal tales validated, rapes legalized' (Taslitz 1999a: 11).

Just as national women's rights advocates recognize the futility of relying on court testimony alone for the production of a narrative that reflects women's experiences, promotes their agency (see Matoesian 1997) and

addresses their need for closure and healing (Fletcher and Weinstein 2002: 592-7), international women's rights advocates should explore the limitations of international tribunals and examine complementary and alternative mechanisms. As Nomfundo Walaza, a South African psychologist and Director of the Center for Survivors of Violence and Torture, has observed, 'revealing is not healing' and the performative aspects of the courtroom may not be therapeutically in survivors' best interests (Fletcher and Weinstein 2002: 584, n. 73, citing Walaza 2001). Although women still may exercise agency in the context of the adversarial process, their ability to do so is stunted. In the words of one Kosovar survivor of wartime rape: 'it is like shouting from the bottom of a well.'⁶ War crime trials do serve useful goals, but they do not adequately meet the needs of survivors.

This essay explores the limitations of international tribunals for wartime rape through a case study of the celebrated case of Kunarac, Kovac and Vukovic (known as the 'Foca case'). The Foca case marked the first time in history that an international tribunal brought charges solely for crimes of sexual violence against women. The International Criminal Court for Yugoslavia (ICTY) in that case sentenced three ethnic Serbs to prison for their abuse of women at a 'rape camp' near Foca, a small Bosnian town southeast of Sarajevo.⁷ The accused were found guilty on several counts, including rape and torture as crimes against humanity and violations against the law or customs of war, and two of the men (Kunarac and Kovac) were found guilty of enslavement. Dragoljub Kunarac was sentenced to twenty-eight years, Radomir Kovac twenty years and Zoran Vukovic twelve years. The sentences were subsequently upheld on appeal. Heralded as a major victory by international women's human rights advocates seeking justice for wartime sexual violence, the judgment has generally proven disappointing to the women survivors themselves and to their kin back home.

STRUGGLING AGAINST THE LEGAL COUNTER-NARRATIVE

The overarching limitation of the adversarial process for survivors and their advocates is the same structural design that makes it so appealing for perpetrators and lawyers. By design, the legal process does not permit witnesses to tell their own coherent narrative; it chops their stories into digestible parts, selects a handful of parts and sorts and refines them to create a new narrative - the legal anti-narrative (Jackson 1988; Symposium 1989; Kaspiew 1995). Women who have survived rape and sexual assault describe the harm committed to them in words far different from the sterile language and performance of law (Smart 1989; Lusby 1995; Ray 1997).

The justification commonly advanced for limiting witnessing is a patronizing one: witnesses need to be protected to ensure that their suffering is not put on trial (see Ni Aolain 1997). Yet witnesses long for the opportunity to finish their story - to speak of their suffering publicly and in their own terms so it

may be publicly acknowledged (Mertus 2000; Orr 2000). At trial, witnesses do continually resist the legal counter-narrative by offering facts that are seemingly irrelevant to the crime and in sequencing their testimony in a manner that appears nonsensical. A close examination of the Foca case demonstrates that witnesses struggle to exercise their agency at all points in the trial – as they respond to both prosecutors' and defense attorney's questioning – but ultimately the adversarial process cannot alone fulfill their needs.

The Prosecution: Responding to 'Friendly' Questioning

In the Foca trial, the prosecution forced witnesses to speak about their experiences in a truncated question-and-answer format. The following illustration of this phenomenon – and the use of testimony throughout this article – demonstrates and, to some extent, reproduces this staccato.

- Q. [prosecution attorney] But the Court will need to know. Can you describe what he did?
- A. Yes. He pushed me onto one of the beds. He asked me to put his penis into my mouth.
- Q. And did he do that?
- A. He did it himself.
- Q. How long did that last?
- A. I don't know.
- Q. Did he say anything while this was happening?
- A. He was saying things like: What am I afraid of? Don't I know what sex is? Haven't I done it before? That kind of thing. Let's enjoy it. That kind of thing.
- Q. Were you scared?
- A. Yes.
- Q. Did you feel like you could do anything to defend yourself?
- A. It was impossible. He had a pistol. He threatened. And even had I risked my own life there, I was afraid for my family's lives. So I didn't dare do anything.
- Q. When did this stop?
- A. I don't know. I can't say exactly.
- Q. Did something happen?
- A. I did not understand your question. Can you rephrase it?
- Q. I'm sorry. I meant, did something happen to stop what he was doing to you?
- A. I think so, yes. Yes. For sure something happened. But I don't know whether these two soldiers walked into the room or whether they knocked on the door before that, or whether they were clamoring in the hallway. At any rate, somebody came in and it stopped.
- Q. And whoever came in, did they indicate that a bus was ready to leave?
- A. Yes.

(Testimony, pp. 1243–4)

Throughout this line of questioning, the prosecutor reduced the witness to the role of Victim and, in so doing, reinforced both gender essentialism and cultural essentialism (Kapur 2002). The nature of the questioning supported the notion that women have a 'true essence, invariable and fixed properties which define [them as Woman]' (Fuss 1990: xi; see also Spelman 1990). Feeding into stereotypes of helpless women (and, in particular, of helpless Muslim women), this woman was portrayed as vulnerable, sexually accessible and of little importance apart from her relations to men. The grand metanarrative of Woman Victim effaced the differences between women and undermined their agency (Young 1998).

Thus, the emphasis of the trial was on who did what to the witness, when and how (Adler 1987). Because the prosecutor appropriated what the witness said to an existing schema, he was no longer listening to *her*, but rather to his own construction of Victim (see Anderson and Jack 1991: 19).

Q. [prosecution attorney] In which way were you raped? What did they do?

A. [I] shut me up in a room with him. He wouldn't let anybody else enter except for him. And he wouldn't let me go the whole night. Every ten minutes he was on me and raped me.

Q. Did he rape you vaginally?

A. Yes.

Q. Anally?

A. Yes.

Q. Orally?

A. Yes.

Q. The other two persons you mentioned, when did they rape you?

A. In the morning, at dawn, early morning.

Q. Did they rape you together at the same time or one after the other?

A. One after the other. And [U] as well.

Q. When did [U] rape you?

A. In the morning.

(Testimony pp. 1427-8)

In the trial narrative, the woman was not relevant as her own agent, but only as her actions demonstrated something about the perpetrator. In all cases survivors of violence need to speak about their experiences on their own terms, but in the aftermath of a war, the need to (re)claim a sense of identity and belonging is particularly acute. Patricia Davis observes that '[b]eing the victim of rape affects a woman not only at the time of her attack, but also throughout the rest of her life, isolating her from her family and community, and putting her at risk of future attacks' (2000: 1246). In a non-legal setting, a rape survivor would tell a much different story, focusing not on the perpetrator, but on her feelings and fears, and how the rape has changed her relationship with her family and community. The adversarial setting makes such potentially therapeutic story-telling impossible (Minow 1998: 2; Crocker

1999: 52). The witnesses in the Foca case who tried to deviate from the structure of legal witnessing were cut off and then steered into the preferred direction.

In an adversarial proceeding the rules of evidence determine what counts as knowledge (Davies 1994; Taslitz 1999b). 'In this sense', Kathy Mack notes, 'evidence law is one manifestation of ... epistemological power in the legal system' (1999: 367; see also Matoesian 1993). Witness after witness in the Foca case was compelled to narrowly define what happened to them in line with the rules of evidence and the legal definition of rape.

Q. [prosecution attorney] When you say, 'rape' what exactly do you mean?

A. I don't understand your question.

Q. You said that this - this elderly man raped you. What exactly did he do?

A. He forced me onto the bed to take my clothes off, and then he raped me, he attacked me and raped me.

Q. Does it mean he put his penis into your vagina?

A. Yes.

Q. And these other men, did they do the same thing?

A. The same thing, yes.

Q. Were you conscious all the time when that happened?

A. I was conscious up to 10, up to the time I counted 10. Then I lost consciousness, and I know that some of them brought some water to splash over me and that I was all wet from that water when I came to, when I regained consciousness. But that didn't mean anything to them. They continued doing what they were doing. One of them came in and made me take all my clothes off, just to see what I looked like. And he said, 'That's a pity for you. You look so beautiful.'

(Testimony, p. 1391)

In the Foca case, the main euphemism for rape was being 'taken out'; the women were taken out of their rooms for rape and other abuse. This detached language might have helped some women speak about the unspeakable, but at the same time it diminished the true nature of the horrors that repeatedly occurred. The use of euphemisms, combined with the examining attorney's failure to ask about the survivors' experiences of *themselves* numbs the reader/listener to the nature of the violence.

Q. [prosecution attorney] Were you taken out by soldiers while you were at Partizan?

A. Yes.

Q. Are you able to say how often you were taken out or how many times?

A. I don't know exactly how many, but it was often.

Q. Was it every night, every day?

A. Not every night and every day. Sometimes not for two days. But then I would be taken out every day for three days, that kind of thing.

- Q. When you were taken out, how long were you kept away?
- A. That depended too, depended on the situation. Sometimes for a short period, just to let them do what they wanted to with me, and at other times in flats of unknown individuals, it would last for three days. I would be shut up for three days.
- Q. Whenever you were taken out, were you also raped?
- A. Yes, every time.
- Q. And when you say 'rape', do you mean what happened to you at the high school, the same thing?
- A. Yes. Every other time it was the same thing, every time after that it was always the same thing.
- Q. Do you remember the first time that you were taken out from Partizan?
- A. Yes.
- Q. Do you remember when it was?
- A. Perhaps a day or two later, after our arrival in the Partizan.
- Q. Do you remember who took you out?
- A. Yes.
- Q. Who was it?
- A. It was what I talked about a moment ago, when I was in the WC. Two soldiers whom I did not know came, and among them was Zoran Vukovic again.
- Q. When you say again, do you mean the same person who raped you at Buk Bijela?
- A. Yes.
- Q. Do you remember if he was armed at that time?
- A. Yes, he was.
- Q. Where did he take you?
- A. He took me to an apartment. I assume that it had been abandoned, because I didn't see anybody there. When he brought me to that apartment, he took me into one of the rooms, which was to the left-hand side of the hallway. There was a big bed there for sleeping in. I don't remember exactly whether there was a cupboard or what there was there, but it was a bedroom. And then it happened once again; I was raped again.

(Testimony, p. 1263)

In this line of testimony, the judge realized that the true nature of the crimes was being lost in their almost rote recitation. The judge pressed for more specifics:

- A. The next time was when I was taken to a house. The house was opposite the bus stop in Foca, the bus station in Foca. There was only one bus station and everybody knew it. A group of soldiers took me off, along with three other girls from the Partizan Sports Hall. They took us into a house, which was – how shall I describe it? It was all ransacked, things all over the place. You could see that nobody lived there. And the first thing they ordered us to do was to tidy the house and they said they'd go off to see to some

business and that they'd come back. And they raped us there. Each one of them raped the girl he wanted to rape, and as many times as he wanted to rape her. Everybody would pick and choose. They would say, 'Come on, you.' or 'Let's go upstairs,' because the house had rooms on the ground floor and on the first floor. So we would be down there until they took us off to rape us, to another room. And whenever they wanted to, they picked the girl they wanted to and raped her. I think that I was raped there three times, perhaps more. I can't remember exactly how many times, but it was dreadful. They would take their turns, one after the other. They would have breaks of 15 minutes or maybe one hour, as long as they wanted, but there were terrible things going on there. There were old people there. They were dirty people and drunken people, and they would take my friend off. He would rape her and then rape me. But they did their best to rape all of us, that each one of them raped each one of us in turn.

Q. How many different soldiers raped you that day?

A. Well, I said a moment ago that I counted up to three. All three of them were different. I was raped three times by three different men, not by one person. But they didn't pay any attention of how much my body could take. They did what they wanted until absolute exhaustion. It was absolutely terrible.

Q. How many soldiers would you say were there?

A. Well, today I can't remember the number exactly, but I do know that there were a lot of them. Perhaps a little less than ten, but there were more of them than there were us. And they took turns. So two of them would go off for a period of time and then some others would come back or they would come back. There was nothing definite. That was how it went.

(Testimony, p. 1264)

The follow-up question to this gruesome testimony concerned the identity and reactions of the soldiers who committed the crimes, not the reactions of the women who survived them. The goal of obtaining a perpetrator-driven narrative is central to criminal proceedings (Oseil 1995: 520). Thus, even when told with greater specificity, the narrative constructed at the Foca trial focused myopically on the actions of perpetrators and reinforced an essentialist image of Woman Victim. Yet whenever witnesses saw an opportunity to step outside the legal definition of rape, quite a different story emerged. One woman who was questioned in the standard format of 'who did what' to her body defiantly disobeyed her handler. She responded instead about injury to her soul.

A. He did say something for sure, but today, eight years later, and after so many rapes, I cannot remember. I only know that he was very forceful, that he wanted to hurt me as much as possible. But he could never hurt me as much as my soul always hurt me.

(Testimony, p. 1274)

The most devastating psychological trauma of rape is that it takes away a person's sense that life has meaning. Rape calls into question all basic human relationships and 'shatter[s] the construction of the self that is formed and sustained in relation to others'. It 'undermine[s] the belief systems that give meaning to human experience' (Herman 1993: 69). For rape victims who are also refugees, the experience is particularly jarring as the victims' familiar way-of-being in the world is challenged by 'a new reality of the sociopolitical circumstances that not only threatens that way-of-being but also forces one to see the world differently' (Daniel and Knudsen 1995: 1). How wartime victims of rape overcome the radical discontinuities and recreate the kind of social landscape necessary for survival is a narrative rarely heard at trial.

The Defense: Responding to Unfriendly Questioning

Defense lawyers are particularly uninterested in survivors' perception of what happened. Their sole purpose is to cast blame and discredit survivors. The rules for the Tribunal in the Foca case specifically prohibited testimony of prior sexual acts and thus limited the ways in which the defense attorneys could blame women for their own rapes. This 'rape shield' rule, however, did not eliminate the blaming tactic altogether. At one point the defense counsel implied that a woman who had testified that she was forced to stimulate a man so he could rape her shared responsibility for her own crime (see Testimony, p. 1452). In another part of the Foca trial, defense counsel suggested that a woman who had spoken of a rapist deciding who to rape on a particular night and who to 'reject' must have been a jealous lover.

Q. [defense attorney] In the course of your stay in the apartment, was there a change with respect to the sleeping arrangements amongst the individuals who were in the apartment?

A. Yes, there were changes.

Q. Could you tell me how this came about and what changed?

A. When he rejected me, he took AB, but he didn't keep her for long either; he rejected her. Then he took number 87, and then he spent most of his time with her.

Q. I don't understand this term 'rejected' that you use. As far as I understand it, when a man rejects a woman, it's in a romantic relationship.

A. When he had had enough of me and taking it out on me, then he didn't keep me there. He chased me away into the other room and he kept AB with him, also for a brief period. After he had had enough of her too, then he took number 87. That is what I meant.

Q. I'm afraid your answers do not correspond to my questions.

A. Then I don't understand your questions.

Q. Will you agree with me that jealousy is a psychological state, when a person

imbued by it is ready to do certain things which people who are not imbued by jealousy would not consider doing?

- A. I'm afraid I don't understand that question at all. What are you talking about? What do you mean by jealousy?
- Q. I'm referring to the fact that you said that after four or five days, [V] rejected you. I said yesterday that in my understanding, when a man rejects a woman, it is usually a person he loves and not a person who has been raped.
- A. How could I possibly be [V]'s beloved? Only dead, not even dead, could I be [V]'s beloved, or any one of theirs. That's all I could say.

(Testimony, p. 1608)

Defense lawyers try to suggest that witnesses are untrustworthy by provoking them and pointing out inconsistencies in their testimony (see generally Lafree 1998). Survivors of any kind of trauma, but especially those uprooted by conflict, are unable to provide a consistent and linear narrative. Courts of law, which demand that truth be told in a complete and linear fashion, mistrust the natural voice of survivors (Symposium 1989). That their narrative is truthful is less important to the linear-thinking, procedure-bound jurist. This can be particularly devastating for rape survivors whose purpose for testifying is to make the truth public and who have made great personal sacrifice to publicly confront their abusers (Mertus 2000).

A natural result of the post-traumatic stress of rape is an inability to remember and/or to recount fully what happened (Summerfield 1995; Olasov and Foa 1997). Some survivors are unable initially to speak about certain painful incidents; other survivors skip facts that appear irrelevant; and others remember differently over time. This witness was able to testify more fully as time passed.

- Q. In 1995, do you remember speaking with investigators from the Tribunal, at the end of August and the beginning of September?
- A. Yes, I remember.
- Q. And you gave a statement at that time about what happened to you during the war; is that right?
- A. Yes.
- Q. Did you tell the investigators at that time the details of what happened to you at Buk Bijela, and Zoran Vukovic?
- A. I did not.
- Q. Why not?
- A. I don't know. Those words could not leave my mouth.
- Q. Over this past weekend, on Sunday, March 26th, did you come to the Tribunal and meet with an investigator, and I was there as well?
- A. Yes.
- Q. Were you shown your previous statements?
- A. Yes.
- Q. Did you read your previous statements?

A. I read them.

Q. Were you asked at that time if you wanted to correct or add anything to your statements?

A. Yes.

Q. Did you describe what Zoran Vukovic did to you at Buk Bijela at that time?

A. I did.

Q. Why did you describe it then?

A. First of all, because of the oath I took today, that I would speak the truth and nothing but the truth. I knew I'd come to this courtroom. That's why. And secondly, let it be known that it really happened. It's not easier for me to speak about it today, but nevertheless, I wanted everyone to hear about it.

(Testimony, p. 1247)

Another witness was able to remember some events in detail, but had no memory of other events at all. She explained that the pain at one point became so great that she stopped experiencing her own body.

Q. What happened when you were returned to that group?

A. I don't think anything happened; that is to say, it was as if I wasn't present, conscious of it all, what was happening to me.

(Testimony, p. 1672)

Defense attorneys are not willing to recognize that the trauma of rape often alters the nature and sequencing of the victim's testimony while not changing the truth of their statements. On the contrary, defense attorneys attempt to pathologize their behavior and undermine their credibility. In one exchange the defense attorney suggested that an elderly woman was ill because she could not consistently remember facts.

Q. [defense attorney] So you don't know whether you said that or not?

A. I don't know. I really don't know.

Q. Well, if you're not feeling very well, perhaps we can make a break.

A. No, we don't have to make a break.

Q. Well, I'm suggesting that for your well-being.

A. No, you don't have to make a break because of me. What I know, I shall gladly state. What I don't know, I cannot say, and you can't make me say anything I don't know. If I've forgotten something, if I've made some mistakes, I don't know. I've had enough of all this.

Q. I do believe that you have had enough of everything, because you have lived through a war.

A. Well, I didn't - I'm an ailing woman.

Q. And an elderly woman you are as well.

A. Yes, and I'm not psychologically all right. The doctors are treating me for my nervous condition and everything else.

(Testimony, p. 1023)

Building on his depiction of the elderly woman as infirm and incapable, the defense attorney attempted to strip the witness of her agency by suggesting that she could not have possibly come to the tribunal on her own volition.

Q. Madam, I'm very interested in finding out who brought you here at all.

A. What I know, I know; what I don't know, I don't know. I'm ready to say what I know. What I don't know, I cannot say.

(Testimony, p. 1023)

Instead of acknowledging the woman's intelligent frankness, the defense attorney scolded:

Q. Yes, but I have to continue with my questions, because at one point you seemed to be saying one thing; at another point you say something else. You see these three men here? They have been charged for terrible crimes, and you are a witness for the Prosecution. As their Defense counsel -

A. My husband is not here anymore. He's no longer with us, and I'm going on living. I think that's very difficult. I've been living for the past eight years -

Q. Yes, I can understand that it is difficult for you.

A. Terrible things happened to my husband. I've never seen him again. I think that it is very hard.

The judge interrupted:

JUDGE MUMBA: Counsel, you have to understand the state in which the witness is and simply ask her questions to elicit whatever evidence you want to elicit; otherwise we'll be here forever.

MR. JOVANOVIC: [defense counsel] Your Honours, with your permission, I have just two more sentences. Perhaps I've let myself go a little, but I should like to ask your indulgence. We come from those regions, from those parts. I know everything that this woman has gone through.

(Testimony, p. 1024)

Outraged at the suggestion that the defense attorney *knows* what she has been through, the old woman exclaimed, 'Nobody can know. Only I know what I have lived through. Nobody else can know' (Transcript, p. 1025).

This exchange demonstrates that even within the confines of an adversarial system, and even when questioned by a hostile defense attorney, rape survivors are able to assert their own agency. Yet by forcing them to fit themselves into the structure of the legal anti-narrative, the adversarial process mutes and distorts their narrative (Smart 1989; Young 1998).

CONCLUSION

One of the most powerful moments of defiance in the Foca trial came when the court heard from a young woman who was only 15 at the time she was raped.

- Q. [prosecution counsel] What happened to you while you were in [W's] House?
A. Rape happened, humiliation, mistreatment.
Q. When you say 'rape', what exactly do you mean?
A. In the Yugoslav language in those days, which is now Bosnian, there is a word, 'silo,' which means power, strength. To me, that very word, 'silovanje,' because I was a child of 15. So they used force, power, strength to bring me there, and that means everything. Everything I went through, as well as the other girls, occurred not through my will or my acquiescence but by the use of force, power and strength.
Q. But for what did they use the power and strength and force, for what?
A. To bring us there and to do everything they did.
Q. Does that mean to put their penises into your mouth, or vagina, or anus?
A. Yes.
Q. How often did that happen? Was it a daily occurrence?
A. For me, no. Of course, all of us who were there didn't - were not given the same treatment. The intensity of the forcible behavior towards us varied.
Q. How often were you raped?
A. These are things that I have always wanted to forget. So not so frequently, but I can't tell you with precision.
Q. Who raped you; do you remember anyone specifically?
A. Yes. The first to do it was [X], [Y], also a man who came and said he was [Z], that he was a Montenegrin.... Now I simply - I could not name any others.
Q. How did this make you feel while you were in [W's] House?
A. Awful, dreadful, helpless. But at the same time I felt dignified and proud.
Q. Of what?
A. I didn't understand the question.
Q. You said at the same time you felt dignified and proud, and what do you mean? What made you feel this way?
A. Yes. We girls, children, were hopeless. They were men under arms and they used force. But simply I did not want to be subdued. They would often describe us as slaves, but I wouldn't accept that.

(Testimony, pp. 2423-4)

Like all witnesses, this young woman had been asked to define what happened to her in narrow legal terms and to focus on the perpetrators' acts against her body. She instead offered her own definition of rape, which focused on power and not on body parts, and her own reaction to the experience, which highlighted women's defiance instead of their victimization.

Women can exercise agency in the context of witnessing before international tribunals, but tribunals alone do not serve their need for creating a record, achieving justice, remembering or forgetting. The trial transcript is marked by what Kathryn Anderson and Dana Jack have called the 'presence of the absence' (Anderson and Jack 1991: 19). Survivors need space and opportunity to 'reflect upon their experiences and choose for themselves which experiences and feelings are central to their sense of the past' (Anderson and Jack 1991: 17). Adversarial tribunals alone cannot provide this. The establishment of a permanent International Criminal Court should prompt not only more international cases alleging wartime rape, but also a renewed search for nonadversarial alternatives that may better meet the needs of women survivors.

Alternative and complementary processes to international war crimes tribunals could include civil suits for compensation, controlled by survivors and their chosen attorneys and not prosecutors responsive to other agendas (Alvarez 1998: 2103). Civil suits, however, would still be within the legal paradigm and subject to the same constraints. Other approaches that move beyond the legal paradigm include truth commissions inspired by grass-roots movements for reconciliation and justice (Rotberg and Thompson 2000; Shankar 2000; Hayner 2001); memory projects that collect and publish without judging the accounts of survivors; popular education campaigns that encourage survivors to test their voices; and psychotherapeutic testimony therapy (Friedrich 1999). As long as these alternative processes are truly bottom-up in nature and do not rely on international pressure, they are far more useful than trials in fostering the reconstruction of civil society. The benefits for survivors of such nonadversarial processes thus may indeed extend far beyond the outcome.⁴

One particularly intriguing complementary mechanism would be the staging of a 'people's tribunal', such as the one held in December 2000 for consideration of Japanese military sexual slavery (Chinkin 2000). People's tribunals are the embodiment of Richard Falk's vision of law as 'an instrument of civil society' that belongs to peoples, not governments (Falk 1988: 29). 'Accordingly', Christine Chinkin explains, 'when states fail to exercise their obligations to ensure justice, civil society can and should step in' (Chinkin 2000: 339). While a people's tribunal could not impose sentences, order reparations or provide the same due process guarantees as a court of law, it could address the need of survivors for public acknowledgment of what happened. Survivors of atrocities could have more say in fashioning the rules of these tribunals and thus ensuring that they have an opportunity to present their full story. By remaining witness-focused instead of perpetrator-focused, the narrative that would be constructed by a people's tribunal would be more true to the experiences of survivors.

No single response will serve all the needs of all survivors in all circumstances. Several tools could help create a narrative that fully includes survivors' experiences and empowers them in the process. As the editors of

the *Harvard Law Review* have aptly noted, '[e]xaggerating just what one tool – international prosecution – can reasonably accomplish may distract attention and resources from other more suitable mechanisms and will inevitably lead to disappointment in the prosecutions' performance' (Developments in the Law 2001: 1981–2). Above all, survivors themselves should take a lead in determining the nature and operation of any set of tools. Only the survivors can determine whether and how to put the past at rest, and whether and how to keep remembering.

The words of one witness in the Foca case are haunting:

I think that I have decided to try and leave many of those things behind me somewhere, although within me, I still have and there will always be traces of everything that happened to me. I think that for the whole of my life, all my life I will have thoughts of that and feel the pain that I felt then and still feel. That will never go away.

(Testimony, p. 1728)

No public memory project will cure the pain of this survivor and the others. However, the adversarial process alone does not honor their assertion of agency, their resistance to power and their will to survive.

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Notes

- 1 The transcript for the trial can be found at www.un.org/icty/ind-e.htm (scroll down to the entry appearing as: Kunarac and Kovac (IT-96-23) 'Foca', and Vukovic (IT-96-23/1) 'Foca'). The link to 'Testimony' can be found in the light blue box. All references to testimony in this article are to this Web-based version of the official trial transcript.
- 2 That many of the survivors were also patients does not negate their ability to exercise agency. Amartya Sen observes that '[t]he fact that the agent may have to see herself as a patient as well does not alter the additional modalities and responsibilities that are inescapably associated with the agency of a person' (1999: 190).
- 3 Interview with Albanian Kosovar woman, Kosovo, August 2001.
- 4 Interview with Croat woman from Bosnia, Vienna, April 1995.
- 5 Interview with Bosnian woman, Croatia, March 1994.
- 6 Author's interview, August 2001.
- 7 The Hague, 22 February 2001 (JL/P.I.S./566-e). The decision read in open court

can be found at www.un.org/icty/pressreal/p566-e.html. The full transcript and text of the decision can be found at www.un.org/icty/foca/triale2/judgement/index.htm

- 8 The author is involved in a project with the NGO 'Women Waging Peace', which documents evidence of the relative benefits of combining nonadversarial and adversarial approaches.

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