

# *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.

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### 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]<sup>1</sup>

#### 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).<sup>2</sup> 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.'<sup>3</sup> 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.'<sup>4</sup> 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.'<sup>6</sup> 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.<sup>7</sup> 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