
Rape as a Crime in International Humanitarian Law: Where to from Here?

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Abstract

This article examines recent developments in the prosecution of crimes of sexual violence under international law. The author suggests that these developments are driven by the dual imperatives of a feminist 're-order' project — which seeks to reconstitute the international order free of sexual violence — and the imperative of recognition for victims of crimes of sexual violence. She argues, however, that by itself, a system of international criminal prosecution will be inadequate to meet the imperative of recognition for victims. She relies in this respect on research on the experiences of victims in national criminal justice systems, on the growing trend towards victims of crimes of sexual violence seeking redress in 'transnational' civil forums, and an analysis of the constraints of the international prosecution process. The article goes on to argue that the concept of international 'justice' for crimes of sexual violence needs to be expanded, beyond even those embodied in the ICTY or Rome Statutes, to include primary and not simply ancillary civil forums for the granting of 'restitution'. The author proposes a system of international victims' compensation, and makes preliminary suggestions for the features such a system should have. She further argues that, ultimately, this system will produce a parallel jurisprudence of 'recognition' which will eventually 'act back' on the discourses of international criminal prosecutions and the imperatives of an order/re-order project.

On 22 February 2001, the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down judgment in *The Prosecutor v. Kunarac, Kovac and Vukovic* ('*Kunarac*'), the first indictment in the history of international war crimes prosecutions with charges based solely on crimes of sexual violence against women.¹ The Tribunal found the accused guilty as principals and accessories to the crimes of rape,

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¹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23T, Judgment, 22 February 2001.

enslavement and outrages on personal dignity, as crimes against humanity and war crimes.

In Part 1 of this article, I examine the significance of this decision for the *acknowledgment and recognition* of crimes of sexual violence against women, and ask: ‘Where to from here?’ I suggest that *Kunarac* demonstrates both the promise and the limitations inherent in international criminal prosecutions as providing recognition of women’s experiences. In Part 2, I suggest that this is connected to the increased recent interest in civil remedies as ‘justice’ for the victims of crimes under international law. I examine the decision of the United States Second Circuit in *Kadic v. Karadzic* in this context, and connect it to civil litigation by Asian women who were used as ‘comfort women’ by Japanese soldiers in the Second World War.² In Part 3, I outline the international movement to recognize victims’ rights, but point to the clear inadequacies in the current approach to compensating victims of international humanitarian law breaches. In Part 4, I develop a proposal for a unified system of international victims’ compensation, as a forum for recognizing both individual instances and systematic patterns of sexual violence against women. And I suggest that, by putting women and the recognition of their experience at the ‘centre’ of a discourse surrounding victims, such a system will produce a jurisprudence which may ‘act back’ on the criminal process, to increase the nexus between women’s actually lived ‘multiplicitous’ experiences and the language of war crimes trials.

1 International War Crimes Prosecutions

Chesterman describes the function of war crimes prosecutions as ‘order-building’ within the international community.³ Order is constituted by the deterrence of future breaches of international humanitarian law, and by the (re-)affirmation of an international ‘moral’ order through retribution and catharsis.⁴ As in domestic criminal prosecutions since the nineteenth century, ‘restitution’ or ‘recognition’ for victims is a purely incidental aim.⁵ Criminal charges are therefore framed in language designed to promote the restoration of the previous (patriarchal) ‘order’, rather than in a more feminist language designed to challenge the construction of this ‘order’ in so-called peace, and to articulate continuities between order and ‘disorder’. The priority of an ‘order-building’ project is to obtain convictions (for breaches of abstract legal norms), rather than convictions *for the crime of what the accused actually did to the victim*.

² *Doe I, Doe II v. Karadzic; Kadic v. Karadzic*, 866 F Supp 734 (1994, US Dist).

³ Chesterman, ‘Never Again ... and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond’, 22 *Yale Journal of International Law* (1997) 298.

⁴ Chesterman, *supra* note 3, at 312–317.

⁵ Kersh, ‘The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia’, 24 *California Western International Law Journal* (1994) 345, at 347.

A The Feminist Critique

Feminist scholars and activists have challenged the traditional 'order-building' project on two levels. First, they have sought to promote notions of '(re-)order' which deter and punish crimes of sexual violence against women. Secondly, they have argued for the inclusion and 're-centring' of the actual *experiences* of women as victims, in the language of the law, because, as Catharine Mackinnon has said, 'behind all law is someone's story; someone whose blood, if you read closely, leaks through the lines. Text does not beget text; life does. The question ... is whose experience grounds what law.'⁶

I want to suggest that the *Kunarac* case represents a clear though limited 'victory' for the first level of feminist challenge, but that, on the second level, it simultaneously acknowledges and repudiates women's actual experience of sexual violence. I argue that this contradictory process of affirmation/denial results from the primacy of order itself, in which the framing of an indictment is secondary to the conviction obtained. I therefore argue that we have to move beyond discourses of order and re-order to fully realize the feminist project of inclusion. In doing so, I argue that the instrumental project will also be advanced, but this time, incidentally.

B Order Versus Re-order

On the level of retribution and deterrence, *Kunarac* represented several significant 'firsts' for a feminist 're-order'. The verdict in *Kunarac* was the first time a commanding officer, and *all* the defendants in an indictment, were convicted as primary actors ('rapists') rather than 'simply' having command responsibility for or being accessories to rape.⁷ Perhaps most significantly, it was the first time that a custodial sentence for crimes of sexual violence was rendered visible from the obscurity of 'lesser' concurrent sentences.⁸ *Kunarac* was also the first indictment in which the crime of sexual enslavement was charged as enslavement — either as a war crime under Article 27 of the Fourth Geneva Convention, or as a crime against humanity.⁹ It was the first time the objectification of women as live pornography was prosecuted as a war crime before the ICTY, following the lead of the International Criminal Tribunal for Rwanda

⁶ Mackinnon, 'Crimes of War, Crimes of Peace', 37 *UCLA Women's Law Journal* (1993) 59, at 59.

⁷ Compare: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; *Prosecutor v. Delacic et al.*, Case No. IT-96-21-A, Judgment, 16 November 1998; and *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, 10 December 1998.

⁸ In *Kunarac et al.*, the defendants were sentenced to 28, 20 and 12 years' imprisonment respectively, taking into account all the charges of which they were convicted. Compare: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentencing Judgment, 2 October 1998 (Akayesu was sentenced to life imprisonment for the crime of genocide, and 15 years for rape and torture as crimes against humanity, to run concurrently); *Prosecutor v. Delacic et al.*, Case No. IT-96-21-A, Judgment, 16 November 1998 (Delic was sentenced to 20 years' imprisonment for murders and killings, and 15 years' imprisonment for rape as torture, to be served concurrently); *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, 10 December 1998 (Furundzija was sentenced to 10 years' imprisonment for torture, and 8 years for rape, to be served concurrently).

⁹ Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *American Journal of International Law* (1999) 97, at 120.

(ICTR) in *Akayesu*.¹⁰ In *Kunarac*, the Trial Chamber also expanded the definition of rape adopted in *Akayesu* and *Furundzija*, to encompass all situations in which consent is not ‘freely’ and ‘voluntarily’ given.¹¹

Further, the Tribunal challenged the ‘state action’ doctrine in international humanitarian law, which, as a constituent element of the public/private divide in international law, has served to obstruct the recognition and prosecution of crimes against women.¹² In considering the definition of torture in customary international humanitarian law, the Tribunal declined to import the ‘state action’ requirement from human rights law, which had previously been adopted by the Tribunal in *Delacic* and *Furundzija* as ‘reflecting a consensus . . . representative of customary international law’.¹³ In *Kunarac*, the Tribunal did not base its finding on this narrow definition of torture, holding that: ‘the characteristic trait of the offence in (the context of humanitarian rather than human rights law) is to be found in the nature of the act committed rather than in the status of the person who committed it.’¹⁴ The decision in *Kunarac* thereby challenged the dichotomized understanding in which ‘when men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. But when men are deprived of theirs by government, it does.’¹⁵ Disappointingly for a feminist re-order project, however, the Tribunal’s reasoning relied on the distinction between the customary international law of human rights and customary international humanitarian law, and thus simultaneously affirmed the public/private divide in so-called ‘peace’.

In the course of expanding the definition of torture within international humanitarian law, the Tribunal was required to reconsider the relationship between rape and torture for the purposes of cumulative charging and conviction. The Tribunal held that rape and torture *could* be cumulatively charged, on the implicit basis that rape does not inherently embody gender discrimination as a constituent mental element.¹⁶

An instrumental feminist ‘re-order’ project will be ambivalent about this development, as treating rape and torture separately produces ‘more deterrence’ and ‘more retribution’ for crimes of sexual violence against women. On a deeper level, however, Askin argues that defining the crime of rape as an ‘outrage on personal dignity’ makes the potential deterrence value of war crimes prosecutions ‘wholly useless’, as ‘the conduct being punished is termed vaguely, and the sexual nature of the crime is indeterminable’.¹⁷

¹⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; cf. Askin, *supra* note 9, at 108–109.

¹¹ *Prosecutor v. Kunarac*, *supra* note 1, at paras 453–460.

¹² *Ibid*, at para. 495.

¹³ *Ibid*, at para. 472, citing *Prosecutor v. Delacic et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, at para. 258; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras 160–161.

¹⁴ *Prosecutor v. Kunarac*, *supra* note 1, at para. 495.

¹⁵ Mackinnon, *supra* note 6, at 69–70.

¹⁶ *Prosecutor v. Kunarac*, *supra* note 1, at paras 443–460.

¹⁷ Askin, *supra* note 9, at 101 n. 31.

C The Schizophrenia of Recognition/Denial

There is no such ambivalence in a second-level feminist critique, however. In this understanding, *Kunarac* represents a repudiation of and retreat from the affirmation and inclusion of women's experiences by the Tribunal in *Delacic*, where the Trial Chamber held that the rapes of GC and MA by Delic were for the purpose of obtaining information, and 'because they were women'.¹⁸ Targeting women for rape because they were women was then held by the Trial Chamber in *Delacic* to be a proscribed discriminatory purpose for the offence of torture.¹⁹

In contrast, in *Kunarac*, the Tribunal held that the rapes in the indictment were a form of torture, because they were committed with an intent to discriminate against 'Muslims in general' and 'the victim in particular'.²⁰ Any suggestion that the *particularity* of a victim's identity embraced her femaleness was not only ruled out at a definitional level, but explicitly dismissed by the Tribunal, when it held that complainants were 'taken out' to be raped 'on the basis *only* of their Muslim ethnicity',²¹ and that Muslim men and women in Foca were 'killed, raped or severely beaten' and the '*sole reason* for this treatment . . . was their Muslim ethnicity'.²² In the words of Catharine Mackinnon, gender discrimination was 'too female to be human . . . and too particular to be universal'.²³ (Of course, in the *Delacic* case, gender discrimination was too 'human' to be racial, and racial discrimination was too particular to be human.²⁴ The Tribunal thus oscillates between essentialisms of gender and race, neither of which are adequate to capture the actually lived experiences of victims of war crimes in Bosnia.²⁵)

A gendered failure of recognition can also be observed in *Kunarac* in the application of Article 5 of the ICTY Statute (crimes against humanity). In finding the existence of an 'attack directed against a civilian population' for the purposes of Article 5, the Tribunal was unwilling to recognize the particular collective subjectivity of *Muslim women*, as a relevant civilian population, preferring to find that the attack was directed against the 'Muslim civilian population' generally.²⁶ In documenting this attack, the Trial Chamber notes the Serbian attack on Muslim men as workers and soldiers, then on Muslim property, and only then on the sexual autonomy and integrity of Muslim women.²⁷ While clearly acknowledging this latter dimension to the attack, the Trial Chamber's reasoning suggests that mass rape will only be defined as an attack on a

¹⁸ *Prosecutor v. Delacic*, Case No. IT-96-21, Judgment, 16 November 1998, at paras 941 and 963.

¹⁹ *Ibid*, at paras 475–494.

²⁰ *Prosecutor v. Kunarac*, *supra* note 1, at paras 711 and 816.

²¹ *Ibid*, at paras 654 and 669 (emphasis added).

²² *Ibid*, at para. 577.

²³ Mackinnon, *supra* note 6, at 60.

²⁴ The Tribunal, in *Prosecutor v. Delacic*, Case No. IT-96-21, Judgment, 16 November 1998, failed to acknowledge the ethno-religious dimension to the crimes committed by the accused, except at the level of sentencing: cf. section V of the Judgment.

²⁵ See Harris, 'Race and Essentialism in Feminist Legal Theory', 42 *Stanford Law Review* (1990) 581.

²⁶ *Prosecutor v. Kunarac*, *supra* note 1, at paras 570–578.

²⁷ *Ibid*, at paras 571–574.

civilian population, where women are attacked along with *other* forms of male ‘property’, rather than as women.

More encouragingly for a feminist ‘re-order’ project, the Trial Chamber in *Kunarac* was willing to enter convictions for enslavement on the basis of, *inter alia*, the sexual enslavement of the complainants, rather than treating sexual enslavement as ‘an attack on the *honour*’ of women, in the context *inter alia* of their *family rights* and *customs*.²⁸ This shift represents an increase in the severity of the offence of sexual enslavement under international law, from a violation of the laws or customs of war to, as partially constitutive of the crime of enslavement, a crime against humanity. In a feminist ‘re-order’ project, this increases the deterrence/retribution value embodied in the prosecution of sexual enslavement as a crime. In addition, this shift represents some advance on previous masculinist failures of recognition of women’s actually lived experiences. It ‘responds’ to feminist calls to name sexual enslavement as a crime of violence and exploitation against women, rather than (as the Geneva Convention invites) simply reinscribing the role of women as family and community property in a patriarchal order in which to be raped or sexually enslaved is shameful and dishonourable, and virginity or chastity are preconditions of the treatment of rape and sexual enslavement as a crime (because only virgins can lose their honour and be made into ‘whores’).²⁹ I have suggested elsewhere that, in recognizing women’s sexual autonomy rather than protecting women’s sexual purity in this context, the Tribunal has opened up possibilities of prosecuting other violations of women’s sexual and reproductive autonomy, including forced pregnancy, as violations of international law.³⁰ However, sexual enslavement is again (implicitly) treated as insufficient to constitute *per se* the crime of enslavement. The findings of guilt under counts 18, 21, 22 and 25 of the indictment turn on combined findings of restrictions on freedom of movement, the abrogation of privacy, domestic enslavement, physical mistreatment of and traffic in the complainants, as well as findings of sexual enslavement.³¹

This partial affirmation of women’s sexual autonomy in the crime of enslavement, and the simultaneous implicit denial of rape as inevitably a crime of violence and gender discrimination, of women’s collective subjectivity as a civilian population, and of sexual enslavement as sufficient to constitute the crime of enslavement, represents the schizophrenic potential inherent in an instrumentalist ‘(re-)order-building’

²⁸ Article 27 of the Fourth Geneva Convention. For a critique of Article 27, see Buss, ‘Women at the Borders: Rape and Nationalism in International Law’, 6 *Feminist Legal Studies* (1998) 161, at 181; Copelon, ‘Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law’, 5 *Hastings Women’s Law Journal* (1994) 243, at 248–249.

²⁹ *Ibid*, at 249; see also Chesterman, *supra* note 3, at 332.

³⁰ See Dixon, ‘Playing Snakes and Ladders with Gender Justice in the Hague: Prosecutor v. Kunarac et al.’ (unpublished paper, 2001) 21: forced pregnancy and maternity represent an unequivocal claim and exercise of control over women’s reproductive ‘labour’ (see by analogy Koppelman, ‘Forced Labor: A Thirteenth Amendment Defense of Abortion’, 84 *Northwestern University Law Review* (1990) 480) and a fundamental infringement of her freedom and privacy rights. This is clearly ‘enslavement’ within the definition given in *Kunarac*.

³¹ *Prosecutor v. Kunarac*, *supra* note 1, at paras 728–744 and 775–782.

focus/fantasy. In an order-based approach, whether masculinist or feminist, women's experiences of violence will be affirmed or denied according to the overriding dictates of deterrence and retribution. Part of what feminisms seek, however, is the re-centring 'here and now' of women's experience and pain in discourses of international law.³²

D Order Versus Recognition: An Inherent Tension?

The tension between the imperatives of order and recognition is further illuminated by a consideration of the (non-)prosecution of rape as genocide in the *Kunarac* indictment.

Kelly Askin has argued, as part of a 're-order' focus, that the primary deficiency of the original *Kunarac* indictment (the Foca indictment) was 'the omission of appropriate charges of genocide' under Article 4 of the Statute of the Tribunal.³³ Barbara Bedont makes a similar argument in relation to the framing of gender-specific crimes in the Statute of the ICC.³⁴ The clear 'instrumental' advantage of prosecuting rape and forced pregnancy as a form of genocide, is that genocide is treated as the most serious of crimes against international humanitarian law, and, as such, attracts the most severe penalties.³⁵ In a misogynist world order, invoking harms to a patriarchal community will also increase the chance that crimes of sexual violence will be charged and successfully prosecuted.

However, recognizing a crime against women as a crime against an entire community rests, at least in some part, on an understanding of the meaning of rape and forced pregnancy in the context of patriarchal family and society.³⁶ Rape is effective as genocide in a patriarchal society because it renders female victims socially

³² I note in this context the concern expressed by Wendy Brown that the attempts by women and racial/ethnic minorities to seek legal redress for/affirmation of their experiences of victimhood imprisons them in a 'plastic cage', in which their identities are fixed so as to 'entrench the injury-identity connection' which the legal process seeks to denounce: Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (1995) 21–29. However, the mechanism I propose does not legally inscribe 'highly specified identities', because it allows shifting coalitions of plaintiffs to frame their injuries as they seem to them, in the context of a particular historical and cultural frame, and the findings made in that context will only bind or affect subsequent plaintiffs at their election (see the discussion below). Further, 'in its economy of perpetrator and victim', the IVCT project *does* seek the empowerment of the 'victim', and not simply [*sic*] 'the revenge of punishment, making the perpetrator hurt as the sufferer does' (see Brown, *ibid.*, at 27).

³³ Askin, *supra* note 9, at 118.

³⁴ Bedont, 'Gender-Specific Provisions in the Statute of the ICC', in Lattanzi and Schabas (eds), *Essays on the Rome Statute of the ICC* (1999), reproduced at www.iccwomen.org/sources/genderprovs.htm, at 18–19.

³⁵ See e.g. *Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998.

³⁶ Gibson, 'The Discourse of Sex/War: Thoughts on Catharine Mackinnon's 1993 Oxford Amnesty Lecture', 2 *Feminist Legal Studies* (1993) 179, at 188, discussed in Kalajdzic, 'Rape, Representation, and Rights: Permeating International Law with the Voices of Women', 21 *Queen's Law Journal* (1996) 457, at 477.

infertile, by virtue of their ‘unmarriageability’ or untouchability.³⁷ Forced pregnancy and maternity may also be instruments of genocide where strict patriarchal notions of patrilinearity ‘cast out’ children born to men outside the ethnic group, as non-members of their mother’s ethnic group.³⁸ In the *Akayesu* case, the ICTR acknowledged in *dictum* that, against the background of such a patriarchal understanding, rape and forced pregnancy could constitute genocide under Article 2(2)(d) of the Tribunal’s Statute.³⁹ In the Bosnian context, the distinct and intersecting roles of patriarchal and ethno-religious understandings in perpetuating notions of unmarriageability, untouchability and ethnic purity remain unresolved. Some feminists suggest that these understandings must be specifically (though not exclusively) located within patriarchal *Bosnian Islamic* society.⁴⁰ Others contest the ‘ethnicization’ of rape-related harms, as a dangerous and ideologically driven construction of ethno-religious difference in the former Yugoslavia, in aid of nationalist propaganda and/or the ‘distancing’ of Bosnian Muslim women as ‘other’.⁴¹

Regardless of how one sees this debate, however, defining these harms as harms against Bosnian men and the (ethno-religious) patriarchal ‘order’ they have created, fundamentally obscures the double harm to women of primary and ‘secondary’ victimization. In Bosnia, many women were not only raped by the ‘enemy’, but beaten

³⁷ Fisher, ‘Occupation of the Womb: Forced Impregnation as Genocide’, 46 *Duke Law Journal* (1996) 91, at 124; for the rejection of married Bosnian Muslim women who have been raped, see Wing and Merchan, ‘Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America’, 25 *Columbia Human Rights Law Review* (1993) 1, at 19; for the fear of such rejection on the part of one Bosnian Muslim woman, see Stiglmeier, ‘The Rapes in Bosnia-Herzegovina’, in A. Stiglmeier (ed.), *Mass Rape* (1994) 137: ‘Where I come from, everybody, my husband, my daughter, the whole town would think of the kid [conceived in rape] as filth . . . [My husband] would never take me back again if he knew what had happened.’ Bosnian Muslim psychiatrist Jusuf Pasalic states that: ‘Muslim society is patriarchal, and the men are jealous. If a man has the slightest suspicion that his wife may have cooperated voluntarily, the marriage is over.’ Stiglmeier, *ibid.*, at 91.

³⁸ Fisher, ‘Occupation of the Womb: Forced Impregnation as Genocide’, 46 *Duke Law Journal* (1996) 91, at 125; Askin, *supra* note 9, at 107; Chinkin, ‘Rape and Sexual Abuse of Women in International Law’, 5 *European Journal of International Law* (1994) 326, at 336; Kalajdzic, ‘Rape, Representation, and Rights: Permeating International Law with the Voices of Women’, 21 *Queen’s Law Journal* (1996) 457, at 483; Wing and Merchan, ‘Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America’, 25 *Columbia Human Rights Law Review* (1993) 1, at 18.

³⁹ *Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, at para. 507: ‘In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during a rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.’

⁴⁰ See e.g. the discussions, *supra* note 37.

⁴¹ For an attack on the way in which feminisms such as Mackinnon’s have contributed to artificial constructions of rigid ethnic difference and ‘become part of the war of propaganda which stirs ethnic hatred and promotes revenge’, see Kesic, ‘A Response to Catharine Mackinnon’s Article “Turning Rape Into Pornography: Postmodern Genocide”’, 5 *Hastings Women’s Law Journal* (1994) 267, at 268; for a discussion of the construction of Bosnian Muslim women’s experience as ‘other’, see Buss, ‘Women at the Borders: Rape and Nationalism in International Law’, 6 *Feminist Legal Studies* (1998) 161, at 200–202.

and cast out by their fathers and husbands.⁴² They were not only forced to carry an unwanted child, but denied any right to establish a familial connection or bond with that child by a rigid (patrilineal or ethno-religious) concept of purity. To treat these harms as harms to (a particular group of) men only further excludes and denies women's experiences, rather than advancing the feminist project.

2 Seeking Recognition Beyond Discourses of Order

I therefore argue that, while 'secondary' harms to women go unrecognized, the prosecution of 'femicidal rape' or 'gynocide' in the name of order, only further obfuscates female 'subjectivity' in international law.⁴³

However, I suggest that the potential to recognize the specific and gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process. The imperatives of 'order-building' (obtaining convictions against the most legally and morally culpable, for the worst possible crimes, in the shortest possible time, with the fewest possible witnesses) leave little scope for stopping to listen and acknowledge what rape has meant for a particular victim. In a context where almost the only rigid evidentiary rule explicitly prescribed by the ICTY statute is a requirement of 'relevance',⁴⁴ there is no opportunity for women to speak about crimes of secondary victimization committed by their own intimates and communities. There is no discursive space to document the likelihood that the victims of rape will face other secondary harms such as rejection, depression, destitution and continuing prostitution.⁴⁵ In the criminal process, women are treated as 'witnesses' rather than complainants in the prosecution of crimes of sexual violence against them, and have no 'ownership' of the process, which allows their stories to be heard.⁴⁶

This is in marked contrast to recent attempts by the victims of gender-specific war

⁴² Folnegovic-Smalc, 'Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and Bosnia-Herzegovina', in A. Stiglmeier (ed.), *Mass Rape* (1994) 176–177: 'in some cases husbands have gone so far as to kill their wives after hearing of the rape.' See also the account of a woman interviewed at the Vrapce Psychiatric Clinic in Zagreb, where she recounted that she was afraid that she would 'reveal everything' to her husband and 'that would have meant the end of our life together' (*ibid.*, at 177).

⁴³ For the origin of these neologisms, see Chesterman, *supra* note 3, at 329: 'femicidal rape' is used by Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996) xiii, quoting Asja Armanda, member of Croatian feminist group, Karet. 'Gynocide' is used by Niarchos, 'Women, War and Rape: Facing the International Tribunal for the Former Yugoslavia', 17 *Human Rights Quarterly* (1995) 649, at 679.

⁴⁴ ICTY Rules of Procedure and Evidence, Rule 89(C).

⁴⁵ I would suggest that the frustrated 'will to empathy' of the Tribunal, within its own 'order-bound' constraints, is in fact apparent in the structure of its judgment in *Kunarac*, which devotes a very substantial part of its 310-page judgment to the facts as presented and established. See *Prosecutor v. Kunarac*, *supra* note 1.

⁴⁶ See the language of complainants as 'witnesses', *Prosecutor v. Kunarac*, *supra* note 1; Kersh, *supra* note 5, at 348. One of the Rwandan victims who testified before the ICTR told a Preparatory Commission meeting on the ICC Statute that 'she did not feel [the] justice [of the ICTR] was "hers"': Nainar, 'Giving Victims a Voice in the International Criminal Court', www.iccwomen.org/sources/article.-unchronicle.htm, accessed 20 May 2001, at 1.

crimes and crimes against humanity to seek redress *and recognition* through civil litigation. Perhaps the most notable such case is *Kadic v. Karadzic; Doe v. Karadzic*, in which Bosnian plaintiffs sued Bosnian Serb leader, Radovan Karadzic, in the United States District Court, under the Alien Tort Claims Act 1789.⁴⁷ Jane Doe I and II brought suit on behalf of Bosnian ‘women and men who suffered genocide, war crimes, summary execution, wrongful death, torture, cruel, inhuman or degrading treatment, assault, battery, rape and intentional infliction of emotional harm’.⁴⁸ Kadic brought suit on her own behalf and behalf of her infant sons, and as a representative, *inter alia*, of the survivors of ‘rape, forced prostitution, forced pregnancy, forced childbirth, and gender and ethnic discrimination’.⁴⁹ In evidence, Kadic was given the opportunity to articulate the way in which she saw her own persecution. When asked ‘why her?’ by her counsel, Catharine Mackinnon, Kadic replied: ‘Because I’m Muslim, I’m Catholic, I’m disabled — and I’m a woman.’⁵⁰

Thus, both at the level of the indictment and in evidence, Kadic was empowered to frame the harm to herself and women plaintiffs in a manner which fully recognized the multiple crimes of sexual violence committed against women, and the intersection of discrimination based on gender, ethno-religious grounds and grounds of disability.⁵¹ She was able to put ‘on the record’ what will be forever obscured in the official account of the rapes of AB, AS, DB, FWS-75, FWS-87, FWS-185, FWS-191 in *Kunarac*: the multiple and intersecting harms and causes of sexual violence as it occurred in the Bosnian context.

While the *Kadic* plaintiffs are unlikely to receive any of the US\$745 million compensation awarded,⁵² the decision has important symbolic value. That is, it

⁴⁷ The plaintiff’s claim under both the Alien Tort Claims Act and the Torture Victim Protection Act 1992 (codified at 28 USC s. 1350 (1994)) was struck out by the District Court for lack of subject-matter jurisdiction, on the basis that it required state action/involvement: *Doe v. Karadzic*, 866 F Supp 734 1994 (US Dist). The Court of Appeals for the Second Circuit held that subject-matter jurisdiction existed in respect of genocide and war crimes under the Alien Tort Claims Act, irrespective of state involvement: *Kadic v. Karadzic*, 70 F 3d 232 (US CA Second Cir, 1996). The claims were therefore pursued on this basis.

⁴⁸ *Doe I, Doe II v. Karadzic; Kadic v. Karadzic*, 866 F Supp 734 (US Dist, 1994) 7.

⁴⁹ *Ibid*, at 8.

⁵⁰ ‘These Women Were All Raped’, 8 *Marie Claire* (2001) 122, at 128. This accords with the way in which Bosnian women have described their experiences elsewhere. Cf. e.g.: Kalajdzic, ‘Rape, Representation, and Rights: Permeating International Law with the Voices of Women’, 21 *Queen’s Law Journal* (1996) 457, at 480; Stiglmyer, ‘The Rapes in Bosnia-Herzegovina’, in A. Stiglmyer (ed.), *Mass Rape* (1994) 96: 20-year-old Bosnian Muslim woman, ‘Sadeta’, described her and her neighbours’ experience of rape as ‘their [the Serb forces’] way of hurting *Muslim* women, and *Croatian* women, and the whole of the female race. Killing them isn’t interesting enough for them anymore. It’s a lot more fun to torture us, especially if they get a woman pregnant. They want to humiliate us.’

⁵¹ For the danger of collapsing these multiple harms into a single crime of rape, see Fletcher, ‘Human Rights Violations Against Women (A Symposium): Rape as a War Crime’ 15 *Whittier Law Review* (1994) 319, at 323.

⁵² Karadzic did not defend this action, and in June 2000 default judgment was entered against him, and on 10 August 2000 a verdict was entered ordering damages in the amount of US\$745 million. Judgment and damages were also awarded in favour of the Doe plaintiffs, in the sum of US\$4.5 billion (US\$617 million in compensatory damages, and US\$3.9 billion in punitive damages): ‘Jury Returns \$4.5 Billion Verdict Against Ex-Bosnian Serb Leader Karadzic’, www.cnn.com/2000/WORLD/europe/09/26/us.bosnia.suit.ap.

acknowledges and condemns the harms to the women who were victims of these crimes as *they understood and perceived them*, and it lends the imprimatur of the court's authority to the recording and documenting of the gender-based crimes committed under Karadzic's command. The greater authority of a duly constituted international tribunal would only serve to increase the symbolic value of an affirmative finding in favour of a complainant.

The 1998 decision of the Yamaguchi Prefectural Court, Shimonseki Branch, in the 'comfort women' case has similar (if more modest) symbolic importance.⁵³ The District Court's decision to award damages of 300,000 yen plus interest was overturned on appeal by the High Court in March 2001⁵⁴ (as was always likely, given the existing authority on Japan's responsibility under Article 1, section 1, of the Japanese State Liability Act). However, the trial court's 'fact-finding' and awarding of damages 'will have widespread political impact' in the fight for recognition of sexual slavery in the Second World War.⁵⁵ Independent of the final appellate outcome on the question of state responsibility, the stories of the plaintiffs, Ha Sun-nyo, Park Tu-ri and Lee Sun-dok, have been 'heard' and believed after more than 50 years of silence, and their suffering acknowledged by a Japanese court.⁵⁶

Hundreds of other 'comfort women' have not obtained justice through the Japanese courts, but have continued to fight for acknowledgment in a variety of civil and quasi-'civil', quasi-criminal forums. In September 2000, one month after the judgment in *Karadzic*, 15 Asian women filed suit in the United States District Court under the Alien Tort Claims Act 1789.⁵⁷ Their claim is against the Government of Japan, in relation to the crime of (sexual) enslavement.

In December 2000, over 75 'comfort women' survivors participated in the 'People's Tribunal, the Women's International War Crimes Tribunal, 2000' in Tokyo.⁵⁸ This Tribunal entertained (quasi-)criminal proceedings against Emperor Hirohito and various high ranking officials of the Japanese Government and military, as well as proceedings against the Japanese state for breaches of state responsibility arising from the commission of international wrongs. The proceedings were quasi-criminal in nature in as much as the charges brought were criminal in nature, and the rules and procedures adopted reflected the desire to maintain 'fairness and credibility' of the

⁵³ Okada (trans), 'The "Comfort Women" Case: Judgment of April 27, 1998, Shimonseki Branch, Yamaguchi Pref. Court, Japan', 8 *Pacific Rim Law and Policy Journal* (1999) 63.

⁵⁴ 'Japan Court Rules Against "Comfort Women"', 29 March 2001 www.cnn.com/2001/WORLD/asiapcf/east/03/29/japan.comfort.women.index.html.

⁵⁵ Totsuka argues that the court's decision will allow political minorities seeking recognition and compensation to harness 'legitimacy of the judicial fact-finding apparatus' to their cause. See Totsuka, 'Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery', 8 *Pacific Rim Law and Policy Journal* (1999) 47, at 48.

⁵⁶ *Ibid.*

⁵⁷ '15 to Sue Japan in US Over Sex Slavery', *New York Times*, 16 September 2000, at 5.

⁵⁸ The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, Summary of Findings and Preliminary Judgment, 12 December 2000, at para. 14.

highest standards (appropriate to the criminal context).⁵⁹ However, the People's Tribunal was substantively a 'civil' tribunal in as much as the proceedings before it were representative, the individual defendants were not present,⁶⁰ some of the defendants, including Emperor Hirohito were not susceptible to traditional criminal penalties,⁶¹ and the Tribunal did not in any event have the power to sentence.⁶² Further, the prosecuting authority was 'civil society' itself.⁶³

In this quasi-civil context, the central project was one of 'acknowledgment' of the harm to and suffering of the victims of crimes of sexual enslavement committed by the Japanese military, and the making of recommendations for ways in which reparation should be made for this suffering. The Tribunal did not confine itself to the matters which would have established the charges, but gave priority to the accounts of women's specific and context-dependent experiences of primary and secondary victimization, and their suffering both then and now. It heard from survivors:

My husband said: it is better to have a left-over dog than a left-over person.⁶⁴

I lost my life. I was regarded as a dirty woman. I had no means of supporting myself and my job opportunities were extremely limited. I suffered terribly.⁶⁵

In the proceedings before this Tribunal, women were empowered to speak of their experiences and feelings — to tell it how they saw it and remembered it, and how it made them feel. They told their stories to a court composed largely of women, supported by prosecution teams from nine countries and numerous *amicus* briefs. The court heard a multiplicity of different voices and perceptions of events, but, in doing so, gave priority to the needs of survivors. In this way, I suggest that the proceedings were indeed wholly 'un-criminal' in nature, in that they rejected the overriding imperatives of (re-)order, in favour of the belief that 'where there has previously only been silence and evasion [the Tribunal hearings] provide a form of public acknowledgment to the survivors that serious crimes have been committed against them'.⁶⁶

In the United States District Court, the Yamaguchi Prefectural Court and the 'People's Tribunal' in Tokyo, the experiences of the victim have thus been put at the centre of a legal discourse of 'recognition'.

⁵⁹ Chinkin, 'The Prosecutors and the Peoples of the Asia Pacific Region v. Emperor Hirohito et al; The Prosecutors and the Peoples of the Asia Pacific Region v. The Government of Japan', www.iccwomen.org/tokyo/chinkinstart.htm, accessed 21 May 2001, at 3. Christine Chinkin was one of the four judges who sat on the Tribunal.

⁶⁰ Though the defendants were notified and *amicus* briefs were filed in defence: Chinkin, *supra* note 59, at 3–4.

⁶¹ Emperor Hirohito died in 1989.

⁶² Chinkin, *supra* note 59, at 5.

⁶³ Judgment, *supra* note 58, at para. 16; Chinkin, *supra* note 59, at 5.

⁶⁴ Belen Alonso Sagum, Philippines, Judgment, *supra* note 58, at para. 2.

⁶⁵ Ten Kao Pau-Cu, Taiwan, Judgment, *supra* note 58, at para. 2.

⁶⁶ Chinkin, *supra* note 59, at 5.

3 International Recognition

A recently published Canadian study has found that the *desire for recognition*, or 'public affirmation of wrong and closure', is the most common reason for women to seek civil compensation for sexual violence at a domestic level.⁶⁷ While the importance of public acknowledgment of victimization in providing healing and closure for victims has been widely acknowledged at the international level,⁶⁸ I suggest that the importance of the 'recognition' potential immanent in *compensation* or *reparation awards* is not adequately acknowledged by the current international system. This is despite the fact that 'the issues of victim rights and reparations for atrocities' are supposed to have 'come to the fore' in ICTY and ICTR proceedings, and in negotiating the International Criminal Court Statute (the Rome Statute).⁶⁹

The international provision for compensation to the victims of genocide, war crimes and crimes against humanity currently turns on a finding, beyond a reasonable doubt, of the guilt of an accused person.⁷⁰ Article 75 of the Rome Statute, unlike the ICTY Statute, *does* empower the Court to make a reparations order, either against the accused directly, or through a Trust Fund established under Article 79, in respect of all money and property collected by the Court through fines and forfeitures.⁷¹ However, this power is only to be exercised in the discretion of the Court, after a finding of guilt.

I would argue that Article 75 embodies a weak connection between tribunal findings of fact, and the exercise of a discretion to award compensation. In this way, it builds on and extends the *discretionary fund* model of the United Nations Voluntary Fund for Victims of Torture (UNVFVT), which makes ad hoc grants to projects designed to provide medical, psychological, economic, legal, humanitarian or other forms of assistance to torture victims and members of their families.⁷² Article 75 can therefore be located within a broader move by the United Nations since 1995 to

⁶⁷ Feldthusen, Hankisky and Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse', 12 *Canadian Journal of Women and the Law* (2000) 66, at 75: 'The highest percentage of respondents — 82 per cent — were seeking public affirmation of wrong or closure.'

⁶⁸ Chinkin, *supra* note 59, at 5.

⁶⁹ *Ibid*, at 6.

⁷⁰ Rule 106 of the ICTY's Rules of Procedure and Evidence provides that a finding of guilt against an accused person shall be transmitted to the competent authorities of the states concerned, and that this finding shall be conclusive in any proceedings brought in a national court for compensation. Article 75(1) of the Statute of the International Criminal Court (Rome Statute) relevantly provides that 'the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon the request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims.'

⁷¹ Article 79 of the Statute of the International Criminal Court (Rome Statute) provides that a Trust Fund shall be established for the benefit of victims of crime within the jurisdiction of the Court, and of the families of such victims; and that the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

⁷² www.unhcr.ch/html/menu2/9/apply.htm.

extend the UNVFVT model, and provide reparation to victims of *all* crimes within international jurisdiction through a discretionary international fund.⁷³

Under the ICC Statute, there is no provision for victims to initiate a claim for compensation, or even, once criminal proceedings have concluded, to seek compensation or to make representations on their own behalf *as of right*.⁷⁴ Under the UNVFVT model, there is no opportunity for victims to speak or be heard, either individually or collectively.

This is in fundamental conflict with the understandings which have been gained of the therapeutic benefits of victims' compensation schemes at the domestic level.⁷⁵ In Canada, for example, sexual assault survivors have explained their decision to seek civil remedies in terms of the desire for *ownership of and empowerment through the process, recognition and catharsis*:

I had unresolved issues which I wanted resolved. I thought it was time to *come forward* and tell *my* truth.

I wanted to deal with the issue . . . wanted to be able to work through what happened so many years ago.

It was about *gaining my* power, *my* dignity . . . to find myself and to get a sense of *self-resolution*.⁷⁶

All current awards of compensation at the international level are disconnected or severed from the opportunity for individual victims to speak on behalf of themselves and fellow sufferers, to 'publicly' express their suffering in their own words and understandings, to be *empowered* to regain a sense of control over their lives, and to have that suffering 'recognized' by the international community. It is for this reason that I believe that the current models are fundamentally inadequate for achieving therapeutic outcomes for victims. Article 75 and the UNVFVT are in this way reminiscent of the Asian Women's Fund set up by the Japanese Government in 1995 to make reparation to 'comfort women' — a response that has been resoundingly rejected as inadequate by 'comfort women' survivors, and by the judgment of the People's Tribunal in Tokyo.⁷⁷ Given these considerations, I cannot agree with Vahida Nainar, when she suggests that: 'By keeping victim interests, concerns and rights as among its primary objectives, [provisions such as Article 75 of] the ICC statute . . . will

⁷³ UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 105, citing the recommendations of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, 1995.

⁷⁴ Article 75(3) of the ICC Statute provides: 'Before making an order under this article, the Court *may* invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.'

⁷⁵ Feldthusen *et al.*, *supra* note 67, found that only 41 per cent of women saw monetary factors as relevant to their decision to seek some sort of compensatory award, as opposed to 82 per cent of women who sought therapeutic benefits. See also Manley, 'Civil Compensation for the Victim of Rape', 7 *Cooley Law Review* (1990) 193, at 210.

⁷⁶ Feldthusen *et al.*, *supra* note 67, at 80 (emphasis added).

⁷⁷ See Judgment, *supra* note 58, at para. 35.

go a long way to help in the healing process and the recovery of the victims which is and ought to be the ultimate goal.⁷⁸

Moreover, the 'discretionary fund' model closes off avenues for the achievement of feminist goals, which are broader than the 'healing and recovery' of individual victims. A discretionary fund model is a 'missed opportunity' for the collective empowerment of women and for the recognition of women's experiences of violence, given its failure to provide for procedures by which women can come forward *en masse* and, before a competent tribunal and trier of fact, name their experiences as war crimes and crimes against humanity. This 'loss' will be particularly significant where national politics silence or even criminalize women's dissent, and the international community tends to define their experiences as a matter of cultural or national difference.

In contrast, a 'tribunal' model offers the potential to connect international humanitarian law jurisprudence and compensation in an uninterrupted discourse of recognition.

First, an international victims compensation tribunal (IVCT) would overcome a multiplicity of obstacles that operate to prevent the recognition of women's experiences through international criminal prosecutions, and would thus vastly increase the number of women's voices heard. As in civil proceedings such as *Kadic v. Karadzic*, a named perpetrator of the harms complained of would not need to be arrested for compensation proceedings to be commenced in an IVCT. Further, under an IVCT model, the obstacle of service requirements found in a traditional civil context would be removed — with defendants not being required to be present during proceedings, as no direct reparations would be sought from individuals, but rather from the IVCT fund itself. Proceedings in those matters for which there are outstanding indictments in the ICTY, but for which the accused have not been apprehended, could thus in this alternative framework begin without further obstacle.⁷⁹ Further, in a non-adversarial context such as an IVCT, domestic experience in this area demonstrates that the perpetrator need not even be named as part of the claim/complaint, if the tribunal could be satisfied that 'a rape' occurred to a particular woman (this may be particularly important given some of the evidentiary obstacles which arise in the context of war, such as in relation to identification of military personnel⁸⁰). Low evidentiary requirements would also likely combine with a civil burden of proof (the balance of probabilities) to encourage women to 'speak', because of the increased chance (*vis-à-vis* criminal proceedings) that they will feel

⁷⁸ See Nainar, 'Giving Victims a Voice in the International Criminal Court', www.iccwomen.org/sources/article.unchronicle.htm, accessed 20 May 2001.

⁷⁹ For a list of outstanding public indictments of the ICTY, see www.un.org/icty/glance/indictlist-e.htm. Note that, under ICTY Rule 61, a warrant can be issued in the absence of a defendant, but a trial cannot proceed *in absentia*.

⁸⁰ See e.g. the finding of the ICTY in *Kunarac*, that there was insufficient evidence (mainly in relation to identification) to establish beyond a reasonable doubt that Vukovic was guilty of certain counts of rape: *Prosecutor v. Kunarac*, *supra* note 1, at paras 806–820. For a general discussion of evidentiary difficulties in this context, see Fitzgerald, 'Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law', 8 *EJIL* (1997) 638, at 657–660.

'heard' and acknowledged by a finding 'in favour' of the complainant. Victims may also be encouraged to testify before an IVCT by virtue of the fact that the entire complaint and proceedings could remain confidential, save for a finding that 'here, a woman was raped'. This should allow women such as F (a rape complainant in the *Tadic* case who decided not to testify, for fear of reprisals against her and her family) the opportunity to speak, in ways which they feel unable to do within a criminal context.⁸¹

This is not to suggest that we should not simultaneously re-examine international criminal procedural rules, such as that which precludes anonymous testimony, in order to improve criminal redress in this area.

Nor is it to suggest that the international community should accept, as pre-given, the patriarchal definition of community attitudes towards rape and being raped, which discourage women such as F from testifying. It is essential that the international community continues to work towards changing these attitudes at a grass roots level, to facilitate more effective criminal redress, as well as to reduce primary and secondary victimization. However, I suggest that, rather than undermining this challenge, an IVCT model parallel to the criminal process has the potential simultaneously to acknowledge and ameliorate the existing reality in terms of community attitudes. By increasing the number of women willing to speak about their experiences, and thus adding to the public record of the frequency of and commonality within this experience, the record of IVCT proceedings could help challenge notions of the exceptionality and private nature of being raped, which are at least partially constitutive of its 'shamefulness'. It might thus 'act back' on community attitudes and, via this, on the willingness of complainants to testify in a criminal context.

Secondly, and in addition, as has already been suggested, a civil tribunal would not only encourage and allow women to successfully bring complaints, it would allow women the opportunity within the international arena to frame their complaint, and the harms against them, *as they see them*. This draws in crucial ways on an understanding of the increasing trend towards women seeking redress for international law violations *on their own terms and in their own words* — in United States and Japanese courts and in the quasi-civil 'People's Court'. In this way, the jurisprudence of a civil tribunal would resist the schizophrenic gender/racial essentialist tendencies of the ICTY and the ICTR, evidenced in *Delacic* and *Kunarac*, and allow complainants to frame their harms as Kadic did: in terms of the intersection of multiple discriminations based on ethno-religious/racial, disability and gender grounds.⁸² In doing so, a civil tribunal offers possibilities for a mature understanding, contrary to that implicit in *Delacic*, that the 'experience of multiplicity is also a sense of self-contradiction ... of

⁸¹ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Judgment, 7 May 1997; Askin, *supra* note 9, at 100–101.

⁸² The intersecting rather than merely additive nature of multiple sites of discrimination is discussed in a large body of anti-essentialist feminist literature. Cf. e.g. Harris, *supra* note 25.

how it is to have multiple and contradictory selves, selves that contain the oppressor as well as the oppressed'.⁸³

Thirdly, a civil tribunal model would also give an international forum for women's current resistance to sex inequality at the local level, based on what Catharine Mackinnon describes as an everywhere-relative universality which claims that: 'if you do not do it to each other, you cannot do it to us.'⁸⁴ When the International Criminal Court becomes operative, it is unlikely in laying charges to resist the culturally relativist cringe which denies recognition of the war against women in countries such as Afghanistan, Algeria, Bangladesh, India, Iran and Pakistan, as crimes against humanity.⁸⁵ However, if a tribunal were empowered to hear women such as Algerian Karima Bennoune speak, from their 'own concrete and socially specific experience',⁸⁶ and to name the experiences of Algerian women as rape/sexual slavery,⁸⁷ the cultural-relativist 'cringe' at the 'centre' will be challenged from the 'periphery' of non-Western women's actually lived experience.⁸⁸

Not only will discourses of recognition be expanded, both at an individual and collective level, I would also argue that an international jurisprudence focused on recognition will 'act back' on the jurisprudence of order, so that the prosecution of war crimes is made more sensitive to and reflective of women's experience. This parallels the way in which 'People's Tribunals' have sought to (re-)act back on jurisprudence at 'the centre' of the international humanitarian law discipline.⁸⁹ I further suggest that the promise of this dynamic interplay between criminal and 'civil' processes is evident in the *Kunarac* judgment itself, when the ICTY relied on the reasoning of the United States Court of Appeals for the Second Circuit in *Kadic*, to reject the state action requirement for torture.⁹⁰

Therefore, if rape, sexual enslavement and forced pregnancy are consistently pleaded and found in a civil/compensatory context to be crimes of violence, exploitation and gender discrimination, which amount per se to torture and

⁸³ *Ibid*, at 608–609. In relying on Harris here, I reject the criticism of her work as essentializing the experiences of women on white/black lines: cf. e.g. Parashar, 'Essentialism of Pluralism: The Future of Legal Feminism', 6 *Canadian Journal of Women and Law* (1993) 328, at 337. I suggest that Harris is seeking to use the experience of African-American women as a lesson for feminism, that all selves are multiplicitous along myriad dimensions. See Harris, *supra* note 25, at 615–616.

⁸⁴ Mackinnon, *supra* note 6, at 79.

⁸⁵ Chesler, 'What is Justice for a Rape Victim', 5 *On the Issues* (1996) 12.

⁸⁶ Mackinnon, *supra* note 6, at 78.

⁸⁷ Bennoune describes the 'kidnapping and repeated raping of young girls as sex slave [*sic*] for armed fundamentalists. The girls are also forced to cook and clean for [military personnel] ... [A] 17-year-old girl was repeatedly raped until pregnant. She was kidnapped off the street and held with other young girls, one of whom was shot in the head and killed when she tried to escape.' Quoted in Chesler, *supra* note 85, at 12.

⁸⁸ Critical international law scholarship employs the concept of the centre/periphery to demarcate the disciplinary territory occupied by the West and the 'non-West'.

⁸⁹ See Chinkin, *supra* note 59, at 4: 'The reports [of the Tribunal] provide a valuable alternative source of evidence and jurisprudence around contested applications of international law.'

⁹⁰ *Prosecutor v. Kunarac*, *supra* note 1, at para. 470.

enslavement as crimes against humanity, prosecutors in an order-focused jurisdiction will take what has become a course of least resistance in framing indictments of this nature. Courts will also consistently be required as a matter of overwhelming persuasive authority to acknowledge the ‘gender’ element to these crimes. If compensation claims are framed in terms of ‘a self that is multiplicitous’, and which may contain the oppressor as well as the oppressed,⁹¹ this will also ‘act back’ on the jurisprudence of an ICC (or the ICTY itself) in ways which challenge the unitary, race and gender essentializing tendencies of mainstream international humanitarian law.

An IVCT model focused on ‘recognition’ would thus simultaneously act as an important complement to the ‘deterrence’/retribution function performed by the criminal prosecution of international humanitarian law breaches, and sensitize the way in which those latter functions are performed. It could not, of course, provide a substitute for the criminal process in relation to the aims of ‘deterrence’/retribution, and thus substitute for a mature ICC. This will be especially the case where, as I have proposed above, an individual perpetrator is not required to be present before an IVCT, nor is liable to a reparations order as against him- or herself personally. I do note that there may be some potential to achieve a form of ‘deterrence’ through an IVCT model which held states liable to contribute to compensation/reparation payments made in relation to crimes which occur within their jurisdiction, and in relation to which effective domestic reparations were not available. This would, however, create additional political obstacles to the implementation of an IVCT system, and would need to be considered accordingly.

4 An International Victims’ Compensation Tribunal (IVCT)

In this article I have sought to show the need for and benefits of an international victims’ compensation/reparations tribunal, for the victims of gender-based crimes of genocide, war crimes and crimes against humanity. While in this article I do not examine the exact form such a tribunal should take, the focus of such a tribunal on ‘recognition’ suggests a broad outline for its structure and functioning.

The IVCT should be as flexible and accessible as possible. It should therefore entertain both documentary and oral hearings, as is the case in domestic tribunals such as the Ontario Criminal Injuries Compensation Board in Canada, or the Crimes Compensation Tribunal in Victoria, Australia, and the newly proposed compensation programme in Spain.⁹² I would argue that the exclusive provision for documentary hearings (as in national jurisdictions such as Cyprus, the Czech Republic, Finland, France, Denmark, Germany, Hong Kong, Israel, Japan, Luxembourg, The Netherlands, Poland, Portugal, Sweden, Switzerland and at first instance in Norway, the

⁹¹ Harris, *supra* note 25, at 51.

⁹² US Department of Justice, *International Crime Victim Compensation Program Directory* (1999); Kersh, *supra* note 5, at 347. Support for this can be found in the recommendations made by sexual assault survivors who have successfully sought compensation in Ontario: see Feldthusen *et al.*, *supra* note 67, at 108.

United Kingdom and the United States) does not provide adequate avenues for 'listening' to and acknowledging the crimes against women within international jurisdiction.⁹³ The overwhelming majority of war crimes, crimes against humanity and genocide will not be prosecuted in an international criminal court, because international war crimes trials aim to create a just 'order' (through deterrence, catharsis and retribution against those *most* responsible) — not justice in each individual case. Where women wish to be heard in person, that opportunity should be provided, despite the administrative 'inconvenience' involved.

In oral hearings, complainants should have the option of appearing in person before the IVCT, or giving evidence by video-satellite technology from locations within their home country, especially in situations where women within those countries face severe restrictions on their freedom of movement (because, for example, they cannot leave the jurisdiction without the permission or presence of a male guardian). In either type of hearing, complainants should have the right to be assisted or represented by a lawyer (with financial assistance from the IVCT if need be),⁹⁴ but should equally be entitled to appear on their own behalf. Complainants should have the right to request that the hearing be conducted and judgment delivered entirely in private, or wholly or partly in public, according to their wishes and needs.

Surveys of sexual assault victims who have sought compensation specifically highlight the need for the IVCT to be a space that is physically comfortable, and designed to eliminate the geospatial hierarchy of a traditional courtroom.⁹⁵ Victims of gender-based crimes report a more positive experience when the decision-makers in their cases are women:⁹⁶ the IVCT should therefore be composed of at least an equal number of women as men, with a female member sitting in every case. These results also suggest that all witnesses should be provided with psychological support when preparing applications and when appearing before the IVCT, and that cases should be heard and disposed of within a relatively short period of an application being made, to promote the link between hearing and healing.⁹⁷

The nature of proof required to show breaches of international humanitarian law — the need to show the existence of an armed conflict, the nationalities of combatant parties and 'protected persons' and a nexus between individual criminal acts and that conflict, or the existence of widespread or systematic violence as part of a broader attack on a civilian population — is unique and demanding. Given these requirements, I suggest that special provision will need to be made for a 'lead case' procedure. That is, where a claim is brought in respect of a particular instance of sexual violence

⁹³ *Ibid.*

⁹⁴ This follows the reasoning and recommendations of the Report of the Australian Human Rights and Equal Opportunity Commission on the establishment of a Reparations Tribunal for Aboriginal people forcibly removed and detained as part of a policy of assimilation: HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander People from Their Families* (1999) 311.

⁹⁵ Feldthusen *et al.*, *supra* note 67, at 96 and 106–109.

⁹⁶ *Ibid.*, at 87–89.

⁹⁷ *Ibid.*, at 93–96 and 105–107.

and the IVCT, or its international counterparts, have not previously been called on to hear evidence and decide these jurisdictional questions, full-scale civil proof will be required. In this instance, the IVCT should provide funding for legal assistance for a complainant/claimant/plaintiff, either on her own behalf or on behalf of a class of claimants, and provide 'interested' parties the right to intervene to contest jurisdiction. A decision on questions of jurisdiction should then be appealable to the Appeals Chamber of the International Criminal Court, when established. Once a finding is made in respect of jurisdiction in the context of a particular conflict/attack on a civilian population, this finding would then apply in all subsequent applications.

I would suggest that, *in general*, the IVCT should entertain both individual and representative applications as in *Kadic v. Karadzic*, on an *opt-in* basis.⁹⁸ In a mature international system, I would suggest that an *opt-out* procedure does not give sufficient recognition to the diversity of women's experience and their (non-)desire for reparation. We know from field-work done in Bosnia that some women do not want to speak about their experiences, or have others speak for them. For some women, the process of seeking compensation will impede rather than improve their psychological 'recovery'.⁹⁹ Others will want their testimonies to be used first and foremost to bring the perpetrators of these crimes to justice, rather than in a compensatory context. In a focus on 'recognition', it is essential to honour women's diverse needs and expectations of the justice system, within the compensatory framework, as well as across and between it and the criminal justice system.

In a departure from purely restitutionary models, I would further suggest that the IVCT's findings, or order for 'reparation',¹⁰⁰ should be divided into two parts: judgments of acknowledgment and awards of compensation. Compensation should be on a needs basis rather than a harm basis, with the causative link between the harm of criminal victimization and need being treated as a matter of statutory presumption.

So, for instance, a judgment of acknowledgment in a rape claim might include: the severe physical and psychological/emotional harm of rape, mental illness, permanent infertility, venereal disease, and harms of secondary victimization — including rejection and violence from a woman's family, and loss of honour, belonging and support within a woman's community. This 'judgment of acknowledgment' would enable the IVCT to distinguish between a woman as the victim of a *crime of violence and discrimination*, and her 'loss of honour and dignity' as a harm of secondary victimization by her community. In this way, the historical conceptual 'confusion'

⁹⁸ This accords with the recommendations of the UN-commissioned inquiry and report by Professor Theo van Boven in 1993: see T. van Boven, *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Law* (1996) Principle 6.

⁹⁹ Feldthusen *et al.*, *supra* note 67, at 113: '[W]hen asked "If you could do this over again what, if anything would you do differently?" 18 per cent of respondents stated that they simply would not go through with their actions and claims at all. Many reported feeling revictimized [by the process].'

¹⁰⁰ The term 'reparations' is used to describe a comprehensive response to wrongs, which includes the 'removal or redress of the consequences of the wrongful acts' and the 'prevention and deterring of violations', whereas restitution and compensation are monetary media for achieving reparation: see *Basic Principles*, *supra* note 98, at Principle 7.

(conflation) in international law, between the definition of crimes of sexual violence such as rape and sexual enslavement and the harms they impose, would be directly challenged. Like the substantive jurisprudence of the IVCT, this two-stage crime/effects understanding then has the potential to 'act back' on other international legal understandings, embodied in instruments such as the Fourth Geneva Convention.

A 'compensatory judgment' might work by analogy to certain types of reparations payments ordered by the South African and Chilean Truth and Reconciliation Commissions.¹⁰¹ For example, there might be an award to allow a woman to obtain adequate psychological and medical care, to relocate herself from a community in which she has and may be continuing to be victimized, to support herself, and to obtain education and training in order to gain employment. She might be enabled to relocate from a setting in which she is rejected by her family, or rendered 'unmarriageable' in a context of gender inequality in work opportunities and earnings, or where she has lost the prospect of financial support and survival. In this way, the harm to women which becomes the harm of genocide to a community can be acknowledged, and the criminal prosecution of genocide made 'just'.

While deeply aware of the problems of my suggested approach, I believe it has two major advantages. First, it is more closely allied to the 'discretionary fund' model currently endorsed by the international community, and thus will more readily gain the requisite political support. Secondly, it does not ignore real-world levels of international financial support for projects in this area — by assuming that the symbolic victories in *Kadic v. Karadzic* or the 'comfort women' case can be repeated in the internationally funded context. As victims have consistently articulated, there is no 'symbolic' justice or victory in an award which equates the experience of being raped with some minimal sum,¹⁰² rather than an amount in the order of the US\$50m awarded to the *Kadic* plaintiffs.¹⁰³ It also avoids the almost insurmountably difficult task of comparing the relative magnitude of harms inflicted by individual instances of rape, forced prostitution, forced impregnation, or enslavement.

A needs-based model of compensation further intersects with the call to empower women in the targeting and delivery of services to them as victims, and to make those services more sensitized to women's experiences. It forms part of a call to direct services towards the still unmet needs of sexual abuse survivors in Bosnia.¹⁰⁴ It thus

¹⁰¹ See the social security, health and educational reparation measures proposed by Chile's 'Truth and Reconciliation Report' (1991) (the 'Rettig Report') Part IV, translated at www.derechoschile.com/basicos/ddhhchile/english/rettigengindex.htm, accessed 21 May 2001; and South Africa's Truth and Reconciliation Commission's 'Final Report', vol. 5 (1998) chapter 5, at 9 on 'interim reparation grants' to individuals, www.polity.org.za/gov/docs/commissions/1998/trc/5chap5.htm, accessed 21 May 2001.

¹⁰² Feldthusen *et al.*, *supra* note 67, at 96–100: 'Referring to awards that they felt were grossly inadequate, respondents stated that: "I felt kind of like I wasn't worth very much. The past six years didn't mean anything to them"; "What would I have had to go through to get more?";

¹⁰³ On average, each of the 15 *Kadic* plaintiffs received damages of US\$49,666,667.

¹⁰⁴ Kalajdzic, 'Rape, Representation, and Rights: Permeating International Law with the Voices of Women', 21 *Queen's Law Journal* (1996) 457, at 492–493.

puts women at the centre of legal discourses *and* choices about the support they receive.

5 Conclusions

I do not suggest that the model of an IVCT I propose is conclusive, rather that the procedural features and questions of quantum I explore must be addressed in any final model adopted. I do, however, argue that a tribunal-based rather than ‘discretionary fund’ model of compensation to victims of crimes under international law is essential to advancing discourses of recognition in international humanitarian law. I argue that a project which seeks to achieve recognition of the gender-specific nature and effects of crimes of sexual violence is inherently limited in its potential efficacy, so long as its primary focus is on directly changing the language of international war crimes prosecutions. I suggest that the ‘discursive battle’ for recognition of intersectional harm *which includes gender* must be fought in a civil context as well as a criminal context, where victims have the opportunity as parties to frame harms to them *as they seem*, rather than acting (as in the criminal context) as ‘mere witnesses’ to the crimes which have been defined by the prosecution to have occurred against them. I argue that there is a need to create an international tribunal to hear such civil claims, because ultimately the international community and not the United States District Court (as in *Kadic* and the recently filed ‘comfort women’ case) should determine liability under international humanitarian law. Further, only a *legitimate international* tribunal can engender post-colonialist possibilities for women at the ‘periphery’ to act collectively, to ‘speak back’ to the centre and to contest their experiences as crimes against humanity. I thus argue that a feminist project of re-order cannot fully accommodate a post-essentialist feminist project of recognition,¹⁰⁵ and that these distinct projects demand separate jurisdictional spaces at the international level. It is, however, envisaged that discourses of recognition will ultimately ‘act back’ on discourses of (re-)order, so that crimes are charged and defined in war crimes prosecutions in ways which fully acknowledge the multiple and intersecting discriminations which underpin them, not least of which is *gender discrimination*.

In this paper, my exclusive focus is on crimes of sexual violence against women in an attempt to counter the ‘historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes’.¹⁰⁶ I do not suggest, however, that an IVCT should be restricted to crimes of sexual violence, as opposed to all violations of international humanitarian law. My aim is simply to put women and gender ‘first’, against a theoretical and jurisprudential background in which harms to men have always been primary.

¹⁰⁵ I situate the feminist recognition project within an emerging ‘post-essentialist’ feminist project embodied in the work of theorists such as Rosemary Hunter, Kimberlé Crenshaw and Elizabeth Spelman. For a survey of this work, see Wong, ‘The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond’, 5 *William and Mary Journal of Women and the Law* (1999) 273, at 292–296.

¹⁰⁶ Judgment, *supra* note 58, at para. 5.

Postscript

An appeal from the decision in *Prosecutor v. Kunarac & Ors* was heard on 4–6 December 2001. The Appeals Chamber handed down its decision on 12 June 2002, dismissing the appeals against conviction and sentence. In its reasons, the Appeals Chamber upheld the Trial Chamber's finding as to, *inter alia*, the relevant civilian population as the non-Serb population in Foca; as to rape, torture and enslavement as separate offences capable of founding cumulative convictions; and the Chamber affirmed the recognition of rape as a distinct 'serious violation of customary international law', contrary to Article 3.