

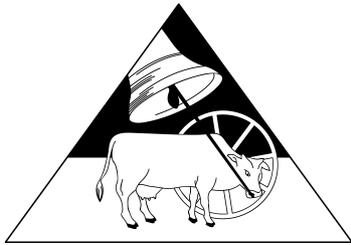
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**PROSECUTING WAR-RELATED  
RAPE & SEXUAL VIOLENCE  
AGAINST WOMEN IN SRI LANKA  
LESSONS FROM FEMINIST  
PERSPECTIVES**

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3, Kynsey Terrace, Colombo 8, Sri Lanka

Tel: +94 11 2684845 / +94 11 2691228 / +94 11 2684853

Fax: +94 11 2686843

Web: [lawandsocietytrust.org](http://lawandsocietytrust.org)

Email: [lstadmin@sltnet.lk](mailto:lstadmin@sltnet.lk)

Facebook: [www.fb.me/lstlanka](http://www.fb.me/lstlanka)

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## SUMMARY

Notwithstanding significant progress, there still remain many questions and contestations with respect to framing and prosecuting war-related rape and sexual violence against women as international crimes. This paper draws on feminist perspectives of these questions and contestations to highlight some of the challenges for feminist activism in relation to prosecuting such crimes against women through a judicial mechanism in Sri Lanka. It considers how rape and sexual have been constructed in and by international criminal tribunals and the International Criminal Court and highlights the possibilities, challenges and limitations thereof. In doing so, the paper is exercised by the idea of furthering feminist political projects through such processes and mechanisms. The paper draws out lessons for feminist advocacy in Sri Lanka in relation to the construction of rape and sexual violence in the context of a prosecutorial and judicial mechanism as well as the modalities of victim participation. It also underlines the importance of looking beyond perpetrator and state-centric judicial mechanisms and discusses one such initiative from the former Yugoslavia as an example offering some key insights in this regard.

# Prosecuting War-related Rape and Sexual Violence Against Women in Sri Lanka: Lessons from Feminist Perspectives

## Introduction

Bringing to justice perpetrators of sexual and gender-based crimes committed in relation to the war must be central to Sri Lanka's transitional justice and accountability agenda. There is now a significant body of ideas and proposals from within Sri Lanka with respect to acknowledging and prosecuting rape and sexual violence against women in connection with the war.<sup>1</sup> Many of these ideas and proposals also address the special judicial mechanism and call for prosecuting such crimes as international crimes.

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<sup>1</sup> The Final Report of the Consultation Task Force on Reconciliation Mechanisms (CTF) and its recommendations reflects many of these proposals: 'Final Report of the Consultation Task Force on Reconciliation Mechanisms', November 2017, available at <https://drive.google.com/drive/folders/oBxbk4wYolphwSXBKSElMYnhlYTg>. In addition, submissions made to the CTF by women's rights organisations and activists also contain many important recommendations in relation to prosecuting rape and sexual violence though not all of these submissions are publicly accessible. See also Raquel Saavedra and Shreen Saroor, 'A Gendered Approach to Transitional Justice in Sri Lanka: Women's Perspectives and International Best Practices', South Asian Centre for Legal Studies, January 2017, available at <http://sacls.org/resources/publications/reports/a-gendered-approach-to-transitional-justice-in-sri-lanka-women-s-perspectives-and-international-best-practices> and also Centre for Policy Alternatives, 'Transitional Justice in Sri Lanka and Ways Forwards, Exploring Four Thematic Areas: Recruitment and Conscripted of Child Soldiers, Disappearances, Sexual Violence and Internal Displacement', July 2015, available at <http://www.cpalanka.org/wp-content/uploads/2015/07/Transitional-Justice-in-Sri-Lanka-and-Ways-Forward.pdf>

Despite the increased visibility, arguably even hyper-visibility, of war-time rape and sexual violence against women, there remain distinct challenges with respect to framing and prosecuting them as international crimes. As this paper underlines, a critical examination of the dynamics of international criminal law prosecutions dispels any notion of linear progressive evolution in the jurisprudence concerning sexual and gender-based violence against women. Feminist critiques have called attention to the tensions between the “...structure of criminal law focused on the punishment of individual crimes...”, and the politics of “...feminist activism directed at eradicating (gender) inequality, including its violent manifestations, in society...”,<sup>2</sup> which are particularly accentuated in the context of large-scale and systematic violations.

**Despite the increased visibility, arguably even hyper-visibility, of war-time rape and sexual violence against women, there remain distinct challenges with respect to framing and prosecuting them as international crimes.**

What this paper draws attention to is the struggle entailed in going beyond a ‘politics of presence’ of women either as victims or as agents in transitional justice mechanisms, especially in the context of criminal prosecution of rape and sexual violence.<sup>3</sup> Feminist struggles—within and around international and national criminal law—have pushed the

boundaries significantly. Yet, as Ní Aoláin suggests, such feminist struggles also have their “...own baggage, namely the tendency to frame political objectives with criminal justice strategies focused on victims and perpetrators.” She also notes that this has led to prioritising “...certain issues (specifically, truth, justice, memorial practices and reparations)” but downgrading others, “...including social and economic equality, reproductive health and choices, cultural identity and the other criss-cross of interlocking identities in conflicted or repressive societies.”<sup>4</sup>

A critical look at the representation and definition of rape and sexual violence as international crimes (Part 1 of this paper) illustrates some of these tensions quite well. Such an analysis is necessary, if not an imperative, to prepare to meet the challenges that feminist activism around accountability in Sri Lanka will surely face with a special judicial mechanism. To this end, Part 1 includes an overview of how war-related rape has been defined, approached and represented in international criminal trials and the struggle over securing adequate recognition of other forms of sexual violence in such trials. This is followed by a discussion of the vexed issue of victims’ participation in such trials.

Ní Aoláin’s warning that “...apparent success in the form of some jurisprudential achievements should not be overstated” or should not see us lose sight of the struggle against “...international law’s structural incapacity to address gendered violations...” is an important departure for feminist

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<sup>2</sup> Doris Buss (2011), ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law?’, *International Criminal Law Review* 11, 409–423, p. 416

<sup>3</sup> Fionnuala Ní Aoláin (2012), ‘Advancing Feminist Positioning in the Field of Transitional Justice’, *The International Journal of Transitional Justice*, Vol. 6, 205–228, doi:10.1093/ijtj/ijso13, p.206

<sup>4</sup> Ibid., p.208

engagement with judicial mechanisms in the context of transitional justice.<sup>5</sup> As Kodikara (forthcoming) underlines,<sup>6</sup> the politics of the distinction between the egregious and the everyday or, as Nesiah puts it,<sup>7</sup> the monstrous and the banal on which transitional justice processes turn, pose a serious challenge to feminist ideas of violence against women as a continuum. The intense spotlight on rape and sexual violence in the context of war runs the risk, in keeping with the nature of spotlights, of leaving in the dark other serious and structural forms of violence against women.

Rooting transitional justice in feminist, not just gender sensitive, visions of justice calls for both pushing the juridical and carceral horizons offered by international criminal law and indeed going beyond them. There is much to be learnt therefore from experiences such as the Women's Court in Sarajevo—the focus of Part 2 of this paper—and from the women

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who despite securing successful prosecutions for rape and sexual violence at the International Criminal Tribunal for the former Yugoslavia (ICTY) felt that justice remained elusive. Attempts at creating such feminist spaces and processes of justice offer valuable insights in terms of framing feminist articulations of justice that go beyond narrow prosecutorial or juridical imaginations of gender-based violence and harms against women.

This paper is motivated by the search for ways to further feminist political projects within and through prosecutions of rape and sexual violence against women. Therefore its exploration of the limitations and challenges posed by the prosecution of these crimes as international crimes must be seen in that light and not as an argument against criminal prosecution of rape and sexual violence against women and girls in relation to the war in Sri Lanka.

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<sup>5</sup> Fionnuala Ní Aoláin (2012), 'Advancing Feminist Positioning in the Field of Transitional Justice', *The International Journal of Transitional Justice*, Vol. 6, 205–228, doi:10.1093/ijtj/ijso13, p. 211-212

<sup>6</sup> Chulani Kodikara, 'Connecting the Egregious and the Everyday: Addressing Impunity for Sexual Violence in Sri Lanka', in Paul Gready and Simon Robins (eds.) *From Transitional to Transformative Justice*, forthcoming, Cambridge University Press

<sup>7</sup> Vasuki Nesiah, 'The Trials of History: Losing Justice in the Monstrous and the Banal' in Ruth Buchanan and Peer Zumbansen (eds.) (2016), 'Law in Transition: Human Rights, Development and Transitional Justice', Hart

## Part 1: War-related sexual violence and rape in international criminal trials—A critical feminist gaze

The recognition of war-related rape and sexual violence in international criminal law is largely due to decades of sustained feminist and women's rights activism, resulting in successful prosecutions in Rwanda and Yugoslavia, Sierra Leone and more recently at the International Criminal Court.<sup>8</sup> However, there has also emerged an important body of feminist thought and activism subjecting both the internationalisation and hyper visibility of war-related rape and sexual violence to very critical scrutiny.<sup>9</sup>

Feminist scholar-activist Cynthia Enloe has underlined that notwithstanding the many obstacles, rendering war-time sexual violence and rape visible can sometimes be “*dangerously easy*” whilst making “*non-patriarchal*” political economic, social or judicial sense of such violence is extremely difficult.<sup>10</sup>

Discussing sexual violence in the context of the political conflict in Peru, Boesten<sup>11</sup> argues that focusing on rape as a weapon of war can obscure other rape regimes during and after the war, including “...*opportunistic rape, sexual exploitation and ‘entertainment,’ rape by neighbors or even family members and rape in the aftermath of war – all acts of sexual violence that do not fit the accepted rape script in which victim and perpetrator abide by the logic of two opposing warring camps.*” She also goes on to show how the South African Truth and Reconciliation Commission was trapped in “...*an essentialized rape script [that] obscured the systemic oppression of women by both the apartheid regime and the resistance, and limited women’s testimony to a ‘perfect victim’ narrative.*”<sup>12</sup>

Examining the treatment of wartime rape and its ethnicisation by international criminal tribunals in Rwanda and the former Yugoslavia, Buss cautions, “*Raising the visibility of sexual violence does not [...] translate into an awareness of the systematic nature of violence against women.*”<sup>13</sup> Considering

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<sup>8</sup> Fionnuala Ní Aoláin (2014), ‘Gendered Harms and their Interface with International Criminal Law’, *International Feminist Journal of Politics*, Vol. 16, No. 4, 622–646, <http://dx.doi.org/10.1080/14616742.2014.952126>

<sup>9</sup> See Doris Buss (2007), ‘The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law’, *Windsor Yearbook of Access to Justice*, Vol 25:1 3-22; Janet Halley (2008), ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law’, 30 *Mich. J. Int’l L.* 1, available at: <http://repository.law.umich.edu/mjil/vol30/iss1/1>; Karen Engle (2013), ‘The Grip of Sexual Violence: Reading United Nations Security Council Resolutions on Human Security’, University of Texas, School of Law, Research Paper Series Number 539; Nicola Henry (2014), ‘The Fixation on Wartime Rape: Feminist Critique and International Criminal Law’, *Social Legal Studies*, 23 no. 1 93-111; Fionnuala Ní Aoláin, ‘The Gender Politics of Fact Finding in the Context of the Women, Peace and Security Agenda’, in Philip Alston and Sarah Kennedy (eds.) (2016), ‘The Transformation of Human Rights Fact Finding’, New York: Oxford University Press; Shana Tabak (2011), ‘False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Colombia’, *International Law and Politics*, 44: 103 – 162

<sup>10</sup> Cynthia Enloe (2010), ‘Maneuvers: The International Politics of Militarizing Women’s Lives’, Univ. of California Press, Berkeley, p.109

<sup>11</sup> Jelke Boesten (2010), ‘Analyzing Rape Regimes at the Interface of War and Peace in Peru’, *The International Journal of Transitional Justice*, Vol. 4, 110–129, p. 111

<sup>12</sup> Boesten citing Fiona Ross (2003), ‘On Having Voice and Being Heard, Some After-Effects of Testifying Before the South African Truth and Reconciliation Commission’, *Anthropological Theory*, Vol. 3: No. 3, pp. 325-341

<sup>13</sup> Buss 2007:21

cases from both Tribunals, she warns of a “...*very thin judicial understanding of sexual violence and gender...*”,<sup>14</sup> one that fixes sexual and gender-based violence to the meta-narrative of ethnic conflict and privileges “...*rape as a modality of ethnic harm.*”<sup>15</sup> This effectively served to sideline other intersecting axes of oppression as well as the social, political and economic contexts and conditions that reproduce such harms.

As Buss rightly argues, the:

Judicial reluctance to explore the systemic complexity of violence against women may mean for feminists that more serious consideration needs to be given to what is achieved -and achievable - through international criminal prosecutions. As a first step, we may need to move away from looking at the formal outcomes of decisions in terms of 'whether or not' sexual violence is prosecuted, to considering how sexual violence is understood and represented in the decisions.<sup>16</sup>

The sections that follow focus on the many shifting and indeed problematic understandings and representations of rape and disturbing elisions and silences on other forms of sexual violence against women in international criminal trials. To reiterate what was outlined at the outset, the point here is to underline the importance of viewing and rendering judicial mechanisms or international criminal trials as sites of feminist struggle.<sup>17</sup>

The importance of this is further underlined by the fact that even in terms of prosecutorial outcomes in cases where war-related rape and sexual violence have been in focus, the results were not very encouraging. A survey of 20 cases from ICTY and the International Criminal Tribunal on Rwanda (ICTR) involving 29 convictions for rape or any other form of sexual violence up to 2005 revealed “...*sentences for sexual violence imposed by the Tribunals have been rather lenient in light of the sentencing determinants applied by the two Tribunals.*”<sup>18</sup> As highlighted in the discussion on the Women’s Court in Sarajevo in Part 2 of this paper, even successful prosecutions and legal victories do not necessarily bring a sense of justice to women survivors of sexual violence.

## **1.1. Rape in international criminal trials: A troubled history and a contested present**

### ICTR and ICTY

From the time the elements of rape as an international crime were first identified in the landmark *Akayesu*<sup>19</sup> judgment of the ICTR in 1998, to the recent conviction by the ICC in

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<sup>14</sup> Ibid: 22

<sup>15</sup> Ibid: 22

<sup>16</sup> Ibid: 22

<sup>17</sup> Karen Engle (2013), ‘The Grip of Sexual Violence: Reading United Nations Security Council Resolutions on Human Security’, University of Texas, School of Law, Research Paper Series Number 539, p. 22

<sup>18</sup> Anne-Marie de Brouwer (2005), ‘Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR’, Intersentia-Antwerp – Oxford, p. 443

<sup>19</sup> ICTR, Prosecutor v Akayesu, ICTR-96-4-T, September 2, 1998

*Bemba*<sup>20</sup> in 2016, the approach to and construction of rape in international criminal prosecutions has been and continues to be a site of much contestation. It is often forgotten that the charges of rape and sexual violence were in fact not in the prosecution's initial charges in *Akayesu* but were only introduced later largely thanks to the efforts of Judges like Navaneetham Pillay and pressure from advocacy by feminists and women's rights groups. In *Akayesu*, the ICTR defined rape as "... a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>21</sup> Physical force was not needed as evidence of coercive circumstances—threats, intimidation, extortion and other forms of duress could be seen as constituting coercion,<sup>22</sup> which in fact may be inherent in the circumstances of armed conflict or high levels of militarisation.<sup>23</sup> The *Akayesu* definition rejected the 'traditional' definition of rape, which was limited either by the gender of the perpetrator or by virtue of the prohibited act or acts.<sup>24</sup>

**Rather than a linear progressive evolution, constructions and understandings of rape and sexual violence against women and girls as an international crime have been and remain a shifting and contested terrain.**

The *Akayesu* definition expanded on the 'traditional' definition by (1) enabling forced oral or anal sex, and digital (finger) and tongue penetration of the vagina to be considered rape and (2) adopting a gender neutral approach to victims and perpetrators.<sup>25</sup> In addition, significant latitude was given in determining what

constituted coercion and the element of lack of consent was not addressed.<sup>26</sup> In other words, consent was considered irrelevant to the definition of rape.

Also in 1998, just four months after *Akayesu*, the ICTY defined rape in *Furundija* as follows:

- (i) The sexual penetration, however slight of (a) the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator,
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>27</sup>

This definition was more in line with the 'traditional' definition of rape: The perpetrator had to be male unless a female used an object or was an accessory. Certain forms of sexual activity, such as

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<sup>20</sup> ICC, *Prosecutor v Bemba*, ICC-01/05-01/08-3343, March 21, 2016

<sup>21</sup> *Akayesu*, para 598

<sup>22</sup> *Akayesu*, para 688

<sup>23</sup> *Akayesu*, para 688

<sup>24</sup> Philip Weiner (2013), 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', *Boston College Law Review*, Vol 54, Issue 3, p. 1209

<sup>25</sup> Weiner, p. 1209

<sup>26</sup> Weiner, p. 1210; *Akayesu*, para 688

<sup>27</sup> ICTY, *Prosecutor v Furundžija*, IT-95-17/1-T, December 10, 1998, para 185

forced digital penetration, were not considered rape.<sup>28</sup> However, *Furundija* did go beyond the traditional definition by including forced oral sex as rape as well as threats to use force against a third person as constituting coercion; therefore, ‘force’ or ‘coercion’ was an element of the crime.

In 2001, in *Kunarac*, which was the first case to focus exclusively on rape and sexual violence against women, the ICTY defined rape as:

The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>29</sup>

The *Kunarac* definition removed the coercion or force element and adopted a lack of consent element instead.<sup>30</sup> The trial chamber was of the view that sexual penetration will constitute rape only if it is not truly voluntary or consensual on the part of the victim.<sup>31</sup> The *mens rea* element required both proof of general intent to effect the sexual act *and* proof that the accused knew the sexual act was taking place without the victim’s consent.<sup>32</sup> This second element would allow for a defence on the grounds of a mistake of fact, i.e., if the perpetrator is able to establish that the act was due to his mistaken belief regarding the victim’s consent, then this precluded establishing beyond a reasonable doubt the required intention to commit a crime.

On appeal in *Kunarac*, the appellants argued that coercion or force was an element, rather than lack of consent. The Appeals Chamber rejected this argument and instead focussed more on inferring lack of consent from surrounding circumstances—“Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape.”<sup>33</sup> The Appeals Chamber noted that circumstances that prevail in most war crimes or crimes against humanity cases are likely to have been almost universally coercive, where true consent will not be possible.<sup>34</sup> In other words, some circumstances are so coercive that they negate any possibility of an individual being capable of giving consent.

In 2005, the ICTR Trial Chamber in *Muhimana* took the view that the definitions of rape in *Akayesu* and *Kunarac* were not incompatible and were not substantially different in their application—to recall, *Akayesu* referred to a physical invasion of a sexual nature and *Kunarac* articulated the parameters of what would constitute a physical invasion of a sexual nature

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<sup>28</sup> *Furundžija*, para 185; Weiner, p. 2013

<sup>29</sup> ICTY, *Prosecutor v Kunarac*, IT-96-23-T& IT-96-23/I-T, February 22, 2001, para 460

<sup>30</sup> Weiner, p. 2013

<sup>31</sup> *Kunarac*, para 439-441

<sup>32</sup> Weiner, pp. 2013-2014

<sup>33</sup> ICTY, *Kunarac v Prosecutor*, IT-96-23& IT-96-23/I-A, June 12, 2002, para 129

<sup>34</sup> *Kunarac* appeals judgment, para 130

amounting to rape.<sup>35</sup> However, the Trial Chamber did not explain how it reconciled the differing definitions of rape in *Akayesu* and *Kunarac* nor did it explain how it applied its view of the definition to the facts of the case.<sup>36</sup> On the issue of coercion, the Trial Chamber agreed that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape and that the circumstances in most international criminal law cases—such as genocide, crimes against humanity or war crimes—will be almost universally coercive, thus vitiating true consent.<sup>37</sup>

In 2006, the ICTR's Appeals Chamber in *Gacumbitsi* went back to the *Kunarac* definition of rape—*Kunarac* establishes that the victim's lack of consent and the perpetrator's knowledge thereof are elements of rape, which means the prosecution bears the burden of proving the elements beyond reasonable doubt.<sup>38</sup> The *Gacumbitsi* judgment reflected a more 'traditional' approach to the definition of rape relative to the more expansive one in *Akayesu*.

## ICC

Unlike the *ad hoc* tribunals relating to Rwanda or the former Yugoslavia, whose definitions (the elements) of rape were decided upon through case law (rather than through the statutes of the respective tribunals), the ICC's definition stems from the Rome Statute and the linked Elements of Crimes. The ICC's definition of rape (in terms of its physical acts) is as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>39</sup>

The first paragraph is considered a compromise between the 'traditional' and more expansive definitions of the sexual act of rape.<sup>40</sup> Various forms of sexual activity are covered, including rape by digital or tongue penetration, and the definition is gender neutral. Unlike the ICTR and ICTY definition of rape, requiring the absence of consent, the ICC focuses on force or coercion, which includes a threat against a third person. In addition, the ICC definition recognises that certain persons may be incapable of providing consent to sexual activity, including due to age, mental or

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<sup>35</sup> ICTR, *Prosecutor v Muhimana*, ICTR- 95-1B-T, April 28, 2005, para 550

<sup>36</sup> Weiner, p. 1216

<sup>37</sup> *Muhimana*, para 546

<sup>38</sup> *Gacumbitsi v Prosecutor*, ICTR-2001-64-A, July 7, 2006, paras 152-153

<sup>39</sup> Rome Statute, Elements of Crimes, arts 7(1)(g)-I, 8(2)(b)(xxii)-I, 8(2)(e)(vi)-I

<sup>40</sup> Weiner, p. 1217

physical conditions, and infirmity.<sup>41</sup> This protection accorded to certain persons, who may be incapable of giving consent, is in accord with domestic jurisdictions.<sup>42</sup>

The *mens rea* or criminal intent requirement for rape as per the Rome Statute is that the “... *material elements are committed with intent and knowledge*”.<sup>43</sup> The perpetrator must (1) intend to invade the body of a person resulting in penetration, and (2) know that the invasion was committed through the use of force, threats, coercion, or by taking advantage of a coercive environment, or a person incapable of voluntarily consenting to such penetration.<sup>44</sup> Whilst the ICC definition does not explicitly require knowledge of the lack of consent, like the *Kunarac* definition, arguably, the ICC definition still allows for a mistake of fact defence,<sup>45</sup> which, to reiterate, means that if the defence is able to establish that the act was due to an accused’s mistaken belief regarding the victim’s consent, then the intention to commit the crime cannot be proven beyond reasonable doubt.

In *Katanga*, which was the first case of sexual and gender-based crimes to be tried at the ICC, the Court clarified that, except for the specific situation of a person whose “*incapacity*” was “*taken advantage of*”, the Elements of Crimes do not refer to the victim’s lack of consent and therefore it need not be proven.<sup>46</sup> The Court was of the view that the Elements of Crimes clearly sought to punish any act of penetration committed under the threat of force or of coercion, such as by the threat of violence, duress, detention, psychological pressure or abuse of power or, more generally, any act of penetration taking advantage of a coercive environment.<sup>47</sup>

**An understanding of the contestations underlying the construction of rape as an international crime is vital to strengthening feminist activism to shape and influence the norms and functioning of a prosecutorial and judicial mechanism.**

In other words, the ICC definition does not contain the element of lack of consent. However, it is not entirely excluded as irrelevant either as the ICC’s Rules of Procedure and Evidence only provide that it may be impossible to infer consent under certain circumstances.<sup>48</sup> The resulting situation is that consent is left open as an issue to be raised as a defence. In practice, this has

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<sup>41</sup> Weiner, p. 1218

<sup>42</sup> Weiner, p. 1218

<sup>43</sup> Rome Statute, art 30(1)

<sup>44</sup> Weiner, p. 1219

<sup>45</sup> Weiner, p. 1219

<sup>46</sup> ICC, *Prosecutor v Katanga*, ICC-01/04-01/07, March 7, 2014, para 965

<sup>47</sup> *Katanga*, para 965.

<sup>48</sup> ICC, Rules of Procedure and Evidence, rule 70.

resulted in the prosecution raising the issue of consent, arguably as a pre-emptive strategy.<sup>49</sup> For example, in *Bemba*,<sup>50</sup> whilst leading evidence from a rape survivor (members of whose family, including an 11-year-old daughter, were also raped), the prosecution directly asked the witness if he or his wives or daughters consented to the rapes that occurred.<sup>51</sup> Therefore, even though the lack of consent is not a formal requirement under the ICC, it nevertheless *still appears* to linger. Moreover, as discussed further below, an expanded definition of rape itself does not mean the ICC embraces an expansive understanding of sexual violence.

Even this brief history of the approach to constructing and defining rape as an international crime underlines some important lessons for advocates of transitional justice in Sri Lanka. Firstly, that far from having been settled, issues such as penetration, consent and coercion continue to bedevil rape trials. Secondly, the manner in which the judicial mechanism approaches the definition and construction of rape must be seen as a critical site for feminist struggle because it will shape how war-time rape and sexual violence will be conceptualised and consequently addressed in Sri Lanka. Thirdly, it is apparent that a call for a judicial mechanism that applies international standards is in itself clearly inadequate because, as the preceding and the following sections underline, international standards are in fact far from clear or consistent, let alone being just from a feminist point of view. Approaches to and definitions of rape, and even more so of sexual and gender-based violence beyond rape (discussed below), are in fact not only inconsistent in international jurisprudence but even contrary to one another. Some of these approaches and definitions are narrow and reflect clear heteronormative biases, and reprise troubling ideas such as consent.

## 1.2. ‘Sexual violence’ beyond rape and international criminal jurisprudence: A case of presence by absence

There has been a considerably high degree of advocacy on the question of justice for ‘sexual violence’—a framing that points, and rightly so, to harms associated with acts beyond the archetypal sexual offence of rape. Given the ICC’s broad definition of rape, one may assume that its conceptualisation of sexual violence would be broader still. But as it happens, this is not necessarily the case. Considering *Uhuru Kenyatta’s* case (involving allegations of crimes against humanity during the post-election violence in Kenya in 2007-08), Rosemary Grey argues how both in the initial application for a summons to appear and during the confirmation of charges hearing, the prosecution “...argued that the forced circumcision of Luo men as a punishment constituted a ‘form of sexual violence’ of comparable gravity to the other sexual violence crimes enumerated in the Rome Statute.”<sup>52</sup> Men suspected to be Luo, were forced to undress in public to check if they were uncircumcised (as is the Luo tradition) and if not were subject to forced circumcision as a form of punishment. But the Pre-Trial Chamber rejected the prosecution’s arguments that forced circumcision as it occurred constituted ‘sexual violence’. The Chamber held that whilst the acts were ‘inhumane’, they were not of a ‘sexual nature’, explaining that “...

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<sup>49</sup> Eithne Dowds, ‘Prosecuting Rape in International Criminal Law: Challenges and Possibilities’, <http://blogs.qub.ac.uk/hrc/postgraduates/phd-seminar-series/prosecuting-rape-in-international-criminal-law-challenges-and-possibilities/>

<sup>50</sup> ICC, *Prosecutor v Bemba*, ICC-01/05-01/08, March 21, 2016

<sup>51</sup> Eithne Dowds, ‘Prosecuting Rape in International Criminal Law: Challenges and Possibilities’, <http://blogs.qub.ac.uk/hrc/postgraduates/phd-seminar-series/prosecuting-rape-in-international-criminal-law-challenges-and-possibilities/>

<sup>52</sup> Rosemary Grey, ‘Beyond Rape – The evolving concept of ‘sexual violence’ under international criminal law’, September 20, 2013, <http://asiapacific.anu.edu.au/regarding-rights/2013/09/20/beyond-rape-evolving-understandings-of-sexual-violence-in-international-criminal-law/>

*not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence” and further that “...the determination of whether an act is of a sexual nature is inherently a question of fact”.<sup>53</sup>*

As Grey underlines, the Chamber’s reluctance to reduce the definition of ‘sexual violence’ to its “...physical elements [...] seems unobjectionable – progressive, even – as it leaves room for a consideration of the cultural and psychological aspects of sexual violence.”<sup>54</sup> But then it also begs the question as to “...what distinguishes ‘sexual violence’ from other types of violence, and the suggestion that this is a ‘question of fact’ seems problematic, given that the ‘sexual’ nature of an act is often a matter of opinion, rather than something inherent to that act.”<sup>55</sup>

Moreover, Grey also rightly underlines that an approach such as the Chamber’s runs contrary to the ICC Statute’s approach to rape in which “...the prosecution is not required to show that the penetration was intended as ‘sexual’, or experienced by the victim/survivor in that way. By contrast, it would appear that ‘sexual violence’ is not defined by the parts of the body subjected to violence, but rather with reference to something qualitatively ‘sexual’ about the act which must be demonstrated.”<sup>56</sup>

The issue of rape and sexual violence also came up before the ICC in the case of *Jean Pierre Bemba*. In March 2016, Bemba was sentenced to 18 years in prison after being convicted as a military commander for two counts of crimes against humanity, including murder and rape, and three counts of war crimes, including murder, rape and pillaging. This was the first conviction and sentencing at the ICC of an individual convicted of crimes of sexual violence as well as the first issued for an individual charged with command responsibility. But this historic first hides a significant failure with respect to accountability for sexual and gender-based crimes.

In the request for Bemba’s arrest warrant, the prosecution had actually filed for several charges of gender-based crimes, which included: Rape as a crime against humanity and war crime; rape as torture as a crime against humanity and war crime; outrages upon personal dignity as a war crime; other forms of sexual violence as a war crime and a crime against humanity, and murder as well as pillaging.<sup>57</sup> But as the Women’s Initiative for Gender Justice (WIGJ) has noted, Bemba only faced charges of rape as a war crime and a crime against humanity as all other charges of gender-based sexual violence were not held as maintainable.<sup>58</sup> The charge of ‘other forms of sexual violence’ related to forcing women to undress in order to publicly humiliate them, but this charge was not included in the arrest warrant as the Chamber held that the facts presented were not of comparable gravity to other enumerated acts.<sup>59</sup> Moreover, the Chamber also held that rape

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<sup>53</sup> *The Prosecutor v Uhuru Muigai Kenyatta*, Confirmation of Charges Decision, Pre-Trial Chamber II, January 23, 2012, (ICC-01/09-02/11-382-Red) at 265 in Grey, 2013

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> See ICC-01/05-13-US-Exp.

<sup>58</sup> Women’s Initiatives for Gender Justice, *Bemba Sentenced to 18 Years by the ICC: The Prosecutor v. Jean-Pierre Bemba Gombo-Powerful sentencing decision on crimes of sexual violence*, June 21, 2016, available at <http://4genderjustice.org/pub/Bemba-Sentencing-Statement.pdf>

<sup>59</sup> Ibid.

as torture and outrages upon personal dignity were not confirmed on the grounds that these were ‘cumulative’ to the charge of rape.<sup>60</sup>

As Grey has noted, whilst the Pre-Trial Chamber in *Bemba* accepted the argument that “...the acts of forced nudity were ‘sexual in nature’...”, its concern however “...was that these acts were not of a ‘comparable gravity’ to the other sexual violence crimes [such as rape, sexual slavery and enforced prostitution].”<sup>61</sup> Grey rightly asks, “...how can the gravity of an act of sexual violence be assessed, and how can one determine whether that act is comparably grave to the other relevant crimes, such as rape? One way to do this would be to seek the views of the victims, or the affected community more broadly. However, the Pre-Trial Chamber did not take that approach in the *Bemba* case.”<sup>62</sup>

**What makes a violent act sexual and how ‘sexual violence’ is defined and constructed in the context of international criminal prosecutions are deeply contested.**

The WIGJ had in fact been granted leave to submit an *amicus curiae* brief arguing why all charges of gender-based crimes should be included. But the Pre-Trial Chamber’s refusal to do so led the WIGJ to issue a statement noting that the Pre-Trial Chamber’s interpretation of the ICC Statute failed to recognise “... that cumulative charging is

appropriate – and necessary – to capture the different and multiple harms experienced by victims/survivors, in particular those who have suffered from sexual violence.”<sup>63</sup>

What the experiences in the *Kenyatta* and the *Bemba* cases underline is the extreme instability of sexual violence (beyond rape) in international criminal law jurisprudence. It should serve to alert transitional justice advocates in Sri Lanka, firstly, of the continuing dangers and challenges at the highest levels of international criminal jurisprudence of accounting fully for the experience of sexual and gender-based violence. Secondly, it also leaves some questions to be considered in terms of whether and how ‘sexual violence’ may be defined, the risks of each option as well as the benefits and risks of open-endedness in the matter of defining ‘sexual violence’. The ICC’s Elements of Crime contains guidance on “...what makes a sexual act **violent** (that it involved force, threat, coercion, etc.) but not what makes a violent act **sexual**.”<sup>64</sup> (Emphasis retained)

Finally, as Grey has rightly argued elsewhere, it also underlines the importance of “...consultation with affected communities, about what it means to say an act of violence is ‘sexual’ in nature, and how ‘sexual violence’ should be defined”.<sup>65</sup> In other words, a question before transitional justice

<sup>60</sup> ICC-01/05-01/08-424

<sup>61</sup> Rosemary Grey (2014), ‘Conflicting interpretations of ‘sexual violence’ in the International Criminal Court’, *Australian Feminist Studies*, 29:81, 273-288, DOI: 10.1080/08164649.2014.958123, p. 278

<sup>62</sup> *Ibid.*, p.278

<sup>63</sup> *Ibid.*

<sup>64</sup> Grey 2014, p. 276

<sup>65</sup> Rosemary Grey, ‘Beyond Rape – The evolving concept of ‘sexual violence’ under international criminal law’, September 20, 2013, <http://asiapacific.anu.edu.au/regarding-rights/2013/09/20/beyond-rape-evolving-understandings-of-sexual-violence-in-international-criminal-law/>

advocates in Sri Lanka is how consultation and participation of victim-survivors can shape the statute of the judicial mechanism and more generally the approach to the construction of crimes and harms being considered by it.

The implications for the feminist struggles for criminal accountability for sexual violence in the context of transitional justice in Sri Lanka are quite clear. Firstly, rather than mandate the special judicial mechanism to draw generally from international criminal law and jurisprudence, the elements of crime and rules of procedure and evidence accompanying the statute must account for the range of lived experiences of sexual violence in Sri Lanka. Secondly, the definitions in the statute must be drawn up through a rigorous process that involves a sound scrutiny of the range of international criminal law jurisprudence, a consultative process involving victims and feminist as well as queer feminist perspectives on sexual and gender-based violence. Thirdly, there must be clear recognition in the statute of diverse forms of sexual violence beyond rape. Fourthly, the statute must include an enumeration of principles that would allow prosecutors and judges to count for all harms that may be experienced as sexual or gender-based by victims/survivors.

### 1.3 Victim participation in rape and sexual violence trials

The role of victims has always remained contentious in criminal trials and is especially fraught in the case of crimes such as rape and sexual violence. Firstly, there is the disjuncture between the complex physical and psychosocial experiences of gendered crimes against women and their multiple horizontal effects on the one hand, and the discrete categories of offences recognised in the law on the other. Secondly, the criminal trial process is focussed on reconstructing a victim's complex experience of harms into a linear narrative and causal chains, as a way to enable a trier of fact to determine whether harm was caused and whether the accused caused the said harm.

The experience with the ICTY and ICTR belied the assumption that the interests of the prosecution and victims are always aligned. As it has been pointed out, “...on a number of occasions, however, the interests of victims of sexual violence and those of the Prosecutor proved not to coincide, this to the detriment of victims of sexual violence.”<sup>66</sup> It is precisely for this reason that safeguards were introduced when it came to the ICC. Article 53 of the ICC Statute requires the Prosecutor to take into account “...the interests of victims...” in deciding on whether to initiate prosecution and Article 54(1) directs the Prosecutor to “...respect the interests and personal circumstances of victims...” during the investigation.

The Court also has a Victims' Participation and Reparation Section, and the Victims and Witnesses Unit, to address various concerns of victims and witnesses, and ensure effective and meaningful participation. Besides providing for victim and witness protection, Article 68 (3) also stipulates:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings *determined to be appropriate by the Court* and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. *Such views and concerns may be presented by the legal representatives of the victims* where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. (Emphasis added)

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<sup>66</sup> Anne-Marie de Brouwer (2005), 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', Antwerp – Oxford: Intersentia, p. 460

On the whole, however, victims' participation is largely at the discretion of judges and in the form of opening or closing statements by the legal representatives of the victims, i.e., "...participation is largely left to participation by the legal representative".<sup>67</sup> Tensions between different interests—especially those of the Prosecutor and the victims, and more fundamentally regarding determination of who the victims are and how they may participate—have remained, with different Chambers and Judges taking different approaches.<sup>68</sup>

A 2008 assessment called for the ICC "...to define a more comprehensive, concerted and defined approach towards victim participation..." failing which participation "...risks ending as a farce."<sup>69</sup> But even in 2014, the Victims' Rights Working Group was still expressing concern over the "...lack of consistency..." on victim participation and that it not only "...risks affecting the exercise of the rights arising from Article 68(3)..." but also risks "...confusing victims and raising false expectations."<sup>70</sup>

What all of this underlines is the extent to which questions of voice and participation, especially in relation to victim survivors of gender-based crimes, women especially, have an unstable, tenuous and contested space in legal processes and spaces of international criminal law. The crucial issue here is that victim survivors are often at a distance from being able to influence

**The role and participation of victims in prosecutions and trials involving international crimes remain deeply contentious and are especially fraught in the case of crimes such as rape and sexual violence.**

prosecutions. Rather than aim to balance the interests of victims and the prosecution, it is important to build processes into Sri Lanka's judicial mechanism that ensure a continuous and respectful engagement between the prosecution, victims and, where relevant, even witnesses. Extensive preparation, periodic conferences and debriefings are especially crucial. The judicial mechanism must include a unit to support victims and its capacity should include providing support with respect to participation and information, with staff trained to translate and interpret different aspects of the trial and also support the prosecution to ensure victims can be meaningfully informed and therefore participate.

Criminal trials reproduce only narrowly constructed narratives of victimhood relevant to the charges, which often render other lived experiences of women invisible. Further, the assumption

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<sup>67</sup> Ibid., p. 305

<sup>68</sup> On the identification and participation of victims, see, for instance, Baumgartner (2008). Regarding concerns over victim participation in the *Benba* case, see 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', November 22, 2010, available at [http://www.iccwomen.org/documents/Bemba\\_Opening\\_Statement.pdf.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf); for a discussion on the complexities of victim participation and identification in the *Lubanga* case--Goldah Nekesa Matete (2013), 'Reflections On Victims Participation In The Lubanga Judgment', available at <https://acontrarioicl.com/2013/05/02/reflections-on-victims-participation-in-the-lubanga-judgment/>

<sup>69</sup> Elisabeth Baumgartner (2008), 'Aspects of victim participation in the proceedings of the International Criminal Court', *International Review of the Red Cross*, vol 90., Number 870, p. 409-440, p. 439

<sup>70</sup> Victims' Rights Working Group (VRVG), 'Making Victim Participation Effective And Meaningful', June 2014, available at [http://www.vrvg.org/downloads/englishvrwgpapermakingvictimparticipationeffectiveandmeaningful-june2014-\(2\).pdf](http://www.vrvg.org/downloads/englishvrwgpapermakingvictimparticipationeffectiveandmeaningful-june2014-(2).pdf) p 2-3

that the visibility of women victims in a judicial process is a sufficient stand-in for representation of all women's voices is a mistaken one. A major feminist concern is that whilst women may be present at and visible in judicial or non-judicial mechanisms of transitional justice, the depth and complexity of their experiences of harm and survival are often not.

Whilst the goal of victim participation is laudable, it is important to recognise that it is subject to significant constraints imposed by the structure and operational technologies of a criminal trial and the hierarchies of knowledge and expertise. It is precisely this concern over the marginality of victims' voices that drove the women's movement to give "...victims a voice in the criminal justice process";<sup>71</sup> prompting measures such as the introduction of victim impact statements. Mostly delivered prior to sentencing, victim impact statements are now part of many domestic and international jurisdictions.

**Criminal trials often reproduce narrowly constructed and perpetrator-centric narratives of victimhood and harms, which often render invisible the complexity of the lived experiences of harms and the resilience of women and girls subjected to sexual violence.**

It is important to ensure that any mechanism with a mandate for criminal prosecution must make it mandatory to offer victims the space to articulate their experiences of violence and its aftermath in their own voice, language and manner. Further, such statements must carry special weight when considering sentencing and compensation or reparations. Victims must also be allowed to make such statements in

person or through a representative, in open court or *in camera*, in the presence or absence of the accused, and in their chosen language.

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<sup>71</sup> Canadian Resource Centre for Victims of Crime, Victim Impact Statements, undated, available at <https://crevc.ca/docs/VictimImpactStatements.pdf>

## Part 2: Feminist spaces and visions beyond judicial mechanisms—The 2015 Women’s Court in Sarajevo

I would like to tell this story. I would like it to be heard all the way to Australia,’ one woman from Foca, Bosnia said. The immense contribution of the Women’s Court was to give women a space in which to speak locally, to be heard globally and to write a plural feminist history of the human impact of the wars in the Former Yugoslavia. All of this can spur the fight against impunity – can spark more official, legalistic responses, and can also change the way we conceive of justice by reminding us to always put victims at the center.

– Karima Bennoune<sup>72</sup>

The Women’s Court in Sarajevo—formally called ‘Women’s Court - Feminist Approach To Justice’—was convened by a coalition of almost 200 civil society organisations, largely women’s rights groups from across the different countries of the former Yugoslavia. The Court was the result of a shared understanding amongst feminists and women’s rights activists that “...*the institutional legal system does not satisfy justice...*” and as a space “...*for women’s voices and women’s testimonies about the daily injustices suffered during the war and now, in peace...*” where “...*women testify about the violence in the private and public spheres.*”<sup>73</sup> The Court was also driven by the need to ensure processes of justice strengthen “...*networks of mutual support and solidarity, and the creation of strong autonomous women’s movement...*” and create “...*different-feminist concepts of responsibility, care and security, in order to build a just peace...*”<sup>74</sup> as well as a “...*space for the testimonies of the organized women’s resistance.*”<sup>75</sup>

The Women’s Court emerged as such a strong felt need even after the creation of the ICTY and some successful and historic prosecutions, including for crimes against women, as well as several other measures of transitional justice. Through the portraits of three women, Clark notes why the Court was immensely significant and meaningful even for those wartime rape survivors who had testified at the ICTY against their respective perpetrators and helped secure successful convictions. She notes that even though all three women “...*received some degree of legal justice through the courts*”, it did not address how their everyday realities of pre- and post- legal justice constantly underlined that an “...*injustice committed against the victim is not a one-time event but rather an unfolding and multilayered process.*”<sup>76</sup>

Speaking of the complex affective burden and legacy of what they suffered, Clark argues (citing Katherine Franke) that the “...*translation of human suffering into the language of law and rights will*

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<sup>72</sup> Women’s Court: A Feminist Approach, 2015, Peace is Loud, <http://peaceisloud.org>

<sup>73</sup> See ‘Why Do We Want To Organize Women’s Court?’ at <http://www.zenskisud.org/en/>

<sup>74</sup> Ibid.

<sup>75</sup> See ‘About The Women’s Court’ at <http://www.zenskisud.org/en/o-zenskom-sudu.html>

<sup>76</sup> Janine N. Clark (2016), ‘Transitional Justice as Recognition: An Analysis of the Women’s Court in Sarajevo’, *International Journal of Transitional Justice*, 10, 67–87, doi: 10.1093/ijtj/ijv027, p. 70

always satisfy the interests of legal authorities more than those who are called to narrate their pain.”<sup>77</sup> Moreover, as she also argues, the legal justice process, in which “...victim-witnesses are simply there to recount the crimes committed against them...”, offers little or no “...opportunities for them to become cognizant of their own resilience and fortitude.”<sup>78</sup> The Women’s Court, therefore, may be seen as an attempt at securing ‘justice as recognition’; recognition not only of multiple forms of individual and collective suffering, but also of personal and structural forms of violence and victimhood as well as of survival and resistance. In other words, the Women’s Court accent on recognition rendered it victim-centric in contrast to a perpetrator-centric criminal trial. It is a process that privileges victims’ perspectives, their lived realities of multiple and intersecting injustices, and their material and affective legacy.

These multiple and intersecting realities include recognition of both public and private harms, the costs of economic violence and the reassertion of patriarchal paradigms in a post-war context. Socio-economic deprivations with its specific adverse effects on women in societies with conflict are regularly ignored in peace negotiations and transitional justice processes.<sup>79</sup> Moreover, very often violence in the public sphere is privileged over

violence in the private sphere; the focus of concerns around militarisation in Sri Lanka, for example, has rarely extended to how it infected the private sphere and other intimate spaces. Another key concern often overlooked in transitional justice contexts is the return to discriminatory gender roles underpinned by violence following the end of war or cessation of conflict.

The manner in which the Sarajevo Women’s Court framed the issues it aimed to address clearly reflected an attempt to capture these overlapping, continuous and multiple experiences of gendered harms in relation to the war and its aftermath. Whilst the broad focus of the Court was on violence and injustice during and after the war, the process aimed to frame these harms in a complex manner in order to reflect women’s everyday realities and the violence related to the multiple spaces and roles women occupied. The Court’s website outlines these issues in detail, which are grouped as follows: Ethnically-based violence, militaristic violence, the continuity of

**The feminist approach of the Women’s Court centred around locating war-related sexual violence against women and girls on a continuum of public and private violence even whilst recognising its specific nature. Central to the approach was linking personal testimony of harm and survival to political analysis.**

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<sup>77</sup> Katherine Franke (2006), ‘Gendered Subjects of Transitional Justice,’ *Columbia Journal of Gender and Law*, 15(3), 813–828 in Clark (2016), p. 70

<sup>78</sup> *Ibid.*, p. 71

<sup>79</sup> For more on the exclusion of socio-economic deprivations from transitional justice process see Ní Aoláin (2012), Nesiah (2016) and also Dustin Sharp (2013), ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’, *Harvard Human Rights Journal*, Vol. 26, 149-178, and Lars Waldorf (2014), ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *Social and Legal Studies*, 1-12

gender-based violence (of different forms in diverse public and private spaces) and economic violence.<sup>80</sup>

The Court itself was convened in 2015 but was preceded by an intense 5-year process that involved 10 consultations, 16 regional seminars, 16 feminist discussion circles and 136 public presentations in 100 towns across the former Yugoslavia. Through these processes and spaces, many women actually told and re-told their stories several times and interacted with other witnesses.<sup>81</sup>

The methodology of the Court itself centred on linking “...a subjective text (a woman’s testimony) with the objective analysis of political, social-economic and cultural context of the violence”.<sup>82</sup> In addition to women who testified about their personal experiences and feelings, there were also expert witnesses analysing “...causes and consequences and formulating the context for individual testimonies...” enabling “...personal testimony [to be] intertwined with political analysis.”<sup>83</sup> There were juries at the local and regional level consisting of “...women and men who enjoy high level of respect among women and women’s organizations – and they are primarily women activists, scientists, legal, economic and media experts etc.” There was also an international jury of women and men chosen for their knowledge and understanding of the context as well as for the respect they commanded.<sup>84</sup> The focus of the Court was not on delivering judgments but rather on public condemnations, putting pressure on national and international institutions, and even initiating measures such as collecting evidence for legal action.

Conducted over four days, the Women’s Court saw testimonies from women affected by wars and conflicts from Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Slovenia and Serbia. Women had the choice of giving testimonies in ways they themselves selected and the space allowed a dynamic engagement with all of those gathered able to respond and express support in different ways.<sup>85</sup> These testimonies created alternative histories of conflict that were more reflective of women’s lived experiences and the continuous nature of harms. But it also did not aim to cast women simply as victims, instead the process allowed recognition—even for the women themselves—of their resilience, as women recounted their stories of survival and resistance. Moreover, aesthetics were central to the Women’s Court, enabling women to transform and express “...the pain they have experienced into yet another form of resistance [through] artistic expression, from poetic expressions, painting and music to dance, handicrafts and theatre forms”.

Both the website of the Court, and Clark (2016), note some of the conflicts and debates that arose during the process. This included disagreements over the extent to which the Court should prioritise sexual violence, which also led to some women’s groups refusing to participate. Whilst some were focussed on placing sexual violence against women front and centre, others very wary of sexual violence becoming the over-determining narrative. There were also disagreements over the choice of selecting expert witnesses and the role and visibility of internationals on the jury

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<sup>80</sup> See <http://www.zenskisud.org/en/o-zenskom-sudu.html>

<sup>81</sup> Ibid.

<sup>82</sup> See ‘Methodology Of Work’ at <http://www.zenskisud.org/en/Methodologija.html>

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

and so on. Moreover, to the extent that it appears to have emulated a formal judicial setting, both in name and to a significant extent in form and setting, it also raises the question as to the extent to which it departed from or reinforced that which it was challenging.

Whilst it is obvious that its processes, effects and afterlife merit far more scrutiny than possible herein, feminist endeavours like the Women's Court appear to widen the understanding and representation of gendered harms against women and girls during and in the aftermath of wars. Arguably, the narratives that emerged reflected the complex realities of women being caught in the cross-hairs of multiple abusive paradigms operating together, including but not limited to bounded/closed collective identities (race, religion and ethnicity), patriarchy, and class.

Processes and struggles such as the Women's Court in Sarajevo, which was also part of wider global initiatives to advance feminist spaces and visions of justice and legality, offer important insights for anti-normative, alternative and feminist conceptions of justice for post-war Sri Lanka. Most importantly perhaps they underline the significance of looking beyond state-centric and formal judicial spaces to "...script new social possibilities and to claim a self who has a future, and is not tethered to a painful past."<sup>86</sup> Processes such as the Women's Court offer important insights into the challenges and possibilities of feminist re-imaginings of justice and are best seen as such rather than as templates to be imitated.

Endeavours like the Women's Court are also significant given that transitional justice processes can sometimes fail to consider other ways in which women want their suffering to be recognised. In South Africa, many women testifying before the Truth Commission chose to testify about the consequences of violence for their families and communities rather than speaking only about their own experiences of rape or sexual violence. In effect, they resisted being confined to the category of rape victims. However, as documented in some cases, despite this, the Truth Commission focussed instead on their testimonies of sexual violence. As Fiona Ross observed,

Women experienced the violence of colonialism, capitalism and apartheid and their aftermaths differently from men, but when they spoke in forms that the commission was not legally enabled to hear, it assumed that women had not spoken, had not offered of their experience, had failed as witnesses, or had not been as affected by apartheid's violence as had men.<sup>87</sup>

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<sup>86</sup> Katherine Franke (2006), 'Gendered Subjects of Transitional Justice', *Columbia Journal of Gender and Law*, 15(3), 813–828 in Clark (2016), p. 80

<sup>87</sup> Fiona Ross (2010), 'An Acknowledged Failure: Women, Voice, Violence, and the South African Truth and Reconciliation Commission', in Rosalind Shaw and Lars Waldorf (eds), 'Localising Transitional Justice: Interventions and Priorities After Mass Violence', pp. 69-91

## Conclusion

**It is critical to strive to politically animate and infect the norms and processes of the judicial mechanism and render them sites of feminist struggles, whilst simultaneously seeking to fashion other spaces and processes centred around feminist visions of justice.**

Rape and sexual violence against women and girls during and in the aftermath of the war are now a major focus of the transitional justice and accountability agenda in Sri Lanka. In the shadows of narratives of rape and sexual violence as international crimes sit narratives of violence, including sexual violence, against women and girls within the confines and boundaries of intimate, communal or political economic relations. The

multitude of harms and experiences of violence faced by women at the sexed/gendered intersections of economic precariousness and social exclusion as a result of caste, disability, marital/family status or other factors, which folded into the war and its aftermath, are still largely on the margins of transitional justice discourse in Sri Lanka.

It is imperative that feminist struggles around justice for sexual violence in relation to the war in Sri Lanka look beyond liberal legality hitched to a narrow state and perpetrator-centric carceral approach to justice and accountability. This, it is worth stressing again, is not an argument against pursuing criminal prosecution of sexual violence and rape but rather to take note of the risks and tensions that are inherent within such an approach, especially that of rape and sexual violence against women and girls or indeed against men and boys being reduced to discrete or specific acts, individualising both responsibility and victimhood. This is not only very likely to fail to recognise, let alone address, the structural conditions producing such violence but it is also likely to impede the framing of collective political struggles to transform such conditions.

The challenge for feminist activism in Sri Lanka is to ensure that there is a continuous process of opening up spaces and amplifying voices, experiences and analyses that would enable such struggles, including through a special judicial mechanism. It is, therefore, critical to strive to politically animate and infect the norms, mechanisms and processes of criminal prosecution, whenever this bears fruit, so as to render them sites of critical feminist struggles, and at the same time look beyond to other sites, spaces and processes. This is crucial if we are to unearth deeper and more searching narratives of the violent ordering of heteropatriarchal sex-gender relations and identity formation in Sri Lanka.

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