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The American University in Cairo

School of Global Affairs and Public Policy

**THE IMPORTANCE OF WOMEN AS VILLAINS AND
VIOLATORS: SCENES FROM THE ICTY, THE ICTR, AND ABU
GHRAIB**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Sheri Ann Labenski

June 2013

The American University in Cairo
School of Global Affairs and Public Policy

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THE IMPORTANCE OF WOMEN AS VILLAINS AND VIOLATORS: SCENES
FROM THE ICTY, THE ICTR, AND ABU GHRAIB

Sheri Ann Labenski

Supervised by Professor Nesrine Badawi

ABSTRACT

Within the narratives of neoliberalism and international law women are often represented as victims. It is in times of conflict that women's roles are generally limited and ignored. Law is guilty of creating more protection for women that effectively perpetuates their status as victims. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are two examples where neoliberalism is reaffirmed through international law. Feminists and advocates, who bolster law's use, are often unintentionally supporting the link between neoliberalism, and international law and human rights. This link at its core uses women to support its aims, as neoliberalism needs a victim to aid in its reproduction. Due to this unfortunate situation women are rarely seen as perpetrators of crimes. Changing the predominate narrative surrounding women in times of conflict can only be seen to aid women, yet very few are comfortable with seeing women as violators. The United States female soldier's actions in Abu Ghraib were one such situation where the international community unanimously chose to treat women, who displayed the power of agency, as an aberration. Looking at Abu Ghraib as something positive for women, and rethinking the discourse that surrounded the ICTY and ICTR gives women the opportunity to be seen as something other than the consummate victim. Analyzing the influence of neoliberalism, and the use of law in reproducing incorrect representations of women further proves that in order for women to be seen as encompassing all forms of human expression one must first become resigned to the fact that women are very capable of committing violent crimes.

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I. Introduction

Women, as a sex, have been constructed to fit into multiple categories and forced to inhabit various definitions of the supposed female gender. While many would argue that these definitions and categories are dominant representations of women, one could also argue that these representations are rather selective. Although it is not hard for people to imagine all of the negative images women are associated with, women are rarely described as villains. The word villain suggests that there is something evil in one's nature and malicious in one's intent; this is not normally used to describe a woman, because it is assumed, by many that women are by nature, gentle maternal creatures. These preconceived notions are so ingrained within human beings that it is rarely contradicted. Even 'feminists' scarcely refer to women's 'lesser' qualities,¹ in fear that this could diminish the gains they have accomplished. It is hard to understand why there is such fear amongst people when describing the evils women do. If their argument is for a greater understanding and inclusion of women in all aspects of life, is it not equally important for women to be seen as naturally flawed, or to be put more precisely, as human?

Women are continually fighting to be seen as fully human, as every person needs to be seen as a human capable of goodness and evil. However, something has almost purposefully been left out of the focus of those who seek to strengthen the female position, which is the realization that women too are capable of committing terrible crimes. It is not only men who employ this assumption, but women as well. It is as if the awareness of this fact would somehow upset the notions men and women presume about the female sex, and then women would no longer be able to push for change. The aim to acknowledge women as violators is not done to disenfranchise women but rather the opposite. To expand the term 'women' to include all aspects of human nature, only supports the work of feminists; women are so often perceived in need of special protection under the law because in many situations the status of women are exploited as a rule.² Even when laws are expanded, to interpret acts of violence against women in a

¹ Karen Engle, *Judging Sex in War*, 106 MICH. L. R. 941, 953 (2008).

² *Id.*

broader range, this still serves within the preset ideals of difference between men and women. Laws, therefore, favor women but reinforce a male position. The vulnerability category in law has often been a place where advocates have rallied around those groups deemed in special need of protection or in a word ‘vulnerable’. Whether their intention is to dissolve the category entirely or not, this place of contention strips away personal autonomy. This concept also bares certain consequences in its qualification; does the use of this category, the special protection of women in law, in and of itself create the reason it is perpetuated? The vulnerability category only strengthens these female representations. There is a clear structural bias present within law and people often have less fear when more law is included, if it is used to protect women, because it solidifies women’s status as victims. In conflict situations immediate assumptions dictate that women are in need of protection as they suffer greatly during war, and while one would never deny this fact, there is something to be said for the work the law does to reinforce these ‘standards.’

It would be to the benefit women and men if the world could become comfortable with the idea that women are villains. Women would no longer be placed into specific roles, the role of loving mother, doting wife, or helpless victim. Men would likewise no longer need to be portrayed as solely violators; this would leave room for men to be seen as perpetrators of kindness rather than of evil.³ It is a common theme to see men as aggressors in war, there is no denying that men often make up the majority of military forces, but there is also no denying that men face their own predetermined sets of representation. The ideas of the male Casanova or the aggressive hyper masculine male are clearly just as limiting and prejudiced as those ‘classic’ female archetypes. Currently law and society creates a binary where women are the continual victim and if women are the victim then men by default must be the violator. If women are then seen as villains, those who violate, then men no longer need to predeterminately fill this role. This allows men to be seen as multidimensional as well.

³ *Id.* at 956.

International law is equally involved in misrepresenting women or falling silent where less common roles of women are seen.⁴ Women in conflict situations are exposed to a type of violence that is often sexual in nature; rape is deployed and is regrettably commonplace in volatile situations.⁵ Keeping women relegated to a specific place in conflicts negatively affects not only the women who were brutalized at the hands of other women, but the men who were sexually assaulted as well. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are two such examples of situations where the international community unanimously chose to silence the breadth of women's involvement in war. These two Tribunals are a useful starting point in order to scrutinize the way international law views women, especially in relation to sexual violence. These Tribunals were responsible for expanding the definition of rape and indicting individuals who took part in genocide, war crimes, and crimes against humanity.⁶ These actions taken by international law only further relegate women to remain forever the victim and little else.

It is necessary then to understand and recognize the way the law effectively victimizes women and in the same turn only allows women to represent maternal, innocent, traditional values. These common representations are evident throughout international law and global governance. Law's silence on the issue of women as violators supports the claim that these gender stereotypes do in fact exist; the lack of evidence in the law that acknowledges women as villains is enough to prove it as a valid statement. The effect that law has is to say that the law seeks to oppress; often a push towards more protection for women in times of need, also creates the space to employ prescriptive gender roles. Some may say that this is not intentional, while others would disagree, law is important because it allows a greater realization of rights and not the latter. However, this idea fails to take into account who it is that is responsible for creating these laws. It is not only people within the ICTY and ICTR to be sure, it is the West, that has become the barer of rights controlling International Courts and policy

⁴ *Id.* at 953.

⁵ Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence under International Criminal Law*, 101 AM. J. INT. L. 121, 121 (2007).

⁶ *Id.* at 128-131.

making, and it is even the most well meaning feminists and advocate.⁷ If any real progress can be hoped for then one must not continue to treat women as if they are incapable of acting as real human beings full of malice and anger as well as goodness.

This work examines the theory of neoliberalism and its affect on the status of women, both in law and the way women are stereotyped. Neoliberalism's relationship to human rights and international law is discussed, as well as its use by the West. Neoliberalism is also used as a way to critique the ICTY, ICTR, and Abu Ghraib. The ICTY and ICTR showcase the international community's tendency to define women as victims and urge to 'protect' women in times of severe brutality. The focus is not on the actual trials of the tribunals, but how rape came to be defined, and how advocates contributed to the courts. The involvement of female U.S. soldiers in the atrocities of Abu Ghraib is also discussed, using this situation as an example of how the international community reacts to women as violators. This case study is useful in order to display how people react when women act outside 'normal' female roles as well as to support the argument that women who commit crimes are good for women as a whole. By making such a statement it would seem as if this paper supports the torture at Abu Ghraib or encourages more women to commit crimes. However, this is not the case, although the recognition of the fact that women are cable of this type of physical destruction is good. Women do and will continue to commit crimes every day. The problem is that they are not adequately discussed, and when they are mentioned they are qualified with numerous statements about gender, as if women who commit crimes are an aberration. Abu Ghraib is used in this paper because seeing women in such positions or roles prompted such a strong reaction from many people that called into question women and gender. This is good, talking and recognizing women who commit crimes is good, and Abu Ghraib was good for women in a particular sense. The questions focused on throughout this research are as follows: how does international law enforce this image of women as victims and why does it do so? Which would better serve women: more protective law or the ability for the world to view women as harmful agents?

⁷ Engle, *supra* note 1, at 941.

This research shows that international law, in accordance with the tenants of neoliberalism, prefers women as victims and actively tries to keep women within this confine, which is why it is so impossible to see women as villains. Constructing women as victims reinforces that women are inferior and at the same time morally superior. This paper begins by defining the current neo-liberal moment and situating it within international and human rights law. The way rape is defined in international law is important to note; therefore, the cases of the ICTY and ICTR and how they influenced these definitions need to be explored. ICTY and ICTR did not aid women on the level of international law but reinforced their status as ‘lesser’. Looking at how rape, came to be thought of as a war crime, crime against humanity, and genocide, is necessary to gather a clear picture of how women are seen in international law, in order to then critique the cases of women as violators. The debates between feminists and the results of their work will be described as well. The cases of Biljana Plavšić and Pauline Nyiramasuhuko offer an interesting insight, as they are the only two women that have been indicted by the ICTY and ICTR respectfully.⁸ Only convicting two women in the Tribunals sends a message of these women are extreme cases, cautionary, and outside the norm. Discussing these women shows the gap in law and points to larger gender issues.

Grappling with the idea that advocating for a more inclusive meaning of rape relegates women to existing gender roles, a new discourse emerges. When discussing the inclusive meaning of rape and sexual violence this paper shows how even with the advancement of the definition of rape there have been some consequences that have almost furthered women’s suffering in the long term. Using the ICTY and the ICTR, reinforces earlier arguments by showing that more inclusion in law does not equal a better place for women. Seeing women as violators and villains, on the other hand, creates a new and undefined space where women would have to be seen as fully human, something the international community is not capable of comprehending.

⁸ Engle, *supra* note 1, at 941.

The focus is not only on women as violators but, how the surrounding environment of the ICTY and ICTR did not allow women to be seen as perpetrators⁹ of crimes. While the tribunals have only indicted two women, domestic courts like in Rwanda have brought many more women to trial.¹⁰ This reality is not dismissed but, the focus will remain on the work of the ICTY and ICTR. There is an element of the international system that warrants special attention. When describing U.S. female soldiers roles in Abu Ghraib, in which women were effective perpetrators of horrific violence, it is important to realize that these acts can be used to change our mindsets from prescriptive gender roles. The debates surrounding the release of the photos from Abu Ghraib are centered on specifically the female soldiers implicated, Lynndie England, Sabrina Harman, Megan Ambul, and their seeming impossible enjoyment when taking part in the atrocities depicted in the photographs.¹¹ The debates by no means defend the soldier's actions, they do however, shift through what are many preconceived notions about how a woman is expected to behave.

The aim is to engage in a discussion in order to demonstrate that it is within women's quest towards whatever issues they deem important, that one cannot operate in a vacuum. Women are, as men, capable of horrible things, yet in order to advance women's situation this fact cannot be denied and while one needs to recognize this, it is also necessary to see how neoliberalism's influence on law and feminists takes an active role in this process. The goal then is to create a new discourse by which women, the ICTY, ICTR, and Abu Ghraib could have been viewed, which would have created better 'protection' of women. This critique can be useful for rethinking one's position on women, international law, and conflict.

⁹ For the purpose of this paper the terms violator, villain, and perpetrator are interchangeable. These terms refer to a violation, but not in the sense of unintended actions; rather all three terms include the notion of direct intent. Committing a crime, and intending to do so.

¹⁰ Nicole Hogg, "I never poured blood": Women accused of genocide in Rwanda 58 (Nov. 2001) (unpublished L.L.M. thesis, McGill University) (on file with McGill University).

¹¹ *The images that shamed America*. (May 2003), available at <http://www.guardian.co.uk/gall/0,8542,121>. [hereinafter *Images*]

II. International Law within the Current Neo-liberal Moment

It is impossible to properly situate international law's impact on the current moment without acknowledging its distinct connection to the human rights project. Despite the criticisms behind the creation of the international human rights framework, arguments that such a framework is inevitably Western and a result of a sort of 'victor's justice'¹², is not the point when one seeks to discuss human rights law within the current climate. The point is to move forward from the creation of human rights, on an international stage, to the search for what it is human rights have become today. While it would be apt to argue that parts of its creation can be seen as problematic, this is not the argument in this case. Instead one must acknowledge the fact that human rights law exists and has been the predominate force in international law since the end of World War II and now look at what human rights and international law has done since, the problems it has caused, the people it has disenfranchised, and the categories it is perpetuating.¹³

The two terms, human rights and international law, can be used synonymously; as recent discourse has treated human rights as the galvanizing force behind the push to end terrorism and the reasoning behind preemptive wars.¹⁴ It is within this moment that human rights law has become critical to one's understanding of the neo-liberal time. Costas Douzinas in his book *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, states that since 1989 human rights has been the official ideology of the world. Douzinas further writes that, "All recent wars and occupations have been carried out wholly or partly in the name of human rights, democracy, and freedom. Human rights become part of a political philosophy and sociology".¹⁵

In 1989 human rights moved from a weapon, to ensure that states seek anti-communist and pro-Western policies, to the "lingua franca" of the new world order.¹⁶ In other words human rights were finally naturalized, and it is once something becomes

¹² See Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*. 4 J. HUM. RTS. 213, 214 (2005).

¹³ See *id.*

¹⁴ COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 3 (Routledge-Cavendish) (2007).

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 32.

naturalized that one can no longer question it or try to move beyond it. The naturalization of human rights states that this is the new way of doing business and everyone must follow suit. Douzinas states that it is because of inclusiveness of human rights that they are easily accepted by every geographical location, political stances, or religion, which makes them the dominate force.¹⁷ Despite humble beginnings, as a defense against the crude manipulative powers at be, human rights have now become the very weapons of those powers because they understand that a policy based in a language of human rights is much more effective. It is now, as Douzinas writes, that human rights greatest triumph has been achieved, the imposition of the ideology of the rich on the poor.¹⁸

Human rights are a tool in the marketplace and are so interwoven within the West that they are exploited. Douzinas gives an example of the way the West exploits democracy and good governance by describing the United States' reaction to policies that were said to have challenged 'American hegemony'. He explained how an American official complained that President Hugo Chavez was creating regional instability through redistributing oil wealth; despite the fact the president was democratically elected, Chavez was still harming democratic institutions.¹⁹ This reaction is not based on the fact that the United States is particularly worried about the stability of democratic institutions; what is more apparent is the fact that the United States is concerned with any action that would negatively affect American hegemonic ideals. The West, seen as the leader in their 'respect for all human life' is continually seen as the standard by which the rest of the world needs to follow, where human rights as well as the economy are concerned. It should not be surprising that the West is the forefront for economic policy and human rights; these two areas are decidedly interwoven, as human rights are used to bolster the economic capitalist agenda. Human rights are no longer a way of critically engaging in global/ local disputes or conflicts, they have become the standard way of doing business and are now a way to smooth over international relations and gain friends.²⁰ Since the West posses all of the human rights, they are capable of bestowing these rights upon the

¹⁷ *See Id.* at 7.

¹⁸ *See Id.*st 43.

¹⁹ *Id* at 85.

²⁰ *Id.* at 32.

rest of the world. The West has framed human rights in such a way that those who are not on the side of the West, those who do not believe in the importance of capitalism or the particular Western brand of democracy, are seen as the enemy; this idea is reminiscent of George Bush Jr.'s thoughts in 2002 on preemptive action.²¹

Rights can offer protection against power, but they can also harm life and regulate the body, elements states can use to wield power spreading Western policy. Due to the use of human rights in this current moment multiple United States presidents have used the language of human rights in order to justify military actions and it is from this perspective that Douzinas discusses the ways in which human rights have been replaced as the world's foremost concern, as the threats to state security have increased.²²

Douzinas noted that now is a time when torture and secret camps have become more important than humanitarianism, and the states with power believe that states with less power can rule themselves, just so long as it does not infringe on the powerful nation's right to rule the entire world.²³ When wars or conflict have resulted in a nation, theoretically due to a Western peace keeping or preemptive decision, the blueprint is clear, stabilize security and then allow NGOs and other institutions to enter the 'new' nation in order to teach others how to run their country properly.²⁴

Just as human rights have become a tool of regulation and the means to a governments desired end, they have also become extremely relevant to international criminal law. The rise in criminal adjudication is another indicator of international criminal law's use in the neoliberal project. Both the ICTY and the ICTR are examples of such instances when the international community selectively chose to impose international criminal law. Ivan Simonovic notes that the establishment of these two courts display decisions the community has made which indicate that there are certain times in which they are "capable of and willing to impose implementation".²⁵ This statement refers to the fact that the international community holds certain situations in

²¹ *Id.* at 3, 32.

²² *Id.* at 6.

²³ *See id.* at 4, 7.

²⁴ *Id.* at 141-142.

²⁵ Ivan Simonovic, *The Role of the ICTY in the Development of International Criminals Adjudication*, 23 *FORDHAM INTL. L. J.* 440, 446 (1999).

higher value, or rather views certain situations desperately in need of their intervention. Intervention not solely based on human need, but instead on the ability to manipulate the situation for personal gain. Despite the rise in adjudication, starting with the ICTY, crimes neither stopped nor were prevented in Bosnia and Herzegovina. This leads one to understand the rise in adjudication in criminal law is linked with the rise of human rights as a tool to promote neoliberalism. As Kenneth Anderson writes, “international criminal law will always exist in tension with UN collective security, the Security Council, and the interests and ideals of the Security Council's permanent members.”²⁶ International criminal law has been idealized as a way to right injustices and to punish those who violate human rights; yet, how can criminal law’s successes not be suspect, seeing as it seeks to punish those who violate the very human rights that are used to protect state interests? The entire system can be seen as complacent to the tenants of neoliberalism.

Thus, Tribunals that are established after such conflicts can be seen to be a part of that very system of human rights within the neoliberal moment. Tribunals can dispense justice, according to the ideals of the West, upon both the aggressor and victors. Understanding that there are ‘victims’ on all sides of a conflict, to punish as well as heal, is distributed according to Western standards. Feminists and advocates who interact with the courts, even if seemingly on behalf of those women who were affected by the conflict do so according to their standards of justice. Those whom advocates deem as victims are important, as neoliberalism needs victims. The production of victims and enforcement of justice by the Tribunals only aids Empire. If neoliberalism on a global scale does not have a victim then in what name can wars be waged? If there is no victim then how can one dispense ‘proper’ justice after a conflict? These actions, more importantly, allow Empire to influence the rest of the world and reshape it in the likeness of the West.

Michel Agier in his article, *Humanity as an Identity and Its Political Effects (A Note on Camps and Humanitarian Government)*, states that the humanitarian project is the “left hand” of Empire, healing the wounds of conflict and death.²⁷ The problem is that

²⁶ Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR J INTL L 331, 334 (2009).

²⁷ Michel Agier, *Humanity as an identity and its Political Effects (A Note on Camps and Humanitarian Government)*, 1 U PENN PRESS 29, 29-34 (2010).

the very powers behind such military interventions are the same powers that swoop in afterwards to heal the scars they created. Agier states that the ideas of compassion and care seem to be the core of the humanitarian mission but in reality are a process of “containment” meant to keep those from areas of recent conflict within their borders.²⁸ Interestingly enough many United States (US) principles or ‘battle cries’ have been turned into universal causes every man, woman, and child on this earth can understand and belong.²⁹ Claims that state American principles are the principles of every modern state and enlightened person make it impossible for people to oppose. Stating that the US is in some way important to all of humanity situates the US as the liberator and conceals its actions and underlying elitism. By the US engaging in war under the guise of humanity it forces states to ‘get on board’ and become modern like ‘us’. Afghanistan and Iraq were justified as a liberation, defending people from dictators and spreading democracy and freedom. The goal is correction, to correct others so that their governments can better, not serve their people, but rather serve those in power. All of these actions and ideals are shrouded in human rights.³⁰

This connection between neoliberalism and the victimization of women in international law is paramount to the importance of Empire. Human rights are seen as liberating women; yet, David Kennedy states that human rights have also had negative consequences on women,

“If the human rights movement increases the incidence of descriptions of women as mothers-on-pedestals or victimized care givers, in legal decisions or institutional documents, that, for some people, is already a cost--ethically, aesthetically, politically. It is bad if women have been represented in too narrow or stereotypical a fashion, even if the only consequence is to pry loose some resources for redistribution to women.”³¹

Even when Tribunals are established to dispense justice this always serves within present ideals of women as victim. Situating the Tribunals much like the US, with its focus on universality states that the process of international law and its components are important

²⁸ *Id.* at 30.

²⁹ DOUZINAS, *supra* note 14, at 141

³⁰ *Id.*

³¹ David Kennedy, *Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 99, 105 (2002).

to all of humanity. Taking a position against the work of international law, as this paper purports, puts one on the defense automatically, having to defend oneself against what is supposed to be the goal of justice and human rights. The Tribunal is seen as the normal, right way of dispensing justice and dealing with the aftermath of conflicts; therefore, any suggestion to the contrary is seen as tantamount to celebrating the violence and destruction realized during the conflict. Since neoliberalism has positioned law as a part of the 'good' when one calls for less law or a reevaluation of law is seen as a direct affront to the production of Empire. Human rights and international law are in this way uniquely woven, as they rely on each other for their survival. Human rights produce victims and international law manages them; human rights are the main focus of international law.³²

Douzinias stated, "Human rights do not belong to humans and do not follow the dictates of humanity; they construct humans".³³ It is evident that human rights have been absorbed into neo-liberal governance and the category of difference has likewise been absorbed by human rights and neoliberal project, difference meaning those who do not fall into the category of the dominant. Gender has long since been a category of difference, and in this category oppression and exploitation have been its main tenants. The gender of women is exploited to justify military intervention. In a human rights based framework, difference is cited as natural or inevitable and of an insignificant value because in reality everyone is the same and difference is superficial. Difference is replaced by new constructs of the individual victim. This idea that naturalizes all difference much like the human rights framework limits political action and critical engagement due to its use of the victim narrative. By neoliberalism identifying itself as the producer of equality and the eradicator of difference it reinforces the importance of universalism. Human rights now give everyone the same formal protection. This means that the new world order will gladly accept difference, this way the dominant cultures does not need to blatantly enforce hierarchies of power, assuming those who have been

³² DOUZINIAS, *supra* note 14, at 177.

³³ *Id.* at 45.

incorporated, those outside the dominant culture or the 'difference', do not intend on challenging the unspoken hierarchy.³⁴

The individual is produced by law, by human rights. This legal subject, especially those from areas of military intervention, can then be seen as a 'victim', a subject forced to be rescued and managed.³⁵ It is in this international regime where the modern subject is conceptualized. This victim is represented without the thought of difference, they are all the same. Agier notes, "The humanitarian world is based upon the fiction of humanity as an identity and conflates universalism and globalization".³⁶ This idea of universalism is an important element of the neo-liberal moment, as universalism allows the new world order to be naturalized. Once the regulatory framework is naturalized then there is no other space left that does not already involve the production of the Empire.³⁷ One cannot look for a place outside of the new world order; therefore, all interactions must be filtered through regulatory bodies. Since this universalism exists there needs to be organizations in place to 'deal' with these 'victims', buildings need to be constructed, finances transferred, humans need to be present to man these organizations, the variable push for humanitarianism sustains a business as well as perpetuating neo-liberal governance.³⁸

Criminal law has also become another arm of neoliberalism by reinforcing a victim narrative. Anderson writes, that international criminal law has emphasized the need for individual freedoms and rights; however, when law solely focuses on the individual it also disregards other issues, such as sides, groups, and parties to a conflict.³⁹ Not only does this limit the narrative of conflict, but it inherently makes the individual the center of the intervention of law, and in doing so it must establish a victim and violator. Criminal law is forced to use the terms of human rights such as victim and violator and address only those who fit into these predetermined definitions. Kennedy writes on the dangers of the victim/ violator binary, he states that humans are far more complex than

³⁴ *Id.* at 43.

³⁵ Agier, *supra* note 27, at 30.

³⁶ *Id.* at 32.

³⁷ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (Harvard University Press, 2001) (2000).

³⁸ Agier, *supra* note 27, at 30.

³⁹ Anderson, *supra* note 26, at 349.

these terms can describe.⁴⁰ Calling someone a violator ignores their personal background the same way calling someone a victim alienates their self-expression.⁴¹ In line with the problem space around these terms one must also be aware of the fact that neoliberalism's focus on the individual victims distracts attention from other issues such as colonization.⁴² Accepting that these categories exist simplifies the human condition; only focusing on the suffering of the victim casts away concern for others who have been harmed as well.⁴³ Despite the insistence of neoliberalism, one needs to view this situation as a humanitarian endeavor, one that seeks to redress all sides that are harmed by the use of human rights. Kennedy even asserts that advocates are to be weary of human rights, as it produces a discourse that is decidedly arrogant and causes one to speak about people, instead of forming solidarity with those they seek to address.⁴⁴

This contemporary moment needs human rights as well as women. Law in this sense is not aiding in dissolving the violence against women, but rather supporting it. When women are addressed in law it is as the status of victim; this is produced through neoliberalism and confers that women need to be 'saved'. Creating more rights for women does not allow women to be seen as full members of a society, instead it only alters the form of the discrimination and in this sense increase the violence.⁴⁵ If the current discourse revolving around women and sexual violence is not actually stopping the violence against women, then something is clearly lacking in the debate. Human rights are not enough to prevent women from being assaulted, especially since human rights are also guilty of victimizing women, which only furthers harms women. It is under the cloak of human rights and humanitarian wars fought in the name of liberating women that neo-liberal governance is able to sustain itself. Douzinas writes, "Morality in the guise of human rights replaces politics in international affairs and neo-liberal economics is imposed by international institutions on governments everywhere".⁴⁶ The

⁴⁰ Kennedy, *supra* note 31, at 111.

⁴¹ *Id.*

⁴² See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA (Princeton University Press) (2002).

⁴³ Kennedy, *supra* note 31, at 112.

⁴⁴ *Id.*

⁴⁵ DOUZINAS, *supra* note 14, at 97.

⁴⁶ *Id.* at 191.

absorption of human rights and gender allow a remapping of this current moment and aid in its growth. These categories are critical to the maintenance of the machines within Empire.

III. The Inclusive Meaning of Rape and Sexual Violence

It is cited by many that rape and sexual violence occur every day, yet it seems that in war and conflicts rape and sexual violence hold the most attention in the law and amongst the public. Many feminists make it their life's work advocating for a more inclusive meaning of rape and sexual violence crimes on an international scale. The assumption seems to be that if only the laws and the courts were better defined or prepared to handle those horrific situations that happen during war maybe women would suffer less. In order to discuss the way law victimizes women during conflict it is important to look at the two tribunals that have greatly influenced the jurisprudence around sexual violence, namely the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda, (ICTR). Debates surrounding the ICTY seem to suggest, if only rape would be defined properly, linked to genocide or not, then there could be real change. In the ICTR many blamed the prosecutors, investigators, and structure of the court for not reaching its potential when handling sexual violence; if only the court was better then, women could find justice.

The problem with these assumptions is that they do not really seem valid. Feminists for years have tried to define rape in international law, even though some would disagree with the way rape was defined, most were thrilled with this result of the ICTR. However, then the question remains, what now? If this was what we were striving for and we finally achieved it, then things should be a lot better for women all around the world, but they are not. It is evident that those who push for change need to examine who it is they are pushing for. Is it for the betterment of those who experiences sexual violence or is it for the betterment of the advocates? This is not to deny that some advocates have a personal stake in law regarding sexual violence, as they themselves have been affected by violent situations. However, this also falls into the common situation of first world women defining and deciding what is appropriate for women of the developing world.⁴⁷ Often times the push for more law is to thwart criminals from committing crimes in the future as well as aiding women who have been negatively

⁴⁷ SITES OF VIOLENCE GENDER AND CONFLICT ZONES, (Wenona Giles and Jennifer Hyndman, University of California Press) (2004).

impacted by such actions. One will see later in the paper that despite the fact that more laws have been produced and definitions accepted, women seem to be continually victimized. It is clear that something is not working.

Not only is there a problem when women speak on other women's behalf, advocates who often differ from their "subject" in culture, religion, or ideals, but there are also issues when women deem themselves fit to handle all of women's "problems". Yes, violence is upsetting and produces a strong reaction even in those not physically affected by it, but does this mean that one who is not technically involved in the situation is allowed to decide what is the appropriate reaction concerning law? Clearly there are disagreements even amongst those who are within the conflict area, but the push for more law or the defining of rape as a war crime, for example, often does not affect those in such local areas. Often times women who are harmed by sexual violence have little to do with Tribunals such as the ICTY or ICTR and are unaware of the debates surrounding the trials.⁴⁸ Due to the detached nature between the advocates and those on the ground it is easy to see that these women are viewed as the consummate victim. As noted above, advocates who frame their struggle through human rights are almost unwillingly promote, "emancipation by propagating an unbearably normative, earnest, and ultimately arrogant mode of thinking and speaking about what is good for people, abstract people, here and there, now and forever."⁴⁹ This hurts advocates who have a different way of thinking, as what is possible and accepted by the human rights discourse is entirely uniform.⁵⁰

The international is far too removed from the local and it is within these cases that one can see a large disconnect between advocates and those locally dealing with a conflict's aftermath. The thought then is not hard to imagine, that feminists are often pursuing certain agendas in law in order to satisfy their own personal desires. It is not possible to equate this behavior with merely the idea that these feminists and advocates

⁴⁸ GERHARD ANDERS, *GLOBAL ORDER IN THE MAKING: THE LOCAL PRODUCTION OF INTERNATIONAL CRIMINAL LAW*, http://www.google.com.eg/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.mecon.nomadit.co.uk%2Fpub%2Fconference_epaper_download.php%3FPaperID%3D1642&ei=CCVoUZn0JoKJhQfx7IGwBA&usg=AFQjCNEguVjjh_ULyMlvq6tzjGFiTZEPPQ&bvm=bv.45175338,d.ZG4.

⁴⁹ Kennedy, *supra* note 31, at 112.

⁵⁰ *Id.* at 112.

believe they know what is best. Despite the fact that women who are directly affected by conflict violence are not always present to discuss many advocates desire for more law, this should not indicate that the results of these advocate's work do not affect those women on the ground. If the work of feminists and NGOs did not influence law for those affected by conflicts or the stereotypes surrounding women that law perpetuates, then there would be no reason to critique their work, as it would bear no real consequences. However, because the work done by advocates surrounding these Tribunals affect the definitions of sexual crimes, as well as limit women's perceived roles in war, it is important to further scrutinize this disconnect. There appears to be evidence that where crimes of sexual violence are concerned the standard viewpoint is that law needs to protect. Law is seemingly present to redress inadequacies; therefore, when violence occurs it is only right to seek to punish.

However, where sexual violence is present there is a larger body of work looming overhead. The severe gender restrictions in society are only that much more pronounced and even exploited when sexual violence occurs. Thus, "correcting" or "punishing" those who perpetrate sexual violence is not merely a situation of stopping such violent episodes, but on a deeper level understanding what motivated the act in the first place. The same can be said about murder in general, that assailants possess a deeper psychological dilemma, but in this case 'gender crimes' bear the weight not only of developing the problems in the mindsets of perpetrators, but with those well meaning advocates who push for their own agendas. These deeper issues such as women as perpetrators are amongst others, dilemmas that need to be fully recognized before such decisions in law can be made. At present one is not able to fully advocate for change, despite the fact that what change is necessary is not agreed upon or will never be, one cannot merely ignore the possibilities that with changing the law comes more oppression and elevates these crimes to the level of being more desirable. One cannot also deny that women often perpetrate crimes, and in doing so create a situation that law cannot handle.

A. The International Criminal Tribunal for Yugoslavia

The International Criminal Tribunal for Yugoslavia was seen by many as a chance to increase awareness of feminist ideals and to bring the struggles of women throughout the war to light. While some still see the ICTY as a champion for women's rights others feel that they cannot escape consequences of the way the court as well as feminists, handled themselves during the events surrounding the trials, further exemplifying that the "advancements" feminists gained by furthering normative law around sexual violence, in the end, limited the female narrative. Janet Halley, in the article, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, discusses the influence women made within the ICTY. Halley cites Kelly Askin who noted that the female judges, investigators, prosecutors, and translators, were very useful in prosecuting gender crimes and that NGOs often increased political will to ensure gender crimes were investigated and tried.⁵¹ In concentrating on adequate prosecuting of sexual violence NGOs had to write briefs, hold seminars, do press work, and request meetings, as a large amount of lobbying was required to keep sexual violence in the spotlight, so to speak. After all their hard work, feminists, especially feminists within NGOs, credited themselves with the development of normative law.⁵²

Halley explains that while the work feminists did within the ICTY was considered beneficial, the results were not always exactly what were hoped for. In *Kunarac*, the ICTY convicted two Serbian army officers, Dragoljub Kunarac and Radomir Kovač, for enslavement, a crime against humanity, as they were seen as organizing and maintaining "rape camps" in the town of Foča.⁵³ Many feminists wanted these men to be convicted of sexual slavery; however, the term sexual slavery was never used in the judgments, enslavement alone was. Yet, feminists felt that because the purpose behind these women's enslavement was for sexual exploitation that sexual slavery would have been a

⁵¹ Janet Halley, Prabha Kotiswaran, Hila Shamir, & Chantal Thomas, *From the International to the Local in Feminist Legal Response to Rape, Prostitution/ Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 342 (2007).

⁵² *Id.*

⁵³ *Crimes of Sexual Violence*, available at <http://www.icty.org/sid/10312>.

more suitable term.⁵⁴ At the time nowhere in the statute or any other source did it list “sexual slavery” as a crime. The difference, feminists stated, between the two terms was that enslavement, while present did not encapsulate the entire crime as there was a difference in the facts of the case where enslavement and rape were concerned.⁵⁵ They insisted that a primary reason behind the enslavement was to contain the women and girls for ‘sexual access’ which would be better termed as sexual slavery and not just enslavement alone.⁵⁶ Enslavement referred to merely the capturing and detaining of, in this case, women while sexual slavery referred to detaining with the purpose of sexual exploitation.⁵⁷

This debate clearly shows the importance feminists gave to the assigning of terms. “Sexual slavery” is an extremely vivid image; this makes one wonder that if it is feminists and advocate’s goal to expose women in this manner. While some women who have been involved in sexual violence may feel comfortable having their experiences described in this way, it is not possible to think that all women would find these terms suitable. It is as if those who advocate for such terms to be included are encouraging the world to view ‘victims’ of sexual violence in a very graphic way. To expose these violent acts with such terms is to expose those involved as well.

Karen Engle in her article, *Feminism and its (Dis)content: Criminalizing Wartime Rape in Bosnia and Herzegovina*, describes the divide between feminists on the issue of genocide. There were those feminists who advocated for rape to be understood as an instrument of genocide in order to separate them from what is considered “everyday rape,” these feminists believed that rape was used as a tool for the systematic extermination of Bosnian Muslims.⁵⁸ Catherine MacKinnon was one such feminist, who vehemently advocated that the rape by the Serbs should be considered genocide.⁵⁹ She stated that “everyday rape” and even everyday wartime rape were still unlike the rapes

⁵⁴ Halley, *supra* note 51, at 344.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ It is important to note that in this case slavery and enslavement are of the same meaning, the difference is present when using the term “sexual slavery”. It is to say “sexual slavery” differs in their definition from merely enslavement.

⁵⁸ Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT. LAW. 778, 785-786 (2005).

⁵⁹ *Id.*

committed against Bosnian Muslims. MacKinnon also said that difference between everyday rape and rape in the legal definition was a product of male dominance, and therefore suspect.⁶⁰ As Article 27 of the Fourth Geneva Convention in a sense protects women from sexual violence because they implicate a women's honor and are seen as property, the Convention does not imply that the protection of women is necessary because these acts constitute violence.⁶¹ This is precisely what MacKinnon was describing when she stated the legal definition of rape is a product of male dominance.

Many of the advocates for 'rape as genocide', like MacKinnon, believed that rapes by Serbian men of Croatian and Bosnian Muslim women constituted genocide, but later as Croatia became an more of an aggressor in the war these same advocates shifted their definition of 'rape as genocide' to only the rape of Bosnian Muslims. MacKinnon then favored a definition that distinguished between everyday wartime rape and the wartime rape committed by the Serbs⁶². MacKinnon's switch in definition not only points to the arbitrary nature of assigning meaning to terms in the first place, but also reveals MacKinnon's clear black and white thinking. In one were to follow this line of thinking then there can be no gray areas, at no point could someone who was not raped by the Serbs be considered a part of their definition of genocide. Especially in conflict and especially when pushing for better feminist practices one's thinking must be in line with the idea that meanings shift and definitions should not be set in stone. The use of definitions in this case clearly victimizes one group and casts another out of one's line of sight. The switching of meaning on the topic of genocide demonstrates that some of those feminists, who advocate, like MacKinnon, are not all too concerned about the extent of their actions. This gives weight to law and delegitimizes other forms of interpretation. It proves very disheartening that feminists who have said they are looking out for the best interests of women chose to delineate who is considered a part of their definition of genocide and who is not. Not being able to understand the larger gray area war creates not only harms women, but jeopardizes women's ability to be viewed as anything but a

⁶⁰ *Id.*

⁶¹ *Id.* at 779.

⁶² *Id.*

victim. As others have noted distinguishing in this case between sides harms women's situation, choosing to pick sides ignores the larger issues present.

MacKinnon also stated that those who did not see the rapes as genocide were as she put it, involved in a "cover-up". MacKinnon believed that those who denied rape as genocide were involved in poor feminist practices and did so in order to free the rapist and prevent intervention.⁶³ Since some of the advocates switched their definition of "rape as genocide" from including Croatian and Bosnian Muslims to just Bosnian Muslims it implies that their concern only lies with those who they consider to be 'true' victims. Once Croatia became an aggressor their focus switched; it was irrelevant whether the occurrence of rape diminished against Croatian Muslims. Their focus remained only with those they felt were truly affected by 'rape as genocide'.

Other feminists insisted that rape in times of war was sadly normal, and genocide should not be the focus of attention. Rhonda Copelon in her article, *Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law*, argued that genocidal rape is horrific as well as obvious; therefore, associating rape with genocide creates the possibility of rape becoming invisible. She further notes, "Women are targets not simply because they 'belong to' the enemy They are targets because they too are the enemy; because rape embodies male domination and female subordination".⁶⁴ Copelon, goes on to say that, with this rhetoric, once again Balkan women were assumed to be victims of rape in war.⁶⁵ Séverine Autesserre in her work on the Congo also noted that focusing on the rape of women overshadows other issues, such as the sexual violence against men and boys as well as other equally horrific forms of violence.⁶⁶

Engle address these two 'camps' by stating that despite their difference in opinion over the issue of genocide both sides carried large assumptions, especially about the ethnic differences between Serbs, Croats, and Bosnian Muslims.⁶⁷ Feminists assumed all women were powerless, victims, and incapable of defending themselves, taking sides,

⁶³ *Id.* at 794.

⁶⁴ Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L. J. 243, 262 1994.

⁶⁵ *See id.* at 264.

⁶⁶ Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences*, AFR AFF 1, 15 2012.

⁶⁷ Engle, *supra* note 58, at 794.

and participating in war.⁶⁸ Due to these assumptions the ICTY has treated women as a part of the “women and children” concept, and as a result denied sexual and political agency.⁶⁹ Within the effort to define rape as genocide in the ICTY advocates found themselves face to face with a difficult issue; if rape was considered commonplace in war, or at least in this war, then on whose side should they intervene? Some felt rapes by Serbs were genocidal others disagreed. Those who disagreed argued that taking such a position would somehow deny the extent to which women were always harmed in war, especially in the Balkan conflict. This latter camp believed that rape on all sides should be considered genocide, but not because they were perpetrated against a certain ethnic group but because they were perpetrated against women as a group.⁷⁰ This is a concerning thought, to prove that genocide is as such because it was perpetrated against women, who are then considered to be a protected group, is not only counter to women’s interests, but inherently victimizes women as a whole. This thought coincides with the narrative that women are the same in all places, in all times. The individual is not just stripped of autonomy, but so is the entire population of women as a whole. If an act is to be committed against multiple women, then women are presumed victims in their entirety. If genocide were to actually be thought of in this way then this would only further encourage such violent behavior against women. This definition would elevate women to such a protected position, while simultaneously showcasing women as weak and frail, unable to be thought of anything but victims of rape/ genocide. The idea that women suffer greatly needs to be reexamined; if the current law victimizes women and is doing little to reduce women’s suffering then maybe this approach to law is to blame. Maybe even viewing women as a group is harmful, and imposing ideals of victimhood and genocide is only making violence that much more attractive.

Engle goes on to state that those who argue for greater legal protection for women against rape often use the argument that rape brings shame on women as well as the community.⁷¹ Engle’s argument is that this process of shaming adds power to rape and

⁶⁸ *Id.* at 795.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Engle, *supra* note 1, at 953.

because rape is not in every war it is not universal or inevitable, therefore shame is not universal or inevitable.⁷² Engle explains that there are conflicts that do not deploy rape and sexual violence as tools of war; therefore rape and sexual violence do not necessarily occur whenever there is a conflict. Since sexual violence is not in every situation then, why would shame be universal as well? Sexual violence affects every women differently, thus one should never assume shame is inevitable. She further notes that feminists and advocates who assume that all raped women are somehow shamed increase the shame themselves.⁷³ Western feminists have largely been behind the push to define rape in war as an international crime as well as seeking more protection for women. Engle states that the ICTY, at the urging of feminists, has limited women's stories and denied sexual, political, and military agency.⁷⁴ Many feminists in and around the ICTY portrayed all women, especially Bosnian Muslim women, as potential victims and denied women's participation in the war militarily and politically. All men, especially Serbian men, were seen as potential sexual perpetrators.

It is clear that despite the efforts of many to increase laws reach women are still confined to very narrow categories in war and conflict. The victimization of women is apparent wherever law is engaged. Law becomes the only way for women to interact with the state and therefore, one narrative is assumed about all women, in this case all women in war. In this current moment law and women's rights have become the central focus of many organizations and government policy. Wars have be waged on behalf of women and in doing so have equated women with the need for protection.⁷⁵ As stated by Douzinas, it is the obligation of those 'rational' beings to lift up such groups, like women, to the modern standard.⁷⁶ Wars waged are not so much to 'help' women in as much as their idea of helping is to modernize, or raise one to the level of the liberator.⁷⁷ This use of women aids the current neo-liberal moment. Women become the producers of Empire by the very fact that their existence, it would appear, reinforces the need for law and

⁷² *Id.* at 942.

⁷³ *Id.* at 958.

⁷⁴ *Id.* at 941.

⁷⁵ Douzinas, *supra* note 14, at 12.

⁷⁶ *Id.* at 92.

⁷⁷ *Id.* at 12.

protection. Women, a form of difference, are accepted by Empire, but it is because Empire needs this difference.⁷⁸ Empire absorbs all under its guise, yet it is through this very absorption that it creates the category of women as victims.⁷⁹

Even further divides arose between feminists who were considered “nationalist” and “antinationalist”, terms referred to by Jalena Batinic.⁸⁰ Yugoslav feminists were divided; some affiliated only with their national branches while others rejected giving priority to national branches or only associating with their national feminist groups, and instead were in support of general women solidarity, “antinationalist”.⁸¹ Women, who had no direct association with the events in the Yugoslav Crisis, were decidedly “antinationalist” and clearly distinguished between those who were victims and perpetrators. Batinic rejected the ideas of the “antinationalist”, i.e. MacKinnon, citing that not only were their claims that genocidal rape was happening to all women wrong, but distinguishing between perpetrators and victims was counter to women’s interests.⁸² This is position is concerning since most of the lines between victim and aggressor shifted throughout the war. When such categories are present that distinguish between two opposing sides, one limits each sides agency and no longer allows alternative views. “The Women in Black” movement, a nationalist feminist antiwar movement, went even further stating that it is not beneficial to strive to increase the amount of women cited with having been raped, as this changes nothing about the singular woman’s suffering. Their focus was with each individual and less importance was given to the law and the international version of ‘justice’, something MacKinnon and her associates were lacking.⁸³

Engle also notes that consensual sex between those on opposite sides of the war was impossible and because of the ICTY’s standards regarding evidence of consent, sex

⁷⁸ HARDT & NEGRI, *supra* note 37.

⁷⁹ Douzinas, *supra* note 14, at 2.

⁸⁰ Engle, *supra* note 58, at 787.

⁸¹ *Id.*

⁸² *Id.* at 788.

⁸³ *Id.*

between opposing sides was made criminal.⁸⁴ The idea of consent in international law is discussed in Wolfgang Schomburg and Ines Peterson's article, *Genuine Consent to Sexual Violence under International Criminal Law*, in which they state that consent is impossible due to the coercive circumstances that are present when sexual violence qualifies as genocide, a crime against humanity, or a war crime.⁸⁵ Schomburg and Peterson further state that consent does not fit in international law and if included in such a definition it would ultimately contradict itself.⁸⁶ The problem that remains with Schomburg and Peterson's idea is that by making consent impossible and only allowing consent as an affirmative defense, one almost, as a rule, views all sex in war as criminal.⁸⁷ This does little to further women's autonomy in war, this takes away their decision making power as any act of sex in war is not only criminal, but the very nexus of what makes women victims. Not only does this imply that women are inferior, but that they are also inferior during all acts of sex in all times.

Engle illustrates that all Bosnian women were believed to have been raped. Catherine MacKinnon was one such feminist, who vehemently advocated that the rape by Serbs was genocide.⁸⁸ She said that the difference between everyday rape and rape in the legal definition was a product of male dominance, and therefore suspect.⁸⁹ For MacKinnon rape is difficult to define because where sex is concerned male dominance is also implicated.⁹⁰ MacKinnon states that if sex is usually done to women then force should not be the issue, rather consent should be more debated upon.⁹¹ Seeing as men engage in sex and often have no idea that they have violated women, the definition of rape should be defined by its meaning from a women's point of view.⁹² MacKinnon favored a definition that distinguished between everyday wartime rape and the wartime

⁸⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, Rule 96, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.10 (1996).

⁸⁵ Schomburg & Peterson, *supra* note 5, at 128.

⁸⁶ *Id.* at 129.

⁸⁷ *Id.* at 128.

⁸⁸ Engle, *supra* note 58, at 785.

⁸⁹ *Id.*

⁹⁰ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635, 647 (1983)

⁹¹ *Id.* at 650

⁹² *Id.* at 652

rape committed by the Serbs.⁹³ Journalist and feminist activities were frequently frustrated as they tried to elicit women's stories of sexual violence.⁹⁴ This frustration, alongside the fact that many interpreted women's silence on the issue of rape as acknowledgement, made it impossible to view Bosnian Muslim women as anything other than rape victims. Silence became a sign of victimization, proof of the trauma of rape. Women were silent, it was assumed, because they had been shamed. When Bosnian Muslim women spoke of rape or were assumed to have been raped because of their silence, they became solely defined by rape. Revenge or other associated thoughts were seen as a product of the sexual violence. If one wanted to join the army or even expressed vengeance, they were seen as exceptional or pathological. Once rape was involved women could be or do nothing else.⁹⁵ Journalist Alexandra Stiglmayer was one such woman who equated the desire for revenge with atypical behavior.⁹⁶ She stated that most women who were raped were broken and unable to think about such things as revenge; therefore, those who did so were not normal.⁹⁷ Stiglmayer also suggested that most 'victims' were powerless, unable to even take care of their families.⁹⁸ Psychiatrists also noted that women who have become pregnant as a result are often suicidal, but after an abortion their symptoms turn to aggression.⁹⁹ These scenarios offer women very little agency: revenge is pathological, potential mothers are suicidal, and rape leaves women 'broken'. It seems that no matter what response women have after rape it is explained to be as a result of the trauma she experienced. By explaining every reaction in relation to rape, there are little options for women to express themselves without one of these stigmas being attached to their actions. Therefore, after experiencing sexual violence women are solely defined by rape.

To expand on the assumptions about women's other roles in war Engle cites Diane Conklin, who stated, "Men fight other men in war. As a general rule, this is true. It is also generally true that women do not fight wars, though they may contribute in other

⁹³ Engle, *supra* note 58, at 786.

⁹⁴ *Id.* at 790.

⁹⁵ *Id.*

⁹⁶ *Id.* at 795.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

ways to a war effort”.¹⁰⁰ Not only does the assumption negatively affect, but men as well. Men as a whole must be the aggressors in war, never mind the fact that many men do not actively participate in war, but may “contribute in other ways to the war effort.” This effectively deletes women’s political agency during war as well. Engle also cites the loss of any real ethnic identity as feminists, who came to see rape as genocide, assumed a simplistic understanding of ethnic identity.¹⁰¹ It is clear that as one reflects upon the assumptions about women’s place in war it is not surprising that women have been relegated to only victim. Furthermore because women’s political agency is taken away by feminism and the law it is obvious that women are incapable of being violators or villains.

Nevertheless, in the *Mucić* case the ICTY found rape to constitute torture and therefore a grave breach under both the Geneva Convention and a violation of the laws and customs of war (ICTY).¹⁰² In the *Furundžija* case the Tribunal widened the scope of rape stating that rape may be considered an act of genocide, even though this case in particular did not convict Anto Furundžija of rape as genocide.¹⁰³ The ICTY has also provided definitions of *actus reus*, for conduct engaged in voluntarily, and *mens rea*, for conduct engaged in with the thought of its wrongfulness, for sexual offenses and rape.¹⁰⁴ As of 2011, the ICTY has convicted 28 individuals for their responsibility for crimes of sexual violence and since the Tribunal started its work, 78 individuals of the 161 accused, were indicted with charges of sexual violence.¹⁰⁵ The ICTY Statute specifically lists rape as a crime against humanity; this could also be considered of sign of feminist advocacy.¹⁰⁶ Still, there are feminists who criticize the ICTY citing that the number of women in important positions within the ICTY itself remains low and that the Tribunal has not done enough to delineate specific crimes of sexual violence.¹⁰⁷ This points to the

¹⁰⁰ *Id.* at 796.

¹⁰¹ *Id.* at 807.

¹⁰² *Crimes of Sexual Violence, supra* note 53.

¹⁰³ *Id.*

¹⁰⁴ Engle, *supra* note 58, at 778.

¹⁰⁵ *Crimes of Sexual Violence, supra* note 53.

¹⁰⁶ Statute of the International Criminal Tribunal for the former Yugoslavia. (1993). S.C. Res. 827, U.N. Doc. S/RES/827.

¹⁰⁷ Engle, *supra* note 58, at 782.

priorities of the advocates and reaffirms the importance of law, because many were disappointed with the work of the ICTY this only enforces the idea that the Tribunal and international law are the foremost platform for 'aiding women'. Engle also cites, Charlesworth and Chinkin who were both upset by the failure of the ICTY "to make explicit that any rape committed in armed conflict is a war crime, entail[ing] the risk of creating the assumption that 'lesser' rapes may still be committed with impunity".¹⁰⁸ However, despite criticisms most feminists viewed the ICTY as a step in the right direction.

It is clear that despite many feminist advocates indicating otherwise, the ICTY did not inspire a strong feminist movement. Instead most feminists were consumed by the idea of the victim and defining certain terms to their satisfaction. This rhetoric furthers the debates away from seeing women as violators and rests upon the idea that in order for women's suffering in conflict to be alleviated one must continue to view women as needing special protection in front of the law. MacKinnon's contribution, along with countless other feminists, solidified the importance of law within especially in the aftermath of conflict. The idea of the female victim, in this case, is very helpful not only towards pushing for more protection of women in law, but for restating the importance of the neoliberal agenda as well. It is as if in this sense feminist used the confines of neoliberalism in order to further their aims of creating a better place for women. This is especially troubling seeing as it is the neoliberal system that is suspect for victimizing women. Feminists who advocated around the tribunals as well as stated arguments for the use of more law ultimately advance the neoliberal moment; albeit unintentional MacKinnon's work also serves neoliberalism. Using the system that is supported by neoliberalism only supports its goals and in continually restating that women are the victim in war approves neoliberalism's reliance on the victimization of others. There can be no use of neoliberalism that does not restate its own importance. The only way to combat this is to subvert the system entirely. How different would the aftermath of the Yugoslavian conflict look if it was not viewed through the lens of the ICTY, or if the ICTY was established upon an entirely different discourse?

¹⁰⁸ *Id.*

B. The International Criminal Tribunal for Rwanda

The ICTR has been lauded as a model for the handling of sexual violence crimes. The ICTR was the first to convict rape as a crime against humanity and rape as an instrument of genocide in the acclaimed *Akayesu* case.¹⁰⁹ The term rape was defined as, “a physical invasion of a sexual nature under circumstances that are coercive” and sexual violence as, “any act of a sexual nature ... under circumstances which are coercive”.¹¹⁰ Kelly Askin, in her article, *Gender Crimes Jurisprudence in the ICTR*, states the ICTR has failed to continue the success of the *Akayesu* case and the gender jurisprudence outside of the *Akayesu* case has been far from adequate considering how common sexual violence was during the conflict.¹¹¹ Askin also notes that there was very little effort by the Prosecutor’s office to investigate the allegations of sexual violence. Despite the many issues of the ICTR, Askin also writes on the positive aspects the ICTR contributed to gender crimes.¹¹² Askin notes that judges would often discuss gender crimes in the judgments of trials that did not include gender crimes in the original indictment, a way of keeping gender crimes in the jurisprudence.¹¹³ In the *Kayishema and Ruzindana* case, although it did not include sexual violence in the indictment, the Trial Chamber did make reference to the rapes committed during the conflict and the large scale of sexual violence.¹¹⁴ The ICTR was limiting, due to its lack of equipped investigators, women’s stories were not properly heard, and unless a witness, by chance, told her own story in court we would have never had the *Akayesu* decision.

Within the confines of this paper the above would be celebrated in a sense, the idea that the ICTR did not advance sexual violence in law as much as it should or could have. It could be said that the ICTR aided the argument presented here because the ICTR did not use law in order to solidify women as victim, so it could protect women from the violence done to them. Judges were not equipped, investigators were less prepared than

¹⁰⁹ *Status of Cases*, available at <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx>.

¹¹⁰ *Prosecution v. Akayesu* (1998).

¹¹¹ Kelly Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 J. INT’L. CRIM. JUST. 1007, 1007-1008 (2005).

¹¹² *Id.*

¹¹³ *Id.* at 1013.

¹¹⁴ *Status of Cases*, *supra* note 109.

desired, and despite the prevalence of sexual violence it did not take center stage in the proceedings. This could be seen as positive within the arguments of this paper, as this shows that despite the universal urge to protect women in law, the court was not as successful as it ought to have been, theoretically leaving room from women to be seen as something other than the helpless victim. However, it would be completely wrong to argue that the ICTR 'aided' women even in this sense because what issues were present concerning women were not due to the fact that the court in its wisdom, did not want to victimize women by confining them to narrow definitions, instead the court was guilty of pure sexual discrimination. This discrimination cannot be said to be seen as helping women out of victim status. This discrimination encouraged the viewpoint that these women were not of real value to begin with. The ICTR was ill equipped and ill managed and instead of undergoing the possibility of a discussion of women in the law the ICTR ignored that women even existed.

There were other cases that have been cited as aiding in gender crime jurisprudence. Laurent Semanza, *bourgemestre* of Bicumbi, was not originally indicted for rape crimes, but the indictment was amended to include sexual violence. Semanza was convicted of six of the counts he was charged with, including complicity in genocide, and extermination, torture, rape and murder as crimes against humanity. Of the two acts of rape as crimes against humanity, only one was sustained. The Trial Chamber concluded that the relevant paragraphs of the Amended Indictment 'provide insufficient notice to the Accused' and acquitted Semanza on rape as a crime against humanity.¹¹⁵ It was established that Sylvestre Gacumbitsi used a megaphone to urge Hutu men to commit rape and he was convicted of three counts: genocide, extermination, and rape as crimes against humanity. Each of these convictions included sexual violence and it was established that sexual penetration with genitals or a foreign object constitutes rape.¹¹⁶ In the *Media* trial, as came to be known, Jean-Bosco Barayagwiza, the Director of the Ministry of Foreign Affairs, Hassan Ngeze, editor of *Kangura* newspaper, and Ferdinand Nahimana, Director of RTLM, the extremist radio station *Libre des Mille Collines* used

¹¹⁵ *Id.*

¹¹⁶ *Id.*

the media to harm women and incite violence, yet the indictments do not concretely discuss the sexual violence.¹¹⁷ However, sexual violence was mentioned in the genocide section of the judgment.¹¹⁸ While the ICTR did influence sexual violence jurisprudence it is also important to note that the court has been cited in general as being mismanaged, evidence from the lack of sexual violence in the initial indictments.¹¹⁹

Janet Halley in her article, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, noted that it was a female judge with significant experience in gender crimes, Judge Navanethem Pillay, who, while sitting on the *Akayesu* case, intervened after hearing the testimony of a witness.¹²⁰ Her intervention led to the trial being suspended and an investigation started in order to prove the existence of sexual violence crimes.¹²¹ Feminists along with feminist NGOs then urged the indictments to include rape and sexual violence.¹²² The problem with this was that crimes of a sexual nature were not included in many of the indictments in the first place. This makes one believe that if it had not been for the spontaneous testimony of one witness as well as the presence of a female judge then the landmark *Akayesu* case would not have been one at all.

One such criticism by feminists was that the ICTR investigators were less than adequate. Galina Nelarva in, *The Impact of Transnational Advocacy Networks on the Prosecution of Wartime Rape and Sexual Violence: the Case of the ICTR*, cites Elizabeth Neuffer, who states that the investigators were mostly white males, who had no experience in dealing with these specific crimes, the reference to the investigators appearance was made to illustrate the reason why many women did not feel comfortable talking about their experiences to the investigators.¹²³ Binaifer Nowrojee also stated, that case involving rape and sexual violence had many obstacles in their way, which was in

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Askin, *supra* note 111, at 1008.

¹²⁰ Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L. L. 1, 9-10 (2008).

¹²¹ *Id.* at 10.

¹²² *Id.* at 11.

¹²³ Galina Nelaeva, *The Impact of Transnational Advocacy Networks of the Prosecution of Wartime Rape and Sexual Violence: the Case of the ICTR*, 85 INT. SOC. SCI. REV. 3, 9 (2010).

direct relation to the investigations taking place, such as a lack of attention by the prosecutor's investigation on rape and sexual violence, lack of communication between the investigation teams and the trial teams, and lack of skills of the investigators.¹²⁴ It appears that the investigators have been cited by almost everyone who has written on the issues as lacking any effort to actually investigate crimes of sexual violence. The investigators lacked sufficient training but, not in investigative skills rather they had no training to elicit information about sexual violence and this seriously damaged the effectiveness of the investigations.¹²⁵

Prosecutors, Richard Goldstone, Louise Arbour, and Carla Del Ponte, had assured that rape and sexual violence would be properly addressed, yet feminists have stated that there was no strategy in place to do so.¹²⁶ This is another point most writings agrees upon, which is, lack of credible effort by the prosecution. Under Del Ponte, the sexual assault team was dismantled and in an effort to speed up cases some of the charges were eliminated, rape charges were the easiest to cut.¹²⁷ Under prosecutor Hassan Jallow there was said to be severe mismanagement and genocide suspects were hired as investigators, which decreased the likelihood that crimes of rape and sexual violence were able to be substantiated or that those who experienced sexual violence would come forward with their stories.¹²⁸

Catharine MacKinnon, in the article, *The ICTR's Legacy on Sexual Violence*, states that the prosecutors often did not charge rape when murder charges were present.¹²⁹ MacKinnon states,

“A parallel judicial pattern can be discerned in the seeming reluctance of the Tribunal, at times, to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 10.

¹²⁷ *Id.* at 25. The reasoning behind why rape charges were so easily dropped needs to be examined on a case by case basis. William Fenrick, former Senior Legal Adviser to the Chief Prosecutor of the ICTY, said that the ICTR might have been less concerned with rape and sexual violence seeing as the genocide in Rwanda was overshadowing everything else.

¹²⁸ *Id.* at 11.

¹²⁹ Catharine MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INTL. & COMP. L 211, 214-215 (2008).

committed on virtually the same evidence, at the same time and place, by and against the same people.”¹³⁰

The tribunal found it difficult to charge men, not with the acts they committed themselves, but, acts that other man committed on their behalf, which was key when accusing one of inciting rape.¹³¹ MacKinnon further states that the underlying impression given the prosecutors is that men would not likely commit murder without orders, yet they would rape on their own without the orders of a superior.¹³² This, she says, falls into the ‘boy-will-be-boys’ theme and shows that the Tribunal does not believe that the rapes were truly the leaders fault. MacKinnon also states that the willingness to drop rape charges, as previously noted, was present especially when murder charges were retained shows the lack of importance of rape, to the Tribunal. MacKinnon describes that there seems to be a higher standard of credibility for witnesses to rape than for witness to murder and that all of these instances combine demonstrate a push towards impunity.¹³³

What is most apparent in the literature of the ICTR is that everyone, in some way or another was disappointed. There was a lack of financial resources, political will, administrative and technical problems, survivors-witnesses were not protected properly, and sexual violence, though it was widely known to be widespread throughout the conflict did not take center stage.¹³⁴ Galina Nelarva writes, “Genocide, war crimes, and crimes against humanity must “shock the conscience of mankind” to qualify as international. Whether or not rape and sexual violence should be viewed in such terms is largely a determination made by legal professionals, primarily the Chief Prosecutor.”¹³⁵ The point in bringing up this issue is not to wish for a different prosecutor, but to see the entire system as suspect. As stated earlier by Anderson, the formation of Tribunals is through the UN Security Council, and therefore subject to the desires of its members. To this aim Chief Prosecutors put in charge of said Tribunals can be seen as politically

¹³⁰ *Id.* at 104.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Askin, *supra* note 111, at 1008.

¹³⁵ Nelaeva, *supra* note 123, at 15

driven as well. Therefore it is not hard to understand why Tribunals are so deeply imbedded in neoliberalism.

It is not just law and its application in the court room that affects people, it is the mechanism in and surrounding law, strengthened by advocates, public opinion, and the decisions made by states in power. All of these factors effectively strengthen laws reach, which is why it is important when viewing the status of women in international law; one must view all of these elements in conjunction. Human rights and international law have both become way to ensure the spread of Western tendencies. Through the universalization of the human rights discourse the West has been able to solidify its vision and goals; the concepts of human rights are known and accepted by all, which allows policy disguised by humanitarian language to bare more weight. Since the world is now united in its belief that women are oppressed and need to be saved, as is the explanation behind wars and humanitarian missions in various countries, the world is also united in its understanding of how to deal with this oppression.¹³⁶

Law that defines sexual violence is seen as helping women. Those advocates who surrounded the ICTY and the ICTR not only aid in the production of the neo-liberal moment but redefine the naturalization of human rights. Despite that women around law have disagreed over exact definitions of terms or whether the Tribunals were effective or not, they all still point to the importance of Empire and aid in its production because it is around law that they pin their struggle. When journalists were frustrated because more women would not admit to having been raped, as noted earlier, they themselves defined this current moment. Through the use of human rights and international law Empire has been able to produce new categories made to sustain itself; the role of women is paramount to this production. Forcing women through the law to discuss sexual violence, assuming all women are rape in war, and only defining women by their relation to sexual violence, mold law and advocate the need to restrain women from realizing another narrative. Law, in its universal approach, does not need multiple views of women, women as political or military actors. That is why in law there is only the example of

¹³⁶ Douzinas, *supra* note 14, at 92.

women as victims, as there is no room in neoliberalism for alternative views. Empire has produced victimized subjects.

If the current discourse is not helpful in preventing violence against women then it would seem to be necessary for a disillusion of the issue entirely. The thought that neoliberalism can be used to further women's issues is false. Neoliberalism is able to consume all difference, allowing this difference to exist assuming it does not pose a threat to the system's order. Women are a difference that exists within the system, but cause no threat because they have been made to play the perpetual victim; women are the excuse for so many neoliberal agendas, that which the neoliberal strategy rests on, the need for a victim.¹³⁷ Even the critique that feminists who use the neoliberal system to their aim is somehow a form of subversion, is untrue. These advocates do so by counting women as weak, in need of protection, they advance stereotypes, and ignore other factors of women's participation in war. Not only is this building up the neoliberal agenda, but it harms women in the long run. Despite their intentions feminists and advocates, who define their struggle in this way, are aiding neoliberalism. No matter what the temporary perceived gains are there can be no excuse for further relegating women towards victim status.

Many would argue that in the aftermath of conflicts, where sexual violence is deployed against women, one must deal with the issue at hand that is how to deal with violators and 'repair' victims. It is important to note that it is not being suggested that those who cause harm to others should continually go unchecked, but in this issues especially there is no better moment to look at the way common themes of victimhood have perpetuated the system and caused the very violence the courts seek to address. If framing these situations within the law, the law that at present sees women as one dimensional, does not benefit women, then would it not be better to remove the issue entirely from the purview of the courts and instead examine where the law is guilty of harming women in its application.

One needs to go beyond Engle and Halley's work that states protection of women in law only serves to further victimize women. This is not enough because during the

¹³⁷ *Id.*

process of criminalizing sexual violence, to such a degree, one thereby makes it all the more prominent. Sexual violence is elevated to a position that it becomes attractive and in effect occurs more often with this idea in mind. If a group of women who have been raped is seen as being shamed, like Engle notes many feminists used as a way to advocate, then rape is all the more desirable to the aggressors of war. Rape and sexual violence becomes more of a tool because it is cited by the international community as holding such an important value. Likewise, those who were exposed to sexual violence are also subjected to the predetermination of their actions afterwards, which solely defined them as victims. This is a link that, through the evidence presented above, is inevitable when increasing laws protective power and when advocates intervene on behalf of those involved in conflict.

What is now necessary is to couple the previous critique with a simultaneous correspondence of terror. This correspondence of terror is to afford women the notion of fear; to fear women, to see women as perpetrators, and villains then allows women the benefit of agency as well as the sense control. It is not being suggested that women are never associated with negative connotations, being described as cunning, devious, and manipulative is not unheard of or out of the ordinary. Many would counter this paper's argument, that women are not seen as villains, with examples of women's cunning and intellectual deceptiveness. In literature there are many examples of women deploying these less than desirable characters, but what this paper is suggesting is a step away from these manipulative descriptions and a move to prioritize the importance of terror, as terror is something quite different. To be physically terrified of someone is an extremely different description entirely. To be considered to be so powerful that one fears one's life, or fears bodily harm is a notion that now needs to be consistently associated with women. If this is achieved, a state where women are seen as physically dangerous, this not only balances the relations between men and women, but does so especially in times of conflict.

Rarely is the idea of women as powerful, physically harmful agents celebrated, possibly because rejoicing in the fact that women are dangerous creates a paradox of sorts. The idea that women commit crimes and physically harm others is not only

unsettling for many feminists, but for international law as well. Biljana Plavšić and Pauline Nyiramasuhuko, are the only two women that have been indicted by the ICTY and ICTR respectfully. Biljana Plavšić, the former Serb president of Bosnia and Herzegovina, was charged with counts of genocide and crimes against humanity, although these charges were dropped when she pled guilty to lesser charges.¹³⁸ During her trial it was pointed out that she was the only person to have accepted responsibility and shown contrition.¹³⁹ It was suspected that she entered a guilty plea to earn a reduced sentence, which she did when the prosecutor dropped the genocide charge. She was sentenced to 11 years, but was released in 2009 after serving three fourths of the sentence due to her acknowledged reformation.¹⁴⁰ Even while she was considered outside of normal female behavior, her guilty plea which lead to her reduced sentenced and subsequent early release is in line with the narrative of a repentant female sinner. Even when witnesses were called to condemn Plavšić they pointed out her contrition.¹⁴¹ Pauline Nyiramasuhuko, former Minister of Family and Women's Affairs, was charged with genocide and crimes against humanity, which included inciting Hutu men to rape Tutsi women.¹⁴² She was eventually sentenced to life imprisonment.¹⁴³ People expressed shock as Nyiramasuhuko stands trail, as she looked like a dear aunt and not a killer.¹⁴⁴ The media also painted Nyiramasuhuko as a monster, assumingly subconsciously or otherwise to distance her from the qualities of a 'true' woman.¹⁴⁵

In conflict situations on as large of a scale as these two, it is unthinkable that only two women have been brought before international tribunals. While a great deal more

¹³⁸ Case Information Sheet - Plavsic Case, available at <http://www.un.org/icty/glance/plavsic.htm>

¹³⁹ *Biljana Plavsic: Serbian iron lady* (February 2003) available at <http://news.bbc.co.uk/2/hi/1108604.stm>.

¹⁴⁰ *Biljana Plavsic granted early release* (September 2009) available at <http://www.rnw.nl/international-justice/article/biljana-plavsic-granted-early-release>.

¹⁴¹ Marlise Simons, *Crossing Paths: Albright Testifies in War Crimes Case*, (December 2002) available at <http://www.nytimes.com/2002/12/18/world/crossing-paths-albright-testifies-in-war-crimes-case.html?ref=biljanaplavsic>.

¹⁴² Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR-97-21-I, Amended Indictment, \ 5.8 (Mar. 2, 2001).

¹⁴³ Judgment, available at

http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_summary.pdf.

¹⁴⁴ Carrie Sperling, *Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide*, 33 *FORDHAM URB. L. J.* 637, 637 (2005).

¹⁴⁵ Dan Moshenberg, *The Rwandan Glass Ceiling*, (June 2011) available at <http://africasacountry.com/2011/06/29/when-does-being-a-rwandan-woman-matter/>

have been indicted in local courts, there is something to be said about the international community's reaction to women who commit crimes. International law, written from the perspective that women are by default the perpetual victim has little to contribute when women are seen as the violator. International law and society both reiterate over and over that women are the victim, women are not the violator, and likewise women in war need to be protected and saved. The cases of Biljana Plavšić and Pauline Nyiramasuhuko, women in power who used their position to cause harm, are an aberration and decidedly not the norm.

IV. Abu Ghraib

In 2004, *60 Minutes II* featured a story on prisoner abuse highlighting the Abu Ghraib prison in Iraq.¹⁴⁶ The classified report and CDROM that was leaked to the show triggered a wave of response and criticism against the US government's operation in Iraq. The story documented with pictures, the horrendous abuse of Iraqi's at the hands of US soldiers.¹⁴⁷ The pictures, disturbing to say the least, show naked men in inhumane positions with smiling US soldiers in the background, a Iraqi man fitted with a dog collar and leash, soldiers next to dead bodies giving a thumbs up, and Iraqi men forced into torturous positions at the hands of their captures.¹⁴⁸ When *The Guardian* published these pictures they entitled them, *The Images that Shamed America*; this situation was now in the public and unavoidable. The debates started in the media and around the world, but quickly the debates became centered on a new focus, it was as if examining the pictures further people realized that the US soldiers were not all men; there were women involved in these atrocities as well.¹⁴⁹ It was a female US soldier that was holding the other end of the dog leash, it was a female US soldier giving a thumbs up next to a dead body and behind a pile of naked and handcuffed Iraqi men. These women have done the unthinkable and yet they are women, who should seemingly know better.¹⁵⁰

Many people could not come to grips with the reality of the way these women voluntarily acted. These photos challenged the stereotypes of women because as it was said that women are expected to be morally superior to men, women do not behave this way, women are better than this.¹⁵¹ This assumption of goodness was only related to the female soldiers and not the male soldiers who were often pictured next to the women in question. It is from this starting point that one can see the issues present when women engage in horrible acts.

¹⁴⁶ Hewitt, D., *Abuse of Iraqi POWs by GIs probed*, *60 Minutes II*, (Apr. 2004) New York: CBS Worldwide.

¹⁴⁷ *Id.*

¹⁴⁸ *Images*, *supra* note 10.

¹⁴⁹ *Id.*

¹⁵⁰ Mary Jo Melone, *We've come a long, and wrong, way* (MAY 2004), available at http://www.sptimes.com/2004/05/07/Columns/We_ve_come_a_long_an.shtml.

¹⁵¹ *Id.*

Barbara Ehrenreich , in her article, *Feminism's Assumptions Upended*, states that, “A certain kind of feminism, or perhaps I should say a certain kind of feminist naivete, died in Abu Ghraib.”¹⁵² She further states that, especially in war, men were seen as the perpetual violators and women the forever victim; therefore, sexual violence against women was the root of all.¹⁵³ The problem she further explains is that this type of feminism, one so many fall into the trap of, believed that if only women were integrated in to all parts of society that things would get better. This assumes that women, as they inhabit traditional male dominated careers, would work for goodness and strive for change.¹⁵⁴ Ehrenreich states, that to assume gender equality can in itself bring about a better world is “lazy” and “self-indulgent”.¹⁵⁵ Seeing women who assimilate into once male dominated fields as a victory for humanity is wrong, as it also assumes women as a group only have one struggle, as if gender equality can solve all of the world's problems.¹⁵⁶ This also somehow misses the point that while assimilating into male dominated positions one is not then subjected to male stereotypes, which are just as limiting and harmful as female stereotypes. Becoming ‘one of the boys’, an all too common dilemma for females in male dominated sectors, is a trope that needs to be examined not just because it harms women who assimilate but the men in these positions as well, men that may not fit into such predetermined masculine roles.

Mary Jo Melone further amplified these sentiments, in her article, *We've Come a Long, and Wrong Way*, stating,

“I can't get that picture of England out of my head because this is not how women are expected to behave. Feminism taught me 30 years ago that not only had women gotten a raw deal from men, we were morally superior to them. When it came to distinguishing right from wrong, the needle of our compass always pointed to true north.”¹⁵⁷

Melone continues to question why women committed these abuses, and after her attempts to almost find an excuse for the violence she recognizes her tendency to not

¹⁵² Barbara Ehrenreich, *Feminism's Assumptions Upended*, 24 S. CEN. REV. 170, 171 (2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 172.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Melone, *supra* note 150, at 1.

believe that women are capable of such acts.¹⁵⁸ Melone writes that, yes women have achieved equality, but it is perverse, women can now behave as badly as men.¹⁵⁹ This statement is extremely useful for understanding the greater circumstances present; evidence of women engaging in torturous acts makes one question the very distinction society has created between men and women. It also questions if gender equality, in the typical liberal feminist ideal, is the proper struggle? If women are pushing to be equal to men, then what is it that women are exactly pushing for? Is it satisfying to know that, now women can behave just as badly as men, or rather now women can inhabit the same gendered characteristics as men?

Karen Engle, in her article *Judging Sex in War*, takes note of Ehrenreich's position but thinks it is slightly over generalized.¹⁶⁰ She discusses that there are cases of women committing acts of terror and while these are said to be evident throughout literature; however, she also notes that these acts, committed by women, usually involve shame or guilt.¹⁶¹ This point made by Engle misses the greater issues, while there are examples of women committing atrocities in literature and in everyday life there is always, as Engle suggest, an association to guilt and shame. Engle misses the key element because she immediately associates the crimes women commit to the importance of their shame.¹⁶² It is as if women, being women, should have known better and therefore are expected to display signs of remorse; this brings one back to stereotypical images. Women have been seen as 'bearers of the nation', the Fourth Geneva Convention even associated women with family honor; therefore, if women are bestowed with these magnanimous gifts then they should display the proper signs of judgment and morality. It is not being suggested that men should not or do not display remorse, the appropriate human emotion should be sorrowful; however, like in the situation in Abu Ghraib it was the women who gained most of the attention in the media and it was Lynndie England who made headlines when she announced that she felt no need to apologize (Estes, 2012). Thus it becomes a situation where women who commit crimes and feel sorry are not seen

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Engle, *supra* note 1, at 953.

¹⁶¹ *Id.*

¹⁶² *Id.*

as appalling, as those who commit crimes and do not feel any sort of emotion. It is then not the crime but the lack of sympathy or empathy that makes these women appear outside the normal realm of ‘womanhood’ and something to be studied.

In the article, *Gender (In) Visibility at Abu Ghraib*, Marita Gronnvoll explains how women are inevitably linked to gender while men are not.¹⁶³ In war, especially within the military itself, women are viewed as a source of pollution and are required to be stripped of their femininity.¹⁶⁴ Even the typical notion of a warrior excludes women.¹⁶⁵ Gronncoll, when comparing England to fellow male soldiers, also responsible for such atrocities, further states that, “Not surprisingly then, the media coverage of England’s behavior at Abu Ghraib focuses on her failure to behave as a woman should, whereas the media coverage of Graner’s behavior focuses on his failure to behave as an honorable soldier should.”¹⁶⁶ This situation develops the ‘human-soldier’ dilemma, I pose this dilemma because it brings one to the heart of the issue, when England was being chastised in the media for her actions it was made clear that she failed, not as a soldier but as a women. England failed to act the way she ought to, predetermined by her sex, her actions are therefore a slap in the face to all women everywhere, military or not. The reason this undermines “female values” is because these less desirable values are so often ignored by feminists. As stated previously, it is as if the recognition of these lesser qualities would uproot all of the gains women have made. This claim is further justified by the strong reactions garnered by the discovery of the photos.¹⁶⁷ In essence England failed in her role as a human, her humanness being centered upon the fact that she is female. Her male colleagues were just shown as bad soldiers, their actions related to their career alone, and were never associated with their inability to act like a man should. There is an interesting binary present concerning the male soldiers, they were cited as being bad at their job and not bad men, gender was not discussed as such.¹⁶⁸ It is as if male identity is associated with work, work for men in their gender, or an expression

¹⁶³ Marita Gronnvoll, *Gender (In)Visibility at Abu Ghraib*, 10 RHETORIC & PUBLIC AFF. 371, 373 (2007).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 377.

¹⁶⁷ Melone, *supra* note 150, at 1.

¹⁶⁸ *Id.*

thereof. Women were berated for being bad people; the emphasis being on the fact that they were women. Their job was seen as something they do, but their gender was a separate issue. It appears women must, while in the workplace, disassociate their job and their gender ‘duties’ and always make the better decision based on gender, as it is the standard they are held up to. It is hard to believe that there is one person who is not shocked by these acts and for a moment deploys some of the very same reactions as the literature suggests above, which states, women are not supposed to act like the female soldiers did in Abu Ghraib. Abu Ghraib and the debates that resulted are just the initial glimpse into the ways gender and sex is viewed in the public.

Shannon Holland cites Judith Butler’s notion that ‘natural’ gender identities and behaviors requires the disciplining of performative acts that might disturb the coherence of sex and gender categories.¹⁶⁹ The act of labeling performances as subversive also goes against the normalcy of binary sex and gender categories.¹⁷⁰ Holland states,

“When particular acts of gender transgression, perceived to be extraordinary in nature, become highly visible in public discourse, the “containing” of those acts often entails the reproduction and circulation of elaborate narratives that explain the “abnormalities” in normative ways”.¹⁷¹

The media scrutinized England’s upbringing and lifestyle. England was cited as “trailer trash” and branded as an adulterer, these depictions helped the media suggest England’s failure as a woman and a soldier was associated with her upbringing and low morals. The problem is that these same news articles did not mention the class or morality of the males involved in the atrocities.¹⁷² Charles Graner was one of the male soldiers cited with orchestrating much of the torture, yet he was never questioned about his background or morals. It is by the construction of the story surrounding England’s background that one tries to explain or offer excuses as to why England did not uphold her gender. The acts of those female soldiers do not fall in line with the gender norms that females are expected

¹⁶⁹ Shannon L. Holland, *The Enigmatic Lynndie England: Gendered Explanations for the Crisis at Abu Ghraib*, 6 COMM. & CRIT. CULT. STUD. 246, 246-248 (2009).

¹⁷⁰ *Id.* at 250.

¹⁷¹ *Id.*

¹⁷² *Id.* at 258.

to portray. Since these acts are seen as opposite from the normal they need to be policed and explained.

Another issue that one encounters is, by calling out England's gender attention is brought to the fact that she has not behaved as a woman should.¹⁷³ It is not just those who blatantly call out England and the other female soldiers for not acting as women should, it is even those well meaning authors who are trying to make sense of the actions of women, authors who see their own reactions as problematic. This is not to say women need to be treated as their male colleagues. It is not beneficial for women to be treated as men when men face equally restrictive gender roles. These debates that have surfaced as a result of the photos from Abu Ghraib, in which the authors wrestle and try to come to terms with their own stereotypical reactions, bring gender stereotypes back into the light and reinforce the fact that something about these female soldiers is very wrong. By stating and restating that people were shocked, because it was women who were seen committing these horrid acts, one polices gender. It is Holland who writes that people were preoccupied after the release of the photos, trying to make sense of a female torturer.¹⁷⁴ Since one sees these women's actions are cited as shocking, shocking for women, then one also acquiesces to the fact that these women are not properly showcasing their gender. Constantly discussing the gendered aspects of these women's involvement takes attention away from the fact that there are other issues present: racism, discrimination against religion, power dynamics, as well as many others. As Butler suggested, England, who did not successfully repeat her own gender, is now something that needs to be explained.¹⁷⁵ England is an anomaly and it is important to show her as something outside what is acceptable behavior for a woman.

This idea clearly is interesting to note in relation to Butler's claim about sex and gender. If sex and gender are linked and equally cultured then why is it that men were not seen in relation to their gender? For many, gender in men does not bear weight. It is as if gender in men is fact. People accept it and do not call it to question whenever a man acts

¹⁷³ Gronnvoll, *supra* note 163, at 375.

¹⁷⁴ Holland, *supra* note 169, at 247.

¹⁷⁵ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge, 1990).

unless of course it is outside their normal preconceived acts.¹⁷⁶ Butler's idea of a sissy boy is important, he is bullied and picked on because he does not enjoy acting or engaging in traditional male acts.¹⁷⁷ If a male soldier was in Abu Ghraib and emotionally distraught at the acts committed or even reported his fellow soldiers, then his gender would almost certainly be called into question by his fellow comrades. The acts committed by men went unnoticed by many, as some believe this is sadly typical behavior for men. Catherine MacKinnon has stated that especially in the situations of sexual violence there is the predominate claim that 'boys-will-be-boys', this idea is important in this situation because many if not all of the acts pictured in Abu Ghraib involved a form of sexual abuse.¹⁷⁸ It is as if men by their very definition are expected to engage in such demeaning activities.¹⁷⁹

Gronnvoll notes, "From basic training on, soldiers in training are taught that to be warriors is to reject all that is feminine".¹⁸⁰ It is as if women in the military suffer from an insurmountable task. In order to belong they must repeat the gender of their male peers yet they must not blend in too much because they still need to retain their feminine qualities. Zillah Eisenstein in her article, *Sexual Humiliation, Gender Confusion and the Horrors at Abu Ghraib*, writes that the female soldiers involved in the atrocities in Abu Ghraib are "gender decoys".¹⁸¹ Eisenstein notes that the women create ambiguity because they are participating in torture of a sexual nature, to which their own gender is usually subjected to. She further states that this switching of gender leaves masculine gender intact.¹⁸² It is not then, that these women are subverting gender they are instead strengthening gender. The male gender remains visible and the negative aspects are that much stronger. It is as if women who employ these characteristics are stating that this gender, despite its stereotypical flaws, is so desirable that it is necessary to try to emulate it. So called "subverting" the female gender in order to replace it with another gender is

¹⁷⁶ Zillah Eisenstein, *Sexual Humiliation, Gender Confusion and the Horrors at Abu Ghraib* (June 2004), available at <http://www.zcommunications.org/sexual-humiliation-gender-confusion-and-the-horrors-at-abu-ghraib-by-zillah-eisenstein>.

¹⁷⁷ Interview by think big with Judith Butler (February 19, 2001). [hereinafter *Interview*].

¹⁷⁸ MacKinnon, *supra* note 129.

¹⁷⁹ *Id.*

¹⁸⁰ Gronnvoll, *supra* note 163, at 373.

¹⁸¹ Eisenstein, *supra* note 176.

¹⁸² *Id.*

not subversion. It is protecting a male gender that in so many ways has been a reason for the discrimination against women in the first place.

Orna Sasson-Levy in the article, *Feminism and Military Gender Practices: Israeli Women Soldiers in "Masculine" Roles*, writes that women soldiers in "masculine" roles adopt characteristic of male combat soldiers, which she states shows both resistance to and compliance with the military gender order.¹⁸³ On one hand these women are refusing to accept military definitions of femininity and masculinity are in a way subversive. However, women's adoption of masculine identity practices can be interpreted as collaboration with the military norms. When women mimic combat soldiers, they confine themselves to a perception that identifies the soldier as masculine and no longer challenges, the gendered military order.¹⁸⁴ The, not always, but sometimes destructive military persona, like one saw in Abu Ghraib, or one reads about when soldiers are in military court for sexually abusing civilians is only that much more protected. Military culture deserves its one analysis entirely, yet in this focus the link between the military gender norms is important to note. Women for so long have remained outside of the military's purview so infiltrating the ranks in any way would seem positive, yet doing so while strengthening the often oppressive male gender is not. It is not my argument that these women in Abu Ghraib were not capable of committing these crimes were it not for the military culture surrounding them, to do so would be to push women back to impressionable small minded individuals; however, these women as members of the military have equal blame in where these gender roles fall.

This point made by Sasson-Levy is complicated. Women and men are seen as two separate entities in the military, defined by very traditional roles; however, by women adopting these male dominated roles they create a problem within this notion of subversion. It is by mimicking male characteristics that women reinforce stereotypes and state, femininity is in no way desirable or beneficial, solidifying the difference between the two. While the concepts of masculinity and femininity are dually oppressive, through reproducing masculinity in this way women almost celebrate this difference and

¹⁸³ Orna Sasson-Levy, *Feminism and Military Gender Practices: Israeli Women Soldiers in "Masculine" Roles*, 73 SOCIO. INQ. 440, 440-43 (2003).

¹⁸⁴ *Id.*

categorize masculinity as superior. By female soldiers reproducing the gender of male soldiers, this is not a form of rebellion this is, as Eisenstein noted, keeping gender in place.

Sasson-Levy's thought of subversion is certainly not the subversion Butler notes, she calls for, "miming and displacing traditional conventions of hegemonic heterosexuality".¹⁸⁵ These acts do not challenge the hegemonic heterosexuality of masculinity but rather, as noted above, celebrate it; these acts redefine the very hegemonic forces that construct it. Eisenstein also wrote that mimicking men is not equality, especially in light of Abu Ghriab, so therefore mimicking is not a way to dispel one's own gender, rather is reinforces gender.¹⁸⁶ Would it not be more useful for these women to blur genders entirely? Butler notes the examples of a tomboy or a sissy boy, two instances where gender is blurred and almost undefined.¹⁸⁷ This idea of something being undefined is what subversion would seem to truly mean, these women soldiers are not blurring they are rather repeating acts of gender, as Butler states, actual subversion cannot be gauged or calculated.¹⁸⁸

England acted outside of her purview as a soldier and women, calling neoliberalism into question. In neoliberal terms England did not conform to the status of victim, like all women should; therefore, her gender is used by the media as a way to shift focus from the war and other violence taking place. These women involved are sensationalized as an aberration. They are used in order to clearly state that what they did is wrong, not wrong in the sense that violence is wrong; on the contrary violence is paramount to the importance of Empire. What they did is wrong because it does not fall in the role within Empire as either soldier or women, i.e. discrete promoter of violence or victim. England challenges neoliberalism and so in this way she must be explained and rejected. Neoliberalism cannot use a physically strong female, disregarding what she did was criminal, her actions as a violator are not welcomed by Empire. The reasons that Empire does not condone the behavior of these women give all the more support for the

¹⁸⁵ BUTLER, *supra* note 175.

¹⁸⁶ Eisenstein, *supra* note 176.

¹⁸⁷ *Interview*, *supra* note 177.

¹⁸⁸ *Id.*

importance of seeing women as violators. What better reason to celebrate the actions of the women in Abu Ghraib than to encourage the subversion of neoliberalism.

V. Conclusion

The importance of seeing women as violators of crimes cannot be overstated.

International law and those surrounding law continue to reinforce women's status as victims. Continuing to view women in the aftermath of conflicts in need of special protection solidifies women as a part of the victim narrative. Neoliberalism uses the tools of human rights and international law around the world to regulate the flow of the market, to disguise the reasons behind wars, and to better control the particular brand of democracy that is spread. The victim is paramount to this process; it is used as the reason for wars, and for the influx of aid and NOGs, which in reality are considerably less concerned with people and more concerned with influencing governments. Women are a common theme to unite around and used accordingly. Difference, such as women or minorities, is accepted by Neoliberalism as long as they do not affect its end goals.

Tribunals aid in this moment because they reproduce the female victim by increasing the protection afforded to women after conflict and by producing a narrative through law that shows women only on the receiving end of violence. This is further exemplified by the fact that in the ICTY and ICTR, two major examples of international law and human rights, only have convicted two women respectively. These Tribunals emphatically state that women are victims, which in turn justifies wars and the 'need' for further aid. Feminists, whether on purpose or without intention, aid in neoliberalism by encouraging more law. By the mere fact of debating over legal definitions around these Tribunals they thereby legitimize their existence. An alternative discourse is to decrease the protection of women in law, as it only victimizes and defines women to narrow roles, at the same time increasing the prevalence of women violators in international law. Arresting and trying more women on an international scale is useful for offering women a larger narrative in conflict. The goal is not to be seen as men, but to be realized to be a human capable of all forms of expression, good and bad.

Abu Ghraib is especially useful, as it showcases that women do actively participate in violence. Clearly, there are gender issues present, when women reproduce masculine roles which are just as problematic as classic female representations; however, these actions more importantly augment one's perception, changing viewpoints about the

ways in which women need to and do act. It is clear then why so many wished to explain away England's behavior, she did not take the victim role and she did not support neoliberalism the way a proper soldier should have. Because England is outside the neoliberal framework she is casted out by her upbringing, her actions, and her gender. She is seen as an aberration because neoliberalism cannot use women who are violent capable agents, Abu Ghraib subverts neoliberalism. Abu Ghraib also adds the final layer to the argument, that in order for perception to change one needs to couple the idea of less protection in law and more women seen as violating crimes, with the realization that women are physically powerful agents. Women who are seen as agents of terror add the final element that would truly offer the most protection for women; better than law and better than more advocates are women who without reproach are able to automatically instill the fear of physical harm.

Had the ICTY and ICTR been framed differently, had advocates not clamored for more law, and had more women been tried at the international level then the discourse could have been more beneficial to women, allowing the law to showcase the different instances of female expression in war. If Abu Ghriab would not have been framed as an aberration and fluke it could have offered another example of women in power. Due to neoliberalism and its wide reach issues and law are framed in a certain manor that promotes the victim status of women. Until people begin to subvert this by in a sense celebrating female violators, there will be continued violence against women as their victim status will be used and exploited. The importance now is that different discourses are present in order to offer women the best possible situation for the future. It is necessary to see women as agents capable of committing crimes, and to understand that law in its current form is responsible for reinforcing the representation of a weak defenseless victim. To say women are violent, women commit crimes, and women are capable of physical harm is at odds with international law and at odds with the comfortableness one has when one speaks of women, but to acknowledge these 'lesser' qualities is to afford women the opportunity of being a powerful agent, one that bares no preset definition.