LESSONS FROM ABROAD

DR HELEN PRINGLE*

Our understandings of the gravity of sexual violation have undergone something like a revolution over the last 10 years; a revolution in which the International Criminal Tribunals for the former Yugoslavia ('ICTY') and for Rwanda ('ICTR') have played a decisive part. Acting under Chapter VII of the *Charter of the United Nations* ('UN Charter'), the Security Council empowered the ICTY in 1993, and the ICTR in 1994, to prosecute war crimes, crimes against humanity and genocide. The tribunals have held that, in certain circumstances, rape can be understood as a means of torture, a grave breach of the laws of war, a tool of genocide, and a form of enslavement. What has caught the attention of most commentators in relation to this aspect of the work of the tribunals, is their attempt to put an end to a long-standing impunity for sexual violence in armed conflict and to ensure accountability for such crimes. My focus here is rather on the lessons that we might learn from the tribunals in thinking through *domestic* law on rape and sexual assault.

In doing this, I should make clear that I realise that international humanitarian law ('IHL') is a discrete body of law that has no direct authority as precedent for domestic law. However, the tribunals themselves have drawn attention to the permeability of the boundaries between IHL and international human rights law, which in turn bears on domestic law. The ICTY in particular has repeatedly drawn attention to the common values underlying IHL and international human rights law. For example, in the case of *Prosecutor v Furundzija*, the Trial Chamber noted:

> The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.[1]

The ICTY Appeals Chamber reiterated the convergence of IHL and international human rights law in *Prosecutor v Delalic*: 'The object of the

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* Helen Pringle is a Senior Lecturer in the School of Politics and International Relations at the University of New South Wales.

1 *Prosecutor v Furundzija* (*Trial Judgment)* [1998] ICTY 3 [183]. Anto Furundzija, a commander in a Croatian paramilitary group known as the Jokers, was charged with torture and outrages upon personal dignity, as violations of the laws or customs of war, for his role in the rape of a Muslim woman.

fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.'[2]

One of the most striking features of the work of the International Tribunals in regard to sexual violation is this focus on the dignity and the integrity of the human person, and the insistence that the law must protect all individuals equally against any impairment of dignity or invasion of personal integrity. Such an equal protection of dignity and integrity in regard to sex has yet to be fully reflected in Australian law, public policy or popular culture, in the time we call peace. There has been very little domestic flow-on from this convergence of principle between IHL and international human rights.[3] I would argue that the Tribunals themselves have pointed out a way of drawing on their work, in their emphasis on autonomy.

The ICTY in particular has noted that the protection of sexual dignity and integrity must centre around the notion of autonomy. In early cases on sexual violation, the ICTY noted the absence of a detailed definition of the crime of rape in international law, and it drew on civil and common law from national jurisdictions in order to set out the elements of rape.[4]

The elements set out by the tribunal are fairly standard: the actus reus of the crime of rape is

> the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[5]

In other cases, the ICTY has drawn out the *principle* that it saw as animating national laws on sexual assault. For example, the Trial Chamber, in *Prosecutor v Kunarac*, noted that 'the true common denominator which unifies the various [national legal] systems may be a wider or more basic principle of penalising violations of sexual *autonomy*'.[6]

The Trial Chamber also emphasised that what constitutes rape is sexual activity that is 'not truly voluntary or consensual on the part of the victim'.[7] Hence, while force and the threat of force are important considerations in assessing the presence and character of consent, they are not per se constitutive

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2 *Prosecutor v Delalic (Appeals Chamber)* [2001] ICTY 1 [149]. The context of the discussion was the applicability of Common Article 3 of the Geneva Conventions.

3 The literature on this convergence is large: for a sample, see Juan E Méndez, 'International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships' in Dinah Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000) 65; René Provost, *International Human Rights and Humanitarian Law* (2002); Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 289–94.

4 See, eg, *Prosecutor v Furundzija* (*Trial Judgment)* [1998] ICTY 3 [175]–[178]; *Prosecutor v Tadic (Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin)* [2000] ICTY 3 [15].

5 See *Prosecutor v Furundzija* (*Trial Judgment)* [1998] ICTY 3 [185], [205]. See also *Prosecutor v Kunarac, (Judgment)* [2001] ICTY 2 [460].

6 *Prosecutor v Kunarac (Judgment)* [2001] ICTY 2 [440], [457].

7 Ibid [440].

of the crime of rape. For consent to be raised successfully by the accused, it would have to be 'given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances'.[8]

The Trial Chamber stated that the definition of rape used in *Prosecutor v Furundzija* focused too much on force. The Chamber decided that there are three main categories to be used in the characterisation of sex as rape:

(1) the sexual activity is accompanied by force or threat of force to the victim or a third party;

(2) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal;

(3) the sexual activity occurs without the consent of the victim.[9]

By reference to (ii) in particular, the Tribunal directs our attention towards the *circumstances* in which agreement to actions is formed and communicated.

In *Prosecutor v Kunarac*, the three accused had claimed, inter alia, that the elements of rape must include force or threat of force, as well as the 'continuous' or 'genuine' resistance of the alleged victim.[10] The actions in contention were committed in 1992, when Serb military forces in the municipality of Foca sent captured women to detention camps, with some being transferred to houses and apartments used as paramilitary 'brothels'. Many of the captured women were subject to assault and rape. The three accused were charged variously with rape and enslavement as crimes against humanity, and rape as a violation of the laws and customs of war.

The case against Kovac, for example, was that he transferred young women to his own apartment, and treated them as his personal and sexual property. Kovac sold one of the younger women (who was never seen again) to another soldier, and on at least one occasion made some of the women dance naked on a table.[11] In his defence, Kovac said that one of his victims, the witness FWS-87, had told others that she was in love with him, and had sent him a love letter to thank him for saving her. Kovac also asserted that the women in his apartment were free to come and go, and had been given keys to the apartment, the latter claim being accepted by the Tribunal.[12] Kovac pleaded that he was led by the women's lack of resistance into mistake about consent.

Kunarac similarly asserted mistake, on the basis that one woman, DB, had initiated sex with him and that he had therefore formed the reasonable belief that she had consented. Although the Trial Chamber accepted that DB 'had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of[f] the trousers of the accused and kissing him all over the body before having

8 Ibid [460].

9 Ibid [442].

10 For example, Radomir Kovac contended that such resistance 'provides notice to the perpetrator that the sexual intercourse is unwelcome … otherwise it may be concluded that the alleged victim consented to the sexual intercourse': in *Prosecuter v Kunarac, (Judgment)* [2002] ICTY 2 [125].

11 *Prosecutor v Kunarac (Judgment*) [2001] ICTY 2 [773].

12 See ibid [73], [141]–[150] (love letter), [265] (keys); see also *Prosecuter v Kunarac (Judgment)* [2002] ICTY 2 [255] (keys).

vaginal intercourse with him',[13] it noted that Kunarac's subordinate 'Gaga' had threatened to kill her if she did not satisfy the desires of his commander.[14]

The ICTY found that the defence mounted by Kovac was not only factually mendacious but legally wrong. It found more generally that the women held by Kovac and Kunarac were psychologically as well as physically detained. The Appeals Chamber characterised Kovac as attempting to evade liability for non-consensual sex 'by taking advantage of coercive circumstances without relying on physical force'.[15] It reiterated that force is not itself a constituent of rape, but is rather properly addressed as evidence of non-consent. Given the coercive circumstances at issue in *Prosecuter v Kunarac*, the Appeals Chamber held that the consent of the victims was rendered impossible, and that under similar circumstances of armed conflict, 'true consent will not be possible'.[16] Lest the Chamber be thought to be making law on the run, it noted that the domestic law of both Germany and some US states penalises ostensibly consensual sex between prison guards and inmates, given an 'inherent coerciveness of the situation which could not be overcome by evidence of apparent consent'.[17]

In *Prosecutor v Kunarac*, sexual violation was also discussed in regard to enslavement, and again the tribunal drew attention to ways in which apparent consent may be set aside where there are coercive circumstances. The Trial Chamber set out the standard definition of enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person'. To give substance to this definition, the Chamber noted:

> indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[18]

Again, the Chamber is emphasising the importance of the circumstances in which sex and consent to sex take place. As I understand this passage, there is no intent to capture the women involved, or women more generally, in the cliché of 'helpless victims'. Vulnerability here does not mean inherent weakness, but refers in part to those who have been made vulnerable by circumstances. The Tribunal is suggesting that vulnerability needs to be acknowledged alongside force so as to appropriately assess autonomy, and the grounds on which to penalise its violation.

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13 Ibid [644]. I think the wording adopted by the Chamber in this sentence is very troubling.

14 *Prosecutor v Kunarac (Judgment)* [2001] ICTY 2 [644]–[645].

15 *Prosecutor v Kunarac (Judgment)* [2002] ICTY 2 [129].

16 Ibid [129], [130].

17 Ibid [131] quoting *State of New Jersey v Martin*, 561 A2d 631, 636 (1989), and noting provisions in the German Criminal Code concerned with 'Crimes against Sexual Self-Determination'.

18 *Prosecutor v Kunarac (Judgment)* [2001] ICTY 2 [542].

The lessons that we can learn from the international tribunals is the paramount importance of autonomy, and the caution that apparent consent is only one part of respect for autonomy. Consent is too often interpreted to mean acquiescence in the designs of others, as something more like submission. However, no certainly means no. It does not mean 'try again' or 'persuade me':[19] initial refusal is not a request for rougher seduction.[20] Nonetheless, many legal as well as popular understandings do not go much beyond this when they fail to understand consent in a manner that protects women, and men, from unwanted sex. That is, in a manner that does not respect sexual autonomy.

Criminal and civil laws, and their interpretation, would look quite different if we were to think about sexual assault in accordance with the notion of autonomy; that is, if we were to see the wrong of rape as lying in the violation of the autonomy of the person. One of the shifts that would take place, I think, is that we would not count passivity, silence or ambivalence as consent. One way to uphold sexual autonomy is to place value on the *communication* of consent. For example, rather than asking the accused whether he honestly believed that his alleged victim was consenting, we might inquire as to the efforts made to ascertain mutuality of desire. That is, to use the words of Stephen Schulhofer: what efforts were made to ensure that there was 'an affirmative indication of actual willingness' on the part of both, or all, of those involved. As L'Heureux-Dubé J noted, in dissent, in the case of *R v Esau*,[21] before the Canadian Supreme Court:

> the customary focus on the complainant's communication of *refusal or rejection* of the sexual touching in question [should be rejected] in favour of an assessment of whether and how the accused ascertained that the complainant was consenting to such activity. The *mens rea* for sexual assault should, therefore, also be established where the accused is aware of, or reckless or wilfully blind to, an *absence of communicated consent* on the part of the complainant.[22]

Autonomy is a difficult and complex notion. It is about leading one's own life. It is about not being the puppet or the slave of the choices and desires of others. It is about governing oneself *and* about respecting others as they seek to make their own path in life. In Immanuel Kant's terms, respect for autonomy is about

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19 See *R v Ewanchuk* [1999] 1 SCR 330. Justice L'Heureux-Dubé argued that a set of myths about women and about sexual activity underlie rape law, myths that deny women's sexual autonomy and imply that women are 'walking around this country in a state of constant consent to sexual activity': at [87].

20 Cf *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214, 219 (Bollen J) on the question of, shall I say, persuasion:

> There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind, and consenting.

See also Janet Albrechtsen, 'Extreme Views from the Bench', ***The*** *Sydney Morning Herald* (Sydney), 16 December 1999, 19. The charges in this case related to incidents involving penile penetration of the vagina, penetration of the vagina by a bottle, penile penetration of the anus and attempted fellatio.

21 [1997] 2 SCR 777.

22 Ibid [31]. Justice L'Heureux-Dubé was joined in dissent by McLachlan J.

treating another person as an end in herself, not as a means or an object to one's own ends.

Modern societies provide strict guarantees to uphold our autonomy in relation to our property interests. However, as Schulholfer argues, there is an asymmetry with the degree of protection afforded to our sexual interests, which cut so much closer to our sense of integrity and identity. He suggests that '[t]he law's narrow scope leaves women vulnerable to male sexual aggressors … The law systematically fails to protect the interest that both women *and* men have in their bodily security and in their ability to choose freely whether to be sexually intimate with another person'.[23]

In sexual relations we are so much more vulnerable than in buying a car, for example, and indeed that vulnerability is the particular grace of intimacy. If there is justice in our sexual relations, that vulnerability deserves to be respected, not exploited. And to do that, autonomy needs to be placed at the very centre of our understandings of sexual matters.

The ICTY has held that sexual autonomy is violated 'wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant'.[24] Mere consent is not enough: the sexual acts at issue must be fully voluntary and free. To count as true consent, agreement to sexual acts must not be coerced by force and fraud, nor by background conditions like intimidation, aggressiveness, abuse of trust or of authority. And in times of peace, regard for autonomy also requires an explicit mutuality.

23 Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998). See especially ch 6, 'The Missing Entitlement: Sexual Autonomy' in ibid, 99.

24 *Prosecutor v Kunarac (Judgment)* [2001] ICTY 2 [457].