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THE ZERO TOLERANCE APPROACH TO VIOLENCE AGAINST WOMEN

LANDON JENNINGS

SOC 228 - SOCIOLOGY OF CRIMINAL JUSTICE

Violence against women is an endemic in North America (Drumbl, 1995). Specifically, “about one in ten married women experience battering each year, in Canada” (Macleod, 1980, p. 67). In 1986, in an attempt to address this issue, the criminal justice system implemented a zero tolerance approach (also known as mandatory charging) to cases of domestic violence (Drumbl, 1995). Advocates believe this approach is needed, whereas others believe that mandatory charging is too harsh.

Regardless, abuse of female partners is still prevalent in our society, as the one in ten statistic still stands (Department of Justice, 2005). Women are abused every day, and many silently sit back until it is too late (Drumbl, 1995). For example, in Singh (2010), the author discusses her encounter with victim of domestic violence named Cynthia. The author came across her working at the Victim Witness Assistant Program in an Ontario courthouse, where she followed her case closely (Singh, 2010). Though the coordinators in this program did their best for Cynthia, she became part of the ongoing statistic of a woman, whose voice was silent as her husband battered and later murdered her. As Singh (2010) explains, Cynthia’s death perfectly embodies the array of complexities that domestic violence incidents pose for the criminal justice system. Seeing the reality, the attempt to prevent harm through mandatory charging is important to understand. However, to do so, it is an imperative to ensure that people are educated on the Laws’ purpose.

This will not only *ensure* people understand the function, but will also allow for informed discussion about reforms to possibly *better* mitigate abuse.

The zero tolerance approach emerged in an attempt by advocates to take violence against woman more seriously (Martin & Mosher, 1995, p. 18). Supporters believed that “if charges were laid, when an assault occurred, offenders would be punished, and individual victims of violence would be protected and woman would benefit” (Martin & Mosher, 1995, p. 18). The belief was that the law was needed to ensure equality of women by treating abuse just like any other crime (Singh, 2010, p. 340). Also, being more punitive would send the message that domestic violence was not tolerated (Martin et al., 1995).

Prior to the adoption of this approach, officers were able to decide how to deal with instances of abuse (Singh, 2010). However, when mandatory charging came into effect, police officers were “directed to lay charges in all instances of domestic violence where there is evidence of assault, regardless if the victim wants to press a charge or not” (Singh, 2010, p. 341). This was to prevent officers from making inappropriate decisions, and further reiterates the goal of the approach, which was to treat abuse as a criminal matter.

Another impetus for implementing this tough on crime approach to dealing with abuse stemmed from a history of systemic neglect (Singh, 2012). Though laws prohibiting violence against woman existed since the early 1900’s, they were rarely utilized. As explained by Hilton (1988), “part of the difficulty (with evoking these laws) lies within the traditional definitions of abuse, as it has been characterized as a private matter, better dealt with in the home” (p. 314). Seeing this, many were reluctant to use existing laws and respond to abuse as a social problem.

The momentum to bring to light the prevalence of woman beating, and attempt to make abuse a social matter, occurred in the 1980’s (Drumbl, 1995). The critical factor in change was the

effort of feminist activists, such as Linda Macleod (Hilton, 1988). In her study, *Wife Battering in Canada: The Vicious Circle* (1980), she illustrated the frequency of female partner abuse in Canada and showed the inadequacy of current policies in preventing harm to victims (Macleod, 1980). Specifically, she illustrated that 500,000 females were battered each year, yet studies indicated, “in 45% of cases where police presence was requested, advice was the response given” (Macleod, 1980, p.108). She concluded that by not being punitive, the legal system was supporting the “powerlessness of woman and accepting battering” (Macleod, 1980, p. 42). This led to the formation of a parliamentary committee, which eventually led to the suggestion of a zero tolerance approach (Singh, 2010).

Another Influential figure to this movement was the London Coordinating Committee on Family Violence, formed after Macleod’s study in 1981(Drumbl, 1995). This committee recommended that police discretion be removed in abuse cases, as they were placing charges in less than 5% of cases (Singh, 2012). London, Ontario thus became the first city to implement the zero tolerance policy, and from its implementation saw a significant increase in domestic violence calls (Drumbl, 1995). Specifically, research shows that “several years after implementing this policy, the number of domestic violence calls rose by 2500%” (Drumbl, 1995, p. 227). By 1986 this approach was implemented to other Canadian jurisdictions (Singh, 2012). Currently, all Canadian jurisdictions follow the zero tolerance policy (Singh, 2010).

The implementation of zero tolerance has affected victims of abuse, perpetrators, and the response of law enforcement. Generally, this approach improves victim rights and successfully conveys the message that violence is unacceptable (Martin et al., 1995). Despite this, there are shortcomings (Drumbl, 1995). Specifically, “more than 75% of abuse incidents involve woman of colour,” yet they are the most reluctant to call for help since they tend to experience negative

consequences of the approach (Drumbl, 1995, p. 335). For instance, some minority woman may experience difficulty with language barriers when seeking aid from the police, along with the detrimental impact on family income that these woman experience upon their husband's incarceration.

For example, African-American woman are more prone to excuse their husband's behaviour due to the negative consequences they have experienced (Drumbl, 1995). As illustrated by in Drumbl (1995):

“all battered woman have the tendency to blame themselves and excuse their husband's behaviour...but this tendency is more marked in African-American woman, who know only too well that that in this society, life is harder for black men than for white men” (p. 235).

Additionally, the loss of financial support is another major consequence of zero tolerance (Singh, 2012). As studied by Martin and Mosher (1995), *Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse*, this criminal justice intervention causes more harm than good. Many Canadian women are dependent on their husbands, particularly financially (Singh, 2010). Thus, incarceration causes them more harm since women are left to figure out how to cover daily expenses for their families.

This hardship (dependency) causes more problems for immigrant woman. Since husbands usually sponsor their immigrant wives to be in the country, the immigrant woman often faces the risk of deportation in the event of their husband's arrest (Martin et al., 1995). This threat leaves victims of abuse less likely to call the police. For instance, Martin and Mosher (1995) found that “husbands were able to terrorize immigrant wives with the fear of deportation, so many ignored abuse” (p. 26). Thus, zero tolerance sometimes causes more harm than good.

Despite the hardship some face in regards to the zero tolerance approach, advocates still believe this is the best method to prevent harm. For instance, Liberal feminists argue that despite the shortcomings, this policy is essential to send the message the abuse is unacceptable (Singh, 2012). As argued by activist Linda Macleod, putting a law in place that is punitive sends a clear message and “shapes the values of society” which benefits woman as a whole (Singh, 2010 p. 43).

On the contrary, some disagree that zero tolerance helps all woman, such as immigrants, and believe that this criminal justice response goes against empowerment model (Singh, 2010). Though the intent of this law is good, sometimes removing the discretion of victims causes more harm to victims. This was illustrated in Martin and Mosher (1995), as many immigrant women experienced difficulty once their husbands’ were charged with domestic abuse. With any domestic violence call for immigrant women, there is a possibility that her citizenship may be taken from her, and with this, her children, family, and dignity. Additionally, removing discretion aids in oppression of woman (Singh, 2012). By not having a say in the outcome of her abuse, opponents argue woman lose their voice. As illustrated in studying cases in Landau (2000), a victim stated: “they did not listen to me...show a little respect. They never asked me what I wanted, they just proceeded anyways” (Singh, 2010, p. 347). Thus, critics argue that zero tolerance approach is harmful.

All in all, female partner abuse is a serious and complex issue. With the success of Liberal feminists advocating to be tough on spousal abuse, the reality of abuse is no longer hidden behind closed doors (Drumbl, 1995). Despite this success, it is an on ongoing debate as to whether this policy is the best to prevent harm and support victim rights. Currently, other avenues are being explored to determine the future direction of this criminal justice response. For example, treatment of abusers outside the justice system is being considered. Advocates argue this will reduce harm

since the abuser will receive treatment and the victim will not face the challenges (i.e. economic) that may come with incarceration (Drumbl, 1995). Despite this, the fear is that not being punitive will send the wrong message and result in an increase in abuse incidents. Thus, though zero tolerance may not be the best measure, female partner abuse is an important issue to understand since it is an ongoing issue, experienced by many women in society.

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*TERRORISM AND ANTI-TERRORISM LEGISLATION IN CANADA
EXAMINING THE INFLUENCE OF THE UNITED STATES, THE
MEDIA, AND THE PSYCHOLOGICAL PHENOMENON OF
TERROR ON CANADA'S DEMOCRATIC STATE*

AMANDA SPITZIG

LS 401 - LAW, CULTURE AND RIGHTS

The events of September 11, 2001 drastically altered the way North Americans view the concepts of safety, security, and terrorism. The unprecedented events of this date left the citizens of the United States in shambles, as the mass media saturated the world with images of hopelessness and despair (Schuster, 2011). Over 3,000 individuals lost their lives when an Al-Qaeda terrorist group struck down the World Trade Centre buildings in New York City (O'Malley, 2003). The political agenda of the White House was rapidly amended, as politicians focused on increasing national security measures in order to put the minds of the American citizens at ease. Canadians were not left unaffected by these events, and rapid policy changes also occurred north of the border (Whitaker, 2003). These controversial policy changes sparked a debate among politicians, academics, and the Canadian citizens about whether these new pieces of legislation represented an appropriate response to the perceived threat of terrorism. Twelve years later this debate still holds strong, and Bill C-36, *The Anti-terrorism Act* (2001), and Bill S-7, the *Combating Terrorism Act* (2013), both of which address crimes associated with terrorist activity, are still under constitutional scrutiny.

This critical analysis paper will seek to explore both sides of this political and legal debate by tackling some of the major issues of concern in regards to anti-terrorism legislation. The

hegemonic influence of the United States over Canada after the events of 9/11 will be examined alongside the pieces of legislation that came into effect as a result. The definition of terrorism itself will be dissected, with special focus on comparing the media portrayal of terrorism with the actual motives and objectives of modern terrorist acts. The psychological phenomenon of terror will be examined in order to determine whether terrorism is a real or perceived threat to society. Finally, we will return to Canada's anti-terrorism legislation in order to determine whether the legislation provides a real or perceived increase in security for Canadians, and how this legislation stands up to the *Canadian Charter of Rights and Freedoms*.

U.S. Hegemonic Influence on Canada's Sovereign Domestic Policy-Making

The asymmetrical power relationship between Canada and the United States played a major role in Canada's policy-making decisions in the aftermath of 9/11. As North America was stricken with terror, governments capitalized on the heightened fear of the nation in order to rapidly advance controversial political agendas (Kellner, 2004). Sharing the longest undefended border with the United States, Canada was in a particularly unique situation in regards to anti-terrorism legislation. Although Canada was not directly in a state of emergency following 9/11, the United States chose to exercise their political influence over Canadian governments in order to ensure the safety and security of Americans (Biswas, 2009).

A key concern for the American government was border control. In order to protect American national security, the government wanted to change how easily accessible the flow of goods and people into the country was (Biswas, 2009). State borders play an important role in both the political functioning of a state and its economic standing with bordering countries. Borders mark out a state's territory, declare and exert national sovereignty, and "their selective permeability operates as a measure of the nation-state's security against external threat" (Macklin,

2001). A country's sovereignty over its state borders means that the country has the sole ability to control behaviour within the state borders, and the power to control movement across them. State governments must also have the capacity to make uninfluenced policy decisions within these borders (Biswas, 2009).

Canada's asymmetrical interdependent relationship with the United States resulted in the United States exercising hegemonic power over Canada's sovereign border policies, and limited Canada's ability to control their own border policies (Biswas, 2009). In particular, the American government scrutinized Canada's immigration and refugee policies, noticing existing terrorist activity in Canada, and feared that these groups would be able to permeate American borders due to lax border security (Biswas, 2009). In response to 9/11, the United States government gave Canada two options: either modify existing domestic policies so that they fit in line with the American interests of heightened national security, or else Canada would face more restrictive border controls. This hegemonic exercise of political power outside of American borders sought to limit Canada's autonomy over its domestic policy, thus infringing on Canada's own sovereignty (Biswas, 2009).

An American decision to tighten border security would have major economic implications for Canada, as the United States is Canada's largest trading partner. In 2010, Canada exported \$2.9 billion of goods to the United States, accounting for 73.3% of the country's total exports. In addition, Canada imported \$2.6 billion of goods from the United States, accounting for 62.8% of Canada's total imports (Statistics Canada, 2012). However, Canada's economic relationship with the United States is very one-sided. In 2012, exports to Canada made up only 17.0% of total U.S. exports, and imports from Canada accounted for only 14.2% of total imports (U.S. Department of Commerce, 2013). The diversified economy of the United States would not be as drastically

harmful by increased border control with Canada. The threat of economic sanctions forced Canadian politicians to react rapidly to the threat of terrorism, and pass legislation that conformed to American interests.

Canada's Anti-Terrorism Legislation

The result of this hegemonic influence from the United States was Canada's *Anti-terrorism Act* (Bill C-36). The bill was introduced into the House of Commons for its first reading on October 15, 2001, and received royal assent on December 18, 2001, a mere 3 months after the events of 9/11. The *Anti-terrorism Act* was a response to issues of national security and it altered many pieces of legislation. The full title of the Act is cited as: "An Act to amend the *Criminal Code*, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism" (*Anti-terrorism Act*, 2001). Bill C-36:

introduced new and potentially dangerous legal concepts such as investigative hearings, preventive arrests, broad motive-based crimes based on participation in or contribution to terrorist groups at home or abroad, as well as new powers to list terrorist groups, take their property, and deprive suspected terrorists of sensitive security information in their trials and appeals. (Roach, 2002)

The bill also ratified two United Nations Conventions: the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Terrorist Bombings (Lennox, 2007).

The new provisions of the *Anti-terrorism Act* did not come without a price tag. Funding to support the implementation of the increased security measures amounted to \$7.7 billion over five years, which was announced by then finance minister Paul Martin in the December 2001 federal

budget (Lennox, 2007). This sum of money was “proportionately larger than the US allocation to the same objectives” (Clarkson, 2003).

The bill received very minimal public input before being passed as law in Canada despite the fact that it drastically increased the investigative and surveillance capabilities of the government (Lennox, 2007). The Liberal government presented a time allocation motion on Bill C-36 after only four-and-a-half hours of debate in order to limit the amount of discussion on the bill. They also used a process called pre-consultation, used in the Senate, in order to push the bill through Parliament as quickly as possible (Lennox, 2007). Although Canada had not declared a state of emergency as the United States did following 9/11, it is evident that this legislation was introduced in a “climate of emergency” (Diab, 2008). It was necessary for legislation to be passed very rapidly through Parliament in order to capitalize on the spirit of urgency, as the United States viewed terrorism as a very imminent threat to the country.

What is Terrorism? The Psychological Phenomenon of Terror and the Influence of Media

Although Canada has taken drastic measures to increase national security, the question remains as to whether terrorism poses a real threat to society. In order to understand this issue, we must examine the definition of terrorism, and examine the motivations behind modern terrorist organizations. There is an interesting discrepancy between the mass media portrayal of terrorism and the political understanding of the term. The terms “terrorist” and “terrorism” have saturated mass media news outlets since 9/11 (Kellner, 2004). These words are used repeatedly to label certain groups in society, although no proper definition of the terms is ever explained. The word “terrorism” is very highly stigmatized, and it is often used indiscriminately (O’Neil, 2010). Before examining the mass media portrayal, it is important to dissect the true meaning of the term

terrorism in order to understand the objectives of modern terrorist groups, and make an objective comparison to the media portrayal of the topic.

To begin to understand the true definition of terrorism, it is important to analyse the meaning of the root word, of these two words, terror. The Oxford English dictionary defines terror as “extreme fear”. The instillation of extreme fear into the mass population is what legitimizes acts of terror (Biernatzki, 2002). Terrorism, on the other hand, proves to be a much more difficult term to define. The United Nations has not been able to decide on a definition of the term, mainly because the term is used very differently by various state leaders. State leaders use the word terrorism whenever they find their state interests to be under threat; whether this is from liberation struggles, guerrilla war, or any other attempt to overthrow the political elite (Melnyk, 2010). Still, fear is the underlying concept that is consistent throughout all ideas of terrorism. State leaders *fear* that their state interests are at risk. Regardless of whether an objective definition of the word terrorism is reached, it is clear that this emotion of fear and terror is the fundamental theme in all situations where the word terrorism is used. “Terrorism is the intentional generation of massive fear by human beings for the purpose of securing or maintaining control over other human beings” (Cooper, 2001). Fear is the primary mechanism by which terrorist organizations seek to gain control over populations and further their own political agendas. Whether this is achieved through actual violence, or merely the threat of violence, implanting fear into the minds of the target group is what makes an act of terrorism successful. Terror is largely a psychological phenomenon; it has the power to immobilize people, and coerce them into action.

The mass media has done a successful job at legitimizing the threat of terror in the minds of North Americans, and perpetuating the “Us vs. Them” ideology that terrorism is an inherent component of Islamic cultures. North Americans have come to understand the word “terrorism”

as “a violent act against an innocent population perpetrated by heartless, fanatical enemies of that population or its government, whose only goal is death and destruction” (Melnyk, 2010). The mass media, as well as politicians promoting this anti-terrorism legislation, have stripped the political and moral justifications from acts of terrorism, and replaced these with ideas of fear and loathing towards particularly Middle-Eastern nations (Melnyk, 2010). North Americans are fed images of Islamic groups on nightly news segments, as racialized headlines flash across the television screen. The idea that terrorism is an inherent part of the Muslim and Islamic culture instils additional fear in the minds of North Americans. Members of these minority groups are racially profiled and further victimized in society because they have been labelled as “Them”, a distinct group in society whose cultural values are viewed as different and inferior from the Westernized norms.

In reality, terrorist groups have similar goals as politicians or journalists, and mass media ironically works to further these goals. These overlapping objectives include:

1. Access – getting prominent headlines and airtime.
2. Name recognition – getting one’s name or organizational “brand” readily known.
3. Setting the agenda – gaining power to frame issues and set the terms of debate. (Widlanski, 2012)

When news headlines constantly feature stories about terrorist groups, emotions of fear and terror are instilled in media consumers, which is precisely the primary objective of an act of terror. Giving terrorist groups access to airtime maintains the emotion of terror in the public. Foremost, terror is a psychological phenomenon, and media access legitimizes this emotion, adding fuel to the fire of terrorism. In George Melnyk’s essay titled “The Word ‘Terrorism’ and its Impact on Public Consciousness”, Melnyk effectively explains this vicious circle that happens between the media and terrorism, and how this works to support government objectives:

When terrorism is put at the forefront of public concern, forces are unleashed that are profoundly anti-democratic. The word creates a demagogic atmosphere

in which fear reigns supreme and that fear much be refreshed from time to time with real actions in the real world. When events labelled “terrorism” recede into memory and are not refreshed with fresh events so labelled, the term loses its potency as political explanation and mobilization. (Melnyk, 2010)

The major issue with the media portrayal of terrorism is that media outlets fail to present an objective view of the issue. A notable news network that is notorious for this is CNN, who because had become one of the most prominent media outlets following before the events of 9/11 (Saighal, 2004). CNN features news broadcasts that reflect the desires of the American government and is filled with misinformation and disinformation on the topic of terrorism (Saighal, 2004). Unfortunately, this results in only one side of the story being shared, which is advantageous for governments in their policy objectives (Melnyk, 2010). If mass media can maintain the emotion of fear in the minds of a country’s citizens, it is more likely that the citizen’s will support controversial policy objectives from the government that undermine the principles of democracy (Melnyk, 2010). Analysed through the structural functionalist perspective of society, legislation works to set a country’s mind at ease. Confidence is the opposite emotion of terror, and the population is more likely to agree with the objectives of the government if they appear to be confident in their methods of eliminating terrorism (Melnyk, 2010). However, the function of media is to remind citizens of the potential for terror, forming a basis for the creation of these government policies. Thus, a full-circle effect occurs. If policy has done a successful job at creating a false sense of security in the minds of Canadians, the mass media has done an equally successful job at dismantling this security (Melnyk, 2010).

Politicians and academics are also largely concerned with the intentions of terrorists. Why do certain groups choose suicide bombings over car bombs? What motivated the al-Qaeda group to hijack two airplanes and fly them into the World Trade Centre buildings in New York? Understanding these intentions allows policy makers to understand why these acts occur, and to

target certain acts with a through policy and to better understand why these acts occur. Aside from the primary goal of instilling fear, terrorist organizations are motivated by political, ideological, and religious reasons. Political terrorists are motivated by the desire to eliminate colonial rule and institute a change in political power. Religious terrorists work to assert their cultural beliefs, which they believe are superior to all other groups. Ideological terrorist groups are motivated by the desire to end economic oppression (Lauderdale & Oliverio, 2005). The end objective is carefully outlined, and then a plan is developed with the intent of achieving this objective while simultaneously intimidating the authorities (Whittaker, 2002). Modern terrorist group activity must be considered in both the context of both historical and political contexts of the nation in order to understand the motivations behind the acts and predict future threats to society.

Modern Terrorist Groups and their Motivations

The Canadian government has faced challenges to terrorism on both a domestic as well as international front. In June of 2006, 18 individuals were arrested for plotting a series of attacks throughout southern Ontario. This terrorist plot became known as Toronto 18. One of the plans was to bomb the Toronto Stock Exchange as well as other prominent buildings throughout southern Ontario (CBC News, 2008). The group was attempting to create a large terrorist unit in Toronto, similar to that of al-Qaeda. The group wanted to arm themselves with weapons and wreak havoc in order to scare the Canadian public, and influence Canada to withdraw troops from Afghanistan, which was the primary political objective of their terrorist plot (CBC News, 2008).

There was a great amount of discrepancy between the actual facts in the Toronto 18 case, versus the media portrayal of the case. Prime Minister Stephen Harper publicly announced that the group of radicalized youths was motivated by a hatred of democracy, and were targeting Canadian values such as freedom and the rule of law (Miller & Sack, 2008). Media outlets worked very

closely with the Prime Minister's Office, and top bureaucrats provided instruction to politicians and security officials regarding what information to reveal in any interviews. The office also carefully monitored what was released to the public in order to ensure that all media coverage portrayed the idea that this domestic terrorist plot was inspired by Al-Qaeda, and would have had a magnitude similar to that of the Oklahoma City bombings if law enforcement hadn't apprehended the group (Miller & Sack, 2008). A high level of fear was injected into the minds of Canadians by this media coverage. However, 15 months after the initial arrests, charges had been dropped against seven of the eighteen suspects. No evidence of radicalization, hatred of democracy, or any ties to Al-Qaeda terrorist groups were proven (Miller & Sack, 2008). 1,700 pages of government correspondence obtained by the Globe and Mail proved that the Conservative government had monitored all media outlets, ensuring that the public had confidence that the government was fighting terror (Miller & Sack, 2008). False motivations were portrayed to the public through the media, and the accused individuals were represented in a way such that the public saw their motivations that were radical and violent in nature, as compared to shadowing the actual legitimate political objectives of the group. The government had worked closely with the media in order to create a climate of fear and emergency, creating a perceived threat that was drastically larger than the real threat that the terrorist group posed.

In contrast to these this example of domestic terrorism, international terrorist organizations also plague North Americans with fear. The unprecedented events of 9/11 formed the basis for all modern anti-terrorism legislation in North America, and reinforced the constant racialization of terrorists by the mass media. Osama bin Laden and the al-Qaeda terrorist organization were motivated by both religious and political reasons. In bin Laden's "Letter to America" he begins by addressing Allah, explaining how believers are given permission to fight by Allah because they

have been wronged (Bin Laden, 2002). Bin Laden also lists many political reasons for waging an attack against the United States. These include previous American attacks in Palestine and Somalia, America's dominance in the global oil market, America's control of Iraq, and various reasons involving America's wealth as well as support of the Jewish population (Bin Laden, 2002).

What is unknown by many people is that although the attack on the World Trade Centres caused an unparalleled number of civilian casualties for a single act of terrorism, this high death toll was unintended. Osama bin Laden recorded a video from the depths of a cave, in which he outlined his Vision for the World. In this video, bin Laden outlined his preparations for the attack on New York City. When speaking about the planned magnitude of the attack, he said:

[W]e calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors [...] I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for. (Whittaker, 2002)

Although citizen casualties were still planned into the attack, it is interesting to note that the original plan for the attack was not motivated by a mass killing of American civilians. The attack's primary objective was political, and it was justified through religious means (Bin Laden, 2002). Again, it is evident that the use of mass media has affected perceptions of terrorist motivations. Media outlets label Islamic terrorist groups as a distinct culture in which violence is an inherent element (Smith, 2013). However, it is clear that there are political, religious, and ideological justifications behind the actions.

Terrorism: A Real or Perceived Threat to Society?

After carefully considering the concept of terrorism, the influence of the media, and the actual objectives of modern terrorist plots, the question arises as to whether terrorism is a real

threat to society, or whether this fear is merely a psychological phenomenon, legitimized by governments to further their political objectives and undermine democracy. Terrorist groups do post a legitimate threat to society. Terrorist groups target public locations, and put the lives of civilians at risk in order to further their objectives. Whether or not the terrorist group has the intent to harm civilians, the risk is still present due to the nature of their activities. For example, Osama bin Laden claimed that his terrorist organisation did not intent to collapse both of the World Trade Centres, killing 3,000 American citizens (Bin Laden, 2002). However, they still had the intent to fly the two airplanes into the towers and kill a number of civilians. Evidently plans do not always proceed as expected, but the magnitude of harm was certainly reasonably foreseeable.

Terrorism also poses real threats to both the economic and political stability of a nation. Highly publicised and effective terrorist attacks are successful in depressing tourism, reducing foreign investment into a country, and harming the stock markets (O'Neil, 2010). Politically, terrorist groups pose a threat to the governing regime of the country, and the democratic function of the state in North America. As citizens constantly see images of terrorist activity on news programs, the people may begin to lose faith in the government if it does not allocate a significant amount of resources towards combating terrorism. In achieving this goal of greater national security, a trade-off occurs between civil liberties and state authority, leading to a breakdown of democratic institutions (O'Neil, 2010). Canada's *Anti-terrorism Act* was passed through parliament during a time of heightened national fear. This government response was intended to reassure Canadians that their safety and security was of primary importance, generating national support for the legislation. However, the demagogic method that the government used in order to create this support suggests that perhaps terrorism doesn't pose as imminent of a threat to society as the media portrays. If governments are relying on emotionally based arguments to support the

threat of terrorism rather than concrete evidence, concerns are raised as to what the real objectives of government actions are, and whether this psychological phenomenon of terror is being strategically used to gain support for controversial legislation.

Implications of Anti-terrorism Legislation on Canadian Charter Rights

Several aspects of Canada's *Anti-terrorism Act* have come under scrutiny for their adherence to democratic principles, and the constitutionality of the Act. As previously mentioned, Canada did not declare a state of national emergency following the events of 9/11. However, the *Anti-terrorism Act* was still rapidly passed through Parliament with a spirit of urgency, despite the insistence from the Canadian government that it was not a piece of emergency legislation (Weinrib, 2001). During debate over the bill, reference was made to the *War Measures Act* of 1914, and politicians argued that the *Anti-terrorism Act* was constitutionally sound because the *War Measures Act* justified the authorization for emergency executive state power in times of crisis. Interestingly, the *War Measures Act* was repealed and replaced with the *Emergencies Act* in 1988, but no reference to the later Act was mentioned in debate (Weinrib, 2001). Considering that the *Anti-terrorism Act* was not considered emergency legislation, and the basis for its justification was a repealed act whose purpose was to justify state power in emergency situations, the constitutionality of the *Anti-terrorism Act* remains a major political issue. It is also interesting to note that a sunset clause was not included in the legislation. A sunset clause would require that the legislation be reviewed for constitutionality after a certain time period has passed. The lack of this sunset clause made many of these controversial new executive powers permanent (Diab, 2008).

Emphasis on government power is also evident in the change of rhetoric used in Parliamentary debate between the first and third readings of Bill C-36. When the bill was proposed in the first reading on October 15, 2001, then Minister of Justice Anne McLellan assured

Canadians that “*Charter* rights [had] been considered and preserved against the objectives of fighting terrorism and protecting national security” (Diab, 2008). During the third reading of the bill, emphasis for the bill’s justification transitioned to primarily security-centred concerns.

McLellan stated that:

Now is the time to move forward. Canadians expect their government to act to ensure their security and safety. [...] What we are doing in Bill C-36 [...] is putting in place the legal and operational infrastructure necessary to provide Canadians with that degree of safety and security that permits them to get on with their lives. (Diab, 2008)

What can be taken from this argument is that the *Anti-terrorism Act* was a response to this psychological phenomenon of terror. McLellan states that the purpose of Bill C-36 is to allow Canadians to “get on with their lives” and move beyond the state of fear caused by 9/11, into a state of security and confidence in the government.

Specific provisions created by the *Anti-terrorism Act* also raised cause for alarm, as violations of *Charter* rights became an issue of concern. In particular, the offence of “facilitating” an act of terrorism and the vague *mens rea* elements of this offence has been challenged in Canadian Courts (Diab, 2008). The full provision, section 83.19 of the *Criminal Code*, can be found in Appendix A. This provision has been criticized as having eradicated the fault element in criminal law. A person could be charged under this offence without knowing they were in fact facilitating terrorism (Diab, 2008). It has been argued that “the only remaining fault element [in the offence] would be failing to take reasonable care to ensure that what was being facilitated was actually *not* a terrorist activity” (Diab, 2008).

Momin Khawaja, the leader of the Toronto 18 terrorist plot, was the first person to be convicted under Canada’s *Anti-terrorism Act* in 2008. He was found guilty of five charges of financing and facilitating terrorism, and two *Criminal Code* offences related to building explosive

devices (MacCharles, 2008). He was originally sentenced to 10 ½ years in prison, but the sentence was increased to life in prison with no chance of parole for 10 years by Ontario's Superior Court of Justice (MacCharles, 2008). Khawaja argued under section 52(1) of the *Canadian Constitution* that certain provisions of section 83 of the *Criminal Code* were inconsistent with the *Constitution*, therefore they should be of no force or effect. Khawaja claimed that "the provisions are vague and/or over-broad, they dilute the essential fault requirements of criminal law, and they infringe [the] rights of association, freedom of conscience and religion, and freedom of thought, belief, opinion, and expression pursuant to section 2 of the *Charter*" (Diab, 2008). The Court upheld the decision that the provision was not vague because they had "sufficiently clear meanings" (*R v Khawaja*, 2012 SCC 69, 3 SCR 555). Khawaja also challenged the inclusion of political, religious, and ideological objectives in the Court's definition of a terrorism offence, arguing that the labelling of these motives causes a chilling effect over minority groups in Canada, violating section 2 *Charter*. The Court agreed with Khawaja that this was a *prima facie* infringement of rights, but that it was justified under section 1 of the *Charter* because this violation represented a minimal infringement on the rights in order to protect Canadian interests (*R. v. Khawaja*, 2012 SCC 69, 3 SCR 555). This case was the first major challenge for Canada's new *Anti-terrorism Act* in the Canadian courts.

Conclusions: The Justification of *Charter* Rights Violations in a Democratic Society

The justification of anti-terrorism legislation in Canada is evidently a process in which Canadians see limitations placed on their *Charter* rights. This challenge to the democratic functioning in Canada began following the events of 9/11, when the United States gave Canada two options in terms of domestic policy: to either implement policy in line with American interests, or face harsh border restrictions. American hegemonic influence also infiltrated the media, which

is the primary mechanism used to instil fear into the minds of citizens. As people are constantly presented with images and ideas of non-Westernized cultures as inherently violent, fear begins to creep into domestic life as well. Canadian governments capitalized on this fear by implementing the controversial *Anti-terrorism Act* in December of 2001, and put the minds of Canadian citizens at ease by sending the message that national security was a high priority. However, the media does an excellent job at camouflaging the true motives of terrorist organizations. In the Toronto 18 case, it was revealed that the Canadian government was working hand-in-hand with media outlets to amplify fear. This demagogic effect, where false reasons were portrayed based on emotion, connects the issue of anti-terrorism legislation full-circle: terrorist groups portray fear, the media amplifies the fear, and governments capitalize on these skewed media messages. Although politicians claim that anti-terrorism legislation is in the best interests of Canadians, and the violation of *Charter* rights is justified, these issues are still up for contest. With the recent Supreme Court review of the *R. v. Khawaja* in 2012 it is clear that the provisions of the *Anti-terrorism Act* still remain an area for debate 12 years after its implementation. Acts of terrorism, although few and far between in Canada, do pose a real threat to the safety of Canadians. However, the primary motivation of terrorist acts in instilling terror in the minds of civilians, not mass killing, as is depicted by the media. If the mass media presented an objective view of terrorist motivations rather than amplifying terror in the minds of North Americans, Canadians may have a significantly different view about the democratic function of the state and Canada's *Anti-terrorism Act*.

Appendix A: Section 83.19 of the *Criminal Code*

Facilitating terrorist activity

- **83.19** (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
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- (2) For the purposes of this Part, a terrorist activity is facilitated whether or not
 - (a) the facilitator knows that a particular terrorist activity is facilitated;
 - (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
 - (c) any terrorist activity was actually carried out.

(*Criminal Code*, RSC 1985, c C-46, s. 17; RSC 1985, c 27 [1st Supp])

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THE KIRPAN: JUSTIFIED DOCTRINE OR JUST A DAGGER? - WHEN RELIGIOUS SYMBOLS CLASH WITH PUBLIC SAFETY

SUKHRAAJ SHERGILL

LS 102 - INTRODUCTION OF CRIMINAL LAW

Freedom and security are often seen as opposites in modern society. One must be relinquished in part to further a sense of the other. Religious rights under section 2a of the *Canadian Charter of Rights and Freedoms* (1982) are often contrasted with the legal right to life, liberty and security under section 7 and the concept of public safety as was the case with *Multani v. Commission scolaire Marguerite-Bourgeois* (*Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 SCR 256). The *Multani v. Commission scolaire Marguerite-Bourgeois* case centered around the sheathed Kirpan Mr. Multani, a twelve year-old baptized Sikh, carried; which fell from its strap, still sheathed on a playground. The case reached the Supreme Court of Canada as it concerned the religious article: the Kirpan. If the Supreme Court of Canada had ruled in favour of removing the Kirpan from Gurbaj Singh Multani, the Court would be impeding his beliefs and be damaging to his sense of identity, as it would also encroach on religious rights. Section 2a of the *Canadian Charter of Rights and Freedoms* states, "[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion" (*The Constitution Act, 1982*). This paper will synthesize the Multani argument under section 2a of the *Canadian Charter of Rights and Freedoms* (1982) and explain the significance of the Kirpan before progressing to synthesize the Commission scolaire Marguerite-Bourgeois' argument under section 7 of the *Canadian Charter of Rights and Freedoms* (1982). The paper will also lay out a preliminary

understanding of section 88(1) of the *Criminal Code of Canada* as it explains the definition of a weapon in relation to section 267 of the *Criminal Code of Canada*, the crime of assault as related to the Commission scolaire Marguerite-Bourgeoys' argument. The paper will then close by summarizing the Supreme Court of Canada's judgement on the matter.

Firstly, in support of the Multani argument utilizing section 2a of the *Canadian Charter of Rights and Freedoms* (1982), the Kirpan is a religious requirement for all baptized Sikhs, formally known as Amritdhari Khalsa Sikhs (Jhutti-Johal, 2011, p. 96-97). It is essentially a dagger or ceremonial sword worn by baptized Sikhs that is a defensive article in the direst of circumstances. However, the Commission scolaire Marguerite-Bourgeoys argued that the Kirpan is indeed a weapon that can be used to injure people. Therefore, the Commission asserted that the Kirpan is a dangerous article that has implications when regarding sections 7 and 1 of the *Canadian Charter of Rights and Freedoms* (1982) in conjunction with interpretations of sections 88(1) and 267 of the *Criminal Code of Canada* (1985). Finally, resolving these two standpoints, restrictions can be enforced to protect public safety in conjunction with accommodating the Kirpan and maintaining rights guaranteed by the *Canadian Charter of Rights and Freedoms* (1982), as well as the *Universal Declaration of Human Rights* (1948), and the *International Covenant on Civil and Political Rights* (1966).

Primarily, the Kirpan is an integral part of the Sikh religion, belief, and identity. It is one of the five articles that are compulsory for baptized Sikhs. These five articles are considered the uniform of a Sikh,

...each beginning with the Gurmukhi letter *k*. These are *kes* (uncut hair), a *kangha* (comb), a *kirpan* (dagger or short sword), a *kara* (wrist-ring of either iron or steel) and *kachh* (shorts that must not reach below the knee). [Baptized] Sikhs...promise to wear the Five K's. (McLeod, 2008, p.326-327).

These Sikhs swear to have the Five K's with them at all times. The value of the Kirpan stretches beyond the guarantees of religious freedom in the *Canadian Charter of Rights and Freedoms* (1982) and has historical significance to Sikhs.

The Kirpan is entrenched in the history of the Sikhs. The Five K's commemorate historical events for Sikhs such as when the ninth Guru, Guru Tegh Bahadur Sahib Ji, was executed for protecting the religious rights of the Hindus (Johar, 1975, p. 192-210). During this era, Sikhs were not distinguishable from the rest of the populace. The Five K's gave a distinct appearance to Sikhs. The Kirpan furthered this distinct appearance as it aligned and solidified the intangible moral obligation of Sikhs with the tangible concept of the Kirpan, to become "an instrument of compassion to be used to protect and safe-guard [the] dignity or honour of others" (Bachu, 1996, p. 203). Sikhs view the Kirpan as a defensive tool that is used strictly to help others and not to be used in an offensive manner.

Furthermore, the meaning and reasoning behind the Kirpan itself is "...derived from the Sanskrit words *Kirpa* and *Aan* meaning mercy or compassion and honour or dignity" (Singh, 2005, p. 287). It is perceived as a symbol that represents a "...duty to fight for good over evil, and to always support freedom above oppression" (Bagga, 2006, p. 7). The Kirpan has an inherently noble meaning rooted in the Sikh belief itself and is meant to be a positive symbol as the Multani argument represented it. The ties of the Kirpan to the Sikh religion connect the article of faith to the religion and subsequently, section 2a of the *Canadian Charter of Rights and Freedoms* (1982). The Kirpan is not to be utilized in a violent manner; which stands in stark contrast to its attempted characterization by the Commission scolaire Marguerite-Bourgeoys as an offensive weapon.

Conversely, the Commission scolaire Marguerite-Bourgeoys brought forth the point that the Kirpan, while being an article of faith with defensive and benevolent connotations, still carries

the potential to be a fatal weapon and thus could have detrimental effects on public safety. In essence, the Commission asserted that the Kirpan is a ceremonial dagger and that a dagger is, by definition a "...weapon designed to kill, intimidate or threaten others" (Schutter, 2010, p. 354). Religious affiliations aside, the Kirpan, without restrictions, does indeed carry with it the capacity to severely wound a person if used. Before the decision of the Supreme Court of Canada in the *Multani v. Commission scolaire Marguerite-Bourgeoys* case, the Kirpan was allowed in schools subject to the condition that it be "...strapped...[and] riveted to [its sheath] or the blade was blunt with a rounded tip" (Hamilton, 2005, p. 115-116). This meant that prior to the Supreme Court decision; schools were required to restrict the Kirpan to only a cloth strap – both of which could be undone relatively easily – and a dull blade. These restrictions could, at the discretion of the individual school district be augmented by the option of riveting the blade to its sheath. However, leaving this choice to individual school boards and avoiding a standard leaves the option that the Kirpan could still be utilized if the school board did not employ the option of riveting. If the Kirpan were to ever be utilized, even a dull blade could pierce flesh in a fatal manner. As this is a recognized threat, the school district's decision to make a safety measure such as riveting optional and not required, still provides the chance of use. It is clear that the Kirpan, with religious status removed, becomes a fatal weapon with unreasonable restrictions that has the potential to violate section 7 of the *Canadian Charter of Rights and Freedoms* (1982).

Section 7 of the *Canadian Charter of Rights and Freedoms* (1982) states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (*The Constitution Act, 1982*). The Kirpan essentially becomes a weapon that has the capacity to deprive someone of their right to life and security of the person as it can be used in an offensive manner. It has the capability to be used to

injure another person and at this point becomes strictly a dagger with no religious significance; as well as an entirely real threat to the security of the person while restrictions on length serve to further counteract the effectiveness of the Kirpan as a weapon (Fox, 1985, p. 114-115).

Furthermore, section 88(1) of the *Criminal Code of Canada* (1985) states that “[e]very person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence”. This section of the *Criminal Code of Canada* (1985) specifically states that anyone who “...carries or possesses a weapon...for a purpose dangerous to the public peace...” (*Criminal Code*, section 88(1)), is guilty of a criminal offence. However, one must be careful in interpreting section 88(1) or any law, down to the letter. As the option to interpret the law in question via a lens that focuses on the intention of the law in contrast to its literal meaning exists, the Kirpan is reasonable to possess and carry. The intention of the law is not to suppress religious freedoms. However, applying a literal understanding of section 88(1) creates a scenario where, a Kirpan, with its religious significance removed, essentially becomes just a dagger that has the sole purpose of being a danger to the public peace. This is not to mention that the mere act of being in possession and carrying the Kirpan would constitute an offence (Nkomo, 2011).

The Commission scolaire Marguerite-Bourgeoys, applying a literal analysis of section 88(1) of the *Criminal Code of Canada* (1985), raised the legal principle of inchoate offences and the concept of preventing a crime prior to its occurrence. Inchoate offences are “...a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves” (Chapman, 2014, p. 245).

The crime of assault under section 267 of the *Criminal Code of Canada* (1985) is defined as

[e]very one who, in committing an assault, (a) carries, uses or threatens to use a weapon or an imitation thereof, or (b) causes bodily harm to the complainant, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months. (*Criminal Code*, section 267).

When the principle of inchoate offences is applied to the *Criminal Code of Canada's* (1985) definition of committing an assault and further applied to the Kirpan, an assault with the Kirpan is a preventable offence. This is applicable by removing the religious significance of the Kirpan, in which case it becomes strictly a dagger with the purpose and ability of causing harm. The *Multani v. Commission scolaire Marguerite-Bourgeoys* case brought forth the intriguing broad notion of whether religious rights and security rights – specifically the Kirpan and public safety rights – could coexist peacefully. Further, the Supreme Court of Canada upheld that the spirit of the law is greater than the letter of the law. The Court answered the notion by upholding restrictions on the length, casing and maintenance of the Kirpan while disregarding the literal application of section 267a of the *Criminal Code of Canada* (1985) as simply carrying the Kirpan would once again constitute an offence.

Ultimately, the responsibility to reconcile the “freedom of religion” (*The Constitution Act, 1982*) under section 2a and the right to “...life, liberty and security...” (*The Constitution Act, 1982*) under section 7 of the *Canadian Charter of Rights and Freedoms* (1982) fell upon the Supreme Court of Canada. It had to decide if a total ban on the Kirpan was justified by applying the *R. v. Oakes* (*R. v. Oakes*, [1986] 1 S.C.R. 103) test in relation to section 1 of the *Canadian Charter of Rights and Freedoms* (1982). Section 1 states that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (*The Constitution Act, 1982*).

The well-established *R. v. Oakes* test lays out the process that the Court must use to determine if a violation of a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* has occurred. The test begins once a violation of a protected right or freedom has occurred. The Court must then determine if the law in question provides a reasonable restriction that follows section 1 of the *Canadian Charter of Rights and Freedoms* (1982). Finally, should the law fail to be a reasonable restriction; the Court can strike it down (*Oakes*, 2013). The Supreme Court of Canada in the *Multani v. Commission scolaire Marguerite-Bourgeois* case was convinced that the not allowing Gurbaj Singh Multani to attend the school with his Kirpan was a violation of his section 2a right under the *Canadian Charter of Rights and Freedoms* (1982). This violation invoked the procedure of the *R. v. Oakes* test and the Court decided that upholding the conditions placed upon the Kirpan by the Superior Court of Quebec constituted a reasonable step that protected both rights under the *Canadian Charter of Rights and Freedoms*. These conditions were that,

the Kirpan was to be worn under the student's clothes; the Kirpan was to be placed in a wooden sheath and wrapped and sewn securely in a sturdy cloth envelope, which was to be sewn to a shoulder strap (guthra); the student was required to keep the Kirpan in his possession at all times, and its disappearance was to be reported to school authorities immediately; school personnel were authorized to verify, in a reasonable fashion, that the conditions for wearing the Kirpan were being complied with; and if these conditions were not complied with, the student would definitively lose the right to wear a Kirpan. (*Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 SCR 256, para. 88).

These conditions made the Kirpan become almost impossible to use as an offensive or defensive weapon by being wrapped in repetitive sheets of cloth, further encased in a wooden sheath and, finally, being sewn into a shoulder strap. In this way, the restrictions satisfied the requirement of section 7 of the *Canadian Charter of Rights and Freedoms* (1982) by removing almost any chance

of using the Kirpan to harm the life, liberty or security of a person as the Kirpan could not be efficiently removed from its security measures to assault someone with.

The decision of the Supreme Court of Canada nullified any likelihood of the Kirpan being utilized as a weapon via the imposition of a set of security measures and conditions which served essentially as an ultimatum: either the conditions would be met or the Kirpan would be removed. This decision followed a similar vein as that of the *Grant v. Canada* case, which also centered on section 2a (*Grant v. Canada (Attorney General)*, 1994 CanLII 3507 (FC), [1995] 1 CF 158) and the *R. v. Badesha* case, which centered on sections 2a and 7 of the *Canadian Charter of Rights and Freedoms* (1982), (*R. v. Badesha*, 2010 ONCJ 10 (CanLII)). In both cases the section 2a rights of Sikhs in Canada were upheld. At issue in those cases were whether the Turban was against the uniform regulations of the Royal Canadian Mounted Police (*Grant v. Canada (Attorney General)*, 1994 CanLII 3507 (FC), [1995] 1 CF 158) and whether the Turban was against motorcycle regulations, (*R. v. Badesha*, 2010 ONCJ 10 (CanLII)) respectively.

The restrictions imposed by the Supreme Court of Canada allowed the Kirpan to remain in the possession of the Sikh who was to be carrying it without changing the Kirpan itself. In this way, the restrictions were a reasonable violation of section 2a of the *Canadian Charter of Rights and Freedoms* (1982). The religious article was retained as the religion dictated while its actual use was limited in an effort to balance the rights of the public under section 7 of the *Canadian Charter of Rights and Freedoms* (1982).

Furthermore, the Supreme Court of Canada's decision to uphold the Superior Court of Quebec's conditions solidified the integral value of Canadian society that is multiculturalism (*Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 SCR 256, para. 71). The decision however, did not give an unlimited right to Sikhs in that the Kirpan was heavily

shielded and rendered useless in a confrontation. The Supreme Court of Canada concluded that the Kirpan was not a weapon and was tied to a sincerely held religious belief, such that its restriction would violate section 2a of the *Canadian Charter of Rights and Freedoms* (1982). However, the Supreme Court of Canada also recognized, under section 1 of the *Canadian Charter of Rights and Freedoms* (1982), that the restrictions on the religious freedom to bear the Kirpan; imposed by the Superior Court of Quebec, were reasonable and justified limits. Limits that were employed to minimally impair the right to religious freedom and also to ensure public safety as the Kirpan had the potential to pose a risk to public safety. The restrictions virtually removed that threat while preserving the religious right to bear the symbol (*Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 SCR 256).

This decision by the Supreme Court of Canada has spread farther than the Kirpan in the school environment and beyond the borders of Canada itself. The decision is not only accommodating of sections 2a and 7 of the *Canadian Charter of Rights and Freedoms* (1982), but also Article 18 of two separate United Nations documents: the *Universal Declaration of Human Rights* (1948), and the *International Covenant on Civil and Political Rights* (1966), both of which Canada has signed and ratified (Barnett, 2.1). These two United Nations documents parallel sections 2a and 7 of the *Canadian Charter of Rights and Freedoms* (1982) (refer to Appendix A for the respective texts of the United Nations documents). As such, the decision of the Supreme Court of Canada regarding the *Multani v. Commission scolaire Marguerite-Bourgeois* case can be seen as informative in the interpretation of both the *Canadian Charter of Rights and Freedoms* (1982) context and in the context of these international rights documents.

The *Multani v. Commission scolaire Marguerite-Bourgeois* case pitted against each other sections 2a and 7 of the *Canadian Charter of Rights and Freedoms* (1982) with regards to the

Kirpan and public safety. The Kirpan is a religious necessity for baptized Sikhs, but with the religious affiliation removed it becomes a simple weapon that is dangerous to public safety. Stipulations can be placed on the Kirpan, which entertain the concerns raised by section 7, and uphold the rights under section 2a of the *Canadian Charter of Rights and Freedoms* (1982) as well as Article 18 of the *Universal Declaration of Human Rights* (1948) and *International Convent on Civil and Political Rights* (1966). To Sikhs, it is a sacred duty not to use the Kirpan in aggression and only to defend another person in a life or death situation (Singh et al., 2016, p. 29). However, relying on simple reasonable faith to prevent the misuse of such articles of faith cannot be allowed, as the actions of an individual are unpredictable and may cause severe harm to another as well as to the notion of safety in society. In addition to the conditions placed on the Kirpan by the Supreme Court of Canada, a restriction should be added that the Kirpan be welded shut or riveted to its original sheath and that sheathed Kirpan be placed within the manifold security measures upheld by the Supreme Court of Canada to render the Kirpan completely useless in a confrontation. It is the duty of a Sikh to fight against aggression, oppression and to protect the weak. As the tenth Sikh Guru, Guru Gobind Singh Ji stated, “[i]f all other peaceful means failed to uproot tyranny then it was right to take up the sword” (Bedi, 1968, verse 22).

Appendix A

Universal Declaration of Human Rights: Article 18

[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance (*Universal Declaration of Human Rights: Article 18*).

International Covenant on Civil and Political Rights: Article 18

Article 18 – Sections 1 and 2

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice (*International Covenant on Civil and Political Rights: Article 18*).

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A REIMAGINED RESPONSE TO DRUG OFFENSES IN THE WESTERN WORLD

RYAN KINGHORN

LS 403 - SOCIO-LEGAL RESPONSES TO CRIME

The “War on Drugs” is the common expression used when explaining the prevailing response to drug offenses in Western society. From the mid-1900s to present-day, a tough on crime approach has been adopted as the primary response for dealing with non-violent illegal drug offenses. The United States initiated this war and has been the dominant actor in pursuing, advancing, and influencing policy toward the criminalization of various substances used around the world. As with most aspects of the United States’ economic and political culture, the country has had a significant effect on global drug policies, responses, and enforcement, especially in other western neoliberal societies like Canada and the UK. The United States has led the international movement for “tough on crime” drug policies, fuelled by the legacy of colonialism and in the interests of capitalist globalization (Reynolds, 2008). Recent drug abuse discourse has made it quite apparent that these traditional methods of dealing with the issues surrounding drugs has been rapidly feeding an increasingly oppressive, corrupt, and unproductive neo-liberal criminal justice system.

This paper will discuss the formation of the war on drugs, what has become of the originally “good intentioned” response, and identify the sources of this corrupt system. In examining the controlling, oppressive, and racialized legacy of colonialism, this paper will demonstrate that the tough on crime structure, regardless of its original intention, has evolved in the interest of a capitalist society constantly seeking tools for sustaining systematic control and inequality. In failing to achieve the goal of eradicating drug production, use, and addiction, the state has successfully achieved its consistent subconscious objective of racialization, control and power (Cummings, 2012). To recognize the racialization of drug abuse in the western world, this essay uses critical race theory as a mechanism of explanation and

connection to the war on drugs. The concluding section of the paper will describe and analyze a reimagined response to the war on drugs, one that responds to abuse socially and medically rather than criminally. By using the case of Portugal's 20th century drug reform, it will become clear that many countries, including Canada and the United States, have the moral responsibility to end this destructive war. With an increasing number of non-violent populations in prisons, lobbying toward prison privatization and proliferation (Cummings, 2012), continued politicization of "tough on crime" philosophies, and evolving systematic inequality, this topic is more important than ever in North America and needs to be addressed promptly. As the United States have taken the war on drugs to a level that is arguably irreparable, Canada, however, still has the opportunity to solve this issue by decriminalizing many of these banned substances in order to aid some of the underlying social problems surrounding drug abuse.

The War on Drugs

In considering these tough on crime responses to social and legal issues, it is not the responses to crimes such as murder, rape, assault, and robbery that most people are questioning, but the non-violent offenses, most of which are drug-related. With the majority of violent crimes decreasing in Western countries over the last few decades, it is fascinating to recognize the state's capacity to transform policies in order to continue nourishing capitalism and authority through punitive systems. The "prison industrial complex", a phrase discussed frequently in drug crime discourse, is the proliferation of punitive institutions due to their ability to increase profits for corporations and wealthy elites (Cummings, 2012). The war on drugs has normalized and legitimized the mass incarceration of citizens. This social atrocity is clearly exhibited in the most basic of crime statistics, with the most obvious one being the fact that the United States having roughly 5% of the world's population, but almost 25% of the world's prisoners (Cummings, 2012). With an astonishing proportion of prisoners in North American prison cells because of non-violent drug offenses, it is clear that the war on drugs is driving a very lucrative business. One of the major contributions to this corrupt system has been the implementation of private prisons, something that is predominately an American issue, but has gained attention throughout Canada in recent years. Prison

privatization is one of the most disturbing aspects of the prison-industrial complex, as it directly contributes to an asymmetrical capitalist system (Reynolds, 2008). The privatized prison effort is one that boosts industries and generates profit via the war on drugs, combining private economic spheres with public issues.

The Economization of Non-Economical Spheres

One of the major tragedies of neoliberal drug response policies has been its capacity to be manipulated by capitalist interests. As described by Wendy Browns in her book, *Undoing the Demos: Neoliberalism's Stealth Revolution*, the forces of neoliberalism have economized non-economical spheres of society (Brown, 2015). The criminal justice system in Western countries has initiated an interweaving of private business and government interests in connection with incarcerating citizens (Cummings, 2012). Violent crime rates have steadily decreased over the past several decades, yet incarceration rates have rapidly increased due the benefits it brings to corporations, enterprises, investors and wealthy elites looking to extract enormous profits from business ventures, regardless of ethically responsible considerations. Corporations and investors are engaged in building, equipping and operating prisons as well as employing prisoners for cheap work, similar to third world labor (Cummings, 2012). Neoliberalism has effectively converted the political character, meaning, and operation of democratic elements into economic ones controlled by private entities (Brown, 2015). Our legal system, founded on the core values of justice, the rule of law, and responsible government has become a system controlled by those with ulterior intentions. The recent evolution of the criminal justice system is examined in both David Garland and Loic Wacquant's articles commenting on the rapid shifts in crime responses in recent years. Similar to Brown's claim, Wacquant views the expansion of the penal sector through state-constructed legitimations "an essential element of its new anatomy in the age of economic neo-Darwinism" (Wacquant, 2008). Furthermore, Garland believes that these evolving practices in policing, prosecution, sentencing and penal sanctioning are in pursuit of new neoliberal objectives, which embody an economically focused interest (Garland, 2001). In addition to the subconscious objective of freeing up capitalist markets through crime policy and privatization, the war on drugs has also remained consistent to the racialized legacy of the Western colonial

state.

Critical Race Theory, The War on Drugs, and the Legacy of Colonialism

Systematic racism is deeply rooted in the war on drugs, pursuing the state's historically racist and oppressive character. Much of what can be understood in the analysis of drug policy and racism is through critical race theory. Critical race theory is the critique of Western society and culture regarding the intersectionality between race, law and power (Gomez, 2004). Critical race theory focuses on racial ideologies, inequalities and identity, all which have been influenced by the legacy of colonialism. In a Western society dominated by American neoliberalism, the legal system does not exist apart from race, and race is deeply rooted in the law (Gomez, 2014). Racialization is a product of society and as stated by Gomez, "racial classifications are historically contingent, the product of political contestation... and are dynamic rather than fixed or essential" (Gomez 2014, p. 457). Racial classifications and policies evolving from the colonial era have indeed changed, but are still deeply engrained in the subconscious of both the legal system as well as its participants. The legal system is grounded in ideologies, and like most ideologies, they evolve over time in order to serve elitist power relations. Drug policies have been framed as being formally neutral, just, and necessary, but it is important to understand how these ideological changes are continuing to assist social inequalities set in place to sustain the social hierarchies (Ewick 2004, 84). As Patricia Ewick explains in her piece, *Consciousness and Ideology*, the state is able to develop in its citizens a "false consciousness" through various formal strategies within the legal system that block the greater population from recognizing the system for how it really is (Ewick, 2004). Based on this argument, it is understood that just because the laws have changed to appear less racialized and more equal, does not mean that our legal system has lost its racist nature. This systematic phenomenon is clearly exhibited in the neoliberal war on drugs.

The War on Drugs and Racialized Communities

The primary point of concern with the war on drugs has been its unproductive disservice to democratic societies. The war on drugs has failed to solve drug related issues and has torn communities apart along the way. As noted previously, the war on drugs is greatly racialized and lurks on marginalized members of society. As discussed by Mumia Abu-Jamal and Johanna Fernández in their controversial article about prison abolition, neoliberal governments responded to the 20th century civil rights movement with a frenzied reaction to equal rights. With minority rights granted and equality progressed, the ruling class lost a great deal of power and control. With this loss of power, the state turned to incarceration to gain back their dominant colonial position. It was at that moment the state recognized the potential for drug criminalization to aid their crusade against the marginalized. Drugs were (and still are) very familiar to low-income and minority communities. Moreover, these communities have high vulnerability and little influence on how their country's criminal justice system is to be operated. In 1971, United States President Richard Nixon named drug abuse "public enemy number one", and so began the domino effect of drug policy after drug policy, all trumping the other with tough on crime policies (Cummings, 2012).

The rationale of the war on drugs has recklessly assumed that there is a direct correlation between drug addiction and crime. States around the world soon followed the United States' model and harshly criminalized drug abuse. This led to a rapid change in criminal justice systems and led to a hyper-incarceration of marginalized populations (Abu-Jamal & Fernández, 2014). The 20th century war on drugs became primarily a way to incarcerate non-violent drug offenders from disadvantaged minority populations. Irregular law enforcement, military-style responses, and vicious stereotypes quickly evolved and became systematic norms, triggering a wide acceptance of increased incarceration rates, particularly in African-American and Latino populations (Cummings, 2012).

As of 2013, there were almost half-a-million Americans in prison for drug offenses (Odeh, 2013). Of this population, roughly 65% were of African-American or Latino decent (Cummings, 2012). Furthermore, the war on drugs has had a ruthless effect on female imprisonment. Forty thousand American

female prisoners were incarcerated for drug-related offences in 1980, and by 2003 that number increased to over four hundred thousand (Mauer, 2003). As claimed by Marylee Reynolds, the war on drugs directly triggered the 20th century explosion of female imprisonment in neoliberal societies (Reynolds, 2008). In the year 1980, roughly 4% of all American prisoners were female, and by 2006 the war on drugs had helped this number grow to over 7% (Reynolds, 2008). Consistent with male prisoner statistics, women of colour became disproportionately overrepresented in drug crimes (Reynolds, 2008). As some of these statistics are over a decade old, it can be assumed that these numbers are just as accurate today, as there has been little done to tackle the inequalities and racialization grounded in the war on drugs.

The racialization of disadvantaged minorities through the war on drugs has had a negative effect on individuals, families, and entire communities. Since the late 20th century, racialized communities struck with poverty and violence have been further brutalized by the war on drugs. The response to drug crimes has led to mass incarceration, structural poverty, systematic asymmetry, economic burdens on communities, and a lack of familial structure for hundreds of thousands of people (Cummings, 2012). Many people assume that the majority of injustices surrounding the war on drugs are mainly American issues, and while the situation has become quite extreme in the United States, it is still very relevant in Canadian society. For example, in 2011, black prisoners in Canada “accounted for 9% of the federal prison population” even though the black population made up only 2.5% of the overall Canadian populace (Wortley & Owusu-Bempah, 2011). Reynolds accurately describes the United States’ ability to expand their tough on crime drug ideologies globally through their international hegemonic status and authority (Reynolds, 2008). The global spread of the war on drugs has influenced both Canadian drug policies as well as the racialized discrimination involved in the war. Akwatu Khenti notes that the war on drugs has intensified the “systemic historical, political, social and economic process whereby black men who have long been stereotyped as criminals are now targeted as the enemy... regardless of the involvement of other racial communities” (Khenti, 2013). Racial profiling has become the reality for black males in Canada, due to the war on drugs’ social construct of the black male ganger and drug dealer (Cummings, 2012). Thousands of social minorities

are discriminated against and abused daily in the United States, Canada, and in other Western societies due to the negative connotations that have evolved as a result of this war and the state's colonial nature.

Drug Abuse in the 21st Century

Like alcohol prohibition in the early 1900s, the prohibition of drugs has been completely ineffective in its objectives. By treating drug abuse as a criminal matter, the war on drugs has completely missed the point on how to deal with such an issue. The United Nations has estimated that the global drug trade is worth more than \$320 billion, with over 200 million people using “illegal” drugs around the world (United Nations, 2012). It is not a debate on whether our strict criminalization of drugs and tough punishment of drug offenders has even slightly eradicated the drug industry. Making drugs illegal is not stopping the production, use, and addiction to drugs in Canada, the United States, or around the world. As a matter of fact, the United States, with some of the harshest drug laws in the world, is also the world's leader in illegal drug use (Warner, 2008). The debate on drug laws is not one that is trying to undermine the harmful social, mental, and physical effects that drugs can have on its consumers. It is undeniable that many drugs have serious and even detrimental effects on their consumers. The goals of the war on drugs and the goals of drug decriminalization are the same: protecting our kids, educating society, protecting public safety, repairing systematic inequalities, and preventing and treating drug abuse and addiction (Branson, 2012). In addition to the irreparable social damages the war on drugs has done, this response to drugs has evidently driven the industry into a dark and underground trade, led by cartels, gangs, and other dangerous individuals and groups. These are not the people we want to have access to \$300+ billion. If any of this is going to change, society needs to ignore the capitalist engine driving the oppressive legal subconscious and understand that illegal drugs are not a criminal issue, but a social and medical issue that can be resolved through more rational methods and responses.

A Reimagined Response to Drug Offenses

Although some scholars make persuasive claims in support of absolute prison abolishment, realistically it is not a rational or feasible response to most crimes. The prison system has many legitimate and just qualities that benefit the greater good of society. That being said, non-violent drug offenders do not belong in the same place as violent or dangerous offenders. What can be taken from Mumia Abu-Jamal and Johanna Fernández's ideas and applied to reimagining the war on drugs however is their call for community revitalization programs and dynamic rehabilitation becoming mainstream (Mumia Abu-Jamal & Johanna Fernández, 2014). The war on drugs has devastated far too many lives in the United States, Canada, and around the world. Social priorities need to shift from economic ones motivated by wealth, to social ones motivated by fairness. As examined by many academics and researchers, it is going to be a near-impossible task to successfully tackle the systematic inequalities induced by neoliberalism (Brown, 2015). Moreover, there are many additional social inequalities progressing through neoliberalism that need to be dealt with above and beyond the war on drugs. The war on drugs is just one of these issues, but it is in fact an issue that appears to have a more realistic chance at being reimagined and revolutionized than other systematic injustices.

The reimagined alternative to the dominant legal response to the war on drugs is not a simple one. The key element of the drug revolution is the social reconstruction of illegal drug abuse. A systematic and social reframing of drug abuse from a criminal problem to a social and/or medical problem is necessary. Instead of treating drug users and addicts as moral delinquents, the responses need to be developed with a better understanding of the social and medical roots related to drug abuse. Although Canada has taken many steps to reform drug responses, as examined in *The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court* (Moore, 2011), there are still many significant steps the nation could be taking to end the damaging war on drugs. Fortunately, Canada can learn by example by adopting some of the various alternatives that have been implemented by other Western countries, recognizing the unproductive nature of the war as well as its damaging social effects.

Portugal is the prime example of how neoliberal countries ought to deal with the issue of drug abuse. In 2001, Portugal adopted laws and procedures that almost completely eliminate jail time for most drug offenses (Drug Policy Alliance, 2015). While completely legalizing some drugs violates United Nations policies, Portugal has decided to simply decriminalize most drugs. Non-violent individuals caught with a relatively small amount of illegal drugs such as marijuana, cocaine, or heroin receive a misdemeanour charge similar to a parking ticket (Hollersen, 2013). As it is evident in countries like Canada and the United States that the criminalization of drugs is doing a disservice to society, the same was identified in Portugal. At the start of the new millennium, Portugal decided to “pave a new path” by decriminalizing drugs of all kinds in order to improve national public safety and health (Hollersen, 2013). The Portuguese government consulted crime and drug statistics and accepted the fact that that the issue of drug abuse was to be framed as a public health one, not a criminal one. Portugal now deems drug abusers as being sick, rather than delinquent, and has thus stopped treating them as criminals. That being said, drugs are still illegal in Portugal. When an individual is caught with a drug possession lower than the legal limit, they are required to attend the “warning commission on drug addiction” where a panel consisting of three members (usually a lawyer or a judge, a doctor, and a psychologist) have three options: recommend treatment, levy a small fine, or do nothing. Counseling is in fact the most common approach (Cummings, 2012). On the other hand, when an individual is caught with a drug possession higher than the legal limit, they are presumed to be a drug dealer and are summoned to criminal court to be dealt with in accordance to mainstream drug charges. (Hollersen, 2013).

As stated by João Goulão, the Portuguese drug czar and key influencer of these new policies, “our most important duty is to invite people to participate in rehab”...“Decriminalization is pointless without being accompanied by prevention programs, drug clinics and social work conducted directly on the streets” (Hollersen, 2013). That is exactly the main objective in ending the war on drugs. Having a healthier, more equal, and less mistreated population should be the highest priority of a truly responsible government. As

it is noted below, refusing to surrender to the forces of capitalism and abolishing the war on drugs can have significant benefits that clearly outweigh the costs.

In 2015, almost a decade and a half after the Portuguese drug reform, the Drug Policy Alliance, a non-profit organization dedicated to ending the global war on drugs, developed a report on the effects such policy changes have had on Portuguese society. First, their research found that there is no major increase in the use of drugs among the population. This should not come as a surprise due to the fact that drugs are as accessible as they have ever been around the world and people will continue to do drugs, regardless of whether they are legal. Secondly, the researchers found the rate of Portuguese minors abusing drugs to be decreasing, which is a very positive social change. Third, there has been a substantial decrease in the amount of citizens arrested and incarcerated for drugs. This is one of the most problematic elements of the reform for North American countries, as it directly competes with the neoliberal prison-industrial complex mentioned earlier. Unfortunately, the reality in countries such as Canada and the United States is that politicians are highly influenced by corporate profiteers, the ones whom are profiting greatly from the war on drugs and mass incarceration (Cummings, 2012). Because of this capitalist corruption, it will be much harder in countries like these to mobilize, lobby, and influence effective drug reform. Nevertheless, other remarkable findings from the Portugal Drug Policy Alliance study are that there has been less drug-induced deaths, more citizens seeking rehabilitation, lower rates of new HIV infections, and a significant amount of money saved by the state. The decriminalization of drugs has the ability to transfer the tax dollars from law enforcement and courtrooms to rehabilitation and education.

These are all very critical social enhancements that could easily be mirrored in a country such as Canada. With more liberal ideologies, welfare objectives, and much less corporate influence than the neighboring U.S., Canada could easily be the next western society to end the war on drugs. Despite the forces of neoliberalism, there is still hope in both Canada and the United States. In Canada, newly elected Prime Minister Justin Trudeau has been very open about his views on drug decriminalization and increasing social assistance programs such as rehabilitation (Glenny, 2015). On the American side, Democratic

candidate Bernie Sanders has been gaining a great deal of popularity and publicity due to his revolutionary visions of what the United States can be by adopting socialist values. As a self-proclaimed socialist, Sanders believes that the United States needs a bold change in the criminal justice system and a productive first step would be to “start treating prisoners as human beings, not profiting from their incarceration (Bernie 2016, 2015).

The war on drugs has done a lasting disservice to western society. Fuelled by the colonial legacy of hatred and greed, this war has economized non-economical social spheres, further racialized populations, destroyed communities, and hyper-incarcerated innocent victims of a mental medical illness. With Portugal being a prime example of how a government should respect its citizens and care for their wellbeing, the war on drugs must be ended in Canada and around the world immediately.

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*PROSECUTING GENDERED VIOLENCE IN INTERNATIONAL
LAW: THE PARADOX OF WARTIME VIOLENCE*

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LS 401 - LAW, CULTURE AND RIGHTS

Prominent legal feminists, like Catherine MacKinnon, have promoted an understanding of rape, when it occurs during time of war and is targeted towards women, as constituting the crime of genocide. Thus an understanding of rape as genocide has been used by Mackinnon and others to call for intervention and recognition (MacKinnon, 1994) (Mackinnon C., 2006) Therefore, one of the most critical shifts in international law and human rights policy is the recognition that sexual violence is not merely incidental to war, but in fact an integral aspect of the conflict. For instance, the conceptualization of rape as genocide, and as a weapon of war, has taken on legal significance. At the International Criminal Justice tribunals in Rwanda and Yugoslavia rape has been prosecuted as a crime against humanity and genocide (Engle, 2007). Thus, the rise of international criminal law and its subsequent tribunals have been revered as effective mechanisms to prosecuting gendered acts of sexual violence that arise in the context of war, thus bringing attention to its victims (Engle, 2007). In this essay, through the judgments of the International Criminal Justice's (ICJ), I examine how its tribunals reflect an understanding of rape as an instrument of the genocide. I argue that the discourse of 'rape as a weapon of war', and the instrumentalization of sexual violence as being natural in an ethnic conflict, paradoxically makes the victims of violence largely invisible. In a sense, international law has reductionist logic in terms of what can be understood about the form of impact on the victims of gendered sexual violence, and its role in the

genocide. I demonstrate how ‘rape as a weapon of war’ renders both male and female victims of violence in war invisible.

When prosecuting gendered violence, the tribunal’s choice of recalling the “facts” of the account of sexual violence, of the victims, becomes about locating the violence as occurring in the realm of the larger inter-ethnic conflict. In this dominant narrative, of inter-ethnic conflict, men from one ethnic group are understood as subjecting women from another ethnic group to sexual abuse. The Rwandan genocide occurred over a period of three months, commencing on 6th April 1994, when the plane carrying Rwandan President Habyarimana was shot down, as it approached Kigali. The early events leading to the genocide began in 1990 when the Rwanda Patriotic Force (RPF), an army of expatriate Rwandans primarily of the Tutsi but also of the Hutu group, occupied Rwanda from Uganda. The consequential civil war continued throughout the early 1990s and became a significant “backdrop to the genocide” (Buss 147). The Rwandan genocide finished in July 1994 when government forces left the country and coerced more than a million Rwandan civilians to depart with them (Buss, 2009). In the hundred days of the genocide, an estimated 800,000 Rwandans, primarily Tutsi were massacred.

The United Nations Security Council in November 1994 created The International Criminal Tribunal of Rwanda, which was similar in function to the International Criminal Tribunal for Yugoslavia (ICTY). The tribunal was established Arusha, Tanzania to hold those individuals accountable who had organized and participated in the genocide, and thus were liable for engaging in a crime against humanity. The Rwandan Tribunal discovered that sexual violence was prevalent throughout Rwanda and “were committed with the specific intent to destroy, in whole or in part, a particular group” (Buss, 2009, p. 151), primarily the Tutsi ethnic group. Furthermore, the tribunal stated the violence led to bodily and mental harm of women of Tutsi descent, their families

and the Tutsi community as a whole. Hence rape was an essential tactic employed in this civil conflict and was targeted at Tutsi women, to ensure destruction of the Tutsi group (Buss, 2009)

Significantly then, the International Criminal Tribunal for Rwanda (ICTR) as a post-conflict mechanism can be seen as a site that utilizes a reductionist narrative for explaining women's experiences of armed conflict. In this narrative, sexual violence is understood as occurring because 'Hutu men who raped Tutsi women [did so] as a means to destroy the Tutsi community' (Buss 160).

Hence, as seen in the Rwanda Tribunal, at post-conflict trials the prosecution of rape becomes inherently connected to the larger context of violence: that is *rape as a crime against humanity or rape as genocide*. In other words, sexual assault in armed conflict, then, to be prosecuted under international law needs to be reflected as having occurred as "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Buss, 2009, p. 150). Rape as genocide requires that the act of rape was "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (Buss, p. 150). Under both crimes, rape is "a crime against a collectivity" (Buss, p. 150). Hence, while rape as an offence in international law is recognized as constituting an "act of sexual violence against an individual", it largely becomes constructed as harm against humanity through the prevailing 'rape as genocide' discourse; here the physical harm is viewed as targeting a community (Buss, 2009, p. 150). In other words, the victim of sexual violence is re-categorized as a particular victim whose suffering denotes a communal narrative of pain (Buss, 2009).

For instance, the International Criminal Tribunal of Rwanda (ICTR) found Mikaeli Muhimana who was a counsellor in Kibuye, western Rwanda, guilty of partaking in and abetting

rape as a crime against humanity. The Tribunal declared in its decision that the sexual violence occurred subsequently as a “discriminatory, widespread attack” against “a group of Tutsi civilians in Gishyita Commune, between the months of April and June 1994” (Buss, p. 150). Muhimana was convicted for having engaged in “acts of rape against women he believed were Tutsi” (Buss, 2009, p. 150). However, it is irrelevant whether the women Muhimana raped were actually Tutsi, what matters is that he engaged in sexual violence against them knowing the violence constituted a “widespread and systematic attack” (Buss, 2009, p. 150) on an identifiable ethnic group i.e. the Tutsi community. Hence the Tribunal found Muhimana “criminally liable for committing and abetting the rapes charged, as part of a widespread and systematic attack against a civilian population”, that is, a crime against humanity (Buss, p. 150). Furthermore, in the much praised first decision in *Akayesu*, the Tribunal found that rapes were widespread, the accused knew of and aided and abetted in the rapes, and hence they “were committed with the specific intent to destroy, in whole or in part, a particular group”, namely the Tutsi. The Tribunal held that the rapes led to the “physical and psychological destruction of Tutsi women, their families and their communities” (Buss, 2009, p. 151). The destruction of the Tutsi community was seen as occurring specifically through the sexual victimization of the Tutsi women (Buss, 2009).

Therefore, the Tribunal held that rape was used to commit the crime of genocide. The Rwanda Tribunal’s recognition that rape in the Rwandan Genocide “was a crime against humanity and/or an integral part of the genocide” resonates with several feminist theorists who reflect upon rape and other forms of wartime sexual violence “as instrumental to the larger conflict” (Buss, 2009, p. 151). Locating rape at the centre of the conflict—as an integral element of the violence—is an important effort which allows us to recognize that violence is indeed gendered in nature. However, without minimizing the impact of communal suffering as a result of sexual violence, it

is imperative to examine how this inter-ethnic narrative of sexual violence conveys “a limited conception of harm and the complex dimensions of violence” (Buss, 2009, p. 151) rendering invisible the various conditions that expose women to violence, and the distinct ways they take to negotiate, resist and cope with sexual abuse and death.

Feminist scholarship and activism have effectively reflected the manner in which rape narratives have served as propaganda for constructing shifting conceptions of national self-identity. More significantly, feminists and legal feminists have long been aware of the impact of calling particular situation genocide-or at least ethnic cleansing or a mass human rights violation. Invoking such language allowed feminists, for instance Catherine MacKinnon, Susan Brownmiller and Beverly Allen, to draw attention to rape as part of the overall violence, targeting a community, and as a result signaled that international legal recognition and military intervention needed to be implemented to prosecute violations of women’s rights matter (MacKinnon, 1994) (Brownmiller, 1975) (Allen, 1996). Although these feminists were not primarily responsible for these interventions, they did play a crucial influence in advocating intervention for wartime sexual violence against women and thus for rape as genocide discourse. For instance, discussions regarding violence in Darfur showed how rape began to be spoken alongside and rather indistinctly from genocide to advocate for international criminal law intervention. The more rape was viewed as genocidal, the more those calling for international criminal law intervention invoked rape as a justification. However, speaking and framing of rape in this way frequently shifts the focus away from the specific harm to women as a gender and instead serves to reflect the collective harm experienced in the Inter-ethnic conflict. (Engle, 2007). Despite the many visibilities of wartime sexual violence, violence against women in war continues to be generally invisible “as a matter of political and legal urgency” (Buss, 2009, p. 154). Below, I demonstrate there is a relationship

between rape that becomes hyper- visible, and “rendered paradigmatic’, and rape and sexual violence that consequently becomes invisible (Buss, 2009, p. 154).

According to sociologist Avery Gordon, hyper-visibility is the phenomena that becomes the “persistent alibi for the mechanisms that render one *un-visible*” (Gordon, 1997). Hence hyper-visibility then acts as a smokescreen to obscure the very existence of un-visibility. Clearly, discussing wartime sexual violence as being hyper-visible might instantly seem controversial and rather peculiar, especially when given the fact the Rwanda Tribunal’s record on sexual violence reflects the strikingly low conviction rate for rape or sexual violence (Buss, 2009). While international law’s invocation of rape as a weapon for genocide and as a signifier of atrocity is well intended, such an emphasis is problematic as it is a ‘homogenising’ tendency to construct sexual violence as inevitable in war. Hence this homogenisation obscures the individual accounts of rape victims. The result is that while violence against women and gender inequality is made visible and treated seriously within international law, it is a partial visibility. Ultimately, women appear and function in these decisions to reinforce “borders of group identity” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007, p. 13). For instance, the *Furundzija* (1995) case was significant for being the “first war crimes prosecution in which rape and sexual assault was the single charge” (Campbell, 2002, p. 150), and thus provided the first definition of the elements of the crime of rape in international humanitarian law, reflecting how a victim’s experience of sexual violence can only find space if it is recalled in a way to reinforce the community-conflict narrative recognized by law (Campbell, 2002). The judgment in *Furundzija* affirmed that rape in armed conflict is a public wrong. Of course, normatively speaking, the acknowledgment of rape as not a crime against an individual, but rather a crime against humanity and hence a public wrong occurred because it constituted a violation “of

universally accepted norms of international law” (Campbell, 2002, p. 155). This was essential in the *Furundzija* case because without this recognition the prosecution could not take place and there could no visibility of sexual assault in law.

However, it is important to observe the significant distinction between the social space in which the individual experience of violence occurs “and the contemporary space in which it is (or is not) recalled” (Campbell, 2002, p. 155). Hence, victims of wartime sexual violence, in order to have their experiences represented and recognized at trial, are expected to speak of the violence in a way that ‘weaves’ fact into a community’s identity. In other words, a victim’s individual memory becomes transformed in international law as “collective memory” (Campbell, 2002, p. 155). Consequently, “collective memory survives and individual memory can find a place [, otherwise] it vanishes from collective memory and the possibility for individual memory is severely strained” (Campbell, 2002, p. 155).

The individual narratives of victims become invisible partially because of the way crimes are defined and categorized in international law. Hence, the categorisation of war crimes under humanitarian law does not merely reflect and recognise the acts as having criminal intent, it offers a ‘grammar of pain’ (Buss, 2009, p. 155), i.e. a distinct and uniform language by which the tribunal can identify, and witnesses are permitted to testify to, their stories of violence. Consequently, this categorisation of rape as a crime against humanity and as genocide, and the grammar of pain certain determine which types of narratives are recognized in court and which are excluded, and thus also which subjects are permitted to speak of the harms they have incurred (Buss, 2009).

In international law the communal narratives triumph over the individual narrative and memory of the victim becomes possible through the grammar of pain. This grammar of pain is

inherently gendered and consequently provides rules and structures to assign people to positions within a script of violence. Through this script of violence, rape and sexual violence comes to be constructed as a material aspect of women's lives and thus are seen as being inevitable. The victimized female subject and her violator are situated in this script of violence and they subsequently emerge with their identities reconstructed to conform to the communal narrative of inter-ethnic conflict. Hence, in the script of violence created by the grammar of pain of international law, gender inequality becomes neutralized and women are then subjects who are 'inherently rapeable' (Marcus, 1992, p. 388). Thus, sexual violence is constructed as an instrument that 'one side' picks up and uses against the 'other side'. In the scripted communal narrative, rape follows from the very existence of conflicts understood as occurring between two polarised 'sides'. The prominence of the 'grammar of pain' and the violence script in international criminal law is reflected in the Rwandan Tribunal recognition of rape as an instrument of genocide. In this context, identities-males and females, Hutu and Tutsi groups- are placed into particular positions within the violent script and thus reconstructed through fixed and stable categories of victim and aggressor (Buss, 2009).

The Rwandan Tribunal's narrative of the rape script where Hutu men raped Tutsi women as a way to destroy the Tutsi community, while not inaccurate, provides an incomplete account of the genocide and sexual violence. In the following discussion I reflect how difficulty arises in accepting this narrative when we begin to examine who are seen as victims and who aren't, how violence against women is rooted in pre-conflict sexual and gender relations, and the resistance victims of wartime sexual violence demonstrate (Buss, 2009). The judgment in the *Gacumbitsi* case depicts some of the dynamics involved in seeing wartime sexual violence through the communal narrative that focuses on the ethnic dimensions of a conflict. The former may of

Rusumo in Eastern Rwanda Sylvestre Gacumbitsi was convicted for his contribution in orchestrating and participating in murder, rape, and extermination in the Rusumo commune during April, May and June 1994. Hence he was tried by the Rwandan Tribunal for genocide and crimes against humanity (Buss, 2007). This case reflects the reductionist logic inherent in international law's construction of wartime sexual violence. The logic is firstly reductionist in nature due to its preoccupation of fixed or stable categories of victim and aggressor. More significantly, because there is a greater distortion at work in judgments like *Gacumbitsi* as they are partially explained by the overemphasis on ethnic affiliation as the dominant narrative within which the events in Rwanda are understood, which silences the individual narrative and memory of the victim.

Individual Responsibility in International Law

It is the commonly held belief that international criminal law, with its emphasis on individual criminal responsibility, is the suitable solution and mechanism to provide justice for instances of mass violence. Hence, when international criminal trials take on instances of mass violence, they are first and foremost a mechanism for establishing *individual criminal responsibility* for that violence (more precisely, they determine responsibility for specific acts or omissions defined as constituting war crimes). In this context, one or more individuals are apprehended for violating principles of international criminal law. The post-conflict criminal trial represents an “effort to fix individual responsibility for history’s violent march” (Krever, 2013). Hence, the focus on individual criminal responsibility is widely understood not as a limitation of international criminal law, but as a key strength. However, as I reflect below, when contextualized, the doctrine of individual criminal responsibility contributes to rendering violence invisible (Krever, 2013, p. 712).

Previously, perpetrators of mass violence could use the notion of state sovereignty as a justification for their actions. Sovereignty as a legal concept allowed state leaders, under the principle of self-determination to govern their state in a manner they thought best, without any international or political interference. However, such sovereignty of states has become *qualified* with the emergence of the “the new universalized rule of law” (Krever, 2013, p. 712) which is meant to regulate the actions of those state leaders who use their power to violate established international norms, regardless of whether or not they have chosen to adhere to such norms by formally becoming a member to an international law treaty. Thus this “universalized rule of law” represents ““a moral conquest over the sovereign indifference of cold leviathans”” (Krever, 2013, p. 712)

In the *Gacumbitsi* case, the Tribunal considered charges relating both to the defendant's role as an authority figure organizing murder, rape, and genocide, and his own role in individual acts of rape and murder. A critical aspect of the evidence was a speech the defendant gave on 17 April 1994, in which he encouraged “the men of Rusumo to have sex with Tutsi ‘girls’ and, should the women refuse, to kill them ‘in an atrocious manner’” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, p. 13). There were two distinct difficulties that arose for the Tribunal in *Gacumbitsi* that need to be reflected upon. The first difficulty concerned his role for the rapes that occurred around the time of his speech; however, the Tribunal in Rwanda was unable to find complete evidence to convict him on the basis of such charges. These charges involved the rapes of witnesses ‘TAO’, ‘TAS’, ‘TAP’ and ‘TAP's mother’ (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007, p. 13). The defendant Gacumbitsi was eventually acquitted for the said charges. He was found not responsible for the rape of these witnesses, because there was a lack of evidence

linking his speech to the sexual violence; the prosecution could not establish a co-relation between the defendant's specific acts of encouragement on 17th April 1994 and the rapes of these women, all of which occurred near mid-April” (Buss, 2007). However, the tribunal did find that rapes of other women and girls did occur due to his speech as they occurred immediately after his “utterances” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007, p. 14).

The second difficulty, which is also difficult to reconcile, in this decision concerns one of above mentioned witness; ‘TAS’ who was actually a Hutu woman but was married to a Tutsi man. In her testimony she reported she was raped by two Hutu men while attempting to find a place to hide. One of her attackers stated that the defendant had given them orders to engage in sexual violence only against Tutsi women and girls, and that nothing had been decided regarding Hutu women married to Tutsi men. Yet these two men raped ‘TAS’ anyway. The ethnicity of ‘TAS’ becomes important here. Given she was of Hutu descent and not officially part of the Tutsi population; this challenged and disrupted the static and stable categories of rape that ‘one side’ picks up to attack another (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007).

In order to prove a crime against humanity, the prosecutor in *Gacumbitisi* was required not only provide of evidence of the rape, but also that the rape of ‘TAS’ occurred as a result of an attack against the Tutsi community, even despite the fact it was known to the tribunal she was of the Hutu ethnic group (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007). To counter this challenge to the inter-ethnic conflict narrative, fixated on collective memory, the tribunal ruled that “through the woman, it was her husband, a Tutsi civilian, who was the target” (Buss, *The Curious Visibility of Wartime Rape: Gender and*

Ethnicity in International Criminal Law, 2007, p. 14). Thus, in a sense, to prevent her unique narrative from disrupting the dominant narrative present in the rape as genocide discourse, her rape was not recognized in the manner feminist sociologists have traditionally understood and made clear its nature i.e. a crime of power by men to dominate women and thus a crime embodying patriarchy. In such a conceptualization of rape the victim would be *allowed* to remain the subject of the abuse, however in *Gacumbitsi* ‘TAS’s’ was reconstructed “as a crime not against her person, but against her husband’s” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007, p. 14).

Essentially, the Tribunal held that the rapes of witness TAS and the three other victims did occur, but were part of a widespread attack meant to destroy the Tutsi community. It ruled that *Gacumbitsi* was not “specifically responsible for causing these rapes” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007, p. 14). The decision in this case reflects the complexities that arise when wartime sexual violence is only examined through the inter-ethnic conflict narrative. Thus, while sexual violence was discussed by the Tribunal, systemic inequality of women remains invisible. This is because the doctrine of individual criminal responsibility prevents International Criminal law from recognizing the victimization of women due to its preoccupation with fixed categories of specific crimes and individual criminal responsibility (Krever, 2013). Clearly such a reductive understanding of violence is predictable within the world of the law, as it is primarily concerned with categories (Buss, 2007).

Besides calling upon Hutu men to rape Tutsi girls, *Gacumbitsi* went further to specify that young Hutu men should be encouraged to rape “girls [who] had refused to marry [them]” (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*,

2007, p. 16). While the tribunal in its decision in *Gacumbitsi* does recount the evidence of several raped women and girls whose attackers specifically stated that the rapes were motivated by revenge for the women's refusal to marry the men, the tribunal's decision fails to address and acknowledge marriage and rape as a type of revenge against Tutsi women. Such a discussion of what marriage meant for both the victims and aggressors serves as a crucial insight into the sexual economy in Rwanda which contributed to the conditions for the genocide that took place. But the tribunal's focus on framing the violence through the lens of ethnic conflict allows the existence of this sexual economy to go largely unnoticed, and hence rendered invisible (Buss, 2007).

In the sexual economy that paralleled the ethnic stratification in Rwanda, Tutsi women, at least symbolically, were idolized and highly sexualized. Tutsi women constituted social capital for Hutu men (Buss, 2007). Therefore, Tutsi women's sexuality was central in the political propaganda used to build up and commence the Rwandan genocide. Constructed images of dishonest and cunning Tutsi women were used to belittle the Tutsi group and subsequently to convince the Hutu group that the Tutsi were on the verge of conquering and killing them (Buss, 2007). Furthermore, the Rwandan tribunal's decisions are full of descriptions about the extreme gendered violence and torture that took place primarily against Tutsi women during the genocide. However, it is important to discuss that Hutu women were also raped and not merely because of their allegiance or sympathy with the Tutsi population or because they had married Tutsi men (Buss, 2007). Legal Studies scholar Doris E. Buss states that sexual violence against women in Rwanda needs to be understood, to an extent, in the context of men gaining ownership of property and assets (Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 2007). Buss reflects that in Rwanda rapes were constructed as "marriages"; one of the key purposes of this was to gain access to assets that women possessed, including land and

farming. This violence against women, under the veneer of “marriages” and other coercions to gain access to women’s assets, continued to occur after the Rwandan genocide had ended. However, there is little or no space at all in the inter-ethnic narrative, where one side picks up ‘rape as a weapon’ to attack the other side, to include a recognition of the role of the sexual and gendered economy that facilitated and marked the genocide (Buss, 2009). While the Rwanda Tribunals’ decisions recognize, to an extent, that the political propaganda leading up to the genocide exposed Tutsi women to particular violence, there is a lack of examination of the various ways in which gender complicated and intersected with ethnicity to create the circumstances under which particular forms of violence were enacted (Buss, 2009).

Besides a lack of understanding of the sexual economy that was crucial in the build-up to the genocide, it is also important to examine how the resistance of victims in wartime violence becomes downplayed in the inter-ethnic conflict narrative and the discourse of rape as a weapon of war. The identities of victims of violence, and the distinct ways in which they negotiate with and resist violence during war, is reflected in the story of Beatrice, a genocide survivor, who narrated her experience to journalist Lindsey Hilsum (Pottier, 2002). Beatrice and her daughter and son, aged 10 and 6, were Tutsi, living in the Muslim area of Kigali, since they had recently converted to Islam. Beatrice’s parents were from Zaire, the current Democratic Republic of the Congo (DRC) and hence she had a Zairean identity card. Along with a neighbour, a Tutsi woman named Laetitia (a pseudonym) and her baby, Beatrice and her children fled Kigali in the early days of the genocide. As they made their way to Rwanda’s south-western border, they were repeatedly harassed at check points and made to show their identity cards. To protect her, Beatrice altered Laetitia’s card to identify her as Hutu, but Laetitia was still raped at check stops. Because Beatrice had a Zairean identity card she was often let go and not subjected to violence, but nonetheless had

to pay substantial sums of bribery money from the finances she had been allocated by her family. However, the neighbour Laetitia and her child were not that fortunate. And while Beatrice attempted to protect Laetitia from violence through the funds she possessed, Laetitia was repeatedly raped. Furthermore, Beatrice's daughter was extremely vulnerable at check points because she apparently had features that made her look like she was of Tutsi descent. As a result, Beatrice asked her friend Mamma Naima to take the son and daughter as her own. Thus, Beatrice parted company with her children and joined them later again in Cyangugu (Pottier, 2002).

Beatrice and her children survived the Rwandan genocide and the interviews she gave were done from Bujumbura, Burundi. Beatrice's story demonstrates the limitation in talking about wartime sexual gendered violence through the lens of the grammar of pain in which sexual violence (as a legally recognized harm) occurs from the very existence of conflicts taking place between two polarized sides. In this sense, we can understand how Beatrice's narrative of how she negotiated the risk of violence and being violated disrupts the construction of the violence script utilized in international law to frame ethnic identities as always being fixed and stable. Beatrice's story emphasizes the significance of various other aspects of social position that influence, together with ethnic identity, an individual's vulnerability to violence (Pottier, 2002).

Beatrice's narrative clearly demonstrates that individuals targeted for attack are likely to have been victimized for multiple reasons, rather than merely their ethnic affiliation. Hence, Beatrice's experience of the genocide was determined by several factors, including who she was and what resources she had available. Because she was recognized as being Zairean, she was not limited to the Tutsi category and this gave her a degree of protection from violence. Furthermore, when she fled and was stopped at checkpoints, she belonged to a Muslim community in a predominantly Christian country. She was resourceful in terms of her finances and friends, and she

was helped by Hutu friends and strangers. While at the time she managed to resist the violence, as evident from her narrative, however she also suffered greatly and died in 1998 (Pottier, 2002). However, what I have meant to emphasise in my discussion above is that Beatrice's narrative is an example of a victim of wartime violence who cannot simply be categorized into the stable and unchanging category of the "Tutsi" victimized subject of the Rwandan tribunal. Her Zairean nationality was more significant in her interaction with some of her potential attackers. Furthermore, another aspect of her identity was being Muslim which allowed her to form and maintain vital links with friends and neighbours that were crucial to her survival and the steps she took to minimize the risk to herself and her children (Pottier, 2002).

The purpose of this preceding discussion has been to demonstrate that international law's overt focus on the instrumentalization of rape, or as weapon during wartime that one side utilizes to eliminate and conquer the other, renders the narratives of women invisible. While the persistent recognition of rape as an instrument of the genocide may rightfully so act as signifier of atrocity, it simultaneously works to obscure the individual accounts of sexual violence as well as who is considered to fit the victim category. In this part of my essay, I discuss gendered assumptions regarding wartime violence in international law.

Sexual violence in wartime has been typically understood as an issue affecting women. Even those authors who admit that men are also raped often discuss it in a manner that minimizes its importance: "Yes, men do get raped, but it is usually by other men and it happens less frequently than is the case for women," claims Sara Sharatt (1999, p. 80), speaking on the Foca Indictment at the International Criminal Tribunal for the former Yugoslavia. Similarly, a report from the Liu Institute claims -without reference to systematic data- that, while men may be more likely to be killed than women, women are *far* more vulnerable to sexual violence (Liu-

Institute, 2005) R. Charli Carpenter, in interviews he carried out with humanitarians from 2001 to 2003, was often told that women comprised the vast majority of rape victims, but these same practitioners told him they were unaware of any data collected that assessed the extent of men's vulnerability to sexual assault (Carpenter, 2006). Despite the tendency to treat sexual violence as a war crime whose victims are only female subjects, "men and boys have historically been and continue to be targeted for sexual violence in particular and gender-specific ways that deserve the attention of the human rights community" (Carpenter, 2006). In my discussion here, I aim to draw attention to how men are rendered invisible as victims of gendered and sexual violence by international criminal law.

According to Carpenter, the predominant types of sexual violence against men and older boys include a combination of rape and sexual mutilation. The ritual castration of male prisoners and enslavement of adolescent boys along with women for sexual purposes has historically been a prevalent feature of warfare (Carpenter, 2006). The ideological basis of these acts of violence is reflected in how these acts are physically and symbolically meant to deprive these males of their self-concept as men and to 'feminize' them; this is achieved through rape which is seen as the ultimate way to eliminate a male's dignity as a man and through castration as way to deprive him of his manhood (Carpenter, 2006).

During times of armed conflict, together with other forms of torture, crimes against the bodily integrity of men are widespread in detention settings. Carpenter discusses several cases of sexual assault against men during the war in Bosnia and Herzegovina, chiefly in detention camps, and these acts included castration, circumcision and other forms of sexual mutilation; in many cases, prisoners were coerced to engage in sexual acts with the guards or with other prisoners, and forced into torturing and mutilating other male prisoners. One scenario involved prisoners being

lined up naked while Serb women from outside undressed in front of them; if any prisoner had an erection, they would be castrated; another ex-detainee told of suffering electric shocks as punishment for experiencing arousal (Carpenter, 2006). Besides being subjected to such humiliation and mutilation, men are likely to be “raped anally in detention or forced to sexually service male guards” (Carpenter, 2006, p. 95).

International law has failed to recognize sexual and gendered violence against men as constituting sexual violence during wartime and armed conflict. For instance, although sexual mutilation of men was reported in the context of the Bosnian concentration camps, it has not been prosecuted as rape or sexual violence at the Hague tribunal, instead merely seen as ‘torture’ or ‘degrading treatment’ with no acknowledgment of the inherent gendered nature of the violence meant to explicitly target the bodily integrity and self-concept of the men victimized (Carpenter, 2006). The invisibility of men as victims of sexual violence largely results from International Law’s script of violence. This script provides the content of the dominant wartime narrative which is spoken through a “*gendered* grammar of violence” (Marcus, 1992, p. 392). Ultimately, through the gendered grammar of violence that emerges in the prosecution of war crimes, gender and gendered violence become “synonymous only with women” (Carpenter, 2006). Hence, through the script of violence, men and women are constructed as stable a category which reifies an “essentialized notion of women as victims and men as perpetrators” (Carpenter, 2006, p. 99).

This essentializing notion in international law is largely rooted in assumptions about male wartime roles. These gendered assumptions impact both how the identities of men and women are constructed in the decisions of the tribunals. For example, while clearly there is no doubt what happened in Srebrenica in Bosnia is constituted as genocide; in the *Krstic* decision the Tribunal instills a problematic understanding of gender in order to determine its ruling. In this decision

gender emerges as a “static, almost self-evident” category. In the Prosecutor’s analysis, women are constructed as merely being the biological reproducers and as signifiers of the patriarchal aspects of their community, as opposed to being individuals with agency. The fixed category of men as perpetrators in war, and thus outside the realm of the civilian population, which includes women and children, emerged as a result of their mass recruitment in the army in the early modern period. As a result, since military institutions became male-dominated, the image of the ‘able-bodied adult male’ arose in the public perception and in the militarized state (Carpenter, 2006). Hence, gender hierarchy and relations came to be constructed through the allocation of power to weapon-bearing men as the guardians of frail and feeble women, who required their protection (Carpenter, 2006). This gender hierarchy continues to force men into military service through actual and threatened physical violence. And thus “masculinized military institutions” in turn reinforce gender hierarchies, as women are excluded from the bearing of arms, and as disproportionate number of male soldiers generate the image of a “masculinized nation-at-arms” voluntarily ready (rather than coerced) to fight (Carpenter, 2006). Consequently, this hierarchical order of gender relations infiltrates into international law, which then locates them in the category of the perpetrator of violence. Hence, due to international law’s preoccupation with categories, the identities of men and women are essentialized; the former are constituted as inherently being aggressive and prone to violence and the latter are constituted as being defenseless, perpetual victims and ‘inherently rapeable’ (Marcus, 1992, p. 388).

One of the most convincing examples of International law’s essentializing process of fixed gender identities in wartime, is the gendered way the concept of the ‘civilian’ has been constructed in international law. Because international’s law recognizes men solely as aggressors, in conflict situations it consequently makes them appear, in a sense, existing outside the civilian population.

This in turn leads to the perception that men of an ethnic and/or age demographic are always potential threats. Consequently, then, this perception encourages sex-selective patterns of atrocity against even those men who manage to remain in the civilian sector, and resist fighting. This transpires when codified laws requiring belligerents to distinguish between combatants and civilian on the basis of a person's actual participation in war are, in fact, interpreted according to the use of sex as a means to recognize the enemy (Carpenter, 2006). Evidently, then, gendered assumptions about wartime roles explain this tendency in conflict zones, and continue to be reinforced by international law in post-conflict trials where men are only recognized as perpetrators, thus rendering violence against men, which includes sexual violence and sex-selective massacre, invisible.

International Law's construction of violence as primarily "the product of an inter-ethnic conflict" fails to consider how it is influenced by other social, political and economic structures. For instance, in the Rwanda Tribunal's decision "all sexual violence is reduced to the equation of 'Hutu men who raped Tutsi women as a means to destroy the Tutsi community'" (Buss, 2009, p. 160). Hence the Tribunal's decision frames the violence against women occurring primarily as a way to eliminate an ethnic group; the Tutsi community. However, as observed by anthropologist Jennie Burnet, it is more so men, and thus not women, who are seen to embody ethnicity (Burnet, 2009). Hence, destroying an ethnic group often is seen achievable through the elimination of its male members, while women can be appropriated into the ethnic identity of the attacking group. While I recognize that this observation only is relevant to cases where target groups were defined according to ethnicity, it does hold relevance in such contexts as the Rwandan Genocide. In Rwanda, Hutu attackers took some Tutsi women as their wives, after their husbands and children had been killed (Carpenter, 2006). Furthermore, according to a 1995 African Rights Report, Hutu

sympathisers convinced the Hutu attackers to spare women because they did not denote ethnicity; ‘the bad ones were men’ and female survivors reported being told they were safe because ‘sex has no ethnic group’ (African-Rights, 1995a). While I do not dispute that women were severely victimized which reflected a shared pattern of sexual violence, the possibility that men would have also been targeted to eliminate a community disrupts International law’s reduction of the Rwandan Genocide as primarily Hutu men who harmed Tutsi women.

Wartime sexual violence “is treated as relatively uniform in practice and experience” (Buss, 2009, p. 155) due to fixed and stable constructions of gender identity i.e. aggressor (men) and victim (women). This focus on shared patterns of violence, against women or women of a distinct ethnic group by men, provides the content of the communal narrative and subsequently renders the inconsistencies and exceptions to this very narrative, which are present in the memory of victims, largely invisible (Buss, 2009). Furthermore, this pre-occupation with fixed gender identities also determines who gets to be recognized as a victim of wartime violence. Particularly female victims must find space within the role of the ‘inherent rapeable’ subject who is vulnerable to violence during wartime and male victims are unlikely to have their narrative of sexual violence recognized as *gendered* violence, in International law.

This clearly has been the case with Beatrice’s *own* narrative of violence as a female victim, mentioned previously in this essay; the resources and connections she had influenced her survival, also it is possible that she was able to resist violence, possibly because the Hutu attackers might have seen as her not representing ethnicity (Pottier, 2002). The fact that some Tutsi women were taken as ‘wives’, while still an indication they were sexually violated and treated as claimed property by Hutu men, provides us with insights about the pre-existing sexual economy in Rwanda where Tutsi women as mistresses were recognized as social capital (Buss, The Curious Visibility

of Wartime Rape: Gender and Ethnicity in International Criminal Law, 2007). Gaining access to women's bodies through "marriage" also allowed men access to the assets they owned including land and farming. Yet, in the inter-ethnic narrative in which victims are located, and where sexual violence is spoken of through an almost dictated rape script; where one side picks up 'rape as a weapon' to attack the other side (Buss, 2009), there is no room to include the context of the sexual-gendered economy that was crucial to the momentum the genocide took in Rwanda. Paradoxically, the hyper-visibility of wartime sexual violence through the inter-ethnic conflict narrative renders invisible - or at least invisible a significant factor of - women's systemic inequality.

The rigid focus on the generalised pattern of rape can lead to an essentializing narrative in which wartime sexual violence is treated as seemingly inevitable. An alternative approach to treating gendered violence as relatively similar with fixed gender identities, as dictated by the rape script in International law, can be found by examining the unique narratives of victims. Beatrice's story allows us to explore the various circumstances that exposed her to violence and the brave steps she took to resist rape and death (Buss, 2009). It is at this level of detail, with all the inconsistencies and complexities revealed, that it becomes possible to imagine a situation where women are not seen as 'inherently rapeable' (Marcus, 1992, p. 388) beings but as individuals who have resilience and thus negotiate, interact, and resist the systemic inequality they live with and the sexual economy they are part of (Buss, 2007). Furthermore, in post-conflict trials when women are seen as "always raped", all men are only recognized as perpetrators, and instances involving men as victims of rape, sexual mutilation, and mass killings are not recognized under gendered violence, despite the sex-selective nature of these acts (Carpenter, 2006).

International law embodies reductionist logic in terms of what can be spoken and understood about the impact on the victims of gendered sexual violence, and its role in the

genocide. Rape as a ‘weapon of war’ renders both male and female victims of violence in war invisible, as it depicts violence “exclusively as the product of an inter-ethnic conflict rather than considering how other social political and economic structures shaped the violence and genocide” (Buss, 2009, p. 160). Pinpointing rape at the centre of the conflict—as an integral element of the violence—is an important effort which allows us to recognize that violence is indeed gendered in nature. However, without minimizing the impact of communal suffering as a result of sexual violence, it is essential to observe how this inter-ethnic narrative of sexual violence conveys a partial account of the violence. Hence, in international law the communal narrative’s triumph over the individual narrative and memory of the victim becomes possible through ‘the grammar of pain’. This grammar of pain is inherently gendered and consequently provides rules and structures to assign people to positions within a script of violence. Furthermore, when wartime sexual violence “is treated as relatively uniform in practice and experience” (Buss, 2009, p. 155), the focus on shared patterns of violence provides the content of the collective memory of suffering, which renders exceptions and variances found in the narratives of individual men and women invisible (Buss, 2009).

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