

Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future* (Martinus Nijhoff Publishers, Leiden 2011, 160 pp., €91.00, \$118.00. (pb) ISBN 9789004189126).

This book examines how sex and gender crimes were and are treated under international law. This is a crucial issue for international criminal law and international humanitarian law. '[W]here there is war', Kelly Dawn Askin wrote, 'there is always sexual assault'.¹ These sexual assaults, despite their long history, have traditionally been treated as a 'natural thing', incidental to the horrors of war, or at least, simply neglected by international law. Women, especially during armed conflicts, have conventionally been left out from the law's safeguards. Historically, Gardam & Jarvis write, it has been the actions most likely to affect men that have been criminalised and prosecuted. However, in recent years there has been a great deal of attention paid to the ways in which armed conflict affects women differently to men and to the ways in which women are particularly vulnerable in war.² At the backdrop of this trend, this book presents the reader with a critical journey of the advance of sex and gender crimes, mainly within international law. Its main aim is to flesh out the 'gaps and silences' which existed (and still exist) in the way international law regards those crimes. Briefly, the author argues that treating rape as an added crime under the outdated current category of crimes is important yet not enough. It ought to be affixed as an autonomous separate category of crime which would create congruence between diverse domestic laws, and, hopefully, would eliminate any leftovers of patriarchal associations to this crime.

The book is comprised of three main parts. Part one presents the 'theoretical tools' which form the basis of this research project and which will be used for a critical discourse of the development of international law, from the absence of any sex crimes anchoring in the past to the current normative status. For this critical analysis, the author uses a feminist perspective. It deals with the different feminist theories critical of international law in general and in particular with relation to sex crimes.³ The author seeks to reveal the 'silence' of international law; to cut across the familiar dichotomy between the private and the public sphere and, perhaps, most importantly, to crystallise the uniqueness of sexual crimes (pp. 11-22).

¹ KD Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997) 1.

² JG Gardam, MJ Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International, 2001).

³ For a classical evaluation of feminist theories on international law see e.g., H Charlesworth, C Chinkin & S Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

Part two presents an historical account of sex crimes within international law, in which the author distinguishes between different legal eras (pp. 59–108). It begins with what Hagay-Frey terms the ‘era of Silence’, when sex crimes were excluded from the legal norm until the beginning of ‘modern’ international law in 1949, with the drafting of the Geneva Convention. Although that era’s conflicts, as the Nazi records attest, were full of horrible sex crimes such as rape, forced prostitution, forced sterilisation, forced abortion etc’, there was a grave failure to prosecute (p. 65).⁴ As one woman stated with regard to sex crimes of that period ‘it was not important ... except to me’.⁵

The second era – the ‘era of honor’ – begins with the Geneva Conventions, in which the crime of rape was introduced, for the first time, as an explicit offense, part of the ‘crimes against the dignity’. The author widely discusses the problem attached to the relationship between honour and rape and the roots of this linking. She criticises the use of the term ‘honour’ in Article 27 of the Fourth Geneva Convention 1949,⁶ which treats rape as a mere offense against women’s honour in its social aspect rather than them as human beings. More generally, she claims that diverting the debate over sex crimes to the realm of ‘honour’ undermines the mental and physical violations which are attached to sex crimes and have necessitated the measuring of the damage according to ‘how her honour was offended’, a strange task indeed. I could not agree more with this criticism. Linking rape and honour conveys the impression that a raped woman is merely dishonourable. Moreover, it simply misses the point. A sex crime is a violent act that strikes at a woman’s (or person’s) ‘body, autonomy, integrity, selfhood, security and self-esteem and standing in community’.⁷ Linking it with honour is simply not enough.

⁴ But see contra PV Sellers, ‘Individual(s) Liability for Collective Sexual Violence’ in K Knop (ed.), *Gender and Human Rights* (Oxford University Press, 2004) 153, at 163: ‘The Nuremberg Tribunal, but more particularly the Tokyo Tribunal and several subsequent national trials, produced judgments that held sexually violent conduct during armed conflict to constitute war crimes or crimes against humanity. Unfortunately, little strenuous legal analysis has been produced about these judicial pronouncements, engendering the mistaken belief among many scholars and practitioners that sex crimes were omitted, almost entirely, from previously rendered humanitarian law jurisprudence.’ See also D Luping, ‘Investigation and Prosecution of Sexual and Gender-Based Crimes Before The International Criminal Court’ (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 436, at 441.

⁵ J Ringelheim ‘Women and the Holocaust: A Reconsideration of Research’, (1985) 10 *Signs: Journal of Women in Culture & Society* 741, at 745.

⁶ Article 27 of the *Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287: ‘women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.

⁷ R Copelon, ‘Gendered War Crimes: Reconceptualizing Rape in Time of War’ in J Peters and A Wolper (eds), *Women’s Rights, Human Rights* (Routledge, 1995) 197, at 201.

The beginning of the new era – the third one – is indicated in the early 90's, with the establishment of The International Criminal Tribunal for the former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR). The historical account ends with the International Criminal Court (ICC) and the new status-quo created by it (pp. 79-108).

With regard to this part, two critical remarks might be in place. *First*, the last section which deals with the 'new era' could have benefited from a wider discussion regarding the role and jurisprudence of the Hybrid courts, which is conspicuously missing from the debate. Take, for example, Art 2 of the Statute of the Special Court for Sierra Leone (SCSL), according to which:

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: ... (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence...⁸

This is a relatively broad definition of sexual crimes that includes more than "rape". Why did the Special Court take such a broad approach and what implications did Hybrid courts elsewhere have (if any) on the drafting of the ICC and *vice versa*? Such questions remain unanswered. While the Hybrid courts are mentioned in one footnote,⁹ it seems that a wider analysis of their approach and jurisprudence with regard to sex crimes was warranted.

Secondly, contrary to the author, I would add another era between the era of honour and the 'new era'. This is the years in which the Additional Protocols to the Geneva Convention were adopted. For example, under Art 75(2)(b) of API, sex crimes are treated as grave breaches.¹⁰ Art 4(2)(e) of APII prohibited acts such as rape, enforced prostitution, indecent assault, and slavery.¹¹ The author acknowledges that these Additional Protocols 'can be seen as an indication of a transition to a new era' nevertheless, she claims that due to their limited application to international treaty law, it is difficult to determine to which extent they have influenced the legal status of sex crimes under international law (p. 76). Yet, I believe that these provisions demand a special and separate

⁸ 16 January 2002, available at: <http://www.unhcr.org/refworld/docid/3dda29f94.html>. More on the Special Court for Sierra Leone with regard to gender and sex crimes see T Doherty, 'Developments in The Prosecution of Gender-Based Crimes – The Special Court For Sierra Leone Experience' (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 327.

⁹ See p. 108, at n. 385.

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

treatment. True, they do not provide an ideal protection of sex crimes, and they suffer from various problems. From a feminist perspective, the language of some of the prohibitions themselves ('indecent assaults') might be problematic and deserves attention. For instance, Art 85(4)(c) of API refers to: 'degrading practices involving outrages upon personal dignity based upon racial discrimination', nevertheless, it importantly negates gender discrimination. While these provisions, with their faults, fail to expressly criminalise sex and gender crimes, they do represent a significant progress as they treat sex violence in a rather broad way and both emphasise that rape is prohibited in international and non-international armed conflicts.¹² That is why they belong in a separate era, distinguished from the 'honour' one.

Part three ties these loose legal ends together (pp 113-55). It first summarises the achievements of international law in that area, especially as manifested by casting sex crimes into the existing crime patterns, simultaneously, exposing the problems embodied within these developments. Finally, the author proposes a normative solution: to leave sex crimes within current existing crimes, to add sex crimes into the pattern of the 'genocide' crime, and concurrently to recognise them, in some circumstances, as a self-standing discrete international crime. A discrete crime, according to the author, would compel the international community to unite and capture sex criminals, so far almost freely committing vicious crimes, indict and convict them. Of particular interest is Hagay-Frey's daring attempt to suggest a preliminary draft of a new crime category. This is a valuable attempt which ought to be admired. Too often scholars delve into theoretical analysis, pointing to problems and gaps within law without any attempt to suggest how, in practice, these difficulties might be solved. I therefore welcome this author's move, which might position her within 'Governance Feminism', that is, as Chantal Thomas describes it 'feminism that which seeks not only to analyze and critique the problem, but to *devise, pursue and achieve reform to address the problem in the real world*'.¹³

Nevertheless, two issues, I believe, might be points of weakness. *First*, according to the author, this discrete crime should be separated from war crimes and apply not only during armed-conflict but rather during peace time. Whenever sex crimes are being neglected by the government, international law, the author proposes, should interfere (pp. 143-4). Even if on its own this seems like a reasonable demand, together with another requirement of the

¹²⁾ Askin, *supra* n. 1 at 246.

¹³⁾ JE Halley, P Kotiswaran, H Shamir and C Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335, at 348.

author – to omit from sex crimes the requirement of systematic breach in order to protect the individual (p. 145) – seems slightly over demanding. Is one sex crime committed during peace time is a matter for the ICC or for other national courts in a ‘universal jurisdiction’ style of trials? Hagay-Frey is not concerned by this. She emphasises both the *jus cogens* nature of these crimes and the complementary jurisdiction of the ICC to justify international law’s interference. She replies concerns such as mine that:

[T]he new crime category that I propose is not intended to apply primarily to the isolated sex crime committed out of relationships of subordination and domination in the framework of the state. Under those circumstances, it is appropriate for the domestic law of the nation-state to act in the first instance.

However, ‘if the domestic law chooses to remain silent, or, alternatively, the judicial and enforcement systems under the domestic law ignore sex and gender crimes ... then the resulting international criminal jurisdiction is appropriate’ (pp. 151–153). I hope this is not too of a utopian demand.

Second, the author’s conditions for the ‘new offense’ might self-contradict. If I am reading correctly, on the one hand, the new offense for which the author advocates should protect any victim from any sexual act which is committed out of indifference to the person’s will.¹⁴ This is due to a presumption that in a conflict, the choice of a person to survive is not consent.¹⁵ Therefore, indifference should be enough in order to establish the circumstances of the forced sexual act. But, on the other hand, the author also calls for the omission of the requirement of circumstances of an armed conflict. How the above mentioned presumption co-exists with non-armed conflicts situations remains somewhat unclear, unless, the author’s proposal applies to all sexual acts which involve coercion or subordination (p. 149). If that is the case, and that should have been made perhaps clearer, the apparent contradiction disappears, but this might create other difficulties due to the very broad definition of the offense.¹⁶

¹⁴ The author terms this mental state; ‘negligence’; and in her words at 146: ‘in order to meet the requisite *mens rea*, it should be sufficient to find that the reasonable man or woman in the defendant’s shoes would not have believed that the victim had consented.’

¹⁵ P. 147: ‘due to the special characteristics of sex crimes in the intensity of conflict, the element of consent should be eliminated...’. The author refers (at 146) to an explanation by Adrienne Kalosieh that a consent requirement in the context of war would be an absurd. See A Kalosieh, ‘Consent to Genocide?: The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca’ (2003) 24 *Women’s Rights Law Reporter* 121, at 122.

¹⁶ The author is aware to this problem, to which she replies (at 151): ‘[T]here is no reason to be apprehensive about the extent of the new crime’s applicability. The new crime category not only will assist in creating a uniform legal norm, which will condemn sex and gender crimes resulting from relationships of subordination and domination, but it will also create a genuine incentive for domestic courts to implement the law and to capture and punish perpetrators of these crimes.’

All and all, this well-read book, critical in its judgment of the actualities that rule sex crimes within international law, may serve as a melancholy record of the gender-biased subordination of women and the failure of our society to adequately respond to this subordination, especially in times of conflict. As Prof. Christine Chinkin wrote:

Rape in war is not merely a matter of chance, of women victims being in the wrong place at the wrong time. Nor is it a question of sex. It is rather a question of power and control which is 'structured by male soldiers' notions of their masculine privilege, by the strength of the military's lines of command and by class and ethnic inequalities among women.¹⁷

In light of such a view, the author's main claim that we must acknowledge the gender stratum as the underlying stratum of sex crimes is compelling.

The book might have benefited from a discussion on one issue which is missing and this is the role of women in modern armed conflicts. Traditionally, male combatant was the norm. Nowadays, women take part in armed groups and armies and often fight on the front lines shoulder-to-shoulder with men.¹⁸ The author recognises this reality and even reveals, in a footnote, that she herself 'has served as an officer and trained soldiers'.¹⁹ I wonder, at least from a feminist perspective, how this participation affects, if at all, sex and gender crimes during conflict. Importantly, such a combating role requires us to cease to regard women in war times as merely victims.

The work ends with a plea for the international community to socially unite and combat sex criminals. Admittedly, it is not clear how the normative proposal of the author to draft a discrete category of crime would facilitate such unification. The author claims that inserting new legal terms and a novel crime pattern would enable international law to 'arm itself' with proper tools to combat sex and gender offenses. However, the author itself admits that international law should combat such offenses not only since these are serious and heinous crimes, but also since the only effective way to combat sex crimes is through a socially comprehensive organisation to undercut the twisted social conceptions that created the gender subordination in the first place. If the answer to the difficulties raised by the author is to socially organise in order to change certain conceptions, this raises the question regarding the ability of law to bring about social-conceptual changes. Put it differently, some

¹⁷) C Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326, at 328.

¹⁸) See e.g. OM Stern, 'The Principle of Distinction and Women in African Conflicts' (PhD Thesis, in-progress, London School of Economics); JM Prescott, 'NATO Gender Mainstreaming and the Feminist Critique of the Law of Armed Conflict' (2013) XIV *The Georgetown Journal of Gender and the Law* 83, at 90.

¹⁹) See p. 139 at n. 469.

scholars – writing within the prism of governance feminism – have argued that governance feminism ‘when it seeks to regulate rape and sexual violence in war, has only one goal: prohibition.’ Nonetheless, feminists frequently regard ‘criminal law reform to operate simply by actually eliminating precisely and only the conduct it outlaws.’ But this de-jure criminalisation often disregards the de-facto surrounding realities regarding law enforcement. One has to look ‘for complex law-in-action/law-in-the-books contingency.’²⁰ The author is mindful about the relation between ‘law reform and reality’. For her ‘in order to change women’s status in society and in law, the change in consciousness must be integrated with a fresh analysis of the institutions, conventions, norms and existing legal criteria’ (p. 24). Whereas this is true, and even if once conceives law as a social tool which could have a significant impact, the ability of the legal system to bring about social changes exists but is still limited.²¹ This is true within domestic legal systems and even all the more so with regard to international law. Perhaps, then, a better rationalisation as to how the drafting of the new crime would facilitate such a social change was in place.

To conclude, in its historical and critical accounts this book will be of interest to those interested with international criminal law, international humanitarian and human rights law, and, of course, feminist theories. The discussion is constantly critical, sharp, and compelling. Although it is a translated work, the style is very clear. Even if not all of Hagay-Frey’s contentions may be accepted, for her objective and daring attempts to improve international law with regard to sex and gender crimes, there can be nothing but praise.

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²⁰ Halley et al., supra n. 13 at 339–340.

²¹ See, e.g. Y Roznai, ‘Revolutionary Lawyering? On Lawyer’s Responsibilities and Roles during a Democratic Revolution’ (2013) 22(2) *Southern California Interdisciplinary Law Journal* 353, at 379–380.

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