ABSTRACT. The Yugoslav war crimes tribunal convicted three men for their role in the mass rape of Muslim women during the conflict in Bosnia-Hercegovina. That decision is a landmark in many respects, but primarily for its determination that the rape of Muslim women amounted to a crime against humanity. This comment provides an overview of the decision, exploring the significance of recognising rape as a crime against humanity within the context of other developments in the area of wartime rape and sexual violence. The comment also provides a brief review of the decision in light of the author’s previous scepticism about the capacity for the Tribunal meaningfully to address violence against women. The comment concludes that while many aspects of the decision are promising, the war crimes trial itself may offer a limiting arena within which to address wartime rape.

KEY WORDS: international law, rape, violence, war, Yugoslavia

INTRODUCTION

On February 22, 2001, the trial chamber of the International Tribunal for the former Yugoslavia (I.C.T.Y.) delivered its decision in Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, convicting the three male defendants of the rape, torture and enslavement of Muslim women in the municipality of Foca, Bosnia-Hercegovina. The decision is noteworthy in several respects. It is the first case solely to focus on the rape, torture and mistreatment of women during the armed conflict in Yugoslavia. It is the first case to prosecute successfully rape as a crime against humanity, and it is the first case to consider the phenomena of ‘mass rape’ in the context of Bosnia-Hercegovina.
For me personally, the decision is additionally important in light of my own scepticism about the I.C.T.Y.’s capacity to address rape and other wartime violence against women. In a 1998 article (Buss, 1998), I argued that the legal remit of the Tribunal reflected stereotypical constructions of women as ‘victims’, and left unchallenged discourses of war, militarism and nationalism that function to elide women’s suffering with the suffering of the nation and, consequently, to marginalise women’s experience of violence. Thus, as a long-awaited statement about how women’s particular experiences during war are treated by the international community, **Kunarac** is an opportunity to take measure of the I.C.T.Y. and to consider if, in fact, it has lived ‘up’ to my low expectations.

In the following case comment, I aim to do three things. First, to provide an outline of the decision in **Kunarac**, exploring the significance of recognising rape as a crime against humanity. Second, I consider **Kunarac** in the context of earlier international developments in the area of rape and sexual violence, noting the several aspects of the decision which significantly advance international legal recognition of wartime violence against women. Third and finally, I evaluate **Kunarac** in light of my previous concerns about the I.C.T.Y. While concluding that the decision is important and contains a number of positive developments, I argue that there are aspects of the war crimes trial, as evidenced in **Kunarac**, which are still of concern for feminists seeking to secure greater international action on violence against women.

1. THE DECISION

In April 1992, the city and municipality of Foca were overtaken by Serb forces. Muslims living in Foca and the surrounding area, were attacked, expelled from the region, and/or, detained, with women, children and some older men taken to detention centres at the local high school and sports hall. Prior to the war in Bosnia-Hercegovina,3 fifty-two per cent of the 40,513 inhabitants of the Foca Municipality were Muslim. After the conflict, approximately ten Muslims remained.4 For the Muslims detained in Foca, conditions were extreme. The facilities were unhygienic, little food was

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3 Bosnia-Hercegovina was a republic within Yugoslavia that declared independence on April 6 and 7, 1992 and became the site of a protracted war between rival Serb, Muslim and Croatian forces. While armed conflict also took place in others region of the former Yugoslavia, the decision in **Kunarac** relates to events in Bosnia. For a discussion of the history of the war in Bosnia see Malcolm (1994).

4 **Kunarac**, supra n. 2, para. 47.