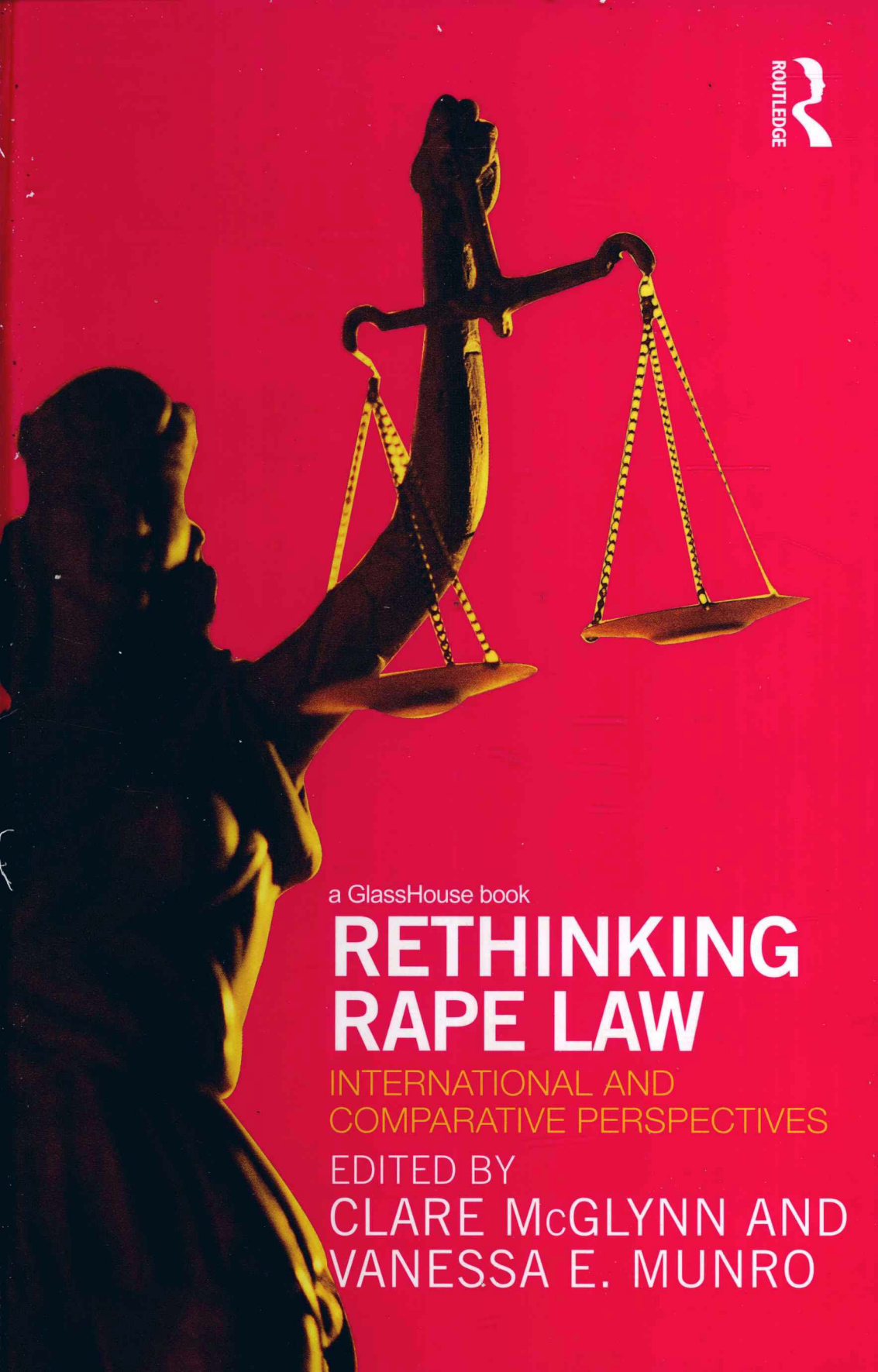
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RETHINKING RAPE LAW
INTERNATIONAL AND COMPARATIVE PERSPECTIVES
EDITED BY
CLARE McGLYNN AND VANESSA E. MUNRO

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regarding sexual offences, which develops the line of argument outlined in their contribution to this volume.

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Foreword

Akayesu 10 years on

It is the inequality and systematic de-humanization against certain groups which makes them susceptible to violence. When those who perpetrate sexual violence can do so with impunity, without justice being done, the violence and gender inequalities which give rise to such violence are perpetuated, with no solace for victims. As a Judge in the International Criminal Court, and former President of the International Criminal Tribunal for Rwanda, I heard many harrowing accounts of human rights violations and sorrow from individuals who refused to remain silent, seeking justice rather than revenge. To redress the suffering, individual accountability and responsibility for crimes of sexual violence must be pursued. The aim must be not only to punish perpetrators, but to deter violations of human rights and advance gender equality; and in times of war, also to promote justice and peace.

Rape and sexual violence are sustained by the patterns of gender inequality which cut across geo-political, economical and social boundaries. Justice is needed on the individual and national level to redress rape and other expressions of sex inequality that women experience as a part of their everyday lives, as well as on the international level for sexual violence and other crimes perpetrated in times of conflict and war that are not effectively addressed at the national level. I was appointed UN High Commissioner for Human Rights in 2008. On behalf of the United Nations, my Office seeks national and international co-operation to assist and support governments in their efforts to promote human rights. This is not just a matter of overseeing the equality of laws which protect fundamental human rights, but also of focusing on the implementation and enforcement of those laws to make changes which will affect and improve individuals' lives in the struggle for social justice.

Accordingly, I was pleased to be invited to speak at the Durham University conference *Rethinking Rape Law: Akayesu 10 Years On* in July 2008. This conference marked the tenth anniversary of the judgment of the ICTR in the case of *Akayesu* in which the mayor of Taba commune in Rwanda was convicted for genocide, explicitly including rape as a form of genocide, and in which rape was defined with a focus on the coercive circumstances in which

the violence took place rather than the absence of consent. In this case, the Trial Chamber, of which I was a member, greatly expanded the international community's ability to prosecute gender-based war crimes. Equally significantly, the jurisprudence it provided has been taken as a starting point to review laws of rape elsewhere, to debate reform strategies in other arenas, and to consider the role of women and feminists in bringing about change at national and international levels.

It is from this successful forum of discussion and debate that this collection of essays has emerged. Contributions are made from internationally renowned scholars across the world, providing fascinating insights into the laws across different cultures, continents and contexts. To this end, the book encourages different ways of thinking about rape law and reform – from substantive legal changes, to implementation and enforcement – in order to rethink rape in different contexts – from sexual violence in the home as a method of dominance, to rape as a weapon of war in armed conflict.

In reading the chapters of this book, I am reminded of the obstacles which block the path to gender equality and women's freedom from sexual violence. However, we must not only look forward to the difficulties and challenges we face, but also reflect on how far we have come and the fundamental changes that we have witnessed, such as *Akayesu*. Our past and our progress can inform our thinking, providing the insight and encouragement to consider the ways forward towards gender equality and social justice, welfare and peace.

Navanethem Pillay, UN High Commissioner for Human Rights
Geneva, September 2009

Acknowledgements

The original inspiration for this collection came from the 2008 conference, *Rethinking Rape Law: Akayesu 10 Years On*, held at Durham University, UK, and organized by Clare McGlynn. The conference brought together an impressive range of scholars, activists, lawyers and policymakers from all over the world. The plenary presentations, from Navanethem Pillay (UN High Commissioner for Human Rights), Catharine MacKinnon (Michigan University), Liz Kelly (London Metropolitan University), Karen Engle (Texas University) and Jessica Neuwirth (Equality Now), amongst others, generated challenging debates about all aspects of feminist thinking and strategy around rape law.

The conference was only possible due to the sponsorship of the British Academy, the Society of Legal Scholars and the Government Office for the North East. Durham University also helped with the administration of the conference, as well as providing financial support via its Institute of Advanced Study, the Centre from Criminal Law and Criminal Justice and the research group 'Gender & Law at Durham' (GLAD). Particular acknowledgment is due to Erika Rackley at Durham University who provided organizational help and assistance which was well beyond the call of duty or friendship.

A collection of this sort does not come into existence without the involvement of a great number of people. We are indebted to Colin Perrin for his enthusiasm towards the project and to the copy-editors and production team at Routledge for their assistance. We are also grateful to both Nikki Godden and Laura Graham for their help in formatting the manuscript prior to submission and Nikki also helped with the index. We extend our thanks also to the contributors, whose diligence in meeting deadlines and constructive approach to engaging with our editorial comments has been hugely appreciated throughout.

Finally, we would like to express our gratitude to the many colleagues and friends who have supported our work on this project, most especially Fiona Raitt, Ian Ward, Celia Wells and Nicole Westmarland.

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Rethinking Rape Law: an introduction

Clare McGlynn and Vanessa E. Munro

Rape, and rape law, have been key sites of feminist struggle – whether nationally, regionally or internationally – for decades. The need to lift the veil of privacy in order to protect the vulnerable has been increasingly acknowledged and respect for a person's right to sexual and bodily integrity has become a prevalent theme in contemporary legal and policy discourse. At the same time – and despite the fact that, in several countries, there has been a marked increase in the number of sexual assaults reported to police – conviction rates for rape typically remain disconcertingly low. There is convincing evidence which suggests that spurious and highly gendered 'rape myths' continue to inform both the popular and penal imagination; and rape complainants who make it into the courtroom often still endure invasive and hostile questioning from defence counsel without any form of representation, and often with inadequate witness preparation or post-trial support.

Progressive reform of rape law has been an ongoing process: and often a painfully slow one. While in some jurisdictions any change to existing doctrinal frameworks for conceptualizing and criminalizing rape has been stubbornly resisted, in others there has been an almost incessant process of consultation and legislative 'tinkering' as new initiatives are developed to address old problems, often with disappointing, limited- or unintended counter-productive results. Common-law legacies have bestowed a level of doctrinal and/or operational scepticism in relation to rape. Sir Matthew Hale's seventeenth-century insistence that rape allegations are easy to make and hard to dispute, especially given the frequent absence of corroborating evidence, though less explicitly endorsed in modern times, continues to inform investigative and prosecutorial perspectives in most jurisdictions. The historical conceptualization of women as property – first of their fathers and then of their husbands – as well as the more contemporary correlation between women and 'honour', accentuated in certain minority communities – has generated obstacles to the recognition of all forms of non-consensual sexual activity as violence, and has embedded into the law – if not substantively, then evidentially – a requirement that women resist their assailant's advances to the utmost (both verbally and physically). In this context, difficult questions have been asked about the ability of legal doctrine – however reformulated – to produce real improvements at the level of practice.

These challenges have been particularly evident at the international level over the past decade or more. While the link between sexual violence against women and militarism is by no means new, the highly visible and instrumental use of rape as a weapon of war in recent conflicts, together with the blossoming of an international criminal jurisprudence, has provided impetus for increased condemnation. The applicability of conventional consent-based analyses of rape in these contexts of displacement, violence and intimidation has been the subject of much critical concern, generating alternative conceptualizations that some have argued also provide a more appropriate response to sexual violence in times of 'peace'. While debate on this issue continues, it is clear that the multiple axes of oppression – racial, ethnic, gender, and so on – that stratify the use, and meaning, of sexual violence in wartime has promoted a more intersectional and complex approach, and that this too can generate fruitful insights in non-conflict contexts.

This collection of essays arose out of a conference, held at Durham University (UK) in 2008, to mark the tenth anniversary of the *Akayesu* judgment of the International Criminal Tribunal for Rwanda (ICTR), which saw the first conviction for genocide and war crimes based on rape (ICTR-96-4-T, Judgment 2 September 1998). The *Akayesu* decision has been heralded by many as a victory for feminist activism – experiences of sexual violence initially marginalized in the indictment were repositioned as central and were met by the Chamber (and in particular – perhaps not coincidentally – by its sole female member, Judge Pillay) with staunch condemnation (see Buss, Cole, and Engle and Lottmann in this collection). Reflecting on the significance of *Akayesu* provides an occasion for engaging with broader debates about the role and relevance of law as a mechanism for securing change in the context of rape – and indeed other entrenched socio-cultural phenomena. More substantively, the judgment also affords an opportunity for reappraising foundational assumptions about the nature of the wrong of rape and the appropriate legal response thereto. The Chamber in *Akayesu* expressly eschewed attempts to prescribe a list of sexual acts that would constitute rape and purported to abandon the consent threshold, replacing it with a focus on the coercive circumstances in which the act took place (paras 598 and 688). This, some have argued, rightly privileges surrounding context and structural inequality, and moves away from the inappropriately individualistic focus on sexual autonomy reflected in the consent threshold (MacKinnon 2006; but see also Munro in this collection). In these ways, then, the concerns that the *Akayesu* judgment gave, and continues to give, rise to render it a symbol of the myriad broader debates about feminism and rape law which are currently taking place both across and within national jurisdictions. And while the contributions in this collection create a profile that is far wider in its remit than a narrow focus on *Akayesu* would permit, they all speak – explicitly or implicitly – to the debates that engaged the ICTR in that case.

The aim of this book is to provide a critical appraisal of recent developments in rape laws, across a range of diverse jurisdictions. Spanning national and international responses, the book explores the parallels and dissonances