

**Martial Rape and International Law: The Work of the  
International Criminal Tribunal for the Former  
Yugoslavia and the International Criminal Tribunal for  
Rwanda**

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## **Abstract**

The International Criminal Tribunals for the Former Yugoslavia and Rwanda are the first international legal venues that have prosecuted rape as a war crime. This paper reviews the history of martial rape and martial rape legislation, as well as the national and international legal mechanisms that have been used to deal with this problem. The limited literature that addresses the topic of martial rape, most of which is based within a feminist framework, is also detailed and used to form the analysis of the work of the International Criminal Tribunals. This analysis begins with a brief history of the conflicts in Rwanda and the former Yugoslavia, and is followed by a summary of each of the completed martial rape cases that have been heard at the Tribunals. A critical analysis of these trials from a feminist perspective is the final component of this paper.

## Introduction

Rape during war has a long history that has never been written. Academics, as well as politicians and legal systems have largely ignored this form of violence. Women have endured martial rape for centuries, bearing physical, psychological, economic and social injury as a result, but the conceptualization of this act as a war crime is very recent. Male conquerors have taken enemy women as slaves and concubines since Biblical times, but this was not condemned; women were considered legitimate spoils of war and a part of the collateral damage of war, the same as the destruction of buildings or homes. These ideas have endured and despite an inclusion of martial rape as a prohibited act within the 1949 Geneva Convention, it has continued unabated until the present.

A change in the conception of rape as a natural part of war has been demonstrated in the prosecutions brought to the International Criminal Tribunal for the former Yugoslavia (hereafter the ICTY) and the International Criminal Tribunal for Rwanda (hereafter the ICTR). Both of these courts were established in the mid-1990s to prosecute those who committed war crimes during these conflicts and in both of these venues rape was prosecuted as such. This is the first time in history that the international community has treated martial rape in this manner, enforcing the laws against it. Those responsible for raping women or inciting rape within these conflicts were thus brought before the Tribunals in an attempt to bring justice to the country and to victims of rape.

The work of the ICTY and ICTR have not gone without criticism however, as complains about the precedents being set and the potential efficacy of a legal solution in deterring martial rape have been leveled by some academics. This work is not extensive or very diverse and neither is the writing that would support the efforts of the Tribunals. Despite the publication of a small amount of writing concerning martial rape around the time that the ICTY and ICTR were formed, there is very little information available about this problem. Available information regarding martial rape is limited and interest in the subject seems to have trailed off as time passes. While critiques of the Tribunals do exist, there have not been any comprehensive explorations of the Tribunals' treatment of martial rape. That is the aim of this research. As the ICTY and ICTR are the first international forums through which martial rape was prosecuted as a war crime, these proceedings will potentially impact the way that wartime rape will be treated

in the future and it is important to examine what this impact will be. The precedents that these courts are setting need to be investigated as well as the lessons being learned about martial rape throughout these proceedings. This study will attempt to accomplish this task using publicly available information about the cases that have been completed by the ICTY and ICTR. The term ‘martial rape’ will be used primarily throughout this work, as it is the phrase most commonly used to describe rape during war. The word “martial” denotes a military context while “rape” is commonly used to describe forcible sexual activity (Encyclopaedia Britannica Online). Susan Brownmiller used this term in her 1975 writing in Against Our Will: Men, Women and Rape and it is used consistently throughout the later literature that discusses forcible sexual contact and sexual violence that occurs during war.

To begin the process of examining the work of the ICTY and ICTY, the literature relating to martial rape will be reviewed in Chapter One. The history of martial rape legislation will be detailed, as will alternate legal mechanisms that have been used to deal with war crimes, such as national court proceedings, hybrid courts and restorative justice mechanisms. Following this discussion of martial rape and law, writing from academics who have directly addressed the subject will be presented. The majority, if not all, of this material can be seen as ‘feminist’ or as rooted within a feminist framework. The work of Susan Brownmiller and the book Mass Rape: The War Against Women in Bosnia-Herzegovina will be featured prominently in this. The meanings and motivations given to martial rape and legal critiques of the ICTY and ICTR are expanded upon in this section, providing a background for the examination of the Tribunals’ work that is presented in later chapters.

The methodology that will be used for this study and the questions that will be answered are indicated in Chapter Two, and will be followed by the findings from the ICTR and ICTY respectively in the following chapters. Each of these chapters will begin with the establishment of a context for each conflict through the inclusion of a historical background and this will be followed by a short summary of all relevant cases and an analysis of these cases. These analyses will be brought together in the fifth chapter and the information presented in the Literature Review will also be integrated into an examination of the work that the ICTY and ICTR have accomplished. To conclude, the current solutions to martial rape will be examined beside proposed prevention strategies.

## **Chapter One: Literature Review**

Martial rape is a subject that has not garnered much academic attention, almost none of which was written before the International Tribunals were established. There are some references to this act in ancient texts, such as the Old Testament, and Brownmiller's book, Against Our Will: Men Women and Rape (1975), did bring the issue to the agenda in the 1970s, but academic study did not really begin until the early 1990s. The major sources of information include laws, the work of feminist academics, non-governmental organizations (NGOs) and material that deals with the motivations for rape during war. This work has also trailed off as the 2000s began and interest seemed to die down, with the exception of periodic NGO reports of martial rape in ongoing conflicts. This chapter presents a historical view of martial rape laws as well as an examination of feminist responses and the psychologically based explanations given.

### ***History of Martial Rape Legislation***

While rape has been a feature of wars throughout history there have been some attempts to legislatively prohibit this act. Totila the Ostogoth forbade his army to rape in 546 A.D., as did King Richard II of England in 1385 and many other countries began prohibiting it at an uneven pace throughout the centuries, but, according to Brownmiller (1975), the practice continued, seemingly unabated by these legalistic prohibitions. Rules of war originally grew within cultures, made internally by militaries and then through informal customs or agreements between nations that dictated what actions were acceptable during war (Ball, 2002). With increasing contact between cultures and countries the scope and application of these customs grew. The creation of the Geneva Convention, signed by more than a dozen European countries in 1864, codified many customs of law for the signatories of that convention, but this did not concern the protection of non-combatants, and hence did not include martial rape until it was revised for the fourth time in 1949 (Rey-Schyr, 1999).

At the end of World War Two, fifty countries created the "United Nations Charter" that brought this international organization into being under a mandate of maintaining peace and security (United Nations, 2000). It was deemed necessary to delineate and enforce a system of internationally codified laws and a new body to oversee global issues. This body has retained the title 'United Nations', and while it was initially comprised of only Western states, over the years it has expanded to include nearly every country.

The Nuremberg Trials, which began in 1945, were the first exercise of a formalized international criminal law. This Tribunal was established to prosecute individuals involved in the atrocities of World War Two while acting under the authority of the Nazi regime. Charges brought in these trials included crimes against humanity and genocide, setting precedents for the creation of new international legislation with the intention of protecting the rights of people worldwide (Ball, 2002). The Fourth Geneva Convention was also drafted in this time period, representing an attempt to protect non-combatants in a time of war. The Nuremberg Principles and a 'Convention Against Genocide' were established and the power of this international body cemented through its use and while its power was used again in the International Tribunal for the Far East a year later, international criminal law was not used again on a large scale until 1993 with the creation of the ICTY by the UN Security Council (Ball, 2002).

It was with the drafting of the fourth Geneva Convention in the 1949 that military action against non-combatants, including rape, during war officially became crimes under international law. Rape was included within this legislation and the Geneva Convention Article 27, states: "Women shall be especially protected against any attack on their honour, in particular against rape, forced prostitution, or any form of indecent assault" (United Nations, 1949). This idea marked a step forward within international law, however this law was not used until 1993. Despite a malleable and newly enacted system of law, during the Nuremberg trials, prosecutors glossed over incidences of rape from World War Two to spare the Tribunal from hearing the "atrocious details" of the attacks (Brownmiller, 1975). These "atrocious details" prevented any charges of rape from being brought at this time.

The particular way in which rape was written into the Geneva Convention made the usage of this law limited, categorizing rape as an assault or harm against a metaphysical concept of 'honour' rather than a physical form of violence. This concept of 'honour' denotes purity or virginity that problematizes the usage of this law in that it may not protect those who are not 'honourable' such as prostitutes or other women who have defied the sexual mores of their context. In addition, a loss of or damage to "honour implies a loss of station or respect; it reinforces the social view, internalized by women, that the raped woman is dishonourable" (Copelon, 1996, p.249). The reinforcement of this social view can have a negative effect in a situation where reporting rates are already low and the social harms of reporting are already devastating to the victims. It also denies the experience of rape as a physical act of violence.

The exact wording of the international prohibition of rape has changed in the recent past through precedents set in the cases of individuals prosecuted for rape during war in the ICTY and the ICTR. The International Criminal Court (the ICC) holds promise in ending impunity for martial rape in its adoption of a broader definition of rape and other concepts established within the Tribunals. Progress has been made in recognizing the problem of martial rape since the establishment of the international system of law, but its ability to solve this problem is yet to be proven.

### **Other Mechanisms Used to Deal With War Crimes**

Further to the ICTY and ICTR, there have been a few different attempts to deal with the aftermath of other wars in the recent past. These mechanisms have taken the form of hybrid national/international courts, internal legal action and restorative justice attempts. All of these options, however, require a large amount of funding and a political will that is not always present. None of these justice-seeking mechanisms have been specifically produced to deal with martial rape, but some have dealt with this issue through their investigations.

#### ***Hybrid Courts***

Following war, in a few cases, countries have opted to create courts that blend the powers of a national and international court. These hybrid-type courts require the state and the UN to work together and jointly bring accused war criminals to trial. With the participation of the troubled country, the UN can help oversee the process of trying war criminals, contributing financially and logistically to the massive effort needed to try a large number of people in a fair manner. This particular method of court composition gives a greater impression of 'fairness' in that neither the international community nor the state would be able to overrun the court system to serve its own interests (Ball, 2002). The hybrid-court structure has been used, most notably in Sierra Leone, following a lengthy civil war during a time when peace remained fragile. In addition to this Special Court in Sierra Leone, hybrid courts have been attempted in Kosovo (1999), Cambodia and East Timor (2000), however all of these courts have been plagued by political, logistical and financial problems such as shortages of lawyers, money to supply defence attorneys, translators, judges or police (Ball, 2002). The court in Kosovo operates within an unstable political environment and primarily hears cases of ongoing violence rather than cases that occurred in a past conflict. It therefore operates slightly differently than the hybrid courts that focus their attention on war crimes of the past, and in Cambodia, a hybrid court has been

discussed but has not been established as of yet due to political resistance (Ball, 2002). The court in East Timor has been in operation for less than three years but has already been severely criticized due to problems such as inadequate defence counsel, due process violations, few translators, a lack of trial transcripts, a poor or non-existent application of international law and a lack of an appeals court (Katzenstein, 2003). The most successful incarnation of the hybrid model thus far is the court that was established in Sierra Leone, therefore this most promising example will be examined in the most detail.

The Special Court in Sierra Leone came about as a result of a request from the government of Sierra Leone for help from the UN in dealing with the aftermath of war and this particular legal mechanism was created through much negotiation and affirmed and given force through a treaty, rather than a UN resolution (Frulli, 2000). This could prove to be problematic in that an agreement between the UN and Sierra Leone would not require that any other countries participate or cooperate with the court (Frulli, 2000).

Additionally, funding has proved to be a stumbling point for hybrid courts. Despite its important mandate “the Special Court (in Sierra Leone) is funded by voluntary contributions from international donors, and its budget has been scaled down from an amount that originally exceeded \$100 million to about \$60 million over three years” (Schabas, 2004). This amount of money and short timeline seem to be inadequate in this situation given the large number of individuals involved with the conflict.

While these courts are not specifically mandated to deal with the issue of rape during war, some willingness to address this issue as a crime has been demonstrated. In Sierra Leone, taking from the provisions of the ICC, this hybrid court specifically allows prosecution of sexual crimes that do not fit within the definition of rape, which expands upon the prosecutions of the International Tribunals that can only prosecute other sexual offences such as enforced prostitution or forced pregnancy under the category of ‘other inhuman acts’ (Frulli, 2000).

### ***Truth and Reconciliation Commissions***

In addition to legalistic measures, the international community has also created ‘Truth and Reconciliation Commissions’ following times of conflict in several countries. Truth and Reconciliation Committees are guided and partially staffed by the UN but are undertaken primarily by the countries they are established within. These commissions allow for a forward-looking focus in terms of the political landscape and in terms of victim assistance. Truth and

Reconciliation Commissions are intended to record and authenticate an agreed upon 'truth' that will help in community healing through allowing groups and individuals to tell their stories of victimization or admit their wrongdoing. They attempt to establish a relatively unbiased history, because following a conflict, groups with vested interests will merely focus on their own peoples victimization, which merely exacerbates any continuing tension (Kritz and Finci, 2001). The South African Truth and Reconciliation Commission that was instituted following Apartheid is the most notable example of this 'justice' mechanism but Truth and Reconciliation Commissions have also been widely used in places such as Argentina, Bolivia, Chad, East Timor, Ecuador, Nigeria, Sierra Leone and the former Yugoslavia (Ball, 2002).

The focus of such commissions is not legal prosecution, as they are often accompanied by grants of amnesty and instead focus on explaining the causes of conflict, harms inflicted and directions for the future (Frulli, 2000). While Truth and Reconciliation Commissions do not work within a legal framework and do not prosecute individuals responsible for acts that can be labelled as war crimes, in a few cases Truth and Reconciliation Commissions have operated at the same time as another mechanism, such as the hybrid courts. This has resulted in establishing a more comprehensive story of what happened as well as punishing those responsible. This has occurred in Sierra Leone but the mixture of mechanisms has proved to be slightly confusing, as the mandates of each can conflict between grants of amnesty and prosecutions, while the demarcations between their respective jurisdictions are not clearly defined (Schabas, 2004).

There is very little information to suggest that the issue of martial rape has been specifically dealt in Truth and Reconciliation Commissions. While it has been stated that special attention was to be paid to sexual abuse in the case of Sierra Leone, no explicit mention of sexual assaults was made in the Truth and Reconciliation Commission and martial rape was merely included into the category of 'human rights abuses' (Schabas, 2004).

### ***National Court Proceedings***

Intervention by the international community can be threatening to the sovereignty of individual countries, thus its intervention in conflict situations is not always welcome. Fear of a biased international community can deter countries from involving the UN in any type of war crimes trials, but there are few national recourses to justice following war that can prosecute war crimes. Military law can step in, as in the American example of soldiers suspected to have tortured prisoners in Abu Ghraib prison in Iraq, or the state courts can take over. There is also the

option to blend this domestic option with international assistance, either by creating a hybrid court, as previously mentioned, or by running national and international proceedings concurrently as in Rwanda and Yugoslavia. Some of these incarnations of national courts have shown some successes or promise, but there are several limitations to the use of this mechanism in pursuit of justice.

During war the government typically has a vested interest in one side or the other, or becomes the government due to the victory of their side, thus the state is generally not an impartial judge of wrongdoing during war. "National courts will only rarely try their own nationals where war crimes are concerned, and even more rarely where crimes against humanity or of genocide are concerned" (Sands, 2003, p.39). There is the danger that national courts will only address individual actions and not the command structure that allowed war crimes to occur, as this command structure is often responsible for initiating legal action (Brody, 2004). The leaders of many countries are targets of international criminal sanctions such as Milosevic in the former Yugoslavia, or they lead the push for action against the former government that was toppled by the military action of the current leader's affiliates, as in Rwanda. There is a division and partiality that remains even after the cessation of conflict and also, domestic courts would have considerable difficulty in extraditing individuals from neighbouring countries for prosecution, as this has even been a challenge for the international courts.

The number of individuals involved in war crimes, in many cases, presents a huge hurdle to dealing with war crimes within a domestic legal forum. The cost for such prosecutions is incredible and many countries cannot handle such a burden, especially after a war. In Rwanda, special legal chambers were established to assist the ICTR by prosecuting cases relating to the genocide, but many of the defendants prosecuted at this national level are unable to afford legal representation and the country cannot afford to provide this for them, thus the 'justice' meted out in these courts is questionable (Amnesty, 2002). The ability of any country to financially or administratively handle this sort of court volume alone is doubtful and the rights and protections for both the accused and witnesses would suffer as a result.

Addressing martial rape in this manner falls within the general limitations of this recourse. Little evidence would point to the successful use of national courts to deal with rape during war. With regard to the invocation of military law, Brownmiller (1975) cited a poor record of prosecutions and limited punishments for American soldiers who were accused of or

suspected of martial rape following the Vietnam War. Any recent improvements in this type of justice system with regard to this issue have yet to be demonstrated.

### ***Local Restorative Justice***

In Rwanda, in addition to the ICTR, local restorative justice-type interventions called gacacas have been put in place in an attempt to help communities to heal following the genocide. Gacacas involve the entire community, under the leadership of respected citizens, in bringing forward cases against individuals suspected of committing crimes and suggesting reparations. Community members provide testimony and evidence both for and against the accused, after which the community leaders confer as to a verdict and sentence (Amnesty, 2002). The particular context of the Rwandan genocide necessitated healing on a community level, as it was an internal genocide, where neighbours were pitted against each other. Opposing sides were determined by colonial racial categorizations that had not completely divided the pre-genocide society as Hutu and Tutsi people lived next to each other and even intermarried. As the people of Rwanda return to their communities and attempt to rebuild after the genocide, deep social rifts remain, while former genocidaires continue to live next door to the families of their victims. Gacacas are attempting to heal some of the community's wounds and also speed up the justice process by taking responsibility for the trials of those charged with the least serious crimes during the genocide.

A continued hatred towards the former political regime that initiated the genocide and all of those who were involved with it has created a problem within the gacaca system in the form of biased prosecutions (Amnesty, 2002). Rwandan society has not healed completely and gacacas have provided a forum to place blame, and enact punishment but this has tended to target only one side of the conflict (Nowrojee, 1996). The government under which the gacacas are operating obtained power through force, by defeating those that ruled during the genocide; the result of this is bias within gacacas. Human rights abuses of the ruling faction are rarely investigated.

While gacacas were traditionally based on a community structure, in this particular case they have been formalized and bureaucratized to take on this enormous task (Sarkin, 2000). This system may work well during a time of peace but it is not equipped to handle the immense amount of cases that are being diverted to this system thanks to the genocide. "More than 54,000 people have been accused, and international observers think there could be as many as 600,000"

(Raghavan, 2004). On top of the sheer number of individuals accused, there have also been problems with witness intimidation, thus presenting a difficulty in obtaining the whole 'truth'. Rwanda's prisons are overcrowded and thus many people accused of committing lesser crimes during the genocide have been released pending trial, which has created an environment where the intimidation or killing of witnesses prepared to speak in front of gacacas can occur (Raghavan, 2004, Dixon, 2004; Amnesty International, 2002). Unlike the ICTR there are no official victim or witness protection measures offered by the gacaca system. There are also suspicions that some of the accused individuals have admitted to lesser crimes, concealing others such as rape or torture, in order to get out of prison (Dixon, 2004). The social and political system in which gacacas are taking place and the enormous amount of people that they are expected to service, have combined in such a way that this manner of justice has not been able to achieve its lofty goals.

Rape is not dealt with through this the local level of justice. Sexual assault has been categorized as a crime that is to be dealt with punitively in national courts or by the ICTR. Gacacas are relevant in the discussion of martial rape in that there have been reports that individuals have successfully avoided prosecution for rape by admitting to lesser crimes during a gacaca and in the possibility that they could be used to deal with the issue in the future (Dixon, 2004).

### ***Conclusion***

Following war, there is a need for some semblance of peace and justice. Survivors who endured the horrors of war and often have lost many friends and family need help to rebuild their country and lives. Acknowledging survivors' experiences of war and finding some level of justice is what international courts, hybrid courts, national courts and restorative justice initiatives aim to accomplish in order to help the people affected by war rebuild. Martial rape is only one of the offences included within the scope of these war crimes and many different types of mechanisms have been used, with varying success. Observers of these efforts have commented on the successes and failures of these mechanisms, but when the efficacy of these legal mechanisms in dealing with martial rape is addressed, the majority of authors adopt a feminist framework.

## ***Feminist Writing***

There is a great range of what can be categorized as 'feminist', from a 'liberal feminist's' quest for inclusion and consideration of women in all aspects of society to a 'radical feminist's' vision of a complete societal revolution to rid the world of all patriarchal structures. There is no single, stable definition of what 'feminist writing' is, but more generally, the identification of work as 'feminist' refers to "both male and female thinkers who put the critical examination of gender and its relationship to power at the centre of their analyses" (Stetz, 2001 p.139). The prevalence of patriarchal structures and the lower status of women in society are ideas upon which feminists base their work, creating structural analyses of situations or events. "Feminism involves the implicit claim that the prevailing conditions under which women live are unjust and must be changed" (McCann & Kim, 2003). While it is not possible to confirm all of the following authors' self-identification as 'feminists', their propositions and a recognition of structural, gender/power elements in their writing has led me to include them as 'feminist'. They all consider that the problem of martial rape is located within a global structure in which males have had the power to define 'wrong' while women have been largely excluded from the realm of war and in the process of creating rules for war. The majority of writing concerning martial rape includes some aspect of an unequal balance of power or status between men and women, however there is no theory that applies directly to martial rape, with feminist principles providing the basic framework for the study of this problem.

The literature concerning martial rape has been produced, primarily, between 1993 and the present, the bulk of which is pre-2000. This pattern is notable in that this period of time coincides directly with the creation of the ICTY and ICTR. However, the seminal work regarding this issue is a chapter in a book about rape written in 1975 by Susan Brownmiller, and which is cited in nearly every other writing concerning martial rape. Brownmiller updated her work in her contribution to Mass Rape: The War Against Women in Bosnia Herzegovina. This book was originally published in 1993, but is not widely available. Another publication dealing with martial rape was produced by the Association of Women for Action and Research (AWARE), a Singapore-based women's organization, and author Sharon Frederick (Rape: Weapon of Terror, 2001). This short book incorporates the personal accounts of women and UN statistics in detailing the historical and current use of rape in war throughout the world. It also includes a call to action for all readers to advocate for women in wartime situations.

Martial rape has also been addressed, if limitedly, in some journals and in the archives of NGO websites, such as Human Rights Watch and Amnesty International. A feminist bent, seen through the inclusion of a gender/power dynamic as an important element of the problem, is found throughout all of this writing. The following literature review examines Susan Brownmiller's work on martial rape and then groups contributions to the martial rape discourse in terms of the recurring topic areas; women's experiences of martial rape, the structure of the patriarchal context in which martial rape occurs, motivations for rape during war, and the limitations of law.

### ***Susan Brownmiller's Writing on Martial Rape***

In her groundbreaking book Against Our Will: Men, Women and Rape (1975), Susan Brownmiller examines the phenomenon of rape through a feminist lens and addresses rape during war explicitly in one chapter. This chapter details the rape campaigns during both World Wars, then in Bangladesh and Vietnam, and it also includes a general history of martial rape that is interspersed with a great deal of commentary (Brownmiller, 1975). While this book may be dated, it is the most comprehensive publication dealing critically with the history of martial rape and it is telling that, over a quarter century after its publication, this remains such a seminal work. Only one book has been published that deals exclusively with martial rape and its context, Mass Rape: The War Against Women in Bosnia-Herzegovina, and beyond this, Brownmiller's ninety-six page chapter devoted to rape during war is the largest available academic work concerning this subject.

It is asserted by Brownmiller that rape is a form of violence that men have used to demonstrate power over both women and other men for centuries in both war and peacetime. Within the context of war the reasons to rape increase and the likelihood of sanction decreases thus it starts to be seen as a 'normal' or inevitable by-product of war. Brownmiller quotes the American General, George Patton Jr. saying that during war "there will unquestionably be some raping" (1975, p.22). Women become the 'collateral damage' in the male-only context of war.

Brownmiller positions rape as a demonstration of power, made more relevant and useful during war. She describes rape during war as "more than a symptom of war or evidence of violent excess. It is a familiar act with a familiar excuse" (1975, p.24). It is the act of a victor, according to Brownmiller, an attack against the male 'possessors' of victims by demonstrating their inability to protect 'their' women. It allows soldiers to bond together in the domination of

an enemy woman; a reward for victories and a proof of masculinity that is to be shared amongst the men fighting towards the same goal. There is pressure for soldiers to participate in gang rapes as a bonding exercise and Brownmiller (1975) cites incidences when men who declined to rape had their heterosexuality questioned or were threatened by death.

She puts forth that it is not sick or demented men who rape during war, but rather that “men who rape in war are ordinary Joes, made unordinary by entry into the most exclusive male-only club in the world” (Brownmiller, 1975, p.25). The men who rape in war are ‘normal’ men who are placed in a situation that makes rape both thinkable and acceptable. It is a context where blind faith and complete allegiance to authority and comrades is necessary, while a code of silence is enforced over transgressions.

Susan Brownmiller set the foundation for future examinations of martial rape from a feminist perspective, placing a focus on the masculine nature of the military and the power dynamic that is present in all rape. The ‘normalcy’ of wartime rapists and of rape during war combined with an unwillingness of the military or any international body to prosecute rape as an offence are ideas that remain current and relevant thirty years after the publication of Brownmiller’s book.

Brownmiller updates her work in a short piece in the book Mass Rape: The War Against Women in Bosnia-Herzegovina (1993) that was originally published in *Newsweek*, applying her prior writing to the conflict in the former Yugoslavia. Notably she discusses the lack of literature about the topic of martial rape and the fleeting global attention that only tends to exist shortly after reports of rape during a war surface (Brownmiller, 1993).

### ***Mass Rape: The War Against Women In Bosnia-Herzegovina***

There is most comprehensive book solely dedicated to the examination of rape during war, Mass Rape: The War Against Women In Bosnia-Herzegovina. Published in 1994 this book is not widely available, and was even listed as ‘out of print’ by a large on-line bookstore. While this book specifically deals with martial rape in the former Yugoslavia, it also includes general information about martial rape and insights that transcend the particular Yugoslavian context, applying to war more generally. The editor, Alexandra Stiglmayer, collected several authors to contribute to Mass Rape, who deal with varying aspects of martial rape in the former Yugoslavia from perspectives that range from a purely feminist, structural view of rape to an ethno-psychological examination of the dissolution of Yugoslavia to collected interviews with martial

rape survivors. All of these authors include an examination of gender elements found in martial rape, thus warranting this book's inclusion as 'feminist writing'. The articles in Mass Rape provide a comprehensive overview of feminist thought with regard to martial rape, but are limited by its explicit focus on the conflict in the former Yugoslavia. Taking off from Brownmiller's beginnings this book furthers her prior work, contemporising it with the inclusion of her commentary on the situation in the former Yugoslavia. The articles contained in Mass Rape have almost all appeared elsewhere, contributing greatly to the discourse of martial rape. This book is representative of further writing on martial rape, including the stories of women raped during war as well as material concerning the structural context that rape takes place within, motivations for rape during war, and the limitations of law. The articles contained within Mass Rape have been thusly categorized below and integrated with other feminist writing that falls within similar topic areas.

### **Accounting for Women's Experiences of Martial Rape**

Contemporary feminism has highlighted a historical lack of women's perspectives and insights throughout history and placed a high value on women's first-person accounts. Personal experiences of martial rape lend a perspective that cannot be understood through other methods. The violence of the attack, the taunts of the attackers, the emotional trauma, fear and confusion as to who can be trusted and the despair of a pregnancy within this context are communicated graphically through first-person accounts. These accounts have largely been incorporated into much of the feminist writing concerning martial rape, helping to create a clear picture of what martial rape is to the victims.

The use of first-person accounts of martial rape is employed significantly throughout the book Mass Rape, and most notably in Andrea Stiglmyer's contribution. This writing highlights the particularities of rape in the former Yugoslavia through interviews of survivors of the war on all sides of the conflict. These interview excerpts are interspersed with commentary and statistics that paint a picture of life during the conflict in the former Yugoslavia. The genocidal aspects of these rapes are cemented in the stories of women forced to sing ethnic songs, put through religious conversions, forcibly impregnated or made to endure racial slurs from their rapists (Stiglmyer, 1994). The human aspect of this act of violence is also brought forward in these women's stories that express the psychological repercussions of gang rape, forced pregnancy and rape by former friends, neighbours or protective forces such as policemen (Stiglmyer, 1994).

Also included in Stigmayer's interviews, are interviews of soldiers who committed rape during the war, which brings a perspective from the other side of martial rape, revealing some the rationale or motivations for rape from the perspective of the perpetrator.

Many other authors support their writing with first-person accounts, such as MacKinnon's (1993) description of pornography found within 'rape-camps', or Price's (2001) investigation into motivations for rape. The National Film Board of Canada also produced a film entitled Rape: A Crime of War that follows four survivors of Bosnian rape camps, allowing them to tell about their experiences during the war, the problems they still face because of their victimization and how they are taking action to help themselves and other women who were raped during the war. Additionally, first-hand accounts of martial rape have been published by several NGO's such as Amnesty International and Human Rights Watch.

### **Structural Perspectives on Martial Rape**

Feminism's focus on patriarchal structural arrangements is particularly apt in discussions of martial rape, as war and the military have been seen to exaggerate this context. The rhetoric of a man's 'sexual need' has been publicly used to excuse incidences of martial rape, portraying rape as an action merely undertaken by a few unruly soldiers. However this thesis is not supported by any academic work with regard to the topic of martial rape. Men do not *need* to have sex within any particular period of time. Margaret Stetz presents an apt illustration of this in her comparison of war to the situation aboard the space station *Mir*. *Mir* isolated one woman in a confined space with several men for an extended period of time without any mention, anticipation or consideration of rape or other untoward sexual behaviour which drastically contrasts against times of war when stories of rape and forced prostitution are common (Stetz, 2001). The desires and actions of individuals are dictated, directed or at least constrained by their social context and in the case of the military there exists, for the most part, a special 'male-only' society. This social context of the military and war combined with a general gender inequality are the areas that are primarily targeted by feminists in discussions of martial rape. The masculinist structure of the military and the utility of rape in war are seen to make martial rape both thinkable and possible.

Patriarchal and masculinist structures that are seen to contribute to martial rape are not exclusively located within the military or during war. Catherine MacKinnon's article, originally published in *Ms.* magazine and reprinted in Mass Rape, locates the sexually permissive Yugoslav

media, which existed both before and during the war, as an influencing factor in martial rape cases. The society that consumed this media was transformed into member of the military, militias and the victims of war as the conflict emerged. MacKinnon indicates that pornographic images adorned the walls of 'rape-camps' during the war and even some of the tanks of Serbian soldiers, while videotaped rapes were broadcast on public television, used as propaganda (MacKinnon, 1993). She explained that when she questioned survivors of these rape camps about the pornography, they identified that the decoration in the rooms of guards "were mainly naked women... those usual pictures from *Start* and those things. Male things." (MacKinnon, p. 29, 1993). MacKinnon describes *Start* as having "a *Newsweek*-like format and the politics of *The Nation* .. (with) ..*Playboy*-type covers and a centrefold section showing women in postures of sexual display and access" (p.28). While this society was not particularly sexually permissive, women were objectified openly and later, as war broke out, their victimizations were used as propaganda (MacKinnon, 1993). This environment is a part of the patriarchal structure that made rape both thinkable and possible within this particular context.

The structure of militaries and their historical exclusion of women is another major target in feminist writing concerning martial rape. Ruth Seifert suggested, in *Mass Rape*, that militaries are strongly connected to ideas about masculinity and most other feminist authors echo this sentiment. In militaries characteristics typically denoted as 'masculine' such as aggression or fearlessness are encouraged, while those that are seen as 'feminine' such as empathy are disdained (Henry, Ward & Hirshberg, 2004). The idea of 'being a man' is important in the military context and rape can be an illustrative way to prove this. It is generally thought that violence is an 'othering' mechanism, which in the case of martial rape delineates a enemy/victim/women and victor/perpetrator/man (Henry, Ward & Hirshberg, 2004; Price, 2001; Card, 1996). It is asserted that in the all-male context of the military, while women are peripheral, their assault is seen to be an affront to 'their' men, who are the 'real enemy', and the women are mere tools by which to accomplish this goal (Seifert, 1994). Rape is useful in war and therefore can be considered a legitimate action. This context makes rape thinkable.

Rape is not solely viewed as an attack on an individual woman, but rather as an attack on the community and especially the men who are imagined as the 'possessors' or 'protectors' of the raped women (Seifert, 1994; Henry, Ward & Hirshberg, 2004; Price, 2001; Card, 1996). In the duality reinforced by rape it is the 'enemy' status of women who are raped during war that is

thought to be particularly important. Rape is seen to serve the purpose of creating societal instability and in many cases causing displacement of people. It is thought that rape “is a cross-cultural language of male domination” carrying messages to the victim, her family and her community (Card, 1996). The military utility of rape can include torture, displacement, reprisal, reward or male bonding through the group domination of an ‘enemy’ woman, but the function of rape that has received the most attention as of late, is its utility within a genocide.

### **Martial Rape as a Tool of Genocide**

Power, utility and masculinity are ideals emphasized by the military establishment that have been identified by feminist authors as major motivators for martial rape and while these factors are fairly universal, with the particulars of each conflict contributing in unique ways, there is another motivation that has recently received a great deal of attention: genocide. All of the authors who discuss martial rape make some mention of its use as a genocidal tool. Even Brownmiller (1975) addressed this motivation, despite a common misconception that using rape as a tool of genocide is a new phenomenon. Rape is and has been used to impregnate, frighten, torture, render infertile, destabilize a community and rid an area of a particular group of people for centuries (Brownmiller, 1975; Mass Rape, 1994; Price, 2001; Henry, Ward & Hirshberg, 2004; Human Rights Watch, 2002; Philipose, 1996; Nicharos, 1996; Card, 1996). “Rape is a trauma with far-reaching consequences for these victims, who have well-founded fears of rejection and ostracism and of lives without marriage or children” thus fulfilling the international definition of genocide (Gutman, 1994, *foreword p.x*). This specific result was recently sought by the militaries involved in the conflicts both in the former Yugoslavia and Rwanda, but it was also used as a genocidal tool in World War Two and the conflict between Bangladesh and Pakistan. The use of rape in service of genocide gained the attention of the world after it was widely publicized that this occurred in the former Yugoslavia and Rwanda. These genocidal wars prompted the creation of the first International Criminal Tribunals in nearly fifty years, which created an appearance that these conflicts were somehow unique, more violent or deserving of sanction than others.

### **Feminist Commentaries Concerning Martial Rape Motivations**

The structure and context of an all-male military and of war creates a particular arena where rape becomes a thinkable action that has military value and will, most likely, go

unpunished. The men who rape in war are average men, who are placed within a situation where rape is an acceptable mechanism by which to achieve feelings of power, masculinity and connection with fellow men. Many authors have addressed this issue and an article by Henry, Ward and Hirshberg (2004) provides a meta-analysis of these motivations (Henry, Ward & Hirshberg, 2004). Their model proposes that diverse factors such as an individual's childhood experiences, attitudes towards women and sexual proclivity combined with the atmosphere of the military and war create the likelihood that an individual soldier will rape. Both environmental/structural and individualistic motivations are connected in this discussion. There has been no decisive research or theory that identifies any one factor that would reliably predict that a man will rape and instead factors have been identified that have been seen to increase or decrease the likelihood that an individual will rape. Gender is the most reliable predictor of rape but societal or individual ideas about masculinity are identified as another major influence.

While sexual tension and release are often associated with rape, rape of the 'enemy' is not conceptualized as being a primarily erotic or sexual experience for the perpetrators. During the act many men experience difficulty performing sexually and they "articulate feelings of hostility, aggression, power and dominance" (Seifert, 1994, p.56). This proposition is supported by Stigmayer's interviews with wartime rapists, who reflect that the rapes they committed were not sexual experiences for them (Stigmayer, 1994). Rape in this context is connected more with power and feelings of dominance than eroticism. Women who were raped in the former Yugoslavia reported that their perpetrators actually spoke of how the rape proved that they were "real men" (Price, p. 9 2001).

Masculinity is important, especially within this particular context. In referring to the situation in the former Yugoslavia, Price stated that "militarized state nationalism does not simply allow men to be violent, but compels them to do so", and should a man resist, his loyalty to both state and heterosexual masculinity is questioned (Price, p.18, 2001). While natural reactions to the context of war, such as fear, are derided by the military they do occur among soldiers and the Multifactorial Model of Wartime Rape (Henry, Ward & Hirshberg, 2004) theorizes that in order to suppress these feelings some soldiers may turn to alcohol, drugs and pornography as coping mechanisms, all of which are disinhibitors to rape (Henry, Ward & Hirshberg, 2004). Thereby increasing an individual's likelihood to rape.

The authors who tackle the issue of martial rape motivation all mention that soldiers almost never report martial rape committed by fellow soldiers, thereby making it difficult to enforce any prohibitions of the action, while it has also been indicated that rape has occasionally been ordered by superior officers and that those who have declined to participate in an ordered rape or threatened to report rape have been threatened by their peers (Brownmiller, 1975; Card, 1996; Price, 2001; Seifert, 1994; Stiglmayer, 1994). This can be connected to the proposition that rape during war is used as a 'male-bonding' ritual. The value of rape, especially gang rape, as a bonding agent among men has been investigated in a peacetime setting by Peggy Reeves Sanday (1990), and is specifically noted in war by Brownmiller (1975), Card (1996), Nicharos (1995), Stiglmayer (1994), Seifert (1994) and Price (2001). Card notes that "the activity of martial rape, often relatively public, can serve as a bonding agent among perpetrators and at the same time work in a variety of ways to alienate family members, friends and former neighbours from each other, as in cases where the perpetrators had been friends or neighbours of those they later raped" (Card, 1996 p.7). Rape has value to individual perpetrators and to military operations as a whole.

Rape is made acceptable through structural arrangements and incentives for rape are made greater in light of its utility in war. The powers of legal sanction are intended to fight against these factors that allow rape. A cost benefit analysis of the situation swings in favour of martial rape as the feasibility of this solution in light of these identified motivations is questionable, especially when they are aligned with the critiques of feminist legal scholars.

### **Feminist Critical Approaches to Law**

There are some feminists who question any law or legal system's ability to satisfactorily deal with issues concerning women (Smart, 1989; Snider, 1999), which would include the issue of martial rape. In placing the discussion of martial rape motivations beside this view of law it appears to be very relevant in this case. Smart (1989) denies the ability of any legal system, established by men and operated within a patriarchal society, to address the concerns of women. She indicates that the law legitimizes a particular 'truth' and utilizes a particular empirical method that is not receptive to the needs of women (Smart, 1989). This theoretical perspective, however does not deal with martial rape specifically and it does not account for the particular context of war basing itself within a context where power is being decentralized and works with a less hierarchical structure.

Snider (1999) posits that violence against women is a problem that is supported by patriarchal structures, and identifies it as a collective/societal problem rather than an issue of individual men. This is problematic, according to Snider (1999), because the legal system works on an individualistic basis, targeting individual offenders rather than the structural arrangements that allow and encourage this violence. She dismisses this individualistic, reactive system, instead supporting measures to increase the status of women in society and to dismantle the arrangements that allow this violence to occur.

Other feminist writers however, accept the legal system as an imperfect tool, but accept it as a recourse available to deal with martial rape. These authors tend to focus on an examination of the ICTY, ICTR and their misgivings and the aim for these authors is fixing the existing system rather than reinventing it. Because the Tribunals in the former Yugoslavia and in Rwanda represent the first times that martial rape has been prosecuted in an international forum, the ways in which this process has played out has resulted in a great deal of commentary from academics. Some praise for the international criminal Tribunals has come from feminists who demonstrate an appreciation of the step forward that prosecuting martial rape presents (Frederick, 2001; Stetz, 2001). Most commentary, however, tends to be rather negative, marking the categorization of martial rape and the particular ways in which the law has been applied in these Tribunals as problematic areas. As the Tribunals continue, over a decade later, it is important to examine the critiques of this 'solution' to the problem of martial rape.

International law is discussed within Mass Rape, with the inclusion of a second submission from Catherine MacKinnon and an article from Rhonda Copelon. The way that the international community has addressed the issue of rape in the former Yugoslavia is lacking according to MacKinnon because it ignores the misogynistic precursors that created the possibility for and probability that rape would be used as a tool of war or genocide. MacKinnon (1994) advocated attending to the aforementioned motivations for rape and creating structural rather than legal changes. The complex interactions that allowed martial rape to occur in the former Yugoslavia come into being, she asserts, is not being adequately recognized.

MacKinnon also questions the notion of 'women's human rights' in that "what is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women" (MacKinnon, 1994, p.184). Conceptualizing rape as genocide and the victimized women as targeted because of their gender *or* their ethnic identity is not enough. The

intersection of ethnicity, gender and religion that creates a target for martial rape must be understood and rape must be seen as violence that is directed by these intersecting identities. MacKinnon (1994) and Copelon (1994) question the will of the international community to charge rape in a non-genocidal war or within a non-war genocidal setting, as the ICTY required a state to charge rape on a mass scale because of a strict interpretation of martial rape as an attack on a people, rather than recognizing the wrongs of the individual rapes.

The first major problem that has been highlighted by feminists is that martial rape has not been explicitly included as a 'grave breach' or torture. While martial rape can be interpreted as being included as a grave breach or as torture in international law or within the Statutes of the Tribunals, it is not explicitly listed as such. The explicit inclusion of martial rape as a grave breach or torture is important, as both are subject to universal jurisdiction and this classification would call attention to the seriousness of this type of assault (Niarchos, 1995; Copelon, 1994). This omission was not the result of any directed efforts towards excluding rape and Niarchos (1995) attributes it to a lack of attention paid to details of the Geneva Convention. How martial rape is categorized and defined through international law is important as it has implications on the frequency and importance placed upon prosecution. Without explicit inclusion, the chances that the law will be uniformly or equitably applied are reduced.

Another major concern with regard to international martial rape law applies to the precedent that the prosecution of martial rape in the ICTY and ICTR may set. The wars in both the former Yugoslavia and in Rwanda have had a genocidal component to them that horrified the world and thus prompted the creation of the international tribunals. In these contexts, rape was widespread, used as a tool of ethnic cleansing and with an obvious military purpose, but in other situations the intentional use of rape as a weapon is often not as easily identifiable. "The international and popular condemnation of the rapes in Bosnia tends to be either explicitly or implicitly based on the fact that rape [was] being used as a tactic of ethnic cleansing" (Copelon, 1996, p. 259). While the practice of rape has been a feature of war for centuries, it was not until the advent of these overtly genocidal wars that any action was taken to truly categorize martial rape as a problem, let alone enact any sort of solution. Liz Philipose (1996) suggests that the ICTY has characterized martial rape in a limited fashion, suggesting that this application of international law "is a condemnation of rape as it is used to pursue policies of ethnic cleansing, but not as a condemnation of rape as a violation of women's human rights" (p.56). This

argument can also be made for the ICTR, however the writing concerning the prosecution of martial rape at this tribunal is not nearly as prolific as that concerning the ICTY. Both international tribunals focus the prosecutions of rape campaigns that were “widespread and systematic”, which is a specific qualifier in the statutes governing the tribunals, thus falling short of an “absolute prohibition on the practice of rape” (Philipose, 1996, p.56). Philipose (1996) concludes that rape is only thus prohibited when it is in service of illegitimate military ends, rather than being prohibited generally because it violates women’s human rights.

More simply, having laws of war makes ‘collateral damage’ a valid and legal concept and these laws “make war itself possible and legitimate” (Philipose, 1996, p.48). The laws of war were written, were and continue to be predominantly enforced by men and they focus on military needs rather than the needs of the population affected by war. This argument thus returns to the theorizations of Smart (1989) and Snider (1999) who critique the ability of any legal system to deal with a problem such as martial rape.

### ***Conclusion***

The topic of martial rape has not been widely addressed in literature and the vast majority of this writing adopts a feminist perspective. This perspective is fitting in that women are raped in war for reasons that reflect patriarchal arrangements and notions. Men are also raped in war, but this act is committed with different motivations and carries a different, but not necessarily lesser, impact for victims. An exploration of male martial rape is outside of the scope of this research, but is deserving of greater attention in literature and in law. In the case of wartime rape targeting women the lack of sanction can be easily attributed to the masculinist structure of the military, an unequal power structure that excluded women from creating and enforcing law, and a devaluing of women’s experiences and accounts of rape. Feminism recognizes these factors in detailing the motivations for martial rape, inaction of militaries and the international community and in observing the work of the ICTY and ICTR.

## **Chapter Two: Methodology**

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## ***Research Questions***

The academic writing concerning martial rape is fairly sparse and there is significant room to explore this topic further. Confined by budget and location, this research will utilize locally accessible information sources to delve into the subject of martial rape. Previous literature has critiqued the ways that international law has (and has not) addressed this problem and has discussed the phenomenon of martial rape as a generalized whole, but a comprehensive breakdown of how the international tribunals have dealt with this issue is absent. As the first international bodies to prosecute martial rape, they have not been explored systematically and much of the literature merely alludes to their successes and failures. These particular bodies and their actions are very important as they are creating definitions and precedents for future martial rape cases. The ways in which martial rape has been dealt with in these venues needs to be examined in a focussed manner and compared against the existing literature. The main research focus in this study is an exploration of how martial rape has been addressed by the ICTY and ICTR. This will be accomplished by answering questions such as: How many cases brought before the tribunals include allegations of rape? What defences were used against charges of rape? What sentences were meted out to those who were found guilty of charges relating to martial rape?

In order to accomplish this goal, a content analysis method will be used with the information presented on the websites of each tribunal. The websites contain case-by-case profiles including indictments, judgements and appeals. This information will be synthesized and the material relating to martial rape will be extracted. This method serves as a cost effective, practical way to obtain detailed information about all of the cases relating to martial rape that have been brought before the ICTY and ICTR.

## ***Content Analysis***

The research method that will be used in this study is content analysis. Content analysis involves studying “a set of objects (i.e., cultural artifacts) or events systematically by counting them or interpreting the themes contained in them” (Reinharz, p. 146, 1992). An artifact can be nearly anything, but “content analysis is one of the classical methods for analyzing textual material, no matter where this material comes from” (Flick, p.192, 1998). The first step in

content analysis is to choose what artifact is to be studied. In doing so it must be remembered that “cultural documents also shape norms; they do not just reflect them” (Reinharz, p.151, 1992). In this particular case the ‘artifact’ to be studied is the case-by-case material published by the ICTY and ICTR on their respective websites. Only the cases that involve allegations of rape and that have been completed will be included in this study.

After choosing a particular ‘artifact’ the issue of coding is raised. “Content analysis is essentially a coding operation” (Maxfield and Babbie, p. 311, 1998). This process is explained more simply by Jackson (1999) as “what is to be measured and how?” (p.174). This choice can involve complicated manipulations to ensure that others who would choose to repeat the study would achieve the same results, establishing inter-rater reliability and this is especially important when it is the latent content is being studied. Latent content, is the “underlying meaning” within the artifact as opposed to manifest content, which is “the visible, surface content” (Maxfield and Babbie, p.312, 1998). This content can be coded in different ways depending on the purposes of the researcher and the amenability of the material. Coding involves creating categories that need to be “mutually exclusive and exhaustive” so that content can easily be placed into one such category (Maxfield and Babbie, p.312, 1998). After the artifacts are broken down into categories, the interactions between them can then be analyzed. This analysis can be of either a quantitative or qualitative nature depending on the nature of the study.

The benefits of using content analysis include its cost-effectiveness and unobtrusiveness. “Cultural artifacts are not affected by the process of studying them as people typically are” (Reinharz, p.147, 1992). A wide variety of materials can easily be obtained for a study of both what they include and what they do not. While society tend to privilege particular voices and material, content analysis can be conducted on any type of artifact that may represent a viewpoint other than the dominant voices of the time and in studying what is not present, these unheard voices can be uncovered (Reinharz, 1992). Processes that take a long time or historical materials are particularly amenable to content analysis.

The drawbacks to this form of research include the fact that only existing material can be used. Over time only certain material survives, thus it cannot be assumed that any material is particularly representative of its time period (Reinharz, 1992). Also, in creating categories that are based on theory, the particularities and depth of the text may be compromised (Flick, 1998). This being said, content analysis has been chosen for this research study. The negative aspects of

this method will be mediated by the specificity of the context and there will be an attempt to create categories that adequately reflect the complexity of the material studied.

### ***Feminist Perspective***

Martial rape is an offence with a long history; a history that accompanies that of every war, but it does not have a history of intervention. The rape of women during war has not attracted much attention from the academic or legal communities despite the devastating effects of rape during war. Martial rape violates one's bodily integrity and thus the most fundamental basic human rights, but it specifically concerns the bodies of women. This type of rape occurs within a context where masculinity is highly valued and women are generally excluded from any positions of power. This problem is well suited to a feminist analysis as it is very open to a gender-based or structural examination.

The majority of the literature that has been written about martial rape has come from feminist authors or material that can be seen to fit within a feminist framework. Feminism has identified martial rape as 'wrong'; it has "made it possible to say that, although there has always been sexual violence against women during war, there is nothing normal or justifiable about it" (Stetz, 2001,p.139). There is a lack of academic work with regard to martial rape and no body of theory that directly relates to the subject. The closest theoretical fit comes from the postulations of varied feminist authors who have written articles about martial rape and is therefore the perspective that will provide the best background from which to work.

Martial rape can be seen as a discriminatory act, enacted upon women in response to their gender and ethnic or religious affiliations. It targets their intersecting identities as women and as a part of another group. Women are doubly 'othered' in the arena of war, excluded from the military realm and identified as 'enemies' because of their membership in an ethnic or religious group.

A feminist approach is fitting for a study of martial rape in that it highlights the gender-based nature of the problem and it also points to some of the structural elements that have allowed martial rape to occur without sanction or intervention. Feminist authors identify the roots of the action, as a collective/structural problem rather than an individual pathology and this presents a comprehensive view of the issue, encompassing the particularities of the context. This perspective marks rape during war as a specific and distinct act of violence, different than rape

during peacetime and different than other acts of violence that take place during war. Historically the voices of women have not been heard and rape was originally conceptualized as a violation of honour or as a mere by-product of war. Women's experiences of martial rape as a legitimate 'wrong' and as an inappropriate form of violence within a violent context were not considered. A feminist approach places a high value of the experiences of women, and affirms their experiences of the violence that is enacted upon them.

This perspective will guide this research, identifying martial rape as a particular form of violence that is specifically enacted upon women within a context where women have little, if any, access to power. The ICTY and ICTR have been heralded as vehicles of progress in the conceptualization of martial rape as a war crime, however their ability to truly do so has not been comprehensively examined.

### ***Artifacts***

In this study, the artifacts to be studied are the Internet published case materials from the ICTY and ICTR concerning the rape of women. Linked to the UN website, each Tribunal has produced its own website (<http://www.un.org/icty/index.html> and [www.icttr.org](http://www.icttr.org) respectively) containing information about the Tribunals themselves and about each case that has been brought before them. The ICTY and ICTR are the first international bodies that have tried and convicted individuals of war crimes that relate to martial rape. These trials may not comprise the total number of martial rape cases that arose from these conflicts as some incidences may have been brought forth in lower courts such as the hybrid court in Kosovo or the national genocide chambers in Rwanda. However, The Tribunals represent the international community and have been given the highest authority in prosecuting the most serious offences committed during these conflicts. The ICTY and ICTR have set precedents, such as definitions of rape and command responsibility that will guide any future international prosecutions. The international laws concerning martial rape have been clarified and operationalized during these proceedings.

The UN has published a wealth of material concerning the Tribunals, including relevant legal texts and case-by-case descriptions. The particular material chosen for this study are the indictments and judgement/sentencing sections of the case descriptions that involve charges relating to martial rape. This material is published by the ICTY and ICTR and connected to the UN website. The format of the information varies between cases and between the Tribunals. The ICTY site notes that the material is for information purposes only and are not official transcripts,

however many indictments and sentences bear the seal of the Tribunal and are signed by the judge while the ICTR information bears no such warning. Despite this notice, this information is presented as the public record of the Tribunals' activities and decisions.

On each website there is an option to view the cases that have been brought before the court and when this option is selected the cases are displayed by name, status or by case number. When a particular case is chosen one can view the indictment, a judgement/sentencing section and appeals (if there were any). Some cases also include trial minutes, but because not all of the examined cases offer this option this information was not included in the study. The indictments ranged in length from five to one hundred and seventy pages; detailing the crimes with which each accused was being charged. The lengthier judgement/sentencing sections were between one hundred and seventy and two hundred and thirty pages. This section compiled a background of both the individual and the conflicts, a summary of the evidence presented by the defence and prosecution and the findings of the court for each count. It also documented the judgements and sentences for each individual. In addition to these sections, several of the studied cases have gone through an appeals process, which is also included on the websites. This section was reviewed when appropriate. These particular documents were chosen as the artifacts to be examined in order to explore the way that martial rape was dealt with through these international interventions.

The first step in this process was to identify what cases were to be further examined because many cases were brought before the Tribunals that do not concern martial rape and are therefore outside the scope of this research. All of the indictments posted on the websites were read during this process and only those that included allegations of the rape of women were subject to further study. To further narrow the field of study, only the completed cases were chosen and in order to discern the status of each case the judgement/sentence section of each of these cases that mentioned rape was read and only the cases that had been completed as of May 2005 have been included in the study. Twenty cases involving rape were completed by the ICTY as of May 23, 2005 and eight had been completed by the ICTR by the same date. These cases will comprise the material to be examined in this study.

Once all of the complete cases that included rape charges were identified, categorization of the information could proceed. Initially a short summary of each case was prepared, detailing the circumstances of the rape charges and the defence presented. A spreadsheet was then created

to note judgement of guilt, sentences given and the charges that include allegations of rape. The status of the accused as a superior or a direct rapist, defences used and any court mention of rape in sentencing was also recorded. An additional category was established to note the results of any appeals and the details of any guilty pleas. All of this material gathered from both Tribunals and was compared against the theories presented in the literature review. The theorized attitudes and motivations with regard to martial rape that feminist authors asserted are tested in this concrete situation. This organization also presents the work of the Tribunal with regard to martial rape in a coherent fashion, identifying who was charged with offences relating to martial rape, the circumstances surrounding this and the defences used. This allowed for the identification of many trends throughout the cases as well as the general direction of the Tribunals. This interpretation of material is the latent content within this research, while the summary and spreadsheet material is the manifest content.

**Chapter Three: Analysis of Cases From the International  
Criminal Tribunal for Rwanda**

## **Background**

The information contained in this background section was gleaned from material presented with the published Judgements. The primary source that was used for this background was the Akayesu case judgement (ICTR-96-4). This represents an account of history that was accepted by the ICTR and upon which the court based its decisions and understanding of the context.

Rwanda is a small country in Central Africa that has suffered through ethnic tensions for decades that culminated in genocide in 1994. Rwanda's people were divided into two major ethnic groups that have pre-colonial roots, but that colonizers had transformed into discriminatory designations. Originally the categorization of Hutu or Tutsi was based on lineage and class, with the elite class of people titled 'Tutsi', but these titles were fluid. Colonists altered this system, creating permanent ethnicities that identified individuals and families as either Hutu or Tutsi. The Belgian colonists created a social structure in which Tutsis were installed and maintained in positions of power and the supposed distinctions between the people were cemented through discriminatory policies and the distribution of identity cards in the 1930's. In the late 1950's, when Rwanda started to gain independence from Belgium and as a democratic process began, voting took place along ethnic lines and unrest was stirred as Tutsis were ousted from their places of power. Ethnic violence from both sides ensued and a Hutu government was installed as Rwanda achieved independence in 1962.

Under this Hutu government, policies that favoured Hutu people began to emerge, creating instability as many Tutsis fled the country or fought, often militarily, for power. Over time a single-party system emerged and President Juvenal Habyarimana was installed as President, and maintained this position for nearly three decades. Anti-Tutsi policies and violence continued and in 1979 the Rwandese Patriotic Front (RPF) was created. The RPF was a primarily Tutsi militia group that opposed the Hutu dominated government. It asserted itself in Rwanda in 1990, fighting against the government-backed Rwandan Armed Forces (RAF). There were some signs of change within the political system at this time with the promise of a multi-party system and the government's entrance into talks with the RPF for a cease-fire and an opportunity to participate in the political process. These attempts at peace and democratic reform, however, were not genuine on the part of the Habyarimana government and further polarized the country along ethnic lines.

Violence and hate propaganda intensified as a new Hutu militia group called the Interhamwe was formed. Tension between previously peaceful Hutu and Tutsi neighbours grew as hatred was fuelled by sources such as the RTLM radio station, that anti-Tutsi propaganda and encouraged Hutu violence against Tutsis. This anti-Tutsi sentiment was organized under the slogan "Hutu Power". Peace processes that had begun in the early 1990's were discarded by 1993 as tensions mounted until April 6, 1994 when President Habyarimana's plane crashed, killing all aboard and the country descended into anarchy.

The RAF and Interhamwe began setting up roadblocks, and those moderate government officials who had supported the proposals of power sharing with the RPF were killed as a Hutu-Power interim government was set up. Belgian soldiers who were a part of a UN peacekeeping mission in the area were also executed as propaganda efforts increased and the genocide began. The ICTR has established that the killing of Tutsis during this time amounted to genocide and that it was supported by the Hutu-Power government and the RAF. At the time of the genocide there was ongoing conflict between the Tutsi backed RPF and the Hutu supported Rwandan Armed Forces (RAF) but the ICTR asserted that this conflict only provided the context for the genocide that occurred. The genocide and conflict are seen to be two distinct events that happened within the same time period. The massacre of Tutsi civilians continued from April 1994 until July 1994 when the RPF took control of the capital, Kigali, and asserted authority over the country declaring a unilateral ceasefire. Reprisal violence did occur as the RPF took power and people began to return to their homes. The UN estimates that 800,000 people were killed in Rwanda during the genocide and that between 250,000 and 500,000 women and girls were raped over these three months.

The UN acknowledged the problem of bringing justice to the people of Rwanda following this genocide and on November 8, 1994 the Security Council adopted a resolution that established the ICTR. The purpose of the ICTR is to prosecute those involved in the genocide who committed violations of human rights, including rape, throughout 1994.

### ***Martial Rape Cases Completed By The International Criminal Tribunal for Rwanda***

After searching through all of the cases that have been completed by the ICTR I discovered that only eight cases related to martial rape. All of these cases included at least one

count of 'Crimes Against Humanity (rape)' and they typically included rape as a part of other charges, such as genocide or extermination. All of the accused were charged with multiple crimes, many of which include rape as an element of the crime. Notably, the rape charges do not follow clear requirements as to how many victims or perpetrators are necessary for each count of rape. In some cases one count relates to the rape of one woman and in others it refers to multiple rapes with multiple victims.

## **Case Summaries**

AKAYESU, Jean Paul (ICTR-96-4): Akayesu was the bourgmestre (political representative/leader) of an area called Taba at the time of the genocide. It was alleged that the females who sought refuge in the governmental building, known as a communal, where he had an office were subject to sexual violence and degrading treatment. Witnesses testified that he had encouraged police and militia members to rape Tutsi women and insert sticks into their vaginas. He was not charged with committing rape personally but one witness testified that he had forced a young girl to undress and perform gymnastic in front of a large group of people. Akayesu denied that rape had occurred within the communal and that he would not have had the power or authority to stop any rapes that may have happened in the surrounding areas. He maintained that, to his knowledge, no rapes had been committed during the genocide and he asserted that all of the allegations and charges of rape were the result of coercion or pressure from international women's groups.

The Tribunal ruled that rape did occur at the communal and that the accused had encouraged or instigated acts of sexual violence. It was held that he should have known or had reason to know that rapes were taking place and should have taken action to stop them. He was thus found guilty of crimes against humanity for rape and indecent acts.

KAJELIJELI, Juvénal (ICTR-98-44A): Kajelijeli held the position of bourgmestre in an area known as Mukingo, which gave him authority over the local police. He allegedly trained and armed the local Interhamwe and made speeches inciting his Hutu audience to assault, rape and exterminate Tutsis. These speeches were followed by instances of rape and one witness even testified that the defendant was present while his subordinates raped her. Kajelijeli argued that he had not heard of any rapes in the area and that he had not encouraged anyone to do so. He claimed that he was being targeted by lies concocted by the RPF.

The Tribunal indicated that while rapes did occur in Mukingo, it was not proven beyond a reasonable doubt that they were caused by statements made by the accused. Insufficient evidence was produced to prove that he was present during any of the rapes. Kajelijeli was found not guilty of rape, however he was convicted of genocide and extermination. Rape had been listed as a part of these charges in the indictment, but all connection between rape and these charges was removed in the judgement.

KAMUHANDA, Jean de Dieu (ICTR-99-54): Witnesses testified that Kamuhanda led a massacre, during which the militia took approximately twenty women for the purposes of rape. A witness indicated that she had heard the Interhamwe discuss that the women were to be raped and the witness testified that later she had heard that the women taken by the militia had been killed after being raped. Kamuhanda presented an alibi for the day of the massacre and claimed that he was not an influential figure in the government, that he would not have had the authority to lead the attack.

The Tribunal found Kamuhanda not guilty of rape. The evidence of rape that was presented was hearsay and did not prove beyond a reasonable doubt that he was involved in rape. He was found not guilty of all charges against him.

MUSEMA, Alfred (ICTR-96-13): Musema was an influential person in his community, the head of a large tea factory, and it was alleged that he had made speeches encouraging Hutu men to kill and rape Tutsi women, then insert sticks into their vaginas. One witness stated that he had watched as Musema had raped a woman himself and then instructed his subordinates to do the same. Others recalled hearing him order others to rape and mutilate Tutsi women. Musema presented alibis for the times in question and claimed that he was not influential, powerful or in a position to give orders.

The court initially believed the witness who testified that he had seen Musema personally commit rape, but evidence admitted to an appeals court at a later date led to a reversal of his conviction. The evidence presented against him did not meet the burden of proof for rape, but he was convicted for genocide and sentenced to life in prison.

NIYTEGEKA, Eliezer (ICTR-96-14): A witness claimed to have seen Niyitegeka take a young girl into his jeep for a period of time, then remove her from the vehicle and shoot her. The witness stated that he later heard Interhamwe talking about the girl being raped and assumed that Niyitegeka had raped her in the jeep. Another witness indicated that on another occasion Niyitegeka had instructed others to insert a sharpened stick into the vagina of a dead woman and the witness explained that he knew this group had carried out Niyitegeka's instructions because he had seen the woman's body afterward. The defendant claimed that the witnesses were mistaken in their identification of him and he presented alibis for the dates in question.

The rape of the young girl in the jeep could not be proven beyond a reasonable doubt, as the witness did not actually see the rape take place and the victim did not survive to testify. Niyitegeka was found guilty for her murder and he was also found guilty of crimes against humanity under the category of 'other inhumane acts' for the command to sexually mutilate the body of a dead woman.

SEMANZA, Laurent (ICTR-97-20): Semanza was a politician who had held the position of bourgmestre in the area of Bicumbi for two decades before becoming involved in national politics. He remained an influential figure in the community and it was alleged that he had delivered a speech to a group of Hutu men encouraging them to rape Tutsi women prior to killing them and inserting sharpened sticks into their vaginas. A witness testified that shortly after these directions were given she and her cousin were raped by men who had been in attendance at this speech. The defendant presented an alibi for the time in question and he claimed that he had never heard of any rapes, that they did not exist within Rwanda's culture.

The Tribunal found the defendant guilty of rape based on the victim's testimony, however it was not proven beyond a reasonable doubt that the victim's cousin had also been raped. The woman explained that she did not actually see her cousin being raped, that she had only heard her saying that she would "rather be killed". This statement did not meet the burden of proof required by the court, but Semanza was sentenced to seven years for the rape of the victim that had testified. This rape was also classified as torture, because it was committed on a discriminatory basis, and he was sentenced to ten years for this offence, served concurrently with the sentence for rape.

SERUSHAGO, Omar (ICTR-98-39): The accused admitted that he had been the head of the Interhamwe in Gisenyi and he pled guilty to several crimes against humanity including extermination and torture. His plea agreement, however, included the dismissal of all charges involving rape.

GACUMBITSI, Sylvestre (ICTR-01-64-I): Gacumbitsi was the bourgmestre of Rusumo. It was reported that he had driven around the area with a megaphone instructing that all Tutsi women should be raped and that sharpened sticks be inserted into their vaginas. Witnesses explained that after he drove past a group of men, they attacked several Tutsi women, raping them and placing a sharpened stick in the genitals of one. Witnesses claimed that other women who lived in the area were lured to places where they would be raped with promises of travel documents that would allow them to move freely. Gacumbitsi denied inciting rape and claimed that he had not heard of any rape occurring in the area. He presented an alibi for the time in question and attacked the credibility of the witnesses.

The Tribunal held that the accused had reason to know that rapes were being committed and that evidence proved that Gacumbitsi had encouraged others to rape. He was found guilty of rape as well as other charges that included mentions of rape, such as genocide, and was sentenced to a total of thirty years in prison.

### **Superior Responsibility in Cases of Martial Rape**

Of the eight ICTR cases studied, six of the accused were tried for offences that were carried out by their subordinates. They were tried as superiors that had a responsibility to be aware of and make attempts to stop the criminal actions of the people they had authority over. There was a very loose, if any, structure for the Interhamwe and citizens that had participated in the Rwandan genocide, as influential figures in the community became leaders for these genocidaires and militias. It was thus difficult for prosecutors to meet the requirements that the courts demand in order to prove that these individuals had a command responsibility over those who actually carried out the rapes. The majority of the defendants were influential members of the community, often involved in politics rather than occupying an official military rank. Only one completed case from the ICTR involved an accused who had acted alone to rape a woman personally (Niyitegeka ICTR-96-14) and another allegedly raped a woman directly before instructing those who were with him to do the same (Musema, ICTR-96-13). That the

overwhelming majority of these defendants were charged with aiding and abetting rape and not as direct rapists means that there are many soldiers who actually raped during the genocide and have not been held responsible by the ICTR.

Those individuals who have been tried by the ICTR were accused of directly inciting others to rape. This incitement ranged from a defendant raping a woman as an example to his subordinates, to another man driving around a city with a megaphone announcing that Hutu men should rape Tutsi women before killing them. These occurrences were very public and the instructions given were not in vain. Rape predictably followed the words of these influential individuals.

Rape and sexual violence were encouraged by these influential individuals but were primarily carried out by the Interhamwe and civilians. While there was no official command structure during the genocide people did tend to defer to community leaders and other powerful people. A witness in the Akayesu case claimed that he had heard the defendant tell his subordinates “Never ask me again what a Tutsi woman tastes like” and described him as “talking as if someone was encouraging a player” (Akayesu IT-96-4, Judgement, pp. 422). Bourgmestres, such as Akayesu, retained control of local police forces that may have been able to establish some level of peace or save some lives, but instead these individuals tended to support the activities of the government and Interhamwe, speaking out in agreement with anti-Tutsi policies.

Akayesu, Kamuhanda, Musema and Semanza all argued that they did not have the authority or power to stop the Interhamwe from raping, that they were just businessmen and moderate politicians who did not support the Hutu Power regime. They portrayed themselves as bystanders to the genocide who had done all they could to help Tutsis, but that their ability to do so was very limited. Akayesu’s defence team even subpoenaed the head of the UN mission in Rwanda, Romeo Dallaire, in order to portray the situation as chaotic and uncontrollable, as even the UN force was unable to stop the genocide. While these defendants denied that they could have had any impact in preventing or stopping the rapes committed during the genocide, the Tribunal held that they could have done something to prevent and stop rape but instead encouraged and incited the action.

The Tribunal affirmed that rape was widely committed against Tutsi women and that this was done rather publicly in the midst of a violent genocide, thus community leaders had reason to know that it was occurring. These leaders were seen to have a duty to prevent martial rape

from occurring. Interestingly, the Nuremberg principle in international law holds that following orders in a conflict situation does not negate the responsibility for one's actions, however in this venue superiors are being held responsible for the actions of their subordinates. The direct perpetrators are not being tried and it does not appear that the prosecutions are evenly applying this principle in the case of the ICTR.

### **Victim Testimony at the ICTR**

The particularities of the Rwandan genocide necessitated stringent witness protections, as victims and perpetrators tended to live in the same communities both before and after the genocide. Thousands of people participated in the massacres of the genocide and some tensions remain, as many perpetrators have not, and may never be, held responsible for their actions during the genocide. The immense number of people involved makes the justice process nearly impossible. There is a fear of reprisal for potential witnesses who may have damning testimony and some newspaper reports indicate that violence has been used to silence witnesses (Dixon, R, 2004; Raghavan, S, 2004). The ICTR has implemented a comprehensive support program for witnesses that include the provision of protective measures as well as counselling services. Many martial rape victims testified against their attackers at the ICTR but many other victims were killed after being raped. In some of these cases witnesses to the attacks appeared in court, but their testimony did not hold as much weight as that of a victim. The court did not require that claims of rape from a victim be corroborated, and thus it was easier to secure a conviction when a living victim testified.

Only three of the seven individuals who pled not guilty were found guilty of rape and in all three of these cases at least one victim testified. Victims testified in two other cases where the accused was found not guilty, as the victim testimony identifying the accused was not considered reliable enough to meet the burden of proof. In the two remaining cases, the rape victims had not survived the genocide and the Tribunal found both of these defendants not guilty. The testimony of victims was generally accepted by the Tribunal as truthful and in the cases where it did not produce a conviction, major inconsistencies created doubt, not that the woman was raped, but rather that their identification of the accused or details of the attack may not have been accurate.

In two cases particular instances of rape could not be proven beyond a reasonable doubt because no witnesses had actually seen the rape occur and the victims had been killed after the rape. In the Nityitegeka case a witness had seen the accused force a young girl into a jeep with

him for a time during which the witness assumed that he had raped the girl. When the accused was finished with the girl in the vehicle the witness saw him take her out into the road and shoot her. The witness indicated that he had heard others saying that he had raped her while in the jeep but he had not actually seen the rape. Niyitegeka was thus found not guilty of rape, but he was convicted of the girl's murder.

While many rapes during the Rwandan genocide were committed quite openly, rape is generally a rather secretive act and it is these cases that did not occur in a public setting that are difficult to prove when victims are not alive to testify. In the Semanza case, a witness testified that she had heard the accused instruct a group of men to rape, after which these men raped her and her cousin. The Tribunal accepted her testimony regarding her own rape, but she had not seen her cousin raped and only heard her screaming and saying that she would 'rather be killed'. The witness took this to mean that her cousin was being raped, especially after hearing the accused instruct the men to rape, and in light of her own victimization. The woman's cousin was killed after this incident and thus no concrete proof that she was raped could be offered. Semanza was found guilty of the rape of the witness but the Tribunal could not find him guilty of her cousin's rape.

## **Defences Used**

In all but one of the ICTR cases studied the accused pled not guilty to all charges brought against them. Only one individual, Serushago, pled guilty but as a part of his plea agreement all charges of rape and mentions of rape in other charges were dropped. Serushago admitted to murders, torture and other acts of violence but did not take responsibility for any rape. Rape is only included in the indictment of this case and there is a short statement explaining that the count of rape was dropped as a part of the plea agreement. In all of the other cases the defendants denied their involvement in martial rape as well as any other accusations brought against them.

As the majority of the defendants were not charged with committing rape directly the defences they used tended to reflect this. Lack of command authority, mistaken identity and a denial of attendance at the events in question were the primary defence strategies. Defendants, in claiming that travel to particular sites was impossible, used the chaotic environment of the war and genocide to their advantage. But defence witnesses who attempted to confirm and establish alibis or determine the impossibility of travel tended to be closely related to the defendant or socially connected to the accused. Their testimony was therefore not often accepted by the

Tribunal because their relationships with the accused called the truthfulness of these witnesses into question. They were seen to have an interest in the accused being found not guilty. As community leaders, these individuals maintained enough power that they would be able to influence others into defending them. Conversely, defence teams argued that witnesses and victims were testifying for personal gains, especially in cases of rape.

Arguments that rape charges were brought to the Tribunal as a result of pressure from international women's organizations rather than from truthful, spontaneous reports from victims were repeated throughout the studied cases. The testimony of individual witnesses and the decisions of prosecutors and the Tribunal itself in bringing or allowing charges of rape were subject to this assertion. A defence witness in the Kajelijeli case testified that a Rwandan women's group had approached her several times, trying to convince her to report that she had been raped. This witness indicated that this organization had offered her assistance in recovering property she had lost during the genocide if she made false rape allegations against Kajelijeli. Apparently the women from this organization "repeatedly visited the witness to solicit her aid" (ICTR-98-44A, Judgement, pp.94). In the Akayesu case the defendant stated that he believed that Rwandan women were "worked up to agree that they have been raped" (ICTR-96-4, Judgement, pp.448). The court dismissed allegations that it had bowed to pressure from women's groups in allowing rape charges to be added in several cases, affirming that rape had occurred on a widespread basis during the genocide. The inference that rape was only reported because of coercion was firmly rejected.

All of the defence teams somehow questioned the credibility and reliability of witnesses and victim testimony, exploiting inconsistencies. The primary means of refuting rape charges was denying that rape had even happened, that victims or witnesses were lying or mistaken. In the Gacumbitsi case the defence went so far as to challenge a victim's testimony because she was a victim. It was insinuated that as a victim of the genocide, she would not be able to give a reliable account of events (ICTR-01-64/1, Judgement, pp.220). For the most part the tactic of attacking the testimony of witnesses, pointing out inconsistencies and challenging specific details did not work. The Tribunal determined that some inconsistencies demonstrated truthfulness, as someone in the particular context of a chaotic genocide could not be expected to perfectly remember details, dates and times.

## **Pregnancy and Gender Myths**

Throughout the trials in Rwanda defence teams challenged the testimony of witnesses and the inconsistencies in their statements, however two particular challenges are notable in that they are related to the witness' gender.

A female witness testified in the Akayesu case saying that she had seen a mutilated female body that was arranged with a stick in the genitals and in response to this statement the accused "questioned how a woman could witness such a thing (ITCR-96-4, Judgement, pp.447). He insinuated that the woman could not have handled witnessing such an act and thus must be lying. The Tribunal did not accept this challenge to the witness testimony, but Akayesu's defence team continued to posit inconsistency based on patriarchal notions. Another female witness' testimony was attacked because she was six months pregnant at the time in question. She stated that she had climbed a tree to hide after her brother was killed and stayed there for a week, descending only for food but the defence denied that this would have been possible because she had been pregnant. The defence described this statement "as the "fantasy" of this witness, which may be "of interest to psychologists and not justice"" (ICTR-96-4, Judgement, pp.456). These women's' testimony was challenged because of their gender and notions about the abilities of a pregnant woman.

Pregnancy was used again in an attempt to discredit a rape victim in the Gacumbitsi case. A woman reported that she had been raped by a group of men after having heard the accused announce over a megaphone that Tutsi women should be raped, but the defence asserted that her pregnancy would have affected her senses and damaged her ability to accurately recall the incident. The court determined that "there is no reason to believe that Witness TAQ's pregnancy during the events affected her senses" (ICTR-01/64/1, Judgement, pp.214). The reasoning that a woman's ability to remember being raped because of pregnancy reflects antiquated notions of women's abilities and the effects of pregnancy. This type of defence was continued as myths concerning rape were presented in attempts to deny rape and discredit victims.

## **Rape Myths**

Denying that rape had occurred was a common defence throughout these trials, as many defendants blamed the activities of women's groups acting in the area for reports of rape and pointed to the fact that some victims had not reported the rape immediately as an indication that reports of rape were fabricated. One victim in the Musema case was challenged by the defence

because when she had been the subject of a radio interview prior to her appearance at the Tribunal, she did not mention that she was raped during the genocide. The defence attempted to assert that this indicated that her story of being raped was untruthful. In discussing this point, the Chamber recognized “that it is especially difficult to testify about rape and sexual violence, moreover in a public forum” (ICTR-96-13, Judgement, pp.842). In the eyes of the court this witness’ credibility was not harmed because of her omission in the radio interview.

Many defence witnesses testified that they had not heard of any rapes committed during the genocide and in some cases even went so far as to suggest that there had never been rape in the Rwandan culture. In the Semanza case the accused indicated that rape did not exist within the culture or tradition of Rwanda while his defence witnesses “made similar broad assertions, stating either that rape is unknown in Rwanda or that they did not see or hear of any rapes in 1994” (ICTR-97-20, Judgement, pp.255). That some people had not heard that rape had occurred was not considered sufficient evidence to prove that rape had not happened. An expert witness who spoke on behalf of the defence in the Akayesu case, acknowledged, that “there is a cultural factor which prevented people from talking about rape”. This statement demonstrated an understanding of the reluctance of victims to report that they have been raped but the same witness also suggested that in the case of the Rwandan genocide “the phenomenon of rape as introduced afterwards for the purposes of blackmail” (ICTR-96-4, Judgement, pp.442).

This expert witness, who positioned reports of rape as attempts at blackmail, indicated that he did not believe that rape had occurred in a widespread manner or that it had been carried out along ethnic lines. He “expressed the opinion that rapists were more interested in satisfying their physical needs, that there were spontaneous acts of desire even in the context of killing” (ICTR-96-4, Judgement, pp.442). He went on to explain that it may seem that more Tutsi women were raped, but “Tutsi women, in general, are quite beautiful and that raping them is not necessarily intended to destroy an ethnic group, but rather to have a beautiful woman” (ICTR-96-4, Judgement, pp.442). This testimony was not found by the Chamber to be convincing. Linking rape with sexuality, desire and a male ‘need’ is a common rape myth in both war and peace. Rape is not about sex and eroticism and instead is used to demonstrate or assert power and it has military utility in war (Brownmiller, 1975). Rape was used to further the genocidal goals of militias and the government and was not the result of uncontrollable libido.

## **Rape As Torture**

One of the legal critiques that has been levelled against the international community with regard to marital rape is its exclusion from the description of torture. Rape can be seen as falling within the definition of torture, but it is not explicitly included in the legislation. The charge of torture is recognized as being particularly serious and rape's inclusion in this would affirm the serious physical and psychological harm that is caused. A charge of torture requires that serious mental or physical suffering is intentionally caused in the pursuit of prohibited goals and the rapes that were carried out during the Rwandan genocide fit within this categorization. Only one of the ICTR cases studied involved a charge of torture that related to a rape. In the Semanza case the torture charge emanated from speeches he made to a group of Hutu men instructing them to rape, kill and mutilate Tutsi women. The subsequent rapes were deemed to have caused a sufficient degree of mental suffering to the victims and were carried out on a discriminatory basis, therefore they met the criteria for torture. While the defence attempted to argue that people were not attacked on the basis of their ethnicity, the court held that the rapes targeted Tutsi women. The Chamber found that "the Accused acted intentionally and with the awareness that he was influencing others to commit rape for a discriminatory purpose as part of a widespread attack on the civilian population on ethnic grounds" (ICTR-97-20, Judgement, pp.485). The genocide in Rwanda was inherently discriminatory but only one person was charged with torture that involved rape.

## **Sexual Mutilation**

In six of the eight cases studied there are allegations that the defendant instructed that sharpened sticks be inserted into the vaginas of Tutsi women. This particular mutilation was reported in different areas of the country and appears to have been a widespread practice. In the Gacumbitsi case the Tribunal established that this type of sexual violence fit within the definition of rape. It involved the penetration of a woman's vagina, thus fitting the definition of rape that was established in the Akayesu case. The Chamber asserted, "that any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape" (ICTR-01-64/1, Judgement, pp.321). Despite this statement and findings that others had ordered that women be violated in this manner, no other defendants were charged with rape for this action. Many women endured this particular form of sexual violence and there is ample evidence of this

throughout the ICTR cases. While defendants denied that rape was committed on a systematic, widespread basis, the frequent reports of this specific form of violence being used across the country appear to indicate that it was part of a widespread systematic attack against Tutsi women.

**Chapter Four: Analysis of Cases From the International  
Criminal Tribunal for the Former Yugoslavia**

## **Background**

Historical information will be presented to introduce this section to contextualize the conflict and locate the abuses within this. The source selected to provide this information is the background portion of the Judgement in the Tadic case. While history is often contentious, the information presented herein represents the historical background that has been accepted by the ICTY.

Yugoslavia was created after the First World War after the dissolution of the Hapsburg Empire, and while it was originally known as the Kingdom of Serbs, Croats and Slovenes, its name was changed to Yugoslavia in 1929. This country was created from the Kingdoms of Serbia, Montenegro, Croatia, Slovenia, and Bosnia and Herzegovina. The people that this country brought together were generally divided in that the Northern and Western areas, of which Croatia is a part, tended to accept the influences of Western Europe and practice Roman Catholicism, while the Eastern and Southern areas, of which Serbia is a large part, were influenced by the Orthodox and Islamic countries of the East. All of these people had strong national and ethnic identities that remained even after Yugoslavia was formed.

During World War Two the Axis powers invaded Yugoslavia. They occupied territory, changed borders and war began amongst the people of Yugoslavia. The Ustasa, a militia that was made up of nationalistic Croats, was supported by the Axis powers in their fight against both the Chetniks, who were Serbian monarchists and nationalists, and the Partisans, a Serbian communist group. The Ustasa set up concentration camps where they carried out abuses against Serbs detainees. The memory of the Ustasa massacres of Serbs coloured relations between Serbs and Croats and even influenced the wartime propaganda in the 1990's. When World War Two ended, power was turned over to the Partisans and their leader Marshall Tito. Reprisal killings of Croats occurred for a time, but then under the strict and brutal rule of Tito there was relative peace within the country.

Under this regime the country was divided into six Republics that were considered distinct nations, with the exception of Bosnia-Herzegovina. While all of the people of Yugoslavia were descended from the same ethnic group, the Slavs, each Republic, except for Bosnia-Herzegovina, considered its people a separate ethnicity. Ethnic identities remained strong despite the discouragement of religious practice and ethnic nationalism under Tito's communism. As time passed, the government evolved and the highly centralist state began to

empower its republics, which resulted in the intensification of nationalist and ethnocentric attitudes and the implementation of policies that reflected these attitudes.

With the end of communism and the death of Tito in the 1980's, nationalistic policy and opinion continued to grow, while tensions within the government grew as a result of this sentiment. In 1990 Slovenia, one of the Yugoslav republics, voted to break away from the federation and the republic of Croatia followed suit the next year. By 1991 Slovenia, Croatia and Macedonia had declared themselves, and were recognized as, independent from the federation of Yugoslavia. At the same time Serbian areas of Croatia attempted to declare themselves distinct from Croatia and align with Serbia, as did Serb-dominated areas of Bosnia-Herzegovina after this republic also declared independence in 1992. The Serb dominated republics of Serbia and Montenegro was all that remained of Yugoslavia and it was within this context that the war began.

Bosnia-Herzegovina was the source of the greatest contention because, unlike the other Republics, there was no clear ethnic majority. Muslims, Serbians and Croatians, all of which were considered distinct ethnicities, inhabited this area. This population distribution was evident in the 1992 during elections in which each ethnic group voted for their nationalist party. The Muslim party won the election but Croatian and Serbian groups revolted against this government and it collapsed in 1992. The aim of the Serbian nationalist group in Bosnia-Herzegovina was to fulfill the dream of a 'Greater Serbia' in which Serbia would be expanded through the acquisition of all Serb dominated areas throughout Bosnia-Herzegovina and Croatia. Then Serbian president Slobodan Milosevic, supported this idea both militarily and politically.

Serbian nationalistic sentiment was stirred up by means of a propaganda campaign that relied on the ancient history of the area, on the atrocities of World War Two committed by the Croatian Ustasa upon Serbians and the portrayal of Muslims as a dangerous fundamentalist force. Propaganda painted other ethnicities as extremists who were plotting genocide against Serbians. Serbian militias blocked television stations in Bosnia-Herzegovina only allowing the stations that broadcast anti-Croat, anti-Muslim propaganda to be transmitted. The propaganda campaign pushed the message that the Serbian people were in danger and that they should fight to protect themselves.

Serbs began politically and militarily taking over regions of Bosnia-Herzegovina and in 1992 declared a distinct 'Serb Republic of Bosnia and Herzegovina'. Serbian militias were

organized in Bosnia-Herzegovina that worked in conjunction with the Serbian national army as Muslims in Bosnia-Herzegovina were disarmed. The 'ethnic cleansing' policies came into full force in 1992 with murders, rapes, desecration of property, forced deportation and the establishment of detention camps for non-Serbs. Horrific conditions, torture, rape and killings were commonplace in these camps where thousands of people were held before being killed or relocated. Non-Serbs who were not brought to camps were subject to harassment and violence by soldiers and militia who pillaged communities, shelled neighbourhoods and destroyed religious and cultural monuments.

International intervention ended the war in Yugoslavia but the maintenance of peace has been a constant struggle. The UN estimates that more than 200,000 people were killed and between 20,000 and 50,000 women and girls were raped during this conflict, but these numbers cannot be confirmed as bodies are still being exhumed from mass graves and it is presumable that there are rape victims who may never come forth. With fragile peace and the horrors of the war revealed to the rest of the world, in 1993 the UN Security Council voted to establish an international tribunal in order to prosecute those individuals who committed war crimes during the conflict in Yugoslavia.

### ***Martial Rape Cases Completed by the International Criminal Tribunal for the Former Yugoslavia***

After searching through the cases that have been heard by the ICTY I found that seventeen cases involved at least one charge that was related to the rape of women (a few other cases dealt with the rape of men and were thus excluded from this study, but it is notable that this practice was prosecuted on an international level). Only six of these cases included a charge of 'Crimes Against Humanity (rape)' but the others made direct reference to rape in counts such as persecutions, outrages against personal dignity or genocide. All of these cases were included for study. Many ICTY cases had multiple defendants who were prosecuted together for events that were linked by location or time period.

#### **Case Summaries**

TADIC, Dusko (ICTY-94-1): The court established that Tadic had regularly visited the Omarska, Keraterm and Trnopolje camps where many offences had occurred and while it was alleged that

he had raped women at the camps, the prosecution withdrew this charge when a witness was deemed untruthful. Rape was included in the persecutions charge against Tadic, but when no evidence was produced to connect him with the sexual assaults that occurred at the Omarska camp this part of the charge was removed.

NIKOLIC, Dragan (ICTY-94-2): During the war Nikolic was the commander at the Susica detention camp where non-Serb civilians were held. The accused admitted that he had facilitated the rape of the female detainees by removing them from camp and handing them over to men for the purposes of sexual assault. Nikolic pled guilty to the persecutions and rape charges against him and received a sentence of twenty-three years, which was appealed and reduced to twenty.

SIKIRICA et al. (ICTY-95-8): Multiple defendants were tried in this case, but only two individuals were tried for offences that related to rape.

SIKIRICA, Dusko: The accused was the Commander of Security at the Keraterm camp, where soldiers and men from the community allegedly came to abuse the detainees.

These men raped many of the female detainees and while Sikirica was not charged with rape specifically, it was included as a part of the persecutions charge brought against him. He pled guilty to the persecutions charge but denied that he knew that rape had occurred and that he would not have been able to stop it. All rape allegations were dropped as a part of his plea agreement and he was sentenced to 15 years imprisonment.

DOSEN, Damir: Because of his work as a shift commander at the Keraterm detention camp, it was alleged that Dosen should have known about rapes committed at the camp and that he had a responsibility to stop them from occurring. He was charged with persecutions and while rape was listed as an element of this charge, it was not explicitly prosecuted. He pled guilty to persecutions but all mention of rape therein was dropped as a part of his plea bargain. He was sentenced to five years in prison.

FURUNDZIJA, Anto (ICTY-95-17/1): Furundzija was the commander of a militia unit known as the 'Jokers'. A witness testified that she had been taken to the Jokers headquarters for questioning by the accused and during the interrogation another soldier rubbed a knife along her inner thigh and threatened to insert it into her vagina if she did not tell the truth. She indicated

that this soldier later raped and beat her, finally throwing her, naked, into a small room where she was raped again. The defence argued that Furundzija was not present during the rapes and that the victim's testimony was not reliable because her memory had been corrupted by the trauma she went through during the war. They tried to assert that because the woman had sought counselling and treatment for Post Traumatic Stress Disorder (PTSD) that her memory was defective. Both the defence and prosecution called expert witnesses to testify as to the effects of PTSD on memory. The Chamber ruled that the witness/victim's memory was sufficiently accurate and that there was not sufficient evidence to show that PTSD would have affected her memory.

Because the first incident of rape occurred during an interrogation it fell within the definition of torture and Furundzija was sentenced to ten years for this charge. He was also sentenced to a concurrent term of eight years, for 'Violations of the Customs of War' (outrages against personal dignity, including rape).

MUCIC et. al. (ICTY-96-21): Only one of the defendants under this case number was charged with a rape-related offence.

DELIC, Hazim: Delic was charged with enacting torture and cruel treatment through rapes that had occurred while he was the deputy commander, and then commander of the Celebici detention camp. One witness indicated that the accused had raped her while she was being interrogated, while another indicated that Delic and others had repeatedly raped her throughout her detention. The defence tried to portray the victims as unreliable witnesses, picking out inconsistencies in their testimony and questioning their ability to identify the accused. They also denied that rape could be considered torture because it was not used to elicit information.

The court did not accept the assertions that the victim/witnesses were not reliable and it emphasized the effects that rape had on the victims. Delic was sentenced to fifteen years in prison, to be served concurrently, for each of the four counts of torture that were brought against him for these rapes.

KUNARAC et. al (ICTY-96-23 &23/1):

KUNARAC, Dragoljub: Kunarac led a reconnaissance group and was a respected figure in the military during the war. However, many women testified that he had transported them between locations where they were raped. There were also several allegations that he personally participated in rapes. The accused presented alibis for many of the time periods in question and he denied knowing that any rape was occurring until later in the war, at which time he claimed that he had tried to stop it.

He reported that he had engaged in sexual intercourse with one of the victims, but he asserted that it had been consensual, that she had initiated it. He later admitted that he had felt bad about the encounter because he could understand that the situation may have been coercive. This was in light of the fact that the girl he had had 'consensual' sex with had been raped repeatedly before spending time with him and had been instructed to make sure he was happy. With regard to other victim's testimony, he claimed that while he may have spent time with them alone he did not have sex with them. He indicated that he had merely talked with these women and tried to help them.

The court found Kunarac's alibis unlikely and his assertions that he was alone with women at a place used like a brothel and only talked with them implausible. It found that he had transported women for the purposes of rape and that he did personally rape women and girls. Kunarac was found guilty of seven counts of rape, three counts of torture and one count of enslavement in relation to these rapes. He received a single sentence of twenty-eight years for these offences.

KOVAC, Radomir: The charges that were brought against Kovac primarily stemmed from the rape and enslavement of one woman. This woman testified that the accused had held her in his apartment and regularly raped her, forced her to perform household chores and strip for him and other soldiers. She indicated that he had also sold her, and another woman, to a Montenegrin man who had also raped her repeatedly and forced her to work. Another woman testified that she had been kept at Kovac's apartment and was raped repeatedly by another man who also resided in the apartment, but both women explained that this other man deferred to Kovac. The defence tried to establish that the primary victim had been in love and in a relationship with Kovac and that he had not sold her to another man, but rather paid the man for her safe passage to Montenegro. Defence

witnesses testified that Kovac had introduced the victim as his girlfriend and that she was treated well.

The court did not believe this portrayal of the victim as the defendant's girlfriend and instead accepted the testimony of the victims, noting the particular humiliations that they had been subject to. Kovac was found guilty of enslavement, outrages against personal dignity and two counts of rape. He was sentenced to twenty years imprisonment. VUKOVIC, Zoran: Vukovic was a member of a military unit that was located in Foca. In relation to martial rape, he was charged with four counts of rape and four counts of torture. Several women testified that they had been raped by the accused; the majority of whom claimed that they were being detained at a sports arena at the time. The defence claimed that the witnesses were mistaken in their identification of the accused, stating that there were eleven men living in the area who had the same name. They also asserted that Vukovic had sustained an injury during the time period in question that had rendered him temporarily impotent.

There was no conclusive medical evidence that the accused had been temporarily impotent as he had claimed, but some of the witness or victim statements did not satisfy the burden of proof necessary to convict Vukovic. These witnesses and victims did not reliably identify that it was the accused who had committed rape. He was convicted of four counts of Crimes Against Humanity, two for torture and two for rape and sentenced to twelve years.

STAKIC, Milomir (ICTY-97-24): Stakic was charged with genocide, complicity in genocide and persecutions in relation to rapes that had occurred at the Omarska, Keraterm and Trnopolje detention camps. He was a doctor who was involved in municipal politics, aligned with a Serbian nationalist party that had organized the ethnic cleansing policies and implementation. He was the President of the group that established the camps and evidence was presented that rape, among other atrocities, had occurred in these facilities. The defence attempted to establish that the camps were set up for legitimate detention purposes and not for genocidal purposes. They indicated that Stakic had never visited the camps, did not have control over them and did not know that rape and other offences were occurring.

The court deemed that the incidents that occurred at the camps were committed with a persecutory intent and that this intent was a part of the campaign spearheaded by Stakic. It found that he should have known about the rapes and stopped them, thus he was found guilty of persecutions and sentenced to life imprisonment.

KVOCKA et. al. (ICTY-98-30/1): The following cases all deal with incidents in the Omarska, Keraterm and Trnopolje detention camps.

KVOCKA, Miroslav: The accused was a policeman when the detention camps were established and he was recruited to activate the reserve police force to serve as guards for the camps. He was not charged with rape explicitly, but rape was included in the offences that made up the persecutions charge that was brought against him. In this case rape was only mentioned in the general description of the conditions at the camps with the connotation that he should have known about it and stopped it. Kvocka claimed that he was only an ordinary guard, with no authority over other guards or others who may have come to the camps and raped women. He claimed that while he had made some attempts to improve the conditions at the camps, his ability to do so was severely limited.

The court recognized that Kvocka had done some good for the detainees, but he primarily helped friends and relatives. It determined that he could have done more and thus he was a willing participant in abuses that were undertaken in the camps. The court deemed rape a 'foreseeable consequence' of the camp conditions and that he should have known that it was occurring. He was sentenced to seven years for persecutions, which included rape but after an appeal, all allusions to rape were removed from the conviction because it was not proved that the rapes in question had occurred while he was a guard at the camps.

PRCAC, Dragoljub & KOS, Milojica: While rape was included in the indictments of these individuals, there was no mention of rape in the Judgement.

RADIC, Mlado: The accused was a policeman who became a shift commander when the camps were established and it was alleged that in the camps the shifts run by Radic were the most feared by the detainees. Several women who had been held at the camps testified that Radic had raped them or had attempted to bribe them with food and other aid in exchange for sex. He denied having raped anyone and he tried to claim that his one

sexual encounter at the camp was consensual because the woman had accepted his offer of protection and food in exchange for sex. The defence tried to explain that, while abuses may have taken place in the camps Radic had no knowledge of them.

Several counts were dropped as a result of legal technicalities but Radic was found guilty of persecutions and torture; both of which related to rape. He was sentenced to twenty years in prison for these offences.

ZIGIC, Zoran: While rape was included in the indictment as a part of the persecutions charge against Zigic, all mentions of rape were dropped in the Judgement.

BRDJANIN, Radoslav (ICTY-99-36): It was alleged that Brdjanin was responsible for the coordination and execution of ethnic cleansing policies. He was charged with genocide, complicity in genocide, persecutions and two counts of torture that related to rape. It was put forth that he should have known that the men carrying out his ethnic cleansing campaign were using rape to do so and that he should have done something to stop this practice. The defence asserted that he did not have the power to stop this violence and that he did not even know that they were being committed. Brdjanin claimed that there was a bias on the part of the court against Serbs and that these events needed to be examined within the particular historical and cultural perspective.

The court found that the accused had not made direct incitements to rape, but his political decisions facilitated the subsequent violence. Abuses and rape were deemed foreseeable consequences of his decisions and the court established that Brdjanin did know about the camp conditions but did nothing. He was found guilty of persecutions, two counts of torture and was sentenced to thirty-two years in prison.

PLAVSIC, Biljana (ICTY-00-39&40/1): The accused was a powerful member of the nationalist Serbian political party that seized power in Bosnia-Herzegovina as the war began. She pled guilty to a persecutions charge that included rape and admitted supporting ethnic cleansing policies, making statements to encourage this policy, spreading propaganda and encouraging paramilitary forces to participate. She was sentenced to eleven years in prison.

BANOVIC, Predrag (ICTY-02-65/1): The accused was a guard at the Keraterm camp who was charged with persecutions that included mention of rape, but when he pled guilty he admitted to 'humiliation' of prisoners but did not mention rape.

## **Detention Facilities**

A notable feature of the war in Yugoslavia was the establishment of detention facilities in many regions. These camps hark back to the concentration camps that were used by the Axis forces in World War Two and perhaps this is intentional, as the memory of those used by the Ustasa and Axis forces in Yugoslavia remained an open wound for Serbians at the time of the war. The camps that were established by Serbian forces used existing structures such as schools, factories and mines to hold the non-Serbs from the surrounding areas. In the camps food was scarce, as was potable water and people were kept in crowded, unsanitary conditions where many of the serious abuses, especially rape, occurred.

The individuals who took power at the time of the war were held responsible for many of the abuses that were committed at the camps, as individuals such as Stakic, Brdjanin and Plavsic were instrumental in allowing this situation to be created. Despite a lack of evidence that any of the detainees had been charged with, indicted for, or had committed any crimes, Stakic maintained that the camps were established for legitimate detention purposes. The court disagreed and established that they were actually used in the ethnic cleansing campaign to hold non-Serbs, often before they were killed or deported. Because all of the detainees were non-Serbs and rape was committed against these women rape was included as a part of many persecutions charges.

In the Brdjanin case the court characterized rape at the camps as 'commonplace', while in the Kvocka case rape was deemed a foreseeable consequence of these facilities. In the Omarska camp in particular, the court noted that many of the guards acted with impunity, drinking while on duty and violently abusing the detainees. The court deemed that, in this situation, "it would be unrealistic and contrary to all conventional logic to expect that none of the women held in Omarska placed in circumstances rendering them particularly vulnerable, would be subject to rape or other forms of sexual violence" (ICTY-98-30/1).

Despite the protestations of some defendants, the court ruled that the detention of these women negated their ability to consent as they were struggling to survive in a coercive, violent environment. The guards held power over the women and the women feared for their lives, as

killings and beatings that took place within the camps were common knowledge amongst the detainees and therefore the women could not freely consent to sex with the guards.

The context was found to have made rape inevitable and this finding effected the decisions of the court. The court denied defences that made use of rape myths and claims of consent while convictions for persecutions were easier to secure because the camp conditions and genocidal context had already been established.

### **Foca: A Case of Enslavement**

The incidents at Foca are slightly different than the other camps in that some of the locations where women were held, separately from men, were used quite openly as brothels. This area was notorious for rape, as many of the facilities in the area housed only women. There was little pretence of legitimate detention in some locations in particular, such as a place known as 'Karaman's House' which held non-Serb women who were regularly raped by soldiers that came to the house. Soldiers either raped the women at this location or they took the women from Karaman's House to other locations, including their private residences, for a time. The women in Karaman's House were forced to cook and clean for the soldiers who visited the house and were made available for sex with whichever soldier(s) wished. This type of enforced prostitution and domestic labour was found to be a form of enslavement by the court. A charge of enslavement was also levelled against Kovac that involved the detention of women at the residence of the accused. At his home the women were forced to perform domestic duties as well as endure rape and other sexual humiliations. Non-Serb women were kept for sexual purposes and violent reprisals ensured that they fulfilled their 'duties'. These women were not able to move freely in the community bound both by their captors and the wartime ethnic cleansing campaign. There were several locations in the Foca area where women were held exclusively and soldiers took advantage of this, frequently raping detainees who made for easy targets.

### **Rape as Persecution**

Many of the studied cases do not include an explicit charge of rape and instead include rape as a part of persecutions charges. The range of acts that can make up the basis for such a charge vary greatly, but in order to be included as persecutions they must be done with the intent to negatively affect individuals because of their membership in some community or group. Rape fell easily within this definition, especially when committed within the detention facility settings,

as it was committed specifically against female non-Serbs. The context affirmed by the court cemented the situation as inherently discriminatory. In the Kvočka et al case the court stated that “rape and other forms of sexual violence were committed only against the non-Serb detainees and that they were committed solely against women, making the crimes discriminatory on multiple levels” (ICTY-98-30/1, Judgement, pp.560). It was accepted that rape had occurred as a part of an ethnic cleansing context that was orchestrated by powerful individuals, many of whom did not directly commit any acts of violence during the war, such as Stakic, Brdjanin and Plavsic.

Several of the cases that included rape as a part of persecution charges in the indictment did not mention rape at all in the Judgement. In a few cases this was the result of a plea agreement and in one because of an appeal, but in some cases rape was just not acknowledged further. No evidence of rape was presented and the persecutions charges proceeded without this element. All but five of the cases studied included a charge of persecutions that related to rape, reflecting the nature of the war and the ethnic cleansing campaign that was enacted against non-Serbs.

## **Rape as Torture**

Only six of the studied cases involved rape-related torture charges. Torture requires that an act that is intended to cause great physical or emotional suffering be carried out for a particular purpose, including interrogation or discrimination. This charge particularly emphasizes the harms caused by the act because it is necessary to prove that great physical or mental suffering occurred. Identifying rape as torture helps reinforce its inclusion as a war crime and ensures that the suffering of the victims is recognized. The frequency of persecutions charges and the existence of an ethnic cleansing campaign would seem to indicate that there would be many counts of torture included at the ICTY, however, only six of the seventeen cases studied define rape as torture.

Torture does not require that the accused carried out the act directly and in the Brdjanin case the accused was charged with torture as a result of his role in encouraging the ethnic cleansing campaign and establishing the detention camps. The court reviewed the reports of rapes that were connected to the accused by virtue of their commission in the camps and determined that these rapes were committed at facilities where individuals were held for discriminatory purposes and thus constituted torture. This was especially highlighted when an

accused rapist, who had worked at the camps, made ethnically degrading remarks while being questioned about the rape during Stakic's trial.

There was much argument over the inclusion of rape in torture, with defence teams arguing for a narrow definition of the torture legislation that would exclude the rapes committed in camps from fitting within the guidelines of torture. The court, however, maintained that the rapes that took place during the war in Yugoslavia often constituted torture. It even insinuated that martial rape, could inherently meet the definition of torture as it is committed against women and thus discriminates on the basis of gender. In discussing the rape of a woman in the Delic case the statement was made that this particular form of violence "was inflicted upon her by Delic because she is a woman... (which)... represents a form of discrimination which constitutes a prohibited purpose for the offence of torture" (ICTY-96-21, Judgement, pp.963). While this statement was affirmed in the judgement against Delic, it is noteworthy that of seventeen individuals charged with rape related offences that only six were charged with torture. Little distinguished these cases from the others and it was not apparent, within the available material, why these individuals and not others were charged with torture.

### **Superior's Responsibility in Martial Rape Cases**

In the seventeen cases studied, eleven of the accused were charged as superior officers who did not personally commit rape and two were tried for a combination of acts committed directly by the accused and by their subordinates. These individuals were primarily charged with inaction in situations where they should have intervened to stop incidences of rape. Politicians who facilitated the ethnic cleansing campaign and established the detention camps, leaders of military units and guards who held positions of authority in the camps were all held responsible for martial rape.

The court determined that those in power should have known that their actions or inaction would lead to or contribute to the abuses that occurred and it affirmed, in Kvočka et al, that the particular conditions that were established in the detention camps made rape a natural and foreseeable consequence. Therefore the individuals who created them should be held responsible. "Any crimes that were natural of foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the joint criminal enterprise" (ICTY-98-30/1, Judgement, pp.327). The likelihood of sexual violence was intensified by the persecutory nature of detention and the campaign of violence and

humiliation that was being carried out against non-Serbs. This placed liability for rape onto those individuals who established or endorsed the camps or ethnic cleansing campaign.

In summary, rape was conceptualized as a foreseeable consequence of the wartime/ethnic-cleansing context that should have been considered by those in power. It was established that they should have taken action to prevent abuses from occurring despite argument from many that they would not have had that power. Decisions made by those in power created a situation where rape was thinkable and likely and these individuals were held accountable for this at the ICTY.

### **Victim Testimony at the ICTY**

The ICTY went to great lengths to protect witnesses, giving many of them anonymity to ensure that there would be no fear of reprisal for their testimony. A 'Victims and Witnesses Unit' was set up to provide counselling or support as needed and it was specifically noted that this should be especially used in cases of rape victims. The ICTY website explains that the staffing of this unit was done with special attention paid to the gender ratio of employees, making sure that there were sufficient women on staff to help rape survivors.

In all of the studied trials where rape remained a part of the charges victims of rape testified. Following legal protocol from many national courts, such as Canada's, the ICTY did not require corroboration of rapes reported by victims, but this did not ensure a conviction. While the court affirmed all of the victim's experiences of rape some defendants were found not guilty of rape, or rape related charges. In these cases the court determined that the accused should not be held responsible for the rape, not that the victim had not been raped.

### **Defences Used**

The majority of the defendants at the ICTY were not charged with raping women directly and this trend was reflected in their defences. The accused was typically portrayed as unable to have stopped rape from occurring or unaware that women were being raped. They tended to claim that there was no connection between their actions during the war and rape but the Court did not accept these claims. Instead it held that those with superior authority had reason to know that rape was occurring or would likely happen within the conditions that they had created or allowed, and that they should have taken action to stop it. Five individuals pled guilty and in three of these cases all mentions of rape were removed from the charges. Few individuals were

willing to admit being a part of martial rape. None of those who pled guilty admitted to actually raping. In the Nikolic case, while the accused pled guilty to the charge of rape, he clarified that he had not personally raped any women. He made sure to explain that he had only facilitated rapes that were committed by other men. Interestingly, in the only other case where an individual pled guilty to a charge that included rape was that of Plavsic, who is a woman. Rape was included as part of the persecutions charge against Plavsic and in her guilty plea she acknowledged that she had participated in the regime that allowed and encouraged this type of action. She expressed remorse for her actions and a hope that her admission of guilt could help her country heal.

The individuals charged with directly raping used different defences than those who were charged as superiors. These defendants primarily relied on attacking the credibility of witnesses and victims who testified by pointing out inconsistencies in testimony and presenting alibis for the times in question. In the Foca cases, Kunarac et. al (ICTY-96-23/1), some interesting defences were used, from claiming temporary impotence to insinuating that the accused had a romantic relationship with his victim, to asserting that the victim had forced herself on the defendant. The Court did not accept any of these stories, as no conclusive evidence was presented to prove that Vukovic had suffered temporary impotence while the claims of Kovac and Kunarac were just considered unbelievable. Another interesting defence involved a challenge to a victim's testimony in the Furundzija case, where Post Traumatic Stress Disorder was reputed to have altered the memory of a victim.

## **Consent and Rape Myths**

Most of the defendants accused of carrying out rapes directly made attempts to put the testimony of rape victims into question but in some instances this was carried out in such a way as to rely on rape or gender myths. Defendants tried to affirm that a woman's ability to consent within wartime or detention settings was not constrained in an attempt to portray their sexual contact with particular women as consensual.

In the case of Radic, he admitted that he did have sex with a woman who was being held at a detention camp but he claimed that this encounter was consensual. The woman was being held at a camp where there was a lack of food and potable water, unsanitary conditions and constant fear of violence or death but Radic claimed that the woman had freely engaged in sex with him in exchange for food, water and protection for her husband and thus this did not

constitute rape. The court disagreed, noting, “a status of detention will normally vitiate consent in such circumstances” (ICTY-98-30/1, Judgement, pp. 555). This principle was used again in the case of Kunarac.

In the case of one particular victim, Kunarac indicated that he did have sex with her, but clarified that she had initiated it. He claimed that he had not really wanted to have sex with the woman but that he did not refuse. Kunarac stated that he had considered the poor situation the woman was in after they had engaged in intercourse, but he maintained that this was not rape. The woman in this case testified that at the time of this incident she was being detained by soldiers, three of whom raped her just prior to her encounter with Kunarac. She reported that she was instructed to clean herself up for the commander, who she identified as Kunarac, and threatened with death if she did not satisfy him. The woman admitted to taking an active role in having intercourse with Kunarac but “she felt terribly humiliated because she had to take an active part in the events, which she did out of fear because of “Gaga’s” threats earlier on” (ICTY-96-23&23/1, Judgement, pp.219). The accused admitted that he later felt bad about the incident but claimed that he did not know why the victim was acting the way she did and that he had actually tried to resist. “He said the following: “[I had sex] against my will [...] without having a desire for sex”; and further, “I cannot say that I was raped. She did not use any kind of force but she did everything” (ICTY-96-23&23/1, Judgement, pp.231). The defence attempted to place the blame on the soldier known as Gaga for this incident, claiming that Kunarac was not aware that the woman was acting of her own free will. The court rejected this claim, as the accused should have understood the wartime situation of this Muslim girl in the context of an ethnic cleansing campaign. The court decided that Kunarac had engaged in sex with this victim with the knowledge that she did not freely consent.

In another attempt to portray consent Kovac claimed that the woman that he held in his apartment during the war was in love with him. While he did not testify, witnesses claimed that they had heard of love letters she had written for him, that she had cried when he was wounded and hospitalized and that he had sold some property in order to pay for her safe passage to Montenegro. They depicted a loving relationship, but the victim’s testimony presented a very different version of events. She indicated that she was locked within the defendant’s apartment where she was forced to perform domestic duties and was regularly subject to rape and threatened with death if she refused. In addition she noted that she and other women who were

taken to the apartment were forced to dance naked in front of the accused and other men. The victim stated that, "she had the feeling that Radomir Kovac owned her" (ICTY-96-23&23/1, Judgement, pp.71). The court accepted the victim's version of events, indicating that, "the relationship between FWS-87 and Kovac was not one of love as the Defence suggested, but rather one of cruel opportunism on Kovac's part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old" (ICTY-96-23&23/1, Judgement, pp.762).

In addition to the use of gender and consent myths with regard to the victims, Furundzija insinuated that because a female judge had been a part of the UN Commission for the Status of Women, that this may leave the appearance of bias. In an appeal the defence put forth "that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW" (ICTY-95-17/1, Appeal, pp.169). This legal and political agenda that she allegedly advanced in this case referred to the protection of women's human rights by ending the impunity that martial rape has seen throughout history. The Appeals Chamber stated that there should be no appearance of bias, for the goals of the UNCSW reflected those of the UN and the ICTY and that "to endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification" (ICTY-95-17/1, Appeal, pp.202).

## **Chapter Five: Discussion of Tribunal Results and Literature**

## Context and 'Collateral Damage'

Brownmiller (1976) posited that militaries and the international community conceptualize victims of martial rape as "collateral damage" and "unfortunate by-products of war". She quoted American General George Patton as describing rape in this way, lamenting that it would occur yet affirming that he would not be able to stop it. This attitude makes martial rape seem natural and unavoidable, which had allowed for the neglect of the needs of women who have been raped in war and lack of sanction for the perpetrators. The ICTR and ICTY prosecutions of martial rape perpetrators and those who aided or incited the commission of these rapes may represent the beginning of a general recognition that rape is not a natural consequence of war. The international community defined martial rape as a criminal offence more than half a century ago and only now is being prosecuted as such.

The ICTR and ICTY have made progress in situating martial rape as a crime and the women it targets as victims of such but it remains questionable if the international community will continue to see those targeted by martial rape as victims of a criminal offence. A major concern to some observers of the International Tribunals' handling of martial rape is the likelihood of these charges being brought again (MacKinnon, 1993; Philipose, 1996; Copelon, 1994). The conflicts in Rwanda and Yugoslavia were extreme situations where systematic rape was openly used as a part of genocide. These contexts highlighted the 'wrongness' of rape, as mutilations, murder and sexual slavery were attached to these allegations of rape, making the part that rape had played in these genocides glaringly obvious. It was genocide that prompted the creation of the ad hoc Tribunals and rape was merely included as a part of these charges. These extreme examples in which women were raped as a part of genocidal campaigns have been the only instances where the international community has taken action to punish rape during war, therefore rape may only be charged in this sort of context in the future. Philipose (1996) even went so far as to say that international rape legislation is "not placing absolute prohibitions on the practice of rape, rather (it) is prohibiting rape only to the extent that it is in the service of illegitimate military ends" (p.56).

The studied ICTR and ICTY cases do not seem to offer a great deal of hope that martial rape may be seen as universally wrong, as the majority of individuals charged with rape-related offences are superior officers or influential people, tied to rape through their genocidal provocations. The courts placed an emphasis on the contexts, denying claims of consent and

asserting that superiors should have predicted and prevented rape. This may have facilitated the prosecutions in these particular situations, but this focus on context may have set a disturbing precedent. Politicians such as Kajelijeli, Kamuhanda, Plavsic and Stakic were all connected to rape through charges of genocide or persecutions while other defendants were charged with torture because of their use of rape in genocide.

All of the individuals brought before the Tribunals were charged with multiple offences and no defendant was simply charged with a single count of rape carried out against one victim. Rape was used as a tool of genocide in Rwanda and Yugoslavia and it was characterized as such through its inclusion as an element of genocide and persecution charges. The world was unable to ignore the systematic way that rape was used towards a genocidal goal in Rwanda and Yugoslavia, and these extreme cases could prove an exception to the impunity for martial rape perpetrators but the individual acts of martial rape may be overshadowed by the horrors of genocide. The international Tribunals may not have defined rape as wrong, but rape used to further genocidal aims. Only time will show whether the suspicion of future inaction in cases of non-genocidal martial rape will be affirmed, but the ICTR and ICTY's focus on genocide seems to support this theory.

### **Martial Rape as Torture**

Some feminist legal scholars such as Copelon (1994) lament the lack of overt recognition of rape as torture in international law. Copelon (1994) has criticized the ICTY for its lack of rape-related torture charges but she indicated that the only charge of torture referred to the sexual mutilation of a man, thus citing it as a difficulty of 'reading-in' to legislation of this kind. This part of her critique was premature, as there were several cases heard by the Tribunals that included rape-related torture charges, but the main point of her argument remains; should rape be explicitly defined as torture?

Torture requires that suffering be intentionally inflicted for particular prohibited purposes, which includes discrimination. It could be argued that all violent actions within these contexts should be considered torture and in the Delic case the court put forth that because rape is primarily committed against women, that rape is inherently discriminatory and thus could fit within the definition of torture (ICTY-96-21, Judgement, pp.963). It is arguable that all of the rape-related cases seen at the ICTR and ICTY meet the qualifications of torture on two levels but only a handful of cases were prosecuted as such. Victims were targeted because of their ethnic

identification and because of their gender. While some rape cases included charges of torture, many other rape cases that included charges of genocide and that involved female victims did not include torture charges. Copelon (1994) theorized that explicitly including rape as torture would create a space where rape could be on par with crimes committed against men and remove any ambiguity on the status of martial rape as a crime. This complete immersion of rape into the category of 'torture' can, however, be problematic, as will be discussed in the upcoming section in this chapter that is titled 'The De-Sexing of Rape'.

### **Enslavement and Martial Rape**

Only two cases studied, both from the ICTY, involved charges of enslavement. This charge brings attention to one of the particular ways that women are sexually victimized during war and it also emphasizes the difficulty of consent in a wartime environment. When women are 'enslaved', forced into a type of prostitution or taken as 'wives' or mistresses, they are victimized in a very specific way that makes it difficult for them to report the offence. The issue of consent is central in this matter, as women who have been trapped in this situation are not always understood as victims, but rather as 'war-brides' or willing prostitutes. The situation of the Chinese 'comfort women' used by Japanese soldiers during World War Two, or the Vietnamese 'prostitutes' used by American soldiers during the Vietnam War fall into this conceptualization; it is not commonly thought that any of these women were raped.

There was ample evidence presented at the ICTY that women, especially in the Foca region, were held in facilities that operated like brothels yet only two defendants were charged with enslavement. Both of these defendants held women in sexual slavery but both claimed that women willingly and freely chose to have sex with them. One of them even asserted that 'his' woman was in love with him. The genocidal and oppressive environment of this war led the court to deny that consent could have been given in these situations, but in another context it may be more difficult to disprove consent. No cases in Rwanda involved charges of enslavement. However, reports from human rights groups such as Amnesty International (Amnesty, 2000) and Human Rights Watch (Nowrojee, 1996) indicate that many women in Rwanda were taken as unwilling 'wives' during the genocide, some of whom are still trapped in these relationships, and other women were held by militia members who repeatedly raped them over a period of time. Some of the witnesses at the ICTR confirmed that this pattern of abuse did occur, as one witness in the Akayesu case noted, "Interhamwe were abducting beautiful Tutsi girls and taking them

home as mistresses” (ICTR-96-4, Judgement, pp.444). The ICTR did not recognize this particular pattern of rape and the ICTY only perfunctorily dealt with this problem. Enslavement inflicts a unique type of harm and humiliation and while the Tribunals did make some progress in prosecuting perpetrators of martial rape, this incarnation of it was largely ignored.

### **Forced Pregnancies**

Another facet of rape that was overlooked by the ICTR and ICTY was forced pregnancies. In the majority of the literature surrounding rapes committed in the Yugoslavian war there is reference made to forced pregnancies. This was a part of the ethnic cleansing campaign that was made effective in this patrilineal society where the child could remain a constant reminder of the perpetrator’s dominance, power and masculinity (Seifert, 1994). The child born of rape would be considered a member of the attacker’s ethnic group despite the ethnicity of the mother and the culture in which the child would be raised. The children of martial rape attack the bonds of family and community while imposing psychological suffering for individual woman.

Forced pregnancies serve the purposes of genocide well but there are no charges that relate to this practice in any of the ICTY cases and there are only three instances where pregnancy is mentioned at all. Two of these instances involve Kunarac. One of his victims testified that after he raped her Kunarac told her that “from now on she would be giving birth to Serbian babies” (ICTY-96-23&23/1, Judgement, pp. 322), while another victim stated that after she was raped by Kunarac and two other men Kunrac had said “she would carry a Serb baby, but never know who the father was” (ICTY-96-23&23/1, Judgement, pp.342). The third reference to pregnancy is in the Brdjanin case when there is a reference to a rapist making “no secret that he wanted a Bosnian Muslim woman to “give birth to a little Serb”” (ICTY-99-36, Judgement, pp.1011). Despite these references that seem to indicate that rape was used to intentionally impregnate women as a part of the genocide, there are no overt charges of this. Using rape in this manner takes advantage of women’s biology and uses her ability to procreate against her; biology is used as a weapon.

The effects of pregnancies resulting from wartime rape are devastating. The women are distrusted or branded as traitors while they must also endure, (for the most part) nine months of pregnancy and the pain of delivering the child (Brownmiller, 1976, Stiglmayer, 1994). Stiglmayer’s (1994) research indicates that the majority of women impregnated during the

Yugoslavian war had abortions when they could, even attempting to abort pregnancies themselves, and those who had to deliver did not keep the child once it was born. The majority did not even want to see the child and many reported having thoughts of killing the baby or themselves. Forced pregnancy is an effective tool in genocidal warfare, harming both individuals, families and communities, but the Tribunals did not include it as a part of charges. This element of rape was not brought forward in the cases studied.

Pregnancy is often the result of marital rape, even when it is not used as consciously and systematically as was seen in Yugoslavia. Impregnation was used less overtly in the Rwandan genocide, yet different reports estimate that between two to five thousand children were born of genocidal rape and these children are known as 'enfants de mauvais souvenir' or 'children of bad memories'. This number excludes women who may have become pregnant and aborted the pregnancy, killed the child at birth or who died during the genocide. This large number suggests that the practice of impregnation by rape was quite common in Rwanda. Despite this, there was no mention of pregnancy in any of the ICTR cases.

## **Motivation and Myth**

In the Brdjanin and Kvočka cases the ICTY established that rape was a foreseeable consequence of the ethnic cleansing campaign and the establishment of detention facilities, while in Rwanda the anarchy of the genocide made reports of rape very believable. The policies of the Tribunals valued victim testimony, requiring no collaboration in cases of rape, which indicated an acknowledgement that rape had occurred during these wars. The utility of rape in genocide was recognized and while the courts generally rejected the use of rape myths as defences, they kept resurfacing. Generally these myths worked in two ways: to deny that rape had occurred or that it was not used in a discriminatory campaign.

In Rwanda several defendants tried to assert that there had been no rape during the genocide. They tried to claim that women's groups had incited false reports of rape or had forced the Tribunal to bring charges of rape. Rape was not a part of the original indictments at the ICTR and women's groups did help to bring reports of rape to the attention of the court, but there was ample evidence to support these claims of rape. Despite the victim-friendly policies of the Tribunals victim testimony was questioned at both Tribunals to try and discredit women's reports of rape. Defence witnesses testified that they had not heard of any women being raped but the court held that the lack of knowledge of rape reported by others did not negate any

particular woman's experience of rape. In contrast to the focus of the ICTR of portraying all reports of rape as false, at the ICTY the concept of consent was at the fore in denials of rape. Defendants such as Kunarac, Kovac and Radic argued that their victims had consented and thus their sexual encounters should not be seen as rape. The ICTY established that within a coercive situation such as war or detention free consent cannot be given for sex with an authority or captor.

The courts affirmed that rape had occurred in both wars in service of genocidal policies on a widespread basis. When leaders or superior officers denied that they had any knowledge of rapes that may have occurred during the war and would not have any reason to know that women had been raped, the utility and open nature of rapes invalidated these claims. The use of rape effectively furthered the goals of those in power and should have been expected. Within these genocides 'enemy' lives were devalued, assaults and killings were common and it is not surprising that the all male militias carrying out this violence would turn quickly to rape in this situation.

Instead of claiming that rape did not happen at all, some defendants merely tried to establish that rape was not used in a discriminatory manner. In doing so many of the accused tried to use rape myths to exonerate themselves or to defend against torture charges. There was a tendency for these individuals to claim that rapes were motivated by sexual desire, a concept that has not been accepted in any of the literature concerning martial rape and was not accepted by the court. In Akayesu an expert witness denied that rape was genocidal and instead was to "have a beautiful woman" (ICTR-96-4, Judgement, pp.422), while Vukovic argued that if the court proved that he had raped a woman that he "would have done so out of a sexual urge, not out of hatred" (ICTY-96-23&23/1, Judgement, pp.816). These individuals tried to deny discriminatory motivations for rape, instead trying to classify rape as a purely sexual act. Another accused rapist who put forth this mistaken conception of rape spoke at the Stakic trial and in trying to protest his innocence he stated that he would not need to rape because he is a "relatively good-looking man" (ICTY-97-24, Judgement, pp.800), implying that he find a willing partner to satisfy his sexual needs. The courts did not agree that martial rape had been carried out motivated only by sexual desire and the satisfaction of sexual needs. Instead it was affirmed that rape was used as a tool of war and genocide, as the courts convicted many individuals of genocide or persecutions charges that included rape.

## Gender Specific Aspects of Martial Rape

Rape was used for obvious purposes in the conflicts in Rwanda and Yugoslavia and it was recognized as such, defined as an element of genocide or persecutions charges and also prosecuted as torture. It was recognized as a form of violence that was effective in these contexts and could be committed against women and men, used to intimidate individuals and break down communities. This conception of rape as violence is contrary to the historical conceptions of rape that described it as the violation of a woman's honour and depicted rape as an offence against the woman's male 'owners', her husband or father. In this case rape's inclusion as torture has recognized the suffering of victims and there were several statements by the courts in both the ICTR and ICTY that emphasized the devastating effects that rape has, especially in a time of war. This however leads to the dilemma of 'women's human rights' as put forth by MacKinnon (1994); in that "what is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women" (MacKinnon, 1994, p.184). While in the past rape may have fallen into this first category of being specific to women, there may be a danger that the decisions of the ICTR and ICTY may skew this problem in the other direction, overlooking that rape tends to be committed by men specifically against women and causes particular harms.

This particular violence is primarily committed against women and it targets them in specific ways that the rape of a man cannot. While men are brutally raped during war, which causes very serious harms, the patriarchal nature of society creates a different experience for male and female victims of martial rape while biology facilitates different physical harms for these victims. This is not to dismiss the seriousness of male rape during war, as it is a terrible act that has severe consequences for its victims. However, many of the consequences of rape target women specifically and make it an effective tool of terror and torture, but the trend of rape prosecutions seems to indicate that the recognition of the gender-specific nature of this violence may be decreasing. It is increasingly viewed as a violent 'tool' rather than an invasion of the intimate as well as the body. Because rape is considered a form of violence rather than a violation of honour, this may result in more diligent prosecution of the offence but it lacks the recognition of the ways in which rape specifically targets women (Niarchos, 1995; Copelon, 1994).

While rape causes social rifts for all women, the social repercussions of martial rape are especially devastating for women who live in extremely patriarchal or religious societies where a woman's sexuality is highly controlled. In many cases women who have been raped are considered 'unmarriageable' or are deserted by their husbands, leaving them to survive in societies where they are often not allowed to own property, have few options for employment or are even rejected by their communities (Brownmiller, 1976; Turshen, 2000; Stiglmayer, 1994; MacKinnon, 1994). These ramifications are specific to women and provide incentive for men to rape in war. Women are afraid of rape and the consequence of this act serves to destroy not only an individual, but families and communities also.

Many of the physical effects of rape are unique to females and can be used to serve genocidal campaigns. Pregnancy and sterility are the principle examples of this. Violent rape of women can often have devastating effects on a woman's reproductive system and in Rwanda particular sexual mutilations such as rape with sharpened sticks or other objects increased the likelihood of negative physical consequences. Subsequent lack of medical attention, which is not readily available in war-torn countries, amplifies the physical consequences of rape that can include infection, trauma or pregnancy. Many women who become pregnant as a result of wartime rape, are placed in a difficult situation in deciding on what to do with her pregnancy or child once it is born. This mental suffering caused by rape is uniquely female and is sometimes purposefully enacted upon women through forced pregnancies. Constraining the choices of these women is the fact that abortion is illegal in many countries, especially those with strong religious influences, where the impact of having the child of martial rape is actually the greatest.

These harms are gender specific and directly attached to martial rape and as there is a movement away from seeing rape as a gendered act these unique ways in which women are targeted may be obscured. A delicate balance is needed in recognizing rape as a form of violence that is serious and horrible while also acknowledging that this violence is primarily enacted by men against women. The 'wrong' of rape victimizes women as both humans and more specifically as women.

## Conclusion

The ICTR and ICTY brought international attention to the problem of martial rape and attempted to bring justice to victims by prosecuting those responsible for rape. These legal interventions have made some impact but not all of the individuals who committed this act have, or will be, brought to the court to answer for their actions. Martial rape was too widespread in these conflicts for all of the perpetrators to be held accountable for their actions therefore many women victimized by this act will not benefit from this intervention. The use of law as a solution to the problem of martial rape has already been discussed at length, and it has been shown that this method cannot completely address this problem. Victims are affected physically, psychologically, socially and economically and legal interventions are unable to address this myriad of harms. Women are offered 'justice', but they are still disabled, infertile, HIV positive, marginalized and rejected by their communities even if the perpetrator who attacked them is sentenced to a prison term. The problem of martial rape extends well beyond issues of 'criminality' and solutions such as imprisonment.

Victims are not only in need of justice interventions, they require assistance in areas that range from health to finance. Both regional and international organizations provided some assistance to victims and martial rape survivors in the former Yugoslavia and Rwanda continue to receive assistance from these groups. One notable group working to assist victims of martial rape is a women's organization in Rwanda called AVEGA. Some witnesses at the ICTR even spoke about this organization and a witness from the Kajelijeli case claimed that this group had tried to entice her to falsely report being raped. This association's website (<http://www.avega.org.rw/english.html>) specifically discusses martial rape and other types of sexual violence experienced by women during the Rwandan genocide and explains the needs of victims in returning to life as the country rebuilds. They offer counselling, medical care, advocacy, justice and capacity building programs including a micro credit program. In this realm of 'repair' and rebuilding martial rape needs to be recognized as a problem that affects women in specific ways that are unique to their gender and organizations such as AVEGA provide a way that women can come together to help each other.

The position of women in society combined with the prevailing conceptions of rape survivors work against the healing and rebuilding process. This is especially true in very patriarchal/religious societies where women's sexuality is highly controlled and women are

relegated only to the role of wife and mother, the effects of martial rape can cripple a woman's ability to survive. In many of these societies women are not permitted to own or inherit land and are not able to participate in the legitimate economy. The rejection of women by their husbands and families following a rape leaves women in this situation with few options for survival. The beliefs that are tied to this rejection and exclusion from commerce are those that allow rape to destroy communities, families and individuals. The things that make martial rape effective are also the things that make life difficult for the victims. Social reconstruction or reorganization that would allow women to participate in the rebuilding of the country and enable victims of martial rape to take control of their lives is needed in these situations where rape has left women without safe or viable options for survival. Martial rape is obviously a problem, but the solutions are not as clear. While legal interventions and victim assistance have already been used feminist writers who have tackled the issue of martial rape do not feel that this is enough and they have suggestions that would reach further into the realm of prevention.

### **Prevention Strategies**

A focus on reactive solutions to the problem of martial rape allows the factors that motivate this act to go unnoticed and it does not protect women from being attacked in this way. This forward-thinking approach requires an analysis of the motivations for martial rape and the context in which it occurs. Context is important, as the tradition of all-male militaries has largely continued with their emphasis on masculinity and patriarchy reinforcing the masculinist military structure and continuing to make women effective targets in war. Card (1996) asserted that women are chosen as victims not only for the particular harms they incur as a result of rape but also because they are "easy victims" (p. 11). She goes on to explain that "women in patriarchies are commonly unarmed and untrained for physical combat (and) perpetrators need fear little reprisal" (Card, 1996, p.11). Her suggestion for eliminating or reducing occurrences of martial rape is to change the connotations of 'woman' and 'female' and the structure of society so that women are able to protect themselves generally, not just in cases of rape. Her concept would entail empowering women physically, socially and politically, which would have far reaching effects. Structural change would skew the cost/benefit balance of rape during war but in this scenario the position of women around the world would need to be improved and myths about women's sexuality and rape dispelled.

In addition to structural changes to deter rape, martial rape must remain a topic of study for academics, both feminist and otherwise. Awareness and recognition of the problem are necessary in implementing solutions. There is little information available about martial rape, with only a handful of academics attending to the issue who have presented a wide variety of parts to the problem, from legal to physical to psychological. The majority of literature also tends to focus exclusively on the Yugoslav context and the genocidal aspect to this conflict. There is little in the way of generalized or comprehensive writing about martial rape that encompasses history, legislation, motivations, harms and solutions from the perspectives of victim, perpetrator and international community. Only pieces of the picture are seen in current writing and not a complete portrayal of the problem of martial rape. The intricate interactions that come together to cause martial rape need to be better understood in order to provide clearer solutions for prevention and justice efforts. Reports of rape from ongoing wars must be investigated and the world must remain vigilant to the problem if it is to be stopped.

### **Concluding Remarks**

The international community tried cases relating to martial rape for the first time at the ICTR and ICTY and they are still working to bring justice to the countries they serve. They have recognized that rape is not just an “unfortunate by-product” of war and given the victims of rape a forum to ask for justice. The International Criminal Court (ICC) has now been entrusted with this task in future wars and it remains to be seen whether this commitment continues. The ICTR and ICTY were set up under exceptional circumstances, where the abuses exceeded the routine horrors seen in war, but rape occurs in every war. In these Tribunals rape was included as an element of genocide and persecutions and recognized as a tool of these goals, which made it easier for the courts to dismiss defences that relied on myths such as a rhetoric of sexual need or captive ‘consent’. Precedents established by the ICTR and ICTY have been adopted by the ICC, such as a definition of rape, which could influence the possibility of future prosecutions of martial rape. It is possible that these precedents may encourage continued legal action or they could make it more difficult for martial rape to be prosecuted in less extreme circumstances. Only time will reveal if this is the case.

This time may come soon as wars rage on in countries such as Sudan, Iraq and Colombia and reports of rape are already emerging from these conflicts. The ICTR and ICTY have paved the way for future martial rape prosecutions and are making an attempt at bringing justice to

victims. After centuries of neglect the crime of martial rape was brought to the international stage and those who perpetrated it in these two horrific contexts are being brought to justice, however slow this process may have been. The ICTR and ICTY have been in operation for more than a decade and have incurred a hefty financial cost. There is pressure on these courts to complete their tasks, yet there are many incomplete cases and perpetrators that have not yet been apprehended. The final results of these Tribunals remains to be seen, but there is hope that they can, more than a decade later, bring some peace to countries that suffered great tragedies.

## References

- AVEGA-AGAHOZO Association of Genocide Widows. (2005). Retrieved July 2005.  
Available at: <http://www.avega.org.rw/english.html>
- Amnesty International (2002) *Rwanda gacaca: A question of justice*. New York: Author.  
Retrieved October 2004.  
Available at: <http://web.amnesty.org/library/index/ENGAFR470072002>
- Ball, H. (2002). *War crimes and justice*. Santa Barbara, California: ABC-CLIO
- Brody, R. (2005, January). Justice for Abu Ghraib. *International Herald Tribune*
- Brownmiller, S. (1975). *Against our will: Men, women and rape*. New York: Bantam Books.
- Brownmiller, S. (1994). Making female bodies the battlefield. In A. Stiglmayer (Ed.), *Mass rape: the war against women in Bosnia-Herzegovina*. (pp.180-182). University of Nebraska Press
- Card, C. (1996). Rape as a weapon of war. *Hypatia*, 11, 5-17
- Cogan, J. (2000). The problem of obtaining evidence for international criminal courts. *Human Rights Quarterly*, 22, 404-427.
- Copelon, R. (1996). Surfacing gender: Re-engraving crimes against women in humanitarian law. *Hastings Women's Law Journal*, 7, 243-266.
- Dixon, Robyn. (2004, April 10) Rwandans struggle to find words. *Baltimore Sun* Retrieved 13 April 2004.  
Available at: <http://www.baltimoresun.com/news/printedition/balte.journal10apr10,0,4351000.column?coll=bal-pe-asection>
- Encyclopedia Britannica Online. Definition of 'martial' and 'rape'. Retrieved 8 September 2005.  
Available at: [www.britannica.com](http://www.britannica.com)
- Frulli, M. (2000). The special court for Sierra Leone: Some preliminary comments. *European Journal of International Law*, 11, 857-869
- deGuzman, M. (2000). The road from Rome: The developing law of crimes against humanity. *Human Rights Quarterly*, 22, 335-403.
- Flick, U. (1998). *An introduction to qualitative research*. London: Sage Publishing.
- Frederick, S. (2001). *Rape: weapon of terror*. New Jersey: Global Publishing.
- Gordon, N. (2000). Sanctioned rape. *The Humanist*, 60, 3

Gutman, R. (1994). Foreword. In A. Stiglmayer (Ed.), *Mass rape: the war against women in Bosnia-Herzegovina*. (pp. ix-xiv). University of Nebraska Press

Henry, N., Ward, T. & Hirshberg, M. (2004). A multifactorial model of wartime rape. *Aggression and Violent Behaviour*, 9, 535-562.

*International Criminal Tribunal for Rwanda Website* (n.d.) Accessed: September 2002-August 2005. Available at: <http://www.ictt.org/>

*International Criminal Tribunal for the Former Yugoslavia Website*. (n.d.) Accessed September 2002-August 2005. Available at: <http://www.un.org/icty/>

Jackson, W. (1999). *Methods: doing social research*. Scarborough, Ontario: Prentice Hall.

Katsenstein, S. (2003). Hybrid tribunals: Searching for justice in East Timor. *Harvard Human Rights Journal*, 16, 246-278.

Kritz, N. & Finci, J. (2001). A truth and reconciliation commission in Bosnia and Herzegovina: An idea whose time has come. *International Law Forum*, 3, 50-58.

MacKinnon, C. (1993, July/August). Turning rape into pornography: Postmodern genocide. *Ms. Magazine*, 24-30

MacKinnon, C. (1993). Rape, genocide and women's human rights. In A. Stiglmayer (Ed.), *Mass rape: the war against women in Bosnia-Herzegovina*. (pp. 183-196). University of Nebraska Press

Maxfield & Babbie (1998). *Research methods for criminal justice and criminology*. Scarborough, Ontario: Wadsworth Publishing Company

McCann, C. & Kim, S. (2003) Introduction. In C. McCann & S. Kim (Eds.) *Feminist theory reader: local and global perspectives*. (pp. 12-26). New York: Routledge.

Niarchos, C. (1995). Women, war and rape: The challenges facing the international criminal tribunal for the former Yugoslavia. *Human Rights Quarterly*, 17, 649-690.

Nowrojee, J. (1996). *Shattered lives: sexual violence during the Rwandan genocide and its aftermath*. New York: Human Rights Watch. Retrieved October 2004.  
Available at: <http://www.hrw.org/reports/1996/Rwanda.htm>

Philipose, L. (1996). The laws of war and women's human rights. *Hypatia*, 11, 46-63.

Price, L. (2001). Finding the man in the soldier-rapist: Some reflections on comprehension and accountability. *Women's Studies International Forum*, 24, 211-227.

Raghavan, Susan. (2004, April 2) Ten years later Rwanda still seeking justice. *Knight Ridder Newspapers*. Retrieved 13 April 2004.  
Available at: <http://www.myrtlebeachonline.com/mld/myrtlebeachonline/8341847.htm>

Reinhartz, S. (1992) *Feminist methods in social research*. Toronto: Oxford University Press.

Rey-Schyr, C. (1999). The Geneva conventions of 1949: A decisive breakthrough. *International Review of the Red Cross*, 834, 209-239. Retrieved March 2005.  
Available at:  
<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7B16F0EA4AFF0F40C1256B66005D0C8D>

Sanday, P. (1990). *Fraternity gang rape: sex, brotherhood and privilege on campus*. New York: New York University Press.

Sands, P. (2003) International law transformed? From Pinochet to Congo...? *Leiden Journal of International Law*, 16, 37

Saywell, S. (Producer). (1997). *Rape: a crime of war*. (Videotape). Montreal: National Film Board of Canada.

Schabas, W. (2004) A synergistic relationship: The Sierra Leone truth and reconciliation commission and the special court for Sierra Leone. *Criminal Law Forum*, 15, 3-54.

Sarkin, J. (2000) Promoting justice, truth and reconciliation in transitional societies: Evaluating Rwanda's approach in the new millennium of using community based gacaca tribunals to deal with the past. *International Law Forum*, 2, 112-121.

Seifert, R. (1994). War and rape: A preliminary analysis. In A. Stiglmyer (Ed.), *Mass rape: the war against women in Bosnia-Herzegovina*. (pp. 54-72). University of Nebraska Press

Smart, C. (1989). *Feminism and the power of law*. New York: Routledge

Snider, L. (1999). The potential of the criminal justice system to promote feminist concerns. *Studies in Law, Politics and Society*, 10, 143-172.

Stephens, B. (1993, Summer). Women and the atrocities of war. *Human Rights*, 12-15, 30.

Stetz, M. (2001). Wartime sexual violence against women: A feminist response. In C. McCann & S. Kim (Eds.), *Feminist Theory Reader* (pp.138-147). New York: Routledge

Stiglmyer, A. (1994). The rapes in Bosnia-Herzegovina. In A. Stiglmyer (Ed.), *Mass rape: the war against women in Bosnia-Herzegovina*. (pp. 82-169). University of Nebraska Press

Turshen, M. (2000). The political economy of violence against women during armed conflict in Uganda. *Social Research*, 67, 803-824.

United Nations (2000) About the united nations/history. *Basic Facts About the United Nations*. Retrieved October 2004.  
Available at: <http://www.un.org/aboutun/history.htm>

United Nations. (1949). *Geneva Convention relative to the Protection of Civilian Persons in Time of War*. Retrieved October 2004.  
Available at: <http://www.unhcr.ch/html/menu3/b/92.htm>