

**Rape as a War Crime and Crime against Humanity:
The Effect of Rape in Bosnia-Herzegovina and Rwanda on International Law**

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Abstract

Rape has been a part of war as long as war has been a part of human existence. Yet though rape has long been acknowledged as an atrocity, rape did not become a war crime until the late 1990s. This paper looks at why this is so and how the role of rape in war in Bosnia, and Rwanda effected the development of international law regarding women. A discussion of human security will show how a change in thinking of human security led to an individualistic security focus rather than security focused on nation-states and state sovereignty. Furthermore, the international laws regarding women in war prior to the 1990s will be discussed, as well why these laws were not adequate in their protection of women internationally. This paper argues that a fundamental change in understanding of the role of rape in war—from consequence of war to method of war—led to the development of rape as a war crime. This claim is explored through case studies of the Bosnian (1992-1995) war in the former Yugoslavia and the Rwandan genocide (1994). The general aim of this paper is to understand the impact rape in war had on the development of international laws regarding women.

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Maps



Map I: The former Yugoslavia during the Bosnian War from 1992-1995

Source: <http://www.aegee.tue.nl/site-archive/hrwg/exyu/exyu.gif>



Map II: Rwanda

Source: <http://news.haverford.edu/blogs/rwanda/files/2008/05/rwanda.jpg>

Section 1: Introduction

“They thought that none of us would survive to tell the truth,”¹ was the eerie testimony of an anonymous witness who was repeatedly raped by Serbian forces during the war in Bosnia-Herzegovina from 1992-1995. This woman was from Foca, a region in eastern Bosnia where Serbian forces virtually annihilated non-Serbian civilians, termed “Bosniaks” (i.e. non-Serbians living in Bosnia, but primarily implying Bosnian Muslims), in a nationalistic campaign of Serbian independence and ethnic cleansing. The conflict² has often been called genocide because of the Serbian intention to “destroy, in whole or in part” the Bosniaks through killings and forced displacement.³ Beyond the usual methods in warfare (bombs, artillery, etc.), Serbian forces used another tactic—rape—that proved most effective at humiliating the Bosniaks and causing them to leave the region.

Serbian forces raped between 20,000 and 50,000 women in the Bosnian war.⁴ The exact figure, of course, cannot be known. The European Union Commission cites 20,000 rapes; however, the Bosnian government claims 50,000.⁵ The discrepancy between the estimations of rape during the Rwandan genocide are even greater, ranging between 250,000 and 500,000 women were raped.⁶ Regardless of the discrepancies, these numbers

¹ *I Came to Testify*, Film, Prod. Pamela Hogan (2011; Thirteen and FORKS Films, 2011). Accessed on November 13, 2011. <http://www.pbs.org/wnet/women-war-and-peace/features/i-came-to-testify/>.

² Throughout this paper I will describe the war in Bosnia as “conflict” or “war” and will not describe it as “genocide” because although there is evidence for genocide, most of the scholars I studied termed what happened in Bosnia as “ethnic cleansing,” “conflict,” or “war.”

³ “Convention on the Prevention and Punishment on the Crime of Genocide.” UNHCHR, 9 December 1948.

⁴ Teresa Iacobelli. “The ‘Sum of Such Actions’: Investigation Mass Rape in Bosnia-Herzegovina through a Case Study of Foca,” in *The Brutality of Desire: War and Sexuality in Europe’s 20th Century*, ed. Dagmar Herzog, (New York: Palgrave MacMillan, 2009): 261-283.

⁵ *Ibid*, see note 24 of source, 280.

⁶ Anne-Marie de Brouwer, *Supranational Criminal prosecution of Sexual Violence: The ICC and the Practice of ICTY and ICTR* (Antwerpen, Oxford: Intersentia, 2005), 12

clearly indicate that rape in these conflicts was not a mere “byproduct of war; *rape was a method of warfare*. Rape implies and signals total dominance and as a method of war humiliates and destroys whole communities and ethnic groups. Gynecologist Melika Kreitmayer said of rape in Bosnia, “These women were raped not because it was the male instinct. They were raped because it was the goal of the war.”⁷

The use of rape in Bosnia and Rwanda was a clearly defined method of war, and the international community came to recognize the rapes as such. Because rape was not an issue in the Nuremberg Trials, which in many ways set the precedent for war crimes and international law, it took much longer for rape to become a part of international law. Although Article 27 of the Fourth Geneva Convention prohibited wartime rape and forced prosecution in 1949, it appears that this was merely a symbolic gesture since rape in war was virtually ignored by the international community until the late 1990s when rape was finally acknowledged as a war crime and crime against humanity.⁸ The twentieth century is arguably the most human rights focused century in history, especially post World War II. However, rape, an acknowledged atrocity, did not receive due attention and status as a war crime and crime against humanity for decades compared with other atrocities. This paper seeks to understand this historical discrepancy and expose a double standard.

Furthermore, in considering why wartime rape in Bosnia grabbed the attention of the international community in the 1990s, Helke Sander says it is simply that “all the mass rapes mentioned [Bangladesh, Uganda, Iran] were simply too far from Europe to

⁷ Roy Gutman, “Mass Rape: Muslim Recall Serb Attacks,” *Newsday*, August 23, 1992, 5, 36-37.

⁸ Full text of Article 27 can be found at <http://www.icrc.org/ihl.nsf/WebART/380-600032?OpenDocument>. Accessed 3 October 2011.

frighten us.”⁹ Sander’s insight, though true, does not go far enough in explaining contemporary awareness of rape in war. Hence, this paper seeks to better understand how rape in war, specifically in Bosnia and Rwanda in the 1990s, contributed to the development of rape becoming a crime against humanity and prosecuted war crime.

This paper argues that the international community underwent a fundamental change in understanding of the role of rape in war—from a consequence of war to a method of war—and this change in understanding led to the development of rape as a war crime. This change in thinking led to the action of the international community in allowing rape to be prosecuted in an international criminal tribunal for the first time during the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This paper argues that the role of the media, the testimonies of victimized women, changing views of human security, and feminist IR theory all contributed to the change in thinking of rape as a method of warfare.

This paper uses qualitative research methods and case studies of Bosnia and Rwanda to understand how and why rape became a war crime and crime against humanity. The research cited consists of newspaper articles documenting the experience of raped women, speeches by international officials calling for the prosecution of rape as a war crime, scholarly articles discussing the implications of rape, women’s testimonials, and reports by the United Nations and Human Rights Watch. Process tracing is also employed to demonstrate how rape in Bosnia and Rwanda led to the development of

⁹ Helke Sander, “Prologue,” in *Mass Rape: The War Against Women in Bosnia-Herzegovina* Ed. Alexandria Stiglyamer, xvii-xxiii (Lincoln: University of Nebraska Press, 1994): xx.

international laws regarding rape in war. Process tracing reveals that martial rape in Bosnia and Rwanda led to a profound change in the understanding of the role of rape in war, and this change in understanding led to the development of international law regarding rape in war.

The next section provides a research context for this paper, discussing feminist IR theory and human security theory as a framework for my argument. Section Three provides the research questions I seek to answer and justifies my research methods and case study selections. Section Four provides the necessary international legal background regarding rape in war. Section Five explores the case studies of Bosnia and Rwanda in detail to show how rape in war effected the development of international laws regarding women. Section Six provides the conclusion of the paper and provides implications for this paper for continued action on behalf of women in war.

Definitions

Before presenting the research, definitions of key terms as they relate to the paper is necessary. Jonathan Gottschall's definition of *mass rape* defined as "distinct patterns of rape by soldiers at rates that are much increased over rates of rape that prevail in peacetime"¹⁰ is applied throughout the paper. The terms *mass wartime rape*, *mass rape*, and *wartime rape* are all used interchangeably and have the same meaning because when wartime rape is discussed it does not mean isolated acts of rape during war.¹¹ Rather, wartime rape carries the definition stated above. Further, the term *martial rape* refers to rape during wartime and "warlike" rape as well.¹²

¹⁰ Gottschall, "Explaining Wartime Rape," 129.

¹¹ Ibid, 129.

¹² Claudia Card, "Rape as a Weapon of War," *Hypatia* 11.4 (Fall 1996): 5.

The difference between war crimes and crimes against humanity is also an important distinction to be aware of throughout the paper. Although the two are often used interchangeably, they have different meanings. A war crime is a grave violation of the customary and treaty law in regards to international humanitarian law that are considered as criminal offenses for which the individual is responsible.¹³ A crime against humanity is defined as any particularly horrible act that is part of a grave attack on human dignity or severe humiliation or degradation of one or more human beings.¹⁴

Section Two: Research Context

Martial rape in Bosnia and Rwanda led to a profound change in the understanding of rape in war, and this change in understanding led to the development of international laws regarding rape and sexual violence against women during times of war and peace. In order to understand this development there must first be an understanding of two main theories, feminist theory and human security theory, situated within the context of International Relations (IR), which apply to this paper. IR is concerned with understanding war and conflict; therefore a study of rape in war fits well into a theoretical framework based in IR. Both feminist theory and human security theory fall under the larger category of IR theory as pertains to this paper.

J. Ann Tickner, a leading feminist IR scholar, states that feminists in IR “focus on how world politics can contribute to the insecurity of individuals, particularly marginalized and disempowered populations. They examine whether the valorization of characteristics associated with a dominant form of masculinity influences the foreign

¹³ Rome Statute of the International Criminal Court, 17 July 1998.

¹⁴ Ibid.

policies of states.”¹⁵ While there are many fields of feminist theory, this broad definition applies to the stated goals of all feminist IR theories. Rape in war is clearly an issue of insecurity of individuals, particularly women. Thus, rape in war is relevant for feminist theory.

Further, Tickner notes that another main concern of feminist theorists is to understand the subordination of women socially and politically and work toward methods for ending it.¹⁶ One of the ways this subordination occurs is through “gendered states,” which sustain policy practices largely in the interests of men.¹⁷ Hence expanding this definition of “gendered states” to apply to international organizations is understandable. The lack of international laws protecting women in war helped protect the interests of men in war. While not discussed explicitly by Tickner, recognition of rape as a war crime and crime against humanity with meaningful consequences would have been highly unlikely without the growth and persistence of feminist theory.

Feminist theory works hand in hand with human security theory, which recognizes that states are often a source of threat to individual security rather than a protection from threat.¹⁸ In *Madness in the Multitude*, Fen Hampson, et. all discuss a change in thought regarding human security after the Cold War. Before the Cold War, security was largely defined as national security, and nation states believed in “traditional values” regarding state sovereignty, and non-intervention was the protocol followed.¹⁹ Hampson argues that the idea of “citizens living in a democracy have a moral obligation

¹⁵ J. Ann Tickner, *Gender in International Relations: Feminist Perspectives on Achieving Global Security*, (New York: Columbia University Press, 1992): 1.

¹⁶ *Ibid*, 11.

¹⁷ *Ibid*, 21.

¹⁸ Fen Hampson, Jean Daudelin, John Hay, Todd Martin, and Holly Reid, *The Madness in the Multitude: Human Security and World Disorder*, (New York: Oxford University Press, 2002): 4.

¹⁹ *Ibid*, 8, 13.

to help secure for others the rights and privileges that they enjoy” emerged before the end of the Cold War in the late 1800s and early 1900s.²⁰ The atrocities of World War II and the Holocaust provided a further catalyst for the consideration of the rights of individuals outside of one’s own nation-state. There is now a clear focus on the individual in international relations, which Hampson attributes to seven factors: an international regime of legal norms; the end of the Cold War; an increasing impact of NGOs; the increased role of the media; a change in the character of international politics to strengthen human security; economic globalization; and a greater understanding of the factors that cause violence and conflict.^{21 22}

Hampson, et. al. all says that there are three main views of human security: 1) Human rights/rule of law approach; 2) safety of peoples; and 3) sustainable human development.²³ While all three views regard the individual as the starting point for issues of security, the views differ in their interpretations of what the main threat to human security is as well as their solutions to promote human security. The *human rights/rule of law* approach says that threats to human security are found in the “denial of basic rights and ‘due process’ and the absence of democratic systems of governance.”²⁴ Threats exist in the absence on these norms of human rights. The International Criminal Court is an example of a solution of the human rights/rule of law approach to human security. Next, *the safety of peoples* approach focuses on ensuring the “moral and legal rights of non-combatants in war or situations of violent conflict and on providing emergency assistance

²⁰ Ibid, 3.

²¹ Ibid, 7-10.

²² It should be noted that this view of human security is not universally accepted among IR theorists. However, human security theory is an appropriate framework for this paper and this paper shows the importance of having views of security based on the individual.

²³ Ibid, 33.

²⁴ Ibid, 33.

to those in dire need.”²⁵ International politics has not always believed in the protection of civilians in war, but ethical and legal norms have changed, requiring the international community to work to protect non-combatants. Strategies favored by the *safety of peoples* approach favors military involvement, humanitarian assistance and aid, and prevention measures.²⁶ Finally, the *sustainable human development* approach views underdevelopment, and lack of economic, social, and environmental rights to be the main threat to human security. This view of security favors action that would address the disparity between rich and poor in the world and work to redistribute the wealth through poverty alleviation.²⁷ All three of these approaches to human security are relevant for my paper since they each focus on the individual as the object of human security. However, the *human rights/rule of law* and *safety of peoples* strategies of addressing problems of human security are most applicable to this paper.

Tickner points out that treating “individuals as the objects of security...[opens] up the possibility of talking about a transcendent human community with common global concerns and allow[s] engagement with the broadest global threats.”²⁸ War is acknowledged to be the main threat to human security since war provides a backdrop for human rights violations to occur and even become a strategic part of warfare. The main international response to issues of human security has been the creation of the International Criminal Court (ICC), which is overseen by the United Nations’ Security Council. The existence of the ICC reveals the shift in focus to individualistic centered notions of security, “as the existence of interstate conflict is not a necessary precondition

²⁵ Ibid, 23.

²⁶ Ibid, 33.

²⁷ Ibid, 33-35.

²⁸ Tickner *Gendering World Politics*, 47.

to the operation of the court's jurisdiction."²⁹ Hampson, et. all point to the International Criminal Tribunals for the former Yugoslavia (ICTY) and International Criminal Tribunals for Rwanda (ICTR) as a final step in recognition of the need for a permanent international legal body capable of prosecuting human rights and security violations in times of war and peace. Thus, both feminist theory and human security theory are essential to the understanding of how rape in war gained international attention. The changes in understanding of the importance of the individual created a political and social atmosphere that allowed the rights of victimized women in war to become international law.

In addition to placing this paper in the framework of feminist IR theory and human security theory, understanding thoughts regarding rape prior to the 1990s is also necessary. That rape has been a part of war as long as men have fought wars is well known. Historical accounts of rape, such as the well-known Roman rape of the Sabine women as well as numerous Biblical accounts of rape (e.g. Deuteronomy 20, Judges 21, Isaiah 13:6), show that men have considered women as prizes of warfare extending from antiquity. Although Article 27 of the Fourth Geneva Convention prohibited wartime rape and forced prostitution, the fact that rape was not tried as a war crime for fifty years despite many international instances of wartime rape shows the bias of the international community in viewing rape as a mere consequence of warfare.^{30 31}

Yet others began to understand that rape was not just an inevitable consequence of war. Contributing to the discussion of rape as a method of war, Caroline Kennedy-Pipe

²⁹ Hampson, *Madness in the Multitude*, 62.

³⁰ Article 27. See note 8.

³¹ Jonathan Gottschall, "Explaining Wartime Rape," *The Journal of Sex Research* 41.2 (May 2004): 129-136.

and Penny Stanley show in their article “Rape in War” that rape in war became a topic for the first time during the ethnic cleansing in Bosnia in the 1990s. In this kind of war “rape can be seen as a military strategy, a nationalistic policy and as an expression of ethnic group hatred.”³² Hence, viewing rape this way allowed rape to be tried as a war crime. Rape as a personal act did not count as a war crime, as Kennedy-Pipe points out. Rather, the political intent of the perpetrator classifies rape as a war crime.³³ Under this criteria “opportunistic rape” cannot be indicted in an international court. Kennedy-Pipe sees this as a failure on the part of the international criminal courts and further research into this area will prove useful for the future implications of this paper. Kennedy-Pipe concludes her article with compelling reasons as to why prohibition of rape in war is largely unenforceable. Prohibition of rape in war is unenforceable precisely because rape is such an effective way for groups to destroy communities and morale, because international law can overlook the experiences of individual women, and because nation states are primarily concerned with placing their own interests over the enforcement of human rights.³⁴ Thus, Kennedy-Pipe concludes, only by addressing these issues can rape in war can be affectively addressed, judged, and prevented.

Finally, Kelly Askin’s book, *War Crimes Against Women*, traces the development of international law regarding women. Askin also proves that rape is a war crime and that war crimes have “jus cogens” status, which are the “principles that form the norms of international law that cannot be set aside.”³⁵ Since war crimes have this status, the

³² Caroline Kennedy-Pipe and Penny Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s,” in *The Kosovo Tragedy* ed. Ken Booth, 67-83 (Portland: Frank Cass, 2000).

³³ *Ibid*, 76-77.

³⁴ *Ibid*, 81.

³⁵ Kelly Askin, *War Crimes Against Women: Prosecution In International War Crimes Tribunals* Cambridge, MA: Kluwer Law International, 1997.

international community can recognize them as violations of law even if the law is not explicitly stated. Finally, Askin distinguishes between different functions of sexual abuse in war: humiliation, degradation, forced impregnation, forced maternity, rape facilities (camps), and ethnic cleansing. These distinctions are found throughout the case studies of Bosnia and Rwanda.

Moreover, some argue that rape could be termed “genocidal rape” and that “rape and rape alone could be the sole predicate crime sustaining a conviction for genocide.”³⁶ The ICTR upheld this view in the *Akayesu* case.³⁷ There was also discussion of terming rape in Bosnia “genocidal.” However, the main argument for genocidal rape came from ICTR. This view made rape in war even more serious and worthy of attention by the international community.

Most of the research regarding rape in war discusses rape as a method of warfare but does not discuss the fundamental change in thinking that occurred in the international community in order for rape to become a war crime and crime against humanity. Claudia Card’s article “Rape as a Weapon of War,” for example, explicitly looks at how rape works as a “martial weapon.”³⁸ This paper will discuss what these selected scholars omitted in order to understand how a change in thinking about rape in war led to a change in international laws regarding women.

³⁶ Janet Halley, “Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict,” *Melbourne Journal of International Law* 9 (2008): 78-124.

³⁷ *Ibid*, 84.

³⁸ Card, “Rape as a Weapon of War,” 5.

Section Three: Methodology

Research Questions

This paper seeks to address four main research questions. My primary research question asks how rape in war effected the development of international law regarding women. Secondly, how did the thinking about rape in war change as a result of crimes against women in the Bosnian and Rwandan conflicts? Thirdly, how did a change in thinking about national security effect the way women (and consequently crimes against women) were viewed on an international level? Fourthly, what steps still need to be taken to ensure security for women in war and where can existing laws be improved.

Additional sub questions related to the main research questions are noted as follows:

1. Main paper question: How did rape in war effect the development of international law regarding women?
 - a. Why did rape in war become an issue in the 1990s? Why was it not until the late 1990s that rape did not become a war crime?
 - b. What laws were in place to safeguard women before the 1990s?
 - c. What laws came as a result of Bosnia and Rwanda?
2. How did the thinking about rape in war change as a result of crimes against women in Kosovo, Bosnia, and Rwanda?
 - a. Why did Yugoslavia get attention?
 - b. What role did the media play in this change? How did the media get the attention of the masses?
 - c. How did testimonials of women effect international action and law?
3. How did change in thinking about national security effect the way women (and consequently crimes against them) were viewed on an international level?
 - a. How did the change in thinking about security as pertaining to individuals and nations contribute to this?
 - b. What happens when a state does not protect its citizens?
4. What steps still need to be taken to ensure security for women in war? Where can existing laws be improved?

The purpose of these research questions is to discover how rape in war effected the development of international law. Analyzing the change of thinking about rape from a

consequence of war to a method of war in Bosnia and Rwanda allows a greater understanding of why this change occurred in the 1990s.

Methodology

This paper is a qualitative study that uses case studies of Bosnia and Rwanda to study the phenomenon of rape in war and the effect rape in war had on the development of international law. Qualitative research methods are appropriate for this paper because of the nature of the topic. Quantitative methods are not possible because they are unable to explain how rape in war effected the development of rape as a war crime. Case studies are an appropriate research method for my paper because case studies answer questions of *why* hypotheses hold, rather than if they hold or not.³⁹

Process tracing is applied to rape in war in Bosnia and Rwanda in order to understand what happened in those conflicts, how the international community responded, and how (if at all) the responses were different for both conflicts. Utilizing the method of process tracing demonstrates that these conflicts led to a profound change in the understanding of the role of rape in war, and this change in understanding led to the development of international law regarding rape. Stephen Van Evera states that process tracing is an appropriate method to use because process tracing observes the “chain of events” whereby “initial case conditions are translated into case outcomes.”⁴⁰ Since this paper involves understanding how different experiences of rape in war in two different conflicts led to the development of international law regarding rape, process tracing reveals the chain of events and how one area of evidence impacts another.

³⁹ Van Evera, Stephen. *Guide to Methods for Students of Political Science*. Ithaca, NY: Cornell University Press, 1997, 55.

⁴⁰ Van Evera, *Guide to Methods*, 54, 64.

Why Bosnia and Rwanda?

The Bosnian and Rwandan conflicts were chosen for process tracing simply because of their proximity in time both to each other (1992-1995) and to rape becoming a war crime in the late 1990s in addition to the significant role rape played in each of the conflicts impacting the development of international law regarding rape. Furthermore, the Bosnian conflict was the first time in history that mass rape got the attention of the media and international action was demanded on a large scale. The Rwandan conflict occurring two years later in 1994, while the Bosnian conflict was ongoing, added further momentum to the attention brought to mass rapes. Thus, examining both cases reveals similarities in the international responses to both conflicts.

Further, the Bosnian and Rwandan cases were chosen because international criminal tribunals were created for both conflicts for the first time since the Nuremberg Trials.⁴¹ In each tribunal, ICTY and ICTR, rape received special attention and was prosecuted as a war crime and crime against humanity. Thus, in seeking to understand how rape in war effected the development of international law, it was necessary to use case studies of the conflicts that created the tribunals that upheld rape as a war crime.

Section Four: International Legal Context

Background regarding international laws pertaining to rape in war prior to ICTY and ICTR is also necessary in order to understand why more international action was

⁴¹ Roy Gutman, "Foreword," in *Mass Rape: The War Against Women in Bosnia-Herzegovina* Ed. Alexandria Stiglyamer, ix-xiii (Lincoln: University of Nebraska Press, 1994): ix.

needed before continuing the argument of this paper. A brief discussion of why former attempts at criminalizing martial largely failed is also needed.

Prior to the Bosnian and Rwandan conflicts there were some efforts to bring international attention and against rape in war but they failed because there was no precedent set for dealing with rape in war and rape was still seen as a consequence of warfare. For example, there was no mention of rape in the Genocide convention adopted by the UN General Assembly on December 9, 1948. Further, the Nuremburg Trials, which had set the precedent for international criminal law, essentially ignored rape in war. The many documented reports of rape in Nazi Germany as well as forced prostitution within concentration camps was rarely discussed and perpetrators were never held accountable for sexual violence against women.⁴²

The previously mentioned Article 27 of the Fourth Geneva convention did prohibit rape in war, saying, “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”⁴³ Yet Article 27 was largely ignored and rape not an acknowledged war crime despite multiple instances of widespread martial rape throughout the twentieth century in Bangladesh, Vietnam, and Uganda. For example, in 1971 there were an estimated 250,000 to 400,000 rapes during Bangladesh’s war for independence and in Uganda, it was reported that soldiers had raped approximately 70% of women in the reporter’s community in the Luwero triangle during the early 1980s.⁴⁴

⁴² Robert Sommer, “Camp Brothels: Forced Sex Labour in Nazi Concentration Camps,” in *The Brutality of Desire: War and Sexuality in Europe’s 20th Century*, ed. Dagmar Herzog, 168-196 (New York: Palgrave MacMillan, 2009).

⁴³ See note 8.

⁴⁴ Shana Swiss, MD and Joan Giller, “Rape as a Crime of War: A Medical Perspective,” *JAMA* 270.5 (August 1993): 612-615.

Additionally, although the Fourth Geneva Convention outlawed rape in Article 27, Article 147 of the “grave breaches” of human rights violations does not mention rape.⁴⁵ This omission implies that rape was not taken seriously. Enforcement and implementation of the convention was also a problem. The articles of the convention did not seem to have any real power. In 1972, for example, when the United Nations Economic and Social Council became concerned about “escalating levels of brutality directed against women in war,” they appealed to those involved in combat to “respect international law.”⁴⁶ Their appeals had no effect.⁴⁷ Hence, Article 27 remained ineffective and unenforced.

However, the Tokyo war crimes tribunals after WWII did pay some attention to martial rape, focusing most notably on the Japanese occupation of Nanking, during which Japanese soldiers raped an estimated 20,000 women and children in what came to be known as the “Rape of Nanking.”⁴⁸ Prosecutors of the Japanese war officials presented substantial evidence of mass rape in order to convict the officials of crimes against humanity. Although the officials were not indicted and tried because of rape, they were charged with crimes against humanity, and rape was acknowledged as a legitimate war crime, at least by some.⁴⁹

Despite the rape of Nanking, the international war crimes tribunals in Nuremberg and Tokyo were hesitant to discuss rape as a serious issue in war. After recounting horrific stories of rape from two witnesses, Justice Pal of the Tokyo War Crimes

⁴⁵ Kennedy-Pipe and Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s,” 72.

⁴⁶ Ibid, 72.

⁴⁷ Ibid, 72.

⁴⁸ History of Nanking Massacre Web site, http://www.nanking-massacre.com/History_of_Nanking_Massacre_1937.html.

⁴⁹ Kennedy-Pipe and Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s,” 70.

Tribunal said, “I might mention...that even the published accounts of Nanking “rape” could not be accepted by the world without some suspicion of exaggeration...I am not sure if we are not here getting accounts of events witnessed only by excited or prejudiced observers.”⁵⁰ Thus, he dismissed the evidence clearly presented to him and refused to consider rape as a serious war crime, believing rape to be a mere consequence of warfare. Furthermore, in an interview for the PBS documentary “I Came to Testify,” Peggy Kuo, a prosecutor in the *Kunarac* case in ICTY, discussed the failure of previous tribunals to seriously address the problem of rape in war. She said, “I had heard that someone made a comment [at Nuremberg] that we don’t want a bunch of crying women in the courtroom...It’s mostly men. In that environment women aren’t given a place at the table even as witnesses in many cases.”⁵¹ Although the historicity of Kuo’s comment is debatable, the sentiment is relevant and obviously pervaded international law and precedent regarding rape in war for most of the twentieth century. Although there were a few symbolic legal gestures regarding women and rape in war, “the gap between government rhetoric and reality is vast.”⁵²

Section Five: Case Studies—Rape in Bosnia and Rwanda

This section provides evidence for the argument that a fundamental change in thinking of rape in war caused the development of rape as a war crime. The case studies of Bosnia and Rwanda demonstrate that rape was used as a method of warfare during the Bosnian war and the Rwandan genocide. The international community responded to both

⁵⁰ Kelly Askin, *War Crimes Against Women*, 181, 184.

⁵¹ *I Came to Testify*.

⁵² Human Rights Watch, *The Human Rights Watch Global Report on Women’s Human Rights* (New York: Human Rights Watch, 1995), xiii.

events by creating two international criminal tribunals, ICTY and ICTR, which dealt with rape as a war crime and crime against humanity for the first time. The ICTY and ICTR were empowered to deal effectively with wartime rape because of a change in thinking about the role of rape in war, changing views of human security, vocal feminists in IR and other fields, actual testimonials of rape women, and the voice of the media calling for international action.

Case One: Bosnia-Herzegovina War from 1992-1995

In 1992, war in Bosnia erupted between the Bosnian Serbs (assisted by Serbia) and the Bosnian Muslims. The war followed the break up of the former Yugoslavia, after Slovenia and Croatia seceded from Yugoslavia. When Bosnia voted for independence in February 1992, Bosnian Serbs rejected the proposal, wishing to maintain greater ties to Serbia, which controlled Yugoslavia. Following the secession vote the Bosnian Serb forces, supported by the Serbian military of President Slobodan Milošević and the Yugoslav People's Army, mounted a full on attack of Bosnia-Herzegovina. A key part of this attack was ethnic cleansing—an attempt to purge Bosnia of all Bosnian Muslims (Bosniaks) even in areas where Bosnian Serbs and Bosniaks had lived together without problems for decades.⁵³ Journalist Refik Hodzic described the war in Bosnia and dehumanization of Bosniaks by saying, “all of a sudden they [Bosniaks] ceased to be neighbors...they became this “filth”.”⁵⁴ Foreshadowing the conflicts to come, the

⁵³ Stiglmayer, Alexandra, “The War in the Former Yugoslavia,” in *Mass Rape: The War Against Women in Bosnia-Herzegovina* Ed. Alexandria Stiglyamer, 1-34 (Lincoln: University of Nebraska Press, 1994).

⁵⁴ *I Came to Testify*.

nationalist Serbian Chetnik song included the lines, “There will be slaughter...there will be rape.”⁵⁵

The first reports of mass rape came from Bosnian refugees to Croatia in June 1992.⁵⁶ Refugees told stories of being gang-raped, held in detention centers, being raped at roadblocks, and being raped during invasions. They told stories of men being taken to concentration camps and the women being put in hotels, homes, etc. as makeshift rape camps.⁵⁷ One woman’s testimony explains the rationale of the forced displacement, detention, and rape, “They [the soldiers] would come and curse us and tells us that we Muslims were getting what we deserved.”⁵⁸ The Bosnian Serbs used raped in order to cause humiliation and the breakdown of the Bosnian Muslim community.

The rape of the Bosnian Muslim women was systematic and widespread, and although no official orders (i.e. memos, documents, speeches) have been found commanding soldiers to rape, the testimonies of individual soldiers to the women they raped conveys orders from top military commanders. One woman said her rapist told her “We have orders to rape the girls.”⁵⁹ Other women testified that they were taken to a house and not raped but ordered to tell other people that they had been raped.⁶⁰ Yet another woman asked her rapist why he, a Bosnian Serb, had suddenly turned on the Bosniaks and begun raping the women. He replied that they had to “because you are Muslims and there are too many of you.”⁶¹ Other rapists said that they had to rape in order to avoid being killed themselves. Other rapists, when interviewed, said that they

⁵⁵ Ibid.

⁵⁶ Stiglmeier, “The War in the Former Yugoslavia,” 25.

⁵⁷ *I Came to Testify*.

⁵⁸ Ibid.

⁵⁹ Gutman, “Mass Rape,” 5.

⁶⁰ Ibid, 36.

⁶¹ Ibid, 37.

were enticed to rape and kill by being told stories, for example, that Muslims had killed the rapist's father, in order to incite the desire for revenge.⁶² Another said that he was provided with drink and food as a "reward for good behaviour and to induce camaraderie with fellow soldiers."⁶³

The main targets of rape were women old enough to have children, although there were reports of girls under twelve years old and women over age sixty being raped.⁶⁴ Over the course of the war an estimated 20,000-50,000 women were raped.⁶⁵ When the UN Commission of Experts went in to investigate rape in the war they refused to guess at the particular number of rapes but stated "that sexual assault was used by the belligerents in Bosnia as a means to 'terrorise, to displace, to demoralize and to destroy'".⁶⁶

The Bosnian Serbs used rape as a method of war and ethnic cleansing. The UN Commission of Experts in Bosnia say that rape in Bosnia can be grouped into five different categories. First, rapes occurred in villages before fighting breaks out to terrorize civilians.⁶⁷ When people heard of rapes in another village they would flee.⁶⁸ In the second category, rapes happened at the same time as the invasion of the Bosnian Serb forces. Women were raped in houses, on streets, gang raped, in public and in private. In the third category women were forced into detention centers, where they were held and raped repeatedly.⁶⁹ The UN found that gang rape was very common in the detention

⁶² Card, "Rape as a Weapon of War," 10.

⁶³ Ibid, 10.

⁶⁴ Roy Gutman, "Foreword," in *Mass Rape: The War Against Women in Bosnia-Herzegovina* Ed. Alexandria Stiglyamer, ix-xiii (Lincoln: University of Nebraska Press, 1994): x.

⁶⁵ See Note 4.

⁶⁶ Kennedy-Pipe and Stanley, "Rape in War: Lessons of the Balkan Conflicts in the 1990s," 73.

⁶⁷ Ibid, 73.

⁶⁸ *I Came to Testify*.

⁶⁹ Kennedy-Pipe and Stanley, "Rape in War: Lessons of the Balkan Conflicts in the 1990s," 73.

centers, such as Partizan Hall and Foca High School in Foca.⁷⁰ The fourth category is similar to the third. In the fourth, attacks occurred in what came to be known as “rape camps.” The women at these camps were raped repeatedly with the goal of impregnating the women with “Chetnik babies.”⁷¹ The women’s group Tresnjevka reports that around 35,000 women were held in Serbian run rape camps.⁷² In the fifth category, women were made to amuse troops in “makeshift brothels,” where most women were killed instead of being released, like many women were from detention centers.⁷³ Additionally, pregnant women were held in detention so that they would be unable to have an abortion.⁷⁴ Other girls were even sold as slaves, sometimes forced to leave the country with their “owner,” often a war official.⁷⁵

Using rape as a method of war humiliates and destroys whole communities and ethnic groups. Rape is particularly severe in traditional, patriarchal societies, like those of the Bosniaks, because the rape victim is often unconsidered for marriage because she is thought of as dirty or unclean, further making rape victims “a target of societal ostracism.”⁷⁶ Moreover, numerous testimonies document women and girls being raped in front of their husbands and fathers to increase the humiliation. Journalist Refik Hodzic said that the rapes were further intended to cause “the long term destruction on the soul of the community.”⁷⁷

⁷⁰ Iacobelli, “The ‘Sum of Such Actions,’” 267-268.

⁷¹ Kennedy-Pipe and Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s,” 73.

⁷² Anne-Marie de Brower, *Supranational Criminal Prosecution of Sexual Violence: the ICC and* , 9-10.

⁷³ *Ibid*, 73-74.

⁷⁴ Askin, *War Crimes Against Women*, 273.

⁷⁵ *I Came to Testify*.

⁷⁶ Askin, *War Crimes Against Women*, 268.

⁷⁷ *I Came to Testify*.

In addition, forced impregnation was used as a sexual war tactic of the Bosnian Serbs because it was generally believed that the conceived child would bear the father's identity and not the mother's. Hence children of Serbian rapists would not be considered Muslim.⁷⁸ Furthermore, since raped women in these societies were often rejected and shamed by their own people, the goal of the perpetrators to destroy the foundation of the Bosniak community was achieved. The shame of rape, and especially carrying the Serbian child of rape, was often too much for the women to bear. Heira, a rape victim interviewed by Roy Gutman stated, "We all feel that we lost everything... We have been abandoned. We have been imperiled. Every woman, if she is raped, has to feel the same."⁷⁹

Case Two: Rwandan Genocide in 1994

A case study of the Rwandan genocide also reveals how rape in war was recognized to be a method of warfare. The Rwandan genocide began on April 6, 1994, after the plane of Rwandan President Habyarimana was shot down. Planned systematic murders and violence was instigated immediately by Hutu militia groups against the Tutsi ethnic minority group, as well as moderate Hutus who believed in including both Hutu and Tutsi in the government. Hutu extremists believed that the Tutsis wanted all the power in the country and would enslave the Hutus. Two Hutu groups were primarily responsible for the killings. The Rwandan Armed Forces, including the Presidential Guard, working under governmental orders. In addition to governmental troops, the Interahamwe, a paramilitary group not officially supported by the government, worked in

⁷⁸ Askin, *War Crimes Against Women*, 268.

⁷⁹ Gutman, "Mass Rape," 37.

conjunction with the Hutus in power.⁸⁰ The Interahamwe was a largely unorganized group, started by young men of the extremist Hutu party without even a list of members or uniforms.⁸¹ The Interahamwe were very brutal perpetrators of the genocide, often using machetes instead of guns to kill victims.⁸² The Interahamwe were in charge of a radio station, RTLM, which incited hatred for Tutsis, calling them “cockroaches,” and encouraging other Hutus to take up arms against their Tutsi neighbors.⁸³ RTLM also broadcasted a list of names and addresses of targeted Tutsis and moderate Hutus, calling on listeners to find and kill them.⁸⁴ The Interahamwe were also largely responsible for setting up roadblocks in order to trap Tutsis and kill them as they tried to flee the areas. During the roughly 100 days of the Rwandan genocide around 800,000⁸⁵ people were killed, which includes as many as three-fourths of Rwanda’s Tutsi population.⁸⁶

It is clear from the testimonials of women, evidence gathered by witnesses, the United Nations, and Human Rights Watch that rape was used as a method of war in Rwanda. The Human Rights Watch Report on Sexual Violence during the Rwandan Genocide shows that the Hutu propaganda specifically “identified the sexuality of Tutsi women as a means through which the Hutu community sought to infiltrate and control the

⁸⁰ Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York, NY: Carroll and Graf Publishers, 2003 and Kinzer, Stephen, *A Thousand Hills* (Colorado Springs, Colorado: John Wiley and Sons, Inc. 2008), 130-132.

⁸¹ Dallaire, *Shake Hands with the Devil*, 129.

⁸² Ibid, 129.

⁸³ Stephen Kinzer, *A Thousand Hills*, 130-132.

⁸⁴ Ibid, 138.

⁸⁵ The Rwandan government cited 934,000 dead at the tenth anniversary of commemorating the genocide. However, 800,000 remains the acknowledged number of deaths by most.

⁸⁶ United Human Rights Council, “Genocide in Rwanda,”
http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm

Tutsi community.”⁸⁷ In the widely publicized Hutu “Ten Commandments,” Tutsi women were specifically targeted in four of the ten commandments because they could be used as “sexual weapons” to destroy Hutu men.⁸⁸

The function of rape in Rwanda is similar to the function of rape in Bosnia. The Human Rights Watch (HRW) Report reveals that patterns of abuse show that women were “individually raped, gang-raped, raped with objects such as sharpened sticks or fun barrels, held in sexual slavery (either collectively or through forced “marriage”) or sexually mutilated.”⁸⁹ Interahamwe also often raped women at roadblocks. Rape was so pervasive that Hutu women sometime raped at roadblocks as well.⁹⁰ However, the intention of the rapes was to utterly destroy the Tutsi community. As a result, UN Special Reporter on Rwandan concluded that anywhere from 250,000 to 500,000 women were raped during the Rwandan genocide.^{91 92}

More prevalent in Rwanda than in Bosnia was the killing of women after they were raped because in Rwanda the ultimate goal was extermination of Tutsis entirely, not just the displacement of them from the region. Force Commander of the UN Mission in Rwanda, Roméo Dallaire, recalls many instances of seeing dead corpses of women after being raped. He said, “If you looked, you could see the evidence, even in the whitened skeletons. The legs bent apart. A broken bottle, a rough branch, even a knife between them... There was always a lot of blood. Some male corpses had their genitals cut off, but

⁸⁷ Human Rights Watch, “Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath,” 1996. Accessed online.

http://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf

⁸⁸ de Brouwer., *Supranational Criminal Prosecution of Sexual Violence*, 12.

⁸⁹ Human Rights Watch, “Shattered Lives.”

⁹⁰ *Ghosts of Rwanda*. DVD, dir. Greg Barker (2004; BBC and Frontline, 2004).

⁹¹ *Ibid*, 11.

⁹² The vast discrepancy in the number of rapes comes from the number of estimated pregnancies (2,000-5,000) multiplied by 100, which is estimating for 1 pregnancy per 100 rape cases.

many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability.”⁹³

Not all women were killed, however. Some women were kept in detention and raped for days or months.⁹⁴ Like in Bosnia, some were allowed to live and the hopes of impregnating women with Hutu children would ensure Hutu dominance and shame the women. From victim testimonials, HRW reported, “Other women managed to survive, only to be told that they were being allowed to live so that they would “die of sadness”.”⁹⁵

Despite widespread recognition that rape was used as a tool of war and genocide in Rwanda, many perpetrators deny involvement with rapes. In his book detailing hundreds of interviews with genocide perpetrators in Rwanda, Scott Straus found that “very few Rwandan men in fact confessed to raping women—an offense that, under Rwandan law, could carry the death penalty.”⁹⁶ Most even denied witnessing rape because, they claim, the rule was to kill the women. The most typical response Strauss received when asking if women were raped was men saying “No. Rapes did not happen in our area.”⁹⁷ Clearly, many of the respondents are lying since as many as 500,000 women were raped.⁹⁸

⁹³ Dallaire, *Shake Hands with the Devil*, 430.

⁹⁴ de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 12.

⁹⁵ Human Rights Watch, “Shattered Lives.”

⁹⁶ Strauss, Scott, *The Order of Genocide: Race, Power, and War in Rwanda*, (Ithaca, New York: Cornell University Press, 2006), 162.

⁹⁷ *Ibid*, 163.

⁹⁸ See notes 90-92.

Responses to rape in Bosnia and Rwanda

The conflicts in Bosnia-Herzegovina and Rwanda led to a fundamental change in the thinking of rape in war. Henceforth, rape is viewed as a weapon of war or method of warfare instead of a mere consequence of war.⁹⁹ Viewed as a method of warfare, rape became an atrocity garnering the attention of the international community. Rape as a method of warfare can be evaluated and prosecuted, while viewing rape as a consequence of warfare invokes feelings of inevitability, helplessness, and inaction. Erica Feller, director of the Department of International Protection of UNHCR, acknowledged in a speech during the Vienna conference in 1999 that “the invisibility of women and sexual violence ended with the war in Bosnia and Herzegovina. This war, and the genocide in Rwanda, made it all too clear that rape and sexual violence, far from being isolated acts, are more and more frequently used as strategic weapons of war.”¹⁰⁰ Hence, discerning rape as a method of war was key in the development of rape as a war crime.

The role of the media

Media coverage during the war in Bosnia also deserves much credit for bringing the attention of the international community to mass rape in war. Pulitzer Prize winning reporter Roy Gutman was the first to release a major news media article on mass rape in *Newsday* on August 23 1992. The cover of the issue showed a picture of crying women under the title “MASS RAPE.”¹⁰¹ The article includes interviews with victimized women and gynecologist Dr. Melika Kreitmayer and provides a first hand account of the situation

⁹⁹ Erica Feller, “Rape is a War Crime: How to Support the Survivors? Lessons from Bosnia-Strategies for Kosovo,” *Refugee Survey Quarterly* 21.2 (August 2002): 35-43.

¹⁰⁰ *Ibid*, 36.

¹⁰¹ Gutman, “Mass Rape: Muslim Recall Serb Attacks.”

in Bosnia at the time. Gutman's article explicitly argues that rape is method of war, saying, "Serb conquerors of Bosnia have raped Muslim women, not as a byproduct of the war, but as a principal tactic of the war."¹⁰² Alexandria Stiglmayer, another researcher in Bosnia at the time, says that his original report fell on deaf ears and that it was not until December 1992 that the International Red Cross admitted that they were "receiving "continual reports of rapes from Bosnian refugees."¹⁰³ Stiglmayer credits the media with putting pressure on the Red Cross and larger international community to deal with the issue. She said that with the insistence of the Red Cross that rapes were isolated in times past, "such a story would end here. The journalists would write down the explanations of the international organizations and pack up. But they kept on writing...It was the pressure of the publicity caused by press reports" that caused the Red Cross and other organizations to admit evidence that rape was being used as a tactic by Serbian forces.¹⁰⁴ Peggy Kuo also cites the media as key in forcing an international tribunal to deal with Bosnian war crimes, including rape.¹⁰⁵

Rape in Rwanda did not receive as much attention as rape in Bosnia did primarily because the international community and the media largely ignored the Rwandan genocide until after the genocide was virtually over. Once the genocide was acknowledged, most of the media attention was focused on the killing of more than 800,000 in a few months. However, there was some acknowledgment that rape was used in Rwanda as a method of warfare and as an act of genocide. Roughly a year after the

¹⁰² Ibid, 5.

¹⁰³ Stiglmayer, Alexandria, "The War in the Former Yugoslavia," 26.

¹⁰⁴ Ibid, 25-26.

¹⁰⁵ Natalie Wilson, "Rape as a Weapon of War," *Ms. Blog Magazine*, 10 October 2011. Accessed on November 14, 2011. <http://msmagazine.com/blog/blog/2011/10/10/rape-as-a-weapon-of-war/>.

genocide, on May 15, 1995, *The New York Times* ran a front page story declaring that a “Wave of Rape Adds New Horror to Rwanda’s Trail of Brutality,” detailing the experience of women in Rwanda and how the country was coping with “genocide orphans,” which are half Hutu half-Tutsi babies.¹⁰⁶ Further, the creation of ICTR did much to bring attention to rape in war and was covered by the media.

The voices of the women

In addition, the testimonies of individual women were invaluable to the process of rape becoming a war crime and crime against humanity. The media gave women an avenue in which to tell their stories and appeal for justice. The prosecutors of the ICTY *Kunarac* case emphasized the vital role of the victimized women’s testimonies in court in the documentary “I Came to Testify.” The women who testified risked extreme danger because although their identities and voices were hidden in court and on camera, everyone in the women’s villages knew who was testifying.¹⁰⁷ The success of the prosecution in ICTY and ICTR hinged on the testimonies of the individual women. Indeed, had the women kept quiet out of shame and not testified of what happened to them, rape in war still might not have been addressed by the international community and the world would have been left with a void of silence similar to that surrounding sexual abuse and rape during the Holocaust. Instead, the women spoke and, as a result, were able to advance the cause of women in war and being the process toward justice.

¹⁰⁶ Donatella Lorch, “Wave of Rape Adds New Horror to Rwanda’s Trail of Brutality,” *The New York Times*, 15 May 1995. Accessed online. <http://www.nytimes.com/1995/05/15/world/wave-of-rape-adds-new-horror-to-rwanda-s-trail-of-brutality.html>.

¹⁰⁷ *I Came to Testify*.

International Criminal Tribunal for the former Yugoslavia

In 1993, in response to the war in Bosnia, the United Nations Security Council set up the International Criminal Tribunal for Yugoslavia (ICTY), which was the first international criminal tribunal since WWII and the first ever to be set up while the war was still ongoing.¹⁰⁸ The mandate of the Tribunal was to indict war criminals for war crimes and crimes against humanity. The ICTY made history in including rape as a serious violation of human rights and a war crime from the outset. Furthermore, the ICTY “took the historic step in issuing an indictment devoted exclusively to rape and other sexual crimes” in the Foca case, which charged 3 men on the basis of sexual abuse.¹⁰⁹ The ICTY established a precedent regarding rape against women during times of war. The specific rape, however, was not really the issue because what mattered was the intent of the rape, specifically the political intent. The intent of the rape had to be ethnic cleansing or humiliation or degradation for a political purpose. Then the rape could be indicted under international law.¹¹⁰

In June 1996 the Foca indictment (also known as the *Kunarac* case) was passed by ICTY and was the first case that considered sexual acts committed during the Bosnian war against women. It indicted 8 men and charged them with “breaches of the Geneva Conventions, including gang rape, torture and sexual enslavement, in the Foca region between 1992 and 1993.”¹¹¹ Then, on February 22, 2001, the ICTY *Kunarac* case

¹⁰⁸ *I Came to Testify*

¹⁰⁹ *I Came to Testify*

¹¹⁰ Kennedy-Pipe and Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s,” 76-77.

¹¹¹ Iacobelli, “The ‘Sum of Such Actions’”, 266.

successfully convicted three men on the grounds of rape and sexual slavery of women in Foca, upholding rape as a crime against humanity and a war crime.¹¹²

Doris Buss adds that the concept of rape as a method of war “laid the groundwork for the legal recognition of rape as a crime by the Rwandan and Yugoslav Tribunals.”¹¹³ Thus, ICTY was able to consider rape as a war crime and crime against humanity because of the recognition of the international community that rape was not just a mere consequence of war in Bosnia. Rather, it was a systematic attempt to destroy and displace the Bosniak population. This change in viewing rape allowed ICTY to be the first international tribunal to take rape in war seriously.

International Criminal Tribunal for Rwanda

Following the creation of the ICTY, the UN Security Council saw an immediate need for a tribunal for Rwanda as well. Thus, in November 1994, The International Criminal Tribunal for Rwanda was established.¹¹⁴ Moreover, the ICTR took prosecuting rape as a method of war one step further. The UN Commission of Experts on Rwanda said in their report that they found rape to be “committed with the intent to destroy, in whole or in part” the Tutsi population, thus acknowledging rape as part of genocide.¹¹⁵

On October 1, 1995, Rwandan political leader Jean Paul Akayesu, former mayor of the Taba commune in southern Rwanda, was indicted by the ICTR for fifteen accounts of genocide.¹¹⁶ Included in the indictment is discussion of the use of sexual violence as a weapon of the war and genocide. The Akayesu trial was unprecedented in that it

¹¹² ICTY. *Kunarac et. al.* Accessed on November 13, 2011, <http://www.icty.org/case/kunarac/4#ind>.

¹¹³ Doris Buss, “Rethinking ‘Rape as a Weapon of War’,” *Feminist Legal Studies* (July 2009): 145-163.

¹¹⁴ ICTR, “General Information,” <http://www.unictl.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>.

¹¹⁵ de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 17.

¹¹⁶ Buss, “Rethinking ‘Rape as a Weapon of War’,” 150.

established rape and other forms of sexual violence were established as acts of genocide because of the intent to destroy another group.¹¹⁷ In this case the Tribunal upheld that “rapes in fact resulted in physical and psychological destruction of Tutsi women, their families and their communities.”¹¹⁸

In another case, the ICTR found Mikaeli Muhimana guilty on accounts of genocide, complicity in genocide, murder and “of participating in and abetting rape as a crime against humanity.”¹¹⁹ Muhimana was also found guilty of raping women that he *thought* were Tutsi. The Prosecutor of the case reasoned, “Whether the victims were in fact *Tutsi* is irrelevant...He raped his victims with the knowledge that the rapes formed part of a widespread and systematic attack on the Tutsi civilian population.”¹²⁰ In like manner to the ICTY indictments, the rationale in charging rape as a crime against humanity is that it is the *intention* that matters, not necessarily the specific rape.

Section Six: Conclusion and Implications

Numerous factors had to be in place in order for the international community to uphold rape as a war crime and crime against humanity and instead of continuing to view rape as a mere consequence of war. This paper argues that a change in understanding of rape was crucial to the development of rape as a war crime. War in Bosnia and the Rwandan genocide prompted the international community to change their thinking of rape from a consequence of warfare to a method of warfare. In the 1990s, ethnic cleansing and war in Bosnia shocked Europe and the Western world with its Holocaust-

¹¹⁷ PBS. “A Brief History of International Law,” Accessed on November 13, 2011.

<http://www.pbs.org/wnet/women-war-and-peace/features/a-brief-history-of-international-law/>

¹¹⁸ Buss, “Rethinking ‘Rape as a Weapon of War,’” 151.

¹¹⁹ *Ibid*, 150.

¹²⁰ *Prosecutor v Mikaeli Muhimana*, Case No. ICTR-95-1B-T (ICTR, Trial Chamber III), 28 April 2005, at para 558, available at <http://69.94.11.53/default.htm>.

like detention camps and mass killings. This change in thinking was crucial for the development of international law regarding women, and that this change occurred is to the credit of feminists, changing ideas regarding human security, the media, and the voices of the victimized women themselves.

Though rape in war was clearly an issue, rape was not upheld as a war crime or crime against humanity in international courts until ICTY and ICTR in 1995.¹²¹ With the establishment of the International Criminal Court, rape is now considered to be both a war crime and a crime against humanity.¹²² The ICC was established in 2002 and given jurisdiction by the United Nation's Security Council. The ICC represents a shift in international thinking of human security and also establishes a permanent legal system for dealing with international war crimes, now also including rape. Support for the ICC was encouraged after the creation of ICTY and the "creation of ICTR affirmed the need for judicial structures to address atrocities committed in times of conflict... The failed attempts of the Security Council to micromanage judicial processes in an ad hoc fashion contributed to 'tribunal fatigue'. This fatigue manifested itself in continued calls for creation of a permanent international criminal court."¹²³ A permanent International Criminal Court offers hope for future war crimes trials to prosecute rape and sexual abuses against men and women in a timelier manner.

Yet, while the creation of the ICC and the upholding of rape as a war crime in both ICTY and ICTR ensured that rape would continue to be seen as a violation of human rights, there is still much work to be done regarding women's protection in war. As

¹²¹ Feller, "Rape is a War Crime," 38.

¹²² International Criminal Court, *Rome Statute of the International Criminal Court* (1998).

¹²³ Hampson, Fen, et al, *Madness in the Multitude*, 70

Kennedy-Pipe points out, “opportunistic” rape during war cannot be prosecuted under international law. The ICTY declared that “it was not rape as a specific act against an individual woman that counted but rather the use of rape as a tool of ethnic cleansing: it was political intent that was important.”¹²⁴ Hence, even modern international law does not apply to many instances of rape in war, requiring other local judicial systems to bring justice to other types of rape in war. For example, judicial systems like the gacaca courts in Rwanda, despite known flaws, have potential to address issues too “small” for the international community.

Further, though the ICTY and ICTR have been praised for prosecuting rape as a war crime and crime against humanity, the record of the Tribunals in charging rape have been lacking on the whole. As of December 2008, ICTR had overseen the trials of only 15 men who went to trial with charges that included rape or sexual violence.¹²⁵ Five men, Akayesu, Bagasora, Gacumbitsi, Muhimana and Semanza have been found guilty on rape related charges.¹²⁶ Of eight men who have pleaded guilty at the Tribunal, five were charged with sexual violence crimes. However, all five had those charges dropped by pleading guilty on other accounts, such as genocide. Hence, none of the men have actually pled guilty to acts of sexual violence or rape.¹²⁷ Furthermore, numerous cases of rape were brought before the Tribunal, but the charges were dismissed because of lack of evidence, poor investigations, and defects in the indictments.¹²⁸

Although repeatedly acknowledging rape as a method of genocide and war in Rwanda, the ICTR’s failure to prosecute on the basis of rape diminishes consideration of

¹²⁴ Kennedy-Pipe and Stanley, “Rape in War,” 76.

¹²⁵ Buss, “Rethinking ‘Rape as a Weapon of War,’” 151.

¹²⁶ *Ibid*, 151. See also note 15.

¹²⁷ *Ibid*, 151.

¹²⁸ *Ibid*, 152.

rape as a crime against humanity since precedent appears to be building that charges can be dropped in exchange for pleading guilty on other accounts. Hence, under the present system rape as a war crime and crime against humanity is acknowledged but not punished as such. This leaves much justice left to be done. This failure of ICTR leads many feminists to believe that “despite the many visibilities of wartime sexual violence...violence against women in wartime, just as in so-called ‘peacetime’, remains largely *invisible* as a matter of political and legal urgency.”¹²⁹

The personal effect of the failure to bring justice in a comprehensive manner was noted when charges were given in the Kunarac case in 2001. Despite the conviction and sentencing of the perpetrators, Bosnian women did not feel happy or justified with the sentences. Nezira Zolota, former inmate of the Sarajevo camp, argued, “We are shocked with the verdict. Justice has not been done, as the three received a minimum punishment for what they have done.”¹³⁰ Many women had the same reaction to the ICTR, arguing that the sentences were not severe enough. Scholar Claudia Card proposes a radical punishment to rape in war, transsexual surgery (which she knows will never be accepted by the international community).¹³¹ Yet Card proposes her drastic solution to draw attention to the ICTR’s practical de-emphasis or wartime rape evidenced by the numerous dropped charges.¹³²

International precedent regarding rape in war is incredibly relevant in light of the current war in the Democratic Republic of the Congo where current estimates indicate

¹²⁹ Ibid, 154.

¹³⁰ Andrew Osborn, “Mass Rape Ruled a War Crime,” *The Guardian*, February 22 2001. <http://www.guardian.co.uk/world/2001/feb/23/warcrimes>. (Accessed 1 November 2011.)

¹³¹ Card, “Rape as a Method of War,” 14.

¹³² Buss, “Rethinking Rape as a Method of War,” 151.

that more than 300,000 women have been raped as part of the war.¹³³ Peggy Kuo said that rape in war is “worth talking about and getting out there so that even if we’re not prosecuting every single rape that occurs, we’re acknowledging this is what’s happening and women’s experience during war time.”¹³⁴ While Kuo is certainly correct, simply acknowledging rape in war is not going to solve the problems women in Congo, Libya and Sudan, for example, face today. Hence, while international standards regarding wartime rape have been set, additional measures are needed, particularly applied in the midst of war, in order to prevent wartime rape and to ensure justice prevails for women victimized by rape as a method of war.

¹³³ The Enough Project, <http://www.raisehopeforcongo.org/>.

¹³⁴ *I Came to Testify*.

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