PLACING BLAME OR FINDING PEACE:

A QUALITATIVE ANALYSIS OF THE LEGAL RESPONSE TO RAPE AS A WAR CRIME IN THE FORMER YUGOSLAVIA

By

Angela Christina Whyte

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Department of Sociology
University of Manitoba
Winnipeg, Manitoba

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ABSTRACT

This thesis is a qualitative analysis of the international legal response to rape as war crime in the former Yugoslavia. Through the examination of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the case law it has generated, this thesis addresses the question will the androcentric characteristics of law found in domestic rape cases be replicated at the international level? More specifically this thesis undertakes an examination which questions will international law be able to adequately amplify and listen to women voices, or will the women's words be silenced by the rule of law? The following research is loosely informed by Carol Smart's (1989) sociology of law theory combined with Liz Kelly's (1988) notions of coping, resisting, and surviving. The purpose of using Kelly's theory is to go beyond viewing women as inevitable victims of sexual assault. The methodological approach is both qualitative and inductive. It draws on data from the ICTY structure, Statute, Rules of Procedures and Evidence, case law and transcripts and women's stories presented outside the legal realm.

The analysis reveals that while written law (including the interpretation and application of the law) is somewhat aware of the experiences of women, it falls short of adequately responding to the needs of women. A detailed look at the women's stories of war revealed diverse experiences not captured in the legal realm. The women's stories spoke of concerns beyond sexual assault and other crimes identified by the ICTY Statute. This thesis also introduces alternatives or complimentary approaches to law when dealing with war crimes. These alternatives include women's local groups and truth commissions. This thesis also identifies the criminological relevance of studying war crimes (as defined by international law) and crimes of war and marks an important step in understanding rape and war from a criminological perspective.

CHAPTER ONE: INTRODUCTION

During the emergence of the women's movement in the early 1970's many feminists challenged the socially tolerated forms of violence against women. As a result of their efforts one area of gendered violence that received increased attention was rape. At both the national and international level feminists accepted the challenge to stop rape and deal with its effects on women. However rape during warfare remained neglected. Diana Wong explains:

> Violence, to which women are particularly vulnerable, is still authorized in two realms of behaviour—in the private realm of domesticity and the public realm of war. Both arenas tend to be enveloped in silence. Unraveling the texture of women's lives in the face of war is a task which remains to be undertaken (Wong, 1995: 25-29).

During the recent war(s) in the former Yugoslavia martial rape was given considerable international exposure. This international attention allowed many western feminists from a variety of disciplines to become actively involved in exposing and challenging rape in the former Yugoslavia. Yet feminists from the discipline of criminology remained notably absent from this discussion.

In general, the area of international war crimes have fallen outside the realm of criminological analysis. Criminologists have traditionally limited their analyses to local crimes. This lack of extensive criminological investigation at the international level has impeded not only the understanding of war crimes, which could potentially lead to the prediction and prevention of these crimes, but it has also hindered the development of criminology as a discipline.

The following research is my effort to minimize the criminological void with respect to war crimes. My scope is narrow in a geographical sense, as that I solely examine the crime of rape as it occurred in the former Yugoslavia and how international law responded to these crimes on an ad hoc basis. That being said, thematically my research could serve as a starting point for a comparative study examining rape as a war crime.

My thesis is organized into nine chapters, including this introductory chapter. Chapter two examines the existing literature on the evolution of the legal treatment of rape from what I have categorically identified as "precognition", "initial cognition" "creation of law", "initial enforcement" and "new trends in enforcement." It also examines what criminology and sociology have contributed to the understanding rape as a war crime, and what is missing and why. Chapter three examines Carol Smart's sociology of law theory and how it can be used to analyze domestic rape cases. In addition I explain how her theory guides my analysis of rape at the international level. Chapter four focuses on the research design and methodology I utilized for my research and analysis. Chapter five is a critical examination of how the International Criminal Tribunal for the former Yugoslavia (ICTY) the Tribunal's Statue and Rules of Procedure and Evidence define rape and how the court is expected to deal with rape and rape witnesses. Chapter six examines the Kunarac, Kovac, and Vuković case in detail and analyze how the Tribunal applied the law. Chapter seven examines what the women of the former Yugoslavia had to say about their experiences with war in general and not just how rape or the threat of rape affected their lives. Chapter 8 examines alternative or complimentary approaches to addressing rape as a war crime.

These alternatives include the establishment of a formal truth commission and the empowering of women vis-à-vis local women centred groups.

CHAPTER TWO: REVIEW OF THE LITERATURE

I. Introduction

Feminists have worked relentlessly to challenge rape at the domestic level; nevertheless some concerns remain with the legal treatment of rape. In order to adequately assess the law at the international level it is important to make note of social trends and societal changes at the domestic level as it is possible that war crimes tribunals are "an extension of the rule of law from the domestic sphere to the international sphere" (Bass, 2000: 7-8), and that a state may, "transpose its domestic successes to foreign relations" (17). However, the ICTY needs to be acknowledged for its uniqueness. I agree with the former Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia Louise Arbour who identifies that while the creation of the ICTY shares a common ground with the Western legal tradition, it does not "mimic our assumptions about the role of criminal law within our own societies" (Arbour, 2002:30). This common ground is premised on the western legal tradition of fairness and due process.

It is also important to note that the extension of domestic law to international law, and the assumed common ground should be approached with some caution as these initial domestic pursuits often first take place in western countries, and are then introduced to non-western countries vis-à-vis the United Nations statutes. This approach allows western feminists to believe that they are rushing in to save non-western women. This is especially true in transitional societies such as the former Yugoslavia. Hilary Charlesworth states that feminists from the non- western or developing world are critical of this "wholesale application of western feminist

theories to their societies" (1993: 4). The implication of this approach is that transitional societies, which are typically non-western countries, are left outside the creation of law and non-western women's strategies of resistance to oppression are ignored (Razack, 1998). Hromadzić, an anthropologist and survivor of the war in the former Yugoslavia explains:

> There is a strong parallel between the way the feminists groups in the West treat the women in the Third World, and the way they approach the Bosnian war rapes. In both situations there is a strong emphasis on the 'Universal Sisterhood/Womanhood'—the idea that the Western women who achieved some level of equality and power in their societies need to export/disseminate this acquired knowledge and liberate the women in the society of the Third World (Hromadzić, 2002: n.p.).

As a result, critics are left with the important question of whose law is being applied at the global level.

While rape laws at the domestic level have changed, feminist remain critical of these changes. Therefore law's response to rape continues to be an issue of discussion and debate amongst feminists. Feminists have attempted to debunk the myth that legislation is an almighty weapon that can fight back against rape (Tang, 1998). Feminists argue that despite changes to the rape legislation in Canada, there are still some critical issues surrounding the legal response to rape that need to be addressed. These issues include the underreporting of sexual assault, low charging and conviction rates, the status of rape-shield rules.[1]

While the laws criminalizing rape during peace were significantly modified at both the domestic and international levels, rape during war remained unchallenged

[1] See *Seaboyer* and *Gayme* (1991) and *Darrach* (2000), 'no means no' (*Ewanchuk* (1999)) and the defence of honest but mistaken belief of consent (*Pappajohn* (1980), *Osolin* (1993), *Park* (1995), *M.L.M* (1994) (Tang, 1998; Women's Legal Education and Action Fund, n.d.).

until the new millennium. This is interesting because research suggests that rape during war is often more brutal, more frequent, and more likely to be a public spectacle (Copelon, 1994) than rape during peacetime.[2] Nikolić-Ristanović (1998) also reports that rape is more likely to go unreported during war because in many cases the "victims" are dead and the perpetrators remain unknown. And for those women who survive war, many do not trust law enforcement and other potentially corrupt officials. In reference to Bosnia Herzegovina, Nikolić-Ristanović (1998: 472) explains that during the war the police were recruited from obsessed soccer fans, criminals, alcoholics, those with serious criminal records, and prisoners who were close to their release date. To date most notable war criminals (i.e. those indicted by the ICTY) have been removed from public office. However, as recent as 2002 Amnesty International (2002) reveals the continued corruption of judicial and police officials in the former Yugoslavia.

MacKinnon also acknowledges the increased violence of rape during war. She states that "For most women, this war [in Bosnia] is to everyday rape what the Holocaust was to everyday anti-Semitism: without everyday, you could not have the conflagration, but do not to mistake one for the other" (1993b: 87). One is left to wonder why the increased violence and prevalence associated with rape during war has historically failed to attract more attention. Before examining the evolution of laws aimed at responding to rape during war, it is important to acknowledge its high prevalence, and to attempt to understand the use of rape as a weapon in war.

[2] The reasons for increased violence during war are closely associated with militarized masculinities and is addressed later in this thesis.

After providing the current definition of rape according to international law, the following review of the literature examines international law's response to rape during war. In order to adequately capture the evolution of international rape law I identify five phases: precognition (laws inability to identify rape as a war crime), early recognition, the creation of law, the enforcement of law, and new trends in enforcement (e.g. the creation of the ICTY and the application of its laws).

After setting the stage for the current state of international law I address the sociological and criminological contribution to understanding the war in the former Yugoslavia. In order to capture the sociological and criminological contribution to the study of rape and war crimes I examine the work of Ruth Seifert (1992 ; 1994) – A German Sociologist who identifies five reasons why rape occurred during the war in the former Yugoslavia, Ruth Jamieson (1998)— a criminologist who outlines the difference between crimes of war and war crimes and argues for a criminology of war in Europe, and the recent work of Canadian criminologist John Hagan (2003) and his analysis of the ICTY. My research is victim centred and looks specifically at the way in which law responds to rape during war. Therefore, my review of the literature is primarily devoted to addressing the issue of law. That being said, some researchers have taken a different approach and have focused on the role of the perpetrator during war (Price, 2001 and Kelman and Hamilton, 1989).

The final section of this literature review acknowledges that despite the sociologists and criminologists listed above, most sociologists or criminologists outside the former Yugoslavia remain reluctant to study war crimes.

II. Defining Rape in International Law

In the international arena, human rights instruments and activists have defined rape and sexual assault in peace and in wartime. M. Cherif Bassiouni and Marcia McCormick distinguish between rape, sexual assault, and sexual violence:

> Rape denotes vaginal, oral, or anal sexual intercourse without the consent of one of the people involved. Sexual assault is a broader term, which includes rape and other forced or coerced sexual acts, as well as mutilation of the genitals. Sexual violence is the most general term, used to describe any kind of violence carried out through sexual means or by targeting sexuality (Bassiouni and McCormick, 1996:3).

The International Criminal Tribunal for the Former Yugoslavia has stated that rape is comprised of the following elements:

> (i) the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) by coercion or force or threat of force against the victim or a third person (Furundžija Case IT-95-17/1 par 185).

As for sexual assault the court decided that:

> 186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing (Furundžija Case IT-95-17/1 para 186).

These definitions will provide the starting point for future cases dealing with rape and sexual assault at the international level.

III. The Evolution of Laws Aimed at Responding to Rape During War

Since its historical beginnings to present conflicts, warfare has demonstrated that women have been seen as the "spoils of war." The world's war technology has evolved from hot gunfire to cold war atomic bombs to the resurgence of hot war (as in the Former Yugoslavia). Despite the ever-changing nature of the way in which wars are fought there continues to be a realization and expectation that rape will occur during war based on the military mentality, which views rape as "standard operating procedure" during armed conflict (Brownmiller, 1975: 107). As Brownmiller points out, the tolerance, expectation, and acceptance of rape during armed conflict manages to persist despite the fact that rape is a criminal act under international rules of war (Brownmiller, 1975: 32).

The law prohibiting rape during warfare has existed in written form, but this reality has not been recognized. Askin observes that:

> Sexual assault has been increasingly outlawed through the years, but this prohibition has rarely been enforced. Consequently, rape and other forms of sexual assault have thrived in wartime, progressing from a perceived incidental act of the conqueror, to a reward of the victor, to a discernable mighty weapon of war (Askin, 1997: 19).

In assessing the development of the historical treatment of rape during warfare, the major shifts in the social recognition of rape can be roughly organized around seven approximate time periods; Ancient times, Middle ages, early 19th century, World War One, World War Two, post World War Two, and present day. I have separated these time periods into five categories based on I how I view the legal

recognition and response (or lack thereof) to rape during warfare. These categories progress as: the failure of law to acknowledge rape as a crime during warfare—'precognition', to the legal awareness of rape in war—'early recognition', to a legal response to the crime and the creation of law—'creation of law', to attempts to enforce the rules created—'initial enforcement', to enforcement—'new trends in enforcement'. Each of these categories will be briefly discussed below. It is important to be aware that these categories are by no means all inclusive or exhaustive as there is some overlap and transition between the periods.

i. Precognition

The precognitive period refers to the period in which international law failed to acknowledge rape in war. This period began with Ancient times and lasted until about the 17th century (this includes the mythology surrounding the kidnapping/raping/sexual confinement of Helen in ancient Greece and the notorious raping of the Sabine women in the beginning of Roman history). According to the early rules of warfare the rape of women was not prohibited—rather it was encouraged and "remained the hallmark of success in battle" (Brownmiller, 1975: 35). To emphasize the ideology that views women as the "spoils of war", Mertus explains that while in later ancient times the emergence of protection for civilians during war was evident, the rape of civilian women, "continued to be accepted as a natural outcome of war" (Mertus, 2000a: 72).

Around the beginning of the Middle Ages, the emergence of rights of war, or "jus in bello" was separate from the right to wage war or "jus ad bellum", thereby

increasing the regulation of warfare. Such restrictions put a greater emphasis on weapons and the treatment of combatants than they did on the protection of civilians, including women, children, and non-combatants (Askin, 1997).

ii. Early Recognition

Early recognition of rape as a war crime occurred when law first identified rape as a crime during war. Law's initial acknowledgement came with the work of Hugo Grotius, a legal scholar who has been identified as the "father of the law of nations" (Askin, 1997: 29). Grotius published the book *Law of War and Peace* in 1625, and for the first time, the notion of rape during warfare as a crime was introduced in the international arena of law. Grotius argued that while some may believe that what belongs to the enemy "should be subject to injury" (Grotius, in Morris (ed), 1959: 105), this is not correct. Grotius wrote:

> But others have judged better, who regarded, not only the injury, but the *act of uncontrolled lust*; and that the act has no tendency to either security or to punishment; and therefore ought to be no more unpunished in peace than in war (Grotius in Morris , 1959: 105 emphasis mine).

While Grotius should be credited with introducing the discussion of rape as a war crime to the international arena, the fact that he conceptualizes the act of rape as "lust" or just sexual, and not as a form of violence is problematic, not only for the current time frame, but also for the time in which he was writing. Viewing rape as both sexual and violent rejects a simple biological explanation (that is what men do) and allows for an understanding that accounts for masculinities (which are socially

constructed) and one that views rape as an act that causes harm to the women.[3] Regardless Grotius' legal acknowledgment failed to manifest itself as enforcement until 300 years later.

During this time women were viewed as property or chattel of their husbands, fathers or other male relatives, and the rape of a woman was not a criminal offence against the woman, but rather a crime against the male who, by law, had ownership over her. Conceptualizing women as property allowed "rape to enter the law through the back door . . .as a property crime of man against man" (Brownmiller, 1975: 18). Rape during this time period was not intended to terrorize the enemy; rather the raping of women was "earned compensation" by the victors, and a "boastful reminder" to the losers that they had been defeated (Askin, 1997: 28).

iii. Creation of Law

The early part of the 20th century marked the codification of the rules of warfare. The foundations of modern international law began with the original *Geneva Conventions* (1864), where the rules of war were first codified to protect persons. The original *Geneva Convention* was revised and expanded in 1906 and 1929 and again later with the 1949 Conventions and 1977 Protocols to compensate for the failure of the early conventions to focus on the protection of non-combatants (Askin, 1997).

The Hague Peace Conferences of 1809 and 1907 were created in order to reduce the horrors of warfare (Askin, 1997). The central focus of the Hague

[3] A recent work by Campbell (2004) examines in detail the relationship between the concept of harm and justice.

conventions was the treatment of prisoners of war and the relationship between occupied forces and non-combatants. The Hague Peace Conference of 1907 was the first time the protection of women during war was documented. Specifically article 46 of the Annex to the 1907 Hague Conventions prohibited sexual violence during armed conflict.

World War One

World War One served as a stimulus for great change in International law. It was the first time that the newly created *Geneva Convention* and *The Hague Convention* could be utilized. However, despite the extensive documentation of rape during World War One (see Brownmiller, 1975 for a discussion on the German soldiers raping the civilian women of Belgium), and the existence of a codified law prohibiting rape during warfare, no persons were tried for rape during this war. Notwithstanding the fact that the War Crimes Commission acknowledged rape and forced prostitution as two of its thirty-two offences identified as violations of laws and customs of war perpetrated by the Axis powers (Askin, 1997), the laws surrounding rape during war time were not utilized. Laws that prohibited rape during war continued to remain untried and untested, it was not until years later that rape as a war crime would be prosecuted.

iv. Initial Enforcement

World War Two

World War Two witnessed all types of gendered violence including rape, forced prostitution, forced sterilization, forced abortion and sexual mutilation. Another form of gendered violence documented during World War Two was the creation of pornography. MacKinnon points out that, "They [the Nazi's] imprisoned women in brothels, forced women in camps to run naked before cameras, and paraded naked women for pictures just before their executions. They published sexually explicit anti-Semitic hate propaganda" (MacKinnon, 1993a: 80).

Brownmiller argues that the existence of Hitler's Nazi regime allowed rape to "burst into perfect flower" (Brownmiller, 1975: 48). She suggests that high ranking members of the Third Reich such as Goebbels, were heavily influenced by Nietzschean philosophy and were specifically inspired by Nietzsche's words in *Thus Spoke Zarathustra*, which read, "Man shall be trained for war and woman for the recreation of the warrior" (cited in Brownmiller, 1975: 48). However, during World War Two, it was not only the Nazis who committed rape. It is documented that Japan confined and raped between 100,000 and 200,000 Comfort Women, Moroccan soldiers raped Italian women, and Russian forces raped German women (Mertus, 2000a). Brownmiller (1975) reports that the US Army General Court-Martial for Rape in World War II was made up of 971 convictions. While Brownmiller provides the number of convictions, she does not provide any statistics for the number of charges.

Like World War One, the documentation of systematic or routine use of rape as a form of terror, was abundant in the Second World War. The Western Allies set up military tribunals to try those accused of war crimes during the Second World War. These trials were better known as the Nuremberg War Crimes Tribunal (International Military Tribunal—IMT) and the Tokyo War Crimes Tribunal (International Military Tribunal for the Far East—IMTFE). It was within these Tribunals that definitions of crimes against peace, violations of the laws or customs of war, and crimes against humanity would be first applied.

What follows are the legal definitions of crimes against peace, war crimes and crimes against humanity as outlined in the *Charter of the International Military Tribunal* in Article Six:

(a) **CRIMES AGAINST PEACE**: namely, planning, preparation, initiation or waging of *a war of aggression*, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES**: namely, *violations of the laws or customs of war*. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY**: namely, murder, extermination, enslavement, deportation, and *other inhumane acts* committed against any civilian population, before or during the war, of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the

> country where perpetrated. *(The Charter of the International Military Tribunal Article 6* [emphasis added]).

The creation of crimes against peace acknowledged that the act of an aggressive ("unjust" versus "just") war constituted a crime, or in other words, criminalized aggressive warfare. The International Law prohibiting aggression was introduced in 1927 to the League of Nations with the adoption of *Declaration on Aggressive Wars* (Askin, 1997); however, the IMT Charter adopted the identical notion of crimes against peace. This crime attracted great debate for two reasons. First, who was to decide what constituted a just versus unjust war? This issue was resolved by arguing that legal notions such as intent, action, promotion and the requirement of knowledge were compulsory. Secondly, it was argued that the law was created "ex post facto", or as "retroactive jurisprudence" (Scharf, 1997: 12) since the Nuremberg Tribunal was created after the war ended. However, this debate quickly proved to be inconsequential as no defendant was sentenced solely for a violation of a crime against peace. In most instances, the defendant was also found guilty of another crime, namely war crimes and or crimes against humanity (for a complete presentation of these arguments see Askin, 1997; Scharf, 1997 and Ginsburgs and Kudriavtsev, 1990).

The greatest distinction between war crimes and crimes against humanity is the existence of a war. That is, war crimes only occur during war, thereby excluding those crimes that occurred pre-war or post war. On the other hand, crimes against humanity are similar in nature but occur before, during or after the war. Bassiouni explains that "crimes against humanity are also distinguishable from war crimes in

that they not only apply in the context of war—they apply in times of war *and* peace" (Bassiouni, 1992: 179).

The problem with the notion of crimes against humanity and war crimes is that the distinction is based on the assumption that during war or wartime there is an evident division in time that marks the start of the war, and the end of the war. Therefore crimes against humanity and war crimes portray war as an event with an identifiable beginning, middle, and end. The start and end of war are not always easily identified. Therefore acts of violence (both sexual and non-sexual) against women do not begin at the official start of the war (as identified by international law) nor do they end with the creation of so-called peace. Thus limiting the international legal response to these crimes associated with war. Schott (1995) argues that instead of viewing war as an event it should be viewed as a presence (cited in Cuomo, 1996). Cuomo (1996) suggests that in order to achieve an understanding of why mass rape occurs, and to adequately describe and contextualize martial rape, war cannot be seen as a clearly defined event.

Despite the significant overlap between war crimes and crimes against humanity, the former was used more frequently as the legal notion of war crimes was less contentious than crimes against humanity. This was because war crimes existed in the codified and established rules of war whereas the legal notion of crimes against humanity had no precedent as they were scarcely recognized prior to 1945 (Askin, 1997).

Regardless of the similarities and differences of Article 6 (b)—war crimes and Article 6 (c)—crimes against humanity, both definitions failed to use the word rape

and as a result failed to identify rape as an explicit crime of war. While not specifically stated, rape could have been prosecuted under Article 6 (c) which refers to "other inhumane acts." Once again the crime of martial rape was not allowed full entry into the legal domain.

In the same spirit as the IMT, the IMTFE—International Military Tribunal for the Far East, was created. However, unlike the IMT's Charter, which was a joint effort between nations, the IMTFE's Charter was created exclusively by Americans. The IMFTE had one female assistant, whereas the IMT was composed only of men. Article 5 of the IMTFE Charter was almost identical to Article 6 of the IMT.

The IMTFE, like the IMT, failed to specifically identify rape as a crime category, but rape did fall under the more grave offence of crimes against humanity. Askin explains that:

> . . . while rape was not successfully enumerated in the Tokyo Charter, rape was charged in the indictment as a war crime, under "inhumane treatment" and failure to respect family honor and rights, establishing a precedent for prosecuting rape as a war crime.. .it appears that the Tokyo Tribunal, in stark contrast to the Nuremberg Tribunal, took pains to ensure that rape crimes were included in the public record (Askin, 1997: 202-203).

Even though there was a plethora of testimony documented at the IMT—a 42 volume set entitled *Trial of the Major War Criminals Before the IMT, 14 Nov 1945 – 1 Oct 1946* (International Military Tribunal, 1947-49)—sexual assault instances were recorded on only 14 pages. As for rape, Catherine Niarchos explains, " 'rape' does not appear once in the 179 page judgment of the IMT. It is apparently folded into the general category of ill treatment of the civilian population" (1995: 665). Despite the

acknowledgement of rape as a war crime, rape was prosecuted as a secondary crime and rape as a crime in and of itself remained "callously neglected" (Askin, 1997: 203).

Post World War Two

Since World War Two, it has been estimated that over one million women have been raped during warfare (Saywell, 1997). This statistic is now seven years old, and with the continued war in the former Yugoslavia (Kosovo), and subsequent wars in Afghanistan and Iraq it is probable to assume that this number has increased. Two wars, which involved a significant number of gendered crimes, include the war in Bangladesh and the war in Vietnam. Brownmiller points to these wars as times where the notion of rape was introduced within a broad feminist framework, but was not embraced. I call these chances "missed opportunities."

The war in Bangladesh ended in 1971, and the first account of the rape on Bengali women by Pakistani soldiers became national headlines. Brownmiller reports that three sets of statistics have been presented that suggest that anywhere from 200,000 to 400,000 women were raped during the nine-month conflict. Brownmiller also argues that this war was the first time that rape during war galvanized international aid (Brownmiller, 1975: 80). The raped women were further victimized when Prime Minister Rahman declared women as "national heroines because of the mass rape, and attempted to reintegrate the Muslim women into society in order to "marry them off." Some years after her initial work, Brownmiller refers to the post war and post rape treatment of women by Rahman as, " a pawn in

the subtle wars of international propaganda" (Brownmiller, 1994: 180). Seen as damaged property, the women's fathers, husbands, and other male relatives demanded personal compensation not for the women, but rather for themselves. The men requested sports cars and publications of their poetry (Brownmiller, 1975: 83) for their losses. The women suffered venereal diseases, unwanted pregnancies that lead to infanticide, suicide, and indigenous methods of abortion (Brownmiller, 1975), but were offered nothing for their losses.

While this was not the first international recognition of rape during war, it was the first time that feminists actively participated and supported a push for the acknowledgement of rape during war as a crime. Brownmiller explained:

> . . . a new feminist consciousness that encompassed rape as a political issue and a growing, practical acceptance of abortion as a solution to unwanted pregnancy were contributing factors of critical importance. And so an obscure war in an obscure corner of the globe, to western eyes, provided the setting for an examination of the "unspeakable" crime. For once, the particular terror of unarmed women, facing armed men had a full hearing (1975: 86).

Like the war in Bangladesh, the war in Vietnam was inundated with rape and forced prostitution. Brownmiller presents statistics obtained from the US Army Court Martial (January 1, 1965 to January 31, 1973). A total number of 86 individuals were tried (for rape, rape and assault, attempted rape, sodomy and statutory rape) and the total convicted was 50, resulting in a 58% conviction rate (Brownmiller, 1975). Brownmiller wrote:

> I am sorry that the peace movement did not consider the abuse of the women in Vietnam an issue important and distinctive enough to stand on its own merits, and I am sorry that we in the women's movement, struggling to find our independent voices, could not call attention to this woman's side of the war by ourselves. The time was not right (1975: 113).

The right time would come some time later with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

v. New Trends In Enforcement: The Creation of the Tribunal

In May 1993 the United Nations Security Council acknowledged that the war in the former Yugoslavia "constituted threats to international peace and security" (UN Doc ICTY Bulletin No. 9/10, 1996), and thereby responded on May 25th, 1993 with the creation of an *ad hoc* criminal tribunal, as per Resolution 827 of the United Nations Security Council. The Resolution emphasizes the "grave alarm at continuing reports of widespread and flagrant violations of humanitarian law . . . including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing'," (UN Doc S/Res. 827, 1993). The Resolution also states that the ICTY would hold jurisdiction for crimes in the "territory of the former Yugoslavia between 1 January 1991 and a date to be determined" (UN Doc S/Res. 827, 1993).

Through the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), located in the Hague Netherlands, and its Statute in May of 1993, the UN secured that it would handle all violations and would hold war criminals responsible for violations of the *Geneva Conventions*. The establishment of the ICTY did not involve the participation of the States of the Former Yugoslavia, but was unanimously approved by the UN Security Council. The creation of the

ICTY *during* the course of the wars stands in contrast to the Nuremberg and Tokyo trials that were created *after* the war.

The ICTY states that its mission is fourfold:

> To bring to justice persons allegedly responsible for violations of international humanitarian law, to render justice to the victims, to deter further crimes, and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia (Le Goascoz, n.d.a).

The ICTY Statute states that it would work concurrently with national courts for serious violations of international humanitarian law (*Statute for the International Tribunal* Article 9). However the ICTY maintains precedent over national courts, and is able to take over national investigations when deemed necessary. The ICTY applies the principle *of non-bis in idem* (*Statute for the International Tribunal Article* 10) that prohibits the prosecution of the same person at both the domestic level and the international level. The general organization of the Tribunal is outlined in *Article 11*. The Tribunal consists of the Chambers—including three trial Chambers and an Appeals Chamber, the Prosecutor, and a registry servicing both the Chambers and the Prosecutors. The role of the registry is to administer and service the International Tribunal (Article 17).

The *Amended Statute of the International Tribunal,* adopted May 25th 1993 by Resolution 827, was further amended May 13th 1998 by Resolution 1166, amended again on November 30, 2000 and amended for a third time on May 17, 2002. It is composed of 34 Articles that address various issues relating to the criminal prosecution of those involved with committing crimes during the war in the former Yugoslavia. The most relevant sections for my analysis include *Article 2* Grave

Breaches of the Geneva Conventions of 1949, *Article 3* Violations of the Customs of war, *Article 4* Genocide, *and Article 5* Crimes against humanity. *Article 5* outlines nine specific acts that when directed against a civilian population in times of armed conflict, whether international or internal in character, are violations of crimes against humanity. These acts include murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, persecutions on political, racial, and religious grounds, and other inhumane acts (emphasis mine). The Statute for the ICTY is the first time that rape is specifically mentioned as a crime of war in an international context (*Statute for the International Tribunal Article 5 (g)).*

In November 1994, the United Nations Security Council created a second *ad hoc* criminal Tribunal, The International Criminal Tribunal for Rwanda (UN Doc S/Res 955, 1994). The ICTR was structured in a similar way to the ICTY. However it was created at the request of Rwanda to establish such a Tribunal. Rwanda was an active participant in the deliberations on the Statue and Resolutions. In its final version the Statute was passed with one vote against (Rwanda) and one abstention (China). In the minds of the people of Rwanda voting "no" was a symbolic gesture to show their unwillingness to accept three facts (Neuffer, 2000). First, Rwanda did not accept the fact that the ICTR did not have the mandate to prosecute individuals for serious violations dating back to October 1990. Secondly, Rwanda did not accept the fact that the ICTR barred the death penalty. The issue of the death penalty was non-negotiable, as the Untied Nations have been committed to the eradication of the death penalty since 1968 (Neuffer, 2000). However domestic courts in Rwanda could enforce the death penalty whereas the international court refused. This had major

implications as those tried for less severe crimes were put to death, whereas the "big fish" are serving their sentences in prison (Neuffer, 2001). The third reason Rwanda rejected the ICTR was because the ICTR was not totally independent as it shared the same Chief Prosecutor and Appeals Chamber as the ICTY (UN Doc ICTY Bulletin No. 9/10, 1996).

IV. Conceptualizing Martial Rape in the former Yugoslavia

Seifert (1992 and 1994), a sociologist from Germany, outlines the purpose of rape and suggests that in the context of war (in and after), the function of rape during war can be theorized by five possible interpretations based on the gendered notions of masculinities and femininities. Seifert explains that these five theories are by no means exhaustive; rather it is her intent to "single out certain aspects of rape in war and make them accessible to analysis" (Seifert, 1994: 58). In addition these functions are contingent upon the respective historical and cultural contexts (Seifert, 1992). Her intent is also to emphasize cultural patterns, not psychological traits.

Prior to discussing the functions of rape Seifert explains that rape is not a sexual act; rather it is a sexual expression of aggression with the ultimate objective of humiliating the woman and conveying the man's power and dominance over the woman. Seifert explains that rape—the forcible entry into the body—removes the woman's control and affects her dignity and self-determination (Seifert, 1992).

In outlining the functions of rape during war, the first thesis presented by Seifert describes rape as part of the rules of war, with war being seen as a ritualized and highly regulated "game." It is also a commonplace belief amongst military

personnel that there inevitably will be some rape (Brownmiller, 1975). Seifert, citing rapes in Berlin in 1945, and in Nan King in 1937, also emphasizes that violence towards women usually extends beyond the confines of war; that is the rape of women continues for one to two months and then abates shortly after such time. Support for this idea can be found in the works of Nikolić-Ristanović (1998) and Brownmiller (1975). Nikolić-Ristanović reports that postwar sexual violence was common in Bosnia, while Brownmiller reports that rape continues during occupation and when the stabilization forces are sent in (Brownmiller, 1975).

The second thesis provided by Seifert states that "in belligerent disputes the abuse of women is an element of male communication." This interpretation views rape as a symbolic expression of the humiliation of the male opponent. This is based on the myth that the man is the "protector" and by raping other "men's women" the message of "you are not able to protect your women" is conveyed. Such a message, Seifert suggests, wounds male masculinity. For example, in Berlin the men who returned home after the war to find their wives raped, blamed the women in fear of acknowledging their perceived failure as protectors and hence, "at the heart is the outcome for the men, not the suffering of women" (Seifert, 1994: 59).

As a third thesis Seifert argues that "rapes also result from the offers of masculinity that armies make to their soldiers, or from the elevation of masculinity that accompanies war in western cultures." This theory equates the soldier with a gendered identity of masculinity. Funk provides several examples that support this theory asserted by Seifert, for example an old Marine Corps chant:

> This is my weapon
> This is my gun (points to groin)

This one's for killing
This one is for fun (Funk, 1993: 66).[4]

Funk argues that training reinforces the military ideology of strength and men cannot separate strength from masculinity (Funk, 1993: 67). Such a theory could apply not only to those soldiers fighting during the war in Bosnia, but also to those peacekeepers and stabilization forces brought in when the war had ended.

The fourth thesis presented by Seifert states, "The background of rape orgies is a culturally rooted contempt for women that is lived out in this time of crisis." Seifert (1994) argues that women are raped not because they are enemies, but because they are "objects of fundamental hatred that characterizes the cultural unconsciousness and is actualized in times of crisis" (65). This theory is supported by the violent nature of the rape crimes. For example in Bosnia often women's breasts were cut off and their stomachs slit open (Staywell, 1997 and Allen, 1996). Such violent disfiguring of attributes that are believed to make women "female" (breasts and stomachs to bear children), indicate that the crimes were committed specifically because the women were women. Seifert argues that violence is a exceptional expression of hatred of women.

Seifert's last thesis explains "rapes in wartime aim at destroying the opponent's culture." In order to illustrate this theory Seifert states, " . . .as tactical objectives, women were of special importance: if the aim is to destroy a culture, they are prime targets because of their cultural position and their importance in the family structure" (Seifert, 1994: 62). It is believed that the rape of women is symbolic to

[4] For an accurate portrayal of the militarized masculinities see Stanley Kubric's Full Metal Jacket (1987). This film portrays masculinities as they develop in boot camp and how they extend over to the fighting of American soldiers in Vietnam.

the rape of community. This elaborates and expands what Doubt (2000) refers to as "severing the community bond." Seifert concludes her analysis by poignantly stating:

> Rape has become a forgotten war crime. That is to say that, until now this *central cultural experience of women* has been stifled, erased from cultural memory, or else placed on the inevitable margin in the form of biologism or naturalization. . . it must be brought back to the center of the historical and political discourse (Seifert, 1994: 69 emphasis mine).

According to Seifert's analysis of the functions of martial rape, it is evident that some functions contradict one another. For example she argues that men who are the soldiers that protect the women, are the same soldiers who commit violent sexual crimes against women. To rectify these contradictions it is necessary to recognize the functions of rape do change across cultures and societies, as Seifert suggests, but also during the course of the war, as well as across individual men and groups of men in the former Yugoslavia. In some instances men go from protecting women to committing violent crimes against them. While a more in depth analysis into militarized masculinities (Price, 2001) and an examination of crimes of obedience (Kelman and Hamilton, 1989) may also help to understand men's treatment of and attitude towards women in war, I will just mention these approaches briefly as detailed examination of the perpetrator is beyond the scope of my analysis.

Price (2001) in her analysis of perpetrators in the former Yugoslavia argues that evil is a human capacity. She argues against a simple dismissal of the perpetrators with labels like "crazy" or "mad", instead she argues that it is possible to see these soldiers as ". . .ordinary men acting out of comprehensible motives" (Price, 2001: 212). Two reasons provided by Price are the creation of differences ("us"

versus "them"), and of militarized masculinities within a group. Price also suggests that in order to end men's sexual violence against women we need to start with an understanding of the source of the violence, the perpetrators themselves.

Another type of analysis that could be applied that is perpetrator centred is the notion of crimes of obedience. Crimes of obedience is a social psychological concept introduced by Herbert C. Kelman and V. Lee Hamilton (1989) which describes crimes where the individual knew his or her behavior was illegal or inconsistent with moral principles, yet proceeded to commit the crime because they were ordered to do so by a person who they regarded to possess the appropriate legitimate authority (Kelman and Hamilton, 1989). Such environments are conducive to war, when authority has run amok, as was the case in the former Yugoslavia. While Kelman and Hamilton did not use crimes of obedience to explain the war in the former Yugoslavia (rather they examined the My Lai massacre) they explain that it is often the situation (i.e. war) that is a crucial factor that allows crimes of obedience to flourish, "Under orders from an authority it appears that many normal people respond with obedience despite their own scruples and discomfort about actions that they and others would usually regard as illegal or immoral" (Kelman and Hamilton, 1989: 23).

While Seifert has offered some explanations as to why rape occurs, she did not address the notion of forced impregnation, or examine the rape genocide nexus. Allen (1996), a women's studies professor from Syracuse University, suggests that perhaps the rape that occurred in the former Yugoslavia was genocidal and illustrated the femicidal nature of rape. She defines genocidal rape as military policy which views rape as a means of genocide.

To prove the intent of the Bosnian Serbs to conduct genocidal rape Allen points to two documents, the Ram Plan (which in Serbo-Croatian means to loom or weave), and Brana Plan (to dam), that were obtained by an Italian journalist, Zaccaria (Allen, 1996). Zaccaria quotes from the Serbian documents:

> [Muslims] can be undermined only if we aim action at the point where the religious and social structure is most fragile. We refer to women, especially adolescents and the children. Decisive intervention on these social figures would spread confusion among the communities, thus causing first of all fear and then panic, leading a probable [Muslim] retreat from the territories involved on war activity (cited in Allen, 1996: 57).

In Bosnia, raping the women and then confining them was seen as a way to produce Serb babies. This ideology bears a striking resemblance to the ideology that the phallus works faster than the sword that was introduced under the Third Reich (Shirer, 1950). In Bosnia, Serbian paramilitary soldiers would hold pregnant women until the point where abortion would be no longer possible. The Serbs viewed these babies as being a way to enlarge the Serbian population. The logic behind such faulty reasoning reduces women to mere "biological containers" (Allen, 1996). It is based on the premise that the Serbian sperm would cancel out any ethnic or cultural identity passed from the Bosnian Croat/Muslim mother. It is unfathomable to believe that the male's identity totally obliterates the female's identity. MacKinnon explains, "combining with it the archaic view that sperm carries all the genetic material, the Serbs have achieved the ultimate racialization of culture, the (one hopes) final conclusion of Nazism: now culture is genetic" (MacKinnon, 1993a: 90).

It has been suggested that in the case of enforced pregnancy, these allegations should be separated from rape itself, and denounced and investigated as such (Human

Rights Watch Women's Rights Project, 1995). However, currently the Tribunal is treating enforced pregnancy as analogous to rape.

While Allen has identified these "plans", I have not been able to determine their credibility nor substantiate their actual existence. It has been suggested that these plans are simply rumours that were circulating in the Italian media at the time Allen (1996) wrote her book (Palme, n.d.). While these plans suggest a specific intent by the Bosnian Serbs, they cannot be given complete credibility without further proof to substantiate them. Further investigation into the data presented at the ICTY and the personal testimonies should be conducted to corroborate Allen's claims of the rape genocide nexus. However just as some researchers deny the credibility of these reports, others have accepted them (Salzman, 2000)

MacKinnon argues that the mass rapes that occurred during the Bosnian war have been interpreted as "rape" or "genocide" but not rape as a form of genocide that was specifically directed against women. She states, "It is rape of misogyny liberated by xenophobia and unleashed by official command. It is rape as genocide" (1993a: 88). To add to MacKinnon's point, Niarchos states, "It [the war in the former Yugoslavia] is a war fought on and through women's bodies" (1995: 651). MacKinnon also argues that it is rape under orders, rape to kill, rape as a spectacle and rape that is organized.

The Commission of Experts for the former Yugoslavia, in their final report, found that the some parties in conflict have carried out practices of ethnic cleansing, sexual assault and rape so systematically that "they appear to be the product of policy. The consistent failure to prevent the commission of such crimes and the consistent

failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission" (UN Doc Final Report of the Commission of Experts S/1994/674, 1994).

Carpenter (2001) argues that there are a number of different labels scattered throughout the literature regarding "forced impregnation" that often lead to confusion. She suggests that the term forced impregnation has been carelessly defined as it focuses only on the women and renders the child of rape invisible. Carpenter provides an operational definition of what she refers to as enforced pregnancy—which includes three distinct events: rape, the withholding of access to abortion and birth. In contrast, other writers refer to such acts as enforced pregnancy without clearly defining these terms. Carpenter argues that by using the term forced impregnation or enforced pregnancy without an operational definition, academics have exacerbated the perceived atrocity of rape as a war crime and a crime against humanity, and it has been relied upon to equate rape with genocide. As a result of the labelling of this crime, the legal discourse excludes another victim, the child who is born from the rape. In order to allow the child a valid spot as the victim within the legal discourse Carpenter offers the terms "birth by forced maternity."

While Carpenter illustrates the absence of the analysis of children as victims of genocide (genocidal rape), Adam Jones (1994) argues that the rape of women during the war exists against a backdrop of the victimization that disproportionably targets males. Jones argues that a "more nuanced and inclusive approach to the gender variable is warranted" (115-116) when examining genocide. According to his recent edited work *Gendercide and Genocide* (2004) Jones argues non-combatant

men of roughly fifteen to fifty-five years of age were most likely targeted for mass killing. The reason for this Jones argues is that they are, "the group posing the greatest danger to the conquering force."

While Jones' argument for the examination of the gendercide or the gender selection of non combatant of men during the war is relevant and that in the case of Bosnia more men may have been killed than women raped, I agree with Lindsey (2002) who argues that Jones' earlier work (1994) is problematic as it places the gendercide of men in opposition to the rape debate. Lindsey states, "It forces the reader to imagine that the feminist debate on rape focuses solely on genocide while at the same time excluding all other victims of genocide. There is no room for an inclusive or sophisticated feminist reading of rape or genocide" (2002: 71).

The study of gendercide and its application to the Bosnian men is a relevant point and worth further analysis and investigation. However, framed against the rape debate, it detracts from the importance of both causes. Gendercide is a valid topic of study on its own merits, but such analysis is beyond the parameters of this thesis.

V. War Crimes Versus Crimes of War

Despite the "blindingly obvious" sociological relevance of the recent wars in the former Yugoslavia, sociology as a discipline has remained "largely aloof and unmoved" by the wars (Jamieson, 1998: 480). With the exception of a few scholars (Chalk and Jonassohn, 1990; Jonassohn, 1998 and Fein, 1990), North American criminologists in general have traditionally given little consideration to war crimes (with the exception of genocide). As a result the analyses of violations of

international law (especially those war crimes other than genocide) have been left exclusively for other disciplines. Yacoubian explains that criminologists have treated the study of genocide and international crimes " . . .as if it was inconsequential to contemporary society" (2000: 5).

In her article, Jamieson (1998) attempts to develop a war/crime nexus. She is dissatisfied with the current criminological understanding of war. She argues that the existing criminological boundaries are too narrow to problematize "the relationship between moral and immoral acts and social order in conditions of peace and war" (1998: 488). More specifically she argues that the current paradigms are incapable of understanding and explaining gendered crimes and crimes of obedience. She argues that criminologists should have the courage to make the theoretical as well as the empirical commitment to study war crimes and crimes of war.

In emphasizing the difference between war crimes and crimes of war, Jamieson explains that traditional criminology tends to treat war crimes as extraordinary violations of the laws and customs of war and violations of human rights instruments. She feels that mainstream criminology tends to interpret these anomalies as beyond the scope of mainstream concerns.

Jamieson is critical of the traditional definition of crimes of war. Jamieson argues that crimes of war are traditionally viewed as the continuation of everyday crime i.e. crimes other than those regulated by international treaties and covenants, which occur "in an alerted social, demographic, and political context with a few novel permutations" (481). Jamieson suggests that these crimes cannot fit within already existing criminological frameworks. Nikolić-Ristanović a survivor of the war in the

former Yugoslavia who was able to study the crimes first hand, explains that crimes during war are very different than everyday crime (1998). She argues that during and after war the number of crimes increase, the number of convictions decrease, the number of juvenile crimes increase, the incidents of domestic violence increase, the existence of organized crime increases, and the incidents of rape increase. Nikolić-Ristanović suggests that there are a number of factors that led to these trends. These factors include the desensitization to violence and post-traumatic stress disorder (PTSD) that accompany the war.

Jamieson's work specifically outlines a criminology of war for Eastern Europe that offers a systematic and comprehensive analysis of war and crime. She argues that such an analysis can come through five 'thematic axes.' Jamieson's most important axis is her argument that a criminology of war must be sensitive to the notion of "gender as a structure of domination". She argues that during war, gender and social formations are changing and there is an increase in the sexual regulation of women (although during "peacetime" women are more sexually regulated than men also). For example women are made available to the military for sexual needs, women are forced into prostitution, and women are held as sexual slaves who are forced to take care of military personnel's domestic and sexual needs. To support this assertion Jamieson states that Amnesty International has widely noted this increased violence against women and girls. MacKinnon (1994) would also argue that the creation and distribution of pornography serves as another form in which women are sexually regulated during war. In addition "forced pregnancy" (Allen, 1996) and

"enforced birth" (Carpenter, 2001) are argued to be additional ways in which women are regulated during war—both sexually and reproductively.

Jamieson suggests that with the introduction of military masculinities, and the subsequent re-ordering of the gender order to accommodate these newly introduced military masculinities, women's sexual victimization is intensified (MacKinnon, 1994; Stiglmayer, 1994, and Seifert, 1994). Jamieson argues that further research is needed to understand what rouses the intensification of the sexual regulation of women.

Jamieson concludes that each gender needs to be studied in relation to one another, and that there is a need to acknowledge the struggle between masculinity and femininity. This comparative analysis is also supported by academics studying the gendered patterns of resistance of Jewish Holocaust survivors. Nechama Tec, a sociologist and Holocaust survivor explains, "I recognized that to exclude men would offer only limited insights, whereas comparison of the experiences of both sexes would result in a broader understanding" (2003: 5). Zarkov (1997) provides a comparative in depth analysis of masculinities and femininities and how they relate to the rape victim identity in the former Yugoslavia

VI. The Sociological and Criminological Relevance of Studying the Legal Response to Rape During Warfare

The above literature review reveals that only a handful of criminologists and sociologists have attempted to analyze why martial rape occurs. These academics have focused on gender roles and notions of masculinities as a crucial part of understanding the prevalence and the intense pervasiveness of the crime. What is

missing from these contributions is a comprehensive analysis of the response to these crimes; namely the examination of the creation and application of law from a criminological perspective. The following section will address the evidence that supports the notion that there exists a sociological and criminological absence in analyses of war crimes, potential reasons why this reluctance exists, and why it would be beneficial for both criminology and sociology to address war crimes.

The Absence of Criminology and Sociology

In order to articulate the absence of criminological interest in war crimes Yacoubian (2000) performed a content analysis on presentations involving genocidal behaviour at the annual meetings of the American Society of Criminology (ASC). Yacoubian argued that the ASC, one of the most prestigious annual conferences of criminal justice academics, had only a total of 12 of its 12,275 (slightly less than 0.1%) its presentations from 1990-1998 dealt with the issue of genocide. Yacoubian also examined presentations involving genocidal behaviour at the annual meetings of the Academy of Criminal Justice Sciences (ACJS) during the same time period. During this time only six of 7,029 (less than 0.09%) presentations addressed genocide.

In a similar vein, Keith Doubt, a sociologist, in an effort to illustrate the absence of sociological analysis in the former Yugoslavia, reports that of approximately 2,300 papers presented at the annual meeting of the American Sociological Association in 1998 only two (less than 0.09%) were on Bosnia, and at the tri-annual World Congress of Sociology approximately 3,500 studies were

presented and only one was on Bosnia (Doubt, 2000: 1). Doubt asks the pertinent question "Can sociology sustain itself as a viable study of society when it ignores perhaps the most pressing and difficult subject in its time?" (Doubt, 2000). Doubt further states:

> Where, then, are the sociologists within the discipline to investigate this societal destruction? Sociologists need to recognize and address the crime. The evidence needs to be gathered and the clues collected. Not only the perpetrators, but also the accomplices, need to be identified; their conduct needs to be understood and judged. In the here and now justice needs to be achieved because justice is the foundation upon which societies are reborn. Justice is the notion through which societies realize their immortality (Doubt, 2000: 5).

Two possible reasons criminologists and sociologists have been reluctant to examine war crimes include parochialism and discipline obstacles. Each of these reasons will be discussed below.

Parochialism

It is important to note that while Doubt (2000) outlines the lack of sociological analysis of the war in the former Yugoslavia, his argument is most likely applicable to works written in English. This is also true for Yacoubian's content analysis. As a result of parochialism and the lack of translation of foreign language articles into English, the voices of academics from other countries are often marginalized, or ignored in international academia (Olesen, 2000). But this does not mean that these voices do not exist. It would be erroneous to assume that sociologists in the former Yugoslavia have not contributed in their native Serbo-Croatian. It is possible that analyses are slowly being translated from Serbo-Croatian into English

filling what Doubt (2000) deemed sociology's ignorance. Such sociological analyses include the work of Nikolić-Ristanović, who is a senior researcher at the Institute for Criminological and Sociological Research and a lecturer at the Centre for Women's Studies in Belgrade. Nikolić-Ristanović is the editor of a compilation entitled *Women, Violence, and War: Wartime Victimization of Refugees in the Balkans* (2000). This book was originally written and published in 1995 in Serbo-Croatian, and was not published in English until 2000. Nikolić-Ristanović has had additional publications in English dating back to 1994.

Another mitigating factor, which contributes to the delay of sociological writings from the academics of the former Yugoslavia, is the reality of the war. Supplies, electricity, and the day-to-day crises of war definitely leave a gap in academic publications. However some academics from the former Yugoslavia continued to write from other countries. For example a sociologist from the former Yugoslavia, Maja Korać has published a number of articles in Serbo-Croatian and English. She received her MA and BA from Belgrade, and her PhD from York University in Toronto. Her publications date back to 1993. She has also contributed to a quarterly journal *Sociologija: Journal of Sociology, Social Psychology, and Social Anthropology* that published articles about the war in the former Yugoslavia. This journal allows for criticism by academics in the Balkans against Western scholars who have oversimplified the interpretation of the history, the events, and people of the war. For example Korać (1994) and Zarkov (1997) are critical of MacKinnon's work because they argue that she creates abstract interpretations that portray the people of Serbia as "demonic villains". Other academics from the former

Yugoslavia argue that these misconceptions and simplistic explanations have re-victimized some of the women who were raped during the war (Nikolić-Ristanović: 2002).

Discipline Obstacles

In attempts to understand why criminology as a discipline has been so reluctant to study violations of international law Yacoubian provides four possible explanations. These explanations include the lack of funding, the notion of localism, the limitations of social science research methods, and the [lack of] education on the topic.

Yacoubian's (2000) first explanation concerns the lack of funding given to criminologists to study international crimes. He explains that "Unfortunately, however funding opportunities for researching genocidal behavior, or, more generally, international crime, have not been copious" (2000: 13). Without funding it makes it difficult for academics to spend time researching international law.

In his second explanation, Yacoubian argues that criminologists have traditionally restricted their analysis of crime to local crimes, or ". . .those events that took place within their sphere of localized influence." He suggests that researchers are confined to their geographic area and that "victims often appear distant" (2000:14).

The third explanation argues that traditional criminological research methods have limited the analysis of genocide. It would be difficult to utilize field research, survey research, experiments and unobtrusive measures. Yacoubian argues that the

limits of available methodology are further exacerbated by the fact that researchers are not usually familiar with the history or culture of those areas under examination. He also suggests that, "(T)he time needed to do so is unreasonable for most academics, particularly those that have not yet earned tenure" (2000: 14).

The fourth explanation concerns the fact that the connection of genocide and criminology is not conveyed to students. If students of criminology are not exposed to international issues at the undergraduate level it is unlikely that they will research such topics at the graduate level. For those who do, it may be increasingly challenging to understand the law and apply the relevant theories. Laufer (1999: 76) explains that different research studies indicate that if you were to look in undergraduate criminology texts, you will "be hard pressed to find a single reference to crimes against humanity—no less war crimes."

The impact of the failure criminologists to study international crimes has left a major void not only in the study of war crimes, but also in the discipline of criminology. Day and Vandiver (2000: 56) explain, "Criminologists will have only a weak claim to understanding crime until we can address the worst of all crimes, genocide."

Positive Impacts of Criminological Endeavours in International Crimes

Both the discipline of criminology and efforts to predict and prevent war crimes would benefit from a criminological analysis of violations of international law during war. Hoffman (2000) argues that the value of criminology's established contribution of understanding criminals will transcend from traditional criminals to

those who commit war crimes. He believes that we can learn from domestic law enforcement around the world and use this knowledge for understanding, predicting, and preventing war crimes.

Recent Interests

Recently there has been growing interest in the study of war crimes from a criminological perspective. For example Canadian criminologist John Hagan has been the recipient of a Social Science and Humanities Research Council (SSHRC) of Canada grant that is dedicated to research interested in the work of the ICTY.

Since Hagan's work has limited relevance to my study of the legal treatment of rape I will just mention it briefly. Hagan's book *Justice in the Balkans* (2003) examines how individuals and groups working with the ICTY effected the creation and application of international law. While Hagan provides considerable detail and background on the war and notable cases, much of his general research is similar to Scharf's (1997) work *Balkan Justice*. Even the titles of the two works are remarkably similar. The similarities do not end there; the first chapters in the two books are entitled "From Nuremberg to Bosnia" (Scharf) and "From Nuremberg" (Hagan). Scharf's third chapter addresses the Commission of Experts, and Hagan does so in his second chapter. Therefore for those who are familiar with Scharf's work some of the information provided by Hagan is old news. However, Hagan's work is unique in the sense that he spends considerable time examining the people who were involved with the administration of the Tribunal.

Hagan's work should be applauded for its list of key characters as it provides readers unfamiliar with these actors a concise background on who was involved. Hagan explains, ". . .the cast of characters must inevitably fill out the creative and consequential spaces around a charismatic figure [Arbour]" (2003: 5). By focusing on the key legal characters Hagan was able to capture the Prosecutor's experience of dealing with female witnesses who had been raped during war. Hagan quotes one of the lead Prosecutors from the Foča case who explains that trust is the key as the women felt shame and fear, "I think the witnesses . . .have to trust you. . .They have to know you and build a kind of trust relationship" (Hagan, 2003: 186).

Unlike Scharf (1997) whose main focus was the first case tried by the ICTY, the Tadić case (Milošević had not yet been indicted), Hagan's main focus is on the ICTY's "mother of all prosecutions", the Milošević case. Not only does Hagan's book begin and end with an analysis of this case, but also the front cover of the book depicts a picture of Milošević on trial. However Hagan devotes one chapter to examining the Kunarac, Kovac, and Vuković case.

In the examination of the ICTY staff assigned to the Foča case Hagan explains that unlike the other legal teams who were united, this team was "a team divided" by gender. The team was primarily composed of women (lawyers, investigators, analysts, translator and advisers) with a lone male. However Hagan notes, "it was a strong sense of shared purpose, in spite of gendered disagreements, that allowed the Foča team to overcome and move beyond its differences" (Hagan, 2003: 177).

This chapter has reviewed the literature relevant to the legal response to martial rape. In addition to outlining the evolution of international law's response, I have also described what criminology and sociology have contributed to this area as well I have identified what is lacking. With these guidelines established the following chapter addresses Smart's sociology of law theoretical approach which I utilize to inform my research.

CHAPTER THREE: THEORETICAL APPROACH

I. Introduction

The following chapter outlines the theoretical framework—Smart's (1989) sociological theory of law—that guided my research and analysis of the legal treatment of rape as a war crime in the former Yugoslavia.

Sociology of law's main quest has been to understand the "law-society relation", and uncover the concurrent way in which law shapes society, and the way in which law is shaped by society. This reciprocal relationship between law and society provides an understanding of law that sees law on a "distinctly social basis" (Comack, 1999: 11). Naffine explains, "feminists are right to perceive law as a central arena of debate because law remains an important part of the construction of, and constraints on women's social role" (1990: 19).

While Smart's (1989) theory is identified as postmodern, it is not my objective to embark on a postmodern endeavour; instead I am using Smart's postmodern feminist theory to guide me in my analysis. The intent of my research is to examine how the legal discourse silences women's experiences of rape during war. In the context of responding to rape as a war crime, it is important to note that law is not a discourse that operates by itself. Rather law relies on other discourses such as the medical discourse—pathologizing the victim (post traumatic stress disorder) or the perpetrator, the nationalistic discourse, and the military/war discourse (unconditionally there will be some raping)—to assist in silencing women. To understand the social basis of the laws of the ICTY it will be necessary to recognize the gendered nature of law.

II. The Gendered Nature of Law

Law's inability to respond to the needs of women has long been evident. Existing law does not allow space for the expression of women's experiences. Both domestic and international law have been unable to accommodate women's needs. For the most part, law's response to rape as a war crime has existed in theory, but has been lacking in practical application. In attempting to apply laws that prohibit rape during war, feminists argue that simply adding women to law, without critically evaluating the law is inadequate. In support of this view Hilary Charlesworth (1993) states that, "simply 'adding women and mixing' obscures the fact that the international legal system is gendered itself" (7). In the same vein, Mertus (2000a:xi) suggests that a perspective that acknowledges the gendered nature of law is not characterized by the "add women and stir" approach .

Evidence of the notion that law is gendered can be traced through what Naffine refers to as "feminist excavations" (Naffine, 1990). These excavations can be seen as a process by which feminists can trace their struggles with the law. Naffine explains that the common thread amongst the three feminist (i.e., liberal, radical, and postmodern) critiques of law has been to "challenge law's own account of itself as rational, fair and objective and hence adequate in its treatment of women" (Naffine, 1990: 2). The feminist struggles with law are based around the notions of 'equality' 'differences' and 'law as gendered'.

Feminist encounters with law began with challenges to the manner in which law failed to treat men and women equally. These feminists, most closely associated

with liberal feminism, argued that laws that applied to men, such as the right to vote and property ownership, should be extended to women. This first phase of feminism saw law as "sexist" (Naffine, 1990 and Smart, 1992), and they thought that the law could be *repaired* by extending full legal rights to women, or seeing women the same as men (androgyny). While both Smart (1989) and Fineman (1995) agree that great social progress for women can be attributed to this first approach, it only deals with the symptoms and not the causes of law's gendered treatment of women. For Smart and Fineman this 'sexist' approach ignores the impact of gender and culture.

The second phase of the feminist struggle, most closely associated with radical feminism, views "law as male." This phase argued that law has a male character, "it embodies a male norm and is thus an expression of masculinity" (Naffine, 1990: 12), and ignores femininity. This second phase was premised on supporting the notion of differences, and therefore the role of feminists was to expose the maleness of the law and replace the existing law with a new legal approach more suited to women and the creation of feminist jurisprudence. This new system would not be like the male combative/adversarial law, but rather based on conciliation. Smart rejects this interpretation as she disagrees that there is a universal notion of what is female. As well it fails to problematize law and deal with law's internal contradictions (Smart, 1992). Smart argues that we must not accept the notion of "law as male", as it is premised on the binary division of male and female, or masculine and feminine and ignore others differences within sex such as race and class.

The third feminist struggle with law, which is closely associated with postmodernism claims that "law is gendered." It rejects the creation of a grand theory to explain the problems of gender and the law. This third phase sees law as both an agent of social reform for women, and also as a "tool that keeps women in their place" (Naffine, 1990). Conceptualizing "law as gendered", allows us to think of law in terms of processes, without the assumption that there are empirical or binary biological categories of *Man* or *Woman*. Smart believes there is a "fluid notion of gendered subject", not dichotomous categories of male and female (Smart, 1992). This allows us to reveal laws complex and paradoxical treatment of women.

III. Smart's Theory

Smart identifies her sociological theory of law as postmodern. However as eluded to earlier, my use of her theory is not a postmodern endeavour therefore I will only make a short mention to postmodernism as it is relevant to my research. The postmodern approach developed in response to the modern or positivist approach. A modernist approach sees the scientific method as holding the key to the "Truth" (Comack, 1999: 62). While law itself is not a science, Smart (1989) argues that law is a form of knowledge and power with its own truth claims. Postmodernism attempts to challenge the connection between the truth, knowledge, and power as they relate to law. To do this, postmodernism breaks from the traditional process of applying an all-encompassing grand theory (such as patriarchy or Marxism), and instead argues that there are various competing truths. Smart (1990: 194) explains,

"We need to abandon the craving for a meta-narrative that will (at last) explain the oppressions and subjectivities of race, class and gender."

Law as a gendering strategy can be found by contextualizing law as a discourse. Discourses are "the meanings and assumptions embedded in different forms of language use, ways of making sense of the world and their corresponding practices" (Comack, 1999:62). By analyzing law as a discourse, legal beliefs and assumptions that rationalize and give law meaning can be challenged. By challenging the truth claims of the legal discourse alternative truths and discourses will become evident.

Smart argues that law attempts to translate women's experiences of rape into legal concepts and by doing so fails to accommodate the realities of women's lives. Lindsey (2002: 59) explains, ". . .the legal process has shaped the public and academic discourse to give it a narrow legalistic framework based on the burden of proof." Smart identifies three major problems associated with law. These include; the assumed benevolent and omnipotent power of law, law's inability to respond to the diversity of women, and law's restrictive and silencing methodology.

The first problem associated with law is the unconditional way in which law is embraced as the remedy for gendered violence. Smart (1989) suggests, "the idea that law has the power to right wrongs is pervasive" (12), and she offers the term "juridogenic" to argue that law's so called cure is as pathological as the original abuse. In other words, instead of remedying the original abuse, law makes it worse.

Smart also cautions that we must not replace what radical feminists see as "male law" with more law, as the creation of "a" so-called feminist jurisprudence promises a

grand theory of law, much like the existing dominant male discourse. She argues that adding more law without examining it critically does not de-centre male law, rather it, "preserves law's place in the hierarchy of discourses which maintains that law has access to truth and justice" (Smart, 1989: 88-89). Smart also argues against a feminist jurisprudence, as the notion of a monolithic woman is impossible. Instead Smart suggests that women of different races or cultures have very different experiences that cannot be collapsed into "a" feminist jurisprudence (1995). This idea fits nicely into the second problem associated with women and the law.

A common belief held by the law is that a woman who has been victimized fits into a prescribed social script and cultural construction. This undisputed and monolithic gendered stereotype views a woman, "the victim", as a damsel in distress waiting to be rescued by law and carried away on the valiant horse of justice. The woman is seen as fragile, weak and unable to protect herself. Zarkov (1997:148) explains, "The Rape Identity constructs the need for a protector. Some of the self-proclaimed protectors simply acted on their own behalf, pursuing their own agendas, instead in the interests of the women on whose behalf they acted."

The legal discourse is aided in this conception of women as helpless victims with war myths and the military discourse, which view men as warriors who fights for their nation and their women, and are mourned by their women. Buss (1998:189) explains, "Western narratives of war tend to centre on the construction of archetypal figures of the courageous (heterosexual) male warrior and the dependent female

'beautiful soul'."[5] This myth portrays women as objects who are acted upon, and men as tools who act upon women (Heberle, 1996).

This monolithic gender script fails to see women as active survivors who resisted male violence. This is especially true in times of war where it is assumed women are passive victims and are targeted for this very reason. A crime against a woman is seen as a violation that disrupts the social fabric of the community. Not only are the women seen as weak, but so are the men for failing to protect their women (or, in other words, their property). All "women as victims only" conjures a dichotomy that sees all "men as perpetrators only." In this dualism, men are seen as offender/aggressive and women as victim/non-aggressive. Smart's theory rejects this dualism. The view of women as passive victims ignores the potential for, and the existence of, women who actively resist and fight back. By introducing diverse narratives of women's experiences of sexual violence it may be possible to challenge these images that portray women as vulnerable.

The image of women as "victims only" also ignores women as perpetrators of crime. Women, who do not fit into the category of victim, are offered only one alternative, the role of the "deviant." Naffine (1996) explains, "women who behave in a manner inconsistent with either male authority or female vulnerability are poorly represented in our culture and often derided when they do appear" (147).

It will be interesting to see how the law will interpret the behaviour of a former Rwandan politician, Pauline Nyiramasuhuko, minister of family and women's affairs in the former Hutu-led government. Nyiramasuhuko was the first woman to

[5] The concept of beautiful soul was initially introduced by Hegel in his "Phenomenology of Spirit", and later used by Elshtain (1987: 4) to contrast the Western assumed personas of "men as just warriors" and "women as beautiful souls."

face rape and genocide charges for her involvement in inciting ethnic Hutus to use rape as a systematic weapon against minority ethnic Tutsis during the 1994 genocide. The judgment and sentence for Nyiramasuhuko has yet to be handed down by the ICTR. Lang explains that:

> [T]o expect women in power to exercise greater humanity is to demand of them what would have been contrary to democratic imperatives. Nyiramasuhuko may have been an aberration in her lack of empathy, but no more so than the male Hutu leaders (Lang, n.d.).

At the ICTY, only one woman has been charged and convicted with crimes against humanity (however not rape). Bijlana Plavsić was charged with "acting individually or in concert with Radovan Karadzić, Momcilo Krajišnik and others, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the destruction, in whole or in part, of the Bosnian Muslim and Bosnian Croat national, ethnical, racial or religious groups, as such, in several municipalities, including but not limited to: Bijeljina; Bratunac; Bosanski Samac; Brcko; Doboj; Foča; Ilijas; Kljuc; Kotor Varos; Novi Grad; Prijedor; Rogatica; Sanski Most; Visegrad; Vlasenica; Zavidovici; and Zvorni" (IT-00-39 and 40/1). Plavsić's original indictment listed her as a co-accused with Momcilo Krajišnik.[6] However, when Plavsić plead guilty, the Trial Chamber ordered that the trial of Krajišnik be severed from Plavsić. Krajišnik plead not guilty and is waiting to stand trial at the ICTY.

[6] Additional accused identified in this consolidated indictment (IT-00-39) include Milošević (currently on trial at the Hague), Raznatović (aka "Arkan" who was assassinated in a gangster style shoot out in Belegrade January 15, 2000), Karadzić (still at large).

Another issue that needs to be examined is how law will deal with pervasive cultural myths surrounding rape and rape victims. Comack (1992) argues that these myths have found their way into law and legal practice. Rape myths such as "women want to be raped" and "no means yes" have been used by Serb paramilitaries in their attempts to justify the rape of Bosnian women. Norman Cigar (1995) points to a Bosnian Serb military newsletter where Serbian official argued that the Muslim women were asking to be raped when they exposed themselves while they dried their undergarments. Another incident of rape was justified by Serbian officials who stated that the Muslim woman wanted to be raped (no means yes) (Cigar, 1995). These issues have been present in domestic courts; the question is how will the International courts respond to the possible introduction of such justifications by the defence.

By focusing on femininities of war it is also necessary to acknowledge that gender is relational, and therefore an examination of masculinities is important. However despite their sociological relevance, I will only address them briefly borrowing on the work of James Messerschmidt (1997).

Messerschmidt gives credit to feminist theory for noting the systematic absence of criminology's awareness of gender as it relates to crime. He also credits feminist theory with providing the foundation for the analysis of crime and gender nexus. However, with the ushering of feminist theory of crime and its attention to gender, Messerschmidt argues that masculinities have not been critically analyzed. He points out that just as there are multiple ways to construct femininities, there are many ways to construct masculinities. In attempt to fill this void, Messerschmidt, using the crime as structured action theory, suggests that crime is a structured action

that is highly contingent upon the social setting. According to Messerschmidt the way in which we "do" gender (and race and class) depends on the social situation. And as a result gender is not a static notion; instead it changes with time and settings. Messerschmidt states "social actors self-regulate their behaviour and make choices in specific contexts" (1997: 12), and thereby their behaviours vary across situations.

In one of his chapters in his book *Crime as Structured Action: Gender, Race Class and Crime in the Making* (1997), Messerschmidt examines the practice of lynching in the Southern United States. Messerschmidt compared the number of lynches prior to emancipation to those post emancipation. He points out that prior to emancipation black men were less likely to be lynched for the rape of a white woman than post emancipation (it was socially accepted that when white men raped black women this was not a crime). Messerschmidt suggests that the reason for the increased lynch mobs was that white masculinities began to feel threatened when they were no longer blatantly superior to the black masculinities with the end of the master/slave relationship. When the black masculinities began to challenge white masculinities (i.e. occupy economic and political positions within society), the white men felt threatened and hence portrayed black men as "animalistic" rapists and engaged in large public spectacle of lynching and the sexual mutilation of the black men.

In applying Messerschmidt's crime as structured action theory to the war in the former Yugoslavia we could substitute the notion of race (black/white) for ethnicity (Bosnian Serb/Bosnian Muslim) to examine masculinities and rape. According to the theory, in the social setting of war, ethnic masculinities associated

with Bosnian Serbs and Bosnian Muslims existed peacefully prior to the war and the resurgence of nationalism. During the changed social setting, i.e. the creation of war, Bosnian Serbs and Bosnian Muslims had to compete to protect their women—the foundation of their community. What is interesting about this, is that according to Messerschmidt's analysis of lynching post emancipation, the lynching of black "rapist" men not only reaffirmed the supremacy of white masculinities it also served to reaffirm women's need to be protected. Messerschmidt states, "Southern white men framed themselves as chivalric patriarchs, avengers and righteous protectors" (1997:33). This portrait of men as protectors and women as victims is a recurrent theme in Bosnia.

The third problem with law and women is one of legal methodology. Smart identifies several problems with the legal response to rape, most notably the rape trial. Smart identifies problems with the way in which law and legal methodology sifts through women's experiences and disqualifies what does not constitute legal facts. For example law has largely ignored women's coping with rape and war. Women have been seen only as victims of sexual assault with all other forms of violence being ignored as well as women's struggle to fulfill their basic needs of safety, shelter, and food as well as caring for the young and elderly (Belić, 1995 and Nikolić-Ristanović, 2000).

When women testify in a court of law Smart explains, "all non-legal knowledge is secondary or suspect" (1989: 11). And the rape trial offers little vindication for the women; rather it constitutes a second victimization. She states, "it is glaringly obvious that criminal law does not provide a remedy to sexual abuse, it is

increasingly obvious that it causes harm, yet still it is assumed that the solution is to encourage more women and children into the system" (161), and, "we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains" (49) and that the rape trial is "a sick parody of justice" (113). Ehrlich (2001) supports this notion arguing that the legal response to rape "masquerades" as justice.

In order to unpack the legal discourse that is enforced by the ICTY it is important to acknowledge the problems associated with legal classification and legal vernacular. Law relies heavily on the process of classification, or a process whereby facts are given legal meaning (Fineman, 1995). Fineman argues that law is part of a dynamic process whereby legal norms are generated, selected, interpreted, and implemented, while legal change will be elusive because law is largely reflective of dominant societal values (Fineman, 1995: 16). Language is another facet of law that continues to deny women's experiences. The legal vernacular often excludes women's voices. Legal notions like facts, evidence, consent, reliability, beyond a reasonable doubt, and burden of proof all exclude women's reality of rape. Specific to the ICTY it will be necessary to look at legal classifications of crimes such as crimes against humanity and war crimes. This is accomplished in forthcoming Chapters. Chapter 5 addresses the creation of the ICTY and Chapter 6 examines the application of these laws.

In order to assess the ability of law to respond to women's needs at the ICTY it will be necessary to have a basis of comparison. This comparison will come from amplifying the women's voices to fill the above noted absence of women's survivors'

voices in the current dialogue of rape and the legal discourse. This is done mainly in Chapter 7 where I examine women's stories. In order to present women's stories I will borrow from the work of Liz Kelly (1988).

IV. A Framework for Understanding Women's Response to Rape in War

In 1988 Liz Kelly, a British sociologist, conducted research which focused on three areas of violence which intimately affected women—sexual violence (rape), incest, and domestic violence. Kelly's work on sexual violence, which attempts to validate the interconnection of women's knowledge and survival, is one of the landmark analyses that went beyond just looking at women as "inevitable victims." Kelly emphasizes that women are not just passive victims receptive to violence and its consequences—rather they are survivors who actively and continually cope and resist.

Kelly defines coping as active and constructive adaptations engaged in by women to avoid or control stress, which results from their experiences of abuse (either during or after). To resist is defined as, "to oppose actively, to fight, to refuse to co-operate with or submit" (1988: 161), and resistance is a form of coping strategy where women exert power and control over their lives physically, mentally, and emotionally. Comack (1996) in her research on women in prison further articulates that Kelly's notion of resisting is a "more immediate response" to sexual violence whereas the notion of coping is a longer and continuing process.

Kelly defines survival as the continued living and resistance of women "after or in spite of a life threatening experience" (1988:162). Kelly also puts a great deal

of emphasis on women's ability to get beyond the sexual violence and prevent the crime from continuing to negatively impact all facets of their lives. Kelly argues that women are socialized to accept the notion of victimization, and that women are expected by society to be "refeminized" by rape, thus further weakening any desire of women to be autonomous.

Kelly's notions of coping with, resisting, and surviving sexual violence can accurately be applied to rape survivors in Bosnia Herzegovina—perhaps even in a more general sense, to all those women in Bosnia who survived the overwhelming effects of ten years of war. Kelly's notion of "survivor" is contrasted with the legal representation of women rape "victims" in order to show a more representative view of women, rape, and war.

Before engaging in my analysis, a small disclaimer is warranted. Mass rape during war has existed for some time, but there have been few efforts by the academic community to study this phenomenon. Without precedent of studying mass rape in an academic context (Lindsey, 2002) some challenges in regards to the validity and reliability of some of the reports written and the sources of the data arise. For example works by more notable academics are often published in volumes alongside journalistic accounts as was the case in Stiglmayer (1993). As well more "iconic" authors research on rape in the former Yugoslavia is rarely questioned (Lindsey, 2002), nor is their representation of the social, economic, and cultural lives of the people of the former Yugoslavia necessarily accurate. In addition to the lack of precedent regarding the study of mass rape, the issue of the number of women raped in the former Yugoslavia is often debatable. It has been suggested some feminists

have inflated the number of raped women to strengthen their own agenda. I am not interested in the number of women raped; to me the notion of mass rape does not need to be quantified in number**.** Afflitto (2000), in his study of the Rwandan genocide explains the dangers of relying on the number of human losses as such an analysis might over look the continual active process of surviving. This is true for rape, as it is not only the act of rape, but also the threat of rape (to themselves and to their children) that affected the women of the former Yugoslavia. I also do not want to place the women who survived in the monolithic script of victim.

The theoretical approach presented in this chapter—Smart's sociology of law theory and Kelly's coping, resisting and surviving—introduced the theory used to guide my research and inform my understanding of the legal treatment of rape as a war crime in the former Yugoslavia. The next Chapter outlines the research design and methodology I utilized to conduct my research.

CHAPTER FOUR: RESEARCH DESIGN AND METHODOLOGY

I. Introduction

In light of the lack of criminological analysis of the legal treatment of rape as a war crime, this study is a qualitative analysis of the legal response of the ICTY to rape as a war crime in the former Yugoslavia. It is my intent to determine if the androcentric characteristics of law in domestic courts are replicated at the international level. Specific attention is paid to legal language and classification of crimes, and analytical or interpretative procedures will be used to see how law affects women. This approach is both inductive and qualitative as these approaches are best suited for examining the law and women's stories. Nechama Tec explains that the qualitative nature of women's oral accounts "ask the evidence to speak for itself and expect the researcher to listen to what they hear" (Tec, 2003: 9).

Premised on the notion that legal methods do not allow women to speak of their complete experiences, as their voices are silenced by legal language and classification, my analysis will be organized into four main sections. These sections include an analysis of the ICTY (the Tribunal)—its *Statute* and *Rules of Evidence and Procedure* (RPE), case law—most notably the Foča Indictment or the *Kunarac, Kovac, and Vuković* case, the women's stories (as presented in two different collective works), and possible alternatives to formal legal mechanisms (such as truth commissions and local NGOs). Consistent with feminist research, my research approach will be a "very broad theoretically informed framework" (Stanley and Wise, 1990), guided by Smart's sociological theory.

II. The International Criminal Tribunal for the former Yugoslavia (ICTY)

Chapter Five, entitled "The Tribunal—the Legal Beginning for the ICTY", examines relevant sections of the *Statute* and the *Rules of Procedure and Evidence*—both forms of legislation govern the application of the laws and procedures for the ICTY. Smart's sociology of law theory argues against the creation of more law. Smart cautions us not to support the creation of more law as an unqualified victory since the negative impact on women may be hidden. Therefore I found it necessary to examine the creation of the Tribunal and its rules. One argument for the creation of the Tribunal comes from Human Right's groups who see the ICTY to be the only opportunity for rape victims to hear the crimes against them denounced, and to see both perpetrators of such abuses and the commanders who allowed and participated in rape prosecuted and to seek remedy for the assaults that they have suffered (Human Rights Watch, 1995).

The Rules of the Tribunal that consider the protection of the victims are Articles 40, 69, 75, 79 and 96. These include safeguards against reprisals, unnecessary public humiliation, and the trauma of testifying before the defendant. In regard to sexual violations after the insurmountable trauma and the nature of rape, the United Nations took a strong consideration of these effects and as a result created special rules governing evidence in matters of sexual violence (Lescure and Trintignac, 1996). However some academics have pointed out that because the ICTY Statute does not guarantee justice for the victims, and despite the offered protection, many women are still reluctant to trust the Tribunal (Nikolić-Ristanović, 2001). Kelly writes, "Women in the former Yugoslavia are exercising agency in choosing to

remain silent. They, like women everywhere, understand that speaking out can have unintended consequences, and may not result in either natural or formal justice" (Kelly, 2000: 54). Another critic of the Tribunal, Neill, questions how effective the law will be in acting as a deterrent. He states, "For girls and women trapped in conflicts in Sri Lanka, Kashmir, Lebanon, Chechnya, or any other war zone, there will likely be no significant lessening of the danger of being raped because of any court proceedings in The Hague" (Neill, 2000: 9).

The relevant articles of the ICTY Statue and the rules from the ICTY Rules of Procedure and Evidence are first described. Through describing the select rules and articles I am dissecting and critically examining them, most notably those areas dealing with the protection of victims. An analysis is provided of the articles and rules, as they are relevant to the objectives of the ICTY. These objectives include reconciliation, deterrence, capturing the accused, rendering justice to the victims and establishing truth. The relevance, desire for the establishment of the tribunal, and its effectiveness is also examined. Previous United Nations policies have often come under intense scrutiny. It is believed that too many of the UN's codes protect the offender, forcing victims to fade to the periphery (Bassiouni, 1994).

III. Case Law

Chapter six entitled "Case Law: Applying the Law and Assessing Blame" examines the case law or the application of the laws outlined in Chapter Five. The *Kunarac, Kovac, and Vukovic* (IT-96-23 T) decision, handed down by the ICTY on February 22, 2001, was selected as the main source of data for analysis as it was the

first case at the ICTY to successfully prosecute rape during the war in the former Yugoslavia as a crime against humanity. Askin explains that this decision was the first time law saw sexual violence, ". . . . as an instrument of terror in the Bosnian conflict and that sex crimes former part of a widespread and systematic attack against a civilian population" (Askin, 2001: 1).

Referred to as the "rape camp case", the three male accused were ethnic Serbs who were guards at the Foča camp. Kunarac received 28 years, Kovac 20 years, and Vuković twelve years. However in terms of acknowledging rape as a weapon of war the court denied such recognition. The decision read, "It is to some extent misleading to say that systematic rape was employed as a 'weapon of war'. This could be understood to mean a kind of concerted approach or an order given to the Bosnian Serb armed forces to rape Muslim women as part of their combat activities in the wider meaning. There is no sufficient evidence for such a finding before the Trial Chamber" (UN Doc ICTY Press Release, February 2001). Because this is the first conviction of mass rape as a crime against humanity it is important to analyze how the law speaks for women, and how women's stories are treated within the confines of legal methodology.

The method used to analyze the Kunarac, Kovac, and Vuković decision is a content analysis. Singleton, Straits, and Singleton (1993) define a content analysis as a set of methods utilized for analyzing the symbolic content of any form of communication. My objective of utilizing a content analysis is to reduce the total content of the Tribunal's decision and transcripts in the Kunarac, Kovac, and Vuković case, to a set of categories that represent some attributes of the women's experiences

with the law. In order to keep the women's testimonies straight, I first created flashcards (electronically reproduced in Appendix A). Each card noted what the legal facts stated and what the women testified in court.

The content analysis of the case law results in two types of coding—open and axial. Strauss and Corbin (1990) define the process of open coding as the process of breaking down, examining, comparing, conceptualizing and categorizing the data. Open coding was followed by axial coding—or the process of putting data back together in a new way. The final result is the creation of four taxonomies representing the identified concepts (See Appendices B-F).

Other cases that were looked at briefly include *The Prosecutor v. Akayesu* ICTR-96-4-T, 5 and *The Prosecutor v Furundžija* (IT-95-17/1) as they both contributed to the definition of rape as a war crime.

IV. Women's Stories

I argue that law cannot accommodate the vast collection of women's experiences with war. In order to illustrate this point I analyze some women's stories of war that were collected outside the legal realm and compared them with the women's stories as told at the ICTY. These stories are found in Chapter Seven, entitled "Women's Stories: The Healing Begins."

International law also has very little direct influence on transforming the women's realities. Goldbach explains, "It [International Law] is inherently political and based in a statist tradition. Thus, those committed to eradicating gender-based

crimes must engage in simultaneous strategies" (1998: 34). The women's stories offer suggestions as to other strategies.

Rape is a crime that tends to be enveloped in silence (Allen, 1996) and as a result most stories of sexual assault are not told and they will die with the women (Tec, 2003). For some women silence is a long term coping strategy for rape and its traumatic memories (Van Boeschoten, 2003). Women are reluctant to retell their stories, or suffer revictimization in the judicial system, as outlined in the previous section (Smart, 1989). In a similar vein, it is also difficult to collect stories of women who were killed during war. The dead women should not be seen as assumed victims, because they may have actively resisted.

I have chosen to look at women's stories and not statistics because I believe that the stories shared by women will have a greater social impact and greater longevity. Mertus (1997) explains:

> While scientific studies lose their importance over time and today's statistics are replaced by those of tomorrow, these stories, as pieces of literature and memories of witnesses, will never lose their importance (6).

Efforts should also be made to include multiple experiences of sexual violence. Heberle (1996: 72) points out "Speakouts rarely if ever include stories from women who self-identify as having successfully resisted assault." I would add to this point that resistance is both physical and mental.

The data for the women's stories was obtained from secondary sources. My objective was to examine women's stories that were retold primarily by women from the former Yugoslavia. These women have collected stories in Bosnian, Serbian, and Croatian and then translated them into English. While some of the stories may be

distorted by translation, these stories may be more accurate than those that were collected in English by Western scholars. Hromadzić also explains that feminists from the West and feminists from Bosnia may have had different agendas:

> Many feminist groups saw Bosnian rapes through the lenses of their own agenda, and they treated Bosnian women as such. Thus, in the service of the fictive Universal Womanhood and the human rights discourse the raped women of Bosnia were collectivized, seen as already constituted and bounded whole (Hromadzić, 2002: n.p.).

The collective works I examined include *The Suitcase: Refugee Voices from Bosnia and Croatia* edited by Julie Mertus, Jasmina Tesanović, Habiba Metikos and Rada Borić (1997), and *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* edited by Vesna Nikolić-Ristanović (2000).

Secondary sources were chosen based upon several factors. The first and foremost is the sensitivity of the subject matter. That is, rape and other forms of violence directed at women in the course of war are sensitive and traumatic for the survivors. In my opinion it is unnecessary to revictimize these women and attempt to gather their stories for my own research purposes. Since there are many sources that have collected women's stories, I am more inclined to use these stories, as opposed to duplicating these efforts to obtain women's stories on my own.

Secondly, while I would like to speak with women refugees and see what their experiences of war were like—I neither speak Bosnia, Serbian, or Croatian nor I am adequately trained in dealing with issues of rape and violence. It is unethical to go and obtain these women's stories and leave them with hope of something better when I cannot offer it. I am not in the position to offer anything in return. Some women of the former Yugoslavia stated that they have felt violated when Western researchers

came during the war and extracted their stories and left. Some women explained that when they told western researchers/journalists of their story they expected some justice. Neier explains that some journalists arrived to speak with refugees walking the street shouting, "Anyone here been raped and speaks English?" (1998:177). Belić, an activist at the Centre for Women's War Victims in Zagreb explained that she once received a fax at the Centre which read, "A journalist. . .wants to interview a woman in the Ex-Yugoslavia about rape camps in Bosnia/Croatia. Preferably a survivor and someone who can speak English. Do you know someone who can do this by phone? Please let me know quickly" (Belić, 1995: 33).

A Special Rapporteur for the Untied Nations also pointed out that those "studying rape" in the former Yugoslavia, including a number of missions and some media representatives, have left the women feeling exploited by their repeated interviewing. In addition health professionals are concerned that repeatedly telling their stories and sharing their experiences could subject women to additional mental hardships (UN Doc UNESCO, 1993).

By examining women's testimonies I challenge the stereotypical image of women from the former Yugoslavia. Mertus explains that the women of the former Yugoslavia have been presented as "haggard, hollow-eyed, despondent, babushka-clad with baby in tow, lugging water, dodging bullets in the streets of Sarajevo weeping uncontrollably over the death of her son/husband/father and child" (Mertus cited in Buss, 1998: 2001). Buss (1998) suggests that this image is not representative. Rather the women of this war are lawyers, doctors, academics,

journalists and political leaders. Many of these women were individually responsible for empowering not only themselves, but also other women.

Since I use secondary sources it is important to acknowledge that there is the possibility that some women's testimonies might be misused (Lindsey, 2002). Lindsey is critical of people who use secondary testimony as it further removes the women from their testimonies. She states, "whether a researcher writes as a populist author or an academic, the physical act of collating testimony for publication is essentially a selfish one because the ego and career of the person who will be controlling the testimony is bound to the process of gathering it" (Lindsey, 2002: 75).

As a result of the consideration of this critique by Lindsey, I emphasize that the women's stories have been loosely organized and examined around Kelly's theory of coping, resisting, and surviving. Initially I felt obligated to abandon my intention of looking at women's testimonies, but I have decided that it is important to balance out the existing legal testimony and stereotypes that exist in regards to women survivors. Lindsey's critique makes me sensitive to the possibility of abusing testimony and I hope that this awareness will reduce the likelihood of this type of abuse. Another issue raised by feminists working with testimonies of raped victims is how does one describe the horrors of rape without running the risk of voyeurism or privileging the perpetrator (Lindsey, 2002 and Schott, 1996)? I am not sure how to answer this challenge. I do feel that there has been enough public exposure of the horrific graphic details of rape in the former Yugoslavia and instead my analysis focuses on the other aspects of the women's victimization (coping, resisting, and surviving).

Lindsey presents valid arguments concerning the study of war rape. She is sensitive to the women, and stresses that as academics we are gatekeepers to the women's testimonies. It is an enormous responsibility, and a challenge.

In examining women's notions of surviving, resisting, and coping I seek to present rape not just an event that ends when the act of the crime is finished. In doing so I attempt to add something to the void identified by Nikolić-Ristanović (2001), who suggests that many academics and journalists failed to examine the price that women pay after surviving rape.

The methodology used to analyze the women's stories is consistent with the methodology used to examine the case law. A content analysis was performed on the women's stories as presented in *The Suitcase* (Mertus et. al, 1997) and *Women, Violence, and War* (Nikolić-Ristanović (ed), 2000), followed by open coding and axial coding.

V. Alternatives to Formal Legal Mechanisms

The fourth area I examine includes alternatives to legal methods. The previous chapters analyze the shortcomings of law and its inability to respond to the diversity of women's experiences with war. While critiquing law was my primary objective, I felt it necessary to offer not necessarily alternatives, but supplemental options. In addition, after reading the women's stories it was evident that many women were not only receiving assistance but were in return assisting others. Most of these interactions occurred outside the realm of international law. The women's words spoke of local women's NGO's. In this section of my analysis I have included

an examination of one women's group—Medica Zenica and I examined the possibility of establishing a truth and reconciliation commission and the recent work if the International Centre for Transitional Justice (ICTJ).

This Chapter outlined the methodology and research design utilized in my research and analysis. Combined with the previous two chapters that addressed the relevant literature and the theoretical approach that guided my research, these three chapters have set the stage for my analysis of the data. The following four chapters take an in depth examination of the data of my research.

CHAPTER FIVE: THE TRIBUNAL: THE LEGAL BEGINNING FOR THE ICTY

I. The Creation

When the war in the former Yugoslavia began it was labelled as a civil war since the fighting was contained within the political boundaries of the country then known as Yugoslavia. The war began in 1991 in Croatia (a province in the former Yugoslavia) and Slovenia (another province in the former Yugoslavia) with the prime aggressor being Serbs, or people who reside in a third province, Serbia. Both Slovenia and Croatia held referendums to separate. With the support of the majority, Croatia and Slovenia were acknowledged by the EC in 1991 as countries independent of Yugoslavia (as a result Yugoslavia was comprised only of Serbia, Montenegro, and Bosnia-Herzegovina).

The war lasted only ten days in Slovenia. In 1992 the war began to spread from Croatia, and both the Serbians and Croatians began sending warring factions into a third province known as Bosnia Herzegovina (herein after Bosnia). Later that year another referendum was held and Bosnia would also become its own country, leaving Serbia and Montenegro to be the 'reduced' Yugoslavia. In 1992 with the official recognition of Bosnia as an independent state the war shifted from a civil war—within a nation to an international war—between nations (Rigby, 1994).

In October 1992, The UN Security Council established a Commission of Experts (The Commission) to examine and analyze evidence from the former Yugoslavia that constituted violations of international human rights law (UN Doc S/Res 780, 1992). A subsequent UN resolution was passed that mandated the

Commission to actively pursue investigation into these violations, and in particular the practice of ethnic cleansing (UN Doc S/Res 787, 1992).

In its original creation, the Commission was made up of five men who included: Mr. Frits Kalshoven (Netherlands) as Chairman, Mr. M. Cherif Bassiouni (Egypt), Mr. William J. Fenrick (Canada), Mr. Keba M'baye (Senegal) and Mr. Torkel Opsahl (Norway). One year after the creation of the Commission, Mr. Kalshoven resigned for medical reasons and with the untimely passing of Mr. Opsahl, the Secretary General appointed Mr. Bassiouni as Chairman and added two female staff members: Ms. Christine Cleiren (Netherlands) and Ms. Hanne Sophie Greve (Norway).

Ms. Cleiren would spearhead a team comprised of 40 female professionals that included lawyers, mental health specialists, and interpreters. Cleiren's team interviewed 223 women who were witnesses to, or victims of, rape and sexual assault. As a result of the dedication and hard work of Cleiren's team, evidence of sexual assault and rape was collected and preserved and would eventually be used at the Tribunal to indict suspected war criminals and prosecute rape as a war crime (Hagan, 2003).

One of the recommendations of the Commission was the creation of the ad hoc tribunal that would later become known as the International Criminal Tribunal for the former Yugoslavia (ICTY). As a result of the final report of the Commission (UN Doc S/ Res 808, 1992), the Secretary General submitted a report "Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808

(1993)" (UN Doc S 25704, 1992). This report outlined a draft of what would become the ICTY Statute.

In his report, Secretary General at the time, Boutros Boutros-Ghali, suggested that the Tribunal be established by a Resolution (rather than by a Treaty). Ratner and Abrams (2001) explain that the creation of the Tribunal by Resolution was more favorable as it was quicker and required less bureaucracy than the Treaty route. In addition, the creation of a Treaty would only bind those states that were signatories. In light of the existing political climate and the raging war it was most likely that certain states with interest in the former Yugoslavia would be reluctant to sign the "after the fact" Treaty.

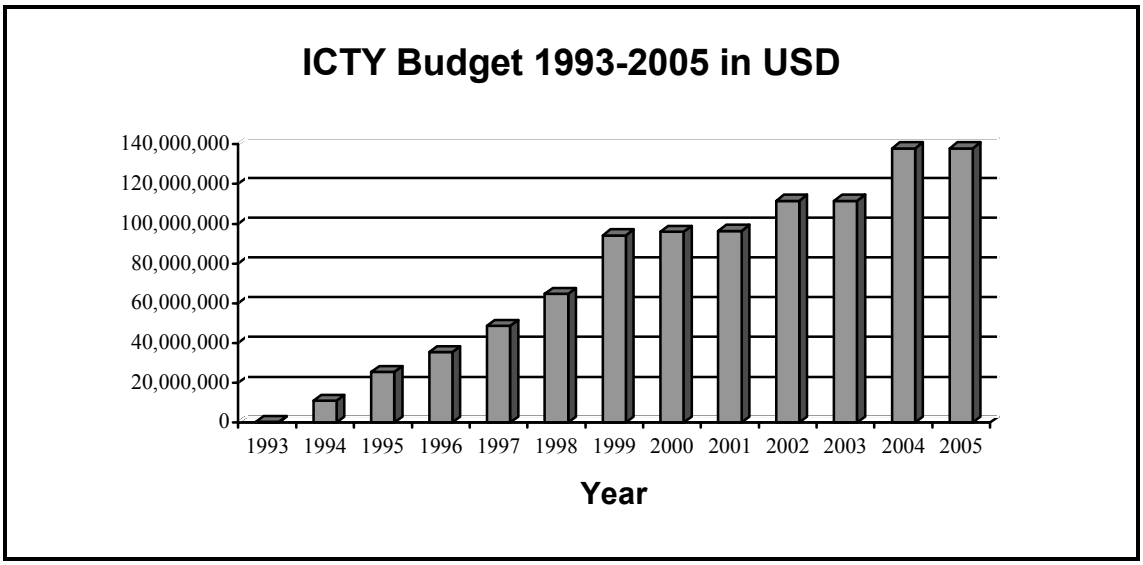
In May of 1993, the United Nations Security Council created an ad hoc criminal tribunal known as the International Criminal Tribunal for the former Yugoslavia or the ICTY (UN Doc S/Res 827, 1993). Resolution 827 emphasized its "grave alarm at continuing repost of widespread and flagrant violations of humanitarian law . . . including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing"" (UN Doc S/Res 827, 1993). Resolution 827 also outlined that the ICTY would have jurisdiction for crimes committed in the former Yugoslavia since 1991 until an unspecified date, as long as the crimes committed were in "accordance with the provisions of the present Statute" (*ICTY Statute*, 2003).

In November 1994, the United Nations Security Council created a second *ad hoc* criminal Tribunal, The International Criminal Tribunal for Rwanda (ICTR) (UN

Doc S/Res 955, 1994). The ICTR was structured in a similar way to the ICTY and shared Chief Prosecutor and Appeals Chamber.

The ICTY outlines its mission as being all-inclusive. Not only was the Tribunal created to hold perpetrators of serious violations of international humanitarian law accountable to justice and to deliver justice to the victims, but its creation was also to act as deterrence and prevent further crimes (both in the area of the former Yugoslavia and the international community in general) as well as contribute to the restoration of peace in the former Yugoslavia by promoting reconciliation

As of January 2004, the ICTY had 1238 staff members representing 84 countries. The current operating budget for 2003-2004 is $271,854,300 USD (for two years), compared with its considerably low starting budget in 1993 of $276,000 USD (Le Goascoz, n.d.a). The ICTY budget comes from assessed contributions from its member states as well as voluntary contributions from member states, international agencies and private entities. Below is a chart that outlines the increase of ICTY's budget from its inception to 2005. The budget for 2002-2003 was combined at $223,169,800.00 USD but was divided by 2 for the purpose of this graph, as was the 2004 and 2005 budget of $271,854,600.



II. The Structure

The ICTY conducts its trials by combining both civil law and common law. This is unique in the sense that it includes the combination of adversarial and inquisitorial procedures. The ICTY is comprised of three organs that include: The Office of the Prosecutor (OTP), The Chambers and the Registry.

Office of the Prosecutor

The Office of the Prosecutor operates independently from the UN Security Council and any other state or organization. The OTP is responsible for investigating crimes. This includes collecting evidence (exhuming mass graves where necessary), identifying witnesses, and prosecuting those accused of committing crimes outlined in the ICTY's Statute.

Prosecutors are appointed upon nomination by the Secretary General and are voted in by the members of the Security Council. The prosecutors are given a four-year term that can be renewed. To date there have been four Chief Prosecutors. The first Chief Prosecutor appointed by the Council was Ramon Escovar-Salom the Attorney General of Venezuela (UN Doc S/Res 877, 1993). However, Escovar-Salom was not active in the position, as he resigned shortly after his initial acceptance. The second Chief Prosecutor was Richard Goldstone of South Africa (UN Doc S/Res 936, 1994) who came highly recommended by Nelson Mandela. Goldstone has been credited with getting the ICTY the desperate funding it needed in its early stages (Hagan, 2003). Goldstone resigned from his position at The Hague to return to South Africa's Constitutional Court. Goldstone was able to recommend his successor, who would be Madame Justice Louise Arbour of Canada.

Arbour was appointed Chief Prosecutor (UN Doc S/Res 1047, 1996) and assumed this position on October 1st, 1996. Arbour is famous for her aggressive strategy of pushing for legal justice when many were arguing for political peace. Arbour is also well known for her ability to get indictments for the most well known war criminals such as Mladić, Karadzić, and Milošević. Critics of Arbour argue that while prior to her appointment to the ICTY she was a competent judge, but she had limited prosecutorial experience. Arbour had never served as a Prosecutor nor had she been head of a prosecutor's office or agency (Williams and Scharf, 2002).

When Arbour was appointed to the Supreme Court of Canada in September 1999, Carla Del Ponte of Switzerland filled her position with the OTP (UN Doc S/Res 1259, 1999). As of 2004 no date of termination of the ad hoc ICTY has been

included in the Statute, however, it is common knowledge that there is pressure to complete all investigations by 2005, and try all cases by 2008. In order to achieve this deadline the Office of the Prosecution for the ICTY was severed from the ICTR (UN Doc S/Res 1503, 2003). The Security Council appointed a new Chief Prosecutor for Rwanda (Mr. Hassan Bubacar Jallow of Gambia) and retained Del Ponte as Chief Prosecutor exclusively for the former Yugoslavia.

While the Chief Prosecutor position has changed hands four times in ten years, the Deputy Prosecutor has changed only once. Graham Blewitt of Australia was appointed on February 15th, 1994 and was replaced by David Tolbert (United States of America) on August 2004.

The Chambers

The adjudicative organ of the Tribunal was originally comprised of two trial chambers with three judges and one appellate chamber with five judges. However subsequent Resolutions have increased the Chambers and added ad litem judges (judges who are appointed for the specific case currently being tried) (UN Doc S/Res 1329, 2000) in order to deal with the growing number of cases waiting to be tried at the ICTY and ICTR. Currently there are three Trial Chambers that consist of three permanent judges and a maximum, at any one time, of six ad litem judges. The Appeals Chamber now consists of seven permanent judges who are also responsible for the Appeals Chamber of the ICTR. Each case that is appealed is heard and decided by five judges.

The 16 permanent judges are elected by the General Assembly of the United Nations for a term of four years and can be re-elected. The ad litem judges are drawn from a pool of 27 judges. They are also elected by the General Assembly of the United Nations for a term of four years, but they are not eligible for re-election.

Of the first eleven judges elected by the UN Security Council General Assembly nine were men and two were women. Three of the judges were from Asia, two from Europe, two from Africa, two from North America, one from Latin America and one from Australia. While countries with predominately Muslim populations were represented by four of the eleven judges, the original selection of judges failed to have a Muslim judge. This was an issue because Muslims made up the largest portion of the victims of the war in the former Yugoslavia (Williams and Scharf, 2002 and Scharf, 1997).

The initial judges drafted and adopted the *Rules of Procedure and Evidence (RPE)*, the main document responsible for regulating the functioning of the ICTY. Williams and Scharf (2002) argue that the qualifications of the initial judges nominated (by individual counties) and selected (by Security Council members) indicated that the international community as a whole was considering the creation of the ICTY an important endeavour.

The current judges include: Theodor Meron (United States of America), Fausto Pocar (Italy), Patrick Lipton Robinson (Jamaica), Carmel A. Agius (Malta), Liu Daqun (China), Mohamed Shahabuddeen (Guyana), Florence Ndepele Mwachande Mumba (Zambia), Mehmet Güney (Turkey), Amin El Mahdi (Egypt), Alphonsus Martinus Maria Orie (Netherlands),

Wolfgang Schomburg (Germany), O-gon Kwon (South Korea), Inés Mónica Weinberg de Roca (Argentina), Jean-Claude Antonetti (France), Kevin Parker (Australia) and Iain Bonomy (United Kingdom) Meron was elected President of the Tribunal and Pocar was elected Vice President.

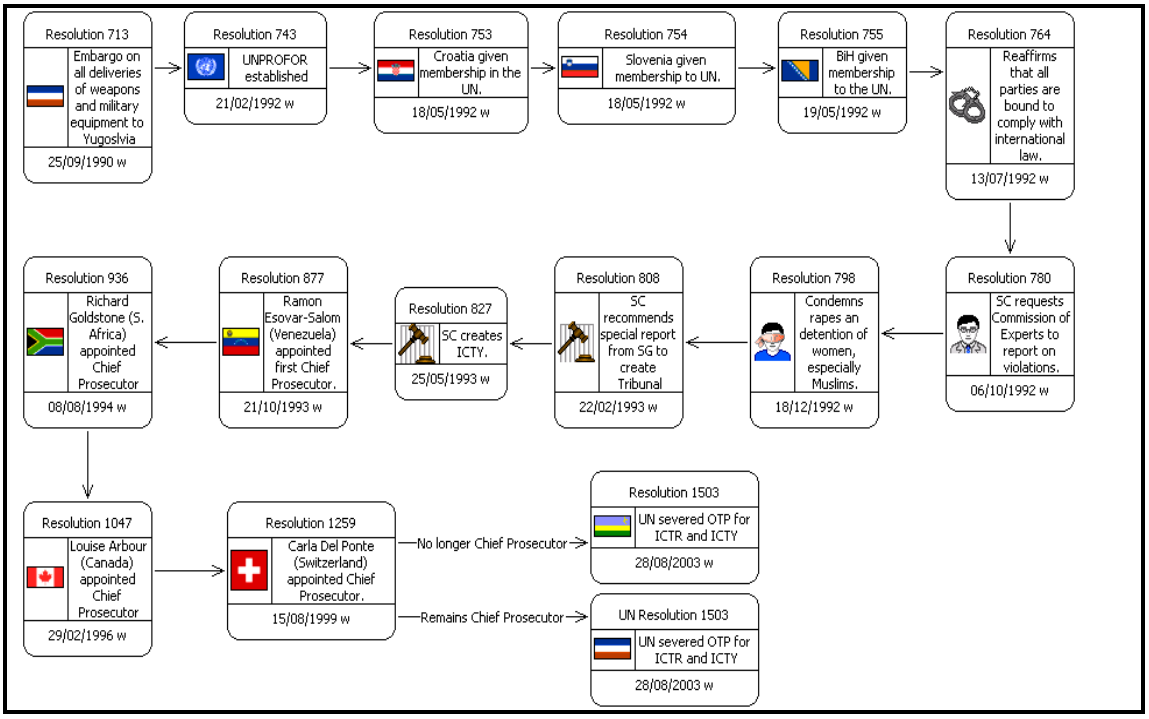
The Registry

The Registry provides administration and judicial support services to the Tribunal (ICTY only, the ICTR has its own Registry). Its responsibilities include: translating of documents and court proceedings, organizing hearings, operating the legal aid program, assisting and protecting witnesses, managing the Detention Unit and coordinating all communications to and from the Tribunal. The current Registrar is Hans Holthuis of the Netherlands (since 1 January 2001).

Located within the Registry is the Victim Witness Section (VWS) that provides support for Prosecution and Defence witnesses while they testify before the ICTY. The VWS also provides assistance to the witnesses in their own country before and after the trial. The VWS works closely with the appropriate local authorities, with specialized non-government agencies and *ad hoc* experts. .

Due to the considerable number of UN Resolutions that have impacted the ICTY, I have created a time line to highlight the most significant Resolutions from its origin to present day. The chart shows the UN Security Council Resolution number, the icon representing the country or the ICTY, a brief explanation of the Resolution, and the date.

Significant UN Resolutions Relating to the International Criminal Tribunal for the Former Yugoslavia



III. The Law

ICTY Statute and its Resolutions

On May 3, 2003 The Secretary General presented a report to the Security Council outlining the proposed Statute for the ICTY. The Security Council accepted the proposed Statute without change. The Secretary General's final proposal was based on 18 proposed drafts and raw material submitted by various states, intergovernmental and non-government organizations and individuals (Shagra and Zacklin, 1994). The two most influential states were France and the United States of America (Scharf, 1997).

Generally speaking the ICTY Statue has remained almost identical to the one presented to the Security Council by the Secretary General in 1993. The only significant changes to the Statue have been limited to four specific Articles. These changes have increased the size of the Chambers, the number of judges and introduction of ad litem judges. What follows is a brief description of the most relevant 24 articles listed in the ICTY's Statute. Some articles have been excluded as they have are concerned with, for example the composition of the Chambers, Office of the Prosecution, Registry, and the competency of the judges. This information has been discussed elsewhere in this chapter.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 1 provides the territorial (former Yugoslavia) and the temporal (since 1991) jurisdiction for the ICTY. This Article is almost identical to Article 8 of the Statute. Shagra and Zacklin (1994) explain that when considering the starting point for the Tribunal three dates were considered. However the Secretary General opted for January 1, 1991 as it was a politically neutral date and did not offer any indication as to whether the war was identified as international or national.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

The legal jurisdiction of the ICTY is outlined in Articles 2-5. These articles outline the crimes for which the ICTY can prosecute subjects. These crimes include *Grave Breaches of the Geneva Conventions* of 1949, Article 11 of the 1907 *Hague Convention* respecting the Laws and Customs of War on Land as reaffirmed in the Nuremberg Charter, Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) and *Crimes Against Humanity* (Nuremberg Charter 6 c).

While Article 5 (g) specifically states that rape is a crime against humanity, rape could also be inferred from 2 (b) torture or inhumane treatment, 2(c) wilfully causing great suffering or serious injury to body or health, 4(c) (genocide) imposing measures intended to prevent births within the group 4(e) forcibly transferring children of the group to another group, 5 (f) torture, and 5(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6 states that the ICTY has jurisdiction over all "natural persons." In legal terms this includes all persons except artificial persons such as juristic persons, and collective entities such as organizations and states. However, individuals in charge of States can be held accountable. This article is important, as it does not allow for the notion of guilt by association or membership, and reinforces the notion that criminal liability is personal (Shraga and Zacklin, 1994).

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 7 outlines individual responsibility, and therefore eliminates using "crimes of obedience" or "just following orders" as a defence. Therefore all perpetrators along the chain of command could ultimately be held legally responsible for their participation or contribution to an offence outlined in Articles 2-5.

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 9 outlines the ICTY's concurrent jurisdiction over war criminals with national courts. Ultimately, as a result of the magnitude and large number of potential war criminals, the ICTY chose to have concurrent jurisdiction, rather than exclusive jurisdiction. However the ICTY still has primacy over national courts. This allows the ICTY to formally request national courts to defer cases to the ICTY if need be.

Article 10
Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10 prevents the accused from being tried by national courts after he/she has already been tried for the same crime by international courts. However,

this article allows the ICTY to retry an individual if it is believed that the national courts were not impartial or independent.

Article 11
Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 11 outlines the basic structure of the ICTY—the Chambers, Prosecutor and Registry.

Articles 12-14 outline the composition of the Chambers, the qualifications, and elections of both the permanent judges and the ad litem judges. However due to the length of these sections, I have not reproduced them here. The points of interest have been discussed under the previous section on the Chambers and judges.

Article 15
Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 15 outlines the Rules of Procedure and Evidence. This section has been further developed in the official ICTY's *Rules of Procedure and Evidence*. The initial judges voted in by the Security Council were responsible for the creation of this document. Since its creation this document has been amended over thirty times. This document will be further discussed and examined in the following section.

Article 16
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16 outlines the roles and responsibilities of the Office of the Prosecutor. An important section of this Article states that the Prosecutor shall act independently and as a separate organ of the ICTY, and that any government should not influence him or her.

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17 outlines the roles and the responsibilities of office of the Registry (see previous section for a description of the Registry).

Articles 18-28 outline the procedures and stages of the legal process from investigation to pre-trial to post trial.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

More specifically Article 21 acknowledges the rights of the accused. These rights include equality before the ICTY, access to a fair and public hearing, presumed innocent until proven guilty, to use the language most comfortable to the accused, access to adequate facilities to prepare his defence, to be tried without undue delay, access to free legal services if he [sic] cannot afford it, the right to question all witnesses, and not compelled to testify against himself [sic] or to confess guilt.

These rights reflect the international standard of due process as outlined in Article 14 of the *International Covenant on Civil and Political Rights* (Shraga and Zacklin, 1994). In addition, the accused cannot be tried in absentia.

One possible problem with this Article is that it specifically refers to the accused in masculine terms. This could be interpreted as the inability of the Statute to see women as perpetrators. This is an erroneous assumption on behalf of the Tribunal as already one woman Plavsić (IT-00-39;40/1), has been tried and convicted by the ICTY.

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

To counterbalance the rights of the accused, Article 22 addresses the rights of the victims. This Article is further articulated in the *Rules of Procedure and Evidence*. Article 22 briefly mentions the right for the victim to provided testimony in camera, and the right of the victim to have their identity protected. This section is gender neutral in its wording of the term victim.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24 outlines the penalties that can be issued by the Chambers. Most notably, in agreement with the UN human rights policy that prohibits the death penalty, the most severe penalty that can be issued by the ICTY is life in prison. Williams and Scharf (2002) point out that 132 of the 181 UN member States (close to 73%) still utilize the death penalty for those guilty of war crimes and genocide in domestic courts. For example, national courts, such as those in Bosnia can apply the death penalty. As a result there is a possibility that there will significant disparity in sentencing war criminals (Williams and Scharf, 2002).

Article 29
Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal

Article 29 is important, as it requires all States to assist with the investigations and prosecutions of those persons of interest to the ICTY. This is an important section as illustrates that the ICTY is not self-executing and requires assistance from states and institutions to apprehend and turn over war criminals. This could prove to be difficult in certain states such as Yugoslavia (Serbia and Montenegro) who were reluctant to hand over notorious war criminals such as Milošević. In addition, some

State or institution is currently giving refuge to Mladić and Karadžić, and thereby not cooperating with this Article. Former Chief Prosecutor Goldstone was critical of the uncooperative approach many States were utilizing in the apprehension (or lack there) of suspected war criminals indicted by The Hague. Instead of seeking out war criminals, many States would just sit back and wait to come across them. Goldstone used a powerful analogy to convey the horrors of such inaction. He stated, "Imagine a serial rapist wanted for trial in England being informed that because he is a dangerous killer the police will not seek him out but will wait until they come across him in the ordinary course of their duties" (Goldstone, 1996: 12).

Rules of Evidence and Procedure

The *Rules of Evidence and Procedure* (RPE) (UN Doc IT/32, 1994) is another key legal document that regulates the proceedings of the ICTY. This document was adopted pursuant to Article 15 of the ICTY Statue on February 11th, 1994 and came into force March 14th, 1994. The document is considerably lengthier than the Statute. It is comprised of 127 Rules and is divided into 10 parts. For the purpose of my analysis I have selected nine rules that are directly related to the protection of victims and witnesses.

Rule 2
Definitions

Victim:
A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed
(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 2 defines the term victim. The definition appears rather straightforward. Rule 2 also points out that wherever in the Rules masculine terms are used, they should be assumed to include feminine terms. This is different from the Statue where the accused is always referred to in masculine terms, and no such disclaimer is made to include feminine terms. While this disclaimer in the Rules is a positive step to remove gender bias, the fact that it is required is interesting, as both genders should have been used throughout the writing of both the Rules and the Statute. The use of masculine terms may have been reflective of how the judges interpreted perpetrators, victims, and those who would apply the law, implicating some gender bias and/or stereotypes by the judges who created the RPE.

Rule 34
Victims and Witnesses Section

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

(B)Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

Rule 34 provides direction for the creation of the Victim Witness Section (VWS) under the Registry organ of the ICTY. This rule is unique because it states that due consideration should be given to employing qualified women. This is interesting as no other Rule, which provides direction for the appointment of staff, states that qualified women should be appointed (for example see Rule 17 Precedence (election of judges) Rule 18 Election of the President, and Rule 30 Appointment of the Registrar). The statement that qualified women should be appointed can be interpreted in a such a way that acknowledged that the Judges who drafted the Rules

are aware that many victims and witnesses are women—which is especially true for crimes of rape and sexual assault. However would not the women who testify benefit from having women employed in the VWS, *and* through out the entire judicial process—from investigation to prosecution to determination of guilty to sentencing? While the ICTY has made a valid attempt to have equal gender representation in all areas it is unclear why only this section of the Rules acknowledges the need to hire qualified women.

Rule 40
Provisional Measures

In case of urgency, the Prosecutor may request any State:
(i) to arrest a suspect or an accused provisionally;
(ii) to seise physical evidence;
(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.
The State concerned shall comply forthwith, in accordance with Article 29 of the Statute.

Rule 40 is important as it allows the Prosecutor to request that States prevent injury and or intimidation of victims or witnesses. However while this Rule may be ideal in theory, the practical application of such a Rule in states such as Bosnia, Croatia, and Serbia is unlikely as the government and police were and to some extent still are left in chaos after several years of war. As Nikolić-Ristanović (1998) has pointed out, in many cases police and judicial bodies in the former Yugoslavia have been corrupt. Amnesty International is actively protesting the intimidation and lack of judicial and police intervention at national war crimes trials in Croatia (Amnesty International Secretariat, 2002).

Rule 61
Procedure in Case of Failure to Execute a Warrant

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:
(i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and
(ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member.
(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge.
(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above
(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.
(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit.

Rule 61 referred to as a "Super Indictment" (Hagan, 2003) has importance for all war crimes committed, including sexual assault and rape. This rule allows the Prosecutor to present evidence, testimony, or documentation into court regarding an accused for which there has been an indictment issued, but no subsequent apprehension. In a sense Rule 61 allows for a mini trial (Williams and Scharf, 2002). This allows for the preservation of testimony of women who have been raped. This is beneficial as it allows the women a sense of personal closure as it is unknown if some of the war criminals such as Mladić or Karadzić will ever be apprehended, and it is also possible that some war criminals who resist apprehension, such as Simo Drljaca, will be killed before they reach The Hague.

Rule 69
Protection of Victims and Witnesses

(A)In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

In attempts to balance the rights of the victims/witnesses and the accused Rule 69 allows for non disclosure of victims and witnesses, but does state that such information needs to be made available to the accused in enough time to prepare for his or her defence. This Rule applies only to the production of evidence; therefore this rule applies only to the protection of the witnesses prior to the actual presentation of testimony before the Chambers. Rule 75 (which follows) protects the witnesses giving testimony before the Chambers.

Rule 75
Measures for the Protection of Victims and Witnesses

A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
(B) A Chamber may hold an in camera proceeding to determine whether to order:
(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
(a) expunging names and identifying information from the Tribunal's public records;
(b) non-disclosure to the public of any records identifying the victim;
(c) giving of testimony through image- or voice- altering devices or closed circuit television; and
(d) assignment of a pseudonym;
(ii) closed sessions, in accordance with Rule 79;
(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75
(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment

or intimidation.
(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal.
(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:
(i) to any Chamber, however constituted, remaining seised of the first proceedings; or
(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.
(H) Before determining an application under paragraph (G)(ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.
(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber."

Rule 75 acknowledges the potential threat to women who are testifying against the perpetrators, not only to themselves but also to their family in such forms as retaliation. Measures such as an initial in camera proceeding with the Judges to determine which measures are required to protect the witness is proactive. The use of imaging and voice altering is also a positive step to protect the witnesses' identities. This Rule allows for legal protection of the identity of the witness as well as protection against intimidation and to avoid harassment.

Rule 75 is important as it demonstrates the willingness of the Tribunal to identify the unique situation of the women (or all victims in general) who testify. However the application of this Rule is only theoretical until we examine it in its application. In a recent press release the VWS stated that between January 1998 and present, of the 2,330 witnesses 1,398 testified openly without any protection (60%)

(UN Doc ICTY Press Release, December 2003). This rule also requires that the witnesses are aware that their identity may not be protected forever, as to balance the right of the witness and the accused, the identity of the witness may be disclosed at a later date. A more interesting study would examine how many witnesses did not testify because they did not believe that they could adequately be protected. However such a research endeavour has not been under taken at this time.

Rule 79
Closed Sessions

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
(i) public order or morality;
(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
(iii) the protection of the interests of justice.
(B) The Trial Chamber shall make public the reasons for its order.

In conjunction with Rule 75, Rule 79 protects the witness/victim by explicitly stating that the judges have the right to exclude the public and press when there is a need to protect the safety, security, and identity of the victim or witness. However to balance the rights of the victims with the accused this Rule also states the judges must make it be known why they are excluding the press and public.

Rule 96
Evidence in Cases of Sexual Assault

In cases of sexual assault:
(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

The creation of Rule 96 significantly reduces the burden of proof for the rape victim (Lescure and Trintignac, 1996). It is evident that with Article 96 (i) regardless of how weak the evidence presented by the witness, neither the defence nor courts can force corroboration by a third party. Proof of the commission of the crime would rest on comparing the victim's testimony with the case being presented by the accused (Lescure and Trintignac, 1996).

Article 96 (ii) restricts the available defences used on behalf of the accused. Consent extracted under physical or moral constraint cannot be utilized.

Article 96 (iii) constitutes a restriction of defence available for the accused. Article 96 (iv) is similar to the Rape Shield Provisions in the *Canadian Criminal Code*. At the domestic level, this section has posed challenges regarding the rights of the accused. It was interesting to see what Arbour, as Chief Prosecutor would do with this section, as she was criticized at the domestic level for turning a blind eye to feminist interests. As a judge with the Ontario Court of Appeals she demonstrated in her support for the right of the accused to cross-examine the rape victim on her sexual past in R. *v Seaboyer and Gayme* cases. Arbour argued that the male defendants' rights would be infringed if judges were not permitted in some cases to allow certain aspects of rape victim's sexual history to be questioned. However, Arbour's work at the ICTY, specifically section 96 (iv) seemed unaffected by her domestic decision that favoured the (male) accused.

Rule 96 appears to be sensitive to the needs of the women testifying; yet the applications of these rules need to be examined in cases presented at the ICTY. This examination will be forthcoming in subsequent chapters.

Rule 106
Compensation to Victims

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.
(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Rule 106 outlines that appearing at the Tribunal does not allow for compensation for the suffering that victim endured as a result of the crime in which she or he is testifying before the ICTY. The victim must file a civil suit within the national jurisdiction in which the offence occurred.

Williams and Scharf (2002) argue that one key limitation of the ICTY has been the inadequate attention that it has paid to providing restitution to the victims. The only power that the Chambers have to address awarding restitution is to order that goods and or property of the victims have been taken and that the accused return the property and or proceeds from its sale (RPE 24(3)). While most criminal proceedings do not provide restitution for damages, as this is most often sought through civil action, the ICTY was given the power to do so vis-à-vis Resolution 827 which called for the creation of the ICTY which stated that, "Acting under Chapter VII of the Charter of the United Nations . . . decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law" (UN Doc S/Res 827, 1993). Following this reasoning, rape has been identified as a violation of international humanitarian law and therefore victims are entitled to restitution for damages.

While the RPE do not allow for compensation, witnesses and expert witnesses are entitled to certain allowances (or expenses) while they testify at the ICTY as per the *Directive on Allowances for Witnesses and Expert Witnesses* (UN Doc IT/200, 2001). As the title of the statute suggests it is not to be viewed as a type of compensation and therefore does not even include the term victim in the title.

The Directive provides the witness with an allowance in regards to lost wages, travel, accommodation, meals, incidental and childcare. The Directive also states that those persons accompanying the witness such as dependents and support persons, if approved by the Registrar, are entitled to travel, accommodation, meals, incidental and childcare. However the ICTY will not cover these person's wages.

In determining the attendance allowance, the expert witness is entitled to their official salary, as for the 'regular' witnesses they will receive the daily minimum wage rate "applicable for UN personnel in the country in which the witness is residing at the time he [sic] testifies" (UN Doc IT/200, 2001, Article 7 (B)). According to the daily salary of UN personnel this would mean that a person who currently resides in Croatia would receive $24.25 USD, Federal Republic of Yugoslavia (reduced Yugoslavia) $23.16, Bosnia $22.84, or the United States $61.18 USD, regardless of where the crime took place. Therefore the allowance is not related to the crime in which one is testifying for; rather it is meant to compensate the witness in terms of where they live now.

The Rules of Procedure have been recognized for their valuable contribution not only to international law and the establishment of the International Criminal Court, but also to domestic law (Williams and Scharf, 2002). The Tribunal has also

been recognized for its invaluable contribution to case law and statutory interpretation of areas of law such as crimes against humanity, genocide and laws and customs of war. It is estimated that by 2002 the ICTY had produced more case law interpretation of war crimes than Nuremberg and Tokyo combined (Williams and Scharf, 2002). Therefore it is reasonable to assume that as the ICTY continues to try cases more law will be interpreted. It will be especially interesting to see how the court applies war crimes law to Milošević, as there has never been a higher-level war criminal tried before an international war crimes tribunal.

IV. Analysis

The creation of the Tribunal and its subsequent Statute took place while the war continued to be fought in Bosnia. The turbulent political climate in the former Yugoslavia, the need to put an end to the war, and the push for peace took precedence. Many political proponents of peace feared that the threat of accountability to the Tribunal would lead many political leaders in the former Yugoslavia, such as Milošević to withdraw from peace talks (first Vance-Owen and then Dayton). From a political perspective his co-operation was essential for the implementation of peace. Akhavan (1998) explains that the ICTY was established within a contemptuous arena in which "political expedience overrode genuine concerns for justice" (751). It was not until a few years later that indictments were issued for former prominent political leaders and suspected war criminals Karadzić, Mladić, and Milošević. And even at such time the indictments were sealed as per Rule 53 "Non-Disclosure" of the RPE. The Rule states that under exceptional

circumstance a Judge or Trial Chamber may order a non-disclosure of an indictment in order to serve the interests of justice.

The creation of the Tribunal also came with the need to appease the guilty conscience of the West and the rest of the international community who failed to stop the war, the ethnic cleansing, the genocide, and the rape (Akhavan, 1998). While debates raged about whether or not the war was civil or international and the failure of the UN to take Milošević's threats seriously, the people of Croatia and Bosnia were slaughtered. It was hoped that the creation of the Tribunal would show the people of the former Yugoslavia that the international community would no longer stand by and watch the atrocities occur.

The raging war and the need for peace may have significantly reduced the flexibility of the initial legal efforts and initiative by the ICTY (Bass, 2000). However, after the fighting stopped and the Dayton Peace agreement was implemented it would only be natural to assume that the objectives of the ICTY would be implemented.

1. Formal and Unwritten Objectives of the ICTY

The objectives of the ICTY as outlined previously can be generally classified as the need for reconciliation, to act as deterrence, the need to bring the accused to justice, and to render justice to the victims. However, more importantly than the formal objectives outlined by the ICTY, is the unwritten but social expectation that law will establish the truth.

a. Reconciliation

The need for reconciliation can be applied to both real (fighting) and perceived (propaganda) hostilities. The notion of bringing justice or the threat of justice could lead to the suspension of animosities on all sides of the conflict in the former Yugoslavia. The ICTY can also place blame on individual war criminals and not stigmatize entire ethnic populations (Bass, 2000), thereby reducing continued perceived historical animosities. In order for this to occur the people of the former Yugoslavia must see the legitimacy of the ICTY. Only time will tell if the ICTY can bring long-term reconciliation to the people of the former Yugoslavia.

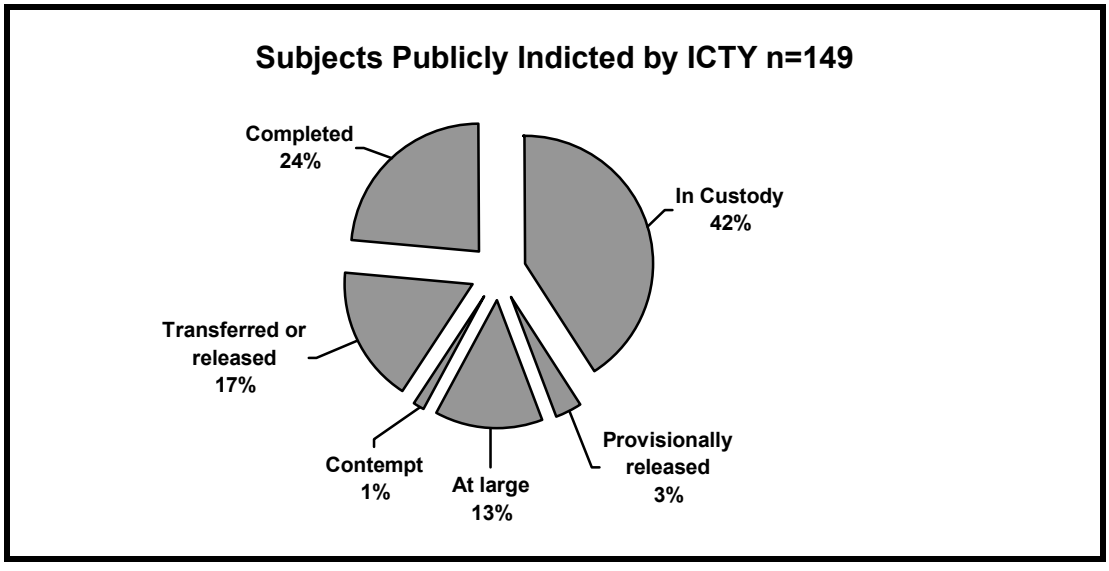
b. Deterrence

Deterrence of the commission of further war crimes can be either specific to Bosnia, or general (international community—other wars) (Akhavan, 1998). The creation of the Tribunal during the war may have protected or stopped some war crimes from occurring. However this is questionable as the war in Kosovo came many years after the Tribunal was created, and still years after its major move towards indicting major war criminals. It is possible that many of the war criminals did not take the threats punishment by the Tribunal seriously. There is no conclusive evidence to suggest that Tribunals act as a deterrence to war criminals. Even well established domestic legal systems have proved that the effects of deterrence are inconclusive for serious crimes like murder, or more simple crimes like shoplifting (Bass, 2000).

Examining the ICTY in isolation will not prove how effective international law is as a deterrent during the course of war. It is possible that successful prosecution of many war criminals at the ICTY will contribute to a series of successful war crimes tribunals. Then it may be possible to have a better understanding of deterrence.

c. Bringing Accused to Justice

Williams and Scharf (2002) suggest that there is an estimated 8-12,000 suspected individual war criminals from the former Yugoslavia. However as of January 2004 the ICTY has publicly indicted only 149 war criminals. Below is a chart that illustrates the breakdown of the status of these individuals. Most notably 35 cases have been completed (21 cases were withdrawn, 14 subjects have died), 20 individuals are still at large (arrest warrants issued) and 53 are currently in custody, 26 transferred or released following the completion of the proceedings (i.e. acquitted or found not guilty) (Le Goascoz, n.d.b).



However due to the sheer number of perpetrators, to bring all the accused to justice would overwhelm the resources of the ICTY (Bass, 2000). Individuals who are investigated and indicted by the ICTY are based on "prosecutorial triage"—those who are suspected of more serious crimes are concentrated on first (Akhavan, 1998). Bass (2000: 300) explains that at best "Tribunal justice is inevitably symbolic: a few war criminals stand for a much larger group of individuals." In essence the prosecutorial strategy has been to go after the big fish (Akhavan, 1998). The limitations of those who are held accountable to war crimes tribunals is not unique to the ICTY. Bass (2000) points out that historically tribunals, due to limited resources and limited evidence, have only intended to prosecute only a fraction of those who are guilty.

In addition the completion of the ad hoc ICTY has been mandated for 2008. As a result many of the perpetrators have been offered plea bargains in order to speed up the process. Some recent plea bargains have resulted in significantly lighter sentences than those previously issued by the ICTY. For example Predrag Banović a former guard at Keratem prison camp, after pleading guilty, was given eight years in prison for his involvement in killing five Bosnian Muslims and beating 27 others. In a similar case Mladjo Radić, who did not plead guilty was given 20 years for similar crimes.

The question remains that if only a few perpetrators will be prosecuted, how can the victims feel vindicated (Akhavan, 1998)?

d. Rendering Justice to the Victims

The next question is how effective can the Tribunal be concerning rendering justice to the victims, and can it really render the justice victims need? Based on the principles of criminal law it would appear that this objective would be almost impossible.

Criminal law is not known to be victim centred, nor has criminal law traditionally provided compensation. Criminal law has always focused on the acts of the accused, and not the suffering of victims. Criminal law requirements of mens rea (mental intent) and actus reus (the act) only reinforce its primary emphasis on the deeds and intent of the accused. Criminal law cannot be seen as representing the rights of the victim. The crime is no longer private against individual; rather it is a public offence against the state. The goal of criminal law is to punish the accused, where in contrast, civil law is concerned with providing compensation for the victims.

Keeping with this tradition of criminal law, it is not expected that the ICTY would be any different. However, as outlined above the Tribunal, the Statute, and RPE have gone to great lengths to ensure that they are sensitive to the needs of the victims especially to those who have survived sexual assault (RPE Article 96). In addition, Resolution 827, in its recommendation for the creation of the ICTY, suggests that damages could be awarded to the individual victims of crimes. However in the composition of the Statute and RPE, the drafters did not address the issue of financially compensating the victims.

In its presentation the law seems promising for the victims. However, these laws masquerade as positive for the victims, but cannot give anything back to them. Essentially the law entices the victims to testify. It offers them a forum that allows

them to share their stories. However it is a limited forum that one can only be invited to. Essentially the only way a woman's story is heard is if the OTP sends investigators to examine the crime. Williams and Scharf (2002) are critical not only of the few numbers of crimes actually investigated by the OTP, but also because the OTP has actively discouraged Human Rights groups from interviewing potential witnesses as they may taint the evidence, and thereby ruin the OTP chance of securing a victim if the OTP decides to prosecute.

In essence, the law operates only to sustain itself as an institution and not to render justice for the victims. It extracts what it needs and leaves behind what will not make a sound legal case. It also prefers to have prize catches, throwing the smaller fish back to either swim free or bait the bigger ones.

e. Establishing Truth

In an address to the Security Council in its deliberations leading to the establishment of the ICTY, US Ambassador to the United Nations, Madeleine Albright stated, "Truth is the cornerstone of the rule of law . . . And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process" (cited in Akhavan, 1998: 765).

An important expectation of the Tribunal is that it will establish a record of truth about what really occurred in the former Yugoslavia. It is expected that the " . . .recognition of indisputable facts before an impartial tribunal will help counter the distortions of demonization and ethnic hatred formed by certain political elite in the former Yugoslavia" (Akhavan, 1998: 741). In a similar vein, Bass (2000: 304)

suggests "the absence of a well established historical record facilitated denial that atrocities ever happened."

However the limit of truth telling is restricted within the confines of law. Notions like due process lead to technical acquittals and delays (Bass, 2000), and the suppression of the victim's truth telling to the provisions of a fair trial (Akhavan, 1998). Even Akhavan, a former legal advisor to the OTP at the ICTY from 1994 to 2000 suggests that

"It is in this respect that extravagant expectations and judicial romanticism about what the ICTY reasonably can achieve should be avoided" (Akhavan, 1998: 783).

It is likely that while the ICTY (the law) will establish one truth, while the victims of rape and other war crimes will very likely have a very different competing truth.

V. Conclusion

So what can the ICTY achieve in its attempts to render justice to the victims? The answer is that it is unclear if it has the resources and the wherewithal to even attempt to achieve this objective. However it is clear what the ICTY will not provide. Driven by time constraints and limited funds it will not provide financial compensation to the victims, it cannot try more than a fraction of the perpetrators, based on these limitations it can not establish a definitive record of truth.

It is naïve to assume that the tradition of criminal law can be transformed with the inclusion of a few Articles and Rules that appear to be victim centred. A few changes in the legal approach to sexual assault is a far cry from changing the entire

system and how it works. The women are not compensated for their suffering. We also know that the ICTY will only seek out a few war criminals, and most states will only look for war criminals if they come across them in the context of day-to-day duties, even then with the prosecutorial triage and the concentration on big fish. It is likely that the women in Bosnia will continue to live next door to the man that raped them since the ICTY has deemed that their rapist is a small fish and that the case is best left for the poorly established National courts with no protection at all for the victims. When the ICTY does deem the woman a valuable tool in the prosecution, she will be paid a small allowance, substantially smaller than the expert witness, to testify. She will relive the horrors of rape, while the expert needs only to have formally studied a dominant discourse such as medicine, psychology, or law.

Bass asks the following:

> Do war crimes tribunals work? The only serious answer is: compared to what? No, war crimes trials do not work particularly well. But they have clear potential to work, and do work much better than anything else diplomats have come up with at the end of war (Bass, 2000: 310).

According to Bass (2000) the ICTY may be far from perfect, but it is better than the alternative of simple retaliation and vengeance. However Bass is myopic in his views of possible responses to the crimes in the former Yugoslavia. Bass fails to acknowledge other alternatives, such as the establishment of a truth commission. A truth commission may be a positive option that is more victim-centred. Williams and Scharf (2002: 126) explain:

> If a truth commission is ever created it may significantly advance the victim catharsis process and facilitate the creation of an adequate historical record—in particular with respect to those individuals who played a central role in the commission of the atrocities, but who are

> now deceased. A truth commission may even be capable of generating leads and information of use to the OTP in its prosecutions, and could possibly be linked to an internationally funded victim compensation program, as in South Africa.

Noting the relevance of alternatives to justice as emphasized by Williams and Scharf (2002) I will revisit the notion of truth commissions in greater detail in Chapter eight of this thesis.

Undoubtedly the law is not doing enough to respond to the needs of women. In light of these shortcomings of law, other responses need to be considered. The international community should not expect the women of Bosnia to settle for a response simply because it is all we have. It is important that the women are asked what they want and what they need.

This Chapter has provided a detailed examination of the ICTY's Statute and Rules of Procedure. My analysis in this chapter has been limited to the existence of the legal response to martial rape in a "theoretical" sense. The next chapter will analyze this legal theory in practice through the interpretation of these laws in its application in the Kunarac, Kovac, and Vuković decision which addressed rape as a crime of war and a crime against humanity.

CHAPTER SIX: CASE LAW: APPLYING THE LAW AND ASSESSING BLAME

I. Defining Rape—Furundžija and Akayesu

As indicated in the literature review, the legal treatment of rape during war has evolved slowly from precognition to new trends in enforcement. The most recent opportunity, and the most progressive attempt to respond to rape as a war crime at the International Criminal Tribunal for the Former Yugoslavia, came via the Furundžija (IT-95-17/1) and Kunarac, Kovac, and Vuković (IT-96-23 and IT-96-23/1) decisions.

Furundžija was the local commander of a Croatian military police force known as The Jokers. The Jokers were part of the Croatian Defence Council (HVO)—the Bosnian Croat Army. It was alleged that after Furundžija had interrogated a female Muslim civilian and a Croatian soldier, he stood by and watched as his men raped the woman and beat the soldier. It was also alleged that Furundžija did nothing to stop these crimes from occurring. Furundžija was charged on the basis of individual criminal responsibility (*ICTY Statute* Article 7 (1)) with violations of the laws or customs of war (Article 3) – torture, outrages upon personality dignity, including rape. He was convicted on the basis of individual criminal responsibility of co-perpetrating torture and aiding and abetting in outrages upon person dignity (rape), which according to the *ICTY Statute* constitutes a violation of the laws or customs of war.

In the Furundžija case, the ICTY Trial Chamber noted that a statutory definition of rape was lacking in international law. The Furundžija decision attempted to fill this void by drawing on the case law developed in the Akayesu (*The*

Prosecutor v. Jean Paul Akayesu ICTR 96-4-T) decision, as well as national criminal statutes from different legal systems of the world.

Jean-Paul Akayesu served as the burgomaster, or mayor, of the Taba commune from April 1993 until June 1994. As the burgomaster he was responsible for the "execution of laws and regulations and the administration of justice" (*The Prosecutor v. Akayesu* ICTR-96-4-T: 5). Akayesu was charged with numerous counts of genocide, complicity in genocide, crimes against humanity—specifically: murder, torture, cruel treatment, rape, other inhumane acts incitement to commit genocide, crime against humanity punishable under violation of Article 3 Common to the Geneva conventions—a total of 15 counts, of which on nine he was eventually found guilty.

The significance of the ICTR decision regarding rape and genocide is that it set the precedent for the ICTY. It will be my intent to see how the Akayesu decision dealt with legal terms and classifications like crimes against humanity, genocide, and rape. Akayesu also stands as an important case as it was the first time that rape was seen as genocide. Lang writes that "Akayesu's conviction marked a vital transition from the understanding of rape as a tool during warfare—shifting it from a 'crime against humanity' to 'genocide'" a crime against a race. Rape is now considered genocidal because of its strategic use to infiltrate ethnic lines and terminate persecuted groups" (Lang, n.d.).

The Akayesu case noted that the " . . .central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts" and that the Tribunal should focus on the "conceptual framework of the state sanctioned violence"

(Akayesu, ICTR-96-4-T 597). The Chamber provided the following definition for rape, "a physical invasion of sexual nature, committed on a person under circumstances which are coercive" (597-598).

The Trial Chamber in the Furundžija case remarked that over the last few years, the general trend at the national level had been to broaden the definition of rape to include acts not previously described as rape. The national courts have also reflected a stricter attitude towards serious forms of sexual assault.

The Trial Chamber provides the following definition of rape based on the consensus of Statutes used by national courts, "the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object onto either the vagina or the anus" (Furundžija, IT-95-17/1, par 181). The Trial Chamber also reports that the maximum sentence imposed for subjects convicted of rape at the national level is life in prison.

In its review of national Statutes, the Trial Chamber found that there were inconsistencies in the treatment of forced oral penetration. Some courts classified it as rape, while others classified it more generally as sexual assault. Therefore the Trial Chamber decided it would be necessary to consider whether or not the act of forced oral penetration should legally be considered a form of rape.

The Trial Chamber held that forced penetration of the mouth by the male organ is humiliating, degrading, and an attack upon human dignity, and therefore violated the very underpinning of humanitarian law and human rights law. They concluded that, "…such an extremely serious sexual outrage as forced oral penetration should be classified as rape" (Furundžija, IT-95-17 par 183).

The Trial Chamber rejected the argument of *nullum crimen sine lege* (no crime with without law) principle, as it would apply to the classification of forced oral penetration as a form of rape. The rationale provided by the Trial Chamber for this decision is that in most nations, including the former Yugoslavia, forced oral penetration was considered a form of sexual assault which carried similar penalties, therefore the only complaint that could be held by the convicted subject is that he has a greater stigma as a result of being convicted of rape than being convicted of sexual assault. The Trial Chamber rejected this argument and reiterated that oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration.

For the purpose of international law, The Trial Chamber finds that the following acts constitute the objective elements of rape (Furundžija, par 185):

(i) The sexual penetration, however slight:
  (a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) Of the mouth of the victim by the penis of the perpetrator
(ii) By coercion or force or threat of force against the victim or a third person

From the above definition it is evident that there will be a need for greater interpretation and expansion of this definition. For example it does not address the issue of consent, or the command of one victim to rape another victim (as the cases of men and women and men and men).

By linking only one particular form of sexual assault to rape, International law shows that at this time it is not willing to consider every form of sexual assault (i.e., sexual assault without penetration) to be a violation of the laws or customs of war (Article 3 of the ICTY Statute), rather the sexual assault must be grave (i.e. penetration). The Trial Chamber also states that serious sexual assault falling short of

actual penetration is still *a crime* of international law and that the difference between sexual assault and rape is not a question of whether or not a crime has been committed, but rather used to determine how long the sentence should be.

However, since Furundžija was only interpreted in the context of one victim, and the subject was only charged (and successfully convicted) with rape as a violation of the laws or customs of war (Article 3) and not as a crime against humanity (Article 5), it is not clear if forced oral penetration and other grave forms of sexual assault will be considered a crime against humanity (Article 5 (g)). It was not until the Kunarac, Kovac, and Vuković decision that the definition of rape would be applied in the context of rape as a crime against humanity. The legal distinction between violations of laws or customs of war and crimes against humanity will be explored in the following analysis of the case.

II. Mass Rape- Kunarac, Kovac and Vuković

The Kunarac, Kovac, and Vuković case (IT-96-23 and IT-96-23/1) is better known as the "Foča Indictment" or the "rape camp case." Foča was a city and municipality in the Republic of Bosnia-Herzegovina that bordered Serbia and Montenegro (the reduced former Yugoslavia). The Foča indictment states that according to the 1991 census, the population of Foča consisted of a total of 40,513 of which 51.6% were Muslim, 45.3% were Serbian and 3.1% were "other." The indictment alleges that by April 16th or 17th, 1992, the town of Foča was completely taken over by Serb forces, and it remained under siege until mid July 1992. At the end of the conflict, the Prosecutor reports that only ten Muslims remained in the area

known as Foča (*The Prosecutor v. Kunarac, Kovac, and Vuković,* IT-96-23 and IT-96-23/1, par 46). During this time thousands of Muslim and Croatian inhabitants were arrested and were unlawfully confined in detention centres, while others were kept under house arrest. The indictment charges that during the arrests the men and women were separated and that many civilians were killed, beaten, and subjected to sexual assault (including rapes and gang rapes).

The accused Dragoljub Kunarac voluntarily surrendered to the Tribunal on March 4, 1998 and Radomir Kovac and Zoran Vuković were apprehended by SFOR (Stabilization Force in Bosnia and Herzegovina) on August 2, 1999 and December 12, 1999, respectively. In order to deal with the three in custody, the three co-accused named above were severed from the other five co-accused. Of the other five co-accused, Dragan Zalenović and Gojko Janković are still at large, Janko Janjić and Dragan Gagović were killed in separate SFOR attempts to apprehend the accused, and Radovan Stanković was successfully apprehended by SFOR on August 10, 2002. On March 3, 2003 the Prosecution filed to severe Stanković from the two accused who were still at large. Zalenović, Janković, and Stanković are all charged with rape and torture (Articles 3 and 5), and enslavement and outrages upon personal dignity (Article 3).

From August 1992 until February 1993 Kunarac (also known as "Zaga" or "Dragan") was the commander of a special reconnaissance unit for the Bosnian Serb Army. The indictment argued that as a commander, Kunarac was responsible for the acts of his soldiers. According to the indictment he allegedly knew that his subordinates were raping women and that he was personally involved in the acts of

rape. As a result the indictment charged him with the following crimes on the basis of individual responsibility (Article 7 (1)) and superior responsibility (Article 7 (3)):

- 2 counts of torture (crimes against humanity)
- 4 counts of rape (crimes against humanity)
- 1 count of enslavement (crimes against humanity)
- 3 counts of torture (violations of laws or customs of war)
- 5 counts of rape (violations of laws or customs or war)
- 1 count of outrages upon person dignity (violations of laws or customs of war)

Kovac (also known as "Klanfa") was one of the sub-commanders of the military police and a paramilitary leader in Foča during the time of attack and subsequent siege of Foča. Kovac was charged on the basis of individual criminal responsibility with the following charges:

- 1 count of enslavement (crimes against humanity)
- 1 count of rape (crime against humanity)
- 1 count of rape (violations of laws or customs of war)
- 1 count of outrages upon personal dignity (violations of laws or customs of war)

Vuković, like Kovac, was one of the sub-commanders of the military police and a paramilitary leader in Foča. Vuković was charged on the basis of individual criminal responsibility with the following charges:

- 2 counts of torture (crime against humanity)
- 2 counts of rape (crime against humanity)
- 2 counts of torture (violations of laws or customs of war)
- 2 counts of rape (violations of laws or customs of war)

The trial against the three co-accused began March 20, 2000 and concluded November 20, 2000. A total of 63 witnesses were called—33 by the prosecution, one by the Trial Chamber and 29 defence witnesses. On February 22, 2001 the Trial Chamber rendered its judgment.

Undoubtedly this case was ground breaking, as it was the first case to solely focus on mass rape, torture, and enslavement during war (Buss, 2002) and the first to successfully convict a perpetrator for these crimes. However, a more in depth analysis of the way in which the convictions were obtained and what was compromised and missed along the way will show that, consistent with Smart's theory, law is not always conducive to the needs of women. The four main sections of the judgment that will be analyzed include the applicable law, the evidence presented, the Trial Chambers findings, and the sentencing. Analysis and insights derived from the court transcripts will also be introduced.

A. The Law

The eight areas of law examined by the Trial Chamber in Kunarac, Kovac, and Vuković include individual and superior criminal responsibility (Article 7 sub sections 1 and 3), the common elements of violation of laws or customs of war (Article 3), the common elements of crimes against humanity (Article 5), and the unique elements of rape, torture, outrages upon personal dignity, enslavement and cumulative convictions. In providing definitions for these crimes the Trial Chamber was sure to identify the required criminal elements of *mens rea* and *actus reus*.

1. Criminal Responsibility

The indictments charged Kovac and Vuković with individual criminal responsibility, and Kunarac with superior and individual. As outlined in the *ICTY Statute* individual criminal responsibility includes planning, instigating, ordering,

committing or otherwise aiding and abetting in the commission or a crime of a culpable omission.

Article 7 (3) defined command responsibility as a superior who failed to stop or prevent a crime that violates the laws set out in Articles 3-5 of the ICTY Statute, or if the superior fails to punish a subordinate who commits these crimes. In order to establish superior criminal responsibility the Trial Chamber relied on the Delalić (IT-96-21 A) test which outlined three requirements: the existence of a superior/subordinate relationship, the mens rea which requires the superior to know that a crime was committed by his subordinate, and the actus reus—the superior failed to take reasonable steps to prevent or stop the crime from occurring. However, in the present case the Trial Chamber ruled that the prosecutor "failed to show that soldiers who committed the offence charged in the indictment were under effective control of Kunarac at the time they committed the offence" (Kunarac, Kovac, and Vuković, IT-96-23 and IT-96-23/1 par 628). As a result the charges against Kunarac were on the basis of individual criminal responsibility.

The Trial Chamber acknowledged that in many ways, specific crimes under Article 3 as well as Article 5 have several common elements. Therefore the Trial Chamber offers an examination of these common elements before it examined the unique elements of rape, torture, outrages upon personal dignity, and enslavement.

2. Article 3 Violations of the Customs or Laws of War

Article three is a "catch all category" of the ICTY Statute. This article ensures that the ICTY has jurisdiction over all serious violations. The majority of the

crimes associated with this category are derived from the *1949 Geneva Conventions*, most notably Article 3 – the Treatment of Prisoners of War. However, Article 3 of the *ICTY Statute* is not limited to those crimes identified in the *Geneva Conventions*. The residual nature of this article was noted in the Tadić (IT-94-1) decision. According to the ICTY Statute Article 3 includes rape, torture, outrages upon personal dignity, and enslavement.

In order for a violation to fall under Article 3—Violations of customs or laws of war there are six requirements as identified by the ICTY in the Tadić (IT-94-1) and Aleksovski (IT-94-14/1) decisions. These requirements include: the violations must constitute an infringement of the rule of international law, the rule must be customary in nature or belong to a treaty, the violations must be serious, there must be individual criminal responsibility, there must be an armed conflict and a close nexus between the alleged offence and the armed conflict, and finally the violations must be directed against a civilian population. In the case of Kunarac, Kovac, and Vuković the Trial Chamber accepted that the first three elements had been met, but it would need to examine the evidence and determine if the remaining three elements had been met.

3. Article 5 Crimes Against Humanity

The two elements unique to crimes against humanity (Article 5) include an *attack* (defined as acts of violence) and the existence of an *armed conflict* (defined as a resort to force). Unlike Article 3, crimes against humanity do not require a close nexus between the acts of the perpetrator and the armed conflict (Tadić, IT-94-1). Crimes against humanity focus on the act of the accused that occurred during an

armed conflict. The necessary actus reus and mens rea for crimes against humanity is attached to the individual act (not attack). The act of the accused must have a close nexus to the attack that is "widespread" and "systematic" and directed against a civilian population.

For the purpose of the ICTY, the term "widespread" refers to an attack that is large scale in nature, with a significant number of victims. The term "systematic" connotes that the attack is organized and thereby rejects the possibility of random or chance occurrences. However, within the definitions of "systematic" and "widespread", the Trial Chamber acknowledged that these definitions are relative and that they need to be interpreted within the context of the attack, and that the onus is on the Trial Chamber to identify the target population of the attack.

The Trial Chamber also stated that crimes against humanity could extend beyond the termination of the conflict. They report that "once the existence of an armed conflict has been established, international humanitarian law, including laws on crimes against humanity, continue to apply beyond the cessation of hostilities" (IT-96-23 and IT-96-23/1 par 414).

4. Rape

The Trial Chamber identified that rape in the context of the Foča Indictment falls under the ICTY's jurisdiction according to Article 3 and Article 5 (g) of the *ICTY Statute*. Its rational for jurisdiction under Article 3 comes from the *1949 Geneva Conventions* that identified rape as an outrage upon person dignity, whereas

Article 5 specifically identifies rape as a crime against humanity. The evolution of rape as a crime against humanity has been addressed in the literature review.

The Trial Chamber conducted its own general analysis of the major national legal system's criminalization of rape in attempts to find common principles regarding the notion of consent. The Trial Chamber focused on the following principles: force (coercion), vulnerability of victim/deception, and lack of consent.

The Trial Chamber confirms that rape is a violation of ones sexual autonomy and that coercion negates consent. The Trial Chamber also points out that Rule 96 (ii) states that in the case of sexual assault, consent will be considered absent unless freely given. The final definition provided by the Trial Chamber concerning rape in the case of Kunarac, Kovac, and Vuković requires the actus reus—the sexual penetration (oral, anal, or vaginal) and the necessary mens rea—the intent to effect penetration, and the knowledge that the act occurs without the consent of the victim.

In the Kunarac, Kovac, and Vuković decision the Trial Chamber spent considerable time tracing the evolution of the laws concerning torture, outrages upon personal dignity, and enslavement in human rights and international humanitarian law. While each individual crime category has important aspects, the discussion that follows only examines how these individual crime categories relate to rape as a war crime. Further examination of these crimes are relevant, but beyond the scope of my analysis.

5. Torture

The crime of torture falls under the jurisdiction of the ICTY vis-à-vis Articles 3 and 5. In the same vein as rape, prior to Kunarac, Kovac, and Vuković there was no definition in international humanitarian law concerning the crime of torture. After an extensive review of human rights literature, the Trial Chamber rejected the traditional human rights definition of torture that requires that the torture must be perpetrated by a state. In contrast, the Trial Chamber argues that according to international humanitarian law all individuals and parties can be held responsible for acts of torture. For the purpose of Kunarac, Kovac, and Vuković the Trial Chamber (IT-96-23 and IT-96-23/1 par 497) defined torture as:

i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
ii) The act or omission must be intentional.
iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground against the victim or a third person.

Based on this definition the crime of rape coincides the crime of torture as per subsections (i) severe pain and suffering (forcible sex or intimidation) and (ii) punishing and intimidating women on the basis of their gender and ethnicity.

6. Outrages Upon Personal Dignity

The ICTY has jurisdiction to try those accused with outrages upon personal dignity under Article 3 of the *ICTY Statute*. Article 3 of the ICTY corresponds with Article 3(1)(c) of the 1949 *Geneva Conventions*. In the present case the Trial Chamber argues that the definition of outrages upon personal dignity is not clearly defined. The ICTY had discussed the elements of outrages in the Aleksovski (IT-95-

14/1) case but failed to define this crime category exhaustively. Therefore the Trial Chamber provided the following definition (IT-96-23 and IT-96-23/1, par 514):

(i) That the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity and
(ii) That he knew that the act or omission could have that effect.

The important aspects of this definition are that the crime is an act or omission, that the violation causes a serious violation on the victim and that the mens rea requires that the perpetrator only needs to have knowledge that his acts could (and not necessarily know for sure that they would) have a detrimental effect on the victim.

Rape and perhaps what the court deems less serious forms of sexual assault (for example women being forced to dance naked on the table in front of soldiers) could also be seen as serious forms of humiliation and degradation and thereby fall under outrages upon human dignity.

7. Enslavement

The ICTY's jurisdiction for the crime of enslavement comes vis-à-vis Article 5 (c) of *the ICTY Statute*. After reviewing the extensive statutes, treaties, and conventions related to enslavement, the Trial Chamber provided the following definition for enslavement as it relates to the treatment of women and children and their compulsory labour and service at the time relevant to the indictment, "the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The mens rea of the violation consists in the intentional

exercise of such powers" (540). The Trial Chamber emphasized that there is control or restriction of the individual's autonomy (including sexual), and that the consent or free will of the victim is absent.

In the present case, the women were kept in collection centres (camps, high schools, sports halls, brothels, and apartments) where they were used for sex as well as forced to perform domestic chores. Undoubtedly the women's freedom to move and control over their own sexual autonomy was transferred to the soldiers.

8. Cumulative Charges

The question put before the Trial Chamber in the Kunarac, Kovac, and Vuković was could an accused be convicted of more than one offence for the same conduct? According to the Delalić decision (IT-96-21-A), the ICTY can allow for multiple convictions for the same conduct if the following requirements are met:

- There is more than one statutory offence based on the same conduct (i.e. rape as a violation of the customs or laws of war and as a crime against humanity).
- The offences have a materially distinct element
- If there is not a distinct element, the Trial Chamber needs to choose the more specific provision.

In regards to the present case the Trial Chamber has previously outlined that there are distinct elements for crimes that fall under Article 3 (*close link between the acts of the accused and the armed conflict*) and Article 5 (*widespread or systematic attack directed against a civilian population),* therefore convictions under both could be permissible. The same holds true for the offences of rape and torture under Articles 3 and 5 of the Statute based on the same conduct as the material distinct element of rape is *penetration* and torture is the *severe infliction of pain or suffering*

aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating against the victim or a third person.

B. The Evidence

The evidence presented in the Judgment included a synopsis of the testimonies of 21 witnesses, a total of one third of the witnesses were used to establish the roles of the accused. To ensure anonymity for the prosecution's witnesses they were referred to as "FWS" (for Foča Witness Statement) and an assigned number. The Court also provided voice and facial distortions for both witnesses for the Prosecution and the Defence when requested. The victims listed in the indictment ranged from 15 ½ to 38 years old, with the median age 23.75 years old. There was also mention of a 12-year-old victim who is still missing and is assumed dead. All the victims listed in the indictment were women.

In an attempt to understand the evidence presented at the trial I have organized the data within the following four concepts (see Appendix B)— testimonial issues, abuse which is divided into two central concepts: physical abuse and intimidation, and blaming the victims. I created these four concepts only as an organizational tool and to provide a simple representation of many facts. The specifics of the women's testimonies are identified as sub concepts under the corresponding concepts.

From the first concept "**testimony of the witnesses**" (Appendix C) I was able to further break it down into five sub concepts. These five sub concepts include: *contradictions* (internal—within their own testimony and external—between

women's testimonies), *inaccuracies* (date time and location), *inability to recall/remember specific incidences*, *the inability to identify the accused Vuković* (at the time of the armed conflict there were eleven men named Zoran Vuković residing in Foča), and the *lack of corroborating evidence* (Rule 96 does not require corroborating evidence for sexual assaults).

The second concept, "**physical abuse**" (Appendix D) is further broken down into seven sub concepts which include *enslavement* (locked in the apartment, forced to do chores, work in cafes, not free to move about, the women explained that they felt like property), *neglect* (food and sanitary supplies), *degradation* (forced to dance naked on tables, men ejaculated on woman's face), *physical—other than rape* (slapped, hit with the butt of the rifle), *trafficked* (women reported being sold and rented out), *separation from family* (men and women were separated, one mother and daughter reported being reunited after two years of being separated), and *rape* (the women described the rapes as being continuous, multiple perpetrators, and beast like, in many instances the rapists are still at large, or never indicted, some rapes described in the testimonies could not be considered relevant as they were not included in the indictment, one woman reported becoming pregnant, one woman reported losing her virginity, one woman reported being ordered to have sex with a 16 year old boy). The violent nature of rape by one woman who describes the rapes "It wasn't sex with pleasure, it was fury. They were taking it out on us" (Kunarac, Kovac, and Vuković IT-96-23 and IT-96-23/1 par 311).

These seven sub concepts, are for the most part legal categories as the testimony selected to be included in the Trial Chamber's Judgment as law is only

concerned with the legally defined crimes, and therefore concepts like Kelly's (1988) resisting, surviving, and coping are not adequately captured in the legal forum. Noting the limitations of law, I have gone beyond the legal realm to find women's voices through their sharing of stories. A detailed analysis of these stories is found in the next chapter.

"**Intimidation**" (Appendix E) is the third concept which is further broken down into three sub concepts which include the *existence of war* (uniforms and weapons), *verbal threats directed at the victim* (cut off breasts, cut off head, slit throat), and/or *to a third person* (son), and *psychological abuse* (women were told that they would enjoy being fucked by a Serb, and that they would have Serb babies, as well one Muslim woman reported that a soldier drew a cross on her back before he raped her). Intimidation played a key role as women admitted they complied with the men's requests out of fear.

The fourth concept identified from the Trial Chambers Judgment was "**blaming the victim**" (Appendix F). In attempts to refute the women's testimonies, the accused put the blame on the women by introducing what I have identified as three sub concepts. These sub concepts include the claim of a *romantic relationship* between the 32 year old accused and the 15 ½ year old witness (Defence witnesses testified that the victim appeared in love, she looked happy, that she allegedly sent a letter of gratitude, and that she received gifts), the accused also claimed that the *women lied* (fantasies, one accused was not able to get an erection due to a medical condition, and that one woman identified a corroborating witness who was dead—knowing that he could not be called to confirm the allegations), and finally the

accused argued that the *women showed initiative*, Kunarac stated, "I had sex against my will. . .without having a desire for sex. . .I cannot say I was raped. She did not use any kind of force but she did everything" (Kunarac, Kovac, and Vuković IT-96-23 and IT-96-23/1 par 231). These sub concepts fit with existing "rape myths" addressed previously in my literature review.

C. The Findings of the Trial Chamber

The Trial Chamber reiterated that it evaluated the evidence based on the guidelines provided in the *ICTY Statute* and the *ICTY Rules of Procedure and Evidence* as outlined in the previous chapter, and that the Prosecution bears the onus to prove guilt according to the accepted criminal law standard (beyond a reasonable doubt).

The Trial Chamber identified and acknowledged several factors that may account for errors or inconsistencies in the witnesses' testimonies. The Trial Chamber accepted that these factors should not be assumed to automatically discredit the witness, rather each testimony needs to be evaluated within the context in which the crime(s) occurred. As well the Trial Chamber offered the possible etiology of these errors. These factors include the vagaries of human perception and recollection, the turbulent and traumatic circumstances of the crimes, and fact that the witnesses were detained for long periods of times (weeks and months) without access to clocks, calendars and as a result they had no way to document experiences. In addition to these factors the Trial Chamber and the women who testified emphasized that the

crimes took place eight years prior to the Trial. For example FWS 132 states in the transcripts that:

> Another thing which I have to repeat, keep repeating, is first of all, that it was a very long time ago—eight years is the period—and I was a child at the time. Now I am a serious woman. And those people were, let me say, middle-aged. Of course, people change in the course of eight years. But there is a high degree of fear and trepidation that was present.

The Trial Chamber acknowledged that these factors may make it difficult for the Prosecutor to establish guilt beyond a reasonable doubt, but such factors alone should not negate the witnesses' testimonies. In addition, Rule 96 of the ICTY's *Rules of Procedure and Evidence* states that testimonies involving sexual assault do not need to be corroborated by other witnesses. In light of these factors the Trial Chamber took great care in determining the reliability of the testimonies presented.

The Trial Chamber found that the Prosecution had established that there was an armed conflict in Foča and its surrounding areas at the time in which the crimes were alleged to have been committed. The Trial Chamber also accepted that all victims were civilians and that Kunarac, Kovac, and Vuković knew that the women were Muslim civilians, and that the Prosecutor had established individual criminal responsibility for each of the accused.

Based on the testimony presented, and the evidence entered in court, Kunarac was found guilty on the basis of individual criminal responsibility for the following charges (the number of counts that they were charged with is in brackets):

- 1 count of torture (crimes against humanity) (2)
- 3 counts of rape (crimes against humanity) (4)
- 1 count of enslavement (crimes against humanity) (1)
- 1 count of torture (violations of laws or customs of war) (3)
- 4 counts of rape (violations of laws or customs or war) (5)

- 0 count of outrages upon person dignity (violations of laws or customs of war) (1)

Kovac was found guilty on the basis of individual criminal responsibility for the following charges:

- 1 count of enslavement (crimes against humanity) (1)
- 1 count of rape (crime against humanity) (1)
- 1 count of rape (violations of laws or customs of war) (1)
- 1 count of outrages upon personal dignity (violations of laws or customs of war) (1)

Vuković was found guilty on the basis of individual criminal responsibility for the following charges:

- 1 count of torture (crime against humanity) (2)
- 1 count of rape (crime against humanity) (2)
- 1 count of torture (violations of laws or customs of war) (2)
- 1 count of rape (violations of laws or customs of war) (2)

D. Sentencing

As a result of the Kunarac, Kovac, and Vuković convictions the Trial Chamber must rely on five sources to provide guidance for sentencing purposes. These sources include the *ICTY Statute* (Article 24), *The Rules of Procedure and Evidence* (Article 101), the general sentencing practices in the former Yugoslavia, the past sentencing practices of the ICTY, and the recommendations submitted by the Prosecution and Defence counsel.

As outlined in the previous Chapter, Rule 101 outlines that the maximum penalty that can be issued is life imprisonment. Rule 101 also states that aggravating circumstances, mitigating factors and general sentencing practices need to be

considered. The Trial Chamber must also give credit for the time served by the accused while they awaited trial.

In a similar vein, Article 24 indicates that in addition to the maximum penalty of life imprisonment, the Trial Chamber must also consider the gravity of the offence and that it has the power to order the return of property and proceeds that were illegally seized from the owner.

Sentencing practices in the former Yugoslavia can be used to inform and aid the Trial Chamber. However, because of the gravity of the crimes being tried by the ICTY, the Trial Chamber is not required to automatically apply the sentencing practices from the former Yugoslavia. Article 41 of the *Criminal Code of Socialist Federal Republic of Yugoslavia* outlines the "general principles in fixing punishment." These principles include: the circumstances, degree of criminal responsibility, motive, danger, injury, past conduct of the accused, personal situation, and conduct after the commission of the act. Article 142 (1) of the same Statute, identifies that those convicted of war crimes and crimes against humanity should be sentenced to no less than 5 years and in exceptional circumstances the death penalty. The death penalty was abolished in the former Yugoslavia in 1977, with the exception of Bosnia Herzegovina. In 1998 Bosnia amended their Criminal Code to use the death penalty only in exceptional circumstances.

Article 33 of the *SFRY Criminal Code* provides three reasons for the imposition of sentencing; specific prevention and rehabilitation, to deter others from committing similar crimes, and to strengthen the "moral fibre of a socialist self-managing society and influence on the development of the citizens' social

responsibility and discipline" (cited in *The Prosecutor v. Kunarac, Kovac, and Vuković* IT-96-23 and IT-96-23/1, par 834).

In the present case, the Prosecutor submitted several aggravating circumstances to the Trial Chamber to consider when sentencing the three accused. These circumstances included: the youthful age of the victims, rapes committed with ethnically based motives, rapes committed against detainees, rapes committed against physically weak persons who could not defend themselves, rape entailing multiple victims, and rapes at gunpoint. The Defence did not oppose the consideration of these factors for sentencing purposes.

The Prosecutor also argued that the conduct of the accused that had not been entered in the indictment should also be a factor considered when sentencing the accused. The Trial Chamber rejected this argument and made it clear that an accused can only be sentenced on what he has been with charged and subsequently convicted.

The Trial Chamber reported that ICTY jurisprudence has accepted that punishment should be for deterrence and retributive reasons. The Trial Chamber also noted the importance of rehabilitation programs and supports such endeavours, but it was not convinced that rehabilitation is a significant factor to consider in sentencing. In regards to specific deterrence the Trial Chamber argued that because of the nature of the crimes, and the context in which they occurred (war), it is unlikely that Kunarac, Kovac, and Vuković would be in the position to re-offend. However, the Trial Chamber acknowledged that it is unfair to impose a harsh sentence for the purpose of general deterrence, as it would be inappropriate to punish the convicted persons based on assumptions concerning what others *might* do.

In regards to retribution, the Trial Chamber referred to the Aleksovski (IT-95-14/1) case where the Appeals Chamber argued that retribution, compared to deterrence is an equally important factor to sentencing. The Delalić (IT-96-21) decision argued that the litmus test for sentencing is the gravity of the offence and Kupreskić (IT-95-16) suggested that the gravity combined with the degree of participation by the accused should be considered.

Based on the consideration of the above sentencing factors Kunarac, Kovac, and Vuković were sentenced to 28, 20, and 12 years imprisonment respectively. The aggravating circumstances considered in Kunarac's sentence included the young age of his victims, the extended period of time in which the women were held, the multiple number of victims, the discriminatory grounds on which the women were chosen (gender and ethnicity), and the vulnerability and defencelessness of the victims. The mitigating factors in Kunarac's sentence were his voluntary surrender, his substantial co-operation with the Prosecution and his statement of remorse. The aggravating circumstances in Kovac's sentence included the relative and very young age of his victims, the sadistic manner in which he carried out the crimes, the extended period of time in which the women were held, and the vulnerability and defencelessness of his victims. The Trial Chamber found no mitigating factors in Kovac's case. Finally the aggravating factors in Vuković's sentence were the young age of the victims and the vulnerability and defencelessness of the victims.

The three defendants appealed, and the Appeal Chamber rendered its judgment June 20, 2002. The Appeals Chamber rejected all grounds of the appeal and confirmed the sentences issued by the Trial Chamber. The most relevant ground

to my research was the Appellant's challenge to the definition of rape. The Appellants argued that rape should include the notion of continuous genuine resistance on behalf of the victim. Kovac's lawyer argued, "resistance must be real throughout the duration of the sexual intercourse because otherwise it may be concluded that the alleged victim consented to the sexual intercourse" (IT-96-23 ; IT-96-23/1 A par 125). The Appeal Chamber agreed with the decision reached by the Trial Chamber that coercive circumstances made consent impossible and dismissed the Appellants' grounds of appeal relating to the definition of rape. On November 28th, 2002, in accordance with *Agreements on the Enforcement of Sentence* between specific European States and the United Nations, Kovac and Vuković were transferred to Norway to serve the remainder of their sentences. And on December 12th, 2002 Kunarac was transferred to Germany to serve the remainder of his sentence.

E. Issues Evident In Transcripts

The judgment handed down by the ICTY provided a summary of the evidence and testimonies presented during the Trial. However, the judgment, in my opinion missed some important aspects of the Trial. By reviewing the transcripts, which total close to 7,500 pages, I was able to identify two issues that were not adequately described in the judgment. These issues include the problems associated with the procedures of international law—most notably demonstrated by the Defence, and the issues associated with translation. An additional issue that I was able to identify from

the transcripts was the limitation of not being able to view Kunarac, Kovac, and Vuković's behaviour in the court.

Upon reading the transcripts, it was evident that the Judges provided extensive guidance to both the Prosecutor and the Defence in regards to the procedures and rules of international law and more specifically the ICTY. On several occasions the Defence reiterated that they were not familiar with this type of legal procedure. For example, one Defence lawyer stated, "I do apologize to the Trial Chamber and my colleagues for this misunderstanding. I think it comes from the different systems we stem from and the systems that we have become used to, the procedures we have come accustomed to, and how we present motions and submissions to courts of law." And at another point in the Trial the Defence counsel stated, "We are doing our best to become part of the procedure practiced in this Tribunal."

Closely related with procedural issues, are the issues related to translation. The official languages of the court are English and French, but the translation is required into Bosnian/Serbian/Croatian. For example the accused, and for the most part their legal representation do not speak English (except Defence Counsel Ms. Lopić), and the Prosecutors did not speak Bosnian/Serbian/Croatian but their witnesses did. The transcripts revealed that some words in both languages do not have adequate translation in the other. The translation also created pauses, and noticeable breaks in the flow of the testimonies and examinations. Because I do not speak Bosnian/Serbian/Croatian it is difficult for me to know to what extent statements and words were taken out of context. However, I am aware that this possibility exists.

Examining the transcripts also gave some (although not a complete) indication of how the accused behaved while witnesses were testifying. It is a definite shortcoming not being able to view the non-verbal indicators. In one instance, the accused, Vuković allegedly threatened Colonel Nogo, an expert witness for the Prosecution. Judge Hunt stated the implication of such behaviour:

> The reactions of an accused person in court can be relevant in many ways. Sometimes their reaction to the evidence of witnesses which has been given against them may indicate their acceptance of its truth. Their reaction to the evidence of witnesses may be relevant to their credit should they subsequently give evidence themselves. Your client has certainly not hidden his reaction to the evidence of some of the witnesses in this case, particularly some of the female witnesses who have given evidence against him.

It is a definite shortcoming not being able to view the non-verbal indicators.

III. Analysis

In attempts to analyze the Kunarac, Kovac, and Vuković decision my evaluation will address the three problems associated with law as a discourse as identified by Smart's theoretical approach to the sociology of law as outlined in the literature review. These problems include the alleged *omnipotent power of law*, *laws inability to respond to the diversity of women*, and *laws ability to silence women*. For the purpose of analysis these problems are separated, but it is my opinion that it is too artificial to exclusively separate the problems. The three problems are interrelated as they legitimize one another. The overlap will become evident in the following discussion.

Omnipotent Power of Law

In the Kunarac, Kovac, and Vuković decision the limited power of law is exemplified by the fact that the Trial Chamber is only able to respond to the "wrongs" identified in the Indictment. At several points in the Trial Chamber's decision the Judges acknowledged that while the women's testimonies provided a factual basis for many rapes, these rapes were not identified in the Indictment and as a result the Trial Chamber could not convict the accused on this evidence, nor can these acts of rape be used for sentencing purposes. This reflects laws inability to adequately respond to the new information obtained during the trial process. Therefore the law is only as powerful as its indictments. This shortcoming is closely linked to the restrictive methodology of the law.

In addition to an incomplete and "convoluted" (Buss, 2002) indictment, law is limited in its power vis-à-vis the few perpetrators brought to trial. For example the Foča Indictment identified eight perpetrators, however the Kunarac, Kovac, and Vuković case only dealt with three of the accused. Of the remaining perpetrators two remain at large, two were killed in apprehension attempts and one is in custody waiting trial. It is difficult, if not impossible to predict exactly how the Trial Chamber would have decided if all of the eight accused were present at the trial. The women's testimony also revealed that some men who raped the women have never been indicted. Perhaps a more holistic picture of the rape camps in Foča may have led the Trial Chamber to conclude that rape was a tool of war. Most notably, if Gagović (former Police Chief) would have been brought to justice more information may have been ascertained concerning the alleged letter ordering rapes. Hearsay

concerning the letter was introduced at the Trial level, but was not substantiated. In addition a better understanding may have been obtained concerning command/superior criminal responsibility.

Another issue related to the failure to capture and try all accused at once is the fear of retaliation among the witnesses who testify. The women who did testify expressed concerns for their own safety and the safety of their family members, as some of the people mentioned in their testimony were still at large.

It cannot be expected that all perpetrators will be brought to Trial, nor will all crimes be brought to justice. Even the Prosecutors in this case stated that it was not their intent to ". . .indict a person who raped once. . .we wanted to have a leading person raping many, many times" (quoted in Hagan, 2003: 178). This leaves very many men uncharged and free to live amongst the women they once terrorized and raped.

It is also evident that preference is given to the rights of the accused and the efficiency of the Trial Chamber, and not to the women who suffered. In its judgment the Trial Chamber wrote:

> Considerations of fairness to the accused and judicial economy, however, outweigh the wish to have each and every crime committed during war brought to light and adjudged in whatever way—that is something which the is International Tribunal simply cannot do (IT-96-23 ; IT-96-23/1 A par 850).

While the ICTY documents fail to define what the Trial Chamber means when it utilizes the terms judicial economy, I have interpreted the terms to refer to the efficient use of the work of the judges (collectively). An example for the ICTYs attempt to maximize judicial economy is Rule 94 of the RPE (IT/32/Rev. 30). Rule

94 or Judicial Notice, allows the judiciary to accept certain facts as if they are either common knowledge or they have already been proven in another case. Another example of judicial economy is the joint trial where more than one accused is tried at the same time (i.e. the Kunarac, Kovac, and Vuković decision).

Even in the few instances that perpetrators are brought to trial and are successfully convicted of crimes (i.e. the crimes are proven beyond a reasonable doubt), the Trial Chamber will only be able to verbally condemn and physically incarcerate the accused. The Trial Chamber's ability to respond to the women is restricted as it will not be able to provide damages to the victims (as noted previously in chapter five).

Also the sentences as handed down by the Trial Chamber seem lenient when attention is paid to the continued and repeated nature of the rapes. Askin (2001) states that the accused are essentially "serial rapists", yet their sentences do not reflect the extremely serious nature of the crimes. Originally the Prosecutor asked for 35 years for Kunarac, 30 years for Kovac, and 15 years for Vuković.

Despite its shortcomings, the Trial Chamber still attempted to assert that law was the prevailing discourse that ultimately trumped any competing discourses (such as the psych and medical) that attempted to make claims to the "truth." Judge Hunt made the following statement concerning the Defence's request for testimony by a medical expert, "I was asking you why a doctor is in any better position than we are, as ordinary citizens, in determining where the truth lies." However Judge Hunt fails to notice the irony, if we replace the word "doctor" with "judge" and the words "we are" with the word "victims", the critique he applied to the medical discourse is just

as relevant to his own existence and the legal discourse. The Defence Counsel even insisted that the prosecution "did not prove that the alleged victims of rape were exposed to any severe physical or psychological suffering" (cited in Hagan, 2003: 1999).

Law's Inability to Respond to the Diversity of Women

Another problem with law, demonstrated in the Trial Chamber's response in the Kunarac, Kovac, and Vuković decision is it inability to acknowledge the diversity of women and their experiences. In its review of the evidence it presented women as "vulnerable" and "weak." The concepts, as outlined in the taxonomies I created from the Trial Chambers discussion on the women's testimonies, focused on the monolithic script of women as victims and denied the notion of women as survivors. Buss (2002: 98) explains why this is problematic, "My concern is that these developments may leave unchallenged dominant assumptions and constructions of women's sexuality and their role—as 'victims'—in wartime." The law is also limited to seeing those acts that it has identified as crimes and it fails to identify long-term effects of the crime of rape such as pregnancies and sexually transmitted diseases (non-crimes). The women's testimonies revealed that these non-crimes consume all aspects of their lives. Many witnesses spoke of diseases that they could not cure, stress, anxiety, and nightmares. The women's testimonies also revealed an adamant denial of pregnancies. One witness stated to the Defence, "And please don't say that. Don't tell me that I was pregnant, and that the doctor told me I was pregnant. I was not."

The women's words as revealed in the transcriptions showed notions of coping, resisting, and surviving (Kelly, 1988). However, little data was provided in the judgment for these notions. Of the three notions, coping was the least articulated in the transcripts, and completely ignored in the judgment. However the several women spoke about surviving.

Surviving, or the continued living (Kelly, 1988) after rape is evident in the women's testimonies and reinforced by fact that they lived through rape and war to testify. Many of the women who testified at the Tribunal spoke of how their survival was temporarily interrupted with thoughts of their desire to die. FWS-48 testified that she would rather be taken to the Drina and be thrown in. On another occasion she asked the soldiers to " . . .just take a rifle and kill me and let it be." And yet on a third occasion she told the man who raped her to, "Slaughter me now. But if I do stay alive, I'll say that you raped me." "Now you have a pistol, you have a rifle you can kill me."

Another witness spoke of how after surviving the war she wanted to die. She attempted suicide by trying to throw herself out of a window. She explained, "So how could I carry on living? Even if my husband is alive, how could I meet him again after everything that has happened? And I tried to commit suicide."

Another women spoke of how the need to take care of her kids was the basis of her survival. FWS-95 stated, "Because I had two small children. What would happen to them? I thought to myself: If they kill them kill me."

In regards to physical resistance, or the refusal to co-operate or submit (Kelly, 1988), the women told the Tribunal of the innovative ways they protected themselves

and their children from plunder and rape. FWS-192 explained how she and her children managed to conceal money and gold from the soldiers who forced them to turn over all their belongings. She stated that, ". . . some of them [the women] had stitched into their clothing. And I remember that my daughter had stitched in some money and jewellery into a bow, into a ribbon she had around her hair."

In order to protect themselves from being raped the women explained how they would hide. FWS-50 explained that she would try to hide under a blanket or hide in the washroom. FWS-152 explained how she would hide her daughter A.S., "I hid her behind my bag in the Partizan." FWS-75 explained how, "when they (the soldiers) would come during the night, I would lie down, my grandma would lie over me, over there in Partizan, and I would hide because I could not take it anymore."

Another witness spoke of mental resistance, which involved withdrawing into her self. FWS-132 spoke how her resistance involved not internalizing what was going on. She spoke of how the soldiers could physically control her, but not mentally. She stated, "We girls, children, were hopeless. They were men under arms and they used force. But simply I did not want to be subdued. They would often describe us as slaves, but I wouldn't accept that, though I could not say it often. But intimately I would refuse to accept it, though it was the truth."

In addition to failing to address the multiplicity of women's lives, The Trial Chamber did not make an attempt to critically examine and challenge the masculinities associated with the typically male discourses such as war, military, and nationalism (Buss, 2002) as defined in the literature review. However FWS-75 provided an insightful look into the masculinities associated with war:

> They (the soldiers) were very low-life people. But when the war broke out, as soon as they managed to get their hands on some rifles, they began to feel big and strong. But they were only brave with us women and children. Yes, they were really brave. And when they killed all the people in my village, women and children, they would celebrate. It was a cause for great celebration. And of course it's easy to kill someone unarmed, and that was their bravery, against innocent, unarmed people.

Silencing

The Trial Chamber's flexible approach to dealing with the women's testimonies is commendable as it gives significant consideration to the aggravating circumstances. However, in reviewing the Trial Chamber decision it is evident that consistent with other criminal courts, the ICTY is ultimately bound by the archaic rules of evidence and relevance and as a result provides a strict reading of criminal law (Buss, 2002). For example some of the counts were "redacted" for insufficient evidence and, as alluded to previously, the indictments that were not properly drawn up. Buss suggests that in this respect the ICTY "reproduces many of the same problematic aspects of the 'rape trial' found in domestic legal systems" (Buss, 2002: 99). Buss also supports my argument that women's stories may provide a better forum for "accounting for, and reconciling the experiences of these women" (2002: 99).

On the surface it appears that the Trial Chamber should also be highly praised for its rejection of the Defence's attempts to blame the victim. However, in reference to the alleged consensual relationship between Kovac and the young witness, Prosecutor Uertz-Retzlaff explains how it was exceptionally difficult on the women when they were recalled to refute this evidence. She states, "This was a really bad

experience for them. They were very, very angry about this situation" (quoted in Hagan, 2003: 198). When the Defence was overstepping, it was the Judges who intervened, and not the Prosecution who objected. On several occasion the judges would interrupt the Defence's questions, and request that the Defence refrain from badgering the witness. In addition to intimidating the witnesses the Defence counsel attempted to undermine the protective measures on several occasions. For example at one point the Prosecution had to interrupt the Defence to remind them and the Trial Chamber that they were asking questions that were too narrow and if the witnesses responded they would be revealing their identity. On another occasion the Registrar had to remind the Trial Chamber "we cannot guarantee the protection of the witness in terms of distortion of her voice if the counsels don't switch off their microphone while the witness is talking."

The Trial Chamber rejected the three opinions presented by the Defence expert witnesses. The Trial Chamber was quick to dismiss the argument that the women initiated the sexual assault, and that the women lied (common rape myths). One expert witness, Dusan Dunjić, a forensic expert stated that ". . .half of the women who report themselves to be rape victims weren't actually raped, and half of them want to deceive a young man or blackmail him." While Brownmiller's (1975) argument of the masculine fear of false accusation is an accurate assertion, her 2% rate is outdated and may be faulty for some of the reasons outlined by Greer (2000).[7] However it is not likely as high as the expert witness in this case suggests (50%).

[7] In his analysis of Brownmiller's 2% figure, Greer argues that the figure is erroneous and has been misused as it is premised on Brownmiller's interpretation of "some data" (Greer, 2000: 956) which originated from a judicial comment.

The Trial Chamber also rejected the expert testimony of Stanko Bejatović, a researcher at the Criminological and Sociological Institute at Belgrade and a Professor at Belgrade University Law School. Speaking in regards to rape in the domestic sense, Bejatović explained that the motives of the perpetrator was most likely ". . .because of the sexual drive which occurred at a given time." By framing rape as a sexual crime, this expert witness is failing to see rape as a crime of violence, a crime of control and a crime of power. The necessity of seeing it as both ensures that rape is a crime that is related to masculinities (sexual) and results in harm (violence). The Trial Chamber also rejected the need for physical proof of harm (i.e. evidence that they women had been raped).

However, Askin (2001) argues that this decision "lends credence towards efforts to place the stigma of sex crimes squarely on the perpetrator not the victim." It is possible that this case was more progressive in its decision as in this instance rape during war can more easily be seen as "real rape" something that equates to stranger rape in national systems. Buss (2002: 98) explains "It is the 'ideal' of rape, where an innocent, helpless woman is at the mercy of a brutal stranger. In this context, issues of consent and competing narratives of women's sexuality that dominate rape trials in Western legal domestic systems are more easily marginalized."

In regards to enslavement, Askin (2001) is critical of the Trial Chamber's inability to adequately mention the sexual nature of enslavement in this case. She argues that when it did mention the sexual nature of enslavement it treated it ". . .as

merely one of a number of indicators of enslavement, instead of treating it as an inherent part of and the principal purpose of enslavement" (Askin, 2001).

An examination of the transcripts also reveals that the legal process and methodology silenced the women. In several incidents, the women were describing their experiences and when it did not fit within the Defence framework, the lawyers would cut them off. For example at one point the Defence counsel stated that, "We heard—have heard your story several times. Would you now refrain from that and answer my questions." It was evident that the women's agendas and versions of the truth were inconsistent with the objectives of law. The defence stated on another occasion, "We have heard your version of the story. My question now is. . .." The Defence also patronized the witnesses by telling them to calm down and by denying the anger. For example the Defence lawyer stated, "Well, please don't get angry. You have no reason to be angry?" And the witness responded, "What do you mean I have no reason? Did I have a reason to be raped? Did I want to be raped?"

Two additional areas where the law failed to accommodate women's stories involve acknowledging the women's reasons for testifying and its failure to adequately note women's active approaches to resist legal methodology.

In reviewing the transcripts it was evident that the women came to the Tribunal to share their sense of pride and to let the accused know they did not erase their identity. One witness explains:

> We didn't have any physical consequences, but I, as a member of an old Bosniak family, I think that no major traces have been left in our mental states, but the wounds and scars remain and I'm trying to overcome them. And in spite of everything, I have managed to remain proud and dignified; and proud, in the first place, of my name, my belonging to that ethnic group.

In more general terms many women explained that despite how difficult it was to speak out they wanted the world to know the truth. One woman stated that she believed the experience would be cathartic and aid with her healing process. The transcript reads:

Q. Can you describe why you finally decided to speak to the Tribunal?
A. Because of my future.
Q. Can you be more specific about what you mean?
A. To say what happened.
Q. And in what way is that related to your future?
A. It will make me feel better.

While previously I discussed women's resistance to rape in the context of Kelly's (1988) theory, the women also resisted laws' restrictive methodology and adversarial nature. As alluded to earlier, the Defence, as is the case with most criminal procedures, were often pitiless with the witnesses. However the women were anything put passive recipients of the abuse dished out by the Defence. Many women launched their own resistance to the Defence's brutal legal campaign. I have selected four poignant examples extracted from the transcripts to support this point. I have chosen to present these examples verbatim as I think the women's voices should be heard.

The first incident, the witness shows her reluctance to be asked the same question over and over again by the Defence Counsel:

> A. Not in the hotel but, yes, he did, in the secondary school, and please don't ask me that question again.
> Q. Well, Witness, you can't tell me what questions to ask you and what not to ask you.
> A. Yes, but you have been asking me the same question five times.

The second incident involves the witness telling the Defence Counsel not to bait her, or ask her questions she is not supposed to answer:

> Q. Please don't say where you were.
> A. Don't ask me the questions that you're not supposed to ask me, then, please.

In the third incident a witness tells that Defence Counsel that they are not paying attention to what she is saying or what she had written:

> A. You should have read that more carefully.
> Q. Will you please be more polite, as I am trying my best to treat you with politeness.
> A. I think I'm treating you sufficiently well.

And finally, one witness expressed her frustration concerning the questions of consent and rape:

> Q. And against your will?
> A. Please, madam, if over a period of 40 days you have sex with someone, with several individuals, do you really think that is with your own will? And people who deal in professional prostitution, do you consider that they have sex as many times? Can you answer my question, please?

Despite its progressive attempt to deal with sexual assault, the true impact of the Kunarac, Kovac, and Vuković decision will not be revealed until the laws are used again in subsequent trials at the ICTY, the ICTR, or the International Criminal Court dealing with rape and other forms of sexual assault. It is a utopian aspiration to assume that law's ability to right the wrongs, in terms of the needs of the victims, will become a reality within the existing international criminal justice system. It is also unlikely that assumptions of women as victims will change in criminal law at any level (national or international) as it does not allow for a survivor centred approach.

Based on the inherent shortcomings of the law we need to look elsewhere to hear the voices of the women who survived rape and other forms of violence in the former Yugoslavia.

CHAPTER SEVEN: WOMEN'S STORIES: THE HEALING BEGINS

I. Introduction

The previous chapter indicated that law has virtually silenced women's voices within the legal discourse. When women's voices concerning war are heard, women are only permitted to articulate their experiences that fit within the legal definition of rape. As a result the women's experiences are sometimes distorted, challenged, and denied. What follows is an amplification of women's voices and augmentation of women's experiences during war—beyond the legal realm. Julie Mertus and Jasmina Tesanović (Mertus, Tesanović, Meitkos, and Borić, 1997: 15) explain the importance of listening to what women have to say, "Women's words are the substance which qualifies victory or defeat, the wisdom which challenges the slaughter, the power of the powerless which demands to be heard."

After examining why I have chosen the women's stories from *The Suitcase* (Mertus et. al., 1997) and *Women, Violence, and War* (Nikolić-Ristanović, 2000), I will outline several concepts that I feel, based on the women's words, represent women's experiences. These concepts include *descriptions of war*, *crime* (the following sub concepts—rape, prostitution, sexual enslavement, harassment, exploitation, looting and document fraud), *death and disappearance, identity, ethnicity, family, friends,* and *memories*.

In addition to explaining women's experiences, I have included a discussion of women's empowerment, their concepts of survival, and an examination of what women say that they need in terms of assistance to continue to survive post war. The

importance of empowerment and reconnection is explained by Martha Minow (1998: 65):

> Empowerment—restoring a sense of power and control—and reconnection—reviving a sense of identity and communality—become the building blocks for healing. Reaching out to help others and to prevent future victimization can help survivors regain a sense of purpose and reason to live.

After examining the above concepts and necessary sub concepts, I will provide an analysis that compares legal stories (one version of the truth) with those stories presented by women (a multiplicity of truths).

II. Sources of Stories

The data used in this chapter was derived primarily from two sources, *The Suitcase* (Mertus et. al., 1997) and *Women, Violence, and War: Wartime Victimization of Refugees in the Balkans* (Nikolić-Ristanović, 2000). Both books are edited works that have collected stories from women who resided in the former Yugoslavia prior to, during, and in some instances after the war.

The Suitcase presented a total of 87 stories (in their raw unanalyzed form), with analysis restricted to the introductory chapter and the postscript. Most of the stories are from women and female children. The editors explain that this is consistent with the fact that over 80% of the refugees from Bosnia and Herzegovina are women and children (Mertus et. al., 1997:13). The stories were collected by a human rights lawyer, two women who worked at the Centre for Women War Victims in Zagreb, and two other women who were assisting refugees in Bosnia and Zagreb. The women asked that potential contributors focus on their experiences beginning

when they fled their homes, and if possible to describe day-to-day life and how they were feeling. The submissions were sent via e-mail, personal contacts in refugee and humanitarian organizations located in Slovenia, Croatia, Bosnia Herzegovina, Serbia, Pakistan, and Switzerland, journalists, peace and human rights groups and refugee run organizations (such as a magazine). The stories were selected, translated and edited by the editors Julie Mertus, Jasmina Tesanović, Habiba Metikos, and Rada Borić (1997). The editors clarify their strategy for compiling *The Suitcase*, "Our policy was simple: look for contributors everywhere and read everything sent to us" (6).

The editors did not claim that the stories presented in *The Suitcase* were a representative sample of the women in the former Yugoslavia. Nor did they consider the collection a scientific endeavour. Rather, they describe it as such, "An ad hoc collection of stories, this book presents small corners of a many-angled refugee population scattered throughout the globe" (6). Consistent with the tenets of feminist research, the editors state that they do not, "seek to make refugees into an 'Other.' Here refugees are the subject, not the object" (7). The editors ensure that the refugees maintain control over their words. They state, ". . .we have striven to publish the refugees' stories in as full and honest voice as possible" (7). The editors also acknowledge that the organization and the presentation of the women's works was an enormous responsibly, and it was one that they took very seriously.

Some of the potential problems associated with using the data contained in *The Suitcase* include the lack of resources and its unequal representation of ethnicities. The editors also recognize that they had a "budget of zero" and attempt to do the best they could with the marginal funding. Major support for the research

came from Oxfam—a British based international humanitarian aid organization. The authors did not provide a breakdown of which ethnicity the women belonged to, but all Yugoslavian ethno national groups are represented. However, it is evident from their stories and names that most of the women were from Muslim and Croatian communities.

Women, Violence, and War, which is also an edited volume, is comprised of different chapter writers. These individual writers include Nataša Mrvić-Petrović, Vesna Nikolić-Ristanović, Ivana Stevsnović, and Slobodanka Konstantinović-Vilić (and various combinations of the above mentioned authors). However, the writers drew their analyses from the same data set that was provided by 70 contributors from the former Yugoslavia. Unlike *The Suitcase*, the majority (53 contributors or 76%) were Bosnian-Serbs.

Parallel to Mertus et. al. (1997), Nikolić-Ristanović and Stefanović (2000) explained how they attempted to stay true to feminist research:

> Feminist research is supposed to collect data on women's experiences in a way that overcomes the traditional hierarchical relations between the interviewer and the interviewee, and makes possible for those interviewed to become the subject, and not the object of research (35).

The writers also acknowledge that they had a great responsibility as the gatekeepers of the women's words. They state that, "We tried to preserve the women's experiences to their full extent, both in terms of their content and the richness of the their language" (37).

In reference to researcher objectivity in *Women, Violence, and War*, Marina Blagojević a Senior Researcher at the Institute for Criminological and Sociological Research, Belgrade, Yugoslavia, a sociologist and feminist states:

> The authors of this book do not pretend to hold the truth, not so they hide the fact that objectivity is not the supreme goal of their research. On the contrary, the sense of this study is the painful writing of the narrated female experience; so rich so dense that it cannot be reduced or compared to some other similar experience. The essence of the trauma is very bound up with the fact that the victim's experience cannot be communicated in (and cannot be reduced to) the terms of dominant discourse (cited in Nikolić-Ristanović, 2000:xi).

In a similar vein as Mertus et. al. (1997), Nikolić-Ristanović, (2000) used feminist groups to connect with interested contributors. In order to obtain data for *Women, War, and Violence* the authors' liased with Women in Black, SOS Hotline for Women and Children victims of Violence, the Autonomous Women's Center against Sexual Violence and the magazine *Feminist Notebooks.*

However*,* unlike the collection methods used in *The Suitcase*, (the "take what you get" approach) the data collected in *Women, War, and Violence* is more structured in their data collection and design. The authors asked open-ended questions that they argue acted as a guideline, not a blueprint, for the interview. The methodological sampling was based on referrals from local women's groups and women who knew other women who had stories to share. Since *Women, War, and Violence* was the final product of the authors' research, it also provides more analyses than raw data. Therefore for the purpose of my research I have noted when I was guided by the authors' analyses by citing the author, but have tried to rely more on the women's raw data as it is presented.

III. Women's Voices

After reading the women's stories in *The Suitcase* and *Women, War, and Violence*, I have identified the following concepts: *description of war, crime* (including the following sub concepts—rape, prostitution, sexual enslavement, harassment, exploitation, looting and document fraud), *death and disappearance, identity, ethnicity, family, friends* and *memories*. Each concept will be discussed below.

1. Description

Many refugees set the stage by explaining the general climate of the former Yugoslavia prior to the war. Some women spoke about how they never imagined that one day they would be refugees, "we didn't believe it would happen to us" (Mertus et. al., 1997: 15). When the reality of the war surfaced the women spoke of how they assumed that the war would be short-term and how they never thought that they would be forced to leave. Lepa, 56 years old states, "at the beginning, there were no big problems, except insecurity and tension" (Nikolić-Ristanović, 2000: 211). Gordana Ibrović (41years old, from Sarajevo, Bosnia Herzegovina) explains, "For the first few months of the war, I never contemplated leaving Sarajevo. I kept thinking that the war would end and we would rebuild the city" (Mertus et. al., 1997:35). Another woman, Vinka Ljubimir (32 years old from Dubrovnik, Croatia), states that they saw all the warning signs, but hoped that the situation would not deteriorate any further, "We could not imagine that in Europe, again, for the third time in the twentieth century, bombs were going to fall on civilians, that there were going to be

massacres, that rape was going to be employed on a large scale for territorial gains" (47). Zorica (19 years old) explains how her cousin was prepared, but she herself remained in denial. "Although she [her cousin] slept with her clothes on, with a suitcase in her hand, I continued believing that this would not happen" (Nikolić-Ristanović, 2000: 211).

After the war commenced the refugees describes how quickly the violence came and how many were forced to flee their homes with few personal belongings. Mira Sudzukovic (60 years old from Lika, Croatia) explains, "The grenades woke us all. The ceiling fell onto us. We didn't have time to dress or even to put on our shoes; we just ran to the cellar" (Mertus el al, 1997: 66).

In a similar way, Olivera (45 years old) explains the expedient exodus, "I couldn't preserve anything. I left everything behind. I could not take anything with me" (Mrvić-Petrović and Stevanović, 2000: 157). Other women only had the opportunity to take their most cherished items. Snežana (36 years old) explained, "My building was destroyed and my apartment was completely sacked. My husband only succeeded in saving two photo albums. . . now I have no place to go" (Konstantinović-Vilić, 2000: 119). Without time to prepare, some refugees were left ill prepared for the dispossession. Rata, (51 years old Knin, Croatia) explains, "When the bombing started I was sleeping. I didn't even have time to dress or put on my shoes. I joined the convoy in my nightgown and put on my brother's shoes" (Mertus et. al., 1997: 67).

Many refugees described how day-to-day life came to include bombing, shelling, snipers, grenades, chaos, and shooting. Hodzic Raska[8] (58 from Sarajevo, Bosnia Herzegovina) stated, "They kept bombing us. It would not stop. A sniper hit the sink in my kitchen" (86). Dzemila Kenjar (20 from Kozarac, Bosnia Herzegovina) describes her situation as follows:

> They ordered us to submit the weapons but we did not have any. Then they bombed us for three days. We went under the earth; we had nothing to eat. They robbed our house completely. They found us in the cellar and they separated out the men. They cut the throat of our neighbour (45-46).

Vesna explains how she was overtaken by fear and disrupted by the noise of the war, "I was so paralyzed by fear that I did not go to the street. I used to wake up at night thinking that someone was screaming in my ear" (Konstantinović-Vilić, 2000: 128).

2. Crime

As outlined in my literature review, war brought not only war crimes (those crimes defined by international humanitarian law) but also left the former Yugoslavia susceptible to opportunistic wartime crimes such as rape, prostitution, sexual enslavement, harassment, exploitation, looting, and document fraud.

a. Rape

[8] The authors of the Suitcase list Hodzić as the woman's first name and Raska as her family name. Based on the fact most female Bosnian first names end in "A." For example, the masculine spelling of Fikret versus the feminine spelling of Fikreta. In addition many last names end in "ić" I believe that the woman's should be Raska Hodzić. However, without a way to prove this, I have replicated the author's use of the name. But acknowledge that is most likely an error.

The crime of rape is probably the most comprehensively documented crime of war that occurred in the former Yugoslavia. While the editors of *The Suitcase* (1997) acknowledged the existence and impact of sexual violence (including rape) on the women of the former Yugoslavia, they argue that this is not the focus of their inquiry. However the editors of *Women, Violence, and War* (2000) devote most of their time to analyzing sexual violence. Many of the women that the authors spoke with discussed not only their actual experiences of rape, but also their constant fear of being raped. I have personally struggled with reprinting the women's words that they used to describe these experiences. While I want to remain true to their individual voices, I do not want to provide a representation with excessive shock value or one that appears as pornographic voyeurism (Lindsey, 2002 and Schott, 1996). However when the specific horrific details are deemed necessary to adequately represent and articulate the women's experiences I use the women's actual words. But when possible I use general, non-explicit or clinical terms to describe the rapes.

The women interviewed in *Women, Violence, and War* (2000) emphasize that women (and in some instances girls) of all ages and ethnicities (Muslims, Croatians, Serbians, and mixed) were subjugated to rape and other forms of sexual assault. They speak of how rapists would sometimes attempt to reassert their "power" by raping the most "vulnerable" women such as the elderly who were left alone. Sanja (76 years old, from Foča, Bosnia Herzegovina) recounted how a 90-year-old Muslim woman was raped and killed by Serbs. Nedžada reports that a 71 year old woman was raped and tortured in her own home and that she was left " . . .in such as state that she could not get back on her feet by herself" (Nikolić-Ristanović, 2000: 51).

However, certain women were more likely to be abused and with greater seriousness if they held a higher socio-economic status or if they were part of an inter-ethnic marriage. For example, Gordana (38 years old) reports that at the Croatian camp Dretelj one out every two women were raped. She explains how women with more prestigious professions were treated more brutally, "The physician and the teacher were especially tortured, because the rapists were provoked by their status and education" (61). The following quote from Emina, a 28-year-old Muslim woman from Mostar, Bosnia Herzegovina illustrates how women of inter-ethnic marriages were targeted. It also exemplifies how women were reluctant to speak about rape, even with their families:

> My mother-in-law, who is a Croat, told me about that when she came to Belgrade to visit us. Croats mistreated my sister because her husband, a Serb had decided to stay in the Croatian part of Mostar. They (Croat neighbours) threatened my sister with rape and viciously insulted her.. . Besides, since her mental health seriously deteriorated after the Croat mistreatment, I fear that my sister was not only threatened with rape but also indeed raped. However, neither she nor my mother wants to talk about that (64-65).

While some women were raped in their homes, most were abducted from their homes and places of work and taken to camps, prisons, and brothels where they were brutally raped numerous times by multiple perpetrators. Nikolić-Ristanović (2000: 57) argues that there is a positive correlation between the brutality of rape and the number of rapists. In the following stories all three women speak of multiple rapists whose acts were inhumane. Olga spoke of a 54-year-old woman from Mostar who was taken from her apartment and raped, "Thirty to forty members of HOS, young men raped her. They kept her locked up for several days. They also shaved her head" (52).

Another woman, Lepa spoke of the brutality:

> My friend told me that a group of Moslem soldiers, five to six members of a private army, broke into the apartment of a girl who worked for the Revenue service. They tortured her and beat her; they all raped her and, at the end they put a bottle into her vagina. She was wounded so badly that she died soon afterwards (54).

Despite the brutality of the rapes, some women managed to resist. Much like the women in the Kunarac, Kovac, and Vukovic (IT 96-23 and 23/1) case, some women hid under the bodies of their mothers.

The women's stories, along with the authors' analyses, point out that as a result of rape, many issues concerning reproductive rights and other issues emerged. These issues included pregnancy, abortion, AIDS, venereal diseases, availability of contraception, access to safe abortions, and adequate medical attention. Milica (21 years old) shares her experience of being raped and not knowing she was pregnant until it was too late for an abortion:

> I did not know I was pregnant. . . I did not have a medical examination. . . Sometime in the fifth month I went to see my doctor . . .In my town abortion is performed only until the third month. . . I gave my baby up for adoption . . .I could not accept my baby because it would have always reminded me of the thing that happened to me. I think it would have killed me (70-71).

Anka (38 years old) shares a story concerning a woman she had met in a shelter. The woman was raped by Muslims but was told by the hospital that they would only perform the abortion if she said the Serbs had raped her. Emina shares her cousin's story, "She was in the Croat part of Mostar where abortions were not allowed, she could not abort in time" (70).

Another woman, Milena (23 years old) attempted to live with the child conceived during a seven-day rape by three Muslim assailants. It was not until the seventh month that she received medical attention, as she was unaware that she was pregnant. At that time she requested a caesarean to get rid of the fetus. However, it was too late and she was forced to carry the fetus to full term. When the baby was born she put it up for adoption. The authors explain "she was torn between her desire for the baby and the emotions produced by her memories" (72).

While the act of rape tormented many women, the fear and threat of rape also had a significant impact on their day-to-day lives. The women were not only concerned with their own protection, but they were also preoccupied with a concern for their daughters. One daughter (18, Sarajevo) explains "I was the biggest problem for my mother. She was afraid I would be raped" (Mertus et. al., 1997: 23). Gordana Ibrović (41 years old from Sarajevo) explained that she and her husband were afraid that Lana, their 11-year-old daughter, would be raped. In a comparable way Olivera explains:

> Once, my younger daughter, aged 15, came home, all desperate and said, 'I'd rather be killed than raped.' Then I lost patience and said to my husband, "We have to move the children immediately. Our daughters are young and pretty. I can be beaten, raped or even killed, but I can put up with everything and continue to live, because I have them (209).

b. Prostitution

As a result of the uncertainty of the economy and the enormous inflation rate women were forced to use their bodies to make money to support their families (Chinkin, 1993). In other words, women used prostitution as survival strategy. Ivana (17 years old) told a story of her friend, "The mother of my friend told me that many

girls prostituted themselves in order to get some food for their parents" (Nikolić-Ristanović, 2000: 75).

It appears that some women felt it was more dignified to sell themselves for sex (i.e. they had control) than to be raped (i.e., to have control over their sexuality taken from them). Stanislava (48 years old) explains how becoming a mistress of men allowed her to protect her dignity. She stated "At least nobody could say that I was a whore during the war" (74).

c. Sexual Enslavement

Closely linked to rape (as illustrated in the Kunarac, Kovac, and Vuković decision) is "hidden rape" (Askin, 2000 and Nikolić-Ristanović, 2000: 73), or the crime of sexual enslavement (forced concubinage). Sexual enslavement involves women (and sometimes girls) being forced to live with, and provide sex to, members of the enemy. These women were also expected to perform domestic chores and in some instances were subjected to domestic violence. In some instances these women go on to marry their captors (reminiscent of the psychological theory of the Stockholm syndrome) and the sexual violence becomes normalized or interpreted into a socially (and individually) acceptable form of romantic sex. Nikolić-Ristanović (2000:73) explains:

> However, it is most probable that future husbands do not understand life in concubinage of these women as rape. It seems that marriage, formal or informal and regardless of its content, represents a mask that men can accept more easily (and more readily forget) than the barren and total sexual violence that women are exposed to.

d. Harassment

Another crime that was ever present in the women's testimonies was harassment. The women report that they were tormented in a number of psychological ways that included being surveilled, monitored, and watched by their neighbours and police. A report written by the Yugoslavian Red Cross and Institute for Social Work states:

> When you realize that you are under surveillance or that you will be arrested, pressure begins to rise. At the beginning, all you feel is just a little stress, but, if the situation continues, you soon remark that when you turn the light on, for example, the sound of the bulb, feeble as it is, unbearably irritates you. That means that your nerves have become quite shaky (cited in Konstantinović-Vilić, 2000: 107).

The women also recall being verbally abused, threatened, and intimidated. They also mention feeling fear and anxiety. Merima, in her own words explains, "What I am going through here is mental harassment, because I was deeply affected by every massacre in Sarajevo" (Nikolić-Ristanović, 2000: 218).

e. Exploitation:

One woman spoke of how she was forced to sell her personal items to purchase a ticket out of Teslic, Bosnia Herzegovina. She stated, "I had to sell everything at half price to smugglers in order to get money for the trip" (Mertus et. al. 1997: 29). Another woman from Bileljina spoke of criminals who just appeared:

> Thankfully there was an agency in the center of our city of Bileljina. A man named Dragas runs it, a man from outside, a man from nowhere. He just showed up and set up business. You have to go there and pay by selling your house, of course at a very unfair, low price. You sign that you are leaving everything of your own free will to the state, and then you can get out (40).

f. Looting

Other women, those not fortunate enough to sell their homes and personal effects, were forced to abandon all their belongings and received no financial compensation. The personal belongings were looted and taken by war profiteers. Natalija (67 years old) explains, "War profiteers used to carry away truckloads of things that belonged to the inhabitants of Grbavica (Sarajevo) . . .They stole everything they could. All abandoned flats were sacked, with no exceptions" (Konstantinović-Vilić, 2000: 120). Natalija also comments on the organization of the profiteers, "One group would take rags and carpets, the other one would load electric appliances, while the third one would pick up the smaller items they found interesting" (120).

g. Document Fraud

While most women spoke of being victims of crimes, one woman explained how the war forced her to commit a crime that prior to the war she would have never considered. Fikreta (36 years old, from Mali Zvornik, Serbia) explains:

> Law made me break the law. We bought some false Slovenian passports, which needed no visas, for two thousand German marks each. They caught us at the Hungarian border and held us for fifteen days; we had to pay for everything, for the stay in a prison, even for the transport (Mertus et. al., 1997: 123).

3. Deaths and Disappearances

Most of the women mention that someone they knew had been killed, or that they had seen someone being killed. Some refugees spoke of the graves and dead bodies and the lasting impact these crime scenes had on them. One woman, who wished to remain anonymous, wrote the following:

> I got a letter from a friend of mine in Sarajevo. It was about graves. A lot of people without arms, legs, eyes. I walked all day through the streets here looking for vegetables but I couldn't buy anything. I was thinking about those graves, those arms and legs. I don't know what people saw when they looked at my face because I wasn't there (Mertus et. al., 1997: 103).

Jovana a nurse from Croatian explains how she directly witnessed the suffering of many others, as she was required to assist the wounded. She explained the lasting impact these images had on her psyche, "My personal experience—I had to see crippled boys of about the same age as me or boys with napalm-made wounds that couldn't heal—[these images] affected me so profoundly that I could not recover for a long time" (Konstantinović-Vilić, 2000: 122). Another woman, Hvalenka Carrara, (early 30's from Croatia) explains that there is one thing about the war and the killings that she cannot forgive, "They did not bury the murdered, the bodies stayed there. We covered the dead with sheets, but they did not allow us to bury the bodies" (Mertus et. al., 1997: 107).

Many of refugees also spoke of the disappearance of family members and friends. With loved ones missing it was difficult for the women to find closure. The uncertainty of the whereabouts of their family and friends created constant stress and fear for the women. An anonymous letter read, "What is a typical day like for me? It is a day of waiting. Uncertainty. Physical and mental pain. I miss seeing people who

know me" (122). Sofia (39 years old) explains how her husband was dead for seven weeks before she was informed. She elucidated how just knowing what was going on helped her, "Regardless of the fact that my husband was far from me, in the Moslem-controlled part of the city, I felt much safer when he was alive. A letter means hope; it gives sense to life, it gives me strength" (Nikolić-Ristanović, 2000: 208).

4. Identity

Many of the women spoke of how their self-concept was changed by the war, and how their identities were continually challenged and transformed. One woman spoke of how she needed to regain control of her life, "to find identity—woman's identity" (Mertus et. al., 1997: 187). A 43-year old woman from Odzak, Bosnia Herzegovina states that " . . .war has destroyed everything. . .I've become a totally different person" (171). In a similar vein, Katica from Banja Luka states, "I am behaving strangely, I don't recognize myself. I am lost, I am scared, I don't communicate" (170). The loss of identity is not just for adults, the war forced many children to grow up quickly. Alisa Mujagić who spent the last of her teenage years in the war states, "I don't have to be afraid anymore. But my soul is empty and cold. What is left is a 40-year old woman in a 20-year-old body" (153).

Prior to the war, several of the women who shared their stories in *The Suitcase* were well-educated and held jobs with high esteem such as doctors, lawyers, University professors and social workers. This was also the case in *Women, Violence, and War*. Based on their sample of 70 contributors, four were illiterate, eleven had elementary education, 33 had secondary education, two had some form of level

higher than secondary, 16 University level and five were currently enrolled in high school. Prior to the war many women interviewed were government officials, or worked in the fields of public service, childcare, and education. However as a result of the war many were forced to take low paying jobs that were hard labour and outside their acquired skill sets (underemployment). For example, Nela (43 years old) who had finished law school started working as a janitor (Mrvić-Petrvić and Stevanović, 1997: 162). Gordana explains that the employers sometimes took satisfaction in exploiting the women:

> My boss was flattered when I brought drinks and coffee to his friends. He said to his friends that he had a woman working in his firm who has an MA in economics and who prepares him coffee (164).

A woman and her husband who were both doctors prior to the war explains the difficulty of adjusting, "Many times I regretted that I didn't know any handicraft—that I was not a seamstress, hairdresser, or something else I could do with my hands and not my head, because no one wanted doctors (especially Muslims)" (Mertus et. al., 1997: 120). Olga supports this statement, "Highly educated refuges are in particularly bad shape. They are completely confused and cannot find themselves" (Konstantinović-Vilić, 1997: 106).

Essentially the exploitation of women expanded beyond the actual war and continued well into their lives as refugees. Underemployment was compounded by the fact that many women did not speak English prior to the war and found themselves in predominantly English speaking countries such as Canada and the United States.

Several women were self-sufficient prior to the war but the war has made them rely on the kindness of others, which in turn has affected how they saw themselves. One woman explains,

> I miss my freedom and my home very much. It is especially difficult to have to rely on social aid. At home I did not know what that was. Now when I have to go to get my social aid I feel very miserable. First I get a big big lump in my throat and I blush and I am so ashamed. Still, I'm grateful for the help and people are always very nice to us and I appreciate everything they give us (Mertus et. al., 1997: 171).

5. Ethnicity

Ethnicity is a concept that is closely linked to the notion of the women's identities. However in the context of women from the former Yugoslavia I felt that it was essential to create a separate concept for ethnicity. The women report that as a result of the war they suffered what I identify as *ethnic dissonance*. Many women speak of how prior to the war they identified themselves as people of Yugoslavia, and that they never identified themselves as Muslim, Croatian, or Serbian. Merima (46 years old) explains, "I never declared myself as Moslem before. We always declared ourselves and our children as Yugoslavs" (Mrvić-Petrović, 2000: 177) Being forced to identify themselves as one ethnicity was often difficult as they were children of mixed marriages, or they themselves had married someone from outside their own ethnic group. In a letter to her husband a woman (who wished to remain anonymous) explains how the notion of ethnicity identity forced her to question their love and ethnicity,

> Is it possible that you would wish me evil because I am a Serbian and you a Muslim? Should I because of that stop loving you? Should I renounce you, you who have helped me dream, who have shown me

> all the paths of love, even the most hidden, which I would never have taken without you (Mertus el al, 1997: 94).

Milica describes how the war created an insurmountable barrier between the two partners in a mixed marriage. She states, "The war made people who had loved each other now hate each other" (Nikolić-Ristanović, 2000: 98). Nataša wrote that as a result of the war, many mixed families split up, and the divorce rate increased. "I'm no means surprised that there are so many divorces in mixed marriages. When times get tough, nobody wants to support the relatives of another nationality" (Mrvić-Petrović, 2000: 143).

In some instances the women were appalled by the behaviour of members of their own ethnicity. This led some women to deny their own ethnic affiliation and as a result jeopardized their own safety. Konstantinović-Vilić (2000:123) explains, "Witnessing scenes of humiliation and torture drove some women to openly protest and express their bitterness against members of their own ethnic group, sometimes endangering their lives."

Given only three alternatives, two ethnic (Croatian or Serbian) and the other one religious (Muslim) many women were unhappy with their options. Some women even had difficulties with the label Bosnian Muslim being associated with the traditional notion of Muslim. For example, Nizima states, "We went to a mosque but we were a progressive European people . . . And we have a Bosnian passport, not a Muslim one" (Mertus el al, 1997: 33-34).

Instead of making generalizations about the Serbs, for the most part the women judged each person on their own merits. A nineteen year old from Sarajevo states that she does not have contempt for all Serbs although harbours anger and

resentment for those who harmed her family, “But if I found the people who killed my friends and hurt my family, I would kill them” (176).

In many instances the refugees explain how members of the differing ethnicities helped them escape. For example, a 41-year-old Muslim woman from Sarajevo explains how she saw a member of the Serb community on the street, “I had never seen him before and I didn’t even know his name, but he had a good face, a kind face, I approached him for help. He said, ‘Come tomorrow and pack your things’” (24). Much like the Germans who helped the Jewish people during the Holocaust, some members of the Serbian community obviously showed compassion for people they did not know and assisted them in escaping. While this member of the Serbian community provided assistance without charging, some members of the Serbian community were willing to help for a fee. Nizima (38 from Janja, Bosnia Herzegovina) explains how she paid a Serb to guarantee her safe transportation to Vienna, “He made a lot of money, but he would do it even for if you had no money. I don’t know if it was all arranged, but I think he was a good man” (33). Subhija Salić (60, from Sarajevo) explains how her neighbour, a Serbian woman, helped her escape. “People are always the same” she adds, “We were all the same in the building we would run together to the cellar: we didn’t insult each other” (60). Another example is provided by Lepa, a Bosnian Serb, “I will never forget how scared I was that night. A Moslem man led me thorough one part of the no-man’s-land” (Nikolić-Ristanović, 2000: 214).

Some refugees state that their Serbian neighbours provided protection (183), while others report that the local Serbs did not harm them, but “they dared not protect

us" (41). One refugee, Radmilla, states that she wanted to find a way to help the people of Belgrade because they suffered too: "they live under such bad conditions" (181). Another refugee, a 58 year old woman from Bijeljina, describes how she felt sorry for the Serbs as "We all lost our country" (41) even though at the time *The Suitcase* was written the Bosnian Serbs continued to hold some of her relatives prisoner. I was taken back by this women's ability to forgive and not cast blame on the entire Serbian community. I found this interesting, as the legal approach is to find blame, whereas this woman's approach was to find peace.

However, Svetlana, a Serbian woman, explains how she was verbally assaulted and judged solely because she was a Serb. She stated, "I was astonished by that hatred . . .the way people look at you, humiliate you. They blame you as if you were guilty for all. As soon as you try to protest, they label you 'Chetnik.' I constantly had to listen to insults, calumnies on my account, like 'You Serbs are all genocidal and Chetniks, Juka's right when he throws you out the window'" (Konstantinović-Vilić, 2000: 113).

6. Family

For many women, survival came not through concern for their own lives rather it came out of concern for their children and other family members. Several refugees reported that it was the thoughts of their children that kept them going when the violence of the war escalated. Merima Nosić (early 30's from Sarajevo) explains how she wanted to give up, but persevered because of her children. Merima states, "I felt terrible. I wanted to die, but what would my three small children do?" (Mertus et.

al., 1997: 62). In a similar vein, one woman attributed her survival to her daughter. A 42-year-old woman from Sarajevo explained, "How did I sustain myself through all of this? When I closed my eyes, I thought of my daughter's eyes" (28). Likewise Ferida Duraković from Sarajevo states, "I think only of my children and God shows me the way." And according to Behka Granov from Foča, "The only thing left for me is to fight for our children, to raise them and see them into adulthood" (129). Some women even state that they would sacrifice their own lives in order to preserve the lives of their children and grandchildren. For example, Ferida Durković's mother said to her, "I would lay down there and die. Just so that my children and grandchildren would survive" (89).

While some women attribute their survival to their children, other women explain that concern for their children's safety was the reason why they left their homes. Gordana Ibrovic explains, "One of the reasons I wanted to leave was because of my son Dario. Like the other children he did not realize the dangers posed by shells. He kept going outside, and our area was a place where lots of people were killed or wounded" (35).

Some women fear their children would be raped, drafted, tortured or killed and therefore sent them to live abroad. For some mothers the fear of violence became an obsession, "I was obsessed with protecting my children from shells" (Konstantinović-Vilić, 2000: 128).

In some instances thoughts of family made women stronger; however some women reported that it also made them weak. Svetlana explains that, "separation from children becomes more difficult than war itself—that uneasiness, the fear that

something might have happened to them" (131). Women report that they felt fear and anxiety when they were separated from their husbands and children. Some women were forced to be alone at home when their husbands went to the front lines to fight.

Some women left their husbands behind and entered refugee life alone. Radmila Bartel (36, Sarajevo) explains that "refugee life was my female way of fighting the war" (Mertus el al, 1997: 179), because leaving with her children was her way of ensuring their survival. In some instances when the women got out safe, they felt guilty for leaving their husbands to fend for themselves in the war.

7. Friendships

Undoubtedly war forces a disruption of the daily routines of people's lives. One of the greatest losses reported by the refugees were the friendships that they had shared. The war erected physical and emotional barriers in some friendships thereby causing frustration, while some women felt betrayed by their former friends and neighbours. One refugee now living in Switzerland states, "I miss having coffee with my friends. I miss seeing people who know me" (Mertus et. al., 1997: 122). Another refugee, a woman (38 from Teslic, Bosnia Herzegovina) discusses how her neighbours had turned on her, "Then our neighbors started to disturb us. It was our neighbours, not the refugees who came into our village . . .My cousin was killed in his home, that was why we left. A neighbour killed him in the middle of the night" (29). The woman next describes how a neighbour, in front of her son, repeatedly raped her. The neighbour came with a mask over his face and dragged her to the stable. She stated, " . . .when I took the mask off his face and recognized him as a

neighbour I felt even worse, I got more afraid. So often he had sat at our place, drank coffee with us" (30).

Another woman, Aida from Sarajevo, explains, "The worse thing for me in this war is the loss of friendships, especially one . . .we had been together since we were born, but war erected a wall between us . . .those who were once friends cannot be friends anymore" (44). The war also created uncertainty and suspicion. A doctor (29 from northern Bosnia) did not know whom she could trust. She explains, "I didn't know whether I could trust my old friends. I could not rely on anyone . . ." (119). Perhaps the younger are less tainted by the wars ability to change friendships. Twenty year old Alisa Mujagic from Kozarac states that she was anxious to return, and anxious to see her friends (153).

The refugees also express the importance of making new friendships and forming new communities abroad. Many stories in *The Suitcase* were collected from Bosnian refugees who met frequently at a then newly formed Bosnian Club in St. Louis, Missouri. It was a place where refugees (Muslims, Croatian, and Serbians) met to drink Turkish coffee and share stories. The need for interconnectedness with other refugees was demonstrated most effectively in one woman's statement "tragedy was our mutual bond" (61).

In many ways, relating with others who suffered similar experiences was necessary for women to cope and heal. Milica B., a woman from Sarajevo, explains how working with other refugees helped her with her own issues, "I wanted to do something that would bring me closer to people whose destiny is similar to mine, who share similar feelings. I wanted to talk to them, to support them, I wanted to get over

my own feelings of being useless" (185). By working with a group of refugees. Milica explains how she felt stronger; "I drew new strength for myself and found a new desire for life" (185).

In addition to collecting stories for *The Suitcase*, three of the four authors (who were refugees from the war in the former Yugoslavia) provide their own stories of how war changed their lives. Rada Borić shares her experiences of working for the Centre for Women War Victims ("war survivors") in Zagreb, Croatia and explains that working with other refuges enables her, "to see the world through the eyes of refugee women." At the centre Rada facilitated self-help groups to help women regain control over their lives. Another author Jasmina Tesanovic explains how she helped set up a publishing house of women who were against war and tried to "defend civilization" (191). The third author, Habiba Metikos, a lawyer from Sarajevo who ended up in Croatia explains how being part of a women's group allowed her to help herself and to help others. Habiba explains,

> I came upon a women's center, for victims of war and violence. I started working there, helping other refugee women. And that is when the worst period of my life ended. I found myself in the women's organization and I found strength not only to survive but to find myself… I felt like a human being again and my faith in people was restored (193).

At the time of publication (1997) Habiba had moved to Canada and was living in Winnipeg, Manitoba where she and her family had become "refugees once again" (236).

8. Memories

Another common concept identified in the women's stories is the existence of memories. Despite all the horrible events they have witnessed and all the crimes that have been committed they explain that remembering is a "heroic act" (72). In a letter one woman explains, "You can take our letters, our homes, our land and even our family, but you cannot destroy our dreams or our love" (72). In a similar vein, another woman writes, "I remember. And this memory you can never take from me" (73).

From reading the women's stories it appears that these memories of home, and how things used to be, provide them with the energy needed to push towards the future. "But I memorized where things are, so when we return home (!) if God allows us, I will put everything back in its place." (87). Ljubica Trkulja (53 year old from, Tuzla, Bosnia Herzegovina) chose to focus on her flowers. She stated, "Oh God, where is the end of this hell, when will I have violets and other flowers in my flat again? I always think how my violets dehydrated and died, dropping their gorgeous flowers" (83). Some state that they did not know when they would return, but that they wanted to go back and help rebuild their country.

While many women speak of returning home to the former Yugoslavia, some did not share this desire. Fikreta explained, "I am not thinking of going back to Bosnia, even if it is my country. Zvornik is the Serbian corridor and I don't want to be a refugee in my own country" (124). Instead Fikreta looked towards the future. Fikreta explained to the editors how she longed for home, but had great curiosity about what the future held for her. The authors described her inquisitiveness, "she was anxious, as if she were reading a book and had yet to hear the ending" (125).

Behka Granov (Foča) states, "I don't think about going back, that won't happen for a long time. I'd go back to Bosnia tomorrow if it were the old prewar Bosnia, but the one they've invented now, this divided Bosnia, I wouldn't even want to visit, nor do I want to live in somebody else's backyard" (129).

IV. Women Speak Out: Empowerment, Survival and Needs

While surviving (to live through the war) is the immediate need expressed by the women it is erroneous to assume that because a woman has survived or that she has managed to escape and live in exile that she ultimately sustained her existence. One woman states (anonymous), "We are more than animals, we need more than food and a place to sleep" (Mertus et. al., 1997: 101). Similarly Subhija Salic (60, Sarajevo) explains that surviving is not enough, "I feel bad in America; I miss Bosnia, we don't have money, we don't speak the language, we are old. They help us but we are surviving, not living" (69). Providing essentials to women from war is a good start, but it is not enough.

The notion of survival for women in exile needs to be expanded beyond the confines of the demographic location of the war to examine the quality of the continuance of women's lives. This means ensuring women refugees' long-term survival strategies are structurally supported. From the women's stories provided in both *The Suitcase* and *Women, Violence, and War* it appears that the women require external assistance to deal with the economic ramifications (loss of property, underemployment), psychological implications (separation from family and friends, witnessing human loss and suffering, being subjected to verbal abuse vis-à-vis

intimidation and harassment, and identity dissonance), and physical repercussions (reproductive issues, non-sexual physical assault, and domestic violence). Mirjana states, "Still, this refugee status is worse than fear. There, I feared for my life, I thought that I might be killed. Here, I fear that I won't survive because of poverty and insecurity" (Nikolić-Ristanović, 2000: 223). It is essential that women who are subjected to war be encouraged and empowered to pursue the solutions that are most relevant to them (Konstantinović-Vilić, 2000), and that when these solutions are identified to ensure that sufficient support is available to them at the external level.

Based on the women's stories provided in *Women, Violence, and War* Konstantinović-Vilić provides specific suggestions as to how women can continue to be supported after the threat of war is over. According to the women's stories, Konstantinović-Vilić (2000) observes that the sooner the women's lives are restored to the pre-war status the better. Rada states, "It's no good to isolate us. We should help in out efforts to get back to a normal live. I would like to work. I have seventeen years of experience and just cannot be imprisoned between four walls" (191). Konstantinović-Vilić (2000) identifies four areas of assistance most frequently mentioned by the women. These areas include the importance of work and volunteer opportunities, the regrouping of family members and friends, unconditional social acceptance and the fulfillment of basic necessities. Each of these four areas will be briefly discussed below.

For the women working and volunteering gave them a sense of being needed. Konstantinović-Vilić (2000) suggests that this type of participation encourages the women to overcome a sense of powerlessness, absurdity, and social isolation.

However, Konstantinović-Vilić explains that basic or simple employment for the women is not enough. Gordana shares her experience, "It is awful when you are educated and yet you have to make coffee in some stupid firm" (192). Based on the women's words Konstantinović-Vilić believes that this form of social activity "animates" the women by breaking the monotonous routines of refugee life.

According to Konstantinović-Vilić, the women also emphasize that regrouping or "reconnecting" with family and friends would reduce their stress of not knowing. She observes that the women want reliable information and that they were "particularly interested in any methods of getting in touch with them" (192).

Konstantinović-Vilić points out that the women also stress that they need assistance in the form of social equality and acceptance. The women do not want to be viewed as "second class citizens." As indicated by Konstantinović-Vilić it is evident that the women want understanding and moral support. Bosiljka describes her feelings, "We need somebody who would listen to us and not only criticize" (193). In the same spirit Danica pleads, "We need some conversation and comfort so as not to feel isolated from society into which we would like to integrate" (193).

In addition to their personal needs the women also request material assistance. The women believe that being provided with the basic needs such as adequate housing, medication, clothing and shoes will alleviate their poor emotional state.

Another need evident in the women's stories is the need for women's spaces. The notion of women's spaces is closely related to Konstantinović-Vilić's notion of social integration. By women's spaces I mean places where women can meet and share experiences and engage in meaningful dialogue. Jasmina Tesanović speaks

specifically of a publishing house of women against war, (Mertus et. al., 1997) and other women mentioned working in centers with groups of refugee women, women like them. It is important that these women's spaces exist for women who stayed in the former Yugoslavia and those forced to live abroad. Most of the existing women's spaces were started as grassroots initiatives, such as the one mentioned in Missouri.

V. Analysis: One Truth Versus Many

The women's words, when not silenced and denied by legal rules of evidence and procedures, speak of diverse and complex experiences. While undoubtedly rape was one crime, it was not the only crime. Nor was it the only injustice experienced by women during the war. Law's myopic approach to rape leaves other crimes (or wrong doings) beyond the scope of law.

It is difficult to compare the women's stories to the women's testimonies, as the two appear to be saying different things. The testimonies are constructed around legal ideals, questions, and requirements whereas the stories allow the women to speak without such restrictive boundaries. The women's stories are based on what they viewed to be important and not on what law imposed upon them as important. The women's stories spoke of serious concerns and issues, but it also allowed room for women to speak of simple things like flowers and photo albums. The legal approach attempted to find one truth, and one truth only—guilt or innocence. However the women's stories were open to interpretation. The women were not looking for blame, but looking for peace not only in the country but also within themselves.

The women's descriptions of war were much more lucid and diverse than the explanations of war provided in the Tribunal transcripts. Unlike the Kunarac, Kovac, and Vuković decision which relied on expert testimony to describe the situation, the women's voices spoke on their own behalf. They spoke not only of crimes, but also of how war affected their relationships (family and friends) and their identities (ethnic, religious, nationalities, employees). The women's words revealed feelings associated with harassment, intimidation, fear of rape, underemployment, the stress associated with day to day chaos, exploitation, uncertainty, loss of identity, separation anxiety, betrayal and distrust.

The women's stories reveal crimes outside the realm of crimes against humanity or war crimes. These crimes will never be tried by the ICTY and most likely not by the local courts. While legal triage might not make them a possibility or a priority the women's words reflect that these crimes do have a significant impact on their lives. In addition the already reduced number of perpetrators indicted by the tribunal is even less representative. Not to mention the perpetrators of these "lesser" crimes will continue to live close to their victims.

The women's stories also revealed that in many ways the women are strong women who survived and persevered. The women did not see themselves exclusively as victims. The women's stories showed signs of empowerment—not of vulnerability.

CHAPTER EIGHT: ALTERNATIVES TO LAW: MULTIPLE TRUTHS

> For, while the rapes are highly policitized, women's own acts—from giving and collecting testimonies, to forming self-help groups and organizing nationally and internationally—are hardly ever recognized or mentioned (Zarkov, 1997: 147).

I. Introduction

While the international legal recognition of rape as a war crime could be considered as a major legal victory for women, previous chapters have illustrated that international law and its statutes have been unable to respond to the diversity of women's needs and expectations. Law with its restrictive methodology and classification system fails to sufficiently listen to the multiplicity of women's voices. The women's stories reveal that women are more than just victims of war and more than just victims of rape. Rather, these stories show that women's experiences of war are multiple and complex, and that the effects continued beyond the confines of the war and beyond the borders of the former Yugoslavia.

Noting the deficiencies of international of law, the intent of this chapter is to examine alternatives (or complimentary approaches) to law that might empower women survivors at the local level in the former Yugoslavia. After briefly outlining some of the other responses to the war in the former Yugoslavia I will address two alternatives to formal legal responses in greater detail. These alternatives include the possible establishment of a truth commission(s) in the former Yugoslavia (one in each—Croatia, Bosnia, and Serbia and Montenegro) and the response of one local women's group in Bosnia—Medica Zenica.

II. Other Responses

While my focus has been exclusively on the responses of the ICTY, it is important to note that the creation of the ICTY has not been the only international response to war crimes in the former Yugoslavia. There are several international government and non-government agencies that provided assistance in collecting women's stories as well as other specific national responses. Since it is impossible to discuss all of these I will focus on those I feel most significant to acknowledge.

International

The International Court of Justice (ICJ, also known as the World Court), unlike the ICTY, is a permanent court monitored by the UN Security Council. Essentially the ICJ is the judicial organ of the United Nations. The ICJ has two functions to resolve disputes between states (only states can appear before the court) and to provide advisory opinions concerning questions of international law. There are currently ten cases before the ICJ relating to the recent war in the former Yugoslavia. Two cases concern the use of genocide by Serbia and Montenegro in Bosnia Herzegovina and Croatia. The remaining eight cases were brought forward by Serbia and Montenegro against NATO member countries that used force against Serbia and Montenegro. These countries include Belgium, Canada, France, Germany, Italy, The Netherlands, Portugal, Spain, and the United Kingdom.

International NGO's have also been actively involved in human rights reporting both during and after the conflict. These groups include, but are not limited to, International Committee for the Red Cross (ICRC), Amnesty International (AI),

Human Rights Watch (HRW), Helsinki Committee, the Institute for War and Peace Reporting (IWPR), and Physicians for Human Rights (PHR).

National

At the national level, Bosnia Herzegovina, Croatia, and Serbia and Montenegro have also set up their own government commissions to collect data on war crimes. These commissions include State Commission for the Investigation of War Crimes, Document Centre, Bureau for Co-operation with the ICTY (Republic of Srpska), Office for Cooperation with the ICJ and ICTY (Croatia), Committee for Data Collection on crimes against humanity and international law, truth and reconciliation committee (reduced Yugoslavia), Bureau of Missing Persons and Victim Recovery and Identification Commission (listed in Djordjević, 2002a).

Local NGO's in the former Yugoslavia include the Association of Citizen's Women of Srebrenica, Medica Zenica (Bosnia Herzegovina), Association of Citizens Truth and Reconciliation (ACTR—Bosnia), Croatian Helsinki Committee (Croatia), Centre for Women Victims of War (Croatia), Humanitarian Law Canter (Serbia and Montenegro), Centre for Collecting documentation and information and Document Centre "Wars 1991-1999" (Serbia and Montenegro) (listed in Djordjević, 2002a).

In addition to the women's groups in Bosnia listed above, there were at least fourteen other groups operating in Bosnia. These groups include Women to Women[9], Women 21, SOS Telephone Women 21 (Sarajevo), BosFam, Viva Women of Bosnia, Amic/Girlfriend, Rainbow Association, Allied Women (Women and Law), SOS

[9] I believe that this should read Women for Women, an international organization. I believe that the translation from Serbo-Croatian is Women to Women.

Telephone for women Victims of Violence (Banja Luka), The Way of Hope, Femina Women Alliance, Nada, SOS (Mostar), and Women in Black (IGC, n.d.).

III. Truth Commissions

In her book, *Between Vengeance and Forgiveness* (1998) Martha Minow explains that there is a spectrum of potential societal responses to mass atrocities and collective violence. According to Minow, prospective responses include legal mechanisms (as discussed in preceding chapters), truth commissions, and reparations (restitution and apology). While the previous chapters have examined legal responses, the following is an analysis of the attempts to establish a truth commission in the former Yugoslavia and what potential impact a truth commission could have on the women survivors. The third response—restitution and apology—fall outside the scope of my thesis.

Definition of a Truth Commission

According to Pricilla Hayner (2001), a well-known expert in the field of truth commissions, a truth commission is a specific type of inquiry that shares four basic characteristics. These defining characteristics include a focus on events which occurred in the past, (i.e. not a specific event—but rather a pattern of abuses), the establishment of the commission as a temporary body (lasting no less than six months, and not more than two years) that is responsible for the completion of a final report (with wide distribution (Minow, 1998), and the commission must be officially sanctioned by a peace accord, a presidential decree or international legislation.

Hayner (2001) explains that the requirement of being officially sanctioned allows the commission access to official sources of information, greater security measures to protect the people testifying, and ensures that its final report and recommendations will be given serious consideration by those with the power to implement these suggestions. While many commissions have been established through out the world very few of these fit within Hayner's exact definition of a truth commission.

Trials versus Truth Commissions—Similarities and Differences

In a similar vein to Minow's continuum, Hayner suggests that truth commissions and trials are not competing responses rather the two processes are complementary. While in many instances the subject matters for truth commissions and trials overlap significantly, their processes and objectives are very distinct. And as Minow (1998) points out, truth commissions are often needed to supplement formal legal mechanisms, as "litigation is not an ideal form of social action" (58). Mertus (2000b) also suggests that truth commissions are required to fill the void left by the limitations of tribunals. She states, "The limited reach of the tribunals will leave survivors still longing for revenge and meaning. Stories of sexual abuse are not only particularly difficult to tell, they are difficult to hear as well" (Mertus, 2000b: 155).

Hayner (2001) and Minow (1998) both explain that the objectives of a truth commission are to; discover, clarify, and formally acknowledge abuses by removing the veil of denial and developing a detailed historical record, responding to the needs and experience of the victims, contributing to justice and accountability, outlining

institutional responses and reforms, and promoting reconciliation and reducing conflict over the past.

Compared to formal legal mechanisms, truth commissions traditionally have fewer formal powers. For example, truth commissions rarely have the powers to compel people to appear before the commission (i.e. no powers to indict), to incarcerate perpetrators (i.e. no powers to apply punishment), nor does a truth commission have the powers to enforce or ensure that its recommendations are adhered to. However without these powers truth commissions are given more flexibility in establishing the burden of proof. According to law the burden of proof necessary for a criminal conviction is the establishment of "guilt beyond a reasonable doubt." Reasonable doubt is defined as the belief that the there is no real possibility that the accused did not commit the act. In contrast, the burden of proof for a truth commission is based on the "balance of probabilities" which is defined as the greater probability that the accused did commit the crime. Also with the establishment of truth commission it also possible to have a broader mandate, and can be more victim centred (Hayner, 2001). And finally, unlike law, the objectives of truth commissions are to provide a summary of testimonies not a final and binding verdict like a tribunal.

Victim Centred

Echoing the argument presented in the previous chapters concerning laws inability to hear the multiplicity of women's stories, Hayner (2001: 28) in her analysis of truth commissions states:

> A fundamental difference between trials and truth commission is the nature and extent of their attention to victims. During the trial victims

> are invited to testify only as needed to back up specific claims of cases, usually comprising of events which constitutes the crime charged.

In contrast to law, where few women are invited to testify at formal trials, and when they do testify their testimony is aggressively challenged, truth commissions can give multiple victims public voices. In order to understand the full impact of war and to understand the complete scope of personal costs (no matter how simple) all voices need to be heard. Tina Rosenberg explains, "People need to see the human cost" for example the woman who says, "The police came in and broke my sewing machine" (cited in Minow, 1998:76). The individual importance of speaking out is explained by Minow, "The chance to tell one's story and be heard without interruption or skepticism is crucial to so many people, and nowhere more vital than for the survivors of trauma" (Minow, 1998: 58).

It is possible that offering the survivors of war a forum in which they can tell their stories can empower them. Testifying may assist them in their recovery and contribute to the restoration of their personal dignity. Hayner (2001) suggests that the ideal environment would be a non-confrontational truth commission which unlike courts of law allows survivors to speak without being interrupted and to testify without being bound by legal methodology (which includes a strict burden of proof and notions of reliability).

Truth Commissions—the Former Yugoslavia

Hayner (2001) outlines the establishment of 21 truth commissions between 1974-2001. All 21 commissions possess the defining characteristics of a truth

commission as outlined above. While most of these truth commissions have taken place in transitional societies, none of these commissions have been established to respond to the war crimes that occurred in the former Yugoslavia. In 2001, the then Serbian Montenegrin president, Vojislav Kostunica appointed a body to examine the crimes of the Yugoslav war. The body was called a Truth and Reconciliation Commission (TRC). The Yugoslav TRC failed to adequately fit Hayner's definition. Aryeh Neier (2001) suggests that perhaps Kostunica's attempt to establish a truth commission was a clever ploy to avoid responsibility and reckoning with the past. According to Neier the Yugoslav truth commission was "ill-conceived" and had at best a very vague mandate (to investigate war crimes committed in Slovenia, Croatia, Bosnia and Kosovo over the last decade), no procedures, no budget, no timetable and no chairperson (Neier, 2001).

While the establishment of a truth commission has yet to become a reality, several different organizations have assisted the former Yugoslavia in drafting strategies and proposing statues for the establishment of a truth commission (or commissions) in the former Yugoslavia. One organization that has attempted to support the former Yugoslavia in its attempt to establish a truth commission is the International Centre for Transitional Justice (ICTJ).

The ICTJ, founded in 2001, is a non-governmental organization that offers various forms of assistance to countries emerging from armed conflict that wish to pursue accountability for mass violence and human rights abuses. Assistance comes in forms such as providing comparative information, legal and political analyses,

documentation and strategic research into justice and truth seeking institutions, non-government agencies, governments, and others (ICTJa, n.d.).

To date, the ICTJ has been very active in assisting the former Yugoslavia in its attempts to establish a truth and/or reconciliation commission. It has provided guidance and advice on proposed legislation to establish a truth commission in both Bosnia Herzegovina and Serbia and Montenegro. The president of the ICTJ, Dr. Alex Boraine, assisted the ICTY by providing expert testimony in the case of former President of the Republic Srpska Bilijana Plavsić.

The ICTJ has also commissioned two reports examining transitional justice in the former Yugoslavia. The first report, "Summary Report Regarding Local, Regional and International Documentation of War Crimes and Human Rights" (Djordjević, 2002a) identified many agencies that possess stories and testimonies that could be presented in front of a truth commission. Djordjević (2002a) concludes that these agencies need to establish networks at the national, transnational, and international level to ensure and promote dialogue between those agencies that have the data. The second report, "A Causality of Politics: Overview of Acts and Projects of Reparation on the Territory of the Former Yugoslavia" (Djordjević, 2002b) examines the various forms of existing reparations in the former Yugoslavia.

In reference to Kostunica's truth commission, the ICTJ website reports that:

> In April 2002, ICTJ staff returned to Belgrade to meet with the Commission and with President Kostunica to address concerns about the pace of reform and progress by the national courts and by the truth commission, and to propose specific actions to address those concerns. However, because of a lack of political will and resources, as well as skepticism among human rights organizations, efforts to get the Commission up and running have failed (ICTJb, n.d.).

In addition to the assistance of organizations like the ICTJ, the international community has hosted different forums to bring experts in the field of truth commissions together. In the Spring 2002 *The Stockholm International Forum on Truth, Justice, and Reconciliation,* as its name suggests, held a conference dedicated to truth, justice, and reconciliation. The purpose of the forum was for different countries to contribute and exchange experiences of transitional justice. There were debates concerning a number of questions relating to conflicting concepts of truth, justice, and reconciliation. The main objective was to discuss how to achieve, foster, and preserve reconciliation in transitional countries. Five different countries held seminars to examine truth, reconciliation, and justice within their respective countries.

In attendance at the Stockholm International Forum was a diverse representation of experts interested in the establishment of truth, justice, and reconciliation in the former Yugoslavia. There were a total of 12 presenters, including academics, journalists, legal scholars, and representatives from international, national, and local non-governmental and governmental agencies.

At the Stockholm Forum local scholars and human rights activists from Bosnia argued that a truth commission could bring out stories of those who resisted the evils of war and abuse (Dizdarević, 2002) and illustrate the goodness and brotherhood of many of the people from the former Yugoslavia (Finci, 2002).

Critiques and Obstacles to a Truth Commission in Bosnia Herzegovina

As a result of the overlapping subject matter, some potential problems could arise from the simultaneous existence of a truth commission and the ICTY. At a conference in Belgrade in November 1998 the opinions of the then Chief Prosecutor Justice Louise Arbour and thee then President of the ICTY Justice Gabrielle Kirk MacDonald were presented.[10] The President and Chief Prosecutor of the Tribunal had serious concerns that the creation of a parallel structure, such as a truth commission, would undermine the powers of the ICTY. More specifically, Arbour and MacDonald believed that the creation of a truth commission would contaminate evidentiary witnesses (i.e. versions of stories told at truth commission and at the tribunal will be slightly different based on the different burdens of proof). They also argued that perpetrators would be less likely to co-operate with the tribunal (that can enforce punishment) and instead co-operate with the truth commission, as they could not punish offenders. Not to mention the truth commission could have the power to grant amnesty. Another possible source of contention was premised on the fact that a truth commission, much like the tribunal would rely heavily on the international community for financial support, and as a result the two structures would be competing for the same funds. MacDonald and Arbour also argued that Bosnia was not ready for a truth commission as it would be susceptible to manipulation by local political factions (reported in Hayner, 2001).

However, according to Hayner's personal interviews (2001) with legal scholars outside the ICTY, none of these issues are insurmountable. Hayner suggests

[10] Both women were denied entry to attend the conference as they were denied entry into Serbia and Montenegro as they failed to have the appropriate immigration Visa. Another attendee presented their opinions.

that rather than hindering the ICTY the truth commission may be able to enhance the scope of the tribunal's investigations. A truth commission would be able to assist the ICTY by providing the tribunal with data collected by local groups in a language native to the survivors. The inclusion of these stories would create a more representative sample and fill a gap in the current legal presentation of women's stories. That being said, I am not convinced that by simply being presented with women's stories obtained by local groups, law will be any more willing to hear what the women have to say, or allow them an adequate voice in the legal discourse. Nor will access to these stories make law more victim-centered. With the end of 2004 being forecasted as the conclusion of war crimes investigations in the former Yugoslavia by the ICTY, and 2008 scheduled as the completion date for the prosecutions, many of these issues introduced by the OTP and the ICTY Judiciary are presently irrelevant.

Madeleine Rees, Head of the Office of the United Nations High Commissioner for Human Rights (UNHCHR) in Sarajevo, was the seminar mediator at the Stockholm International Forum. She presented several critical questions that need to be answered. Rees asked, "Will the Bosnian government support and endorse the truth and reconciliation commission? Will the Bosnian government provide the necessary information? Will there be strong support for a truth commission from the civil society? And how will gender differences and gendered issues be addressed?" (Brolenius, 2002). Of these questions, the most relevant to my study is the later question, how will the truth commission address gender differences and gendered crimes like rape and sexual assault?

Truth Commissions—Sexual Assault and Rape

In their analyses of truth commissions both Hayner (2001) and Minow (1998) argue that at truth commissions women rarely speak of their own victimization. Instead the women speak of the atrocities that affected their husbands, sons, and fathers. Hayner suggests that it is often the result social stigma and embarrassment (as outlined in a previous chapter) that lead to the underreporting of rape and sexual abuse during war. Hayner also reported that those working for the South African Truth and Reconciliation Commission (TRC) were alarmed by the few testimonies that they received in comparison to the estimated number of rapes believed to have occurred during apartheid. In many instances when the women did speak of rape, it was only to refer to it as an added on or secondary crime. It is also not clear how a truth commission will interpret the crime of rape. It also raises the question will the crime of rape be viewed as a sexual crime, or a violent crime?

In addition, the failure of previous truth commissions to adequately address gender issues likes rape and sexual abuse (for example see Hayner's (2001) discussion on the El Salvador truth commission), may be rectified with the recent legal and social recognition of rape and sexual assault during war. Hayner explains that, " . . .there has been a heightened appreciation of the importance of more fully describing women's experiences in any historical record of abuses suffered" (79). However, as suggested previously the true impact of the law is still unknown.

Perhaps one can hope that the legal recognition of rape will give "rape as a war crime" social currency in the transitional societies that are attempting to deal with

the effects of mass atrocities. However one word of caution for those who in the future will study rape during war, if there is an increase in women willing to share their stories, this should not be interpreted as an increase in the rate of rape during war, rather it should be interpreted as an increase in the willingness of survivors to speak.

Hayner suggests that women should collect women's stories, and that in some instances women would rather tell their story to a non-national. However, I am not convinced that this is necessarily true. It is most likely that women who speak the survivor's language, national or non-national, might be best suited to this role. However a balanced mix is appropriate as in some instances external women's rights scholars may have unique knowledge and/or expertise to deal with these issues (Hayner, 2001). Other issues concerning gender that were raised at the South African TRC were the issues of being exploited by the media/voyeurism (same argument presented in testifying at a tribunal) and the issue of casting women as the essential passive victim and not an active survivor. Minow reports that ". . .there are dangers that a truth commission focuses so much on victims that it deters participation by those who view themselves as survivors, not victims" (Minow, 1998: 68).

While women are reluctant to speak of their experiences it is important that some representation of rape and sexual abuse is presented at a truth commission in the former Yugoslavia. Without women's stories a key gap will be present in the establishment of truth and history for the former Yugoslavia.

Healing

To date no study has been undertaken to determine to what extent testifying at a truth commission has had a healing or injurious effect on the psyche of those who testify. Hayner explains, " . . .but the evidence that is available is enough to raise some serious questions" (2001, 135). In the event a commission is held, special attention should be given to those women (and perhaps men) who testify about sexual abuse and rape. It is erroneous to assume that testifying is always positive. In reference to the South African TRC Hayner explains that some scholars argue, "the assumption that knowing the facts about what happened will always contribute to healing is too simplistic and simply not true" (142).

Hayner reminds us that providing testimony to a truth commission is a one-time opportunity, and the healing process is long and complex. The danger of this is that the truth commission might ultimately open something with which it is not able to deal. It is essential that social, psychological, economic, political and legal mechanisms are in place to address the potential outcomes of the truth commission and that assistance is available to promote long term healing. Minow explains that perhaps healing is too optimistic considering the limitations of truth commissions. She suggests that instead of healing, survivors might more adequately seek endurance, strength to carry on. Minow also cautions against locking the survivors into the role of victims.

Once political, social, legal and economic issues have been resolved, the ultimate decision on the establishment of a truth commission(s) is for the people of the former Yugoslavia to make. The solution of how to respond, whether it is justice,

truth commission or reparation, is never simple, or clear cut, nor is there a blueprint of how to construct a truth commission, rather the process is unique to each country or conflict. It is important that the international community continue to assist the former Yugoslavia in its endeavours. However outside participants need to understand that if they do play a role, it should be secondary to that played by the participants in the former Yugoslavia. It is their history, their justice, their truth and their reconciliation, and the international community should not impose their own versions or will on them. It is essential that the people of the former Yugoslavia be asked what they need and what their expectations are. Whatever the solution—a truth commission, a tribunal, or a combination of both—Minow (1998, 102) reminds us, "There are no tidy endings following mass atrocity."

It is also important that a truth commission is not unconditionally accepted as an unbiased representation of the truth. It is possible that a truth commission could construct truth in the same way that law constructs truth to correspond with its needs. In reference to the South African TRC, Mamdani (2001) argues that political compromise greatly impacted how the TRC defined truth. He states that in many ways the single version of truth is something "manufactured" as it is pushed through narrow political lenses. Future researchers interested in truth commissions in the former Yugoslavia should be wary of this potential drawback. The work of Christodoulidis (2000) reinforces the need of both formal legal mechanisms and non-legal mechanisms such as a truth commission however the two must remain separate. Christodoulidis, in his analysis of South Africa's TRC argues that the South African TRC attempts to be a hybrid—both a forum and a tribunal—and as a result impeded

the process of restoration and reconciliation. He believes that the truth commission, by trying to fill both roles, becomes "schizophrenic" and as a result inefficient in both areas since both processes—the tribunal and a forum—have different objectives and approaches. A truth commission is reflexive, open to risk, and allows for uncertainty, whereas the tribunal (or law) is reductive, attempts to minimize risk, and resists uncertainty.

IV Women's Groups in Bosnia—The Example of Medica Zenica

While the women of Bosnia were being represented by the international community as victims or a "war affected population", local women were actively engaged in humanitarian organizations to address the multiplicity of women's needs relating to war time abuses (Walsh, 1998). A great number of women from the former Yugoslavia found themselves immersed in humanitarian organizations involved with local and international efforts during and after the conflict (Mertus, 2001 and Belić, 1995). These organizations provided women refugees with physical, psychosocial, economic, and political assistance. Many women involved in organizing and delivering services at these women centred groups were themselves refugees in the former Yugoslavia (Belić, 1995 and Mertus et. al., 1997).

However the extent of local women's involvement of rebuilding the community and empowering individual women has been overshadowed by formal legal mechanisms (i.e. the ICTY) created by the international community. Mertus explains that while some women were assisting those involved with the ICTY, many more women helped other women at the local level:

> Some women found themselves immersed in local and international efforts to highlight that wartime rape and sexual violence are crimes and to support the efforts of the International War Crimes Tribunal for the Former Yugoslavia to bring the perpetrators to justice. Many more local women turned their attention instead to more immediate local matters, such as the rebuilding of their families and communities (Mertus, 2001: 36).

However, these local initiatives are rarely acknowledged, endorsed or funded by the international community (Walsh, 1998).

Previously in this chapter, the work of Djordjević (2002a) identified several women's groups and organizations operating in the former Yugoslavia at the local level. Many additional female researchers have studied some of these groups and the impact that they have had on local women in detail.

Many of these organizations involved very basic functions such as providing connection with other women. For example, Šušnjara (1999) explained that local initiatives in the Lasava Valley, most notably Majka I Dijete (which in English translates to Mother and Child). Majka I Dijete served as a mediator between international humanitarian organizations and local women and facilitated basic interchanges linking women during the war. In some instances women were isolated or kept hidden in cellars for long periods of time. One woman interviewed by Šušnjara explained, "I was afraid of spiritual poverty through this war. I exchanged books that I had with other women" (1999: 133).

In addition to providing interconnectedness, the common goal of many of the women's groups were to help women achieve independence, self-support, self esteem, and control over their lives (Zvizdić, 2002 and Borić and Desnica, 1996). In general many of the women's organizations hoped to spread women's solidarity to

not only to transform and empower individual women, but also to create a domino effect; that is to have the women actively involved in helping other women. Borić and Desnica (1996) explain that many women's groups attempted to change despair into language and action for women. This was achieved by pulling women survivors into focus. Borić and Desnica (1996) state:

> Although the circumstances are very hard, women find creative ways to survive by themselves or are encouraged by others—they consider themselves survivors. They pride themselves on being able to cope with everything that comes along and think that they deserves recognition, sometimes asking for it for the first time in their lives (143).

While it is evident that local women were providing essential services and immediate assistance to those women in need, we are left asking the question: what can the international community do to assist these local efforts? Mertus (2000a: 50) suggests, "Instead of subverting the plans of local women's organizations and using local women as cheap service providers, internationals should respect local agendas and involve local women in decisions-making processes over the design of internationally sponsored projects." Julie Gerte (cited in Mertus, 2000a: 37) of the Organization for Security and Co-operation in Europe (OSCE) in Mostar stated, "One of the best things internationals can do is to foster and support networks of local groups and then withdraw and let these groups decide on their own programs."

The one women's organization that I have chosen to elaborate on is Medica Zenica because it, as Gerte suggests, fostered the permanent creation of a local group, and the international figures left once the organization could run independently. By selecting this women's group in particular I am not suggesting that it is the best, or the most effective group. I am not is a position to provide such an endorsement.

While such an analysis would be a valid endeavour, my intent at this time is to provide a snap shot of one organization. Medica Zenica was chosen because I was able to access the most information on this organization in English. Unfortunately the language barrier makes analyzing local women's groups more difficult for an outside researcher like myself.

Medica Zenica was started in Bosnia in 1993 by a German gynaecologist Monika Hauser. Its creation was a direct response to the systematic rape occurring in the former Yugoslavia. Unlike the ad hoc nature of the ICTY, Medica Zenica is a permanent organization. Medica Zenica is a non-profit non-governmental organization that advocates for and assists all women (despite ethnicity) who survived the war in the former Yugoslavia.

The initial response of Medica Zenica was to combine psychosocial, political, and legal support for the women in Bosnia. However, acknowledging the lack of positive prospects in post-war Bosnia, it has since expanded its mandate to also provide training opportunities, networking abilities, and long term assistance. Medica Zenica was premised on feminists' notions—it is made up of women working for women and endorses non-hierarchical gender relations.

When it began, Medica Zenica worked with local experts in multiple areas including the documentation of crimes, political lobbying, networking with national and international governments, and preparing sociological and analytical work. It was also asked to contribute its research to the Tribunal by educating and supporting those witnesses testifying.

Medical Zenica began as a local response, with assistance from women outside the former Yugoslavia, and has now developed into an international organization—Medica Mondiale—that empowers local women. Since the creation of Medica Zenica, Medica Mondiale has set up similar responses in other war torn countries such as Kosovo, Albania, Afghanistan, and Iraq.

The current staff of Medica Zenica—which is all women and all local Bosnian women, has doubled since its creation. In 1993 there were 40 employees, in 1996 there 60, and in 2002 a total of 80 employees. Medica Zenica currently has a website www.medica.org.ba which is in Bosnian only.[11] The website provides similar information that can be found on the Medica Mondiale web page (English version www.medicamondiale.org/index_e.html).

Medica Zenica is only one of many women or "zene" groups that operated during the war and continues to be in existence today. Unlike law it appears that it is women centred and attempts to address the multiplicities of women's needs. Medica Zenica provided a space for women to come together and connect with other women. As revealed by the women's stories interconnectedness was something that women say they need. It also identified the women of Bosnia as having something to contribute and not merely as a "recipient population" (Walsh, 1998). Medica Zenica is a permanent organization that acknowledges the need for long-term assistance and involvement to deal with not only the immediate effects of war, but also the long term consequences such as increased domestic violence.

[11] I have had this page translated into English.

Due to language barriers it is difficult for me to adequately assess the impact Medica Zenica has had on the women of Bosnia. However, I have attempted to identify it as one possible alternative to the formal legal mechanisms.

In noting the inadequacies of formal legal mechanisms, the intent of this chapter was not to provide a holistic overview of all agencies operating in the former Yugoslavia. The objective was to provide general information concerning local and international responses (government and NGO), and additional information concerning the possible alternatives of a truth commission and women's groups as means to hear women's stories.

CHAPTER NINE: CONCLUSION

I. Summary

The creation of the ICTY, the subsequent creation of laws prohibiting martial rape, and the successful application of these laws have illustrated that the international community is attempting to respond to a previously socially tolerated form of violence against women. My literature review traced the evolution of the enforcement of martial rape from its early acceptance, tolerance, and expectance, to World War One where it was "callously" neglected (Askin, 1997), to World War Two where it remained an "unspeakable crime" (Brownmiller, 1975), to the recent enforcement vis-à-vis the ad hoc ICTY and ICTR, and to the possibility of the future application of these laws at the permanent International Criminal Court. I also briefly addressed Seifert's (1994) explanation of why rape occurred during the war. These explanations included the expectation that rape is part of the rules of war, rape as a mode of male-to-male communication, the notion of militarized masculinities, misogyny and the belief that rape would destroy the opponent's culture. It has been my attempt to illustrate that while the legal response to rape as a war crime has offered some advancement for women and women's rights, it should not be embraced as an unconditional victory for women.

While Smart's theory examined the gendered application of law at the domestic level I have attempted to apply such criminological analysis to international law, most notably the ICTY, its statute, rules of evidence, and procedure and its case law. Smart argues that law is not omnipotent, its methodology and classification silences women, and that the legal discourse fails to acknowledge the diversity of

women's experiences. Simply transporting Smart's theory to understanding the legal treatment of rape as a war crime in the former Yugoslavia in a "wholesale" application is not adequate. Not only do women in transitional societies have different needs politically, socially, and economically, but also martial rape is explicitly different from every day rape. Rape during war is more brutal, more frequent and often becomes a public ritual (Copelon, 1994). Martial rape also leaves many victims silenced not only because rape is traditionally seen as an unspeakable crime, but also because many women are either dead or have "disappeared." However most importantly I have tried to show that martial rape is not a crime (or wrong doing) that exists in isolation. As illustrated by the women's stories, the effects of war manifests themselves in multiple forms of social and psychological traumas. My research has been guided by the notion that the creation of more law does not correct the problem of martial rape, as it is reactive and addresses only the end and most overt manifestations. By not delving into etiology of martial rape, law fails to adequately respond to the multiplicity of women's wants, needs, and experiences.

My analysis of the Statute and Rules of Procedure and Evidence showed that the ICTY was not willing to provide women with the financial compensation they very much need. It also showed that law was often forced to balance not only the rights of the victims with those of the accused, but also balance peace with justice in a war torn country.

My examination case law showed that the anonymity of the victims was sometimes jeopardized by the technology. And those women who were selected to testify often were harassed, patronized and re-victimized by Defence lawyers.

Through a qualitative and inductive approach, and in an attempt to exemplify law's neglect in representing women's experiences, I have analyzed some of the women's stories collected in a manner that is consistent with feminist research practices. This analysis has illustrated that the women are strong and have struggled to not only empower themselves, but to empower other women around them.

In noting the inclusion of women in all areas of the ICTY structure (the Chambers, the Office of the Prosecutor, and the Registry) it is evident that their inclusion has been consistent with the "add women and stir" approach. As a result this approach has failed to adequately challenge or change the structure of the ICTY. Ultimately with the inclusion of women in the application of law, the importance of gender was overridden by the power of law. While my approach has been survivor centred it is unknown how the law will respond to women who are war criminals. It is possible that law, if it continues to use the "add women and stir" approach, will either deny women a place as an aggressor or mistakenly assume that their violent acts are equivalent to that of their male counterparts. Thus leaving the gender social scripts unchallenged.

After noting the short comings of law I have attempted to offer possible options that can supplement the ICTY in its attempts to fulfill its objectives that include the delivery of reconciliation to people of the former Yugoslavia, to act as deterrence, to bring those accused to justice, to render justice victims and to establish truth. The possible complementary approaches include the establishment of a formal truth and reconciliation commission as described by Hayner (2001) or the utilization of local women's groups such as Medica Zenica. The truth commission would allow

for a reduced burden of proof and allows for (and encourages) multiple truths and Medica Zenica has empowered women sociologically, politically, and economically.

II. Obstacles

The obstacles I encountered during my research and analysis can be organized into three different categories. These categories include the notion of an unfamiliar subject matter (which includes: a foreign country, international law, mass rape, and the criminological interest (or lack thereof)), the sensitivity of the subject matter (sponges of trauma), and the methodological obstacles (wholesale borrowing of testimony).

Unfamiliar Subject Matter

In order to understand the legal response to rape in the former Yugoslavia I first had to research the country. This included examining its people, politics, culture and its history. This process of setting the stage for my thesis took considerable time. Yacoubian (2000) validates my experience by stating that researchers examining war and war crimes are often required to spend a significant amount of time researching the basics.

I was also hindered by the fact that I am not a student of international law. Without exposure to crime and law in the international context I found it time consuming to interpret and apply as well my unfamiliarity could allow for error. Noting this potential area for errors I have tried to do supplementary research to reduce these errors.

Third, I was limited by what Lindsey (2002) identifies as the lack of precedent studying mass rape in an academic context. Initially it was very difficult to find reliable publications by academics concerning mass rape in the former Yugoslavia. As a result, a great deal of my initial research was based on media stories, books, and reports. However as of recent (between 2000 and present) more analyses of academic quality have been published. The passing of time has also allowed for the translation of work by local researchers from the former Yugoslavia to be translated from Serbo-Croatian/Bosnian into English.

And finally the subject matter of martial rape in the former Yugoslavia from a criminological perspective has remained painstakingly neglected. As a result of the lack of exposure to suitable theories to understand war crimes and crimes against humanity I utilized a feminist sociology of law theory to examine laws inadequacy. I often wonder if at the undergraduate level I had been exposed to theories of war crimes, such as genocide, if my research would have taken a much different approach. However I attempted to make do with the tools (or theory) of understanding I had available to me.

Sensitivity of Subject Matter

Every day rape is disturbing. However, during war rape is more brutal, more frequent, and occurs against the backdrop of complete social, political, and economical disruption of every day life. The lingering presence (Schott, 1996) of war makes rape even more disconcerting not only for those women who survived, but also for those who choose to research it. Many times I have had to step away from my

research as the women's words had a tremendous impact on me. Hayner (2001) describes how the collection of stories often leads the researcher to be a "sponge of trauma." In her work with truth commissions Hayner explains:

> A number of commissions have found that the staff who are the most disturbed by the harrowing tales of torture and abuse are not those taking statements directly from the victims, but instead data entry staff charged with coding and entering the information into the database. Perhaps this is because statement takers can see signs of resilience as the victim tells the story, and put the account into context thus easing the horrors. (Hayner, 2001: 151).

In order to balance out the negative affects of war I researched, and in the hopes of finding signs of resilience, I have become involved with some Bosnian refugees in Winnipeg. I have had the wonderful opportunity to see many young adults grow from small little children to high school students. I have also seen some of the older children of war start families of their own. While I have made a distinct separation between my research (data was collected only through unknown stories shared in the collected works) and my personal involvement, I hope that some of the women I have read about have been able to find happiness and laughter like those survivors I know personally. It is this hope that sometimes serves as my own coping mechanism.

Limitations of Methodology

Lindsey (2002) offers some important insights regarding the utilization of survivors' testimonies. Lindsey suggests that the casual use of testimonies degrades the quality of the testimony and subsequently by creating categories removes the survivor's identity. Undoubtedly I am guilty of categorizations in both my

classifications of the testimonies in my case law analysis and my classifications of the women's stories. However, I do not believe that my utilization degrades the women's stories, nor does it remove their identity. I have used the women's names, ages, and where they were from in order to retain as much of their identity as possible. In addition I tried to remain committed to using their words to articulate their experiences. My categories were not predetermined; rather the categories were created based on the data. My categories are neither meant to theorize about why the crime occurred, or support an already existing theory of rape. Rather my intent is to illustrate the diversity of women's experiences not just with rape, but also with the war in general. By doing this it was also possible to identify common themes. I feel that it is necessary to provide alternatives to legal testimonies to understand what the women want and what the women need. While Lindsey is non-committed on the increased validity of survivors testimony, I wanted to amplify the voices of women based on the work of women at the local level that is often left out of mainstream (western) analysis (Lindsey, 2002). That is why I was careful to select testimony that was collected by women and for women consistent with feminist research practices.

III. Specific Limitations of My Research

In addition to the general obstacles listed above, my research has specific limitations in its application. The limitations of my research can be understood as being limited in scope and in answering the question why rape occurs during war.

Scope

My examination has a somewhat narrow scope, as it is limited to understanding the legal response as it occurred in the former Yugoslavia. While my scope is limited to the war in the former Yugoslavia, other subsequent wars have also been plagued with excessive sexual violence. That being said, a similar thematic approach could be applied to other countries subjected to war. There is a continued need for this type of research. With the eruption of international and civil wars all over the globe, the fact that women and girls will continue to be raped remains an unsettling reality. For example Amnesty International reports on the rape in Dafur:

> When we tried to escape they shot more children. They raped women; I saw many cases of Janjawid raping women and girls. They are happy when they rape. They sing when they rape and they tell that we are just slaves and that they can do with us how they wish (Amnesty International, 2004).

My analysis is also limited in its scope of legal cases. While I have briefly mentioned other cases, one case from the ICTY served as my primary data source. This is because it has been the only case (to date) that has tried rape as both a crime against humanity and a violation of the customs of war. As of September 18th, 2004 of the 121 accused (some remain at large) a total of 16 individuals (13.22%) have been charged with rape under the *ICTY Statute*. One accused has been charged (and convicted) with rape as a violation of the laws or customs of war—*Article 3 of the ICTY Statute* (Furundžija). Nine accused have been charged with rape solely under *Article 5 Crimes Against Humanity* (Prlić, Stojić, Praljak, Petković, Corić and Ousić – all at the pre-trial stage, Todorović (serving 10 year sentence) Nikolić (appeal

pending), Radić (appeal pending) and Cesić (sentenced to 18 years). There have been six accused under both *Articles 3 and 5 (*Kunarac, Kovac, Vuković (as discussed), Stanković (pre-trial stage) Janković (at large) and Zelenović (at large). All six of the aforementioned accused were indicted in relation to rape at the Foča camp. In addition one accused, Rajić, was charged with sexual assault (not rape) under *Article 2 Grave Breaches of the Geneva Conventions of 1949,* and *Article 3 Violations of the laws or customs of war of the ICTY Statute*.

As I have alluded to earlier, until subsequent cases are tried and the Kunarac, Kovac, and Vuković decision is used as precedent the entirety of its impact remains unknown. It is also unknown if the ICC will consider the cases that appeared before the ICTY to have relevance in their court. My analysis is also limited by the fact that it fails to examine any cases that have been tried in national courts of the former Yugoslavia. In the event there is data at the national level, it is unlikely that it has been translated into English.

Explaining Why Rape Occurs

My research fails to address the pertinent question of why rape occurred during the war in the former Yugoslavia. My research began with the acceptance of rape as a given crime and instead of trying to examine why, I have examined the legal responses to martial rape. Instead of offering solutions for the women, my research and analysis offer suggestions for those who will in the future study rape, war, and law. In the future, in order to prevent or predict the occurrence of rape during war criminologists will have to examine the destitute "why" question.

My analysis is limited to critiquing the international response vis-à-vis the creation of the ICTY. However my research could be used to inform those interacting with refugee women, or those looking at future legal responses to rape and other sexual violence during war.

IV. Criminological Relevance

As indicated in my literature review criminology as a discipline has been reluctant to engage in extensive analyses of war crimes. Despite more recent publications by academics from other disciplines (Zolo, 2004; Garapon, 2004; Mundis and Gaynor, 2004 and Todorov, 2004), there is still very little criminological analysis of war crimes. As criminologists, we must break through our resistance to study only local crimes and move beyond what Yacoubian (2000) referred to as "localism." Hoffman (2000: 109) explains that criminologists who study international crimes need to ask themselves and their discipline, "What can we learn from domestic law enforcement experience around the world that may have utility in understanding, predicting and preventing war crimes?"

The greatest leverage to increase graduate study and new interest into the criminological/ war crimes nexus is to increase exposure in undergraduate courses in the field of criminology. Not only will students be exposed to a new criminological topic, they will also have a strong basis of understanding of war crimes for their graduate work. Increased criminological analysis to the field of war crimes will strengthen not only the understanding of these crimes (and subsequently improve the predicting and prevention of these crimes), but also improve criminology as a discipline (Day and Vandiver, 2000). In Yacoubian's (2000: 107) words, "The

evolution of international crime…. poses an interesting opportunity for criminologists."

Although law operates differently at the domestic and international level it is not an unreasonable leap to apply domestic theories to international crimes. However in this transportation of domestic criminology to war crimes we must be cognizant of the pitfalls of domestic law as pointed out by criminology. It would be erroneous to assume application will be identical, and that without critical examination of gendered issues of domestic enforcement the same error could be duplicated at the international level.

As criminologists we cannot respond only to the crime itself. We must address the social context in which the crime takes place. That involves not only examining what happened during the war, but also examining what preceded and what followed the war. In order to ascertain the social implications of the war as researchers we must look beyond the legal narratives. We must look beyond the immediate crime and expand our analysis to include the impact of these crimes.

My research and analysis marks an important step in understanding rape and war from a criminological perspective. However, I am left with more questions than answers. My work points to the need for further research into a largely neglected field that nonetheless appears to be fertile and promising. For the people of the former Yugoslavia my research acknowledges that we cannot undo the past, and what matters now is reconciliation. As the people of the former Yugoslavia move ahead from the present to the future it is important that their voices are heard, and remembered. And perhaps something can be learned from their experiences.

Appendix A: Women's Testimonies

FWS 192

- 37 years
- Mother of 191
- 191 and 192 were not reunited until 1994
- Daughter was taken by Zaga and Gaga
- Received letter requesting clothes and money

FWS 190

- 16 years
- Raped
- Weapons
- Told to obey
- Could not remember with certainty

FWS 96

- 44 years
- Support the testimonies of FWS 88/75/87/74
- 87 taken out of every day to be raped

FWS 50 ***KUN/VUK***

- 16 years
- Daughter of FWS-51
- Grand daughter FWS-62
- Raped orally by Z. Vuković (not indictment)
- Did not mention any of the names of the rapists
- Tried to hide in bathroom
- V. Daughter same age
- Draw cross on back
- Raped "beast like" manner
- V. Unable to get an erection

FWS 191 **KUN**

- 17 years old
- Town of Gacko
- Daughter of 192
- Was virgin
- Gun on table
- Felt like she was property
- Was not free
- In 1 month raped 20 times
- Became pregnant
- Did not feel safe to walk alone in Foča

FWS 186

- 16.5 Years
- Daughter of FWS 185
- Gacko
- Raped

FWS 52

- Mother of FWS 51
- Daughter of 62
- 35 years old
- Vukovic – familiar but not 100% sure

FWS 62

- Unable to recognize Vukovic

FWS 205

- 22 years old
- With FWS 101 and JB
- No supporting evidence

FWS 48

- 35 years old
- Village Trosanji
- Could not recall exact ate
- Ejaculated on her face
- Give birth to Serb babies
- Testimony v. by FWS 48
- Could not recognize Vukovic
- Unreliable
- Unable to put dates with event
- No supporting evidence

FWS 175

- 16 years old
- Lived in Miljevina
- Raped orally and vaginally
- Expression on girls face
- Forced to work in cafe

FWS 132

- 15 years old
- Confirmed others testimonies
- Continuously raped
- Remembered Kunarac
- Unable to identify Kovac

FWS 95

- 27 years old
- Slapped
- Raped
- "Withdrew into herself"
- Raped on a regular basis
- "It wasn't sex with pleasure"
- Inconsistencies
- Conflicting testimony

FWS 105

- Support FWS 151's testimony
- Gang raped (not supported)

AS

- 19 years old
- Daughter of FWS 152
- Continuously raped
- Forced to do chores
- Raped by Kostić (not indicted)
- Supported testimony of FWS 87 and AB

FWS 61

- 35 years old
- Only to support 183
- Her house was burnt down
- Supported by 183

DB

- 19 years old
- FWS 87 sister
- 3 rapist in one day (Gaga)
- Acted out of fear not free will
- Supported FWS 75 Testimony
- Visited by journalist
- Uniforms
- Stankovic—raped/protected
- Kun—DB showed initiative

FWS 183

- Tried to flee, hit with butt of rifle
- Neighbour of 61
- 38 years old
- Threaten to cut off head
- Threats to kill son
- "Enjoy being fucked by a Serb"
- Afraid for son
- Multiple rapes
- Did not resist—was afraid
- Supported by FWS 61

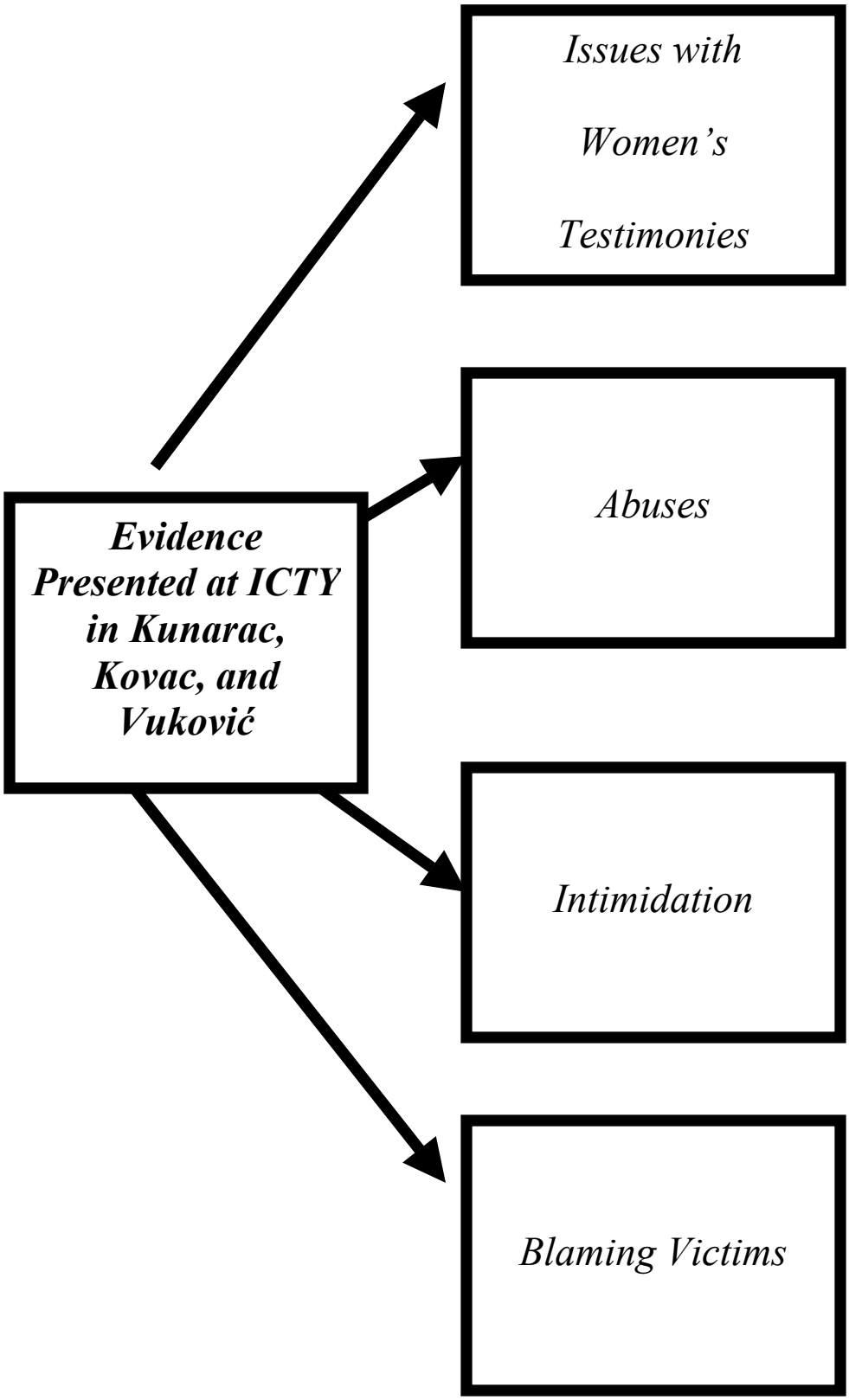
FWS 87 **KUN/KOV/VUK**

- 15.5 years old
- Sister of DB
- Village July 3, 1992
- Could not remember Vukovic
- Testimony contradicts previous
- Unable to testify with accuracy
- Continuously raped
- Forced to do chores
- Inconsistencies
- Could not recall
- Domestication
- Had to strip
- Alleged relationship with Kovac
- Passed food via window
- A.S. were sold
- Forced to work
- Letter of gratitude
- Initiated

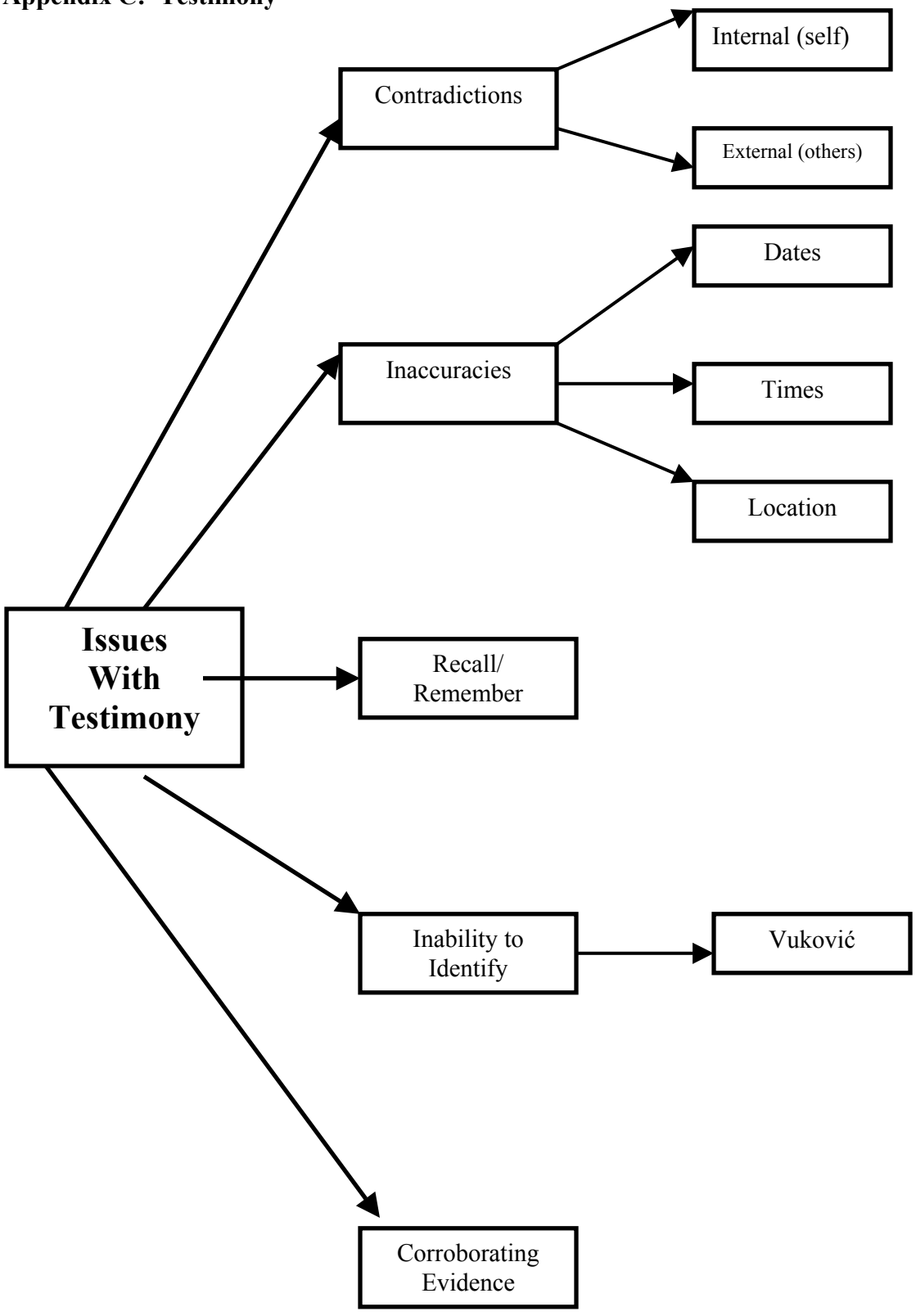
FWS 75 **KUN/KOV/VUK**

- 25 years
- Women and men separated
- Sexually assaulted
- Not sure what night
- Could not remember
- Raped orally (not charged)
- Raped almost every night
- Ordered to have sex with 16 year old boy
- Gang raped, threaten to cut off breasts
- Raped orally/vaginally/anally
- Kovac pretended to be story
- Locked in apartment
- Forced to do chores
- Sold/rented out
- Stand naked on table and dance
- Threatened to cut throat
- Barely able to walk
- Continuously raped
- Differs in time/location/duration

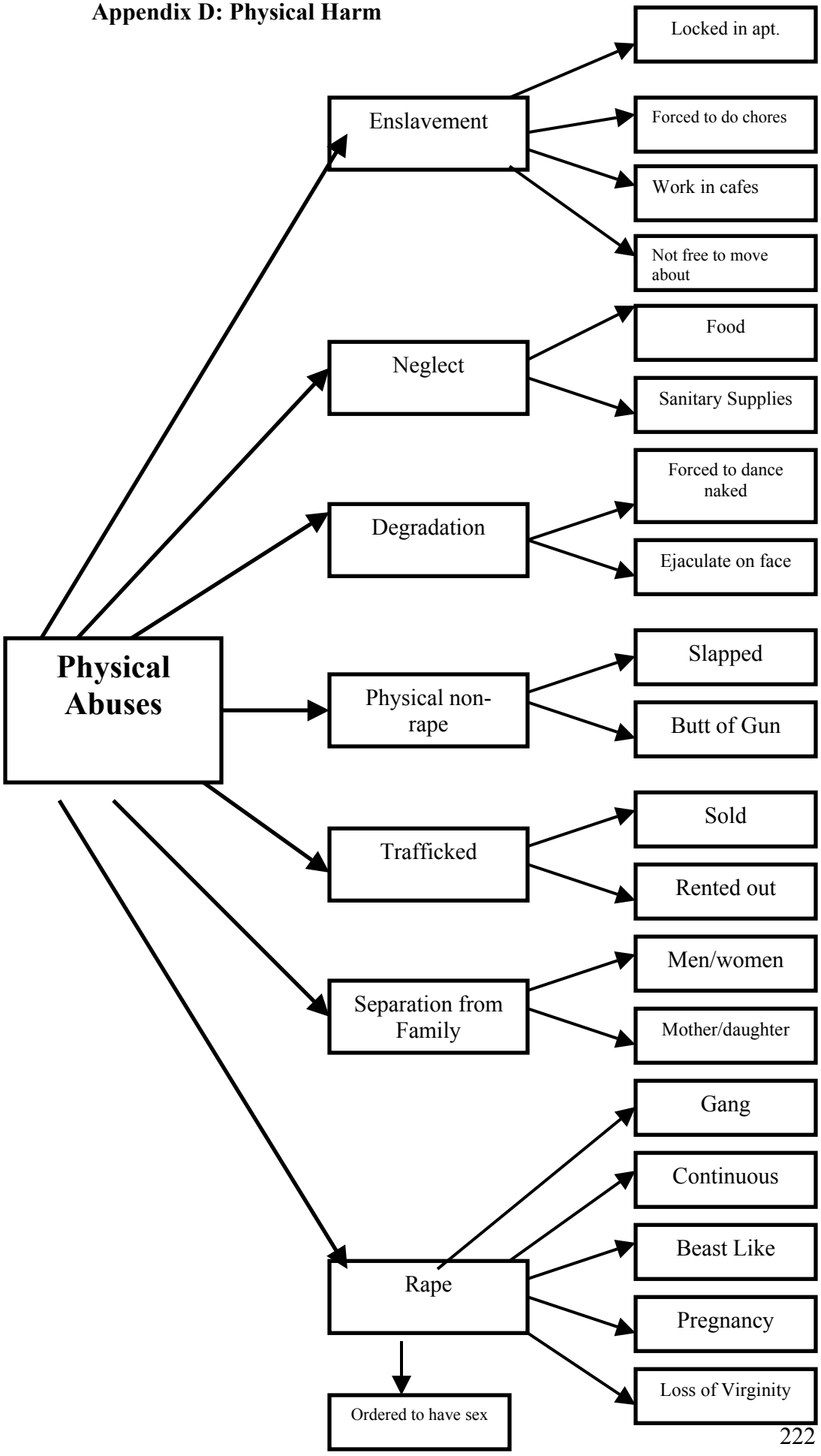
Appendix B: Evidentiary Concepts



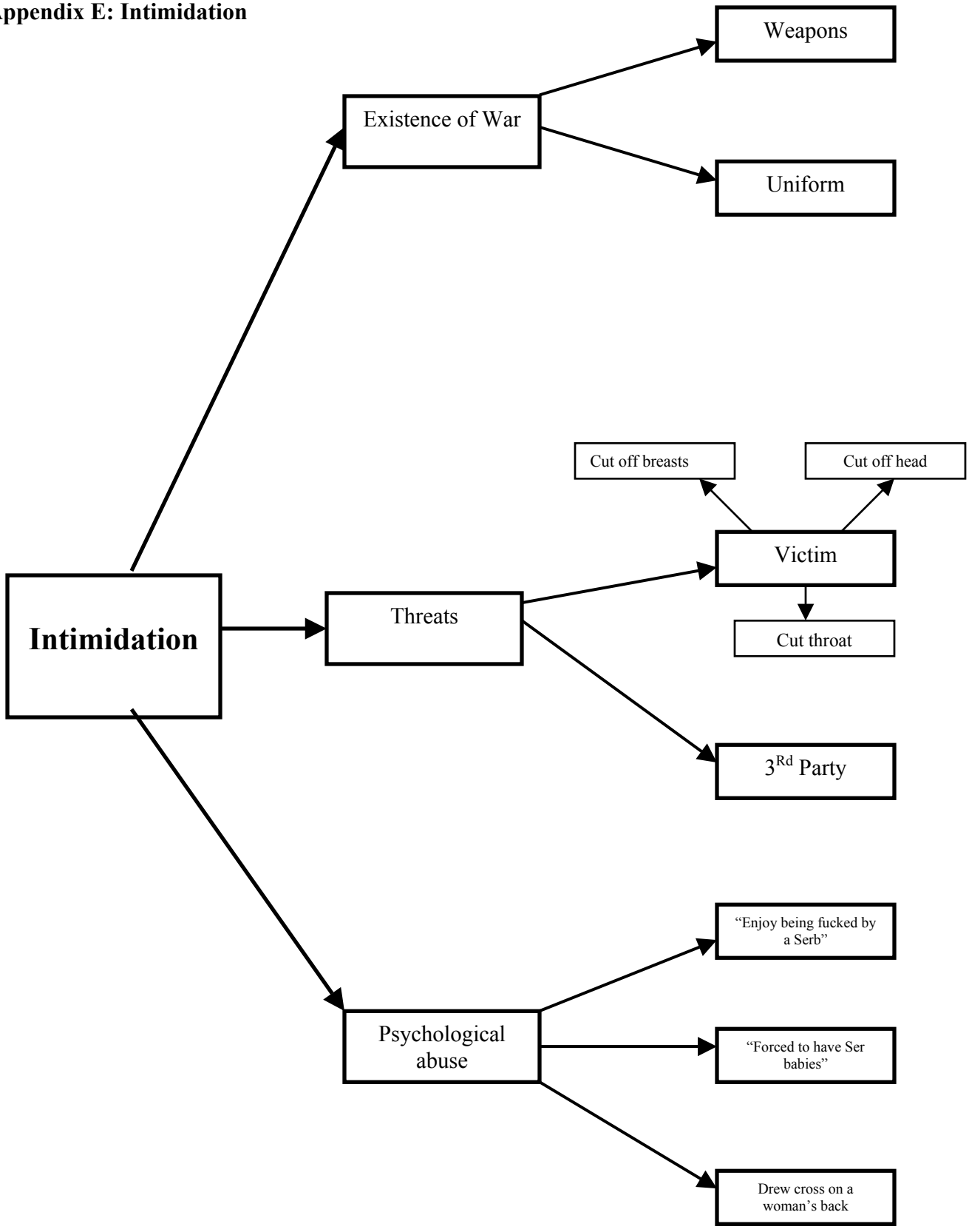
Appendix C: Testimony



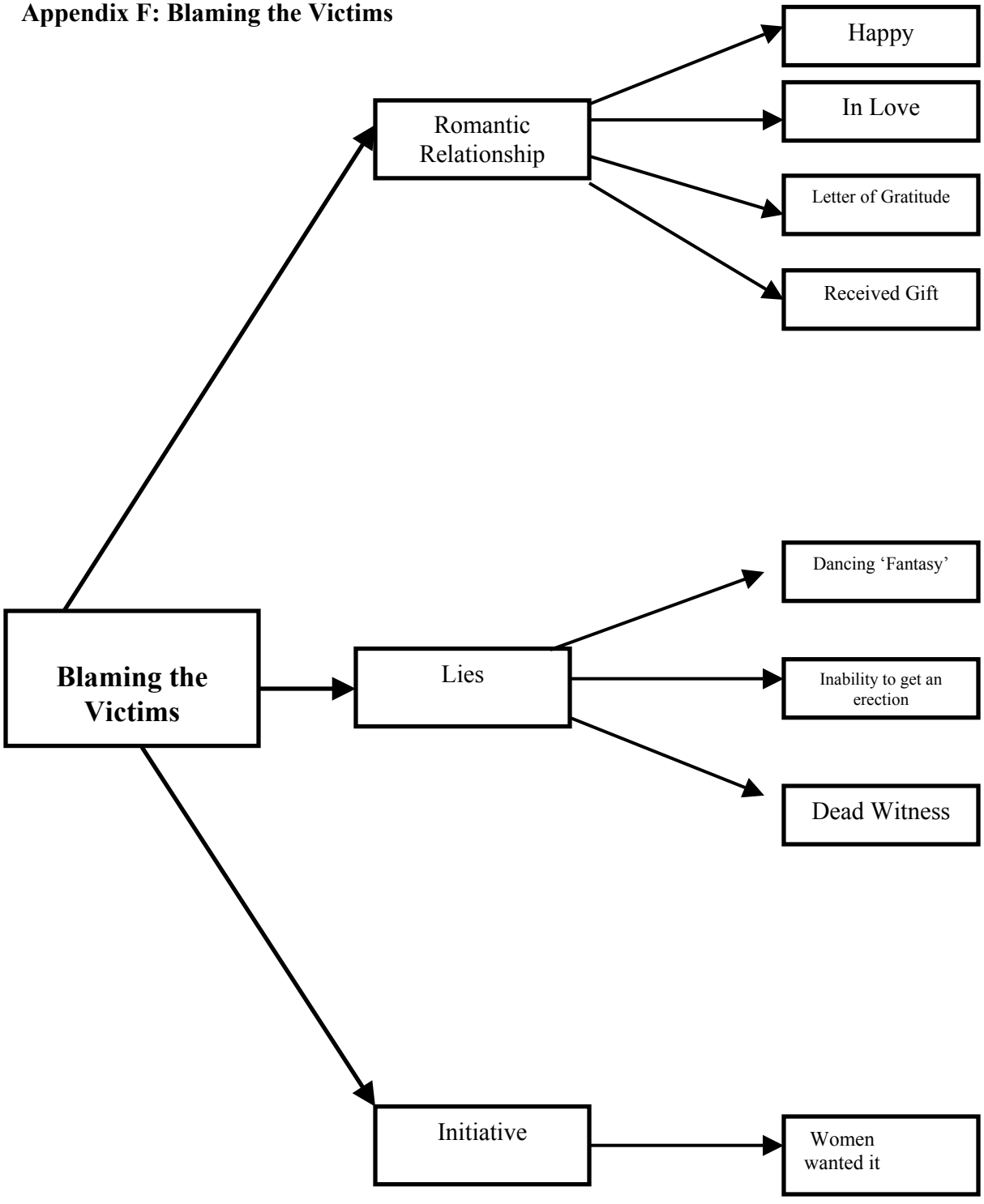
Appendix D: Physical Harm



Appendix E: Intimidation



Appendix F: Blaming the Victims



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