

The Impact of Legal Precedents on the Survivors of Genocidal Rape



The death tolls from the mass slaughters in Bosnia-Herzegovina in 1992 and in Rwanda in 1994 convey the horror and extent of the genocides, but do not tell the whole story. In the shadow of these statistics are the ‘living dead’, the women from both conflicts who survived systematic sexual violence, including rape, sexual mutilation, forced pregnancy, forced abortion, sexual exploitation and forced marriage, all of which ‘constituted a central part of the aggressors’ genocidal mission’ (de Londras, 2009, p3). In both countries the rapes were organised, systematic, predominantly targeted one ethnic group and focused mainly on women, who symbolised the heart of their communities. The scale and nature of their suffering triggered an international response from women’s organisations, which pushed for the crime of rape to be hauled out of its customary pit of indifference and impunity and included in the mandates of the United Nations (UN) ad hoc tribunals, specifically created to punish the genocidaires of Bosnia and Rwanda. The tribunals, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), set powerful legal precedents by finding respectively that rape could constitute genocide in *Prosecutor vs. Akayesu*, and by delivering a guilty verdict for rape as a crime against humanity in *Prosecutor vs. Kunarac*.

While these tribunals made definite strides in the development of the crime of rape in international law, their attitude and actions consigned the mass rapes to historical record as a minor event during the genocides. For the countless rape survivors the powerful precedents are merely empty legal victories that neither reflect the scale and extent of the crime, nor translate into any form of justice.

What happened to these woman more than 20 years ago in Rwanda and Bosnia remains an ongoing but neglected humanitarian tragedy.

Chapter one highlights the magnitude of the legal progress made by the tribunals by exploring the historical context of rape in warfare. The dominant lens through which the crime of rape has been viewed and judged has been male. Looking at rape through gendered lenses (Tickner and Sjoberg, 2007), from a feminist perspective, explains why rape was seen as one of war's dirty little secrets, 'conceptualised as a letting off of steam and not as a crime' (de Londras, 2009, p2). It also exposes why the crime of rape has remained marginalised, its victims demeaned and its consequences negligible. A realist perspective explains the persistent presence and nature of rape on the battlefield through the centuries, while the rise of international women's movements explains why the suffering of women in Bosnia and Rwanda merited court attention, despite the previous reign of impunity. Women's organisations also helped define genocidal rape as opposed to war rape, and explore why rape is such an effective weapon to destroy a group. The chapter finally explores the tribunals' ground-breaking decisions, and their establishment of an international definition of rape, but with the caveat that the act of defining a crime may ultimately prove to be a stumbling block in the judicial process.

Chapter two outlines the context of the mass rapes during the genocides in Bosnia and in Rwanda. While highlighting the particular strategies used in each country, the chapter illustrates how the goal of rape and the consequences of the crime were universally the same. The chapter then analyses the creation of the tribunals, 'slammed as "fig leaves" for international apathy' (Power, 2003, p491), before exploring the instrumental but limited role of women within 'a judicial process that marginalizes, dehumanizes or demeans rape victims' (Nowrojee, 2005).

Chapter three evaluates the failings of the ICTR when dealing with sexual violence, specifically exploring the Akayesu judgement to demonstrate that it was more incidental than ground-breaking, and is increasingly seen as a 'stand alone decision' (Nowrojee, 2005). It then analyses the deficiencies of the ICTY, particularly its failure to acknowledge the charge of rape as an act of genocide or of ethnic cleansing, a charging practice that highlights the problem with how crimes are defined. The debate over the use of the term genocide versus crimes against humanity necessarily involves analysing the problems inherent within the definition of genocide.

However, the tribunals' real legacy comes from the voices of the survivors for whom snapshot courtroom victories do not reflect their fate. These women are unable to go back to their communities because of the stigma and shame associated with rape; they are dying of AIDS; are psychologically scarred; are mothers of

children they do not love, all trapped in a living hell. There has never been compensation, and without legitimate recognition of the crime against them there will never be any justice. The tribunals' legacy within the International Criminal Court (ICC) remains to be seen, but there appears to be some room for optimism as the ICC recognised rape as a main component of al-Bashir's 2003 genocidal campaign in Darfur.

Before rape can be tried as the truly heinous crime that it is, however, attitudes need to change. The pervading perspective in the tribunals towards crimes of sexual violence was 'the stereotypical image of rape in male judges' heads', that of 'domestic crimes where a girl is walking down the street in a short skirt' (Askin, 2009). In addition, gender-sensitive rules and procedures are only as effective as the people who are interpreting and enforcing them.

While acknowledging that men and children in both countries were also victims of rape, this dissertation will focus on the rape of women, who were overwhelmingly the target (Folnegovic-Smalc, 1994). It is also necessary to add that rape was committed on all sides of the conflicts, but in Bosnia the majority had been 'committed by Serb forces against Muslim women from Bosnia-Herzegovina' (UN Commission on Human Rights, 1993, para 84), while in Rwanda, 'Tutsi women were specifically targeted because of their ethnicity' (Organization of African Unity (OAU), 2000).

Chapter One

The aim of chapter one is to highlight the magnitude of the legal progress made by the ICTY and the ICTR. To do this it is necessary to explore the historical context of the crime of rape, in which the act was mostly dismissed as collateral damage on the battlefield, and left undocumented and unpunished as a crime. The chapter also seeks to understand why mass rape during the conflicts in Bosnia and Rwanda came to the forefront of international consciousness by looking at the nature of the attacks and the coincidental rise of women's human rights organisations in the 1990s.

The Historical Status of Rape in Warfare

Rape has been recognised as a crime throughout history, and has an inherent association with conflict as far back as the ancient Greeks when rape was socially acceptable within the rules of war (Siegel, 2009, p291). This attitude has been allowed to continue throughout history with wartime rape dismissed by those in charge, the male military and political elite, as 'a private crime committed by undisciplined soldiers who have momentarily lost control' (Rittner, 2002, p91). Despite the introduction of legal instruments across the centuries banning rape, history has shown that there is little, if any, understanding of the crime, and as a result the consequences and the victims 'slid to the margins of history, or faded into oblivion' (Rittner, 2002, p92).

Rape during warfare has been prohibited since the 1385 Articles of War (Brownmiller, 1975), and was recorded as a war crime in 1474. Since then, it has been variously outlawed as an act of molestation; a crime of troop discipline; and a crime targeting women's honour. The founding statute of the International Military Tribunal at Nuremburg, established by the Allies after World War Two (WWII), labelled the crime 'outrages against dignity' (Wald, 2007, p625), but it was not until Germany's Control Council Law No. 10 in 1945 that rape was categorised as a crime against humanity, putting it for the first time on a par with murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population (Ellis, 2007). This was followed by Article 27 of the 1949 Fourth Geneva Convention, which prohibited wartime rape, indecent assault and enforced prostitution of women (de Londras, 2009).

While the world paid theoretical lip service to rape as a crime, in practice, it was treated with impunity. A legal framework did not equal enforcement (Goldstone, 1997), as evidenced by the International Military Tribunal for

the Far East, which considered rape a violation of international criminal law, but ignored the 200,000 Korean ‘comfort women’ who were forced into prostitution, where they were repeatedly raped by Japanese soldiers (Ellis, 2007). Similarly, the estimated rape of 900,000 women by the liberators in Berlin at the end of WWII became ‘neither a topic for research nor a political issue’ (Seifert, 1994, p54). Even studies on the Holocaust avoid the issue of sexual atrocities, despite reports of brothels in concentration camps and myriad testimonies from camp survivors who witnessed the mass rape of Jewish women.

Former prosecutor at the ICTY and the ICTR, Richard Goldstone (1997, p231) asserts that the prosecutors at Nuremberg would have been ‘too embarrassed by the idea of prosecuting rape’. He fully acknowledges the dearth of attention paid to gender-related crimes, and the lack of inclusion in humanitarian law, which he describes as ‘a body of law drafted by men for men’. It seems only logical then that a crime perpetuated unchecked in conflict, rarely documented or punished throughout history, and frequently misunderstood by the men in charge of enacting the laws against it and punishing the perpetrators of it, should rear its head at distinct intervals. With such a history, the most surprising element of the world’s reaction to mass rape in Bosnia and Rwanda was its incredulity that rape on such a scale could happen in the 20th century. Targeting women as a conscious military tactic is similarly not a new phenomenon. In 1971 the systematic nature of the mass rapes of an estimated 200,000 women in Bangladesh smacked of a purposeful strategy with the objective of creating a new race (Seifert, 1994, p63).

The Realist Code

Morgenthau’s (1978, p4) realist perspective of a world in which ‘Society in general is governed by objective laws that have their roots in human nature’ underscores this theory that human nature remains unchanging. This belief is illustrated by the scientific experiments performed by psychologists Stanley Milgram and Philip Zimbardo during the 1960s and 1970s in the US. In both experiments ordinary people were given a degree of power over their fellow man, and both times they showed ‘the relative ease with which sadistic behaviour could be elicited from normal non-sadistic people’ (Zimbardo, as cited by Valentino, 2004, p44). With genocide, neighbours slip into the role of genocidaires overnight (Neuffer, 2003), a trait that ‘persists over time’ and is ‘common across cultures’ (Marsh and Furlong, 2002, p18). Such an assertion can just as easily be applied to rape.

This is not to say the rape is a response to an uncontrollable male drive, making men involuntary victims of nature. ‘Studies show that rape is not an aggressive manifestation of sexuality, but rather a sexual manifestation

of aggression' (Seifert, 1994, p55). It is the aggression in this context that is the unchanging element of human nature, and the rape is one of the ways in which the aggression asserts itself.

Rape is so much a part of war that the mass rapes in Bosnia and Rwanda were at first dismissed as a necessary evil within conflict. However, the extent and the nature of the violations in both conflicts triggered a shift from the traditional position that viewed rape as 'less atrocious than inevitable' (Donovan, 2002). This time it was not seen as predictable collateral damage, but rather as a weapon to fight a war.

Women's Movements Break the Realist Code

The catalyst that broke the 'historical practice of ignoring gender based crimes' (Askin, 2009) was pressure from international women's human rights groups, who forced the issue of rape into the media and into international consciousness (Copelon, 2003). They contributed to the setting up of the ICTY (Amnesty, 2009a, p12), and campaigned successfully to influence the content of the founding Statute to include rape as a crime against humanity (Art 5, ICTY Statute; Art 3, ICTR Statute) and a Grave Breach of the Geneva Conventions (Art 3 (3), ICTR Statute). They also ensured that the rules of evidence, the indictments, and strategies would be effective in prosecuting rape (Engle, 2005, p778).

Rape has long been considered a crime in international law, so the tribunals' inclusion of it per se was not that extreme, but the pressure from women's organisations was new. Goldstone (1997, p231) agrees that women's groups lobbying his office made him 'determined that something should be done about the proper investigation of allegations of mass rape in the former Yugoslavia and Rwanda'. Arguably, without them the tribunals may have paid as little attention to the mass rapes as previous courts had done.

However, while feminists made substantial gains they disagreed on whether the rapes should be seen as genocidal, arguing that making a distinction undermined the crime in other contexts such as in war or every day (Engle, 2005, p779). Feminist writer Susan Brownmiller (1994) saw no difference between war rape and genocidal rape. In response to the mass rapes in Bosnia, described as 'an organized, systematic attempt to destroy a whole Muslim population...which is unprecedented in the history of war crimes' (Stiglmeier, 1994, p181), Brownmiller replies, 'Alas for women, there is nothing unprecedented about mass rape in war'. In that respect she is right, sexual violence in war claims its first victims as quickly as the bullet, but while genocidal rape 'has elements of commonality with rape that happens elsewhere and in peacetime' (Allen, 1996, p39), there is ample evidence to show the specific nature of genocidal rape.

War Rape vs. Genocidal Rape

In war the destructive consequences of rape are part of the war effort, to demoralise and take revenge on the enemy, but in genocide destruction is the ultimate goal (MacKinnon, 2006). The fundamental trait that distinguishes genocidal rape from war rape lies in the definition of genocide itself, enshrined in Article 2 of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide as the 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such'. Rape becomes genocidal rape when perpetrators use it as part of their group's genocidal programme to destroy a targeted group. This is not like wartime rape, which Brownmiller (1994) describes as been carried out 'as casually or frenetically, as a village is looted or gratuitously destroyed'. Genocidal rape is under control, perpetrated in groups, carried out under orders, in a calculated manner. It targets one side in the conflict, and if there are reports of rape on both sides, there is 'a radical disproportion of sexual violence by one group against the civilians of another group' (MacKinnon, 2006, p222).

The men rape not as individuals, but as members of their race, ethnicity, religion or nationality, while the woman is not an individual but a 'stand in' for her entire group; 'their social group membership is the reason the rape is happening' (MacKinnon, 2006, p222). This is illustrated by Serbian rapists forcing their Bosnian Muslim victims to sing Serbian songs or recite Christian prayers while being raped (Vlachova and Biason, 2005), while others taunted their victims that they would 'give birth to little Chetniks' (Allen, 1996, p96). Similarly in Rwanda, one of the six Hutu militia who raped Denise (not her real name) in her home said: 'You Tutsi, we are going to exterminate you...You Tutsikazi, you think you are the only beautiful women in the world'. 'Then he cut out the inside of my vagina. He took the flesh outside, took a small stick and put what he had cut on the top' so that everyone could see what a Tutsikazi looked like on the inside (Human Rights Watch, 1996, p30).

Although evidence suggests rape took place on a large scale during the Holocaust, it is arguable that Nazi's did not choose rape per se as a way to destroy the European Jews as there is no logical link between destroying the women in order to destroy their community. The efficiency of the gas chambers meant they could destroy whole communities in one go, without using women as a filter. Given the prohibition of sexual relations between Jews and non-Jews under the 1935 Law for the Protection of German Blood and Honour, the crimes of rape were covered up with the crime of murder. It is also important to look at what is meant by 'destroy'. The Nazis

wanted to physically annihilate every Jew, however, destruction can be as effective if it destroys the spirit of the victim group, which is what rape does and why it is such an efficient tool in the destruction of a group.

During the 1998 ICTR trial of Jean-Paul Akayesu, the Hutu mayor of the Taba commune, prosecutor Pierre Prosper, also attempted to define what was meant by the verb ‘destroy’ in order to illustrate how raping Tutsi women was tantamount to destroying the Tutsis as a group. By invoking the spirit rather than the letter of the Genocide Convention, Prosper equated the destruction of a group with an attack at its very centre, an act that would leave people alive but ‘left so marginalized or so irrelevant to society that it was, in effect, destroyed’ (Power, 2003, pp485-486). He argued that while destruction could mean killing, it could also mean the systematic rape of its women, because, ‘nor do those who commit genocide forget that to destroy a people, one must destroy the women’ (Dworkin, 1994).

Why Rape is Effective for Facilitating Genocide

Rape ‘results in physical pain, loss of dignity, an attack on her identity, and a loss of self-determination over her own body’ (Seifert, 1994, p55). The intention, says Silvana Arbia, former acting chief of prosecutions in the ICTR, was to ‘kill without killing’. Such was the fate of a Rwandan woman, then 45, who was raped in front of her husband by her 12-year-old son, while the Interahamwe held a hatchet to his throat, and her five younger children were forced to hold open her thighs (Landesman, 2002). Such an horrific scenario is ‘engulfed by social, cultural, domestic, physical and psychological repercussions’ (Vlachova and Biason, 2005, p115).

While rape destroys the core identity of the victim and how she defines herself within her community, her individual rape will have deeper repercussions, and this is the key to perpetrating genocide more efficiently than having to kill on an individual level. Raping women can be seen as ‘raping the body of the community, in doing so, undermining the entire fabric of that community’ (Vlachova and Biason, 2005, p118). As a result, the harm done to the woman can be ‘obscured or even compounded by the perceived harm to the community’ (Human Rights Watch, 1996). The focus of the social degradation is switched from individual to the wider community, the blame is shifted from rapist to victim, the ‘stigma is reinforced and women are victimized in perpetuity, made to feel isolated long after the attack is over’ (OAU, 2000, para 16.22).

If carried out publicly, the purpose of the rape is to communicate a message for the whole group. In Rwanda, a Tutsi woman would be killed and then penetrated vaginally with a stick, her corpse deliberately made a

spectacle of and left on a public road (Human Rights Watch, 1996). 'Sexually destroying the women of these groups in these ways destroys the group' (MacKinnon, 2006, p231). This public display of evil spreads terror, and creates a submissive, fear-filled group, a pattern perpetrated by the Serbs, who would terrorise communities into leaving their villages by publicly raping several of their women (UN Commission on Human Rights, 1993). Killing group members can boost solidarity but rape can shatter communities' ability to identify with one another and even result in the victim being ostracised. It is extremely common for victims to be rejected by their group. 'After rape, you don't have value in the community' (Human Rights Watch, 1996, p14) says one survivor from Rwanda. On a different continent, thousands of miles away, a rape victim from Bosnia describes the same sentiment: 'Now I must lower my head and look to the ground. If you identified me there would not be any place for me in the world' (Vranic, 1996, p130).

Breaking the Silence of Rape in International Law

To punish the perpetrators and acknowledge in court that what happened to these women is a crime, so heinous it can constitute genocide, so unbearable it has been found to be an act against the human race, is remarkable progress in the context of such an appalling record of indifference and impunity. The ICTY and the ICTR, established by the UN Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations, appeared to usher in the arrival 'of international criminal accountability' (de Londras, 2009, p1), while their jurisprudence was credited with significantly advancing the crime of rape 'by enabling it to be prosecuted as genocide, a war crime and a crime against humanity' (Ellis, 2007, p229).

Prosecutor vs. Akayesu

The ICTR case against Akayesu included allegations that he knew of, facilitated and encouraged repeated acts of sexual violence, including the rape of hundreds of Tutsi women, and therefore was criminally responsible for them. The judgement found that widespread and systematic rape could be used to destroy an ethnic group, becoming the first case to explicitly state that rape can constitute the *actus reus*, or the act, of genocide in international law.

Although rape is not mentioned in the Genocide Convention, the ICTR illustrated how genocide could be achieved through rape by linking it to three of the five methods that constitute genocide, as listed in Article 2 of the ICTR's Statute (taken verbatim from Article 2 of the Genocide Convention). It specifically included causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about its physical destruction; and preventing births (Article 2 (b), (c) and (d)). In its judgement the court found that 'rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims...These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities' (Akayesu, 1998, para731). The measures for preventing births in the victim group were interpreted to include sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages and forced pregnancy. The tribunal also found that these measures may be mental 'when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate' (Akayesu, 1998, para508).

In addition, the court made 'the critical link between rape and intent' (Ellis, 2007, p233) when committed in a patriarchal society, where membership of a group is determined by the identity of the father. The intent behind deliberately impregnating a woman of the victim group by a man of another group is 'to have her give birth to a child who will consequently not belong to its mother's group' (Akayesu, 1998, para507).

Prosecutor vs Kunarac, Kovač and Vuković

Three years later, the ICTY made its own legal history in the Prosecutor vs. Kunarac trial, known as the Foca rape case, named after a municipality in Bosnia where women were held captive for months and subjected to repeated rapes in detention centres and rape camps (Barkan, 2002). The 2001 Kunarac decision was a landmark moment in the history of rape for two reasons. It was the first indictment by an international tribunal based solely on allegations of sexual violence against women, and it was the first conviction by the ICTY for rape and enslavement as crimes against humanity (Ellis, 2007, p 235).

Foundations for the ICC

The tribunals' jurisprudence paved the way for the ICC to include an expanded list of crimes against humanity as they related to crimes against women in its founding 1998 Rome Statute, specifically 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' (Article 7 (1) (g)), as well as 'Persecution against any identifiable group or collectivity on gender' (Art 7 (1) (h)). The recognition that rape and a spectrum of gender crimes are now among the most serious crimes under international humanitarian law marks an historical achievement (Bedont and Martinez, 1999).

The Rome Statute also benefitted from the tribunals' development of a consensus on the definition of rape, because no internationally agreed definition existed at the time (Ellis, 2007, p231). Akayesu broadened the domestic definition of rape, where the type of penetration and the issue of consent are key factors, by dismissing the idea that rape could be defined 'in a mechanical description of objects and body parts' (1998, para597). Instead, it introduced a more conceptual approach that defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances that are coercive' (1998, para598), and 'may include acts which do not involve penetration or even physical contact' (1998, para688). Under this definition, where coercive circumstances could be established, non-consent would be assumed. This version won widespread support among feminists, because for the first time 'rape was defined in law as what it is in life' (MacKinnon, 2006, p239).

However, the ICTY backtracked from the largesse of Akayesu, and re-introduced a more 'particularised' definition of what body parts and acts constituted rape, and reignited the prosecution's burden of having to prove 'coercion or force or threat of force' (Furundzija, 1998, para185). Kunarac (2001, para460) went for the middle ground and maintained the description of specific body parts, but the consent issue was to be 'assessed in the context of the surrounding circumstances'. Proof of force was no longer required, rather the existence of coercive circumstances without the threat or use of force may be enough to demonstrate the absence of consent; in such circumstances implied consent becomes irrelevant (Ellis, 2007, p229). As a result, international criminal law now accepts that coercive circumstances provide for the inference of non-consent (de Londras, 2009).

The Problem with Definitions

However, history shows that defining a crime is not tantamount to recognising it, preventing it or even punishing the perpetrators - the crime of genocide being the most obvious example. When defining rape neither tribunal listened to the other, and the goalposts for what bodily parts defined rape and whether consent was assumed or not moved with every trial. The ICC has now incorporated a definition that is in fact a much narrower version than was developed in Akayesu. This backtracking highlights the importance of not only who is interpreting the law, but also who is formulating it. Judge Navanethem Pillay, who was instrumental in the Akayesu decision, stresses how critical it is 'that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defence, witness protection and judiciary' (Bedont and Martinez, 1999).

Definitions are never an exact science, especially in the context of rape, where much of the evidence comes from the victims, a myriad of voices that together create testimony of one group's intention to use rape as a means to destroy another. However, just as the crime of genocide is itself notoriously difficult to prove and prosecute, so is genocidal rape, which means that due to 'the peculiarities of definition, some of the worst crimes in history may not be brought as genocides but only as crimes against humanity' (Wald, 2007, p627).

However, the currency of the label, a crime against humanity, has devalued. Once seen as the ultimate wicked act, it was used to highlight the heinous nature of the atrocities in the Holocaust, for the first time recognising that 'the whole of humankind...have a concern to bring perpetrators to justice' (Goldstone, 1997, p228).

However, when Polish jurist Rafael Lemkin introduced the hybrid term, 'geno' from the Greek derivative race, and 'cide' from the Latin derivative killing, in 1943, he created an unwritten pecking order in criminal evil, with genocide carrying 'the heaviest stigma in the popular and in the diplomatic world' (Wald, 2007, p629).

Chapter Two

Chapter two aims to show how rape was used as weapon of genocide in Bosnia and Rwanda. To do that, it explores the evidence pertaining to the nature and scale of rape, before analysing the different strategies behind the rapes in each conflict with the similarities of agenda. It also aims to explore the motivations underlying, not only the creation of the ICTY and the ICTR, but also the inclusion of the crime of rape in the statutes of the tribunals. This necessarily involves an analysis of the invaluable role of women in the judicial process, and an exploration of the idea that the crime of rape was always seen as expendable.

Background to the Mass Rape in Bosnia

Despite the conclusions of three courts, the ICTY, the International Court of Justice and the European Court of Human Rights, all of whom determined that genocide took place in Bosnia (Hoare, 2010, p191), the atrocities are still referred to as ethnic cleansing. Defined by a UNSC report (1994) as ‘rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area’, ethnic cleansing was interpreted by the US National Security Adviser Scowcroft, under the Bush administration, in purely geographical terms - ‘Ethnic cleansing is not “I want to destroy an ethnic group, wipe it out”. It’s “They’re not going to live with us. They can live where they like, but not with us’ (Power, 2003, p289).

This understanding, however, did not tally with Serbia’s president Slobodan Milosevic’s plan to create a Greater Serbia. After the Federal People’s Republic of Yugoslavia began to dissolve in the early 1990s, the Serb regime encouraged the most violent methods possible ‘to make a multinational society unthinkable’ in its quest to establish a homogeneously Serb state, whose borders were thought to include at least the greater part of Bosnia, eastern Croatia, Macedonia, and Montenegro (Weitz, 2003). The most recent estimate of Bosnian citizens killed in the conflict currently stands at 97,207 (Ahmetasevic, 2007).

Despite worldwide press coverage of the mass murder of civilians in the heart of Europe, the international community covered up their inaction to the increasing death toll and destruction of a specific ethnic group with political and diplomatic posturing, while dismissing the conflict as ‘an impenetrable civil war in which no

intercession is possible' (Stiglmyer, 1994, p22). The term ethnic cleansing became the buzzword to describe the atrocities, 'as if the euphemism could eliminate the stench of genocide' (Vranic, 1996, p26).

The international community also attempted to dismiss the increasing reports of mass rape, which had begun to emerge from the refugees fleeing from Bosnia to Croatia in June 1992. By August, American journalist Roy Gutman had published his first reports in an American newspaper, *Newsday*, exposing 'the systematic rape of Muslim women in camps' by Serbian soldiers. His findings led him to conclude that the Serbs were raping Muslim women 'not as a by-product of the war, but as a principle "tactic of the war"' (Gutman, 1993, p68). Testimony from 40 young Muslim women raped by Serb forces in the small town of Brezovo Polje in August 1992, reported their rapists saying they were under orders to rape them, a 'mission they had to accomplish' (Gutman, 1993, p68-69), while others testified to being held at a house without being raped but instructed to tell others that they had been. Gutman's stories alerted the world and the international press body descended on Bosnia in a collective quest to find rape victims to interview.

However, it took international headlines and a new round of public outrage, before the UN Commission on Refugees and the International Red Cross backtracked from their previous statements at the beginning of December 1992 that described the reports of rapes as 'isolated cases' committed 'by all sides', to admitting that it had been receiving 'continual reports' of rape and that they were 'widespread' (Stiglmyer, 1994, p25-26). By January a report by the UN Commission on Human Rights (1993), led by Special Rapporteur Tadeusz Mazowiecki, into the allegations of mass rape concluded that while there had been victims on all sides 'the majority of rapes...had been committed by Serb forces against Muslim women from Bosnia and Herzegovina', and that this form of rape was 'an instrument of ethnic cleansing'. The subsequent UNSC report (1994), chaired by Professor Cherif Bassiouni, also suggested that there is an 'overriding policy advocating the use of rape as a method of "ethnic cleansing"'. It cited as evidence a correlation between a reduction in the number of rapes committed with an increase in international headlines, surmising that if the media attention caused the decline in rapes, 'the commanders could control the alleged perpetrators if they wanted to'. It also cited the existence of detention centres and rape/death camps, set up in restaurants, hotels, schools or hospitals, which indicated an environment where rape was encouraged and supported by 'a deliberate failure' of those in charge to stop it.

A European Council report (1993, para15) suggested the rapes were intended to humiliate the victims, their families, and communities, while other rapists deliberately impregnated women, held them captive until it was too late for a termination 'as an additional form of humiliation and constant reminder of the abuse done to

them'. However, the reported numbers of women raped can only ever be a rough approximation of the real situation, with 'estimates varying from 10,000 to 60,000' (Vlachova and BIASON, 2005, p226), although the 'most reasoned estimates' place the number of victims at around 20,000 (Women's Aid International, 1993, para14). Whatever the tally, it does not include the women who were subsequently killed, or the thousands silenced by shame and fear. Even in peacetime it is impossible to collect accurate statistical data of a crime that is rarely disclosed, but the situation becomes much worse in conflict as the victims will not talk for fear of reprisals from perpetrators they 'personally knew...had raped them' (UN Commission on Human Rights, 1993, Annex II, para24). The normal channels of complaint are also barred to rape victims as it is the officials who often sanction or commit the rapes.

It is within the context of gross under-reporting that the statistical data must be read. The Mazowiecki report (1993, Annex II, para29) identified 119 pregnancies resulting from rape in 1992, but added that health workers estimated that the actual number was probably much higher. It also found evidence documenting four times the number of abortions in a Sarajevo clinic in September, October and November 1992. Estimates of the number of children born of rape range from 100 to 1000, but again the stigma associated with these children could mean that the numbers may be even higher (Haddad, 2009).

Zlata (Vranic, 1996) is just one of the thousands of Muslim women whose rape and subsequent abortion are not part of official statistics. On 6 April, 1992, Zlata's husband disappeared, and the following day the Serbs attacked her home in Bosnia. On the morning of 17 April, three men in black masks, who Zlata believes were local Serbs, rang on her doorbell, forced their way in and raped her one by one, stuffing a dishcloth in her mouth to gag her screams. When she finally escaped to a refugee camp in Hungary, Zlata, then 36, was pregnant as a result of the gang rape. She sought an illegal abortion so no one would know. Zlata will only be identified by her first name because if her husband is still alive she does not want him to know what happened to her. She also wants to protect her two sons from the truth. 'If I must live with humiliation myself, carrying it like a burden all my life, I want my children to grow up themselves without this handicap'.

Sofija, then 30, also became pregnant after being raped every night by several soldiers for six months in a school turned prison camp. She was held captive until it was too late for an abortion, and instead of turning to her family, she hid in a Sarajevo hospital 'tormented by the thought of the unwanted child growing inside her' (Newsweek, 1993).

Women are the key to the survival of an ethnic group and as such are always targets in a campaign of genocide. Just as Zlata and Sofija and the thousands of Muslim women like them were targeted in Bosnia, so were the Tutsi women sought out for destruction in Rwanda.

Background to the Mass Rape in Rwanda

Tutsi women were targets, not just because they were at the heart of their communities, but also because of their superior position bestowed on them by the Belgian colonial rule from 1916, and their myth of sexual mystique. The state-owned Kangura newspaper ('Wake Up' in Kinyarwanda) regularly published articles fuelled by Hutu propaganda that denigrated Tutsi women, accusing them of using their womanly wiles to help their men fight the war and having the monopoly on jobs because of their thin noses. Articles often warned Hutus to be on guard against Tutsi women, such as the Hutu Ten Commandments, Number One of which stated: 'Hutus must know that the Tutsi wife, wherever she may be, is serving the Tutsi ethnic group' (Kangura, 1990). 'Tutsi women have always been viewed as enemies of the state,' said one Tutsi woman (Human Rights Watch, 1996).



The ensuing message that Tutsi women were using their sexuality to infiltrate the Hutu community, while remaining sexually inaccessible to them, made them prime targets for destruction during the genocide. Hutu militia groups, the Interahamwe, civilians and soldiers of the Rwandan Armed Forces, including the Presidential Guard, used rape as a weapon to achieve their political goal of destroying the Tutsi as a group, because 'Rape shattered the image that Tutsi women were "too good" for Hutu men' (Human Rights Watch, 1996, p11). Destroying a Tutsi woman's sexuality would destroy her alleged power and place within her own community and subsequently would destroy her ethnic group.

The roots of the Rwandan genocide can be traced back to the German and Belgian colonisers who re-established the Tutsi as the indigenous elite, creating political division and a two-tiered ethnic population of Hutus and

Tutsi. With the start of decolonisation in the late 1950s came the first round of violent clashes between the two groups, followed by decades of mistrust. By 1994 'the groups perceived each other as separate, ethnic enemies' (Amann, 1999, pp195-196). On April 6 1994, when Hutu President Juvenal Habyarimana's plane was shot down, Hutu extremists blamed the Tutsi-led Rwandan Patriotic Front (RPF), and used it as their cue to eliminate their ethnic enemy. The killings, however, were far from spontaneous, having been planned for months in response to the concurrent RPF invasion and the international pressure on Habyarimana to share power with the moderate Hutus and the Tutsis (Valentino, 2004).

Over the course of 100 days, from 6 April to 16 July 2004, the Hutus slaughtered an estimated 800,000 to one million Tutsis and some moderate Hutus, although recent estimates put the number closer to two million (Musoni, 2008). Integral to the plan to annihilate the Tutsi population was the systematic sexual molestation, mutilation, and rape of women and girls (Donovan, 2002), which quickly became 'the rule and its absence the exception', according to a report by the UN Commission on Human Rights (1996, para16), led by special rapporteur René Degni-Ségui. Widespread sexual violence occurred in every prefecture, and was committed in public, on the streets, at checkpoints, near hospitals, churches and government buildings.

From the witness box at the ICTR, former UN peacekeeping force commander Romeo Dallaire describes the numerous bodies of young women who were 'laid out with their dresses over their heads, the legs spread and bent...a variety of material were crushed or implanted into their vaginas; their breasts were cut off' (Nowrojee, 2005). Women were subjected to individual and gang rape, to sexual mutilation, to forced pregnancy, often held in sexual slavery or in a forced 'marriage', and violated with objects such as sticks or gun barrels (Human Rights Watch, 1996). 'Interahamwe men went through Tutsi women like scythes through wheat fields' (MacKinnon, 2006, p220), but as in Bosnia, the actual number of victims will never be known. The UN report (1996) put the figure between 250,000 to 500,000 women, but according to testimonies from survivors 'practically every female who survived the genocide was raped' (OAU, 2000).

Among the weapons of choice calculated to destroy while inflicting maximum suffering was rape by men who 'knew they were HIV+, and were sadistically trying to transmit the virus to Tutsi women and their Tutsi families' (OAU, 2000). Rwanda's President Paul Kagame reveals that 'We knew that the government was bringing AIDS patients out of the hospital specifically to form battalions of rapists' (Landesman, 2002). Survivors' testimony corroborate that many women were deliberately infected from a systematic and planned use of rape by HIV+ men as a weapon of genocide. As a result an estimated 75% of rape victims became

infected (The Wire, 2004). For Mary the end of the killing campaign was the start of a slow, tortuous journey towards death: 'All my friends have AIDS. But I'll die of loneliness before I die of AIDS. All I wanted was to marry and have a family' (Landesman, 2002).

For others, the torture was getting pregnant by their rapists. Rose Mutseayue (Author's interview, 2010), then 22, first endured the slaughter of her parents and seven siblings, then the horror of repeated gang rapes, followed by the realisation that she was pregnant. 'I didn't say another word until the baby was born. Today my daughter doesn't talk. I didn't want the child and tried to abort her, but it didn't work. I don't like her, because she is a child of an animal. I think when those children find out where they come from they will take revenge on us. We should have abandoned them.'

Many women did abandon their babies at birth, with reports of women during delivery crying, 'My child is an Interahamwe!', or of a mother handing over her baby to the Ministry of Family and the Promotion of Women, saying 'This is a child of the State'. There were also many attempts to secretly self-abort the pregnancies, as abortion is illegal in Rwanda. As a result there are no accurate figures for the number of pregnancies, nor are there accurate statistics for the resulting complications that left many victims unable to have a normal sex life or give birth in the future. Many pregnancies were concealed, with women giving birth in secret and then committing infanticide, while other women took their babies home and allowed them to die. Between 2000 and 5000 babies were estimated to have been born as a result of rape (Human Rights Watch, 1996).

The children who survive carry the stigma of their conception, and are singled out from their communities and families as '*les enfant mauvais souvenir*' (children of bad memories). The patriarchal nature of Rwandan society, where children are identified through their fathers' line, means these children are seen to belong to the enemy. For the mother too, they are a constant reminder of her ordeal (Mukangendo, 2007, p42). When Solange Uwamusesa (Author's interview, 2010) sees her teenage daughter, she remembers the repeated rapes she endured for weeks by her neighbour, the same man who murdered her entire family. 'When she was born I tried to abandon her, because no one would help me with this child. In the end I sent her to live with her grandmother when she was eight. Others say she is beautiful, but for me she reminds me of all the bad things.'

Different Strategy, Same Agenda

The stigma surrounding rape and the ensuing shame and fear of rejection and reprisals are universal, whether the victims are black or white, African or European, Christian or Muslim. The response to rape makes it the most under-reported crime, while its common consequences make it one of the most effective methods to commit genocide. The sexual violence in Bosnia and Rwanda shared many similar forms, but the perpetrators adopted particular strategies to achieve their goal, which in both cases was to ultimately destroy a particular group.

In Bosnia, testimony revealed a policy of rape as a mechanism of impregnation, with reports of rapists repeatedly threatening their victims that they would have ‘our little Chetniks’ (Weitsman, 2008). By planting the seeds of Serbs in Bosnia via a woman who was seen as merely a ‘sexual container’ (Allen, 1996, pxiii), the rapists were marking their territory in keeping with Serb mythology that ‘wherever a Serb is buried, there lies Serb territory’ (Allen, 1996, p98). This strategy to propagate the Serb lineage was arguably a response to Serbia’s fears for its national survival, fuelled by its low birth rate in the late 1980s compared with the higher birth rates among other groups such as the Muslim population. The political elites saw ‘population growth as essential to the preservation of national power’ (Shiffman, Skrabalo, Subotic, 2002, p30), a policy that backs up the rapists’ claim that ‘their President had ordered them to do this’ (UNSC, 1994). However, in Rwanda, while there were many children born of rape, forced pregnancy was only one form of sexual violence, and it did not stem from a national psyche to promote the Hutu line, whose population was already in the majority. The paramount strategy was to destroy, and one of the main tools was the systematic rape of women by men who were HIV+.

Although both countries used different forms to destroy the victim group, the goal was the same, ‘Destroy the women and you destroy the race or ethnicity’ (Human Rights Watch, 1996). Just as the rapes in Bosnia were to ‘humiliate, demoralize, and destroy not only the victim but also her family and community’ (Helsinki Watch, 1993, p21), the humiliation, pain and terror inflicted by the rapists in Rwanda were ‘meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part’ (Human Rights Watch, 1996). As a result, rape survivors in Bosnia and in Rwanda were seen as damaged goods, ‘rendered unmarriageable by sexual violation’ (Weitsman, 2008), or abandoned by their husbands if they found out about the rape (Stiglmeier, 1994). Both conflicts produced thousands of children born of rape, and the consequences for these half-Serb and half-Hutu children are the same. They live in limbo, neither acknowledged by their

father's ethnic group, nor wanted by their mother's. However, both sets of children have unwittingly achieved the goal of the genocidaires in destroying the humanity of their mothers who cannot accept or love them, and perpetrating the genocide into the next generation.

The Compromises that Spawned the ICTY and the ICTR

While European and American leaders lacked the political will to stop the mass rape and murder of civilians, they succumbed to public pressure to show a demonstrable reaction. This resulted in the UNSC passing Resolution 827 to establish the ICTY in May 1993. However, this low risk, low cost option 'was set up more for the sake of appearances than for the sake of results' (Hoare, 2010, p202). Having set up the Hague-based ICTY to bring the perpetrators of Bosnia's atrocities to justice 'it would have been politically prickly and manifestly racist to allow impunity' (Power, 2003, p484) for the genocidaires in Rwanda, so the UNSC passed Resolution 955, which established the ICTR in Arusha, Tanzania, in November 1994. Ralph Zacklin (as cited in Smith, 2004, p541), the former UN Assistant Secretary-General for Legal Affairs, describes the establishment of the tribunals 'more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda'.

While there were legitimate problems, including the location of the courts in foreign countries away from potential victims and perpetrators, and trials held long after the fact (Power, 2003), the real obstacle to prosecuting crimes of sexual violence was the attitude of both tribunals that rape was an expendable crime, an afterthought on the scales of justice. This view of rape as a postscript in the hierarchy of crimes is as unchanging as human nature itself. And so it must be recognised that human nature's tolerance of sexual violence is not established by international tribunals, that 'baseline is established by societies, in times of peace. The rules of war can never really change as long as violent aggression against women is tolerated in everyday life' (Donovan, 2002). This tolerance of domestic violence has resulted in more death and disability among women aged 15 to 44 than cancer, malaria, traffic accidents, and war. In particular, sexual violence, including marital rape, was denounced as a major cause of the rapid spread of HIV/AIDS among women (Human Rights Watch, 1999). It is not surprising then that the problems national jurisdictions encounter with rape as a domestic crime made their way into the UN's tribunals (de Londras, 2009) with 'the same crushing limitations and biases'

(Nowrojee, 2005). Before the system can work, the attitude of the people who create and implement it must change.

The Role of Women in Court

The participation of women as judges, prosecutors, investigators and translators was particularly instrumental in adding sexual violence to the tribunals' judicial agenda (Askin, 2004). According to Goldstone (2006) 'if a woman had not been on the Tribunal in its early years, there may not have been *any* indictments for gender-based crimes'. The tribunals' female judges played a significant role in highlighting the seriousness of crimes of sexual violence. Judge Pillay, the only woman judge in the ICTR for the first four years, was instrumental, along with women's organisations, in bringing about the Akayesu decision, while Judge Florence Mumba insisted on 'recounting the testimony of woman after woman' in the Kunarac case (de Londras, 2009, p10). Elizabeth Odio-Benito (1999), one of the first female judges at the ICTY, also played a pivotal role in putting sexual violence on the prosecutors' map after she noticed the total absence of such crimes in the indictments a year after the tribunal opened.

However, the task was a mammoth one, and the number of influential women was limited. The dissenting opinion of Judge Arlette Ramaroson in the 2003 Kajelijeli case, where the defendant was convicted of genocide but acquitted of rape, meant there was every chance for a successful reversal of the rape acquittal, but the prosecutors' office under Hassan Jallow negligently missed the deadline to appeal the rape charges (Nowrojee, 2005). The tribunals' statutes made no reference to gender balance in terms of permanent judges, with the result that in 2009, the ICTY had two female permanent judges out of 16, while the ICTR had three out of 14.

The tribunals' successes in cases of sexual violence were more as a result of 'extraordinary interventions by extraordinary judges and NGOs' (de Londras, 2009, p4), rather than the total integration into the prosecutorial strategy of women's experiences during the conflicts. Proving the exception to the rule was Carla Del Ponte, whose attitude made 'it very clear that sexual violence isn't high on her priority list' (Haddad, 2009, p14) as did her memoir. In it, Del Ponte records in great detail her experiences as prosecutor, but nowhere does she acknowledge the systematic use of rape as a weapon of war and the thousands of victims it maimed for life. In one of the few entries that even mentions rape she records a conversation with a Tutsi woman, who had become pregnant after being raped repeatedly by Hutu soldiers. Her family rejected her because the child was half Hutu,

and sent her and the infant to live in the jungle. 'In this instance it did trigger an urge to do something to right a wrong' (Del Ponte, 2008, p79), but her actions showed this to be empty rhetoric. When talking about genocide survivors and victims she lists the mothers who lost their sons, the wives who lost their husbands and the children who lost their fathers (Del Ponte, 2008, p22). She ignores the mothers, daughters, sisters who were raped and left alive only to never really live again, as one survivor echoes the sentiment of thousands: 'The soldiers killed what I would have become' (de Brouwer and Ka Hon Chu, 2009, p165). Despite the depth of evidence that documented the extent and consequences of mass rape in Bosnia and Rwanda, Del Ponte's attitude became symbolic of the tribunals' innate de-prioritization of crimes of sexual violence.

Chapter Three

Chapter three reveals the failings behind the prosecution of the crime of rape in the ICTR and the ICTY. To explore this premise, it examines the attitude of indifference within the judicial system to the crime and its victims, and reveals the impact on the survivors who are still waiting for justice. It also looks at the tribunals' legacy to the ICC, and asserts that the heightened awareness of genocidal rape in Darfur is a small but important step.

Failures at the ICTR

After the widespread publicity surrounding the ICTY's intent to prosecute mass rape, the first ICTR prosecutor, Goldstone, promised publicly that sexual violence in Rwanda would be punished. However, when he issued his first motion in a case that involved the mass rape of women in camps, the rapes were 'mentioned in passing, like road accidents' (Gaer, as cited in Barkan, 2002). Instead, the motion singled out 'what was worse' – the solitary incident of a man being forced to bite off the testicles of another man (Halley, 2006, p343). Other early indicators that sexual violence against women was not a priority was the limitation of the category of rape as a crime against humanity and a grave breach of the Geneva Conventions, thus immediately placing sexual violence on the sidelines of the prosecution strategy, despite it being central to the genocide. Out of 18 rape trials the ICTR secured only five convictions (Haddad, 2009), illustrating how 'the law in practice has systematically minimised the extent to which such sexual violence occurred by under-prosecuting it' (de Londras, 2009, p5).

While the overall approach to investigating these crimes was limited by staffing and budget constraints, the ICTR's inherent weakness was its lack of political will to integrate these crimes into a consistent prosecution strategy. This led to poor quality investigations, which resulted in inadequate information at the prosecution stage. The investigators received no specific training on how to interview victims of sexual abuse, and some even believed 'this is not a crime that deserves serious attention'. In 1996, the deputy prosecutor blamed the failure to collect testimonies from rape survivors on the victims themselves: 'African women don't want to talk about rape. We haven't received any real complaints' (Nowrojee, 2005). This age-old indifference towards rape created a 'self-fulfilling prophecy' where investigators blamed the victims' for their silence while doing nothing to elicit their testimony (Haddad, 2009, p12).

The approach to gender-sensitive procedures was sporadic, and reflected the lack of care and protection afforded to the victims throughout the proceedings. In 1995 Goldstone created the post of Legal Advisor for Gender-Related Crimes whose role was to formulate a prosecution strategy for crimes of sexual violence for both tribunals. However, the position was based at The Hague, which meant the ICTR in Arusha missed out. A sexual assault unit was not created until two years after the tribunal was established, then disbanded in 2000 and reinstated in 2003, while the witness protection programme did not exist until the tribunal had been working for four years (Haddad, 2009). Victims repeatedly stated that they would only talk to a woman, but the investigative team remained dominated by men.

However, the typically dismissive attitude towards rape was nowhere more evident than in the courtroom. Rape survivors were not told that they would have to speak explicitly about their attack, and were subjected to a hostile court room and lengthy cross-examinations. Instead of being treated as victims, they were often humiliated by the defence counsel with questions such as: ‘why did you not interrupt the act if you did not find pleasure in it?’ (Hirondelle News Agency, 2002). During the week-long cross examination of one young rape victim, TA, testifying in the 2001 Butare trial, the judges started laughing. They never apologised to the victim, who had endured multiple rapes, and whose family was killed during the genocide, nor were they reprimanded for their behaviour. Her suffering was compounded by the failure to protect her identity after the trial. Despite promised anonymity victims were not told that their names would be given to the defence team (Haddad, 2009), and many returned home with their identity revealed, leaving them open to threats and reprisals. When TA’s fiancé found out she had been raped, he left her, sentencing her to a life alone as it is almost impossible in Rwandan society for a rape victim to get married (Landsman, 2002). She was also threatened and her house attacked. ‘In any case, I’m already dead,’ she said (Nowrojee, 2005). Once witnesses realized how precarious protection measures were, some refused to testify (Human Rights Watch, 1999).

While there are credible obstacles to obtaining such sensitive testimony, such as the taboo surrounding rape that silences its victim or the logistical difficulty in finding women who have since disappeared, they are not insurmountable barriers. The real problem is the lack of motivation to investigate and prosecute this genre of crime. The ICTR had not issued any rape indictments in its first three years, because ‘crimes of sexual violence were not a policy priority for the Prosecutor’ (Breton-Le Goff, 2002), something Louise Arbour attempted to change when she replaced Goldstone in 1996. Arbour created a team specifically to deal with crimes of sexual violence, and held workshops to increase sensitivity of staff to gender issues. By the end of 1998, acts of sexual

violence were included in the initial indictments (Breton-Le-Goff, 2002), but despite her progress the backing required to fulfil such a gargantuan task was not forthcoming (Nowrojee, 2005). Perpetrators of sexual violence were still slipping through the net, and Akayesu was nearly one of them. Although the ICTR was applauded for its decision in Akayesu, how the judgement was reached is more enlightening than what the decision ultimately said.

The original 12 indictments against Akayesu in 1996 on counts of genocide, crimes against humanity and violations of the Geneva Convention did not include rape, but during his trial one witness spontaneously testified about the gang rape of her six-year-old daughter (Askin, 2009). After a subsequent witness testified that she too had been raped and had witnessed many others, Judge Pillay, the sole female judge on the bench, asked for permission to investigate further. This request, combined with the submission of an *amicus curiae* brief, or friend's letter, signed by the Coalition on Women's Human Rights in Armed Conflict, revealed widespread and systematic rape and sexual violence, and resulted in an amended charge of rape as genocide. The manner in which Akayesu came about demonstrated the lack of prioritization on rape prosecution at the ICTR, and in time its verdict would come to represent 'an anomaly within the larger pattern of neglect and silence about issues of sexual violence and rape' (Haddad, 2009, p11).

While Akayesu set a powerful precedent in international jurisprudence its verdict did not open the floodgates to similar cases (de Londras, 2009). Astonishingly, when the allegations against Akayesu were being investigated, a witness in the next courtroom during the 1997 Ruzindana trial spontaneously testified about sexual violence, but rather than halt the proceedings to investigate, the judge 'maintained a stony silence...the Akayesu precedent triggered no judicial response' (Breton-Le Goff, 2002). In the wake of Akayesu, prosecutors did amend two indictments to add rape charges, in the Musema case, and in that of Pauline Nyiramasuhuko, the former Minister for Women's Development and Family Welfare. However, these belated amendments only demonstrated that crimes of sexual violence remained an afterthought.

Of the four prosecutors who held office at the ICTR, the blame for its gross failure in bringing rapists to justice is largely levelled at Del Ponte, who is accused of paying 'sporadic attention' to sexual violence crimes, of not carrying out thorough investigations, or reflecting the scale of the crimes in the indictments. Under her, the sexual assault investigations team was disbanded and the number of new indictments including sexual violence charges dropped from 100% in 2000 to 35% in 2001-2002 (Breton-Le Goff, 2002, p7). By 2003, only five of a

100-strong team of general investigators were women, the sexual assault team itself, however, only ever had 10 members of staff at a time (Nowrojee, 2005).

The dismissal of these crimes from the prosecutor's agenda is clear from the 2000 Cyangugu trial, where no rape charges were added to the indictment despite the prosecution having strong evidence to support allegations of more than 132 reported cases of rape and the willingness of the victims to testify. Testimony on the stand describing the sexual abuse and an *amicus curiae* brief, both steps that had changed the course of the Akayesu trial, were dismissed and denied (Haddad, 2009, p24). Under pressure from judges and the UNSC to expedite their caseload prosecutors were encouraged to cut unnecessary charges, and 'sexual violence charges were seen to be in that category' (Nowrojee, 2005).

Failures at the ICTY

Del Ponte was also the Prosecutor at the ICTY from 1999, and her strategy to ignore crimes of sexual violence in the ICTR's Cyangugu case, is echoed in the subsequent ICTY's conviction of cousins Milan and Sredlje Lukic on 20 July, 2009 for war crimes and crimes against humanity, including murder, persecution, extermination and torture. Despite Del Ponte meeting one of the victims, a mother who had been raped in front of her children (Del Ponte, 2008, p325), plus evidence of the abduction and rape of young women (Amnesty, 2009), and documented testimonies from victims, the prosecutor failed to bring amended rape charges so as to 'ensure the expeditious progression of the case' (de Londras, 2009, p12). The move left 'hundreds of raped and sexually abused women from the monster of Milan Lukic' without justice (Sarajevo-X.com, 2008).

Unlike the ICTR, however, prosecuting rape was a consistent part of the ICTY's strategy, and it did produce consistent levels of indictments for rape charges. However, although the ICTY convicted 23 people of rape or sexual assault (Haddad, 2009), the court's mandate, 'to investigate war crimes on all sides of the conflict' (Del Ponte, 2008, p179), reflected the international body's attitude towards the genocide - hesitant to lay the blame at the Serbs' feet, while it 'bent over backwards to be "even-handed" in attributing responsibility for the conflict' (Kenney, 1992), despite evidence that Serbia was responsible. It resulted in the ICTY prosecuting individuals 'on a piecemeal, haphazard basis' (Hoare, 2010, p202), a policy that manifested itself in the rape cases, which were brought against all rapists no matter their ethnicity.

While all crimes of rape should be punished, the blanket prosecution missed the point that the crime was being used as a weapon of ethnic cleansing by the Serbs to destroy a targeted ethnic group, and did not reflect the evidence that repeatedly showed ‘the largest number of reported victims were Bosnian Muslims, and the largest number of alleged perpetrators have been Bosnian Serbs’ (UNSC, 1994, IV, F, para3). While rapes were committed by Bosnians, Croats and United Nations forces, none had ‘an official policy that not only permits but recommends and commands that atrocities, including genocidal rape, be committed as the means for furthering a military and political goal: the establishment... of a so-called Great Serbia’ (Allen, 1996, p43). The 1998 Celebici case against Bosnian Muslim defendants for raping Serbian women found rape to constitute torture, while the same year the Furundzija case successfully prosecuted Croat defendants with rape as a war crime under Article 3 of the ICTY Statute. The ICTY’s ‘reluctance to grasp the entire point of their victimization made survivors unwilling to put themselves in its hands, damaging trust and opportunities for cooperation’ (MacKinnon, 2006, p241).

However, on the face of it the ICTY had got off to a better start than its sister tribunal by adopting and implementing gender sensitive procedures, such as the creation of a Gender Legal Adviser, and a Victims and Witnesses Unit, staffed with qualified women to provide counselling in cases of sexual violence, (Haddad, 2009). However, the sensitivity in overall treatment of rape victims, especially in eliciting evidence ‘in an empowering as opposed to a traumatizing way’, was based more in theory than enforced in practice (Copelon, 1994, p210), as evidenced at the Kunarac trial. Chief defence counsel Slavisa Prodanovic made his view on rape abundantly clear when he announced that ‘rape in itself is not an act that inflicts severe bodily pain’ (Simons, 2001). During the cross-examination of a rape victim in that case, the witness described how one night the rapist had ‘rejected’ her and chosen another girl to rape instead. In response, the defence asked if she was jealous of this other women, because ‘when a man rejects a woman, it is usually a person he loves and not a person who has been raped’ (Kunarac Transcript, 2000, p1624). The defence implied the act was consensual and therefore not rape, blatantly ignoring Rule 96 of the ICTY’s Rules of Procedure and Evidence, a rule the Gender Legal Advisor asserted offered ‘the strongest evidence of the Tribunal’s specific intent to investigate, prosecute, and adjudicate sexual assaults’ (Sellers and Okuizumi, 1997).

The ‘rape shield’ rules originally barred consent from being used as a defence to sexual assault, and did not allow evidence of the victim’s sexual past nor require that the victim’s testimony be corroborated, giving rape survivors confidence that the tribunal understood their experiences. However the rule was amended to read,

consent could not constitute 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 (ICTY, 2009). By backtracking from the original rule the tribunal badly damaged its credibility with potential witnesses (MacKinnon, 2006, p240).

Nor did the ICTY consider the long-term implications for these victims (Human Rights Watch, 1999). Bosnian women temporarily residing in Germany feared what they perceived as the potentially deadly consequences of testifying, as once a witness had testified she had to return home. Between 1996 and 2006, 3700 witnesses appeared before the tribunal, 18% of them were women and only 4% were aged between 21 and 30, figures that illustrate the limited role women played in the prosecution of rape (Henry, 2009, p120). The alienation of its crucial witnesses, ‘the lifeblood of ICTY trials’ (Wald, 2002), no doubt influenced the tribunal’s charging practices. The ICTY found rape to constitute torture, a war crime and a crime against humanity, but exhibited a reluctance to charge rape as an act of genocide. By July 2005, 28 indictments by the ICTY charged rape or other sexual assaults as something other than genocide, while 12 other cases pursued genocide charges on facts that did not mention sexual assault (MacKinnon, 2006).

While Akayesu has been hailed as ‘the most important case for prosecuting rape as an international crime’ (Ellis, 2007, p232), the Kunarac case is arguably more laudable for being deliberately constructed as a case ‘devoted to just one type of crime, just one category of victim’ (Barkan, 2002). Without the same precise circumstances Akayesu’s verdict is unlikely to be repeated, yet its decision ranks above Kunarac in the judicial hierarchy, because it found rape to constitute genocide and not just a crime against humanity, raising again the problem with definitions.

The Kunarac trial judgement (2001, para410) set forth a detailed explanation of the five elements that constitute a crime against humanity under the ICTY Statute. There must be a widespread and systematic attack, directed against any civilian population, and not only must the perpetrators’ acts must be part of the attack, he must also be aware of the wider context in which his acts occur, and he must know that his acts are part of the attack. If the perpetrator has so much awareness of his actions and the context, the logical conclusion is that he has a degree of intention, or for what purpose do the courts want to know that he knows what he is doing, and in what circumstances? This conclusion that there is somehow implied intent strays awkwardly into the arena of genocide. Yet it is this elusive element of ‘intent’ that has left Bosnia’s atrocities categorised as ethnic

cleansing, and the rape of women from all ethnicities labelled a crime against humanity and not as an act of genocide against Bosnian Muslim women. This fixation on what is genocidal intent raises the question of ‘what the motive of the Bosnian Serb forces was supposed to be when they massively and systematically murdered, raped, and tortured Bosniaks’ (Hoare, 2010, p196). Arguably the choice of name is not actually relevant, given that ‘crimes against humanity is a big tent set up on ground that overlaps both war crimes and genocide’ (Wald, 2007, p625). However, ‘Victims of almost all massacres feel cheated when a court finds that their perpetrators have only committed a crime against humanity not a genocide’ (Wald, 2007, p633).

Genocide vs. Crimes Against Humanity

Former judge at the ICTY, Patricia Wald (2007, p629) recalls that while she worked for the tribunal, ‘there was a feeling among at least some judges that genocide lay at the apex and deserved the highest level of sanction’, a sentiment echoed by former prosecutor in both tribunals, Del Ponte (2008, p83), who labelled genocide as ‘the most serious crime known to humanity’. The unwritten hierarchy between genocide, crimes against humanity and war crimes can influence the prosecutors’ decision on what charges to bring, while the charge of genocide could also be used as ‘a bargaining chip because of its super-stigma’, and could be negotiated down to crimes against humanity in exchange for a guilty plea or the accused’s help in prosecuting others (Wald, 2007, p627). To prove genocide requires proof that there was specific ‘intent to destroy’, therefore victory is easier to come by if rape is charged under the edict of crimes against humanity, because there is no requirement to prove intent. The discrepancy between what actually happens to a victim and what the perpetrator is punished for invites the proposition that the definition of genocide stands in the way of achieving true justice.

The Problem with ‘Genocide’

For the crime of genocidal rape to be recognised, the crime of genocide must already be established. History has shown, however, that despite a legal definition under the Genocide Convention, establishing that genocide is occurring has not proved as straightforward as Lemkin, who lobbied for a law that would pre-empt, prevent and punish genocide, had hoped. The wording of the definition is admittedly ambiguous and produces legitimate concerns about if and when to label an internal conflict within a sovereign state as genocide. The definition cannot provide a number as to how many victims constitute genocide, ‘...there is – and can be – no consensus’



(Power, 2003, p65), while the list of diverse methods with which it can be carried out make it almost impossible to pinpoint the start of atrocities (Roth, 2002). The biggest stumbling block, however, is the burden of having to prove the perpetrator's 'intent' to destroy a victim group. During the preparation for Milosevic's trial, Del Ponte (2008, p157), was advised that 'given the very difficult burden of proving genocidal intent beyond reasonable doubt' dropping the charge of genocide would free up resources to try lesser charges, which had more chance of success.

However, the reality of these definitions and the legal strides made in their name, have proved to be 'merely rhetoric' (Haddad, 2009, p33) for the people whose opinions have been least sought and whose voices least heard – the victims: 'Where fighting raged, women were raped; where conflicts subsided, women looked fruitlessly for protection, help, and justice; and where conflicts ended, women's hopes for improved rights met with disinterest and denial' (Human Rights Watch, 1999).

Voices of the Victims

The survivors of rape and sexual violence in Bosnia and Rwanda have received no acknowledgement, no justice and no compensation (Amnesty, 2009b; Nowrojee, 2005). Their attackers often live in the same communities, but while the perpetrators live as free men, their victims live with psychological and physical problems. They often have no access to support and medical health as many are unemployed and living in poverty (Amnesty, 2009b). The social stigma that surrounds rape only exacerbates their suffering. Coupled with misplaced shame and guilt for a crime they did not commit, rape survivors become isolated behind a wall of silence, considered outcasts by their own people (Mukangendo, 2007, p42).

Sixteen years after the Rwandan genocide, Freddy Umutanguha (Author's interview, 2010), the director of Rwanda's Kigali Genocide Memorial Centre, asserts that the rape survivors are the forgotten victims, the ones who continue to suffer the most, but who are last on the list of people in need of help. These women have no voice, and are 'no longer looked at as if they are someone, but as if they have lost part of their humanity'. The 'life sentence of severe physical, sexual and emotional dysfunction' (Donovan, 2002) means that the genocide is never ending, and so the genocidares' toll is much higher than the one million bodies - the number of deaths

documented and remembered by the world today that officially constitutes the Rwandan genocide. Few remember the rape victims, the 'the living dead' as they call themselves (Human Rights Watch, 1996).

The genocide also lives on in the children born as a result of rape, the crime slipping soundlessly, unnoticed and ignored by the rest of the world, into the next generation, with many innocent babies born already carrying the death sentence of the AIDS virus. The National Population Office of Rwanda estimated that between 2000 and 5000 children were born of rape (Mukangendo, 2007, p40), but Foundation Rwanda (2008), set up to help these children go to school, put the figure at around 20,000 children.

When Levine Mukasakufi (Author's interview, 2010) found out she was pregnant after enduring multiple rapes throughout the genocide, she unsuccessfully tried to abort her unborn daughter. While she did not reject the baby when she was born, she has never fully accepted her. 'Even today I find it difficult to love her, because she is a constant reminder of what happened to me. When anything goes wrong she is the cause. It's difficult to survive with these children, because they are children of the Interahamwe, which means we have not really escaped the genocide.' Levine is trapped in limbo, disowned by her own people because she has a genocidaire's daughter, a child who is rejected by both her mother's community and the Hutu community of her father. Levine sees no connection with the ICTR and her ordeal, resigned that they will never help her, 'They can do nothing. I am alone. My life is finished. Who can repay my heart?'

As well as resignation, the overwhelming feelings of the rape survivors towards the ICTR are anger and frustration. The court has failed them and denied them justice by not acknowledging their pain, nor telling their story. Above all, they want public acknowledgement from the ICTR that what was done to them was a crime of genocide. One victim who contracted AIDs after being raped is dying and will leave three young children behind her: 'For those of us on the road to death, this justice will be too slow. We will be dead and no one will know our story' (Nowrojee, 2005).

In a second affront to the victims, anti-retroviral medication has not been made readily available, while the HIV+ genocidaires have had access to medication in Arusha (D'Adesky, 2003). 'They give the Interahamwe lots of things, but we have never had anything from anyone,' says Eugenie Mukeshimana (Author's interview 2010), who was 23 when she became pregnant with twin boys as a result of being repeatedly raped alongside her two sisters for a month in their home. Both her sons have psychological problems, she believes because of the circumstances in which they were conceived and her problems in accepting them. As '*enfants des tueurs*'

(children of killers) Eugenie's community turned their back on them. Today she lives in a hut, scrabbling from day to day to make a living. She is 40 with no plans for the future.

The story for Bosnian women, 18 years on, is no different. Compared to other war victims, these women suffer discrimination in accessing social benefits. They have no healthcare or psychological support and in most cases the 'women face stigmatization rather than the recognition and vital assistance they need to help rebuild their lives' (Amnesty, 2009b). Amma is one of thousands of women for whom there has been no justice or acknowledgement of what she went through. She was just 16 when she became pregnant after being raped, and gave birth to a daughter. She kept her, but 'Nobody in the community wanted to help me because they knew where [she] had come from and hated me for it. I couldn't work because no one wanted to look after my child'. Another survivor, Nadia also decided to keep her son, born after she was repeatedly raped by soldiers in a concentration camp. Her husband does not know the boy is not his. 'I see him as a focus for what has gone wrong with my family and our lives'. For Mirella the suffering has never gone away. She has depression and severe gynaecological problems after being repeatedly raped in front of her children for over a year by Serbian soldiers while a prisoner in her home. When she became pregnant she had an abortion but never told her husband. She has attempted suicide three times. (Holt and Hughes, Independent, 2005)

The survivors of sexual atrocities are forgotten, their voices, if not silenced by rape, then gagged by the apathy of the international community. It is unlikely that they will ever see justice, but arguably their suffering has not been totally in vain.

Hope...in Darfur?

Since 2003 Sudan's President Omar al-Bashir's campaign to destroy the Fur, Marsalit and Zaghawa ethnic groups in Darfur has resulted in the deaths of an estimated 300,000 people, while more than 2.7 million have been displaced. Rape naturally plays its part in this conflict between the Government of Sudan and its militias, commonly known as the Janjaweed, and the rebel movements. A report by Amnesty International (2004) found that the taboos surrounding rape in Sudanese society meant that the consequences for the raped women in Darfur mimicked those of the victims in Bosnia and Rwanda. Women either suffer in silence or face ostracism from their community. They also suffer from the same medical problems, including sexually transmitted diseases, which rarely receive attention. Exacerbating the trauma is the belief among the Sudanese that a woman

cannot become pregnant if she is raped, the implication being that women who became pregnant through rape were not really attacked. In 2004, a woman was charged with adultery and attempted murder when she abandoned her newborn baby, who was conceived as a result of rape. While the adultery charge was ultimately dismissed, there has been no investigation to identify the perpetrators (UN High Commissioner for Human Rights, 2005, p16). ‘Janjaweed babies’ born of the rapes rarely have a future in the mother’s ethnic group, with infanticide and abandonment a common occurrence. Another victim explained: ‘They kill our males and dilute our blood with rape. [They] ... want to finish us as a people, end our history’ (Scheffer, 2008). Even if they were still physically able to bear children, these women typically were ostracized from their communities and could not marry their ethnic men. As well as the consequences for the victims, rape in Sudan, as in Bosnia and Rwanda, has long-term repercussions for the entire community.

Askin (2009) is optimistic that the legal breakthroughs in the ICTY and the ICTR will pave the way, an optimism supported by the ICC’s statement in July 2010 that explicitly called the rape in Darfur an act of genocide, with ICC Chief Prosecutor Luis Moreno-Ocampo (2010) asserting that al Bashir’s forces ‘continue to use different weapons to commit genocide: bullets, rape and hunger’.

Despite the optimism surrounding the ICC, the failings of the ICTY and the ICTR illustrate that the judicial arena is still not ready to prioritise and punish rapists. The tribunals’ powerful precedents are weakened by stemming from incidental circumstances rather than from a consistent, inclusive prosecutorial policy.

Evolving Attitudes: Making Legal Precedent Count

When the UN’s tribunals close their doors for good, will their legacy have ‘contributed to the march of civilization?...placed future aggressors on notice? Or would a bellicose mankind learn nothing?’ (Persico, 1994, p405). When those words were written about the Nuremberg Trials, the jury was still out, but what of the legacies of the ICTR and the ICTY?

For the rape survivors of Bosnia and Rwanda, there was no justice, and now there never will be. The courts’ judgements failed dismally to reflect the scale of the mass rape, to acknowledge the life-long consequences of such an attack and to adequately punish the perpetrators, whose minimum sentences minimise ‘the suffering of the victims’ (Barkan, 2002). For the rape victims, it is not just about getting justice, it is also about being seen to get justice. The act of condemning, prosecuting and convicting the offenders acknowledges the victim is not

guilty, that this crime is wrong, and in doing so gives the victim back some of the humanity that was violently taken away. This desire for public condemnation is the survivor's 'struggle for meaning'. The silence that surrounds crimes of sexual violence, however, only perpetuates the stigma and shame, both real and imagined, of the victim (Lifton, 1980, p123). Institutions in society that publicly condemn the crimes can take the lead in creating society's response to the act and also in their attitude toward the victims, who 'need recognition that they were indeed victims of the offence and acknowledgment of that status by the community and official agencies' (Henry, 2009, p128).

Had the tribunals made rape a priority it could have helped to create a legal culture 'in the reconstituted state where sexual violence is taken seriously by the criminal justice system' (de Londras, 2009, p15). In fact, the tribunals have done just the opposite. By failing to treat such crimes with the seriousness that they deserve, the courts' legacies have condemned future generations of women to suffer the same fate. The UNSC resolutions establishing the tribunals justified them as something that would contribute to the restoration and maintenance of peace. However, there is no evidence that the ICTY - by treating war crimes on a purely individual basis - has made any contribution to reconciliation between the different ethnic groups (Hoare, 2010, p203). By failing to apportion blame and answer the victims' calls for justice, 'One cannot build a secure and peaceful future upon such a foundation of unacknowledged, unaccounted for human rights violations' (Goldstone, 1997, p230). Similarly, the ICTR's 'interpretation of those events, through its judgements, will colour how generations to come will view what happened in Rwanda and who bears responsibility' (Nowrojee, 2005).

While it cannot go unacknowledged that the tribunals' pivotal cases broke 'the historical silence and ambiguity surrounding rape prosecution and from which precedents and norms about processes and outcomes of rape prosecution emerge' (Haddad, 2009), it is evident that there is little power in the precedents of Akayesu and Kunarac. Each step in the recognition of such crimes at the ICC had to be fought, just as each time progress was made on sexual violence crimes at the ICTY it 'required a lobbying campaign' (Barkan, 2002). Outside pressure from women's groups is still necessary to generate political will to try crimes of rape and sexual violence, as seen during the early days of the drafting of the ICC's Rome Statute when government and human rights groups paid little attention to gender issues. As a result women's human rights activists began lobbying government delegations, and subsequently founded the Women's Caucus for Gender Justice in the ICC (Bedont and Martinez, 1999).

The ICC has put in place ground-breaking structures and processes to ensure the prosecution of these crimes in a non-discriminatory and respectful manner, with safeguards to protect the safety and privacy of the victim as well as ensuring reparations (Copelon, 2003), but ‘much resides in the interpretation’ (Sellers, 2009). As the ICTY and the ICTR testify, rules are only as good as the people who are enforcing them. And this is what is crucial if the crime of rape is going to be consistently and successfully prosecuted.

However, the world changes slowly because society is ruled by the unchanging phenomenon of human nature, but that is not to say it cannot change, especially in the arena of human rights, which came to the fore in the 20th century with the metamorphosis of, for example, rights for black, homosexual and disabled people. The crime of rape has been neglected, categorised for centuries as ‘the fault of unchaste women or brushed under the rug’ (Copelon, 2003), but today, awareness of it as a heinous crime is in transition. It cannot change overnight, but each time a rape law is created, or a rape case is tried, ‘communities rethink what rape is’ (MacKinnon, 2006, p237). It is this remoulding of where rape sits in the hierarchy of crimes that is central to finding justice for future victims and punishing the perpetrators. It is also about re-educating people so that well-educated prosecutors and judges in future tribunals realise that it is wrong to laugh or taunt rape victims on the stand. Education is also vital to break down the social stigma attached to rape, which ‘has not yet disappeared anywhere in the world, and Rwanda certainly is no exception’ (OAU, 2000).

There is a global mindset that instinctively makes one judge and categorise crimes, and re-programming that mindset is the task ahead. Racism, like rape, also influences where a crime sits in the pecking order. In Rwanda, the world’s media had a negligible interest in the rape of black, African women, but only two years earlier in 1992 the same press corps had descended en masse into Bosnia for a career-making human interest story about rape victims. The rape of African women was seen as less heinous than women raped in Europe, because ‘Racism slips in so it changes our expectations’ (Dallaire, as cited in Power, 2003, p350) - just as the word rape triggers an instinctive response as to the level of the crime. For the tribunals the crime of rape was always secondary and ultimately became expendable.

Change is slow, but only a decade ago rape had never even been charged as a crime against humanity. Today, rape and genocide are talked about in the same breathe. ‘Prosecuting the rapes in Darfur as a crime against humanity would get at the crime’s seriousness. But genocide is another order of destruction altogether’ (Scheffer, 2008). Women’s groups play a vital role in changing attitudes and giving the victims of sexual violence a voice, but the rules of the game, on the battlefield and in the courtroom, are still interpreted and

enforced by men. Until they understand that rape is not just a crime against all of humanity, but that it strips the victim of her individual humanity, the crime of rape will forever remain an incidental amendment, if that.

