

STUDENT CONTRIBUTION

Rape as a War Crime: The Position of International Law since World War II

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International attention first focused on the use of rape as a tactic of warfare in Bosnia between 1991 and 1995. Rape was also employed by Hutu troops against Tutsi women in the genocidal campaign in Rwanda in 1994. In December of 1993, The United Nations adopted the Declaration on the Elimination of Violence against Women, and with that the international community acknowledged its global dimensions. What became clear to the world was that women's distinctive needs, experiences, vulnerabilities, and perspectives were being excluded in the development of both the substantive and procedural rules of international humanitarian law, as well as the remedies it offered victims. A community of elite women legal policy makers comprised of judges, prosecutors, lawyers, and investigators evolved to try these cases in International Criminal Tribunals in Europe and Africa. During the Bosnian war of 1992-95 Yugoslav women and hundreds of other Muslim women were systematically raped and tortured in a clear attempt to advance the cause of ethnic cleansing. Several of the women took to court, and testified against, three Bosnian soldiers in the courtrooms of the Yugoslav war-crimes tribunal in The Hague. The ruling made on the rape cases between Yugoslav women and the Bosnian Serb army is a landmark in establishing that systematic rape during conflict is not merely a violation of the practice of war but a crime against humanity. In turn, sexual assault during slavery has been recognized as an independent crime under humanitarian and human rights laws. The ruling is very significant because it opens the door for many other victims of sexual violence to press for their recognition as victims, for penalties, and for compensation. It also means that effort will consequently be made to promote its application. However, whether the codification

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of such laws can be translated into the practical protection of women during conflict remains to be seen.

Keywords

International Humanitarian Law, war crimes, mass rape, comfort women.

I. Introduction

In the arena of armed conflicts canvassing the globe, regardless of the internal or international character of the conflict, the truth that peeks at us time and again is that no one is safe. Worse yet, perpetrators do not consider any act off limits. And nowhere is this more apparent than it is in attacks committed against women. Uniformly, these crimes are becoming more blazoned and more horrific in their character and commission. It is almost as if the attackers are boldly defying and challenging the acceptable moral standards set by humankind and daring anyone to take action even as they threaten escalated inhumanity if outside forces intervene in any way or begin to record the crimes committed.

The connection between sexual conquest of women and war was considered natural and inevitable, an essential engine of war, rewarding soldiers and readying them to fight again.¹ The rape of women in prison was not considered torture but was usually noted as incidental to war,² a lesser abuse and even excused in law as a mere personal indiscretion, while official toleration of privately inflicted gender violence was ignored as a human rights issue. Rape was the fault of unchaste women or brushed under the rug, and thus raped women were consigned to invisibility, isolation, and shame.³ In the first recorded International Criminal Tribunal (1474), Peter von Hagenbatch⁴ was convicted and executed on a number of charges which included offences of rape.

¹ ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST: AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 244 (2007).

² Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L. J. 91-133 (1996), available at <http://www.jstor.org/stable/1372967> (last visited on Aug. 17, 2009).

³ Rhonda Copelon, *Rape and Gender Violence: From Impunity to Accountability in International Law*, 2 HUMAN RIGHTS DIALOGUE (2003); *Violence Against Women*, (Nov. 5, 2003), available at http://www.cceia.org/resources/publications/dialogue/2_10/articles/1052.html (last visited on Aug. 16, 2009).

⁴ Following a rebellion by the towns of the Upper Rhine against his tyranny, Hagenbach was put on trial. He was convicted and beheaded for crimes during the siege of Breisach that "he as a knight was deemed to have a duty to prevent," although he had argued that he was only "following orders" from the Duke of Burgundy to whom the Holy

II. War Crimes

Although an exact definition of this much-used expression is not possible, largely because the term refers to a variety of different transgressions, war crimes could be said to be the violation of national and international laws and customs regarding the resort to war and the conduct of war, and other activities associated with war. It has been accepted in international law that war crimes include at least three types of activity: crimes against peace, crimes against the laws and customs of war and crimes against humanity.

Article 6 of the August 1945 Charter for the Nuremberg Tribunal defined the three categories of crimes. Crimes against peace related to violations under *jus ad bellum* (laws governing the legitimacy of war) and were defined as “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.”

Jus in bello (laws governing the conduct of war) thinking, on the other hand, drove the prosecution of crimes against the laws of war, which were defined in the Nuremberg Tribunal Charter as “murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder of 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.” In addition, it was accepted that violations of the laws of war could include other acts, such as the use of banned weapons or the misuse of the flag of surrender, which were not explicitly mentioned in the Charter but were covered elsewhere.

Lastly, the Nuremberg Tribunal Charter defined crimes against humanity as “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds.” As such, crimes against humanity were, like crimes against the laws of war, derived more from the *jus in bello* tradition. Since crimes against humanity could be committed “before or during the war,” and since “any civilian population” including that of the offending state was henceforth to be protected against such crimes, the Nuremberg and Tokyo tribunals tried a new and very broad category of offences. In this respect, the tribunals represented a serious challenge to the traditions

of state sovereignty and non-interference; previously, a state had been more or less entitled to treat its citizens as it wished. There was also the defence of ex post facto legislation to contend with; those on trial for crimes against humanity argued that these new developments in international law could not logically or fairly be applied to actions and events which had already taken place. However, the Principle of Non-Retroactivity had to give way to the overriding need for accountability for large scale atrocities.⁵

One of the most significant of the “Nuremberg Principles”⁶ was that war crimes, as defined in the Charter of the Tribunal, were an offence against customary international law and as such were subject to universal jurisdiction. In other words, when a state found that it could not exercise domestic jurisdiction over the national of another country who chose not to present himself for trial, it was entitled to bring a prosecution under international law. Another principle was that private individuals could be tried under international law, and as criminals. Furthermore, it was not acceptable for an individual accused of committing war crimes to claim in his defense either that he had acted under superior orders or that he had acted out of military necessity being required to act in certain ways in order to carry out an otherwise just and legal military mission. War crimes, in these respects, were absolute and there could be no plea in mitigation.

III. Prosecution History of “Rape” in the International Scenario

The International Criminal Tribunal for Rwanda (“ICTR”) Trial Chamber held in the *Akayesu* case⁷ that rape “is a form of aggression and ... cannot be captured in a mechanical description of objects and body part,” which led it to the definition “a physical invasion of a sexual nature, committed on a person in circumstances which are coercive.”⁸

A slight rift emerged in Tribunal Jurisprudence when in the *Furundzija* case,⁹ a subsequent decision of an International Criminal Tribunal for Former Yugoslavia (“ICTY”) Trial Chamber concluded that greater clarity was needed, and defined the physical element as:¹⁰ “The sexual penetration, however slight: (a) of the vagina or anus

⁵ *Supra* note 1, at 188.

⁶ U.N. A/RES/1/95 (Dec.11, 1946)

⁷ *Akayesu* ICTR T. Ch. I (Sept. 2, 1998).

⁸ *Supra* note 1, at 209.

⁹ *Furundzija* ICTY T. Ch. II (Dec.10.1998).

¹⁰ *Supra* note 1, at 209.

of the victim by the penis of the perpetrator or any other object used by the perpetrator; (b) of the mouth of the victim by the penis of the perpetrator; or (c) by coercion or force or threat of force against the victim or a third person.¹¹

The Kunarac case¹² Trial Chamber, however, found element (iii) more restrictive than that required by international law, and concluded that it should be interpreted to mean “where such sexual penetration occurs without the consent of the victim.”¹³ The judgment emphasizes that “Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances”¹⁴ and the principal focus should be whether there were serious violations of sexual anatomy.¹⁵ The mens rea of the crime of rape is the intent to effect a sexual penetration and the knowledge that it occurs without the consent of the victim.

A much wider scope of acts have been recognised as constituting sexual violence - an act of oral penetration, and a slight penetration of any part of the body with a sexual organ, object or other body part, can constitute rape in international law.¹⁶

The case also provided a new definition of “outrages upon personal dignity.” A crime against personal dignity requires: 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 That he knew that the act or omission could have that effect.

Additionally, Kunarac openly departed from the definition in the previous cases where there had to be “real or lasting suffering” for the crime to be an outrage upon personal dignity. The court ruled that just because a victim had recovered or was in the process of recovering from the assault did not mean that the crime had not occurred. An outrage against personal dignity did not require that there be a minimum time period for the duration of the effects.¹⁷

The definition reflects the brutality of rape, which is frequently perpetrated with sticks, guns, bottles or other objects to injure victims and is gender-neutral, recognising

¹¹ Andre Klip & Goran Sluiter ed., *Annotated Leading Cases of International Criminal Tribunals*, in THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (VIII) 616 (2001-2002)

¹² *Kunarac* ICTY T. Ch. II (Feb. 22, 2001)

¹³ *Supra* note 11.

¹⁴ *RAPE: Zero tolerance under international law, In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law* (Jun. 2006), available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59493> (last visited on Aug. 16, 2009).

¹⁵ *Supra* note 11.

¹⁶ Freyana, *Bemba trial tests rape as war crime*, in AMNESTY INTERNATIONAL AUSTRALIA (Feb. 4, 2009), available at <http://www.amnesty.org.au/svaw/comments/20168/> (last visited on Aug. 16, 2009).

¹⁷ Mark Ellis, *Rape May Be a War Crime*, available at http://clg.portalxm.com/library/keytext.cfm? keytext_id=203 (last visited on Aug. 16, 2009).

that men and women alike are raped in situations of conflict. Of particular significance is an understanding that physical force alone is not the only method of securing control of a person in order to commit rape and other forms of sexual violence. The International Criminal Court ("ICC") Elements of Crimes definition falls in between the two definitions as given in *Akayesu* and *Kunarac*:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body.

In devolving the second component, the ICC followed the approach of Early Tribunal Jurisprudence:

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

In the *Kunarac* case, the Trial Chamber concluded that the correct element was lack of consent of the victim. The Appeals Chamber confirmed this approach and held that force or threat of force maybe relevant in providing clear evidence of non-consent, but force is not an element per se of rape.¹⁸ The ICC Elements were adopted prior to the new line of cases that better reflect national legal systems and the underlying principle of sexual autonomy,¹⁹ and the newer interpretation is also more compatible with the ICC Rules of Procedure and Evidence.²⁰

¹⁸ *Supra* note, at 210.

¹⁹ *Id.*

²⁰ The ICC RPE is an instrument for the application of the Rome Statute of the International Criminal Court, to which it is subordinate in all cases. See U.N. Doc. PCNICC/2000/1/Add.1 (2000).

IV. Is Rape a War Crime?

Evidence collected in the last decade reveals the use of rape as a method of oppression in wars all around the world, ranging from the Democratic Republic of Congo to Chechnya, Bosnia, East Timor, Sierra Leone and Colombia. Its use as a form of torture has also been documented, revealing the lengths gone to in order to achieve the sexual degradation of those being interrogated: one torture chamber in General Pinochet's²¹ Chile had a dog trained to perform sexual acts upon female detainees.

The crime of rape has long existed under customary international law. The Leiber Code²² listed rape as a specific offense, and made it a capital offense.

In the 1907 Hague Convention, rape was delicately coded as a "violation of family honor and rights,"²³ simultaneously invoking male entitlement and female chastity. Rape was thus explicitly cast as a moral offense, not a crime of violence; the fault lay with the victims, not the perpetrators.²⁴

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War came into force in October 1950. Article 27 explicitly prohibits wartime rape and enforced prostitution.²⁵ It was the first international law to state that: "Women shall be especially protected from any attack upon their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Article 3 of this convention, often referred to as Common Article 3,²⁶ lists prohibited acts which include: "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and outrages upon personal dignity, in particular humiliating and degrading treatment." Article 76 of the First Geneva Protocol²⁷ directed towards victims of international armed conflicts, provides that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of

²¹ Augusto Jose Ramon Pinochet Ugarte (1915-2006) was a Chilean army General and later head of the state as a military dictator. He used a trained dog to perpetrate rape on captive women. See William F. SCHULZ, *THE PHENOMENON OF TORTURE: READINGS AND COMMENTARY* 315 (2007).

²² A code of military conduct towards enemy civilians and Prisoners of War (POWs) issued by the U.S. War Department in 1863 vide General Order No. 100, drafted by Professor Francis Leiber of Columbia College.

²³ The Hague Convention (IV) Respecting the Laws and Customs of War on Land.

²⁴ Rhonda Copelon, *Rape and Gender Violence: From Impunity to Accountability in International Law*, 2 HUM. RTS. DIALOGUE (2003): *Violence Against Women*, Nov. 5, 2003, available at http://www.cceia.org/resources/publications/dialogue/2_10/articles/1052.html (last visited on Aug. 16, 2009).

²⁵ Keiko, *International Law and War Rape*, WikiGender (May, 27, 2009), available at http://www.wikigender.org/index.php/International_Law_and_War_Rape (last visited on Aug. 16, 2009).

²⁶ Common Article 3 to the four Geneva Conventions.

²⁷ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) is an amendment to the Geneva Conventions.

indecent assault.”²⁸ Rape was specifically mentioned, along with “enforced prostitution and indecent assault,” as among the “outrages against personal dignity” in the 1977 Second Geneva Protocol²⁹ relating to non-international armed conflict.

Although it was not codified in their Charter, some evidence of sexual violence was presented before the International Military Tribunals, after World War II, most notably, before the International Military Tribunal for the Far East where rape was first specifically referenced in the judgments. Unfortunately, in the Tokyo Trials, acts of sexual violence and rape were not placed at a level that would allow them to stand alone. The Tribunal and its lawyers, while deserving ample credit for presenting the evidence and recognizing the atrociousness of the offenses committed upon women in places such as Nanking, Borneo, the Philippines, and French Indo-China, lumped the acts of sexual violence under the residual umbrella of Crimes Against Humanity, Inhumane Treatment. This resulted in a blur. The only solace arose from the Allied Control Council Law No. 10,³⁰ Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, which specifically mentioned rape in its charter.³¹

The turning point was the 1993 World Conference on Human Rights in Vienna, which prioritized violence against women and gender mainstreaming throughout the human rights system. Responding to women’s demands, the ICTY began to prosecute rape and sexual violence as war crimes and crimes against humanity, including as torture and enslavement,³² while the ICTR³³ prosecuted rape as genocide.

These developments laid the foundation for the gender provisions of the Rome Statute of the ICC, which creates the world’s first permanent criminal court with jurisdiction over genocide, war crimes, and crimes against humanity and provides for future jurisdiction over the crime of aggression. The Rome Statute names a broad range of sexual and reproductive violence crimes - rape, sexual slavery including trafficking, forced pregnancy, enforced prostitution, enforced sterilization, and other serious sexual

²⁸ Mark Ellis, *Rape May Be a War Crime*, Center on Law and Globalization, available at http://clg.portalmx.com/library/keytext.cfm?keytext_id=203 (last visited on Aug. 16, 2009).

²⁹ Protocol II is a 1977 amendment protocol to the Geneva Conventions relating to the protection of victims of non-international armed conflicts.

³⁰ Enacted in order to give effect to the Moscow Declaration of Oct. 30, 1943 and the London Agreement of Aug. 8, 1945, and the charter issued pursuant thereto. available at <http://avalon.law.yale.edu/imt/imt10.asp> (last visited on Aug. 18, 2009).

³¹ David J. Scheffer, *Rape as a War Crime*, War Crimes Issues Remarks, (Oct. 29, 1999), available at <http://www.converge.org.nz/pma/arape.htm> (last visited on Aug. 16, 2009).

³² Article 5 of the ICTY enabling statute specifically states that the tribunal shall have the power to prosecute persons responsible for certain crimes committed during armed conflict, when they are directed against a civilian population, including rape, torture and enslavement.

³³ “Rape” specifically included in ICTR Statute, art. 4(e),

violence-as among the gravest crimes of war.³⁴ These are also “crimes against humanity” when committed as part of a widespread or systematic attack on a civilian population, in times of peace as well as war, and by non-state actors as well as officials. It also confirms that such acts of sexual violence would constitute a grave breach of the Geneva Conventions.³⁵

Significantly, the ICC treaty should also affect domestic laws. It is not only the blueprint for the court; it reflects accepted minimal international norms for the operation of a justice system worldwide. The Principle of Complementarity encourages states to adopt its provisions as local law in order to retain the right to try national offenders. The ICC thereby powerfully supports women’s domestic law reform efforts.³⁶

V. Rape Not Recognized as a War Crime: The Nuremberg Trials, The Nanking Massacre and Other Such Instances

War rape has rarely been prosecuted as a war crime. In the World War II, Hitler’s army engaged in sexual violence.³⁷ Evidence was provided to that extent, but, however, was not allowed to be put into the formal records.³⁸ The Nuremberg tribunal did not prosecute sexual crimes. One episode of wide scale rape, which went unpunished and even unexamined for many years, occurred in Berlin when Soviet soldiers capturing the city in 1945 were reported to have raped more than 110,000 women; less conservative estimates put the figure at over 800,000.³⁹ Many of these victims were raped repeatedly. Upto half the victims were victims of group rapes. Not only did each victim have to carry the trauma with her for the rest of her days, it inflicted a massive collective trauma on the East German nation.

Another relatively unexamined episode occurred in Italy in 1943-44 when Moroccan

³⁴ ICTR Statute, art. 8(2) (b) (xxii)

³⁵ *Id.*

³⁶ *Supra* note 24.

³⁷ Wendy Jo Gertjeanssen, *Victims, Heroes, Survivors: Sexual Violence on the Eastern Front during World War II*, (unpublished thesis, submitted to University of Minnesota in 2004), available at <http://www.victimsheroe ssurvivors.info/VictimsHeroesSurvivorspp1-18.pdf> (last visited on Aug. 18, 2009).

³⁸ Rose Marie Berger, *The Mercy Seat, Sojourners*, (Jul. 1, 2001), available at <http://www.thefreelibrary.com/The+Mercy+Seat+a076751344> (last visited on Aug. 16, 2009).

³⁹ Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649-690 (1995), available at <http://www.jstor.org/stable/762485> (last visited on Aug. 17, 2009).

soldiers of the French army were apparently given license to rape.⁴⁰ Many Italian women who did not take shelter in the mountains were raped. Their story is known because the Italian Government later offered them a pension.⁴¹

The War Crimes Tribunal in Tokyo did convict Japanese officers “of failing to prevent rape” in the Nanking massacre⁴² in which Japanese soldiers raped approximately 20,000 women and children in what is known as the “Rape of Nanking.”⁴³ Japanese General Matsui Iwane and the then Japanese Foreign Minister Hirota Koki were sentenced to death by hanging.

Another highly controversial aspect remains the conviction and execution of General Tomoyuki Yamashita by a U.S. Military Tribunal in the South Pacific, who was held responsible for barbarous acts against civilians including massacre, rape and pillage in the defense of Manila in Philippines in 1944 in what is known as the Manila Massacre, despite the fact that he had ordered Japanese soldiers to leave the city in an orderly manner and had no idea the atrocities occurred, and regardless of the fact that most of these barbarities had been committed by naval ground troops not under his direct command.⁴⁴ The Japanese soldiers who raped Korean and Filipino women were found guilty of crimes against humanity, even though they pleaded that they were ordered to do so.⁴⁵ However, the sexual slavery of women as “comfort women” by the Japanese military was overlooked.⁴⁶ The Tribunal chose to ignore such instances of rape of so-called comfort women by declaring such actions to be voluntary on the part of the victims, and labeled them as prostitutes, rather than victims of the perpetrators of war crimes.

In 1971, East Pakistan (predominantly Muslim-populated Bangladesh) declared its independence. In the ensuing war, at least 200,000 Bengali women were raped by West Pakistani soldiers.⁴⁷ Some of the women were held in military brothels. Many of the victims were rejected by their husbands and families.

Rape also played a role in the Vietnam war. It was one of the atrocities committed by

⁴⁰ *Id.*

⁴¹ Ignazio Silone, *Reflection on the Welfare State*, 8 *DISSENT* 185, 189 (1991).

⁴² It refers to a six-weeks period following the Japanese capture of Nanking, then capital of the Republic of China on December 9, 1937. During this period 20-80,000 women were raped. See IRIS CHANG, *THE RAPE OF NANKING* 6 (1997).

⁴³ Keiko, *International Law and War Rape*, WIKIGENDER, May, 27, 2009, available at http://www.wikigender.org/index.php/International_Law_and_War_Rape (last visited on Aug. 16, 2009).

⁴⁴ Military History Companion, *West's Encyclopedia of American Law*, available at <http://www.answers.com/topic/war-crime> (last visited on August 16, 2009).

⁴⁵ Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 *DUKE L. J.*, 91-133 (1996), available at <http://www.jstor.org/stable/1372967> (last visited on Aug. 17, 2009).

⁴⁶ *Supra* note 1, at 245.

⁴⁷ *Supra* note 39.

U.S. soldiers at My Lai,⁴⁸ charges were brought in but later dismissed. A number of the witnesses testified about humiliation, rape, torture and mutilation of the Vietnamese women by U.S. soldiers. Brothels were organized within military compounds. The situation worsened as the women fled the country. Thousands of asylum-seeking women were raped, tortured and killed in the Gulf of Thailand and the South China Sea.⁴⁹

In the 1990 Gulf War, an estimated 5000 Kuwaiti women were raped by Iraqi soldiers⁵⁰ and during the internal conflict in Peru, women reported being raped by government soldiers and Shining Path⁵¹ members.⁵²

According to the United Nations Development Fund for Women, an estimated 20,000 rapes were committed in the war in Bosnia, yet they resulted in only 27 convictions; 64,000 rapes in Sierra Leone yielded six convictions; and 500,000 rapes in Rwanda, eight convictions.⁵³ These being the total number of convictions in both national and international tribunals combined, it becomes clear that the outlook of the courts with regards to rape as a war crime had not yet undergone any significant change. The status of women was still inferior, and the rape of women looked down upon as another necessary outcome of war. There was still a need for the status of women to be recognized, for rape to be recognized as a war crime, for recognition of the fact that rape never occurs in voluntary indulgence of the women, who are nothing but helpless and innocent victims of soldiers who run rampant destroying human lives and degrading human dignity and humanity in all its forms.

⁴⁸ A hamlet in Vietnam where on March 16, 1968, the Charlie Company, 1st Battalion, 20th Infantry of the U.S. army slaughtered approximately 504 civilians. Women were extensively raped and gang-raped before being murdered. Martin Shaw, *My Lai to Haditha: War, Massacre and Justice*, OPEN DEMOCRACY, Mar. 17, 2008, available at http://www.opendemocracy.net/article/conflicts/asia_pacific/my_lai_haditha (last visited on Aug. 18, 2009).

⁴⁹ *Supra* note 39.

⁵⁰ Full Incidence Report, *Sexual Violence and Abuse of Women in Iraq*: July 16, 1968- May 1, 2003, available at <http://www.globaljusticecenter.net/media/Incident%20Report%20May%2006%20version.pdf> (last visited on Aug. 18, 2009).

⁵¹ The Shining Path is a Maoist Guerilla organization in Peru. It is regarded in Peru as a terrorist organization. The group is on the U.S. Department of States List of Foreign Terrorist Organizations.

⁵² Heidi Nichols Haddad, *Transnational Advocacy and Post-Conflict Rape Prosecution: A Comparison of the ICTY and the ICTR*, a paper presented at the Annual Meeting of the ISA's 50th Annual Convention "Exploring the Past, Anticipating the Future," New York City, Feb. 15, 2009, available at http://www.allacademic.com/meta/p313070_index.html (last visited on Aug. 17, 2009).

⁵³ Editorial, *Rape: It's a War Crime*, L.A. TIMES, Aug. 13, 2009, available at <http://www.latimes.com/news/opinion/la-ed-rape13-2009aug13,0,4833486.story> (last visited on Aug. 16, 2009).

VI. The Tables Turned: The Akayesu Case

It all started quietly within the ICTR in the case of the Prosecutor v. Jean-Paul Akayesu.⁵⁴ The Rwandan president, Juvenal Habyarimana, was killed when his aircraft was shot down over Kigali in April 1994. In the months of violence which followed, over one million Tutsi and Hutu people were massacred, mainly by extremist Hutu *interahamwe*⁵⁵ militia groups. Akayesu was the mayor of Taba, a small Central Rwandan village. He was charged with facilitating the commission of sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to take place at the mayor's offices on 15 counts. By virtue of his presence during the commission of the sexual violence, beatings and murders, and by his failure to prevent these acts, Akayesu was charged with encouraging these activities. Many of the rapes were committed next to mass graves so that the women could be violated, mutilated, killed and then dumped in the pre-prepared graves. Of a sample of Rwandan women surveyed in 1999, 39 percent reported being raped during the 1994 genocide.⁵⁶

If you looked, you could see the evidence, even in the whitened skeletons. The legs bent and apart. A broken bottle, a rough branch, even a knife between them. Where the bodies were fresh, we saw what must have been semen pooled on and near the dead women and girls. There was always a lot of blood. Some male corpses had their genitals cut off, but many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability, flat on their backs, with their legs bent and knees wide apart. It was the expressions on their dead faces that assaulted me the most, a frieze of shock, pain and humiliation.⁵⁷

Akayesu was found guilty on the basis of violation of: Common Article 3 of the Geneva Conventions, Article 2⁵⁸ and Article 3⁵⁹ of the enabling statute of the ICTR on 9 out of 15 counts. On October 2, 1998, Akayesu was sentenced to life imprisonment. He is serving his sentence in a prison in Mali.

⁵⁴ ICTR-96-4-T

⁵⁵ Meaning those who stand/work/fight/attack together, available at <http://news.bbc.co.uk/2/hi/africa/1288230.stm> (last visited on Aug. 18, 2009).

⁵⁶ RAPE: Zero tolerance under international law, In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law (Jun. 2006), available at <http://www.irinnews.org/InDepthMain.aspx?InepthId=7&ReportId=59493> (last visited on Aug. 16, 2009).

⁵⁷ *Id.*

⁵⁸ Echoed the Convention for the Prevention and Repression of the Crime of Genocide.

⁵⁹ An act constituting a crime against humanity must be committed as part of a widespread or systematic attack directed against a civilian population on discriminatory grounds.

In this case, for the first time, rape and acts of sexual violence were put on equal footing with all other war crimes. The Chamber in its progressive decision captured the essence of the crime holding that like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity, and in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Akayesu decision also held that rape or sexual violence can be prosecuted as genocide if the evidence shows that it is accomplished with the intent to physically or psychologically destroy a group. This landmark case is now the cornerstone of all future genocide and crimes against humanity prosecutions.⁶⁰

In 1997, “the ICTR established an incredible precedent by being the first tribunal ever to charge a woman with genocide and rape.”⁶¹ Pauline Nyiramasuhuko, who had held the cabinet position of Minister for the Family and Advancement of Women during the Rwandan genocide, “was charged with two charges of rape:⁶² one as a crime against humanity and the other as a violation of the Geneva conventions on war crimes.” As a member of the Council of Ministers, Nyiramasuhuko “had been open and frank at cabinet meetings, saying that she personally was in favor of getting rid of all Tutsi.”⁶³

Even after the historic success of the Akayesu case, the ICTR failed to adequately incorporate rape into their prosecution strategy. In the Kajelijeli case,⁶⁴ the defendant was convicted of genocide, but acquitted of rape. Because there was a dissenting opinion on the rape charge, the chances for successful appeal on the rape charge were high, but the prosecutor failed to file the paperwork on time, and subsequently relinquished the right to appeal.⁶⁵ As the ICTR reaches its final phase - the tribunal is to shut down in 2010⁶⁶ - rape charges may be the first thing dropped in plea agreements as demonstrated by the 2005 Bisengimana⁶⁷ case.

⁶⁰ *Supra* note 31.

⁶¹ Laura Sjoberg, *Women and the Genocidal Rape of Women: The Gender Dynamics of Gendered War Crimes*, a paper presented at the annual meeting of the ISA's 50th annual convention “Exploring the Past, Anticipating the Future,” New York Marriott Marquis, New York, Feb 15, 2009, available at http://www.allacademic.com/meta/p313767_index.html (last visited on Aug. 18, 2009) See also *Supra* note 52.

⁶² She is said to have told militiamen, “Before you kill the women, you need to rape them.” PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007).

⁶³ *Supra* note 61.

⁶⁴ *The Prosecutor v. Juvenal Kajelijeli*. See ICTR-98-44A-T.

⁶⁵ *Supra* note 52. .

⁶⁶ *Rwanda: UN Security Council Extends ICTR Mandate to December 2010*, Hironelle News Agency (Lausanne), Jul. 9, 2009, available at <http://allafrica.com/stories/200907101002.html> (last visited on Aug. 18, 2009).

⁶⁷ *The Prosecutor v. Paul Bisengimana*. See ICTR-00-60-T.

VII. Rape as a Weapon of War: The Situation in Bosnia

According to investigators of the European Union and Amnesty International, rape was often used in Bosnia as a strategy to terrorize people. They said that all three parties to the conflict, including Muslims and Croats, had committed sexual abuses, but that Bosnian Serbs had been the main perpetrators. The European investigators calculated that in 1992, 20,000 Muslim women and girls were raped by Serbs. The indictment described the ordeal of 14 Muslim women in Foca,⁶⁸ a town overrun by Serb forces in April 1992, “some of them as young as 12 years of age.” Most were detained in a prison camp, where they were subjected to almost constant rape and sexual assaults, torture and other abuses. A woman who complained to the local chief of police, Dragan Gogovic, about the abuse was then herself raped by him, the indictment said.⁶⁹

The rapes that have been documented seem to fall into five distinct patterns:⁷⁰ (a) Rapes committed before fighting breaks out in a region, (b) Rapes occurring in conjunction with invasion and capture of villages and towns, (c) Rapes occurring when the women are held in detention, (d) Rapes in the so-called rape camps, and (e) In brothels where the women are put forcibly to sexually entertain the soldiers.

The Serb forces rounded up some women and children from the Foca region and took them to sports halls or schools which served as detention centres. There they were repeatedly raped. In another indictment, Dragoljub Kunarac,⁷¹ Radomir Kovac⁷² and Zoran Vukovic, were accused of the abuse of women at what was effectively a rape camp in the Foca High School. All three defendants were accused of crimes against humanity and violations of the laws and customs of war in grave breach of Article 3 of the Geneva Conventions as an “outrage upon personal dignity”⁷³ before the ICTY.

⁶⁸ Southeastern Bosnia and Herzegovina.

⁶⁹ Marlise Simons, *U.N. Court, for First Time, Defines Rape as War Crime*, N. Y. TIMES, Jun. 28, 1996, available at <http://www.nytimes.com/1996/06/28/world/un-court-for-first-time-defines-rape-as-war-crime.html> (last visited on Aug. 16, 2009).

⁷⁰ UNITED NATIONS SECURITY COUNCIL, FINAL REPORT OF THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION (1992).

⁷¹ The girls or women, who were selected by Kunarac or his men, were systematically taken to the soldiers' base, a house located in Osmana Didik Street No. 16. There the girls and women were raped by Kunarac himself or his men. Kunarac' s Case. *Supra* note 12.

⁷² While four girls were kept in his apartment, Kovac abused them and raped three of them many times. He sometimes allowed his friends to rape one of the girls. He also sold three of them. He had given two of these girls to other Serb soldiers who abused them for more than three weeks before taking them back to Kovac, who proceeded to sell one and give the other away to an acquaintance of his. Kunarac' s Case. *Id.*

⁷³ HUMAN RIGHTS AND CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW AND PEACEBUILDING 228 (Julie A. Mertus & Jeffrey W. Helsing eds., 2006).

Specifically, Kunarac was charged with rape, enslavement and torture, and committing outrages upon personal dignity; Kovac was charged with rape, enslavement and committing outrages upon personal dignity; and Vukovic was charged with torture and rape.

In 2001, Kunarac, Kovac and Vukovic were found guilty of war crimes and crimes against humanity for acts that the presiding judge described as “a nightmarish scheme of sexual exploitation.” Kunarac received a sentence of 28 years, Kovac 20 years and Vukovic 12 years. Kunarac was transferred to a prison in Germany, where he is serving his time; the other two were put in prisons in Norway. Vukovic was released in May 2008, after serving half of the sentence.⁷⁴

Besides, the cases of Hazim Delic, Anto Furundzija, Zdravko Mucic before the ICTY have all contributed to the development of sexual violence in international law. Delic, in the case known as the Celebici case after the name of the prison camp where the acts took place, was found guilty of torture for the rapes he committed.⁷⁵ Mucic, in the same case, was found guilty for the command responsibility⁷⁶ for rape.⁷⁷ It was held that rape by his subordinates in the camp was so widespread and notorious that he must have known about them.

The case of Prosecutor v. Furundzija,⁷⁸ addressed the war crime of “outrages against personal dignity.” In this case, soldiers had made a woman stand before them naked on a table while they stood around and laughed. While the woman was on the table, the accused allegedly pressed a knife against her thigh and threatened her with mutilation if she did not cooperate. Later she was raped by multiple assailants in multiple ways. The tribunal found that the woman suffered severe physical and mental pain along with public humiliation. All this amounted to a violation of her personal dignity and sexual integrity. Furundzija was found guilty of violating the laws of war.⁷⁹

⁷⁴ Available at <http://www.an.no/nyheter/article3558162.ece> (last visited on Aug. 18, 2009).

⁷⁵ Delic was the Deputy Commandant of the Celebici prison camp from May-November, 1992. Celebici is a village in the Konjic municipality of Central Bosnia. Here the prisoners were murdered, tortured, subjected to sexual violence, beaten up and subjected to cruel and inhumane treatment. He was charged with 49 counts, and sentenced to 18 years imprisonment by ICTY, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/hazim_delic_487.html (last visited on Aug. 18, 2009).

⁷⁶ It is the doctrine of hierarchical accountability in cases of war crimes. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law* (Sept. 15, 2004), available at http://www.law.berkeley.edu/students/curricular_programs/ils/workshop/fall04_Martinez.pdf (last visited on Aug. 18, 2009).

⁷⁷ Mucic was the Commandant of the Celebici prison camp from May-November of 1992. He was charged with 13 counts, and sentenced to 9 years imprisonment by ICTY, available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/zdravko_mucic_486.html (last visited on Aug. 18, 2009).

⁷⁸ IT-95-17/1.

⁷⁹ Mark Ellis, *Rape May Be a War Crime*, available at http://clg.portalex.com/library/keytext.cfm?keytext_id=203 (last visited on Aug. 16, 2009).

VIII. The Scene in the Democratic Republic of Congo

In eastern region of the Democratic Republic of the Congo, the prevalence and intensity of rape and other sexual violence have been described as the worst in the world.⁸⁰ Since 1998, tens and thousands of women and girls have been raped.⁸¹ Reported cases have been numbered at 25,000 in South Kivu, 11,350 in Maniema, 1,625 in Goma, the capital of North Kivu and 3,250 cases in Kalemie, Katanga province.⁸² Needless to say, unreported cases exceed such numbers. It is estimated that there are at least 2,00,000 rape victims in the country today.⁸³ Evidence of war rape emerged when United Nations troops move into areas previously ravaged by war after the peace process started. Gang rape and rape with objects has been reported. Witness accounts include an instance of a woman who had the barrel of a gun inserted into her vagina, after which the soldier opened fire.⁸⁴

Two suspects Germain Katanga and Mathieu Ngudjolo Chui have been surrendered to the ICC by the Congolese authorities. Both of them have been charged with 6 counts of war crimes and 3 counts of crimes against humanity.⁸⁵

IX. The Recent Showdown: The Central African Republic

Following an attempted overthrow of the government by the armed forces in 2001, President Patasse of the Central African Republic (“CAR”) sought military assistance from the armed political group *Mouvement de libération du Congo* (“MLC”).⁸⁶ As Commander in Chief of the MLC, Jean-Pierre Bemba Gombo⁸⁷ allegedly led systematic

⁸⁰ Stephanie McCrummen, Prevalence of Rape in E. Congo Described as Worst in the World, THE WASH. POST, Sept. 9, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/08/AR2007090801194.html> (last visited on Aug. 18, 2009).

⁸¹ *Photo Journal: Tales of rape in DR Congo*, BBC News, available at http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/05/africa_tales_of_rape_in_dr_congo/html/1.stm (last visited on Aug. 18, 2009).

⁸² *Stop Violence against Women*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/library/asset/AFR62/018/2004/en/618e1ff2-d57f-11dd-bb24-1fb85fe8fa05/af620182004en.pdf> (last visited on Aug. 18, 2009).

⁸³ Available at, <http://www.pbs.org/pov/lumo> (last visited on Aug. 18, 2009).

⁸⁴ Jackie Martens, *Congo rape victims seek solace*, BBC NEWS (Jan. 24, 2004), available at <http://news.bbc.co.uk/2/hi/africa/3426273.stm> (last visited on Aug. 18, 2009).

⁸⁵ Relating to an attack on the village of Bogoro on February 24, 2003 in which 200 civilians were killed and women and girls were sexually enslaved.

⁸⁶ MLC is a political party in the Democratic Republic of the Congo.

⁸⁷ He was a politician in the Democratic Republic of the Congo and one of the four Vice Presidents in the transitional

and widespread acts of rape and sexual violence against the civilian population of the CAR, many of whom belonged to the same ethnic group as the leader of the attempted coup. The acts of rape were condoned by government forces, intended to punish women for alleged assistance to the mutinous army, and aimed at humiliating the men and demonstrating their powerlessness to protect the vulnerable women and families.⁸⁸ An estimated 200,000 people have been abused in war in the last decade. In 2008 alone, the U.N. Population Fund recorded 16,000 cases, two-thirds of them adolescent girls and other children. The crimes include sexual enslavement, forced incest, gang rape in front of families and community members, sometimes followed by stabbing and shooting in the genitals. So common is the rape of women and children that combatants increasingly had turned to raping men as added humiliation.⁸⁹

On May 23, 2008, a Pre-Trial Chamber of the ICC found that there were reasonable grounds to believe that Bemba bore individual criminal responsibility for war crimes and crimes against humanity committed in the CAR between October 25, 2002 and March 15, 2003, and issued a sealed warrant for his arrest. He was charged with 5 counts of war crimes and 2 counts of crimes against humanity, both of which included rape. On May 24, 2008, Bemba was arrested near Brussels.⁹⁰

The trial is expected to start from 2010. From January 12-15, 2009, evidence was presented to the Pre-Trial Chamber III. According to human rights and humanitarian organisations, victims/survivors were aged between six and sixty years old, with hundreds of cases of rape-related injuries, infections of STDs and AIDS, unwanted pregnancies, and some deaths, amidst the trauma of community rejection and shame for the victims/survivors, their spouses and members of their immediate family.⁹¹

According to the latest reports on the case, on August 14 2009, ICC Pre-Trial Chamber II decided to grant interim release to Bemba Gombo. However, the Chamber still has to determine to which state and under which conditions Bemba will be provisionally released. Bemba will not be released until a state agrees to host him. States currently under consideration are Belgium, Portugal, France, Germany, South Africa, The Netherlands and Italy. Once his trial is set to open in The Hague, authorities of the host state have the obligation to surrender him to the Court to stand trial. The ICC Prosecutor has also announced that he will appeal the decision. Bemba has been

government of the DR Congo from July 2003 to December 2006. He is also the leader of the MLC.

⁸⁸ Freyana, *Bemba trial tests rape as war crime*, AMNESTY INTERNATIONAL AUSTRALIA, Feb. 4, 2009, available at <http://www.amnesty.org.au/svaw/comments/20168/> (last visited on Aug. 16, 2009).

⁸⁹ *Supra* note 53.

⁹⁰ *Former DR Congo Leader arrested*, BBC NEWS, May 24, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7418932.stm> (last visited on Aug. 18, 2009).

⁹¹ *Supra* note 88.

detained in one of the 12 ICC cells of the “Haaglanden Prison,” in Scheveningen in The Hague since 3 July 2008.⁹²

X. The Darfur Crisis for Humanity

Sudan has been engulfed in a civil war for the last twenty years. However, it was not until 2003 that the rest of the world began to notice the plight of Darfuris. Members of the Sudan Liberation Army (“SLA”)⁹³ and Justice and Equality Movement (“JEM”)⁹⁴ group attacked the Sudanese government air base on April 25, 2003, where more than seventy-five government troops were killed while the rebels lost only nine men and escaped with ammunition, vehicles and weapons.⁹⁵ The rebels - SLA and JEM members - had challenged the government and succeeded in their attack of the military base.

The Sudanese government responded by recruiting soldiers from ethnic Arabic speaking tribes - whose land and property were already destroyed due to the conflict to join the Janjaweed⁹⁶ group to fight against rebels in the Darfur region, together with air raids in the rebel controlled areas.

One of the key methods Janjaweeds successfully used to terrorize the black Darfuris is by raping their women and girls and castrating men.⁹⁷ As of May 2006, 2.3 million Darfuris have been displaced and 285,000 are estimated to have died from starvation, diseases and killings in Darfur since 2003. However, the situation in Darfur didn't garner world's and media's attention until Mukesh Kapila, the UN Human Rights

⁹² Bemba Case, available at <http://www.iccnw.org/?mod=bemba> (last visited on Aug. 16, 2009).

⁹³ A Sudanese rebel group founded as the Darfur Liberation Front by members of three indigenous ethnic groups in Darfur, the Fur, the Zaghawa and the Masalit.

⁹⁴ It is a rebel group involved in the Darfur conflict of Sudan. It is led by Khalil Ibrahim, and is fighting against the Sudanese government along with other groups like the SLA.

⁹⁵ Ammina Kothari, *When Rape Victims Become Symbolic Representations of War: A Textual Analysis of the NY Times Reporting on the Use of “Rape as Weapon of War”* in Darfu, a paper Presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, Chicago, Aug. 6, 2008, available at http://www.allacademic.com/meta/p271438_index.html (last visited on Aug. 17, 2009).

⁹⁶ The Janjaweed is a blanket term used to describe mostly armed gunmen in Darfur, western Sudan and Eastern Chad. Using the UN definition, the Janjaweed comprised nomadic Arab-speaking African tribes (Black Arabs or Afro-Arabs), the core of whom are from the Abbala (camel herder) background with significant recruitment from the Baggara (cattle herder) people. Mikael Nabati, *UN responds to the crisis in Darfur: Security Council Resolution 1556*, ASIL INSIGHTS, Aug. 2004, available at <http://www.asil.org/insigh142.cfm> (last visited on Aug. 18, 2009).

⁹⁷ Pamela Shifman, the UNICEF advisor on violence and sexual exploitation, said she heard dozens of harrowing accounts of sexual assaults- including numerous reports of gang rapes. UN News Centre, *UNICEF advisor says rape in Darfur, Sudan continues with impunity*, Oct. 19, 2004, available at <http://www.un.org/apps/news/story.asp?NewsID=12280&Cr=darfur&Cr1> (last visited on Aug. 18, 2009).

Coordinator for Sudan, declared on the UN's own IRIN network, that Darfur was "the world's greatest humanitarian crisis" and that "the only difference between Rwanda and Darfur is now the numbers involved."⁹⁸

A number of human rights groups have documented that women have played a role both in the commission of crimes against other women and in the encouragement and celebration of men's commission of those crimes in Darfur. Women, called Hakama or Janjaweed women, "stirred up racial hatred against black civilians during attacks on villages in Darfur and celebrated the humiliation of their enemies" by singing during the commission of rapes and other atrocities.⁹⁹ "Hakama appear to have directly physically harassed the women who were assaulted, and verbally attacked them."

On July 14, 2008, prosecutors at the ICC filed 10 charges of war crimes against Sudan's President Omar Al-Bashir, that included 3 counts of genocide, 5 counts of crimes against humanity and 2 of murder. On March 4, 2009, the ICC issued an arrest warrant for him, without the genocide charges.¹⁰⁰ Bashir has rejected the charges and ICC's jurisdiction. Though he may not go to trial, "he would effectively be in prison within the Sudan itself."¹⁰¹ The prosecutor has publicly warned that authorities could arrest the President if he enters international airspace. The Sudanese government has announced that the Presidential plane shall be accompanied by jet fighters.¹⁰² In this situation, what happens in the future remains to be seen.

XI. Conclusion

Hence we can see that the stand of the International Tribunals with reference to rape as a constituent of war crime has undergone a vast change since the early days. The courts have started looking at rape as a comprehensive war crime in itself, and have started prosecuting the criminals for the same. The change in the outlook of the courts can be attributed to the development of war crimes jurisprudence and the inclination of the

⁹⁸ *Supra* note 95.

⁹⁹ *Supra* note 61.

¹⁰⁰ Peter Walker, *Darfur genocide charges for Sudanese President Omar al-Bashir*, THE GUARDIAN, July, 14, 2008, available at <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes1?gusrc=rss&feed=worldnews>, (last visited on Aug. 18, 2009).

¹⁰¹ Sudanese President charged with genocide, an interview with Payam Akhavan, a professor of International Law at McGill University and a former war crimes prosecutor, in CBC NEWS, July, 14, 2008, available at <http://www.cbc.ca/world/story/2008/07/14/bashir-icc-charges.html> (last visited on Aug. 18, 2009).

¹⁰² *Qatar, Arab League reject ICC co-operation request on Bashir arrest*, THE SUDAN TRIBUNE, Mar. 17, 2009, available at <http://www.sudantribune.com/spip.php?article30536> (last visited on Aug. 18, 2009).

courts to develop a mechanism against this wide-spreading offence which was eating away into the annals of international history. The change in the outlook of the courts gradually gave way to the rise of the notion of rape as a comprehensive war crime in itself, and paved the path for an all-encompassing war crimes jurisprudence.

There can be no doubt that war is an invention of “mankind,” literally.¹⁰³ Although warfare is a male habit, tragic numbers of women are victims of it. They are raped, forced into prostitution, forcibly impregnated. Rape in war and rape in peace exist on vastly different planes, yet the connection is clear. In both situations, women are reminded that they are vulnerable, unequal and exist only by man’s good graces. Sexual violence is a result of a combination of male domination, cultural practices and the failure of state institutions to protect and promote women’s rights. This dismal state of affairs rises from the interplay of two systems. One is the legal system that has since long tended to overlook or dismiss women’s pain, and the other is the war system in which rape has been a tried and tested effective weapon. This is the legacy that the tribunals must overcome. The trials will test the commitment of the international system to women’s human rights and determine whether women can participate as equals in international legal system created by men. It is critical that the stigma to which rape victims are subjected is lifted through education and awareness-raising, as well as prosecution of perpetrators. Conflict-related sexual violence must be condemned in the strongest terms possible.¹⁰⁴

¹⁰³ VIRGINIA WOOLF, *THREE GUINEAS* (1963). See also *supra* note 39.

¹⁰⁴ *Supra* note 16.