Complicating Consent: A Study of the Rhetorical Strategies Employed to Interrupt Rape Myths

in the *Prosecutor v. Kunarac*

By

Lindsey Shook

Submitted to the graduate degree program in Communication Studies
and the Graduate Faculty of the University of Kansas
in partial fulfillment of the requirements for the degree of
Master's of Arts

_____
Chairperson

_____

_____

Date approved:_____

The Thesis Committee for Lindsey Shook certifies
that this is the approved Version of the following thesis:

Complicating Consent: A Study of the Rhetorical Strategies Employed to Interrupt Rape Myths

in the *Prosecutor v. Kunarac*

Committee:

_____
Chairperson

_____

_____

Date approved:_____

# Chapter 1: Introducing *Kunarac* and Rape Myths

## Introduction

### *Trial Background and Significance*

When the Serbian forces invaded Foca, an area in Bosnia-Herzegovina, families were chased out of their homes and away from their towns. Families hid in the woods as soldiers shot at them. Women were forced to listen to the gunfire that killed their male family members before the Serbian soldiers seized the women and placed them in detention centers (*Prosecutor v. Kunarac* par 24-25). Detention centers, including high schools, hotels, apartments, and sports complexes, were used to hold women against their will. The living conditions in these centers were deplorable. Sanitation products and food were scarce if available at all (*Prosecutor v. Kunarac* par 29-30). Women lived under constant surveillance and fear. Women that lived in the apartments of the soldiers were often forced to do household chores; they were given to other soldiers to "use" and in some instances sold to other soldiers (*Prosecutor v. Kunarac* pars 206, 210, 742, 756). Woman after woman testified that she felt more like the property of the soldiers who held her captive than like a human being (*Prosecutor v. Kunarac* pars 339, 742). Fear of brutal beatings, torture, rape, and gang rape were a constant fact of life for the women of Foca (*Prosecutor v. Kunarac* par 32-35). Foca was once an area that had a population that was 52% Muslim (about 40,513 Muslims in 1991). After the war all of the mosques were wiped out and there were only about ten Muslims left in Foca (*Prosecutor v. Kunarac* pars 46-47).

The women of Foca faced the horrors described above because they were women and because they were Bosnian Muslims. The testimony of the women in *Kunarac* communicates the specific traumas each woman faced based on her sex, religion, and ethnicity. Several women testified that multiple men raped them vaginally and orally (*Prosecutor v. Kunarac* pars 81, 170). One woman was raped while sleeping next to her ten-year-old child (*Prosecutor v. Kunarac* par

81). Another witness reported soldiers had threatened to cut off her breasts as they raped her (*Prosecutor v. Kunarac* par 166). Other women testified to numerous acts of humiliation that occurred before, during, and after the rapes. Prior to the act of rape some women were forced to "seduce" the soldiers by stripping and kissing them. Later, in court, these acts were introduced by the defense as evidence that the women were attracted to the men and thus the sex acts were not rape (*Prosecutor v. Kunarac* pars 71-73). Some Serbian soldiers spewed ethnic, religious, and misogynist hatred at the women while raping them. Victims of rape were told that they would have Serbian babies so that there would no longer be Muslims in the area of Foca (*Prosecutor v. Kunarac* par 322). One witness testified "an old Montenegrin soldier who wielded a knife… threatened to draw a cross on her back and to baptize her" (*Prosecutor v. Kunarac* par 243).

The experiences of the women in Foca are not unique. Between 20,000 and 50,000 women were raped by military combatants during the war in Bosnia-Herzegovina (Seifert 54-55). And war rape is not a new phenomenon. Rape has a long history as a tactic in wars around the globe (Thomas & Ralph 203-218). The international legal community first recognized war rape during the American Civil War, and the Geneva Conventions in 1949 declared it a crime against humanity on the same scale as torture (Bergoffen 118; Thomas & Ralph 203-218). Comfort women in Japan, Jewish women raped by the Nazis, Soviets who raped German women, Bengali women raped by Pakistani soldiers, Rohingya Muslim women raped by Burmese government troops, and women in Rwanda are just a few groups subjected to this dehumanizing act prior to the war in the Former Yugoslavia (Thomas & Ralph 203-218).

Yet international tribunals like Nuremburg and the International Criminal Tribunal for Rwanda (ICTR) never prosecuted rape as an individual crime. In each instance rape was

dismissed as an inevitable albeit unfortunate and unplanned consequence of war (Bergoffen 117). As of 2001, no defendant had ever stood trial for the rapes committed in these conflicts and no victims had their stories heard in an international court. Unfortunately, an absence of accountability was not novel for raping women in times of war.

The ICTY recognized the gravity of war rape in Bosnia by prosecuting several men for rape as both a crime against humanity and a war crime (Kuo 314). The most significant of the rape trials is *Prosecutor v. Kunarac*. The justices presiding over the *Prosecutor v. Kunarac* trial found three men guilty of rape, torture, and sexual slavery (Kuo 312-314). While rape has been condemned in other international tribunals and legal statutes, it was not until the tribunals in Rwanda and the former Yugoslavia that charges of rape were included in indictments.[1] *Kunarac* was the first case to try individual men for individual counts of rape (Thomas & Ralph 203-218). *Kunarac* is also important because the justices had to adapt legal rules and procedures for the purposes of the trial.

If we want to improve the likelihood that war rape victims will receive justice in the future (Bergoffen), then we must understand how rape myths hinder prosecution and perpetuate acts of rape (Orenstein, "No Bad Men"). I investigate the rhetoric of the *Kunarac* judgment in order to explain how rhetorical strategies are used to enable and constrain the achievement of justice in war rape prosecutions. In particular, I focus on the rationales for redefining rape in *Kunarac* and presentations of evidence in order to see whether, which, and how rape myths were deployed. It is important to discuss the presence of rape myths in war rape trials because scholarly sources indicate that these myths constrain the ability for trials to achieve justice (Orenstein "No Bad Men"). In order to understand how rape myths function in tribunals, I must

[1] Rape was condemned by courts following the American Civil War, The Geneva Conventions, and Nuremburg.

first define and describe what constitutes a rape myth. Second, I review the literature surrounding the Kunarac trial. After discussing how this thesis contributes to the scholarly discussion, I explain the methods I will use to analyze the legal discourse in the Kunarac trial. Finally, I preview how the arguments unfolds in subsequent chapters.

*Background of Rape Myths*

Scholars argue that the presence of rape myths in trials hinders the ability for rape victims to seek justice. Torrey and Burt define rape myths "as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists" (1017, 229). Myths about reputation, asking for it, and what constitutes "real" rape exist in both society and the court; "[r]ape trials not only mirror societal values, but also perpetuate them, setting the social (as opposed to necessarily legal) standard of what counts as rape" (Orenstein, "Special Issues" 1590). The following sources highlight the varieties of rape myths and explain how they function in a trial process.[2]

The foundation of several rape myths is reputation. Torrey, Taslitz, and Orenstein illustrate how a woman's reputation can be used to attack her in a trial. A bad reputation (Torrey 1025) might consist of having previously consented to any sex (Taslitz 7), and slandering a reputation is easier if the victim has previously consented to sex with the attacker (Torrey 1015). These myths are based on the assumption that a woman will falsely accuse a man of rape to protect her reputation or to punish an intimate partner or to cover up an illegitimate pregnancy. For example, if a woman has a good reputation, then an attorney might argue that she is lying

[2] These scholars use the phrase "rape myth" as synonymous with widespread fictional beliefs about rape. They do not go into detail about how these particular stereotypes function "mythically" in the technical sense used by some communication scholars. The literature about rape myths assumes that we should work towards the elimination of these patriarchal fictions from legal and cultural discourse. They do not critically question whether or not there is a "true" experience of rape to juxtapose with the myths. Their primary argument is that the myths often prevent women from telling their stories about how they were raped or that the myths constrain and distort the stories of the women in patriarchal ways.

about rape because she feels guilty or ashamed about consensual sex (Torrey 1015, 1025). All women fantasize about rape and secretly invite rape because they want to give up control over sex so that they can abandon the feelings of shame and guilt that a "good girl" associates with sex (Torrey 1015, 1025: Taslitz 5-6).

As a result, according to the myths women really mean yes when they say no. The "she asked for it" myth is prevalent (Torrey 1025, Orenstein "Special Issues" 1588). In fact it is the effect of a reputation story. A victim who hangs out with a bad crowd, dresses provocatively, and flirts or teases a man clearly wants sex. Not only do her negative actions provide evidence of a bad reputation, but those actions nullify her right to say no because her desire for sex is supposedly stronger than any resistance she may feign (Torrey 1015, Taslitz 7).

Aside from her interpersonal behavior, a woman can also be asking for rape if she is in the wrong place at the wrong time. A woman should not walk home alone at night, should not be in dark places, should not be at his house if she does not want to have sex. A woman who places herself in these situations should know better and thus is not credible (Orenstein "Special Issues" 1587, Burt 218). In these examples a woman's actions are evidence of her bad reputation or indicate that she deserved to be raped.

A final myth is the myth of the "real rape." This myth contends that a woman must prove that a violent attack took place. If she really did not want to have sex she would have viciously fought to defend her honor (Orenstein, "Special Issues" 1587; Luchjenbroers & Aldridge 342). This myth assumes that in order to be a "real rape," the rapist must be a crazed stranger who attacks a woman as she valiantly fights him off (Temkin 51). This myth is both about the rapist and the victim. The rapist in this myth must be a stranger and not an acquaintance or lover or husband, and the victim must prove she was physically hurt and fought back.

Mythologizing rape, rape victims, and rapists inhibits the achievement of justice in rape trials. "By definition, myths and stereotypes divorce the law from contemporary knowledge because they have more to do with fiction and generalization than reality. They are irrational, nonscientific narratives used by human beings to explain what they do not fully understand" (L'Heureux-Dube 89; see also Torrey 1015-1016). Rape myths, in this view, are patriarchal rhetorical strategies employed in courtrooms to constrain the ways defendants and victims explain their experiences of the sex acts in question. The rape myths naturalize patriarchal stereotypes about sexuality and consent and constrain how the lived experiences of the trial participants are heard in the court. It is important to understand the extent to which these myths are found in *Kunarac* to determine how and to what extent the justices used rape myths when framing their decision. Since *Kunarac* is the first war rape trial where men were found guilty of individual counts of rape, the precedent it sets should be understood. In other words we should trace the use of rape myths in the justification of the *Kunarac* decision to see if justices endorse the myths or challenge the myths and determine what lessons can be learned from the evaluation of rape myths in *Kunarac*.

## Review of Literature

This study builds on three main groups of sources. First, it builds on sources that discuss rape myths but only in the context of domestic trials. Second, it builds on work discussing war rape and/or international tribunals but not rape myths. Third, it builds on discussions of legal rhetoric that do not address rape myths and war rape. My thesis contributes to war rape literature by examining how war rape is discussed in an international tribunal, how rape myths function in the context of a war rape tribunal, and how international legal rhetoric works particularly in a war rape trial.

*Rape Myths in Domestic Trials*

Scholars who have studied the existence of rape myths in trials have determined that the roots of rape myths can be found in historical legal discourse. Further, scholars have built upon this historical analysis to document the presence of rape myths in current U.S. laws. Finally, scholars have broken down the legal process into distinct stages that are influenced by rape myths. My thesis builds on this set of scholarship by explaining the function of rape myths in a recent war rape tribunal.

Brownmiller traces legal references to rape myths back to the thirteenth century (*Against Our Will* 30). Rape was only referred to in the cases of forced sex with a virgin, and there was a proper procedure for the rape victim to follow:

> She must go at once and while the deed is newly done, with the hue and cry, to the neighboring townships and there show the injury done to her to men of good repute, the blood and her clothing stained with blood, and her torn garments… A day will be given her at the coming of the justices, at which let her again put forward her appeal before them, in the same words as she made it in the county court, from which she is not permitted to depart lest the appeal fall because of the variance. (qtd. in Brownmiller, *Against Our Will* 26)

Brownmiller also quotes Bracton describing how a man, in the thirteenth century, could defend himself in a rape trial by saying he had previous sexual relations with the woman or that she was making the story up as revenge or that the sexual act was not really against her will (*Against Our Will* 26).

Brownmiller also cites the book Deuteronomy in the Bible as one of the original places where women are described as property and women were more valuable as property if they were

virgins. A husband wanted the right to deflower his wife on their wedding night, he wanted to break "open a pristine package that now belonged to him—private property—and he wanted tangible proof of the mint condition of his acquisition" (*Against Our Will* 319). These early legal statutes and cultural conceptions that women were the property of their husbands persist into the Victorian era. In the Victorian era women were commonly conceived of as the property of men. The threat of rape was a way of confining women in the private domestic sphere. If women truly wanted to guard their chastity, they would stay in the home away from the strangers that would rape them (Stevenson 349). Women who were fulfilling their role as property would not have left the domestic sphere.

Stevenson, Picart and Orenstein all detail how the notion that women are property has been codified into current American law and culture. From the moment they file a police report, women are likely to have their experience understood through the lens of the rape myths. While Stevenson says this notion of the proper behavior of a woman as domestic has its roots in the Victorian era, Picart updates this assumption. Picart argues that the victim/agent dichotomy is a simplistic dualism used to constrain the ways in which women who are subjected to violence can act (119). Both Stevenson and Picart examine trial proceedings and popular media coverage of cases where women were sexually abused. They both argue that women who had earned bad reputations through being too bold in the public sphere were less likely to have their stories believed by the courts and by society (Stevenson 359; Picart 113, 118). Orenstein ties acting in the public sphere to the myth that women ask for rape:

> We do not mind if a rape victim has had some reasonable sexual experience, but if she is too promiscuous, she will fall into the category of 'asking for it.' And if she has regained interest in sex or 'partying' after the attack, such conduct undermines the veracity of her

> report, because 'real victims' do not behave that way. Finally, because women were historically silenced in the public sphere, their accusations were considered suspicious and subversive of the power hierarchy. ("Special Issues" 1588)

In other words, the more passive a woman acts, the more she fits the stereotypes that she should be respectable property and the higher the probability that she will be believed by the court and society (Stevenson 359; Picart 108). A genuine or valorized rape victim should be "chaste, sensible, responsible, cautious, dependent" (Larcombe 133; see also Stevenson 153).

Women should be protected as long as they are appropriately fulfilling their role as property. So long as women remain passively in the private sphere, they are protecting themselves and thus should enjoy the protection of the men in their life and the court (Stevenson 354). Leaving the protective bubble of the private sphere indicates that a woman has agency. Leaving the public sphere and acting with willful agency violates the traditional sex roles that are ascribed to women as property. Brownmiller cites anthropological studies of tribes in other cultures that use rape and gang rape as punishment for women that violate the norms of that particular society (*Against Our Will* 285-288). In instances of rape as punishment, the rapists are no longer villains to be punished; they are heroes to be valorized. Picart argues that the more agency a woman has, the more capable she is of fabricating a story of rape to harm a man, according to the public (117). As in the Victorian era, it is feared that willful women will create stories of rape as a way of punishing men (Stevenson 350). The fear of false reports underlies the myth that women lie about rape. The fear of a false rape report is largely unfounded because rape is no more likely to be falsely reported than any other crime (Stevenson 358-359; Orenstein, "Special Issues" 1591).

Since the ICTY and domestic trials are adversarial systems, many of the legal processes are similar. Despite evidence that rape myths were both challenged and accepted as part of the pretrial evidence gathering in *Kunarac* (Kuo 310-318), my thesis focuses on the culmination of these efforts: the judgment. I choose to examine the end point of the trial because the justices outline all lines of reasoning and precedent that were relevant to their decision. Rape myths present in the system are likely to appear and be deemed relevant or irrelevant in this document.

Current scholarly literature details how rape myths function at every step of the legal process. The first part of the legal process for a rape victim is filing a report with the police and district attorney's office. It is up to those two groups of people to determine whether or not to prosecute the attacker. Edward and McLeod argue, "attributions of responsibility for a rape having occurred were related to previously held stereotypical beliefs about rape" (41). The more a prosecutor and police subscribe to the rape myths outlined in this section, the more likely they are to blame the victim for the rape. The police and district attorney are more likely to decide to prosecute a case if the victim meets certain requirements. They want a rape victim that is articulate and can give a consistent story. Picart indicates that prosecutors worry about the rape myths: "prosecutors emphasized force, prior assailant-victim social interaction, corroboration, the credibility of the victim" (109). Rape myths seen in this light are not just a tool of the defense used to discredit rape victims. Rape myths can function as gate keeping devices capable of helping the district attorney determine what cases to prosecute.

Part of the reason that prosecutors base decisions about how to proceed with cases on rape myths is because some myths have been codified into law. There is an assumption that rape should be reported immediately (Torrey 1015). The doctrine of prompt complaint has been adopted by nearly every legal jurisdiction in America:

> Even though the prompt complaint requirement usually is not a statutory element of the crime, judges admit into evidence and place great emphasis on the speed with which the victim complained of the alleged rape to a third party. According to the courts, the introduction of evidence of a prompt complaint is necessary in order to negate the inference of a recent fabrication. (Torrey 1016)

A quick report is important for gathering physical evidence whether the rape was physically violent or not. However, women who do not report the crime immediately are often subjected to slanderous arguments that insinuate the women took time to scheme or create stories about rape to cover up consensual sex (Torrey 1015). Torrey supports these arguments about the popularity of prompt complaint with footnotes of doctrines that date back to the seventeenth century penal code and cases that happened as recently as the 1990's.

Prompt complaint to a third party is just one form of corroboration that the court looks for as evidence of a rape. In line with the "real rape" myth, courts often demand that women prove they were physically harmed during the rape. Pictures of bruises, DNA under her fingernails, and other signs of physical trauma become evidence that the woman truly did not want to have sex (Orenstein, "Special Issues" 1587; Taslitz 6; Luchjenbroers & Aldridge 342). In absence of evidence of physical violence, the court often requires an external witness to the crime (Taslitz 6). These standards of evidence help frame the legal talk in courtrooms.

The scholarship on rape myths paints a picture of how rape victims are treated and depicted in courtrooms. However, none of the legal scholars discussing rape myths applies those myths to international legal settings or war rape. In order to understand how justices in *Kunarac* dealt with the rape myths in their court, it is necessary to understand what the rape myths are and how they manifest themselves in other legal contexts.

*War Rape*

Feminist scholars have spent decades investigating war rape. They are attempting to find coping mechanisms for the people who survive and solutions that prevent the occurrence of war rape. The following scholars discuss the intersections of identity that they believe factor into why war rape happens and how the victims should be addressed.

Albanese, MacKinnon, and Salzman argue that the rapes in the Yugoslavian conflict stem from a larger ethnic oppression and conflict. Albanese argues that extreme ethnic nationalism in the former Yugoslavia increased the patriarchal oppression of women, inevitably leading to the rape of women during the war (999, 1023). While Albanese focuses on the years preceding the conflict, MacKinnon and Salzman discuss the ethnic hatred that led to genocide and rape during the conflict. The Serbian population sought to cleanse Yugoslavia of the Croat Catholics and Bosnian Muslims through a genocidal strategy (Salzman 358-359). Serbians carried out genocide not only through mass murder but also through rape. MacKinnon and Salzman contend that rape was not only tolerated but coordinated as a Serbian tactic of war. Women who were raped were seen as less likely to return to their communities, cleansing Yugoslavia of Bosnians and Croats without having to kill all of the people (Salzman 360). Serbian soldiers also forcibly impregnated women in an attempt to spread the Serb population while limiting the Bosnian population (MacKinnon 16). Albanese, Salzman, and MacKinnon focus on the ethnic component of war rape in Yugoslavia in an attempt to explain why rape was such a significant factor in this war. For these three scholars, investigating the ethnic identity of the perpetrators and the victims is necessary for understanding the complicated nature of the war rapes in Yugoslavia.

Brownmiller argues that women in the Yugoslavian conflict were victims of war rape because they were women (“Making Female Bodies”). Unlike the previous three scholars,

Brownmiller contends that sexual identity is more crucial to understanding the experience of war rape than ethnic identity ("Making Female Bodies"). In other words we must understand why women are targeted in conflict after conflict despite changing ethnic identities.

All four discussions of identity and war rape provide a context for the *Kunarac* judgment. Each article provides cultural cues from the Yugoslavian conflict that will inform the degree to which each rape myth can be expected to be deployed in *Kunarac.* My thesis will build on the analysis of these scholars by analyzing legal rhetoric, because this legal talk about rape both shapes and is shaped by the attitudes and beliefs that make war rape possible.

Richey argues that we must examine how *Kunarac* and other ad hoc tribunals enact the legal changes that shape victims' voices because "surveying the jurisprudence regarding war rape is one way to gauge the seriousness with which women's human rights are considered by the international community" (127). In the past international trials have objectified and trivialized war rape victims (128). In the Rwandan tribunal judges and defense lawyers openly mocked a witness during her testimony (128).

> On 31 October 2001, the judges suddenly burst out laughing while witness TA, a victim of multiple rapes during the genocide, was being cross-examined by defence lawyer Duncan Mwanyumba. As lawyer Mwanyumba ineptly and insensitively questioned the witness at length about the rape, the judges burst out laughing twice at the lawyer while witness TA described in detail the lead-up to the rape. (Richey 128)

This story illustrates the importance of studying how trials shape the talk of war rape victims. Richey concludes that tribunals are a space where women can speak about the harms they have experienced in an attempt to break the silence that traditionally surrounds war rape (128). When trials objectify the women testifying in the manner described above, courts cease to be a space

where women can seek justice and empowerment (Richey 128). Richey calls on other scholars to examine how the participants in trials treat victims. The behavior of judges and lawyers provide important insight into how the international legal arena is responding to the legal changes in war rape. Although she does not specifically mention the study of rape myths in trials, it is logical to assume that rape myths are an important rhetorical feature shaping the voices of victims in the court.

*Rhetorical Scholarship*

Rhetorical scholars have dedicated numerous books and articles to exploring the role of rhetorical analysis in legal criticism. While legal rhetoric can include the study of any legal proceeding, this thesis focuses on rhetorical theory about criminal court proceedings. Since *Kunarac* is a criminal trial in an adversarial court system, the theories and frames discussed in rhetorical literature about domestic criminal trials provide a basis for interpreting the decision in *Kunarac.*

Rhetorical scholars have studied specific trials, including rape trials and a war tribunal. But to my knowledge rhetorical legal scholars have not analyzed an international war rape trial, nor have they focused on rape myths as rhetorical devices in a rape trial. The judgment of *Kunarac* is a particularly important document in this instance because it allows for the expansion of rhetorical legal theory to include a significant international trial and a richer understanding of how rape myths function in the reasoning of a judicial decision. To understand how this thesis contributes to studies of legal discourse from a rhetorical perspective, I first explore the reasons scholars argue that trials are significant rhetorical acts. Second, I articulate the basic assumptions of legal rhetorical criticism. Third, I detail the use of specific rhetorical frames in the analysis of legal rhetoric.

White argues that trials like *Kunarac* are essentially rhetorical acts (*Heracles' Bow* 28). He uses the term "constitutive rhetoric" to describe "the central art by which culture and community are established, maintained, and transformed" (*Heracles' Bow* 28). White dedicated a large portion of his academic career to exploring how to analyze and understand legal texts. Like other legal rhetoric scholars, he assumes that trials are not isolated legal events. Rather trials should be seen as:

> A rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community… the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality is tested against another. (*When Words* 273)

White is primarily concerned with providing methods of legal criticism that can distinguish valuable from invaluable modes of reasoning. His major criticism of both legal criticism and legal thought is that they are largely mechanical and bureaucratic, thus failing to challenge any assumptions of the status quo (*Living Speech* 11). The critic's role is to identify and criticize the dead mechanistic speech and encourage living speech in a trial. Living speech is not just a recitation of judicial precedent. It includes elements of the experiences of the judge and should provide both the writer and the reader with greater insight into humanity (*Living Speech* 89). White's advocacy of a rhetorical analysis of legal proceedings is rooted in his belief that the practice of law revolves around controlled choices of language that challenge and/or accept the flaws in the current legal culture. His work illustrates the importance of rhetorical strategies like language choices and stories within a trial. White focuses on domestic legal practices; international law is outside of the scope of his work. His analysis provides a foundation for

understanding how rape myths hurt the pursuit of justice, but he does not account for rape myths specifically.

Although White and Hasian adopt different terms of discussion, their end goals are similar. They both want traditional legal theory to be more inclusive of rhetorical criticism so that the trial process can be seen as contingent and dynamic as opposed to static and factual. Hasian follows the same line of argument as White when he argues that trials are essentially rhetorical acts (*Legal Memories* 1). Hasian also criticizes participants in the legal system and academics in legal studies for failing to be skeptical of the systems of power at work in legal culture (*Legal Memories* 2). He sees rhetorical criticism of the law as an important step in accepting that laws are not static precedents to be valorized (*Legal Memories* 198). Critics should examine specific trials to determine how the performance of the trial relates to particular rhetorical exigencies (Hasian & Croasmun 396). For White it is not enough to meet the formal requirements of a criticism or a judicial opinion; a writer must resist the modes of power that maintain status quo stereotypes (*Living Speech* 32-33).

Hasian advocates critical legal rhetoric in which critics "provide theories and practices that simultaneously deconstruct the rhetoric of the empowered while helping to find a space for the marginalized to speak" (*Legal Memories* 197). In Hasian's academic work on specific trials, he utilizes multiple rhetorical theories to deconstruct the rhetoric and examples of the elite while carving out space for minority voices. For example, he analyzes the case of *Romer v. Evans* in order to challenge the rhetoric deployed in that trial and determine how existing legal rhetoric constructs homosexual rights (Hasian & Perry-Giles 27).

Although Hasian has a consistent goal for his legal criticisms, he does not provide a specific rhetorical method for interpreting legal proceedings. His methods are heuristic and thus

rhetorical frames are chosen based on their appropriateness for each trial. For example, Hasian examines the 1980's trial of John Demjanjuk who was accused of being a sadistic guard at a Ukrainian death camp during World War II ("In Search of" 231). In this examination Hasian argues that legal irony should be used as a heuristic frame ("In Search of" 232). He argues that understanding irony as a frame allows a critic to decode tropes and narratives that may be used to hide contradictions within the law ("In Search of" 235). This analysis, while about the importance of a wartime atrocity, fails to discuss rapes that occurred in this Ukrainian death camp. So while Hasian provides an important analysis of an international trial that utilizes irony as a heuristic frame, he does not help us understand war rape in international tribunals or the functioning of rape myths in trials.

Some legal rhetorical scholars have prescribed a method for studying criminal proceedings. This literature focuses on how to read and interpret legal documents but fails to incorporate methods of analysis that focus on gender. So while these articles are an important contribution to understanding how arguments function in criminal settings, they fail to account for the specific dynamics of rape myths or war rape discussed above. Feteris argues that the courtroom operates according to the argumentative theory of pragma-dialectics (459). She argues that critics should adopt a pragma-dialectical framework to help bridge the gap between legal reasoning and interpretation (468). A pragma-dialectical framework is a methodical and rational process where the trial is understood as "part of a discussion about two rival interpretations of a legal rule where a judge has to anticipate or react to critical questions that are relevant on the different levels of argumentation" (Feteris 468).

Hannken-Illjes investigates how standards of reasonableness and rationality are negotiated in legal settings (310). She argues that an ethnographic approach can create an

understanding of legal proceedings that focuses on the social as well as procedural elements (323). For instance, ethnography allows the critic to examine the rules set up in a trial as appropriate or not appropriate based on the situation rather than focusing on the validity of the rules in a formal legal setting. She asserts that the rhetorical exigency of a trial situation could have more influence on the rules and procedures of a courtroom than formal requirements (321).

Similarly to Hannken-Illjes, Turnage accepts that society plays an important role in trial rhetoric. Turnage examines the Duke rape case through a Burkean perspective. She argues that a scene-act ratio dominated the rhetoric surrounding the case, and "led certain members of the community to vilify, or scapegoat, the Duke Lacrosse players as agents who performed horrible acts against an exotic dancer—a victim of the scene" (Turnage 143). Her application of Burke's pentad illuminates several important relationships at play in the community and in the trial; however, she does not examine any rape myths that might have been a factor in the case. Turnage's use of Burke's pentad is a heuristic method unlike the methods that Hannken-Illjes and Feteris prescribe.

Turnage, Hannken-Illjes and Feteris are concerned with how both judges and critics of arguments evaluate rational arguments in criminal trials. They also examine the relationships between societal conceptions of the law and the actual trial. However, they fail to account for the role that narratives play in the trial process. Since rape trials often include physical evidence and competing narratives, it is important to understand how those narratives function in a criminal trial. Bennett argues that storytelling is an important element that underlies criminal trials ("Storytelling in Criminal Trials" 1). Trials must organize a large amount of information in order to transmit the understandings of evidence and argument to a jury ("Storytelling in Criminal Trials" 1; "Rhetorical Transformation" 323). For Bennett a trial consists of competing stories

presented by the opposing sides. Narratives are not just individual components of evidence but an organizational structure that influences how evidence is understood ("Storytelling in Criminal Trials" 21). In his 1979 article "Rhetorical Transformation of Evidence in Criminal Trials," he proposes a storytelling perspective for legal critics. A storytelling perspective is necessary because the central facts and evidence in a trial can differ radically from the overarching story of the trial ("Rhetorical Transformation" 323). A critic in this frame should discern the meta-narrative of the trial and determine how that narrative influenced the way that evidence and arguments were interpreted ("Rhetorical Transformation" 311). Similar to pragma-dialectics and ethnography, Bennett's storytelling perspective provides a way of analyzing the social and formally legal components of a criminal trial. Bennett's method is a helpful rhetorical foundation for understanding how rape myths function in a trial. As noted in the rape myth section above, the myths tend to influence the entire trial process. In a storytelling perspective a rape myth could be seen as a significant piece of the overall narrative of the trial rather than an isolated rhetorical strategy. Bennett however does not examine rape myths as a part of this story telling process.

Hasian also argues that stories are an important part of the trial process. But unlike Bennett he does not argue that all trials should be viewed through a story telling perspective. Instead he utilizes a storytelling lens when it will help him achieve his goal of challenging hegemonic modes of thought in legal settings. Hasian examines the Leo Frank case of the early 1900's as a story with characters that were as influential as the formal legal principles in the case ("Judicial Rhetoric" 251). He argues that there are "recurring 'characters' in narratives that provide us with enduring cultural exemplars that influence the ways in which we categorize trials, accept evidence, and apportion blame" ("Judicial Rhetoric" 251). He builds on Bennett's

theory by asserting that characters in the story of a trial provide an important nexus between technical legal questions and significant cultural issues ("Judicial Rhetoric" 254), and invoking these characters in trials invites the public to identify with the particular "iconic and ideographic figures" ("Judicial Rhetoric" 255). Hasian's theory of character construction and use in trial and society is useful to understanding rape myths since many of the above descriptions involve painting the women and perpetrators as particular characters. In the Leo Frank case there is the murder of a little girl who is portrayed as the innocent and pure victim of the perverted advances of Leo Frank. So while Hasian touches on a rape myth in this examination, it is not a focal point of his analysis.

The Leo Frank case does not provide a rich analysis of gendered frames in legal settings. However, there are rhetorical criticisms of trials that do provide ample ground for analyzing gendered frames. Hasian and Flores examine the myth of Medea in the representations of Susan Smith as a mother in her trial for the murder of her sons. Like Medea, Susan Smith violated the norms of motherhood, and this mythic construction overwhelmed any sociological influence on her behavior (Hasian & Flores 164). They tie the myth of the ideal mother to traditional roles of women and argue that our legal system has adopted this mythology (Hasian & Flores 167). This analysis focuses less on the technical legal arguments of the case and more on the intersection between legal and cultural spheres (Hasian & Flores 174-175). Their examination of a patriarchal myth functioning in a trial provides a basis for understanding how rape myths function in a trial; the Susan Smith trial was not a rape trial and as such rape myths were not present.

The trials examined in studies of legal rhetoric are complex, important legal and social events that scholars like White and Hasian encourage us to pay attention to in order to challenge the elite power structures in our legal system. My thesis adds to this literature by examining how

rape myths function as rhetorical frames in a war rape tribunal. To my knowledge legal rhetoric as a field has done little work on exposing rape myths in trials and has also just scratched the surface of examining international law. In order to understand how rape myths function in *Kunarac,* the rape myths should be understood as rhetorical frames playing a part in an overarching legal narrative.

## Methodology

### *Research Questions*

In light of the literature review I propose the following research questions. What exigencies created a necessity for *Kunarac*? How did the justices in *Kunarac* redefine rape? What are the consequences of that redefinition on legal understandings of consent? Were rape myths and stereotypes deployed in the *Kunarac* judgment document? How did changing the definition of rape constrain the use of rape myths and stereotypes in the *Kunarac* judgment? The next chapter is devoted to setting up the exigencies of *Kunarac* and contextualizing the definition of rape in *Kunarac*. In order to understand how the justices in *Kunarac* redefined rape, it is necessary to explore how rape has been defined and used in previous international courts (and likely some domestic precedents as well). Similarly, standards of evidence and procedure found in rape trials will be explored in order to highlight the changes in *Kunarac.*

The third chapter explores the redefinition of rape in *Kunarac*. I explain the process the justices used to create their new definition of rape and then discuss the ways their new definition constrains the use of rape myths in *Kunarac*. The fourth chapter focuses on the specific stories of victims testifying in the court to determine if the shift in definition influenced the actual evaluation of evidence and testimony in *Kunarac*. Using the instances outlined in the previous chapter as evidence, I determine whether or not the new definition of rape and the new standards

of evidence shaped the response of the justices to the use of rape myths and stereotypes in *Kunarac*.

*The Kunarac Judgment*

This judgment was delivered on February 22, 2001 by three justices: Florence Ndepele Mwachande Mumba (presiding), David Hunt, and Fausto Pocar. The judgment of this case is particularly important because in it the justices weave together their findings with the new definition of rape, rules of procedure and evidence, and a plethora of witness testimony. The defendants were Dragoljub Kunarac, a commander of a special reconnaissance unit, and Radomir Kuvac and Zoran Vukovic, sub-commanders of the Bosnian Serb Army. All three men were found guilty for specific counts of rape. The Trial Chamber had to justify these guilty verdicts through the lens of the new rape definition and the testimony of the victims and other witnesses. This particular 322-page judgment document paints a rich picture of the ways that the Trial Chamber was able to use their new definition of rape. It then lists charges and evidence, which detail the stories of the victims as they apply to the accused. The applicable law section creates a basis for the legal findings the justices make in the next section. In their section on findings, there is a discussion of how they evaluated evidence. The sentencing and disposition sections lay out what each man was charged with and whether he was found guilty or not guilty of each specific charge. Finally there are annexes at the end of the text that provide the reader with several documents that aid in understanding the case, including maps of the area in question in Foca and amended versions of the indictments.

The *Kunarac* trial judgment is an appropriate document to aid in furthering the scholarship about legal discourse on war rape. Several sources recognize this trial as landmark for its prosecution and conviction of rape as a war crime and a crime against humanity (Askin

16; Buss 91-99; Bergoffen 116). The trial chamber also redefined rape. Previous definitions of rape in tribunals included force and coercion as elements of consent. In other words, to convict a defendant of rape the prosecution had to prove there was direct physical force or coercion of the victim. The justices in the Kunarac trial decided that definition did not fit the scope of the atrocities committed in the area of Foca. They argued that there are other events and circumstances that negate a woman's ability to consent to a sex act; thus the prosecution does not need to prove that the woman resisted, merely that the woman was in a situation in which she had no ability to choose (*Prosecutor v. Kunarac* par 442). It is important to know how this definition influenced the ways the justices explained their decision. It is not enough to know that the definition is new or legally significant; we should learn how the altered definition of rape was used as a strategy by the justices to explain their guilty verdict. We should know whether or not this change in legal discourse about rape had any impact on the war rape myths and stereotypes invoked in the courtroom. By rhetorically analyzing the judgment document of the Kunarac trial, I create a clear picture of the ways in which changing the legal definition about rape changed the way rape was ultimately discussed in *Kunarac*.

## Chapter 2: Creating Accountability

In order to determine what rape myths are present in the *Kunarac* judgment and how they function, it is necessary to understand the exigencies of the trial and the ICTY. First I discuss the role that news agencies and human rights organizations played in the formation of the ICTY. Second I explain the debates among feminist organizations about the correct goals and missions for the ICTY. Third I argue that the purposes of the ICTY and *Kunarac* are to increase accountability and provide a public record of war rape. Fourth I set out the important differences between the ICTY and domestic trials in areas like evidence gathering and the lack of judicial precedent that likely implicate the existence of rape myths in the trial.

### Exigencies

*Formation of the ICTY*

The recent tension in Yugoslavia began when Milosovic was elected president in 1987. By 1991 Croatia and Slovenia declared independence, and Bosnia-Herzegovina declared independence on March 3, 1992. By the time Bosnia-Herzegovina declared independence, the world had begun to notice the human rights atrocities in Yugoslavia. After the war in Bosnia began, the world began paying closer attention as the atrocities increased in intensity and number (Stiglmayer 17). In particular they started to notice the systemic rape of civilians.

The United Nations (UN) set up an investigative team chaired by Cherif Bassiouni to investigate atrocities like systematic rape in Yugoslavia (Lewin 16). Bassiouni said, “I think the momentum is there now for an ad hoc war crimes tribunal for Yugoslavia” (Lewin 16). Bassiouni is referring to the momentum that was built up over months of reports from news reporters and human rights organizations.

The news reports about the rapes in Yugoslavia serve two important functions. First they provide narrative accounts of the atrocities. Second they report the findings of the various investigating organizations. Both of these functions make the atrocities in Yugoslavia public knowledge. Although there are numerous newspaper articles about rapes in the Yugoslavian conflict (e.g. *The Globe and Mail*; Lewin; McLean; Moorehead; *The New York Times* "Rape Becomes"; *The New York Times* "Rape Was"; *Ottawa Citizen* "Act Now"; *Ottawa Citizen* "Mass Rape"; Scroggins), Gutman wrote the first news article about the systemic rapes of civilian women in August 1992. He focused on the narratives of the women and the soldiers:

> Statements by victims of the assault, describing their ordeal in chilling detail, bear out that the Serbian conquerors of Bosnia have raped Muslim women, not as a byproduct of the war, but as a principle tactic of the war… Hafiza, also 23, said she sought to dissuade the soldier who raped her. "I tried crying and begging," she said. "I said, 'You have a mother and a sister, a female in the family.' He said nothing. He did not want to talk. Then he said 'I must, I must.' I said, 'You must not, if you don't want to.'" But she was unable to stop him. (Gutman)

Gutman has a clear agenda. He argues that the women were being raped as a systemic tactic of war, and that rape is a common experience for the women he interviews in the refugee camps.

The reports about investigations covered the information being disseminated from governmental and non-governmental sources. The UN and the International Red Cross (IRC) were two of the first organizations on the ground in Yugoslavia and as such were supposed to be neutral humanitarian forces. Despite their neutral stance, the UN and the IRC were the first international organizations to demand more attention be focused on the rapes in the early stages of the conflict (McLean; Stiglmayer 25). The early declarations of the problem began the

momentum towards a tribunal. In order to substantiate the need for a trial, several agencies compiled quantitative estimates of how many women were raped in Bosnia by late 1992 and early 1993 (Doyle; "Rape Weapon"; Lewin). There is a discrepancy in the numbers of raped women. The European Commission estimated that 20,000 women had been raped while the UN created a Commission of Experts that found 3,000 cases of rape that they could document ("Rape Weapon"). The dispute in numbers can be traced to the willingness of the European Commission to count even undocumented cases and to estimate how many women were raped but not speaking about the experience. Of the 3,000 cases documented by the UN investigative team, 800 were documented with victim names and details ("Rape Weapon").

Early declarative reports that repeated victim stories and outlined the numbers of women raped were an important first step in momentum building. However not all organizations stopped at compiling stories and numbers. To my knowledge, no human rights organization was opposed to the formation of the ICTY or the prosecution of rape as a war crime. The organizations merely differed in the level of specificity they used in demanding a tribunal. The Alliance Against Rape as a Weapon of War ("Mass Rape"; "Women Against"), the Women's Coalition Against War Crimes in the Former Yugoslavia (Lewin), and the International Women's Tribune Centre (Bone) are all human rights organizations that called for the formation of an international tribunal to achieve retributive justice for war crimes in Yugoslavia.

Three organizations that were already studying rape as a weapon of war further specified that any tribunal created should prosecute rape as a war crime. Amnesty International (AI), Physicians for Human Rights (PHR), and Human Rights Watch (HRW) used their scholarship on war rape to inform the Ad Hoc Women's Coalition against War Crimes in Yugoslavia. The AI, PHR, HRW and twelve other human rights organizations formed the ad hoc coalition "to keep

crimes against women on the agenda of any international tribunal that might prosecute Balkan war crimes" (Scroggins). Although legal scholars like Catherine MacKinnon and Rachel Pine noted that rape was already defined as a war crime, the purpose of the ad hoc group was to ensure that rape be prosecuted as a war crime rather than merely being recognized as an atrocity of war (Scroggins; Lewin).

The UN Security Council met the early demands from human rights organizations on May 25, 1993. The ICTY website says that its formation was a direct result of the UN Commission of Experts' findings ("Establishment"). During the early years of the tribunal, the Office of the Prosecutor (OTP) began investigations based on the reports described above. I quote the ICTY at length to indicate the importance of the fact-finding and advocacy missions in the formation of the trial:

> In this start-up period, the OTP utilized and built upon the work of the UN Commission of Experts, a fact-finding body established by the Security Council, whose earlier work had demonstrated that serious crimes were being committed in Bosnia and Herzegovina (BiH), as well as Croatia. Information was also available from State and from a number of non-governmental organizations and humanitarian agencies who were operating in the region during the conflict. National and international media were another source of information. (ICTY "History")

The formation of the ICTY seems attributable to outside pressure. Although this quote does not mention rape, one of the prosecutors involved in *Kunarac* argues that rape was embedded in the very foundations of the tribunal because of pressure from international organizations (Kuo 309). The early days of unified recommendations from feminists and human rights groups eventually unraveled into debates about how to prosecute rape as a war crime (Engle 798).

*Feminist Debates about Rape Prosecution*

The major feminist debate is about whether the ICTY should prosecute men on all sides of the conflict for rape or focus on the acts of rape that were perpetrated by Serbs because of their connection to ethnic cleansing. Feminists engaged in this debate want to ensure that a correct interpretation of war rape is recorded in international law. As mentioned in chapter one, MacKinnon argues that rape in Bosnia was a strategy of ethnic cleansing and should be prosecuted as such. Patriotic feminists in Croatia, who had enlisted the help of MacKinnon, articulate the rape as genocide argument:

> Mass rapes under orders of the Serbian-occupied territories of Bosnia-Herzegovina and Croatia are part of a Serbian policy of genocide against non-Serbs. That means that non-Serbian women—most prominently Muslims and Croatians—are not only tortured by rape as are all women, but are being raped as a part of a Serbian policy of 'ethnic cleansing' on the basis of their sex and ethnicity both; most of these rapes end in *murder*. And this is *not* happening to all women. (qtd. in Engle 788)

Activist groups like Women in Black refused to politicize or nationalize victims by emphasizing rapes of a particular ethnicity, claiming "a victim is a victim, and to her the number of other victims does not decrease her own suffering and pain" (qtd. in Engle 788). Scholars Copelon and Brownmiller also argued against MacKinnon, claiming that women on all sides of the conflict were victims of rape (Engle 786).

The three sexual violence cases that the ICTY has completed provide evidence for the claim that the ICTY is responsive to public demands like the feminist debate about rape and its relationship to genocide. The first two cases dealing with sexual violence prosecuted Bosnian and Croatian soldiers for other non-gendered war crimes and for rape. Prosecuting Bosnian and

Croatian soldiers is consistent with the requests of Brownmiller and Copelon. Since Serbs are seen as the dominant aggressors in the conflict, prosecuting Bosnian and Croatian soldiers indicates that the ICTY is taking sexual violence committed against any woman seriously. Conversely, *Kunarac* places three Serbian soldiers on trial for sexual crimes committed against Bosnian Muslim women in the area of Foca, Bosnia. Both external reports (Barkan) and the chief prosecutor Goldstone acknowledge that the investigations into the area of Foca were a response to repeated pleas from human rights organizations to prosecute rapes by Serbian forces. The prosecution of Serbian soldiers can be read as a result of patriotic Croatian and Bosnian groups and scholars like Catherine MacKinnon.

The decision to prosecute particular cases is a significant shift in international law regarding war rape. The momentum maintained by feminist organizations and scholars clearly played a role in the formation of the ICTY and the decisions to prosecute particular cases. Furthermore, feminist scholars and organizations view the guilty verdict as a landmark event in accountability for rape (Bergoffen). The justices in *Kunarac* held three men accountable for raping women.

In order to understand how the justices approached evidence, and thus rape myths in the trial, it is necessary to explore the biographies of the justices. The justices presiding over *Kunarac* have strong backgrounds in international law and human rights. Florence Ndepele Mwachande Mumba (presiding), David Hunt, and Fausto Pocar constituted the Trial Chamber of *Kunarac*. In particular, Justice Mumba's life long focus on the status of women is evidence that *Kunarac* is in part a response to feminist exigencies. Her presence and prominence within *Kunarac* signifies the shift in international law to focus more on women in international law. Florence Mumba represented her native country of Zambia at the Conference on Women in

Nairobi and in Senegal. She also worked to organize the African Court on Human Rights in South Africa in 1995 (The Hague "Press Release Judge Florence Mumba"). Of the three judges, David Hunt has the fewest ties to human rights law. He is an Australian with a long history of working for legal reform in the common law state of New South Whales (The Hague "Judge Theodore"). Fausto Pocar is an Italian judge who along with his extensive legal career in Italy has also established strong ties to the United Nations. He has conducted various human rights missions for the United Nations (The Hague "Judge Theodore").

*Purposes*

The continued debate about how the ICTY can best achieve justice for victims of sexual assault and the cases on sexual violence indicate that justice and accountability are significant goals of the ICTY. The numerous human rights organizations calling for soldiers to be held accountable for raping women were not ignored. The ICTY was formed and cases on sexual violence have been heard. The feminist debate about how to prosecute rape and whether or not the court has achieved justice for rape victims serve as evidence that the ICTY is being observed. Kuo acknowledges that the ICTY cannot provide perfect or even near perfect accountability. Institutional constraints such as funding, human resources, and time prevent many cases from being pursued. The Foca investigation was narrowed from fifty potential indicts to three. And there have only been three cases about sexual violence throughout the tribunal. Thus, the purpose of the court should not be understood as accountability for all soldiers who committed rape. Rather the purpose of the court is to show that international law can and will prosecute rape as a war crime. It is not a universal accountability but it is a step in the direction of greater accountability.

Another important purpose of the tribunal in general and *Kunarac* specifically is to provide a public record of victim testimony. Similar to the early news articles and organizational accounts, the trials on sexual violence record the atrocities of war rape so that they are accessible to the public. Unlike the trials of Nuremburg and Tokyo, *Kunarac* confronts the phenomenon of war rape and provides detailed accounts of victims' stories.

## Legal Differences

*Kunarac* is able to cite more victim testimony than previous tribunals because of more humane evidence gathering procedures and a lack of strict precedent in international law. Since the ICTY is one of the first UN tribunals, it is important to understand what procedures they adopted to work with rape victims and how those procedures might influence the appearance of rape myths in *Kunarac*.

### *Evidence Gathering*

The office of the prosecutor in *Kunarac* was aware of the sensitive nature of gathering evidence about rape and attempted to make accommodations for potential witnesses. In the ICTY prosecutors work with investigators to find evidence and witnesses to help them make decisions about whom to prosecute and which witnesses are credible. Kuo indicates that most investigators were cooperative. However the existence of even a select few who believe in the rape myths can hinder prosecution. Kuo notes, "there were comments made by investigators, who were admittedly overworked at the time, saying things like, 'I've got ten dead bodies, how do I have time for rape? That's not as important,' or 'So a bunch of guys got riled up after a day of war, what's the big deal?'" (311-312). Despite the incredibly insensitive comments from some investigators, most investigators went out of their way to make the women they were talking to feel comfortable expressing their experiences. As often as possible translators were used so that

women could communicate in their native language and female staffers were used to help keep the women at ease (Kuo 311-312). The extraordinary measures taken to make sure the women felt comfortable telling their stories is a significant departure from the system described by the rape myth literature where any detective and district attorney may be placed in charge of evidence gathering.

The fact that the Foca investigations on which *Kunarac* is based started several years after the height of conflict in Bosnia-Herzegovina had two major implications on the existence of rape myths in *Kunarac*. First, since the tribunal investigations were taking place years after most of the incidents of rape, there is little to no expectation of prompt complaint in the way Torrey describes it. Even the hostile investigators would find it difficult to discredit a witness because he or she had failed to complain immediately after the rape. Second, the delay in evidence gathering makes physical evidence rare. Several years after the rapes occur, most of the injuries have healed and the DNA has been washed away. Investigators and prosecutors would find it almost impossible to determine the credibility of a story based on outward signs of physical force or violence. The difficulty of gathering physical evidence indicates that the use of the "real rape" myth is not probable. According to the myth "real rape" is only possible when the victim can prove violent force was used during the rape (Orenstein, "Special Issues" 1587; Taslitz 6; Luchjenbroers & Aldridge 342). There could still be affirmations of "real rape" and prompt complaint in *Kunarac* but, given the practical constraint of delayed evidence gathering, it is unlikely that women can be discredited based on either myth. Limiting the importance of physical evidence should broaden what the investigators could count as rape. They would rely more on the specific account of each witness defining and telling his or her own story.

*Lack of Precedent*

The justices and the prosecutors struggled to create definitions and interpret rules of evidence in the absence of legal precedent. The definitions and interpretations put forth in *Kunarac* altered the way rape myths function.

The lack of a definition of "rape" led to the justices creating their own ad hoc definition in *Kunarac*. In order to create the definition of rape, the justices in *Kunarac* had to determine what elements comprise rape. Essentially Kuo notes they had to determine how a person could identify rape based on a victim's story (313). The justices note this particular constraint when they discuss their definition of rape:

> The specific elements of the crime of rape, which are neither set out in the Statute nor in international humanitarian law or human rights instruments, were the subject of consideration by the Trial Chamber in the *Furundzija* case. There the Trial Chamber noted that in the International Criminal Tribunal for Rwanda judgment in the *Akayesu* proceedings the Trial Chamber had defined rape as 'a physical invasion of a sexual nature, committed under circumstances which are coercive.' It then reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law. (*Prosecutor v. Kunarac* par 437)

In order to determine what the essential elements of rape should be, the justices in *Kunarac* first looked to previous ICTY and ICTR trials and a significant amount of data from major domestic legal systems (*Prosecutor v. Kunarac* par 437).

The Trial Chamber of *Kunarac* was able to create their own definition of rape to meet the needs and constraints of the trial. In the judgment document the Trial Chamber argues "that the *Furundzija* definition, although appropriate to the circumstances of that case, is in one respect

more narrowly stated than is required by international law" (par 438). The conclusion that *Furundzija* does not provide an adequate definition for international law leads the Trial Chamber of *Kunarac* to examine and cite rape statutes from countries and states around the world (see examples in pars 443-456) as a justification for their definition of rape. In *Kunarac*:

> The Trial Chamber understands the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. 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. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. (par 460)

This understanding of rape and coercion changes the way consent is viewed in *Kunarac*. Consent under this definition is based on the surrounding circumstances. This displaces the myth that consent is implied unless the woman is actively resisting. In practical terms the expansion of what it means to consent means that more details of a woman's experience could be relevant to determining guilt or innocence. It could also mean that more experiences count as rape.

A change in definition alone does not ensure that more experiences will be expressed as rape and be seen as credible in the court. Sometimes even if a story can be basically understood to be rape, it can still be dismissed because the standards of evidence in court are high. The shift in understanding also leads the Trial Chamber of *Kunarac* to reinterpret Rule 96. Rule 96 establishes standards for evaluating competing stories in the trial to determine whether or not rape occurred according to the law (*Prosecutor v. Kunarac* pars 461-463). The justices in

*Kunarac* were forced to evaluate competing stories because of the lack of physical evidence discussed above. Rule 96 provides that in sexual assault cases:

> (i) no corroboration of the victim's testimony shall be required;
>
> (ii) Consent shall not be allowed as a defence if the victim
>
> > (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
> >
> > (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear;
>
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
>
> (iv) prior sexual conduct of the victim shall not be admitted into evidence. (*Prosecutor v. Kunarac* par 462)

The tribunal established Rule 96 to prevent defense strategies that attempt to blame the victim. The Trial Chamber in *Kunarac* justifies this standard of evidence by focusing on consent as absent unless each woman freely gave her consent to each sex act (pars 463-464). Thus, unlike previous ICTY and domestic court cases, the argument that the woman consented to sex cannot be used as an affirmative defense. A potential implication of this rule is that a defense attorney is less likely to frame the discussion of consent in the courtroom. The level of consent present in a particular act will be expressed by the witness and under Rule 96 cannot be substantively attacked or altered by the defense. Rule 96 ultimately makes the legal standards for evidence about sexual violence less dependent on physical evidence and the belief that consent is implicit.

## Conclusions

The significance of these changes based on a lack of precedent is that rape myths might be less likely to occur in the exact forms previously outlined by rape myth scholars. New definitions and interpretations of rules of evidence should be tracked along with the appearance of rape myths so that relationships between the definitions/rules and myths can be explored. However, without the vigilance of news agencies and governmental and non-governmental organizations, it is unlikely that *Kunarac* would exist as a trial. The office of the prosecutor, listening to the demands of feminists and humanitarians, investigated war rape in the area of Foca. And the justices worked to build definitions and procedures that ensured each witness's story could be evaluated in terms of the specific context of the Bosnian war. The oversight of organizations and the flexibility of the trial participants in *Kunarac* do not ensure the disappearance of the rape myths discussed in chapter one. Rather the changes in international law have the potential to change the way each story of rape is heard and evaluated. In the following chapters I explore how the changes in definition and procedure implicate the existence of rape myths in *Kunarac*.

## Chapter 3: Denaturalizing Consent

The inherent gap between the lived experience of rape and the legal concept of "rape" has often been filled in with the patriarchal rape myths discussed in previous chapters. Since it is difficult to communicate the experience of rape in legally acceptable and effective terms, victims and attorneys are left to the task of explaining traumatic events within the confines of narrowly defined legal categories. In this view, rape myths are meant to provide the reasons why a particular sex act is or is not rape according to particular legal definitions. The gap between lived experience and the legal concept of rape is inevitable, but the filling in of those gaps with rape myths is not inevitable. I contend that the Trial Chamber in *Kunarac* was able to disrupt definitional rape myths by narrowing the gap between lived experience and the legal term "rape." They accomplish this narrowing by grounding their definition of rape in legal precedent, thus challenging the notion that there is a true or real rape experience. They also emphasize the relationship between the specific context of *Kunarac* and the definition of rape.

I argue that the detailed legal process of justifying their definition of rape is a significant legal strategy. The setting up of multiple legal precedents for rape that differ from country to country indicates that there is no "real rape." That is to say that there is no particular act or set of acts that constitutes the perfect or natural example of "what rape is." Rather the existence of multiple legal definitions makes manifest that characteristics of the act of rape are not naturally occurring and thus awaiting discovery by a clever legal mind, but rather the characteristics that constitute the act of rape are constructed through a process of invention. In order to explore this claim and its implications, I first describe the how the Trial Chamber establishes its definition of rape. Second I discuss the implications of this rhetorical strategy on the relationship between the lived experience and the legal concept of rape.

## Creating a Definition of Rape

The section on rape as a crime begins by explaining jurisdiction and the charges against the accused. Establishing the charges and jurisdiction of the court are not arguments about definition; they are a reason that the trial chamber is adjudicating *Kunarac*. According to Articles three and five of the ICTY statute, which are based on the 1949 Geneva Conventions, rape can be prosecuted as a crime against humanity under the jurisdiction of the ICTY (*Prosecutor v. Kunarac* par 436). After they recognize their jurisdiction over *Kunarac* and the crime of rape, they begin to justify their definition of rape. The Trial Chamber follows a basic problem-solution argumentative structure. They begin by arguing that the current definition of rape is too narrow, then they provide evidence of previous legal conceptions of the *actus reus* of rape, and finally they argue that the solution to a narrow definition is refocusing the idea of consent on sexual autonomy instead of force.

### *The Problem*

The problem for the justices of *Kunarac* is that the current international and domestic conceptions of rape construct the notion of consent too narrowly. They begin to outline this problem by first citing *Furundzija* and *Akayesu*. *Furundzija* and *Akayesu* are trials previously held in the ICTY and ICTR respectively that necessitated a definition of rape. The Trial Chamber in *Kunarac* ultimately concludes that the definition set out in the previous cases is too narrow:

> In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundzija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim, which… is

> in the opinion of this Trial Chamber the accurate scope of this aspect of the definition of international law. (par 438)

This particular quote illustrates not only the problem that the Trial Chamber of *Kunarac* found in narrowly defining "consent," but it also highlights the fact that they are constructing a definition based on their opinions of the scope of international law and the context of the trial. They are framing the justification of a new definition as both required to meet the needs of the particular case at hand and allowable under the jurisdiction set out for them by international law. Their emphasis on non-consensual and non-voluntary is also significant because it marks the problem they see with the *Furundzija* definition. It lacks the flexibility to adapt to situations where both consent and force are absent.

Since they argue that international law lacks a sufficient definition, the Trial Chamber supplements international law with an understanding of the common themes in domestic law. They justify the examination and use of domestic legal themes by arguing that the commonalities in domestic systems "embody the *principles* which must be adopted in the international context" (par 439). In other words, they begin the section on domestic legal statutes by arguing that the commonality of these systems holds the solution to their problem with the *Furundzija* definition. The Trial Chamber argues that the *Furundzija* definition misunderstands the common theme in domestic law:

> Force, threat of force or coercion – are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgment suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalizing violations of sexual *autonomy*. (par 440)

There are two important ideas at work in this quote. First, the Trial Chamber is describing the specific problem they have with the previous notion of consent and justifying that concern by grounding their new definition in what they argue is a more accurate interpretation of domestic standards. The shift they suggest here towards penalizing violations of sexual autonomy is significant enough that the justices justify it through the citation of domestic legal precedent. The Trial Chamber is setting up their solution that they proceed to justify through domestic legal precedent. Second, they are enacting the process of invention by explaining the locations of their topics of rape. Rape is no longer located solely under the domain of violence and force because as a crime its constituent parts can also be located under the heading of violations of sexual autonomy. The justices in this war are both showing the process of invention they enacted to come to their new definition or solution and they are providing a new topic for the invention of rape arguments. As the Trial Chamber argues for the importance of sexual autonomy as a category, it becomes clear that victims in *Kunarac* have a broader scope of topics for the invention of arguments to prove rape than the victims in *Furundzija*.

After identifying the larger problem with the previous interpretation of national legal jurisdictions, the Trial Chamber lays out the evidence that supports their argument. They note that there is a large range of sexual acts that can be classified as rape according to domestic courts (par 442). Noting the range of possibilities is important because it makes clear that there is no true or natural definition of rape. In order to win an argument that the victim testifying was not a victim of "real rape," the defense would have to first prove that there is a natural set of acts that constitute rape and that the alleged act does not fit that description. This would be a difficult argument to win given that there are multiple definitions of rape that have all been constructed for legal purposes. The acknowledgement of several definitions of rape and the prior

acknowledgment that the definition the Trial Chamber posits is situational combine to indicate that even the new definition does not describe a "real rape" experience.

The next three sections spread over seven pages cite and categorize definitions from national jurisdictions from around the globe. The Trial Chamber identifies three major themes that are used to constitute the *actus reus* of rape: force or threat of force, some countries argue that specific circumstances affect the vulnerability of the victim, and the absence of consent or voluntary participation.

The force or threat of force provision of a definition is controversial because direct force, which is often required, may not always be present or provable. Jurisdictions that require proof of direct force or threat of force focus on the imminent physical danger to the victim (in the codes they cite the victim is explicitly female). For example:

> The Criminal Code of Korea defines rape as sexual intercourse with a female 'through violence or intimidation'. Other jurisdictions with definitions of rape similarly requiring violence, force or a threat of force include, China, Norway, Austria, Spain and Brazil. (par 444)

Some jurisdictions require the proof of force or threat of force and proof "that the act was non-consensual or against the will of the victim" (par 445). In both situations there is an emphasis on rape consisting of violence external to the act of rape itself. The myth that "real rape" is violently perpetrated by a crazed stranger on a helpless victim can be seen as a derivative of this set of definitions. Requiring violence may not only limit the cases of marital or date rape in domestic settings but complicates the issue of war rape in *Kunarac*. If the women are expected to prove that they were in imminent danger to prove that they were raped, then the absence of physical evidence due to the time between the crime and the trial would be devastating for proving rape.

By insinuating that the women could or should have resisted more, the rape myth implies that the women wanted to engage in sex and thus the act could not have been rape. The women testifying are thus encouraged (even if implicitly) to frame their lived experience in terms of how much they resisted and how much force was exerted on them. When rape requires proof of violence, it necessarily constrains the way women describe their experience of rape. The women of Foca, particularly the ones testifying before the court, made constant recourse to the fear and terror they felt in captivity. However the soldiers and defense attorneys argued that the women could leave detention centers at any time and were never threatened. Essentially the question of direct force or threat of force was a live issue even in this time of war. *Kunarac* has to determine whether or not there was an ongoing threat of force inherent in the war even if each individual act of rape was not accompanied by direct threats and force.

A victim need not prove force or threat in some jurisdictions if she can prove the existence of a special circumstance that goes toward the vulnerability or deception of the victim: "These circumstances include that the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation" (par 446). Jurisdictions with clauses about special circumstances often account for psychological pressure on the victim. Switzerland, Portugal (par 447), Denmark, Sweden, Finland, Estonia (par 448) and Japan (par 449) recognize that perpetrators and circumstances may make it impossible for a victim to resist. Various jurisdictions in the U.S. argue that sex is rape

> If committed in the presence of various factors as an alternative to force, such as that the victim is drugged or unconscious, has been fraudulently induced to believe the

> perpetrator is the victim's spouse, or is incapable of giving legal consent because of a mental disorder or developmental or physical disability. (par 451)

It is important to note that the circumstance can be enduring or temporary but that in either case the "ability to freely refuse the sexual acts was temporarily or more permanently negated" (par 452). The wording and emphasis on the special circumstances is connected to the idea of the ideal victim. The special circumstances revolve around the rape victim being totally helpless in the face of attack. In Estonia the victim is marked as helpless: "rape is defined in the Criminal Code as sexual intercourse 'by violence or threat of violence or by taking advantage of the helpless situation of the victim'" (par 448). And jurisdictions like France and Italy have provisions for surprising or deceiving the victim. Both circumstances emphasize that a rape victim is totally helpless and unable to defend herself physically or psychologically. My aim is not to argue that these provisions are bad for women or rape victims but merely to highlight the dubious nature of this victim status with regard to rape myths. In the instance of applying special circumstances to rape, the gap between the legal concept of rape and the lived experience of the woman is filled in with questions of what made the woman deficient. The emphasis is placed on how the woman was unable to psychologically or physically fend off her attacker. This not only implies that true rape victims are helpless but it also implies that if they do not meet one of these special circumstances and still do not resist, then they were "asking for it."

The final major component of the *actus reus* of rape is the absence of consent of voluntary participation. The difference between voluntary participation and force or threat of force may seem semantic at first glance. However the difference is about standards of proof for what counts as consent in a rape case.

> Force or threat or fear of force need not be proven; however where apparent consent is induced by such factors it is not real consent… In these jurisdictions it is also clear that the consent must be genuine and voluntarily given. In Canada, consent is defined in the Criminal Code as 'the voluntary agreement of the complainant to engage in the sexual activity in question.' The Code also explicitly identifies circumstances in which no consent will be considered to have been obtained, including that 'the agreement is expressed by the words or conduct of a person other than the complainant' or that the accused 'induces the complainant to engage in the activity by abusing a position of trust, power or authority.' (par 453)

I quote this statute and standard at length because it encompasses the other two provisions. In order to have voluntarily agreed to intercourse, force and threat of force must be absent. Additionally voluntary agreement implies that no enduring or temporary circumstances complicate the victim's ability to freely consent.

*Their Solution*

It is from this final broad component that the Trial Chamber in *Kunarac* draws its basic principle underlying how national jurisdictions define rape. The principle is that serious violations of sexual autonomy should be punished. "Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant" (par 457). There is a key shift in the way force, threats, and special circumstances are seen in regards to the crime of rape when we focus on sexual autonomy. Rather than seeing force, threats and circumstances as necessary components of the crime of rape, *Kunarac* sees these components as evidence of the absence of genuine consent:

> The absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator. (par 458)

The shift is crucial to understanding how we talk about rape myths. In *Kunarac* it is sufficient for a woman to prove that she did not voluntarily consent to the sex act. She no longer has to prove that she was physically forced or threatened to prove that she was raped.

*Implications of the Shift*

The understanding of consent embodied in courts like *Furundzija* assumes that women implicitly consent to sex unless they were either forced to have sex or incapable of consenting to the sex act. When consent is always implied it renders the self and sexuality of a woman static. Women are statically understood as wanting sex with men unless the woman is violently jarred from that state of desire. A woman is "asking for it" or consenting unless the rape victim can prove she was coerced, forced physically, or incapable of consenting at the time of the act, then the consent is null and void.

By assuming that consent must be given voluntarily and genuinely, *Kunarac* recognizes that a woman's desire or lack of desire for a particular sex act is tied to systems of power acting on her and the contextual factors grounding the sex act. There is no presumption that states women consent to sex with men. There is no presumption at all when consent must be actively engaged as opposed to consent being understood as an implicit and static part of women's

sexuality. The view that rape is essentially a yes or no question of consent in a particular moment fails to account for the multiple and changing systems of power that influence any particular sex act. In particular, the static view of consent fails to account for the context of the war in Bosnia where soldiers who were engaged in ethnic cleansing of Bosnian Muslims were holding the women captive.

It is important to note at this point that the Trial Chamber likely could have argued that the state of war constituted a state of perpetual force acting on the women being held captive and thus nullified the contract of consent between the women and the soldiers. However, the justices focused on a standard of affirmative consent that accounts for the context of the war as a system of power influencing the likelihood that a woman would freely engage in a sex act with a soldier. It is not that the presence of war is a breach of contract making the sex act rape by default. It is rather that the presence of war makes it unlikely that a woman would genuinely and voluntarily engage in consensual sex with her captor, making the sex acts rape. It is a shift in the way rape is understood. The shift is important because it affords the raped woman more ways to express the lived experience of rape. She can explain that she felt that the context did not allow her to actively refuse sex with a soldier rather than saying that a soldier actively forced her into a sex act. When consent is viewed as genuine and voluntary rather than implied, the woman can describe the experience of rape with less necessary recourse to an underlying assumption that a rape must be accompanied by physical violence. If she did not fight off her attacker, it is not a sign that she implicitly consented to rape; the absence of a struggle can be explained as a product of the systems of power affecting her ability to freely and genuinely consent to a sex act.

In essence *Kunarac* has complicated the notion of consent by opening up space for the context of a given sex act to render the act rape if the participants were likely aware that the

woman was not genuinely and freely engaging in the sex act. This complication is achieved through a shift in the way rape is defined in international law. The *actus reus* of rape in *Kunarac* is not predicated on proving force, threats, or incompetence. The *actus reus* of rape in *Kunarac* is predicated on the perpetrator engaging in a sex act with a woman when he is aware that the woman is not genuinely and freely consenting to the act. This means that the woman is no longer constrained by the need to prove physical force or imminent danger to herself or another was a part of the sex act to prove rape. A "real rape" in *Kunarac* does not require a brutal or crazed perpetrator. Furthermore a "real rape" in *Kunarac* does not require the victim to have violently and valiantly struggled against the attack in an effort to defend her honor. By allowing circumstances to play a vital role in their understanding of consent, the justices allow the subjectivity of the woman to be contingent on the situation in which she exists. Thus the justices create an understanding of consent that accounts for situations like the war in Bosnia by articulating that a woman's position as agent or subject might be compromised by being held captive in a war. It is not that she was incapable of consenting to sex. Rather *Kunarac* assumes that the women who were raped in the Bosnian war were unlikely to have willingly engaged in sex acts with their captors. That shift in orientation allows the women testifying in *Kunarac* to express their experiences of rape without recourse to as many legal constraints regarding the definition of rape as in previous trials. The following chapter will explore how the justices applied this shift in definition to the standards of evidence and eventual verdict.

## Chapter 4: Evaluating Consent

In the previous chapter I argued that the justices in *Kunarac* were able to disrupt rape myths by altering the definition of rape. The justices argue that women must voluntarily consent to any sex act. By shifting from a notion of consent based on force or the threat of force to a notion of affirmative consent, the court places fewer legal constraints on what the women can explain as part of their experience of sexual violence. However, altering the legal definition and *actus reus* of rape does not necessarily mean that the rape myths can no longer appear. The justices in *Kunarac* also disrupt rape myths by tying their decisions and verdicts to the details and testimony of the witnesses. This chapter explores how the shift in orientation toward consent is enacted in the way testimony is treated in *Kunarac*. More specifically, this chapter explores how the justices interpret and act on the testimony of witnesses to craft their verdict. I argue that the justices use their notion of voluntary consent to interrupt rape myths that occur in the presentation of testimony in *Kunarac*.

The justices use the broader notion of consent they established to disrupt the "she asked for it" and the "real rape" myths. They use the details of the war to fill in the gaps between defense arguments and victim testimony. The justices presume that the context of armed conflict supersedes defense arguments that the women actually consented to the sex acts. Based on the context of war and captivity, the justices in *Kunarac* conclude that it is improbable that a woman would "ask for" or consent to rape even if her actions suggested consent. The captivity of the women also helps the justices argue against an altered facet of the "real rape" myth. According to the "real rape" myth, women who truly want to avoid being raped will fight valiantly to defend their honor. At the heart of this argument is the assumption that women would avoid circumstances conducive to rape if they did not secretly desire to be raped. It is not "real rape" if

the woman failed to attempt to fight back or escape as a method of avoiding the rape. The justices shift the burden of proof away from the woman. A woman does not have to prove that she attempted to fight or escaped, instead she must prove that she did not voluntarily and willingly participate in the sex act. I illustrate the ways the broader notion of consent allowed the justices to account for more contextual details of the war and constrain how the myths were articulated. I begin by explaining how the context of a war constrains the way the myths can be articulated in *Kunarac*. Then I use victim testimony and the attorneys' discussion of said testimony to indicate how specifically the justices interrupted the rape myths, and explore the consequences of each interruption. Then I explore how the stories presented indicate the presence of a shift in the ways women are allowed to discuss their experiences of rape in court. The evidence and testimony presented illustrate the presence of a shift from the position that rape is a crime of sex to the position that rape is a crime of domination and hate. This shift loosens the constraints on how women can talk about their experience of rape.

## Altering the Myths

The nature of war changes the way rape myths can be articulated in *Kunarac*. There are particular arguments that are used in domestic rape myths that simply do not apply when examining war rape. The myths presented in the first chapter (e.g. she asked for it, real rape, etc.) are largely present in domestic legal settings. The question is whether and how they will appear in *Kunarac.* The war constrains the possibility of blaming the victim. For instance, in the "she asked for it" myth, a woman is typically accused of being in the wrong place at the wrong time or dressing provocatively and thus inviting sexual advances. Since the women testifying in *Kunarac* were kidnapped and taken from their homes, it is unlikely that either of those charges would resonate. First, the women had no control over their location because they were being held

captive, which makes it nearly impossible to argue that the women were in the wrong place at the wrong time. Second they did not have access to clothing options, which makes it difficult to argue that they were seeking sexual encounters based on their clothing choice. But the idea that women secretly desire sex with any man and further that women desire rape as a means of relinquishing control over their sexuality remain (Torrey 1015, 1025: Taslitz 5-6). Even in the context of a war and being held captive, it is still possible to assume that women will desire sex with the soldiers. If one accepts this myth, then any act that can be construed as sexual might imply consent to a sex act. Accepting this myth as an ontological position requires that the women's actions be understood as implicitly wanting sex even if the context of the war makes that unlikely.

The myth that women can escape situations in which they are being held captive or that they should do more to evade rape may be articulated in the same ways it is articulated against victims of domestic violence but is practically more difficult to defend. Scholars and social workers note that women who are facing partner violence are often asked why they failed to leave their abuser.[3] Similarly rape victims are asked why they did not run away from or fight off their attacker. In both instances the assumption is that the women must have wanted to be raped or they would have tried harder to escape or fight back. The assumption that women should escape or fight back ignores the argument that women who suffer from this sustained or traumatic abuse are often conditioned to become passive and avoid resistance in order to survive

[3] See for example: Brown, Dubau, and McKeon in *Stop Domestic Violence* classify this question as a commonplace myth (27). Mullender in *Rethinking Domestic violence* states several theories about women that revolve around debunking the argument that women could escape (51-55). Jaffe, Lemon, and Poisson in *Child Custody and Domestic Violence* argue that many people still feel the need to ask battered women why they stay in the relationship (9). Saucier Lundy, Saucier Lundy, and Janes in *Community Health Nursing* cite it as a common question asked about women in abusive relationships (804). James-Hanman in "Enhancing Multi-Agency Work" refers to it as "the most commonly asked question about domestic violence" (277).

(Walker 22). During a war it is unlikely that women could escape from detainee situations and yet, as I explain later, the defense still made claims that the women could have left if they chose. The context of the war means that the abusers were soldiers who were often armed and that escape would have meant needing to escape enemy territory, which is practically and logistically more complicated than escaping one's own house. However, the same logic applies. The women who are being detained in a war are conditioned to avoid resistance as a method of surviving their status as captives. Thus the fact that *Kunarac* is a war rape trial means that the claims that the women could leave or escape might be difficult to defend practically. Nonetheless, studying how the justices used those practical details to disrupt the idea that women were capable of escaping can tell us how to disrupt the logic that women can escape abusive situations.

## Victim Testimony

Twelve women who were raped during the conflict in Foca testified against the accused. Their stories varied in length and depth of details. Their stories also varied in treatment by the Trial Chamber. Some stories were used without corroboration to convict the accused, some stories were used in conjunction with other stories to obtain conviction, and some stories were not detailed enough to obtain conviction but were used to help corroborate other stories. No testimony by any victim was dismissed. As the justices explained each count of the indictment in their verdict, they retold the stories of the women even if they did not find the accused guilty of that particular rape. For example, the story of J.G. could not be substantiated by her own account of the details, nor could it be corroborated with enough detail from the other women's stories. However, the justices still retold J.G.'s account of events and used her account to help corroborate the stories of FWS-191 and FWS-186 (pars 717-727). I choose to explore the stories of sisters D.B. and FWS-87 because they are two of the longer and more detailed accounts of

what happened to the women during the war. Each sister's story was also attacked by the defense on the basis of rape myths. And in both sets of testimony the justices use the details of the context instead of rape myths to fill in the gap between the experiences of the women and the claims being made by victim testimony and attorneys. As the justices pointed to the relevant details about the war and captivity of the women, they contended that rape is not a crime committed because of over-heated sex drives. This allowed the justices to make visible the aspects of domination and disciplinary power that were exhibited by these acts of rape. Through retelling the stories of these sisters, I also incorporate the stories of some of the other women with whom they were detained. I focus on the places where rape myths were brought to bear in the defense's arguments but were rejected by the Trial Chamber.

D.B. was around 19 years old and her younger sister FWS-87 was around 15 years old when Foca was invaded by Serbian forces. They were part of the group of Bosnian Muslims who were captured in the woods while attempting to flee Foca, Bosnia on the morning of July 3, 1992 (*Prosecutor v. Kunarac* par 215). They were separated from the men in their family and as they were led away "the women were told to lie down and bursts of gunfire were heard coming from the place where the men had been detained" (*Prosecutor v. Kunarac* par 25). They never saw those men again and later heard that the men had been killed. The sisters were then detained at the area high school before being separated and taken to different detention locations. During their detention they were both repeatedly beaten and raped. The following stories detail how the defense lawyers attempted to prove the women consented to sex with Kunarac and Kovac.

The defense attorneys for Kunarac and Kovac both used a modified version of the "she asked for it" myth to argue that the women desired sex with Kunarac and Kovac or at least that

the men thought the women desired sex. Kunarac's lawyers argued that D.B. initiated the sex act with Kunarac and that he had no idea that she did not desire to have sex with him:

> Kunarac told D.B. to sit down on the couch but instead he said that she sat next to him on the bed. D.B. told him what had happened to her during the previous month, her rapes and mistreatments, and that she was with her sister at Partizan. The conversation allegedly continued for 1 ½ - 2 hours. She then fell on him and put her head on his chest and started kissing him. Dragoljub Kunarac said that he felt very confused and that he tried to repel her, but to no avail… He said the following: "I had sex against my will… without having a desire for sex"; and further, "I cannot say that I was raped. She did not use any kind of force but she did everything." Dragoljub Kunarac added that she took the initiative, that she unbuttoned his trousers and initiated the intercourse. Dragoljub Kunarac said that he did not understand at the time the reasons for her behaviour. (*Prosecutor v. Kunarac* pars 230-232)

The difference between the story that Kunarac tells and the story D.B. tells hinges on consent. When D.B. was transferred from the school to the house at Ulica Osmana Dikica, which served as a headquarters for a group of Serbian soldiers, she was immediately separated from the other woman and "Jure [a soldier] followed her into the room, undressed her and raped her vaginally. Then 'Gaga' [another soldier] entered the room and raped her, too. Finally, a boy of 15 or 16 years of age came in and raped her as well" (*Prosecutor v. Kunarac* par 219). She testified that after being raped three times "'Gaga' told her to have a shower because his commander was coming, and he threatened to kill her if she did not satisfy the commander's desires" (*Prosecutor v. Kunarac* par 219). The justices summarize her testimony:

> He [Gaga] repeated this when the accused Dragoljub Kunarac walked in. D.B. took off the trousers of the accused, kissed him all over the body, and then had vaginal intercourse with the accused. D.B. said she felt terribly humiliated because she had to take an active part in the events, which she did out of fear because of "Gaga's" threats earlier on; she had the impression that the accused knew that she was not acting on her own free will. (*Prosecutor v. Kunarac* par 219)

While D.B. believed she was being forced to initiate a sexual act with Kunarac, the defense argues that her initiating sex indicated that Kunarac did not commit rape because he assumed that she desired sex with him.

The defense has modified the "she asked for it" myth while relying on the core notion that women always desire sex with men. Kunarac's testimony suggests that he was being seduced and pressured into a sexual encounter by D.B. His attorneys make a more qualified claim, stating that he simply did not know that "Gaga" had forced D.B. to initiate the sex. Both Kunarac and his attorneys argue in a way that assumes that D.B. desired sex with Kunarac despite the fact that she was a captive in a war. The defense relies on the myth that it is reasonable to believe that women desire sex with men no matter the context. Since they rely on the assumption that it was reasonable for Kunarac to believe that women always desire sex, then they can argue that any sexual act (for example the kissing or undressing) is a sign of desire to engage in intercourse at that particular moment. Kunarac actively blames D.B. (the victim) for initiating sex, insinuating that he would not have raped her had she not initiated the act. His attorneys implicitly blame D.B. by arguing that he had no knowledge of the prior threat made by his subordinate officer "Gaga." The implicit nature of blaming D.B. is further highlighted by Kunarac's own explanation that he could not be at fault for the incident because she had initiated

the act. In fact he would have labeled himself a victim of rape if D.B. had forced him to have sex with her. Kunarac's defense of his innocence illustrates the myth that "real rape" involves direct force. And since she initiated the acts and he in no way directly forced her to have sex, then it was her responsibility to protest or stop the sex act, not his responsibility. Both versions of blame contend that it was plausible that Kunarac believed she wanted to have sex and that rape involves physical force.

Under the previous definition of rape that required proof of force, the justices could have accepted the defense lawyer's argument that D.B. may have been forced by "Gaga" to initiate sex but that Kunarac remained blissfully unaware of said force. However, since the court already acknowledged that consent is required to be voluntarily given, they were able to disrupt this myth by asserting that the context surrounding this sex act makes it highly unlikely that Kunarac could have believed that D.B. desired sex with him. The justices highlighted and made visible the coercive nature of Kunarac's power over D.B. Whereas the myth that the women "ask for it" relies on the notion that all power or domination happens in the open or through direct force, the Trial Chamber points out that the coercive and dominating power that Kunarac had over D.B. may not be visible in this particular sex act but is present nonetheless. The Trial Chamber explains why they believe that Kunarac is responsible for the rape of D.B.:

> The Trial Chamber accepts D.B.'s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by "Gaga" if she did not do so. The Trial Chamber rejects the evidence of the accused Dragoljub Kunarac that he was not aware of the fact that D.B. only initiated sexual intercourse with him for reasons of fear for her life. The Trial Chamber regards it as highly improbable that the accused Kunarac could realistically have been "confused" by the behavior of D.B., given the general context of

> the existing war-time situation and the specifically delicate situation of Muslim girls detained in Partizan or elsewhere in the Foca region during that time… the Trial Chamber finds it irrelevant as to whether or not Kunarac heard "Gaga" repeat this threat against D.B. when he walked into the room, as D.B. testified. The Trial Chamber is satisfied that D.B. did not freely consent to any sexual intercourse with Kunarac. She was in captivity and in fear for her life after the threats uttered by "Gaga." (*Prosecutor v. Kunarac* pars 645-646)

The justices argue that since D.B. was being held captive during a war that targeted her based on both her status as a Muslim and as a woman, it is unlikely that Kunarac believed that she would freely initiate sex with him. The justices use the details of the war and D.B.'s captivity to argue that she did not desire sex at that time. Based on their previous argument that women must freely and voluntarily consent to a sex act, the justices use the context of the war and the details of D.B.'s testimony to interrupt the notion that she desired sex with Kunarac. The justices layered D.B.'s testimony that she was forced by "Gaga" with the context of the extermination of the Muslim population and her particular status as captive to argue that she did not voluntarily engage in a sex act with Kunarac.

Much like her sister D.B., FWS-87 was accused of wanting to have sex with the accused. FWS-87 was accused of being in love with Kovac and of being able to escape at any time. In this instance Radomir Kovac and his attorneys presented several witnesses to testify that FWS-87 and Kovac were in love. The supposed relationship between FWS-87 and Kovac is used by the defense to prove that FWS-87 could not have been raped because she was in love with Kovac. The defense attorneys' argument was based on the assumption that women who are in love cannot be raped by their partners. The defense is appealing to the assumption that underlies both

the "she asked for it" myth and the "real rape" myth: Women who are in romantic relationships or who engage in some intimate sexual behavior are consenting to any sex act. According to the myths, a woman in an intimate relationship has forfeited her right to refuse sex in the same way that a woman who is "provoking" a man has forfeited her right to say no. Real rape of innocent women can only take place outside of a relationship. If the defense could have successfully argued that FWS-87 was in love with Kovac, then according to the myths she was plausibly consenting to sexual relations with Kovac.

Kovac's defense alleges that "the allegations of mistreatment and forced naked dancing were pure fantasy" and that "FWS-87 and Radomir Kovac were in love with each other and that FWS-87 stayed with him out of her own free will" (*Prosecutor v. Kunarac* par 141). FWS-87 was described as looking "happy with Kovac" (*Prosecutor v. Kunarac* par 143), as behaving "beautifully, wonderfully, nicely" (*Prosecutor v. Kunarac* par 145). The witnesses testified that Kovac introduced her as his girlfriend, that "Kovac and the girl had a good relationship" (*Prosecutor v. Kunarac* par 147) and that "judging from Kovac's and the girl's behavior, she had no doubt that they were a couple" (*Prosecutor v. Kunarac* par 146). The witnesses testified to seeing them multiple times in public and each time Kovac and FWS-87 appeared to each of the witnesses to be in love. Kovac told several of the witnesses "that he had received a letter with a heart drawn on it from one of the girls who he had seen off to Montenegro, who was expressing her gratitude to Kovac" (*Prosecutor v. Kunarac* par 150).

FWS-87 told a very different story about her "relationship" to Kovac. She explicitly denied being in a relationship with Kovac: "FWS-87 underlined that she had no reason to be grateful to Kovac since he and Jagos Kostic, the other resident of Kovac's apartment had raped her" (*Prosecutor v. Kunarac* par 73). While she stayed at his apartment, FWS-87 says that she

"had almost daily contact with him" and "was raped by him vaginally and orally almost every night" (*Prosecutor v. Kunarac* par 68). She testified that she felt as if Kovac owned her (*Prosecutor v. Kunarac* par 71).

> Kovac forced her alone to undress, climb on a table and dance to music. While he was watching her, he pointed a gun at her… She recalled that again the women [FWS-87, FWS-75, A.S. and A.B.] were made to undress and get on a table. Radomir Kovac threatened to take them to the river and kill them. He actually walked them to the river. (*Prosecutor v. Kunarac* pars 70-72)

The other women confirmed FWS-87's story. A.S. also testified that Kovac singled out FWS-87 and that A.S. could "hear when Kovac raped FWS-87, since she herself was sleeping in the next room" (*Prosecutor v. Kunarac* par 84). The women argue that Kovac submitted them to constant rapes, brutal beatings, and death threats and was holding them captive.

Ultimately the justices decided that Kovac had obviously been raping the women staying at his apartment. The justices in *Kunarac* attack the argument that Kovac and FWS-87 were romantically involved both at the level of evidence and at the level of assumption:

> The Trial Chamber notes that several Defence witnesses mentioned a letter with a heart drawn on the envelope which was allegedly sent by FWS-87 to Kovac. The Trial Chamber accepts, however, that FWS-87 did not send such a letter, and it notes the fact that, even by their own account, none of the Defence witnesses actually read the content of the letter, but only heard about it from Kovac. The relationship between FWS-87 and Kovac was not one of love as the Defence suggested, but rather one of cruel opportunism on Kovac's part, of constant abuses and domination over a girl who, at the relevant time was only about 15 years old. (*Prosecutor v. Kunarac* par 762)

Earlier in the judgment document the justices argue that Kovac was a participant in the attack on the civilian population by raping the women in his apartment: "While four girls, FWS-75, FWS-87, A.B. and A.S., were kept in his apartment, the accused Radomir Kovac abused them and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population" (*Prosecutor v. Kunarac* par 587). The Trial Chamber concluded that FWS-87 was being abused and raped by Kovac while she was held captive at his apartment. They argue that there is no proof that FWS-87 was in love with Kovac; they accept the veracity of FWS-87's testimony. If no one actually saw the letter, then there is no concrete evidence that FWS-87 was in love with Kovac. The Trial Chamber notes the absurdity of the idea that FWS-87 would have been in a relationship with Kovac given her age and the war. In particular the justices note that Kovac was in a situation of such power that he was able to constantly abuse FWS-87 and the other women. The presence of such disparate power relations decreases the probability that FWS-87 was in love or consenting to sex with Kovac. By recognizing the abuse and coercion of FWS-87, the justices are recognizing that she is not responsible for the way that Kovac treated her. The justices support this claim by contending that raping FWS-87 and the other women was part of the systemic attack on the citizens of Foca. FWS-87 did not consent either to a relationship with Kovac or to any sex act – she was not "asking for it."

The tactic of Kovac's defense attorneys relies upon the same line of argument that lawyers arguing date rape cases rely upon. "Real rape" victims are not romantically involved with their attackers. The justices in *Kunarac* provide an important observation. Kovac was obviously coercing and dominating FWS-87. The justices used the context of the war to make the argument that love did not exist where coercion and abuse were present. The justices acknowledge that FWS-87 was separated from her friends and family, controlled with constant

surveillance, and deprived of basic living conditions. These circumstances mirror domestic violence situations where abusers attempt to render women helpless by hurting their mental capacities and cutting them off from outsiders who might come to their aid (Brown, Dubau, & McKeon 37-38). Whether the woman is being held captive by an intimate partner or a soldier, sensory deprivation due to poor living conditions and isolation from the outside world complicate notions of escape and consent. Brown, Dubau, and McKeon argue that women facing domestic violence discover strategies for survival under the daily threat of terror (37-38; see also Mullender 51). These strategies may include playing the role of the loving wife or girlfriend in public like FWS-87 may have done. Rather than accepting that it was possible for love to exist amidst the war and abuse, the justices assume that the presence of war and abuse negates the ability for love to exist. The justices use their knowledge of how FWS-87 was abused, in combination with their knowledge that Kovac was part of the attack on the Muslim population in Foca, to argue that FWS-87 was not in love with Kovac.

The second line of Kovac's defense is that FWS-87 and the other women were free to leave the apartment at any time. The defense is arguing that the women stayed of their own free will and thus are responsible for their rapes and abuse because if they did not like the treatment they could have escaped. As I have noted this is a common line of argument used in domestic violence trials. The justices of *Kunarac* faced this myth when evaluating whether or not the women in Kovac's apartment were able to freely move about the area.

All four women testified that they did not feel free to leave Kovac's apartment despite the defense's claim that "the girls were actually free to move about as they wished" (*Prosecutor v. Kunarac* par 141). The Trial Chamber ultimately sides with the women, noting that the women

> Could not and did not leave the apartment without one of the men accompanying them. When the men were away, they would be locked inside the apartment with no way to get out… Notwithstanding the fact that the door may have been open while the men were there, the Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured. (*Prosecutor v. Kunarac* par 750)

The Trial Chamber argues that the women were "psychologically oppressed and kept in constant fear" by the consistent cycle of servitude, sexual assault, beatings, threats, and humiliation (*Prosecutor v. Kunarac* par 747). The Trial Chamber also cites the complete power Kovac would have had over the women as an important factor in their inability to exert free will:

> Radomir Kovac detained FWS-75 and A.B. for about a week, and FWS-87 and A.S. for about four months in his apartment, by locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labor… For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property. The Trial Chamber is also satisfied that Kovac exercised the above powers over the girls intentionally. (*Prosecutor v. Kunarac* pars 780-781)

In this summary of their findings about Kovac's treatment of the four women, the Trial Chamber recognizes that the context of being held captive likely meant that Kovac had complete control over the women and thus the women could not flee even if they had wanted to. The justices go beyond recognizing the physical constraints that prevented the women from leaving to recognizing the psychological constraints that kept the women captive. It is the recognition of the fact that the women felt like property that interrupts the myth that women consent to sex unless

they fight back or flee their situation. The justices in *Kunarac* state that the women were not psychologically capable of resisting Kovac and his men. Resistance for these women would have likely meant death. By relying on the context of the disparate power relationship between the women and their captors, the justices are displacing the myth that women consent to sex unless they resist.

## From Sex to Domination

Each rape myth discussed in the first chapter relies on the notion that rape is the inevitable result of an uncontrollable male sex drive. Rape is a crime where sex becomes too aggressive because men have not had full and proper access to consensual sex. Men are seen as innately sexual creatures that are entitled to fulfill their sexual desires: "Men are entitled to act on their sexual passions, which are viewed as difficult and sometimes impossible to control… women should know this and avoid stimulating them if they do not wish to have sexual intercourse" (Henderson 131). The uncontrollable male drive to have sex is amplified in times of war because soldiers participating in armed conflict are encouraged to be hyper-masculine in order to be more effective fighters and killers. The soldiers are deprived of consensual sexual partners and thus rape becomes an inevitable and natural extension of their sex drive. "The advantage of this theory is that it relieves the individual of responsibility for his actions and exculpates him for the use of sexual violence" (Seifert 55) because men cannot be held solely accountable for their actions when they cross a line doing what is natural: boys after all will be boys and more specifically soldiers will be soldiers. In fact in their final judgment of the third defendant, Vukovic, the justices address this claim directly:

> The accused Zoran Vukovic argued that, even if it were proved that he had raped a woman, the accused would have done so out of a sexual urge, not out of hatred… The

> Trial Chamber has no doubt that it was at least a predominant purpose, as the accused obviously intended to discriminate against the group of which his victim was a member, ie the Muslims, and against his victim in particular. (*Prosecutor v. Kunarc* par 816)

Rape in *Kunarac* is explicitly tied to the hatred of the Muslim population, not to over indulged sex drives of the soldiers.

The justices in *Kunarac* support the view that rape is not just an overly aggressive manifestation of sexuality but instead rape is a sexual manifestation of hatred and aggression (Seifert 55). Kunarac and Kovac did not become too violent in their pursuit of sex with D.B. and FWS-87. Rather Kunarac and Kovac acted out their hatred for Muslims and women on D.B. and FWS-87 by raping them. The justices' constant recourse to the context of the war and frequency with which they cite the torture and extreme abuse of the women is evidence that they do not believe that the rapes were crimes committed by sexually frustrated soldiers looking to let loose after a hard day of war. The justices do not allow the defense attorneys to claim that the men were entitled to have sex with the witnesses nor do the justices allow arguments about how the women actually wanted to have sex with the defendants. And when arguments about the women consenting were posed, the justices justified their belief in the women's testimony by citing the evidence of violence and hatred that surrounded each act of rape.

Tying rape to hate helps the justices use their expanded conception of consent to fill in the lived experiences of the women with context instead of the myths. The justices provided a new category of legal invention for the women testifying in *Kunarac*. Evidence of the domination and coercion the women felt on a daily basis because of the war and their captive status was admissible as evidence of non-consent. Domination and the context of war became acceptable topics under which the women could shape their reasons for why they did not

consent. Women like D.B. and FWS-87 were allowed to include evidence of the subjugation they felt as evidence that they did not freely consent to sex with the defendants. It was the details of hatred, domination, and war that the justices used to argue that the women did not actually desire sex with any of the accused. Rather than relying on the myths that women "ask for it" or that their rape is not "real rape," the justices in *Kunarac* dismissed the idea that the rapes were about sexuality. The rape myths discussed in the first chapter have a difficult time resonating in a trial where it is argued that the core motivation to rape is hatred and domination and not sexual desire. The justices are able to argue that the rapes were about hate and domination by pointing to the contextual factors such as captivity, war, and ethnic cleansing. Those contextual factors are evidence of the power that any soldier could have over any female civilian during the war in the Former Yugoslavia. Rather than allowing the war and captivity to exist invisibly in *Kunarac,* as a secondary concern to the acts of rape and their immediate context, the justices chose to highlight the war as indicative of the power relationship between the defendants and the victims. And as I argued in the previous chapter, the redefinition of rape allows the women to include more details of their stories in testimony.

Adding the category of domination to the inventive categories to discuss consent in legal settings makes it possible for victims to discuss how oppression or societal forces that contribute to domination contribute to or complicate their consent to a sex act. As such the rapes we encounter in domestic trials should be understood in the context of the norms and dominations in society that complicate consent. Domestic trials could use this same category of invention to allow victims to explain their experience of a particular sex act in terms of not only the direct force exerted by the perpetrator but also the force exerted on her and the perpetrator by the norms of society. This topic allows for more details of a particular act to be discussed which not

only allows more of the victim's voice to be heard but also makes visible the lines of power that complicate the ways in which women consent to sex acts. The justices in *Kunarac* teach us that rapes that occurred during the war in Yugoslavia are best understood in the context of the war.

## Conclusions

My analysis of the justices' evaluation of the victim testimony shows that the justices were able to utilize their broader notion of consent to interrupt the "she asked for it" and "real" rape myths. The justices also interrupted the myth that rape is the inevitable result of an overdeveloped male sex drive. These interruptions illustrate how the justices were able to use the new definition of rape and consent to incorporate more contextual factors of the war and the disparate power relationships between the soldiers and the women. In the conclusion of this thesis, I argue that these interruptions provide examples of how domestic rape myths might also be interrupted. The tactics used for interruption can be used as inventional resources to constrain the use of rape myths in future domestic and international trials.

# Chapter 5: Conclusions

## Summary

*What Exigencies?*

Chapter two answers the question: what exigencies created the need for *Kunarac*? I argue that the Office of the Prosecutor began investigations about the mass rapes in the Foca region of Bosnia-Herzegovina because of pressure from governments, aid organizations, the popular press, and scholars. The systemic rape of women during the war in the Former Yugoslavia attracted worldwide attention. International organizations, non-governmental organizations, reporters, and scholars were on the ground, mostly in refugee camps, recording the experiences of women and providing aid as they fled conflict zones. Reporters like Gutman, organizations like the UN, the International Red Cross, and Human Rights Watch, ad-hoc organizations like the Coalition against War Crimes in Yugoslavia, and scholars like Catherine MacKinnon called for more attention to be paid to the systemic rape of women and demanded justice for the victims. The UN Security Council responded to these early demands by creating the ICTY, and the Office of the Prosecutor specifically sought out cases of sexual violence. *Kunarac* is the case that resulted from a larger investigation into the crimes occurring in the Foca area of Bosnia-Herzegovina. The verdict of *Kunarac* handed down in February 2001 found three men (Kunarac, Kovac, and Vukovic) guilty of rape, torture, and sexual slavery (Kuo 312-314). I chose to examine the presence of rape myths in *Kunarac* because of its significance as the first trial to find individual men guilty of individual counts of rape (Thomas & Ralph 203-218).

Scholars studying rape myths in domestic settings are concerned with determining how rape myths hinder prosecution and perpetuate acts of rape (e.g. Orenstein, "No Bad Men"). By definition rape myths "divorce the law from contemporary knowledge" (L'Heureux-Dube 89;

see also Torrey 1015-1016). *Kunarac* was successful in the sense that soldiers were held accountable for acts of rape and sexual torture. Examining the uses of rape myths and how they were discussed illustrates how the Trial Chamber prevented them from hindering justice in this instance. In chapters three and four I examine of the presence of rape myths and how each myth could have constrained the rhetoric of the victims who testified but instead was interrupted by the justices during two stages: setting up definitions and rules of evidence, and determining the validity and usefulness of each story or piece of evidence.

*Redefining Rape and Changing Consent*

Chapter three explains how the justices redefined rape and argues that the redefinition of rape in *Kunarac* broadens the legal conception of consent, thereby allowing for more variations in what counts as valid evidence of rape. The Trial Chamber argues that force, threats, and special circumstances (such as impaired mental capacity) should be seen as evidence of the absence of genuine consent rather than necessary components of the crime of rape (*Prosecutor v. Kunarac* par 458). There are two significant implications to this broadened notion of consent. First, the process they use to justify their new definition of consent denaturalizes current conceptions of rape by showing their constructed nature. The justices spend several pages of their decision laying out the previous legal definitions of rape. In particular the justices focus on how the previous standards for the *actus reus* rape are not broad enough to encompass how consent functioned for the women testifying. By laying out the multiple legal precedents for rape, they indicate that the legal conception of rape is created and not natural or "real." If there has never been consensus on which acts constitute rape, then the myth that a particular experience can ever constitute a "real rape" is difficult to support.

Second, they shift factors of a story that are relevant for testimony regarding consent. This shift is significant because it allows a woman to argue that her sexual autonomy was violated because she did not freely consent to the sex act rather than proving she was physically forced or threatened. The new definition broadens the elements of a story that can be considered legally relevant for victims testifying in *Kunarac* because testimony about the deplorable living conditions and their captive status become relevant to whether or not the accused could have reasonably thought that the women desired sex with the soldiers. The broadening of consent to include topics like dominant power relationships and context challenges the "real rape" myth by not requiring direct evidence of the brutality or physical violence to constitute rape. By allowing circumstances and power relations to play a vital role in their understanding of consent, the justices acknowledge that consent is often more complicated than a simple yes/no proposition to one sex act at a particular moment in time. Factors like the ongoing war and ethnic cleansing of Bosnian Muslims are seen as evidence that the women testifying did not desire sex with the accused. The question that remains at the conclusion of chapter three is whether or not the broadening of what counts as relevant to consent made any difference in how the rape myths presented at trial were discussed by the justices.

*The Presence and Constraint of Rape Myths*

Chapter four begins with the argument that the broadening of relevant information in regards to consent allowed the justices to disrupt the "she asked for it" and the "real rape" myths as they were presented in *Kunarac.*The stories of D.B. and FWS-87 indicate the presence of the "real rape" and "she asked for it" myths in *Kunarac*. The chapter ends with the argument that the interruptions of the myths illustrate a shift from the mindset that rape is a crime of over-active sex drives to one of domination and hatred. After studying the stories of D.B. and FWS-87, it is

clear that the justices found it improbable that the accused could have thought that the women desired sex with them given the overarching factors of domination and ethnic hatred present during the war. The justices conclude that D.B. in no way "asked" to be raped even if her actions of kissing and undressing Kunarac could be construed as indicating consent in other contexts. The justices make visible the coercive nature of Kunarac's relationship with D.B. to justify the decision that it is "highly improbable that the accused Kunarac could realistically have been 'confused' by the behavior of D.B., given the general context of the existing war time situation and the specifically delicate situation of Muslim girls detained… in the Foca region at the time" (*Prosecutor v. Kunarac* pars 645-646).

Just as improbable, according to the justices, was the chance that FWS-87 was in a loving relationship with Kovac. The justices challenge the "real rape" myth in two ways. First, they challenge the notion that "real rape" victims are not romantically involved with their attackers through their observation that the relationship between FWS-87 and Kovac was based on coercion, constant surveillance, and domination. Second, they challenge the idea that "real rape" victims fight back against their rapist or attempt to flee. The defense evidence that Kovac and FWS-87 were in love was dismissed on the grounds that the evidence presented indicated great disparity in the power of Kovac and FWS-87. The justices state that FWS-87 could not have escaped Kovac's custody, that she was deprived of basic living conditions, and that she was cut off from outside forces that could have come to her aid. All of these factors indicate that FWS-87 had little or no sexual autonomy during her time as Kovac's captive. Despite some public behavior that might have indicated a loving relationship, the context indicates that Kovac likely had total control over the life of FWS-87, and any behavior indicative of consent or love was either a survival strategy or misunderstood. The justices concluded that FWS-87 and the other

women were psychologically incapable of resisting Kovac and the other soldiers based on the testimony of each woman that she felt like the property of the soldiers. As such, in the evaluation of evidence the justices do not prescribe who constitutes a "real rape" victim.

The focus on the context of the war and how that implicates the power relationships between the accused and the women testifying highlights the presumption that rape is a crime of domination and hatred rather than a crime of overly aggressive sex drives. Vukovic claimed that he should not be legally accountable for the rape because he had acted out of sexual urge and not out of hatred. The Trial Chamber dismissed this claim by stating that Vukovic had obviously intended to "discriminate against the group of which his victim was a member, i.e. the Muslims, and against his victim in particular" (*Prosecutor v. Kunarac* par 816). The justices tie each rape to the domination each woman felt both as an individual and as a Bosnian Muslim. For example:

> The accused acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls. The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should "enjoy being fucked by a Serb." (*Prosecutor v. Kunarac* par 654)

This is consistent with the claims of Albanese, Salzman, and MacKinnon that the ethnic component of war rape in Yugoslavia is a significant factor in why the women were raped. The justices do not separate the clear ethnic tension between Serbs and Bosnian Muslims. In accordance with Brownmiller, the justices are clearly cognizant of the fact that women in particular were targeted for rape. During testimony the justices heard that Kunarac "demonstrated a total disregard for Muslims in general, and Muslim women in particular…

Kunarac used his bravery in combat to gain the respect of his men, and he maintained it by providing them with women" (*Prosecutor v. Kunarac* par 585). So while the justices do not resolve the feminist debate about whether the ethnic or gender component of identity is a more significant factor in war rape, they do acknowledge that both components are important in understanding how the women were being dominated by the soldiers. It is significant that the justices make visible the ways in which the women were targeted and discriminated against both because they were women and because they were Muslims. The justices do not accept the argument that rape is an inevitable consequence of soldiers being deprived of sex in a hyper-masculine environment. They presume that rape in Foca was the result of a desire to dominate and dehumanize Bosnian Muslims and in particular Muslim women. The justices use the evidence of domination and hatred to argue that the soldiers likely understood that the women did not consent to sex.

Rape victims testifying in *Kunarac* could testify about the instances of hatred and domination they encountered in their day-to-day existence as captives. The inclusion of graphic details of the hatred and domination they experienced was not evaluated as irrelevant to the question of consent to a particular sex act. Rather, each detail was considered as evidence of an overall pattern of domination that indicated that the women being detained lacked sexual autonomy. The broadening of topics of invention in regards to consent is clearly illustrated in *Kunarac* and can aid in the treatment of rape victims in both international and domestic courts. Myths like "she asked for it" and "real rape" naturalize patriarchal assumptions about sexuality. For instance, when a woman is accused of not fighting off her attacker, there should be a discussion of the ways in which women are socialized to be passive in the face of male aggression to account for the context and the relevant power relationships (Walker). The justices

in *Kunarac* see each rape as part of the rhetorical and social system created by the war and extreme ethnic tension in Yugoslavia at the time. They engage in the critical and rhetorical process that Hasian and White advocate. The justices in *Kunarac* break down the legal constraints on the way rape victims can describe their experiences by rendering visible the flaws in the previous legal systems and the oppressive power relationship complicating the notion of consent. As a result, the justices can accept testimony about the disparate power relationships between the accused and the victims as evidence relevant to questions of consent. And while the specific contexts of war rape in the former Yugoslavia are not applicable to the deployments of rape myths in domestic trials, the process of accepting that consent might be complicated by oppressive power relationships and social and cultural factors can be adopted by legal participants being asked to evaluate testimony in rape trials.

If domestic courts adopted similarly broadened concepts of consent, rape victims would have more freedom to articulate their experience. Allowing for more lines of argument about how the context or power relations complicated consent in a particular sex act will not guarantee the elimination of rape myths nor will it guarantee more rape convictions. Allowing testimony about the domination that a victim felt and the power relationships at stake in a given sex act accounts for the historic oppression that Brownmiller, Stevenson, Picart and Orenstien claim is at the heart of the rape myths that they problematize. Practically, this may mean that domestic courts hear testimony about the sustained psychological or physical abuse that a woman experienced at the hands of her partner. It might also mean that domestic courts allow evidence that speaks to the reasons a domestic violence victim is unlikely to attempt escape or a rape victim is unlikely to physically fight off her attacker. Courts adopting the lessons learned from *Kunarac* have a greater potential to interrupt rape myths like “she asked for it” and “real rape”

because they would presume that consent is a concept that is complicated and contingent on the power dynamics between the participants and the social and cultural factors relevant to that particular sex act. In essence legal participants would refuse to allow a sex act to be an ahistorical, apolitical act. This move should not be confused with attempting to find the "real" motivation for rape because the specific motivations may be unknowable and constantly in flux. Legal participants can constrain the acceptability of rape myths in trials by connecting the legal concept of consent to context and power relationships relevant to each case.

## Limitations and Future Research

Complicating the legal definition of consent denaturalizes the rape myths but also opens space for other patriarchal lines of argument. As a measure to prevent women from being unfairly put on trial, laws have been created to prevent her sexual history from being relevant evidence in trial. A more complicated notion of consent could entail knowing the sexual history of a victim. Certainly there are situations where the sexual history of the accused and the victim will be relevant to tracing lines of domination that exist in a relationship or to what degree social and cultural norms about sexuality were at play in a particular sex act. Remaining open to the idea that consent is a complicated contingent process also entails maintaining consent as the center of legal understandings of rape. The Trial Chamber in *Kunarac* expands, literally redefines, the center of the legal definition of rape; it does not reject the consent model of evaluating the *actus reus* of rape. Consent is still an overarching rhetorical constraint on the way women explain their experiences as rape. Maintaining a center of consent means that the rape myths function is still intact which makes it possible that they will continue to be effective and acceptable arguments in court. Since the "real rape" and "she asked for it" myths rely on

questioning the nature of consent, as long as consent exists as the center of the legal conception of rape, lawyers will find ways to deploy the rape myths in acceptable ways.

Further research could explore the consequences of the model of consent on which the current legal standards of rape are based. An exploration of the consent model of understanding rape could include examining the rhetorical strategies used to describe how people consent to sex acts. What kinds of people are allowed to deny and give consent? What social and cultural factors complicate consent at various points in history? These questions should be answered both for the context of war rape and domestic rape trials. This thesis draws a few parallels between rape trials and war rape trials but, as more trials focus on war rape, more research could be devoted to determining the relationships between the two types of rape trial.

Further research could also explore theories of legal argumentation to determine if there are theoretical or practical tools available to evaluate competing narratives in rape trials. Research along these lines could include questions about standards of evidence and corroboration and how they relate to the stories told in rape trials. Mapping the points of stasis most commonly found in rape trials and analyzing how those points of stasis constrain the rhetorical strategies of the legal participants could also aid legal research. Since this thesis only examines one trial, future research about legal rhetoric in rape trials could focus on accumulating more information about how patriarchal rape myths are deployed in courts.

Rhetorical scholars interested in myth and the way myths function could question the category of rape myth. I do not question the category of rape myth in this thesis, but it is important to determine if "she asked for it" and "real rape" function mythically. Questioning the rhetorical category of rape myth could illustrate more precisely how these rhetorical strategies work in social and legal contexts. An analysis along these lines might benefit from placing these

patriarchal lines of thought within a broader historical context. A genealogical investigation of rape myths or a deconstruction of rape myths could work towards denaturalizing the myths as cultural assumptions. Any analysis of the rhetorical work that "she asked for it" and "real rape" myths perform would be a useful addition to the scholarly conversation about rape myths.

This thesis does not explore the cultural and social assumptions tied to "she asked for it" and "real rape." Future research could explore the ways these myths and other patriarchal stereotypes of sexuality are rhetorically expressed in particular societies. This exploration would involve examining non-legal artifacts. Societies with on-going conflicts and a high incidence of war rape, as well as, peaceful societies with a high incidence of rape could be examined. A larger project could then compare the rhetorical strategies used in societies with a high incidence of rape to societies with a relatively low incidence of rape to determine if there are significant differences in the ways each society rhetorically conceptualizes rape and consent.

There will never be a world free of rape myths. The significance of the interruptions in *Kunarac* is not that they eliminate future discussions of rape myths in courts. The significance of *Kunarac* is that the justices lessen the legal and rhetorical constraints on rape victims, thus allowing for more stories and more aspects of stories to be heard as relevant to questions of consent and rape. *Kunarac* illustrates that the stories of many women can be told and validated if their stories are deemed relevant to considerations of consent. By including dominating power relationships and contextual factors as relevant inventive topics for discussing consent, the Trial Chamber in *Kunarac* was able to record the stories of more women in official records. The inclusion of victim testimony as relevant in holding perpetrators accountable ensures that the stories of the women who were raped in the war in the former Yugoslavia will not be ignored like so many women who were victims of rape in wars throughout history. The process that the

Trial Chamber engages in to tell those stories and reach a guilty verdict for Kunarac, Kovac, and Vukovic illustrates how consent has been constructed as a legal concept. The exposure of consent as a complicated construct with no natural or intrinsic legal meaning in regards to rape allows the justices to interrupt the ways that the "she asked for it" and "real rape" myths function in *Kunarac*. So despite the possible (and probable) continued acceptance of rape myths as rhetorical strategies in legal settings, *Kunarac* complicates consent. If domestic legal participants became open to the possibility that consent is a living contingent process, then challenging the acceptability of rape myths by tracing the dominant power relationships and relevant contextual factors for each sex act in question will be possible.

Works Cited

"Act Now to Stop Rape in Bosnia: Protesters; Anguished Muslims Tell of Gang Rapes and Beatings by Serbs." *Ottawa Citizen* 10 January 1993 final ed.: A6. Electronic.

Albanese, Patricia. "Nationalism, War, and Archaization of Gender Relations in the Balkans." *Violence Against Women* 7 (2001): 999-1023.

Askin, Kelly. "A Decade in Human Rights Law: A Decade of the Development if Gender Crimes in International Courts and Tribunals: 1993 to 2003." *Human Rights Brief* 11 (2004).

Barkan, Joanne. "As Old as War Itself: Rape in Foca." *Dissent* 49.1 (2002): 60-66.

Bennett, W. Lance. "Storytelling in Criminal Trials: A Model of Social Judgment." *Quarterly Journal of Speech* 64 (1978): 1-22.

Bennett, W. Lance. "Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment." *Quarterly Journal of Speech* 65 (1979): 311-323.

Bergoffen, Debra. "February 22, 2001: Toward a Politics of the Vulnerable Body." *Hypatia* 18.1 (2003): 116-134.

Brown, Louis, Dubau, Francois, and McKeon, Merritt. *Stop Domestic Violence: An Action Plan for Saving Lives.* New York City, NY: St. Martin's Press, 1994.

Brownmiller, Susan. *Against Our Will: Men, Women, and Rape*. New York, NY: Fawcett Books, 1975.

Brownmiller, Susan. "Making Female Bodies the Battlefield." *Mass Rape: The War against Women in Bosnia-Herzegovina.* ed. Alexandra Stiglmayer and Marion Faber. Lincoln, NE: University of Nebraska Press, 1994. 180-182.

Burt, Martha R. "Cultural Myths and Supports for Rape." *Journal of Personality and Social Psychology* 38.2 (1980): 217-230.

Buss, Doris. "Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic." *Feminist Legal Studies* 10 (2002): 91-99.

Doyle, Leonard. "Bosnia Rapes 'Horrifying' Says Amnesty." *The Independent* 22 January 1993: Electronic.

Edward, Katherine E. & Macleod, Malcolm D. "The Reality and Myth of Rape: Implications For the Criminal Justice System." *Expert Evidence* 7 (1999): 37-58.

Engle, Karen. "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina." *The American Jounral of International Law* 99.4 (2005): 778-816.

"Establishment." Icty.org. ICTY, n.d. Web. 13 March 2010.

Feteris, Eveline T. "The Rational Reconstruction of Argumentation Referring to Consequences and Purposes in the Application of Legal Rules: A Pragma-Dialectical Perspective." *Argumentation* 19 (2005): 459-470.

Gutman, Roy. "Muslims Recall Serb Attacks." *Newsday* 23 August 1992: Electronic.

The Hague. " Judge Florence Mumba Sworn in as a Member of the Appeals Chamber of the ICTR." Icty.org. ICTY. 19 November 2003. Web. 14 March 2010.

The Hague. "Judge Theodore Meron and Judge Fausto Pocar Re-Elected as President and Vice-President Respectively." Icty.org. ICTY. 17 November 2003. Web. 14 March 2010.

Hannken-Illjes, Kati. "In the Field-The Development of Reasons in Criminal Proceedings." *Argumentation* 20 (2006): 309-325.

Hasian, Marouf Jr. "Judical Rhetoric in a Fragmentary World: 'Character' and Storytelling in the Leo Frank Case." *Communication Monographs* 64 (1997): 250-269.

Hasian, Marouf Jr. *Legal Memories and Amnesias in America's Rhetorical Culture*. Boulder, CO: Westview Press, 2000.

Hasiain, Marouf Jr. "In Search of 'Ivan the Terrible': John Demjanjuk and the Judicial Use of Ironic Argumentation." *Argumentation and Advocacy* 39 (2003): 231-253.

Hasian, Marouf Jr. & Croasmun, Earl. "Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric." *Philosophy and Rhetoric* 29.4 (1996): 384-399.

Hasian, Marouf Jr. & Flores, Lisa A. "Mass Mediated Representations of the Susan Smith Trial." *The Howard Journal of Communications* 11 (2000): 163-178.

Hasian, Marouf Jr. & Parry-Giles, Trevor. "'A Stranger to its Laws': Freedom, Civil Rights, and the Legal Ambiguity of Romer v. Evans." *Argumentation and Advocacy* 34.1 (1997): 27-43.

Henderson, Lynne. "Rape and Responsibility." *Law and Philosophy* 11.1/2 (1992): 127-178.

"History." Icty.org. ICTY, n.d. Web. 13 March 2010.

Jaffe, Peter G., Lemon, Nancy K. D., and Poisson, Samantha E. *Child Custody and Domestic Violence: A Call for Safety and Accountability.* Thousand Oaks, CA: Sage Publications, Inc., 2003.

James-Hanman, Davina. "Enhancing Multi-Agency Work" in *Domstic Violence: Feminist Influences on Policy and Practice: A Reader.* Eds. Jalna Hanmer and Catherine Itzin with Sheila Quaid and Debra Wigglesworth. London: Routledge 269-286.

Kuo, Peggy. "Prosecuting Crimes of Sexual Violence in an International Tribunal." *Case Western Reserve Journal of International Law* 34 (2002): 305-322

L'Heureux-Dube, Claire. "Beyond the Myths: Equality, Impartiality, and Justice." *Journal of Social Distress and the Homeless* 10:1 (2001): 87-104.

Larcombe, Wendy. "The 'Ideal' Victim v Successful Rape Complainants: Not What you Might Expect." *Feminist Legal Studies* 10 (2002): 131-148.

Lewin, Tamar. "The Balkans Rapes: a Legal Test for the Outraged." *The New York Times* 15 January 1993: B16. Electronic.

Luchjenbroers, June & Aldridge, Michelle. "Conceptual Manipulation by Metaphors and Frames: Dealing with Rape victims in Legal Discourse." *Text & Talk: Interdisciplinary Journal for the Study of Discourse* 27.3 (2007): 339-359.

MacKinnon, Catherine. "Rape, Genocide, and Women's Human Rights." *Harvard Women's Law Journal* 5 (1994): 5-16.

"Mass Rape in War: Prosecute the Guilty." *The Ottawa Citizen* 17 January 1993 final ed.: B1. Electronic.

McClean, Alan. "People Must Speak Out Against Rape." *The Age* 30 December 1992 late ed.: Electronic.

Moorehead, Caroline. "Rape as a Weapon of Modern Warfare; Bosnia highlights the growing use of sexual abuse as military strategy." *The Independent* 6 August 1995: Electronic.

Mullender, Audrey. *Rethinking Domestic Violence: The Social Work and Probation Response*. New York, NY: Routledge, 1996.

Orenstein, Aviva. "No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials." *Hastings Law Journal* 49 (1998): 663-716.

Orenstein, Aviva. "Special Issues Raised by Rape Trials" *Fordham Law Review* 76 (2007): 1585-1608.

Picart, Caroline Joan (Kay) S. "Rhetorically Reconfiguring Victimhood and Agency: The Violence Against Women Act's Civil Rights Clause." *Rhetoric and Public Affairs* 6 (2003): 97-126.

*Prosecutor v. Kunarac.* Case IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001.

"Rape Becomes 'a Weapon of War.'" *The New York Times* 10 January 1993 late ed.: Electronic.

"Rape Was Weapon of Serbs, U.N. Says." *The New York Times* 20 October 1993 late ed.: A1. Electronic.

Richey, Katie C. "Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women." *Texas Journal of Women and the Law* 17.1 (2007): 109-129.

Salzman, Todd. "Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia." *Human Rights Quarterly* 20.2 (1998): 348-378.

Saucier Lundy, Kay, Saucier Lundy, Karen, and Janes Sharyn. *Community Health Nursing: Caring for the Public's Health.* Sudbury, PA: Jones and Bartlett Publishers, 2009.

Scroggins, Deborah. "The Middle Kingdom Why Things Happen and How Things Work War Crimes How Bosnia Violence is Shaking Views on Rape." *The Globe and Mail* 20 January 1993: Electronic.

Seifert, Ruth. "War and Rape: A Preliminary Analysis." *Mass Rape: The War against Women in Bosnia-Herzegovina*. Ed. Alexandra Stiglmayer and Marion Faber. Lincoln, NE: University of Nebraska Press, 1994. 54-72.

Stevenson, Kim. "Unequivocal Victims: The Historical Roots of The Mystification of the Female Complainant in Rape Cases." *Feminist Legal Studies* 8.3 (2000): 343-366.

Stiglmayer, Alexandra. “The War in the Former Yugoslavia.” Ed. Alexandra Stiglmayer and Marion Faber, NE: University of Nebraska Press, 1994. 1-34.

Taslitz, Andrew. *Rape and the Culture of the Courtroom.* New York, NY: New York University Press, 1999.

Temkin, Jennifer. *Rape and the Legal Process*. New York, NY: Oxford University Press, 2002.

Thomas, Dorothy Q., & Ralph, Regan E. “Rape in War: The Case of Bosnia.” *Gender Politics in the Western Balkans*. Ed. Sabrina P. Ramet. University Park, PA: Pennsylvania State Press, 1999. 203-218.

Torrey, Morrison. “When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions.” *U.C. Davis Law Review* 24 (1990-1991): 1013.

Turnage, Anna Kimberly. “Scene, Act, and the Tragic Frame in the Duke Rape Case.” *Southern Communication Journal* 74 (2009):141-156.

“UN Pressed to Identify Rape Cases as War Crimes.” *The Globe and Mail* 20 February 1993. Electronic.

Walker, Lenore E. “Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome.” *Pyschotherapy* 28.1 (1991): 21-29.

White, James Boyd. *When Words Loose Their Meaning: Constitutions and Reconstitutions of Language, Characters and Community*. Chicago, IL: Chicago University Press, 1984.

White, James Boyd. *Heracles; Bow: Essays on the Rhetoric and Poestics of the Law*. Madison, WI: University of Wisconsin Press, 1985.

White, James Boyd. *Living Speech: Resisting the Empire of Force*. Princeton, NJ: Princeton University Press, 2006.