

WAR AND RAPE

Law, memory and justice

NICOLA HENRY

INTERVENTIONS

War and Rape

Law, memory and justice

Nicola Henry



First published 2011

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2011 Nicola Henry

Typeset in Times New Roman by Glyph International Ltd

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Henry, Nicola.

War and rape: law, memory, and justice / Nicola Henry.

p. cm. – (Interventions)

Includes bibliographical references and index. 1. Rape as a weapon of war.

I. Title.

K5304.5.H46 2010

345*.02532–dc22 2010022753

ISBN 13: 978-0-415-56472-4 (hbk)

ISBN 13: 978-0-415-56473-1 (pbk)

ISBN 13: 978-0-203-83619-4 (ebk)

Acknowledgments

My deep gratitude extends to many kind people who supported me throughout the writing of this book. I am very grateful to the Institute for Human Security at La Trobe University for the Teaching Relief Fellowship, which enabled me to get writing done during teaching-intensive time. Thanks also to the Faculty of Humanities and Social Sciences at La Trobe University for a generous early career research grant that facilitated research assistance and a trip to Europe. Thank you to Emma Colvin for your excellent research assistance.

I am grateful to Simon Clews and the University of Melbourne Writing Centre, and my mentor Martin Krygier, for helping me to get started on this book back in 2006. Thanks to Jennifer Balint and Fiona Haines for earlier support and inspiration. And thanks to the friendly people at the International Criminal Tribunal for the Former Yugoslavia and various women's NGOs when I visited Europe some years ago: Michelle Jarvis, Wendy Lobwein, Monika Naslund, Patricia Viseur-Sellers, Florence Mumba, Judith Armatta, Beate Ziegler, Gabi Mischowski, Monika Hauser, Karin Griese, Marcia Jacobs, Ajli Bajramović, Mirha Pojskić and Nurka Babović. A very special thanks to Jan Ruff-O'Herne for her grace and generosity. And to Craig Fowlie, Nicola Parkin, Emma Hart and Mary Dalton from Routledge, I am grateful to your guidance throughout the publication process.

Many thanks to the wonderful support of my colleagues and students at La Trobe University, in particular to Judy Brett, Sue Davies, Anastasia Powell and Bronwyn Bardsley. Thanks to the Green Pen Reading Group for helpful comments on earlier chapters: Raelene Wilding, Karl Smith, Anne-Maree Sawyer, Anastasia Powell, Nesam McMillan, Wendy Bowler and Claudia Slegers. I am indebted to Nesam McMillan for reading through various draft chapters and offering me excellent support, advice and feedback, and overall for her generosity and friendship. Heart-felt thanks also to David Yencken for putting me on a new path of writing that helped immeasurably with this book.

I wish I could thank all of my wonderful friends and family individually for their love and support. In particular, thank you to Harriet for your unwavering and loyal life-long, treasured friendship, which means the world to me.

And to my family: Dad, Mum, Justine, James, Esther, Emma, Mike, Isabel, Maya, Matt, Emily and Owen – thank you for your love, encouragement and endless support that has taught me so much about the sanctity of family.

And to my sweet Brent: there may be no such things as magic wands, but you always managed to have one up your sleeve to help me through all my worries and fears. Your generosity, support, humour and love has filled me to the brim with great happiness and much needed grounding, and I can't imagine life without you. I dedicate this book to you and our little Frederick.

Some chapters of this book are based on three previous publications of mine, although in substantially altered forms. Chapter 3 draws and expands upon a chapter I wrote about the Tokyo Tribunal ('Silence as Collective Memory: sexual violence and the Tokyo Trial', in Y. Tanaka, T. McCormack and G. Simpson (eds) *Beyond Victors' Justice? The Tokyo War Crimes Trial Revisited*, Leiden: Martinus Nijhoff Publishers, forthcoming 2010). A very small section of Chapter 4 appeared in an article about rape and war crimes courts ('Witness to Rape: the limits and potential of international war crimes trials for victims of wartime sexual violence', *International Journal of Transitional Justice*, 3: 114–34, 2009). And parts of Chapter 5 appeared in an article about trauma and rape ('The Impossibility of Bearing Witness: wartime rape and the promise of justice', *Violence Against Women*, 16(1), forthcoming 2010).

Contents

<i>Acknowledgments</i>	xi
1 Introduction: how the past is made to matter	1
2 Traces of truth: collective memory and the law	10
<i>The problematic of memory</i>	13
The fragility of memory	13
Collective memory	14
Gender and memory	19
<i>Collective memory and the law</i>	21
3 A history of silence: the Nuremberg and Tokyo trials	28
<i>Silence at Nuremberg</i>	29
<i>The Tokyo trial: the Rape of Nanking and the 'comfort women'</i>	36
<i>The silent witness</i>	39
The victors	40
Whose justice?	47
<i>Unspeakability</i>	49
<i>History under siege</i>	52
The rape wars	53
4 Casualties of law: wartime rape and war crimes courts	61
<i>Victims' justice: wartime rape and the rise of the counter-memory</i>	62
<i>The International Criminal Tribunal for the Former Yugoslavia</i>	64
The first trial: Tadić	66
A crime of torture: Čelebići	72
A crime against humanity: Foča	80

x *Contents*

The International Criminal Tribunal for Rwanda 90

Genocidal rape: Akayesu 92

Beyond the International Criminal Court 97

5 Trials and trauma: the impossibility of bearing witness 100

Trauma trajectories 101

Articulating trauma 107

Legal conceptions of trauma 109

The impossibility of memory: Furundžija 109

6 Wartime rape and the legacy of law 117

The legacy of law 118

The limitations of law 123

The violence of law 125

Notes 131

References 144

Index 163

1 Introduction

How the past is made to matter

To understand how collective memory works, we cannot restrict our inquiries to tracing the vicissitudes of historical knowledge or narratives. We must also, and I believe foremost, attend to the construction of our emotional and moral engagement with the past. When looking at public discourse, this translates into questions about how the past is made to matter.

(Irwin-Zarecka 2009: 7)

On 22 February 2001, the Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia rendered its judgment for one of the biggest rape trials in international history. It sentenced Dragan Kunarac, also known as 'Zaga', to 28 years' imprisonment; Radmir Kovač, also known as 'Klafa', to 20 years' imprisonment; and Zoran Vuković to 12 years' imprisonment. The three defendants had no previous criminal convictions, all three were married, and at least two had young children. The crimes of which the three defendants were found guilty included crimes against humanity and war crimes for the enslavement, rape and torture of Muslim girls and women in the Foča region of Bosnia-Herzegovina.

The Chamber found that in July 1992 Kunarac had taken two girls to a house where they were raped by several soldiers and where he personally raped one of them, and aided and abetted the gang-rape of the other. In August 1992, Kunarac again took four girls to a house and personally raped one of them and aided and abetted the rapes of the others. In addition to this, on at least two other occasions, the accused took another girl to an apartment where she was raped by him and three other soldiers.

The Chamber found that four girls were taken to the accused Kovač's apartment in October 1992 and were 'constantly raped, humiliated and degraded' (*Foča Judgment*, 2001: para. 749). One girl, who was just 12 years old, was eventually sold off by the accused and was never seen again. The accused also handed two other girls over to Serb soldiers who kept them in another apartment where they were continually raped. Over the proceeding months, Kovač continued to sell off other Muslim girls and women to willing soldiers.

For the charges against the defendant Vuković, the Trial Chamber could only prove one incident beyond reasonable doubt involving a 15-year-old girl.

2 Introduction

The Chamber found that the accused had threatened the girl's mother with death if she did not tell him where her daughter was hiding, and that in July 1992, the girl was taken to an apartment by the accused and another soldier and was raped.

The judgment authoritatively declared:

What the sum of the evidence manifestly demonstrates, is the effect a criminal personality will have in times of war on helpless members of the civilian population ... The women and girls were either lent or 'rented out' to other soldiers for the sole purpose of being ravaged and abused. Some of the women and girls were kept in servitude for months on end ... it is opportune to state that, in time of peace as much as in time of war, men of substance do not abuse women.

(ICTY Press Release, Judgment of Trial Chamber II)

The judgment makes an important contribution to the collective memory of wartime sexual violence. The law shapes, selects and institutionalizes the way the past is remembered (Markovits 2001) through authoritatively declaring which crimes are deserving of international recognition and justice, and which crimes are to be relegated to the forgotten abyss of history. The law is thus both a potent source and site of memory, but also a powerful arbiter of memory. At the very least, trials provide an important avenue for public debate and international courts represent 'monumental spectacles' or 'moments of truth' because they provide, incite and encourage historical interpretation and moral pedagogy (Osiel 2000: 2–3). War crimes trials create a space for the airing of personal and collective memories of wartime terror and trauma. Ideally, these trials capture the public imagination by giving a voice to both victims and perpetrators, judging guilt, attributing responsibility and vindicating victimhood (Karstedt 2009). Moreover, war crimes courts represent a means to prevent social amnesia and forge a collective memory of the past.

Despite the obvious relationship between collective memory and the law, little socio-legal inquiry has been undertaken to explore the connection between the two (some exceptions include: Bloxham 2001; Campbell 2002; Douglas 2001; Fournet 2007; Karstedt 2009; Osiel 2000; Simpson 2007).¹ The law by its very design, however, is fixated on memory, constructing a narrative of the past, and shaping collective memory indirectly through dictating and selecting the events that are to be remembered (Savelsberg and King 2007). This has important ramifications as far as wartime sexual violence is concerned, particularly since in the past international courts were largely silent on this matter.

Although silence has traditionally shrouded wartime sexual violence both inside and outside law, rape has nonetheless existed as a lasting legacy of violent conflict throughout the centuries. During the First and Second World Wars, countless numbers of women were raped in concentration camps,

military brothels and in occupied areas. In the latter part of the twentieth century, rape was no less ubiquitous: the rape of Bengali women during the nine-month conflict in Bangladesh in 1971 created a national crisis when thousands of women became pregnant and husbands rejected their wives (Brownmiller 1976). Sexual violence also forms a well-remembered part of the Vietnam War due to the rapes committed by American soldiers against civilian Vietnamese women, and the fact that few perpetrators have ever been brought to justice (see Weaver 2010). Likewise, during the 1980s conflict in Uganda, women once again suffered the effects of impunity and silence due to widespread forms of wartime sexual violence.

While rape has been both central or peripheral to the history of warfare, it was not until the spate of mass rapes and the systematic sexual enslavement of women during the 1990s conflict in Bosnia-Herzegovina that international legal attention finally turned to war crimes against women. During the Bosnian conflict, rape was an integral component of an ‘ethnic cleansing’ campaign designed to render regions ethnically homogenous through force and intimidation. The consolidation of rape as an appalling crime of war thus emerged dramatically into historical consciousness during this period. This occurred also in the context of the mass rapes against Rwandan women during the 1994 genocide, where ‘thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced “marriage”) or sexually mutilated’ (Human Rights Watch 1996: 1).

Since the 1990s, for the first time in international history, victims have appeared as witnesses before international courts; perpetrators, both direct and indirect, have been successfully prosecuted; and sexual violence has been tried as a crime of genocide, a war crime and a crime against humanity. These past two decades can be starkly contrasted to the silence and neglect that has previously encumbered the issue since – and long before – the end of the Second World War. Mass media documentation in diverse geographical locations has since revealed both the gravity and extent of wartime sexual violence; truth and reconciliation commissions have heard harrowing victim narratives; and books, documentaries and films have captured the unceasingly common horrors of rape, forced impregnation and sexual slavery. However, despite the growing attention to wartime sexual violence and the codification of rape as a serious violation of international criminal law, rape remains an ‘unspeakable’ crime of war. Victim accounts of rape have not featured prominently in post-conflict collective memory and yet, paradoxically, rape has been manipulated by and through political debates that have pitted nations against each other. Thus when rape is ‘remembered’, it is often the subject of political controversy and heated debate, and victims are often caught in the crossfire of these disputes.

In part, the establishment of the two *ad hoc* tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Court for Rwanda (ICTR) in 1994 – were in response to the

4 Introduction

extent and perceived gravity of war crimes against women in both the former Yugoslavia and Rwanda. And yet despite the international shock surrounding mass rapes and the subsequent prosecution of these crimes, thousands more women suffered a similar fate during the decade-long war in Sierra Leone from 1991 to 2001, the 1998 Kosovo conflict and the 1999 Timorese war of independence. Patterns of rape and sexual enslavement were also rife in conflicts in Liberia, Haiti, Iraq and many other locations during the latter part of the twentieth century. In more recent times, the use of sexual violence as a method to humiliate, control and displace women has been widespread in the conflicts in the Democratic Republic of Congo and the Darfur region of the Sudan.

In wars of sovereignty, territory, conquest, religion, ideology and liberation, sexual violence has brought about long-lasting physical, psychological, emotional, communal, national, international, as well as intergenerational impacts. We now know that the taboo, silence and shame of sexual violence can have significant repercussions on a woman's psychological wellbeing, identity and livelihood. Moreover, these crimes can destroy the social fabric of post-conflict communities well after the cessation of violence. As Kai Erikson (1994: 233) states, traumatic events can administer 'a blow to the basic tissues of social life that damages the bonds attaching people together and impairs the prevailing sense of community'. The intergenerational cycle of unresolved trauma, violence and vengeance obstructs the fulfilment of post-conflict peace and justice, contributing to the perpetuation of conflict and suffering. Victims are often dealing with economic deprivation, displacement, homelessness, cultural property destruction and the deaths of friends, family and people within their communities. The burden of carrying a child under these devastating circumstances is quite simply unthinkable.

The mass rapes that have occurred in recent history contribute to some accepted 'truths' about wartime rape. First and foremost, sexual violence has been prolific throughout the history of warfare. Wartime rape and sexual enslavement have been well captured by mythical, artistic and historical representations: from the abduction/rape of Helen of Troy described in Homer's *Iliad*, and the rape of the Sabine women as a legendary tale of early Roman history; to the story of systematic rape in the Scottish Highlands during the eighteenth century by English forces, the rape of Belgian women during the First World War, and of course, the many contemporary examples of mass rape that have occurred during and since the Second World War (see Brownmiller 1976).

A second accepted certitude of wartime rape is that women suffer disproportionately from these crimes. While the torture, rape and sodomy of male prisoners held at the Iraqi Abu Ghraib prison in 2004 has vividly imprinted on public memory images of female-perpetrated wartime sexual violence (see e.g. Hersh 2004), and there are many other wars where men have been subjected to horrific forms of sexual violence, few would disagree that women bear the brunt of wartime sexual violence. For the majority of these crimes, it is men who are the perpetrators of wartime sexual atrocities

(Bourke 2008; see also Engle 2005 for a critical discussion of this issue). Third, there is little dispute that impunity for wartime rape has been the rule rather than the exception. Although there have been formal prohibitions of rape in national and international legal jurisdictions at various historical junctures (see Khushalani 1982; Krill 1985), and many individuals have been tried for crimes of rape by domestic or international tribunals (Meron 1993a; Piccigallo 1979),² the prosecution of sexual violence against women has been traditionally both selective and sporadic, and wartime rape continues to be demarcated by both impunity and silence.

While few would challenge any of these largely accepted historical truths, the subject of wartime rape has caused, and continues to cause, heated debate. I was quite shocked when someone commented to me last year that they did not see what the big deal was about wartime rape. I could not stop thinking about this remark and where it belonged in the wider discourse on this topic. Although very few people dare challenge the gravity of sexual violence in this way, in scholarly writing new questions about whether or not rape is the worst thing that can happen to women during wartime have been increasingly raised. Atina Grossman (1995), for instance, discusses how rape was not the worst of horrible experiences for German women at the end of the Second World War. Janet Halley (2008a: 80) also argues that the superior ‘badness’ of wartime rape ‘can be deployed in an alarming number of ways to advance contested ends, ends which one might well want to resist’ (see also Engle 2005).

The point that these scholars are trying to make, I imagine, is that the focus on wartime rape can have a range of implications, including obscuring the other harms that occur against women and men during armed conflict (Gardam and Jarvis 2001; Halley 2008b; Nikolič-Ristanović 2000); prioritizing rape above other human rights violations; positioning women solely as helpless victims of sexualized atrocities (Engle 2005); failing to account for the sheer heterogeneity of survivors of mass atrocities; and treating wartime rape as a universal example of women’s oppression (Halley 2008b). Indeed, in this book I do focus exclusively on wartime sexual violence (whether that be penetrative rape or other forms of sexual violation – and the reader should note that I do not always make a distinction between ‘rape’ and ‘sexual violence’).³ I am aware that such exclusive attention may make me guilty of some or all of the above problems. However, what is concerning to me is the fixation on hierarchies of suffering that are increasingly popular in the current war crimes literature. On the one hand, rape is often included on an actual or metaphorical list of the worst possible crimes, and the recent push of rape up the international criminal hierarchy reflects this perceived gravity. Even as far back as 1919, a post-war commission was set up to investigate breaches of law and customs of war committed by Germany and its allies in the First World War, and out of 32 war crimes, rape was listed at number five and the ‘abduction of girls and women for the purposes of enforced prostitution’ at number six (murders and massacre made the number one spot) (Adatci and Tachi 1920).

6 Introduction

On the other hand, although wartime rape has been repeatedly condemned as the ‘worst of crimes’ throughout history in political rhetoric, in practice these crimes have very much been neglected, disregarded, denied and downplayed. The debate about whether or not rape is a fate worse than death (‘Better a Russki [Russian] on top than a Yank overhead’ – quoted in Halley 2008a: 104) not only contributes to a problematic suffering hierarchy, but may also lead to complacency and inadvertently position rape yet again as an inevitable by-product of armed conflict.

It is important to note that there is a distinction between suffering hierarchies within the minds of victims and what I believe is the futility of these comparisons within political and scholarly discourse. We often find similar historical analogies and hierarchies of atrocities constructed in relation to genocide. The Nazi Holocaust, for example, is often taken as the benchmark and epitome of the crime of genocide and heated debate inevitably arises when the Holocaust is compared to other historical examples of genocide (see e.g. Moses 2005; Moshman 2001). Like the Holocaust, past narratives of wartime sexual violence have also been subjected to revisionism and denialism in contemporary political discourse. For example, former sex slaves from the Second World War – euphemistically known as ‘comfort women’ – began to talk about their experiences in public from the 1980s, leading to the celebration of women’s lost and silenced voices; however, as a consequence, voracious debate ensued as revisionists sought to question the veracity of the entire ‘comfort system’ in Japan.⁴ Of course, these debates form a key part of the collective memory of past atrocities – and this is what this book is about.

Most of the literature to date on wartime rape and international criminal courts is from a more practical, legalese perspective. For example, there has been much discussion about whether the establishment of *ad hoc* and permanent international war crimes courts since the 1990s have adequately dealt with rape crimes, and whether the definition of gender-specific crimes under international humanitarian law provides an adequate framework for prosecuting war crimes against women (for excellent books on the application of international law, see Askin 1997; de Brouwer 2005; Quéniwet 2005). My approach to examining wartime rape deviates from the more narrow, disciplinary location of international law. My book is instead situated within the interdisciplinary field of memory, and more specifically the understudied yet growing body of literature on collective memory and the law.

I am inadvertently asserting or underscoring the gravity of wartime sexual violence in the same way perhaps that other law and memory scholars have done in relation to other examples of mass atrocities. While I certainly want to avoid comparing and contrasting the array of crimes and whether or not international law should prioritize their prosecution, I nonetheless hope that this book will stress the significance of law, the limitations and harms of legal institutions for responding to crimes of gendered violence, and the importance of documenting rape crimes within these institutional sites of memory.

The purpose of the book, therefore, is not to document victim experiences of rape *per se*, nor to document the rules, procedures or institutions of law, but rather to provide a conceptual analysis of the political, cultural and historical impact of law and its attention to wartime sexual violence throughout the past 65 years. I do not set out to evaluate the most appropriate form of justice for victims of rape, nor examine the vast array of legal and non-legal responses to wartime rape. Rather, my aim is to examine the power of memory through three interrelated issues: the historical silencing of rape throughout international legal history; the potential of law to restore these silenced histories; and the violence of law and the obstacles to individual and collective redemption.

The book is essentially about the pivotal relationship between law and memory. I look at memory from both the personal and collective perspective. My main concern is with how law shapes or produces a history of wartime rape, and how law reproduces hegemonic relations of power that in turn shape how wartime rape is remembered. In other words, how is memory used as a tool of power in the discourse on wartime sexual violence, and whose memories are privileged? What are the didactic aims or consequences of legal prosecution for wartime rape?

While there have been some momentous achievements within international war crimes law,⁵ there have also been some worrisome outcomes emerging from this shift. Because of the power and ‘selective memory’ of law, not only is history clarified and proclaimed, but law can also obscure and distort crimes of the past (Douglas 2001). This book examines the contribution that international courts make in shaping historical consciousness about wartime sexual violence. In addition to exploring the potentials and limitations of law in ‘collective memory’ terms, the book also explores the ‘violence’ of law in addressing gendered crimes. I am not suggesting that international criminal justice for these crimes is undesirable, but rather, I am interested in the nature and limitations of this justice, and how it contributes to, or distorts, memory, both interpersonal and collective. A subset of questions therefore concerns the emergence of the ‘counter-memory’, namely memories that challenge dominant or pre-existing memory, in both law and politics. In what way has law facilitated the celebration of the counter-memory? And in what way does law subvert or distort these counter-memories?

In Chapter 2, I critically examine the concept of ‘memory’ and more specifically the dynamics and problematic of ‘collective memory’. The chapter will thereafter consider the role of law in the formation of collective memory, provide a framework to think about not only the way in which law – as a repository or site of *traumatic memory* – contributes to a historical consciousness of the past, but also the ways in which law may obscure or distort such consciousness through its method and mode of selection.

Chapter 3 focuses on the silence of law at the Nuremberg and Tokyo trials following the Second World War, and the didactic legacy of these historic trials in relation to wartime rape. Rape was not enumerated as

a war crime or a crime against humanity in either the Nuremberg or Tokyo charters. Both tribunals were fixated on vilifying the aggressor nations of Germany, Japan and their allies, and victims played a small role in the prosecution of offenders. At Nuremberg, evidence of rape was presented but rape was not formally prosecuted. At Tokyo, some defendants were prosecuted for rape crimes, but rape was tried only alongside other crimes and the sexual enslavement of comfort women was all but completely ignored. The chapter goes on to examine wartime rape as a terrain of contestation, illustrating how law and collective memory are deeply intertwined, and how the politics and power of memory inform this relationship. Most pertinently, the chapter looks to the 'stories' of wartime sexual violence told and *not told* by law. The chapter will thus examine the contemporary relevance of historical war crimes trials and the notion of 'contested memories', seeking to understand the political manipulation of memory and wartime rape.

Chapter 4 examines the role of law in shaping collective memories of wartime rape. According to Lawrence Douglas (2001: 112–13): 'The trial ... must be seen not simply as a procedural device whose legitimacy is governed by rules generated within the system of legality itself, but as a complex ritual which *produces* and *suppresses* narrative and *clarifies* and *obscures* history' (emphasis added). The chapter critically evaluates three international courts: the International Criminal Tribunal for the Former Yugoslavia (ICTY); the International Criminal Court for Rwanda (ICTR); and the International Criminal Court (ICC). In the chapter, I discuss the most 'legally' significant rape trials that have gone before the ICTY and ICTR (*Tadić*, *Čelebići*, *Foča* and *Akayesu*) in order to assess the contribution that such trials (and other rape trials at the international level) may make to collective memory: whether they produce, suppress, clarify or obscure both narrative and history.⁶ In particular, I will focus on witness testimony,⁷ the nature of cross-examination, prosecution and judgment to identify the power potential and 'violence' of law.

The intersection of personal and collective memory is examined in Chapter 5. Specifically, the mediation of trauma and memory through law is addressed, looking at the way in which witness memory in the courtroom communicates the pain or trauma of gross human rights violations, and the way in which legal actors in turn use personal memory to undermine witness authenticity, credibility and reliability. In this chapter, I examine the vulnerability and inexpressibility of human pain to develop a deeper understanding of the inexpressibility of wartime rape within war crimes courts, and the complex array of reasons for the silencing of victims, including the political complications that arise out of the difficulty women experience disclosing their experiences of sexual violation.

Finally, Chapter 6 will explore the ways in which international criminal justice has contributed to a collective memory of wartime rape. To what extent does the law do 'representational justice' (Douglas 2001) to

wartime rape? How is the past history of wartime rape through law made to matter?

A question that has beleaguered scholars and practitioners within the growing multidisciplinary field of transitional justice is how societies come to terms with a violent past of political conflict, totalitarianism and genocide.⁸ Justice has increasingly been sought via war crimes trials (international and domestic), truth-telling commissions, apologies, memorials, forgiveness and other forms of redress in post-conflict reconstruction. These various forms of justice are viewed as important avenues for international peace and stability, societal reconciliation and victim vindication. More recent investigations into the efficacy of transitional justice mechanisms, such as war crimes trials, have exposed the gap between the promise and reality of justice. This confirms what John Rawls (1971) proclaimed about justice; that it is universal, inviolable, sacrosanct and morally imperative, but also fragmentary, incomplete, elusive and deeply personal. Rawls famously declared that justice is the first virtue; an intuitively natural right. Historically in practice, however, victims of wartime rape have been alienated and excluded from any form of justice. Even today, in conjunction with hostile community reactions to rape survivors and the lack of acknowledgment for rape crimes, denialism most of all serves to deeply entrench silence and stigma, and victims typically suffer multiple layers of pain, grief and loss when their experiences are neglected, distorted, questioned and they are told they never happened. It is thus not simply the trauma of the rape that devastates notions of self and the world, but the reactions of others to rape in the aftermath of conflict that may be equally damaging.

Each chapter of the book implicitly or explicitly recognizes the impossibility of full justice and vindication for gross human rights violations in the aftermath of armed conflict, as well as the heterogeneity of rape victims within their communities and their differing conceptions of justice. In each chapter I aim to explore the political skirmishes that take place over wartime rape in the post-conflict period, whether they be *nationalistic* (e.g. historical denialism; competing versions of historical truths); *interpersonal* (e.g. the inexpressibility of wartime rape); or they cross the divide of the *public and private* (e.g. the repetition of gendered biases within criminal justice institutions). Because of their influence, scope and authority, international criminal trials are capable of contributing to, or even defining, a 'historical consciousness' of past events through authoritatively declaring what constitutes crimes worthy of international recognition and justice, who should be prosecuted and which groups are deserving of justice.⁹ In part, the long overdue legal attention to wartime rape and the courageous achievements of victims who have overcome enormous social, cultural and political barriers to bearing witness are celebrated in this book, but my aim is more focused on the relationship between law and memory, and between law, memory and politics, in order to assess the significance of wartime rape – for not simply the past, but also the present and the future, both inside and outside the law.

2 Traces of truth

Collective memory and the law

Contest, conflict, controversy – these are the hallmark of studies of collective memory.

(Schudson 1997: 361)

In late September 2004, Bosnian Muslim women were reportedly pelted with eggs, stones and insults by 200 protestors as they attempted to erect a memorial plaque to honour the memory of Foča women who were raped, tortured and sexually enslaved during the 1992–95 conflict in Bosnia-Herzegovina (BBC News 2004). This is a stark reminder of the tensions, hostilities and controversies that arise when memories of the past, particularly ‘unspeakable memories’, are invoked in the present. Indeed, much controversy typically surrounds the invocation of memory. This is likewise exemplified in heated debates about the Holocaust, including controversial questions about Polish and German complicity in the extermination of Jews (Goldhagen 1996; Gross 2001); the nature of Jewish resistance in concentration camps; the collusion of the Jewish Council in assisting with the ‘Final Solution’ (Arendt 1994; Hilberg 1961); and the likewise vexed debate about the exclusivity of Jewish Holocaust memorials and whether sites of memory exclude the experiences of other victims of the Third Reich (Adam 2009).

The unspeakability and contestation of traumatic histories reveals the complexity of memory and the nature of competing truths in the aftermath of conflict. And yet at the same time, the memorialization of the past also provides and sustains social cohesion and solidarity, serving as an antidote to amnesia and silence; a potent marker of trauma, justice and injustice. Memory validates the experiences and identities of victims and may bolster conceptions of national, religious, community and personal identity. We thus indubitably live in an age of memory. Even war crimes courts have begun to acknowledge their own unique contribution to collective memories of war crimes, genocide and crimes against humanity, and some courts have established legacy officers with the aim of extending the didactic and historical reach of these courts.

Over the past two decades, there has been escalating fascination and interest in the phenomenon of memory; what Andreas Huyssen (1995) calls