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“Don’t Worry. These girls have been raped once.”¹
Analyzing Sexual Violence in the Bosnian Genocide and the Response of the
International Criminal Tribunal for the Former Yugoslavia

Madeline Brashear

Sexual violence in wartime has existed throughout history. However, it was treated as a byproduct of war, which denied its severity and culpability. It was not until 1995 that sexual violence was addressed and prosecuted in an international criminal tribunal. At the dawn of the 21st century, women began to receive justice for the crimes committed against them in wartime. The rape, forced impregnation, and sexual slavery perpetrated against women in the Bosnian genocide initiated the prosecution of sexual violence in an international setting. This was because sexual violence was used as a weapon of war. The Bosnian war (1992-1995) drew international attention to the issues of gender violence, causing the United Nations (UN) to come under substantial pressure to condemn and end the violence in Bosnia and Herzegovina. Through the force of Western humanitarian organizations and the media, the UN was pressured to respond to the atrocities committed against women in the Bosnian genocide. This response resulted in the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which put the prosecution of sexual violence and the maintenance of women’s rights on the UN agenda. With Western media and aid organizations exposing and

¹ “‘Don’t Worry. These girls have been raped once.’ Zlata, 23, recalled one of the officers telling the Seselj followers. According to the victims, preparations for the mass rapes began as early on the morning of June 17 (1992)...” Roy Gutman, *A Witness to Genocide: The First Inside Account of the Horrors of “ethnic cleansing” in Bosnia*. Pennsylvania State University (1993), 70

condemning the gender violence in Bosnia and Herzegovina, the UN, through the ICTY, focused its authority on addressing this specific violence.

Historical analysis of the ICTY and sexual violence in the Bosnian genocide has heretofore focused on the failures and successes of the ICTY, and has done so using a feminist framework. Kelly Askin argued that "the crimes are usually investigated and indicted only after concerted pressure by women's rights organizations and feminist scholars to prosecute the crimes."² Askin and Heidi Haddad both focused on the influence of women's rights organizations; however, Haddad expands the argument to include larger advocacy groups such as Human Rights Watch.³ These scholars observed the problem through the lens of feminist advocacy. For example, Karen Engle concentrated her analysis on the discord among feminists in defining how rape should have been prosecuted, claiming "Feminists had both a direct and indirect impact on the development of international criminal law, particularly on the ways it addressed rapes that occurred in Bosnia and Herzegovina."⁴ Using this same interpretative lens, this paper intends to expand the field of analysis to include the media and various political agencies. Previous analysis of the ICTY focused on aspects of the impact of advocacy, however it did not look at the larger picture, including political organizations, media, and advocacy organizations. Feminist organizations have been recognized for their role in condemning sexual violence in Bosnia and their influence on the ICTY. Furthermore, an analysis on

² Kelly Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," *Berkeley Journal of International Law* Volume 21 no. 2 (2003).

³ Heidi Haddad, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals," *Human Rights Review* 12 no. 1 (2011), 120.

⁴ Karen Engle, "Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," *The American Journal of International Law* 99 no. 4 (2005).

how the ICTY prosecuted sexual violence and its influence on subsequent international tribunals is necessary.

Rape was not addressed in international criminal tribunals previous to the ICTY, and therefore no international policy existed on the prosecution of rape and sexual violence. Neither the Nuremberg Tribunal nor the Tokyo Tribunal fully addressed the innumerable instances of rape, which occurred in World War II.⁵ The absence of female policy makers and enforcers largely explained the lack of jurisdiction on gender violence, as rape in wartime was viewed as an unfortunate but inevitable consequence of the conflict. Additionally, rape was deemed as a crime against personal honor. The 1907 Hague Convention did not mention rape, however, Article 46 states “family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”⁶ Further, the 1949 Geneva Convention and 1977 Additional Protocols categorized rape as an attack on the woman’s honor. Article 27 of the Geneva Convention states, “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”⁷ In 1979, the UN established the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), though this document made no mention of

⁵ Richard Goldstone and Estelle Debon, “Engendering Accountability: Gender Crimes Under International Criminal Law,” *New England Journal of Public Policy* Vol.19 (2003), 123.

⁶ International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, Article 46.

⁷ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 Article 27.

rape or sexual violence.⁸ Sexual violence against women was eventually addressed in the 1989 CEDAW, General Recommendation 12.⁹ The establishment of CEDAW reflected the developing international women's rights movement, as by this point feminist advocacy had begun to take hold in international policy. Despite the Convention and its mission against the discrimination of women, sexual violence was still used as a tactic of war in Bosnia, demonstrating that international policy failed to address sexual violence in its totality. By treating rape as a crime against honor and a by-product of war, rape was allowed to endure on a global scale.

From 1992 to 1995, during the Bosnian war, genocidal violence took a new form through the systematic and mandated rape of Bosnian women. Serbian soldiers targeted and attacked Muslim women using both rape and public humiliation. By committing these acts, Serbian soldiers intended to force the Muslim Bosnian population from their homes.¹⁰ This tactic was not used sparingly, but was instead implemented from the top of the Serbian command. From a witness testimony, "Almira said one of her captors told her they wanted to 'plant the seeds of Serbs in Bosnia.'"¹¹ Serbian soldiers were encouraged to rape and commit violence against Bosnian women as part of a tactic, which was identified and coined as "ethnic cleansing."¹² The purpose of this "ethnic cleansing" was

⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249,

⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

¹⁰ EC Investigative Mission into the Treatment of Muslim women in the Former Yugoslavia. "Report on Rape in Bosnia and Herzegovina," European Council, (Copenhagen: 1993).

¹¹ Roy Gutman, *A Witness to Genocide: The First Inside Account of the Horrors of "ethnic cleansing" in Bosnia*, Pennsylvania State University (1993), 76.

¹² Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*. New York. (1995), 10.

to force the Muslim Bosnian population to flee the country, and the Serbian government discovered that rape was an effective method to achieve their end goal. “Mass rapes instill terror, so that the victims will never seek to return to their homes and villages.”¹³ The proliferation of the term “ethnic cleansing” as a euphemism for genocide is important to note, because while the crimes being committed in Bosnia and Herzegovina were massive and unacceptable, the delayed reactions by the UN was characteristic of this conflict. The term “ethnic cleansing” was coined by Bosnian Serb forces to justify their actions of murder, rape, and pillage carried out against the Muslim Bosnian population in an attempt to rid the country of this specific group.¹⁴ The Commission for War Crimes defined “ethnic cleansing” as “a conscious policy of an ethnic or religious group that intends through violent and horrific means to remove the civilian population of another ethnic or religious group from certain geographic areas.”¹⁵ The United Nations Protection Force (UNPROFOR), United Nations High Commissioner for Refugees (UNHCR) and the International Committee for the Red Cross (ICRC) adopted and spread this term.¹⁶ The UN severely condemned the acts of Serbian nationalists, however it was slow to provide any relief for the victims of this violence. Rape was implemented as a

¹³Thomas Cushman and Stjepan Mestrovic, *This Time We Knew: Western Responses to Genocide in Bosnia*. New York: NYU Press (1996), 76.

¹⁴ Human Rights Watch, *The Human Rights Watch Global Report of Women’s Human Rights*, New York (1995), 9.

¹⁵ Security Council Resolution 780 established the Commission for War Crimes on 6 October 1992. This commission reported on the crimes committed in Bosnia and Herzegovina. This definition of “ethnic cleansing” was present in the First Interim Report of the Commission for War Crimes; Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992).

¹⁶ Gregory Kent, “Humanitarian Agencies, Media and the War against Bosnia: ‘neutrality; and framing moral equalization in a genocidal war of expansion,” *The Journal of Humanitarian Assistance*,” (2003).

tool of "ethnic cleansing,;" its purpose was to force the population to abandon their homes.

Bosnian Serbs were among the first to use rape as a tool of war and genocide in the form of state policy.

This is also rape as a policy of ethnic uniformity and ethnic conquest, of annexation and expansion, of acquisition by one nation of other nations. It is rape because a Serb wants your apartment. Most distinctively, this is rape as ethnic expansion through forced reproduction.¹⁷

Forced impregnation was an integral part of Serbia's policies of genocide in Bosnia and Herzegovina, and this conflict was the first in which it was used as a form of systematic and mandated gender violence. "The UN Commission that investigated the rapes in the former Yugoslavia in January 1993...found 119 cases of pregnancy resulting from rape...in 104 of the 119 cases the women decided to abort the pregnancy."¹⁸ These numbers did not represent the actual proportion of women raped and forcibly impregnated, as underreporting was an issue. The stigma attached to rape, as well as shame and the fear of reprisal prevented women from reporting rape.¹⁹ Rape and forced impregnation were used in tandem to destroy the female population of Muslim Bosnians.²⁰ Forced impregnation was a method of "ethnic cleansing" because of the Serbian notion that forcefully impregnating Bosnian women with Serbian babies would eradicate the Muslim Bosnian population while expanding the Serbian population. These

¹⁷ Catherine MacKinnon, "Rape, Genocide, and Women's Human Rights," 17 *Harvard Women's Law Journal* Vol. 5 (1994), 13.

¹⁸ Alexandra Stiglmeier, *Mass rape: the war against women in Bosnia-Herzegovina*. Lincoln: University of Nebraska Press (1996), 135.

¹⁹ United Nations, General Assembly, *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary General*, UN Doc A/48/92 S/25341 (26 February 1993).

²⁰ Siobhan Fisher, "Occupation of the Womb: Forced Impregnation as Genocide" *Duke Law Journal* Volume 46 no. 91 (1996), 92.

forced impregnations inflicted severe psychological trauma and bodily harm upon the female victims. International law scholar, Siobhan Fisher identified forced impregnation as “a military occupation of the womb.”²¹ Forcefully impregnating and then detaining women until the pregnancy was too far enough advanced to terminate was a new and separate gendered attack against women. Not only did these women have to live with the trauma of being raped, they were forced to carry the child of their attacker.

Rape was used to attack the victim based solely on their gender. The rape of civilian women in Bosnia and Herzegovina by Serbian soldiers was a tool of war in addition to an act of genocide, contributing to the focus on Bosnia and Herzegovina by humanitarian and political organizations as well as international media.

More and more journalists spoke with the women and girls concerned, made known the horrible details of rapes, and quoted large numbers of victims. Since then the subject has been taken up by investigatory commissions and human rights organizations, women’s groups, and aid agencies, but also by politicians.²²

Serbian troops further targeted women and performed acts of sexual violence against them through the institution of rape camps in occupied territories. “A leading Bosnian Women’s group has charged that upwards of 10,000 Bosnian women are currently being held in Serb detention camps where their captors rape them repeatedly.”²³ Amnesty International reported on the institution of rape camps throughout Bosnian territory, highlighting the organization and intent of rape within these camps.²⁴ Rape camps were the sites in which forced impregnation was instituted. These women were purposely

²¹ Siobhan Fisher, “Occupation of the Womb: Forced Impregnation as Genocide,” 124.

²² Stiglmeier, *Mass Rape: The War against women in Bosnia-Herzegovina*, 161

²³ Gutman, *Witness to Genocide*, 69.

²⁴ Amnesty International, *Rape and Sexual Abuse by Armed Forces*, AI Index: EUR 63/01/93 (January 1993), 7.

detained to be raped, impregnated, and forced to carry the resulting child to term.

“Serbian soldiers, as a routine practice, forcibly impregnated non-Serbian women held in rape camps, continued to gang-rape these pregnant women for months, and finally expelled them from Serbian occupied territories when they were near term.”²⁵

The site of these crimes, known as Partizan Sports Hall, was in the center of Foča, a small predominately Muslim town in Eastern Bosnia. At times, it was used as a transit factory for women and children about to be deported from the town. But for two months in 1992, between June and August, it functioned as a rape camp, holding 74 people, including about 50 women...Partizan was one of dozens of Serb rape camps in Bosnia-some are said to be still in operation-and it was prominently located, next door to the police station.²⁶

The use of rape camps by Serbian forces reflected intent of genocide towards Bosnian women. The reports by humanitarian organizations and Western media on the use of rape, forced impregnation, and rape camps revealed a concern for women's rights through their exposure and condemnation of this gender violence.

It is important to note that the crimes of rape, forced impregnation, and sexual slavery occurred on both sides of this conflict. Muslim Bosnian forces instituted detention centers where they beat, raped, and killed Serbian civilians. Sexual violence was not limited to Serbian forces. However, the systematic and mandated sexual abuse of women by Serbian forces was committed on a much larger scale. The European Community (EC) estimated there had been 20,000 victims of rape by Serbian forces in 1993.²⁷ While this did not excuse the sexual violence committed by Bosnian forces, the scale and nature of the crimes was noteworthy. Furthermore, “most of the abuses

²⁵ Cushman and Stjepan, *This Time We Knew: Western Responses to Genocide in Bosnia*, 47.

²⁶ Gutman, *A Witness to Genocide* 157.

²⁷ European Community, “EC Investigative Mission into the Treatment of Muslim women in the Former Yugoslavia: Report to EC Foreign Ministers” February 1993.

attributable to the predominately Muslims forces of the Bosnian government are perpetuated by individuals and do not appear to be a pre-meditated plan of the Bosnian authorities.”²⁸ This differed significantly from the Serbian campaign of “ethnic cleansing.” Bosnian Serb forces utilized sexual violence as a tactic of war and coordinated “ethnic cleansing” operations to forcibly remove the Muslim population from the region.²⁹ Serbian troops ran two-thirds of the reported 407 detention camps in Bosnia and Herzegovina; these camps were part of and practiced the state policy of “ethnic cleansing.”³⁰ While Serbian actions were more systematized and coordinated than other documented instances of sexual violence, it remained a crime all too commonly perpetrated by all parties to the conflict.

In response to the conflict and violence that ensued, humanitarian organizations embedded themselves within the region to provide aid and sanctuary for the victims and refugees of the war. Additional activities by these organizations included investigating and reporting on the “ethnic cleansing” and sexual violence. Humanitarian organizations were the first to publish reports on the atrocities committed in Bosnia and Herzegovina. Their presence within the region made it impossible to avoid the evidence and knowledge of “ethnic cleansing,” and awareness of the widespread sexual violence became public within the first months of the conflict.³¹ Political institutions and the media began to pay close attention to the conflict in Bosnia, aided by the humanitarian organizations’

²⁸ Human Rights Watch, *The Human Rights Watch Global Report of Women’s Human Rights*, New York (1995), 9.

²⁹ Human Rights Watch, *The Human Rights Watch Global Report of Women’s Human Rights*, 9.

³⁰ Cushman and Mestrovic, *This Time we Knew: Western Responses to Genocide in Bosnia*, 52.

³¹ Amnesty International, *Bosnia and Herzegovina: Gross Abuses of Basic Human Rights*, AI Index EUR/63/01/92 (1992).

documentation and publications of the atrocities committed. These organizations sent investigatory missions to document the humanitarian situation and to help decide what type of aid was needed. However, what resulted was a media frenzy when evidence of the violence against civilians was published.³² The humanitarian organizations affected the situation in multiple ways. The organizations provided aid to the victims, but also acted in a political manner when releasing information or allowing media organizations to participate in their fact finding missions. Ultimately, these organizations became witnesses to the crimes committed. By publishing the information, humanitarian organizations were able to sway public opinion, which further put pressure on the international community. Amnesty International and Human Rights Watch used their presence and prominence to investigate, report, and condemn the sexual violence that was occurring in Bosnia. The reports published by these organizations put intense pressure on the UN to address and eradicate gender violence in the region.

Utilizing documented abuse reports, these organization campaigned governments and political bodies to act against these abuses. They also released 20 publications on Bosnia from 1993-1994, eight, which mentioned rape, and four that focused exclusively on rape.³³ In addition, they conducted a fact-finding mission in Bosnia in August of 1992 that resulted in the publication of *Bosnia-Herzegovina: Gross Abuses of Basic Human Rights*, and *Bosnia-Herzegovina: Rape and Sexual Abuses by Armed Forces*³⁴. The former reported on the abuses committed by Serbian forces, utilizing interviews and

³² Human Rights Watch, *The Human Rights Watch Global Report of Women's Human Rights*, 9.

³³ Heidi Haddad, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals," *Human Rights Review* 12 no. 1 (2011), 125.

³⁴ Amnesty International, *Bosnia and Herzegovina: Gross Abuses of Basic Human Rights*, AI Index: EUR/63/01/92 (1992)

testimony from the victims.³⁵ The significant findings included that Serbian soldiers illegally detained civilian non-combatants in detention centers, where torture and mistreatment was conducted. Furthermore, instances of these detentions occurred where no fighting was taking place locally.³⁶ This report revealed that atrocities were being committed against civilians, which alarmed the public and brought greater attention to the conflict. *Rape and Sexual Abuse by Armed Forces* provided greater detail on the human rights violations regarding abuses against women. Amnesty International acquired testimony through their officers, journalists, and women's advocacy groups in Bosnia.³⁷ These records indicated that there was a presence of fact-finders in Bosnia, whose report brought massive media attention to the human rights violations. This report publicized that soldiers were encouraged by their commander to forcefully detain, humiliate, and rape Muslim Bosnian women without any fear of reprimand from their commanding officers.³⁸ It alluded to the discriminatory nature of the instances of rape, specifically that "in almost all reported or alleged cases the victims are of different nationality from the perpetrator, that is women have been singled out for humiliation on account of their nationality..."³⁹ This report recommended further investigation into the sexual abuses and support for the victims. In Bosnia, Amnesty International was pertinent in bearing

³⁵Amnesty International, *Bosnia and Herzegovina: Gross Abuses of Basic Human Rights*, AI Index: EUR/63/01/92 (1992), 22.

³⁶Amnesty International, *Bosnia and Herzegovina: Gross Abuses of Basic Human Rights*, AI Index: EUR/63/01/92 (1992), 25.

³⁷Amnesty International, *Rape and Sexual Abuse by Armed Forces*, AI Index: EUR 63/01/93 (1993), 8.

³⁸ Amnesty International, *Rape and Sexual Abuse by Armed Forces* AI Index: EUR 63/01/93 (1993) 8.

³⁹ Amnesty International, *Rape and Sexual Abuse by Armed Forces* AI Index EUR 63/01/93 (1993), 8.

witness to the human rights violations that occurred.⁴⁰ By ensuring international witness to the atrocities, further attention was brought to the sexual violence on an international scale.

Human Rights Watch deployed and investigated the violations in Bosnia at the start of the conflict in 1992. Witness testimony taken by Human Rights Watch was reported in *War Crimes in Bosnia-Herzegovina, Volume II* in 1993.⁴¹ Witness testimonies were additionally published in *The Human Rights Watch Global Report on Women's Human Rights*, which included research conducted from 1990 to 1995 regarding international abuses of women. The sexual violence in Bosnia was featured through interviews conducted by Human Rights Watch from the victims of rape and "ethnic cleansing" in Bosnia during the conflict. Additionally, Human Rights Watch reported on the forcible impregnation, which they cited as a tool of "ethnic cleansing." "Women interviewed by Human Rights Watch described how they were gang-raped, taunted with ethnic slurs, and cursed by rapists who stated their intention forcibly to impregnate women as a haunting reminder of the rape and intensification of the trauma it inflicts."⁴² Furthermore, this report reflected on the impact of the media attention on rapes committed in Bosnia. Human Rights Watch cited the evolving public perception of rape due to international organizations for women that advocated for the punishment and condemnation of rape.⁴³ This organization proposed further investigation into forced

⁴⁰ Kristen Young, "UNHCR and ICRC in the former Yugoslavia: Bosnia-Herzegovina," *International Review of the Red Cross* Vol. 83 no 843 (2001), 785.

⁴¹ Helsinki Watch, *War Crimes in Bosnia-Herzegovina, Volume II* (New York: Human Rights Watch, 1993).

⁴² Human Rights Watch, *Human Rights Watch Global Report on Women's Human Rights*, New York (1995), 9.

⁴³ *Ibid.*, 10.

impregnation as a form of “ethnic cleansing.”⁴⁴ In publishing their findings, Human Rights Watch increased awareness to this “ethnic cleansing” in the form of media attention for the victims as well as further humanitarian aid for the women.

During the conflict, Human Rights Watch adopted a political stance, failing to remain impartial. In a statement released in June of 1994, Human Rights Watch denounced the UN and their failure to take direct action against the human rights violations, claiming their failure had allowed the “ethnic cleansing” to spread and resonate throughout Bosnia.⁴⁵ Human Rights Watch demanded immediate action from the UN to protect the remaining civilians in Bosnia from becoming victims of the “ethnic cleansing.” By transmitting evidence of the violence in Bosnia, Human Rights Watch assisted in bringing media attention to the genocide, which ensured public awareness of the atrocities committed. Likewise, by taking a political stance and demanding action from the UN, Human Rights Watch put additional pressure on the UN as an organization.

Humanitarian organizations were assisted by journalists in investigating the rape, enslavement, and forced impregnation of Bosnian women, who “discovered” the detention camps and published images from Trnopolje and Omarska in August of 1992.⁴⁶ Roy Gutman, a journalist for *Newsday*, investigated the crimes in Bosnia, using his reports to write *A Witness to Genocide: The First Inside Account of the Horrors of “Ethnic Cleansing” in Bosnia*.⁴⁷ Gutman first reported on the genocide in August, 1992, using witness testimony of the women living in refugee centers on the ordered rape of 40

⁴⁴ *Ibid.*, 10.

⁴⁵ Human Rights Watch, “War Crimes in Bosnia- Herzegovina: U.N Ceasefire Won’t Help Banja Luka,” Human Rights Watch Vol. 6 no. 8 (June 1994).

⁴⁶ Stiglmayer, *Mass Rape: The War Against Women in Bosnia-Herzegovina*.

⁴⁷ Gutman, *A Witness to Genocide*, 140.

Muslim women.⁴⁸ Gutman's was the first complete report of the rapes of Muslim women by Serbian soldiers in August of 1992⁴⁹ accompanying the International Committee of the Red Cross (ICRC) inspectors to several Serb detention facilities.⁵⁰ His account of the Bosnian genocide flooded Western and international media alike, bringing widespread attention to the gender violence inflicted there. He also reported on the actions of the UN and the ICRC. His reports on humanitarian actions revealed how ineffective the current peacekeeping efforts were, "for foreign relief agencies the deployment of the British and other forces under UN control is another case of inadequate humanitarian 'Band-Aids' that have no impact on the war itself."⁵¹ Gutman outlined UN activity in investigating and condemning the mass rape and violence in Bosnia. His reports on the violence in Bosnia, as well as the limited action taken, exposed to the international community that little to nothing had been done to prevent the genocide and sexual violence. "Reports in *Newsday* and other publications, that the conquering Serb forces engaged in systematic rape of Muslim and Croat women and minors, prompted a flurry of investigations by international committees."⁵² International journalists inserted themselves within the conflict to record victim and witness testimony. At one point, approximately 5,000 journalists were reporting on the war in Bosnia and Herzegovina.⁵³ The mass media reports of rape in Bosnia and Herzegovina became well known, "in the 18 month period

⁴⁸ Gutman, *A Witness to Genocide*, 38.

⁴⁹ Stiglmeier, *Mass Rape: The War Against Women in Bosnia and Herzegovina*, 25.

⁵⁰ Gregory Kent, "Humanitarian agencies, Media and the War against Bosnia: 'neutrality' and Framing Moral Equalization in a Genocidal War of Expansion," *The Journal of Humanitarian Assistance* (August 2003).

⁵¹ Gutman, *A Witness to Genocide*, 127.

⁵² Gutman, *A Witness to Genocide*, 146.

⁵³ Kirsten Young, "UNHCR and ICRC in the former Yugoslavia: Bosnia and Herzegovina," *IRRC* Vol. 83 No. 843 (September 2001), add page number or end with period

between April 1992...and September 1993...139 media stories ran in major world publications with ‘rape’ in Bosnia in the headline of their story.”⁵⁴ In 1993, *The Los Angeles Times* published “Testimony: A Trio of Women’s Voices Bear Witness to the Horror of War and Rape as Yugoslavia Disintegrates.”⁵⁵ This article used witness testimony to expose the atrocities that women were facing. Western media was instrumental in the promulgation of information and international attention to the crimes of sexual violence, both during and after the Bosnian genocide. Extensive coverage of the atrocities committed put pressure on the international community to respond.⁵⁶

The distribution of information and first hand accounts of the war and violence in Bosnia by journalists was possible due to the media support from the United Nations High Commissioner for Refugees (UNHCR). The UNHCR began operations for humanitarian relief efforts in Bosnia in 1992, and was assisted by the United Nations Protection Force (UNPROFOR) in delivering humanitarian aid. The UNHCR established relationships with media agencies, providing opportunities for journalists to report on the front lines. Journalists were often issued UNHCR ID cards, which improved their access throughout the region and, at times, were smuggled through checkpoints by UNHCR officials.⁵⁷ In locations that journalists could not access, the UNHCR provided them with information that exposed the atrocities committed in those areas.⁵⁸ The UNHCR had a direct role in the mass media reports on the situation in Bosnia, intending to bring as

⁵⁴ Gutman, *A Witness to Genocide*, 125.

⁵⁵ “Testimony: A Trio of Women’s Voices Bears Witness to the Horror of War and Rape as Yugoslavia Disintegrates.” *Los Angeles Times*. January 31 1993.

⁵⁶ Kent, “Humanitarian Agencies, Media and the War against Bosnia: ‘neutrality’ and framing moral equalization in a Genocidal War of Expansion.”

⁵⁷ Mark Cutts, “The Humanitarian operation in Bosnia 1992-95: dilemmas of negotiating humanitarian access,” *Working Paper* No. 8, UNHCR.

⁵⁸ Young, “UNHCR and ICRC in the former Yugoslavia,” 803.

much attention to the violence in Bosnia. This participation was because of their understanding of the importance of international journalists and the media. This tactic incited condemnation for the inaction, and led to the condemnation of the UNHCR.

The reports of humanitarian organizations and media outlets and their demands for action compelled political agencies to involve themselves in the conflict. However, member nations of the UN wanted little to do with the conflict, which they considered a civil war. It was not until the reports of sexual violence and "ethnic cleansing" arose that nations made a concerted effort to understand the conflict. The United States (US) was one of the first, and loudest, nations to take an interest in Bosnia. As the most powerful member of the UN, the US had a substantial influence on UN policy and action. The US conducted intelligence investigations on the "ethnic cleansing" in Bosnia and Herzegovina. The US had gathered intelligence on the detention camps in July 1992 prior to these camps being exposed by the media.⁵⁹ In 1993, the CIA documented "Rape as an Instrument of Ethnic Cleansing,"⁶⁰ This document outlined the severity of the genocide in Bosnia at the time and uncovered 34 facilities where women were held and raped.⁶¹ The Clinton administration was deeply concerned with the genocidal violence in Bosnia and Herzegovina, and because of the findings in the intelligence reports, President Bill Clinton deployed a rhetoric denouncing the genocidal acts and pushed for action based on

⁵⁹ Vaughn Shannon, "Judge and executioner: the politics of responding to ethnic cleansing in the Balkans," *Journal of Genocidal Research* 7 no.1 (2005), 55.

⁶⁰ CIA Directorate of Intelligence Memorandum. "Rape as an Instrument of Ethnic Cleansing." 2 April 1993. Released October 2013 by CIA Historical Collections Division.

⁶¹ "1993-04-02, Office of European Analysis Report re Rape as an Instrument of Ethnic cleansing," *Clinton Digital Library*.

America's moral obligation.⁶² The US actively pressured the UN to aggressively pursue an end to the violence, supporting the use of force in the conflict as well as the establishment of the ICTY. However, the US was the only Security Council member who campaigned for the use of military force in the form of airstrikes.⁶³ The US campaigned for North Atlantic Treaty Organization (NATO) conducted airstrikes near the end of the conflict, as Clinton feared that the credibility of NATO, and subsequently of the US, was weakened by the failure to successfully intervene.⁶⁴

American politicians such as Senator Bob Dole also demanded action, stating "it was about whether some small country that had been ravaged on all sides, pillaged, women raped and children killed—do they have any rights in this world?"⁶⁵ Key members of the Clinton Administration such as National Security Advisor Anthony Lake and US Ambassador to the UN Madeleine Albright called for military action based solely on the humanitarian crisis. Advisor Lake issued a statement to President Clinton in 1993 advising the use of humanitarian airdrops to the Bosnian civilians.⁶⁶ From the start, UN Ambassador Madeleine Albright made her desire for immediate military action evident. Albright insisted that military intervention was a necessity to provide humanitarian assistance as well as defense for the Bosnian civilians.⁶⁷ Reports from the Clinton

⁶² Adam Roberts, "Humanitarian War: Military Intervention and Human Rights," *International Affairs* 69 no. 3 (1993), 102.

⁶³ Softic, *The Legal Nature of the War in Bosnia and Herzegovina: Aggression, genocide, the UN response, nonrecognition*, 172.

⁶⁴ Chi-Hahn Chang, *Ethical Foreign Policy? US Humanitarian Interventions*, Burlington: Ashgate Publishing Limited (2011), 136.

⁶⁵ Chang, *Ethical Foreign Policy*, 124.

⁶⁶ "1993-02-19C, Anthony Lake to President Clinton re Presidential Decision on Humanitarian Air Drops for Bosnia," *Clinton Digital Library*.

⁶⁷ 1993-04-14, Ambassador Madeleine Albright to National Security Advisor re Options for Bosnia," *Clinton Digital Library*.

administration defined their intentions of sustaining democracy, claiming, "Escalating violence and its potential spillover into other Balkan states would undercut US interests in promoting democracy, economic reform, and regional cooperation."⁶⁸ These documents exposed the early intentions of the Clinton Administration in regards to the conflict in Bosnia. The Clinton Administration sought to retain the position of the US as a world super-power, as well as preserve democratic institutions and alliances within Europe. Differing objectives aligned in the campaign for the use of force to end the conflict.

Other international bodies published reports of their own on the crimes committed in the former Yugoslavia. The European Community initially sought to resolve the issue in Yugoslavia in 1991, but as the conflict escalated and reports of "ethnic cleansing" rose, the EC sent an investigative mission into Bosnia and reported their findings in 1993.⁶⁹ The EC report stated that there were several thousand victims of rape, and that Serbian soldiers forcibly impregnated and detained women until the pregnancy could not be terminated.⁷⁰ It openly denounced these acts as war crimes and called on fellow European nations to act against the perpetrators. The EC, being a large political body of European nations, had the visibility to encourage action against Serbian forces. However, "the EC was an economic grouping without a mechanism for formulating or implementing foreign

⁶⁸ "1992-04-01, NIE Report, A Broadening Balkan Crisis Can It Be Managed," *Clinton Digital Library*.

⁶⁹ Sakib Softic, *The Legal Nature of the war in Bosnia and Herzegovina: Aggression, Genocide, the UN Response, Nonrecognition*. Saarbrücken: Lambert Academic Publishing (1999), 236.

⁷⁰ European Community, "Report on Rape in Bosnia-Herzegovina" EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, Copenhagen, 28 January 1993.

policy.”⁷¹ Despite its inability to bring real political change, it was still possible for the EC to be used as a platform to condemn these atrocities. Furthermore, the EC submitted their reports to the UN as evidence of the “ethnic cleansing” and sexual violence. The involvement of the EC reflected the concern of European nations to the conflict as well as their aversion to involvement.

Despite international attention and criticism, the UN constructed a limited response. UN efforts in Bosnia involved peacekeeping efforts, instead of military action to end the conflict. The UN presence in Bosnia and Herzegovina began with Security Council Resolution 743 on February 21, 1992. This resolution mandated that UNPROFOR deploy peacekeepers to the region.⁷² Following this resolution, official UN involvement began on July 12, 1992.⁷³ The UN deployed peacekeepers, but these peacekeepers had no jurisdiction to protect and enforce. “As Serb artillery shells crashed past the minarets into the center of this historic city [Travnik], British troops nearby winced as they described their orders, which are to do nothing beyond guarding convoys of humanitarian aid.”⁷⁴ UNPROFOR was ordered to protect UNHCR in delivering humanitarian aid and protecting ‘safe areas.’⁷⁵ The UN limited its role in the conflict to providing humanitarian relief and protection for those fleeing war zones.

⁷¹ Gutman, *A Witness to Genocide*, XXV.

⁷² UN Security Council, *Security Council resolution 743 (1992) [Socialist Federal Republic of Yugoslavia]*, 21 February 1992, S/RES/743 (1992); Cushman and Mestrovic, *This Time We Knew: Western Responses to Genocide in Bosnia*

⁷³ UN Security Council, *Security Council resolution 764 (1992) [Bosnia and Herzegovina]*, 13 July 1992, S/RES/764 (1992).

⁷⁴ Roy Gutman, *A Witness to Genocide*, 126.

⁷⁵ Cutts, “The Humanitarian operation in Bosnia, 1992-95: dilemmas of negotiating humanitarian access,” 2.

The UN conducted its own fact-finding missions after appointing a special rapporteur of the Commission on Human Rights to investigate the human rights violations in the former Yugoslavia.⁷⁶ On August 14, 1992 the Commission on Human Rights appointed Special Rapporteur Tadeusz Mazowiecki to investigate the situation in Bosnia after adopting resolution 1992/S-1/1.⁷⁷ Mazowiecki conducted three missions into Bosnia and Herzegovina, reporting to the UN Security Council after each mission. The first was conducted from the 21st of August to the 26th of August 1992, the second from the 12th of October to the 22nd of October 1992. After the third from January 12th to the 23rd of 1993, Mazowiecki requested that a team of medical experts investigate and report on these allegations of mass rape and forced impregnation in Bosnia and Herzegovina.⁷⁸ In a report to the Security Council, the special rapporteur included the findings from this mission as well as documentation received from governments, intergovernmental agencies, and other missions conducted by UN bodies regarding rape.⁷⁹ It concluded that rape was committed on a large scale by Serbian soldiers towards Muslim women. It also stated that no attempts were made by Serbian leaders to stop or punish rape, and that rape was used as a tool of "ethnic cleansing."⁸⁰ The findings of this mission and the statements from the Mazowiecki revealed the dire need for UN intervention on a greater scale. The

⁷⁶ UN Security Council, *Security Council resolution 780 (1992) [Former Yugoslavia]*, 6 October 1992, S/RES/780 (1992).

⁷⁷ UN Commission on Human Rights, resolution 1992/S-1/1, 14 August 1992.

⁷⁸ UN Secretary General. UN Commission on Human Rights. *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary General*. Special Rapporteur on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia A/48/92 1993-02-26.

⁷⁹ United Nations, General Assembly, *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary-General*, A/48/92 S/25341 (26 February 1993).

⁸⁰ United Nations, General Assembly, *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary-General*, A/48/92 S/25341 (26 February 1993).

Commission on Human Rights additionally called for international bodies to submit their findings to the UN Security Council in preparation for the establishment of a criminal tribunal. This report also noted the similarity and lack of coordination among missions conducted by the European Community, World Council of Churches, Amnesty International, and Helsinki Watch.⁸¹ Multiple organizations reporting on the issue brought attention to the situation, as well as the need for evidence of such reports. Additionally, this report criticized the media for re-victimizing and exploiting women with repeated interviews before these women were given the proper psychological or social support.⁸²

The amassing of information on the atrocities committed in Bosnia led the UN to establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia (ICTY) Since 1991.⁸³ By establishing this criminal tribunal, the UN promoted its stance on human rights violations and their intentions to punish the criminals behind it. Instead of acting to prevent the “ethnic cleansing,” the UN instead reacted to the consequences of this genocide by establishing an international criminal tribunal to convict the perpetrators of war crimes, crimes against humanity, and violations of the laws or customs of war. The use of documented reports of human rights violations became a vital tool in the development of the UN’s response to the genocide in Bosnia. The amassing of reports by humanitarian organizations on the human rights violations

⁸¹ United Nations, General Assembly, *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary-General*, A/48/92 S/25341 (26 February 1993).

⁸² United Nations, General Assembly, *The Situation of human rights in the territory of the former Yugoslavia: Note by the Secretary-General*, A/48/92 S/25341 (26 February 1993).

⁸³ United Nations General Assembly, *Rape and abuses of women in the areas of armed conflict in the Former Yugoslavia*, A/Res/48/143. 20 December 1993.

would be useful for the documentation of violations by the ICTY.⁸⁴ The United Nations requested these documented investigations be submitted to the Security Council as evidence of war crimes that would allow the ICTY to begin prosecutions.

UN Resolution 808 initiated the International Criminal Tribunal for the Former Yugoslavia (ICTY) in February of 1993. The ICTY was established to bring justice to those who violated international humanitarian law.⁸⁵ Article 29 of the UN Charter allowed the UN to exercise its power to establish the ICTY.⁸⁶ The Statute of the ICTY was drafted and approved with UN Resolution 827 on May 25, 1993.⁸⁷ UN Resolution 827 affirmed the Statute of the ICTY to prosecute grave breaches of the Geneva Convention of 1949 and violations of laws and customs of war.⁸⁸ Three judges made up the tribunal panel and a prosecutor responsible for investigating and indicting criminals.⁸⁹ The inception of an international tribunal arose from the public outcry over the published reports of mass atrocities occurring in Bosnia and Herzegovina. The ICTY was established to bring peace to the region and justice against the perpetrators of war crimes. The conflict, however, did not end until the signing of the Dayton Peace Accords in December 1995.⁹⁰ The ICTY was created in the midst of the conflict as a strategy for

⁸⁴ Young, "UNHCR and ICRC in the Former Yugoslavia," 786.

⁸⁵ UN Security Council, *Security Council resolution 808 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 22 February 1993, S/RES/808 (1993).

⁸⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XV, Article 29.

⁸⁷ UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993).

⁸⁸ UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993).

⁸⁹ United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, *supra note 12*, art. 18.

⁹⁰ *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995.

peace and as a way to temper public outrage over the inaction of international bodies in during the war.

The establishment of an international criminal tribunal was meant to pressure the conflicting parties into peace, as well as put individual responsibility on the perpetrators of war crimes. UN Resolution 771 intended to publicize the information gathered by international bodies for the international community in order to bring awareness about those accountable for the war crimes.⁹¹ The resolution had a two-part purpose, as an attempt to halt the “ethnic cleansing” and to gather evidence on violations of international humanitarian law. The inception of the ICTY arose from the international demand for action and from the minimal action taken to end the conflict previously. UN Resolution 780 established the UN Commission of Experts to collect evidence on war crimes committed in the former Yugoslavia.⁹² The commission published multiple reports on the humanitarian crisis. The first interim report published in February of 1993 argued that an international criminal tribunal would be necessary.⁹³ Reports from the Commission of Experts stated that countless breaches of the Geneva Convention occurred in Bosnia-Herzegovina and that systematic rape was part of the policy of “ethnic cleansing” being perpetuated by Serbian soldiers.⁹⁴ Activities of this commission included the exhumation

⁹¹ James C Obrien, “The International Tribunal for violations of international humanitarian law in the former Yugoslavia,” *American Journal of International Law* Vol. 87 (1993), 641.

⁹² UN Security Council, *Security Council resolution 780 (1992) [Former Yugoslavia]*, 6 October 1992, S/RES/780 (1992).

⁹³ Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274; Lillian Barria and Steven Roper, “How effective are international criminal tribunals? An analysis of the ICTY and ICTR” *International Journal of Human Rights* Vol. 9 no 3 (2005), 354.

⁹⁴ UN Security Council, Letter Dated 24 May 1994 From the Secretary General to the President of the Security Council, 27 May 1994, S/1994/674.

of mass graves, investigating witness reports of mass rape and "ethnic cleansing."⁹⁵

Based on evidence found through their fact-finding missions and documents submitted to the UN by additional investigative reports, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia.

In preparation for the establishment of an international criminal tribunal, the United Nations called upon other political bodies to submit their findings to the Security Council. The EC submitted their report, "EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia," which was especially influential on the decision to establish an international criminal tribunal, as indicated in UN Resolution 808.^{96,97} Stating that mass rape was used as a tool to force populations of Bosnian Muslims to flee, in addition to other forms of humiliation and torture, the mission emphasized the role of rape as part of "ethnic cleansing." "Rape is part of the pattern of abuse, usually perpetrated with the conscious intention of demoralizing and terrorizing a community."⁹⁸ This report made the clear distinction between rape as a byproduct of war and rape as a tool of war. The research conducted by the EC added substantial evidence for the accusation of war crimes. This report, written by the EC and submitted to the UN Security Council, provided evidence and reason to establish an international criminal tribunal.

⁹⁵ Barria and Roper, "How Effective are international criminal Tribunals?" 355.

⁹⁶ European Community, "EC Investigative Mission into the treatment of Muslim women in the Former Yugoslavia. "Report on Rape in Bosnia-Herzegovina." Copenhagen, 28 January 1993.

⁹⁷ UN Security Council, *Security Council resolution 808 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 22 February 1993, S/RES/808 (1993)

⁹⁸ European Council, "EC Investigative Mission into the treatment of Muslim women in the Former Yugoslavia. "Report on Rape in Bosnia-Herzegovina." Copenhagen, 28 January 1993.

The US had a major role in the establishment of the ICTY. The US strongly supported the decision to establish a criminal tribunal and ensured its formation.⁹⁹ The United States government commended the establishment of the ICTY, with Albright making evident US support in her statement regarding Resolution 808. “The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory.”¹⁰⁰ As the leading state in the UN, US support for the establishment of an international criminal tribunal was paramount. Without this unwavering backing, the formation of the ICTY would have been unlikely. The US further supported the tribunal by being the largest financial contributor to the ICTY.¹⁰¹ The tribunal employed a significant number of US citizens, and those employed were in high-level positions. This presented an opportunity for the US to influence tribunal proceedings.¹⁰² By playing a large role in the establishment of the ICTY as well as in its continuation and procedures, the US displayed its support for and influence on the ICTY.

It can be argued that the ICTY was established to remove pressure from the international community to become militarily involved in the conflict. “The tribunal appears to be more of a token to placate a disillusioned world than a symbol of the United

⁹⁹ John Cerone, “U.S Attitudes toward international criminal courts and tribunals,” in *The Sword and the Scales: The United States and International Courts and Tribunals*, edited by Cesare P. Romano, Cambridge University Press (2009), 143.

¹⁰⁰ Madeleine K. Albright, *UN Security Council Adopts Resolution 808 on War Crimes Tribunal*, U.S Dept. of St. Dispatch No. 12 Art. 5 (March 22, 1993); Cerone, “U.S Attitudes toward International Criminal Courts and Tribunals,” 145.

¹⁰¹ Cerone, “U.S Attitudes toward International Criminal Courts and Tribunals,” 145.

¹⁰² Cerone, “U.S Attitudes toward International Criminal Courts and Tribunals,” 146.

Nations' commitment to justice."¹⁰³ Public outcry against the genocide applied pressure to the international community to involve itself in the conflict. The failures of UN sanctions and arms embargos proved that military involvement would be necessary, and international community demanded action against the crimes of genocide. However, no nation was eager to act with force. The establishment of an international criminal tribunal was in response to these demands.¹⁰⁴ The creation of the ICTY was a strategy to avoid military intervention, but this strategy failed as the war and "ethnic cleansing" continued uninhibited. The end to this conflict was far on the horizon, and worse war crimes were yet to come.

The massive scale and magnitude of rape and sexual violence in Bosnia required the ICTY to thoroughly address these accusations and prosecute accordingly. However, no international statute for the prosecution of sexual violence had been developed. The ICTY reacted to the reported mass rape and forced pregnancy by instituting witness protection and gender sensitive policies. The unique use of rape by Bosnian Serbs as part of an official policy of war required the ICTY to develop specific gender sensitive procedures to ensure that the rights and privacies of the victims and witnesses were preserved.¹⁰⁵ Due to international media attention and the activism of women's groups, the ICTY Rules of Procedure and Evidence crossed a threshold into gender policies. The UN made evident its intent to prosecute the perpetrators of mass rape with a resolution in

¹⁰³ Cushman and Mestrovic, *This Time We Knew: Western Responses to Genocide in Bosnia*, 286.

¹⁰⁴ Lilian Barria and Steven Roper, "How effective are international criminal tribunals? An analysis of the ICTY and ICTR" *International Journal of Human Rights* Vol. 9 no 3 (2005), 355.

¹⁰⁵ Anne M. Hoefgen, "There Will be no Justice Unless Women are Part of That Justice: Rape in Bosnia, the ICTY and Gender Sensitive Prosecution," 14 *Wisconsin Women's Law Journal* 155 (1999), 168.

February 1993 that defined rape as a war crime.¹⁰⁶ This initial step defined the development of international law in regards to women's rights as the ICTY yielded convictions of sexual violence as breaches of the Geneva Convention or the ICTY statute as war crimes or as crimes against humanity.¹⁰⁷ The ICTY established procedures for the prosecution of cases of sexual violence where no such precedent had existed.

The particular attention on gender policies of the ICTY was credited to the action of women's advocacy groups, both international and local. Through various methods, women's groups campaigned for gender specific policies to be put into practice by the ICTY. Such methods included letter writing campaigns, media work, protests, and conferences.¹⁰⁸ This brought international attention to crimes of sexual violence as well as the obligation of the ICTY to prosecute them. The conversation on women's rights gained international recognition during the Bosnian genocide due to the burgeoning women's movement.¹⁰⁹ Women's advocacy groups had a variety of approaches; initially, these groups focused on bringing international attention to the prevalence of crimes of sexual violence in Bosnia. As women's advocacy groups developed further, they crusaded for the prosecution of perpetrators of sexual violence in addition to the establishment of gender specific policies by the ICTY. The Association of Women Victims of War, for example, provided support and aid for rape victims in Bosnia. This organization mobilized victims and provided testimony for trials against sexual violence

¹⁰⁶ UN Commission on Human Rights, *Rape and abuse of women in the territory of the former Yugoslavia*, 23 February 1993, E/CN.4/RES/1993/8.

¹⁰⁷ Karen Engle, "Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," *The American Journal of International Law* 99, no. 4 (2005), 781

¹⁰⁸ Heidi Haddad, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals," *Human Rights Review* 12 no. 1 (2011), 122.

¹⁰⁹ Haddad, "Mobilizing the Will to Prosecute," 121.

in the ICTY.¹¹⁰ They provided a platform for the victims of sexual violence to speak out against the perpetrators of sexual violence. International women's advocacy groups were responsible for the ICTY explicitly defining rape as a war crime and a violation of human rights.¹¹¹ Through the campaigns of these advocacy groups, gender procedures were implemented in the ICTY Rules of Procedure and Evidence. These policies provided for greater precision in the prosecution of war criminals.

UN Resolution 808, which established the ICTY, prompted feminist scholars and lawyers to formulate international gender policy for the consideration of the ICTY, campaigning vigorously for the ICTY to implement gender sensitive procedures. After Resolution 808, the International Women's Human Rights Clinic of the City University of New York (CUNY) Law School formulated the memorandum, *Gender Justice and the Constitution of the War Crimes Tribunal Pursuant to Security Council Resolution 808*.¹¹² This memorandum was the initial step made by feminist scholars and lawyers for gender sensitive policies in the ICTY. In 1993, it was distributed amongst women's groups as well as submitted to the Secretary General of the UN, the UN Commission of Experts, the UN Security Council, and the UN office of Legal Counsel.

This memorandum insisted that rape, forced prostitution, and forced pregnancy not only constituted crimes against humanity, but also grave breaches, regardless of the

¹¹⁰ Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*. Open Society Justice Initiative (2010), 72.

¹¹¹ Denise Aydelott, "Mass Rape During War: Prosecuting Bosnian Rapists under International Law," *Emory International Law Review* Vol. 7 No. 2 (1993).

¹¹² International Women's Human Rights Clinic of CUNY Law School, *Gender Justice and the Constitution of the War Crimes Tribunal Pursuant to Security Council Resolution 808*, App. B to Jennifer Green et al., *Affecting the Rules for Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia Feminist Proposal and Critique*, 5 *Hastings Women's Law Journal* 171, 235 (1994).

association with “ethnic cleansing.”¹¹³ This memorandum wanted the ICTY to address rape and forced pregnancy as both a genocidal and a gendered attack. This was to ensure that all forms of gender violence were prosecuted in the ICTY, not just crimes associated with the “ethnic cleansing.” Additionally, these crimes were to be tried as grave breaches and crimes against humanity, instead of solely the latter. The memorandum condemned the crime of forced impregnation as especially egregious, and insisted on the investigation and separation of this crime from rape or other sexual violence.¹¹⁴ In regards to the functioning of the ICTY, this memorandum advocated for women to be fully incorporated into every function of the ICTY. “The nature of the Tribunal’s function, the prevalence of gender-specific violations in this war, and the pervasiveness and subtlety of the gender-specific issues presented adds urgency to the implementation of gender parity.”¹¹⁵ Furthermore, feminist scholars proposed that gender sensitivity training be mandated in the judicial and prosecutorial staff of the ICTY as well as the establishment of a sex crimes unit to provide support to the victims of sexual violence who chose to testify.¹¹⁶ Mitigating any trauma that these victims would encounter was imperative to proper gender protocol, as well as to ensure that victims felt safe and secure to testify against their perpetrators. Particularly because of the trauma these victims incurred, the memorandum suggested these protections. Additionally, the memorandum insisted that the ICTY prosecute both those directly responsible and those through command.¹¹⁷ This was especially important to the ICTY’s

¹¹³ *Ibid.*, 236.

¹¹⁴ *Ibid.*, 237.

¹¹⁵ *Ibid.*, 238.

¹¹⁶ *Ibid.*, 238.

¹¹⁷ *Ibid.*, 240.

prosecution of sexual violence that was mandated from Serbian military command. Those who ordered as well as those who condoned sexual violence would be prosecuted. This addressed the systematic and widespread nature of the crimes of sexual violence. This demand would ensure that sexual violence be prosecuted, whether as a genocidal crime or as a gendered attack. This memorandum had substantial influence on the development of the Rules of Procedure and Evidence for the ICTY. However, not all their concerns were met under the initial institution of the Rules of Procedure and Evidence.

The proposal, *Affecting the Rules for the Prosecution of Rape and other Gender Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, was prepared by the International Women's Human Rights Law Clinic at the City University of New York (CUNY) School of Law and the Harvard Law School Human Rights Program.¹¹⁸ It was submitted to the ICTY judges at their first session in November of 1993, then refined and again sent to the judges at their second session in 1994. The refinements included critique of the initial "Rules of Procedure and Evidence" and their suggested modifications, including definite and mandated protections for the victims and witnesses, the inclusion of women within the Judicial branch of the ICTY, and gender sensitive training for all staff within the ICTY.¹¹⁹ Its purpose regarded gender violence in the ICTY as well as at the international level, "we recognized that the Tribunal rules would serve a model for future international

¹¹⁸ Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens, *Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 *Hastings Women's L.R.* 171 (1994), 177.

¹¹⁹ *Ibid.*, 178.

and national prosecutions of sexual crimes against women and provide international standards for national law reform regarding the prosecution of sex crimes in civil society.”¹²⁰ Feminist scholars addressed the bigger picture of international gender policy within their recommendations for the ICTY. The main focus of this proposal was the establishment of gender sensitive procedures.

The rules established for the investigation, trial, and protection of witnesses, and the understanding by all judges of the need for those rules, will determine whether war crimes of sexual violence will be fairly redressed with due regard for both rights of the accused and the protection of the victims. These rules will thus be a very significant factor in whether women ultimately come forward as complainants.¹²¹

In addition to providing commentary and proposals to the Rules of Procedure and Evidence, this proposal sought greater implementation of female staff in the ICTY. This arose from the ICTY electing two female judges, which prompted a concern from feminist human rights scholars that women would play a minimal role in the judiciary and prosecutorial branch of the ICTY.¹²² Lastly, the proposal focused on protections for the victims and witnesses testifying. This included identity concealment and the proper admittance of evidence that ensured that the rights of the victims were maintained.

The suggestions from these proposals were implemented within the ICTY Rules of Procedure and Evidence. This included Rule 34: The Victims and Witnesses Unit. Rule 34 established that counseling and support would be provided for victims and witnesses of sexual violence, as well as the incorporation of female staff.¹²³ Suggestions from these proposals were also implemented in Rule 69: Protection of Victims and

¹²⁰ *Ibid.*, 178.

¹²¹ *Ibid.*, 185.

¹²² *Ibid.*, 179.

¹²³ ICTY Rules of Procedure and Evidence, Rule 34, U.N Doc. IT/32 (March 14 1994).

Witnesses, which allowed the non-disclosure of the identity of victims and witnesses.¹²⁴ This provided safety and protection for the victims, establishing a safe environment for women to come forward to testify. Rule 75 provided further protections to witnesses and victims, including the non-disclosure of witnesses to the media or public, testimony through image altering or voice altering devices, the use of pseudonyms, and closed sessions.¹²⁵ Rule 96 dealt entirely with sexual violence. It established that no corroboration of victim testimony would be required: consent would not be allowed as a defense, that evidence must be proven credible and relevant, and the prior sexual history of the victim could not be admitted.¹²⁶ The establishment of Rule 96 is primarily due to these proposals from feminist scholars and lawyers. The advocacy of feminist scholars was paramount to the development of gender procedure in the ICTY as well as future international tribunals.

Although their suggestions were widely implemented, feminist scholars still had concerns over the ultimate effectiveness of the policies the ICTY put in place. The main concern was with the lack of funding and staff for the Victims and Witnesses Unit. Further, the Victims and Witnesses Unit did not provide legal advice or representation,¹²⁷ which was especially problematic to feminist scholars. They argued that legal counsel separate from the Office of the Prosecutor would provide victims with the proper guidance and support necessary.¹²⁸ Further concerns regarded women's involvement in

¹²⁴ ICTY Rules of Procedure and Evidence, Rule 69, U.N Doc. IT/32 (March 14 1994).

¹²⁵ ICTY Rules of Procedure and Evidence, Rule 75, U.N Doc. IT/32 (March 14 1994).

¹²⁶ ICTY Rules of Procedure and Evidence, Rule 96, U.N Doc IT/32 (March 14 1994).

¹²⁷ Green, Copelon, Cotter, and Stephens, *Affecting the Rules for the Prosecution of Rape and other Gender-Based violence before the International Criminal Tribunal for the Former Yugoslavia*, 220.

¹²⁸ *Ibid*, 220.

the Judicial and Prosecutorial branch of the ICTY. The presence of female prosecutors and judges was paramount to feminist scholars. Despite this being among their initial critique and proposal to the ICTY, women were not involved at the scale these feminist scholars had hoped for.

Article 22 of the Statute for the ICTY, adopted May 1993, defined the requirement for the ICTY to institute witness protection procedures.¹²⁹ The ICTY implemented Article 22 by the creation of the Victims and Witnesses Unit in the Rules of Procedure and Evidence.¹³⁰ The Victims and Witnesses Unit provided counseling and support in cases of sexual violence. Additionally, this unit ensured the employment of women to the ICTY.¹³¹ By enacting this rule, the ICTY indicated a focus on the health and safety of the victims of sexual violence. The emphasis on the employment of women by the ICTY was noteworthy. This specific rule revealed the appreciation the ICTY had on the Bosnian genocide's impact of women. While many people were victims, women were specifically targeted in the genocidal campaigns of the Serbian army. This targeted attack on women was addressed with the establishment of the Victims and Witnesses Unit to provide counseling for the victims, as well as the large presence of women employed in the ICTY.

Further protections for victims and witnesses were enacted through Rule 75, which provided women privacy during court proceedings.¹³² Rule 75 allowed for the anonymity of those testifying. For instance, the identity of a victim or witness would be

¹²⁹ ICTY, Statute of the International Tribunal for the Former Yugoslavia, Article 22, U.N Doc. S/Res/827 (1993).

¹³⁰ ICTY Rules of Procedure and Evidence, Rule 34, U.N Doc. IT/32 (March, 14 1994).

¹³¹ ICTY Rules of Procedure and Evidence, Rule 34, U.N Doc. IT/32 (March, 14 1994).

¹³² ICTY Rules of Procedure and Evidence, Rule 75, U.N Doc. IT/32 (March 14, 1994).

concealed during testimony through the use of image or voice altering devices, closed circuit television, assignments of pseudonyms, and closed sessions.¹³³ All these protections were put in place to create a comfortable and safe environment for the victims of sexual violence, as fear of retribution or public opinion strongly influenced many of these victims. To eliminate any fear of testifying, the ICTY promulgated this rule. By providing a comfortable environment for victims and witnesses to testify, women were encouraged to come forward, ensuring the proper prosecution and conviction of the perpetrators of sexual violence.

Rule 96 regarded the admittance of evidence. It specifically directed that no corroboration of testimony was required, that consent was not a defense, and that the prior sexual history of the victim could not be admitted as evidence.¹³⁴ The ICTY was aware that the prosecution of cases of sexual violence would be difficult, as the only type of evidence usually available was the testimony of the victims and other witnesses. These types of cases were unique in this aspect. Through establishing witness protections, the ICTY provided support and privacy for the victims and witnesses of sexual assault. By preventing the argument of consent from being used, the ICTY acknowledged the severity, scale, and the variety of forms that sexual violence had taken.

The procedures developed to protect the victims and witnesses of sexual violence addressed gender rights in an international setting. These procedures brought visibility to the victims of sexual violence and to the necessity to prosecute sexual violence.¹³⁵ The ICTY established that sexual violence was a crime that would no longer be overlooked,

¹³³ ICTY Rules of Procedure and Evidence, Rule 75, U.N Doc. IT/32 (March 14, 1994).

¹³⁴ ICTY Rules of Procedure and Evidence, Rule 96, U.N Doc. IT/32 (March 14, 1994).

¹³⁵ Orentlicher, *That Someone Guilty Be Punished*, 44.

and that it would be prosecuted as a war crime, a crime against humanity, and as an instrument of genocide.¹³⁶ By focusing on procedures for the prosecution of cases regarding sexual violence, the ICTY addressed women within the international community and through their requirements for gender-specific legislation and procedures.¹³⁷ An evolution of international criminal policy developed through the formation of rules and procedures specifically concerning the victims of sexual assault.

The first international trial since Nuremberg and Tokyo, as well as the first to address and prosecute sexual violence, was *Prosecutor v. Duško Tadić*. Tadić was initially indicted in February of 1995 and his trial began in May of 1996.¹³⁸ The ICTY found Tadić guilty of crimes against humanity and in violation of laws and customs of war. The Appeals Chamber convicted Tadić of grave breaches, crimes against humanity, and violations of the laws or customs of war.¹³⁹ Tadić had been the president of the Bosnian Serb Democratic Party and participated in the takeover and “ethnic cleansing” of Prijedor and Kozarac, in addition to the confinement of Muslim civilians at the Omarska camp. His trial pertained to acts of sexual violence committed towards male victims at the Omarska prison camp, in which Tadić was both a witness and perpetrator.¹⁴⁰ While this case was important in that it was the first to explicitly address crimes of sexual violence in an international criminal tribunal, the issue had not yet been addressed for female victims of sexual violence during the armed conflict in Bosnia. However, as the first trial of the ICTY, the charges of sexual violence set the precedent for the ICTY to

¹³⁶ *Ibid.*, 44.

¹³⁷ Hoefgen, “There Will Be No Justice Unless Women are Part of That Justice,” 167.

¹³⁸ ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1, Initial Indictment, 13 February 1995.

¹³⁹ ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997; Appeals Chamber, *Prosecutor v. Dusko Tadić*, IT-94-1-A, Judgment, 15 July 1999.

¹⁴⁰ ICTY, *Prosecutor v. Dusko Tadić*, IT-94-T Opinion and Judgment, 7 May 1997.

prosecute sexual violence. Tadić was sentenced to 20 years imprisonment and released on July 17, 2008.¹⁴¹

The *Čelebići* case involved the conviction of three men for war crimes including rape and torture in the *Čelebići* prison camp in Bosnia. The *Čelebići* case determined the responsibility that commanders have in the crimes committed by subordinates.¹⁴² Hazim Delić, the deputy commander of the camp, was convicted for crimes of sexual violence in the form of torture as a war crime. The judgment on Delić defined that the crime of rape can be torture, as

Rape causes severe pain and suffering, both physical and psychological... Furthermore, it is difficult to envisage circumstances in which rape, by or instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meets these criteria.¹⁴³

This classification had not yet been defined in international humanitarian law, highlighting the importance of the *Delić* Judgment in forming the basis of rape as torture. This definition would be used frequently in later convictions of sexual violence in the ICTY. Zdravko Mucić, the commander of the *Čelebići* prison camp, was convicted for his superior responsibility of the grave breaches of international law that occurred under his supervision. His failure to prevent crimes of sexual violence, as well as his

¹⁴¹ ICTY, *Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić* IT-94-1-ES.

¹⁴² Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," *Human Rights Brief* 11, no. 3 (2004), 17.

¹⁴³ *Prosecutor vs. Mucic and 3 others*, IT-96-21-T, Judgment, 16 November 1998, par 495-496.

participation in them, resulted in multiple war crimes convictions.¹⁴⁴ His conviction established precedent in which superior officers could be held fully responsible for crimes committed by subordinates under their authority. The charges of command responsibility paved the way for prosecution of those acting under explicit orders to rape, those aiding and abetting rape, as well as those with authority failing to prevent and punish those committing rape.¹⁴⁵ This ensured that justice would be brought to all those involved. Mucić and Delić were convicted on November 16, 1998, a conviction that was upheld on appeal on February 20, 2001.¹⁴⁶ Mucić was sentenced to nine years and was released on July 18, 2003.¹⁴⁷ Delić was sentenced to 20 years and granted early release on June 24, 2008.¹⁴⁸ It is important to note that those accused in the *Čelebići* case were Bosnian forces, committing crimes against Bosnian Serbs. The ICTY attempted to prosecute all those who committed war crimes, on both sides. Bosnian and Croat forces were prosecuted for perpetuating war crimes and sexual violence in Bosnia. All sides in this conflict perpetuated sexual violence, and it was the mission of the ICTY to prosecute all instances. As of September 2016, the 161 individuals that were prosecuted by the ICTY, 94 were Serbs. However, 29 individuals were Croatian and nine were Bosnian.¹⁴⁹

¹⁴⁴ Askin, “A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993-2003,” 16.

¹⁴⁵ Julie Mertus, “When Adding Women Matters: Women’s Participation in the International Criminal Tribunal for the former Yugoslavia,” *Seton Hall Law Review* Vol. 38 (2008), 1318.

¹⁴⁶ *Prosecutor vs. Mucic and 3 others*, IT-96-21-T, Judgment, 16 November 1998, and *Prosecutor vs. Mucic and 3 others*, IT-96-21-A, Judgment, 20 February 2001.

¹⁴⁷ ICTY IT-96-21-A, Order of the President in Response to Zdravko Mucic’s request for Early Release, 9 July 2008.

¹⁴⁸ ICTY, IT-96-21-ES, Decision on Hazim Delic’s Motion for Commutation of Sentence, Public Redacted, 24 June 2008.

¹⁴⁹ ICTY Official site: Key Figures, <http://www.icty.org/en/cases/key-figures-cases>.

Prosecutor vs. Kunarec set a precedent for convictions regarding sexual violence. This case “was the first case on rape as a crime against humanity to come before the Yugoslav Tribunal, and the first international trial in history to adjudicate rape and enslavement for crimes essentially constituting sexual slavery.”¹⁵⁰ The trial initiated the process of convicting men for crimes of sexual enslavement and torture as crimes against humanity. The basis for this conviction was the testimony of victims who were held against their will by Dragoljub Kunarec, Radomir Kovač, and Zoran Vuković in private homes for several months. During their confinement, Kunarec repeatedly raped his victims and was charged on 11 counts solely regarding the sexual violence he committed.¹⁵¹ The conviction of Kunarec for crimes of sexual violence exclusively was significant. The majority of convictions by the ICTY involved elements of sexual violence; however, they did not address crimes of sexual violence exclusively. The decision to establish rape as a crime against humanity was the result of the blatant discrimination against Muslims that Kunarec propagated during the armed conflict in Bosnia as well as his involvement with the rape camps in Foča. The discrimination and persecution of women because of their ethnicity, observed in the trial, aided in the ruling of rape as a crime against humanity. “They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of and had effect of

¹⁵⁰ Askin, “A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003,” 19.

¹⁵¹ UN Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*.

perpetrating the attack against the Muslim civilian population.”¹⁵² *Prosecutor vs. Kunarec* established that crimes of sexual violence were serious and grave enough to prosecute unaccompanied. Kunarec was convicted for war crimes and crimes against humanity on February 11, 2001, this conviction was upheld on appeal on June 12, 2002. He was sentenced to 28 years imprisonment.¹⁵³

Prosecutor v. Karadžić & Mladić was significant in finding that sexual violence could be used as evidence in prosecuting the crime of genocide. This case found that the systematic rape of women in Bosnia and forced impregnation provided evidence for “genocidal intent.”¹⁵⁴ The ICTY made a distinction between independent cases of rape and the systematic rapes that occurred in Bosnia. This distinction allowed for the definition of systematic rape as a form of genocide.

On the basis of the features of all these sexual assaults, it may be inferred that they were part of a widespread policy of ‘ethnic cleansing.’ the victims were mainly non-Serbian civilians, the vast majority being Muslims. Sexual assaults occurred in several regions of Bosnia and Herzegovina, in a systematic fashion and using recurring methods... They were performed together with an effort to displace civilians and increase the shame and

¹⁵² *Prosecutor v. Dragoljub Kunarec, Radomir Kovac, and Zoran Vukovic*, Judgment: IT-96-T, 22 February 2001.

¹⁵³ *Prosecutor vs. Kunarec and 2 others*, Judgment, IT-96-23 & IT-96-23/1-T, 22 February 2001; *Prosecutor vs. Kunarec and 2 others*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002.

¹⁵⁴ Susana SaCouto, “Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes,” 15.1 *Michigan State Journal of International Law* (2007), 144. See also *Prosecutor vs. Karadzic and Mladic*, IT-95-5-R61 & IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules and Procedures of Evidence, 16 July 1999, par 94.

humiliation of the victims and of the community they belonged to in order to force them to leave.¹⁵⁵

The connection drawn between the crimes of sexual violence and "ethnic cleansing" established the genocidal intent of Serbian troops against the Bosnian population. The ICTY defined that sexual violence was connected to the "ethnic cleansing," contradicting the notion that crimes of sexual violence are independent and unrelated to genocidal intent. The ICTY established that perpetrators of sexual violence could be charged and convicted for genocide. The conviction of genocide was brought before Radislav Krstić, a commander of the Bosnian Serb Army, for his role in the Srebrenica massacre. Krstić was convicted on counts of genocide, crimes against humanity, violations of the laws or customs of war, persecutions and murder. He was sentenced to 35 years in prison. The conviction for persecution as crimes against humanity and the rape of women at Potočari during the Srebrenica massacre was included.¹⁵⁶

The participation of women in the ICTY was challenged and reaffirmed in the *Furundžija* case. On appeal, Anto Furundžija attempted to discredit Judge Florence Mumba as biased because of her participation in the UN Commission on the Status of Women. Furundžija was convicted of violations of laws or customs of war, which included rape, and sentenced to 10 years imprisonment.¹⁵⁷ The defense attempted to characterize Judge Mumba as having too much knowledge and influence on women's issues. Despite these attempts, the Appeals Court upheld the convictions and countered

¹⁵⁵ *Prosecutor v. Karadžić & Mladić*, IT-95-5-R61 & IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules and Procedures of Evidence, 11 July 1996, par 64.

¹⁵⁶ *Prosecutor vs. Krstić*, IT-93-33-T, Judgment, 02 August 2001.

¹⁵⁷ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, 164, 169–70 (July 21, 2001).

the claim of bias. The Appeals Court reminded the defense team that the tribunal was established to prosecute crimes committed against women, and having a judge with extensive knowledge on gender issues was intentional to accomplish this goal.¹⁵⁸ The ICTY regarded the role of women as prosecutors and judges as imperative to this mission. The *Furundžija* case also structured a definition of rape that would be used by the ICTY, defining it as:

- (i) The sexual penetration, however slight:
 - (a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) Of the mouth of the victim by the penis of the perpetrator;
- (ii) By coercion or force or threat of force against the victim or a third person.¹⁵⁹

This definition of rape would be used thereafter in the ICTY. *Furundžija*'s attempt to discredit Judge Mumba failed, and instead reaffirmed the importance of women within the ICTY.

While the ICTY was commended for introducing revolutionary legislation against sexual violence in an international setting, criticisms of the ICTY were marked, particularly from the failure to accomplish the initial goal of the ICTY, which was to bring peace. The ICTY was established in 1993, with the intent to end the genocidal violence by holding the perpetrators accountable.¹⁶⁰ It was believed that if the soldiers were aware that there would be consequences for their actions, in the form of a war crimes tribunal, this would reduce their criminal acts. However, this notion proved

¹⁵⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, para. 164, 169–70 (July 21, 2001).

¹⁵⁹ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, para. 164, 169–70 (July 21, 2001).

¹⁶⁰ Lillian Barria and Steven Roper, “How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR,” 358.

incorrect as the conflict continued until late 1995.¹⁶¹ The violence in Bosnia and Herzegovina did not cease until the signing of the Dayton Peace Agreement in December of 1995.¹⁶² Nearly three years after the ICTY was mandated, a tentative peace was finally established. The failures of the ICTY to establish peace in the midst of conflict is evident in the Srebrenica massacre in July 1995.¹⁶³ If a war crime tribunal did not have the authority itself to end the violence, greater measures were necessary.

The conflict in Bosnia ended with the signing of the Dayton Accords on December 14, 1995.¹⁶⁴ The US was a proponent for NATO airstrikes early in 1995, however the UN and subsequent member nations disagreed with the use of military force because of the safety of UNPROFOR forces in Bosnia. However, after the Srebrenica massacre in July 1995, the international community agreed that NATO airstrikes would be necessary to stop the increasing violence and genocide by Bosnian Serb forces. The US, a founding member of NATO, had a key interest in maintaining their credibility as a world power.¹⁶⁵ In August of 1995, the two-week NATO airstrike campaign, Operation Deliberate Force, began. These bombings hindered the Serbian effort, forcing Serbian leaders to concede to peace discussions towards the end of 1995. Further efforts by Muslim and Croatian forces gained headway in regaining territory from Serbia, and the siege of Sarajevo was ended in September. By October, a nationwide cease-fire was

¹⁶¹ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 358.

¹⁶² *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995.

¹⁶³ The Srebrenica Massacre occurred in July 1995. The Army of the Republic of Srpska murdered over 8000 Bosnian Muslim men and boys.

¹⁶⁴ *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995.

¹⁶⁵ Ivo H. Daalder, "Decision to Intervene: How the War in Bosnia Ended," *Brookings* (December 1998).

mandated and peace talks began in Dayton, Ohio.¹⁶⁶ The Dayton Peace Accords were signed by the presidents of Bosnia, Croatia and Serbia and implemented in December 1995 at the leadership of US official Richard Holbrook.¹⁶⁷ The Dayton Accords split Bosnia and Herzegovina into two regions: the Federation of Bosnia and Herzegovina and the Republika Srpska. NATO deployed forces to assist and oversee the implementation of the Dayton Peace Accords.¹⁶⁸ With peace now established, the UN would begin the process of prosecuting war crimes. Without the NATO involvement and airstrikes, an end to this conflict was unforeseeable. Despite reports of “ethnic cleansing” dating as early as 1992, the international community refused to take military action until the crimes of Bosnian Serb forces could no longer be ignored. UN peacekeeping efforts had ultimately failed, as NATO military force was necessary to end the violence. The UN faced severe criticism for their failure to stop the violence and, now that the war had ended, the international community looked skeptically towards UN efforts to prosecute the massive instances of war crimes.

The Srebrenica massacre was the biggest failure of UN peacekeeping efforts. Despite the initiation of the ICTY in 1993 and initial indictments released in 1994, mandated violence against the civilian population in Bosnia peaked in July 1995.¹⁶⁹ Not only did the massacre reveal initial failures of the ICTY, but also UN peacekeeping measures as a whole. The Srebrenica massacre was “the single worst atrocity committed

¹⁶⁶ Chang, *Ethical Foreign Policy? US Humanitarian Interventions.*, 112.

¹⁶⁷ Daalder, “Decision to Intervene: How the War in Bosnia Ended” and Chang *Ethical Foreign Policy? US Humanitarian Interventions*, 130.

¹⁶⁸ NATO, “15 Years ago, Dayton Peace Accords: a milestone for NATO and the Balkans,” 14 December 2010; *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995.

¹⁶⁹ ICTY-IT-94-2-I *Prosecutor v. Dragan Nikolic*, Initial Indictment, 4 November 1994

in the former Yugoslavia during the wars of the 1990s and the worst massacre that occurred in Europe since the months after World War II."¹⁷⁰ Srebrenica was declared a safe area in 1993 and a cease-fire established, protected by UNPROFOR.¹⁷¹ However, this proved short-lived as Bosnian Serb troops launched an attack on Srebrenica on July 6, 1995 that led to the fall of Srebrenica to Bosnian Serb forces on July 11, 1995.¹⁷² UN peacekeeping officials were reluctant to use force against Bosnian Serb forces, thereby allowing these forces to overtake Srebrenica with no interference.¹⁷³ Upwards of 28,000 refugees in Srebrenica fled to the UN base at Potočari, where Bosnian Serb forces began to transport civilians into Bosnian controlled territory. However, men aged 16 to 60 were separated and the systematic murder of approximately 8,000 men occurred between July 11 and July 19.¹⁷⁴ Women were victims of rape and sexual violence by Bosnian Serb forces in Potočari while waiting to be transported. Human Rights Watch, *The New York Times*, and *The Independent* published reports of rape and sexual abuse in the Srebrenica massacre.¹⁷⁵ It was the biggest failure of UN peacekeeping measures in the Bosnian War. The ICTY indicted 19 individuals for the crimes committed in Srebrenica. *Prosecutor v.*

¹⁷⁰ ICTY, "Facts about Srebrenica," *Outreach*, originally published in *Justice in Transition* Vol. 1 (October 2005), 1.

¹⁷¹ UN Security Council, *Security Council resolution 819 (1993) [Bosnia and Herzegovina]*, 16 April 1993, S/RES/819 (1993).

¹⁷² Ivan Lupis and Laura Pitter, "The Fall of Srebrenica and the Failure of UN Peacekeeping: Bosnia and Herzegovina," *Human Rights Watch* Vol. 17 No. 13 (October 1995), 14.

¹⁷³ Lupis and Pitter, "The Fall of Srebrenica and the Failure of UN Peacekeeping: Bosnia and Herzegovina," 1.

¹⁷⁴ ICTY, "Facts about Srebrenica," *Outreach*, originally published in *Justice in Transition* Vol.1 (October 2005), 2.

¹⁷⁵ Ivan Lupis and Laura Pitter, "The Fall of Srebrenica and the Failure of UN Peacekeeping: Bosnia and Herzegovina," *Human Rights Watch* Vol. 17 No. 13 (October 1995); Stephen Kinzer, "Conflict in the Balkans: The Refugees; Bosnian Refugees' Accounts Appear to Verify Atrocities," *New York Times* (July 17 1995); Snjezana Vukic, "Refugees Tell of Women Singled Out for Rape," *The Independent* (July 18 1995).

Krstić found that genocide occurred in Srebrenica from July 11th to 19th, and General Radislav Krstić was found guilty for his role in this massacre.¹⁷⁶ The massacre revealed the futility of UN established “safe areas” and discredited the notion that the mere establishment of an international criminal court would deter forces from committing further war crimes.

The ICTY failed to bring peace in the aftermath of the conflict as both Bosnian and Serbian public sentiment regarded the ICTY with bitterness. Peace through reconciliation was not met, as the ICTY created animosity among the differing communities within Bosnia and Herzegovina.¹⁷⁷ The Bosnian Muslim public reaction to the ICTY was, for the most part, in support of its institution, however particular elements in the prosecution of perpetrators of war crimes in the ICTY spurred resentment among Bosnians. The largest complaint from Bosnian Muslims was that the sentences were too short. In one instance, a former camp guard received relatively light sentence of eight years for killing five inmates,¹⁷⁸ and it was felt that the ICTY failed in achieving true, lasting justice for the victims and their families. Another criticism regarded the failure to hold all accountable. The ICTY convicted 161 people for violations of the international humanitarian law.¹⁷⁹ This number appeared too low for the majority of the Bosnian Muslim population. Furthermore, massive public discontent was present in the ICTY's

¹⁷⁶*Prosecutor v. Radislav Krstic*, Case no. IT-99-33, Appeals Judgment, 19 April 2004.

¹⁷⁷ Donna Arzt, “Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone,” *The Annals of the American Academy of Political and Social Science* 603 (2006), 232.

¹⁷⁸ ICTY, *Prosecutor v. Predrag Banovic IT- 02-65/S-1*, Judgment, 28 October 2003; Marlise Simon, “Plea Deals Being Used to Clear Balkan War Tribunal’s Docket,” *New York Times* (November 2003); Arzt, “Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone,” 232.

¹⁷⁹ ICTY Official Site “Key Figures” <http://www.icty.org/en/cases/key-figures-cases>.

allowance of plea bargains. The Bosnian Muslim population was shocked that plea bargains were put into practice in the ICTY, an option not present in their national court system.¹⁸⁰ The expectations of the Bosnian Muslims had fallen flat when the convictions and practices of the ICTY were contrary to what they had hoped for.¹⁸¹ Negative sentiment towards the ICTY in Bosnia was a result of the poor communication between the tribunal and local institutions. Local expectations were not met because of the lack of communication.¹⁸² The ICTY failed to connect with local organizations and women's groups. These organizations played a large role in interviewing and providing assistance to victims of sexual assault, however, their potential to aid the ICTY was ignored.¹⁸³ Establishing a relationship with local women's organizations would have allowed the ICTY to successfully prosecute a larger proportion of sexual assault because these organizations worked directly with the victims.¹⁸⁴ Efforts by the UN to alleviate the communication block came too late for a substantial impact.

Serbia and the Republic of Srpska were largely against the ICTY. The vast majority of Serbians disapproved of the practices and convictions of the ICTY.¹⁸⁵ Their criticism lay in their distrust of the ICTY, as well as their impression of false intent. Serbians felt that the ICTY specifically targeted Serbians, and was not an independent

¹⁸⁰ Arzt, "Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone," 235.

¹⁸¹ Mirko Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia," *Journal of International Criminal Justice* 7 no.1 (2009).

¹⁸² Julie Mertus, "When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia," *Seton Hall Law Review* Vol. 38 Art. 4 (2008), 1323.

¹⁸³ Julie Mertus, "When Adding Women Matters," 1322.

¹⁸⁴ Julie Mertus, "When Adding Women Matters," 1326.

¹⁸⁵ Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia."

body convicting all criminals in the Bosnian war.¹⁸⁶ The distrust of the ICTY among Serbians was largely because of the bias they felt in the indicting and sentencing of war criminals. Because of the negative feelings towards the tribunal, Serbian cooperation was slight, which created additional problems for the ICTY.¹⁸⁷

International criticism of the ICTY regarded the problems of application, as opposed to the concept of the tribunal. The ICTY was established in 1993, however indictments did not initially go out until 1994. It took two years before the ICTY was able to apprehend any of the first 34 indictments.¹⁸⁸ Initially, the ICTY faced non-compliance in the international community to extradite the criminals.¹⁸⁹ Further, critics argued that it was impractical to initiate a criminal tribunal in the midst of an armed conflict.¹⁹⁰ The ICTY did not begin trials until 1996. Additional criticism of the ICTY was in respect to the shortsightedness of its creators.¹⁹¹ The tribunal was not allocated the proper funds for the effective prosecution of the war criminals. Furthermore, the ICTY did not begin with an adequate number of judges for the process to run smoothly and quickly.¹⁹² The ICTY originally tried one case at a time, drawing out the process indefinitely for those waiting trial, an ineffective method for an international tribunal

¹⁸⁶ Arzt, "Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone," 233.

¹⁸⁷ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 355.

¹⁸⁸ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 356.

¹⁸⁹ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 359.

¹⁹⁰ Payam Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and beyond," *Human Rights Quarterly* 18 no. 2 (1996), 269.

¹⁹¹ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 364.

¹⁹² Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 360.

hoping to gain prominence and legitimacy among the international community.¹⁹³ The ICTY further struggled with obtaining evidence, largely because the ICTY was established during an armed conflict. It was nearly impossible to gather evidence in locations where the conflict was the most severe. Additionally, the majority of evidence needed for prosecution was solely based on the testimony of the victims and witnesses.¹⁹⁴

Feminist critique of the ICTY focused on the ICTY's interpretation of rape in the trials it prosecuted. In cases regarding sexual violence committed during the conflict, the focus remained on rape as a crime against the community, rather than a crime against the specific women. This led to a patriarchal understanding of rape within the context of the ICTY.¹⁹⁵ Feminist criticism was on the treatment of victims of rape and sexual violence as witnesses to the crimes, instead of the victims.¹⁹⁶ This treatment created a divide between the victim and the assault committed against them. The ICTY ignored the ongoing suffering these women faced from the aftermath rape due to the rules of relevancy. These victims were unable to share their ongoing struggles of their victimization and rape. This removed ownership from the victims, who did not feel that they had been brought justice.¹⁹⁷

¹⁹³ Dominic Raab, "Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals," *Journal of International Criminal Justice* 3 no.1 (2005), 87.

¹⁹⁴ Barria and Roper, "How effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," 358.

¹⁹⁵ Rosalind Dixon, "Rape as a crime in International Humanitarian Law: Where to from here?" *European Journal of International Law* Volume 13 No. 3 (2002), 703.

¹⁹⁶ Dixon, "Rape as a crime in International Humanitarian Law: Where to From Here," 705.

¹⁹⁷ Dixon, "Rape as a crime in International Humanitarian Law: Where to From Here," 705.

Feminist scholars continued to debate as to how the tribunal should prosecute rape in this specific circumstance. The debate was divided on the prosecution of rape as genocide.

Scholar Catherine MacKinnon argued at the onset of the ICTY:

Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control...It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back...It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.¹⁹⁸

MacKinnon was the main proponent to prosecute rape as genocide in the ICTY, arguing that rape could occur simultaneously as an act of war and genocide. A separate camp of feminists largely critiqued this viewpoint, fearing that charging rape as genocide would make it difficult to establish other convictions on rape. Rhonda Chopelon led the opposition against charging rape as genocide. She argued that rape outside of the context of genocide would be ignored. Because rape was committed on such a large scale in this conflict, every instance of this crime should be prosecuted, not just instances of rape as genocide.¹⁹⁹ Chopelon's argument succeeded, as rape was charged in the ICTY as crimes against humanity, grave breaches, and violations of laws and customs of war.²⁰⁰ While genocidal intent was apparent, the ICTY did not bring charges of genocide in relation to

¹⁹⁸ Catherine MacKinnon, "Rape, Genocide, and Women's Human Rights," 17 *Harvard Women's Law Journal* 5, 16 (1994), 12.

¹⁹⁹ Mertus, "When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia," 1317.

²⁰⁰ Mertus, "When Adding Women Matters," 1315.

sexual violence and forced impregnation.²⁰¹ This was one of the largest critiques in feminist scholarship of the ICTY. For example, the *Kunarac* trial had many elements of genocidal intent, however no charges were brought.²⁰² Testimonies from the victims in the *Kunarac* trial revealed the intent for Bosnian Muslim women to give birth to Serbian babies.²⁰³ This forced impregnation could have been charged as genocide. One of the few convictions of genocide in the ICTY was against Radislav Krstić for his role in the Srebrenica massacre.²⁰⁴ No genocide charges were brought forward for the crimes of forced impregnation. This crime has largely been ignored in the ICTY, despite its genocidal intent. While feminist scholars agreed that the ICTY was imperative to bring justice to Bosnia, and that it made progress in the jurisdiction of sexual violence, the ICTY failed to correctly and fully address the crimes of sexual violence in Bosnia for what they truly were: attacks on Bosnian women because they were women.

To further analyze the successes and failures of the ICTY, the reflections of former ICTY Judge and President Gabrielle Kirk McDonald are essential. McDonald served as a judge for the ICTY in 1993 and as president from 1997 to 1999. Prior to her time with the tribunal, McDonald was an American civil rights lawyer who worked with

²⁰¹ Karen Engle, "Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," *The American Journal of International Law* 99 no. 4 (2005), 783.

²⁰² Kelly Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," *The American Journal of International Law* 93, no.1 (1999), 114.

²⁰³ Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," 115.

²⁰⁴ *Prosecutor v Radislav Krstic*, IT-93-33-T, 2 August 2001.

the NAACP and as a federal judge in Texas.²⁰⁵ The election of a female American civil rights lawyer as one of the original judges in the ICTY, and later president impacted the structure of the ICTY; particularly, how the ICTY addressed sexual violence in the Rules of Procedure and Evidence. The previous absence of women in the roles of lawmakers and enforcers explained the lack of prosecution of sexual violence prior to the ICTY.²⁰⁶ In 1993, with the establishment of the ICTY and the appointment of McDonald as a judge, witness and victim protections would be seriously considered and put in place, which allowed sexual violence to be sufficiently prosecuted.

As one of the original 11 judges, McDonald participated in the formulation of the Rules of Procedure and Evidence. Of the 11 judges, only two were women: McDonald and Elizabeth Odio Benito. They were the first women to be instituted into an international court as judges.²⁰⁷ McDonald took the lead in formulating Rules of Procedure and Evidence, relying on US law to build the law's framework.²⁰⁸ McDonald took special interest in the matters of sexual assault in the Rules of Procedure and Evidence.²⁰⁹ She relied heavily on the proposal submitted to the ICTY by the International Women's Human Rights Clinic at CUNY Law School. The suggestions

²⁰⁵ Judge Gabrielle Kirk McDonald, "The International Criminal Tribunals: Crime and Punishment in the International Arena," *ILSA Journal of International and Comparative Law* Vol. 7: 667 (2001), 667.

²⁰⁶ McDonald, "The International Criminal Tribunals: Crime and Punishment in the International Arena," 675.

²⁰⁷ Julie Mertus, "When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia," 1301.

²⁰⁸ Gabrielle Kirk McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," Interview by David Briand and Leigh Swigart, International Center for Ethics, Justice and Public Life, Brandeis University, 15 July 2015, 4.

²⁰⁹ McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 5.

made in this proposal pertained to rights of the victims of sexual violence, ensuring that the victim would not become the accused during the trial.²¹⁰ McDonald's particular interest in the sexual violence as well as her reliance on this proposal to create the Rules of Procedure and Evidence instituted protections for victims of sexual violence that were never before used in an international court. As a leading voice among the judges, McDonald used US law as well as proposals from American women's advocacy groups to devise the protections for victims and witnesses while still upholding the rights of the accused.²¹¹

In McDonald's reflections on the ICTY, she observed how uncomfortable men acted on the issue of sexual assault, stating "you know, I think as I sat through trials and consideration of the issue, there is a certain sense, a certain, I don't want to say 'sensitivity,' a certain 'reaction' that men have to this whole business of sexual assault."²¹² As a woman in her position, McDonald ensured the inclusion of sexual assault in indictments as well, even confronting the prosecutor on the absence of sexual assault in several of the indictments.²¹³ Her observation on the reactions to sexual assault reflected the importance of the implementing women in high positions in the ICTY.

McDonald reflected on her time with the ICTY, particularly its effectiveness as a whole. Her main criticism of the ICTY regarded the lack of enforcement. While the Statute of the ICTY stated that compliance among nations is required, no system to

²¹⁰ McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 9.

²¹¹ Gabrielle Kirk McDonald, *Reflections on the Contribution of the International Criminal Tribunal for the Former Yugoslavia*, (2000), 160.

²¹² McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 39.

²¹³ McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 39.

enforce this was present.²¹⁴ Non-compliance was widespread in the initial years of the ICTY, especially among the former Yugoslavian nations of Serbia, Republika Srpska, and Croatia in addition to other member nations of the UN.²¹⁵

By way of example, while over seventy people had been indicted by mid-1997, only eight were in custody. States were reluctant to provide staff or funds, declined to order the 60,000 peacekeepers in Bosnia to assist what few investigations the prosecutor had, and it had been said, refused to provide it the intelligence information that would have allowed the investigation of those who instigated and directed the violence.²¹⁶

The lack of support for the ICTY made the initial years problematic for McDonald and the other judges. Antonio Cassese, the first president of the ICTY, reported non-compliance five separate times to the Security Council.²¹⁷ At the onset of McDonald's presidency in 1997, cooperation had increased substantially due to international activist efforts. However, non-compliance once again became an issue after the conflict in Kosovo began. This resulted in McDonald reporting non-compliance to the Security Council six times within one year.²¹⁸ Without enforcement capabilities there was little McDonald or others could do in regards to state non-compliance.

During the two years that McDonald served as president, she expanded the ICTY and adopted measures to bring about expedited trials. Indictments that had been made years before were beginning to transition to trial. In response to the influx of cases at trial, McDonald requested three additional judges, as well as two additional courtrooms.

²¹⁴ Gabrielle Kirk McDonald, "Problems, Obstacles and Achievements of the ICTY," *Journal of International Criminal Justice* 2 (2004).

²¹⁵ McDonald, *Reflections on the Contribution of the International Criminal Tribunal for the Former Yugoslavia*.

²¹⁶ McDonald, *Reflections on the Contribution of the International Criminal Tribunal for the Former Yugoslavia*, 160.

²¹⁷ McDonald, "Problems, Obstacles, Achievements of the ICTY."

²¹⁸ McDonald, "Problems, Obstacles, Achievements of the ICTY."

Additionally, she adapted the Rules of Procedure and Evidence in 1998 to include new rules for trial efficiency.²¹⁹ Because of her expansion of the ICTY, it was possible to hold multiple trials simultaneously, which alleviated the backup of cases.

McDonald observed the lack of interest in the ICTY in the US, but more importantly, the lack of awareness and understanding of the ICTY in the former Yugoslavia.²²⁰ The misrepresentation of the ICTY was extensive in the former Yugoslavia, particularly because of the distance of The Hague from the actual site of the crimes.²²¹ McDonald responded to the misconceptions of the ICTY by establishing the Outreach Programme in 1999. The Outreach Programme promoted the ICTY in the former Yugoslavia by providing information on the accomplishments and works of the ICTY.²²² The efforts in the Outreach Programme also included bringing judges and lawyers from the former Yugoslavia to The Hague who "watched the trials, they could speak one-on-one to the judges, they spoke to the Victims and Witnesses Unit, the prosecutors, and the Registry, the whole thing. They got an understanding that we're not sitting in The Hague with horns, trying to go after any group of people."²²³ The Outreach Programme attempted to dispel misconceptions of the ICTY in the former Yugoslavia.

McDonald's reflections on the ICTY involved the difficulties she faced as a judge and president, yet she still concluded positively on the work of the ICTY. "The Tribunal has expanded the jurisprudence of international humanitarian law. Secondly, it has

²¹⁹ McDonald, "Problems, Obstacles, Achievements of the ICTY."

²²⁰ McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 57.

²²¹ McDonald, "Problems, Obstacles, Achievements of the ICTY."

²²² McDonald, "Problems, Obstacles, Achievements of the ICTY."

²²³ McDonald, "The Ad Hoc Tribunals Oral History Project: An Interview with Gabrielle Kirk McDonald," 60.

demonstrated that the rule of law is an integral part of the peace process. Third, the tribunal has proved that international criminal justice is possible.”²²⁴ McDonald commended the ICTY for the procedure it established, which would be implemented by other international and national bodies. Additionally, McDonald acknowledged the awareness that the ICTY brought to the violations of human rights and the need to prosecute these violations.²²⁵ At the local level, the ICTY allowed for the possibility of reconciliation in the former Yugoslavia by prosecuting the criminals, developing law to be established in local courts, and by allowing victims to put their suffering on record.²²⁶

The UN sought to reflect the effectiveness of the ICTY on prosecuting sexual violence. Resolution 1820, adopted by the Security Council on June 19, 2008, analyzed the development of international gender justice and called for the Security Council to release a review on the ad hoc international criminal tribunals of Yugoslavia, Rwanda, and the Special court for Sierra Leone.²²⁷ This Resolution was part of the UN response to gender violence in the wake of the new century.

Noting that civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.²²⁸

²²⁴ McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 167.

²²⁵ McDonald, “The International Criminal Tribunals: Crime and Punishment in the International Arena,” 684.

²²⁶ McDonald, “Problems, Obstacles, Achievements of the ICTY.”

²²⁷ UN Security Council, *Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]*, 19 June 2008, S/RES/1820 (2008).

²²⁸ UN Security Council, *Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]*, 19 June 2008, S/RES/1820 (2008).

The international attention on the crimes of sexual violence in Bosnia led to the UN's implementation of policies for the sole purpose of addressing and eliminating sexual violence. Documents such as Resolution 1820 were published by the UN Security Council in the wake of concentrated gender violence, not only in Bosnia, but in Rwanda and Sierra Leone as well.²²⁹ Its purpose of the resolution was to analyze the efficacy of international criminal tribunals in addressing and implementing proper procedures to successfully convict perpetrators of sexual violence.

In response to Resolution 1820, the UN Department of Peacekeeping Operations published the *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820* in March of 2009.²³⁰ This review provided an in-depth analysis of the cases from ICTY regarding convictions for sexual violence. A significant finding in this review addressed the nature of sexual violence in Bosnia:

At the ICTY, a noticeable feature of relevant judgments is that sexual violence against civilians formed part of and flowed from the so-called 'ethnic cleansing' of areas coveted by parties to the conflict. Sexual violence

²²⁹ Un Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*, 9 March 2009, http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf.

²³⁰ Un Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*, 9 March 2009.

centering on detention centres, including in situations amounting to sexual slavery of women and girls, comprise a considerable part of the findings²³¹

Furthermore, the ICTY did not limit its judgments on sexual violence to instances of rape as a crime against humanity. Sexual violence in the form of torture, enslavement and persecution were tried as war crimes as well as a crime against humanity.²³² The ICTY addressed the multiplicity of the types of sexual violence in the Bosnian genocide. This review outlined specific cases in which men were convicted for crimes of sexual violence as war crimes, crimes against humanity, or genocide. As of September 2016, 78 individuals were indicted for crimes including sexual violence and 32 were convicted for crimes of sexual violence. 14 individuals were acquitted for charges of sexual violence, nine died before the end of their trial, and six cases were transferred to a national jurisdiction. Lastly, 11 cases involving charges of sexual violence were still in trial in as of September, 2016.²³³ When comparing these numbers to the estimated tens of thousands instances of rape, it is difficult to maintain the success of the ICTY in bringing justice to the victims of sexual violence. The ICTY set an international standard for prosecuting sexual violence. The efforts of this tribunal, despite the apparent low numbers, cannot be ignored. Without any prior jurisdiction, the ICTY managed to formulate extensive procedures to safeguard the rights of the victims and witnesses of

²³¹ Un Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*, 9 March 2009.

²³² Un Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*, 9 March 2009.

²³³ ICTY Official Site, “Crimes of Sexual Violence: In Numbers”
<http://www.icty.org/en/in-focus/crimes-sexual-violence/in-numbers>.

sexual violence, enabling victims to come forward and testify against their perpetrators without fear of retaliation. Further, the ICTY expanded the way in which sexual violence was prosecuted under crimes against humanity, grave breaches, and genocide. The casework from the ICTY on sexual violence was imperative to the future of prosecuting sexual violence in the international tribunals to come.

The ICTY initiated a precedent in prosecuting sexual violence, which would be carried on through subsequent international tribunals. The International Criminal Tribunal for Rwanda (ICTR), established in 1994, followed the example of the ICTY in convicting sexual violence. The ICTR also set its own precedent for prosecuting sexual violence. Unlike the ICTY, the ICTR was able to prosecute rape as genocide and establish a solid definition of rape. The *Akaseyu* case rendered the decision:

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a widespread or systematic attack;
- (b) on a civilian population
- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.²³⁴

The *Akaseyu* case improved the definition of rape. The ICTR followed the model of the ICTY closely in prosecuting sexual violence, even improving on it. Further, the ICTR was able to charge rape as genocide. The *Akaseyu* case held that rape and sexual violence constituted genocide in the attack on Tutsi women.²³⁵ *Akaseyu* was found guilty of Genocide and Crimes against Humanity for extermination, murder, torture, rape, and

²³⁴ *Prosecutor v. Akaseyu*, ICTR 96-4-T (September, 1998) Para 596.

²³⁵ *Prosecutor v. Akaseyu* ICTR-96-4-T (September, 1998), Para 731.

inhuman acts on September 2, 1998.²³⁶ Decisions rendered in the ICTR revealed that the ICTY was effective in establishing a guideline for the prosecution of sexual violence. By improving on the definitions of sexual violence in the ICTY, the ICTR developed significant casework that would not have been possible without the influence of the ICTY.

The ICTY further influenced the Rome Statute of the International Criminal Court (ICC). The Rome Statute was signed July 17, 1998, which established the ICC.²³⁷ ICTY standards for prosecuting sexual violence influenced the Rome Statute prohibiting rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization as crimes against humanity and war crimes in international and non-international armed conflicts.²³⁸ Jurisdiction from the ICTY as well as the campaigning of the Women's Caucus ensured that sexual violence would no longer be ignored under international law. Sexual violence was no longer listed under "outrages upon personal dignity."²³⁹ The Rome Statute utilized the ICTY's Rules of Procedure and Evidence in formulating gender policy as well. The ICC established that corroboration was not necessary and that consent and sexual history of the victim would not be admissible as evidence.²⁴⁰ The influence of the ICTY on the Rome Statute was evident. Further, the ICC built a more comprehensive

²³⁶ *Prosecutor v. Akaseyu* ICTR- 96-4-T (September, 1998) Verdict.

²³⁷ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

²³⁸ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

²³⁹ Richard Goldstone and Estelle Debon, "Engendering Accountability: Gender Crimes Under International Criminal Law," *New England Journal of Public Policy* Vol. 19 (2003), 134.

²⁴⁰ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

framework for the prosecution of sexual violence.²⁴¹ Through the precedents established in the ICTY, gender violence was no longer considered a by-product of war or an attack on one's honor. The ICTY established that sexual violence would be prosecuted, how it would be prosecuted, and protections for those victims and witnesses of sexual violence.²⁴² As the first international criminal tribunal to prosecute sexual violence in its totality, the ICTY was the groundwork for future tribunals.

Although sexual violence has always been an element of war, it was largely ignored, and treated as though it were impossible to avoid. It was not until the ICTY that sexual violence was realized for what it was, a violent attack on women that should be prosecuted under international humanitarian law. The reports from humanitarian organizations, the media, and political organizations during the Bosnian conflict influenced this new understanding. Furthermore, the larger women's movement and newfound feminist advocacy prompted the UN to fully address the issue of gender violence in war. Sexual violence was now considered severe enough to prosecute through the action of Western media and aid during the Bosnian conflict. To address the criticism of Western media and aid, the UN established the ICTY, which defined its stance on women's rights violations and their intention to punish the criminals behind it. The ICTY formulated the procedures for later tribunals to follow in prosecuting sexual violence.

²⁴¹ Goldstone and Debon, "Engendering Accountability: Gender Crimes Under International Criminal Law," 136.

²⁴² Goldstone and Debon, "Engendering Accountability: Gender Crimes Under International Criminal Law," 123.

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