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# Bringing War Criminals to Justice and Justice to Victims: Mass Rape in Bosnia-Herzegovina and the Efficiency of the ICTY

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*SIT Study Abroad*

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Bringing War Criminals to Justice and Justice to Victims:  
Mass Rape in Bosnia-Herzegovina and the Efficiency of the ICTY

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## *Abstract*

This paper investigates if the International Criminal Tribunal for the Former Yugoslavia has been efficient in achieving its main objective of “bringing war criminals to justice [and] bringing justice to victims.” This study explores the historical context by which the ICTY was created, and therefore examines the disintegration of Yugoslavia, focusing specifically on the Bosnian War. During this conflict, rape was employed as a method of warfare; this paper presents a brief theoretical examination of rape as a war weapon and analyzes rape and sexual violence as explicit methods of ethnic cleansing in Bosnia-Herzegovina. It explores the evolution of gender and the protection of women in international humanitarian law preceding the ICTY, and discusses the development of gender strategy at the Tribunal. The successes and failures of this strategy are analyzed through four critical Tribunal cases involving charges of rape and sexual violence in Bosnia-Herzegovina.

Finally, this study analyzes the Tribunal’s efficiency in achieving its published objectives, drawing on concerns voiced by both international organizations and individuals interviewed for this research. Efficiency is examined as not only as bringing justice through judicial avenues, but through outreach and relationships with Bosnian organizations, survivors and victims as well. The conclusions of this paper acknowledge the complexities surrounding the Tribunal and its limitations, but call on the international community to combat the failed systems of instituting justice to victims of the Bosnian War, specifically sexual violence victims and their children.

**Key words:** rape, mass rape, war crime, ethnic cleansing, Bosnia-Herzegovina, International Criminal Tribunal for the Former Yugoslavia (ICTY)

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## *Introduction*

Rape has historically evolved as an integral component of warfare, a militarily accepted battle strategy that has long gone unpunished under the shield of combat. Every major war has observed instances of rape, but the atrocities of the Bosnian War and subsequent media coverage prompted an international outcry for justice. Between 1992-1995, approximately 30,000 Bosnian Muslim women were raped and sexually assaulted, the majority of them by Serbian men.<sup>1</sup> Many of these women were held captive, forcefully impregnated and induced to give birth to children of mixed ethnicity, supposedly as a method of eliminating an entire population. These events have been internationally denounced as part of an ethnic cleansing campaign in which Bosnian Serbs targeted the country's Muslim population specifically.

In May 1993, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in response to immense pressure from local and international human rights advocates and the demand for a mechanism to prosecute high-ranking officials responsible for human rights violations occurring within the former Yugoslav territory. The ICTY established rape as a crime against humanity for the first time in international criminal law, and has been judicially successful in bringing numerous war criminals to justice.

Since its inception, the Tribunal has faced speculation from human rights activists, feminists and scholars internationally. There has been some criticism of the ICTY's handling of rape and sexual assault charges, and concern that women's rights are still not fully considered in prosecution. International organizations, including Amnesty International, have expressed concern that the United Nations' "Completion Strategy" for the Tribunal has negatively affected the prosecution of sex-related crimes. Additionally, the ICTY has been accused to failing to

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<sup>1</sup> See "majority" in *Definitions*

reconcile the needs to victims with the desires of the Prosecution, and has been reluctant in establishing a relationship with the community it serves. This essay will discuss the disintegration of Yugoslavia, analyze rape as a method of warfare, examine the ICTY's successes and failures in prosecuting gender crimes of the Bosnian War, and attempt to answer the question of whether the Tribunal has efficiently pursued and achieved its goal of "bringing war criminals to justice [and] bringing justice to victims."<sup>2</sup>

### *Methodology*

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<sup>2</sup> International Criminal Tribunal for the Former Yugoslavia

My research was conducted using primary and secondary methods, from reading existing publications and conducting interviews. My paper relies heavily on secondary sources, because I felt it imperative to introduce historical context and external opinion in order to fully gauge the responses I received in my primary research and configure my analysis. I gathered the majority of historical information from reading articles and journals published on the breakup of the former Yugoslavia, the Bosnian War, and the methods of rape employed within them. I utilized articles analyzing rape and war rape in order to supplement my analysis. The weaknesses of this research are primarily related to dates of publication: it was difficult to find articles about the Bosnian War written after 1995 that were useful to my project. Most of the journals I found were written as the war was ending and the international community had begun to respond to the mass human rights violations committed, and therefore many of the arguments are emotionally charged and one-sided. This made it somewhat difficult to present my research in a non-biased manner, but also encouraged me to examine accounts and material from all sides, which I believe improved the quality of my research.

I researched publications regarding the International Criminal Tribunal for the Former Yugoslavia and pre-existing international laws and court systems. The majority of these articles were written in recent years, since the inception of the ICTY. I interviewed an official related to the ICTY, who requested their name and relationship with the court be omitted, because I felt that it was important to get a first-hand understanding of evolutionary and current gender strategy at the Tribunal. The ICTY offers all case transcripts, decisions, and information online as public record, so I was able to go right to the primary sources for much of my information.

I also used Patricia Seller's keynote address at American University as a primary resource and interviewed Emina Bužinkić of the Croatian Youth Network and Iva Vukušić,



formerly of the war crimes department at the Sarajevo Tribunal. The ability to talk to people with first hand experience of the war and its wake was crucial to developing a well-rounded examination of the circumstances.

There were several limitations in my research that I had to reconcile in order to complete my project. The greatest initial limitation was that as an American student, I have no previous experience researching this field. I actually had very little knowledge regarding the circumstances of the war or the ICTY before I began this study. To resolve this, I did a large amount of research before beginning my project in order to ensure that I would be able to understand the subject, and read pre-existing ISPs related to my topic.

Sexually violent atrocities were committed on all sides during the Bosnian War by many ethnic groups, including by Croat and Bosnian forces. For the purposes of my research, I focused only on crimes committed by Serbian men on Bosnian Muslim women, and excluded rape cases and ICTY cases regarding other instances. Numerous studies and testimony from international organizations, the ICTY and United States Central Intelligence Agency maintain that the majority of crimes were committed by Serb men against Bosnian Muslim women as a method of ethnic cleansing.

Another limitation I encountered was the definition of rape as applied to my paper: many sexual abuses that did not constitute legal rape were also very prevalent in Bosnia, but for the purpose of statistics and analysis I focused only on legally defined rape.<sup>3</sup> There were some cases of sexual violence against men in Bosnian rape camps, and these instances have been documented in ICTY testimony and decisions. However, a large part of my research focuses on war rape as an extension of male dominance over women, and the cases involving men are

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<sup>3</sup> See *Definitions*

extraordinary. Most of this essay focuses solely on gender-based violence against women, while the sexual abuse of men is mentioned briefly.<sup>4</sup>

My initial assumption regarding this research was that I would find strong evidence of the inefficiency of the ICTY in bringing justice to Bosnian rape victims. This was based on very basic previous research and general knowledge about the Tribunal and the war. Admittedly, I began this research without much academic knowledge regarding the ICTY, but an emotional belief that the Tribunal had not done its duty in providing justice and retribution for sexual assault victims. After completing my research, I have learned that the situation is far more complex than I can still fully understand, and that a myriad of factors affect the Tribunal's efficiency and limitations.

### *Definitions*

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<sup>4</sup> Ibid

## **Rape**

This paper utilizes Susan Brownmiller's definition of rape, that "if a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."<sup>5</sup>

## **Ethnic cleansing**

Ethnic cleansing is defined in this research using Salzman's definition, as "an act intended to render an area ethnically homogeneous by removing members of a given group through the use of concentration camps, torture, sexual violence, mass killings, forced deportations, destruction of private and cultural property, pillage and theft, and the blocking of humanitarian aid."<sup>6</sup>

## **Gender-based crimes**

Gender crimes are violations against a gender as a collective group and target members with the intention of demoralizing the group as a whole. In this paper, the term "gender crimes" and statistics relating to rape refer explicitly to crimes against women as a collective, unless otherwise stated. To quote Alice Hansen, "Although men were sexually assaulted during the war in the former Yugoslavia, it is virtually never discussed, making the rape victim identity one that is created as entirely female."<sup>7</sup> Additionally, It can be argued that gender-based violence in the Bosnian war is such because it targeted women not only for their biological sex, but attacked the societal gender roles that women traditionally filled.<sup>8</sup>

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<sup>5</sup> Susan Brownmiller via Neill

<sup>6</sup> Diken and Lausten 113

<sup>7</sup> Hansen 27

## **Bosniak**

This term surfaced in the 1990s and serves as the name for Bosnia-Herzegovina's Muslim population.

## **Chetnik**

Originally, this term was used to identify a member of the Serbian nationalistic guerrilla movement that began in World War II and fought against the Yugoslavian communist guerrilla force, but it was revived during the breakup of Yugoslavia. According to Encyclopedia Britannica, "Serb nationalists, associating the term with loyalty and an active defense of the nation, used it to describe various paramilitary formations that fought for the Bosnian Serb cause."<sup>9</sup>

## **Majority**

Rape, murder, and torturous acts were committed by all sides during the Bosnian War; this research claims that the majority of sexual violence was committed by Serbian men against Bosnian Muslim women, and focuses on those crimes. This statement is archetypal in reports from international organizations including the United Nations and Amnesty International, the estimates of international governments including the United States, and testimony from the International Criminal Tribunal of the former Yugoslavia.

## *Literature Review*

To comment on or critique the International Criminal Tribunal of the Former Yugoslavia (ICTY) on its efficiency necessitates a base knowledge of understanding the historical context

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<sup>9</sup> Encyclopedia Britannica, History and Society, "Chetnik."

surrounding the breakup of Yugoslavia and the subsequent Bosnian War. *Mass Rape: The War Against Women in Bosnia-Herzegovina* by Alexandra Stiglmayer is arguably one of the most important publications written about gendered crimes in Bosnia, and supplied most of my base research regarding the former Yugoslavia. She discusses the history of Serbian nationals pre-dating the formation of Yugoslavia, which is critical to understanding the conflict surrounding the Bosnian War.

Danise Aydelott's article "Mass Rape During War: Prosecuting Bosnian Rapists Under International Law", reads like a gold-mine of Bosnian War history, and provides a concise and detailed historical background of the breakup of Yugoslavia and the context in which subsequent wars began. For my research purposes this information is incredibly useful, as the history of the former Yugoslavia is exceptionally complex and lead to mass human rights violations on all sides. Aydelott examines the inherent nationalism that proved to be Yugoslavia's ultimate downfall, which paramount in understanding what started the Bosnian war, and why Bosnian Muslim women were targeted in an ethnic cleansing.

Aydelott argues that rape during war dates back to Biblical and Medieval times, and provides a chronology of rape instances in every major war. She contends that the fact rape is illegal is overlooked during war, and rape has become a militarily accepted battle strategy. She further discusses the evolution in language surrounding gender-based war rape, documenting the discourse development of war rape among international players like Amnesty International and the United Nations.<sup>10</sup>

The article "Prosecuting Rape as a War Crime: Speaking the Unspeakable" by Tamara Tompkins also explores the dynamics of rape in war context both historically and theoretically in

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<sup>10</sup> Aydelott 58

the feminist pedagogy. Written in 1994, Tompkins' essay was drafted at the end of the Bosnian War, when the international community was just beginning to make sense of the atrocities committed in the years prior. She argues that historical inequality and male entitlement culture that has been generationally sustained allows wartime rape to be used as a method of troop mollification.<sup>11</sup> This assertion is both intriguing and interesting, as my research expands on this point and questions the extent of male entitlement culture as the catalyst for rape.

Kevin Neill expands on this idea in his article, "Duty, Honor and Rape: Sexual Assault Against Women During War," by arguing that war specifically affects women in ways that it does not affect men, as violence against them can add a negative effect intended to erode their social and environmental conditions.<sup>12</sup> This idea of women being attacked as a byproduct, or as an affront to or for the comfort of men, is recurrent in all of the articles presented here.

A key part of understanding the conflict presented in this research is addressing the theory behind war rape as a gendered crime. Several sources contributed heavily to my knowledge in this area, including Patricia Weitsman's article, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda." She analyzes the historical significance of war rape, as well as its potential to demonize and destroy entire cultures, especially in patriarchal societies. Similarly, Diana Milillo's "Rape as A Tactic of War," introduces the idea of "in-group" and "out-group" mentality in situations of war rape, a theory that I utilized and expanded in my research to reflect the conflict between Bosnian Serbs and Muslims. The article "Becoming Object: Rape as a Weapon of War," by Bulent Diken and Carsten Bagge Lausten presents what they call a "Brotherhood of Guilt," in which individuals within a community transgress social norms that individually they would not. This applies directly to the systematic

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<sup>11</sup> Tompkins 964

<sup>12</sup> Neill 2

rape of women in the Bosnian War, in which gang rape was heavily prevalent as a method of sexual assault.

Rape in the Bosnian War transcended the instances of its predecessors, as the method of rape transformed from a tool of dominance and discrimination into a means of ethnic cleansing. Tompkins makes a very convincing argument regarding this distinction: she points to the xenophobic, deliberate targeting of Muslim women in the forms of rape, forced prostitution, assault by acquaintances, and enforced pregnancy as means of ethnic cleansing.<sup>13</sup> Aydelott adds to this, additionally citing the widespread abuse has been perpetrated by a majority<sup>14</sup> of Bosnian Serb forces on a majority of Bosnian Muslim women, the rapes have been committed on women and girls of all ages, and the “rape camps” where Muslim women were be taken to be abused. The international community’s response to these crimes is incredibly important to my research, because my essay ultimately examines the ICTY, it is imperative to note why these crimes differ from instances of wartime rape in the past, and why the international response to the Bosnian War was substantially different.

Another essential component of researching and understanding systematic rape in the Bosnian War is why Muslim women and girls were targeted. Tompkins writes that a central tenet of Muslim life is the separation of gender roles and the sanctity of women’s sexuality, and virginity is highly valued.<sup>15</sup> Rape violates this separation in the most traumatic of ways, and that the psychological aspects of the assault affect the victim’s family life, social life, religious and private life daily. In the Muslim culture, rape is seen as an attack on the family structure as a whole. For Bosnian Serbs, raping Muslim women provided the maximum amount of lasting

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<sup>13</sup> Tompkins 966

<sup>14</sup> As mentioned in my paper, numerous intelligence agencies and international organizations maintain the majority of sexually violent crimes were perpetrated by Serbian men against Bosnian Muslim women

<sup>15</sup> Tompkins 966

damage and was demoralizing to all Bosnians, effectively asserting nationalism over an entire people. Religion is a major component in understanding the aforementioned distinction between Bosnian war rape and traditional rape in wartime, and therefore is critical to my research. Neill also comments on the specific targeting of Muslim women, pointing to the community's condemnation of abortion and valuable assessment of sexual purity.

Since my paper ultimately examines the efficiency of the ICTY, it is important to have an understanding of why the tribunal was primarily created. At the end of the war, many Western feminists and international organizations felt that existing international legal discourse was not sufficient in prosecuting the human rights atrocities that had occurred. The ICTY was conceived in a manner similar to the Nuremburg courts with the expectation of being able to bring justice where pre-existing courts had failed. Both Aydelott and Tompkins argue that pre-existing laws were adequate to try Bosnian war criminals, even for rape and gender-related crimes. Tompkins contends that there have always been laws on the books prohibiting wartime rape, but historically they have not been enforced or investigated because rape has traditionally been viewed as an unfortunate byproduct of war. She presents legal discourse dating back to the Middle Ages that explicitly outlaw sexual atrocities and offers a substantive chronological timeline of international laws surrounding the prosecution of rape, examining instances where they were effective or failed to be utilized. Aydelott makes an adamant argument that the international laws prohibiting rape during war are already in place and, if endorsed properly, are sufficient for prosecuting rape in Bosnia without the need for an international criminal tribunal. She also introduces the problem of new countries following the breakup of Yugoslavia, individual countries that had not signed many of these international treaties.<sup>16</sup>

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<sup>16</sup> Aydelott 607



Patricia Viseur Sellers' keynote address "Gender Strategy is Not a Luxury for International Courts" picks up where Aydelott leaves off, analyzing the ICTY and its prosecution of gender crimes since its inception. Sellers, the former Legal Advisor for Gender of the Office of the Prosecutor at the ICTY, led the team that essentially introduced gender strategy into the court and conceived of the policies and protocols surrounding it. Her article is exceptionally helpful, because it explains the legal language involved in gender crimes in layman's terms, and gives a chronological timeline for the evolution of gender in the court. Sellers and her team were key in introducing gender to the ICTY, and she provides an evolutionary timeline of this process. She chronicles how she came into the position of the Legal Advisor for Gender, and discusses the difficulties in reconciling the intentions of the court and the demands of women's groups internationally.

Sellers details her meetings with NGOs, ICTY officials, women and victims advocates groups, and problems within the ICTY. Inevitably, she creates a well-rounded discussion of the path to gender inclusion in the international court. Her article provides a first hand account of gender introduction at the ICTY, something that my research would be lacking without. Sellers' former position at the ICTY makes her paper very credible and her information factually sound. She acknowledges the trials of introducing gender into the court, but also recognizes the crucial jurisprudence produced by those formative years, and the progress made by the ICTY in the prosecution of gender crimes.<sup>17</sup> This examination of both the positive and negative aspects is important and it prevents bias research.

The question my essay seeks to answer is whether the ICTY has been efficient in its objectives. While much of this analysis comes from primary sources, some work has been done

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<sup>17</sup> Sellers

concerning the Tribunal's productivity. Julie Mertus' paper, "Women's Participation in the International Criminal Tribunal for the Former Yugoslavia: Transitional Justice for Bosnia-Herzegovina" analyzes the role that women have played in developing gender-strategy at the ICTY, and argues that the Tribunal has not reached its full potential in incorporating women into its work. Additionally, Mertus highlights the lack of outreach that the ICTY has extending to victims and inhabitants of former Yugoslav territories.<sup>18</sup>

Amnesty International is one of many international organizations that are vocal in criticizing the ICTY, and in 2009 published the article "Whose Justice?" The Women of Bosnia-Herzegovina Are Still Waiting." This report acknowledges the Tribunal's successes but echoes Mertus' claim that their obligations to the victims have gone unfulfilled. Amnesty International points to several factors, including the United Nations "Completion Strategy" for the Tribunal, the lack of victim restitution and the failure of the ICTY to fully protect and provide support to witnesses before and after they testify.

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<sup>18</sup> Mertus 6

“On August 12, some foreigners came to the prison, and the Serbs were told they had to release us. On the evening between August 12 and 13, a thirty-year old woman and I were taken away and we were raped on the benches of the sports hall. The number of men who came to rape us increased. First, there were three, then four and five. I eventually counted twenty-eight different men who raped me that night, but I lost consciousness after that. They must have thrown water on me, because I was all wet when I awoke... We were taken back to [the workers’ quarters at] Buk Bijeli, and there I was gang-raped again by four men dressed in camouflage. The other woman who was being raped started to cry; the soldiers started to yell at her. They started to scream, ‘Your guys are doing the same things we are doing.’”  
- M., Muslim woman of Foča, Bosnia, 1992.<sup>19</sup>

### *The Breakup of Yugoslavia*

The Bosnian War rose from the turbulent collapse of the former Yugoslavia in 1991, after nationalistic secession left the country divided into several independent states. At the end of the Cold War, Yugoslavia began to suffer from the weakening of the Communist system as its official party was losing ideology to individual nationalistic movements. The country, formed in 1918 by the merging of Montenegro and the Kingdom of Serbia with Croatia and Slovenia, was tenuous from its inception, as the initial union was unable to fully reconcile years of animosity

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<sup>19</sup> Tompkins 845

over each republic's traditions, political and economic climates and ethnic differences.<sup>20</sup> This antagonism was especially prevalent among Serbs, as Serbian history is deeply entrenched in conflict with Muslims. After temporarily gaining independence in the 12<sup>th</sup> century, the Serbian Empire fell in 1389 when its army was defeated by the Ottoman Empire. Serbia had been historically rooted in orthodox Christianity and influenced by the eastern Roman church, and was now faced with religious and social oppression. Many Serbs fled to Croatia and to Northern Turkey, and this displacement generated the importance of what was considered the rightfully Serbian holy land.<sup>21</sup>

Serbia was under Turkish rule for almost five hundred years, from the 14<sup>th</sup> century to the 19<sup>th</sup> century, and their attempt at 19<sup>th</sup> century independence was centered on the goal of driving all Muslims from the Balkans and assimilating remaining populations into what they deemed "Greater Serbia." The Serbs rebelled against the Ottoman Empire's occupation, destroying Turkish cultural artifacts including architecture and mosques, and killing Muslims in the region. The conflict continued during the Serbian-Turkish Wars of the 1870's and in the Balkan Wars of 1912 and 1913 when Serbian combatants massacred Albanian Muslims and Sandzak Muslims in the Sandzak of Novi Pazar.<sup>22</sup> Tensions were still high years later in the Yugoslav federation, as the relationships between ethnic groups grew exceedingly fragile.

Volatile conflict eased when Josip Broz Tito gained control of the country in 1953, as he gained generally widespread support for his platform of "Brotherhood and Unity" and his insistence on equality among ethnicities. He successfully held the republic together by prohibiting nationalistic movements and promoting cooperation among ethnic groups.<sup>23</sup> His

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<sup>20</sup> Aydelott 600

<sup>21</sup> Stiglmeier 3

<sup>22</sup> Schwartz 71

<sup>23</sup> Hansen 24

progress in creating stability was promising, but after his death in 1980, inherent nationalism and the collision of cultures left Yugoslavia on the verge of economic collapse. In 1989, nationalistic hostilities erupted when amendments were adopted to the Serbian constitution, allowing the Serbian government to impose power and legal control over the autonomous provinces of Kosovo and Vojvodina. This increase in authority enabled Serbia to exert a strong influence over the federal government, leading to objections from the other republics and demands for constitutional reform.

The disintegration of Yugoslavia began in 1991 when the republics of Slovenia and Croatia declared their independence after being unable to agree on the main issues affecting the federation, including the expansion of Serbian power. Bosnia's Muslim and Croatian populations followed suit and opted for secession from the Serb-dominated coalition. Meanwhile, conflict was brewing between the Serbs and Kosovo Albanians, as reports began to surface that Albanians were planning an ethnic cleansing of Serbian nationals, and that violence had begun breaking out towards Serbian women.<sup>24</sup> These reports were largely falsified and exaggerated, but they were encouraged by Serbian leader Slobodan Milošević in an attempt to regain Serbian control of Yugoslavia. The resurrection of "Greater Serbia," the nationalistic ideal that spurred initial conflict in the 1800s, was extremely well received by the economically depressed Serb population. Milošević attempted to keep Yugoslav regions under Serbian control as the country began to fragment, and when Bosnia-Herzegovina claimed independence he demanded that most of its areas remain under Serbian rule.<sup>25</sup> While Serbs were attacking and claiming various parts of the country, the Croats and their former leader Franjo Tuđman were also attempting to secure Croatian sections of Bosnia-Herzegovina.

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<sup>24</sup> Stiglmeier 14

<sup>25</sup> Aydelott 600

Franjo Tuđman and Slobodan Milošević undertook a series of discussions in 1991 known as the Karadžorđevo agreement. These meetings aimed to redistribute Bosnia-Herzegovina's territories between Croatia and Serbia in a manner that annexed Croatian or Serbian majorities in order to expand each country's borders. The Karadžorđevo agreement did not, however, include Bosniaks<sup>26</sup>, the largest ethnic group in Bosnia-Herzegovina, and as a result, the state administration effectively lost control of the entire territory. With little possibility of annexing purely Serbian areas or gaining control of the entire country with the Bosniak population intact, Bosnian Serb forces commenced an ethnic cleansing campaign aimed non-Serb civilians in Eastern Bosnia.

With the alleged support of Slobodan Milošević, many Bosnian Serbs attempted to clear Serb-controlled areas of non-Serb inhabitants. While discrimination against Muslims had subsided under Tito, it was revived as Milošević and Serbian nationals became focused on forcing them out of Europe in the name of a "Greater Serbia." Milošević was often quoted saying that the Bosnian War had been provoked by Turks who sought to re-establish the Turkish Empire.<sup>27</sup> These grievances from five hundred years of occupation became justification for the need of a "Greater Serbia" and widespread xenophobia regarding Muslims of all nationalities.

By the end of 1992, Serbian nationals held control over seventy percent of Bosnia-Herzegovina, even though they only constituted thirty percent of the population. More than 1.5 million people had been displaced by the war, including approximately half of the Bosnian Muslim population, according to a United States State Department report issued that year.<sup>28</sup> The "decline of economic and political conditions, the collapse of the one-party communist system" and the rise of many nationalistic politicians left a breeding ground for violence, and reports of

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<sup>26</sup> See *Definitions*

<sup>27</sup> Schwartz 71

<sup>28</sup> Aydelott 601

human rights violations began surfacing from groups internationally.<sup>29</sup> In October 1992, the UN Human Rights Commission's special envoy to Yugoslavia, former Polish Prime Minister Tadeusz Mazowiecki, reported that "the Muslims of Bosnia-Herzegovina were virtually threatened with extermination" unless the international community intervened to save them. He stated, "Serbian ethnic cleansing does not appear to be the consequence of the war but rather its goal... this goal, to a large extent, has already been achieved through killings, beatings, rape, destruction of houses and threats."<sup>30</sup>

Most research estimates the number of casualties of the Bosnian War between 100,000 - 200,000,<sup>31</sup> and, according to the Research and Documentation Center in Sarajevo, Bosnia, sixty-six percent of casualties resulting from the war were national Bosniaks.<sup>32</sup> Additionally, the United States Central Intelligence Agency concluded that ninety percent of war crimes in Bosnia were acts of ethnic cleansing carried out and officiated by Serbs. The lack of state control over Bosnian areas, communication, infrastructure, and competition between ethnic groups led to a wide range of human rights violations in the region. Numerous ICTY verdicts and indictments assert that Serbian and, to a lesser extent, Croatian forces undertook politically sanctioned ethnic cleansing to create the ethnically pure states of Republic Srpska<sup>33</sup> and Herzeg-Bosnia.<sup>34</sup> The

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<sup>29</sup> Mertus 4

<sup>30</sup> Aydelott 601

<sup>31</sup> European Journal of Population. This estimation varies greatly depending on organization and authors, but there is general consensus that anywhere from 100,000-200,000 casualties occurred, and death tolls may be higher than speculated

<sup>32</sup> Research and Documentation Center in Sarajevo

<sup>33</sup> Serbian-controlled areas of Bosnia-Herzegovina. *"In the Motion, the Prosecution submits that both the existence and implementation of the plan to create an ethnically pure Bosnian Serb state by Bosnian Serb political and military leaders are facts of common knowledge and have been held to be historical and accurate in a wide range of sources. Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, and Vinko Pandurevic". ICTY.*

<sup>34</sup> Croatian-controlled areas of Bosnia-Herzegovina. *"Significantly, the Trial Chamber held that a reasonable Trial Chamber, could make a finding beyond any reasonable doubt that all of these acts were committed to carry out a plan aimed at changing the ethnic balance of the areas that formed Herceg-Bosna and mainly to deport the Muslim population and other non-Croat population out of Herceg-Bosna to create an ethnically pure Croatian territory*

Serbian media attempted to cover up acts of politically sanctioned violence against Bosniaks by blaming them on extremist minority groups and other ethnicities. Systematic human rights violations included murder, imprisonment, deportation, destruction of property, torture and rape.<sup>35</sup> An estimated thirty percent of Bosniak civilian victims were women and children, and while women from many ethnic groups were subjected to mass rape, the overwhelming majority of them were victimized by Bosnian Serbs. Between 1991-1995, between 20,000-50,000 Bosnian Muslim women and girls were raped in their homes, in public, and in rape camps established for that very purpose.<sup>36</sup>

### *An Analysis of Rape in Wartime*

Since the Biblical and Medieval periods, rape has been an integral military battle component. Every major war has experienced mass rape in some form, as the illegality of sexual violence has historically been ignored and unpunished under shield of combat. Rape has long been considered an unfortunate byproduct of conflict, even though mass rape has been proven as an effective battle strategy utilized to gain control of enemy ground.<sup>37</sup> Incidents of rape in militarized conflict have been documented with increasing regularity in the twentieth century. World War II is historically notorious for rape and sexual violence, including instances of Soviet soldiers raping German women, and the forced enslavement of 200,000-400,000 “comfort women” by the Japanese army. Similarly, tens of thousands of women were raped by Japanese

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*within Herceg-Bosna*. Prosecutor v. Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic. ICTY.

<sup>35</sup> Hansen 28

<sup>36</sup> United Nations Office for the Coordination of Humanitarian Affairs. This statistic varies depending on source

<sup>37</sup> Aydelott 588



soldiers in Nanking, China, and approximately 200,000 Bengali women were assaulted during Bangladesh's war of independence from Pakistan.<sup>38</sup> Scholar Patricia Weitsman contends that “tens, even hundreds, of thousands of rapes have been documented in conflicts in Liberia, Peru, Rwanda, Somalia, Uganda, El Salvador, Guatemala, Kuwait, the former Yugoslavia and Sudan.”<sup>39</sup>

Recently, the international community has begun to take sexual violence in wartime more seriously, including the acknowledgement of mass rape as a violation of human rights and women's rights. This is an imperative step in understanding war rape, because, as Susan Brownmiller stated, “rape in war is a familiar act with a familiar excuse.”<sup>40</sup> It is important to note that invisibility of war rape exists largely because rape occurs also during peacetime. Even when no war has been declared, women of every nationality are beaten and raped by men. Although these acts are viewed as criminal offenses, they do not legally constitute human rights violations but instead are counted as everyday hostilities.<sup>41</sup>

Rape is a gender-motivated crime that discriminates against women as a collective and enables men to use their genitalia as a weapon of force. It is “an expression of and contributor to the domination of women by men in every aspect of every society.”<sup>42</sup> Kevin Neill argues in “Duty, Honor, Rape: Sexual Assault Against Women During War,” that rape represents a “virtually universal symbol of terror for the entire female gender.”<sup>43</sup> While it is true that men are sometimes violated in ways similar to women, these cases are typically do not reflect overarching gender discrimination. The vast majority of societies have traditionally embraced a

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<sup>38</sup> Weitsman 563

<sup>39</sup> Ibid

<sup>40</sup> Tompkins 852

<sup>41</sup> MacKinnon 184

<sup>42</sup> Tompkins 852

<sup>43</sup> Neill 2

heteronormative and patriarchal dominance of men over women, and it is within these societies that rape is an exceptionally powerful form of torture. According to Patricia Weitsman, when a “woman’s standing derives from her relationship to the men in her family: her brothers, father, husband and sons,” the shame of victimization is torture that outlives a physical crime.<sup>44</sup>

Male entitlement culture and the construction of masculinity are exceptionally important contributors to understanding rape. These intrinsic ideas encourage men to be the aggressive counter-parts to their passive, feminine women. Boys are inundated with the notion of female objectification often before they go through puberty, and are inherently taught that their anatomy lends them to sexual privilege that women do not possess.<sup>45</sup> Social dominance theory, which contends that members of a dominant group often truly believe in and act in ways that legitimize their power, asserts that in this case the notion of inequality is inherent within men, and is not something that can be easily unsubscribed to. Male identity and control are often equated with active expressions of masculinity, and allow sexual aggression to be seen as a masculine assertion, which thereby enables rape to be viewed as a masculine act. The culture of aggressive masculinity inevitably creates an “in-group” and “out-group” mentality, which is exacerbated by strong group identity in wartime. Soldiers and collective fighters are enabled to use sex as an “in-group” means of supporting national identity. This is seen in cases of rape as troop mollification: in some historical instances, sexual assault has been used not as a method of warfare but instead as a means of sustaining the desires of male soldiers, sparing them from boredom and boosting group morale.<sup>46</sup>

Historically, men have viewed themselves as the sole protectors of women, an expression

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<sup>44</sup> Weitsman 564

<sup>45</sup> Tompkins 854

<sup>46</sup> Tompkins 964

of power that rape explicitly violates.<sup>47</sup> This is especially true in instances of war rape, as the majority of these crimes are committed not on a sexual basis, but in compliance with an overall desire to maintain dominance. Patriarchal ideology in war often becomes a cognitive process of intimidation by which men keep women as a gender group in a perpetual state of fear. Shaming the female members of an “out-group” through “rape and sexual assault serves to keep male identity intact by suppressing the power of the out-group’s women.”<sup>48</sup> In doing this, the “in-group” is intrinsically attacking the men of the perceived “out-group” by threatening the power and control that the group has and its ability to protect its women. Rape, combined with this “in-group, out-group”<sup>49</sup> mentality, often become a way in which power is exchanged between men.<sup>50</sup> In this sense, wartime rape discriminates against women as a class, and as a socially unequal gender in an attempt to attack and establish hierarchical masculinity.

As an exaggerated transcendence of rape in peacetime, rape in wartime is principally an act of destruction, not sexual desire. Instances of rape are committed primarily by groups of men rather than individuals, as gang rape encourages the notion of group identity. War circumstances allow soldiers to perform in ways in which they ordinarily would not, and dissociation from personal identity induces many to act without concern for the repercussions of their actions. Identification with the group supersedes personal moral doctrine in wartime, and this decrease in self-awareness breeds what Diken and Lausten argue is a “brotherhood of guilt.” Within a community, it is acceptable for individuals to transgress norms like the understood illegality of rape and murder. This acceptance is transformed into shame when the soldier leaves the

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<sup>47</sup> Milillo 189

<sup>48</sup> Milillo 190

<sup>49</sup> In the instance of the Bosnian War, the in-group, out-group mentality is reflected in ethnicities: Chetnik and Bosniak. It was possible that in these instances, rape and ethnicity combined created a power-struggle between the men of both sides

<sup>50</sup> Hansen 27

community, which is why men in wartime often do not leave their groups.<sup>51</sup> In the Bosnian War, rape was used as an initiation tactic to solidify men as truly Serbian while rejecting the multiculturalism despised by “Greater Serbia.” Many Serbs committed mass rape as an act of nationalism and group identity, acting in the interest of the collective and proving themselves as loyal adherents. Bosnian Muslim women became representatives of the enemy, and demoralizing them was viewed as an affront to the identity and pride of the entire community and an establishment of total Serb superiority. In this regard, Diken and Lausten contend, “soldiers were not just soiled in blood but also baptized in it.”<sup>52</sup>

### *Rape as Ethnic Cleansing in Bosnia-Herzegovina*

Circumstances surrounding the Bosnian War “elevated tactical deployment of sexual assault to an entirely new level.”<sup>53</sup> Reports of human rights violations began surfacing in the early 1990s, and many of them introduced the idea of a Serbian “ethnic cleansing” of Bosnian Muslims. A U.S. State Department report in 1992 accused Serb forces of violating human rights “on a scale that dwarf[ed] anything seen in Europe since Nazi times,” and stated that “the atrocities of Croats and Bosnian Muslims pale in comparison to the sheer scale and calculated cruelty of the killings and other abuses committed by Serb and Bosnian Serb forces against

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<sup>51</sup> Diken and Lausten 124

<sup>52</sup> Diken and Lausten 125

<sup>53</sup> Tompkins 865

Bosnian Muslims.”<sup>54</sup> In her article “Mass Rape During War: Prosecuting Bosnian Rapists Under International Law,” Danise Aydelott argues that one of the principal tools of the Serbian ethnic cleansing campaign was mass rape targeting Muslim women. She insists that many witnesses and scholars are convinced that “mass rape was a deliberate component of the ethnic cleansing plan, committed in order to humiliate Bosnian Muslims into submission and to drive them away so they would never want to return to Bosnia.”<sup>55</sup>

Mass rape in the Bosnian War was an incredibly effective war weapon, as it attacked the Muslim community in a myriad of ways. All sides employed rape as a weapon, but the majority of sexually violent crimes were committed by Serb forces against Bosnian Muslim. This perceived xenophobia against the Muslim community is a strong argument for rape as a tool of genocide, as strategic rape aims to attack the entire structure of the victim’s society. A traditional Muslim aphorism states: “as our women are, so also is our community,” and this is exactly what many argue Serb aggressors capitalized on in weakening their enemy.<sup>56</sup> A central tenet of Muslim life is the separation of gender roles and the sanctity of women’s sexuality, and virginity is highly valued.<sup>57</sup> Rape violates this separation in the most traumatic way, and the psychological aspects of assault can affect the victim’s family life, social life religious and daily private life. In many cases, the worth of an unmarried woman is equated to her status as a virgin. As a victim of rape, she may be outcast and no longer seen as socially marriageable.

When the concepts of self and value are inextricably linked to sexual intercourse, women are unable to separate their identities from relationships with men.<sup>58</sup> For this reason, raping Muslim women provided the maximum amount of lasting damage and acted to demoralize all

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<sup>54</sup> Aydelott 602

<sup>55</sup> Ibid

<sup>56</sup> Diken and Lausten 116

<sup>57</sup> Tompkins 966

<sup>58</sup> Weitsman 564

Bosnians, effectively asserting nationalism over an entire people. Rape in many cultures is seen as a shame on the familial structure, and as an end result the family often uproots. As a tool of ethnic cleansing, mass rape is therefore incredibly effective in eliminating an community. Diken and Lausten argue that the only guilt of sexually assaulted victims was that they were Muslim, and therefore deemed responsible for the oppression that Serbs experienced under the Ottoman Empire. In her work “Turning Rape Into Pornography: Postmodern Genocide,” Catherine MacKinnon recounts the gang rape of a Muslim woman that horrifically illustrates the xenophobia and misogyny surrounding mass rape in the Bosnian war:

“...[T]he men laugh and chide each other for “not satisfying her,” for not being able to “force a smile out of her, because she is not showing signs of love.” ... The superior who is ordering them says, “She has to know that we are Chetnicks. She has to know that this is our land. She has to know that we’re commanding, that this is our Greater Serbia, that it’ll be like this for anyone who doesn’t listen.”<sup>59</sup>

Forced familial rape was also employed as a means of ethnic cleansing. Diken and Lausten contend that the primary goal of war rape is to inflict trauma and thereby destroy family ties and group solidarity.<sup>60</sup> Some soldiers enlisted family members or acquaintances to partake in rape in order to maximize the motive of humiliation. Recalling her experience in the Doboje rape camp, A., a Muslim woman, said, “[t]hey liked to punish us. They would ask women if they had male relatives in the city: I saw them ask this of one woman and they brought her fourteen-year-old son and forced him to rape her.”<sup>61</sup>

A report issued by Bosnian human rights groups called “The Black Book of Ethnic Cleansing” asserts that at least twenty rape camps existed in Bosnia during the war, where Serb officers repeatedly raped Muslim women and on occasion performed genetic experiments on

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<sup>59</sup> MacKinnon via Tompkins 849

<sup>60</sup> Diken and Lausten 111

<sup>61</sup> Tompkins 870

them.<sup>62</sup> It is argued that these camps implicitly prove the existence of rape-policy, and that even though they were established and controlled by paramilitary forces, political leadership in Belgrade condoned them as a means of warfare.<sup>63</sup> Many of the camps were set up with nearly identical layouts and utilized the same patterns of rape. Additionally, the rapes occurred simultaneously in noncontiguous sections of Bosnia and Serb soldiers often reported in testimony being forced to rape women, even women that they knew.<sup>64</sup>

One of the most notorious rape camps, “Karaman’s house,” held captive women and children as young as twelve. The outdoors sports stadium in Foča, Bosnia was another popular destination for sexual violence; in one instance twenty-eight Serbian soldiers raped and burned a woman there before she lost consciousness.<sup>65</sup> Enforced pregnancy was a practice that occurred often within these camps: Mark Wheeler, a lecturer on Balkan history at the University of London, asserts that “the idea of nationality in the former Yugoslavia is based on descent, and the greatest debasement is to pollute a person’s descent.”<sup>66</sup> Impregnations in these instances were often intended to force Bosnian Muslim women to give birth to children of mixed ethnicity and eliminate the Bosniak population. To quote Professor Francis Boyle’s explanation to the International Court of Justice: “the soldiers rape for the express purpose of making sure they produce Chetnik babies...for the express purpose of preventing the birth of children who would be either Bosnian, or Muslim, or both.”<sup>67</sup> Some women were continually raped until a doctor established pregnancy, and then were often kept hostage until they gave birth or it was too late to

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<sup>62</sup> Aydelott 607

<sup>63</sup> Diken and Lausten 113

<sup>64</sup> Weitsman 569

<sup>65</sup> United Nations Security Council: Unites States submission of information. See quotation page 14

<sup>66</sup> Neill 3

<sup>67</sup> Tompkins 808

seek an abortion. The following is testimony from a female survivor of the rape camp at Dobož in northeastern Bosnia:

“They said that each woman had to serve at least ten men a day. . . . God, what horrible things they did. They just came in and humiliated us, raped us, and later they told you, “Come on now, if you could have [Bosniak] babies, then you can have a Chetnik baby, too.” . . . Women who got pregnant, they had to stay there for seven or eight months so they could give birth to a Serbian kid. They had their gynecologists there to examine the women. The pregnant ones were separated off from us and had special privileges; they got meals, they were better off, they were protected. Only when a woman’s in her seventh month, when she can’t do anything about it anymore, then she’s released. Then they usually take these women to Serbia. . . . They beat the women who didn’t get pregnant, especially the younger women; they were supposed to confess what contraceptives they were using.”<sup>68</sup>

While rape in wartime is characteristically an attack on women as a gender, hundreds of men in the Bosnian War were subjected to rape and sexual violence in detention centers and camps. Male rape shares similar characteristics to the rape of women in war, in that the ultimate objective is typically the assertion of power and dominance over the victim. The effects of male rape are intended to humiliate and intimidate, and as a method of torture rape is incredibly effective as there is an international and historical taboo surrounding men as victims of sexual assault.<sup>69</sup> As of 2010, there have been no trials, either at the ICTY or in local courts, focused solely on the sexual abuse of men, primarily because most male victims have been unwilling to testify or discuss the abuse in public. Emina Bužinkić, the Secretary General of the Croatian Youth Network, believes that “not many men were encouraged enough to serve as witnesses at the ICTY. It is so very humiliating to them that many of them do not even speak about it.”<sup>70</sup>

Most of the reported sexual assaults occurred at the Bosnian Serb-run Omarska detention center in Prijedor, which housed a large number of Bosniak men. One witness testified that he

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<sup>68</sup> Weitsman 570

<sup>69</sup> Karabegović 2

<sup>70</sup> Emina Bužinkić, Interview



was forced to bite off another prisoner's testicles, and the men were assaulted with glass bottles, guns and other objects. Some prisoners were forced to sexually abuse one another, and several people testified that family members were often coerced to perform sexual acts on each other.<sup>71</sup> Bužinkić contends that "Bosnian men were not viewed as men by Serb soldiers in the true sense of the word," and sexually assaulting them was a way for Serbs to exert masculinity and domination.<sup>72</sup>

### *The Evolution of Gender in International Humanitarian Law*

Just as rape has historically been an integral component of warfare, so have the laws of war that proscribe it. Ancient cultures embraced customary codes of conduct during wartime, and military codes of conduct of the Middle Ages authorized capital punishment as the penalty for war rape. Various modern international laws and treaties outlaw rape in warfare, but these prohibitions are largely ignored in areas of conflict. Danise Aydelott contends, "nearly every treaty, convention, and agreement that deals with human rights incorporates a rule of law prohibiting attack on the honor of women and protecting against rape," but believes that although these treaties and laws recognize the right of women to be free from rape, they have not been

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<sup>71</sup> Karabegović 2

<sup>72</sup> Emina Bužinkić, Interview

effectively enforced.<sup>73</sup>

The laws of war have historically revolved around the conduct of combatants, and it was not until the nineteenth century that civilians' human rights became a concern. Early treaties addressing customs of warfare in relation to human rights included the Declaration of Paris of 1856, the Geneva Convention of 1864, the Saint Petersburg Declaration of 1868, the Declaration of Brussels of 1974, and the Hague Conventions of 1899 and 1907.<sup>74</sup> International laws continued to evolve during World War I, and at its conclusion a Commission was established to investigate human rights violations by Germany and its allies. The Commission recommended the establishment of an international court to prosecute those who aided or perpetrated war crimes. This effort was abandoned following the Treaty of Versailles, but was revived towards the end of World War II and at Yalta. Here, the Allies agreed that an "international criminal tribunal should be established to bring all war criminals to just and swift punishment."<sup>75</sup> This initiative led to the establishment of the Nuremberg and Tokyo Tribunals; convictions of serious war crimes were secured for nineteen of twenty-two defendants at the Nuremberg trials and twenty-five of twenty-eight defendants at the Tokyo trials.<sup>76</sup> These Tribunals represent a primary attempt at solidifying human rights violations as war crimes under international law. Rape was not included in the listed war crimes of the Nuremberg and Tokyo Charters, but testimony and affidavits of war rape were brought as evidence in the prosecution of crimes against humanity. However, neither court brought successful charges of rape as an explicit crime against humanity: in Nuremberg, sexual violence was included under blanket charges of inhumane acts constituting crimes against humanity, and the Tokyo tribunal judges held that the

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<sup>73</sup> Aydelott 586

<sup>74</sup> Tompkins 880

<sup>75</sup> Tompkins 881

<sup>76</sup> Tompkins 882

rapes committed by Japanese forces constituted war crimes.

A major development in international human rights law came with the enactment of the Geneva Conventions, which further protected the rights of civilians during wartime. The Fourth Geneva Convention was the first binding international treaty that specifically prohibited rape. Article 27 of the treaty states that women are “protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>77</sup> Aydelott argues that the Geneva Conventions provided a solid basis in law for the proposition that human rights should be protected. She maintains that mass rape as a war crime clearly falls under several articles in the Convention, which holds “grave breaches” as war crimes for which states can be held responsible. Article 147 prohibits “willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health.”<sup>78</sup>

Additional protections against rape came with the supplementation of the 1997 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts “Protocol I.” Protocol I provides explicit protection for women against rape during international armed conflicts: Article 76 maintains, “women shall be the subject of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”<sup>79</sup> This article was supposedly adopted because the United Nations believed that women needed protection beyond what was already established in the Geneva Conventions, but the supplement stirred controversy, as some believed the existing law was adequate.

A second supplement, Protocol Additional to the Geneva Conventions of 12 August 1949

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<sup>77</sup> Aydelott 611

<sup>78</sup> Aydelott 612

<sup>79</sup> Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391

and Relating to the Protection of Victims of Non-International Armed Conflicts “Protocol II”, was the first major international agreement on non-international conflicts. Article 4 also explicitly prohibited rape, stating its protection against “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault.”<sup>80</sup> The United Nations was concerned that the protections available within Protocol II would infringe upon state sovereignty, and therefore added a provision stating that “[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the international or external affairs of the High Contracting Party in the territory of which that conflict occurs.”<sup>81</sup>

Women’s rights have only been recently recognized as crucial as an international issue, and the majority of this recognition is within non-binding treaties and declarations. This illustrates a growing concern for the rights of women and the connection between war rape and women’s rights: rape has long been considered a private issue, but the legal acknowledgement of a woman’s right to be free of sexual violence promotes rape discourse to a public forum. Some feminist writers have argued that this distinction in international law between public acts and private actions has been a significant factor in the historical international failure to address human rights violations against women.<sup>82</sup> The inclusion of women’s rights in international legislation, even non-binding legislation, is therefore progressive.

The United Nations has continually expressed concern for the treatment of women, but the long-term international reluctance to address rape explicitly and instead under a blanket of “inhumane acts” is echoed within documents drafted to specifically protect women. The

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<sup>80</sup> Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442

<sup>81</sup> Aydelott 615

<sup>82</sup> Chinkin 334

Declaration on the Protection of Women and Children in Emergency and Armed Conflict notes the need for special protection for women during wartime, but excludes rape from its list of prohibited acts. The declaration states,

“all forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerent in the course of military operations or in occupied territories shall be considered criminal.”<sup>83</sup>

This lack of expressly mentioned rape is also seen in the Hague Conventions Respecting the Laws and Customs of War on Land of 1899 and 1907, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1951, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the International Covenant on Civil and Political Rights, the United Nations Charter and the Universal Declaration of Human Rights. None of these treaties or declarations explicitly prohibits rape, but instead provide overarching protections against “inhuman acts,” and “degrading treatment.”

The Rome Statute, entered into force in July 2002, is the treaty that established the International Criminal Court.<sup>84</sup> The statute was adopted after United Nations General Assembly discussions calling for a permanent international tribunal to prosecute serious international criminals, and for the first time defined the term *gender* in an international criminal law treaty. The Rome Statute’s definitions of crimes against humanity and war crimes explicitly include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any

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<sup>83</sup> G.A. Res. 3318, U.N. GAOR, 29<sup>th</sup> Sess. Sup. No. 31 at 269, U.N. Doc. A/9631(1975)

<sup>84</sup> Hereafter “ICC”

other form of sexual violence.”<sup>85</sup> In Article 6, the Rome Statute provides that sexual violence could be considered a component that satisfies the legal requirement of genocide. All states that ratify the Rome Statute agree to cooperate completely with the ICC in prosecuting crimes against humanity, war crimes, and genocide in their national courts.

*The International Criminal Tribunal for the Former Yugoslavia*

In her article “Rape as a Weapon of War: Women’s Human Rights During the Dissolution of Yugoslavia,” Elizabeth Kohn argues that the violence against women in the Bosnian War changed the international perspective on mass rape and women’s rights in wartime. She maintains that the failure of the international community to stop mass rape in Bosnia demonstrated that the progressive aspirations to protect human rights post-World War II failed to fully consider and protect the rights of women.<sup>86</sup> As the Bosnian War ended, speculation began to surface regarding the prosecution of war criminals under existing laws and courts. There was immense pressure from local and international human rights advocates to provide a “mechanism

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<sup>85</sup> Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II at art. 7(1)(h), U.N. Doc. A/CONF. 183/9 (1998)

<sup>86</sup> Kohn 200

for justice and reconciliation” for victims of harrowing human rights violations. The widespread and well-documented evidence of rape and sexual violence during the Bosnian War prompted public outrage at the ineffectiveness of international legal response. For the first time in history, the United Nations Security Council issued a declaration condemning rape in wartime, calling the rapes occurring in the former Yugoslavia “massive, organized and systematic.”<sup>87</sup>

The Security Council, acting under Chapter VII of the United Nations Charter, issued Resolutions 808 and 827, declaring “an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia in 1991.”<sup>88</sup> The International Criminal Tribunal for the former Yugoslavia<sup>89</sup> was accorded jurisdiction over crimes against humanity, war crimes, and genocide, as defined under the Geneva Conventions and Protocols. The ICTY was the first war crimes court to be created by the United Nations, and the first international war crimes court to be established since the Nuremberg and Tokyo trials.

As of July 2010, the ICTY had indicted 161 persons for serious violations of international humanitarian law committed within the former Yugoslav territory, and of November 2010, secured sixty convictions of high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts. Mass rape in the Bosnian War is recognized as an important vehicle for the establishment of the ICTY, and thus the Tribunal was born from an international clamor for justice. The drafting of rules and procedure that would govern the Tribunal included Rule 96, a groundbreaking principle providing that the testimony of a sexual assault victim did not have to be corroborated in order to be entered into evidence. Rule 96 was the first procedural rule to specifically govern evidence of sexual assault in an international

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<sup>87</sup> Mertus 7

<sup>88</sup> Ibid

<sup>89</sup> Hereafter “ICTY”

tribunal. The original judges also established a Victims and Witnesses Unit to provide victims and witnesses with support and counseling related to rape and sexual assault. Prior to Rule 96, rape victims had to rely almost entirely on rape kits and registered police complaints.

In 1994, women's groups internationally pursued the establishment of a separate prosecution unit for sexual assault investigations. They wanted to ensure that sexual assault was included in the forefront of prosecution, and not left as an afterthought trailing other war atrocities. As a result, Patricia Viseur Sellers was appointed the Legal Advisor for Gender of the Office of the Prosecutor and asked to develop investigation and prosecution strategies that would address sexual assault successfully as a serious issue. As she recalls,

“Only one enumerated crime was explicitly of a sexual nature, rape, under crimes against humanity in Article 5. The conventional wisdom was that only rape as a crime against humanity would be prosecuted. That was to be it; however, they underestimated us... gender strategy factually broadened at the ad hoc Tribunals. It also legally broadened, pushing beyond the Western women's movement focus...soon after I was named legal advisor by the Prosecutor, Nancy Patterson was asked to head a team for sexual assault investigations. For several weeks, Nancy and I, and certain members of her team poured over every in-house document, every NGO report, newspaper article, and each precedent that we could summon from international law. We produced an in-house report detailing several options of a strategy to investigate and prosecute the wartime sexual violence that occurred in the former Yugoslavia.”<sup>90</sup>

Sellers, Patterson and her team produced guidelines on the gender composition of sexual assault investigation and prosecution teams, along with guidelines on identifying and resolving instances of sexual or moral harassment within the Office of the Prosecutor. They contended that if male colleagues did not properly respect their female counterparts, it would not be possible to fully investigate and prosecute sexual violence. Sellers recounts that this perception came with great resistance:

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<sup>90</sup> Sellers



“Soon after Nancy and I produced our gender strategy report, a request came from a group of potential witnesses. The potential witnesses requested that they be interviewed by a team consisting of only female investigators, lawyers, and interpreters. In response, a team composed of female investigators was amassed to interview this group of sexual assault survivors located in a European country. Certain male investigators were openly adverse to the “audacity” of the request and the mission composition that honored the request. Soon thereafter, Nancy was informed that she would no longer be needed on the investigation management team... the ICTY traditionally has been a rewarding place to work, however, resistance to thoroughly normalizing the investigation and prosecution of sexual violence created a perceptible backlash.”<sup>91</sup>

Despite a turbulent beginning, Sellers believes the successes of the ICTY in dealing with sex-based crimes are great. The Tribunal has triumphed in several areas of international humanitarian law, including joint criminal enterprise. This provides that perpetrators, such as political or military leaders, can be geographically distant from the commission of crimes yet held liable in criminal court. This is seen especially in cases of sexual violence, where instances of wartime rape are viewed as a foreseeable part of a plan in which one need not be physically present in order to aid, abet, or instigate the crime.

*Case Study: Furundžija, Kunarac, Zelenović, Lukić*

A momentous development in gender strategy at the ICTY was the *Furundžija* case in 1993<sup>92</sup>, when the ICTY established a new principal definition of rape, one that extended beyond forceful penetration definitions of the past. This definition focused on the discrepancy between rape prosecuted as a separate crime against humanity and other forms sexual assault prosecuted under “other inhumane acts.”<sup>93</sup> The Trial Chamber questioned whether rape could be committed against a victim of either sex and whether or not penetration should be the necessary grounds for prosecuting rape over other forms of sexual violence. They found that,

“...the forced penetration of the mouth by a male sexual organ constitutes a most

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<sup>91</sup> Ibid

<sup>92</sup> The *Furundžija* case was prosecuted at the Tribunal before the end of the war

<sup>93</sup> deBrouwer 111

humiliating and degrading attack upon human dignity...it is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape. The notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favors broadening the definition of rape.”<sup>94</sup>

In *Furundžija*, Anto Furundžija, the local commander of the “Jokers,” a unit of the Croatian Defense Council (HVO) in central Bosnia-Herzegovina, was sentenced to ten years imprisonment for torture and outrages upon personal dignity, including rape. The charges were based on actions that occurred at a holiday cottage, in which he raped, sexually assaulted, and sexually humiliated women publicly for information he thought would benefit the HVO.<sup>95</sup> This case illustrates the utilization of joint criminal enterprise, as Furundžija was found criminal liable of aiding and abetting the rape of one victim, called witness A, even though he did not physically attack her. Additionally, he was found criminally liable of rape in the case of a woman who was forced to perform oral sex on another perpetrator.

The first Tribunal case to focus solely on wartime crimes of sexual violence and to issue convictions for rape and enslavement as crimes against humanity was the *Kunarac* case in 2001. In this case, the trial chamber decision found that the repeated rapes of a group of women in a camp in Foča, Bosnia constituted enslavement under international law, and took the opinion that “sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.”<sup>96</sup>

Dragoljub Kunarac was the commander of a special unit for the Bosnian Serb Army in Foča between 1992-1993, and participated in the ethnic campaign to cleanse the area of non-Serb inhabitants. He was the first person to plead guilty to rape as a war crime and was sentenced in

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<sup>94</sup> deBrouwer 113

<sup>95</sup> ICTY Case Information Sheet: Anto Furundžija

<sup>96</sup> MacKinnon 950

twenty-eight years imprisonment for rape, enslavement, and torture as crimes against humanity and torture and rape as violations of the laws and customs of war. The *Kunarac* decision additionally sentenced Serbians Radomir Kovac and Zoran Vukovic to sixteen and twelve years imprisonment, selectively. The trial lasted eight months and included testimony from sixty-three witnesses, including sixteen rape victims held in sexual slavery and repeatedly subjected to gang rapes by the defendants and other perpetrators. The witnesses were identified by numbers, their voices were distorted and they were kept physically hidden from the public.<sup>97</sup>

Much evidence was introduced in the *Kunarac* case regarding enslavement and rape camps. Some victims testified that they had been moved to different locations so often that they could not with certainty count the number of times they had been assaulted. Evidence revealed that many of these occurrences were ignored or condoned by law enforcement: some local police officers “helped guard the women, and even join in their mistreatment when approached [by the victims] for help against their oppressors.”<sup>98</sup> The testimony indicated that dozens of women were assaulted and sold by the defendants, including some as young as twelve. In a statement read in open court, Judge Florence Mumba, the presiding judge, said,

“What the evidence shows are Muslim women and girls, mothers and daughters together, robbed of their last vestiges of human dignity. Women and girls, treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces, and more specifically at the beck and call of the three accused.”<sup>99</sup>

One of the greatest successes of the *Kunarac* case was that the Tribunal found that the defendants’ actions were part of a deliberate, systematic attack against Muslim civilians

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<sup>97</sup> Mertus, “Judgment Trial Chamber II in the *Kunarac*, Kovac and Vukovic Case”

<sup>98</sup> Ibid

<sup>99</sup> Ibid

specifically. Julie Mertus, an Assistant Professor at American University and Senior Fellow with the U.S. Institute of Peace, speaking to the Tribunal's decision, reasons:

“They knew that one of the main purposes of that campaign was to drive the Muslims out of the region. They knew that one way to achieve this was to terrorize the Muslim civilian population in a manner that would make it impossible for them ever to return. They also knew of the general pattern of crimes, especially of detaining women and girls in different locations where they would be raped. The actions of all three accused...show beyond any doubt their knowledge of the detention centers, and of the practice of systematically transferring the women and girls to locations where they would be abused by Serb men. The Tribunal flatly rejected the soldiers' claim that they were only following orders. Judge Mumba explained, "The three accused were not just following orders, if there were such orders to rape Muslim women. The evidence shows free will on their part."

A recent example of gender strategy at the Tribunal is the *Zelenović* case of 2007. In January of that year, Dragen Zelenović pleaded guilty to three counts involving torture and four counts involving rape as a crime against humanity. A Bosnian Serb, he was sentenced to fifteen years imprisonment; as part of his plea agreement, the Tribunal prosecution withdrew the remaining seven counts of torture and rape against him. The *Zelenović* case focused on the mass human rights atrocities committed in Foča, Bosnia, after the take-over in 1992 by Serb forces. During this time, Muslim women and children were detained in their homes or at detention centers such as Buk Bijela, Foča High School and the Partizan Sports Hall.<sup>100</sup>

According to the indictment, Zelenović and other soldiers gang-raped several women they accused of lying about the hiding places of male villagers and weapons. The indictment alleged that in 1992, at least 72 Muslim inhabitants of Foča were held at the public high school, and that every evening groups of Serb soldiers, including Zelenović, sexually assaulted and gang-raped some of the younger women and girls. Testimony illustrated that Zelenović had committed a myriad of rapes, and he was found guilty by the ICTY of personally committing

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<sup>100</sup> ICTY Case Information Sheet: Dragen Zelenović

nine. Two witnesses testified that they had been raped repeatedly by Zelenović, one of who was fifteen years old at the time of the attacks. Zelenović was found guilty of participating in four gang rapes, together with three or more perpetrators, and of gang-raping one woman with ten other men so violently that she lost consciousness.

The *Zelenović* trial reflects acknowledgement by the international legal community of the systematic ethnic cleansing of Bosnian Muslims during the Bosnian War. In its sentencing judgment, the Trial Chamber agreed that,

“Zelenović’s criminal acts and omissions were part of a widespread or systematic attack against the civilian population, especially the Muslim population of the Foča municipality... Zelenović was aware of the existence of the armed conflict and of the widespread the systematic attack on the non-Serb, primarily Muslim, civilian population, and of the fact that his conduct occurred within and contributed to that attack.”<sup>101</sup>

One of the most notorious of Tribunal cases is the *Lukić* case, which concluded in 2009. According to the ICTY, Milan Lukić was the leader of the “White Eagles,” a group of local Bosnian Serb paramilitaries in Višegrad, which worked with police and military units in systematically terrorizing the local Bosnian Muslim population during the war. He was convicted of persecutions on racial, political and religious grounds, murder, inhumane acts, cruel treatment and extermination as crimes against humanity and violations of the laws or customs of war.<sup>102</sup> Lukić was found criminally liable for personally committing several horrific acts, including killing seven men execution-style on a river bank, and barricading seventy Bosnian Muslim women, children, and elderly men in a home before setting it on fire and firing automatic weapons and those who tried to escape. He was sentenced to life imprisonment in July 2009, and had already been tried and convicted *in absentia* for his participation in the Sjeverin

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<sup>101</sup> Ibid

<sup>102</sup> ICTY Case Information Sheet: Milan Lukić and Sredoje Lukić

massacre by the Court of Bosnia-Herzegovina.

Sredoje Lukić, Milan Lukić's cousin, was a member of the "White Eagles" and served as a police officer before and throughout the Bosnian War. He was convicted of inhumane acts, cruel treatment, aiding and abetting persecution and murder as crimes against humanity and violations of laws or customs of war and sentenced to thirty years imprisonment in 2009. The Trial Chamber found that Sredoje Lukić substantially contributed to the deaths of fifty-nine people in the house that Milan Lukić set on fire, and that he frequently abused prisoners at the detention camp at the Uzamnica military barracks in Bosnia. According to the Tribunal,

"The Trial Chamber found that the perpetration by Milan Lukić and Sredoje Lukić of crimes in this case was characterized by a callous and vicious disregard for human life. The Trial Chamber further found that Milan Lukić personally killed at least 132 Muslim civilians...as opportunistic visitors to the Uzamnica camp, both Milan and Sredoje Lukić came for no reason other than to inflict violence on the detainees. Although Sredoje Lukić came to the camp with less frequency than Milan Lukić, both accused beat the detainees with extraordinary brutality, causing them serious and permanent damage."<sup>103</sup>

One of the greatest criticisms of the *Lukić* proceedings is the failure of the ICTY to prosecute crimes of rape and sexual violence, despite clear evidence of perpetration. Carla Del Ponte, the former prosecutor, reasoned that there was not enough evidence existing at the commencement of trial, and that her obligation was to conclude the work of her office within the time frame mandated by the United Nations Security Council.<sup>104</sup> She took the official position that adding sex-based charges to the *Lukić* indictment would lengthen the trial, and maintained that the Office of the Prosecutor had been unable to reach any witnesses to corroborate sexual violence allegations. A spokesperson for Del Ponte later acknowledged that there was a plethora of information of rapes in Višegrad, but that the United Nations' "Completion Strategy" for the

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<sup>103</sup> Ibid

<sup>104</sup> Sellers

Tribunal disabled prosecution from bringing new charges or amending existing ones unless the case was transferred to local courts.<sup>105</sup> This decision produced a backlash from women's rights organizations, victims and inhabitants of Bosnia-Herzegovina. Eventually, a month before the *Lukić* trial was set to begin, the Office of the Prosecutor filed a motion for a new indictment, which added rape and sexual slavery to the existing charges. The Trial Chamber rejected this proposition, reasoning that the inclusion of additional charges did not allow the accused proper time to establish a defense.

The Association of Women Victims of War was one of the most vocal opponents of Del Ponte's decision, and the head of the organization, Bakira Hasečić, was raped by Milan Lukić in the basement of a police station. As she describes the attack,

““There was a large armchair, a bar, some chairs and a half of the room was decorated with wood. I saw Milan Lukić and Sredoje Lukić. I knew Milan Lukić very well. Holding a crescent-shaped knife, he told me to take off my clothes - I thought he was joking. But I realized he was holding the knife right in front of me.”<sup>106</sup>

Hasečić has publically disputed Del Ponte's claim that the Office of the Prosecutor was unable to find witnesses to substantiate rape charges, and claims that she and other women made statements to officials that were available to Hague investigators. Additionally, she traveled to The Hague to give her statements in person. One woman, who remained anonymous in an interview with the Balkan Investigative Report Network, reported that Milan Lukić raped her repeatedly as one of the estimated 200 women held at Vilina Vlas, a spa hotel that served as a detention center and rape camp during the Bosnian War.<sup>107</sup> She witnessed Lukić murder her sixteen-year-old son before taking her to the hotel. She recalls,

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<sup>105</sup> The current prosecutor submitted a motion to amend the indictment, which the Trial Chamber denied after the OTP failed to meet the deadline for amendment

<sup>106</sup> Ahmetašević, *Balkan Investigative Reporting Network*

<sup>107</sup> Ibid

“Sometimes they would keep me for a day, sometimes longer, before taking me home and then bringing me back to the hotel. I lost count of how many times they raped me...[there] where many women held in the hotel and there was blood everywhere. All the rooms in the hotel were locked. Everyday they threw us bread, which we had to catch with our teeth as our hands were tied. The only time they untied us is when they raped us. They abused us in unspeakable ways. They burned me with cigarettes, cut my body with a knife and ripped flesh from my mouth.”<sup>108</sup>

Vilina Vlas served as Lukić’s headquarters during the war, and acted as a brothel for Bosniak women and girls that were selected primarily for their youth and beauty. The Association of Women Victims for War estimate fewer than ten women survived Vilina Vlas, as many of them were murdered or committed suicide. The woman aforementioned witnessed one suicide herself, when a girl jumped from a second-story room through a glass balcony. She told the newspaper *Balkan Insight* that she did not understand why the Lukić cousins had not been indicted for rape, considering she and others had told their stories to investigators. Similarly, a 1994 United Nations report on mass rape in Bosnia-Herzegovina explicitly cited Vilina Vlas as a detention center in which rape had occurred.<sup>109</sup> The report stated that women and girls younger than fourteen were being held at the hotel, and cited testimony from a woman who was raped by nine soldiers in a twenty-four hour period. Alexandra Stiglmayer, author of “Mass Rape: The War Against Women in Bosnia-Herzegovina,” researched and reported on mass rapes occurring in Vilina Vlas, gave all her information to investigators from the Hague and agreed to testify on her evidence, but maintains that she was never contacted by the Tribunal.

As of July 2009, the ICTY had prosecuted eighteen cases related to sexual violence in Bosnia-Herzegovina. The Court of Bosnia-Herzegovina has also prosecuted war criminals of crimes committed during the war, including rape and sexual assault. As of 2010, the Court had

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<sup>108</sup> Ibid

<sup>109</sup> Ibid



convicted eight people for crimes of rape against the non-Serb population.

### *Analysis of Efficiency*

To be efficient, in its simplest definition, is to be productive in the area of desired effects. For the ICTY, the area of desired effect is, “bringing war criminals to justice [and] bringing justice to victims.”<sup>110</sup> In this field, the Tribunal has been incontestably successful in the development of gender strategy, bringing a multitude of war criminals to justice and bringing the rights of women to the forefront in international criminal and humanitarian law. However, this success has been flawed, and the Tribunal has missed opportunities to further incorporate gender into the international legal process and fully reconcile the needs of female war victims with the desires of the Office of the Prosecutor. Efficiency is not a quantitative method of measurement, and therefore yields no concrete solutions. This analysis will examine the conduct and proceedings of the ICTY in two areas, judicial and humanitarian efficiency, and attempt to

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<sup>110</sup> As stated on the Tribunal’s website, [www.icty.org](http://www.icty.org)

determine to what degree the Tribunal has been productive in its objectives.

It is undeniable that the Tribunal has produced critical jurisprudence on war rape and enslavement under international humanitarian and criminal law. The ICTY has found revolutionary achievement in prosecuting rape as crimes against humanity and violations of the laws and customs of war, and in doing so has brought several mid- and high- level officials to justice for their part in sexually violent war crimes. This success has been judicially groundbreaking, but also symbolically important for victims of war crimes internationally. Emina Bužinkić, the Secretary General of the Croatian Youth Network, is of Bosniak heritage and has spent most of her life in former Yugoslav regions. She contends that the prosecution of former Yugoslav war criminals by an international court is emblematically important to those who survived the atrocities, and the Court has indicted higher-ranking officials who would not ordinarily be prosecuted:

“...that there were some people prosecuted [at the Tribunal], even though that is a small number of people, it is symbolically important. That people could understand what was happening, this is where it was symbolic. These kinds of trials would never happen if it were founded in the former Yugoslav area. Regional or state courts, you can't try people from outside of the region. Many generals and people who gave orders during the war were prosecuted, and that is symbolically important.”<sup>111</sup>

Despite these achievements, the Tribunal has been criticized for failing on several occasions to properly include charges of crimes relating to sexual violence. Much of this criticism stems from the controversial Completion Strategy, which was endorsed by the UN Security Council in resolutions 1503 and 1534. The plan consists of three phases and target dates for the Tribunal's dismantlement upon completion: the first phase required the completion of all investigations, and was successfully completed in 2004. The second phase demanded the

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<sup>111</sup> Emina Bužinkić, Interview

completion of all trials by the end of 2008, but the ICTY has now estimated that all trials will be completed by 2012, with most appellate work completed by 2013.<sup>112</sup> According to M., counsel with the Office of the Prosecutor of the ICTY,

“As an *ad hoc* tribunal with limited resources, it is simply not feasible to expect the ICTY could prosecute the thousands of cases arising out of the conflict. In line with this policy, the Tribunal has been implementing its “Completion Strategy” since 2003, focusing on the highest-level perpetrators. However, this does not mean that the cases the ICTY does not try will be abandoned. Several cases concerning intermediate and lower-ranking accused have been transferred to courts in Bosnia, Croatia and Serbia.”<sup>113</sup>

There is speculation among many NGOs and international organizations that pressure from the Completion Strategy has led to the exclusion of certain charges, specifically sex-based charges, from indictments in order to expedite prosecution.<sup>114</sup> As aforementioned, the most cited example of this is the *Lukić* case, in which the Office of the Prosecutor neglected to indict Milan Sredoje Lukić on rape and sexual slavery charges, despite a large amount of credible evidence. Carla Del Ponte, the former prosecutor, took the opinion that her obligation was to conclude the work of the Tribunal’s mandate within the time frame of the Completion Strategy, and that adding sex-based charges would lengthen the trial. The Office of the Prosecutor was later given until November 2007 to present a new indictment that included sex-based charges, but the new indictment was submitted past this deadline. Upon Carla del Ponte’s departure, the new Chief Prosecutor, Serge Brammertz, requested permission to amend the indictment despite the time lapse, a request that was rejected by the Trial Chamber in 2008.<sup>115</sup> This spurred disappointment and protesting from organizations of survivors, especially The Association of Women Victims of War, and from those who felt their suffering and testimony had been ignored by the international

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<sup>112</sup> International Criminal Tribunal for the Former Yugoslavia

<sup>113</sup> M., counsel, OTP ICTY. Interviewed on the condition of anonymity, responses were provided in the counsel’s personal capacity and not as representative of the United Nations or the ICTY

<sup>114</sup> Amnesty International

<sup>115</sup> Ibid

community.

Concerns have also been raised regarding the *Karadžić* case, currently before the Tribunal, in which rape and sexual slavery were not fully included in the initial indictment. Karadžić, the former leader and commander of the Bosnian Serb forces, is the alleged mastermind of the ethnic cleansing campaign that utilized rape and enforced pregnancy as methods of warfare. The lack of expressly mentioned sexual violence in the initial indictment prompted an outcry from survivor, human rights, and women's groups internationally calling for an amended indictment that appropriately recognized the sexual atrocities committed under Karadžić. According to the International Women's Human Rights Law Clinic at CUNY Law School<sup>116</sup>, the indictment, notably also prepared under Carla Del Ponte, contained "a cursory charge of sexual violence that predated the jurisprudential developments of, and factual proof accepted by the Tribunal."<sup>117</sup> A statement issued by IWHR on behalf of twenty-two organizations asserted,

"[t]o close the ICTY and its most significant case with only a partial and superficial treatment of sexual violence would not only turn back the clock on the progress made; it would also undermine the capacity of international criminal law to develop as a meaningful deterrent to such abuse, especially with regard to high-level actors."<sup>118</sup>

According to Professor Rhonda Copelon, director of IWHR,

"It is utterly discriminatory to make sexualized violence the scapegoat of delay; all charges demand prosecutorial and judicial resources. Survivors of sexual violence, many of whom still suffer trauma and stigma in addition to physical harm, should be among the first and not the last to obtain justice."<sup>119</sup><sup>120</sup>

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<sup>116</sup> Hereafter "IWHR"

<sup>117</sup> IWHR

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> The indictment was eventually amended to include sexual violence in a more prevalent capacity, but still does not expressly mention rape or sexual violence as individual crimes

Similarly, the timeline for dismantlement has not been hindered despite the fact that two key indictees are still evading arrest. Ratko Mladić and Goran Hadžić, both of Serbian heritages, have been indicted by the ICTY but remain at large. Mladić, the former Chief of Staff of the Army of the Republic Srpska, has been recognized by the Tribunal as the chief of command for the Srebrenica massacre and attacks on Sarajevo and would absolutely be considered a highest-level perpetrator. Hadžić has been charged with fourteen counts of war crimes and crimes against humanity for his alleged involvement in the murder of thousands of Croats during the war. Specifically, he is believed to have participated in the 1991 Vukovar massacre of 250 civilians. Emina Bužinkić believes that the elusion of these men makes the Tribunal appear weaker to victims and the international community:

“...politically that makes the court weaker, and because [two] of them who were leaders of crimes where the wars happened, the fact they weren’t prosecuted weakened the court, because they were the ones to lead the war. They were the ones in charge of the army and decision-making in war crimes and all actions.”

Rewards are being offered internationally for information regarding their whereabouts; the Tribunal intends to follow the Completion Strategy regardless of their capture. Both accused would likely be prosecuted in their home country, which is problematic because much of Serbia supports them: according to a 2009 public opinion poll published in the *International Herald Tribune*, sixty-five percent of Serbian citizens said they would not divulge information regarding Ratko Mladić for a reward of one million Euros. Similarly, the majority the population voiced its

opposition to Mladić's potential extradition to the Tribunal.<sup>121</sup> Despite this, M., counsel with the Office of the Prosecutor of the ICTY, seems optimistic:

“Only two accused remain at large, and the Prosecutor continues to stress the importance of their arrest. Just last month in Belgrade, he maintained that “the arrest of the two fugitives is the Tribunal’s priority number one”. The Prosecutor reports on the cooperation of States to the UN Security Council twice per year, which includes the arrest and transfer of accused at large.”

Efficiency cannot be evaluated from a judicial standpoint alone, and it necessary to also consider the relationship between the Tribunal and the people it was established to serve. It is important that those affected by the Yugoslav wars feel that their needs are being met, their stories are being told and that justice is being brought to those responsible for destroying their stability. Emina Bužinkić believes,

“Efficiency is not only seen as prosecution and punishment, but in all perspectives. It is horrible what happened to those women, to the people here and how the war destroyed lives and solidarity among people living here. Some war victims have lost faith in the Tribunal. [The ICTY] can be efficient in a judicial way, but here in this part of the world, in accordance to the seriousness of the problems that happened here, perception of the public is still a relevant thing.”<sup>122</sup>

Iva Vukušić, an analyst formally with the Sarajevo Tribunal, explains that the effects of the war are permanently present, and that some victims, witnesses and inhabitants of the former Yugoslav areas feel that the ICTY has let them down in its pursuit for international justice.

“Everything that happens in Bosnia and Herzegovina today is somehow related to the war. The war (and the outcome of the war) influences politics daily and through politics it influences everything else. The war has also scared, more or less, every person that lived through it. The war influences everything and everyone on a daily basis. I think there is a lot of disappointment in the [ICTY]. There is also a large segment of the society that disapprove[d] of the Tribunal from the start on political grounds, but there is also a lot of disappointment among those that supported the Tribunal. Some of this disappointment the Tribunal deserves but some is also a result of the lack of knowledge of what the ICTY can and what it cannot do as well as with

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<sup>121</sup> Public Opinion Poll, *International Herald Tribune*

<sup>122</sup> Emina Bužinkić, Interview

expectations that were built up too high.”<sup>123</sup>

In 2010, Amnesty International published a report stressing the lack of support for survivors provided by the ICTY, especially compared to the International Criminal Court.<sup>124</sup> There are several areas in which the Tribunal does not incorporate ICC methods, including attendance rules and reparations. Survivors can only attend ICTY trials in The Hague if they are selected to be part of the proceedings as witnesses, whereas the ICC allows survivors to attend trials and present their concerns if the Court feels it is not prejudicial towards the rights of the accused.<sup>125</sup> The ICC statute maintains that the Court may order reparations for victims and survivors, while the ICTY concluded that, “it is neither advisable or appropriate that the Tribunal be possessed of such a power, in particular, for the reason that it would result in a significant increase in the workload of the Chambers and would further increase the length and complexity of trials.”<sup>126</sup>

Since the Tribunal’s inception, a major concern has been the level of support provided by victims willing to testify. The ICTY was established almost two thousand kilometers from the locations of Yugoslav conflict, and therefore is exceptionally far from the homes and lives of the people it is serving. The development of gender strategy at the Tribunal produced the Victims and Witnesses division, a creation that was symbolically groundbreaking in the international judicial system. However, neither the Statute of the ICTY nor the Rules of Evidence and Procedure define specific measures detailing what kind of support is available to witnesses and victims, and therefore there is no standard of care or mandatory assistance. The Tribunal’s support system has been criticized for failing to adequately address psychological, social and

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<sup>123</sup> Iva Vukušić, Interview

<sup>124</sup> Hereafter “ICC”

<sup>125</sup> Amnesty International

<sup>126</sup> Ibid

economic needs of the survivors of sexual violence, both short term and long term. In her article “Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina,” Julie Mertus claims that the Tribunal does not take care of witnesses after they testify, including sending them home on the same plane as the war criminals against whom they are testifying. According to Amnesty International,

“Many survivors agreed to be witnesses as a result of their determination to see those responsible for the crimes against them brought to justice, risking their personal safety and exposing themselves to re-traumatization, only to discover that, upon the conclusion of the trial, all support to them ended despite their continued need for support and protection.”<sup>127</sup>

From this, a complicated question emerges: as an international court, what responsibilities does the Tribunal have to support victims and witnesses of war crimes that occurred in the former Yugoslavia? Just how far does the objective of “bringing justice to the victims” extend? Historically, the legal system has been limited to the judicial and procedural aspects of bringing justice to victims, and Iva Vukušić believes that it is important to keep this in mind when looking at the ways in which the Tribunal has aided survivors. She contends,

“The ICTY is a court and I believe we should keep that in mind. A court is not there to help victims necessarily. International governmental and non-governmental agencies and organizations help, government agencies, social services, specialized medical institutions and initiatives help. The ICTY is there to make sure the ones most responsible for the war crimes are arrested, tried fairly, impartially and timely and that those that are found guilty serve their sentence. Now we can discuss if the ICTY has done that successfully but we cannot expect a court to assume responsibilities that don’t belong to a judicial institution. So the ICTY cannot help victims directly, but by administering justice and making sure those most responsible for the crimes are punished they can maybe to a certain extent assist victims in moving on with providing a sense of justice. Accomplishing that is what the ICTY does and how it helps. The president of the Tribunal, Judge Robinson, has asked the international community at the Security Council to establish a fund for victims and that may also be one of the things the ICTY can accomplish or support in terms of supporting victims and survivors of war crimes. We need to think of complementary mechanisms, methods and tools that can be part of a wider policy to assist a troubled post-conflict society. War crimes prosecution has to be part of it, but other mechanisms need to be put in place because I believe we tend to expect too much from tribunals in terms of assisting victims.”<sup>128</sup>

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<sup>127</sup> Ibid

<sup>128</sup> Iva Vukušić, Interview



International organizations and NGOs are viable resources in these instances, and groups are an incredible asset to victims and their families. However, a large part of victims' services should also come from state governments, and it is of widespread agreement that the government and domestic courts of Bosnia and Herzegovina have failed to adequately support war victims, both judicially and from a humanitarian perspective. A massive backlog of unresolved cases, amounting to almost two million, leaves hundreds, if not thousands, of war criminals able to live and walk among their victims, inciting fear and promoting the opinion that the government does not serve justice in Bosnia. There are insufficient means of protecting witnesses willing to testify, which negatively affects victims as well as discourages others from coming forward to tell their stories. The majority of victims are responsible for finding their own way to Sarajevo to testify, and many of them must turn to NGOs for assistance. A serious concern voiced by Amnesty International is since travel options are limited, and that many witnesses have been forced to travel on the same bus with family members of the accused or defense witnesses.<sup>129</sup> In some instances the court has issued fines against victims who are unwilling to testify against their attackers, many of who live in desperate economic situations and cannot afford to pay those fines. While it is important to prosecute those responsible for horrific acts, the rights of a victim to not testify are not respected, and the support system for these victims is wholly inadequate. Despite obvious shortcomings, M., counsel with the Office of the Prosecutor of the ICTY, is optimistic regarding the judicial relationship between the Tribunal and local courts and the legal potential of the latter:

“Evidentiary materials that have not resulted in an indictment before the Tribunal have also been transferred to national prosecutors. Local courts are now conducting their own

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<sup>129</sup> Amnesty International

investigations and prosecutions of many alleged perpetrators not indicted by the ICTY. ICTY personnel have worked closely with local authorities to facilitate the prosecution of war crimes cases domestically. The ICTY provides support to ongoing investigations and pending cases before local courts, including many requests for assistance related to the provision of documents and making ICTY staff available to testify in domestic trials. OTP has an evidence collection of over six million pages of material. The ICTY also works with the domestic courts on witness protection issues and has hosted delegations from the former Yugoslavia who come to the ICTY for training sessions. Domestic prosecutions have become an important addition to the work being done by the ICTY, which will continue to develop capacity building programs for the local courts, [such as] exchange programs for legal professionals. Relationships have developed between ICTY prosecutors and their counterparts in the domestic courts, allowing for the sharing of information and expertise.”<sup>130</sup>

The Bosnian government has been criticized for its failure to deliver justice, not only within the domestic court system, but also to rape victims as war survivors. Bosnian law granted civil victims of war status to female survivors of rape in 2005, but it is estimated that only 500 women receive the social benefits awarded to them. The maximum financial allowance available is only seventy percent of the amount available to a male war veteran, and no psychological support is provided by the state to victims of sexual violence.<sup>131</sup> Iva Vukušić believes very strongly that the government of Bosnia and Herzegovina does not effectively support women who were victims of the war. As she says,

“The [women] that [survived] do not have appropriate access to health care and psycho-social support in BiH and few victims receive an adequate form of financial assistance while many still face the challenges of dealing with such personal trauma in a society that still often stigmatizes them. I believe that as a state Bosnia and Herzegovina is failing all its victims of war, especially civilians, those injured, illegally detained, abused and raped during the war. The level of care for these people is not adequate. Rape victims are no different in that sense and often they are on their own in dealing with their traumas and physical and psychological injuries. The victims of the war, especially civilians, especially those that are now old, poor, without parents or family – they are all being failed by the state.”

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<sup>130</sup> M., counsel, OTP ICTY. Interviewed on the condition of anonymity, responses were provided in the counsel’s personal capacity and not as representative of the United Nations or the ICTY

<sup>131</sup> Ibid

While the state has been largely unsuccessful in promoting reconciliation and providing assistance, there is an impressively great range of NGOs active in Bosnia, a large amount of which are focused on peace building, civic education and social services. Julie Mertus maintains that recent years have seen a shift in the focus of Bosnian NGOs towards long-term institutional change and political and social transformation, and that women's organizations in Bosnia are ready and willing to cooperate with the Tribunal, as they have done so very successfully on some occasions in the past.<sup>132</sup> According to Mertus,

“Bosnian women's groups exhibited the ability to play a key role in supporting witnesses. Although the availability of psychosocial services to survivors of sexual assault and other forms of wartime violence was scarce, it was a handful of women's groups that had principal or exclusive contact with central witnesses in sexual violence cases... experience suggests that the increased participation of local NGOs in the ICTY would be enhance the ability of local NGOs to prepare witnesses and chance the potential of the Tribunal to influence local processes in long-lasting and positive ways... local participation in transitional justice mechanisms like the Tribunal enhances the legitimacy of such processes.”<sup>133</sup>

Women's groups forge direct contact with victims, often finding and preparing witnesses to testify, and many Bosnian organizations feel that their potential for support that has gone largely untapped. Many of these organizations provide medical and psychological support to war victims and their families, as well as provide therapy and preparations to sexual violence victims who have agreed to testify at the Tribunal. Mertus maintains that the ICTY has not made a serious effort to develop relationships with Bosnian NGOs, despite past successful interactions.

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<sup>132</sup> Mertus 10

<sup>133</sup> Mertus 23

### *Conclusion*

The International Criminal Tribunal for the Former Yugoslavia has unquestionably set international precedent in the development of gender strategy and the prosecution of war rape and sexual violence. As the first international tribunal to define rape and sexual assault under international law, the ICTY has sought justice for thousands of women and men victimized during the former Yugoslav conflicts. The Tribunal has emerged as a symbol of hope and impartiality, but the findings of this research conclude that the Court has not been fully efficient in pursuing its objective of “bringing war criminals to justice [and] bringing justice to victims,” specifically the latter.<sup>134</sup>

Weak outreach has held the ICTY back from realizing its full potential as a mechanism for transitional justice: little effort has been made to establish a relationship between the Tribunal and local communities, and the court has undertaken no role in supporting reconciliation within Bosnia and Herzegovina. While laudably reaching out to the local court system, the Tribunal has failed to fully develop relationships with the NGOs and women’s organizations that often find and prepare witnesses and provide psychological and medical care to victims.<sup>135</sup>

It is unrealistic to expect an international tribunal to provide support in the same capacity

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<sup>134</sup> This research focuses on the efficiency of the Tribunal in regards to Bosnia-Herzegovina

<sup>135</sup> Mertus 6

as an NGO, but given the unsuccessful endeavors of the Bosnian government, the Tribunal would be a more effective mechanism if it increased outreach services. As an international beacon of justice, the ICTY never fully embraced its potential as a resource for the people it was created to serve. Given the precedents set by the ICC, the ICTY has a multitude of avenues to provide adequate levels of assistance to at least some witnesses and their families, including reparations and changes in attendance policy.

However, it is important to remember that the Tribunal is a complex mechanism that is greatly limited by both time and resources.<sup>136</sup> Since its inception in 1993, the ICTY has extradited, indicted and prosecuted over 120 people responsible for horrors that ensued following the disintegration of Yugoslavia. The Tribunal has been paramount in the advancement of gender strategy and the consideration of women's rights in the international sphere. The ICTY has succeeded in many ways, and this should not be overlooked in the wake of criticism. The findings of this research fully support this quote from Iva Vukušić:

“I firmly believe, no actually I know that the ICTY is an imperfect institution administering imperfect justice that leaves a lot of frustration among the victims and survivors, [and] also some of the observers of the entire process. Unfortunately, due to many factors, the ICTY had limitations, external and internal, to its performance, but ultimately I know that the region would be much worse off than it is now if it wasn't for the Tribunal. It is an imperfect situation, an imperfect institution but one that brought some accomplishments, and the societies in the region would have been much worse off without it.”<sup>137</sup>

This study calls on the international community to combat the failed systems of instituting justice to victims of the Bosnian War, specifically sexual violence survivors and their children. Relationships must be forged between the government in Bosnia-Herzegovina, the local courts, NGOs and international organizations in order to ensure that true justice is served to those

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<sup>136</sup> See “Other Findings” in *Appendix*

<sup>137</sup> Iva Vukušić, Interview

who desperately need and deserve it. Future research should be conducted on the best avenues for implementing the Tribunal's successful procedures locally and expanding the outreach provided for survivors. It is of immeasurable importance that the international community does not forget about these women and their families once the Tribunal closes, because all of their stories deserve to be told and there must always be someone to listen.

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## *Appendix*

Interviews were conducted with individuals of varying relationships to the Tribunal and Bosnia-Herzegovina, and therefore were asked different questions. Samples are included below, but do not represent all of the questions asked during interviews.

### Interview Questions

Why do you think Muslim Bosnian women were targeted in the Bosnian War?

In what ways do you think the outcomes of the Bosnian War affect the country today?

Do you think the Bosnian government effectively supports women who were victims of the Bosnian war, financially or through outreach services?

In what ways do you think the ICTY effectively balances the needs of victims with the needs of the Tribunal?

What does “efficiency” mean to you, in terms of the Tribunal?

Do you think Bosnian war victims have faith in the ICTY?

How can the ICTY improve in helping Bosnian war victims?

Do you think that the ICTY has been, overall, an effective vehicle for prosecuting rape as a war crime?

### Other Findings

This study also finds that the Completion Strategy has hindered the proper prosecution of rape and sexual violence, but it is laudable that the Office of the Prosecutor has attempted to remedy these situations

This study also finds that if the ICTY has implemented stronger protection policies for witnesses, it is plausible that more women would have come forward to testify and indictments would have been stronger against those accused of rape and sexual violence

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