

MASS RAPE IN FOČA: THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA VS. DRAGOLJUB KUNARAC

By

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ABSTRACT

The Bosnian war witnessed the organized expulsion of Bosnian Muslims by Serbian and Bosnian Serb military forces from 1992 until 1995. As a tactic aimed at creating mono-ethnic towns from multicultural populations, rape was perpetrated against all women, but particularly Muslim women, as part of a larger plan to terrorize populations into permanently abandoning their homes. The Muslims of Foča, a township close to the border with Montenegro, were one of the first multiethnic populations to be attacked and terrorized by Bosnian Serb and Serbian forces. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković were three Bosnian Serb soldiers, among thousands, to rape and sexually enslave Muslim women in multiple camps formed over the spring and summer of 1992. With the war's conclusion, the International Criminal Tribunal for the Former Yugoslavia set a legal precedent in the trial of Kunarac, Kovač, and Vuković as one trial in a chain of cases at the International Criminal Court for the Former Yugoslavia to advance the classifications of what sexual violence constitutes and the ways in which these crimes would be tried in international courts of law. Importantly, the Kunarac case marked the first instance in which war criminals were convicted of rape as a crime against humanity, a legal classification second only to genocide, and was the first legal proceeding to define sexual slavery as a war crime and to convict defendants of this offense as a crime against humanity. This thesis will examine the precedent set by the *Kunarac Case*, exhibiting first the development of the international acceptance of sex

crimes as serious war crimes, and second the broadening of sexual abuse classifications written to encompass the increasing number of sexual crimes perpetrated in modern war.

All Bosnian locations and names, requiring diacritical marks, have been provided when appropriate. ǃ represents a full “ch” sound and ǂ represents a lighter “ch” sound.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	iv
ABSTRACT	v
LIST OF MAPS	viii
INTRODUCTION	2
THE WAR IN BOSNIA BEGINS	4
THE POLICY OF RAPE, TERROR AND ETHNIC CLEANSING: A LARGE-SCALE POLICY PERPETRATED IN FOČA	9
RAPE IN FOČA: THE CRIMES OF DRAGOLJUB KUNARAC, RADOMIR KOVAČ, AND ZORAN VUKOVIĆ.....	17
RAPE AS A WAR CRIME: A SYNOPSIS OF THE EVOLUTION OF MODERN INTERNATIONAL LAW	32
PAVING THE WAY: ICTY CASES DEALING WITH SEXUAL CRIMES PRIOR TO KUNARAC.....	41
THE ICTY VS. DRAGOLJUB KUNARAC, RADOMIR KOVAČ, AND ZORAN VUKOVIĆ	47
AFTER THE KUNARAC DECISION.....	56
CONCLUSION.....	65
BIBLIOGRAPHY.....	68

LIST OF MAPS

Map 1. Front Lines of the Bosnian War, 1993..... 1



Map 1. Front Lines of the Bosnian War, 1993 (from <http://www.partitionconflicts.com>)

INTRODUCTION

The Bosnian war, lasting from 1992 to 1995, began as an invasion by Serbian and Bosnian Serb forces aimed at territorial expansion. It consisted of many brutal, systematically organized sieges, occupations, and massacres. Serbian nationalist forces sought to clear what they labeled “alien” Bosnian Croat and Bosnian Muslim ethnic communities from lands they claimed in a campaign to force multicultural societies into mono-ethnic populations. This came to be known as ethnic cleansing. Foča, one of the first towns to be confronted by this assault, exemplified the pattern of “ethnic cleansing.” As a part of this strategy, women were raped in camps, stolen homes, and brothel-like establishments that were in reality prisons, in an attempt to destroy the social fabric of these communities and to terrorize Muslims to the extent that they would not seek to return to their homes.

In the *International Criminal Tribunal for Yugoslavia vs. Dragoljub Kunarac*, three members of the Bosnian Serb forces, Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, stationed in Foča, were tried and convicted for their roles in the mass rape and enslavement of Bosnian Muslim women, abuses severe enough to be characterized as crimes against humanity by the international tribunal.¹ Though the short length of the sentences disappointed many rape survivors of Foča, the *Kunarac Case* is exceptional since it was one of the first instances when an international war crimes

¹ International Criminal Tribunal of the former Yugoslavia (ICTY), "Facts about Foča," November 2005, http://www.icty.org/x/file/Outreach/view_from_hague/jit_foca_en.pdf, 2.

tribunal focused solely on sexual crimes against women. This was one trial in a chain of cases at the ICTY to advance the classifications defining what constituted sexual violence, and how these crimes could be tried in international courts of law. Importantly, the Kunarac case marked the first instance in which war criminals were convicted of rape as a crime against humanity, a legal classification second only to genocide. It was also the first legal proceeding to define sexual slavery as a war crime and to convict defendants of this offense as a crime against humanity. The impact of the Kunarac case on the future inclusion of sex crimes in international judicial proceedings is undeniable. The trial's importance is attested to in the expanded definitions of sexual abuses contained within the statute of the International Criminal Court and in the developing perception of rape and sexual crimes as violations of international law deserving of equal scrutiny by this multi-national tribunal.

THE WAR IN BOSNIA BEGINS

This chapter will illustrate that though Bosnian women—Serb, Muslim, and Croat—all suffered the terrible crime of rape over three and a half years of the Bosnian war, Muslim and Croat women in Bosnia were subjected to rape and sexual crimes as part of a larger system of systematic expulsion through the perpetration of atrocities. The overall goal of the Bosnian Serbs, working with the support of the Serbian government, was to attempt to compel other ethnic groups into flight, mentally and physically devastating Bosnia's Muslim culture so that those expelled would not seek to return. Systematic rape became one tactic utilized by the forces of Serbia and the Bosnian Serbs against these populations, including Foča's, in the purpose of generating an atmosphere of fear.

Foča, located across the border from Serbia and with a large population of Bosnian Serbs, was one of the first Bosnian towns to experience the consequences of nationalist propaganda and economic downturn. Paramilitary units, in the case of Foča's ethnic Serbs, were responsible for the most atrocious crimes committed during the war. In Foča, as throughout the north and east of Bosnia, militias made up of roving bands of gangsters, released prisoners, and extreme nationalists terrorized Bosnian Muslim and Croat communities as they gathered angry and disillusioned men to their ranks.² In an economy with few jobs, crime paid and young men took notice as reporter Louise

² Blaine Harden, "Terror" *Washington Post Weekly*, February 21, 1993, 2-5.

Branson noted in 1992: “these are young men, mostly in their early 20s; most of them have been fighting in Croatia or Bosnia in these paramilitary groups and a lot of them have looted and killed, they have taken a liking to the lifestyle.”³ Radomir Kovač and Zoran Vuković, two of the indicted war criminals tried in *ICTY vs. Kunarac*, were members of paramilitary units made up of men from or near Foča.⁴

The highest ranking political leader in Foča, Velibor Ostojić, a minister in the secessionist Bosnian Serb government of Radovan Karadžić’s Serb Democratic Party, requested the presence of paramilitary militias to carry out their policies of “ethnic cleansing.”⁵ Journalist Roy Gutman, writing about irregular forces operating in the town, stated “paramilitary groups led by self-promoting nationalists from neighboring Serbia and aided by local Serb extremists wore camouflage fatigues and called themselves the ‘Serbian Guard’.”⁶ These forces, both local and external, aided in setting up the system of camps in which women would be raped and helped coerce those Serbs who were unwilling to partake in the violence into active if reluctant roles. Ostojić, one witness told Gutman, told local Serbs at a restaurant that “if they would not take up arms and start shooting at the Muslims he would call for reinforcements from Serbia.”⁷ Leadership in Foča was represented by a local crisis committee that, Human Rights Watch reported, “established a network of detention centers where non-Serb civilians were detained,

³ Louise Branson, "Young Gangs Rule Belgrade Streets as Law and Order Collapses in the Yougoslav Capital, New Crime Bosses Are Vying for Control and Finding New Ways to Circumvent UN Sanctions," *The Christian Science Monitor*, November 6, 1992.

⁴ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, "Case Information Sheet - 'Foča' (IT-96-23 and 23/1) Kunarac, Kovač & Voković," http://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf, 1-2.

⁵ Roy Gutman, *A Witness to Genocide: The 1993 Pulitzer Prize-Winning Dispatches on the "Ethnic Cleansing" of Bosnia* (New York: Macmillian), 158.

⁶ *Ibid.*, 158.

⁷ *Ibid.*, 162.

tortured, raped, and either expelled, killed, or ‘disappeared.’”⁸ It was these committees that requested the paramilitary units from Serbia and Montenegro that would carry out many of the crimes in Foča early in 1992. Four thousand paramilitary members poured into the area in April of 1992 to terrorize the Muslims population.⁹

The atmosphere between Serbs and the other ethnic groups began to drastically deteriorate during the late 1980s and early 1990s. A survivor from Banja Luka, the second largest city in Bosnia experiencing the same tense atmosphere as in many other Bosnian towns, including Foča, described the situation just prior to the war, stating, “I couldn’t recognize Serbs I’d been friends with for years, they suddenly spoke of feeling threatened, saying we couldn’t go on living together in the same community, some claimed that Muslims should leave Banja Luka.”¹⁰ In Foča, “in the months leading up to the attack on April 8, 1992, Muslim workers stopped receiving their salaries or were simply told that there was no work for them.” Another witness asserted that “the freedom of movement of Muslim citizens was increasingly restricted, their communication limited and their gatherings banned.”¹¹

To achieve an ethnically pure land for the Serbs in Bosnia, Karadžić and his subordinates attempted to ethnically cleanse Bosnia of its Muslim and Croat inhabitants. During his trial at the ICTY, prosecutors showcased the recorded minutes from a

⁸ Human Rights Watch, *"A Dark and Closed Place": Past & Present H. R. Abuses in Foca*, July 1, 1998, <http://www.refworld.org/docid/3ae6a7ee0.html>, 3.

⁹ Gutman, *A Witness to Genocide*, 162.

¹⁰ The survivor, Selma, quoted by Christina M. Morus in "War Rape and the Global Condition of Womanhood: Learning from the Bosnian War," in *Rape: Weapon of War and Genocide*, eds. Carol Rittner and John K. Roth (St. Paul: Paragon House, 2012), 47.

¹¹ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, "III. Evidence: A. General Background," in *Judgement - Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, Feb. 22, 2001, <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

meeting, prior to the war in Bosnia, in which a group of Serbian and Bosnian Serb political and military leaders surmised that “one third of Muslims would be killed, one third would be converted to the Orthodox religion, and a third will leave on their own.”¹² When war broke out in Bosnia in April of 1992, Eastern Bosnia became a testing ground for the strategy of “ethnic cleansing.” Zvornik, Bijeljina, Višegrad, and Foča were only a few, but some of the most devastated townships to face the violent onslaught and were the first locations to be attacked by the old Yugoslavian National Army, or JNA, now a predominantly Serbian force.¹³ Not wanting to risk the lives of their soldiers by fighting the rag-tag militia units Muslims and Croats formed in order to protect their homes and villages, the Serb commander initially bombed targeted areas with heavy weaponry. Historian Noel Malcolm described this tactic, depicting how Serb forces would “sit back at a prudent distance and soften up the areas they were attacking with artillery bombardments for weeks or even months on end.”¹⁴ After the region’s defenders had been killed or had fled, paramilitaries units and Bosnian Serb forces methodically searched through Muslim or Croat neighborhoods looting, expelling, killing, and raping those they found hiding.

The first stages of the invasion went quickly in Foča, lasting from April 7 to 17, 1992. Foča epitomized the Serbian forces’ pattern of brutality as “men were separated from women and taken to Foča’s Kazneno-Popravni Dom (KP Dom Foča) a large prison facility from which many men went ‘missing’ and are presumed dead, while women,

¹² ICTY, Case No. IT-95-5-5/18-I, "Summary Judgement - Appeals Judgement Summary in the Case of Radovan Karadzic," July 11, 2013, http://www.icty.org/x/cases/karadzic/acjug/en/130711_judgement_summary_rule98bis.pdf, 4.

¹³ Human Rights Watch, *A Dark Closed Place*, 4.

¹⁴ Noel Malcolm, *Bosnia: A Short History*, 2nd ed. (New York: New York University Press, 1996), 244.

young children and the elderly were held at a number of detention centers across Foča.”¹⁵ Throughout Bosnia, after the initial invasions ended, women were frequently raped within their homes and often in front of loved ones.¹⁶ In most instances, they were then taken to rudimentary facilities that were comprised of “restaurants, hotels, hospitals, schools, factories, brothels, or other buildings.”¹⁷ In these settings, women were gang-raped and tortured some in front of their mothers, daughters, sisters, friends, and acquaintances.

As one of the first towns to be attacked in what developed into an extremely violent war comprised of separate sieges, occupations, violent expulsions, and horrendous atrocities, Foča is one case in which the Serbian forces’ campaign of terror, of which mass rape and sex crimes are one component, can be more easily understood. The rapes that occurred in the spring and summer of 1992 in Foča would follow a similar pattern in other Bosnian towns and cities.

¹⁵ Teresa Iacobelli, “The ‘Sum of Such Actions’: Investigating Mass Rape in Bosnia-Herzegovina through a Case Study of Foca,” in *Brutality and Desire: War and Sexuality in Europe’s Twentieth Century*, ed. Dagmar Herzog (Basingstoke: Palgrave Macmillan, 2009), 266.

¹⁶ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “III. Evidence: A. General Background,” 23.

¹⁷ Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (Minneapolis: University of Minnesota Press, 1996), 65.

THE POLICY OF RAPE, TERROR, AND ETHNIC CLEANSING: A LARGE-SCALE POLICY PERPETRATED IN FOČA

The emphasis of this chapter will be to describe the larger policy of expulsion through terror the Muslim citizens of Foča suffered at the hands of Bosnian Serb forces. The latter portion of this chapter will explain how, as a part of this larger process, rape and sexual crimes were calculated to result in the expulsion of Foča's Muslim population.

From the start, the war in Bosnia consisted of many smaller sieges and massacres. Radovan Karadžić and the Bosnian Serb military leadership cunningly designed the overall campaign of expulsion witnessed in Foča and other locations so that the overarching strategy of "ethnic cleansing" would be managed within smaller, municipal level governing units labeled crisis committees.¹⁸ After the war, the crimes Karadžić was indicted for involved his role as the political and strategic mastermind of the Bosnian Serbs, a position in which the ICTY prosecution asserted that, as such, he:

was the highest civilian and military authority in the Republika Srpska and participated in a joint criminal enterprise, or JCE, together with other members of the Serb and Bosnian Serb leadership to permanently remove Bosnian Muslims and Bosnian Croats from the municipalities through a campaign of persecutions, which included conduct that demonstrated an intent to destroy in part the national, ethnic, or religious groups of Bosnian Muslims or Bosnian Croats as such.¹⁹

Organizing "ethnic cleansing" throughout Bosnia by using the regionalized municipality structure allowed for Karadžić and the Bosnian Serb leadership to acknowledge to

¹⁸ ICTY, Case No. IT-96-93-T & IT-96-23/1-T, "III. Evidence: A. General Background," 17.

¹⁹ ICTY, Case No. IT-95-5-5/18-1, "Summary Judgement-Appeals," 69-70.

prosecutors that organized expulsions, rapes, and killings did occur while providing them with a manufactured alibi purporting that they were not in leadership positions governing these localities.²⁰ Because of this, connecting the program of mass rape to this elite stratum of the Bosnian Serb leadership proved challenging for prosecutors because regional crisis committees issued the orders pertaining to separate municipal zones.

In Belgrade, in 1991, journalist Giuseppe Zaccaria obtained photocopies of minutes recorded during a meeting in which the Serbian military leadership of the JNA contemplated the means through which they might speedily “cleanse” the regions they sought to control. The plan has been referred to as the *RAM Plan*, a premeditated strategy in which “ethnic cleansing” became the official policy for the war that would begin in Bosnia a short time later. This strategic plan, author James Gow asserts, “named RAM – the Serbian word for frame – established a frame around the periphery of the country within which Serb forces drove out non-Serbs and ‘disloyal’ Serbs from occupied areas; this was ethnic cleansing.”²¹ Though very little evidence for this plan exists, there are fragile threads connecting the strategy to the leadership of both Serbia and the Republika Srpska. Serbian president Slobodan Milošević, before the attack on Banja Luka in northern Bosnia, told Karadžić in a phone conversation, “it is of strategic importance for the future of ‘RAM’ that the Banja Luka Corps is able and mobile... Call... General Uzelac in one hour with a reference to the agreement at the highest place...All the people you supply...he will arm. We will bring helicopters and

²⁰ ICTY, Case No. IT-96-93-T & IT-96-23/1-T, “III. Evidence: A. General Background,” 3.

²¹ James Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes* (Montreal: McGill-Queen’s University Press, 2003): 174-175.

everything.”²² Milošević’s orders mention RAM and form a valuable evidentiary thread, used during Milošević’s trial, between himself, Radovan Karadžić, and the widespread military campaign to manufacture an ethnically pure Serbian state.

Zaccaria also asserted that in a subsection of this plan, written by the army’s special services, psychologists proposed the most effective means for killing and expelling other ethnic populations during the spreading war in Croatia and the ensuing war with Bosnia.²³ This plan directly targeted traditional patriarchal communities, the type dotting the northern and eastern rural regions of Bosnia. Zaccaria, quoting from the minutes of this meeting, described the agenda of the plan, restating what was said: “Our analysis of the behavior of the Muslim communities demonstrates that the morale, will, and bellicose nature of their groups can be undermined only if we aim our action at the point where the religious and social structure is most fragile.”²⁴ The architects of these crimes elaborated, finishing by clarifying who should be especially targeted, “We refer to the women, especially adolescents, and to the children.” They concluded that attacking this demographic would “spread confusion among the communities, thus causing first of all fear then panic, leading to a probable [Muslim] retreat from the territories involved in war activity.”²⁵ For those women imprisoned at the Partizan Sports Hall, the selections prior to rapes seemed planned. ICTY Witness FWS-48 stated that “some soldiers told her that they were ordered to rape their victims and that soldiers would come into the hall,

²² Quoted in Josip Glaurdić, “Inside the Serbian War Machine: The Milošević Telephone Intercepts, 1991-1992,” *East European Politics & Societies* 23, no. 1 (2009): 86-104, 95.

²³ Allen, *Rape Warfare*, 63.

²⁴ Quoted in Allen, *Rape Warfare*, 57.

²⁵ Quoted in Allen, *Rape Warfare*, 57.

point at women, take them out, and rape them and bring them back.”²⁶ Dr. Cherif Bassiouni, Emeritus Professor of Law at DePaul University and legal consultant to the ICTY, described a scene where guards would “rape the women and then go out in the streets soliciting men to come and rape the women.”²⁷ This sub-plan was known as the *Brana Plan*. It was to be managed by General Ratko Mladić who “encouraged his troops to rape the young women of Srebrenica,”²⁸ in 1995, while ethnic cleansing was being conducted in other locations through the violent actions of paramilitary units such as Arkan’s Tigers and Vojislav Šešelj and his White Eagles among many others.²⁹

Rape meant the total humiliation of women who, in many traditional Bosnian Muslim communities, “symbolized the family code of honor/shame, as evident in the highly controlled aspects of their chastity, marital virtue, and fertility.”³⁰ Sexually assaulting women from these communities, besides creating fear and spreading terror, was intended to signify the ability of the Serb militants to commit rapes as a direct attack on the male population of their enemies who, it was thought, would “suffer the shame of their failure to protect their property that includes women, family, bloodlines and soil.”³¹

Sexual assault aided in securing the Serbs’ outcomes by damaging the individual mentally and emotionally and harming the relationships with traditional Muslim families.

²⁶ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “III Evidence: A: General Background,” 6.

²⁷ *War Crimes in the Balkins: Joint Hearing, S. Hrg. 104-448, Before the Select Committee on Intelligence of the United States Senate and Committee on Foreign Relations of the United States Senate*, 6th August 1995, 104th Cong., 1st sess. (Washington, DC: U.S. Government Printing Office, 1996), 50.

²⁸ *War Crimes in the Balkins*, 80.

²⁹ *Ibid.*, 58.

³⁰ Cindy S. Snyder et al., “On the Battleground of Women’s Bodies: Mass Rape in Bosnia-Herzegovina,” *Affilia: Journal of Women and Social Work* 21, no. 2 (2006): 184-195, 187.

³¹ Maria B Olujie, “Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia-Herzegovina,” *Medical Anthropology Quarterly* 12, no. 1 (1998): 31-50, 39.

Another objective was to harm the women enough, both mentally and physically, so they would stop bearing children or, in a seeming contradiction, impregnate them with “Serb” babies.³² This was decided by the Serb leadership would, “interfere with autonomous reproduction and destroy the group by sexually traumatizing the pregnancy so they may be unable to have normal sexual or childbearing experiences with members of their own group; may no longer be marriageable in their society, or, simply because they are pregnant with the children of the aggressors, cannot bear their own children.”³³ A raped woman was often rejected by their husbands and “blamed for the rape, the woman faced ostracism from her family and community.” Furthermore, “those women were often viewed as tainted and unworthy for reproduction.”³⁴ Atrocities committed in civilians’ homes, places of worship, schools, businesses, and townships, it was calculated, would limit the willingness of survivors to one day return. Judge Florence Mumba, of the ICTY, stated of the men on trial in the *Kunarac Case* that “They knew that one of the main purposes of the campaign was to drive the Muslims out of the region and 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.”³⁵ Rape, for these three militants, was a principal means through which they spread terror throughout Foča.

³² Iacobelli, “The ‘Sum of Such Actions,’” 263.

³³ Quoted in Yana Hashmavova, “War Rape: (Re)defining Motherhood, Fatherhood, and Nationhood,” in *Embracing Arms: Cultural Representation of Slavic and Balkin Women in War*, eds. Helena Goscilo and Yana Hashmova (New York: Central European University Press, 2012), 234-235.

³⁴ Todd A. Salzman, “Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia,” *Human Rights Quarterly* 20, no. 2 (1998): 348-378, 366.

³⁵ ICTY, “Judgement of Trial Chambers II in the Kunarac, Kovac and Vukovic Case,” ICTY press release, February 22, 2001, on the ICTY website, <http://www.icty.org/sid/8018>.

The United Nations Security Council acknowledged rape as a tactic for ethnic expulsion in the early part of 1992 in *Resolution 780* in which the assembly admitted the existence of the “widespread use of rape as part of the phenomenon of ‘ethnic cleansing.’”³⁶ One phase of this mass rape strategy occurred with the rounding up of civilians within besieged towns and villages. When citizens had been assembled for deportation or execution, women were often dragged off into nearby buildings, or frequently assaulted in plain sight, and raped frequently by multiple assailants. Age had no bearing on who was raped. In one such instance, “a victim witnessed the rape of an elderly woman in front of a group of 100 villagers.”³⁷ After the initial phases of the “cleansing” campaigns, women were sent to the camps where rapes continued.

The next phase of mass sexual assault took place within temporary detention facilities, in a more organized fashion. Women were guarded by regular, revolving units of men with paramilitary, Serb police authorities, regular soldiers, camp guards, and Bosnian Serb civilians repeatedly coming to these centers in the purpose of raping women. In these circumstances, the women might be taken away, many times never to be seen again by their friends and family who had also been imprisoned. Many times women came back to the camps mutilated and in intense pain, yet rarely received adequate medical attention.³⁸ In the camps, women were raped several times a day and regularly by groups of men. In many cases, if women were found to be pregnant, they

³⁶ William M. Walker, "Making Rapist Pay: Lessons from the Bosnian Civil War," *Journal of Civil Rights and Economic Development* 12, no. 2 (1997): 449-476, 454.

³⁷ Catherine N. Niarchos, "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 17, no. 4 (1995): 649-690, 655.

³⁸ ICTY, "Facts about Foča," 4.

were held for seven months, the timeframe required for a safe abortion, then released.³⁹ It was believed that by forcefully impregnating Muslim women future generations of Bosnian Muslims would slowly begin to vanish in a slow process of dilution as Muslim offspring became Serb.⁴⁰

The last element of the mass rape plan occurred in brothel-like prisons that catered primarily to Serbian militants; establishments such as Hotel Zelengora in Foča and the Vilina Vlas Spa in Višegrad became centers of torture and rape.⁴¹ In Vilina Vlas, women were detained in hotel rooms that were unlocked as men selected which girls they wanted to rape. Within these prisons, women routinely faced execution, and like other imprisoned women, suffered greatly at the hands of soldiers who had lost comrades in the fighting and were regularly intoxicated and often seeking violent retribution.⁴²

Speaking about Foča, a witness for the prosecution, Witness KDZ-239, answered cross examination questions directed against him by Karadžić who represented himself at the Tribunal. The witness described the system of occupation in the town stating “there were 14 locations in the municipality of Foča which were designated either as camps or detention facilities.” He continued, mentioning a few of these locations, “If we take the first, Hotel Bukovica, there were civilians held there and if we go along the Drina downstream of the Drina, there was a Buk Bijela hydroelectric plant facility where civilians were also held.” He went on, “admittedly most of them were women and children because the men had been taken to the KP Dom Foča (Kazneno-Popravni Dom,

³⁹ Allen, *Rape Warfare*, 73.

⁴⁰ *Ibid.*, 87.

⁴¹ Rachel Irwin, "Visegrad in Denial Over Grisly Past," *Institute for War and Peace Reporting*, February 24, 2009, <http://iwpr.net/print/report-news/visegrad-denial-over-grisly-past>.

⁴² Niarchos, "Women, War, and Rape," 656.

Home for Criminal Rehabilitation).” Concluding his synopsis, the witness described the layout of the town, stating “in the center proper, we have the so-called Partizan conference hall where a number of women and children were held and where some of the most serious crimes were committed, women were raped there.”⁴³ Professor Cherif Bassiouni, head of the U.N. Commission of Experts on Bosnia, testifying in front of the United States Senate, stated “when you see the same thing happening over a period of 4 years, and happening in the same way, with the same structure, you are bound to reach the conclusion that this was the product of policy.”⁴⁴ The rapes committed in Foča were the crimes of the individuals who committed them, the local military, and civilian leadership, and also a product of the Bosnian Serb and Serbian leadership.

The rapes and sexual abuses perpetrated in Foča represent a pattern seen throughout Bosnia. The town of Višegrad, farther north along the Drina River, witnessed the formation of hastily formed rape camps also. In northwest Bosnia, the women of Prijedor and other villages were detained and raped inside of Omarska concentration camp. Women were raped in camps and brothels just outside of Sarajevo. The *Ram Plan* was a strategy designed to intentionally maximize the affects of the violence and terror perpetrated against traditional Muslim and Catholic populations. Rape, extreme violence, and the destruction of cultural landmarks and history represented the strategy instituted by ethnic Serb forces in which, through terror and destruction, the Serbians’ ethnic others would not seek to return to their homelands.

⁴³ ICTY, Case No. IT-95-5/18-I, "Transcript Testimony of Witness KDZ-239," September 16, 2011, <http://www.icty.org/x/cases/karadzic/trans/en/110916ED.htm>, 18946-18947.

⁴⁴ *War Crimes in the Balkans*, 59.

RAPE IN FOČA: THE CRIMES OF DRAGOLJUB KUNARAC, RADOMIR KOVAČ,
AND ZORAN VUKOVIĆ

The organized nature of the Bosnian Serb municipal system will be described in relation to the sexual crimes perpetrated by Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković in this portion of this thesis. The large-scale policy of ethnic cleansing will be displayed through the violent sexual abuses of these three war criminals. Examining these crimes will showcase the need for the development of the broadening criteria for sexual violations which occurred at the ICTY.

The organized system behind the Bosnian Serb and Serbian assault was epitomized in the early attacks against the townships dotting Bosnia's eastern border with Serbia, of which Foča was one. On April 8, 1992, Bosnian Serb and Serbian forces invaded the municipality of Foča. They commenced the siege by using heavy artillery to attack and subdue the Muslim section of town before irregular forces "cleansed" the area and collected or killed civilians hiding in nearby woods. Within ten days, Serb militants had taken over Foča and the surrounding villages, at which point the occupation began. The ICTY's investigative unit, in a report to the court conducting the *Kunarac Case*, described this phase of the attack as "achieved without much fighting but involving futile violence."⁴⁵ Villagers and townspeople were taken to collection points in and around Foča and detained, where they faced beatings, rapes, and killings. Witnesses recalled that

⁴⁵ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, "III. Evidence: A General Background," 18.

“men were separated from the women as they were captured, and that the former were sometimes killed on the spot.”⁴⁶ Survivors recounted to investigators that they later saw bodies with hands tied behind their backs and wounds in the backs of their heads floating down the Drina River.⁴⁷

Muslim women were initially imprisoned among a variety of houses, apartments, gymnasiums, and schools. Many survivors, interviewed by ICTY investigators, stated that they had already been severely sexually abused prior to their arrival in the camps.⁴⁸ Witness FWS-75, imprisoned at the Buk Bijela Hydroelectric plant, was taken away from a group of detainees by Zoran Vuković, allegedly for questioning, where she described being “raped in the very same room by approximately 10 other men, fainting after the tenth man.”⁴⁹ Crimes such as Vuković’s were routine at camps throughout Foča. Men like Vuković represented, as Dr. Cherif Bassiouni stated, again testifying in front of the United States Senate, “the worst elements of society, who yesterday would have been convicted of crimes, now clothed with the flag of nationalism, were heralded for whatever they were doing.”⁵⁰ The atmosphere in Foča exhibited the breakdown of order which “encouraged the worst elements of society to engage in those activities.” These policies, Bassiouni continued, “created an opportunity for political plausible deniability

⁴⁶ Ibid., 20.

⁴⁷ Ibid., 20.

⁴⁸ Ibid., 22.

⁴⁹ Ibid., 22.

⁵⁰ *War Crimes in the Balkan*, 44.

by the leaders and by the military by claiming that those were police auxiliaries, they were not even wearing uniforms, they were acting on their own, or they were militias.”⁵¹

The three men who seized power and allowed this atmosphere to flourish in the Foča opština were, Roy Gutman described in 1993, “three top associates of the Bosnian Serb leader Radovan Karadžić: Velibor Ostojić, a minister in Karadžić’s government, and two other close aides, Vojislav Maksimović and Petar Čančar.”⁵² They relied upon militias to carry out their orders which, in Foča, “wore camouflage fatigues and called themselves the ‘Serbian Guard’”⁵³ They were aided in their crimes by Foča’s chief of police, Dragan Gagović, who “was personally identified as one of the men who came to the detention centers to take women out and rape them.”⁵⁴ These three leaders, assisted by the local police, set up their headquarters in a villa just outside of Foča surrounded by paramilitary units. From here, they directed the occupation of the municipality for over a year, renaming Foča “Srbinje” or the place of the Serbs.⁵⁵

Over the span of 1992, and into 1993, hundreds of Foča’s Muslim women were held and moved between a series of rudimentary camps. At first those soldiers detaining the women proclaimed that they were being interrogated for information about the location of arms depots and Bosnian fighters; but later, other reasons motivating their imprisonment quickly became clear. Between late April and mid July, “at least 72 Muslim prisoners were being held at Foča High School, at least 50 of these prisoners

⁵¹ Ibid., 44-45.

⁵² Gutman, *A Witness to Genocide*, 157.

⁵³ Ibid., 158.

⁵⁴ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “ V. Judgment,” 205.

⁵⁵ Gutman, *A Witness to Genocide*, 163.

were female, some as young as 12 years old, being held for the sole purpose of rape.”⁵⁶ Many of the victims at the school reported being raped every night in the school and frequently in the apartments where they were taken. Many were then brought to the Partizan Sports Hall, which acted as rape camp until August of 1992 and was located next door to Foča’s Police Station in the middle of the town center.⁵⁷

The conditions at Partizan Hall were purposefully horrible with “unhygienic facilities, overcrowding, starvation, physical and psychological torture, including sexual assaults.” The detained were issued “neither blankets nor towels, only a few mattresses were provided for sleeping, food was meager and medical care for the detainees was not authorized.”⁵⁸ They had been tortured and beaten; many were in urgent need of medical attention, many developed serious and damaging infections. Numerous women suffered internal injuries from the violent sexual abuse they endured, mistreatment that frequently resulted in lasting injuries to their reproductive systems. It was reported to ICTY investigators that two women died due to the torture they suffered when not given medical attention at Partizan Sport Hall.⁵⁹

At these locations, guards monitored the arrival of small groups of soldiers, militiamen, and civilians who raped the women in the camps or took the chosen women away to local headquarters, barracks, houses, and apartments. These men, prisoners reported, would sleep during the day and rape every night. The survivors would, as they fled Foča, communicate and spread the frightening crimes they experienced at the hands

⁵⁶ Iacobelli, “The ‘Sum of Such Actions,’” 267.

⁵⁷ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “III. Evidence: General Background,” 25-26.

⁵⁸ Iacobelli, “The ‘Sum of Such Actions,’” 267.

⁵⁹ Niarchos, “Women, War, and Rape,” 658.

of their Serb captors with the intention that the areas in which these crimes occurred, old homelands, would be transformed into locations haunted by horrible memories, motivating survivors to not seek to return.⁶⁰

Many women were raped in other, smaller locations. One site, used frequently by Bosnian Serb soldiers, was “Karaman’s House,” a property seized by Bosnian Serb soldiers after its Muslim owner had fled. In these locations, Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković committed many of their offenses. Kunarac was the commander of a Bosnian Serb Army reconnaissance unit charged with gathering intelligence concerning enemy movements and locations within the Foča crisis zone. He had been born in Foča and knew the area, joining the Yugoslavian Army when he was old enough. Kunarac himself stated in front of the ICTY trial chamber that he was in charge of a group of fifteen soldiers, a unit subject to change, from which he would take four to five men at a time from other units for specific missions.⁶¹ He was a commander of men and was responsible for the conduct of his soldiers including the rape of women, but was, as will be examined later in this thesis, not convicted of crimes of superior criminal responsibility, but only for individual criminal responsibility.

The women imprisoned within Foča High School and the Partizan Sports Hall came to know Dragoljub Kunarac well. Witness for the prosecution FWS-87, FWS being the acronym that designated those testifying in cases relating to the conflict in Foča who were in need of protected pseudonyms, a girl of fifteen years of age during the occupation of Foča, told investigators that Kunarac and his soldiers “would come inside looking for

⁶⁰ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “ V. Judgment,” 205.

⁶¹ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “ V. Judgment,” 206-207.

particular persons, girls.” The soldiers would then “select them, as many as they wanted, and then they would take them with them.”⁶² From these locations, the girls were taken to confiscated Muslim houses. Witnesses recalled a house near the Aladža Mosque, located in downtown Foča, a residence near the bus station, the infamous “Karaman’s house,” and the apartments in the Brena block structure. She described how, when she and the other women arrived at these locations, there usually were several—if not more—soldiers there who would immediately take them away and rape them. Witness FWS-87 recalled being raped by Kunarac himself on more than one occasion as well as by the other men, including Radomir Kovač.⁶³

Witness FWS-191 was a seventeen year old girl when the war started in and around Foča. She recounted how, around June 20, 1992, the situation became unbearable, her family tried to flee into the woods like so many other non-Serb families. They were captured on July 4, 1992, and taken to a school close to where they were seized, alongside one hundred and forty other Muslims from the village of Gačko.⁶⁴ On August 2, 1992, she was separated from her mother, abducted with eight other girls by Kunarac and his gang. The girls were forced into a refrigerated storage truck and taken to Foča and detained in a house in the Trnovace section of Foča. At this location, FWS-191 was questioned by Kunarac. During her interrogation, she told him that she was a virgin after being forced to disclose to him her sexual history. He responded by declaring “that he

⁶² ICTY, Case No. IT-96-23-T & IT-96-23/1-T, Testimony of Witness FWS-50, March 29-30, 2000, <http://www.icty.org/sid/188>.

⁶³ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, Testimony of Witness FWS-87, April 4-5, October 23, 2000, <http://www.icty.org/sid/10117>.

⁶⁴ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “III. Evidence: A. General Background,” 94.

would then be the first.”⁶⁵ He took off his clothes and ordered her to do likewise; he then placed a bayonet on the bedside table. Kunarac attempted to rape her, but because she was terribly frightened, the witness stated he could not. She was forced to spend the entire night next to Kunarac.⁶⁶

Over the time she was imprisoned by Kunarac and his men, witness FWS-191 recalled being raped by many Serb militants. At the Trnovace house, girls were forced to use Serb names and cook and clean, they did whatever they were told because, as they informed ICTY investigators, they were afraid of far worse abuses. FWS-191 told ICTY investigators that she was raped by Dragoljub Kunarac more than twenty times over the period lasting from August 22, to September 22, 1992. She also recalled being taken to the Brena block apartment of Radomir Kovač. During a brief instance in his apartment FWS-191 remembered seeing witness FWS-87 there, a statement which corroborated the testimony of FWS-87. Shortly after being taken back to the house at Trnovace, FWS-191 escaped her horrible circumstances when her boyfriend and future husband, a Bosnian Serb, took her and FWS-186 away from the residence when Kunarac was away in Montenegro for a week. This suggests an atmosphere in Foča where not all Bosnian Serbs participated in ethnic cleansing or held even negative views about Muslims.⁶⁷ This Serb continued to protect FWS-191 and 186 when, upon his return, Kunarac tried to locate the women.

Foča High School was the first place in which witness FWS-95, a twenty-seven year old Muslim woman, was imprisoned. She stated in front of ICTY investigators that

⁶⁵ Ibid., 95.

⁶⁶ Ibid., 95.

⁶⁷ Ibid., 95-98.

during the first night of her imprisonment a man, she did not know his identity, came in and ordered her and some other women to come with them. She and witness FWS-87 were two of those selected. From there, they were led to a classroom in which four men were waiting; each man took a woman and raped her. She recounted these abusive encounters with Serb militants stating that “it wasn’t sex with pleasure, it was with fury; they were taking it out on us.”⁶⁸ She was taken to the house near the Aladža Mosque on two occasions where she was raped by Kunarac in addition to being raped by him at Partizan Hall. A Serb guard at Partizan attempted to stop soldiers from coming in and taking the women away, but was told that the soldiers had the approval to do so granted them by Foča’s chief of police, another ICTY indicted war criminal, Dragan Gagović, who died before he could stand trial.⁶⁹

Another witness sexually assaulted by Dragoljub Kunarac was thirty-five years old at the time of her imprisonment. Witness FWS-48 recalled before ICTY investigators that she was also initially detained at Foča High School for two weeks prior to being taken to Partizan Sports Hall. She recalled the instance in which she found herself being taken from the bathroom at Partizan, lined up in the building’s entrance hall, and taken by Kunarac to Hotel Zelengora in Foča where “Kunarac allegedly raped her twice, telling her that from now on she would be giving birth to Serb babies and that there would be no Muslims left in Foča.”⁷⁰ He then threatened that she should not cry as this was not the

⁶⁸ Ibid., 109.

⁶⁹ Ibid., 109.

⁷⁰ Ibid., 112.

first time she had been raped and that it would not be the last. At this hotel, she also recalled being raped by Zoran Vuković before being brought back to Partizan Hall.⁷¹

Raping women was not Dragoljub Kunarac's only crime; he encouraged his subordinates to do the same. In the ICTY tribunal's judgment against Kunarac, it was acknowledged that "the accused not only showed that he knew that his crimes fitted in with or were a part of the attack (on Foča's non-Serbs), but he also clearly showed that he intended them to be so." The judgment continued, stating, "He demonstrated a total disregard for Muslims in general and Muslim women in particular." The document concludes, asserting that "The accused Dragoljub Kunarac used his bravery in combat to gain the respect of his men, and he maintained it by providing them with women."⁷² He urged his men to abuse the women, expressing the view that "the rapes against the Muslim women were one of many ways in which Serbs could assert their superiority and victory over the Muslims."⁷³ He told one of the women he raped, witness FWS-183, that she should enjoy being "fucked by a Serb."⁷⁴ Leaders such as Dragoljub Kunarac made the policy of expulsion through terror by raping women a feasible strategy meant to provoke panic in Foča, however he never faced charges for superior criminal responsibility, only individual accountability. Because Kunarac would select only "four or five soldiers at any one time and that the soldiers returned to their respective detachments after completing individual tasks," the trial chamber pronounced more proof would be necessary for him to face charges of superior criminal responsibility, a charge

⁷¹ Ibid., 112.

⁷² ICTY, Case No. IT-96-23-T & IT-96-23/1-T, "V. Judgment," 206-207.

⁷³ Ibid., 207.

⁷⁴ Ibid., 207.

that encompasses the orders issued by those in positions of leadership, making officers responsible for the crimes of their men, minus their own physical involvement.⁷⁵

Kunarac was actively physically involved in sex crimes alongside his men. After taking witness FWS-87 from the Partizan Sport Hall to the house located near the Aladža Mosque, she was taken to “Karaman’s House” where she was imprisoned for a period of nearly two months.⁷⁶ The detained women were repeatedly raped every other night. One night, she recalled to ICTY investigators, Kunarac was wounded but still, she stated, “he took me into a room on the upper floor and he raped me there.” She said she wondered “how an individual who had been wounded or injured could do something like that.”⁷⁷ She and several other women detained in “Karaman’s house” never tried to flee, they explained, because the town was completely militarized and the men who had raped them as well as the Serb residents they knew would spot them. The women said they were far too intimidated by the violence they endured at their captors’ hands to ever attempt such a feat.⁷⁸ After her two months in “Karaman’s house,” FWS-87 was taken to an apartment in the Brena building, the lodgings of another war criminal charged in the indictment, Radomir Kovač—a local born in Foča who had lived there all his life and a sub-commander of Foča’s Bosnian Serb military police.⁷⁹

FWS-87 and several other girls were imprisoned in the Brena apartment for a period of nearly four months, from roughly late October of 1992, until February of

⁷⁵ Richard P. Barrett and Laura E. Little, "Lessons in Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals," *Minnesota Law Review* 88, no. 30 (2003): 47.

⁷⁶ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, "Testimony of Witness FWS-87," April 4-5 and October 12, 2000, <http://www.icty.org/sid/10117>, 4.

⁷⁷ *Ibid.*, 4.

⁷⁸ *Ibid.*, 4.

⁷⁹ *Ibid.*, 4.

1993.⁸⁰ Radomir Kovač was indicted for the repeated rape, enslavement, torture, and other outrages upon the personal dignity of Witnesses FWS-75, FWS-87, and two other girls known simply as A.B. and A.S. In the apartment, the girls were forced to do household chores, to cook for the men, and to dance naked for Kovač and his friends; these crimes that earned him a conviction for outrages upon personal dignity as violations of laws and customs of war later. They persistently suffered the shock of repeated sexual assaults, psychological and physical torture, and being incarcerated in a constant state of fear for the four months they were under Kovač's control. The witnesses stated that they were forced to survive on the scarce leftover food of Kovač and his men; he locked them in the apartment when he was away, forcing them to subsist without any sustenance for days. One of the girls, A.B., was no more than twelve years old during the period in which she suffered frequent sexual abuse. During the last period of these girls' incarceration, they faced further sexual aggression before being sold to other militants in Foča. A.B., a twelve year old girl, was sold to an unidentified Montenegrin Serb militant for two-hundred Deutschmarks and was never seen again.⁸¹

After the sale of A.B., witness FWS-87 continued to endure her captivity along with another woman, A.S. Witness FWS-87 described to prosecutors the constant state of humiliation she suffered, detailing how Kovač "forced me to take my clothes off, to climb on the table, and to dance to music." He also "was sitting on the bed with a pistol pointed at me, I was frightened and I was ashamed."⁸² If they resisted his aggressive wishes, he would threaten the girls with the frightening prospect of being paraded naked

⁸⁰ Ibid., 5.

⁸¹ ICTY, Case No. IT-96-23-T & IT-96-23.1-T, "III. Evidence: A. General Background," 28.

⁸² ICTY, Case No. IT-96-23-T & IT-96-23.1-T. "Testimony of Witness FWS-87," 4.

down the main streets of Foča where he promised to slit their throats and throw them into the Drina River. On one such day, witness FWS-87 stated, Kovač actually did take them, all naked and in public, to the river where the girls thought they would be killed and surely would have been, the witnesses asserted, if not for the intervention of another soldier whose motivations for stopping the crime were left unstated.⁸³

In mid February, witness FWS-87 was sold, along with another girl, to two Montenegrin soldiers for the sum of 500 hundred Deutschmarks and some soap.⁸⁴ From the Brena apartment building, they were then taken across the border to neighboring Montenegro, which was still a republic in Yugoslavia with Serbia, and was supportive of the Bosnian Serb military aims. After crossing the border, the girls were driven in the trunk of a car to the town of Nikšić where they lived in an apartment and continued to suffer frequent rapes. They were forced to work as waitresses in a local coffee bar before being taken to the capital city of Podgorica. After a few weeks, they broke free from the apartment, found a bus station, and escaped. FWS-87, in summarizing her feelings surrounding the sexual violence she had suffered, stated, “I think that for the whole of my life I will have thoughts of that and feel the pain that I felt then and still feel, that will never go away.”⁸⁵ The crimes committed by Radomir Kovač went beyond rape; he also conspired to make money off the sale of human beings, individuals he enjoyed torturing and saw as his personal slaves. Later, during the trial, sexual slavery, enslaving an individual with the purpose of sexually exploiting them, became a new classification of

⁸³ Ibid., 4.

⁸⁴ Ibid., 5.

⁸⁵ Ibid., 6.

war crime to be added to the ICTY statute and drafted in an attempt to define an increasingly vast accumulation of sex crimes being brought to the tribunal's attention.

Zoran Vuković was born in Foča where he worked as a waiter and a truck driver before the war. During the invasion and subsequent occupation, he was a member of Dragoljub Kunarac's reconnaissance unit. Along with Kunarac, Vuković would select girls and women to rape from Foča High School and the Partizan Hall. Kunarac and Vuković took some of the girls they selected to another facility often used for the rape of Muslim women, the Hotel Zelengora in downtown Foča. He was also occasionally a visitor at Kovač's Brena block apartment where he forced witness FWS-75 to have sex with him by locking her in the kitchen. In addition, he was charged with the rape of FWS-87 while in Kovac's apartment, sexually abusing her at least two times. At the Hotel Zelengora, Vuković and Kunarac participated in the joint rape of witness FWS-48.⁸⁶

At the Partizan Sports Hall, witness FWS-50, a fifteen year old girl at the time of her captivity, was hiding in the bathroom of the complex when Vuković specifically sought her out. He took her to the Brena apartment and raped her there. When he was done, the witness said, he threatened her, "when he finished raping me he sat down and lit a cigarette, he said that he could perhaps do more, much more, but that I was about the same age as his daughter, and so he wouldn't do anything more for the moment."⁸⁷ Though Vuković was not an officer, or a person in a high position of command, his molestation of underage Muslim girls is an example of what Bosnian Serb militants

⁸⁶ ICTY, Case No. IT-96-23-T & IT-96-23.1-T, "III. Evidence: A. General Background," 127.

⁸⁷ ICTY, Case No. IT-96-23-T & IT-96-23.1-T, "Testimony of Witness FWS-50," 2.

throughout Foča did to torture Muslim women, and comments like his threat to Witness FWS-50 strongly suggest the existence of a command structure issuing orders for Serb militants to rape Muslim women.

The Muslim women of Foča, and women across Bosnia, found themselves stuck in the impossible scenario of resisting the mass rape campaign of Serbian militants and possibly being brutally tortured and killed, or coping with the burdensome shame placed upon them by the traditional cultures they were a part of. The crimes these women lived through inflicted lasting wounds, mentally and physically, affecting the lives they began to lead after the Bosnian war's conclusion.

In Foča, the investigative team dredged up evidence suggesting that the sexual assaults perpetrated there were “widespread and systematic, problems that followed a pattern very similar to those in other regions such as Prijedor and Brčko.”⁸⁸ These investigators concluded that “the events in Foča could be linked to the wider picture of the events in Bosnia and Herzegovina and the overall goals of the Bosnian Serb leadership.”⁸⁹ Thus, the crimes committed in Foča and the attempts to obtain some measure of justice for the women who endured suffering at the hands of Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković in addition to many others became an issue of larger importance to those who survived mass rape in other regions of Bosnia.

The crimes of these three war criminals encompassed multiple sex crimes, including rape, making a singular set of legal classifications for their crimes insufficient.

⁸⁸ *Bridging the Gap Between the ICTY and Communities in Bosnia and Herzegovina: Conference Series, conference proceedings in Foča*, October 9, 2004. ed. Liam McDowall (The Hague: Communications Service Registry, ICTY, 2009), http://www.icty.org/x/file/Outreach/Bridging_the_Gap/foca_en.pdf, 25.

⁸⁹ *Ibid.*, 25.

Accordingly, justice in *ICTY vs. Kunarac* was about more than simply punishing war criminals who committed rape against Foča's Muslim women. The process behind achieving successful convictions became as important as the rulings themselves. As prosecutors of the *Kunarac Case* attempted to characterize the crimes they were presented with, it became apparent that these sexual crimes required new definitions in order to be tried by the ICTY. During this process, rape became severe enough to be considered as a crime against humanity and as a violation of the laws or customs of war. The newly classified crime of sexual enslavement merged two crimes into one term, slavery and sexual abuses as one crime against humanity. For the mental anguish and humiliation these perpetrators caused, abuses such as forcing women to walk naked through Foča or dance naked on tables, the ICTY established the crime of outrages upon personal dignity as a violation of the laws and customs of war. Additionally, extra charges could be applied for these crimes under the definition of individual criminal responsibility and superior criminal responsibility, the latter encompassing commanders and officers at all levels of the military or civilian hierarchy.⁹⁰ One of the ICTY's greatest achievements, it is now clear, came out of the necessity to define the overwhelming amount of sexual crimes perpetrated by the three defendants and their fellow Bosnian Serb soldiers.

⁹⁰ Matteo Fiori, "The Foča 'Rape Camps': A Dark Page Read through the ICTY's Jurisprudence," *Hague Justice Journal* 2, no. 3 (2007): 14, [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2\(3\)/The%20Foca_Fiori_EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2(3)/The%20Foca_Fiori_EN.pdf).

RAPE AS A WAR CRIME: A SYNOPSIS OF THE EVOLUTION OF MODERN INTERNATIONAL LAW

Long before the ICTY's precedent setting hearings, international laws such as the *Lieber Code* in 1863 and the *Geneva Conventions* in 1864 were drafted in an attempt to control the levels and forms of violence occurring on battlefields. These laws and the prominence of rape laws within these regulations and conventions will be the topic of this chapter in order to highlight the progressive nature of the *Kunarac Case* and of the ICTY.

As warfare changed in the nineteenth century, so did international law. Coinciding with the first years of the American Civil War, Francis Lieber, a German immigrant and professor of philosophy, wrote what would be called the *Lieber Code*, a significant set of guiding principles for the conduct of war, which included the mistreatment of women in occupied war zones, a precursor to future international conventions. The official name of the document was *General Order, No. 100*, issued by President Abraham Lincoln to Union troops in 1863.⁹¹ Lieber's code established three of the first articles dealing with the crime of rape during times of modern war and set a precedent that would continue in the twentieth century. The first rule stated that "soldiers will protect the persons of the inhabitants of occupied territory, especially women." Clause two defined the punishment for rape as death. The code concludes stipulating that "crimes... such as rape, if committed by an American soldier in a hostile country against

⁹¹ Crystal N. Feimster, "Rape and Justice in the Civil War," *The New York Times*, April 25, 2013, <http://opinionator.blogs.nytimes.com>.

its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.”⁹² The *Lieber Code* was an inspiration to Europeans following the widely publicized war and, “in 1864, representatives from all the major European powers met in Switzerland to discuss humane rules governing warfare.”⁹³ They passed a draft statute similar to Lieber’s code, which later became the original *Geneva Conventions* of 1864, which focused primarily on the ethical treatment of wounded soldiers, but did not yet mention rape as a violation.

Following closely after the 1864 *Geneva Conventions*, *The Hague Regulations of 1907* were the next major international convention attempting to define and regulate conduct for ethical behavior in war. These regulations focused primarily on classifying rules to constitute appropriate laws and customs of war, punishable war crimes and procedures for disarmament, and offering very few measures devoted to the protection of civilians.⁹⁴ Rape is not specifically referred to in the Hague Regulations. Article 46 of these regulations restricts attacks against, “family honor and rights, the lives of persons, and private property, as well as religious convictions and practice.”⁹⁵ Within the parameters of this clause, rape was interpreted as a crime against a collective, not as a violation of war perpetrated against individuals. Yet seven years later, World War I witnessed the use of rape by German soldiers marching through Belgium en route to invading France in 1914 as a way of improving the morale of soldiers while also using

⁹² Ibid.

⁹³ Nathan Johnson, "The Lieber Code," *History Revived* [blog], April 30, 2013, <http://historyrevived.blogspot.com/2013/04/the-lieber-code.html>.

⁹⁴ Michael Siegrist, “Belligerent occupation under the Fourth Geneva Convention of 1949,” *Graduate Institute Publications Online*, April 2011 <http://iheid.revues.org/94>, 1.

⁹⁵ "Regulations: Art. 46," in *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, International Peace Conference 1907, The Hague, October 18, 1907, <https://www.icrc.org/ihl/INTRO/195>.

rape as a method with which to instill fear in the populace of occupied regions.⁹⁶ These crimes, and others like them, made it increasingly necessary for an evolved set of international regulations encompassing the staggering levels of violence.

The *1929 Geneva Conventions* did however draft new terminology for the protection of wounded and captured combatants, language that would later be applied to the *Fourth Geneva Convention* of 1949 in relation to the treatment of civilians. Specifically, in Article 27 of the *Fourth Geneva Convention*, the opening paragraph refers to “respect for the person,” which is based on a similar requirement listed in the convention of 1929.⁹⁷ In the Second World War, mass rape was perpetrated on a far greater scale than the First World War, leading to a broadening series of regulations for the protection of civilians with rules specific to the treatment of women.

More civilians than soldiers died in the Second World War with mass rape being committed as a strategy behind the production of terror and retribution. German armies raped Polish, Jewish, and Russian women during their aggressive push eastwards. As Russian forces battled throughout the streets of Berlin in 1945, millions of German women faced mass rape. One of the multitudes of women raped by Russian forces recorded this massive war crime in her diary, which became *A Woman in Berlin: Eight Weeks in the Conquered City*. The anonymous author describes the state of constant terror women suffered as they attempted to hide and disguise themselves to avoid the repeated rapes Russian soldiers committed against them. She, and other women in Berlin,

⁹⁶ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975), 40-48.

⁹⁷ "Commentary - Art. 27. Part III : Status and treatment of protected persons #Section I : Provisions common to the territories of the parties to the conflict and to occupied territories," in *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, Geneva, August, 12, 1949, <https://www.icrc.org/ihl/COM/380-600032?OpenDocument>.

joined nearly two million other German women who were raped as the Red Army moved towards Berlin.⁹⁸ After the war's end, German men began to return home and rape became taboo. The victorious Soviet forces did not see fit to apply the judicial scrutiny of an international tribunal to their own men and the rapes perpetrated by the Red Army went unpunished.⁹⁹

In China, Korea, and other nations occupied by Japan, women were savagely raped and killed. In Nanking, China, Japanese soldiers brutally raped, mutilated, and killed Chinese women. With obvious and widespread atrocities perpetrated across the map, at places such as Nanking, the international community attempted to punish those perpetrators they could find and incarcerate.¹⁰⁰ At the end of the Second World War, the resultant criminal military tribunals at Nuremburg and Tokyo pursued justice for civilian victims, both living and dead. During the Nuremburg Tribunals, prosecutors submitted evidence of rape from which the court could witness how sexual abuse had been perpetrated en masse. Yet, after many restated testimonies, regarding the violent sexual abuses of women by German forces in France and Russia, "rape does not appear once in the 179 page judgment of the IMT (International Military Tribunal)."¹⁰¹

Progress was made by the Tokyo Tribunals owing to the fact that rape charges had been applied to war criminals for their violations of Chinese women during the rape

⁹⁸ *A Woman in Berlin: Eight Weeks in a Conquered City, A Diary*, trans. Phillip Boehm (New York: Picador, 2006), xx.

⁹⁹ Tazreena Sajjad, "Rape on Trial: Promises of International Jurisprudence, Perils of Retributive Justice, and the realities of Impunity," in *Rape: Weapon of War and Genocide*, ed. Carol Rittner and K. John Roth (St. Paul: Paragon House, 2012), 65-66.

¹⁰⁰ Siegrist, "Belligerent Occupation," 1-2.

¹⁰¹ Niarchos, "Women, War, and Rape," 664.

of Nanking in 1937.¹⁰² Despite this headway, the Tokyo Tribunal's reluctance to include rape, forced prostitution, and sexual enslavement as crimes against humanity illustrated how far international recognition of rape as a war crime had yet to come. It was not until the ICTY statute of the 1990s that rape was represented in the first international war crimes tribunal since Tokyo and the *Geneva Convention's* declarations, criminalizing rape, were finally put into practice.

After the end of the Second World War, the Nuremburg hearings and the Tokyo War Crimes Tribunal, it became clear that civilians needed more legal protection from the international community. The *1949 Geneva Conventions* represented a significant attempt by the leading nations of the world to limit the level of atrocity committed in modern war against civilians. The aim of the *Fourth Geneva Convention*, as the 1949 convention was also called, was to outline acceptable behaviors for occupation forces in relation to the civilian populations living within regions controlled by military forces. They classified civilians as "protected persons"¹⁰³ under the *Fourth Geneva Convention* and, thus, entitled to special treatment by belligerent powers during occupation. The convention regards protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."¹⁰⁴ Women,

¹⁰² Nicola Henry, "Memory of an Injustice: The 'Comfort Women' and the Legacy of the Tokyo Trial," *Asian Studies Review* 37, no. 3 (2013): 367.

¹⁰³ Siegrist, "Belligerent Occupation," 4.

¹⁰⁴" Art. 4 - Definition of Protected Persons," in *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, Geneva, August, 12, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=78EB50EAD6EE7AA1C12563CD0051B9D4>.

under Article 27 of the convention, represented protected populations rewarded special protection.

To enforce this special status, Article 27 of the *Fourth Geneva Conventions* was drafted, declaring “civilians shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”¹⁰⁵ The article continues, asserting that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁰⁶ This affirmation also emphasized the convention’s intention to protect the rights of families, including the physical residence of those families as well as the rights of individual members of those families. Violations of these rights include the rape of women, defining this abuse as a criminal act that threatens to sever marriage ties and destroy families and can include the destruction of a family’s domicile. This portion of the *Fourth Convention* goes on to declare that “respect for family rights implies not only that family ties must be maintained, but further that they must be restored should they have been broken as a result of wartime events.”¹⁰⁷ The crimes of the Bosnian Serb and Serbian regimes were intended to damage the social ties that connected Bosnian Muslim communities. Despite the declaration of rape as a war crime, it was not charged against any war criminal until the ICTY indicted Bosnian Croat

¹⁰⁵ "Art. 27 - Treatment I. General Observations," in *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, Geneva, August, 12, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=FFCB180D4E99CB26C12563CD0051BBD9>.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

Paramilitary leader Anto Furundžija and Bosnian Serb Dragoljub Kunarac because this was the first international war crimes tribunal since Tokyo and Nuremberg.¹⁰⁸

Rape and other sexual crimes could also be categorized as grave breaches of the *Geneva Convention* included in Article 147 of the *Fourth Convention* of 1949. Grave breaches were defined by the International Committee of the Red Cross in 1948 and were included in the 1949 *Geneva Convention* for violations considered “minor offenses or mere disciplinary faults which as such could not be punished to the same degree.”¹⁰⁹ These offenses involved “willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person.”¹¹⁰ Under this clause, rape and other sexual abuses could be additionally charged as grave breaches constituting acts of torture, inhumane treatment, willful causing of great suffering and the infliction of serious injury to body or health. Though grave breaches are labeled as minor offenses, they are considered minor only in relation to more severe crimes such as genocide, crimes against humanity, and violations of the laws and customs of war. War criminals were now tried for rape and sexual abuses both as grave breaches of the *Geneva Conventions* and under more severe categories of crimes.

Sex crimes were specifically listed as serious criminal offenses in the *Fourth Geneva*

¹⁰⁸ Mark Ellis, "Breaking the Silence: Rape as an International Crime," *Case Western Reserve of International Law* 38, no. 255 (2006-2007): 225-247.

¹⁰⁹ "Commentary - Art. 147. Part IV : Execution of the Convention, Section I : General Provisions," in *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, Geneva, August, 12, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=F8D322BF3C0216B2C12563CD0051C654>.

¹¹⁰ "Art. 147 - Penal Sanctions II. Grave Breaches," in *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, Geneva, August, 12, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F8D322BF3C0216B2C12563CD0051C654>.

Convention for the first time in the twentieth century, but more than forty years would pass before these laws were practically applied at the ICTY hearings, the first international war crimes tribunal since 1945.

The last momentous addition to the collections of international laws prohibiting war rape and sexual offenses were applied in the drafting of the 1977 Protocol Additions to the *Geneva Conventions*, which address the protection of victims of non-international armed conflicts.¹¹¹ Article 76-1 of these additional protocols, section I states “women shall be the object of special respect and shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Additionally, Article 4-2(e) of additional protocols, section II prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”¹¹² Considering the decree in the *Hague Regulations of 1907* declaring that rape constituted an attack on a family’s honor and that, seventy years later, it was defined as an attack on an individual’s honor, the reclassification represented a great move towards classifying sexual abuses of all kinds as major crimes of war. Nevertheless, despite the perpetration of mass rape in Bangladesh by Pakistani soldiers in 1971, by Indonesian forces in East Timor in 1975 and against

¹¹¹ "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977," Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, June 7, 1949, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

¹¹² United Nations Division for the Advancement of Women, "Sexual Violence and Armed Conflict: United Nations Response," *Women 2000* (New York: UN Women Headquarters, 2000), <http://www.un.org/womenwatch/daw/public/w2apr98.htm>, 7.

Kuwaiti women by Iraqi soldiers in 1990, no international tribunals were formed to deal with international war crimes, including sexual offenses.¹¹³

The International Criminal Court for the Former Yugoslavia was the first multinational legal body to consider rape as a war crime substantial enough to be labeled as a crime against humanity. Due to the lack of recognition rape had received in the past, the ICTY's willingness to charge the Serbian militants of Foča solely for the sexual assaults they committed proved a progressive step towards the attainment of greater acknowledgement of sexual abuses and rape as continuing tactics of war. Additionally, the ICTY began the important process of applying in practice the new legal classifications for sexual crimes, which, until that point, had only been asserted in writing as crimes included in international conventions. Acknowledging rape as a crime against humanity was a significant admission by the international community, recognizing that rape was a supremely damaging abuse perpetrated increasingly in modern war.

¹¹³ Ibid.,” 7-8.

PAVING THE WAY: ICTY CASES DEALING WITH SEXUAL CRIMES PRIOR
TO KUNARAC

Though the *Kunarac Case* represents the defining moment of the ICTY's progressive move towards punishing war criminals for the sexual abuses they committed, previous trials paved the way by classifying specific sex crimes as violations of war and indicting defendants for those offenses. This portion of the thesis offers a synopsis of these important cases and the manner in which they advanced ICTY jurisprudence prior to *ICTY vs. Kunarac*.

The trial of Duško Tadić was the first case tried by the ICTY in 1995. This beginning marked another first, the first time a witness gave testimony detailing rape to an international legal body for the abuses she endured in Omarska, the notorious death camp near the town of Prijedor in northwest Bosnia.¹¹⁴ Omarska was a camp in which the Bosnian Serbs murdered thousands of Muslim and Bosnian Croat men. Yet, this death camp held a secret prison at its center, a rape camp designed to terrorize and forcefully impregnate Bosnian Muslim and Bosnian Croat women. Tadić was a police officer and the president of the local board of the Serbian Democratic Party and was in a position of leadership in Prijedor, including nearby Omarska. He led roundups of civilians who were later transported to the camp. He was initially charged with rape as a crime against

¹¹⁴ Ibid., 14.

humanity and as a grave breach of the *Geneva Conventions* for his crimes.¹¹⁵ However, the rape charge was withdrawn prior to the commencement of the trial for reasons of expediency. Tadić was convicted of cruel treatment as a violation of the laws or customs of war and for inhumane acts as crimes against humanity for the sexual violations of men at Omarska.¹¹⁶ The precedents set by the trial of Duško Tadić marked important beginnings for the nascent tribunal; the testimony of a rape survivor played an important role in Tadić's conviction and sex crimes were realized to have been perpetrated against men on a large-scale.

The next case at ICTY to include rape and sexual crimes in an indictment focused on four guards of Čelebići prison camp thirty miles southwest of Bosnia's capital city, Sarajevo. Zdravko Mučić, Hazim Delić, Esad Landžo, and Zejnil Delalić were not Bosnian Serbs, but Bosnian Muslims responsible for violently terrorizing hundreds of Serbian inmates at the camp. Their indictment was handed down in March 1996 with the trial beginning in April of that year.¹¹⁷ Three of the men were convicted of sex crimes as grave breaches of the *Geneva Conventions* and also for superior criminal responsibility for the sexual abuses they committed and supported in positions of leadership. This conclusion "set the standard for holding a civilian or military leader responsible for crimes committed by subordinates under their authority or control by failing to prevent, halt, or punish."¹¹⁸ The defendants in this case were not tried for crimes against humanity

¹¹⁵ ICTY, Case No. IT-94-1, "Case Information Sheet - 'Prijedor' (IT-94-1) Duško Tadić," http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf, 1.

¹¹⁶ *Ibid.*, 4.

¹¹⁷ ICTY, Case No. IT-96-21, "Case Information Sheet - 'Celebici Camp' (IT-96-21) Mucic et al.," http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf, 1-2.

¹¹⁸ Kelly D. Askin, "A Decade of Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," *Human Rights Brief* 11, no. 3 (2004):17.

because evidence must, as the prosecution clarified after the trial, “involve a widespread or systematic attack on a people or group.”¹¹⁹ The crimes at Čelebići did not represent a systematic campaign on the part of the Bosnian Government forces and could not be considered crimes against humanity despite their high degree of brutality, marking a clear differentiation between the patterned violence of Bosnian Serb ethnic cleansing campaigns from the horrible, yet disparate war crimes of the Bosnian forces.

After the *Čelebići Case*, the trial of Anto Furundžija in 1997 helped to expand the notion of what “superior criminal responsibility” included. Furundžija, a Bosnian Croat who committed crimes throughout the Lašva Valley region of central Bosnia, was convicted for sex crimes, including rape. This is a worthy decision because he never physically touched the survivor, whose interrogation and rape he was being charged with but, because he was a paramilitary leader for the region’s Croatian Defense Council (HVO, Hrvatsko Vijeće Obrane) he was considered accountable for the actions of his men and other subordinates. The trial focused on the rape of one woman who Furundžija interrogated while a fellow soldier raped her in front of a male friend, also being tortured, and while a crowd of HVO soldiers, the witness reported, looked on and laughed.¹²⁰ The trial chamber ruled on December 10, 1998 that though he had not raped her, the role he played in facilitating the abuse made him equally liable for the physical aspect of the offense itself.¹²¹ Furthermore, this case was the first to solely address rape and sexual

¹¹⁹ Marlise Simons, “A War Crimes Trial, but of Muslims, not Serbs,” *New York Times*, April 3, 1997, sec. A 3.

¹²⁰ Askin, “A Decade of Development,” 18.

¹²¹ Chad G. Marzen, “The Furundžija Judgment and Its Continued Vitality in International Law,” *Creighton Law Review* 43, no. 2 (2010): 1.

abuses in an international court of law.¹²² This proceeding played an important role in expanding the definition of rape in legal terms and defined “aiding and abetting” torture and rape as a war crime to be differentiated from perpetrator liability for the physical crime itself.¹²³ For torture, outrages upon personal dignity and rape, Furundžija was found guilty of violations of the laws and customs of war and sentenced to ten years in prison.¹²⁴

In Rwanda, another crucial case similar to those being heard by the ICTY occurred before the International Criminal Tribunal for Rwanda, the sister tribunal of the ICTY. The trial of Jean-Paul Akayesu in 1996 advanced the parameters under which rape could be punished. Akayesu, the civilian head of the Taba Commune in rural Rwanda, “was accused of allowing police and others under his authority to rape and torture mostly Tutsi women who had sought his protection.”¹²⁵ This guilty verdict led to the first time any war criminal was found guilty of sexual crimes that constituted genocide, supporting the decision in the judgment of Anto Furundžija, which asserted that war criminals may be found guilty of rape without physically perpetrating the abuse if that person was in a position of leadership.¹²⁶ Through rape and other atrocities, Akayesu perpetrated “certain crimes, including causing serious physical or mental harm to members of a group with

¹²² Marzen, “The Furundžija Judgment,” 2.

¹²³ Ibid., 2.

¹²⁴ ICTY, Case No. IT-95-17/1, “Case Information Sheet - ‘Lašva Valley’ (IT-95-17/1) Anto Furundžija,” http://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf.

¹²⁵ “Rwanda Tribunal to Rule on Akayesu Case,” *Human Rights Watch*, Sept. 1, 1998, <http://www.hrw.org/print/news/1998/09/01/rwanda-tribunal-rule-akayesu-case>.

¹²⁶ Ibid.

the intent to destroy, in whole or in part, a national, racial or religious group.”¹²⁷

Furthermore, the trial chamber concluded “Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”¹²⁸ Sexual crimes were determined to be acts perpetrated with the intent to damage the reproductive systems of the Tutsi women. This led the ICTR to conclude, for the first time in history, that sexual mutilation, sterilization, forced birth control, separation of the sexes and rape could be defined as acts leading to the prevention of births and the commission of genocide.¹²⁹

The Akayesu decision would have a direct impact on how sex crimes would be defined and included in the ICC’s criminal statute and would also aid prosecutors in including and classifying mass rape and other sexual abuses in the trials of Bosnian Serb general Ratko Mladić and Bosnian Serb president Radovan Karadžić. In the trials of these two Bosnian Serb leaders, the ICTY tribunal found that forced impregnation may constitute genocidal intent through ethnic cleansing and that rape can be used to transmit a new ethnic identity to a child, constituting genocide.¹³⁰ This trial affirmed that sex crimes could be considered acts of genocide and, combined with ICTY proceedings, did much to further the cause of including rape and other sexual assaults alongside the most terrible war crimes.

¹²⁷ U.N. International Criminal Tribunal for Rwanda (ICTR), "Historic Judgement Finds Akayesu Guilty of Genocide," ICTR press release, Sept. 2, 1998, on the ICTR website, <http://www.unictr.org/tabid/155/Default.aspx?id=476>.

¹²⁸ Ellis, “Breaking the Silence,” 233.

¹²⁹ *Ibid.*, 233.

¹³⁰ *Ibid.*, 234.

Ultimately, the Kunarac Case was a product of the indictments and decisions that took place before it and must be interpreted as one important trial in a collection of other war crimes trials. These trials combined to expand the parameters of what now constitutes wartime sexual abuses and how they would come to be prosecuted within international criminal tribunals. Without the progressive cases proceeding *ICTY vs. Kunarac*, it is doubtful that such a precedent would have been set during the trial.

THE ICTY VS. DRAGOLJUB KUNARAC, RADOMIR KOVAČ,
AND ZORAN VUKOVIĆ

This chapter will analyze the trial of Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković specifically. The *Kunarac Case* presented a model for other war crimes hearings to follow because it was the first instance where a trial chamber successfully convicted war criminals for the commission of rape as a crime against humanity, greatly illustrating the severity of the crime of sexual abuse in war from the international community's perspective. It also marked only the second instance in which an international court of law indicted war criminals solely for sexual assault and rape, following the indictment of Anto Furundžija in 1995.¹³¹ The United Nations Security Council provided the necessary authority for the ICTY to prosecute war criminals for grave breaches of the *Geneva Conventions*, violations of the laws and customs of war, crimes against humanity, and genocide.¹³² Acting upon the authority granted them, the ICTY's prosecutorial team responsible for Foča began to address the severity of organized rapes and other sexual abuses perpetrated in Bosnia.

The first step in the prosecution's legal process was to indict the three defendants based upon the information gathered by ICTY investigators. Prosecutors agreed that through Article 2 of the ICTY Statute, which includes the violations of "torture or

¹³¹ ICTY, Case No. IT-95-17/1, "Indictment - Prosecutor of the Tribunal Against Anto Furundžija," <http://www.icty.org/x/cases/furundzija/ind/en/fur-ii951110e.pdf>, 1-2.

¹³² Doris Buss, "Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković," *Feminist Legal Studies* 10 (2002): 93.

inhumane treatment, including willfully causing great suffering or serious injury to body or health and the unlawful confinement of a civilian,” the three men could be charged with the lesser offenses of grave breaches of the *1949 Geneva Conventions* for the sexual abuses they committed and the imprisonment of Muslim women.¹³³ Prosecutors also charged the men with violations of laws or customs of war according to Article 3 of the ICTY statute, which included the “employment of weapons calculated to cause unnecessary suffering,” including crimes encompassing torture through sexual abuses, rape and sexual slavery.¹³⁴

Most importantly, Article 5 of the ICTY statute stipulates crimes that fall under the broader category of crimes against humanity, crimes second only to genocide in severity. These violations include “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts.”¹³⁵ The difference between genocide and crimes against humanity seems slight; journalist Robert Coalson, in his interview with Philippe Sands, a lawyer with the International Criminal Court, wanted to know the difference between the two charges; Sands replied stating:

Crimes against humanity focus on the killing of large numbers of individuals. The systematic, mass killing of a very large number of individuals will constitute a crime against humanity. Genocide has a different focus. Genocide focuses not on the killing of individuals, but on the destruction of groups. In other words, a large number of individuals who form part of a single group. The two concepts in this

¹³³ ICTY, "Article 2," in *Updated Statute of the International Tribunal for the Former Yugoslavia*, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹³⁴ ICTY, "Article 3," in *Updated Statute of the International Tribunal for the Former Yugoslavia*, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹³⁵ ICTY, "Article 5," in *Updated Statute of the International Tribunal for the Former Yugoslavia*, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

way have different objectives. One aims at protecting the individual; the other aims at protecting the group.¹³⁶

The crimes carried out against the Muslims, and more specifically against Muslim women, of Foča, were clearly violations against specific individuals who comprised a specific group. The violence was also directly aimed at Bosnian Muslims with the intent to expel and erase this community from the Foča municipality and therefore represented crimes against humanity.

ICTY investigators surmised that “As a consequence of the concerted effect of the attack upon the civilian population of Foča and surrounding municipalities, all traces of the Muslim presence in the area were effectively wiped out.”¹³⁷ Charging war criminals with genocide depends on the ability of the prosecution to prove *specific intent*, which is almost impossible to establish in many cases because perpetrators intentionally conceal their actions and their connection to higher leadership.¹³⁸ Prosecuting war criminals for genocide is difficult and carries the risk of prosecutors spending considerable time and money to gain no convictions “if the Trial Chamber believes that the prosecution has not presented sufficient evidence.”¹³⁹ Therefore, it is easier to convict on a charge of crimes against humanity, which indicates violence as part of a larger system minus the overwhelming evidence required for a charge of genocide.

¹³⁶ Robert Coalson, "What's the Difference Between 'Crimes Against Humanity' and 'Genocide?'," *The Atlantic*, March 19, 2013, <http://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167/>.

¹³⁷ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “ III. Evidence: A. General Background,” 8.

¹³⁸ Norman Cigar, *Genocide in Bosnia: The Policy of “Ethnic Cleansing”* (College Station: Texas A & M University Press, 1995), 8.

¹³⁹ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “Case Information Sheet,” 4.

Hildegard Uertz-Retzlaff, chief prosecutor in the *Kunarac Case*, defended the ICTY's position of not charging the three war criminals with genocide stating "we could not prove that what they did amounted to or that they acted with genocidal intent." She continued, asserting that: "Of course, when you look at what happened all over Bosnia and Herzegovina, you could argue that these crimes were part of a genocidal campaign, we did not really look into it deeply."¹⁴⁰ She does not deny that genocide might have taken place in Foča, or that rape was used to commit such crimes, she simply concludes that genocide was difficult to prove within a court of law and because of this conclusion decided to pursue charges of crimes against humanity.

Additionally, Drogoljub Kunarac and Radomir Kovač each faced charges for the enslavement and eventual sale of young girls such as twelve year old A.B. and witness FWS-87, only fifteen years old at the time of the rapes. They were charged for enslavement as a crime against humanity.¹⁴¹ The prosecution never explicitly used the term sexual slavery, but enslavement for these women, it was made clear, constituted acts of sexual violence.¹⁴² Although the classification is not listed in the ICTY Statute, as a result of the Kunarac trials and others like it, the International Criminal Court includes sexual slavery as a specific crime.¹⁴³

The ICTY's prosecutors set a precedent in the Kunarac Case by solely focusing on the sexual abuses perpetrated by the three defendants, a choice that put forth the

¹⁴⁰ *Bridging the Gap*, 71.

¹⁴¹ Fiona de Londras, "Telling Stories and Hearing Truths: Providing an Effective Remedy to Genocidal Sexual Violence Against Women," in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, edited by Ralph Henham and Paul Behrens (Burlington: Ashgate, 2007), 122.

¹⁴² George Rodrigue, "Sexual Violence, Enslavement," *Crimes of War*, <http://www.crimesofwar.org/a-zguide/sexual-violence-enslavement/>.

¹⁴³ *Ibid.*

message that in war crimes against women are taken as seriously by the international community as other war crimes. Whether or not the actual nature of the mass rapes in Foča was “genocidal” or “crimes against humanity,” the fact remains that when the Bosnian War ended, ten Muslims remained in the municipality out of a population once numbering 20,790 and that rape and other sexual crimes played a large role in producing this outcome.¹⁴⁴

The Kunarac Case began on March 20, 2000 at The Hague, the headquarters of the ICTY. The men had been indicted with crimes against the citizens of Foča as early as June 27, 1996. Dragoljub Kunarac turned himself in on March 4, 1998. Zoran Vuković was not so gracious; he was apprehended by members of NATO’s stabilization force, a multinational peacekeeping force policing post war Bosnia, on December 24, 1999. His arrest was followed by that of Radomir Kovač on August 2, 2000.¹⁴⁵ During the trial, approximately twenty women who had been raped by one or all of the three testified in front of the perpetrators, actions that “again set a precedent in a war crimes trial, as this was the first time that testimony of the victims was asked for and considered in a case of rape.”¹⁴⁶ The witnesses courageously testified, reliving the most traumatizing moments of their lives before a public audience.

These witnesses’ testimonies aided in the successful convictions the three war criminals received. FWS-48, an eyewitness for the prosecution, helped to connect the rapes she lived through by recalling that Bosnian Serb soldiers constantly stated they were simply following orders; they had no choice but to rape them while at the same time

¹⁴⁴ Buss, “Prosecuting Mass Rape,” 92.

¹⁴⁵ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “Case Information Sheet,” 1-2.

¹⁴⁶ Iacobelli, “The ‘Sum of Such Actions,’” 271.

detailing the fact that many men did, in reality, eagerly rape Muslim women. The testimony of Witnesses FWS-75, FWS-87, A.S., and FWS-132 helped to link rapes she endured to the network that formed the framework of camps and private residences used by the Bosnian Serb forces in Foča. The testimony of FWS-87 and A.S. provided reliable evidence that led to the successful convictions for enslavement of Kunarac and Kovač. More than this, these women set an important precedent for future war crimes tribunals, procedures in which raped women have been and will continue to be relied upon to testify in the pursuit of convictions.

As a direct result of the testimonies of Foča's Muslim women, Dragoljub Kunarac was convicted of rape and torture under multiple counts of the ICTY's statute as both violations of the laws and customs of war and as a crime against humanity. In addition to the first two convictions, Kunarac was found guilty of enslavement as a crime against humanity for his part in the imprisonment of witnesses FWS-186 and FWS-191. Judge Florence Mumba told the convicted rapist that "you ravaged Muslim women because of their ethnicity, and from among their number, you picked whomsoever you fancied on a given occasion."¹⁴⁷ Continuing to address the accused, she affirmed, "You not only mistreated women and girls yourself, but you also organized their transfer to other places, where, as you were fully aware, they would be raped and abused by other soldiers."¹⁴⁸ Consequently, Dragoljub Kunarac was sentenced to twenty-eight years in prison for the crimes he conducted and personally committed in Foča, receiving more time than Kovač and Vuković due to his position of leadership.

¹⁴⁷ ICTY. Case No. IT-96-23-T & IT-96-23/1-T, "Judgment," <http://www.icty.org/sid/8018>.

¹⁴⁸ Ibid.

Radomir Kovač was the next of the three war criminals to face the scrutiny of Judge Mumba. She methodically listed and narrated the despicable nature of his crimes. He was found guilty of enslavement and rape as crimes against humanity, rape as a violation of the laws or customs of war, and for outrages upon personal dignity as a violation of the laws or customs of war.¹⁴⁹ Judge Mumba addressed Kovač, asserting that:

Particularly appalling and deplorable is your treatment of 12-year-old Witness A.B., a helpless little child for whom you showed absolutely no compassion whatsoever, but whom you abused sexually in the same way as the other girls and who you finally sold like an object, in the knowledge that this would almost certainly mean further sexual assaults by other men.¹⁵⁰

Concerning his other crimes, Judge Mumba reproached Kovač: “you relished in the absolute power you exerted over their lives, which you made abundantly clear by making them dance naked on a table while you watched and when they served their purpose, you sold them too.”¹⁵¹ The trial chamber sentenced Radomir Kovač to a term of twenty years imprisonment.

Lastly, Zoran Vuković was called to account for his crimes in Foča. He was held accountable for only one rape “namely that on or around 14 July 1992 you personally raped Witness FWS-50; you and another soldier took her out of Partizan after you had threatened her mother that you would kill her if she did not tell you where her daughter was hiding.”¹⁵² He was found guilty of torture and rape as crimes against humanity and

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

for rape as a violation of the laws or customs of war.¹⁵³ For the crimes he perpetrated against FWS-50, Zoran Vuković was sentenced to 12 years imprisonment and he was released early in 2008.¹⁵⁴

In spite of these three successful convictions and the subsequent sentences, controversy erupted in 2013 due to the early release of Radomir Kovač who served only two-thirds of his twenty year sentence. In Norway, where he was serving his time, Kovač reportedly requested early release from his prison term because he felt “sincere regrets for his crimes and said that he had re-educated [himself] in order to change [his] value system.”¹⁵⁵ The president of the Hague Tribunal, Theodor Meron, approved the request because, the president believed, Kovač had demonstrated considerable rehabilitation.¹⁵⁶ A Bosnian victims’ association expressed indignation over the controversial ruling asking “how victims will feel when they meet the people they fear most on the streets tomorrow?”¹⁵⁷ A representative speaking for the victims of Foča summarized the feelings of many survivors, stating that “this is not acceptable to us and we cannot understand it, I see this as a mockery of the victims.”¹⁵⁸ Regarding the sentences handed down by the ICTY, a spokesperson for the Sarajevo-based Association of female camp survivors said many of the Foča women felt that these “minimum punishments actually minimized the suffering of the victims.”¹⁵⁹ Witness FWS-90, disappointed with the sentences stated,

¹⁵³ Ibid.

¹⁵⁴ ICTY, Case No. IT-96-23-T & IT-96-23/1-T, “Case Information Sheet,” 2.

¹⁵⁵ Denis Džidić, “Hague Frees Bosnian War Rapist Radomir Kovac,” *BalkanInsight*, July 4, 2013, <http://www.balkaninsight.com/en/article/another-hague-defendant-granted-early-release>.

¹⁵⁶ Ibid., 2.

¹⁵⁷ Ibid, 2.

¹⁵⁸ Ibid., 2.

¹⁵⁹ Quoted in Sajjad, “Rape on Trial,” 65.

“Given everything they have done; I no longer believe in those sentences and will not testify before the tribunal.”¹⁶⁰ The ICTY, it has been argued by many other victim advocacy groups and rape survivors, was remiss in the task of seeking the justice victims expected.

Despite the reality that many of Foča’s survivors feel that the justice they expected was never realized and it is highly arguable that they are validated in their beliefs, some truly positive international legal precedents were set as a result of the ICTY’s efforts to convict Kunarac, Kovač, and Vuković and proved an important moment leading towards the reclassification of rape and sexual abuses as highly destructive and calculated crimes of warfare.

¹⁶⁰ IWPR, “Foča Rape Case,” *Institute for War & Peace Reporting*, February 14, 2001, <http://iwpr.net/report-news/foca-rape-case>.

AFTER THE KUNARAC DECISION

The end of the Kunarac Case did not mean the conclusion of the ICTY's efforts to include rape among the charges facing indicted war criminals. A number of trials including rape and sexual abuse in their indictments took place after Kunarac and continued to develop the international community's perception of rape as an extremely destructive war crime and expanded the tribunal's collection of terminology used to classify many different sex crimes. This chapter will focus on these trials and the manner in which they contributed to the advancement of international law dealing with rape and sexual abuses.

The Kvočka Case was one of the first cases after Kunarac to deal with sex crimes. This trial witnessed the indictment of Miroslav Kvočka, Dragoljub Prčić, Milojica Kos, Mlado Radić, and Zoran Žigić for the crimes they committed in the camps of Omarska and Keraterm, near the city of Prijedor in northern Bosnia. They were indicted for sex crimes as crimes against humanity despite the fact that evidence showed that only one defendant, Mlado Radić, had physically raped a prisoner. Like the decision against Anto Furundžija, the judges decided that because the other guards knew that the women imprisoned there would be raped, and that they were in positions of command and did not stop these crimes, they too were liable for the rapes that occurred within the camps.¹⁶¹

¹⁶¹ Askin, "A Decade of the Development," 19.

The defendants were found guilty of sex crimes under the charge of a joint criminal enterprise, or a collective crime, which classified Omarska and Keraterm as camps formed with the purpose of persecuting, terrorizing, and executing Bosnian Muslims and Croats. Therefore, the defendants knew sex crimes would be perpetrated against the inmates of both camps, making them guilty of sexual abuses despite lack of physical perpetration of the rapes. As with the Kunarac decision, the five defendants were found guilty of crimes against humanity for the sexual abuses they committed in the camps. They received sentences ranging from five to twenty-five years in prison.¹⁶² The trial expanded the jurisprudence defining sex crimes, including other sexual abuses to an already long list; crimes such as forced nudity, molestation, sexual mutilation, and forced marriage were additionally listed as war crimes.¹⁶³

The ICTY returned to the rapes committed in Foča with the trial of Dragan Zelenović, a Bosnian Serb soldier involved in the attack against the town in 1992 and 1993. He was indicted for torture and rape as crimes against humanity as well as for violations of the laws or customs of war, including the sexual abuses he perpetrated against women imprisoned at the Buk Bijela power plant, Foča High School, and the Partizan Sports Hall.¹⁶⁴ Zelenović pled guilty in 2006 to several counts of crimes against humanity for the rape and torture of Muslim women.¹⁶⁵ As part of his agreement to drop other charges, Zelenović provided information pertaining to the sexual abuses committed in Foča's camps and in so doing marked "the first time in the history of the Tribunal that

¹⁶² Ibid., 19.

¹⁶³ Ibid., 19.

¹⁶⁴ ICTY, Case No. IT-96-23/2, "Case Information Sheet - 'Foča' (IT-96-23/2) Dragon Zelenović," http://www.icty.org/x/cases/zelenovic/cis/en/cis_zelenovic_en.pdf.

¹⁶⁵ Fiori, "The Foča Rape Camps," 18.

a perpetrator admitted to and confirmed what happened to the non-Serb population in Foča in 1992.”¹⁶⁶

The next notable case involving sexual abuse and rape centered on the town of Višegrad in eastern Bosnia, which witnessed one of the most brutally perpetrated massacres of the war. Starting in the spring of 1992, this small town’s Muslim population was terrorized by one of the most violent and sadistic war criminals to gain infamy during the Bosnian War. Milan Lukić, a local leader of a paramilitary group named the White Eagles, led a faction of likeminded Bosnian Serbs in the killing of thousands of civilians, often in the cruelest ways imaginable. They are responsible for burning roughly one-hundred and forty senior citizens, women, and children to death in two houses they had prepared before hand by dousing them in petrol before cramming their victims inside.¹⁶⁷ He and his men frequently visited the nearby concentration camp Uzaminica to torture and execute Muslim inmates imprisoned there and also killed many civilians along the bank of the Drina River and on the Mehmed Paša Bridge, a historical treasure completed by the Ottoman Empire in 1577.¹⁶⁸ At his militia’s headquarters, Vilina Vlas Hotel and Spa just outside of the town, the White Eagles imprisoned and raped hundreds of women and young girls with very few survivors.¹⁶⁹ The trial of Milan Lukić, starting in 2007, was notable however for the omission of rape charges in the

¹⁶⁶ Ibid., 19.

¹⁶⁷ ICTY, Case No. IT-98-32/1, "Case Information Sheet - 'Višegrad' (IT-98-32/1) Milan Lukić & Sredoje Lukić," http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/cis/en/cis_lukic_lukic_en.pdf.

¹⁶⁸ Ibid., 1.

¹⁶⁹ Nidzara Ahmetasevic et al., "Visegrad Rape Victims Say Their Cries God Unheard," *BalkanInsight*, October 18, 2006, <http://www.balkaninsight.com/en/article/visegrad-rape-victims-say-their-cries-go-unheard>.

indictment of the war criminal for one of the most terrible perpetrators of sex crimes during the Bosnian War.

Milan Lukić was not charged for the sexual abuses he perpetrated due to an administrative error on the part of the prosecution. Prosecutors submitted charges of rape against this war criminal a month before the trial was set to begin, a time frame judges stated “would prejudice the right of the accused to have enough time to mount a defense.”¹⁷⁰ Yet, under certain rules “the trial chamber has discretion to permit amendments to indictments in the late stages of pre-trial proceedings, and even after the trial had begun.”¹⁷¹ The only individuals to be punished by such a ruling commented, Kelly Askin, a legal officer with Open Society Justice Initiative, were the victims and not the prosecutors or perpetrators.¹⁷² Despite the exclusion of rape from the charges against Lukić, he was found guilty of persecutions on religious, racial, and ethnic grounds; murder; inhumane acts; and extermination as crimes against humanity and for murder and cruel treatment as violations of the laws or customs of war. He received a life sentence due to the scale and sheer brutality of his crimes.¹⁷³ Lukić received one of the most severe sentences to be handed down by the ICTY, yet controversy surrounds the trial chamber’s decision to omit rape, with Višegrad’s survivors feeling that justice for them was left unrealized despite his life sentence.

The last two trials now being conducted by the ICTY are, quite arguably, the most important of the entire tribunal. Radovan Karadžić and Ratko Mladić, the former the

¹⁷⁰ Simon Jennings, “Lukić Trial Ruling Provokes Outcry,” *Institute for War & Peace Reporting*, August 15, 2008, <http://iwpr.net/print/report-news/lukic-trial-ruling-provokes-outcry>, 2.

¹⁷¹ *Ibid.*, 3.

¹⁷² *Ibid.*, 3.

¹⁷³ ICTY, Case No. IT-98-32/1, “Case Information Sheet,” 1.

president of the Bosnian Serb Republic and the latter the supreme commander of Bosnian Serb forces during the war, were responsible for the conduct of their forces in many towns and villages throughout Bosnia. Consequently, these two men were also in charge of the large-scale campaign of “ethnic cleansing” in which so many women, including those of Foča, were unlawfully detained, tortured, sexually abused, and raped.¹⁷⁴ The trial of Ratko Mladić began May 16, 2012 and is ongoing, with the indictment against him including two counts of genocide, one relating to the killings, rapes, torture, and other inhumane acts committed by his soldiers in 1992 during the first year of the war with the second count involving his leadership during the genocide perpetrated in Srebrenica in 1995.¹⁷⁵ Adding to the progress made by the trials of Jean Paul Akayesu and Anto Furundžija, Ratko Mladić has been charged for his role in the rapes of numerous women without physically perpetrating the crime himself. Additionally, rape is being tried as a crime of genocide, a major advancement for the ICTY.¹⁷⁶

The case against Radovan Karadžić began on October 26, 2009 and is still ongoing, with September and October of 2014 set as the time for closing arguments.¹⁷⁷ Karadžić was indicted for genocide and crimes against humanity in Bosnia Herzegovina, including Foča. The Bosnian Serb president was charged with “causing the serious bodily or mental harm to Bosnian Muslims and Bosnian Croats during their confinement in camps and detention facilities and for the inhumane treatment of Bosnian Muslims and

¹⁷⁴ ICTY, Case No. IT-95-5/18, "Case Information Sheet - Bosnia and Herzegovina & Srebrenica (IT-95-5/18) Radovan Karadžić," http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf; ICTY, Case No. IT-09-92, "Case Information Sheet - Bosnia and Herzegovina & Srebrenica (IT-09-92) Ratko Mladić," http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf.

¹⁷⁵ "ICTY/Bosnia: Start of Mladic Trial Shows Persistence Pays," *Human Rights Watch*, May 15, 2012, <http://www.hrw.org/news/2012/05/14/ictybosnia-start-mladic-trial-shows-persistence-pays>, 1.

¹⁷⁶ *Ibid.*, 1.

¹⁷⁷ ICTY, Case No. IT-95-5/18, "Case Information Sheet," 1.

Bosnian Croats,” in many Bosnian municipalities.¹⁷⁸ These crimes include sexual violence and torture.¹⁷⁹ The judgments have not yet been made in these cases, demonstrating the often unorganized and trial and error nature of the ICTY, but the inclusion of rape in the indictments of the two top leaders of the Bosnian Serb forces is a major step forward and a hopeful indicator of the addition of rape and sexual abuses in war crimes tribunals to come.

Rape is still perpetrated against women across the world, and remains a consistent and often premeditated wartime atrocity. The need for lengthy convictions for rapists is as important now as they were after the wars in Bosnia and Rwanda. With the more recent wars in the Congo, Darfur, Sierra Leone, Syria, and many other nations, the ICC statute and the expansive classifications that define rape and other sexual abuses remain important manifestations of the international community’s agreement to defend the human and civil rights of women.

To defend the rights of men and women worldwide, the United Nations member states drafted and ratified the *Rome Statute* in July 1998. The advancements made by the International Criminal Tribunals for both the former Yugoslavia and Rwanda are clearly visible in the International Criminal Courts Statute, which was “reproduced from the official records of the Assembly of States Parties to the *Rome Statute* of the International Criminal Court, September 2002.”¹⁸⁰ The *Rome Statute* was adopted by the ICC as the tribunal’s official declaration outlining what actions constituted war crimes and the level

¹⁷⁸ Ibid., 1.

¹⁷⁹ Ibid., 1.

¹⁸⁰ International Criminal Court (ICC), *Elements of Crimes* (The Hague: International Criminal Court, 2011), <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>, 1.

of severity of those crimes. Particularly noted, the “*Kunarac et al. case*,” delineated what constitutes enslavement as a crime against humanity and the relationship of gender crimes to the customary law.”¹⁸¹ The statute of the ICC represents, “The first time in history an international criminal court has explicitly authorized the prosecution, as war crimes and crimes against humanity, of rape, sexual slavery, forced prostitution, forced sterilization, forced pregnancy and any other form of sexual violence of comparable gravity.”¹⁸²

Specifically, the Rome Statute, now the ICC Statute, includes rape as a constituent crime to the charges of genocide, crimes against humanity, war crimes, grave breaches, and crimes of aggression.¹⁸³ Under Article 6, which outlines crimes of genocide, causing severe physical or mental harm under section (b) encompasses rape and sexual abuse. Genocide can also be perpetrated by inflicting measures intended to prevent births under section (d) of the same article.¹⁸⁴ Article 7 of the ICC Statute defines crimes against humanity and includes enslavement, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence.¹⁸⁵ The crimes that constitute crimes against humanity, stated above, may also constitute war crimes under Article 8 of the statute, and can therefore be charged as violations of both.¹⁸⁶ Article 8 also includes the crime of mutilation, which encompasses

¹⁸¹ ICTY, “ICTY Global Legacy - 2011 Conference,” *International Criminal Tribunal for the Former Yugoslavia Global Legacy Conference*, The Hague, November 15-16, 2011, <http://www.icty.org/sid/10405>, 1.

¹⁸² Askin, “A Decade of the Development,” 19.

¹⁸³ ICC, *Elements of Crimes*, 2-42.

¹⁸⁴ *Ibid.*, 2-3.

¹⁸⁵ *Ibid.*, 6-10.

¹⁸⁶ *Ibid.*, 13-33.

sexual maiming, and outrages against personal dignity.¹⁸⁷ The inclusion of these crimes by the drafters of the *Rome Statute* marks a significant move forward for the development of women's human rights internationally, representing a future in which sexual crimes against women are considered among the most egregious of all atrocities.

The ICC Statute has been utilized by prosecutors for the indictment of war criminals and to gain convictions for perpetrators of sexual abuses since the adoption of the *Rome Statute* in 2002. In 2005, Joseph Kony, the leader of the Lord's Resistance Army operating in Uganda and the Congo, was indicted by the ICC for rape and sexual enslavement as crimes against humanity and for the offense of inducing rape as a war crime.¹⁸⁸ Kony has yet to be apprehended. Jean Pierre Bemba, the president of the Movement for the Liberation of the Congo or MLC, was indicted for rape both as a crime against humanity and as a war crime in 2008 for his crimes as a leader in the Central African Republic; this trial is ongoing.¹⁸⁹ Omar al Bashir, the president of the Republic of Sudan since 1993, has been indicted for rape as a crime against humanity and for causing serious bodily or mental harm as genocide, with the second warrant for his arrest being issued by the ICC in 2010.¹⁹⁰ Many other cases have also included various forms of sexual abuse within the pages of their indictments. These cases strongly suggest that within the realm of international law, rape and sexual abuse are finally garnering enough

¹⁸⁷ *Ibid.*, 33.

¹⁸⁸ ICC, Case No. ICC-02/04-01/05, "Case Information Sheet - Situation in Uganda: The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen," ICC-PIDS-CIS-UGA-001-002/14_Eng, July 3, 2014, <http://www.icc-cpi.int/iccdocs/PIDS/publications/KonyEtAlIENG.pdf>.

¹⁸⁹ ICC, Case No. ICC-01/05-01/08, "Case Information Sheet - Situation in Central African Republic: The Prosecutor v. Jean-Pierre Bemba Gomba," ICC-PIDS-CIS-CAR-01-009/12_Eng, June 15, 2012, <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>.

¹⁹⁰ ICC, Case No. ICC-02/05-01/09, "Case Information Sheet - Situation in Darfur, Sudan: The Prosecutor v. Omar Hassan Ahmad Al Bashir," ICC-PIDS-CIS-SUD-02-003/14_Eng, July 3, 2014, <http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf>.

attention to generate the political will needed to effectively punish war criminals for mass sexual abuse and mass rape.

CONCLUSION

The rapes and abuses committed in Föca shattered the innocence of the many Muslim women and girls who called the town their home. Analogously, the pattern of violence in Foča is also the story of the Bosnian war, a conflict in which violence of all forms was carried out across the nation in the goal of erasing the Bosnian Muslims' presence in Bosnia.¹⁹¹ Rape and sexual abuse are equally damaging in other conflicts in different war zones throughout the world and must be considered as consistent and destructive tactics for those looking to impose their will on a nation or people. Importantly, the cases heard in the trial chambers of the ICTY affected more than Bosnians, Croats, Serbs, and the many survivors and perpetrators of war crimes.

The *Kunarac Case* represents an important landmark in the pursuit of justice against those who rape and commit other forms of sexual abuse against women. It was a legal proceeding that helped to gain international recognition for sex crimes as offenses deserving the time, money, and effort of international war crimes tribunals when seeking convictions. The ICTY's progressive action, focusing on only sexual crimes of the three defendants, highlighted the depravity of the Bosnian Serb regime's quest for territorial expansion. Furthermore, the testimony of women who lived to tell of the mass rapes in Foča, were some of the first rape survivors upon whose testimony prosecutors, in an international war crimes tribunal, depended upon to earn convictions of war criminals.

¹⁹¹ *War Crimes in the Balkans*, 48.

These witnesses provided “collective evidence which exposed the magnitude of rape which courts could no longer ignore.”¹⁹²

Despite the progressive nature of the *Kunarac Case* and the trial chamber’s history-making decision, a debate concerning the nature of Kunarac’s, Kovač’s, and Vuković’s crimes shadow the legacy of the case. Specifically, some survivors believe the prosecution missed the opportunity to take a decisive stand against rapists by attaining lengthy convictions. Though this is true, this case cannot be interpreted as either a total failure or a complete success. As one trial in a chain of cases, *ICTY vs. Kunarac* progressively expanded the international community’s collective perception of sexual abuses and their destructive consequences on civilian populations in war and provided groundbreaking legal definitions for future war crimes tribunals seeking to punish war criminals for sexual crimes. Because of the *Kunarac Case*, rape is now listed as a crime against humanity within the statute of the ICC. Sexual enslavement, a term defined during the *Kunarac Case*, is now included among many violations of war such as forced pregnancy, sexual mutilation, enforced prostitution, inhuman treatment, and outrages upon personal dignity among many other sexual abuses. Sexual crimes are now considered constituent acts of genocide and can be considered crimes that cause serious bodily or mental harm or measures intended to prevent births by the standards of the ICC statute. Lastly, the ICTY’s commitment to include rape in the pages of its many indictments, a process of which the *Kunarac Case* was part, ushered in a new age in which sexual crimes against women, in war or otherwise, are considered to be equally as devastating to individuals, families, and communities as crimes such as torture, murder,

¹⁹² Aida Cerkez, "Bosnian Woman Helped Make Rape a War Crime," *Associated Press*, March 8, 2013, <http://bigstory.ap.org/article/bosnian-woman-helped-make-rape-war-crime>.

extermination, and many other abuses that are not of a sexual nature. Progress has yet to be made in gaining convictions for sex crimes during war, but international jurisprudence has advanced considerably since the beginning of the ICTY's founding in 1993 due to the advances made in Kunarac and other cases.

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