

COMMENT

“THERE WILL BE NO JUSTICE UNLESS WOMEN ARE PART OF THAT JUSTICE”¹: RAPE IN BOSNIA, THE ICTY AND “GENDER SENSITIVE” PROSECUTION

Anne M. Hoefgen²

In the spring of 1992, everything changed. The terror began in April when soldiers entered the city and separated the members of her family. Her father and brothers were arrested and she and her mother were forced into detention at a local sports arena. In July her fear turned into horror when soldiers dragged her away from her mother. Her captors interrogated her, a gun was held to her head, and she was accused of lying. Shortly thereafter she was raped for the first time. For the following eight months she was enslaved, raped, and treated as property. She was only fifteen years old. Now she is Witness 87.³ Witness 87 is one of the tens of thousands of rape victims from the war in Bosnia between 1991 and 1995. The story of Witness 87 diverges from the stories of past victims of wartime rape because, for the first time in history, the international community is stepping forward to aggressively punish rapists as war criminals.

More than fifty years ago, at the post-World War II trials in Nuremberg and Tokyo, the international community successfully punished individuals for war crimes. Never before had individuals been held accountable by the international community for criminal acts committed during war. The most meaningful developments in the international approach to individual responsibility for human rights violations since World War II have occurred in the 1990s.⁴ One signif-

1. Judge Elizabeth Odio-Benito in CALLING THE GHOSTS (Women Make Movies 1996).

2. University of Wisconsin-Madison, J.D. anticipated May 2000.

3. See CALLING THE GHOSTS, *supra* note 1. Witness 87 is named FWS-87 in an indictment issued by the International Criminal Tribunal for the former Yugoslavia. See International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor of the Tribunal Against Gagovic and Others* (June 26, 1996) <<http://www.un.org/icty/indictment/english/gagovic.htm>> [hereinafter *Indictment of Foca 8*]. The indictment and the corresponding trials that encompass the terrorization of Witness 87 are commonly known as the “Foca 8.”

4. One example is the adopting in 1998 of a treaty to establish the International Criminal Court (ICC), a permanent criminal court of international jurisdiction for trying individual defendants. See *Despite Fierce Foe, New World Court Could Succeed*, STAR TRIB. (Minneapolis-St. Paul), Aug. 13, 1998, at 18A [hereinafter *Despite Fierce Foe*]. The treaty for the ICC provides jurisdiction over several categories of crimes, “ranging

icant addition to human rights law was the United Nation's founding of an ad hoc criminal tribunal to prosecute human rights abusers in the former Yugoslavia.⁵ This newly created judicial body, the International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal), advances international human rights law by explicitly recognizing rape as a war crime and by actively prosecuting rapists.⁶

This article discusses the ICTY, the impact of gender consciousness⁷ on the personnel, structure and procedures of rape prosecution, and women's place in international humanitarian law.⁸ Section I offers a brief background description of the war in the former Yugoslavia and Bosnia-Herzegovina (hereinafter Bosnia) in particular. Section II analyzes information about the systematic mass rapes perpetrated by Bosnian Serbs against Bosnian Muslims. Section III explains how the ICTY and its rules and procedures developed with a sensitivity towards the victims and witnesses of sexual assault.⁹ Section IV dis-

from harming civilians to abusing prisoners to using prohibited weapons during war." Anthony Keller, *Reviving Nuremberg*, GLOBE & MAIL, July 11, 1998, at D4.

5. See S.C. Res. 827, U.N. SCOR, 48th Sess., ¶ 2, U.N. Doc. S/RES/827 (1993). The United Nations established a similar ad hoc tribunal to address war crimes in Rwanda. See S.C. Res. 955, U.N. SCOR, 49th Sess., ¶ 1, U.N. Doc. S/RES/955 (1994); see also Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 97 (1999) (referring to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda).

6. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, art. 5(g), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter *Statute of the International Tribunal*]. Rape in war has rarely been punished despite nearly universal condemnation. As early as 1625, Dutch scholar Hugo Grotius, often considered the father of international law, developed the idea of universal legal rights and the just and unjust uses of force within an armed conflict. In his discussions of rape as an instrument of war, Grotius argued that it was contrary to natural law and argued that rape in war was "subject to punishment." HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, book 3, chap. 19 (1625), quoted in ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* 183 (1998). Despite this condemnation 375 years ago, rape, as a consequence or inevitable by-product of war, has rarely been punished. In January 1919, at the Paris Peace Conference following World War I, rape was included in the statute establishing war crimes, but disagreement among the Allies caused the treaty to have little impact on international prosecution of war crimes. See Karl A. Hochkammer, Note, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNAT'L L. 119, 134 n.99 (1995).

7. "Gender consciousness," as used by the author, is defined as the appreciation and acknowledgement of the importance of gender in one's life experience. It is recognizing that the same event may be viewed and experienced differently because of one's gender.

8. For a thorough discussion of the general principles of international humanitarian law, see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1999).

9. Some sexual assault advocates choose to use the term "survivor" rather than "victim" when discussing women who have been raped. The author uses both terms to recognize both victimization and empowerment of the women.

cusses the prosecution of Dragoljub Kunarac, one of eight Bosnian Serbs indicted for brutal acts of sexual assault perpetuated against women and girls in the Bosnian town of Foca.¹⁰ I argue that the indictment will measure the strength of prosecutions based exclusively on rape as a violation of international human rights law. Finally, Section V concludes with an assessment of the importance of the ICTY's rape prosecutions and the influence of the ICTY on international law and women's rights.

I. BACKGROUND OF THE WAR IN BOSNIA

Many scholars have attempted to explain the tangled web of personalities, policies and actions that led to war in the former Yugoslavia between 1991 and 1995.¹¹ It is beyond the scope of this paper to offer in-depth analysis of the origins of the war; however, a brief discussion of the former Yugoslavia and the events of the early 1990s is necessary to understand why rape and ethnic cleansing¹² were so prevalent in the Bosnian war.¹³

For most of the twentieth century, Yugoslavia consisted of six republics (Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Serbia, and Montenegro) and two autonomous provinces within Serbia (Voj-

10. See International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor of the Tribunal Against Dragoljub Kunarac* (Aug. 19, 1998) < <http://www.un.org/icty/indictment/english/98-13-07.htm> > [hereinafter *Kunarac Indictment*]. As part of the Serb's ethnic cleansing, Foca has been renamed Srbinje to honor the Serb forces that fought there and defended Serbianness. See NORMAN CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF ETHNIC CLEANSING* 60-61 (1995). In part because the name Srbinje has not been recognized by either the United Nations or the Bosnian government, this article will refer to the city as Foca.

11. See, e.g., CIGAR, *supra* note 10; ROY GUTMAN, *A WITNESS TO GENOCIDE* (1993); MICHAEL A. SELLS, *THE BRIDGE: BETRAYED RELIGION AND GENOCIDE IN BOSNIA* (1996); LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997).

12. This article refers to the term "ethnic cleansing" because of its popular acceptance. Arguably, genocide is a more accurate term. See GUTMAN, *supra* note 11, at xxiv ("In Bosnia, 'ethnic cleansing' became a euphemism for genocide."); see also NEIER, *supra* note 6, at 121-24 (discussing the acts of the Serbs in Bosnia as constituting genocide under international law).

13. By focusing on Bosnia and the Bosnian Muslim victims, the author does not intend to minimize the suffering of victims of other crimes or from other regions in the former Yugoslavia. The defendants in the first international criminal convictions for war atrocities during the Bosnian War, which included rape, were a Bosnian Croat and two Bosnian Muslims. See Mike Corder, *Three Convicted of Crimes Against Serbs*, Associated Press Online, Nov. 16, 1998, available in 1998 WL 22418953. The methodical use of rape by Bosnian Serbs as part of a planned ethnic cleansing and allegations that this policy continues in the providence of Kosovo create a unique chance to study in more depth the relationship between victims and perpetrators. See Sam Kiley, *Serbs Make Rape a Weapons of War*, *TIMES* (London), Apr. 6, 1999, at 2; Tom Mashberg and Jules Crittenden, *Kosovo Crisis: War Crimes Will Be a Challenge to Prove*, *BOSTON HERALD*, Apr. 11, 1999, at 8. It is worth noting that there is evidence of male sexual abuse in the Bosnian war, but the sexual violence against women appears to be more organized and systematic. See GUTMAN, *supra* note 11, at 144. As a result, this paper focuses exclusively on female victims.

vodina and Kosovo). The vast majority of the Yugoslavian population, although of the same race, was divided culturally according to religion.¹⁴ These three ethnic groups were Serbs, Slavic Muslims, and Croats.¹⁵ However, aside from a few homogeneous rural areas, the country was ethnically mixed.

The republic of Bosnia in particular enjoyed a multi-ethnic population.¹⁶ Throughout Bosnia, members of each ethnic group lived side-by-side, attended school together and worked together. Inter-marriage between ethnic groups was not uncommon, particularly in urban areas.¹⁷ Although some Muslims observed Islamic holidays and traditions, many considered themselves atheists or agnostic and chose the categorization of Muslim to avoid the religious implication attendant with being identified as a Serb or a Croat.¹⁸ Under the tutelage of Yugoslavia's President Milošević, however, some Bosnian Serbs feared an independent Bosnia in which Serbs would be a persecuted minority.¹⁹ Although by the late 1980s there was little evidence justifying these concerns, the propaganda of Milošević and others led many Serbs to accept the possibility of a Muslim-dominated Bosnia.

14. See Neier, *supra* note 6, at 116-17. Generally, Serbs are Orthodox Christians, Croats are Catholics, and Slavic Muslims are Islamics. These three ethnic-religions do not possess parallel histories. Two of the ethnic groups, Serb and Croatian, are an integral part of Yugoslavian history and the third, Slavic Muslims, is a recent political construct. It was not until the 1960s that Muslims were officially recognized as a distinct ethnic group. See *id.* The 1971 census was the first time "Muslim" was listed as a national category. See SELLS, *supra* note 11, at 14. Slavic Muslims, like Israeli Jews, are one of the few groups of people for whom ethnicity and religion are combined into one classification. See NEIER, *supra* note 6, at 117.

15. See SELLS, *supra* note 11, at 5-6.

16. See Adrien Katherine Wing and Sylke Merchán, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 8 (1993) (citing the division within the Bosnian population of 4.4 million to be 18 percent Croat (Catholic), 31 percent Serb (Orthodox Christian) and 44 percent Muslim).

17. See Diana Kapidzic & Aida Daidzic, *BISER: A Conversation with Bosnian Women Living in Exile*, 5 HASTINGS WOMEN'S L.J. 53, 55-56 (Sara Kurlich trans., 1994).

18. See SELLS, *supra* note 11, at 14. For some, identifying oneself as ethnically Muslim was the religiously neutral choice. Bosnian Muslims often "viewed their religion as a national identity and saw themselves as secular Europeans first, Muslims second." GUTMAN, *supra* note 11, at xxvii. During the Bosnian war, Muslims were targeted as "the other" and their destruction became crucial to the Serbian effort. See SELLS, *supra* note 11, at 17. Muslims were forced to identify themselves with white armbands and forced to concede places in supply lines to their Serbian neighbors. See *id.* Before its break-up, Yugoslavia was considered a largely secular nation. See telephone interview with Ian Sethre, graduate student of history at the University of Minnesota (Feb. 4, 1999).

19. See CIGAR, *supra* note 10, at 38; Alex N. Dragnich, *Bosnia-Herzegovina: A Case Study in Anarchy in the Third World*, 3 CARDOZO J. INT'L & COMP. L. 163, 169-70 (1995). Tactics of Milošević to gain power in Serbia included control of the media, violent street rallies and the intimidation of rivals. See CIGAR, *supra* note 10, at 33. The fear of Serb subjugation stemmed from Nazi occupation during World War II. See Hochkammer, *supra* note 6, at 129 n.70. One in ten Serbs died in World War II. See *id.*

On February 29, 1992, Bosnian voters approved a referendum to secede from Yugoslavia.²⁰ Growing discontentment among many Croats and Muslims over a system controlled by Serb nationals and Milošević led them to support secession from the rest of Yugoslavia.²¹ Bosnian Serbs boycotted the referendum. Shortly thereafter, the European community and the United States “accorded diplomatic recognition” to Bosnia and the Bosnian war began.²²

Propaganda by Serbian leadership and militant Serb nationalism incited religious and ethnic warfare in Bosnia.²³ Early in the war, Bosnian Serb soldiers targeted cultural and religious buildings. The educated and cultural elite were also viewed as potential sources of Muslim resistance.²⁴ As the war intensified, the Serb tactics against the Muslims intensified.²⁵ The non-Serb populations of villages were divided along gender lines and by age.²⁶ Men were forced to live in detention centers at one location and women, children and the elderly at another.²⁷ It was at the detention centers that the soldiers selected Muslim girls and women to rape.

After stories about the abusive conditions of the “detention centers” in Bosnia were publicized in the world media, Bosnian Serb leaders allowed journalists access to a detention center at Omarska to refute the reports.²⁸ Of the thousands of prisoners at Omarska, ap-

20. See CIGAR, *supra* note 10, at 38. Of the 63.4 percent of registered voters in the referendum (1.6 million votes), 99.43 percent voted in favor of independence. See *id.* at 214 n.1.

21. See GUTMAN, *supra* note 11, at xxvii. The war in Bosnia is considered both “civil,” because of the armed conflict between regions within Yugoslavia in 1991, and “international,” because of subsequent international (including United States and European) recognition of Bosnia as a sovereign state. See SELLS, *supra* note 11, at 9.

22. GUTMAN, *supra* note 11, at xxvii; see also Dragnich, *supra* note 19, at 172. The fourth conflict resulting from the dissolution of Yugoslavia, between Kosovo and Serbia, climaxed in the spring of 1999 with NATO intervention. See Norman Cigar, *Target the Troops*, WASH. POST, Mar. 25, 1999, at A36 (hereinafter Cigar, *Target the Troops*).

23. See CIGAR, *supra* note 10, at 33.

24. See SELLS, *supra* note 11, at 20.

25. See *id.* at 72-77. Muslims were “cleansed” from their homes and forced to migrate or stay in detention centers. See *id.*

26. See *Indictment of Foca 8*, *supra* note 3, ¶ 1.4.

27. See *id.* For example, in the three-day struggle over the city of Srebrenica, more than 8000 men and boys disappeared. See Amnesty International, *Bosnia-Herzegovina: The Forgotten of Srebrenica - Another Snub to Justice* (July 9, 1999) <http://www.amnesty.org.uk/news/press/releases/12_july_1999-1.shtml>.

28. See GUTMAN, *supra* note 11, at xii-xiv. Roy Gutman of New York Newsday played an integral role in the initial reporting of the atrocities of the Serbian concentration camps as well as early reporting of the mass rapes committed in Bosnia. He deserves much credit for forcing the international community to face the crimes in Bosnia. See NEIER, *supra* note 6, at 134; SELLS *supra* note 11, at 13; CALLING THE GHOSTS, *supra* note 1.

Even with the Omarska camp made temporarily tolerable for the media visit and with the limited reporters’ access to prisoners, the international community was horrified by the images they captured. The photographs of the emaciated Muslims behind barbed wire reminded many of pictures taken by the Allies during the liberation of

proximately thirty-three were women,²⁹ and many were subject to sexual assault and abuse.³⁰

The international community began to react, even without full knowledge of the abuse, torture, and murder that occurred in Bosnia. Graphic articles and film footage from the Omarska detention center generated international outrage from human rights and other non-governmental organizations.³¹ Worldwide publicity of the Serb atrocities created a crisis that the international community could no longer ignore. For example, the United States Senate was among the numerous political institutions expressing concern over the events in Bosnia, in particular the evidence of mass rape. In January 1993, the Senate passed a resolution condemning the systematic rapes by Bosnian Serb Military units as an "unacceptable means of warfare," a crime against humanity, and a violation of Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949.³²

Although final numbers are uncertain, it is estimated that by mid-1993 over ten percent of the Muslim population in Bosnia had been murdered.³³ In addition, thousands more were forced from their

the internees from Nazi concentration camps. See NEIER, *supra* note 6, at 135. After these visits the detention centers were renamed "death camps" by the international media. See GUTMAN, *supra* note 11, at xiii. Eventually, the number of Muslim men murdered at Omarska was estimated at as many as 5000 out of 13,000 total detainees processed at that location. See *id.* at xiv.

29. See GUTMAN, *supra* note 11, at 144.

30. See *id.* at 144-49. Mass rape of the women at Omarska was documented both in Roy Gutman's Newsday Articles, see *id.*, and in the documentary CALLING THE GHOSTS, *supra* note 1. Attorney-turned-activist, Jadranka Cigelj, has come forward to publicize the event at Omarska including descriptions of her own victimization. One of those she accuses of raping her, Zeljko Mejhic, denies this charge, calling Omarska an "investigative center." GUTMAN, *supra* note 11, at 145. Regarding Cigelj, he adds, "she is a bad and unattractive woman . . . [and] I wouldn't lean a bicycle on her, let alone rape her." *Id.*

31. See GUTMAN, *supra* note 11, at xv; NEIER, *supra* note 6, at 134-38. For months, the United Nations had focused its discussions on the "internal" nature of the conflict (Bosnian versus Bosnian). Based on the United Nations Charter's principles of non-intervention, the organization chose to remain neutral. See David Kresock, "Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention, 27 CORNELL INT'L L.J. 203, 209-10 (1994). The U.N. Charter codifies this doctrine in Article 2(4) and Article 2(7). See U.N. CHARTER art. 2, para. 4, 7. Another key tenet of the Charter is the prohibition of aggression. See *id.* at art. 2, para. 4. Two major exceptions to non-intervention allowed within the Charter relate to the use of aggression. First, there is the right of any state to react in "individual or collective self-defense" in the event of an "armed attack." *Id.* at art. 51. Second, Article 42 of the Charter grants to the Security Council the right to "take such action" as may be necessary to maintain or restore international peace and security. *Id.* at art. 42.

32. S. Res. 35, 103rd Cong. (1993). Despite some agreement that the 1995 NATO intervention accelerated the end of the war, at least one commentator argues that the credit given to NATO air strikes is "undeserved." Cigar, *Target the Troops*, *supra* note 22, at A36.

33. See GUTMAN, *supra* note 11, at xxxi. In the Banja Luka region of Bosnia, the pre-war Muslim population of 350,000 had dwindled to 40,000. See CIGAR, *supra* note 10, at 58.

homes, escaping to refugee camps, and immigrating to Europe and the United States. By 1996, one-half of the population of Bosnia had fled, been expelled, or killed.³⁴

II. RAPE IN BOSNIA

The systematic nature of the sexual assaults in Bosnia and the estimated numbers of victims attest to rape as an integral role in the Serbian plan to eliminate Muslims from Bosnia.³⁵ Throughout Bosnia, the Serb forces' ethnic cleansing took shape by destroying cultural and religious landmarks, targeting the educated Muslim elite for detention, torture, murder, renaming Muslim cities, and raping Muslim women.³⁶ Bosnian Serbs chose rape as an instrument of war for several interdependent reasons. First, it was a well-known fact in Bosnia that the Muslim birthrate was higher than the Christian birthrate. Slowing this birthrate was a means to slow the growth of the Muslim majority.³⁷ Second, Serbs recognized the stigma attached to rape victims in Yugoslavia. As a result of the stigma, victims have difficulty being accepted as wives and are less likely to produce Muslim children.³⁸ Third, there is evidence of rape being conceptualized as the "forced impregnation of Serb nationhood" and as a means to increase

34. See SILBER & LITTLE, *supra* note 11, at 386.

35. See Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 7 (1994). There is evidence that some victims were detained and raped until impregnated. See Siobhan K. Fisher, Note, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 107 (1996). In addition, some victims report that Serb soldiers told them that the soldiers had been ordered to rape. See *id.* at 111. Many scholars argue that mass rape in Bosnia was a tool of genocide. See Danise Aydelott, Comment, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT'L L. REV. 585, 586 (1993); MacKinnon, *supra* at 6-8; Theodor Meron, Editorial Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993). Others assert that the policy of rape was a means of terrorizing Muslim women and "emasculating" Muslim men. See Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 203 (1994).

36. See CIGAR, *supra* note 10, at 59-61; NEIER, *supra* note 6, at 118-19; see also Danise Aydelott, *supra* note 35; Wing and Merchán, *supra* note 16; Women in the Law Project of the International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89 (1993) [hereinafter *No Justice, No Peace*]. Rape has been an expression of cruelty in war for centuries. Thus, some of the sexual assaults perpetrated upon Bosnian Muslim women may have been the "inevitable" result of an armed conflict. However, evidence of the systematic nature of the sexual assaults indicates that the objective of a Muslim-free Bosnia is a more likely explanation.

37. See SELLS, *supra* note 11, at 22.

38. See *id.*; Susan Ronn, *Jane Doe on Behalf of Herself and All Others Similarly Situated: Radovan Karadzic in United States District Court*, 19 SEATTLE U. L. REV. 289, 294 (1996); Wing and Merchán, *supra* note 16, at 20-25 (discussing rape as a "spiritual injury" in Muslim culture).

the Serb population.³⁹ According to tradition, children of Serb fathers are Serbian regardless of the mother's ethnicity.⁴⁰ Therefore, a Muslim woman who gave birth after a rape would both increase the Serb population and simultaneously taint "'pure' Muslim populations."⁴¹

Estimates of the total number of Bosnian Muslim women raped during the war range from 10,000 to 80,000.⁴² Accurate numbers of rape victims may never be determined because of a "self-imposed silence."⁴³ Rape victims in Bosnia hesitate to tell their stories or to identify rapists for a multitude of reasons.⁴⁴ For example, the "stigma associated with rape in Bosnian Muslim . . . communities," perhaps greater than that of Western culture, has made some victims unwilling to speak about the crimes.⁴⁵ One woman, after her 18 year-old daughter was led away by soldiers and later found dead, refused to believe that her daughter had been raped. Instead, the woman insisted that it was better that her daughter had resisted and been killed rather than survive the rape.⁴⁶ Just as Serb soldiers predicted, Muslims' religious and cultural beliefs had a chilling affect on the rape victims' ability to tell their stories. The fear of retaliation against themselves or their families also silences some victims.⁴⁷ The fear of punishment or rejection from one's own family for "allowing" herself to be raped sup-

39. CIGAR, *supra* note 10, at 92. The "Conflict in Kosovo," as it has been dubbed by the press, see Robert Seely, *With the Cold War a Memory, Europe's Defense Industries Fight for Life Arms*, L.A. TIMES, Oct. 24, 1999, at A36, also includes reports of forced impregnation. See Kiley, *supra* note 13, at 2. ("[B]order guards . . . clearly hope to father scores of Muslim children carrying Serb blood.")

40. See Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255, 265-66 (1994).

41. *Id.* at 266.

42. See Kapidzic & Daidzic, *supra* note 17, at 60.

43. Levy, *supra* note 40, at 267.

44. See Kresock, *supra* note 31, at 225. For examples of the victimization, see *Indictment of Foca 8*, *supra* note 3.

45. *No Justice, No Peace*, *supra* note 36, at 102. Many cultures stigmatize victims of sexual abuse. Thus, the effect of Islam, though a factor in rape survivors' willingness to speak out, may not be dispositive. See Ronn, *supra* note 38, at 294. By the 1990s, Yugoslavia was largely secularized and arguably, the effects of religion on some victims' willingness to speak out have been over-emphasized. It may be possible that the poorer, and more rural areas of the former Yugoslavia attached a greater stigma to rape and will have fewer victims willing to come forward with their stories of rape and sexual assault.

46. See *All Things Considered, Stories of Rape in Kosovo and its Effect on the Culture* (National Public Radio, July 2, 1999) (transcript available in LEXIS, News, Transcripts).

47. See SELLS, *supra* note 11, at 77. One horrifying aspect of rape in a "civil war" is that the perpetrators often know their victims as former friends, neighbors or co-workers. See *id.* At Omarska, victims report being held captive by former neighbors who pretended not to know them. See CALLING THE GHOSTS, *supra* note 1. Perhaps because of this, the first female victim from Omarska to testify at the ICTY withdrew her testimony in May 1996 for fear of the safety of her family and self. See *id.*

presses others from speaking.⁴⁸ In addition, a victim may not want to create a presumption of victimization, or the stigma that attaches to this victimization, to be placed on others in her village. She therefore remains silent to avoid harming the reputations of the other women in her village.⁴⁹ Because most rape victims experienced multiple horrors of war, they do not want to expose their victimization and be known "just" as rape victims.⁵⁰ Once it is discovered that a woman is raped, the other effects of the war suffered by the victims may be overshadowed. Most rape victims in Bosnia also experienced the murders of family members and friends, forced detention, destruction of property, and the loss of their homes. Finally, there is speculation that the attention placed on the mass rapes of Bosnia has created intense pressure to give interviews and reveal intimate details of their rapes, adding to the overwhelming trauma of war.⁵¹

In contrast to those who choose not to speak, other survivors express anger and are publicizing their experiences in order to let the international community know the truth about the horrors they suffered.⁵² Even during the war, women were contemplating this need for a public forum. This was evidenced by Muslim women at the Omarska detention center who promised one another that "[m]aybe one of us will survive and one day tell all this . . . to the whole world."⁵³

International organizations have collected data on the rapes in Bosnia. One organization has collected over seven thousand stories of rape and other forms of sexual violence.⁵⁴ Seventeen-year-old Senada, for example, one of forty young victims from Brezovo Polje, spoke out because, "[w]e want the world to know our truth. All mothers. All women It is worse than any other punishment in the world."⁵⁵ The women's need not to feel isolated in their victimization is evident.

Women who come forward with their accounts of rape atrocities are critical to the prosecutions conducted by the ICTY.⁵⁶ Unlike a

48. See *No Justice, No Peace*, *supra* note 36, at 103.

49. See *id.* at 108.

50. See CALLING THE GHOSTS, *supra* note 1; *No Justice, No Peace*, *supra* note 36, at 104.

51. See AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES 2 (1993). Anytime a witness tells her story she relives the trauma of the events. In addition, testimony at the ICTY has the added pressures of international travel and the other fears involved with courtroom testimony. See Kate Fitzgerald, *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law*, 8 EUROPEAN J. INT'L L. 638, 650 (1997).

52. Even those willing to speak, however, acknowledge that "shame alternates with anger." GUTMAN, *supra* note 11, at 73. Victims often wish to be identified only by a first name or nickname. See *id.* at 68.

53. CALLING THE GHOSTS, *supra* note 1.

54. See Kapidzic & Daidzic, *supra* note 17, at 60.

55. GUTMAN, *supra* note 11, at 69.

56. There may be demographic factors that are affecting whether women come forward with their accounts of rape or remain silent. Since the war in Bosnia there has been an invasion of the western "women's movement" and pressure on victims to

crime such as murder, with rape there is often no forensic or physical evidence remaining years after the crime. Witnesses other than the victim may not exist. The witnesses that do exist may be reluctant to aid the victim since they are often other soldiers or other rape survivors.⁵⁷ Therefore, without the testimony of rape survivors, the international prosecution of rapists would likely fail. While risking both physical and emotional harm by coming forward and testifying, these rape victims offer the international community an uncommon opportunity to address rape and sexual violence as violations of international law.

III. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

A. *Origins and Founding of the ICTY*

The post-World War II Charter of the International Military Tribunal for the Trial of the Major War Criminals and the resulting Nuremberg and Tokyo trials were significant turning points in the field of international criminal law and the recognition of individual responsibility for crimes committed during international wars.⁵⁸ The discovery of the atrocities committed by the Axis powers during World War II gave rise to the notion of "international humanitarian law."⁵⁹ The notion that individuals are restricted by the same international rules of human rights law as nation states is "one of the most significant legacies" of the post-World War II trials.⁶⁰

The Nuremberg trials focused almost exclusively on the Nazis' genocide of all non-Aryans.⁶¹ The less well-known Tokyo Tribunals,

come forward with accounts of rape. It is generally accepted that the women's movement in the West, and the United States in particular, has been a largely white and middle to upper-class movement. See generally SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1979). It is not understood whether there is a correlation between a Bosnian victim's willingness to discuss her rape and her class status. Middle-class and urban victims may be speaking up more than the poorer, rural victims, mirroring class divisions among their western counterparts.

57. See generally *Indictment of Foca 8*, *supra* note 3 (describing gang rapes by soldiers and rapes that occurred with other victims in the room).

58. See Felice D. Gaer, *And Never the Twain Shall Meet? The Struggle to Establish Women's Rights as International Human Rights*, in *THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE* 1, 5 (Carol Elizabeth Lockwood et al. eds., 1998) (arguing that traditionally, international law is based on actions of states and not actions of individuals or a state's responsibility to individuals).

59. See Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICES* 3, 5 (Hurst Hannum ed., 2d ed. 1992).

60. Hochkammer, *supra* note 6, at 144.

61. See CIGAR, *supra* note 10, at 7. The international community only briefly addressed the rapes of Frenchwomen by German soldiers. See *id.* Sexual assault crimes were ignored due to the tribunal's focus on the other crimes of the Axis powers. Many of the rapes that occurred during World War II are also attributed to the Allied Forces. See NEIER, *supra* note 6, at 181. Rapes were perpetrated by both the Axis and

however, did prosecute rape and punished rapists as war criminals. According to one commentator, rapes in Nanking were presented with "horrifying detail."⁶² As the prosecution of rape at the Tokyo Tribunals demonstrated, even at the first international attempt to prosecute war crimes, rape within war has been deemed illegal under international law.⁶³

During the early stages of Yugoslavia's dissolution, the United Nations passed a series of resolutions condemning known violations of international law in the former Yugoslavia.⁶⁴ The resolutions also created the ICTY. The United Nations Security Council, under Chapter VII powers of the United Nations Charter, unanimously passed Resolution 827 on May 25, 1993.⁶⁵ Resolution 827 established a Tribunal to "prosecute persons responsible for violations of international humanitarian law in the former Yugoslavia after January 1, 1991."⁶⁶ Following the legacy of the post-World War II tribunals,⁶⁷ the ICTY was established to prosecute individuals for crimes committed during an armed conflict. The United Nations learned from Nuremberg and Tokyo and created an institution able to withstand international scrutiny.⁶⁸

Allied powers. However, rape ran counter to the Nazi policy of a pure Aryan race because Judaism runs through the blood of the mother. Therefore, a raped Jewish girl would give birth to a Jew regardless of the religion of the father. See MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES: HA-MISHPAT HA-IVRI, 1688-90* (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Soc'y 1994).

62. NEIER, *supra* note 6, at 181.

63. *See id.* at 180.

64. Beginning with Resolution 713 in 1991, the United Nations passed at least 15 resolutions regarding the situation in former Yugoslavia. *See* James C. O'Brien, *Current Developments: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 640 (1993).

65. *See* S.C. Res. 827, *supra* note 5. Under Chapter VII of the United Nations Charter, the Security Council has the power to "take measures necessary to maintain international peace and security." O'Brien, *supra* note 64, at 643. The creation of the ICTY was the judicial remedy to the threat to peace and security. *See id.*

66. O'Brien, *supra* note 64, at 640. The Tribunal consists of three distinct elements: the judicial component, including a trial and appeals chambers; the executive, consisting of the office of the prosecutor; and the administrative branch or "registry." *See* Hochkammer, *supra* note 6, at 151. The Registry is the administrative and public relations branch of the Tribunal. *See id.*

67. Prior to the Nuremberg Tribunal Charter, "crimes against humanity," any inhumane acts committed against any civilian population, were illegal by custom. The Nuremberg Charter was the first document "which dealt specifically with crimes against humanity as a distinct category of international crimes." BASSIOUNI, *supra* note 8, at 528.

68. Although the Nuremberg and Tokyo trials were criticized for selective prosecution and ex post facto application of law, they marked a turning point in individual's criminal responsibility for international crimes and established the notion of crimes against humanity. *See id.* at 206-12. The ex post facto concerns expressed at Nuremberg and Tokyo were overshadowed by the atrocities committed by the Axis powers. In addition, although the trials theoretically provide the Axis powers with the

Since World War II, there has been an explosion of scholarship in the field of human rights. Included in this growing field is the recognition that some human rights issues are unique to women. The ICTY adds to this discourse with the explicit recognition of rape as a war crime.⁶⁹ Unlike previous international tribunals, which included rape implicitly under general provisions forbidding "Crimes Against

"rule of law," it is generally accepted that the law was applied unfairly because of the need for vindication by the Allied powers. See Hochkammer, *supra* note 6, at 141.

Despite near unanimous acceptance of the ICTY by the international community, some commentators express concerns about the Tribunal's legitimacy, just as there were those who had criticized the Nuremberg Tribunal. Some commentators are concerned that the ICTY Statute will not bind Yugoslavia and its breakaway provinces because of the "clean slate" principle of international law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 210(3) (1986), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 479-80 (2d ed. 1995). The "clean slate" theory is that a new state is not bound by the treaties ratified by the predecessor state but instead has the right to ratify its own conventions and treaties. See *id.* at 478. Therefore, arguably Slovenia, Croatia, Bosnia, and the "new" Yugoslavia are not bound by the obligations of the former Yugoslavia. See Aydelott, *supra* note 35, at 608.

Even with a "clean slate" however, Slovenia, Bosnia, and Croatia are subject to both customary international law and Common Article Three of the Geneva Conventions. Common Article Three of the Geneva Conventions establishes humanitarian standards in war. See Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499, 506 (1994). Common Article Three applies to new states because it prohibits certain behavior, including crimes against humanity "at any time and in any place." Aydelott, *supra* note 35, at 609. Furthermore, in May 1992, "representatives from four parties in Bosnia-Herzegovina signed an agreement . . . in which . . . they agreed to be bound by [the standards of] Common Article 3." AMNESTY INTERNATIONAL, *supra* note 51, at 3.

In addition, customary law encompasses the notion that certain behaviors are internationally condemned and contrary to *jus cogens* or "customary" international law. Once an act falls within the sphere of the *jus cogens*, no treaty is necessary to prevent the state from the act. Two elements are used to determine *jus cogens*: (1) state practice and (2) *opinio juris*. See STEPHEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 17 (1997). *Opinio juris* is the idea that states follow a practice out of a sense of legal, not moral or ethical, obligation. It is generally agreed that torture and genocide fall within the *jus cogens*. See Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 471 (1998).

Finally, charges of ex post facto application of the law against ICTY prosecutions are unfounded. It is "beyond any doubt" that customary law criminalizes all of the acts implicated in the ICTY Statute. *Statute of the International Tribunal*, *supra* note 6, ¶ 34. For example, rape as a means to genocide is illegal under the customary law of war. See Paust, *supra*, at 515-16 ("Genocidal 'ethnic cleansing' is prosecutable in any nation as genocide and, in time of war . . . as a war crime."). Unlike Nuremberg and Tokyo, the ICTY is an international effort initiated by parties not directly involved in the armed conflict. War criminals have been indicted from all sides of the conflict and, therefore, the tribunal is less susceptible to charges of selective prosecution.

69. See *Statute of the International Tribunal*, *supra* note 6, at art. 5(g). Since World War II, numerous international declarations, treaties, and conventions have also addressed the illegality of rape. See AMNESTY INTERNATIONAL, *supra* note 51, at 2; Aydelott, *supra* note 35, at 606-07; Meron, *supra* note 35, at 424-28.

Humanity," the ICTY statute explicitly criminalizes rape.⁷⁰ The Statute of the International Tribunal names rape as a Crime Against Humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."⁷¹

The Statute recognizes rape and reverses the trend in international law in which "sexual violence against women has not been apportioned the same significance as human rights abuses against men."⁷² The acceptance of rape as a war crime worthy of vigorous prosecution, a crime in which most victims are women, explicitly signals the acceptance of women as a group within the international community requiring recognition of their gender-specific human rights. Under the Statute of the ICTY, rapists are being prosecuted because they victimized women, not simply because the victimization of women is a legal or cultural injury to men. The classification of rape in the Statute of the Tribunal affirms the importance of women as equal participants before international law and institutions.

The Statute of the Tribunal focuses first on individual criminal responsibility. For example, the statute is written to avoid commonly invoked defenses, such as "head of state immunity."⁷³ In addition, the Statute does not relieve a superior of responsibility for crimes committed by a subordinate when the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and . . . failed to . . . prevent such acts or to punish the perpetrators."⁷⁴ A commander may be responsible for sexual assaults committed by his soldiers if he could have prevented the crimes. Alternatively, a soldier may not use the affirmative defense of "superior orders."⁷⁵ A crime committed "pursuant to an order of a Government or of a superior shall not relieve [the defendant] of criminal responsibility."⁷⁶ Accordingly, a soldier who alleges that he raped under the

70. See *Statute of the International Tribunal*, *supra* note 6, at art. 5(g). In addition, rape and sexual abuse implicitly fall under Article 2 of the ICTY Statute, "Grave Breaches of the Geneva Convention of 1949," which includes "torture and inhumane treatment," and "causing great suffering or serious injury." *Id.* at art. 2(b), (c).

71. *Id.* at art. 5. By referring to internal as well as international armed conflicts, the tribunal embraces the dual nature of the Bosnian conflict. Before the 1991 breakup of Yugoslavia, the conflict was internal. Thereafter, by referendums and international recognition of the provinces as independent states, the war became "clearly international." O'Brien, *supra* note 64, at 647.

72. Levy, *supra* note 40, at 263.

73. See *Statute of the International Tribunal*, *supra* note 6, at art. 7(2).

74. *Id.* at art. 7(3). As early as the Middle Ages individuals have been held responsible for the crimes of their subordinates. Peter vonHagenbach claimed he was following orders when knights under his command committed rape, murder, and perjury. He was sentenced to death. See Lyal S. Sunga, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 18-19 (1992).

75. See *Statute of the International Tribunal*, *supra* note 6, at art. 7(4).

76. *Id.*

direction of a superior may not be exonerated for his act but may have his punishment mitigated if "justice so requires."⁷⁷

The ICTY did not invent the legal concept of rape as a war crime. Even without the explicit recognition given by the Statute, rapes committed in the Bosnian war were a patent violation of previously existing international law.⁷⁸ The ICTY has, however, recognized the significance of rape as an instrument of war and the necessity of a gender conscious process in the prosecution of this uniquely personal and violent crime.

B. *Rape and Sexual Assault in the ICTY: Personnel, Rules, and Procedure*

The crime of rape is unique, in part because it is an intimate violation of a person, and its victims are most often female. Until recently, rape had not been afforded the same significance in international criminal prosecutions as other violent crimes. Traditionally in international law, rape had been viewed as a "private" act falling "outside of the state's, and thus the international community's purview."⁷⁹ In Bosnia, however, the "extent and scale of rapes" has made the international community's neglect of rape and rape prosecution unconscionable.⁸⁰ As grim stories of rape and sexual violence began to emerge, an appreciation of the need for sensitivity to issues of female victimization and the role of women as sexual assault victims and witnesses developed. The significance of the inclusion of women in the ICTY as victims and otherwise was noted by Judge Odio-Benito:

[R]ape has been listed for the first time in the history of humanitarian law as a crime. And that the systematic use of rape has been an essential instrument of ethnic cleansing policy Rape, then, is a crime under the competence of these international tribunals There will be no justice unless women are part of that justice.⁸¹

The international community has recognized that to successfully resolve these war crimes, the mass rapes of women must be addressed.

Despite appeals for participation of women in the process of rape prosecution, the international community has failed to automatically recognize its importance. Initially, the anticipated role of sexual abuse crimes generated calls for gender parity during the selection procedure for Tribunal personnel.⁸² Yet, of the twenty-three judicial nominations for the eleven positions, only two were women.⁸³ Ques-

77. *Id.*

78. See AMNESTY INTERNATIONAL, *supra* note 51, at 2.

79. Levy, *supra* note 40, at 262.

80. *Id.* at 263.

81. CALLING THE GHOSTS, *supra* note 1.

82. See Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171, 176 (1994).

83. See *id.*

tions of the United Nation's commitment to gender parity and sensitivity persisted when, after the first round of voting, the only woman elected to the bench was former United States Federal Judge Gabrielle Kirk McDonald. The second and final woman elected to the inaugural court was Elizabeth Odio-Benito of Costa Rica. Odio-Benito was not selected until "late in the balloting and only after heavy political negotiations."⁸⁴ The necessity of political negotiations indicates the continued reluctance of some within leadership of the United Nations to recognize the importance of allowing women's influence on ICTY procedures.

Visible female leadership in the ICTY increased in 1996 when the United Nations Security Council appointed Canadian Louise Arbour as head prosecutor for both the ICTY and the International Criminal Tribunal for Rwanda.⁸⁵ In August 1999, another woman, Costa Rican Carla del Ponte, replaced Arbour.⁸⁶ The appointment of del Ponte as the second female head prosecutor indicates a heightened sensitivity to, and recognition of, the gender issues of the Tribunal. Furthermore, her appointment reflects a modest reaffirmation of the United Nations Security Council's commitment to maintain women's voices in the leadership of the ICTY.

Women's voices are necessary in the prosecution of mass rape in Bosnia because women have a unique perspective on sexual assault. Women, whether personally victimized by sexual assault or not, are privy to perspectives on crimes of sexual violence unattainable by men. Regardless of ethnicity or nationality, women share perspectives on rape unique to the female experience. Whether taught or through experience, women more easily accept themselves as potential victims. Even sexually active women are taught that "purity" and sexuality are invaded and changed by a rape. Because women rather than men are more often victims of sexual violence, and male victimization often differs from female victimization, men's perceptions of the gravity of sexual violence are not necessarily those shared by women. A gender-specific perception of sexual assault is well served by female presence in the ICTY for the successful prosecution of crimes of sexual violence. This is especially true when the victims in question are all women.⁸⁷

84. *Id.* at 176-77. The judges were elected effective November 17, 1993, for four-year renewable terms and at the time of this writing, both women remain on the bench. Since 1993, additional female judges have been appointed. For a complete listing of the Tribunal personnel, see *Fact Sheet* (Oct. 27, 1999) <<http://www.un.org/icty/glance/fact.htm>>.

85. See *The Office of the Prosecutor*, 4 BULLETIN 4, ¶ 1 (1996) <<http://www.un.org/icty/BL/04art3e.htm>>.

86. See *UN Finds 2,108 Bodies in its Investigation of Atrocities in Kosovo*, CHI. TRIB., Nov. 11, 1999, at 10.

87. See Scott Splittgerber, Comment, *The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L.J.

The United Nations evidenced a gender conscious policy in the Statute of the Tribunal by acknowledging the need for the protection of witnesses during ICTY prosecutions. Under Article 22 of the Statute of the Tribunal, the Tribunal is directed to "provide in its rules of procedure and evidence for the protection of victims and witnesses."⁸⁸ Means of witness protection created under the Article 22 directive include "the assignment of pseudonyms, distortion of voice and video image, in camera testimony, and full anonymity."⁸⁹ For these rape victims, witness protection assumes even greater significance. In addition to the fear of retaliation faced by all victims of war crimes, rape survivors also confront the shame and stigma associated with sexual assault. Testifying as a victim of sexual assault differs from testifying as a victim in other types of crimes. Unlike a rape victim, no one questions whether a victim of torture consented, nor is a torture victim seen as defiled. Community members do not wonder about a torture victim's purity or morality. Procedures protecting rape victims' identities are critical in assuring victims' safety, and to maintaining their credibility and integrity within their communities.

Rules of evidence pertaining to the testimony of sexual assault victims is a delicate and political subject in both national and international criminal law.⁹⁰ In recognition of the exceptional nature of rape, the ICTY developed Rule 96 to offer greater procedural protections for sexual assault victims. After several revisions, the final rule states:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defense if the victim
 - (a) has been subject to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

185, 201 (1996) ("Participation in decision making is essential for addressing the concerns and interests of women.")

88. *Statute of the International Tribunal*, *supra* note 6, at art. 22. The Rules of Procedure and Evidence adopted by the ICTY were entered into force on March 14, 1994. See *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence*, U.N. Doc. IT/32 (1994), reprinted in 33 I.L.M. 484. For the entire text of the Rules, see *Rules of Procedure and Evidence*, U.N. Doc. IT/32/REV16 (last modified July 15, 1999) <http://www.un.org/icty/basic/rpe/IT32_rev16con.htm> [hereinafter *ICTY Rules*].

89. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L. L. 57, 84 (1999).

90. See, e.g., FED. R. EVID. 412-413.

- (iv) prior sexual conduct of the victim shall not be admitted in evidence.⁹¹

Rule 96 recognizes rape as a unique form of violence and victimization.⁹² As previously noted, sexual assault is often perpetrated in private. Accordingly, Rule 96 eliminates the necessity of witnesses.⁹³ A victim may testify against the accused regardless of witness verification. There is an awareness that a victim may “consent,” fearing that refusal to submit to the assault could threaten her life or the lives of her family members.⁹⁴ Under Rule 96 this “consent” is not a legitimate defense. The court must be satisfied in camera that any offered consent is a valid defense before evidence of such consent reaches open court.⁹⁵ This assures victims an opportunity to stop illegitimate defenses before they reach open court, and prevents further humiliation of the victim. In addition, a victim’s sexual history is deemed legally irrelevant to the issue of whether there was forced sexual contact, and is therefore inadmissible.⁹⁶ The final aspect of Rule 96 seeks to protect victims from humiliation and supports the primarily female victim-witnesses in verifying the allegations in the indictments.⁹⁷ This appreciation of the stigma of rape and the gender component of crimes of sexual violence is a first in international criminal prosecutions. It is not yet clear whether the safeguards of Rule 96 have enticed reluctant witnesses to testify about the horrors of their sexual abuse.

Victim-witnesses of the Bosnian war required protections beyond those provided for in court by the rules of evidence. The ICTY acknowledged a responsibility for the protection of these witnesses.⁹⁸ The Tribunal responded by establishing the Victims and Witness Unit to:

- (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
- (ii) provide counselling and support for them, in particular in cases of rape and sexual assault.⁹⁹

91. *ICTY Rules, supra* note 88, at Rule 96.

92. For a thorough discussion of Rule 96 and the implications of the various amendments, see Fitzgerald, *supra* note 51, at 638-63.

93. *See ICTY Rules, supra* note 88.

94. *See id.* at Rule 96(ii).

95. *See id.* at Rule 96(iii).

96. *See id.* at Rule 96(iv).

97. Although there is evidence of male-to-male sexual abuse in Bosnia, Rule 96 appears to be directed towards female victims and heterosexual sexual contact.

98. *See* Fitzgerald, *supra* note 51, at 650. A witness willing to put herself through the trauma of discussing and reliving her victimization must be reassured that adequate protective and support services are available. In addition to protecting victims, the safeguards will help assure prosecution and enable the families of the victims to begin the healing process.

99. *ICTY Rules, supra* note 88, at Rule 34(A)(i), (ii).

The Witness Protection Unit is housed within the Registry and is independent from the judicial or executive branches of the Tribunal.¹⁰⁰ Its goal is to provide counseling services and address the emotional needs of the witnesses.¹⁰¹

Two rulings of the Tribunal demonstrated that the witness protection rules of the Statute were applied conscientiously. Despite the Tribunal's adherence to the Rules, such witness safeguards are not absolute. In September 1997, the Office of the Prosecutor filed a confidential motion to allow video-link testimony for three witnesses unwilling to testify in The Hague.¹⁰² The trial chamber denied the request, stating that the prosecution failed to satisfy the requirements of the rule which allows testimony by video-link only "in exceptional circumstances and in the interest of justice."¹⁰³

The high threshold established by the Rules for witness protection motions may restrict the prosecution's ability to meet the standard necessary for witness protection. Nevertheless, the denial of the motion reinforces the legitimacy of the process; the ruling demonstrates that the Tribunal is not simply a puppet of the prosecutors. When the Tribunal faces international scrutiny, such rulings will be important in documenting the Tribunal's impartiality.

A second example of the Tribunal's enforcement of witness protection rules involves the sustaining of a witness protection order. In 1998, the Tribunal fined defense attorney Anto Nobile for contempt for revealing the identity and occupation of a protected prosecution witness.¹⁰⁴ The Tribunal rejected Mr. Nobile's argument that he was unaware of the protective order and hence was not "in knowing violation."¹⁰⁵ Through this penalization, the Tribunal emphasized the importance of victim-witness protection and assured rape survivors that the Tribunal respects their safety needs.

The ICTY struggles to be the first international entity to prosecute competently perpetrators of war-time rape. As well-known feminist scholar Catharine MacKinnon noted, "women are . . . violated in ways men are not, or that are exceptional for men."¹⁰⁶ In order to be successful, the ICTY prosecution must continue to acknowledge the unique character of crimes of sexual violence. The creation of an international court, sensitive to crimes of sexual abuse and which en-

100. See Fitzgerald, *supra* note 51, at 649.

101. See *id.* The services of the unit are available to both prosecution and defense witnesses. See *id.*

102. See *Press Release Communiqué de Presse: Celibici Case: Trial Chamber Denies Prosecution Request for Witness Testimony by Video-Link* (Nov. 18, 1997) <<http://www.un.org/icty/pressreal/p263-e.htm>>.

103. *Id.*

104. See *Press Release Communiqué de Presse: Mr. Nobile Found to Be in Contempt of the Tribunal* (Dec. 15, 1998) <<http://www.un.org/icty/pressreal/p375-e.htm>>.

105. *Id.* The fine was split, with part to be paid within seven days of the Tribunal's order and the rest to be paid if he was found in contempt within a year. See *id.*

106. MacKinnon, *supra* note 35, at 6.

forces the protections established for victim-witnesses, is further confirmation of women's emergence into the international legal community.

IV. THE FOCA 8 AND THE CASE OF DRAGOLJUB KUNARAC

In June 1996, the Tribunal handed down an indictment addressing only the crimes of rape and sexual abuse.¹⁰⁷ The "Foca 8" indictment is significant because it is the first international criminal indictment dealing solely with crimes of sexual assault and sexual degradation. The indictment is a result of an investigation that focused on the operation of detention centers and the commission of gender-related crimes during the occupation of Bosnia.¹⁰⁸ All of the victims are women. The indictment charges eight Bosnian Serbs with sixty-two counts of criminal sexual violence.¹⁰⁹ All charges stem from a continuing series of sexual assaults of Muslim girls and women in the Bosnian city of Foca.¹¹⁰ Beginning on April 7 and concluding on or about April 17, 1992, Serb military forces entered Foca and began arresting Muslim and Croatian residents.¹¹¹ During these arrests many residents were beaten and killed. Girls and women were sexually assaulted. The men were put in the local prison and the women, children, and elderly moved to local houses, motels, or other detention centers.¹¹²

One of the infamous Foca 8 defendants, and the first to be taken into custody by the ICTY, was Bosnian Serb Army Commander Dragoljub Kunarac.¹¹³ Kunarac was the first defendant to be indicted by

107. See *Indictment of Foca 8*, *supra* note 3.

108. See *Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY's First Indictment Dealing Specifically with Sexual Offences* (June 27, 1996) <<http://www.un.org/icty/pressreal/p093-e.htm>>.

109. See *Indictment of Foca 8*, *supra* note 3.

110. See *id.* According to the 1991 census, the ethnic make-up of Foca's 40,513 residents was 51.6 percent Muslim, 45.3 percent Serbian, and 3.1 percent other. See *id.* ¶ 1.1.

111. See *id.*

112. See *id.* ¶ 1.4. One of the detention centers, housing over 70 Muslim civilians, was the Partizan Sports Hall. See *Kunarac Indictment*, *supra* note 10, ¶ 1.4.

113. Kunarac's indictment was amended July 13, 1998, by prosecutor Louise Arbour pursuant to her powers under Article 18 of the Statute. See *id.* The amended indictment supplemented the background information and included new charges. In addition, Kunarac's case was severed from his co-indictees not in custody. See *id.*

Kunarac filed a complaint alleging that the amended indictment "still contained deficiencies" and proposed (1) deleting paragraphs 1.1-1.9 which lay out the background information about Foca and the Serb takeover; (2) "withdraw[ing] allegations of superior authority . . ."; (3) "instruct[ing] the Prosecutor . . . to state precisely the characteristics of the accused Kunarac as a member of the military unit . . ."; and, (4) "instruct[ing] the Prosecutor to describe precisely the acts, the time and place of perpetration of the acts of the accused, and in accordance therewith legal qualifications." *Overview of Court Documents: Kunarac & Kovac Case* (visited Mar. 10, 1999) <<http://www.un.org/icty/news/Kunarac/kunarac-cd.htm>> [hereinafter *Overview of Court Documents*]. Judge Mumba dismissed the defendant's motion citing to Rule of

an international court exclusively for acts of sexual violence. His alleged crimes were abhorrent, mirroring those of his co-defendants in their degree of violence.¹¹⁴ The outcome of this case may be indicative of the legitimacy given to the Tribunal. Furthermore, as the first indictment based exclusively on crimes of rape and sexual abuse, his case is notable for its value as precedent, even beyond the jurisdiction of the ICTY. The success or failure of the prosecution attests to the impact of the gender sensitive personnel, structure, rules, procedure, and serves as a litmus test for future international criminal prosecution of rapists.

The indictment accuses Kunarac of entering the Partizan Sports Hall detention and choosing Bosnian Muslim women and girls to take to his headquarters. At his house-turned-military headquarters, Kunarac and his men allegedly raped and sodomized the victims.¹¹⁵ Kunarac is charged with direct responsibility for his role in the rapes.¹¹⁶ In addition, Kunarac is charged with responsibility for the crimes of his inferiors by "failing to take action required of a person in superior authority."¹¹⁷ The indictment's description of Kunarac's acts is simple and chilling:

Usually at nights, Dragoljub Kunarac, accompanied by some of his soldiers, removed women from Partizan and took them to the house . . . knowing they would be sexually assaulted there by soldiers under his command. After taking the women to his headquarters, Dragoljub Kunarac would sometimes stay and take one of the women to a room and rape her personally.¹¹⁸

Witness 87 (FWS-87) was one of Kunarac's victims. The indictment alleges that at least twice in late July 1992, Kunarac took the fifteen-year-old to his headquarters and allowed two soldiers under his command to rape her.¹¹⁹ On August 2, 1992, Kunarac and three

Evidence 96 and Article 7(3) of the Statute of the International Tribunal. *See id.* Rule 96 lays out the procedures for testimony of sexual assault victims. *See ICTY Rules, supra* note 88. Article 7(3) assigns responsibility to superiors for crimes of their subordinates and does not exclude superior responsibility for rape. *See Statute of the International Tribunal, supra* note 6.

114. *See Indictment of Foca 8, supra* note 3 (charging the Foca 8 with the brutal rape and torture of Muslim women and girls).

115. *See Kunarac Indictment, supra* note 10, ¶¶ 5.1-5.5.

116. *See id.* ¶¶ 4.6, 5.6, 6.3, 7.3, 8.2, 9.3, 10.4.

117. *Id.* ¶ 4.7. Article 7(3) of the Statute of the International Tribunal reads:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Statute of the International Tribunal, supra note 6, at art. 7(3).

118. *Kunarac Indictment, supra* note 10, ¶ 5.1.

119. *See id.* ¶ 5.2.

other soldiers again raped her.¹²⁰ After this rape, Kunarac took FWS-87 to an abandoned Muslim house that was maintained as Bosnian Serb headquarters. She was kept for months and sometime in September or October Kunarac raped her again.¹²¹ Kunarac is charged with six counts of torture and rape for the violence perpetrated against FWS-87.¹²² In total, the indictment charges Kunarac with twenty-one counts of rape and torture as crimes against humanity and violations of the laws or customs of war.¹²³

Two years after his indictment and six years after FWS-87 was raped, Kunarac, still a free man, gave a newspaper interview in a Foca café.¹²⁴ In this interview, Kunarac denied participation in any sexual assaults or gang rapes and claimed to have a "clear conscience."¹²⁵ Yet, soon after the interview, Kunarac surrendered himself to French United Nations Forces¹²⁶ and immediately plead guilty to count 41 of the indictment charging him with "A Crime Against Humanity" punishable under Article 5(g) (rape) of the Statute of the Tribunal.¹²⁷ Four days after he entered his guilty plea, the court rejected it.¹²⁸ The court found the plea was not entered unequivocally, as required by

120. See *id.* ¶ 5.4.

121. See *id.* ¶¶ 7.1-7.2.

122. See *id.* ¶¶ 5.6, 7.3.

123. See *id.* ¶¶ 5.6, 6.3, 7.3, 8.2, 9.3, 10.4.

124. See Phillip Smucker, *Bosnian War Crimes Suspect Awaits Call 'Sooner or Later,'* PITTSBURGH POST-GAZETTE, Mar. 2, 1998, at A1. As the reporter for this story spoke with Kunarac, several other indicted war criminals passed by casually as United Nations Police sat nearby. See *id.* During the creation of the ICTY, the international community recognized the potential difficulty of apprehending and arresting suspects from within a sovereign nation. Human rights organizations have continually criticized the NATO forces in Bosnia for failing to indict war criminals. In response to this lack of commitment to arrest, in July of 1997, at which point only nine of the 75 individuals indicted had been arrested, Amnesty International launched a call for more arrests. See Amnesty International, *Bosnia-Herzegovina There Are Still at Least 66 Indictees at Large — Arrest Now* (July 11, 1997) <<http://www.amnesty.org/news/1997/46301897.htm>>. Western governments claim to have no information on the whereabouts of indictees, but this claim is largely unsupported. See R. Jeffery Smith, *Secret Meetings Foiled Karadzic Capture Plan: U.S. Says French Jeopardized Mission*, WASH. POST, Apr. 23, 1998, at A1; *War Criminal Watch* (visited Sept. 25, 1999) <<http://www.wcw.org>> (listing sightings and daily routines of indicted war criminals).

125. Smucker, *supra* note 124, at A1.

126. See *Press Release Communiqué de Presse: Dragoljub Kunarac is the First Accused of Rape and Torture of Bosnian Muslim Women to Turn Himself In* (Mar. 4, 1998) <<http://www.un.org/icty/pressreal/p298-e.htm>>.

127. See *Statute of the International Tribunal, supra* note 6; *Press Release Communiqué de Presse: Kunarac Case: Trial Chamber Enters a Not-Guilty Plea for the Accused* (Mar. 13, 1998) <<http://www.un.org/icty/pressreal/p303-e.htm>> [hereinafter *Not Guilty Plea*]. The case of *Prosecutor v. Kunarac* was assigned to Trial Chamber II. Originally, Trial Chamber II consisted of presiding Judge Cassese of Italy, Judge May of the United Kingdom, and Judge Mumba of Zambia. On May 13, 1998, the Security Council passed Resolution 1166 amending the Statute of the Tribunal and adding a third Trial Chamber to handle the excessive caseload of the tribunal. See S.C. Res. 1166, U.N. SCOR, 53rd Sess., ¶ 1, U.N. S/RES/1166 (1998).

128. See *Not Guilty Plea, supra* note 127.

Rule 62, and that Kunarac “did not perceive his criminal conduct to be part of a widespread or systematic attack against the Muslim population of Foca on discriminatory grounds, which is a legal requirement of a Crime against Humanity.”¹²⁹ Rape, when charged as a crime against humanity, must be proven to be part of “an orchestrated plan to carry out mass rapes.”¹³⁰ Because Kunarac did not accept responsibility for his role in an organized attack on Muslims as part of the Serbs ethnic cleansing campaign, his case will go to trial.¹³¹

As anticipated, the procedures for witness protection proved critical to Kunarac’s case. Early in pre-trial motions the prosecution filed for protective measures for rape victim FWS-191.¹³² The allegations of harm to FWS-191 are extensive. Kunarac’s indictment charges that on August 2, 1992, Kunarac, his Deputy, “Gaga,” and Gonko Jankovic¹³³ took FWS-191 and two other girls to an abandoned house.¹³⁴ The indictment alleges that each man raped one of the girls and Kunarac raped FWS-191.¹³⁵ According to the indictment, Kunarac repeatedly sexually assaulted FWS-191 over a two-month period.¹³⁶ Further, the indictment charges that “[i]n addition to the rapes and other sexual

129. *Id.*

130. Murphy, *supra* note 89, at 88.

131. See *Not Guilty Plea*, *supra* note 127. Based on concerns over the length of the detainees pre-trial incarceration and an increasing case load, Trial Chamber II appointed Judge Florence Ndepele Mwachande Mumba as a pre-trial judge to conduct all preliminary matters in the Kunarac case. See *Press Release Communiqué de Presse: Kunarac Case: A Pre-Trial Judge is Appointed in Order to Speed up the Proceedings* (June 22, 1998) <<http://www.un.org/icty/pressreal/p326-e.htm>> [hereinafter *A Pre-Trial Judge Appointed*]. This was the first pre-trial judge in ICTY proceedings and was appointed with the consent of all parties. See *id.* The latest rule changes codified the use of pre-trial judges after all initial appearances. See *A Concerned Effort*, 21 Bulletin 1, ¶ 6 (1998) <<http://www.un.org/icty/bulletin21-e/index.html>>.

The court’s order was based on Articles 21(4)(c) and 20(1) which guarantee respectively the “right to be tried without undue delay” and rights to a fair and expeditious trial. *A Pre-Trial Judge Appointed*, *supra*. Despite this measure, Kunarac joined with 25 fellow detainees in signing an open letter to the ICTY president discussing the conditions of their detention and the impact of the deaths (one by suicide and one of natural causes) of two of the accused. See *Press Release Communiqué de Presse: Open Letter from the Detainees Regarding Their Conditions at the ICTY’s Detention Unit* (Aug. 12, 1999) <<http://www.un.org/icty/pressreal/p339-e.htm>>. Included in the letter were concerns regarding the length of the trials, the lack of resources available to the defense teams, and alleged biased publicity. See *id.*

132. See *In the Trial Chambers: Granting Protective Measures for Witness FWS-191* (Nov. 20, 1998) <<http://www.un.org/icty/gagovic/trialc2/decision-e/81120PM24549.htm>> [hereinafter *Protective Measures for Witness FWS-191*].

133. Jankovic is another named in the Foca 8 Indictment. See *Indictment of Foca 8*, *supra* note 3.

134. *Kunarac Indictment*, *supra* note 10, ¶ 10.1 (referring to the dwelling as “abandoned,” however, it is likely it was a house of a Muslim who was forcibly evicted).

135. See *id.*

136. See *id.* ¶ 10.2.

assaults, FWS-186 [another detainee and victim-witness] and FWS-191 had to do all household chores and obey all demands."¹³⁷

After *ex parte* hearings and oral presentations, the court granted the prosecution's motion for witness protection for FWS-191.¹³⁸ The order allowed the prosecution to disclose the name of the witness only after the Victims and Witness Unit provided the appropriate arrangements, instructed the defense to arrange contact with the witness only through the prosecution, and mandated that the testimony of FWS-191 "be heard in closed session."¹³⁹ The court ordered the protective measures for FWS-191 based on numerous articles of the Statute of the Tribunal including: Article 20, Commencement and Conduct of Trial Proceedings; Article 21, Rights of the Accused; and Article 22, Protection of Victims and Witnesses.¹⁴⁰ Additionally, the court found legal justification for the witness protection in Rules 69, 75 and 79 of the Rules of Procedure and Evidence.¹⁴¹ This motion, a minor aspect of Kunarac's case, is of large significance for the victim-witnesses. The ruling represents a victory in witness protection for sexual assault victims. The court acknowledged and upheld the protections offered by the rules and procedures. Further, the court demonstrated that the rules of procedure of the ICTY may be utilized effectively to guard the safety and privacy of victims.¹⁴²

Radmir Kovac, another member of the Foca 8, was arrested in August 1999, in Foca.¹⁴³ Prosecutors quickly filed and were granted leave to amend the indictments to join the trials of the two members of the Foca 8.¹⁴⁴ Despite calls for quick justice, the Kovac-Kunarac prosecution remains in the pre-trial procedure stage and no trial date has been set.¹⁴⁵ Nearly seven years after the incident, and three years

137. *Id.* ¶ 10.3. Cigelj describes similar abuse at Omarska. Before she and the other woman captives could sleep at night they had to wash away the blood of the men who had been beaten and tortured during the day. In addition, they were told they no longer had names. See *CALLING THE GHOSTS*, *supra* note 1.

138. See *Protective Measures for Witness FWS-191*, *supra* note 132.

139. *Id.*

140. See *id.*

141. See *id.*

142. See *id.*

143. See *Bosnian War Crimes Suspect Arrested*, *WASH. POST*, Aug. 3, 1999, at A12. The indictment alleges that Kovac detained FWS-87 from October 1992 until February 1993 during which time Kovac and another man continuously raped her. See *Indictment of Foca 8*, *supra* note 3, ¶ 12.1. Kovac's arrest was the first successful arrest of an indicted war criminal in the French patrolled section of Bosnia. See *War Criminal Watch*, *supra* note 124.

144. See *Overview of Court Documents*, *supra* note 113. ICTY Rules 48, 49 and 82 allow this adjointer. See *ICTY Rules*, *supra* note 88.

145. See *Case Information Sheet*, (last modified Sept. 6, 1999) <<http://www.org/icty/glance/foca.htm>>. A status conference on the combined case was scheduled for September 24, 1999, however, no information regarding the results of that conference has been made public. See *In the Trial Chamber: Scheduling Order for a Status Conference* (Sept. 9, 1999) <<http://www.un.org/icty/gagovic/trialc2/order-e/909097329126.htm>>.

after the indictment, the victims still await justice. Despite the delays, the Foca 8 indictment represents a move forward for women's rights under international law. Unlike in previous accusations of wartime rape, the international community, in the Foca 8 indictment, has indicted war criminals based solely on acts of violence against women. The prosecution of the Foca 8, although imperfect, legitimizes women as significant members of the international community.

V. CONCLUSION

In Bosnia, mass rape and sexual assaults exacerbated the horror of war for victims and their families. Worldwide media attention highlighted the occurrence of mass rapes in Bosnia,¹⁴⁶ eventually prompting vigorous investigations resulting in indictments. The Foca 8 indictment, an indictment based solely on crimes of sexual assault, occupies an important role in the development of international law and international prosecution of war crimes. The Foca 8 indictment accepts sexual violence as a war crime worthy of independent prosecution. In addition, it acknowledges that women as victims are entitled to justice.

On March 24, 1999, the North Atlantic Treaty Organization (NATO) began an intervention in the Balkans.¹⁴⁷ NATO air strikes on Yugoslavia resulted from reports of atrocities being committed against the ethnic Albanian majority in the Kosovo province. Within weeks of the initial bombing and flood of refugees out of Yugoslavia, the international community began "getting some very disturbing reports" of mass rapes of Kosovo women by Serbian troops with an "eerie" resemblance to the reports of rape from Bosnia.¹⁴⁸

It appears the threat of an ICTY prosecution has had no measurable affect on the genocide of the ethnic Albanians.¹⁴⁹ Some might

146. See Levy, *supra* note 40, at 258 n.18.

147. See Cigar, *Target the Troops*, *supra* note 22, at A36. Unlike Bosnia, Kosovo has not voted to secede from Yugoslavia, but since 1989, the former autonomy of the region has been dissolved and some ethnic Albanians are calling for an independent nation-state.

148. Pentagon spokesman Kenneth Bacon *quoted in* Andrew Miga, *Kosovo Crisis; Allies Accuse Serbs of Brutalizing Women*, BOSTON HERALD, Apr. 10, 1999, at 1. Though the rapes in Kosovo appear to be less systematic than in Bosnia, a victim may deem it irrelevant whether her assault was a random act of sexual violence or part of a systematic destruction of a culture. See Peter Finn, *Among Serb Crimes, Rape May Leave the Most Lasting Scars*, SALT LAKE TRIB., June 27, 1999, at A1. An ethnic Albanian victim powerfully describes her continuing anguish in the following way: "Only when I am sleeping is there silence in my heart." *Id.*

149. *But see* Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT'L L. & POL'Y 317, 334 (1994) (discussing the creation of a permanent ICC as a means to "deter future atrocities"); *see also* Elisa Massimino, *Prospects for the Establishment of an International Criminal Court*, 19 WHITTIER L. REV. 317 (1997). In June and July 1998, nine years after the initial proposal to the United Nations, over 140 countries gathered in Rome to negotiate a treaty for a permanent ICC. *See Despite Fierce Foe*, *supra* note 4, at 18A. Though

regard the lack of deterrence as a failure of the Tribunal, but the ICTY is not a failure. The role of the Tribunal is not to stop war. Instead, the Tribunal's role is to create a sense of lasting peace among the survivors of this multi-dimensional and multi-ethnic war.¹⁵⁰

The ICTY has, thus far, enhanced international law in two ways. First, through the ICTY, rape is outlawed as both a war crime and a crime against humanity. Second, the ICTY's gender conscious approach reinforces and invigorates women's role in the international community and in future international criminal prosecutions. The procedures protecting rape victims acknowledge the specific harm that rape causes its women victims.¹⁵¹ In addition, the ICTY recognizes that women typically face this unique type of violence. The ICTY is therefore a necessary part of the retribution. Ultimately, the ICTY's approach to crimes of sexual violence has ramifications for future international prosecutions.¹⁵² The law must not go back to the days when rape was treated as a spoil of war—an act of war as inevitable and acceptable as the destruction of property. The thousands of rape victims in Bosnia deserve better.

120 countries voted in favor of the treaty, a permanent ICC is still far from realization. *See id.* The willingness of states to ratify the ICC and accept its jurisdiction depends in large part upon the perceived fairness of ICTY proceedings and the legitimacy of its results.

150. *See* R. Jeffery Smith, *Grenade Blast in Market Kills 2 Kosovo Serbs*, WASH. POST, Sept. 29, 1999, at A23 (reporting on "ethnically motivated" violence directed at Serbs in Kosovo).

151. *See generally* Brook Sari Moshan, Comment, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154 (1998).

152. Of particular importance in international law is the effect of the ICTY on the recently adopted treaty for the ICC. *See Despite Fierce Foe, supra* note 4, at 18A. As the ICC struggles for acceptance, legitimacy, and ratification, attention will be focused on the successes and failures of the ICTY.

