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Reconstruction After Genocide: An analysis of the justice system for the women  
victims of genocidal rape in post-conflict Bosnia

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**Abstract**

In the conflict in Bosnia-Herzegovina, one of the critical elements of the ethnic cleansing regimes was rape and impregnation of women. When the international justice system was created to criminally try the perpetrators of the atrocities, including the rape victims was a new development. Looking at the tribunals and court system from a gendered perspective reveals that the efforts to include rape victims have not taken into account their specific needs, stemming from their trauma. A critical look the ICTY and other criminal courts are presented, as well as recommendations for improving inclusivity and reconciliation.

**Keywords**

Trauma

Wartime Rape

Genocide

Transitional Justice

Bosnia-Herzegovina

## **Introduction**

As post-conflict states begin the process rebuilding infrastructure, economies, and governments, they are largely reliant on the international community. The international community's political and economic assistance has been the area where a majority of traditional peace and society building processes begin to take place. In order to better understand the process of state-building after conflict and genocide and the limitations within the traditional approaches, I will analyze the case of Bosnia-Herzegovina, and more specifically focus on how the conventional approaches to the state-building process has either helped or failed women victims of genocidal rape. The Bosnian conflict was a turning point, in that there was a historical shift in how the world viewed rape of women during conflict. Rape of women during times of unrest had always been treated as a given, as a norm of sorts, but the violence and subjugation of the women of Bosnia changed the global conversation. In this new and forming context, how did the international community react and how well did they handle the raped women? What I hope to offer is an analysis of how women have not been treated as humans who have suffered crimes against them, their bodies, and their ethnic identities, but how they have been treated solely as victims of rape. I hope to be critical in how we approach the courts and offer a better alternative model for how to help women who have been in a conflict zone.

First, I will establish some of the pre-existing goals and elements of peace and society building approaches. Taking a gendered look at how rape has been used in historic conflicts, I will give an overview of rape as a trauma to an individual person. Using the Bosnian case, which exhibits an historical shift to how gendered issues have become more critical in understanding conflict, I will give an analysis of how the international community created a system of justice. The focus will be on the International Criminal Tribunal for Yugoslavia, but I will briefly mention some of the other courts in the justice system in order evaluate their successes and a weakness, with a focus on the ICTY's handling of gendered issues. Thus, I will show the system in place is not serving women victims to the best of its potential and finally I will offer some recommendations.

## **Peace and society building**

The three most important elements of peacebuilding are restoring and promoting rule of law, disarmament, and demobilization and the reintegration of ex-combatants. The reintegration of ex-combatants reduces the likelihood of their returning to fighting again<sup>1</sup>. These goals speak to the first task of peacemaking: the stabilization of the country, and bringing an end to the fighting. When treaties have the goal of ending the fighting and the bloodshed, often they are not looking to the longer term goals of reconstruction afterward. The delay between the end of the conflict and the creation of the legal framework to bring justice is for the country to rebuild itself, physically. Only after this first period of rebuilding had been completed, and the country of Bosnia had become at least functional again, could the population turn to dealing with the violations of the past.

The first phase, there is the goal of immediate reconstruction. In the aftermath, the first phase looks to the primary needs of the displaced population still in refugee camps. The international organization has focused on humanitarian aid, such as providing dental and gynecological clinics (services not provided in the camps) to the women of the refugee camps or maintaining communal houses as the displaced persons worked to find their place again.<sup>2</sup> Much of the relief aid in the aftermath of a conflict, dependent upon international resources, looks to the short-term conditions, rather than the more difficult process of state and society building.

The next phase is the reconstruction of a country as a whole and with longer-term goals in mind. Scholars of political science have developed traditional approaches to reconstruction. Their various arguments are either based on a rebuilding of political institutions, economic development, or legal peacebuilding. However, few appreciate the gendered elements of reconciliation.

Rebuilding democratic institutions tends to be the focus of political reconstruction. Divided societies must be administered jointly, and power ought to be shared but not divided. Often the issues that arise when organizing a parliament are

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<sup>1</sup> Sriram, Martin-Ortega and Herman 2011, 338

<sup>2</sup> Allen 1996, 108

who is represented and how does one create fair representation in the system.<sup>3</sup> While parliament is a good place to give equal space to all the ethnic groups involved, a representative parliament does little to help repair gender relations. Public opinion data shows that a large section of Bosnian citizens perceive the main problems and challenges facing Bosnia as corruption in government and administration of the state, followed by ethnic and religious relations.<sup>4</sup> Furthermore, the group blamed by almost 80% of Bosnians to be responsible for the failings of the new state was the government and politicians.<sup>5</sup>

Another often cited route to reconstruction after conflict is economics. The focus on material concerns is the strength of the economic argument. After a city or community has been physically destroyed by shelling and fighting, it will take some resources (both labor and material) to get the infrastructure rebuilt enough for the normal economy to function and for people to have the money to afford the necessities that they may have been lacking during the conflict. In the Bosnian case, the state has become dependent on international aid, often from the EU, to continue development.<sup>6</sup>

An emerging literature is being written on how traditional justice has contributed to the maintenance of peace in their relevant regions. Scholarship debates as to whether the tribunal process is purely a legal criminal proceeding or if the tribunal has (or ought to have) a larger role in society making. Because of the violent nature of many of the horrors of the wars and conflicts that have come with the Balkanization of Yugoslavia, and the perceived corruption in the Bosnian administration, the inclusion of the international community in the justice and legal process seems to be in line with the trend of the international aid in the reconstruction process. The tribunal is a legal procedure that has far more important social and political goals; it cannot be merely a criminal court.

Despite efforts to integrate gender concerns into political initiatives, gendered issues remain a relatively low priority.<sup>7</sup> Parliaments tend not to see how gender and ethnicity are intertwined, for a female rape victim is always female and ethnic at the

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<sup>3</sup> Bieber 2005

<sup>4</sup> Prism Reserach 2013, 14

<sup>5</sup> Prism Reserach 2013, 15, 56

<sup>6</sup> Poschl 2001, 2-3

<sup>7</sup> Helms 2003, 15

same time. In ethnic conflict, nobody is just a man or a woman; rather, a person is a Serb man or a Croat woman, or another other variation.<sup>8</sup> Womanhood and manhood are ethicized and gendered at the same time.<sup>9</sup> Rebuilding political institutions does little to reduce the trauma felt by those who were made most vulnerable by the horrors of the conflict. Because of the gendered nature of some of the crimes, the rebuilding process needs to be more inclusive of the gendered perspective. Much like the arguments for political development, economic development does not help those who have survived heal from their psychological trauma. Even if someone does not carry the physical scars, they may have others: “When a soldier is killed, he is dead. But who continues to suffer? The Mother, the Sister, the Wife.”<sup>10</sup>

### **Rape as a tool of war and genocide**

The trauma that the women victims of rape and genocide are dealing with is not being fully included in the traditional literature within peace and conflict studies. What has been done to bring these women the justice they deserve? Is the way we have been approaching the concept of justice the best approach for the victims?

Rape has always been widespread in war and in the new understanding of genocide because it is a highly effective weapon in helping to destroy, whether wholly or in part, an ethnic, religious, national, or racial group.<sup>11</sup> Sexual violence in war is a well-documented phenomenon. Women do not have the access to power that men do even in peacetime, but war exacerbates the inequality of power, taking the most vulnerable and powerless group and making them more vulnerable and powerless.<sup>12</sup> As such, women’s humanity is reduced to something afforded to them by men; women can function like property and not like human beings (and this phenomenon is exacerbated by war and conflict), whenever it suits men to treat the women as either the spoils of war or something to be “looted”. The woman’s body, sexual purity, and sexual desires are all things which can be taken from her and from her family or community. The

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<sup>8</sup> I will use Serb (Orthodox)/Croat (Catholic)/Bosniak (Muslim) to refer to ethnic identities and Serbian/Croatian/Bosnian to refer to nationality. I am recognizing the ways that religion and ethnic identity are linked but I will not be addressing this explicitly in my analysis. Rather, I will focus on the more underappreciated link between gender and ethnicity.

<sup>9</sup> Zarkov 2007, 10-11

<sup>10</sup> Nikolic-Ristanovic 2000, 23

<sup>11</sup> Rittner 2012, 9

<sup>12</sup> Nikolic-Ristanovic 2000, 21-22

narrative of the “spoiled” women focuses on women as a piece of property or repository of honor rather than a person who has undergone a traumatic event.<sup>13</sup>

The traumatic experiences of the rape camps have long lasting roots in the women’s psyches. For example, a mother might see her child as the enemy, even if no longer at war, and tries to either abort or commit suicide.<sup>14</sup> The damage done to her is one of long term effects. Because the trauma happens to her identity and her body, an economic or political approach to the post-conflict rebuilding process is not enough. Justice can bring long-term peace of mind for victims and their families, which is needed before the reconciliation process can begin.<sup>15</sup> The victims ought to have justice for all the suffering they have lived through. Those responsible ought to be held accountable for the trauma they inflicted on another human being. The impact of the conflict goes beyond tangible physical and economic destruction and affects people’s ongoing sense of self and wellbeing. Therefore, post-conflict reconstruction must address the cause of the trauma (injustices done during the conflict) to heal the symptoms (a struggling country that cannot seem to fully reestablish itself). The traditional understanding of peace and society building does not account for the trauma experienced by the victims of the conflict.

### *Trauma*

Trauma is defined as any event either experienced or witnessed which threatens the physical or psychological integrity of self or others and to which a person’s response includes intense fear and helplessness.<sup>16</sup> Trauma is one of the most important mental health problems for a nation to address, especially because trauma has been linked to poor physical health.<sup>17</sup> Based on the various publicly available interviews with women from conflict zones, and more specifically in the ‘rape camps’ of Bosnia, the evidence suggests many of the women could be feeling affected by trauma from the events that they have either witnessed or experienced. Because the women are suffering from trauma, we must use a model that carefully addresses the needs of the women that are particular to their experiences.

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<sup>13</sup> Rittner 2012, 55

<sup>14</sup> Allen 1996, 98-99

<sup>15</sup> Clark 2008, 331

<sup>16</sup> Levenson 2014, 12

<sup>17</sup> Weissbecker and Clark 2007, 910

What is missing in the literature is a follow-up on the state of the women of Bosnia years after the conflict. Many interviews have been done and tend to focus on life before and during the conflict, but little has been done to question whether or not the internationally created justice systems have had a positive effect on the reconciliation and peace processes. As such, the number of women that are still experiencing trauma has never been calculated, but we know that rape and trauma victims do not have their symptoms go away easily, especially without some sort of support network.

In order to look at how the justice process is serving or not serving the victims, I will be giving an analysis of the different court systems set up to try the perpetrators, giving an overview of the system and a deeper critic of the ICTY. I am interested in how rape and sexual violence against women was used as a form of genocide and how criminal proceedings have dealt with the unique challenges this presents. As such, I have drawn from historical analysis and from the field of genocide studies, as well as primary legal documents from the United Nations and the English-language court documents.

Because there has been a large emphasis on international tribunals, I seek to understand whether or not they have a positive impact on the victims and their communities. While there is much debate about the role of the international justice systems, the argument seems to focus on where we should feel the positive impact. A positive impact can be measured by the reconciliation process and inter-ethnic dialogues, particularly when the victims feel comfortable and safe. In order to best serve the victims, the courts ought to respect their experiences and work to give the women closure and a point where they can begin to best heal themselves. The Tribunal ought to function as a tool for those that survived the horrors of genocidal rape. The underlying driver of the issues is traumatization of the victims, but this essay will first and foremost focus on an evaluation of the justice system.

### **Feminist lens**

Genocidal rape, resting on the practice of forced impregnation, defines a person strictly by their reproductivity and the crime is only a viable if the person has a specific

sex organs. Any other consideration of what it means to be a 'women' is eliminated.<sup>18</sup> Many official and unofficial data collectors, such as academic scholars and journalists, went to the field to interview the women about their most intimately violent moments, with a preconceived narrative in mind, one that paints a rigid definition of womanhood and rape, to twist the women's stories to fit into some propaganda or political agenda. For example, very few articles on the rape of Bosniak women did not mention the shame that the women felt.<sup>19</sup> The court systems seem to have this anti-feminist lens as well, and as such have not been very good at considering the difficulties and challenges for women victims. The court could hardly protect them from being reduced to their reproductively before the trial, and does not seem to be able to protect them during and after the trial. There is no reason for the women to risk the lives that they have been able to make afterwards, to have the court discredit their experience and open the trauma wounds.

Gendered crimes, such as rape and genocidal rape, are a crime against the self-determination of the individual. The crime is a trauma to the bodily integrity of a person. The reason that the criminal justice sees a crime committed rest upon the idea of a physical trauma to the material body of the victims.<sup>20</sup> However, rape is not just a breach of physical safety, but also a breach of sexual autonomy. Having the ability to make autonomous choice about how and when one has sex is based on the idea that human beings have the right to their material body and how they choose to share it. A breach of sexual autonomy is a breach and an undermining of "the fundamental human right to sexual self-determination."<sup>21</sup> In order to have any sort of self-determination, sexual or otherwise, the victim must be perceived as an individual human being having personhood. As such, the trauma being done when mass rape is committed is a trauma to the integral being and the integrity of the self. As the criminal justice system sees rape as an attack on personhood, and less on a material body.

In order for the process of reconciliation and truth exchange to happen across ethnic lines and different experiences during the conflict, everyone involved must be

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<sup>18</sup> Nikolic-Ristanovic 2000, 81

<sup>19</sup> Zarkov 2007, 129-130

<sup>20</sup> Campbell 2003, 509

<sup>21</sup> Campbell 2003, 509

treated as wholly human. Punishment and forgiveness both need to be present; punishment allows victims to have a moment of vengeance and forgiveness marks a change in how the victim feels about the violence committed against them.<sup>22</sup> The justice that the international court system needs to move towards is less a justice that is punitive in nature, and more toward a justice that aims to restore the feeling of humanness to the victims that felt theirs was lost. The legal system needs to dole out punishment, but also encourage forgiveness. Justice is an institution of collective international norms, which it conceives as foundational recognitions of the other as a member of humanity.<sup>23</sup> The tribunal is working towards a restoration of the international norms/understanding of human rights and rule of law. Because the ‘truth’ of the war varies depending on who you are talking to and what their ethnic identity is, the exchanging of truths and experience is all the more important. Everyone is an expert on their own experience and all of those different experience are valid and worth sharing and remembering. In order for ethnic exchange to begin, individuals have to meet and exchange as human beings, and not as victims of their ethnic and gendered identity.

### **Case study background**

In the 1990s, the ethnic tensions that had been building since Tito’s death in 1980 in Yugoslavia finally came to a head. What followed was a violent outbreak of inter-ethnic conflict. The three main ethnic groups, the Serbs, the Croats, and the Bosniaks, murdered and raped each other in mass numbers, often with an end goal of “ethnic cleansing”. While all of the warring ethnic groups committed atrocities, the group that tended to use the most organized and systematic ethnic cleansing and rape regimes were the Serb paramilitaries.

What makes the case study of Bosnia interesting is not only the mass scale, as Serb military and paramilitary forces reported raped more than 20,000 Bosniak women alone, but also the organization of “rape camps,” where women were held in hotels, schools, animal stalls, barns, and many other fenced in areas so that the women could be raped and forcibly impregnated. Use of forced impregnation is twisted logic because

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<sup>22</sup> Minow 1998, 15

<sup>23</sup> Campbell 2003, 512

treating the women as a genetically neutral womb or sexual container is not biologically correct. No baby born from these acts will be solely the child of the father; the baby will always carry something from the mother as well.<sup>24</sup> Furthermore, the plan targets women to be raped specifically because of their ethnic identity, but during and afterwards, their ethnic identity is entirely removed<sup>25</sup>:

"The practice of rape defines women as both female and the ethnic Other at the same time—with gender and ethnicity appearing equally relevant. But the practice of forced impregnation, wherein the child's ethnicity is defined through the father, tells us about a gendered hierarchy of ethnicity—it tells us about the primacy of gendered difference in the midst of the ethnic war"<sup>26</sup>

What made the women the other (that is, their ethnic identity) is entirely removed (leaving just their gender identity), so there ought to be no justification for genocidal rape, as the justification rested upon her ethnic identity.<sup>27</sup> Regardless, the forced impregnation was a new additional horror that the women were forced to bear, simply for being reduced to their sex. Women who were forcibly impregnated will remain prisoners of their experiences, whether they choose to abort or give birth<sup>28</sup> Rape is used in many conflicts, but holding women hostage to their reproductive organs keeps them captive long after the conflict has ended is a fairly new phenomenon.

### **International tribunals**

In response the tribunals were created by the UN in 1993, as the first international tribunal since World War II.<sup>29</sup> The peacemaking and peacebuilding processes are authorized by the UN under Chap VI of the UN Charter, "Pacific Settlement of Disputes", which gives the UN some limited powers when it comes to disputes or areas of disagreement. At no point in the mandate of the tribunals is the word 'reconciliation' used. However, since the mandate, the concept of reconciliation has been emphasized in the further literature from and around the Tribunal.<sup>30</sup> As such, it has been difficult to measure the contribution of the tribunal to the reconciliation

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<sup>24</sup> Allen 1996, 96

<sup>25</sup> Allen 1996, 87

<sup>26</sup> Zarkov 2007, 122-123

<sup>27</sup> Allen 1996, 101

<sup>28</sup> Zarkov 2007, 122

<sup>29</sup> United Nations 2009

<sup>30</sup> Clark 2009, 133

efforts and there is not very much material on the effect of the tribunal. The concept and process of reconciliation is not easily measured; there is very little quantitative data on the subject. Thus, the measure that I will use is one that is victim-centric and acknowledges the feelings of safety and well-being of the victim as the basis for reconciliation.

The reason that one would set up an international justice system is so that the perpetrators are not allowed to have a hand in how the new country will function. Those that planned the destruction of the nation have no power in how it is to be rebuilt. For this, the international justice system serves two ends “1) limiting their capacity to perpetrate further crimes and 2) limiting their capacity to function as statesmen.”<sup>31</sup> The tribunal is mandated with the principal objectives to deter further crimes, do justice (in a way defined to mean almost exclusively retribution), and contribute to the restoration and maintenance of peace.<sup>32</sup>

### **International justice system**

In order to try those that have committed human rights abuses, the transitional governments and international community created three different legal systems to prosecute the war crimes, crimes against humanity, and genocide: War Crimes Chamber of the State Court of Bosnia and Herzegovina (WCC), entity courts (the local courts in Bosnia), and International Criminal Tribunal for the Former Yugoslavia (ICTY). The first system, the WCC, has competence for crimes under Criminal Code of Bosnia and Herzegovina, which specifically targets crimes against humanity, genocide, and war crimes. Secondly, the domestic national entity courts do have some competency, drawing from the National War Crimes Prosecution Strategy. Approved in December of 2008, it stated that there are close to 10,000 accused, however, 2,000-3,000 could potentially face charges, as they are alive, evidence is still available, and witness are also still alive.<sup>33</sup> Often the entity courts will be delegated cases from the WCC or the ICTY, but is often perceived as less effective than the international courts. The third apparatus, the ICTY, was established by a 1993 UN statute to include rape and

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<sup>31</sup> Allen 1996, 109

<sup>32</sup> Clark 2009, 123, 131

<sup>33</sup> Sriram, Martin-Ortega and Herman 2011, 346

enslavement as crimes against humanity, a charge second only to genocide.<sup>34</sup> The ICTY legal processes are based mostly on the common law legal tradition.<sup>35</sup> Importantly, the ICTY provision constituted the first time that cases of rape and sexual violence were identified as crimes against humanity and subject to prosecution within an international court.”<sup>36</sup>

### **Weaknesses of the WCC**

Many perpetrators have been brought to justice; The WCC has verdicts pronounced in the “first instance for 35 persons and another 35 in the second instance, and 118 accused have cases pending.”<sup>37</sup> Because rape and genocidal rape are charged as evidence of crimes against humanity, war crimes, or genocide, strictly speaking, there are no explicit data on these specific cases. However, because we know that sexually violent perpetrators have been convicted, we can assume that a number of these cases would be dealing with the mass rape crime.

The way that competences have been distributed between the entity courts and the WCC is complicated and often causes tensions between the judicial entities. WCC was designed look at the most complex cases, but it does not have supremacy over the entity courts.<sup>38</sup> Because the judges in the entity courts are appointed by each political party (which is supported by particular ethnic groups) to serve their interests, they may disagree with the internationally, and more neutrally, appointed judges.

### **Weaknesses of the entity courts**

#### *Stankovic Case*

There are many examples of places where the entity courts have not been effective at all, particularly when dealing with the human rights violations of the past. The sentencing of Radovan Stankovic, a member of a Serb paramilitary unit, shows some of the weaknesses in the court system and the difficulties of gaining justice for the victims. Originally indicted by ICTY, the Tribunal turned the case over to the local Bosnian court system. The hope was that the national court would send a signal they

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<sup>34</sup> I will use the term “war crimes” to refer to cases tried as either “Grave breaches of the Geneva Conventions of 1949” or “Violations of the laws or customs of war” for brevity’s sake.

<sup>35</sup> Clark 2009

<sup>36</sup> Sajjad 2012, 68

<sup>37</sup> Sriram, Martin-Ortega and Herman 2011, 346

<sup>38</sup> Sriram, Martin-Ortega and Herman 2011, 346

could effectively handle the cases and the national government was willing and able to fairly confront the past injustices. Stankovic was convicted on charges of detaining Muslim women, subjecting them to forced labor, beatings and rape, turning them into sex slaves for fellow soldier, and personally raping at least three women. The first count against him was Enslavement (as a Crime against humanity) and the second and third counts against him were both Rape (as a Crime against humanity and then a Violation of the laws or customs of war). Other counts against him included Outrages upon personal dignity (a Violation of the laws or customs of war).<sup>39</sup> For all his crimes, he received a 16 year prison sentence. The prevailing opinion of victims and their advocates after the sentence was announced was that the courts favored war criminals over the victims<sup>40</sup>. When the ICTY gave the case to the local justice system, the intended outcome was not one that made victims feel as though they were being treated as less than those that victimized them. The punishment was overturned and is now in the process of newly sentencing for Stankovic. The clear message is that, despite the good intentions of the international community, the legal system is not an efficient mechanism for the challenges related to prosecuting human rights violations.

The trial of Stankovic shows two of the largest weaknesses in the overall system of justice that has been created. Firstly, the legal capacity or political will to try the cases is limited. The second challenge represented is the weakness of the sentences.

### *Corruption*

Legal courts as highly ineffective and seen as corrupt Almost three-quarters of Bosnian citizens see corruption as the biggest problem facing present Bosnia and over 10% see the rule of law as the biggest challenge.<sup>41</sup> Judges are subservient to the political party in power and as a result, cheating and fraud rampant in the legal system. Basic contract law is difficult to enforce.<sup>42</sup> If the courts cannot even handle contract law and judges are subservient to the political parties and their ethnic ties, issues of genocide and crimes against humanity cannot be properly tried and convicted. The

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<sup>39</sup> The International Criminal Tribunal for the Former Yugoslavia 2003

<sup>40</sup> Sajjad 2012, 73

<sup>41</sup> Prism Reserach 2013, 14

<sup>42</sup> Poschl 2001, 18

courts are not necessarily the safest place to go for someone who is suffering from trauma, as the judge may have a political bias against the survivors.

### **ICTY successes**

The timing of the ICTY establishment coincided with a revival in the international women's movement. Non-governmental organizations (NGOs) and other activist and advocacy groups heavily pushed for rape to be included in the trials of the ICTY. Some of the groups involved Equality Now, Amnesty International, the Fund for Feminist Majority, Women's Action Coalition, Center for Women's Global Leadership, Center for Reproductive Policy and Law, Women's Action Coalition, Women's Coalition against Ethnic Cleansing.<sup>43</sup> Due to the work of these and other groups, the ICTY was created with an open process of rulemaking, which allowed for states and NGOs to help formulate the rules and procedures of the ICTY.<sup>44</sup> The involvement and active advocacy of women's coalitions and feminist groups ensured that the ICTY paid attention to the needs of women victims.

Because of this advocacy and openness from the foundation, the ICTY is continually working towards gender-sensitive policies and procedures, which has led to a sustained level of rape indictments and successful prosecution of rape as genocide, crime against humanity, of a war crime. In the ICTY, 92% of completed rape cases resulted in a successful conviction (compared to 25% in the ICTR).<sup>45</sup>

Victims and Witness Section (VWS) provide support and assistance to those who come to testify. VWS will help create travel plans, including pick up the victim or witness at the airport. Furthermore, if wanted or needed, the VWS will provide counselling and debriefing to those that leave the court room feeling anxious and distressed. If the VWS assess that there is a verifiable, identifiable, and sustained threat to life, they will help the target and their close family arrange to live in a third country until the threat has been nullified<sup>46</sup>. The Section is small, in the overall functioning of the Tribunal, but provides valuable resources to some women.

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<sup>43</sup> Haddad 2011, 120-121

<sup>44</sup> Haddad 2011, 122

<sup>45</sup> Haddad 2011, 117

<sup>46</sup> Clark 2009, 128-129

## **Weaknesses of the ICTY**

### *Limited Capacity*

Firstly, the capacity and scope of the ICTY is rather limited. The Tribunal process is one that is very difficult to get cases through the system. Getting a case through the ICTY is a daunting, slow, and expensive process. International courts have neither the capacity nor the time to prosecute large number so perpetrators, thus the local courts have to take up much of the case load.<sup>47</sup> The international courts may be riddled with problems and pitfalls, but at least the system is working toward being unbiased. The local courts, with all their local biases, are not as welcoming and supportive to survivors. The courts are ill-equipped in capacity and inclination to deal with crimes of mass sexual violence; due to the biases of the local justice system, many victims are reluctant to speak out, particularly when identifying the victim of the gender-based crimes could be rather easy.<sup>48</sup> If the goal of the justice is to limit capacity for statesmanship or local power for the perpetrators, then there are simply too many perpetrators from the war for the courts to possibly handle, even if the local courts are willing and able.

### *Long and Little pay out*

Secondly, the trial process is often very long with weak sentences and low conviction rates. The sentencing of Radovan Stankoic is an example of a larger issue, where the perpetrator is given a sentence considered too light by the victims and their advocates. When one minimizes the punishment for the perpetrators, the result is that the victims' suffering is also minimized. The process can be so long, the victims want to feel that the hardships they go through are justified by a harder punishment.

No one pays attention to the actions of the court on a day to day basis. People may be interested in the turn out of the case, but the ICTY is too boring and too difficult to understand for anyone to be interested in something beyond the sentence. However, it is in the details of the case that the production of truth happens. Because no one pays attention to the details, they do not pay attention to the truth produced. Reconciliation more difficult when there is resistance to the reality that their ethnic kin committed

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<sup>47</sup> Sajjad 2012, 72

<sup>48</sup> Sajjad 2012, 72

atrocities. Even when the ICTY finds out the ‘truth’ it is going to be resisted by some.<sup>49</sup> When denial is possible, the process of reconciliation is slowed down, as the experience of the other are denied as existing. The denial of experience further victimized them. The experience of the victims is real and must be acknowledged. When everyone is validated as a human being, the exchange and reconciliation process is ready to move forward.

### *Narrow Mandate*

The ICTY has a very narrow mandate; it was created in order to preferably prosecute the leaders and organizers of mass crimes. The mandate only gives the ICTY jurisdiction over the “those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.”<sup>50</sup> Furthermore, it only has jurisdiction over individual persons and not organizations, political parties, army units, administrative entities or other legal subjects.<sup>51</sup> The ICTY has concurrent jurisdiction as the national courts, but has primacy in human rights violations from 1991 forward. However, the ICTY was not designed to take on the responsibility of the national courts, merely to take on the high profile individuals and set the tone for how the national courts ought to handle themselves. The overlapping, yet also hierarchal system gives victims the opportunity to have an international organization try the case, especially if the national courts have proven that they are not going to effectively give justice.

The Tribunal has a very specific definition of War Crimes (Article 3) Genocide (Article 4) and Crimes against humanity (Article 5).<sup>52</sup> Having a numerated list of how to commit genocide or crimes against humanity inherently limits the type of cases that the court can take. For example, forced impregnation is not a listed as an act “committed with intent to destroy, in whole in part, a national ethnical, racial, or religious group” despite being a large portion of how sexual violence was used genocidally, in the Bosnian case, has been discluded from the definition.<sup>53</sup>

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<sup>49</sup> Clark 2008, 335

<sup>50</sup> International Criminal Tribunal of Yugoslavia

<sup>51</sup> International Criminal Tribunal of Yugoslavia

<sup>52</sup> United Nations 2009

<sup>53</sup> United Nations 2009

The ideals of justice for the victims and the mandate of the court do not always align. While the ICTY claims that it is delivering justice to the victims of crimes, it does not seem to be giving them justice they want to see. The ICTY mandate is to go after the ‘big fish,’ those that were the overseers and organizers of the genocide, and in the first few years of operation, the ICTY was often criticized for not going after people that were ‘high enough’. However, aside from the very top few individuals, most victims want to see justice prevail over the ‘small fry’ that harmed or killed their loved ones.<sup>54</sup> While this falls under the local entity courts of Bosnia, the local population seems to think that this role falls to the ICTY. The vast majority of people (72%) are not well informed about the organization of the ICTY.<sup>55</sup> This speaks to a larger issue of differentiating between individual responsibility (something that can be tried well in court) and the political responsibility of states and organizations in the crimes committed during the conflict.

#### *Investigation and Testimony*

The challenges of the investigation to gather the proof needed can be triggering and upsetting for many survivors. Legal recourse tends to be extremely stringent and the burden of proof does not always hold up to the realities on the ground. In order to prosecute genocidal rape, one has the challenge of proving that what happened was part of a “systematic, organized pattern to cause the destruction of the other.”<sup>56</sup> Already, rape cases have a low conviction rate and a difficult burden of proof. Trying to prove mass rape, one has to prove all the individual rapes were connected. Trying to prove genocidal rape requires proving that there was a plan of genocide behind the actions. Other obstacles to fair and accurate trails (which would hopefully lead to fair and accurate sentencing) include collecting sufficient documentation, especially if the victim has died from the rape. Those that have died as a result are, obviously, not able to testify and survivors often are reluctant or afraid to testify.<sup>57</sup> Directly contrasting to the idea that the women are the experts of their own experience, the survivors now have the burden of proof and have to prove that what happened to them was illegal.

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<sup>54</sup> Clark 2009, 375-376

<sup>55</sup> Clark 2008, 334

<sup>56</sup> Sajjad 2012, 71

<sup>57</sup> Sajjad 2012, 71

Furthermore, it can be difficult to secure eye-witness testimonies from those that have survived. The process of testifying in court opens the witnesses and their families to retributions from the lingering ethnic tensions back home in Bosnia. In the local systems, witnesses are reluctant to speak, especially in the smaller communities, where ethnically motivated retaliation against the victims, witnesses, and their families has been known to happen.<sup>58</sup> Even with anonymity, the victims are easily identified and subjected to the political will of the local elites. In the international courts, there are protections for the witnesses. The Tribunal Rules and Procedures and Evidence have safeguards for the protections of victims, however, the safeguards are far from perfect. Protections for family members are virtually non-existent and education of the court personnel and investigators on gender issues is often lacking.<sup>59</sup> Therefore, there is little incentive for the women to testify. They have a high chance of losing their anonymity, having a triggering experience, or feeling some sort of retribution against their family or community.

Because the ICTY is based on common law practices, it faces the same weaknesses that that other common law courts face when dealing with sensitive issues, such as rape cases. Common law practice of question and answer denies the women the ability to tell their story in their own words. In order for the process to be healing for the victims, they must have the opportunity to articulate and visualize their experience. While this leads to longer trials, it does not leave the victims feeling frustrated nor does it increase their trauma.<sup>60</sup> Furthermore, the origins of common law practices are of the UK and the Commonwealth. As such, the difficult process to navigate is made more difficult by being foreign and not in line with the local legal methods, making them more difficult to navigate.<sup>61</sup>

The goal of having punitive measures ought to be limiting the capacity for statesmanship or local power for the perpetrators, as those who have abused people in the past should not have power in the new political system of the new country of Bosnia and Herzegovina. Those that led the population into the trauma or had been unable to

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<sup>58</sup> Sajjad 2012, 72

<sup>59</sup> Mertus 2000, 99

<sup>60</sup> Clark 2009, 128

<sup>61</sup> Clark 2009, 370

prevent its occurrence are not the political leaders that are needed to lead the country out of the self-same trauma.<sup>62</sup> Since the ICTY is designed on the basis of common law tradition, it can only bring to trial the accused that are in the custody of the court. As such, the tribunal is only able to try and judge individual perpetrators who have been captured. The ICTY must rely upon the UN Security Council to produce those persons that have been accused and not yet arrested.<sup>63</sup> This is a major weakness, as the Security Council is must then organize a sub-body in order to capture the perpetrators in a decades old conflict, while also dealing with the most pressing modern issues. In addition, the ICTY cannot try the authors of the policy of genocide, genocidal rape, war crimes, and crimes against humanity, only those that have perpetrated the crime against human beings.<sup>64</sup>

#### *Issues of inclusion*

Even when the court judges try their best to give the women the recognition of their suffering and the closure they may need to heal, the court system set up is so narrow in scope that many people who would benefit from the system are excluded. There are victims of rape and genocide that may not feel included into the conversation. The narrow definition of rape as a crime against humanity or in the “exclusive incarnation as a form of mass and genocidal rape” will obscure the rapes that happened from without the system, setting up a dichotomy between genocidal rape and mass rape.

The system obscures the rapes of Serb/Serbian women, as they were targeted for rape, but not necessarily for genocidal rape. There have been some Amnesty International reports and rare studies of rape against Serb/Serbian women which have demonstrated Serb/Serbian women were also victims of forced impregnation, although the scope of the occurrence remains unknown.<sup>65</sup> Because the media has often portrayed a more one-sided picture of Serbs (men) perpetrating and of Croats/Bosniaks (women) being victimized, the Serb women who were victims of Croat/Bosniak men perpetrators has been affectively erased. Very little data has been collected about Serb women raped

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<sup>62</sup> Poschl 2001, 52

<sup>63</sup> Allen 1996, 110

<sup>64</sup> Allen 1996, 109

<sup>65</sup> Amnesty International 1995

by Croat/Bosniak men.<sup>66</sup> The portrayal of a black-and-white image of the conflict has made it more difficult for Serb/Serbian women who were raped to have their experience seem valid in a court of law. The Tribunal has seemed to largely follow through on the idea of a more one-sided view of the conflict.

The courts are not to be proactive in included new scientific breakthroughs into the precedents they are setting. The precedent from genocidal rape cases sets a precedent for other cases of manipulation of biology as a tool of genocide. One, rather horrifying, logical extreme that the court has not been considering, but perhaps should, is the concept of genocide on a more genetic level. The international justice system is not doing enough to create precedents for the potential of genocide on the level of genetic engineering. Fear of genocide on the level of genetic engineering shall be given precedent by the forced impregnation not being tried.<sup>67</sup> That is, the goal of forced impregnation is to create children that are somehow, on a genetic level, better than their mothers. The goal of the forced impregnation was a natural manipulation of how the children of Yugoslavia would look and what their identities would be. The predictions and thought experiments of genetically engineered genocide have similar goals and outcomes. The genetically engineered genocide would possibly work in a similar fashion. Because this has not yet happened, the only legal framework would be the precedents of the forced impregnation trials.

### **Courts are not the best choice for victims**

The court system has proven itself to not always handle the cases of the genocidal rape in the best interests of serving and protecting the victims of the crimes that it tries. From the local entity courts to the larger International Tribunal, the safety and well-being of the victims is not at the heart of the discourse. The debate around the core values of the Tribunal focuses on whether or not the Tribunal mandate to “contribute to the restoration and maintenance of peace in the region”<sup>68</sup> ought to be interpreted to look for the positive impact on communities or on a large scale of international security. The system is a criminal justice legal system and ought to (at the very least) contribute to the safety and health of those involved in the cases. A positive

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<sup>66</sup> Nikolic-Ristanovic 2000, 81

<sup>67</sup> Allen 1996, 112

<sup>68</sup> International Criminal Tribunal of Yugoslavia

impact on the lives of the victims and survivors should be the positive impact the Tribunal strives for. Operating under the assumption that the best way to build peace in the region is to work through the lingering trauma in the population, the court system is not the correct method.

Some advocates and practitioners argue that accountability, from criminal trials, truth-telling processes, or other mechanisms, is an essential aspect to address old grievances and potentially decrease the inter-ethnic tensions that remain in modern day Bosnia.<sup>69</sup> However, there is not much evidence that supports the claim that the criminal trials have a deterrent effect or that they provide a satisfactory retribution within the society. The trials do not function well for the victims, in that they are not vindicated in the aftermath of armed conflict and genocide. Further, the pursuit of justice does not have a healing effect for the victims: "...the international therapeutic paradigm and the increased popularity of war trauma studies obscure the material needs of survivors..."<sup>70</sup> The needs of the survivors are obscured more than they are addressed by the justice and court systems. The courts do not seem to care about the victims of the crimes that they were set up to try. If a court on human rights is perceived to not care about the victims of massive human rights violations, what is their effective use?

Other argument made by advocates of the criminal Tribunal system in place rests on the significance of the representation. That is, the court trials are significant because they send a message on an international scale that proves that the crimes will not be tolerated by the international community. I disagree with this perspective. It is significant to prosecute because the international community and the advocates for the victims want a preservation of post-conflict collective memory by establishing historical record or rape as a war crime. In addition, the Tribunal creates a system which acknowledges rape as deplorable, condemnable, and, most importantly, punishable and thus ensures that the perpetrators are held accountable.

Because the courts have shown no evidence of providing a satisfactory societal retribution or reconciliation, one gets the feeling that no one asked the victims what they wanted to see done to the men who perpetrated crimes against them. No one went

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<sup>69</sup> Sriram, Martin-Ortega and Herman 2011, 73

<sup>70</sup> Sajjad 2012, 73

back after the immediate aftermath of the conflict, and certainly not in the aftermath of a large trial, to ask if the women had their mental or existential status addressed. As such, it seems that the Tribunal cannot guarantee their protection either before or after the trial. This means that, for the time being at least, it would not be realistic to expect a significant number of women to risk the little that is left of their lives in order to fight for justice.<sup>71</sup> The justice ought to be given to them without forcing them through a process that has the potential to cause them more harm and more trauma than had they not gone through the criminal justice system at all. Any therapeutic gains may be overly simplistic. The short-term cathartic moment is outweighed by the counter-productivity of re-opening wounds and causing the women to re-experience their original trauma, especially when they are being judged as to whether their trauma is “enough evidence”. The legal system is too dry and can call into question the experience of the trauma victims.<sup>72</sup> For most trauma victims, having their experience not believed can be very damaging.

### **Recommendations and Conclusions**

I have shown that the Tribunals and the other court systems have not been fully prepared to handle the particular issues that arise when women’s bodies are the place and means of genocide. They have not been able to fully support the women testify and see their case validated without causing undue trauma to the victim. The women and other victims of crimes against humanity, war crimes, and genocide ought to feel that those who committed human rights violations have been held accountable for their criminal actions.

The needs of the Tribunal were set up with an eye for stability in the region and less on the practical needs of the victims. Practical needs of the victims include defining rape as a crime of violence, defining rape in non-sexualized or outside anatomical terms, and clarifying a dynamic of power, such that rape is not connected to sexual desire.<sup>73</sup> The goal of these clarifications is to bring the conversation of rape as something of sexual desire and women’s rights, and to move the conversation to the issues of unequal power dynamics and human right’s violations. I would include

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<sup>71</sup> Nikolic-Ristanovic 2000, 82-83

<sup>72</sup> Nikolic-Ristanovic 2000, 73

<sup>73</sup> Allen 1996, 116

genetic manipulation, or the attempt to do so, of a group as a way of included forced impregnation in the definition of genocide. Furthermore, I would recommend including sexual and gendered violence as an explicitly defined act of genocide.

The media portrayal of the victims and perpetrators has too large an effect on the outcome of the Tribunal trials. For the Tribunals to be most effective, they need to rid themselves of biases from the media portrayal, propaganda wars, and political agendas. The Tribunal “does not guarantee a fair punishment for the perpetrators of gendered crimes” regardless of ethnicity or nationality.<sup>74</sup> The propaganda wars that have been raging before, during, and now after the war have left an impact onto how the victims of the conflict are defined and how they are treated. In both Serb and Croat oriented press, denials and accusations are common in how they represent the rapes and sexual assaults.<sup>75</sup> Relaxing the need to prove ethnic cleansing regimes will prohibit the distinction between mass rape and genocidal rape to continue to exclude women victims a place to start their process of reconciliation.

My final recommendation would be increasing the funding of the VWS. As one of the ICTY’s most underfunded and poorly staffed institutions, doing some of the most important support work, the Section needs to have enough resources.<sup>76</sup> In addition, the Section could then implement a program training judges and lawyers working with the victims of rape and genocide in how to best be supportive to the victims and witnesses. With those working for the victims and understanding their trauma and experience, the Tribunal will “contribute to the restoration and maintenance of peace in the region.”<sup>77</sup>

In conclusion, I began by questioning what has been done to bring the women victims of the rape camps and other forms of sexual violence the justice they deserve after the bloody and war-torn Balkanization of Yugoslavia. After three ethno-religious groups and two international wars merged together, the region need a return to rule of law. To respond to mass violence with a legal system is to embrace a return to the rule of law.<sup>78</sup> The international and domestic communities came together to create a system of human rights courts with overlapping jurisdictions on crimes against humanity, war

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<sup>74</sup> Nikolic-Ristanovic 2000, 82

<sup>75</sup> Zarkov 2007, 116

<sup>76</sup> Clark 2009, 128-129

<sup>77</sup> International Criminal Tribunal of Yugoslavia

<sup>78</sup> Minow 1998

crimes, and genocide. The women who had lost so much, emotionally, physically, or psychologically, did have a place where they could possibly gain some sense of justice. However, the court system proved that it was less adequate than expected with dealing with the traumatized victims. The system failed to address the needs of the trauma victims. Neglecting the women and their interests has furthered their victimization.<sup>79</sup> In this vein, the victims and their needs have not been a central part of the trial process, despite the idea that the opinion of victims are fundamental to any assessment of whether or not the tribunal has accomplished its goals.<sup>80</sup> While I have given some recommendation as to how the system could be more victim-centric in its approach, the well-being of the victims must be moved to the center of the conversation. As rape continues to be used in conflicts and the bodies of women continue to be sites of genocide and violence against the person and her community, more victims are created and the system will continue to fail them as well.

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<sup>79</sup> Nikolic-Ristanovic 2000, 83

<sup>80</sup> Clark 2009, 124

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