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Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY

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ENSURING THE EFFECTIVE PROSECUTION OF SEXUALLY VIOLENT CRIMES IN THE BOSNIAN WAR CRIMES CHAMBER: APPLYING LESSONS FROM THE ICTY

ABSTRACT

Despite the extensive use of sexual violence as a weapon in war throughout history, the International Criminal Tribunal for the former Yugoslavia was the first international tribunal to develop criminal jurisprudence concerning sexual violence. Although the ICTY expanded criminal liability for sexually violent acts committed during the Yugoslav Wars to an unprecedented extent, the conviction rate for sexually violent crimes was much lower than the conviction rate for other crime.

This Comment will explore the dissonance between the expansion of criminal liability for sexually violent crimes and the low conviction rate for these crimes. Cases, eyewitness reports, and interviews with ICTY prosecutors provide insight on the possible causes of this dissonance. This comment argues that the low conviction rate in the ICTY for sexually violent crimes is the result of several factors: (1) a lack of expertise in the Office of the Prosecutor, (2) gender bias (3) the reluctance of victims to testify, and (4) the lack of coordination between the Office of the Prosecutor and the Victim and Witnesses Unit.

Understanding the reasons behind the ICTY's low conviction rate is especially important as the ICTY shifts its caseload to the national court system. Just because the Bosnian War Crimes Chamber is inheriting the ICTY's cases does not mean the War Crimes Chamber must inherit the ICTY's difficulties in prosecuting sexually violent crimes. Although the War Crimes Chamber will face many of the same difficulties—gender bias, lack of expertise, victim reluctance—the ICTY's successes and failures in prosecuting sexually violent crimes can provide guidance. By applying the lessons learned in the ICTY, the War Crimes Chambers will be able to successfully prosecute sexually violent crimes.

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INTRODUCTION

“He forced me to take my clothes off. I didn’t want to take my clothes off. He slapped my face and told me to get undressed. I didn’t want to do this. Then he tried again and ripped everything off me. He ripped my knickers off me, and then he raped me. . . . [He] said that it was quite natural. ‘You’re not the only Muslim to be raped. Other Muslim women have been raped in other villages, and that is nothing terrible,’ and that I had no right to protect myself. And he said, ‘You’re going to bear Serb children, not Muslims any more,’ and that there won’t be a single Muslim left”¹

During periods of armed conflict, rape and other forms of sexual abuse are used as instruments of violence and terror. Military history is filled with reports of sexual violence directed against women.² The systematic use of rape as a weapon has many purposes: to destroy communities, to force impregnation, and to drive out populations from a specific territory.³ Sexual violence’s ability to disintegrate communities makes it an especially potent tool of war.⁴

Until recently, despite the calculated use of sexual violence as a weapon of war, rape was not a crime that could be prosecuted under international law.⁵ Instead of a crime, sexual violence was simply seen as an unfortunate by-product of war.⁶ Historically, victims of sexual violence during conflict have had little legal recourse because rape was viewed as part of the “spoils of

¹ Transcript of Record at 2639–40, Prosecutor v. Kunarac, Case No. IT-96-23-T & 23-1-T (Int’l Crim. Trib. for the Former Yugoslavia May 2, 2000).

² Geoffrey Best, *Restraints on War by Land Before 1945*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT* 26 (Michael Howard ed., 1979) (“A free hand with the girls seems always to have been a basic component of what the common soldier hopes for, believes he deserves, and feels entitled [to receive] The literature of war is full of evidence of this disagreeable dark edge to military behavior.”).

³ SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 16, 49, 53, 79–80 (1975).

⁴ See *id.* at 31–113.

⁵ Ariane Brunet & Stephanie Rousseau, *Acknowledging Violations, Struggling against Impunity: Women’s Rights, Human Rights*, in *COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS* 33 (Indai Lourdes Sajor ed., Peter Feldstein trans., 1998) [hereinafter *COMMON GROUNDS*].

⁶ See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997–2000)*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2001/73, para. 23 (Jan. 23, 2001) (by Radhika Coomaraswamy) (explaining how the ICTY chose to prosecute rape as a crime against humanity “[i]nstead of falling back on the often heard claim that rape is a random or arbitrary act perpetrated by soldiers in search of an outlet for sexual energy”).

war.”⁷ Sexual violence was viewed as an assault on a woman’s honor—a private affair that should be kept out of the realm of the international legal system.⁸

This view began to shift in the 1990s, when there was recognition that sexually violent crimes must be tried at an international level to begin the healing process for the victims.⁹ The international community also discovered that allowing impunity for sexually violent crimes undermines community-building in post-conflict societies.¹⁰ Rape is now a crime under international law, although “it remains the least condemned war crime.”¹¹

The 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 (“ICTY”) has played a leading role in developing the jurisprudence of sexually violent crimes. The judgments of the ICTY have greatly expanded the articulation of sexually violent crimes during armed conflict.¹² Scholars generally agree that the ICTY’s progressive

⁷ Comm’n on Human Rights, Sub-Comm’n on the Promotion and Prot. of Human Rights, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, July 31–Aug. 18, 2000, para. 20, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000) [hereinafter Contemporary Forms of Slavery]; see also Mary Robinson, *Message from the UN High Commissioner for Human Rights*, in COMMON GROUNDS, *supra* note 5, at 21 (“The official failure to condemn or punish rape, giving it overt political sanction, allows for rape and other forms of sexual torture and ill-treatment to become tools of military strategy.”).

⁸ Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, para. 11, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998) (by Radhika Coomaraswamy) (“By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as ‘dirty’ or ‘spoiled’. Consequently, many women will neither report nor discuss the violence that has been perpetrated against them.”); see also Radhika Coomaraswamy, *Message from the UN Special Rapporteur on Violence Against Women*, in COMMON GROUNDS, *supra* note 5, at 24–25.

⁹ See Contemporary Forms of Slavery, *supra* note 7, para. 91 at 22. Article 1 of the Declaration on the Elimination of Violence Against Women defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” G.A. Res. 48/104, art. 1, UN Doc. A/RES/48/104 (Feb. 23, 1994).

¹⁰ See Contemporary Forms of Slavery, *supra* note 7, para. 89 at 21–22; see also COUNCIL OF EUR. COMM’R FOR HUMAN RIGHTS, POST-WAR JUSTICE AND DURABLE PEACE IN THE FORMER YUGOSLAVIA 25–26 (2012) (detailing the damage to community-building continuing caused by impunity for the rapists).

¹¹ Brunet & Rousseau, *supra* note 5, at 37.

¹² The ICTY has prosecuted rape as a war crime, a crime against humanity. See, e.g., Prosecutor v. Kunarac, Case No. IT-96-23-T & 23/1-T, Judgement, para. 4 (Int’l Crim. Trib. for the Former Yugoslavia June

jurisprudence on sexual violence during armed conflict has been a significant victory.¹³

Unfortunately, scholars celebrating this victory have ignored a major issue: Sexually violent crimes are not being prosecuted successfully. Despite the advancement of the gender-based crimes jurisprudence in the ICTY, the overall number of prosecutions and successful convictions remains low.¹⁴ In all ICTY cases that had been completed as of April 2011, ninety-three individuals were indicted; forty-four of those individuals were indicted for crimes involving sexual violence.¹⁵ These numbers show that only forty-seven percent of individuals indicted in the ICTY were indicted for a sexually violent crime.¹⁶ Of those forty-four individuals, only twenty-nine were convicted of sexual violence, representing a conviction rate of sixty-nine percent.¹⁷ Although a conviction rate of sixty-nine percent appears high, it is much lower than conviction rates for other forms of crime. For completed cases, in which the accused was not charged with a crime of sexual violence, the conviction rate was seventy-eight percent.¹⁸ Even more striking, in nine cases with an indictment for sexual violence, the indictee was acquitted of sexual violence charges while being found guilty on all other counts.¹⁹ The low success rate of

18, 2006). It has also prosecuted rape as an instrument of genocide. *See, e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 172 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). It has recognized rape as a form of sexual slavery as well as a form of persecution. *See, e.g.*, Kunarac, Case No. IT-96-23-T & 23/1-T, para. 542. Furthermore, the ICTY has recognized that gender-based crimes may form part of a joint criminal enterprise. Richard P. Barrett & Laura E. Little, *Lessons of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 53 (2003). The ICTY has pronounced that several perpetrators may be held responsible for intended or foreseeable crimes committed in furtherance of the joint criminal enterprise. Giulia Bigi, *Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajišnik Case*, 14 MAX PLANCK Y.B. UNITED NATIONS L. 51, 53–54 (2010). The ICTY has also recognized that men and boys may be victims of sexual violence. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, paras. 206, 726 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). Finally, the ICTY has explicitly recognized that forced marriage, forced pregnancy, and forced abortions may constitute international crimes. U.N. ENTITY FOR GEN. EQUAL. & THE EMPOWERMENT OF WOMEN, PROGRESS OF THE WORLD'S WOMEN: IN PURSUIT OF JUSTICE 82, 86, 97 (2011).

¹³ For example, Cynthia Enloe optimistically claimed that the ICTY would usher in a new era of international political consciousness—the era in which “the construction of the entire international political arena [would] be significantly less vulnerable to patriarchy.” Cynthia Enloe, *Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA—HERZEGOVINA 220 (Alexandra Stiglmeier ed., 1994).

¹⁴ U.N. ENTITY FOR GEN. EQUAL. & THE EMPOWERMENT OF WOMEN, *supra* note 12, at 90–91.

¹⁵ *Id.* at 90.

¹⁶ *Id.*

¹⁷ *Id.* at 91.

¹⁸ *Id.*

¹⁹ *Id.*

prosecutions illustrates that the creation of a feminist-friendly jurisprudence is not sufficient to effectively prosecute sexually violent crimes in international law. The evolution of substantive jurisprudence must be accompanied by an improvement of the procedural aspects of a prosecution for sexual violence.

This Comment will examine the breakdown between the ICTY's evolving jurisprudence of sexually violent crimes and the difficulty of securing a conviction for these crimes. The obstacles that must be overcome to successfully prosecute sexual violence include inexperience, gender bias, ineffective witness protections, lack of inter-division cooperation, and prosecutorial errors.

This Comment argues that the lessons learned from the ICTY's struggles should be used by the Bosnian War Crimes Chamber ("WCC"), which will take over the ICTY's caseload in 2014.²⁰ The WCC faces many of the same challenges—both jurisprudential and procedural—that have been addressed by the ICTY. Therefore, by using the lessons learned from the ICTY, the WCC can effectively investigate and prosecute sexually violent crimes.

Part I of this Comment outlines the history of the Yugoslav Wars and their impact on the former Yugoslavia. Part II examines the ICTY's jurisprudence on sexually violent crimes. Part III examines how the combination of prosecutorial discretion and the inherent difficulty of prosecuting sexually violent crimes has led to ineffective investigations and prosecutions. Part IV illustrates how, without a coherent gender strategy, prosecutions can be derailed by simple prosecutorial error. Part V examines the ICTY's completion strategy and the transfer of its caseload to the WCC. Finally, Part VI examines how the WCC can use the lessons learned by the ICTY to successfully prosecute sexually violent crimes.

I. BACKGROUND

The atrocities of the Yugoslav Wars precipitated the need for prosecuting sexually violent crimes under international law. The Yugoslav Wars were the first to bring reports of mass rape and other sexually violent crimes into the

²⁰ See Int'l Criminal Tribunal for the Former Yugoslavia, *Completion Strategy*, ICTY-TPIY, <http://www.icty.org/sid/10016> (last visited Mar. 31, 2013) [hereinafter *Completion Strategy*]. The Bosnian War Crimes Chamber ("WCC") is a domestic court. See *Frequently Asked Questions*, CT. BOSN. & HERZ., <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=e>.

public eye.²¹ Furthermore, the Serbian use of sexually violent crimes to facilitate ethnic cleansing spurred the recognition of such crimes under international law.²²

A. *History of the Yugoslav Wars*

The Yugoslav Wars were a series of wars that resulted in the dissolution of Socialist Federal Republic of Yugoslavia from 1991 to 1995.²³ The Yugoslav Wars were comprised of three separate, but related, wars: the “Ten-Day War” in Slovenia (1991), the Croatian War of Independence (1991 to 1995), and the Bosnian War (1992 to 1995).²⁴ These three wars resulted in the dissolution of Yugoslavia into several sovereign territories.²⁵ The causes of the Yugoslav Wars are numerous and complex. In general, the outbreak of civil war in the former Yugoslavia was precipitated by intense cultural, religious, linguistic, and ethnic tensions.²⁶

By 1991, the state of Yugoslavia existed in name only. Yugoslavia had fractured into regions controlled by ethnic groups.²⁷ The Serbian effort to regain control of Bosnia introduced the world to a violent policy now known as “ethnic cleansing,” which the U.N. Security Council defined as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”²⁸ The wars in Yugoslavia have since been “held up as *the* paradigmatic examples of ethnic conflict” and “extremest nationalism leading to violence.”²⁹

²¹ Shana Swiss & Joan Giller, *Rape as a Crime of War: A Medical Perspective*, 270 JAMA 612, 612 (1993).

²² See Rhoda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 228 (2000).

²³ Monica Oproiu, *Slobodan Milosevic and the Violent Transformation of Borders in Former Yugoslavia*, EUROLIMES, Spring 2011, at 142, 148.

²⁴ *Id.* at 149.

²⁵ *Id.* at 148.

²⁶ See *id.* at 146–48.

²⁷ *Id.* at 148.

²⁸ Comm’n of Experts established pursuant to Security Council resolution 780 (1992), Interim Rep., transmitted by letter dated Feb. 9, 1993 from the Secretary-General addressed to the President of the Security Council, para. 55, U.N. Doc. S/25274 (Jan. 26, 1993). A Commission of Experts sponsored by the Security Council concluded that ethnic cleansing in Yugoslavia had been carried out “by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.” *Id.* para. 56.

²⁹ V. P. GAGNON JR., *THE MYTH OF ETHNIC WAR: SERBIA AND CROATIA IN THE 1990S*, at xix (2004).

B. Rape in the Yugoslav Wars

The nationalist sentiment that justified “ethnic cleansing” included organized campaigns of sexual violence. In addition to the systematic and deliberate use of torture and murder, the Serb faction engaged in mass rapes.³⁰ Reports of mass rapes have included stories of

[T]he repeated rapes of girls as young as 6 and 7; violations by neighbors and strangers alike; gang rapes so brutal their victims died; rape camps where Serbs routinely abused and murdered Muslim and Croat women; rapes of young girls performed in front of fathers, mothers, siblings and children; [and] rapes committed explicitly to impregnate Muslim women and hold them captive until they gave birth to Serbian babies.³¹

An investigative commission sent by the U.N. Security Council concluded that the rape of Muslim women had occurred on “a wide scale” and as “part of a clearly recognizable pattern.”³² An estimated fifty to sixty thousand women were raped during the Yugoslav Wars.³³ The victims were primarily Muslim women from Bosnia–Herzegovina.³⁴ An estimated thirty-five thousand women and children were held in “rape camps,” the purpose of which was to allow Serbians to impregnate Bosnian women.³⁵ Because of the patrilineal structure

³⁰ Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32.

³¹ *Id.*; see also Comm’n of Experts established pursuant to Security Council resolution 780 (1992), Final Rep., transmitted by letter dated May 24, 1994 from the Secretary-General to the President of the Security Council, paras.245–48, U.N. Doc. S/1994/674 (Dec. 28, 1994) [hereinafter Letter dated May 24].

³² European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to European Community Foreign Ministers, in a letter dated Feb. 2, 1993 from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General, para.13, U.N. Doc. S/25240, Annex I (Feb. 3, 1993).

³³ Aida Cerkez, *U.N. Official: Bosnian War Rapes Must Be Prosecuted*, ASSOCIATED PRESS, Nov. 26, 2010, available at http://seattletimes.com/html/nationworld/2013527330_apebosniawartimerape.html. In the final report of the United Nations Commission of Experts, Professor Bassiouni indicates that there are six main reasons for the disparity between the estimates of rapes in the former Yugoslavia: (1) victims are “reluctant to report the assaults”; (2) victims “fear reprisals by their attackers”; (3) victims, especially Muslim victims, feel intense shame and embarrassment; (4) a long time has passed since the crime was committed; (5) victims “do not have a place to report the assault or feel that reporting would be useless”; and (6) there is a general “level of skepticism about the international community.” Letter dated May 24, *supra* note 31, para. 6.

³⁴ See Special Rapporteur of the Comm’n on Human Rights, *Rep. on the Situation of Human Rights in the Territory of the Former Yugoslavia*, Comm’n on Human Rights, para. 84, U.N. Doc. A/48/92-S/25341, Annex (Feb. 26, 1993) (by Tadeusz Mazowiecki) (“Rape of women, including minors, has occurred on a large scale. . . . The team of experts is not aware of any attempts by those in positions of power, either military or political, to stop the rapes. There is clear evidence that Croat, Muslim and Serb women have been detained for extended periods of time and repeatedly raped.”) (internal quotation marks omitted).

³⁵ See ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 9 (2005).

of Bosnian culture, the resulting children would inherit their father's ethnicity: Serbian.³⁶ After being raped and impregnated, the women were confined until it was too late to terminate the pregnancy.³⁷

The use of mass rape and other forms of sexual violence as a core part of ethnic cleansing illustrates that the nationalism was a mostly male sentiment.³⁸ Men were viewed as soldiers, women as victims: "Bands of males may assert their manhood as warriors, but war affords women no corresponding empowering role; instead they become victims, not only displaced and damaged, mourning the loss of family members, but also prey for men on the enemy side."³⁹

Because of the intense influence of nationalism and misogyny⁴⁰ that led to sexual atrocities against women in the Yugoslav Wars, the prosecution of sexual violence is incredibly important: "[R]ape as a tool of 'ethnic cleansing' is unique, worse than or not comparable to other forms of rape in war or in peace"⁴¹ Indeed, rape and other forms of sexual violence have been cited as major factors in undermining post-conflict peace resolution processes.⁴² Prosecuting sexually violent crimes leads not only to retributive and restorative justice, but also to an international condemnation of the mindsets that led to their committal in the first place.

³⁶ *Id.*

³⁷ *Id.* The horrific circumstances of such enforced pregnancies certainly shocked the international community. However, some commentators argue that merely denouncing forced impregnation and forced pregnancy is insufficient; rather, these issues must "be construed not as the 'natural' consequence of rape but rather as violations of women's right to reproductive health, hence control over their fecundity; as crimes, violations in and of themselves, not mere consequences. Brunet & Rousseau, *supra* note 5, at 33, 39.

³⁸ See Cynthia Enloe, *The Politics of Masculinity and Femininity in Nationalist Wars*, CURIOUS FEMINIST (2004). A gendered reading of the Yugoslav Wars—especially of the Bosnian War—has become popular in the past decade. CYNTHIA COCKBURN, *THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT* 206 (1998) (stating that in Bosnia, the "so-called ethnic war was totally gendered").

³⁹ SWANEE HUNT, *THIS WAS NOT OUR WAR: BOSNIAN WOMEN RECLAIMING THE PEACE* 179 (2004); see also GAGNON, *supra* note 29, at 67 (describing the Serbian media's manipulation of rape reports to promote fear during a period of nationalist hysteria); Robinson, *supra* note 7, at 20.

⁴⁰ See Indai Loudes Sajor, *Our Common Grounds*, in *COMMON GROUNDS*, *supra* note 5, at 3 ("War is an inherently patriarchal activity, and rape is one of the most extreme expressions of the patriarchal drive toward masculine domination over the woman. This patriarchal ideology is further enforced by the aggressive character of the war itself, that is to dominate and control another nation or people.").

⁴¹ Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN'S L.J.* 243, 247 (1994).

⁴² U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Security Council Resolution 1820 (2008)*, para. 8, U.N. Doc. S/2009/362 (Aug. 20, 2009) [hereinafter Secretary-General's Report].

II. SEXUALLY VIOLENT CRIMES IN THE ICTY

Like most other historical international documents,⁴³ the ICTY Statute mostly avoids the explicit recognition of gendered crimes.⁴⁴ The exception is Article 5, which explicitly lists rape as a crime against humanity.⁴⁵ Prosecuting a crime against humanity requires a heavy burden of proof; a prosecutor must prove there was a “widespread and systematic attack” on civilians during an armed conflict.⁴⁶ In turn, investigations into possible crimes against humanity can be problematic because evidence must be gathered under post-conflict conditions.⁴⁷ Prosecuting rape as a crime against humanity, therefore, means a difficult investigation and a heavy burden of proof on the ICTY Prosecutor.

Fortunately, the ICTY has judicially expanded its subject matter jurisdiction to cover a broader range of sexually violent crimes. Although other forms of sexual violence are not explicitly mentioned anywhere else in the ICTY Statute, ICTY judicial opinions have found sexual violence to be within the jurisdiction of the court because it is: (1) a “grave breach[]” under the Geneva Conventions of August 12, 1949; (2) a violation of the laws or custom of war; and (3) a form of genocide.⁴⁸ Consequently, the ICTY may obtain subject matter jurisdiction over many forms of sexual violence.

These judicial expansions have been greatly praised as advancements towards the successful prosecution of sexually violent crimes in international

⁴³ See Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, BROWN J. WORLD AFF., Winter/Spring 1999, at 65, 70–71.

⁴⁴ See *id.* at 71.

⁴⁵ See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(g), U.N. Doc. S/RES/827, (May 25, 1993) [hereinafter Statute of the ICTY] (adopting the Statute as proposed by the Secretary-General, in U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, Annex (May 3, 1993)).

⁴⁶ Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appellate Judgement, para. 85 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002). The ICTY has interpreted this to mean “widespread or systematic.” *Id.* (emphasis added).

⁴⁷ See U.N. ENTITY FOR GEND. EQUAL. & THE EMPOWERMENT OF WOMEN, *supra* note 12, at 90.

⁴⁸ ANGELA M. BANKS, SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF THE AD HOC TRIBUNAL’S JURISPRUDENCE & THE INTERNATIONAL CRIMINAL COURT’S ELEMENTS OF CRIMES 7 (2005), available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs>; see also Brunet & Rousseau, *supra* note 5, at 47 (“Rape and other forms of sexual violence directly linked to a genocidal intention indeed qualify as crimes of genocide, for the following reasons . . . these crimes inflict serious physical and/or mental injury contributing to the destruction of the targeted group; they can give rise to the victims’ inability to give birth again, which, in turn, has a direct link with the physical destruction of the group.”).

law.⁴⁹ For the first time, perpetrators of sexual violence were brought to justice for sexually violent crimes committed during armed conflict.⁵⁰ But while the jurisprudence of sexually violent crimes has undergone an unprecedented expansion, the ICTY still faces many substantial procedural challenges in prosecuting these crimes. These challenges include the inherent difficulties of prosecuting sexually violent crimes, such as lack of expertise, gender bias, victim reluctance, and lack of coordination between the Office of the Prosecutor (“OTP”) and the Victim and Witnesses Unit (“VWU”).

III. THE INHERENT DIFFICULTY OF PROSECUTING SEXUALLY VIOLENT CRIMES

Prosecuting sexually violent crimes committed during armed conflicts is inherently difficult. For the ICTY, these difficulties included: (1) a lack of expertise in the OTP; (2) gender bias present in the OTP; (3) the reluctance of victims to testify; and (4) the lack of coordination between the OTP and the VWU. Each of these difficulties and its effects on prosecutions will be discussed in turn.

A. *Lack of Expertise in the Office of the Prosecutor*

The first obstacle in prosecuting crimes successfully was the OTP’s general lack of expertise in leading investigations of sexual violence. In the ICTY, referrals by the Bosnian police and judiciary were especially problematic.

In Bosnia–Herzegovina, a criminal case destined for the ICTY usually began with a complaint to the local police authorities.⁵¹ After the initial investigation by police, the case could only proceed after the OTP had reviewed the case file and determined there was sufficient evidence to continue.⁵² The Prosecutor reviewed only the case file before making a

⁴⁹ SIOBHAN KEHOE DUBIN, CASE W. RESERVE UNIV. SCH. OF LAW INT’L WAR CRIMES RESEARCH LAB, A COMPARATIVE STUDY OF SEXUAL VIOLENCE TRIALS IN THE ICTY AND ICTR COMPARING SIX PARTICULAR ISSUES 4–9 (2003), available at <http://law.case.edu/war-crimes-research-portal/memoranda/SexualViolence.pdf>.

⁵⁰ See *id.* at 9 (“The judicial acknowledgment and punishment of rape during an armed conflict was historic, and was also a vitally important precedent for both the ICTY and ICTR in regard to sexual violence trials.”). Precedent regarding rape as torture, as held by courts such as the ICTY, is significant in providing a new avenue for remedy and protection for rape victims, which had not been consistently available under other instruments. See Bedont & Hall-Martinez, *supra* note 43.

⁵¹ Mark S. Ellis, *Bringing Justice to an Embattled Region—Creating and Implementing the “Rules of the Road” for Bosnia–Herzegovina*, 17 BERKELEY J. INT’L L. 1, 12 (1999).

⁵² *Id.* at 16.

decision.⁵³ The OTP did not interview witnesses, did not make decisions about whether national authorities had complied with international legal standards, and did not review national criminal laws for their compliance with international standards.⁵⁴

The OTP's heavy reliance on the Bosnian police to investigate crimes was especially troubling because of the widespread corruption throughout the legal system. Many of the governmental leaders in power after the war were the same leaders responsible for international crimes during the war.⁵⁵ Bosnian politicians had the authority to appoint judges and prosecutors, and politicians packed the judiciary with individuals of their ethnic group.⁵⁶ The judicial system and law enforcement structures were ineffectual, weak, and unprepared to address powerful figures for their violations of international law.⁵⁷ The corruption of the national legal system and the untrained investigators contributed to the relatively few investigations and indictments for any sexually violent crime in Bosnia.⁵⁸

B. Gender Bias in the Office of the Prosecutor

The ICTY's second obstacle in prosecuting sexually violent crimes was the inherent gender bias in the OTP. The first Prosecutor, Richard Goldstone, was "amazed at the gender bias that emerged in our international office."⁵⁹ The gender bias inhibited effective investigations, impeded the development of rape jurisprudence, and resulted in unequal treatment of male and female victims.

Gender bias prevented investigators from adequately investigating sexually violent crimes. Originally, there were virtually no senior female investigators, and the male investigators came from cultures where there was generally no

⁵³ *Id.* at 14.

⁵⁴ *Id.* at 16.

⁵⁵ Sebastian van de Vliet, *Addressing Corruption and Organized Crime in the Context of Re-establishing the Rule of Law*, in *DECONSTRUCTING THE RECONSTRUCTION* 206 (Dina Francesca Haynes ed., 2008).

⁵⁶ Fidelma Donlon, *Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION*, *supra* note 55, at 264.

⁵⁷ See INT'L CRISIS GRP., *COURTING DISASTER: THE MISRULE OF LAW BOSNIA AND HERZEGOVINA 2* (2002); U.N. MISSION IN BOSN. & HERZ., *PROSECUTING CORRUPTION: A STUDY OF THE WEAKNESSES OF THE CRIMINAL JUSTICE SYSTEM IN BOSNIA AND HERZEGOVINA 5* (2000).

⁵⁸ U.N. ENTITY FOR GEND. EQUAL. & THE EMPOWERMENT OF WOMEN, *supra* note 12.

⁵⁹ Richard J. Goldstone, *Prosecuting Rape as A War Crimes*, 34 CASE W. RES. J. INT'L L. 277, 280 (2002).

concern about gender-based crimes.⁶⁰ These male investigators often downplayed the seriousness of sexual assault. One assistant prosecutor recalls hearing investigators state: “So a bunch of guys got riled up after a day of war, what’s the big deal?”⁶¹ and “I’ve got ten dead bodies, how do I have time for rape? That’s not as important.”⁶² Investigators in the OTP worried that prioritizing sexual assault cases would jeopardize the “larger” cases of genocide.⁶³ Female attorneys would often have to re-interview victims and witnesses after the male investigators had completed a cursory and inadequate interview.⁶⁴ This gender bias prevented the thorough investigation and indictment of sexually violent crimes.

The gender bias in the OTP may have also stalled the jurisprudence of rape from developing in the ICTY. The only form of sexual violence explicitly listed in the ICTY is rape, which is charged as a crime against humanity.⁶⁵ Therefore, the OTP—at least initially—“did not charge rape directly as a war crime . . . [it] charged rape as an act of outrage against personal dignity, which was a war crime.”⁶⁶ The OTP did not refer to rape as direct evidence of another war crime, such as genocide.⁶⁷ Instead of treating rape as a form of torture, and therefore as a war crime, the OTP preferred to treat rape as a “degrading treatment” and “willful[ly] caus[ing] great suffering” which would qualify as a “grave breach.”⁶⁸

The gender bias is especially evident in the disparate ways the OTP treated sexual violence against women and sexual violence against men in the *Tadić* Case.⁶⁹ In this case the OTP treated the same type of sexual violence in two separate ways depending on the gender of the victim. If the sexually violent act was committed against a woman, the act was prosecuted as a “grave breach.”⁷⁰ In contrast, if that same sexually violent act was committed against a man, the

⁶⁰ *Id.*; see also Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT’L L. 305, 310–11 (2002).

⁶¹ Kuo, *supra* note 60, at 311.

⁶² *Id.* at 310–11.

⁶³ JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 52 (2003).

⁶⁴ *Id.* at 78.

⁶⁵ See Statute of the ICTY, *supra* note 45, art. 5(g).

⁶⁶ Kuo, *supra* note 60, at 314.

⁶⁷ See *id.*

⁶⁸ See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Indictment, paras. 4.2–.3 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 13, 1995).

⁶⁹ Copelon, *supra* note 22, at 230.

⁷⁰ See *id.*

act was prosecuted as a “war crime.”⁷¹ By letting the gender of the victim determine the crime to be charged, the OTP illustrated its gender bias against women.⁷²

Though gender bias was initially prevalent in the OTP, the subsequent incorporation of a comprehensive gender strategy alleviated much of the bias.⁷³ Developed by Chief Prosecutor Richard Goldstone, the comprehensive and cohesive gender strategy played an integral role in recognizing the crime of rape under international law. Perhaps his most important contribution was the creation of the office of a Gender Advisor in the OTP.⁷⁴ The Gender Advisor “was charged with developing the law through formulating the approach of the OTP to the investigation and indictment of gender crimes. [The Gender Advisor] also devised the approach of the OTP to gender issues within the office itself.”⁷⁵

One of the Gender Advisor’s first recommendations was the creation of a “sexual investigation team.”⁷⁶ This sexual investigation team was comprised completely of women who had extensive experience investigating sexually violent crimes.⁷⁷ Although the team was disbanded after several years, its influence was felt in the greater understanding of how to investigate sexually violent crimes.⁷⁸ The creation of the position of Gender Advisor and the all-

⁷¹ *Tadić*, Case No. IT-94-1, Initial Indictment, paras. 5.2–4; see also Copelon, *supra* note 22, at 230.

⁷² The judge who confirmed the charges against Tadić, Judge Elizabeth Odio Benito, questioned the OTP’s charging decision and told the OTP: “Do not forget the women.” Sara Sharratt, *Interview with Elizabeth Odio Benito, Justice of the International Criminal Tribunal for the Former Yugoslavia*, 22 *WOMEN & THERAPY*, no. 1, 1999, at 39, 40 (internal quotation marks omitted). Judge Odio Benito later stated:

If we had started working on cases from an armed conflict in the former Yugoslavia where the United Nations legal documents documented massive rape of women and there was not a single mention of rape in this indictment, I thought I had a very valid reason for expressing my concern. I was worried that once again we were going to invisibilize what had happened to women with the pretext that we did not have any evidence or that no one was talking about rape.

Id. at 41–42.

⁷³ Rhonda Copelon recalls Goldstone beginning a training session on rape by admitting: “I am the idiot who filed that affidavit.” Copelon, *supra* note 22, at 245.

⁷⁴ Julie Mertus, *When Adding Women Matters: Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia*, 38 *SETON HALL L. REV.* 1297, 1303 (2008).

⁷⁵ Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, *NEW ENG. J. PUB. POL’Y*, Fall/Winter 2003–2004, at 121, 123.

⁷⁶ Mertus, *supra* note 74, at 1304 (citing Interview by Julie Mertus with Nancy Paterson, Former Senior Trial Att’y, ICTY, in D.C. (Feb. 2004)).

⁷⁷ *Id.*

⁷⁸ *Id.*

female investigatory team was the first step in developing a cohesive gender strategy for the prosecution of sexually violent crimes.

Goldstone himself participated in training sessions, attended women's conferences addressing gender issues, and emphasized his respect for the Gender Advisor.⁷⁹ He committed the OTP to the position that "sexual assaults . . . provide the basis for justiciable charges of torture," a complete turnaround from the characterization of rape in previous indictments, such as the *Tadić* case.⁸⁰ After Goldstone committed to eliminating gender bias in the OTP, the ICTY began making the first substantial contributions to sexual assault jurisprudence: For example, the FOCA indictment was the first international indictment to list rape as torture "and other forms of sexual violence, such as forced nudity and sexual entertainment, as inhumane treatment."⁸¹ The elimination of gender bias in the OTP not only facilitated the investigation and indictment of sexually violent crimes, but also helped the ICTY form its influential body of jurisprudence regarding sexually violent crimes.

C. *Reluctant Witnesses*

The third and biggest obstacle to a successful indictment for sexual violence was—and remains—the reluctance of victims and witnesses to testify. The number of women who testified before the ICTY is very low: Between 1996 and 2006, 3,700 witnesses testified before the ICTY, but only 666 (eighteen percent) were women.⁸² The very first case before the ICTY contained a rape charge that had to be dropped because the key female witness was too scared to testify about her assault.⁸³

The international community recognizes that the heinous nature of sexually violent crimes requires the victims and witnesses to be offered extensive protection.⁸⁴ The protection measures would need to ensure the privacy rights of the victims and allay the victims' fear of reprisal after testifying. Although

⁷⁹ Copelon, *supra* note 22, at 230.

⁸⁰ *Id.* (quoting Letter from Justice Richard Goldstone, Prosecutor, U.N. Int'l Criminal Tribunals for the Former Yugoslavia and Rwanda, to Rhonda Copelon, Professor of Law and Dir., Int'l Women's Human Rights Law Clinic, City Univ. of N.Y. (Sept. 8, 1995)) (internal quotation marks omitted).

⁸¹ *Id.*

⁸² U.N. ENTITY FOR GEND. EQUAL. & THE EMPOWERMENT OF WOMEN, *supra* note 12, at 90.

⁸³ HAGAN, *supra* note 63, at 80.

⁸⁴ *See* The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, para. 6, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/34, at 214 (Nov. 29, 1985); *see also* Secretary-General's Report, *supra* note 42, para. 30.

the ICTY Statute includes specific protections for victims of sexual violence, these protections are inadequate.

1. *Victims' Privacy and the Fear of Reprisals*

The privacy rights of the victims were a paramount concern to the drafters of the ICTY Statute. While a severe sense of shame and self-blame are commonly present in all rape victims,⁸⁵ the creation of shame was often a primary intent of sexual assaults during the Yugoslav Wars.⁸⁶ Many of the sexual assaults were conducted in ways that emphasized the shame: For example, at times family members were forced to rape each other in front of other family members or in public.⁸⁷

Beyond intense shame and embarrassment, rape victims also commonly suffer from a host of psychological disorders, such as extreme nervousness, memory impairment, and post-traumatic stress disorder.⁸⁸ Publicly speaking about the sexual abuse and confronting the abuser can exacerbate these psychological harms.⁸⁹

In addition to protecting the privacy rights of victims, the ICTY also needed to assuage the victims' fear of reprisals. Perpetrators threatened to kill the families of their victims if the rapes were reported.⁹⁰ These threats were especially effective against women whose husbands remained interned in detention centers.⁹¹ At times, the perpetrators threatened the murder of detained relatives to ensure that a woman would be so afraid for her family's safety that she would not report her own rape.⁹² Reports were prevalent of soldiers, paramilitary members, and camp guards extracting women from

⁸⁵ Int'l Human Rights Law Grp., *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 91, 108 (1994) [hereinafter *No Justice*].

⁸⁶ Robinson, *supra* note 7, at 20 ("It has been said that women's bodies are the fighting ground for the battle between men and since within many societies a woman's chastity is a matter of family honour, rape is perceived to be the ultimate humiliation of the male enemy.").

⁸⁷ Letter dated May 24, *supra* note 31, para. 250(a).

⁸⁸ *No Justice*, *supra* note 85, at 109; *see also* Brunet & Rousseau, *supra* note 5, at 37 ("Rape dehumanizes a woman and breaks down her sense of personal identity. It is an invasion of a woman's body by force, an attack on her physical and emotional integrity. It is a hostile act and one of degrading violence. It is also . . . an expression of hatred toward women as a class.").

⁸⁹ *No Justice*, *supra* note 85, at 110.

⁹⁰ *Id.*

⁹¹ *Id.* The ICTY began prosecuting cases during the Yugoslav Wars, and thus many witnesses and victims had relatives who were still in detention facilities at the time interviews were conducted. *See id.*

⁹² *Id.*

refugee camps to rape the women.⁹³ Local commanders, meanwhile, overlooked the perpetrators' crimes. As of 1993, not a single Serbian soldier had been punished for the rape of a woman in a refugee camp.⁹⁴ The U.N. even reported that those in authority not only condoned the mass rapes, but engaged in them.⁹⁵

Rape victims also faced ostracism in their local communities.⁹⁶ Women often feared retaliatory abuse or abandonment by their husbands or relatives.⁹⁷ Rape destroyed communities, and the perpetrators used it as a method of terrorizing the civilian populations.⁹⁸ The U.N. report describes the soldiers' calculated use of rape to dissolve local communities:

[P]aramilitary units would enter a village. Several women would be raped in the presence of others so that word spread throughout the village and a climate of fear was created. . . . Those male villagers who had wanted to stay then decided to leave with their women and children in order to protect them from being raped.⁹⁹

The possibility of retaliation—reinforced by official involvement in and sanction of the abuses—required the development and implementation of protections for victims and witnesses.

2. *The ICTY's Statutory Protections for Victims*

Acknowledging the reluctance of victims and witnesses to testify, the ICTY Statute provides protections that seek to minimize re-traumatization of the victim, prevent public humiliation, and safeguard against reprisals.¹⁰⁰ The strength of the Statute's protections lies in their specificity and mandatory application.

⁹³ Letter dated May 24, *supra* note 31, para. 247, at 58.

⁹⁴ *No Justice*, *supra* note 85, at 98 n.27.

⁹⁵ Special Rapporteur of the Comm. on Human Rights, *Rep. on the Situation of Human Rights in the Territory of the Former Yugoslavia*, Comm'n on Human Rights, para. 48(c), U.N. Doc. E/CN.4/1993/50, Annex II (Feb. 10, 1993) (by Tadeusz Mazowiecki) [hereinafter Mazowiecki Report]. One woman reported being abducted by a policeman and transported to the home of one of the most prominent political figures in the region, who then raped her. *Id.*

⁹⁶ *No Justice*, *supra* note 85, at 108.

⁹⁷ *Id.* at 110.

⁹⁸ Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110, 120 (“[A]s the stigma of rape was seen to be effective in driving away women and their families from the lands that Serbs sought to conquer, rape indeed became a new and gruesome weapon in the ancient quiver of ethnic cleansing.”).

⁹⁹ Mazowiecki Report, *supra* note 95, para. 48(a).

¹⁰⁰ See Statute of the ICTY, *supra* note 45, art. 22.

In addition to the broad protections available for all victims and witnesses, victims of sexually violent crimes are guaranteed additional protections under Rule 96.¹⁰¹ The provisions of Rule 96 effectively lighten the burden of proof in rape cases.¹⁰² Rule 96 establishes certain presumptions that encourage victims to testify.¹⁰³ First, the testimony of a rape victim is afforded the same presumption of validity as that of other crime victims, and therefore does not require any additional corroboration through evidence or eyewitness testimony.¹⁰⁴ Sexual assault does not always leave physical evidence, and even when it does, the victim rarely reports the crime immediately.¹⁰⁵ During the Yugoslav Wars, victims rarely had access to any medical services,¹⁰⁶ meaning they could not preserve the evidence even if they wanted to. In the absence of a corroboration requirement, the testifying victim is given an inherent measure of credibility.

Second, the defendant is often precluded from raising consent as a defense.¹⁰⁷ To raise the issue of consent, the defendant must provide evidence of the consent that is relevant and credible.¹⁰⁸ Furthermore, the burden of proof for the affirmative defense is on the defendant.¹⁰⁹ In essence, the defendant would have to prove the negative: that the victim was not subjected to or threatened with violence.¹¹⁰

Finally, Rule 96 also creates a type of “rape shield law.” The Trial Chamber must exclude any evidence of the prior sexual conduct of the victim and cannot infer from a victim’s sexual history that she consented to sexual contact in the present instance.¹¹¹ Any evidence of prior sexual behavior is inadmissible, even prior sexual acts between the victim and accused.¹¹² Rule

¹⁰¹ See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, r. 96, U.N. Doc. IT-32/Rev. 48 (Nov. 19, 2012) [hereinafter ICTY Rules of Procedure and Evidence], available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev48_en.pdf.

¹⁰² See *id.* r. 96(i).

¹⁰³ See *id.* r. 96(ii)–(iv).

¹⁰⁴ *Id.* Many national jurisdictions still require corroboration, though many are moving toward abolition of the requirement. M. CHERIF BASSIUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 601 (1996).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ ICTY Rules of Procedure and Evidence, *supra* note 101, r. 96(ii).

¹⁰⁸ *Id.* r. 96(iii).

¹⁰⁹ *Id.*

¹¹⁰ BASSIUNI, *supra* note 104, at 602.

¹¹¹ ICTY Rules of Procedure and Evidence, *supra* note 101, r. 96(iv).

¹¹² Compare *id.* (excluding all prior sexual conduct of the victim from being admitted into evidence), with FED. R. EVID. 412 (allowing some specific instances of prior sexual conduct of the victim to be admitted into

96's protections encourage victims of sexual crimes to testify while protecting the victims from harassment, intimidation, and an invasion of privacy.

3. *Failure of the ICTY's Victim Protections*

Despite its specificity and mandatory application, Rule 96 still fails to protect victims of sexual assault adequately. First, correct application of Rule 96 requires constant vigilance by the judiciary. In *Mucić*, the Defense was able to circumvent Rule 96 and question the victim about her prior sexual history.¹¹³ The defense questioned the victim about a previous abortion—which is prohibited by Rule 96.¹¹⁴ After a motion to redact by the prosecution, the Trial Chamber re-emphasized the importance and applicability of Rule 96 and expunged the victim's testimony from the trial record.¹¹⁵ The treatment of victims in the *Mucić* case highlights the need for constant vigilance on the part of the judiciary for the protection of victims.

Even constant vigilance by the judiciary will not ensure victim privacy. In fact, in *Furundžija*, the judiciary actively permitted an incredible assault on victim's rights and privacy.¹¹⁶ After his conviction, Furundžija brought a motion to set aside the evidence of Witness A on the basis that he had been prejudiced by the non-disclosure of Witness A's rape counseling records.¹¹⁷ The Trial Chamber agreed, ordered the proceedings to be "reopened only in connection with the medical, psychological or psychiatric treatment or counseling received by Witness A after May 1993" and ordered the prosecution to disclose any connected documents.¹¹⁸ This extremely broad order allowed the defense access to all of a testifying victim's medical records, regardless of the records' relevance to the trial. Furthermore, presenting the psychological records of a victim inherently undermines her credibility. Indeed, once the victim's medical records were made available, the defense

evidence). In U.S. federal courts, the accused can submit evidence of specific instances of the victim's prior sexual conduct with someone other than the accused to show that the defendant was not the source of semen or injury. The defendant may also offer evidence of past sexual behavior between the accused and the victim on the issue of consent. FED. R. EVID. 412(b)(2)(A–B).

¹¹³ Prosecutor v. Mucić, Case No. IT-96-21, Decision on the Prosecutor's Motion for the Redaction of the Public Record, para. 3 (Int'l Crim. Trib. for the Former Yugoslavia June 5 1997).

¹¹⁴ *Id.*

¹¹⁵ *Id.* paras. 52, 58–60.

¹¹⁶ See Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgement, para. 22 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

questioned her credibility because she suffered from post-traumatic stress disorder.¹¹⁹

Fortunately, the Trial Chamber rejected the contention that the victim was unreliable because she suffered from post-traumatic stress disorder.¹²⁰ The release of her medical records and the public accusation that her psychological illnesses inherently made her unreliable grossly violated the victim's privacy. The ICTY should therefore explicitly prohibit the release of medical information to protect the privacy of victims. Without ensuring the privacy of victims and witnesses, the ICTY will not be able to encourage reluctant witnesses to testify.

D. Lack of Coordination Between the Office of the Prosecutor and the Victims and Witnesses Unit

The fourth obstacle involved ensuring victims protection during the course of investigations. Because of the substantial stigma and psychological trauma sexual assault victims and witnesses face, the OTP originally planned to create special unit that would exclusively handle sexually violent crimes.¹²¹ This special Victims and Witnesses Unit would have provided extra training and experience to its investigators.¹²² In addition, the unit's existence would have ensured that the OTP recognized the gravity of sexually violent crimes. As initially imagined, the VWU would have facilitated the investigation and prosecution of sexually violent crimes by virtue of its location within the OTP.

The initial plan to structure the VWU within the OTP was ultimately rejected.¹²³ Instead, the judges decided instead to incorporate the VWU under the office of the Registrar.¹²⁴ The creation of the VWU in the Registrar shifted the emphasis of its work from ensuring effective investigation and prosecution of sensitive cases to providing counseling and support services to the victims

¹¹⁹ *Id.* para. 102.

¹²⁰ *Id.*

¹²¹ Antonio Cassese, President, Int'l Tribunal for Crimes in Former Yugoslavia, Statement by the President Made at a Briefing to Members of Diplomatic Missions: Summary of the Rules of Procedure at the International Tribunal for the Former Yugoslavia U.N. Doc. IT/29 (Feb. 11, 1994), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 653 (1995).

¹²² *Id.*

¹²³ See ICTY Rules of Procedure and Evidence, *supra* note 101, r. 34.

¹²⁴ *Id.*

and witnesses.¹²⁵ The VWU therefore became more concerned with restorative justice rather than retributive justice.

While the VWU has undoubtedly provided immeasurable help and services for victims, the shift in its emphasis has led to less effective prosecutions by the OTP. The OTP can still request special protection measures for victims and witnesses,¹²⁶ but by placing the VWU under the office of the Registrar, the Statute increased the complexity of coordination between the OTP and VWU, which in turn led to prosecutorial error.

IV. PROSECUTORIAL ERROR

Even if all the barriers that make prosecution inherently difficult are removed, successful prosecutions of sexual violence in the ICTY are not guaranteed. The prosecutions of sexually violent crimes have been undermined in two ways. First, the OTP has used its prosecutorial discretion to omit charges of sexual violence despite sufficient evidence. Second, the Prosecutor has made inexcusable errors, such as presenting evidence that is inconsistent with the alleged crimes. Both prosecutorial discretion and error have contributed to the poor success rate for prosecuting sexually violent crimes.

A. *Prosecutorial Discretion and the Non-Inclusion of Rape Charges in Indictments*

The first way a prosecution for sexually violent crimes can be undermined is through the unwise use of prosecutorial discretion. In the beginning, the OTP often exercised its discretion by not including rape charges in indictments, even when the evidence warranted such a charge.¹²⁷ While the ICTY has a better record than other tribunals of including sexual assault charges in indictments,¹²⁸ the *Lukić* case is a paradigmatic example of the unwise use of prosecutorial discretion.

¹²⁵ See Cassese, *supra* note 121, at 653.

¹²⁶ See ICTY Rules of Procedure and Evidence, *supra* note 101, r. 69.

¹²⁷ Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave To Amend the Second Amended Indictment and on Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, paras. 12, 60 (Int'l Crim. Trib. for the Former Yugoslavia July 8, 2008) (citing Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Prosecution Motion Seeking Leave To Amend the Second Amended Indictment, para. 14 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2008) (filed confidentially)).

¹²⁸ See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (in a case before the ICTR, despite the testimony of three witnesses concerning acts of sexual

During the investigation of Milan Lukić, many women alleged that the defendant had sexually assaulted them.¹²⁹ The Prosecutor at the time of the initial indictment, Carla del Ponte, did not include any charges of sexual assault against Lukić.¹³⁰ Del Ponte defended her decision by stating that ICTY's completion strategy required her to conclude her cases as quickly as possible.¹³¹ She believed that sexually violent crimes would result in a lengthy case.¹³² In essence, Del Ponte acknowledged that the crimes of sexual violence occurred, but refused to prosecute them based on a misunderstanding of the ICTY's completion timeline.

Del Ponte's successor tried to rectify her erroneous reasoning. The new Prosecutor, Serge Brammertz, filed a motion to amend the *Lukić* indictment to include charges of sexual assault.¹³³ In the motion to amend, the Prosecutor noted the incongruence of allowing victims to testify about their sexual assault while at the same time shielding the defendant from prosecution for sexual assault.¹³⁴ Despite evidence of "very serious sex crimes,"¹³⁵ the Trial Chamber denied the motion to amend.¹³⁶ The Trial Chamber explained that the inclusion of new charges would result in an undue delay of the trial proceedings¹³⁷ and

violence, the Prosecutor did not investigate or formally charge the defendant until nine months after the start of the trial); *see also* Prosecutor v. Norman, Case No. SCSL-03-14-I, Decision on Prosecution Request for Leave To Amend the Indictment, para. 86 (Special Court for Sierra Leone May 20, 2004) (in a case before the Special Court for Sierra Leone, the Trial Chamber refused to allow the Prosecutor to add charges of sexual violence to the original indictment).

¹²⁹ *Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave To Amend the Second Amended Indictment and on Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, paras. 12, 60.

¹³⁰ *See* Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Initial Indictment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 25, 2000).

¹³¹ *Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave To Amend the Second Amended Indictment and on Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, paras. 12, 60 (citing Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Prosecution Motion Seeking Leave To Amend the Second Amended Indictment, para. 14 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2008) (filed confidentially)).

¹³² *Id.*

¹³³ *Id.* para. 13.

¹³⁴ *Id.*

¹³⁵ *Id.* (citing Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Prosecution Motion Seeking Leave To Amend the Second Amended Indictment, paras. 16, 37).

¹³⁶ *Id.* para. 64.

¹³⁷ *Id.* para. 62.

“there is no miscarriage of justice in the present circumstances.”¹³⁸ After the denial of the motion to amend, the Prosecutor made a motion for certification, which the Trial Chamber also denied.¹³⁹

Unfortunately, the *Lukić* case is not an isolated incident. In *Nikolić*, the defendant was initially charged with a variety of crimes against humanity and grave breaches of the Geneva Convention including murder, torture, and inhumane acts.¹⁴⁰ The initial indictment did not include a charge of rape.¹⁴¹ During the evidentiary hearing to confirm the charges, the prosecution presented evidence that women and young girls were raped and sexually assaulted.¹⁴² Although the testimony of the women and girls implicated the defendant in the sexually violent crimes, the prosecution had not included a single charge of rape or sexual assault in the indictment.¹⁴³ In its review of the indictment, the Trial Chamber sua sponte invited the Prosecutor to amend the charges to include rape.¹⁴⁴ The amended indictment then included thirty-seven charges of sexual assault.¹⁴⁵ The repeated failure to include charges of sexual violence despite sufficient evidence again illustrates the gender bias present in the OTP.

B. Inconsistency Between Charges and Evidence

The second way in which a prosecution may be undermined is through simple error. In the ICTY, this error often took the form of presenting evidence that was inconsistent with the charges in the indictment.¹⁴⁶ Whether caused by ineffective investigation strategies or a lack of coordination between

¹³⁸ *Id.* para. 63.

¹³⁹ Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Certification To Appeal the Trial Chamber’s Decision on Prosecution Motion To Amend the Second Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 19, 2008).

¹⁴⁰ Prosecutor v. Nikolić, Case No. IT-01-2-I, Initial Indictment, pmb. (Int’l Crim. Trib. for the Former Yugoslavia Nov. 4, 1994).

¹⁴¹ *See id.*

¹⁴² Transcript of Record at 397, Prosecutor v. Nikolić, Case No. IT-01-2-I (Int’l Crim. Trib. for the Former Yugoslavia Oct. 11, 1995); Transcript of Record at 288, Prosecutor v. Nikolić, Case No. IT-01-2-I (Int’l Crim. Trib. for the Former Yugoslavia Oct. 10, 1995).

¹⁴³ *Nikolić*, Case No. IT-01-2-I, Initial Indictment, pmb.

¹⁴⁴ Prosecutor v. Nikolić, Case No. IT-01-2-I, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 33 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995).

¹⁴⁵ Prosecutor v. Nikolić, Case No. IT-01-2-I, First Amended Indictment, paras. 44–59 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 12, 1999).

¹⁴⁶ *See, e.g.*, Prosecutor v. Mrkšić, Case No. IT-95-13/1-I, Judgement, para. 522 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

the OTP and VWU, lack of supporting facts hindered the prosecution of sexually violent crimes.¹⁴⁷

A clear example of this error is present in the *Mrškić* case, where the Prosecutor charged the defendants with crimes against humanity consisting of torture, deprivation of medical care, and sexual assault.¹⁴⁸ The prosecution alleged that these crimes took place in a hospital in Ovčara, though it failed to provide any evidence of this allegation.¹⁴⁹ Instead, the prosecution relied on evidence of sexual assault at a different hospital, in Vukova—an entirely different camp in an entirely different city.¹⁵⁰ Although there was evidence of sexual assault at the hospital in Vukovar, the defendants were not charged with crimes that occurred in Vukovar, and consequently could not be prosecuted for them.¹⁵¹ At the same time, because evidence of sexual assault at Vukovar could not be used to establish a sexual assault in Ovčara, the defendants could not be convicted of sexual assault.¹⁵² Therefore, despite ample evidence that Mrškić was responsible for the sexual assault of hundreds of women, prosecutorial error prevented him from being convicted of the crime.

The OTP committed a similar mistake in *Delić*. The initial indictment accused the defendant of rape at Kamenica Camp.¹⁵³ However, the prosecution's evidence indicated that the sexual assault had not occurred at Kamenica Camp, but rather at a different camp nearby.¹⁵⁴ Again, because the OTP failed to double-check the name of the camp, all of the rape and sexual assault charges were dismissed.¹⁵⁵

The *Mrškić* and *Delić* cases are examples of simple prosecutorial error that have undermined the prosecution of sexually violent crimes. These errors were most likely symptoms of gender bias and a lack of a coherent strategy for prosecuting sexual assault cases. These errors illustrate the need not just for a comprehensive strategy, not just during the investigation stage, but throughout the whole prosecution.

¹⁴⁷ See *id.* paras. 521–22.

¹⁴⁸ *Id.* para. 519.

¹⁴⁹ *Id.* paras. 519–21.

¹⁵⁰ *Id.* para. 519.

¹⁵¹ *Id.* para. 521.

¹⁵² *Id.*

¹⁵³ Prosecutor v. Delić, Case No. IT-04-83-PT, Indictment, paras. 41–43 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2005).

¹⁵⁴ Prosecutor v. Delić, Case No. IT-04-83-T, Judgement, para. 320 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 15, 2008).

¹⁵⁵ *Id.* annex B, para. 20.

Because of prosecutorial discretion and error, the conviction rate for sexually violent crimes in the ICTY has been lower than it should be. Some of these issues, such as gender bias and lack of expertise, have been successfully eradicated by the OTP's commitment to incorporating gender strategy into its prosecutions. Other issues, such as the inadequacy of victim protections, remain stumbling blocks. The ICTY's experience illustrates that successful prosecutions need not only a developed and inclusive jurisprudence, but also a dedicated, focused effort to prosecute sexually violent crimes.

The ICTY's successes and failures become even more important as the ICTY itself is phased out. With the end of the ICTY approaching,¹⁵⁶ many of its cases will be transferred to national court systems.¹⁵⁷ These new court systems, such as the WCC,¹⁵⁸ will encounter many of the same challenges the ICTY initially faced. However, by learning from the ICTY's mistakes in prosecuting sexually violent crimes, the WCC should be able to avoid the pitfalls that plagued the prosecutions in the ICTY.

V. SHIFTING FROM AN INTERNATIONAL TRIBUNAL TO A NATIONAL JUDICIAL SYSTEM

Acknowledging the mistakes the ICTY has made in prosecuting gender-based crimes is important because the ICTY is currently shifting its caseload to the WCC.¹⁵⁹ The WCC is based on the ICTY, both in jurisprudence and in structure.¹⁶⁰ These two similarities were necessary both to ensure the continuing prosecution of crimes and to legitimize the WCC's rulings. An unforeseen benefit, however, is that these similarities will allow the WCC to avoid the mistakes that the ICTY made in prosecuting sexually violent crimes.

¹⁵⁶ S.C. Res. 1503, para. 7, U.N. Doc. S/RES/1503 (2003) (Aug. 28, 2003).

¹⁵⁷ *Id.* para. 1.

¹⁵⁸ *Cf. id.*

¹⁵⁹ *Cf. id.* para. 7.

¹⁶⁰ *Cf.* BOGDAN IVANIŠEVIĆ, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT 6 (2008), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

A. *History of the War Crimes Chamber in the Court of Bosnia–Herzegovina*

The ICTY's creation was spurred by the corruption of the Bosnian national system.¹⁶¹ During the Yugoslav Wars and immediately thereafter, the Bosnian national courts attempted to try war criminals.¹⁶² These prosecutions were rarely successful or fair.¹⁶³ The Bosnian judiciary faced serious obstacles in the prosecution of war criminals: the loss of skilled lawyers and judges during the war, destruction of facilities and equipment, and inadequate procedural laws.¹⁶⁴ In addition, the police force responsible for investigating war crimes was plagued with allegations of corruption.¹⁶⁵ Ethnic bias motivated many of the prosecutions, and the trials “were regarded as occasions for dispensing ‘ethnic’ justice or exacting revenge.”¹⁶⁶ In one appeal to the European Court of Human Rights, the Court overturned a conviction on the basis that the defendant did not receive a fair trial in the former Yugoslavia.¹⁶⁷ The fear of arbitrary arrests and corrupt trials prevented the Bosnian national justice system from gaining legitimacy after the wars ended.

The Bosnian national justice system's inability to prosecute war crimes effectively motivated the creation of the ICTY in 1993.¹⁶⁸ Now, twenty years later, the ICTY's completion strategy has been the catalyst for the creation of the WCC, a special national court that specializes in prosecuting war crimes.¹⁶⁹

¹⁶¹ See ORG. FOR SEC. & COOPERATION IN EUR. [OSCE], WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA: PROGRESS AND OBSTACLES 3 (2005) [hereinafter OSCE REPORT], available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf.

¹⁶² *Id.*

¹⁶³ *Id.* at 4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Michael Bohlander, *Last Exit Bosnia—Transferring War Crimes Prosecution from the International Tribunal to Domestic Court*, 14 CRIM. L.F. 59, 67 (2003).

¹⁶⁷ See *Damjanović v. Fed'n of Bosn. & Herz.*, Case No. CH/96/30, para. 40 (H.R. Cham. for Bosn. & Herz. Sept. 5, 1997), available at <http://www.hrc.ba/database/decisions/CH96-30%20Damjanovic%20Merits%20E.pdf> (ruling that the trial court “lacked a sufficient appearance of independence”).

¹⁶⁸ See *Completion Strategy*, *supra* note 20.

¹⁶⁹ *E.g.*, S.C. Res. 1503, *supra* note 156, para. 7 (setting deadlines for the ICTY to conclude investigations, trial, and work, respectively); see also S.C. Res. 1534, para. 6, U.N. Doc. S/RES/1534 (2004) (Mar. 26, 2004) (requiring periodic updates from the ICTR and ICTY on the implementation of the completion strategy). For a brief overview of the implementation of the completion strategy, see *Completion Strategy*, *supra* note 20.

B. *Similarities Between the ICTY and the WCC*

The ICTY influenced the WCC's basic structure. The WCC has an Office of the Prosecutor, a judicial branch, and a Registry.¹⁷⁰ As in the ICTY, the Prosecutor is responsible for investigating and prosecuting crimes, the judicial branch is composed of trial and appellate courts, and the Registry handles the administrative functions of the WCC.¹⁷¹ The WCC's structural similarity to the ICTY was based on its desire to bring its national prosecutions up to international standards.

The WCC's jurisprudence is also influenced by the ICTY. The WCC has subject matter jurisdiction over three types of crimes: genocide, crimes against humanity, and war crimes.¹⁷² The definitions of these crimes are generally consistent with the parallel definitions in the ICTY, allowing the ICTY to refer cases to the WCC.¹⁷³ Although the WCC does not officially incorporate the ICTY's jurisprudence,¹⁷⁴ the WCC "brings with it as persuasive authority its international legal heritage, as well as the international jurisprudence that interprets and applies it."¹⁷⁵ The ICTY's rulings are considered persuasive authority that is necessary to ensure uniformity in the interpretation and application of legal rules.¹⁷⁶

Since its creation in 2005, the WCC has made significant contributions to the prosecution of war crimes—and of sexually violent crimes in particular. Unlike the ICTY Charter, the WCC's Charter explicitly lists sexually violent crimes.¹⁷⁷ Furthermore, twenty-six cases have included charges of sexual

¹⁷⁰ OSCE REPORT, *supra* note 161, at 6.

¹⁷¹ *Id.* at 6–7.

¹⁷² *Id.* at 7. In contrast to the ICTY, however, the WCC will focus its prosecution on mid-level and low-level perpetrators, rather than on high-level perpetrators. *Id.* at 6.

¹⁷³ ICTY Rules of Procedure and Evidence, *supra* note 101, r. 11*bis*, at 8–9. There are some differences in the definitions of the crimes; for example, the Bosnian definition of "crime against humanity" does not require a nexus between the act and an armed conflict. KRIVIČNI ZAKON [Criminal Law] art. 172 (Bosn. & Herz.). This and other differences generally occur because the Bosnian Criminal Code provision is tracking the ICC Statute rather than the ICTY Statute. YA'EL RONEN, BOSNIA AND HERZEGOVINA: THE INTERACTION BETWEEN THE ICTY AND DOMESTIC COURTS IN ADJUDICATING INTERNATIONAL CRIMES 41 (2008), available at <http://www.domac.is/media/veldu-flokk/Domac8-2011-YR.pdf>.

¹⁷⁴ RONEN, *supra* note 173, at 42.

¹⁷⁵ *Id.* (quoting Prosecutor v. Stupar, Case No. X-KR-05/24, at 53, First Instance Verdict, (Sud Bosne I Hercegovine [Court of Bosn. & Herz.] July 29, 2008), available at <http://ebookbrowse.com/milos-stupar-i-dr-1st-instance-verdict-pdf-d141288650>).

¹⁷⁶ *Id.*

¹⁷⁷ KRIVIČNI ZAKON [Criminal Law] arts. 172(1)(g), 173(1)(e).

violence.¹⁷⁸ These cases involved charges of sexual violence in detention facilities,¹⁷⁹ as a method of ethnic cleansing,¹⁸⁰ and of sexual violence against males.¹⁸¹ Despite the early success in charging and prosecuting sexual violence, the WCC needs significant improvements to increase accountability for sexually violent crimes.

The intentional similarities between the WCC and the ICTY allow the effective transfer of cases and creates a feeling of familiarity to those involved. However, the similarities between the WCC and ICTY can be further used to prosecute sexually violent crimes successfully. By incorporating the lessons that the ICTY learned, the WCC can effectively and efficiently prosecute sexually violent crimes from the start.

VI. USING LESSONS LEARNED FROM THE ICTY TO IMPROVE PROSECUTIONS FOR SEXUALLY VIOLENT CRIMES IN THE WAR CRIMES CHAMBERS

The WCC faces many similar challenges to prosecuting sexually violent crimes that plagued the ICTY: (1) lack of expertise in the WCC, (2) prosecutorial discretion, and (3) inadequate witness protections. Unlike the ICTY, however, the WCC does not need to start from scratch. Instead, the WCC can use and improve on the lessons learned at the ICTY. Each of these challenges and the possible improvements will be discussed in turn.

A. *Lack of Expertise in the WCC*

The first challenge the WCC must overcome is its inadequate investigation procedures. The prosecutor, in conjunction with the War Crimes Unit (“WCU”), is responsible for investigating war crime allegations.¹⁸² Just like in

¹⁷⁸ Claire Garbett, *Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina*, 10 HUM. RTS. L. REV. 558, 567 (2010).

¹⁷⁹ See *Prosecutor v. Mejkajić*, Case No. X-KR-06/200, Verdict, at 5, 7, 10, 13 (Court of Bosn. & Herz. May 30, 2008), available at http://www.sudbih.gov.ba/files/docs/presude/2008/Zeljko_Mejkajic_First_Instance_Verdict.pdf.

¹⁸⁰ See *id.* at 2.

¹⁸¹ See *Prosecutor v. Kurtović*, Case No. X-KR-06/299, Verdict, at 3 (Court of Bosn. & Herz. Apr. 30, 2008), available at http://sudbih.gov.ba/files/docs/presude/2008/Zijad_Kurtovic_-_1st_instance_verdict_-_redigovana.pdf.

¹⁸² See, e.g., HUMAN RIGHTS WATCH, LOOKING FOR JUSTICE: THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA 13 (2006) [hereinafter LOOKING FOR JUSTICE], available at <http://www.hrw.org/sites/default/files/reports/ij0206webwcover.pdf> (stating that the “the SIPA War Crimes Unit (WCU) has the potential to provide substantial assistance to the Special Department for War Crimes, as well as to prosecutors at the district and cantonal levels, on a long-term and sustainable basis”).

the ICTY, the main issue in ensuring effective prosecutions is the lack of expertise among investigators and prosecutors.

Prosecutors in the WCC lack even basic training in prosecuting war crimes and investigatory procedures. In one survey, two prosecutors admitted they had not received any training in regard to prosecuting war crimes, nine prosecutors stated they did not have access to a legal library, five prosecutors stated their library was insufficiently stocked, and only four prosecutors' offices had internet access.¹⁸³ Without basic resources and training, WCC prosecutors are not able to prosecute any crimes effectively, let alone sexually violent crimes.

The lack of training is also a problem for investigators. As of 2007, no WCU investigator had received training in investigating sexual violence or working with victims.¹⁸⁴ There have been reports of investigators taking inadequate witness statements or not realizing the witness has made an incriminating statement.¹⁸⁵ Without proper training, the WCU investigators cannot recognize the very crimes they are meant to investigate.

The necessary training has not been offered to prosecutors and investigators because of a lack of funding in the WCC. However, this is where the current international/national hybrid nature of the WCC will be helpful. Many of the international persons working within the WCC also have experience working the same types of cases in the ICTY.¹⁸⁶ The WCC should incorporate and rely on their experiences before the WCC becomes a completely national court in 2014. Maximizing the use of the information from these international persons is the first small step towards improving training.

Lack of basic training plagues the WCC, as it plagued the ICTY. Unfortunately, because sexually violent crimes are among the most difficult to investigate,¹⁸⁷ this means they will probably not be pursued or prosecuted. The

¹⁸³ OSCE REPORT, *supra* note 161, at 45.

¹⁸⁴ HUMAN RIGHTS WATCH, NARROWING THE IMPUNITY GAP: TRIALS BEFORE BOSNIA'S WAR CRIMES CHAMBER 17 (2007) [hereinafter NARROWING THE IMPUNITY GAP], available at <http://www.hrw.org/reports/2007/ij0207/ij0207webwcover.pdf>.

¹⁸⁵ *Id.* at 14.

¹⁸⁶ See, e.g., Garbett, *supra* note 178 (acknowledging the similarity between the cases in the ICTY and the WCC). The WCC is inherently receptive to international support because the international community holds certain executive powers in Bosnia ("Bonn powers"). RONEN, *supra* note 173, at 8–9.

¹⁸⁷ See NARROWING THE IMPUNITY GAP, *supra* note 184, at 17 ("[A] number of cases within the chamber's jurisdiction involve victims, witnesses, and/or defendants who have relocated to other countries in the former Yugoslavia, namely Serbia and Croatia. The prosecution must therefore rely heavily on cooperation with the authorities in these and other states in order to obtain evidence, locate witnesses and, in some cases, arrest defendants in relation to proceedings before the chamber."); see also Kim Thuy Seelinger et al., The

prosecutors need access to resources on the jurisprudence of sexual violence as a war crime and as a crime against humanity. The investigators need specialized training in investigating sexually violent crimes and working with witnesses and victims. Adequate resources and training are imperative to the appropriate investigation of sexually violent crimes, which can be very complex and difficult to prosecute.

B. Prosecutorial Discretion in the WCC

The second challenge the WCC faces is the possible abuse of prosecutorial discretion. The fact that the WCC is underfunded and understaffed¹⁸⁸ raises issues concerning prosecutorial discretion. Aside from those cases referred by the ICTY, the WCC Prosecutor has the discretion to pursue and prosecute his own cases.¹⁸⁹ The number of cases that could possibly be brought is incredibly high.¹⁹⁰ As seen in the ICTY, cases involving sexual violence are not as likely to be pursued by prosecutors unless there is a firm gender strategy in place.¹⁹¹ Due to the shortage of resources at the WCC, a fair case selection policy is important to both the successful prosecution of sexually violent crimes and the overall legitimacy of the court.

The WCC Prosecutor's case selection policy, however, does not incorporate a gender strategy that will ensure the prosecution of sexually violent crimes. Currently, the Prosecutor pursues cases it deems "highly sensitive" based on factors such as "the nature of the crime alleged . . . whether additional investigations are necessary[,] difficulties in locating the suspect(s)[, and] the availability of witnesses"¹⁹² This information is difficult to provide in cases of sexual violence, especially with untrained investigators.¹⁹³ Therefore, cases of sexual violence are less likely to be deemed "highly sensitive" by the Prosecutor. Because the WCC's case selection process relies

Investigation and Prosecution of Sexual Violence 19 (Human Rights Ctr., Univ. of Cal. Berkeley, Sexual Violence & Accountability Project, Working Paper, 2011), available at http://www.law.berkeley.edu/HRCweb/pdfs/SVA_IandP.pdf (highlighting a number of challenges to investigating crimes involving sexual violence). *But see* Garbett, *supra* note 178 (finding that there are a "high number of cases [in the WCC that] includ[e] charges of sexual violence").

¹⁸⁸ See LOOKING FOR JUSTICE, *supra* note 182, at 11–12.

¹⁸⁹ See NARROWING THE IMPUNITY GAP, *supra* note 184, at 8–9; *see also* OSCE Report, *supra* note 161, at 18.

¹⁹⁰ See OSCE Report, *supra* note 161, at 6 (between 1996 and 2005, the ICTY Rules of the Road Unit received criminal files on 5789 people).

¹⁹¹ See *supra* Part III.B.

¹⁹² NARROWING THE IMPUNITY GAP, *supra* note 184, at 8–9.

¹⁹³ *Id.* at 14.

so heavily on information that is difficult to provide in sexually violent crimes, it is unlikely the Prosecutor will pursue these crimes.

The current case selection policy also undermines the legitimacy of the WCC. While the Prosecutor has enumerated some factors that determine whether the case is “highly sensitive,”¹⁹⁴ the evaluation of these factors has not been explained. There are no details on how these factors are weighed, and therefore, the process of case selection is largely opaque.¹⁹⁵ Inadequate information about the case selection process negatively impacts the public’s perception of the WCC and has “led to significant uncertainty regarding the department’s priorities.”¹⁹⁶ Certainly, damaging the public’s perception of the WCC will prevent cooperation by the public and will discourage victims from coming forward.

In response to the negative publicity, the WCC announced a new case selection policy in 2009: a Situation-Event-Act-Actor (“SEAA”) approach.¹⁹⁷ The SEAA approach’s purpose is to streamline investigations.¹⁹⁸ The SEAA approach will require the investigators to look broadly at the crimes that occurred during the Bosnian wars, rather than focusing on individual complaints.¹⁹⁹ The WCC also implemented a new charging policy that attempts to increase the number of accused in a single prosecution, while at the same time reducing the number of charges in each case.²⁰⁰ Because of the new case selection policy, the WCC expects less court time, fewer witnesses, and less evidence, all of which will save the court’s meager resources.²⁰¹

While it is too early to observe the actual effects of the new case selection policies, the efforts to streamline the investigations could definitely decrease the number of prosecutions for sexually violent crimes. As seen in the ICTY, when a prosecutor decides to press fewer charges, sexually violent criminal charges are usually the first to be dropped.²⁰² Furthermore, because evidence and witnesses are difficult to discover, investigators are more likely to use their

¹⁹⁴ *Id.* at 9.

¹⁹⁵ *Id.* (“[T]he department has not adequately articulated to the public the criteria for case selection and their application, which has led to significant uncertainty regarding the department’s priorities.”).

¹⁹⁶ *Id.*

¹⁹⁷ David Schwendiman, *Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina*, 8 NW. U. J. INT’L HUM. RTS. 269, 291–92 (2010).

¹⁹⁸ *Id.* at 292.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 294–95.

²⁰¹ *Id.* at 295.

²⁰² *See supra* Part IV.A (explaining the *Lukić* case).

power to terminate the investigation when pursuing allegations sexually violent crimes.

Again, a comprehensive gender strategy can curb the abuse of prosecutorial discretion. To prevent the new case selection policies from decreasing the number of prosecutions for sexually violent crimes, the WCC needs to create explicit standards for investigating and charging such crimes. An officer, similar to the Gender Advisor for the ICTY, could help formulate an effective method for pursuing sexually violent crimes efficiently. Furthermore, a team that specializes in investigating sexually violent crimes would also ensure that such crimes are prosecuted, while at the same time preventing the waste of valuable resources. All of these suggestions should be a part of the WCC Prosecutor's commitment to an inclusive and expansive gender strategy, similar to Judge Goldstone's commitment in the ICTY.

C. Victim and Witness Protections in the WCC

The third challenge the WCC faces is ensuring the privacy and dignity of witnesses, with respect to both investigators and the courts. Investigators must respect the trauma the witnesses have experienced. This sensitivity, in turn, will lead to better cooperation and information from witnesses. The courts, meanwhile, must provide both specific legal protections and increased judicial sensitivity to witnesses. Without specific protections and increased sensitivity by investigators and judges, victims of sexual assault will not be adequately protected from the resulting stigma and the possibility of retribution by the accused.

To begin, investigators must be sensitive to the trauma the witnesses have experienced. Otherwise, victims and witnesses will be unwilling to help investigators. Currently, however, there is no formal training program for investigators on how to deal with witnesses.²⁰³ Instead, the WCC relies on international nongovernmental organizations to mediate when investigators interview victims of sexual assault.²⁰⁴ In addition to lacking a formal training program, the WCC also lacks any kind of guidelines for protecting witness sensitivity.²⁰⁵ As a result, there have been numerous complaints detailing the lack of sensitivity by investigators interviewing victims and witnesses.²⁰⁶

²⁰³ NARROWING THE IMPUNITY GAP, *supra* note 184, at 17.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Inadequate training and a lack of sensitivity on behalf of the investigators results in both the re-traumatization of victims and the ineffective investigation of sexually violent crimes.

This lack of sensitivity toward victims of sexually violent crimes is also evident in the Bosnian legal system. Although the Bosnian courts have implemented some general victim protections, there are no protections focused on victims of sexually violent crimes.²⁰⁷ The Bosnian laws meant to protect victims and witnesses are ineffective because they are too vague and place the burden of protecting victims on the judge.²⁰⁸

The primary law protecting victims and witnesses is too general to afford specific, effective protection. Article 25 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses vaguely requests that a court “adopt rules of procedure ensuring the appropriate use of the means to protect witnesses”²⁰⁹ These protections, available to victims and witnesses of all types of crimes, can include psychological and medical support, removal of the accused from the courtroom during testimony, and preventing the disclosure of the identity of the witness.²¹⁰ As written, however, these protections are too vague to confidently ensure victim protection.

For example, Article 6 nominally provides the victim with access to counseling: “[T]he Court . . . [shall] ensure that the body responsible for issues of social care is aware of the involvement of the vulnerable witness in the proceedings.”²¹¹ Article 6 is inadequate for several reasons. First, the onus is on the judge to recognize that the victim needs counseling.²¹² Not only may a judge be unable to recognize psychological trauma, but this also means that a victim will not have the possibility of counseling until after the indictment has been issued. This delay in access to care can re-traumatize the victim. In addition, the judge must only make the counseling body “aware” of the victim’s involvement.²¹³ Article 6 does not mandate that counseling or care be

²⁰⁷ See *Zakon o Zaštiti Svjedoka pod Prijetnjom i Ugroženih Svjedoka* [Law on Protection of Witnesses Under Threat and Vulnerable Witnesses], *SLUŽBENI GLASNIK BOSNE I HERCEGOVINE* [OFFICIAL GAZETTE OF BOSNIA AND HERZEGOVINA] (Mar. 1, 2003) No. 21/03 [hereinafter *Law on Protection of Witnesses*].

²⁰⁸ See, e.g., *id.* art. 8.

²⁰⁹ *Id.* art. 25.

²¹⁰ See *id.* arts. 6, 10, 13.

²¹¹ *Id.* art. 6.

²¹² *Id.* arts. 4, 6.

²¹³ *Id.* art. 6.

provided to a victim, just that a counselor be aware there is a victim who needs care.²¹⁴

As seen in Article 6, the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses places much of the burden of protection on the judge.²¹⁵ Furthermore, all of these protections are subject to the judge's complete discretion.²¹⁶ The reliance on judges to protect victims is troublesome because judges themselves have exhibited insensitivity to female victims. For example, there have been instances of victim-blaming by judges in the WCC. One judge "asked a woman if she was a virgin at the time of the alleged rape, and what she looked like when she was 16."²¹⁷ If a judge does not find a sexual assault victim's testimony convincing, the judge may remove the original protections. In one case, when the judges found the testimony of six (or seven) women unconvincing, the judges released their names to the public.²¹⁸ Furthermore, it is not uncommon for the names of victims to be leaked to the press.²¹⁹ The lack of specific protections in court and the insensitive treatment of the victims by judges mean that fewer women are willing to testify. Indeed, one victim stated, "It seems better to be a war criminal in this country than a victim."²²⁰

Here again the WCC should follow the ICTY's lead. The WCC must provide adequate training to its investigators and recognize that victims of sexually violent crimes require significant, specific protections if they choose to testify. A comprehensive gender strategy, similar to the one formulated by the ICTY, could ensure that victims and witnesses are protected in the WCC.

Bosnia took a significant step toward incorporating gender strategies in the WCC when it created the Witness Support Unit in 2011.²²¹ The Witness Support Unit provides assistance and psychological counseling to victims, including victims of sexually violent crimes.²²² Support services, such as legal

²¹⁴ *Id.*

²¹⁵ *Supra* note 212 and accompanying text.

²¹⁶ Law on Protection of Witnesses, art 4.

²¹⁷ *International Justice Failing Rape Victims*, INST. FOR WAR & PEACE REPORTING (Feb. 15, 2010), <http://iwpr.net/report-news/international-justice-failing-rape-victims> (quoting Madeleine Rees, Chief of Mission in Bosnia for the Office of the High Commissioner for Human Rights).

²¹⁸ *Id.* (quoting Bakira Hasečić, a rape victim of the Bosnian War).

²¹⁹ *Id.*

²²⁰ *Id.* (quoting Bakira Hasečić).

²²¹ Amnesty Int'l, *Bosnia-Herzegovina: Submission for European Commission Progress Report 4* (Amnesty Int'l Briefing, AI Index EUR 63/007/2012, 2012), available at <http://www.amnesty.org/en/library/asset/EUR63/007/2012/en/5673c9f5-d6cc-4544-a119-520461b1b9d8/eur630072012en.pdf>.

²²² *Id.*

assistance, medical care, and counseling are provided for victims willing to testify. These support services facilitate investigations, encourage victims to testify, and minimize the risks of re-traumatization.

The Bosnian Witness Support Unit is an improvement on the ICTY's VWU because the Bosnian unit is placed within the Office of the Prosecutor.²²³ The Witness Support Unit's organizational location within the OTP can facilitate coordination between the victims and the OTP, which in turn will facilitate the creation of a cohesive gender strategy. The Bosnian Witness Support Unit should take advantage of this facilitated coordination to enlighten investigators, prosecutors, and judges about sexual violence. By teaching about the effects of rape, the Witness Support Unit could alleviate gender bias in the system. Investigators could be trained to "recognize the range of effects that severe trauma may have on a person's memory."²²⁴ Information from the Unit could alert "judges to the fact that gaps in the memory of a rape survivor, far from discrediting her account, may signal the likelihood of trauma."²²⁵ The Witness Support Unit could also help the judges in their evaluation of a victim's testimony by having expert witnesses on hand to testify about the pattern of psychological recovery from rape. The Bosnian Witness Support Unit and the Prosecutor's Office should therefore take advantage of the opportunities that their organizational proximity provides.

In addition to maximizing the benefits of the Witness Support Unit, the WCC should incorporate a law similar to ICTY's Rule 96, which provides explicit protections to victims of sexually violent crime.²²⁶ Such a law would apply to all sexual assault victims, and the protections should be mandatory rather than at the discretion of a judge. The inclusion of requirements that protect victims' privacy and protect against retaliation will encourage victims to testify.

Explicit, mandatory victim protections are often inadequate to truly protect victims, as seen in the ICTY.²²⁷ Concerning the WCC, gender bias in the judicial branch must also be overcome. Again, some of the biases may be overcome by making victim protections mandatory, rather than at the judge's discretion. However, as illustrated by the ICTY,²²⁸ the eradication of gender

²²³ *Id.*

²²⁴ *No Justice*, *supra* note 85, at 105.

²²⁵ *Id.*

²²⁶ *See* ICTY Rules of Procedure and Evidence, *supra* note 101, r. 96.

²²⁷ *See supra* notes 113–19 and accompanying text.

²²⁸ *See supra* notes 73–81 and accompanying text.

bias can be accomplished through a comprehensive gender strategy in all divisions of the WCC.

In the absence of an office similar to the VWU, the ICTY's experience provides other effective methods of incorporating a comprehensive gender strategy. Investigators need specialized training in dealing with victims of sexual assault instead of relying on nongovernmental organizations. In particular, the creation of a specialized team of female investigators that only pursues sexually violent crimes, similar to the one created by the ICTY, would greatly improve the chances of an indictment for sexual violence. Furthermore, like the provisions found in Article 96 in the ICTY,²²⁹ the WCC needs witness protection provisions that are specifically aimed at victims of sexual assault. Increased sensitivity toward victims of sexual violence will greatly facilitate the prosecution of those crimes. With better training, extensive victim protections, increased victim participation, and a comprehensive gender strategy, the WCC will be able to prosecute sexually violent crimes effectively while avoiding the mistakes of the ICTY.

CONCLUSION

Accountability and reconciliation remain paramount in post-conflict societies. Ensuring accountability for crimes committed during the Yugoslav Wars was—and remains—an especially difficult challenge.²³⁰ The reinvigoration of the Bosnian justice system provides an optimistic opportunity to acknowledge and prosecute these crimes. As a relatively young legal system,²³¹ however, the Bosnian courts should reflect on and learn from the lessons of the ICTY, especially those that involve the prosecution of sexually violent crimes.

Sexually violent crimes committed during conflict are serious violations of international law,²³² and must be treated as such. If sexually violent crimes are nominally labeled violations of international law, but never prosecuted, then the law does not provide justice or redress to the victims. If there are no prosecutions for sexually violent crimes, then the legal system implicitly expresses a tolerance for these crimes. Although the ICTY initially struggled

²²⁹ ICTY Rules of Procedure and Evidence, *supra* note 101, r. 96.

²³⁰ See *supra* notes 46–47 and accompanying text.

²³¹ *Supra* note 158.

²³² Rome Statute of the International Criminal Court art. 8(2)(b)(xxi)–(xxii), (c)(ii), (e)(vi), *done* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

with the prosecution of sexually violent crimes, it also made remarkable strides.²³³

The WCC faces many of the same challenges in prosecuting sexually violent crimes that the ICTY encountered: lack of expertise and training, reluctant witnesses, and the inherent difficulties of prosecuting sexual crimes.²³⁴ However, the WCC need not make the same errors as the ICTY. Instead, the WCC should use the experiences and knowledge of the ICTY to avoid making the same mistakes. The fundamental lesson learned from the ICTY is the importance of a coherent and cohesive legal strategy for prosecuting sexually violent crimes. A fully integrated gender strategy must include the elimination of gender bias, a commitment to the prosecution of gender crimes, and the protection of victims and witnesses. This legal strategy could include specially trained investigators, a gender advisor in the OTP, and explicit protections for victims throughout the investigatory process and trial. By learning from the ICTY's experience, the WCC can effectively prosecute sexually violent crimes.

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²³³ See *supra* Part III.B–D.

²³⁴ See *supra* notes 182–96, 203–20 and accompanying text.

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