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Cover Page Footnote

International Law; Commercial Law; Law

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What is wonderful is that we come from all different systems and we are trying to create a system that is acceptable to all. We are doing pretty good thus far.

—ICTY Judge Gabrielle Kirk McDonald¹

For as long as organized human conflict has existed, the specter of wartime rape has loomed as a deplorable and historically unaddressed side effect of war.² The International Criminal Tribunal for the Former Yugoslavia (ICTY), created to hear cases arising from the conflict in that war-torn area, has had occasion to pass judgment on rape and sexual assault as sanctionable criminal offenses.³ This Comment analyzes the ways in which the procedural and evidentiary rules governing the ICTY's treatment of rape have been interpreted and applied in practice. It represents a close analysis of the treatment of rape by the judicial and prosecutorial arms of the ICTY through scrutiny of three cases in which sex crimes were charged and prosecuted in that international criminal court: *Prosecutor v. Dusko Tadić*,⁴ *Prosecutor v. Aejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo*,⁵ and *Prosecutor v. Anto Furundžija*.⁶

¹ Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-T, at T. 12 (May 11, 1995), <http://www.un.org/icty/ind-e.htm> [hereinafter *Tadić* Transcript].

² See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 7 (1975) (chronicling occurrences of wartime rape through 200 years of history).

³ See *infra* notes 28-41 and accompanying text.

⁴ Opinion and Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T (May 7, 1997), <http://www.un.org/icty/Tadić/trialc2/judgment-e/tad-tj970507e.htm> [hereinafter *Tadić* Judgment].

⁵ Judgment, *Prosecutor v. Delalic*, Case No. IT-96-21-T (Nov. 16, 1998), <http://www.un.org/icty/celebici/trialc2/judgment/main.htm> [hereinafter *Celebici* Judgment].

⁶ Judgment, *Prosecutor v. Furundžija*, Case No. IT-95-17/1T (Dec. 10, 1998), <http://www.un.org/icty/Furundžija/trialc2/judgment/main.htm> [hereinafter *Furundžija* Judgment].

While scholars have extensively written in advance of the Tribunal's deliberations on its capacity to adjudicate rape charges effectively, little in the way of primary source analysis has been done on those few cases wherein rape was actually charged, tried, and convicted under the Tribunal statute.⁷ This Comment weighs the substantial criticism and equally considerable praise the Tribunal has garnered concerning the treatment of rape by its rules of evidence and procedure against the actual application of those rules by the Tribunal.

I. Rape as a Weapon of War

In times of conflict, rape, whether occurring *en masse* or in isolated incidents, has long been employed as a weapon against female members of the adversary group.⁸ Viewed traditionally as one of the accepted "spoils of war," rape for hundreds of years represented a way for wartime victors to humiliate and demoralize the vanquished.⁹ While rape for the most part historically has been recognized as a crime under international law, it overwhelmingly has been viewed by the international community as an inevitable product of war, and as such, has seldom been prosecuted.¹⁰ Even where gender violence has been addressed by international courts, as in the case of the Nuremberg Trials,¹¹ the effect of widespread rape on a civilian population as well as the status of rape as a

⁷ See generally Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031 (1998) (presenting a comprehensive summation of prior criticisms of the ICTY).

⁸ BROWNMILLER, *supra* note 2, at 31-113. See generally Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 U.C.L.A. WOMEN'S L.J. 59, 71 (1993) (discussing in feminist terms the history of rape during war as a forum for the male assertion of dominance and aggression over the bodies of women).

⁹ Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* 21 (1997).

¹⁰ Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 46-47 (1997); *infra* note 39 and accompanying text. The domestic prosecution of wartime rape is not unprecedented; individual soldiers have been convicted in domestic courts for isolated acts of rape. Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

¹¹ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947-1949) [hereinafter NUREMBERG TRIAL] (containing the Tribunal's official documents).

sanctionable offense have been downplayed.¹²

Wartime acts of rape are calculated to shame the vanquished within their communities and give the victors a sense of power.¹³ Female victims of rape suffer first and foremost from its immediate physical and possible long-term psychological effects.¹⁴ These effects can be further aggravated in a wartime context when accompanied by other physical abuse, gang rapes, the death of family, and the loss of homes and possessions.¹⁵ The husbands and families of rape victims also may suffer ignominy or detachment from their communities as a result of the tremendous social stigma attached to rape in many countries.¹⁶ However, with the end of war usually comes a public desire to overcome past tragedy, and rapes are often overlooked in the rush to formulate peace agreements and divide up conquered territory.¹⁷

In the former Yugoslavia, the use of rape as a demoralizing weapon of war became an institutionalized practice.¹⁸ Rapes were part of a “carefully conceived and effective war strategy,” used as an instrument of fear, oppression, and humiliation.¹⁹ In 1995, United Nations War Crimes Commission head M. Cherif Bassiouni estimated 12,000 instances of both reported and

¹² The Charter authorizing the Nuremberg trials, for example, does not explicitly list rape as a criminal offense. See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, ANNEXED TO THE LONDON AGREEMENT, Aug. 8, 1945, 59 Stat. 1546, 1547, 8 U.N.T.S. 284, 288 [hereinafter NUREMBERG CHARTER]. Further, unlike the victim testimony admitted in ICTY rape proceedings, evidence of rape was submitted to the Nuremberg court only in the form of affidavits. ASKIN, *supra* note 9, at 54-59; NUREMBERG TRIAL, *supra* note 11.

¹³ BROWNMILLER, *supra* note 2, at 31-113.

¹⁴ Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 350 (1995).

¹⁵ *Id.* at 337.

¹⁶ *Id.* at 350.

¹⁷ See C.P.M. Cleiren and M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues*, 5 CRIM. L.F. 471, 481 (1994).

¹⁸ Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM U. L. REV. 793, 803 (1997); see also *Rape, A Weapon of War* (National Public Radio broadcast, July 2, 1999) (discussing rape as a war crime in the context of Kosovo).

¹⁹ Ray, *supra* note 18, at 801.

unreported rape in the former Yugoslavia.²⁰ Catherine A. MacKinnon, who counseled several Croatian women's organizations, set the number of rapes at 50,000 in 1992.²¹ However, speculative statistics do no justice to the types and numbers of rapes that occurred in the former Yugoslavia, as women were often repeatedly raped, gang raped, or publicly raped in front of their families or their entire community.²² Others were held in rape camps²³ for months, where Serbian²⁴ soldiers inflicted multiple and frequent sexual assaults on them daily.²⁵ Many reports state that Serbs used forced pregnancy against Muslim rape victims as a demoralizing means of increasing the Serbian population.²⁶ At the very least, Muslim rape victims feel isolated by the personal physical and emotional trauma of rape, while at worst, they may be asked to leave their communities as a result of the profound social stigma Muslim culture attaches to rape victims.²⁷

²⁰ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992) U.N. SCOR, Addendum Annex IX, at 70-71, U.N. Doc S/1994/674/Add.2 (Vol. I) (1995) (under the direction of M. Cherif Bassiouni, Chairman and Rapporteur on the Gathering and Analysis of the Facts).

²¹ Judy Mann, *Rape and War Crimes*, WASH. POST, Jan. 13, 1993, at D22.

²² See Healey, *supra* note 14, at 350.

²³ Rape camps were instituted by Serbian forces as military brothels and maintained to entertain men and perpetuate the Serbian race through forced pregnancy. See ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 174-75 (1998). See generally ROY GUTMAN, *A WITNESS TO GENOCIDE: THE 1993 PULITZER PRIZE-WINNING DISPATCHES ON THE "ETHNIC CLEANSING" OF BOSNIA*, (1993) (compilation of missives from one of the first journalists to report on the use of rape camps as a weapon of war in Bosnia).

²⁴ Acts of violence have been committed by all sides against all sides during the turmoil in the region of the former Yugoslavia, which has lasted for hundreds of years. See, e.g., M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 5-25 (1996) (detailing the struggles between peoples in this area of Eastern Europe). A discussion of the ethnicities of parties indicted and tried by the ICTY raises political implications that lie beyond the scope of this Comment.

²⁵ Darren Anne Nebesar, Comment, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147, 152 (1998); Catharine A. MacKinnon, *Turning Rape Into Pornography: Postmodern Genocide*, Ms., July-Aug. 1993, at 24.

²⁶ Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 86 (1994).

²⁷ Healey, *supra* note 14, at 339-40. Either way, the ICTY faces enormous

II. The International Criminal Tribunal for the Former Yugoslavia

In a 1992 Resolution, the United Nations Security Council for the first time in history condemned the practice of wartime rape as detailed in reports of “the massive, organized and systematic detention and rape” taking place in the former Yugoslavia.²⁸ Security Council Resolution 808 soon followed.²⁹ Citing the findings of the U.N. Commission of Experts charged with investigating war crimes in the region,³⁰ Resolution 808 expressed “grave concern” over the “treatment of Muslim women in the former Yugoslavia,” and declared that a tribunal should be established to address the problem.³¹ After seeking comments from state governments and non-governmental organizations (NGOs),³² the U.N. Office of Legal Affairs produced a draft statute establishing an international criminal court, which was unanimously approved by the Security Council on May 25, 1993 as Resolution 827.³³ Expressing “grave alarm” at continuing reports of the “rape of women” in the region,³⁴ this Resolution officially created the ICTY as an international body charged with “the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law” in the former Yugoslavia.³⁵

problems in motivating women to report rapes and testify about them publicly. *See infra* notes 267-70 and accompanying text regarding reluctance of rape victims to testify in the ICTY.

²⁸ S.C. Res. 798, U.N. SCOR, 47th Sess., 3150th mtg., U.N. Doc. S/INF/48 (1992).

²⁹ S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/INF/49 (1993) [hereinafter S.C. Resolution 808].

³⁰ *See id.*; Marlise Simmons, *U.N. Court, for First Time, Defines Rape as War Crime*, N.Y. TIMES, June 28, 1996, at A1.

³¹ S.C. Resolution 808, *supra* note 29.

³² NGOs, or Non-Governmental Organizations, are independent agencies such as Amnesty International and Human Rights Watch that claim no affiliation with any particular country. They give technical and political support to state governments and international bodies such as the U.N. BASSIOUNI & MANIKAS, *supra* note 24, at xvi.

³³ *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/INF/49 (1993) [hereinafter S.C. Resolution 827].

³⁴ *Id.*

³⁵ *Id.* The Security Council created the analogous International Criminal Tribunal for Rwanda (ICTR) in 1994 to prosecute war crimes taking place in that country. S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/INF/50 (1994)

The establishment of an international criminal court is not without precedent; the international community created criminal courts after World War II to try those accused of war crimes in Germany and Japan.³⁶ The U.N. has made efforts since then, especially over the last decade, to install a permanent international criminal court.³⁷ The ICTY's authorizing documents continue this trend.³⁸ They represent an historic step forward for the prosecution of wartime rape, due in particular to their recognition of this act as a crime worthy of sanction by the international community.³⁹ Although the intentions of the U.N. were heavily debated at first, the international legal community presently appears to agree that the references to rape in the ICTY's authorizing documents demonstrate the U.N.'s recognition of rape as a war crime, as well as an intent to prosecute it as a war crime through the ICTY.⁴⁰ Nonetheless, the prosecution of rape involves serious evidentiary and procedural difficulties, even when undertaken in peacetime

[hereinafter ICTR Statute].

³⁶ See generally NUREMBERG TRIAL, *supra* note 11, for documents authorizing the Nuremberg Trials; "Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity," Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946 (providing for the trial of certain defendants within the military zones they had occupied and authorizing the post-World War II trials of the "lesser" Nuremberg defendants); "International Military Tribunal for the Far East," Proclaimed at Tokyo, Jan. 19, 1946 and amended April 26, 1946, T.I.A.S. No. 1589 (entered into force Jan. 19, 1946), Annex, Charter of the International Military Tribunal for the Far East (Tokyo) (authorizing the post-World War II trials of Japanese defendants at Tokyo); NUREMBERG CHARTER, *supra* note 12 and accompanying text (discussing the treatment of rape at the Nuremberg trials under the Charter for the International Military Tribunal).

³⁷ Rome Statute of the International Criminal Court, U.N. Doc./ Conf.183/9 (1998); *International Criminal Court* (National Public Radio broadcast, July 17, 1998).

³⁸ See generally 1999 Annual Report of 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, A/54/187 (1999) [hereinafter 1999 ICTY Annual Report] (discussing the mandate and activities of the ICTY over a year-long period).

³⁹ ASKIN, *supra* note 9, at 298; *infra* notes 96-136 and accompanying text.

⁴⁰ Sellers & Okuizumi, *supra* note 10, at 46-50; Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* 3 HOFSTRA L. & POL'Y SYMP. 87, 103-04 (1999). In an address at the University of Iowa, former ICTY Chief Prosecutor Justice Richard Goldstone noted that "we in the Prosecutor's Office haven't hesitated to charge gender-related offenses as rape and sexual assault." *Symposium: Prosecuting International Crimes: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 3 (1997).

settings.⁴¹ The ICTY has experienced such difficulties in three illustrative cases: *Tadić*, *Delalic* (commonly referred to as *Celebici*), and *Furundžija*.⁴²

III. Synopsis of *Tadić*, *Celebici*, and *Furundžija*

A. Prosecutor v. Tadić

The prosecutor initially indicted Dusko Tadić, a Serbian and former cafe owner, for his alleged participation in, inter alia, the repeated beating, rape, murder, and torture of detainees at the Omarska, Keraterm, and Trnopolje detention camps within Bosnia-Herzegovina.⁴³ All public sessions of the *Tadić* trial were broadcast live within the former Yugoslavia.⁴⁴

Most noteworthy was the rape charge listed in the indictment. Tadić was accused of forcible sexual intercourse with a female prisoner, called by the pseudonym "F."⁴⁵ The prosecutor charged him with rape under each of the three aforementioned categories for causing "great suffering" and subjecting F to "cruel treatment."⁴⁶ Much of the confusion that still surrounds the outcome of this case arose from the form of the original indictment, which the prosecutor amended several times.⁴⁷ The prosecution sought to amend the indictment by dropping and

⁴¹ See Sellers & Okuizumi, *supra* note 10, at 46-50.

⁴² See *Tadić* Judgment, *supra* note 4; *Celebici* Judgment, *supra* note 5; *Furundžija* Judgment; *supra* note 6.

⁴³ Indictment, Prosecutor v. Tadić, Case No. IT-94-1 (Feb. 13, 1995), <http://www.un.org/icty/indictment/english/tad-ii950213e.htm>, amended by Case No. IT-94-1-T (Sept. 1, 1995), <http://www.un.org/icty/indictment/english/tad-1ai950901e.htm>, amended by Case No. IT-94-1-T (Dec. 14, 1995), <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm> [hereinafter *Tadić* Indictment].

⁴⁴ *Tadić* Judgment, *supra* note 4, para. 10. The offenses alleged were charged under the ICTY Statute as grave breaches, violations of the laws or customs of war, and crimes against humanity. *Id.* para. 9; *infra* notes 98-130 and accompanying text for definitions and analysis of these charges. See also NEIER, *supra* note 23, at photo insert (displaying photos of the *Tadić* trial).

⁴⁵ *Tadić* Indictment, *supra* note 43, para. 5.

⁴⁶ *Id.* For a discussion of each of the areas of jurisdiction listed under the ICTY Statute, see *infra* notes 98-130 and accompanying text.

⁴⁷ *Tadić* Indictment, *supra* note 43; Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 101 (1999).

adding charges as evidence gradually became available.⁴⁸ Technical amendments were also made to reorganize the charges in the interest of clarity, as the original indictment did not list the crimes charged by count.⁴⁹ Later amendments charged Tadić with crimes against humanity for his alleged participation in the torture and rape of more than twelve female detainees.⁵⁰ The prosecutor also charged *Tadić* with crimes against humanity for the killing and torture of Muslims and Croats in the Omarska detention camp, which included beatings and sexual mutilation.⁵¹ The procedural glitch embodied in the Prosecutor's multiple amendments to the indictment may betray a learning curve, as *Tadić* was the first trial to be brought to completion in the ICTY.⁵²

The determinations of appropriate protective measures for witnesses made by the *Tadić* trial chamber stand as benchmark decisions for subsequent ICTY proceedings.⁵³ Despite the prosecution's offer of protective measures to Witness F, she ultimately refused to testify due to fear of reprisal.⁵⁴ Further, when the cross-examiner discredited the testimony of a corroborating witness to the rape of F, the prosecutor dropped all rape charges against Tadić.⁵⁵ This was a disappointment in the international legal community, as many anticipated *Tadić* to be the first war crimes trial in history to prosecute rape as an offense independent from the other crimes charged.⁵⁶ However, the prosecutor ultimately convicted Tadić under another provision of the ICTY Statute for, inter alia, crimes of sexual violence, namely, aiding

⁴⁸ Tadić Judgment, *supra* note 4, paras. 17, 27.

⁴⁹ *Id.* para. 17.

⁵⁰ Tadić Indictment, *supra* note 43, para. 5.

⁵¹ *Id.*

⁵² Tadić Judgment, *supra* note 4, para. 1.

⁵³ Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, (August 10, 1995), <http://www.un.org/icty/ind-e.htm> [hereinafter Tadić Decision on Protective Measures]. Regarding protective measures for witnesses generally, *see infra* notes 267-323 and accompanying text.

⁵⁴ Askin, *supra* note 47, at 101.

⁵⁵ Order on the Prosecution Motion to Withdraw Counts 2 through 4 of the Indictment without Prejudice, Prosecutor v. Tadić, Case No. IT-94-1-T (June 25, 1996); Tadić Judgment, *supra* note 4, para. 33.

⁵⁶ Askin, *supra* note 47, at 101.

and abetting the sexual mutilation of a male Omarska prisoner, and aiding and abetting persecution, including sexual assault.⁵⁷ The Tribunal sentenced him to a term of twenty years.⁵⁸

B. Prosecutor v. Delalic and others (Celebici)

The *Celebici* indictment charged four defendants with participation in atrocities at the Celebici prison camp, where officials “killed, tortured, sexually assaulted, beat and otherwise subjected [detainees] to cruel and inhuman treatment.”⁵⁹ As the first multi-defendant trial in the ICTY, *Celebici* took nineteen months in total, and involved 122 testifying witnesses, 691 exhibits, and numerous decisions, orders, and interlocutory appeals.⁶⁰ The ICTY acquitted only defendant Zejnil Delalic of all charges.⁶¹

The ICTY convicted *Celebici* defendant Zdravko Mucic under the doctrine of command responsibility for sex crimes that took place within his battalion, including his role in forcing two brothers to commit fellatio upon each other, and lighting a slow-burning fuse that he had tied around a male prisoner’s genitals.⁶² The prosecutor charged these acts as “cruel treatment” and

⁵⁷ Tadić Judgment, *supra* note 4, paras. 715, 718, 722, 726; *see generally infra* note 142 and accompanying text (discussing Tadić’s acquittal on the grave breach charges).

⁵⁸ Sentencing Judgment, Prosecutor v. Tadić, Case No. IT-94-1-T (July 14, 1997), <http://www.un.org/icty/tadic/trialc2/jugement-e/tad-ts9/0/14e.htm> [hereinafter 1997 Tadić Sentencing Judgment]. For a discussion of sentencing in the ICTY, *see infra* notes 349-70 and accompanying text.

⁵⁹ Indictment, Prosecutor v. Delalic, Case No. IT-96-21 (Mar. 21, 1996), <http://www.un.org/icty/indictment/english/cel-ii960321e.htm> [hereinafter Celebici Indictment]. *See also* ICTY Press Release, *Celebici Case: The Judgement of the Trial Chamber*, ICTY Doc. CC/PIU/364-E (Nov. 16, 1998) [hereinafter Celebici Press Release] (presenting a concise summary of the judgment).

⁶⁰ 1999 ICTY Annual Report, *supra* note 37, para. 17.

⁶¹ *Id.* para. 20. Convictions of the *Celebici* defendants were obtained under the grave breach and violations of the laws or customs of war provisions of the ICTY Statute. *See infra* notes 98-130 and accompanying text for definitions and analysis of these charges.

⁶² Celebici Judgment, *supra* note 5, para. 1019 (quoting Celebici Indictment, *supra* note 59), and para. 1060 (quoting Celebici Indictment, *id.*). “He forced me to do oral sex with my own brother. [Landzo] took this piece of slow-burning fuse . . . [and] wound it round my anus. He put one end inside and the other round my penis. Then he lit it.” Transcript, *Prosecutor v. Delalic*, Case No. IT-96-21-T, at T. 4358 (July 7, 1997), <http://www.un.org/icty/ind-e.htm> [hereinafter Celebici Transcript].

“willfully causing great suffering or serious injury.”⁶³ As in *Tadić*, the prosecutors charged and tried sex crimes against male prisoners at Celebici along with sex crimes against women.⁶⁴ The Tribunal sentenced Mucic to seven years in prison for his complicity in these crimes of sexual violence.⁶⁵

The ICTY did not find Esad Landzo guilty of any sex crimes.⁶⁶ However, the Judgment of the Trial Chamber noted that, although the prosecutor did not charge Landzo with any sex-related assaults, he had admitted to participating in the fuse-tying and fellatio incidents.⁶⁷ ICTY judge Karibi-Whyte expressed concern about the “depravity of mind necessary to conceive of and inflict such forms of suffering.”⁶⁸ The Judge further stated that “[i]t is most disturbing to see such propensity for violence and disregard for human life and dignity in one so young.”⁶⁹ The ICTY sentenced Landzo to fifteen years in prison for murder, torture, and submitting Celebici detainees to inhumane conditions.⁷⁰

The Tribunal found defendant Hazim Delic guilty of the brutal and repeated rapes of two women imprisoned in the Celebici prison camp.⁷¹ After interrogating his first victim, Grozdana Cecez, Delic raped her in front of two other men.⁷² “Dzajic was lying on a bed next to the window and . . . Cosic . . . remained there until [Delic] was done.”⁷³ She was later raped by at least five other men

⁶³ Celebici Press Release, *supra* note 59.

⁶⁴ Askin, *supra* note 47, at 104, 114-15.

⁶⁵ Celebici Judgment, *supra* note 5, para. 1285. For further discussion of the sentencing of Celebici defendants, *see infra* notes 356-58 and accompanying text.

⁶⁶ It is unclear why the Prosecutor failed to charge Landzo with sex crimes. *See* Celebici Judgment, *supra* note 5, para. 1276.

⁶⁷ *Id.*

⁶⁸ *Id.*; Celebici Transcript, *supra* note 62, at T. 4358 (July 7, 1997).

⁶⁹ Celebici Press Release, *supra* note 59.

⁷⁰ *Id.*

⁷¹ Celebici Judgment, *supra* note 5, para. 1285.

⁷² According to Cecez:

[H]e asked me to take off my clothes and then he started taking off clothes from me. It was the trousers, the skirt, the panties, and then he put me on my chest and he started raping me. I didn't realize that this would be happening to me, this at the end of the 20th century, that someone would allow themselves to do.

Celebici Transcript, *supra* note 62, at T. 493 (Mar. 17, 1997).

⁷³ *Id.*

during the two-month period of her detention.⁷⁴ Delic also raped prisoner Milojka Antic on three separate occasions, both vaginally and anally, after interrogating her.⁷⁵ “The following day . . . he asked me . . . how I felt. I was looking right in front of me and started to cry straightaway. He said: “Why are you crying? This will not be your last time.’ . . . I felt so miserably, I was constantly crying . . . as if I had gone crazy.”⁷⁶ The ICTY convicted Delic of the rapes of these two women, which the Trial Chamber defined as a form of torture as well as murder and cruel treatment, and is currently serving a fifteen-year sentence.⁷⁷

C. Prosecutor v. Anto Furundžija

In a December 10, 1998 Judgment, the Trial Chamber found defendant Anto Furundžija guilty of violations of the laws or customs of war on the basis of command responsibility for his role in the rape of Victim A in the village of Nadioci.⁷⁸ Much of the testimony in this case took place in closed session due to protective measures granted by the Trial Chamber, which makes analysis of the proceedings from an evidentiary or procedural standpoint difficult.⁷⁹ The Trial Chamber did find, however, that Furundžija, the local commander of a special unit of military police called “the Jokers,” interrogated A.⁸⁰ While he did so, another man, Accused B, threatened A by rubbing his knife along her thighs and stomach, and telling her he would put the knife inside her vagina if she failed to tell the truth.⁸¹ Then the second man raped A both vaginally and orally in the presence of Furundžija and another prisoner, Witness D.⁸² Forced to remain

⁷⁴ “It was difficult for me. I was a woman who only lived for one man and I was his all my life . . . I said how [can I] go back to my husband and my children and my family.” *Id.* at T. 503 (Mar. 17, 1997).

⁷⁵ Celebici Judgment, *supra* note 5, para. 957.

⁷⁶ Celebici Transcript, *supra* note 62, at T. 1780.

⁷⁷ Celebici Judgment, *supra* note 5, para. 965.

⁷⁸ Furundžija Judgment, *supra* note 6, paras. 269, 275.

⁷⁹ See Askin, *supra* note 47, at 110.

⁸⁰ Furundžija Judgment, *supra* note 6, para. 124.

⁸¹ Amended Indictment, Prosecutor v. Furundžija Case No. IT-95-17/1-PT, paras. 25-26, (June 2, 1998), <http://www.un.org/icty/indictment/english/fur-1ai980602e.htm>.

⁸² Furundžija Judgment, *supra* note 6, para. 125.

naked, A was then taken to another room, where she was again raped by Accused B in front of an audience of soldiers.⁸³ Following the precedent set by *Celebici*, the Trial Chamber characterized the assault as an act of torture under Article 3 of the ICTY Statute, and noted that this act satisfied the elements of rape, which it based in large part on the definition established by the International Criminal Tribunal for Rwanda (ICTR) in its *Prosecutor v. Akayesu* decision.⁸⁴ Furundžija was sentenced to ten years.⁸⁵

IV. Jurisdiction and Mandate of the ICTY

The ICTY, as an arm of the United Nations Security Council, has jurisdiction over “serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁸⁶ In addition, the Secretary-General mandated that, in trying these crimes, the ICTY restrict itself only to application of international humanitarian law, and refrain from creating new law.⁸⁷ In accordance with the legal principle *nullem crimen sine lege*—no crime without law—the Security Council expressly limited ICTY jurisdiction solely to trial and punishment for violations of recognized international law.⁸⁸

⁸³ “Accused B forced her to perform oral sex on him. He raped her vaginally and anally, and made her lick his penis clean.” Furundžija Judgment, *supra* note 6, para. 87. These later rapes were not considered by the Trial Court in its determination of Furundžija’s culpability. Presumably, an investigation and indictment of Accused B regarding these acts is forthcoming. *Id.* para. 81.

⁸⁴ *Id.* paras. 176, 185; Judgment, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998), <http://www.ictor.org/ENGLISH/cases/Akeyesu/judgment/akay001.htm> [hereinafter *Akayesu* Judgment]. See also *infra* notes 180-90 and accompanying text for discussion of the significance of *Akayesu* to *Furundžija*.

⁸⁵ Furundžija Judgment, *supra* note 6, para. 296. For discussion of ICTY sentencing protocol, see *infra* notes 349-70 and accompanying text.

⁸⁶ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at 9, 33 (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163 [hereinafter *Report of the Secretary-General*].

⁸⁷ *Id.* at 8, 29.

⁸⁸ *Id.* at 9, 34. “Recognized” law under the ICTY Statute includes both conventional and customary law generally observed by the international community, but tension may arise regarding application of that law to countries that have not bound themselves by treaty obligations. Accordingly, the Secretary General states that the ICTY must “apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to

ICTY rape prosecutions conflict with the Security Council's mandate on a fundamental level. Although rape is recognized under an amalgam of both customary and conventional international law, no clear-cut definition of rape existed under international law prior to the genesis of the ICTY.⁸⁹ The ICTY thus faces a unique dilemma. It has been directed, on the one hand, to try sexual assault cases under a statute that offers groundbreaking international recognition of the crime of rape.⁹⁰ However, the ICTY's mandate explicitly prohibits it from applying anything other than accepted definitions of international humanitarian law.⁹¹ Consequently, the ICTY's interpretation of the legal gray area occupied by rape under international humanitarian law cannot help but position it in what some would call a legislative role.⁹²

The ICTY has chosen both to define rape in express terms, and to categorize it within the more internationally recognized crime

specific conventions does not arise." *Id.* See generally BASSIOUNI & MANIKAS, *supra* note 24, at 259-60 (discussing intent behind Security Council's drafting of the ICTY Statute).

In contrast, the ICTR Statute, *supra* note 35, has received a fair amount of criticism regarding the scope of its jurisdiction, which some believe presents *ex post facto* problems. See Alvarez, *supra* note 7, at 2076. ICTR jurisdiction extends to Common Article 3 of the Geneva Conventions, which has never formed the basis for criminal liability in any court, and Article 4 of Additional Protocol I to the Geneva Convention, which arguably does not constitute established customary international law. See *id.* Cf. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM J. INT'L L. 554 (1995) (defending jurisdiction of the ICTR Statute on Common Article 3 grounds).

⁸⁹ Cleiren & Tijssen, *supra* note 17, at 476; Sellers & Okuzumi and Meron, *supra* note 10 and accompanying text. See also BASSIOUNI & MANIKAS, *supra* note 24, at 560 (discussing fragmentary and inconsistent treatment of rape as a crime under various international agreements and conventions).

⁹⁰ Cleiren & Tijssen, *supra* note 17, at 474. The Annex to the Secretary-General's Report contains the Statute of the International Tribunal. See Report of the Secretary-General, *supra* note 86, Annex at 36, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1192 [hereinafter ICTY Statute]. Article 5 of the Statute is the only one of the four subject matter jurisdiction areas to explicitly list rape as a crime against humanity. See *id.*

⁹¹ Report of the Secretary-General, *supra* note 86, at 9, para. 35.

⁹² In *Furundžija*, for example, the ICTY characterizes rape as torture and sets forth the "objective elements" of rape. See *Furundžija* Judgment, *supra* note 6, paras. 163, 185. While the ICTY bases its ruling on precedent set by *Aydin*, *Mejia*, and *Akayesu*, these cases themselves may not represent recognized international law. See *infra* notes 185-87. See also Meron, *supra* note 10 (presenting a useful survey of the normative development of rape and its current status under international humanitarian law).

of torture.⁹³ Ultimately, the ICTY retains broad power to set precedent (and, indeed, has exercised that power) through selective application of international law.⁹⁴ The treatment of rape by the ICTY Statute has been cited as precedent in other international judicial bodies, such as the Inter-American Commission on Human Rights.⁹⁵

A. Subject Matter Jurisdiction Over the Crime of Rape

Four categories of crimes fall under the ICTY's jurisdiction: Article 2 deals with grave breaches of the Geneva Convention of 1949; Article 3 addresses violations of the laws or customs of war; Article 4 delineates the crime of genocide; and Article 5 recognizes crimes against humanity.⁹⁶ To date, with the exception of genocide, express charges of rape have been brought by the ICTY Prosecutor under each of these areas.⁹⁷

The grave breach provisions of Article 2 apply only to armed conflicts of an international character.⁹⁸ They include "willful killing . . . torture or inhumane treatment . . . [and] willfully causing great suffering or serious injury to body or health."⁹⁹ A nexus between the armed conflict and the alleged offense must also be shown.¹⁰⁰ Additionally, to establish a grave breach, the

⁹³ See *infra* notes 188-91 and accompanying text for a discussion of the ICTY's incorporation of international precedents in its definition of torture. For discussion of the use of precedent in legal systems generally, see *infra* note 188.

⁹⁴ Tadić Judgment, *supra* note 4; Celebici Judgment, *supra* note 5. See also Furundžija Judgment, *supra* note 6, paras. 137, 140 (containing an interesting mention of the treatment of torture in the Nuremberg Trials).

⁹⁵ Mart' de Mejia v. Perce, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91.7.

⁹⁶ ICTY Statute, *supra* note 90.

⁹⁷ Sellers & Okuizumi, *supra* note 10, at 6. Rape has been charged as genocide in the Tribunal for Rwanda under the ICTR Statute. See ICTR Statute, *supra* note 35; Akayesu Judgment, *supra* note 84.

⁹⁸ ICTY Statute, *supra* note 90. The requirement of international armed conflict was established by the ICTY Appeals Chamber in *Tadić*. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1, paras. 80-84, (Oct. 2, 1995), <http://www.un.org/icty/ind-e.htm> [hereinafter *Tadić* Interlocutory Appeal].

⁹⁹ ICTY Statute, *supra* note 90, at Art. 2.

¹⁰⁰ See Sentencing Appeal, *Prosecutor v. Tadić*, Case No. IT-94-1, para. 572 (July 15, 1999), <http://www.un.org/icty/tadic/appeal/judgement/main.htm> [hereinafter *Tadić*

Prosecutor must prove that the perpetrator was linked to one side of the conflict, and that the victim was a protected citizen of another nationality, as defined by Geneva Convention provisions.¹⁰¹ Another prosecutorial hurdle therefore consists of proving that the parties involved were on opposite sides, a burden that, if not satisfied, results in acquittal for grave breach charges.¹⁰² This is often difficult to prove in a region as politically tumultuous as the former Yugoslavia.¹⁰³ Even if the parties do claim allegiance to a particular state, the government may not be recognized by the United Nations.¹⁰⁴

Although Article 2 does not explicitly enumerate rape as a grave breach, the ICTY has interpreted this provision to include rape, both implicitly as torture,¹⁰⁵ as well as through the application of the Additional Protocols to the Geneva Convention as customary international law.¹⁰⁶ While the inclusion of Protocols I and II is desirable as an interpretive tool, because they both expressly prohibit rape,¹⁰⁷ neither of the Protocols appears on the Report of the Secretary-General's list of instruments recognized under international law.¹⁰⁸ Nonetheless, the ICTY Trial Chamber in

Appeal].

¹⁰¹ Celebici Judgment, *supra* note 5, para. 274.

¹⁰² Victims of rape who are the same nationality as their rapists are not protected under Article 2 of the ICTY Statute. Kristijan Zic, *The International Criminal Tribunal for the Former Yugoslavia: Applying International Law to War Criminals*, B. U. INT'L L.J. 507, 518-19 (1998). Tadić initially was found not guilty of the grave breach counts against him as a result of this requirement, because he and his victims were held to be of the same nationality. Some of these counts involved crimes of sexual violence. Tadić Judgment, *supra* note 4, para. 608; *infra* notes 140-43 and accompanying text.

¹⁰³ Zic, *supra* note 102, at 518-25.

¹⁰⁴ *Id.* Judge McDonald's dissent from the majority's Article 2 analysis in *Tadić* illustrates this dilemma. Tadić Judgment, *supra* note 4 (McDonald, J., dissenting).

¹⁰⁵ Celebici Judgment, *supra* note 5, para. 459. See also *infra* notes 170-214 and accompanying text for discussion of rape as torture.

¹⁰⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. See also *supra* notes 87-88 and accompanying text (discussing the ICTY's mandate to apply only "recognized" international law).

¹⁰⁷ Protocols I and II, *supra* note 106.

¹⁰⁸ Report of the Secretary-General, *supra* note 86, para. 35.

Celebici unequivocally recognized rape as a violation of international humanitarian law under both Protocols I and II, thus removing the Prosecutor's burden of proving that rape may appropriately be classified as a grave breach under the ICTY Statute.¹⁰⁹

Article 3 of the ICTY Statute deals with violations of the laws or customs of war.¹¹⁰ Like the grave breach provision, Article 3 does not expressly mention rape, but instead presents a nonexclusive list which includes prohibitions against "wanton destruction of cities, towns, or villages . . . [and] plunder of public and private property."¹¹¹ It provides individual criminal responsibility for those engaging in violations of conventional law, customary law, or customs of war.¹¹² As a codification of the Annex to the 1907 Hague Convention, Article 3 was originally interpreted to apply to international armed conflicts.¹¹³ Presently, however, the ICTY hold that, under Article 3, "[I]t is immaterial whether the breach occurs within the context of an international or internal armed conflict."¹¹⁴ In addition, the prohibited acts must have been "serious" breaches involving "grave consequences," committed against persons not involved in the hostilities.¹¹⁵

Article 4 endows the ICTY with jurisdiction over the crime of genocide.¹¹⁶ Defined as an act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," genocidal activities under the ICTY Statute expressly include killing and the infliction of serious bodily or mental harm, but not

¹⁰⁹ *Celebici* Judgment, *supra* note 5, para. 476.

¹¹⁰ ICTY Statute, *supra* note 90.

¹¹¹ *Id.*

¹¹² *See id.* at Art. 7. Regarding liability of individuals as opposed to states, *see infra* notes 154-56 and accompanying text.

¹¹³ Report of the Secretary-General, *supra* note 86, para. 44.

¹¹⁴ *Furundžija* Judgment, *supra* note 6, para. 132.

¹¹⁵ *Tadić* Judgment, *supra* note 4, para. 610. In the *Tadić* Judgment, the Court describes the rights protected from serious breaches involving grave consequences as those "recognized as indispensable by civilised peoples" under "'elementary' considerations of humanity" and "'important values.'" *Id.* para. 612 (quoting Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, para. 218)).

¹¹⁶ ICTY Statute, *supra* note 90.

rape.¹¹⁷ Nevertheless, the Genocide Convention, recognized in the Report of the Secretary-General as an instrument of customary international law,¹¹⁸ can reasonably be interpreted to include individual responsibility for rape.¹¹⁹ Describing rape as a form of genocide, Kelly Dawn Askin, Visiting Scholar at the Notre Dame Center for Civil and Human Rights, noted that “[w]hen sexual assault crimes are deliberately inflicted upon an ethnic group in an effort to cause that group’s destruction, wholly or partially . . . genocidal rape is established.”¹²⁰ Although it seems that the Tribunal would agree, the ICTY Prosecutor has yet to try rape as genocide under Article 4.¹²¹ However, in an historic case, the ICTR tried and convicted former mayor Jean-Paul Akayesu of genocide for his complicity in acts of mass rape committed in Rwanda.¹²² While the international conflict and armed conflict elements required by the other Articles of the ICTY Statute are absent from the crime of genocide,¹²³ proof of genocide presents other prosecutorial difficulties, such as the widespread nature of the oppression, and the fact that it need not be purely physical.¹²⁴

Finally, the ICTY has jurisdiction over crimes against humanity under Article 5 of the ICTY Statute.¹²⁵ Notably, this section of the statute is the only one that expressly lists rape as a punishable offense.¹²⁶ First formally defined in the Charter of the International Military Tribunal at Nuremberg, crimes against humanity include murder, torture, rape, persecution, and “other

¹¹⁷ See *id.* at Art. 4(2). Proof of *mens rea* for genocide is especially difficult, and usually requires an extensive analysis of the *actus reus* of the alleged crime. See ASKIN, *supra* note 9, at 338.

¹¹⁸ Report of the Secretary-General, *supra* note 86, para. 45.

¹¹⁹ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260A (III), 78 U.N.T.S. 277; ASKIN, *supra* note 9, at 342-43.

¹²⁰ ASKIN, *supra* note 9, at 339.

¹²¹ Sexual assault was charged as genocide in the Kovacevic and Drljaca Indictment, but both defendants died before ICTY trial proceedings were completed. See Case No. IT-97-24 (Mar. 13, 1997).

¹²² Akayesu Judgment, *supra* note 84, at 7.8.

¹²³ ICTY Statute, *supra* note 90; Healey, *supra* note 14, at 365.

¹²⁴ Healey, *supra* note 14.

¹²⁵ ICTY Statute, *supra* note 90.

¹²⁶ *Id.*

inhumane acts.”¹²⁷ To constitute crimes against humanity, these acts must be linked to the existence of an armed conflict, either international or internal.¹²⁸ The ICTY Statute also implicitly requires that crimes against humanity arise from an official state action or policy, and that they be directed against a civilian population as part of a “widespread or systematic attack.”¹²⁹ Notoriously hard to prove, both of these elements require the ICTY Prosecutor in many cases to undertake extensive investigation under war-like conditions that are less than ideal for gathering and preserving evidence.¹³⁰

Other more practical concerns also plague the ICTY. As an international body and an arm of the United Nations, the ICTY frequently encounters enforcement difficulties.¹³¹ It has no true enforcement body, but can only lodge a complaint with the Security Council should it encounter noncompliance on the part of states.¹³² Noncompliance by the former Yugoslavia with arrests and deportations ordered by the ICTY has presented a consistent problem.¹³³ Additionally, the ICTY relies heavily on financial support by member states.¹³⁴ On a positive note, the ICTY’s financial backing at present appears to be steady,¹³⁵ in contrast to funding difficulties experienced in past years.¹³⁶

¹²⁷ *Id.*; NUREMBERG CHARTER, *supra* note 12.

¹²⁸ BASSIOUNI & MANIKAS, *supra* note 24, at 547-48.

¹²⁹ Report of the Secretary-General, *supra* note 86, para. 48; ICTY Statute, *supra* note 90, at Art. 5.

¹³⁰ Pratt & Fletcher, *supra* note 26, at 79.

¹³¹ 1998 Annual Report of 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, A/53/219, paras. 218, 253 (Aug. 10, 1998) [hereinafter 1998 ICTY Annual Report].

¹³² *See id.* at para. 248.

¹³³ 1999 ICTY Annual Report, *supra* note 38, para. 4.

¹³⁴ 1998 ICTY Annual Report, *supra* note 131, para. 281.

¹³⁵ *See* 1999 ICTY Annual Report, *supra* note 38, paras. 170, 171.

¹³⁶ *See id.*

B. Charging Rape Under the ICTY Statute

1. Subject Matter Jurisdiction Issues

Article 3, which encompasses violations of the laws or customs of war, has been interpreted as a catch-all provision intended to cover, in residual fashion, crimes that might otherwise slip through the cracks of ICTY jurisdiction.¹³⁷ While a catchall provision surely is a helpful tool for facilitating the prosecution of rapes that might otherwise evade recognition, the all-purpose nature of Article 3 could ultimately downplay official recognition of rape as a serious war crime worthy of international sanction.¹³⁸ For example, isolated occurrences of rape might be classified as violations under Article 3 jurisdiction rather than as “serious” offenses constituting grave breaches under Article 2.¹³⁹

Further, because ICTY jurisprudence requires proof of an international armed conflict to charge a crime as a grave breach, it may inadvertently force its prosecutors to charge rape as a violation of the laws or customs of war rather than as a violation of Article 2.¹⁴⁰ Indeed, recent amendments to ICTY indictments that dropped grave breach charges reflect the possibility that prosecutors have felt the impact of the heightened proof required to demonstrate the existence of an international conflict.¹⁴¹ The prosecution in *Furundžija*, for example, declared that it would not pursue the grave breach charges listed in the initial November 2,

¹³⁷ Tadić Interlocutory Appeal, *supra* note 98, para. 91 (noting that “Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable”); *Furundžija* Judgment, *supra* note 6, para. 14 (stating that “Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved.”).

¹³⁸ Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 69-70 (1999).

¹³⁹ See ASKIN, *supra* note 9, at 313-14. *Celebici* illustrates the indeterminacy of the “serious” nature of Article 2 grave breach violations. Here, the Tribunal found defendant Hazim Delic guilty of two grave breach counts for the rapes of two different women. While the rapes could have been viewed as separate and isolated acts of violence under Article 3, the Tribunal instead charged the rapes as torture, a crime which is arguably more widely recognized as serious by the international community. See *infra* notes 170-214 and accompanying text for discussion of rape as torture.

¹⁴⁰ Murphy, *supra* note 138, at 68.

¹⁴¹ *Id.*; *Furundžija* Judgment, *supra* note 6, para. 7.

1995 indictment, and the Court granted leave to withdraw that count on March 13, 1998.¹⁴² This decision most likely arose from the May 7, 1997 *Tadić* Judgment, which acquitted the defendant of all grave breach charges due to the prosecution's failure to establish beyond a reasonable doubt the existence of an international armed conflict.¹⁴³

The international armed conflict requirement was softened somewhat when, on July 15, 1999, the ICTY Appeals Chamber reversed *Tadić* in part, holding that an international armed conflict did in fact exist in the region during 1992.¹⁴⁴ The Appeals Chamber stated that because "the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply," a guilty verdict must be entered against *Tadić* on six counts of grave breaches.¹⁴⁵ This decision squares the facts of the earlier *Tadić* judgment with facts established in the subsequent *Celebici* judgment, which found that an international conflict did exist in the former Yugoslavia throughout 1992, the period during which the offenses in both cases occurred.¹⁴⁶ The *Tadić* Appeal Decision will have slightly different repercussions for defendant Furundžija, however.¹⁴⁷ If the Prosecutor chooses to pursue the grave breaches initially charged in *Furundžija*, presumably it must try the accused for those offenses because, unlike *Celebici*, the counts were withdrawn prior to trial.¹⁴⁸

Article 5, crimes against humanity, requires proof of rape on a mass scale or systematic basis, a much higher burden for prosecutors than that required to prove war crimes, and probably

¹⁴² Furundžija Judgment, *supra* note 6, para. 7-8.

¹⁴³ *Tadić* Judgment, *supra* note 4, paras. 607, 608.

¹⁴⁴ *Tadić* Appeal, *supra* note 100.

¹⁴⁵ *Id.*

¹⁴⁶ For a background of *Tadić* and *Celebici*, see *supra* notes 43-77 and accompanying text. Cf. Olivia Swaak-Goldman, *Constituting Torture as Grave Breach of 1949 Geneva Conventions and Violation of Laws or Customs of War-Characterization of Conflict in Bosnia and Herzegovina*, 93 AM. J. INT'L L. 514, 518 (1999) (noting the inconsistency between the *Tadić* and *Celebici* trial court findings regarding the existence of an international conflict in the same region during the same period).

¹⁴⁷ *Tadić* Appeal, *supra* note 100.

¹⁴⁸ *Id.*

grave breaches as well.¹⁴⁹ As a result, although rape is explicitly listed as a crime against humanity under the ICTY Statute, rape is charged more often under Articles 2 and 3 than under Article 5.¹⁵⁰ Of the three trials involving rape which have presently been brought to completion in the ICTY, only one—*Celebici*—resulted in conviction for rape as a grave breach.¹⁵¹ More often, rape has been charged as a violation of the laws or customs of war.¹⁵² While the charges are reasonable given the specific circumstances of these cases, ICTY jurisprudence that sets the bar very high for the prosecution of rape under certain statutory provisions may have chilled prosecutorial zeal.¹⁵³

2. *Individual Liability, Command Responsibility, and State Sovereignty*

The Nuremberg Trials were the first international criminal proceedings based on principles of individual criminal liability.¹⁵⁴ The ICTY continues the recent international law trend of applying criminal responsibility toward individuals rather than toward states as sovereigns.¹⁵⁵ Under the ICTY Statute, any and all individuals, whether they are in command or carrying out orders, can be charged with war crimes.¹⁵⁶ Further, the status of the ICTY as an international body lends legitimacy to its proceedings and subverts the criticism of “victors’ justice” that tainted the Nuremberg

¹⁴⁹ ICTY Statute, *supra* note 90.

¹⁵⁰ *Id.*

¹⁵¹ *Celebici* Judgment, *supra* note 5, para. 1285. Grave breach charges were withdrawn in both *Furundžija* and *Tadić*. *Furundžija* Judgment, *supra* note 6, para. 7; *Tadić* Judgment, *supra* note 4, para. 27.

¹⁵² *Tadić* Judgment, *supra* note 4, para. 9; *Celebici* Judgment, *supra* note 5, para. 3; *Furundžija* Judgment, *supra* note 6, para. 2.

¹⁵³ Murphy, *supra* note 138, at 68.

¹⁵⁴ See NUREMBERG TRIAL, *supra* note 11.

¹⁵⁵ Some critics view the establishment of the ICTY as representing a derogation of the principle of state sovereignty in international law. Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT’L L. & POL. 417 (1999). Others recognize individual responsibility under international law as useful and “increasingly important.” Dr. P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT’L L. & POL’Y 151, 182 (1992).

¹⁵⁶ See ICTY Statute, *supra* note 90, at Art. 7.

trials.¹⁵⁷

The ICTY has expressed its intent to prosecute the misfeasance or knowing nonfeasance of those in command, as well as the soldier in the field who actually commits the act of rape.¹⁵⁸ This approach serves two goals; it strives to match particular proscribed acts with appropriate punishment, while at the same time focusing on individuals rather than entire communities or ethnicities.¹⁵⁹ ICTY Prosecutor Minna Schrag states that “[o]nly by prosecuting particular individuals, at all levels of responsibility, can we hope to persuade the victims that justice has been done. We must persuade the victims that criminal responsibility is personal to the particular person accused and should not be attributed to entire communities.”¹⁶⁰

The ICTY prosecutor has charged and tried both commanders and the commanded alike.¹⁶¹ For example, the ICTY convicted defendant Furundžija, a commander of Bosnian forces, for allowing rapes to take place under his command.¹⁶² The *Celebici* case, on the other hand, resulted in criminal liability for defendant Delic, deputy commander of the Celebici prison camp, who was sentenced for his actual participation in multiple acts of rape.¹⁶³ The prosecution of commanders who knowingly allow or encourage their troops to commit acts of rape sends a message to the international community and to the former Yugoslavia about the ICTY's seriousness in bringing those responsible to justice.¹⁶⁴ However, if only commanders are charged, the rapists themselves

¹⁵⁷ Alvarez, *supra* note 7, at 2037-40 (arguing that the Nuremberg proceedings encouraged the public perception that “Nazi war criminals were merely an especially evil collection of gangsters bent solely on aggressive conquest”). Whether or not one agrees with Alvarez, a tribunal possessing no inherent imperialist or political interest in the outcome of the infighting in the former Yugoslavia is clearly more likely to approach proceedings arising therefrom with an unjaundiced eye. *Id.*

¹⁵⁸ Minna Schrag, *The Yugoslav Crimes Tribunal: A Prosecutor's View*, 6 DUKE J. COMP. & INT'L L. 187, 192-93 (1995).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 192.

¹⁶¹ See generally *Celebici Judgment*, *supra* note 5, paras. 319-47 (discussing principles of individual and superior responsibility).

¹⁶² *Furundžija Judgment*, *supra* note 6, para. 263.

¹⁶³ *Celebici Judgment*, *supra* note 5, paras. 11, 14.

¹⁶⁴ See Alvarez, *supra* note 7, at 2093.

remain at large within their communities.¹⁶⁵ This surely offers little closure or vindication to rape victims in the former Yugoslavia, many of whom, prior to the events in question, either knew or lived among those who would become their rapists.¹⁶⁶

Nonetheless, there are advantages to trying lesser participants initially, as the ICTY did in *Tadić*.¹⁶⁷ By selectively choosing to try “small fry” parties first, the ICTY Prosecutor has been able to “work out kinks while the stakes are not perceived to be as high,” and to “build a pyramid of factual evidence that ultimately leads upward to higher-level officials.”¹⁶⁸ Additionally, the likelihood of finding eyewitnesses to testify is much higher when actual perpetrators, rather than commanders, are charged with rape.¹⁶⁹

3. Rape as Torture

The prohibition against torture has attained *jus cogens* status in international law.¹⁷⁰ The United Nations Convention Against Torture embodies the prohibition of the international community against acts of torture.¹⁷¹ It also imposes an affirmative duty upon

¹⁶⁵ *Id.* at 2092.

¹⁶⁶ An eighteen year-old girl named Aida relates that one of the rapists at the Trnopolje detention camp had been her high school physics teacher for four years. He pretended not to recognize his female students. NEIER, *supra* note 23, at 173. A woman detained at the Foca rape camp identified her rapists as:

. . . colleagues/doctors with whom I worked. The first who raped me was a Serbian doctor . . . [h]e knew I recognized him. He saw my name on the list and called it out. . . . We worked in the same hospital. . . . Another doctor whom I had previously known also raped me. . . . Before he raped me he said, ‘Now you know who we are. You will remember forever.’

WAR CRIMES IN BOSNIA-HERCEGOVINA, HUMAN RIGHTS WATCH 9, at 220 (Vol. 2, 1993).

¹⁶⁷ Alvarez, *supra* note 7, at 2093.

¹⁶⁸ *Id.*

¹⁶⁹ Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 744 (1999).

¹⁷⁰ See generally EDWARD PETERS, TORTURE (expanded edition, 1996) (detailing the social history and nature of torture). A *jus cogens* prohibition on torture means that clearly recognized principles of international law forbid the act. YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 133 (1982).

¹⁷¹ United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, United Nations G.A. Res. 39/46, U.N. GAOR Supp. (No. 51) Dec. 10, 1984.

participating states to prevent and enforce the crime of torture and to extradite, if necessary, those who commit it.¹⁷² In two significant ICTY cases involving rape—*Celebici* and *Furundžija*—the Prosecutor sought convictions based on a characterization of rape as torture under the ICTY Statute.¹⁷³ This characterization is not unheard of in international law.¹⁷⁴

In the 1996 case of *Mejia v. Peru*, the Inter-American Court of Human Rights found the Peruvian State responsible for rape as torture under Article 5 of the American Convention on Human Rights.¹⁷⁵ In its discussion of torture, the Court specified that the act must be committed: (1) with intent to inflict physical pain and suffering; (2) for the purpose of producing a certain result in the victim; (3) by a public official or a private person under the direction of such an official.¹⁷⁶ Recognizing that “soldiers use sexual abuse as a weapon for punishing, intimidating, coercing, humiliating and degrading women,” the Court held that all of the above conditions for proving torture had been satisfied.¹⁷⁷

In the 1997 case *Aydin v. Turkey*,¹⁷⁸ the European Court of Human Rights held the Turkish State responsible for rape as a violation of the United Nations Convention against Torture.¹⁷⁹ In doing so, the Court recognized that the severe trauma of rape “leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”¹⁸⁰

In 1998, the ICTR Trial Chamber in *Prosecutor v. Akayesu* set forth one of the first legal definitions of rape by an international

¹⁷² *Id.* at Art. 2, 6.

¹⁷³ *Celebici Judgment*, *supra* note 5, para. 475; *Furundžija Judgment*, *supra* note 6, para. 163.

¹⁷⁴ *Mejia*, *supra* note 95, at 157.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ 50 Eur. Ct. H.R. 1866 (1997).

¹⁷⁹ *Id.* at para. 86. The perpetrators in this case, Turkish government officials, detained a 17-year-old girl, stripped her, blindfolded her, spun her around in a car tire while spraying her with cold water from pressurized jets, and then raped her. *Id.* at para. 75.

¹⁸⁰ *Id.* at para. 83.

judicial body.¹⁸¹ The ICTR found former Mayor Jean-Paul Akayesu guilty of the crime of torture for his complicity in mass rapes committed in Taba, Rwanda.¹⁸² The prosecutor charged Akayesu with sex crimes under both the crimes against humanity and genocide provisions of the ICTR Statute¹⁸³ due to the widespread and systematic nature of the rapes involved.¹⁸⁴ In applying the U.N. Convention Against Torture to Akayesu, the ICTR noted that the Convention does not “catalogue specific acts in its definition of torture.”¹⁸⁵ However, the ICTR calls this nonspecific approach “useful,” noting that rape, a “form of aggression . . . cannot be captured in a mechanical description of objects and body parts.”¹⁸⁶ The ICTR defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive,” noting that “[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”¹⁸⁷

The ICTY has applied precedent from each of these courts in its deliberations.¹⁸⁸ In *Celebici*, the ICTY applied rules set forth in *Aydin*, *Mejia*, and *Akayesu* in determining that rape constitutes a form of torture under certain circumstances.¹⁸⁹ The Tribunal consequently found defendant Delic guilty of torture for the rapes he committed under both the grave breach (Article 2) and violations of the laws or customs of war (Article 3) provisions of the ICTY Statute.¹⁹⁰ The Trial Chamber that convicted Furundžija

¹⁸¹ Akayesu Judgment, *supra* note 84, paras. 686-88; Askin, *supra* note 47, at 107.

¹⁸² Akayesu Judgment, *supra* note 84, para. 688.

¹⁸³ ICTR Statute, *supra* note 35, at Art. 3 (crimes against humanity), Art. 2 (genocide). The four subject matter jurisdiction areas available to the ICTR under its statute are nearly identical to those of the ICTY Statute. *Id.*

¹⁸⁴ Askin, *supra* note 47, at 107.

¹⁸⁵ Akayesu Judgment, *supra* note 84, para. 687.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at para. 688.

¹⁸⁸ The mere fact that the ICTY relies on precedent underscores its predominantly common law character. In contrast, civil law tradition rejects the use of precedent and the attendant doctrine of *stare decisis* in favor of the application of statutes, regulations, and customs. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 24-25 (1969).

¹⁸⁹ Celebici Judgment, *supra* note 6, paras. 466, 478, 482.

¹⁹⁰ Celebici Press Release, *supra* note 59.

of rape as torture under Article 3 expanded on the *Akayesu* judgment by proffering a definition of the “essential elements” of rape under international law.¹⁹¹ While the characterization of rape as torture represents an important step forward for international prosecution of rape, its disadvantages also deserve scrutiny.

Torture may properly be charged under each of the four subject matter jurisdiction areas of the ICTY and ICTR statutes.¹⁹² Therefore, construing rape as torture allows the Prosecutor greater flexibility in deciding which cases to bring. As illustrated by the recent decision in the *Tadić* appeal, this classification of rape may be quite helpful in light of the uncertain national status of factions within the former Yugoslavia at any given time.¹⁹³ Certainly, the crime of torture is widely recognized and unequivocally prohibited by international instruments such as the Torture Convention,¹⁹⁴ much more so than the fragmentary and inconsistent treatment of rape under international law.¹⁹⁵ Further, the recognition that rape is a crime at least as severe as torture¹⁹⁶ is undoubtedly a positive trend in international law. ICTY rape convictions may represent a growing international awareness of the harmful and lasting effects of rape, which could signal a movement away from historical categorizations of rape as a “private” and, therefore, unaddressed incident of war.¹⁹⁷ *Furundžija* illustrates the ICTY’s recognition of rape as a crime sufficiently serious to warrant prosecution—

¹⁹¹ *Furundžija* Judgment, *supra* note 6, paras. 176, 185.

¹⁹² *E.g.*, *Celebici* Judgment, *supra* note 5, para. 14 (charging torture as both a grave breach and a violation of the laws and customs of war); Amended Indictment, Prosecutor v. Kunarac and Kovac, Case No. IT-96-23-PT (Sept. 6, 1999), <http://www.un.org/ictyindictment/english/kun-2ai990906e.pdf> (charging torture as a crime against humanity); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 86 (Vol. 1 1995) (noting that Genocide Convention recognizes torture as a form of prohibited activity).

¹⁹³ *See supra* notes 103-04 and accompanying text.

¹⁹⁴ *See supra* notes 170-72 and accompanying text.

¹⁹⁵ BASSIOUNI & MANIKAS, *supra* note 24, at 560. The difficulties inherent in prosecuting an offense implied by custom versus an offense expressed in recognized international instruments are obvious.

¹⁹⁶ *See* ASKIN, *supra* note 9, at 316-17.

¹⁹⁷ MacKinnon, *supra* note 8, at 70. This movement may be analogous to the shift toward prosecution of individuals as subjects of international law rather than of anonymous and faceless states. Alvarez, *supra* note 7, at 2033.

Furundžija was convicted and sentenced solely on rape charges.¹⁹⁸

However, disadvantages to charging rape as torture also exist. A self-evident, although fundamentally important issue, arises in cases where rape cannot be conceived of as torture; for example, where rape is not instigated by a public official.¹⁹⁹ In other words, while rape is not always torture as defined for purposes of war, rape is always rape, and should be addressed as an individual and separate offense even if it does not meet the definition of torture under the circumstances of the particular case.²⁰⁰ Concerns have been voiced by feminist scholars that rape charges standing alone may be viewed by the ICTY as offenses unworthy of prosecution without additional visceral elements that would “upgrade” rape to torture.²⁰¹ In *Celebici*, for example, the elements of torture were satisfied where women were detained, interrogated, and ultimately victimized by multiple acts of rape.²⁰² Under ICTY jurisprudence, however, it remains unclear how and if these rapes would have been charged had the women not been detained or interrogated.²⁰³

In contrast, a charge of torture could easily subsume a rape charge, making rape appear less important than other types of bodily injury; torture could even eradicate a rape charge where death results from the prohibited act.²⁰⁴ Criticism has been leveled at the ICTY Prosecutor for applying what some view as an “unreasonably high standard for torture.”²⁰⁵ In other words, the “interrogation by a state official” element of torture, in addition to the elements of rape, may be difficult to establish, which could result in fewer rape charges overall in the ICTY.²⁰⁶ Finally, while torture is widely recognized under international law, the

¹⁹⁸ See Furundžija Judgment, *supra* note 6.

¹⁹⁹ See *supra* notes 175-77 and accompanying text for the elements of torture under *Mejia*.

²⁰⁰ Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTING'S WOMEN'S L.J. 171 (1994).

²⁰¹ See Stephens, *supra* note 40, at 102.

²⁰² See *supra* notes 71-77 and accompanying text.

²⁰³ *Id.*

²⁰⁴ ASKIN, *supra* note 9, at 321 n.1009.

²⁰⁵ Green et al., *supra* note 200, at 219.

²⁰⁶ See ASKIN, *supra* note 9, at 321 n.1009.

categorization of rape as torture by the ICTY could nonetheless be viewed as “legislating from the bench,” an activity that would contradict the ICTY’s mandate to apply only recognized humanitarian law.²⁰⁷ In other words, even if rape is prosecuted as torture, the ICTY may not have jurisdiction over such a characterization.²⁰⁸

On a level of principle rather than pragmatics, many critics have stressed the symbolic value of an express proscription against rape by international law.²⁰⁹ Presently, only Article 5 of the ICTY Statute (crimes against humanity) specifically lists rape as a punishable offense.²¹⁰ Charging perpetrators for rapes defined as torture rather than defining those acts as rape may risk “implicitly enforcing the dangerous misperception that rape and other sexual abuse of women are a normal and uncontrollable product of warfare.”²¹¹

Overall, however, the benefits of the characterization of rape as torture in the ICTY outweigh its detriments.²¹² Although problems do exist with such a categorization, the ICTY has successfully charged, tried, and convicted defendants for the war crime of rape in an international criminal forum, an unprecedented accomplishment.²¹³ The exposure and recognition of the crime of rape resulting from ICTY proceedings arguably overshadows any detrimental precedent that may have been set by categorizing rape as torture.²¹⁴

²⁰⁷ Alvarez, *supra* note 7, at 2061.

²⁰⁸ *Id.*

²⁰⁹ Green et al., *supra* note 200, at 198. Cf. Kent Greenawalt, *A Vice of its Virtues: The Perils of Precision in Criminal Codification, as Illustrated by Retreat, General Justification, and Dangerous Utterances*, 19 RUTGERS L.J. 929 (1988) (noting that while greater precision has been a major aim of systematic codification, which can specify what behavior is criminal in a way that is more rational, coordinated and exact, the disadvantages of codifying matters previously left to judicial interpretation must also be weighed).

²¹⁰ See ICTY Statute, *supra* note 90.

²¹¹ Green et al., *supra* note 200, at 198.

²¹² See *supra* notes 170-74 and accompanying text for a discussion of the characterization of rape as torture under international law.

²¹³ Murphy, *supra* note 138, at 95.

²¹⁴ See *id.*

V. The Rules of Procedure and Evidence in the ICTY

The United States played a large role in the creation of the ICTY by helping to draft its initial statute and subsequent revisions and by influencing the Rules of Procedure and Evidence adopted by the ICTY.²¹⁵ As a result, the structure and operation of ICTY proceedings represent a mixture of both common law and civil law tradition.²¹⁶ As Michael Greaves, defense counsel for defendant Mucic in *Celebici*, accurately stated, “our Rules of Evidence and Procedure are drawn from both systems, although it might be said that the common law has had a greater input into the Rules than perhaps the civil law has.”²¹⁷

While the evidentiary rules of many countries are often carefully drafted to keep prejudicial or irrelevant evidence from the jury, the ICTY Rules were purposely drafted to be simple and concise in light of the fact that all ICTY proceedings are bench trials.²¹⁸ As a result, the Rules adopt an extremely broad definition of admissibility by directing the trial chamber to “admit any relevant evidence which it deems to have probative value,” and to

²¹⁵ Report of the Secretary-General, *supra* note 86; Embassy of the United States of America, *Proposed Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia* (Nov. 18, 1993); Special Task Force of the A.B.A. Section of International Law and Practice, *Report on the Proposed Rules of Evidence and Procedure of the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia* (1995); Special Task Force of the A.B.A. Section of International Law and Practice, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia* (July 8, 1993). The ABA in 1993 called the lack of scholarly analysis of the procedural rules of the Nuremberg trials “unfortunate,” and noted that the ICTY Rules of Procedure and Evidence would benefit greatly from such analysis. *Id.*

²¹⁶ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32 (1994), reprinted in 33 I.L.M. 484 (1994), amended by U.N. Doc. IT/32/Rev.16 (1999), [hereinafter Rules of Procedure and Evidence]; Decision on the Defense Motion on Hearsay, *Prosecutor v. Tadić*, Case No. IT-94-1 (Aug. 5, 1996), construed in *Tadić Judgment*, *supra* note 4, para. 35 n.23; Murphy, *supra* note 138, at 80.

²¹⁷ *Celebici Transcript*, *supra* note 62, at T. 2767 (May 14, 1997).

²¹⁸ Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT'L L.J. 475, 518-19 (1995).

balance that evidence with “the need to ensure a fair trial.”²¹⁹ This balancing test, along with the absence of complex rules governing admission of out-of-court statements, allows ICTY judges a great deal of discretion in their interpretation of what constitutes relevant evidence.²²⁰ However, many of the standards familiar to American criminal procedure and constitutional law regarding rights of the accused, such as proof beyond a reasonable doubt, the right to cross-examine witnesses, and the right against self-incrimination, also apply in ICTY proceedings.²²¹ The interpretive linchpin of the ICTY Rules, as in the American criminal justice system, is the principle of legality known as *nullem crimen sine lege*, or “no crime without law.”²²² As discussed above, this principle forbids the ICTY from creating law and gives the Tribunal the authority to apply only recognized international law, a double-edged mandate, which in light of the flexibility delegated to judges to determine the relevancy of evidence, seems to both authorize and prohibit the ICTY from playing a quasi-legislative role.²²³

The ICTY Rules have sparked both criticism and praise for their treatment of rape.²²⁴ The Rules contain several provisions that apply in particular to proceedings involving sexual assault.²²⁵ For example, specialized ICTY rules address the presentation of

²¹⁹ Rules of Procedure and Evidence, *supra* note 216, at 533.

²²⁰ *Id.*; May & Wierda, *supra* note 169, at 745-46. *See also* Alvarez, *supra* note 7, at 2066 (discussing the issue of fairness to an accused in light of the lack of an ICTY prohibition on hearsay testimony).

²²¹ Rules of Procedure and Evidence, *supra* note 216.

²²² *See, e.g.*, BASSIOUNI & MANIKAS, *supra* note 24, at 265-70 (discussing principles of legality under international law, including the principle of *nullem crimen sine iure* (“no crime without law”), which the authors view as a more accurate expression of the principle dictating the ICTY’s application of international law).

²²³ *See supra* notes 87-88 and accompanying text. Viewed from the perspective of the civil law tradition, the prohibition on judge-made law is a common one; generally, civil law judges are trained to apply existing law and are forbidden from creating or interpreting law. MERRYMAN, *supra* note 188, at 37.

²²⁴ While praise for the ICTY’s recognition of rape as a serious international crime exists across the board, some critics say the Rules of Procedure and Evidence do not go far enough toward recognizing concerns of victims. *See generally* Green et al., *supra* note 200 (presenting an American proposal on the ICTY Rules that was submitted to the ICTY to influence the rulemaking process).

²²⁵ *See* Green et al., *supra* note 200.

evidence in rape cases and provide protective measures for witnesses, while other rules establish a victims' and witnesses' support network within the ICTY.²²⁶ Rules with special relevance to rape cases are discussed in turn herein.²²⁷

A. Evidence of Rape in the ICTY

Rule 96 functions as the main provision dictating the presentation of evidence in sexual assault cases.²²⁸ Among other things, the Rule does not require corroboration of the testimony of rape victims.²²⁹ This is a departure from the general practice in many jurisdictions of mandating corroborating testimony in rape cases and from civil law jurisdictions in particular, where the doctrine of *unus testis, nullus testis* ("one witness is no witness") functions to exclude uncorroborated testimony of any kind.²³⁰ Critics have called the traditional requirement of corroborative testimony in rape cases misogynistic and insulting, and have heavily criticized this requirement for its inherent assumption that women are untruthful and more likely to fantasize than men about sexual encounters.²³¹ Most importantly, a corroboration requirement makes rape, usually a private act, virtually impossible to prove in most cases.²³² While Rule 96 removes the necessity of corroboration in ICTY rape cases, this rule in practice may nonetheless be negated by judicial concerns about sufficiency of evidence, which may result in a *de facto* corroboration requirement.

An example from *Tadić* illustrates this point. When Witness F, Tadić's alleged rape victim, refused to testify against him, Witness L's eyewitness testimony alone was presented to establish the rape charge.²³³ The Trial Chamber granted the prosecution's motion to

²²⁶ Rules of Procedure and Evidence, *supra* note 216, at 507, 535.

²²⁷ See *infra* notes 228-399 and accompanying text.

²²⁸ Rules of Procedure and Evidence, *supra* note 216.

²²⁹ *Id.*

²³⁰ Tadić Judgment, *supra* note 4, para. 535; May & Wierda, *supra* note 169, at 755-56.

²³¹ Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 547 (1994).

²³² See *id.*

²³³ Tadić Judgment, *supra* note 4, para. 17.

withdraw the protective measures for Witness L when it was discovered that he had been lying, allegedly under coercion by the Bosnian government, and it thus chose to disregard L's testimony completely.²³⁴ As a result, the charge of rape against Tadić was formally withdrawn.²³⁵ Had L's testimony not been debunked, *Tadić* may have become the first case in which the ICTY convicted an accused for rape on the basis of uncorroborated testimony.²³⁶

In *Celebici*, at least one other witness corroborated the testimony of each rape victim.²³⁷ Cecez related that defendant Delic "would make me go to the front room and he raped [Milojka] in broad daylight."²³⁸ She further related that Milojka "told me that . . . Hazim Delic raped her . . . he took Milojka whenever he wanted."²³⁹ The Court found, based on the "supporting evidence of Ms. Cecez . . . and Dr. Petko Grubac, that [Antic] was subjected to three rapes by Hazim Delic."²⁴⁰ The rape of Cecez was corroborated by Witness D, who testified that he had heard that "the guards had boasted of having raped somebody last night—you see, they had raped Gordana Cecez and some others."²⁴¹ A doctor at the Celebici camp also testified about his general awareness of the rapes: "when I asked (redacted) what was wrong with them she told me they were being taken out every night and raped."²⁴² The Court found Cecez's testimony credible, as bolstered by the "supporting testimony of Witness D and Dr. Grubac . . . and thus concluded that Ms. Cecez was raped by Mr. Delic."²⁴³

²³⁴ Decision on Prosecution Motion to Withdraw Protective Measures for Witness "L," Prosecutor v. Tadić, Case No. IT-94-1-T (Dec. 5, 1996), <http://www.un.org/icty/ind-e.htm>; Order for the Prosecution to Investigate the False Testimony of Opacic, Prosecutor v. Tadić, Case No. IT-94-1-T (Dec. 10, 1996); Tadić Transcript, *supra* note 1, at T. 5867-75 (Oct. 25, 1996).

²³⁵ Tadić Judgment, *supra* note 4, para. 27.

²³⁶ See generally Murphy, *supra* note 138, at 86.

²³⁷ Celebici Transcript, *supra* note 62.

²³⁸ *Id.* at T. 535 (March 18, 1997).

²³⁹ *Id.* at T. 529 (March 18, 1997).

²⁴⁰ Celebici Judgment, *supra* note 5, para. 957.

²⁴¹ *Id.* at T. 5219 (July 17, 1997).

²⁴² *Id.* at T. 5996 (August 12, 1997).

²⁴³ Celebici Judgment, *supra* note 5, para. 936. The testimony of these witnesses

Although it is difficult to discern from the heavily redacted transcript of *Furundžija*,²⁴⁴ it appears that rape victim testimony was corroborated in that case as well. In its opening statement, the prosecution averred that “[w]hilst Rule 96 does not require corroboration of the testimony of a rape victim, the Prosecution does propose to call . . . Witness D, who will be able to corroborate at least a part of the appalling abuses . . . suffered by Witness A.”²⁴⁵ The closed-session testimony of both Witness D and Witness A, the victim, is unavailable.²⁴⁶ However, after hearing all the testimony, the Court publicly noted that, although corroboration was not required under the ICTY rules, it had made a factual finding nonetheless that “evidence of Witness D does confirm the evidence of Witness A.”²⁴⁷

Although the Rules of Evidence and Procedure unequivocally state that corroboration of rape victim testimony is not necessary,²⁴⁸ the circumstances of these cases may illustrate the existence of a *de facto* corroboration requirement. It remains to be seen whether the testimony of a rape victim alone, lacking corroborative testimony, would result in a positive credibility determination by the ICTY; such a case has not yet been tried. Further, even if the Trial Chamber strictly observes Rule 96 in adjudicating the credibility of rape victim testimony, the Prosecutor may be hesitant to charge rape in cases where no corroborative testimony exists to bolster the victim’s testimony.²⁴⁹ Finally, the difficulties of producing corroborative testimony multiply where the victim refuses to testify at all out of fear or shame, as is often the case with rape prosecutions generally and

illustrates the importance of the ICTY’s allowance of hearsay evidence. Most of these statements lack independent “guarantees of trustworthiness” that would remove them from the category of hearsay in an American court, but without these uncorroborated accounts prosecution in the ICTY would have been difficult. *See* FED. R. EVID. Article VIII advisory committee’s note. Regarding admissibility of evidence in the ICTY generally, *see supra* notes 218-20 and accompanying text.

²⁴⁴ *See* Askin, *supra* note 47, at 110.

²⁴⁵ Transcript, Prosecutor v. Furundžija, Case No. IT-95-17, at T. 67 (June 8, 1998), <http://www.un.org/icty/ind-e.htm> [hereinafter Furundžija Transcript].

²⁴⁶ *See* Askin, *supra* note 47, at 110.

²⁴⁷ Furundžija Judgment, *supra* note 6, para. 116.

²⁴⁸ Rules of Procedure and Evidence, *supra* note 216, at Rule 96.

²⁴⁹ *See supra* notes 228-32 and accompanying text on corroboration issues.

particularly in the former Yugoslavia.²⁵⁰ An alternative may be to introduce a limited hearsay rule for use in rape prosecutions in order to replicate the trustworthiness sought to be gained by corroboration. Such a rule would also ameliorate problems inherent to testimony about rape, such as lack of eyewitnesses and effects of psychological trauma on victims.²⁵¹

Rule 96 also provides a limited consent defense.²⁵² To present a defense of consent in the ICTY, a defendant must present relevant and credible evidence in camera to show that the victim was not subjected to or threatened (or reasonably believed she would be threatened) with violence, duress, or detention.²⁵³ A failure to carry this burden results in a finding of coercive circumstances, which in turn gives rise to a reputable presumption against consent.²⁵⁴ The consent defense is a much-debated and contentious aspect of rape prosecutions in criminal law.²⁵⁵ Although a preliminary draft of Rule 96 stated that in rape proceedings, "consent shall not be allowed as a defense," a revised consent defense was reinstated after fair trial concerns arose from the complete denial of the defense to the accused.²⁵⁶

However, in light of the circumstances surrounding rape cases in the former Yugoslavia, it is difficult to fathom how consent could ever be a contested issue, as many rape victims were detained against their will in camps or raped at gun or knifepoint.²⁵⁷ Indeed, the defense has not arisen in any of the rape cases adjudicated in the ICTY to date.²⁵⁸ Rape victim Ramic in

²⁵⁰ *Supra* note 27 and accompanying text for discussion of the social stigma attached to rape in the former Yugoslavia.

²⁵¹ On the other hand, a limited hearsay rule could, in many cases, effectively force the victim to testify as the only eyewitness to the encounter. *See infra* notes 268-71 and accompanying text for a discussion of the reluctance of rape victims and witnesses to testify in the ICTY.

²⁵² Rules of Evidence and Procedure, *supra* note 216.

²⁵³ *Id.*

²⁵⁴ *See id.* *See also* Green et al., *supra* note 200, at 218-19.

²⁵⁵ *See e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (detailing history and evolution of consent defense in order to show its problematic application in rape cases in the United States).

²⁵⁶ Sellers & Okuizumi, *supra* note 10, at 52-53.

²⁵⁷ *See supra* notes 43-85 and accompanying text.

²⁵⁸ *See id.*

Tadić told the Trial Chamber that a man named Kicanovic “knocked me down and raped me in the corridor,” threatening that “if I told about this to anybody he would come back and kill me.”²⁵⁹ *Celebici* detainee Cecez described the circumstances surrounding her rape as follows: “they took my freedom then. . . . they would lock us up from the outside.”²⁶⁰ During the rape, Cecez said she “could not do anything . . . I had no way of defending myself . . . I was crying.”²⁶¹ Rape victim Antic in *Celebici* told the court “[Delic] pointed the rifle at me. I got scared. I was afraid he would kill me. So I had to do what he asked . . . I had to take my clothes off”²⁶² Witness A in *Furundžija* was interrogated at knifepoint and then repeatedly raped after being “arrested and detained by the jokers.”²⁶³ Undoubtedly, consent to rape in the context of this chaotic and war-torn country is a non-issue in the overwhelming majority of ICTY cases.²⁶⁴ Thus, while abrogation of the defense would be ideal for rape prosecutions, the likelihood that it will ever present a serious issue for adjudication is remote.²⁶⁵

Rule 96 also contains a rape shield provision, which, similar to Rule 412 of the Federal Rules of Evidence of the United States, bars evidence in any form of the victim’s prior sexual conduct.²⁶⁶ Like the consent defense, however, evidence of prior sexual history will most likely not present a justiciable issue in the types of rape cases emerging from the former Yugoslavia.²⁶⁷

²⁵⁹ *Tadić* Transcript, *supra* note 1, at T. 2466 (July 19, 1996).

²⁶⁰ *Celebici* Transcript, *supra* note 62, at T. 487 (Mar. 17, 1997), 569 (Mar. 18, 1997).

²⁶¹ *Id.* at T. 494 (Mar. 17, 1997).

²⁶² *Id.* at T. 1778 (Apr. 3, 1997).

²⁶³ *Furundžija* Judgment, *supra* note 6, para. 262. The Trial Chamber in both *Celebici* and *Furundžija* entered convictions for torture, an offense which, because it involves coercion, negates any conceivable showing of consent. *See Celebici* Judgment, *supra* note 5, para. 455-56; *Furundžija* Judgment, *supra* note 6, para. 159.

²⁶⁴ *See Green et al.*, *supra* note 200, at 218-19 (conceding that a “strictly limited exception for this defense is important for the legitimacy of the Tribunal’s process and will make it more relevant as a precedent.”).

²⁶⁵ *See id.*

²⁶⁶ Rules of Procedure and Evidence, *supra* note 216; FED. R. EVID. 412(a)(1).

²⁶⁷ *See Green et al.*, *supra* note 200, at 203.

B. Protective Measures for Witnesses

Nobody disputes the need for a high level of protection for ICTY witnesses, as many witnesses have been coerced into testifying falsely, or into not testifying at all, and victimized by physical or sexual assaults or death threats.²⁶⁸ Additionally, in light of the tumultuous circumstances and tremendous stigma attached to rape within the former Yugoslavia, many victims from that area refused to testify unless the ICTY agreed to give witnesses stringent physical protection from the defendant and his military counterparts not in custody, as well as suppression of identity from the public.²⁶⁹ The Special Rapporteur for U.N. Human Rights Committee noted that fear, trauma, and shame experienced by rape victims may cause a reluctance to testify.²⁷⁰ Fear and shame have caused some witness-victims to decline to testify in the ICTY, even after being promised protective measures by the ICTY Prosecutor.²⁷¹

Several of the Rules of Procedure and Evidence function together to provide witnesses testifying before the ICTY the protection mandated by Article 22 of the ICTY Statute.²⁷² Rule 69 explains the circumstances under which the Prosecutor may ask the Trial Chamber for protective measures.²⁷³ For example, where "exceptional circumstances" are present, the Trial Chamber may order non-disclosure of the identity of the witness.²⁷⁴ Protective measures may conceal witness identity even from the defendant in exceptional circumstances.²⁷⁵ Rule 75 lists specific avenues

²⁶⁸ Kitty Felde, The Honorable Gabrielle Kirk McDonald, Alan Tieger, Michail Wladimiroff, Moderator—Paul Hoffman, Panel Discussion, *War Crimes Tribunals: The Record and the Prospects: The Prosecutor v. Dusko Tadić*, 13 AM. U. INT'L L. REV., 1441, 1446-47 (1998).

²⁶⁹ See Ray, *supra* note 18, at 804-06.

²⁷⁰ U.N. Doc. E/CN.4/1993/26, para. 355.

²⁷¹ Murphy, *supra* note 138, at 85-86.

²⁷² See ICTY Statute, *supra* note 90.

²⁷³ Rules of Procedure and Evidence, *supra* note 216.

²⁷⁴ *Id.*

²⁷⁵ The Tribunal used this provision to withhold the identity of most of the witnesses from the defendant in *Tadić*. See *Tadić* Decision on Protective Measures, *supra* note 53. This practice, however, raises concerns of fairness to the defendant. See generally Green et al., *supra* note 200 (proposing that only in the "most extreme cases" should the Tribunal have authority to shield witness identity from the defendant and the

available to the Court for witness protection, “provided that the measures are consistent with the rights of the accused.”²⁷⁶ These include redaction of the record, suppression of witness identity or whereabouts, assignment of pseudonyms, and closed sessions.²⁷⁷ The Court may, in its discretion, hold an in camera hearing to determine whether these protective measures are needed.²⁷⁸ It may also, under Rule 75, safeguard witnesses during their testimony, by controlling the “manner of questioning to avoid any harassment or intimidation.”²⁷⁹

An analysis of ICTY transcripts reveals that the Court treats protected witnesses with due concern. Before the witnesses in *Celebici* began their testimony, the Trial Chamber judge confirmed that each of them was testifying under protective measures by asking, “you have requested that your name and identity not be released to the public?”²⁸⁰ The *Celebici* Trial Chamber utilized Rule 75 during the cross-examination of rape victim Antic, when counsel for defendant Mucic attacked Antic’s credibility on cross-examination, asking her if she had “simply invented” parts of her testimony,²⁸¹ and suggesting that the account of a conversation she related on direct was “a lie.”²⁸² Judge Jan chastised the defense, saying “[d]o not use the word ‘lie.’ Use a less-milder word.”²⁸³ Judge Karibi-Whyte had previously warned defense counsel that his questions were “amounting to harassment.”²⁸⁴

The Decision of the Trial Chamber in *Tadić* sets forth the ICTY standard for determining the necessity of protective

defense attorneys). Cf. Monroe Leigh, Editorial Comment: *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT’L L. 235 (1996) (asserting that withholding names of witnesses from the accused amounts to a denial of a fair trial).

²⁷⁶ Rules of Procedure and Evidence, *supra* note 216.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* Rule 75 allows the Trial Chamber to hold in contempt parties who intimidate witnesses. *See id.*

²⁸⁰ *Celebici* Transcript, *supra* note 62, at T. 1296 (Mar. 26, 1997).

²⁸¹ *Id.* at T. 1840 (Apr. 14, 1997).

²⁸² *Id.*

²⁸³ *Id.* at T. 1841 (Apr. 14, 1997).

²⁸⁴ *Id.* at T. 1836 (Apr. 14, 1997).

measures for witnesses.²⁸⁵ It addresses the practice of withholding witness identities from the public, the prevention of re-traumatization of victims, and the propriety of allowing the testimony of witnesses to be anonymous to the defendant.²⁸⁶ The need for protective measures in *Tadić* was great because the entire trial was broadcast live on Bosnian television.²⁸⁷ In its confidentiality determination, the Court undertook a comparative legal analysis of both common law and civil law states and concluded that a balancing test was appropriate under Rule 79.²⁸⁸ Confidentiality is thus granted by the ICTY under Rule 79 when the need for witness protection involving special circumstances, such as sexual assault, outweighs the interest in giving the defendant a fair and public hearing.²⁸⁹

In addition to the witness protection/fair trial balancing test, the Court also granted complete anonymity to certain prosecution witnesses through the use of a five-part test.²⁹⁰ First, the witness or his or her family must face an objectively real fear for their safety.²⁹¹ Second, the testimony of the particular witness must be so "important" to the Prosecutor's case that it would be unfair to proceed without it.²⁹² Third, there must be no prima facie evidence that the witness is untrustworthy, such as an extensive criminal background.²⁹³ Fourth, the inability of the ICTY to shroud witness identification through a comprehensive witness protection program must be considered.²⁹⁴ Finally, the measures taken must be "strictly necessary."²⁹⁵

Following the five-part test described in the *Tadić* Decision on

²⁸⁵ *Tadić* Decision on Protective Measures, *supra* note 53.

²⁸⁶ *Id.*

²⁸⁷ See Grant H. Carlton, *Equalized Tragedy: Prosecuting Rape in the Bosnian Conflict Under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, 6 J. INT'L L. & PRAC. 93, 105 (1997).

²⁸⁸ See *Tadić* Decision on Protective Measures, *supra* note 53, paras. 33, 36-41.

²⁸⁹ See *id.* at para. 33.

²⁹⁰ See *id.* at para. 55.

²⁹¹ *Id.* at para. 62.

²⁹² *Id.* at para. 63.

²⁹³ *Id.* at para. 64.

²⁹⁴ *Tadić* Decision on Protective Measures, *supra* note 53, para. 65.

²⁹⁵ *Id.* at para. 66.

Protective Measures, the Trial Chamber in *Celebici* granted requests for various types of protective measures for witnesses.²⁹⁶ The court allowed numerous witnesses to testify under pseudonyms.²⁹⁷ The identities of Witnesses D and F were concealed from the public through video distortion of their faces.²⁹⁸ *Celebici* witnesses B and F gave eyewitness testimony concerning sexual assaults at the Celebici camp from behind a one-way screen, through which only the defendant, not the witness, could be seen.²⁹⁹ The court allowed other witnesses to testify by means of video link due to serious medical problems that prohibited them from traveling to the Hague.³⁰⁰

Pursuant to Rule 75, the *Furundžija* Court granted closed-session proceedings for key witnesses, including the rape victim.³⁰¹ In addition, all testimony by unprotected witnesses that included identifying facts about the victim was taken in closed session. As the prosecution put it, “[c]losed session is the only way to appropriately ensure that there are no statements that can be linked to Witness A if she is later identified, which we think is very possible.”³⁰²

Faced with this predicament, the Trial Chamber decided to remove the majority of the proceedings in *Furundžija* from public

²⁹⁶ Celebici Transcript, *supra* note 62, at T. 1041-43 (Mar. 24, 1997).

²⁹⁷ Order for Non-Disclosure to the Public or Media of Names of Potential Witnesses, Prosecutor v. Celebici, Case No. IT-96-21-T, (Nov. 29, 1996), <http://www.un.org/icty/ind-e.htm>.

²⁹⁸ Celebici Transcript, *supra* note 62, at T. 1294 (Mar. 26, 1997), 5138 (July 16, 1997).

²⁹⁹ *See id.* at T. 1293-96 (Mar. 26, 1997).

³⁰⁰ Decision on the Motion to Allow Witnesses “K,” “L” and “M” to Give Their Testimony by Means of Video-Link Conference, Prosecutor v. Celebici, Case No. IT-96-21-T, para. 14 (May 28, 1997), <http://www.un.org/icty/ind-e.htm>. *See also* Maryland v. Craig, 497 U.S. 836 (1990) (holding that Confrontation Clause of U.S. Constitution was not violated where child witness was allowed to testify by one-way closed circuit television).

³⁰¹ Order on Prosecutor’s Motion Requesting Protective Measures for Witnesses “B” and “C,” Prosecutor v. Furundžija, Case No. IT-95-17/1 (June 10, 1998), <http://www.un.org/icty/ind-e.htm>; Decision on the Prosecutor’s Motion Requesting Protective Measures for Witnesses “A” and “D,” Prosecutor v. Furundžija, Case No. IT-95-17/1 (June 11, 1998), *construed in* Furundžija Judgment, *supra* note 6, para. 31 [hereinafter Furundžija Protective Measures for “A” and “D”].

³⁰² Furundžija Transcript, *supra* note 245, at T. 758 (Nov. 9, 1998).

record.³⁰³ Because the Court did not want to reveal any information about the victim that might lead to disclosure of her identity, it could not publish the rationale underlying its decision to allow closed proceedings for the entirety of Witness A's testimony.³⁰⁴ This problematic situation places the defendant's right to a public trial in question and removes judicial determinations of protective measures from the public scrutiny they would otherwise be afforded.³⁰⁵ Further, the ICTY gives judges a large amount of discretion to decide appropriate protective measures, and the Tribunal rarely refuses requests for protective measures due to the highly publicized nature of the proceedings.³⁰⁶

Despite the best efforts of the ICTY, identifying information about protected parties often leaks out due to the massive amount of testimony and victims involved. For example, a critical error occurred in the *Celebici* trial transcript when a witness mentioned in open court the names of parties who had been offered confidentiality.³⁰⁷ Although a motion was later made to redact the names from the transcript, the names were mistakenly never removed.

The ICTY has experienced difficulties in its efforts to locate witnesses and transport them to the Hague.³⁰⁸ Chief Prosecutor Louise Arbour cites obtaining witnesses from around the world as one of the major obstacles in ICTY investigations and proceedings.³⁰⁹ Defense counsel Michail Wladimiroff tells of his experiences in investigating the indictment of Dusko Tadić:

I was in the area of the opstina of Prijedor . . . when I had to leave . . . because of the NATO bombing. . . . It is a war zone nowadays and, therefore, it is not possible for me to go into the area. . . . we are terribly handicapped and, therefore, not able to

³⁰³ See *id.*

³⁰⁴ See Furundžija Protective Measures for "A" and "D," *supra* note 301.

³⁰⁵ David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT'L & COMP. L.Q. 352 (1967).

³⁰⁶ See Falvey, *supra* note 218, at 517-19.

³⁰⁷ Due to the sensitive nature of the disclosed information, this Comment cites no transcript page number.

³⁰⁸ See Charles Trueheart, *Judgment Day, on Two Counts: War Crimes Suspect, U.N. Court Both on Trial*, WASH. POST, June 25, 1997, at A1.

³⁰⁹ *Id.* at A25.

conclude the investigations on the initial indictment.³¹⁰

Under Rule 40, “the Prosecutor may ameliorate such circumstances, in the interest of providing a fair trial, by requesting states to take all necessary measures to prevent . . . injury to or intimidation of a victim or witness.”³¹¹ Fair trial concerns arose in *Tadić*, however, because the defense was hindered in its attempts to protect witnesses, many of whom were located within the former Yugoslavia, while most of the Prosecution witnesses were living outside the area.³¹²

The ICTY’s proposed balance between fair trial and witness protection concerns has been compromised at times by logistical problems regarding the order of presentation of witnesses.³¹³ Witnesses, many of whom have traveled a great distance to reach the Tribunal, often have been delayed from testifying for days.³¹⁴ In such circumstances, the ICTY must balance concerns about the fear, stress, and possible retraumatization of witnesses who may be victims of sexual assault against the defense’s need to prepare for effective cross-examination of such witnesses.³¹⁵

For examples, in *Celebici*, when tired defense counsel asked for early adjournment and continuation of cross-examination until the next day, the Prosecution objected, expressing a desire to finish cross-examination immediately.³¹⁶ The Prosecutor, who had “only recently . . . learned how serious the problems were,” was attempting to expedite the testimony of victim Milokja Antic, who, as a victim of sexual assault, was in a vulnerable state and had been waiting because the trial was behind schedule.³¹⁷ The Trial Chamber nevertheless decided to adjourn and allowed the

³¹⁰ *Tadić* Transcript, *supra* note 1, at T. 7-8 (Oct. 24, 1995).

³¹¹ Rules of Procedure and Evidence, *supra* note 216.

³¹² *Tadić* Transcript, *supra* note 1, at T. 11 (Oct. 24, 1995).

³¹³ See Trueheart, *supra* note 308, at A1. See generally 1999 ICTY Annual Report, *supra* note 38, para. 207 (stating that the Tribunal endeavors to provide the accused with “fair and expeditious trials, while ensuring protection for the victims and witnesses.”).

³¹⁴ See *Celebici* Transcript, *supra* note 62, at T. 3012 (May 29, 1996) (“due to . . . the delay . . . we had to from economical and other reasons . . . send witnesses back.”).

³¹⁵ Rules of Procedure and Evidence, *supra* note 216, at Rule 75. See also Murphy, *supra* note 138, at 84 (noting that the ICTY must weigh the need for a fair trial against the needs of witnesses whose suffering may be perpetuated by lengthy proceedings).

³¹⁶ *Celebici* Transcript, *supra* note 62, at T. 1682 (Apr. 2, 1997).

³¹⁷ *Id.* at T. 1682, 1683 (Apr. 2, 1997).

defense to continue cross-examination the next day, reasoning that "some of the accused persons have greater difficulty at this stage."³¹⁸ Later in the *Celebici* proceedings, the delay resulting from a contempt hearing even forced the prosecution to send home several witnesses who had been waiting to testify.³¹⁹

The solution cited by many critics to ICTY witness protection problems is to establish an ICTY witness relocation program.³²⁰ Because the prosecution depends heavily on witness testimony as one of its few sources of evidence, the testimony of rape victims can make or break a case.³²¹ If victims were offered the permanent protection of relocation, they might be more likely to testify.³²² In addition, elaborate witness protection measures would not need to be as readily employed by the Tribunal, thereby minimizing concerns of fair trial and unfettered judicial discretion.³²³ According to the ICTY, a program to relocate witnesses to states that have agreed to accept them is "still in its nascent stages."³²⁴

C. *The Victims and Witnesses Unit*

The drafters of Rule 34 intended to deal with logistical and emotional hardships experienced by ICTY witnesses.³²⁵ Rule 34 establishes a Victims and Witnesses Unit with the power to recommend protective measures for victims and witnesses and provide them with support and counseling, particularly in rape and sexual assault cases.³²⁶ In addition, the Unit is intended to provide

³¹⁸ *Id.* at T. 1684 (Apr. 2, 1997).

³¹⁹ *Id.* at T. 3012 (May 29, 1996).

³²⁰ Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 15, 21 (1997).

³²¹ *See id.*

³²² *See* Ruth Wedgwood, Conference Paper, *Prosecuting War Crimes*, 149 *MIL. L. REV.* 217, 221 (1995). *See also* William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 *ST. JOHN'S J. LEGAL COMMENT.* 449, 473-74 (1997) (advocating an asylum program for victims who testify in the ICTY).

³²³ *See* Wedgwood, *supra* note 322, at 221.

³²⁴ 1998 ICTY Annual Report, *supra* note 131, para. 291 (recognizing that the Tribunal is denied one crucial facility that most national systems take for granted: It is unable to offer practical protection to witnesses who are at risk by virtue of the fact that they assist the Tribunal.).

³²⁵ Rules of Procedure and Evidence, *supra* note 216.

³²⁶ *Id.*

victims with a supportive and responsive legal ear in order to encourage reporting of rapes.³²⁷ The Unit also makes arrangements for travel and accommodation of witnesses and provides around-the-clock information and assistance.³²⁸

The defense in *Celebici* criticized the Victims and Witnesses Unit for limiting access to prosecution witnesses: "A connection . . . exists between the Victims and Witnesses Unit and the Office of the Prosecutor that is improper."³²⁹ The Court, citing delay by the defense, allowed the witnesses to take the stand without first allowing the defense a chance to interview them, reasoning that the defense would have adequate opportunity to cross-examine.³³⁰ One is left to wonder if, in the ICTY, equal access to witnesses is an essential part of the right of the accused to a fair trial, as mandated by Article 21 of the ICTY Statute.³³¹

Rule 34 also provides that "[d]ue consideration shall be given, in the appointment of staff, to the employment of qualified women."³³² This provision illustrates a larger ICTY recognition of the serious negative effects of rape and the importance of female staff capable of addressing those effects through the Victims and Witnesses Unit.³³³ The United Nations Secretary-General advised that qualified women be appointed to the ICTY at all levels to respond to "the sensitivities of victims of rape and sexual assault."³³⁴ Indeed, women do maintain a strong presence on the Tribunal: two women sit as Tribunal judges, the Chief Prosecutor is a woman, and of the three-member prosecution team who tried *Furundžija*, two were women.³³⁵

In a larger sense, because the impetus behind the establishment

³²⁷ Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 892-93 (1997).

³²⁸ 1998 ICTY Annual Report, *supra* note 131, paras. 152-53.

³²⁹ *Celebici* Transcript, *supra* note 62, at T. 7946 (Oct. 21, 1997).

³³⁰ *See id.* at T. 7946-51 (Oct. 21, 1997).

³³¹ ICTY Statute, *supra* note 90.

³³² Rules of Procedure and Evidence, *supra* note 216.

³³³ Report of the Secretary-General, *supra* note 86, para. 88.

³³⁴ *Id.*

³³⁵ 1999 ICTY Annual Report, *supra* note 38, para. 9; Ron Scherer, *Women Needed on Bosnia Tribunal* (Christian Science Monitor, May 26, 1993, at 3); *Furundžija* Judgment, *supra* note 6, para. 34.

of an international criminal tribunal did not intend the Victims and Witnesses Unit or the ICTY to be a vehicle for victors' justice, some rape victims who testify may not receive the closure or vindication they would like.³³⁶ However, the increased reporting spurred by the Victims and Witnesses Unit undoubtedly benefits rape victims by allowing them the chance to tell their stories, thereby promoting discussion and facilitating understanding within the victims' communities.³³⁷

D. Compensation of Victims

The ICTY Statute offers restitution as a penalty, authorizing the Tribunal to order "return of any property and proceeds acquired by criminal conduct."³³⁸ Rule 105 further details these restitutionary measures.³³⁹ However, the Rules do not offer compensation beyond such restitutionary measures.³⁴⁰ Rule 106 specifies that the ICTY may notify the states involved of the criminal liability incurred by defendants, and that the "final and binding" judgment of the Tribunal may be utilized by a victim who wishes to "bring an action in a national court or other competent body to obtain compensation."³⁴¹ The Tribunal thus does not constrain victims seeking civil remedies in domestic courts, pursuant to Security Council Resolution 827, which instructs that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."³⁴²

Critics have pointed out that the ICTY could do more to

³³⁶ Terry Coonan, *Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia*, 88 AM SOC'Y INT'L L. PROC. 239, 244-45 (1994). If conviction and punishment for rape were to issue from a judicial body within the former Yugoslavia, for example, victims might feel more vindication within their communities. *See generally* Alvarez, *supra* note 7, at 2068-73 (discussing the effect of international criminal prosecutions on rape victims).

³³⁷ Alvarez, *supra* note 7, at 2084-89.

³³⁸ ICTY Statute, *supra* note 90, at Article 24(3).

³³⁹ Rules of Procedure and Evidence, *supra* note 216.

³⁴⁰ *Id.* at Rule 106.

³⁴¹ *Id.*

³⁴² S.C. Resolution 827, *supra* note 33, at 2. Regarding alternative remedies for rape victims, *see infra* notes 400-20.

provide victims with compensation.³⁴³ The ICTY could interpret Resolution 827 to require the Tribunal to undertake what would amount to civil proceedings coterminous with its determination of criminal liability.³⁴⁴ Indeed, many Bosnian rape victims, especially those who are already reluctant to testify in a criminal matter, could benefit from such a determination, as they may show even more unwillingness to litigate their case in yet another proceeding.³⁴⁵ However, the ICTY's already strained resources make it difficult for the Court to undertake proceedings beyond the adjudication of criminal liability.³⁴⁶ Further, rape victims of the former Yugoslavia have already begun to pursue compensation in other forums.³⁴⁷ For many more victims, criminal sanctions provided by the ICTY may be sufficient vindication.³⁴⁸

E. Punishment/Sentencing

The ICTY imposes sentences by taking into account the domestic law of the state of which the defendant is a citizen.³⁴⁹ The Tribunal is authorized, for example, to take into account the "general practice regarding prison sentences in the courts of the former Yugoslavia," and other punishments imposed on the convicted party by individual States for the same criminal act, along with any aggravating or mitigating factors.³⁵⁰ Sentencing practices of the former Yugoslavia set the maximum prison term at twenty years³⁵¹ and structure sentencing so that a penalty derived

³⁴³ Green et al., *supra* note 200, at 212. This feminist proposal details the terms of the Compensation Commission established after the 1991 Gulf War and advocates the establishment of a fund to benefit rape victims in the former Yugoslavia. *Id.* The Compensation Commission awards damages for "serious personal injury and mental pain and anguish," including "physical or mental injury arising from sexual assault." S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th Mtg., U.N. Doc. S/RES/692 (1991).

³⁴⁴ S.C. Resolution 827, *supra* note 33, at 2.

³⁴⁵ See *supra* notes 268-71 and accompanying text.

³⁴⁶ See *supra* notes 131-36 and accompanying text.

³⁴⁷ See *infra* notes 400-20 and accompanying text.

³⁴⁸ Coonan, *supra* note 336, at 253-54.

³⁴⁹ Rules of Procedure and Evidence, *supra* note 216, at Rule 101.

³⁵⁰ *Id.* The Tribunal may not utilize death as a punishment. ICTY Statute, *supra* note 90, at Article 24.

³⁵¹ The twenty-year limit applies to criminal acts eligible for the death penalty or crimes of an especially grave nature. Celebici Judgment, *supra* note 5, para. 1204.

from the combination of several sentences cannot exceed the term of the single longest sentence.³⁵²

In the *Tadić*, *Celebici*, and *Furundžija* cases, the Court imposed concurrent sentences on each of the convicted parties.³⁵³ *Tadić* was found guilty of several counts, the sentences for each of which were imposed concurrently, with the longest being twenty years.³⁵⁴ He is currently serving that time under a mandate from the Tribunal that his sentence not be commuted to less than ten years.³⁵⁵ For allowing sex crimes to occur as commander of the *Celebici* camp, defendant Mucic will serve a total of seven years, while *Celebici* defendant Landzo will serve fifteen years for willful killing and torture.³⁵⁶ The Tribunal convicted *Celebici* defendant Delic of multiple acts of rape and sentenced him to a fifteen-year sentence.³⁵⁷ However, under the sentencing practice applied by the ICTY, Delic's twenty-year sentence for murder and willful killing effectively subsumed the rape sentence, thereby diminishing its impact.³⁵⁸ The ICTY sentenced *Furundžija* to a total of ten years imprisonment for his participation in beatings and sexual assault, which the Court called a "particularly vicious form of torture."³⁵⁹ Although *Furundžija* did not personally commit the assault and rape of Witness A in that case, the court refused to take into account such mitigating factors as his age, his clean record, and his status as the father of a young child.³⁶⁰

³⁵² *Id.*

³⁵³ Murphy, *supra* note 138, at 91-92. Some critics advocate broad ICTY discretion to impose stricter sentences than those used in the former Yugoslavia: "Rape and forced prostitution are explicitly listed as war crimes and are, therefore, subject to much greater penalty than the ten-year maximum applied to rape as a domestic crime." Green et al., *supra* note 200, at 210.

³⁵⁴ 1997 *Tadić* Sentencing Judgment, *supra* note 58, para. 74.

³⁵⁵ *Id.* See also Sentencing Judgment, Prosecutor v. *Tadić*, Case No. IT-94-1 (Nov. 11, 1999), <http://www.un.org/icty/tadic/trialc2/jugement-e/tad-ts991111e.htm> (increasing *Tadić*'s sentence to twenty-five years); Judgment in Sentencing Appeals, Prosecutor v. *Tadić*, Case No. IT-94-1 (Jan. 26, 2000), <http://www.un.org/icty/tadic/appeal/jugement/tad-asj000126e.htm> (reinstating *Tadić*'s former sentence of twenty years).

³⁵⁶ *Celebici* Judgment, *supra* note 5, para. 1285.

³⁵⁷ *Id.*

³⁵⁸ See Askin, *supra* note 47, at 114-15.

³⁵⁹ *Furundžija* Judgment, *supra* note 6, paras. 295, 296.

³⁶⁰ *Id.* paras. 282, 284.

Arguments for and against the imposition of more stringent rape sentences are numerous.³⁶¹ On the one hand, the indictment, trial, and conviction of those who commit rape on an individual or mass scale represent an enormous step forward for women's rights at the international level.³⁶² International awareness of the crime of rape, now also recognized as occurring in Kosovo, has arguably never been more intense.³⁶³ Exposure of the international community to the war crime of rape may be instrumental in "helping to break the endless cycle of violence and retribution" occurring in the former Yugoslavia, and elsewhere.³⁶⁴ The often very public nature of ICTY trials may offer deterrent value to those who might commit such crimes in the future.³⁶⁵

However, it is difficult to deny that ICTY sentencing seems lenient, especially given the magnitude of the atrocities attributed to many defendants.³⁶⁶ Chief Prosecutor Louise Arbour noted that the ICTY will be ineffectual as a deterrent should it fail to bring more high-ranking officials to justice.³⁶⁷ It remains to be seen if the ICTY can truly have deterrent effect, given the scope of the ongoing conflict in the former Yugoslavia and the sheer number of perpetrators whose battle tactics have involved rape.³⁶⁸ Certainly, balancing the interest in documentation and recognition of rape as a weapon of war with the basic criminal law goals of retribution and deterrence is no simple task.³⁶⁹ In sentencing perpetrators of war crimes, the Tribunal continually struggles to weigh humane and proportional punishment against a growing international

³⁶¹ See, e.g., Green et al., *supra* note 200, at 210 (advocating discretion in sentencing, especially for rape).

³⁶² *Id.* at 173.

³⁶³ See *Stories of Rape in Kosovo and Its Effects on the Culture* (National Public Radio broadcast, July 2, 1999), available at LEXIS, News File.

³⁶⁴ Schrag, *supra* note 158, at 193.

³⁶⁵ Coonan, *supra* note 336, at 246.

³⁶⁶ See Green et al., *supra* note 200, at 210.

³⁶⁷ Trueheart, *supra* note 308.

³⁶⁸ Alvarez, *supra* note 7, at 2080.

³⁶⁹ See Celebici Judgment, *supra* note 5, paras. 1231, 1234. This is to say nothing of the practical difficulties experienced by the ICTY in finding States willing to enforce the sentences imposed. See ICTY Statute, *supra* note 90, at Article 27; 1998 ICTY Annual Report, *supra* note 131, para. 253.

appreciation for the seriousness of rape.³⁷⁰

F. Interpretation/Translation in the ICTY

Descriptions of the speed and volume of testimony undergoing translation during any given instant in the ICTY are staggering.³⁷¹ Parties wear earphones, into which simultaneous translation is given in at least three different languages, depending on the fluency of the parties present.³⁷² A simultaneous transcript appears on monitors placed on each desk in the courtroom, where parties can read it and watch for inaccuracies.³⁷³ Although issues surrounding translation in the courtroom are not specific to rape proceedings, a close reading of ICTY transcripts reveals that their effect on rape trials does bear mentioning.

The presence of a foreign language interpreter in the courtroom necessarily adds delay and intrudes upon the normal linguistic and procedural flow of the events taking place.³⁷⁴ Interpreters can unintentionally interfere with testimony—evidence that attorneys religiously seek to control—by exerting a coercive power through rephrasing and interruptions.³⁷⁵ These types of inadvertent influences happen quite often in ICTY proceedings, due to the multilingual nature of the proceedings and the linguistic needs of the parties.³⁷⁶

The two official languages of the ICTY are English and French.³⁷⁷ However, the ICTY Statute dictates that the accused has the right to be promptly and completely informed of the charges

³⁷⁰ See, e.g., Furundžija Judgment, *supra* note 6, at para. 290 (the Trial Chamber discusses the difference between the fact of punishment and the severity of sanction and recognizes that, for the ICTY, “penalties are made more by its international stature, moral authority and impact upon world public opinion.”).

³⁷¹ See May & Wierda, *supra* note 169, at 734.

³⁷² Tadić Transcript, *supra* note 1, at T. 22-23 (May 11, 1995).

³⁷³ May & Wierda, *supra* note 169, at 734.

³⁷⁴ SUSAN BERK-SELIGSON, *Bilingual Court Proceedings: The Role of the Court Interpreter*, in LANGUAGE IN THE JUDICIAL PROCESS 155, 156-57 (Judith N. Levi & Anne Graffam Walker, eds., 1990).

³⁷⁵ *Id.*

³⁷⁶ See Trueheart, *supra* note 308 (reporting that ICTY Chief Prosecutor Arbour cites interpretation as one of its most difficult and frequent challenges).

³⁷⁷ ICTY Statute, *supra* note 90, at Article 33; Rules of Procedure and Evidence, *supra* note 216, at Rule 3.

against him or her in a language he or she understands, and that an interpreter is to be provided at no cost if the accused cannot speak or understand the languages used in the Tribunal.³⁷⁸ Under Rule 76, ICTY interpreters take a solemn oath to perform all duties faithfully, impartially, and confidentially, and to observe the ICTY Interpreters' Code of Ethics.³⁷⁹

The Trial Chamber in *Tadić* warned the parties at the outset of the trial to “speak slowly, because sometimes the interpreter needs additional time.”³⁸⁰ The delay caused by interpretation may negatively affect witnesses who have traveled to the Hague to testify. The feelings of fear and stress already felt by many rape victims may be heightened as testimony is delayed.³⁸¹ Further, certain witnesses needing special interpreters sometimes require rescheduling of testimony. The defense counsel interrupted proceedings in *Celebici*, for example, when it sought to change the order of witnesses in order to accommodate the Arabic interpreter required by his witness: “I would like to . . . interpose a witness The witness speaks Arabic and we do not have Arabic interpreters in house and special provision has been made to bring them in.”³⁸²

Where speed and duration of translation are intense, the possibility for human error naturally increases.³⁸³ The prosecution in *Tadić* noted that:

there is also the issue of multiple languages and the imprecision of the interpretation process. . . . [A] great deal of accuracy is bound to be lost in the translation process. There is no statement taken during the course of the investigation that will be a verbatim report of what the witnesses say.³⁸⁴

³⁷⁸ ICTY Statute, *supra* note 90, at Article 21; Rules of Procedure and Evidence, *supra* note 216.

³⁷⁹ Rules of Procedure and Evidence, *supra* note 216; Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/144 (Mar. 5, 1999).

³⁸⁰ *Tadić* Transcript, *supra* note 1, at T. 22 (May 11, 1995).

³⁸¹ For a discussion of the effects of delay on rape victims, *see supra* notes 313-19 and accompanying text.

³⁸² *Celebici* Transcript, *supra* note 62, at T. 5857 (August 11, 1997).

³⁸³ *Tadić* Transcript, *supra* note 1, at T. 34 (May 7, 1996).

³⁸⁴ *Id.*

Parties bear the responsibility to check the transcripts for accuracy and make objections as soon as errors are discovered: “[t]he attorneys who speak both English and Bosnian have noticed many errors in the translation which change the meaning. . . . [T]he answer given on several occasions changed not only the names of people and places but also the very substance of what the witness was saying.”³⁸⁵ The ICTY corrects typographical errors brought to its attention but does not accept stylistic changes.³⁸⁶ In *Tadić*, for example, Judge McDonald noted one such instance where the transcript had been corrected: “last time . . . I think the transcript read ‘released’ and it should have been . . . ‘[a]rrests.’”³⁸⁷

Listeners at times have trouble understanding the translation through their headphones—often in ICTY proceedings, the questions asked of witnesses, as well as their answers, are translated by the same person.³⁸⁸ As a result, there is no audible differentiation in the speaker’s voice to indicate where the question of one speaker ends and the answer of the other speaker begins, which can lead to confusion on the part of the listeners.³⁸⁹ Judge Jan halted proceedings during the testimony of rape victim Cecez in *Celebici* to explain that “the interpreter is the same, so the questions and the answers really get muddled up. . . . Getting the same voices in quick succession, it is very difficult to make out what the question is and what the answer is.”³⁹⁰

Translation problems arise even when the examining attorney speaks the same language as the witness. Because these parties understand each other without the aid of translation, they tend to speak much faster, making it difficult for the interpreters to keep pace with them.³⁹¹ In the *Furundžija* transcript, for example, the interpreter interrupts constantly to ask the speakers to slow down, especially during presentation of expert testimony crucial to the Court’s understanding of the effects of Post-Traumatic Stress

³⁸⁵ *Celebici* Transcript, *supra* note 62, at T. 6803-04 (Sept. 4, 1997).

³⁸⁶ *Tadić* Transcript, *supra* note 1, at T. 23 (May 11, 1995).

³⁸⁷ *Id.*

³⁸⁸ *Celebici* Transcript, *supra* note 62, at T. 591 (March 18, 1997).

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *See Furundžija* Transcript, *supra* note 245, at T. 1142 (Nov. 11, 1998).

Disorder on rape victims.³⁹² Translating the ICTY proceedings requires interpreters to make quick and definitive choices daily, even hourly, between analogous words, phrases, and linguistic idioms.³⁹³ These swiftly made decisions ultimately affect the meaning of the testimony, and unfortunately may at times be tainted by human error, fatigue, or stress.³⁹⁴ The need to check constantly for accuracy in the testimony appearing on courtroom monitors distracts attorneys and judges.³⁹⁵ Technological glitches can bring the entire proceeding to a halt.³⁹⁶ In short, interruptions and errors focus attention on the linguistic mode of production rather than on the testimony itself.³⁹⁷ Undoubtedly, interpretation and translation problems have at times interfered with the overall impact of rape victim testimony and the presentation of evidence of rape.³⁹⁸ However, no feasible alternatives exist. Ironically, the multinational and multilingual character of the ICTY, while acting as an international safeguard against unduly biased proceedings, may also be the very thing that sometimes hinders its search for truth.³⁹⁹

VI. Alternatives to the ICTY for Rape Victims

The ICTY lacks the resources to address each and every injury arising from the conflict in the former Yugoslavia.⁴⁰⁰ However, alternative remedies in other fora are available to rape victims.⁴⁰¹ Remedies may be pursued in domestic Bosnian courts, for example, where litigation could have a more immediate effect on

³⁹² *Id.*

³⁹³ *E.g.*, Tadić Transcript, *supra* note 1, at T. 23 (May 11, 1995) (describing ICTY procedure for reviewing and correcting transcripts).

³⁹⁴ Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 296 (1996).

³⁹⁵ *See* May & Wierda, *supra* note 169, at 734.

³⁹⁶ *See* Celebici Transcript, *supra* note 62, at T. 6797-98 (Sept. 4, 1997).

³⁹⁷ *See id.* at T. 591 (Mar. 18, 1997).

³⁹⁸ *See* Furundžija Transcript, *supra* note 245, at T. 1142 (Nov. 11, 1998).

³⁹⁹ *See generally* Alvarez, *supra* note 7, at 2035-42 (exploring the concept of "victor's justice" through discussion of the Nuremberg Trials).

⁴⁰⁰ *See* 1998 ICTY Annual Report, *supra* note 131, at para. 280.

⁴⁰¹ *See infra* notes 402-16 and accompanying text.

the local community.⁴⁰² Domestic courts may be limited by their own political agendas, which, in the case of rape in the Balkans, often do not hold victims' concerns as paramount.⁴⁰³ However, a domestic judicial body might be more representative of the goals of citizens within the particular State and certainly would possess expertise in applying its own law to the case at hand.⁴⁰⁴

Truth Commissions could also bring closure to rape victims in the former Yugoslavia by providing a means for the compilation and dissemination of information about the regional conflict in a non-adversarial manner.⁴⁰⁵ A truth commission could increase international awareness of rape through exposing to public scrutiny specific occurrences of the crime within the former Yugoslavia.⁴⁰⁶ While they may risk jeopardizing the anonymity sought by the ICTY in certain indictments, truth commissions could promote awareness and vindicate victims by allowing them an opportunity to tell their stories to the world.⁴⁰⁷

The International Court of Justice (ICJ), on the other hand, could foster public debate and solidarity within the former Yugoslavia through proceedings against states as entities.⁴⁰⁸ Concerns about derogation of state sovereignty, intimidation of witnesses, and the minimal impact of individual criminal liability could be assuaged by ICJ proceedings that pit state against state.⁴⁰⁹

⁴⁰² Alvarez, *supra* note 7, at 2095 (noting possibility of domestic proceedings, but advocating international criminal proceedings as superior due to current fragmented status of Balkan government and small likelihood of evenhanded treatment).

⁴⁰³ See Askin, *supra* note 47, at 99.

⁴⁰⁴ See Alvarez, *supra* note 7, at 2097.

⁴⁰⁵ Truth commissions are a recording mechanism, designed not to inflict legal punishment but as "a kind of non-adversarial process of re-establishing democratic justice by exposing the truth of what happened." Alvarez, *supra* note 7, at 2100 (quoting Anne Sa'adah, *Germany's Second Chance: Trust, Justice, and Democratization* (forthcoming Fall 1998, manuscript at 232, on file with author). See also Coonan, *supra* note 336, at 253 (describing the ICTY "super-indictment" procedure under Rule 61). Functioning much like a miniature truth commission, the ICTY, under certain circumstances, can make indictment information on the accused publicly available.

⁴⁰⁶ Alvarez, *supra* note 7, at 2100.

⁴⁰⁷ See 1998 ICTY Annual Report, *supra* note 131, para. 225 (discussing ICTY reservations about the creation of a Truth and Reconciliation Commission for Bosnia and Herzegovina).

⁴⁰⁸ See Alvarez, *supra* note 7, at 2099.

⁴⁰⁹ See BASSIOUNI & MANIKAS, *supra* note 24, at 244-45.

For example, the ICJ could ultimately act as a safety valve for the expression of public outrage in Bosnia by providing a forum for that country's legal dispute not with individual citizens, but with the Serbian and Montenegrin states themselves.⁴¹⁰

Another remedy for rape victims exists in United States Federal District Court under the Alien Tort Claims Act, amended in 1992 as the Torture Victim Protection Act.⁴¹¹ Some see civil damages levied against individual rapists as a more effective punishment, for both victim vindication and deterrence, than imprisonment.⁴¹² Indeed, two of the first cases to be brought under that Act, *Doe v. Karadzic*⁴¹³ and *Kadic v. Karadzic*,⁴¹⁴ were filed by Muslim women seeking damages for various acts of sexual violence that occurred during the disintegration of the former Yugoslavia.⁴¹⁵ These types of suits help cultivate international awareness of the war crime of rape, but even if they are successful, the plaintiffs will likely face problems in enforcing judgments.⁴¹⁶

Each of these alternative courses of action for remedy poses potential problems for rape victims. While the ICTY exists for the specific purpose of reconciliation through adjudication of the guilt of those accused of committing war crimes and to impose criminal sanctions on those found guilty,⁴¹⁷ criminal sanctions do not always offer the types of vindication desired by individual victims.⁴¹⁸ As

⁴¹⁰ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, *Bosnia and Herzegovina v. Yugoslavia* (July 11, 1996) (1996 I.C.J. 91) at 595.

⁴¹¹ Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 (Supp. V 1993).

⁴¹² Coonan, *supra* note 336, at 253.

⁴¹³ 93 Civ. 0878 (PKL) (S.D.N.Y. 1994).

⁴¹⁴ 93 Civ. 1163 (PKL) (S.D.N.Y. 1994).

⁴¹⁵ The two cases were consolidated in a motion to dismiss. See *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994). On appeal, Circuit Judge Jon O. Newman remarked on the unusual nature of this case in the first sentence of his opinion: "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan." *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

⁴¹⁶ See Alvarez, *supra* note 7, at 2102.

⁴¹⁷ 1998 ICTY Annual Report, *supra* note 131, para. 285.

⁴¹⁸ Alvarez, *supra* note 7, at 2094-2103 (weighing the pros and cons of the justice obtained for victims in an international criminal court, as well as alternatives to criminal proceedings).

the Tribunal itself remarked, “[f]or the abused, forgiveness is possible only when they know, and exceptionally, understand, the reasons for their suffering. For the abusers, forgiveness is possible only when they accept accountability.”⁴¹⁹ While this may be true in a substantial number of cases, even the ICTY itself would admit that there are as many different conceptions of reconciliation and responsibility as there are factions within the former Yugoslavia.⁴²⁰

VII. Conclusion

Although it has accomplished a great deal, the ICTY still has much work ahead of it. Alleged perpetrators of some of the most egregious acts of violent rape in the former Yugoslavia, Mladic and Karadzic, have yet to be apprehended.⁴²¹ The Foca Indictment⁴²² is the first ICTY indictment to charge suspects solely with crimes of rape and sexual assault as offenses independent of other acts of violence, has the potential to set international precedent and signal a new era of international recognition of rape as a war crime, it has yet to go to trial.⁴²³ The criminal prosecution of rape as a war crime by an international body is historic and represents perhaps the single largest contribution to international humanitarian law by the ICTY.⁴²⁴ However, the Tribunal cannot

⁴¹⁹ 1998 ICTY Annual Report, *supra* note 131, para. 285.

⁴²⁰ *See id.*

⁴²¹ Initial Indictment, Prosecutor v. Karadzic and Mladic, Case No. IT-95-5 (July 24, 1995), <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>; Initial Indictment, Prosecutor v. Karadzic and Mladic, Case No. IT-95-18 (Nov. 16, 1995), <http://www.un.org/icty/indictment/english/kar-ii951116e.htm>; *All Things Considered: Karadzic and Mladic* (National Public Radio Broadcast, April 16, 1996).

⁴²² Initial Indictment, Prosecutor v. Dragan Gagovic, Gojko Jankovic, Janko Janjic, Radimir Kovac, Zoran Vukovic, Dragan Zelenovic, Dragoljub Kunarac, Radovan Stankovic, Case No. IT-96-23 (June 26, 1996), <http://www.un.org/icty/indictment/english/foc-ii960626e.htm>; *amended by* Case No. IT-96-23-I (July 13, 1998), <http://www.un.org/icty/indictment/english/kun1ai980819e.htm>; *amended by* Case No. IT-96-23-PT (Sept. 6, 1999), <http://www.un.org/icty/foca/trialc2/order-e/kun-corder980819e.htm>; *amended by* Case No. IT-96-23-PT (Oct. 7, 1999), <http://www.un.org/icty/indictment/english/foc-1ai991007e.htm>; *amended by* Case No. IT-96-23-PT (Dec. 1, 1999), <http://www.un.org/icty/indictment/english/kun-3ai991201e.htm>.

⁴²³ Overview of Court Documents, 11 February 2000, Foca Case, Vukovic's Request for Joinder of Trials Dismissed, <http://www.un.org/icty/news/Kunarac/kunarac-cd.htm>.

⁴²⁴ *See* 1999 ICTY Annual Report, *supra* note 38, para. 280.

survive without the international financial support, apprehension assistance, and enforcement of judgments that states currently provide.⁴²⁵

The international nature of the Tribunal helps to insulate it from accusations that it administers a biased “victor’s justice,” while the consent and support of various independent sovereign states serve to validate the goals and activities of the Tribunal.⁴²⁶ However, the international character of the ICTY functions as its Achilles heel as well, through language translation, evidence gathering, and witness transportation, presenting enormous and inevitable challenges to the adjudication of criminal liability.⁴²⁷ These challenges are sure to continue in light of the Tribunal’s recent indictment of those involved in atrocities in Kosovo.⁴²⁸ The mission undertaken by the United Nations is to bring war criminals to justice by exposing them to the scrutiny of the international community.⁴²⁹ The International Criminal Tribunal for the Former Yugoslavia has adhered to the goals of this truthseeking mission as well, by questioning its own methods and asking for assistance where appropriate, while accepting the challenges of international prosecution and expressing a willingness to address its own shortcomings.

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⁴²⁵ *See id.*

⁴²⁶ *See id.* para. 3.

⁴²⁷ *See supra* notes 371-99, 268-324, 308-10, and accompanying text.

⁴²⁸ *See* Prosecutor v. Milosevic et al., Case No. IT-99-37 (May 24, 1999), <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>; *Morning Edition: Milosevic Indicted for Kosovo War Crimes* (National Public Radio Broadcast, May 27, 1999), available at LEXIS, News File.

⁴²⁹ *See supra* notes 28-42 and accompanying text.

