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The ICTY, a Legacy of Justice for Female Victims of Rape:

A comparative study of Bosnian war criminal cases 'Kunarac et al.' and 'Milan Lukić & Sredoje Lukić', to assess the prosecution of sexual violence by the ICTY from 1996.

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Master Thesis: MA International Relations in Historical Perspective

Date: 15.01.2023

Word Count: 14928

Abstract

The International Tribunal for the former Yugoslavia (ICTY) declared itself a pioneer in obtaining justice for female victims of sexual violence. This claim has been challenged by various feminist organisations. This thesis will assess what the cases of Lukić and Lukić and Kunarac et al reveal about the prosecution of sexual violence by the ICTY. It will be argued that the ICTY intended to be a breakthrough institution, recognising, and prosecuting sexual violence as a crime against humanity. However, analysis of how these cases were impacted by the ICTY's 'completion strategy' reveals institutional assumptions of 'accountability' and what constitutes a 'serious' crime, hindered the ICTY's ability to effectively prosecute sexual violence. Court proceedings of these cases demonstrate that high evidentiary standards resulted in the truth of the systematic sexual violence being overlooked. Failures to reveal the truth of the crime and prosecute accordingly meant no person was held accountable for mass rape and hindered justice for hundreds of victims in these cases. Finally, sentences administered for convicted crimes appear consistent and justified despite, the ICTY being limited in its ability to administer justice to victims of systematic sexual violence. Further research and infrastructure is required to help reconcile victims back into society.

List of Abbreviations

BiH	Bosnia and Herzegovina
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IRMCT	United Nations International Residual Mechanism for Criminal Tribunals
NGO	Non-Governmental Organisation
OHCRC	United Nations Human Rights Office
OTP	Office of the Prosecutor
UN	United Nations

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Introduction

On 25th May 1993, UN Security Council Resolution 827 established the International Criminal Court for the former Yugoslavia (ICTY). The court was created to respond to war crimes committed during the Bosnian War (1992-1995), bring perpetrators to trial, 'deter future crimes and render justice to thousands of victims,' including victims of sexual violence.[1] Statistics from varying sources, including the charity *Remembering Srebrenica*,[2] and academics- Ivana Radovic and Paul Bartrop,[3] claim that between 20,000 and 50,000 women experienced sexual violence during the Bosnian war.[4] The disparity in numbers highlights the difficulty in collecting data on sexual violence. The reasons for the inconsistency in the specific number of victims is beyond the scope of this paper, instead this research will focus on the ICTY's understanding and prosecution of sexual violence.

Wartime sexual violence has been overlooked as a 'unfortunate biproduct' of conflict.[5] However, several reports on the conflict in former Yugoslavia (Bosnian war), including UN special rapporteur Mr. Tadeusz Mazowiecki, claimed systematic rape, was used 'as an instrument of ethnic cleansing.'[6] The ICTY claims that upon its establishment 'investigations were conducted into reports of systematic detention and rape of women, men and children.'[7] 'The ICTY was the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as crime against humanity.'[7] More than a third of the total offenders convicted by the ICTY (78 of 161) have been found guilty of crimes involving sexual violence.[7] Thus the ICTY states it was the first international criminal tribunal to prove that 'effective prosecution of wartime sexual violence is feasible.'[7] However, as of 2016 only thirty-two of those charges ended in convictions. Furthermore, a total of eighteen cases have been acquitted by the ICTY, fourteen of those acquittals involved sexual violence. Of the seventeen individuals who died before transfer to the ICTY or during their trial, nine of those men had convictions for sexual violence cases. Comparatively of the twenty individuals charged for the Srebrenica massacre, fourteen have been convicted and there has only been one acquittal and one death before judgement from the ICTY.[6] These statistics suggest there may be a difference in urgency and resources provided in prosecuting sexual violence versus other war crimes. Moreover, multiple organizations, including *Amnesty International*, claim that the female survivors of Bosnian wartime sexual violence were 'denied justice.'[8]

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[1] "ICTY," International Justice Resource Centre, Accessed October 12, 2023, https://ijrcenter.org/international-criminal-law/icty/.

[2] "Women of Bosnia," Remembering Srebrenica, Accessed October 23, 2013, https://srebrenica.org.uk/what-happened/history/women-bosnia.

[3] Paul R. Bartrop, *Bosnian Genocide: The Essential Reference Guide*, 1st ed. (Bloomsbury Academic, 2016), 140, ISBN 978-1-4408-3868-2.

[4] Ivana Radovic, "Wartime Sexual Violence in Bosnia: The Human Trafficking Connection," Balkan Transitional *Justice*, December 31, 2020, https://balkaninsight.com/2020/12/31/wartime-sexual-violence-in-bosnia-the-human-trafficking-connection/.

[5] Wolfgang Schomburg and Ines Peterson, "Genuine Consent to Sexual Violence under International Criminal Law," The American Journal of International Law 101, no.1 (2007): 121, http://www.jstor.org/stable/4149827.

[6] Tadeusz Mazowiecki, "Situation of Human rights in the Territory of the former Yugoslavia," February 10, 1993, E/CN.4/1993/50, UN Commission on Human rights forty ninth session agenda item 27, 19, https://digitallibrary.un.org/record/226088?ln=en#record-files-collapse-header.

[7] IRMCT, "Crimes of Sexual Violence," Legacy Website of the ICTY/ TPIY/MKSJ, Accessed October 12, 2023, https://www.icty.org/en/features/crimes-sexual-violence.

[8] Gauri Van Gulik, "Bosnia and Herzegovina: Last chance for justice for over 20,000 wartime sexual violence survivors," Amnesty International, September 12, 2017, https://www.amnesty.org/en/latest/press-release/2017/09/bosnia-and-herzegovina-last-chance-for-justice-for-over-20000-wartime-sexual-violence-survivors/#:~:text=A%20quarter%20of%20a%20century%20after%20the%20start,justice%2C%20said%20Amnesty%20International%20in%20a%20new%20report.

I will use the cases of 'Kunarac et al' and 'Lukić Milan & Lukić Sredoje' to assess the following research question:

What does the comparison of the cases of Lukić and Lukić (2000-2008) and Kunarac et al (1996-2002) reveal about the prosecution of sexual violence by the ICTY?

Understanding the prosecution of sexual violence will contribute towards an understanding of whether the ICTY 'rendered justice to victims.' [9] Justice requires several elements: revealing the truth about the past; holding perpetrators responsible; offering reparation; providing reconciliation, including psychological and physical treatment.[10] Prosecution of a crime and providing justice for victims is a crucial investment 'in the peace and future of the former Yugoslavia.'[11]

The Kunarac et al case focuses on abuse in Foča, it was one of the two ICTY trials to deal 'entirely with charges of sexual violence' and the 'the judgement broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement.'[12] Thus, this case should demonstrate how the ICTY understood and responded to sexual violence as a war crime, whilst advocating that sexual violence, as a stand-alone crime, is taken seriously. Meanwhile the case of 'Lukić and Lukić' focuses on war crimes committed in Višegrad. Many women have accused Lukić and Lukić of commanding systematic rapes yet this was not included in their indictment.[13] Comparative analysis of the ICTY as an institution, their indictment and judgement of these two cases, which both involve systematic rape, will provide deeper assessment of the ICTY's intention to prosecute sexual violence, how the court worked in practice, and the implication on victims of sexual violence obtaining some form of justice. Conclusions drawn are specific to these two cases.

Argument

The ICTY has faced criticism from the UN office of the special representative of the Secretary General on sexual violence in conflict, that 'investigations into conflict- related sexual violence in Bosnia and Herzegovina had been ineffective and slow.'[14] Baron Serge Brammertz and Michelle Jarvis suggest that this could be due to the fact that conflict related sexual violence is not as serious as other crimes.'[15]

In contrast to Brammertz and Jarvis ideas, based on comparative assessment of the cases of 'Kunarac et al.' and 'Milan Lukić & Sredoje Lukić' it will be argued that the institution of the ICTY intended to prosecute sexual violence and introduced progressive legal framework to

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[9] IRMCT "About the ICTY," Legacy Website of the ICTY, TPIY, MSKJ, Accessed: September 22, 2023, https://www.icty.org/en/about#:~:text=By%20bringing%20perpetrators%20to%20trial%2C%20the%20ICTY%20aims,to%20a%20lasting%20peace%20in%20the%20former%20Yugoslavia.

[10] Nicholas A Jones, Stephen Parmentier and Elmar G.M. Weitekamp, "Dealing with international crimes in post-war Bosnia: A look through the lens of the affected population", *European Jorunal of Criminology 9*, no.5 (2012): 555 https://doi.org/10.1177/1477370812454645.

[11] IRMCT, "The Cost of Justice," Legacy Website of the ICTY, TPIY, MSKJ, Accessed January 10, 2024, https://www.icty.org/en/about/tribunal/the-cost-of-justice

[12] IRMCT "Landmark Cases," Legacy Website of the ICTY, TPIY, MSKJ, Accessed: September 22, 2023, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases .

[13] Ehlimana Memišević, "Višegrad's rape camps: Denial and Erasure", Aljazeera, October 17, 2020, https://www.aljazeera.com/opinions/2020/10/17/visegrads-rape-camps-denial-and-erasure/.

[14] Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, "Bosnia and Herzegovina," United Nations, Accessed October 23, 2023, https://www.un.org/sexualviolenceinconflict/countries/bosnia-and-herzegovina/.

[15]Kate Vigneswaran and Michelle Jarvis, "Challenges to Successful Outcomes in Sexual Violence," in *Prosecuting Conflict- Related Sexual Violence at the ICTY*, ed. Baron Serge Brammertz and Michelle Jarvis, (Oxford University Press, 2016), 36.

contextualise and address systematic rape. The ICTY was structured by the completion strategy. The completion strategy refers to a plan initiated by the ICTY judges to ensure that the 'tribunal concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia.'[16] Despite the intention to prosecute sexual violence as a serious war crime, analysis of the application of the completion strategy to Kunarac et al versus Lukić and Lukić reveals institutional misconceptions regarding the 'severity' and 'accountability' of perpetrators of rape, which hindered the ICTY's ability to reveal the truth of a crime and effectively prosecute sexual violence. Furthermore, throughout the court proceedings of Kunarac et al and Lukić and Lukić whilst the ICTY's Office of the Prosecutor (OTP) successfully prosecuted and contextualised isolated instances of rape as crimes against humanity, the OTP's high evidentiary requirements and prioritisation of other crimes meant the ICTY failed to prosecute organisers of systematic nature, leaving many victims ignored. Whilst the sentences administered to Lukić and Lukić and Kunarac et al appear methodical, sentences imposed can only hold individuals accountable for convicted cases. Consequently, these cases suggest that the ICTY's ability to prosecute sexual violence and administer justice was restricted to a mere few victims. Finally, this research highlights that the ICTY is limited in its authority to promote transitional justice in the form of reconciliation within society and further research, beyond criminal justice systems is required to provide long time support to victims of sexual violence.

Historiography

'Rape is as old as war itself.'[17] Both men and women are susceptible to extreme sexual violence during war, however rape disproportionately affects women, and is largely recognised as a form of gender-based violence.[18] Historically wartime 'sexual violence was simply implied and until the nineties did not attract much attention.'[19] This is problematic as 'unless international criminal law practitioners understand the influence of gender on conflict-related sexual violence, the judicial system remains vulnerable to mischaracterizing, overlooking, or under-prioritizing sexual violence and other gendered harms in their work.'[20] 'The world cannot stop what it doesn't understand,' thus failure to understand rape is detrimental to the safety of women during war. [21]

Despite developing international jurisdiction, the ICTY has faced criticism. Several feminist institutions have argued that the legacy of wartime sexual violence in Bosnia has not been properly addressed, and such crimes have instead been treated as 'second class crimes, with the victims as lower priorities for the justice system.'[22] Moreover, it has been comparatively less common for the OTP to bring specific charges of underlying crimes of sexual violence in

[16] IRMCT, "Completion Strategy," Legacy Website of the ICTY, TPIY, MKSJ, Accessed December 30, 2023, https://www.icty.org/en/about/tribunal/completion-strategy#:~:text=Consequently%2C%20the%20Tribunal%27s%20judges%20took%20the%20initiative%20of,with%20domestic%20legal%20systems%20in%20the%20former%20Yugoslavia.

[17] "War's overlooked victims," The Economist, January 13, 2011, https://www.economist.com/international/2011/01/13/wars-overlooked-victims.

[18] Kerry K. Paterson, "A competition of suffering: Male vs Female rape," August 29, 2012, https://womensmediacenter.com/women-under-siege/a-competition-of-suffering-male-vs.-female-rape.

[19] Radovic, "Wartime Sexual Violence in Bosnia."

[20] Baron Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016), 13.

[21] Paul Kirby, "What do we really know about wartime rape?," United Stated Institute of Peace, December 10, 2014, https://www.usip.org/publications/2014/12/what-do-we-really-know-about-wartime-rape.

[22] British Embassy Sarajevo, "Legacy of wartime sexual violence in Bosnia still far from addressed." Gov.UK, June 20, 2013, https://www.gov.uk/government/news/legacy-of-wartime-sexual-violence-in-bosnia-still-far-from-addressed.

addition to persecution or genocide as compared with some other crimes.[23] Iva Vukusic argues that 'at the ICTY, we have not seen a similar pattern of omissions in relation to other specific crime categories, underscoring the particular risk that sexual violence may be overlooked.' [24] The conviction of Milan and Sredoje Lukić reinforces Vukusic's idea. They were prosecuted 'for war crimes and crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (Tribunal) which consequently 'brought justice for the killing of scores of people during the war in Bosnia and Herzegovina but ignores the suffering of victims of sexual violence.'[25]

During the Bosnian war, though all sides were guilty, most sexual violence victims were Bosnian Muslims who were assaulted by Serbs. The attacks took place largely systematically.[26] A culture of 'rape camps' existed during the Bosnian war.[27] Female victims held in these centres were repeatedly raped, kept in 'slave-like' conditions as they could not 'exercise any control over their lives.'[27] The case of Kunarac et al was arguably the best known case for these conditions and was the first judgment 'handed down by the ICTY that treated sexual enslavement and rape as crimes against humanity.' [27] Kunarac et al operated in the town of Foča where many Bosnian Muslim women and girls were detained in various locations for months, raped, frequently beaten, and abused. Some were traded among Bosnian Serb soldiers and some murdered.'[28] Similar camps operated throughout the territory of former Yugoslavia. Vilina Vlas in Višegrad was one of the most prolific rape camps.[29] It is suspected that at least 200 Bosniak girls and women were held at Vilina Vlas and systematically raped in order to be 'inseminated by the Serb seed.'[29] Paramilitary group, 'White Eagles' or 'Avengers' oversaw crimes in Višegrad and 'Vilina Vlas was commandeered as their headquarters.'[30] However Milan Lukić, leader of paramilitary group White Eagles was not indicted with rapes, even though 'ample evidence about a large number of rapes' was presented to the office of the prosecutor. [29] Instead evidence of the rapes were merely used to 'dismantle Lukić's claim that he was not in Višegrad at the time of other attacks.'[30] Thus the ICTY's achievement of explicitly recognising sexual violence as an international crime, could be called into question as many sexual violence survivors were seemingly ignored during the Lukić and Lukić case.

The Lukić and Lukić case and Kunarac et al case, seemingly 'oppose' each other when assessing the ICTY's understanding of systematic sexual violence. The aim of this research is to further compare and analyse Kunarac et al and the Lukić and Lukić case to further understand the prosecution of sexual violence by the ICTY. Whilst other scholarship has largely focused on either the cases individually or the functionality of the ICTY, through this research I will highlight the intricacies of the two cases and a close comparative analysis of these specific cases. I aim to bring forward the key considerations, motivations, and priorities of the ICTY,

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[23] Iva Vukusic, *Serbian Paramilitaries, and the Breakup of Yugoslavia: State Connections and Patterns of Violence*, (Routledge, 2022) 59.
[24] Ibid,54.
[25] "Bosnia and Herzegovina: No justice for rape victims," Amnesty International, July 21, 2009, https://www.amnesty.org/en/latest/press-release/2009/07/bosnia-and-herzegovina-no-justice-rape-victims-20090721/.
[26] Ian Black, "Serbs enslaved Muslim women at rape camps," The Guardian, March 21, 2000, https://www.theguardian.com/world/2000/mar/21/warcrimes.balkans.
[27] Radovic, "Wartime Sexual Violence in Bosnia: The Human Trafficking Connection."
[28] IRMCT, "Bridging the Gap- Foča, Bosnia and Herzegovina," Legacy Website of the ICTY, PTIY, MKSJ, Accessed October 13, 2023, https://www.icty.org/en/outreach/bridging-the-gap-with-local-communities/foca
[29]Ehlimana Memišević, "Višegrad's rape camps: Denial and Erasure."
[30] Emma Graham-Harrison, "Back on the tourist trail: the hotel where women were raped and tortured," The Guardian, January 28,2018, https://www.theguardian.com/world/2018/jan/28/bosnia-hotel-rape-murder-war-crimes.

to assess what this reveals about the prosecution of sexual violence by the ICTY. The aim is to understand how the intention of the ICTY successfully prosecuting sexual violence and administering justice to sexual violence survivors, applies to the reality of the ICTY, in these cases. Conclusions drawn will be specific to Kunarac et al and Lukić and Lukić. The pressing need to understand and efficiently prosecute wartime sexual violence is evident in the ongoing war in Ukraine. The UN states that Russia's use of sexual violence in Ukraine is a strategic programme of dehumanisation.'[31] Both 'Ukraine's prosecutor general and the International Criminal Court have said they will open investigations into reported sexual violence.'[32] Furthermore efforts are being made to understand why rape is consistently underreported and looking at changes, possible on a legislative level, which would encourage people to report crimes. For example, granting survivors of sexual violence with a special status that makes them eligible for state financial support.[33] Through this research I hope to contribute to the discussion of ensuring women are not ignored nor further oppressed by an unfair justice system. Highlighting the importance of assessing the phenomenon of prosecuting wartime rape.

The question of '*What does the comparison of the cases of Lukić and Lukić (2000-2008) and Kunarac et al (1996-2002) reveal about the prosecution of sexual violence by the ICTY?'* will be divided into three parts. First chapter one will assess how the institution of the ICTY was set up to prosecute sexual violence in the cases of Kunarac et al and Lukić and Lukić? This chapter will analyse the institutional intention of the ICTY to identify, prosecute and contextualise sexual violence in these cases. Furthermore, the first chapter will analyse how the ICTY's OTP was driven by the completion strategy and the implication on the ICTY's ability to investigate and reveal the truth of sexual violence. The second chapter will questions how the court proceedings of the ICTY address sexual violence in the case of Kunarac et al and Lukić and Lukić? Chapter two will largely focus on the ICTY's OTP, assessing how the crimes were understood and the evidentiary standards required to indict a crime. The second chapter discusses the ICTY's ability to apply their intention to prosecute sexual violence, highlighting any challenges that arose during court proceedings and the courts' ability to hold persecutors accountable. Finally, the third chapter will question 'to what extent the ICTY's judgement and sentencing in the cases of Kunarac et al and Lukić and Lukić achieved justice for the victims of sexual violence? The third chapter includes an assessment of both the second and third organ of the ICTY, known as the trial chamber and the registry. The trial chamber 'determines the guilt or innocence of those accused' and 'pass sentence on whom they convict', thus forms a significant role in ensuring that those responsible for crimes are truly held accountable and given a sentence proportional to the crime committed. The registry is responsible for several matters including the court support service. 'The offices of the Registry are responsible for bringing witnesses to testify in court, protecting them when necessary and providing them with expert psychological support.' Analysing these aspects of Kunarac et al and Lukić and Lukić will reveal the effectiveness of the prosecution in obtaining justice for their victims.

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[31] Liz Cookman, "I just want justice: Ukrainians struggle with hidden war crime of sexual violence," The Guardian, September 26, 2023, https://www.theguardian.com/world/2023/sep/26/i-just-want-justice-ukrainians-struggle-with-hidden-war-of-sexual-violence.

[32] Bethan Mckernan, "Rape as a weapon: huge scale of sexual violence inflicted in Ukraine emerges," The Guardian, April 4, 2022, https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine.

[33] Ministry of Justice, "Greater Support and Better Outcomes for Victims of Sexual Violence," GOV UK Press Release, August 3, 2023, https://www.gov.uk/government/news/greater-support-and-better-outcomes-for-victims-of-sexual-violence.

Limit of scope

This research proposal will focus largely on the sexual violence experienced by female Bosniak (Bosnian Muslim) population. It is important to acknowledge that a significant number of the victims were children, girls aged between 12-15, highlighting the need for specific protection of children during time of war and their vulnerability to war crimes, however such discussion is beyond the scope of this paper. Furthermore, 3000 men and boys were systematically raped by Serbian military men during the war. [34] The systematic sexual violence endured by men contradicts the oversimplified idea that 'male civilians are killed and female civilians are raped.'[35] It is important to counter such an assumption as I do not want my research to undermine the severity of sexual violence endured by men.

Furthermore, sexual violence does not refer to a 'single experience.' The World Health Organization defines sexual violence as 'any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting.'[36] This includes, but is not limited to rape. There is inconsistent jurisprudence around 'sexual violence.'[37] The International Criminal Court enumerated seven sexual and gender-based crimes, namely "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any form of sexual violence.'[37] This highlights the broad scope in which sexual violence occurs. It is important to note that this research does not discuss the ICTY's approach to sexual violence as reproductive violence. Instead, this research focuses on the systematic 'rape and sexual slavery' which occurred in detention centres described as 'rape camps.' For the purposes of this research, the definition of sexual violence extends beyond penetrative sex to include any 'physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or forcing victims to perform sexual acts on one another or harm one another in a sexual manner.'[37]

When selecting case studies to focus on I considered analysing other landmark sexual violence cases. I considered assessment of Anto Furundžija, as this was the first case at the ICTY to 'concentrate entirely on charges of sexual violence.'[38] Furundžija was found guilty of aiding and abetting rape, but not a direct perpetrator, consequently this case was unique, a stand-alone case which was not necessarily representative of how the ICTY deals with perpetrators of mass sexual violence.[39]

Methodology

To assess 'what the comparison of Lukić and Lukić (2000-2008) and Kunarac et al (1996-2002) reveal about the prosecution of sexual violence, by the ICTY?' I will question whether the ICTY was set up to prosecute sexual violence? To achieve this, I will assess UN resolution 780 to understand how the UN wished to respond to reports of mass rape. Furthermore, analysis of UN resolution 808 and 827 describes the purpose and key aims when establishing the ICTY and will help identify an intention to prosecute rape. Using the ICTY website, documentation

[34] Maja Garaca Djurdjevic, "Wartime rapes of Men remains taboo in Bosnia," Balkan Transitional Justice, May 18, 2017, https://balkaninsight.com/2017/05/18/male-victims-of-war-related-sexual-abuse-shunned-in-bosnia-05-18-2017-1/

[35] Daniela de Vito, Aisha Gill and Damien Short, "Rape Characterised as genocide," SUR, January 2019, https://sur.conectas.org/en/rape-characterised-genocide/

[36] "Violence against Women," World Health Organisation, March 9, 2021, https://www.who.int/news-room/fact-sheets/detail/violence-against-women

[37] Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality." *German Law Journal* 22, no. 5 (2021): 889. doi:10.1017/glj.2021.45.

[38] IRMCT, "Landmark Cases."

from the International Criminal Court and various sources, including the *Australian Journal of Human Rights* I will assess the office of the prosecutor organ, its structure and development of jurisprudence to categorise and deal with sexual violence as a crime against humanity. Analysis of UN resolution 1503 and speeches from ICTY president (1999-2003) Claude Jorda, will demonstrate how the ICTY was structured in order to achieve its completion strategy. To assess the implications of this strategy on the prosecution of crimes committed by Kunarac et al and Lukić and Lukić analysis of case files sheets and secondary sources including Baron Serge Brammertz and Michelle Jarvis 'Prosecuting Conflict-Related Sexual Violence at the ICTY.' Chapter two will focus on the court proceedings, focusing on the indictments produced by the OTP. To understand how the court proceedings of the ICTY address sexual violence in the cases of Kunarac et al and Lukić and Lukić, primary sources including UN indictment decisions will be utilized to understand the evidentiary requirements to indict a crime. Chapter two places a strong reliance on the judgement documentation of both the Lukić and Lukić case and Kunarac et al case. The judgement documentation is a 360 page and 323 page document, respectively. The judgement documentation includes details of the charges against the accused and both the prosecution and defence evidence including various witness testimony, providing key insight into evidentiary standards required for an indictment and an understanding of court proceedings. Furthermore, judgement documentation includes details of 'applicable law' essential to understand how crimes were contextualized throughout the duration of a court proceeding. Finally, the third chapter questions to what extent the ICTY's judgement and sentencing in the cases of Kunarac et al and Lukić and Lukić achieved justice for the victims of sexual violence?? This chapter will first analyse the second organ of the ICTY, the trial chamber. To understand how sentence lengths were determined I will compare judgement documentation and ICTY case files from both cases and utilise ICTY press releases. The second half of this chapter will analyse the ICTY's third organ, the registry using the ICTY website. To understand how the ICTY conceptualized justice assessment the ICTY as a tool for transitional justice will be questioned. I will use UN produced material and varying secondary sources to develop an understanding of transitional justice and what infrastructure is required to support it. Furthermore, I will consider varying books and articles assessing the ICTY's long term effectiveness.

Chapter 1: The institution of the ICTY

'Prosecution' is the 'act of officially accusing someone of committing an illegal act.'[39] Prosecution demonstrates recognition that a crime has been committed and a perpetrator needs to be held accountable. It is the first step towards obtaining justice for victims. This chapter questions whether the institution of the ICTY was set up to successfully prosecute sexual violence?

To answer this question, this chapter will analyse the ICTY as an 'institution' and assess how the ICTY understood sexual violence in the Kunarac et al case. It will be argued that the institution was set up with the intention of prosecuting perpetrators of sexual violence, evident by the ICTY's unprecedented mandate in which sexual assault, including rape would be prosecuted 'as a serious violation of international humanitarian law.'[40] Furthermore Patricia Sellers was enrolled as the first 'legal advisor for gender issues.'[41] This position contributed to an expansion of jurisdiction, and 'remains the pre-eminent international legal standard for the interpretation of sexual violence as war crimes.'[42] The Kunarac et al case exemplifies this broader understanding of sexual violence where rape was recognised as an act of enslavement, constituting a crime against humanity. Furthermore, the ICTY was structured to satisy its completion strategy. The completion strategy refers to a plan initiated by the ICTY judges to ensure that the 'tribunal concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia.'[43]This chapter will assess how this strategy was applied to the Kunarac et al case versus Lukić and Lukić case. It will be argued that there are discrepancies in the conceptualisation of sexual violence and accountability which question the ICTY's ability to prosecute sexual violence. Originally the Kunarac et al indictment detailed eight perpetrators of rape and sexual violence, however introduction of the completion strategy and prioritisation of prosecuting Bosnian Serb army leaders resulted in the transferral of cases to local courts, this included people responsible for organising mass rapes in Foča. The ICTY's institutional assumption that seniority aligns with criminal responsibility hindered the ICTY's ability to prosecute sexual violence in the case of Kunarac et al. Instead, responsibility to prosecute was placed on local courts. Comparatively, during the Lukić and Lukić case, Sredoje Lukić was indicted by the ICTY as a facilitator in the mass extermination of Muslims in Višegrad, despite holding no senior military position. His crime was deemed too grave to transfer. Comparative study of Kunarac et al and Lukić and Lukić suggests institutional inconsistencies in prosecuting facilitators of sexual violence compared to other war crimes. Raising the question of whether the ICTY was set up to recognise systematic sexual violence and prosecute accordingly.

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[39] "Prosecution," Cambridge Dictionary, Accessed December 12, 2023, https://dictionary.cambridge.org/dictionary/english/prosecution.

[40] United Nations(UN) Security Council, 'Resolution 827 Adopted by the Security Council at its 3217th meeting on 25 May 1993,' May 25 1993, S/RES/827,United Nations Security Council Resolution 827, http://unscr.com/en/resolutions/doc/827.

[41] "Patricia Sellers," International Centre Truth and Justice, Accessed December 8, 2023, https://www.ictj.org/node/35032.

[42] IRMCT, "Landmark Cases," Legacy website of the ICTY, TPIY, MKSJ, Accessed January 7, 2023, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.

[43] IRMCT, "Completion Strategy," Legacy Website of the ICTY, TPIY, MKSJ, Accessed December 30, 2023, https://www.icty.org/en/about/tribunal/completion-strategy#:~:text=Consequently%2C%20the%20Tribunal%27s%20judges%20took%20the%20initiative%20of,with%20domestic%20legal%20systems%20in%20the%20former%20Yugoslavia.

1.1The Creation of an Institution, ICTY

Professor Oran Young understands institutions as 'human artifacts' in which 'patterns of behaviour or practice' are managed.[44] Institutions occur on a spectrum from informal to formal.[45] The ICTY is a formalised structure. [46] The ICTY exists as an established structure characterised by rules and a conscious effort to agree on major provisions, namely 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.'[47] The creation of formalised institutions involves addressing divergent expectations. Thus, decisions regarding what qualified as a war crime and the correct way to address these crimes is at the heart of the ICTY as an institution.

Prior to the creation of the ICTY, resolution 780, 6th October 1992 was adopted by the UN. Resolution 780 UN security council tasked secretary general, Boutros Boutros-Ghali, with establishing a 'Commission of Experts' to draw conclusions, regarding which 'of the Geneva Conventions and other violations of international humanitarian law had been committed in former Yugoslavia.'[48] Mass rape was one of the key atrocities identified by the commission who claimed that it had 'been carried out by some of the parties so systematically that they strongly appear to be the product of policy.'[49] Similar comments were made in the European Community Investigative Mission, which stated that 'rape cannot be seen as incidental to the main purpose of the aggression but as serving a strategic purpose in itself.'[50] These observations demonstrate that both the scale of sexual violence and how it was being utilised, was a key concern of international bodies, including the UN, in the lead up to the creation of the ICTY. This unprecedented international interest in understanding sexual violence as a war crime that needed to be prosecuted would be a key factor when creating an institution to address war crimes committed in the former Yugoslavia.

The ICTY was created by Resolution 808, May 1993, following a 'recommendation by the Co-chairmen of the Steering Committee of the International Conference on the former Yugoslavia.'[47] UN Resolution 827, May 1993, stated that the ICTY 'would be part of an effective measure to bring to justice the "persons responsible for serious violations of international humanitarian law.'[51] Serious violations included the 'systematic dentition and rape of women.'[51] The institutional decision to recognise and prosecute rape as a serious violation of international humanitarian law was unprecedented.[51] Prior to the ICTY, wartime sexual violence was recognised as an unfortunate 'biproduct' of war, evident in the Nuremburg and Tokyo tribunals. The Nuremberg and Tokyo tribunals were created to prosecute 'high-level political officials and military authorities for war crimes,' following Nazi and Japanese

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[44] Oran Young, "Regime Dynamics: The Rise and Fall of International Regimes," *International Organization* 36, no. 2 (1982): 297, https://www.jstor.org/stable/2706523.
[45] Ibid, 227.
[46] Ibid, 283.
[47] United Nations (UN) Security Council, "Resolution 808 (1993) Adopted by the Security Council at its 3175th," 22 February 1993, S/RES/808, United Nations Security Council Resolution 808, http://unscr.com/en/resolutions/doc/808.
[48] United Nations (UN) Security Council, "Letter Dated 24 May 1994 from the Secretary- general to the president of the Security Council," May 27, 1994, S/1994/674, United Nations Security Council, https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf .
[49] M. Cherif Bassiouni, *Investigating War Crimes in the Former Yugoslavia War 1992-1994 : the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),* (Cambridge: Intersentia, 2017), 175.
[50] United Nations (UN) Security Council, "Letter Dated 2 February 1993 from the permanent representative of Denmark to the United Nations Addressed to the Secretary- General," February 3, 1993, S/25240, https://digitallibrary.un.org/record/160501
[51] United Nations (UN) Security Council, "Resolution 827."

aggressions in Europe and Asia.[52] These tribunals had been recognised as setting a new precedent influencing international justice, yet they ignored the sexual violence that had taken place during World War II.[52] This included ignoring knowledge of 'comfort women', whereby 'thousands of Asian women and girls were forced into military sexual slavery by the Japanese Army', yet 'no reference was made to sexual violence in the Charters of either the Nuremburg or the Toyko tribunals.'[53] Consequently, the ICTY's focus on sexual violence, represents a shift from the 'status quo' of previous war crime institutions. This is significant as it indicates that the ICTY, as an institution, decided to recognise female vulnerability to sexual violence during armed conflict. The decision to change jurisdiction and recognise sexual violence further highlights the institutional intention to successfully prosecute the crime.

The ICTY enrolled Patricia Sellers for the position of 'legal advisor for gender issues.' [54] This role was created by the ICTY's OTP to ensure that 'the large number of sexual violence allegations would be properly addressed.'[54] The ICTY was the first international tribunal to create this role, demonstrating acceptance that systematic rape had occurred, and acknowledgement that institutional infrastructure to investigate, analyse and prosecute the rapes as war crime, were required.

1.2 Defining Sexual Violence

The introduction of a legal advisor for gender issues' resulted in developed understandings of rape.[55] Patricia Sellers was 'a member of, and developed new legal strategies for the office of the prosecutor's trial teams' in several cases including Kunarac et al.[56] Sellers was instrumental in the ICTY's assessment of the Kunarac et al case and its landmark decision to prosecute the rapes as 'sexual enslavement', constituting an act of 'enslavement as a crime against humanity.'[57] Crimes against humanity are a type of war crimes.[58] Expanding jurisprudence to include acts of rape and other sexual violence highlights the ICTY's intention to contextualise and sentence rapes, and recognise sexual violence as a violent act, which can be utilised as a method of warfare.[59] Understanding how sexual violence is used in conflict is crucial to recognise 'the truth of the crime.'[60] Thus the development of new legal strategies to define sexual violence demonstrates how the institution of the ICTY, identified the issue of sexual

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[52] Kristen Burton, "War Crimes on Trial: The Nuremburg and Tokyo Trials," The National WWII Museum, November 24, 2020, https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials.
[53] Philipp Kuwert, and Harald Jürgen Freyberger. "The Unspoken Secret: Sexual Violence in World War II," *International Psychogeriatrics* 19, no. 4 (2007): 782–84. doi:10.1017/S1041610207005376.
[54] "Women 2000: Sexual Violence and Armed Conflict: United Nations Response," UN Women Publication,(April 1998), 9. https://www.un.org/womenwatch/daw/public/cover.pdf#:~:text=Despite%20the%20fact%20that%20rape%20and%20other%20forms,of%20either%20the%20Nuremberg%20or%20the%20Tokyo%20tribunals.
[55] The Office of the Prosecutor, "Short Biography Ms Patricia V. Sellers," International Criminal Court, accessed November 11, 2023, https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Bio-Patricia-Sellers-ENG.pdf.
[56]Patricia V. Sellers & Louise Chappell Gender, "Conflict-related violence and justice: Patricia V. Sellers in conversation with Louise Chappell," *Australian Journal of Human Rights* 25, no 3 (2019): 358, https://doi.org/10.1080/1323238X.2019.1695386.
[57] IRMCT, "Landmark Cases."
[58] United Nations, "Updated Statute of the International Criminal Tribunal for the Former Yugoslavia," September 2009, 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, 5, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.
[59] United Nations, "Foča" (It-96-23/2) Dragan Zelenović," International Criminal Court for the Former Yugoslavia, Accessed October 10, 2023, https://www.icty.org/x/cases/zelenovic/cis/en/cis_zelenovic_en.pdf.
[60] Navanethem Pillay, "Establishing Effective Accountability Mechanisms for Human Rights Violations," UN Chronicle, Accessed December 30, 2023, https://www.un.org/en/chronicle/article/establishing-effective-accountability-mechanisms-human-rights-violations.

violence, devoted resources and developed further understanding of the dynamics of sexual violence, acting in a practical manner, resulting in the ground-breaking Kunarac et al indictment and arguably showing that as an institution the ICTY take sexual violence seriously as a war crime and are set up to prosecute it.

Bosnian society largely valued 'chastity and purity of women.' There were 'reports coming out of the former Yugoslavia that some husbands abandoned their wives after learning they had been raped.[61] This demonstrates the risk of victims 'being ostracised from their society by coming to testify about the horrors they endured.'[62] Thus, the institution introduced several innovative measures to support survivors of sexual violence. Measures for witness security such as 'electronic distortion of witness' face and voice in the court video' and 'withholding of the witness's name' were introduced. In an efforts to not traumatise victims further the ICTY provided the 'opportunity to testify from the witness's home country through video link' or 'testify in another room via one-way closed-circuit TV.'[62] Moreover, counselling and support to witnesses during the court procedure was provided.[62] These measures highlight the ICTY's recognition of the unique vulnerability and psychological scarring endured by victims of sexual violence and suggests that the ICTY intended to be set up to protect witnesses and prosecute sexual violence effectively.

1.3 The Completion Strategy

As an institution the ICTY had to decide which crimes to prosecute and which individuals should be held accountable for these crimes. These decisions shape the ICTY's ability to administer justice. Claude Jorda, president of the ICTY (1999-2003) stated it would be 'physically impossible' to try all the perpetrators of serious violations of humanitarian law, committed during the conflict.[63] It would 'require too much time' and 'risk undermining the reliability of the testimony and do damage to the credibility of the International Tribunal.'[64] Consequently, a strategy needed to be created to ensure that 'major war criminals' were convicted to 'preclude them from sustaining a climate of hatred.'[64] Thus Security Council resolution 1503 adopted the ICTY's completion strategy.[65] The completion strategy structures the ICTY and prioritises the 'prosecution and trial of the highest ranking political, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law.' [66] The UN security council stated that the ICTY must prosecute 'serious' violations of international humanitarian law, but did not explicitly define 'serious.'[67]

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[61] Susanna SaCouto, "Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes," *Michigan State Journal of International Law* 137, (2007): 146, https://digitalcommons.wcl.american.edu/facsch_lawrev/632/.

[62] IRMCT, "Innovative Procedures," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 27, 2023, https://www.icty.org/en/features/crimes-sexual-violence/innovative-procedures

[63] Claude Jorda, "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina", May 17, 2001, Transcript of speech delivered at Sarajevo, https://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-bosnia-and-herzegovina.

[64] International Tribunal for the former Yugoslavia, "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina," ICTY Press Release, May 17 2001, https://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-bosnia-and-herzegovina.

[65]United Nations, "Resolution 1503 (2003) Adopted by the Security Council at its 4817th meeting, on 28 August 2003," August 28, 2003, S/RES/1503, United Nations Security Council Resolution 1503, https://www.icty.org/x/file/Legal%20Library/Statute/statute_1503_2003_en.pdf

[66] United Nations, 'Letter dated 17 June 2002 from the Secretary- General addressed to the President of the Security Council,' June 19 2002, S/2002/678, United Nations Security Council, https://digitallibrary.un.org/record/467936

[67] Michelle Jarvis and Kate Vigneswaran, "Challenges to Successful Outcomes in Sexual Violence Cases," in *Prosecuting Conflict- Related Sexual Violence at the ICTY*, ed. Baron Serge Brammertz and Michelle Jarvis (Oxford University Press, 2016), 46.

Furthermore the completion strategy meant that the ICTY should take 'all possible measures to complete investigations by the end of 2004, all trial activities at first instance by the end of 2008 and to complete all work in 2010.'[68] To aid this, rule 11bis was introduced and meant that cases could be transferred to national courts depending on "the gravity of the crimes charged and the level of responsibility of the accused."[69]

1.4 Application of the Completion Strategy

The Kunarac et al case demonstrates how the completion strategy impacted the ICTY's method of prosecution. The original Kunarac et al indictment detailed the crime of eight individuals. Three individuals were tried and convicted of rape, torture and enslavement. Namely; Dragoljub Kunarac, Radomir Kovač, Zoran Vuković, further details of their crimes will be discussed in chapter two. Meanwhile, Dragan Zelenović; Gojko Janković; Janko Janjić; Zoran Vuković; and Radovan Stanković were removed from the final indictment of Kunarac et al. Zelenović pleaded guilty and was convicted of torture and rape.[70] Janjić and Vuković died before their trial.[70] Meanwhile, under rule 11bis Janković and Stanković were transferred to the Bosnia and Herzegovina (BiH) court.[71] Gojko Janković was indicted for torture and rape of multiple women held at Foča High School, Partizan Sports Hall and Karaman's house. He 'knew or had reason to know that soldiers subordinate to him sexually assaulted women and girls and he failed to take necessary steps to prevent it or to punish the subordinates.'[72] Stanković was indicted for being 'in charge of Karaman's house, where women and girls, were detained so that Serb soldiers and other Serb men could sexually assault them.'[72] Karaman's house was one of the most prolific rape camps in Foča. Additionally, Stanković participated in the assignment of girls and women to Serb soldiers so that soldiers could rape and otherwise sexually assault them.[71] 'The girls and women not specifically assigned to certain Serb soldiers could be raped by any soldier allowed into Karaman's House.'[71] Thus not only did Janković and Stanković participate in the constant sexual assault of these detainees, the indictments demonstrate they were organisers/ leaders in carrying out these atrocities. However, as Janković was a 'sub-commander of the military police' and Stanković 'a member of the Miljevina battalion, there military rank was lower than the three individuals indicted by the ICTY and according to the completion strategy these cases could be transferred. Thus, application of the completion strategy to Kunarac et al resulted in the transferal of organisers of systematic rape and questions the 'severity' to which the ICTY understands these crimes, raising doubt as to whether the ICTY was set up to prosecute sexual violence.

In contrast to the Kunarac et al case, the case of Milan and Sredoje Lukić show them both to be indicted by the ICTY. Milan Lukić had committed serious violations of international humanitarian law, he was also a senior leader of paramilitary group the 'White Eagles.'[73] Thus,

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[68] United Nations, "Resolution 1503," August 23, 2003, S/RES/1503, Resolution 1503 (2003) https://www.icty.org/x/file/Legal%20Library/Statute/statute_1503_2003_en.pdf.
[69] United Nations, "Rules of Procedure and Evidence," July 8 2015, IT/32/Rev.50, 17, https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf
[70]United Nations, "Foča" (It-96-23/2) Dragan Zelenović," International Criminal Court for the Former Yugoslavia, Accessed October 10, 2023, https://www.icty.org/x/cases/zelenovic/cis/en/cis_zelenovic_en.pdf
[71] United Nations, "Foča" Janković and Stanković (It-96-23/2)," International Criminal Court for the Former Yugoslavia, Accessed November 4, 2023, https://www.icty.org/x/cases/stankovic/cis/en/cis_jankovic_stankovic_en.pdf
[72] The International Criminal Tribunal for the Former Yugoslavia, "The Prosecutor of the Tribunal against Radovan Stankovic, Second Amended Indictment," Accessed November 11, 2023, Case No.: IT-96-23/2-1, Second Amended Indictment Stankovic, https://www.icty.org/x/cases/stankovic/ind/en/stan-2ai030303.htm
[73] United Nations, "Višegrad» (It-98-32/1) Milan Lukić & Sredoje Lukić," International Criminal Tribunal of the former Yugoslavia, Accessed November 4, 2023, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/cis/en/cis_lukic_lukic_en.pdf.

according to the ICTY's completion strategy, Milan Lukić meets the requirements necessary for the ICTY to prosecute him. However, Sredoje Lukić was convicted by the ICTY, yet held no senior paramilitary position, instead was just a member of the White Eagles. His indictment claims he "substantially contributed" to the death of fifty-three people, but not necessarily a direct perpetrator. The comparison between Sredoje Lukić who was a leader in the death of many people vs Gojko Janković, an organiser of systematic rape at Karaman's house, demonstrates a discrepancy within the conceptualisation of rape. There exists an institutional conceptual difference in finding individuals guilty of rape 'mens rea' (through giving orders), compared to other war crimes. In the case of Kunarac et al the focus was on their military status, rather than focusing on the individuals who 'organised' the crime. Whereas with Lukić and Lukić, Sredoje was understood as a leader for 'contributing' to the crime of mass murder, with his military status seemingly overlooked. Thus, there exists a difference in the ICTY's understanding of sexual violence vs other war crimes when it comes to 'connecting crimes committed by others to leaders through acts, intent and knowledge.'[74] Thus, despite an attempt to understanding how rape is used in war, these cases question if there is a tendency for the ICTY to misconceive sexual violence as opportunistic sexual acts perpetrated by individuals, not premeditated violent acts. Comparison of Kunarac et al versus Lukić and Lukić suggests that institutional ideas regarding 'accountability' for rape, hinder the ICTY's ability to fully recognise and prosecute sexual violence. This increases the chance of sexual violence being overlooked as a serious war crime and suggests that as an institution the ICTY is not set up to prosecute sexual violence, in its entirety.

Furthermore, it is important to note many women accused Lukić and Lukić of raping them in detention centres across Višegrad.[75] Time limitations imposed by completion strategy meant the OTP could not prosecute every crime. To adhere to 'the time frame mandated by the UN security council', the OTP decided 'not to add sex crime charges' to the indictment.[76] The OTP claimed such investigations would have required 'time and resources that were not made available.'[76] Instead, they 'focused on investigating other crimes,' including but not limited to crimes of persecution, murder, physical abuse among other violent acts.[76] OTP's reference to lack of 'time' hints at the inability of the institution to utilise evidence of systematic rape efficiently. Furthermore, the completion strategy demands that the ICTY addresses the most serious violations of international humanitarian law, the ignorance of rape, and prioritisation of other violent crimes, questions institutional understanding of the sexual violence as an inherently violent act. Thus, analysis of the completion strategy, considering Kunarac et al and Lukić and Lukić, demonstrates inconsistencies in prosecuting sexual violence compared to other crimes. In these cases, key organisers of sexual violence were overlooked, and prosecuted war criminal's crimes of rape were dismissed, casting doubt as to whether the ICTY was set up to prosecute sexual violence efficiently.

1.5 Conclusion

Overall, analysis of Kunarac et al and Lukić and Lukić suggests that the institutional intention was for the ICTY to prosecute sexual violence, however institutional assumptions around 'accountability' and 'serious' crimes introduced by the completion strategy hindered the ICTY's ability to effectively prosecute sexual violence.

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[74] Kate Vigneswaran and Michelle Jarvis, "Challenges to successfully outcomes in sexual violence cases," 50.
[75] Evidence of these cases will be discussed in chapter two.
[76] Grace Harbour, "International Concern Regarding Conflict- related sexual violence in the lead up to the ICTY establishment" in *Prosecuting Conflict-Related Sexual Violence at the ICTY.* ed. Brammertz, Baron Serge, and Jarvis, Michelle, (Oxford: Oxford University Press, 2016), 53.

Systematic sexual violence was a key concern of international bodies, including the UN, when creating an institution to 'try those individuals most responsible for appalling war crimes.'[77] Prior to the ICTY's establishment, a commission of experts suggested sexual violence was a product of policy, a violent crime that required attention.[78] The ICTY was established to establish 'individual criminal liability for atrocities committed in the court of the Yugoslav wars,' including the recognition and prosecution or rape.[79] The ICTY's statute was unprecedented in its recognition of rape as a crime against humanity and further highlights the institutional decision to prosecute sexual violence. The institution designated resources to ensure practical measures were in place to prosecute sexual violence, including the appointment of Patricia Sellers as the first legal advisor for gender issues. Sellers was instrumental in recognising that sexual violence committed by Kunarac et al, constituted enslavement, a crime against humanity.[80] Investigation and contextualisation of the sexual violence that took place is crucial to understanding the crime in its entirety, allowing for effective prosecution. Furthermore, the institution established innovative procedures to encourage and support victims of sexual violence during their testimony, suggesting the ICTY was set up to support victims of sexual violence during the prosecution of criminals. However, the ICTY was structured by the completion strategy. The completion strategy ensured major war criminals were convicted effectively. Analysis of the completion strategy, considering Kunarac et al and the Lukić and Lukić trial suggests that there exist institutional misconceptions around 'accountability' and the 'seriousness' of rape, compared to other war crimes. These institutional misconceptions affected how the completion strategy was applied resulting in sexual violence cases being overlooked. For example, in Kunarac et al case the organised nature of rape was seemingly overlooked and institutional assumptions that military status equates to guilt resulted in leader of Karaman house, Stanković's case being transferred. Similarly, in the Lukić and Lukić case time restrictions meant other crimes took precedence over sexual violence, and sexual violence victims were seemingly disregarded. Thus, the problem is not that sexual violence was intentionally viewed as "lesser" but, conceptual errors, primarily arising from the comparative seriousness of crimes, resulted in legal practice which led to injustice for victims of the crime and challenges the notion that the ICTY was set up to prosecute sexual violence in these cases.

[77] IRMCT, "About the ICTY," Legacy Website of the ICTY, TPIY, MSKJ, Accessed September 22, 2023, https://www.icty.org/en/about#:~:text=By%20bringing%20perpetrators%20to%20trial%2C%20the%20ICTY%20aims,to%20a%20lasting%20peace%20in%20the%20former%20Yugoslavia.
[78] Kate Vigneswaran and Michelle Jarvis, "Challenges to successfully outcomes in sexual violence cases," 38.
[79] "ICTY," International Justice Resource Center, Accessed December 31, 2023, https://ijrcenter.org/international-criminal-law/icty/.
[80] IRMCT, "Landmark Cases."

Chapter 2: The ICTY and the Court Process

Chapter one argued that the institution of the ICTY intended to recognise and prosecute sexual violence, including how its creation signified a breakthrough in understanding sexual violence as a crime against humanity. Analysing the court process of the ICTY is crucial in understanding how the institutional intentions to prosecute sexual violence materialised in practice. To ensure justice is achieved, robust legal systems are required to determine how courts should proceed during prosecution, which crimes should be prioritised and who justice should be distributed to. These decisions were the responsibility of the ICTY's OTP.[81] Navanethem Pillay, a UN high commissioner for human rights, stated that justice is 'the indispensable companion of truth,' following which 'accountability for crimes and gross violations, including accountability under criminal law is key to reinstate public trust in justice.'[82] Holding people accountable and recognising victims ensures that 'people who have been affected by human rights violations have access to information to make informed decisions on how to exercise their rights and obtain redress.'[81] If the 'truth' of what took place is not formally recognised, the process of justice arguably cannot take place. To understand how the institutional intention of prosecuting sexual violence materialised, this chapter will assess the judicial process of identifying the crimes and indictment of Kunarac et al and Lukić and Lukić. It will be argued that the indictment of Kunarac et al demonstrates that whilst the court successfully contextualised isolated incidents of rape as a form of enslavement, there existed high standards of evidence resulting in the systematic nature of the rapes being overlooked. Meanwhile during the court proceedings in Lukić and Lukić sexual violence was merely used by the prosecution as a form of alibi rebuttal. Moreover, neither Kunarac et al nor Lukić and Lukić indictments addressed that most sexual violence victims were Bosnian Muslim females, thus the ICTY missed an opportunity to understand whether rape of these women was used as a method of persecution.[83] Based on the findings in these cases, the court proceedings of the ICTY were limited in their ability to reveal the 'truth' of the systematic crimes thus failed to hold anyone accountable for the organisation of the systematic rapes, resulting in thousands of unrecognised victims and limitations in obtaining justice for those victims of sexual violence.

2.1 The Indictments

An indictment refers to a 'formal accusation of a serious crime.'[84] An indictment occurs only once the OTP's investigation division collects sufficient evidence that an individual has committed a war crime. The OTP's findings are submitted to a judge who then decides whether to confirm or reject an indictment. If confirmed the judge can order an 'arrest warrant, orders required for the conduct of the trial or indictee's detention surrender or transfer.'[85] In the case

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[81] IRMCT, "Office of the Prosecutor," Legacy Website of the ICTY, TPIY, MKSJ, Accessed January 11, 2024, https://www.icty.org/en/about/office-of-the-prosecutor .
[82] Navanethem Pillay, "Establishing Effective Accountability Mechanisms for Human Rights Violations," United Nations (UN) Chronicle, December 2012, https://www.un.org/en/chronicle/article/establishing-effective-accountability-mechanisms-human-rights-violations.
[83] "Sexual Violence in Bosnia," Remembering Srebrenica, Accessed December 7, 2023, https://srebrenica.org.uk/what-happened/sexual-violence-bosnia.
[84] "Indictment," Cambridge Dictionary, Accessed November 29, 2023, https://dictionary.cambridge.org/dictionary/english/indictment.
[85] IRMCT, "Investigations," Legacy Website of the ICTY, TPIY, MKSJ, Accessed November 28, 2023, https://www.icty.org/en/about/office-of-the-prosecutor/investigations#indictment.

of Lukić and Lukić judge Liu Daquin ordered warrants for their arrest on 12th January 2004.[86] The second (and penultimate) amended indictment was confirmed February 27, 2006. They were both indicted with persecution, murder, and inhumane treatment as crimes against humanity and cruel treatment and murder as violations of the laws or customs of war.[87] In the Kunarac et al case the final indictment, confirmed 1st December 1999, indicted Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković.[88] It was the second ICTY trial to deal entirely with charges of sexual violence. Kunarac and Kovač's indictments were the first to be indicted with sexual slavery constituting enslavement as a crime against humanity, highlighting the ICTY's unprecedented recognition of rape as a war crime. [89]

2.2 High Evidentiary Standards

The first indictment of Kunarac et al included 3000 counts of rape, however this was reduced to 50 counts by the final indictment.[90] As outlined in chapter one, the ICTY's completion strategy resulted in the prioritisation of prosecuting those of a senior status rather than indicting every alleged crime. However, a further reason many cases were not indicted was due to a lack of supporting evidence. This includes the unindicted case of witness FWS-48. FWS-48 accused Vuković of raping her.[91] Vuković was not indicted, 'due to lack of sufficient evidence.'[92] It is important to note Vuković had been indicted with the rape of other women. Further evidence against Vuković included Witness FWS-48 testifying that she knew Zoran Vuković prior to the war 'and that same person was one of the soldiers who captured her at Trosanj on 3 July 1992.'[93] Furthermore FWS-48 description of her attacker would fit the accused 'Zoran Vuković.'[93] Vuković was indicted with taking FWS-48 to Brena apartment block bar near Hotel Zelengora, demonstrating Vuković had contact with FWS-48. Furthermore, Kunarac was indicted with raping FWS-48 at Hotel Zelengora, demonstrating she had endured sexual violence at this location, the location Vuković transported her to. [94] Despite this evidence the validity of FWS-48 claims were challenged as 'FWS-48 had mentioned a number of other witnesses who had been detained with her, none of those witnesses gave evidence that she had been "taken out" by the accused Vuković. [93]One such witness (FWS-105) mentioned witness FWS-48 several times in her statement and evidence, but she did not say that she had ever seen witnessed FWS-48 with the accused Vuković'.[93] This evidence should not have undermined FWS-48's accusation, as FWS-48 stated she had not been raped in the presence of others. [93]A further 'weakness' in FWS-48 case was that other witnesses had alluded to the fact there may be multiple Vuković's involved in raping women. 'There was no direct evidence that the Zoran

[86] International Criminal Tribunal for Former Yugoslavia, "Warrants of Arrest and Orders for Surrender Issued for 12 Accused," ICTY Press Release. January 13, 2004. https://www.icty.org/en/sid/8486.
[87] International Criminal Tribunal for the Former Yugoslavia, 'Second Amended Indictment of the Prosecutor of the Tribunal against Milan Lukić, Sredoje Lukić and Mitar Vasiljević,' (N.D), Case No. IT-98-32/1-PT. https://www.icty.org/x/cases/vasiljevic/ind/en/vas-ii000125e.pdf.
[88] International Criminal Tribunal for the former Yugoslavia, "The Trial of Kunarac, Kovac, Vukovic will begin on Monday 20 March 2000," ICTY Press Release, March 17, 2000, https://www.icty.org/en/sid/7888
[89] IRMCT, "Landmark Cases," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 28, 2023, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases
[90] Baron Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict- Related Sexual Violence at the ICTY.* (Oxford University Press, 2016), 53
[91] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' Case No. IT-96-23-T & IT-96-23/1-T, February 22 2001, 225, https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.
[92] Ibid, 257.
[93] International Criminal Tribunal for Former Yugoslavia (ICTY), 'Prosecutor V Drajolub Kunarac, Radomic Kovac and Zoran Vukovic Decision on Motion for Acquittal,' July 3, 2000, https://www.icty.org/x/cases/kunarac/tdec/en/00703DC213246.htm.
[94] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' 14.

Vuković whom she (FWS-48) knew before the war and the accused Vuković are the one and the same person.'[95] The ICTY trial chamber claimed, 'he had no case to answer.'[96] Comparatively Vuković was found guilty of raping 15-year-old FWS-50.[97] Vuković's defence team attempted to portray the acts of violence as 'acts of love', instead the trial chamber declared it an act of 'cruel opportunism.'[98] Witnesses FWS-51, FWS-62, FWS-50, FWS-75, FWS-95, FWS-96, FWS-48, D.B. and FWS-105 were among the women who testified that women were kept 'at Foča high school, soldiers would call women out of the main classroom, take them to another classroom and rape them.'[99] FWS-87 claimed that FWS-50 was amongst the women who were called out and raped during this incident at Foča high school.[100] FWS-51, the mother of FWS-50, stated that Vuković came looking for FWS-50 and took her away.[101] These witness statements support FWS-50 claims and provide eyewitness accounts to the crime. Furthermore FWS-50 stated that, the second time Vuković raped her, he said 'that she was lucky in that she was the same age as his daughter, otherwise he would have done much worse things to her.'[102] The Trial Chamber notes that Vuković's daughter was approximately of the same age as FWS-50 at the relevant time.'[102] Thus further supporting that FWS-50 had correctly identified the accused Vuković. The indictment of FWS-50 demonstrates the high standard of evidence and need for witnesses to reaffirm victim statements and successfully indict a crime. Furthermore, the successful indictment of FWS-50 suggests that had a witness seen FWS-48 be raped by Vuković arguably there would there be enough evidence to indict him with her rape. The comparison of these two cases suggests an exceptionally high standard of proof was required to indict sexual violence, hinting at difficulties in the ICTY successfully prosecuting sexual violence.

During her testimony FWS-50 described how it was very common that other girls were 'picked out by soldiers' and that the soldiers would come to select girls 'two or three times a day' and stated that every time you were 'taken out you were raped.'[103] FWS-50 also described an incident in which she accused Zoran Vuković of raping her at Buk Bijela.[104] Her original statement had not included this incident as she was 'too ashamed.'[104] When later discussed the chamber declared there was not enough evidence and thus the event was not charged in the indictment.[104] Lack of legal recognition of these events demonstrates how court proceedings focused on isolated incidents, failing to acknowledge the extreme culture of sexual violence which existed in Foča. There is a lack of systematic response throughout the process of the ICTY court.[105] The indictments of Kunarac et al suggest that the ICTY had not developed an

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[95] International Criminal Tribunal for Former Yugoslavia (ICTY), 'Prosecutor V Drajolub Kunarac, Radomic Kovac and Zoran Vukovic Decision on Motion for Acquittal.'
[96] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' 257.
[97] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' Case No. IT-96-23-T & IT-96-23/1-T, June 12 2002, 85 https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf
[98] Ibid,116.
[99] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' 39.
[100] Ibid, 15.
[101] Ibid, 127.
[102] Ibid, 90.
[103] IRMCT, 'Case It-96-23-T & 23/1-T Prosecutor Vs. Kunarac Et.Al.("Foča") Witness Name: "Witness 50" 29 & 30 March 2000," March 29, 2000, Kunarac et al-witness 50- Full Testimony_EN, 1264, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.icty.org%2Fx%2Ffile%2FVoice%2520of%2520Victims%2520Support%2520Docs%2FWitness%252050%2FKunarac%2520et%2520al-Witness%252050-Full%2520Testimony_EN%25281%2529.doc&wdOrigin=BROWSELINK.
[104] International Criminal Tribunal for Former Yugoslavia (ICTY), 'Prosecutor V Drajolub Kunarac, Radomic Kovac and Zoran Vukovic Decision on Motion for Acquittal.'
[105] Sara Milenkovska, "Hague Tribunal's blind Spots Marred Wartime Sexual Violence Cases," Balkan Transitional Justice, January 24, 2023, https://balkaninsight.com/2023/01/24/hague-tribunals-blind-spots-marred-wartime-sexual-violence-cases/.

effective investigative and prosecution process, required to acknowledge, and address systematic sexual violence. Furthermore, the indicted cases of rape in Foča highlight that the court could only prosecute instances of rape that occurred in detention centres where there were multiple witnesses, revealing a high standard of evidence that is not usually conducive of the crime of sexual violence. Rape normally is a private act without witnesses, suggesting that the prosecutors' approach should be further developed to help recognise individual crimes without multiple witnesses. Such development is crucial to ensure that the truth of the systematic crimes are revealed, and individuals held accountable. The specifics of this new evidentiary standard are beyond the scope of this research.

The Lukić and Lukić case further highlights failures in court proceedings to indict sexual violence. Milan Lukić led paramilitary groups, including the 'White Eagles' and 'Avengers'.[106] These units 'engaged in a litany of very public violent acts', which included the 'systematic perpetration of sexual violence.' [107] Survivors allege that a number of these rapes took place in detention centres such as Vilina Vlas, with 'up to 200 women from the area sexually abused.'[108] Similar reports had been named by the Commission of Experts, prior to the establishment of the ICTY, demonstrating evidence of these crimes was available. Kelly Askin, senior legal officer at Open Society Justice Initiative described 'Milan Lukić as one of the most notorious rapists in Bosnia during the war, with some of the worst crimes of sexual slavery being committed in Višegrad by the Lukić cousins.'[109] However, Milan Lukić was never indicted for the rape committed by the paramilitaries he led nor was he indicted for the rapes he was accused of directly perpetrating. Similarly, Sredoje Lukić was not indicted with perpetrating, aiding or abetting rape.[110] As discussed in chapter one the completion strategy contributed towards the OTP's prioritisation of other crimes. The prosecution intended to later amend the indictment to include sexual violence, however, the OTP did not act quickly enough and missed the final amendment deadline of November 15 2007, despite the fact that they had been in possession of evidence of rape for some time.[111]The indictment could not be amended late, as the defence would receive inadequate notice potentially 'denying his [Lukić's] rights to be informed promptly and in detail of the charges', resulting in an unfair trial.[112] Failure to include sexual violence in the Lukić and Lukić indictment resulted in a public outcry and some female victims 'refused to appear in the Hague to talk about the two men's other alleged crimes if rape is not included.'[113] Such public outcry suggests a failure from the ICTY to administer justice for rape

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[106] International Criminal Tribunal for the Former Yugoslavia, 'Second Amended Indictment Milan Lukić and Sredoje Lukić,' February 27 2006, Case No. IT-98-32/1-PT https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/ind/en/luk-2ai060227.htm

[107] Iva Vukušić, *Serbian Paramilitaries and the Breakup of Yugoslavia*, 1st ed. (New York: Routledge, Taylor & Francis Group, 2023), 143.

[108] Ibid, 145.

[109] Simon Jennings, "Lukic Trial Ruling Provokes Outcry," Institute for war and peace reporting, August 15 2008, https://iwpr.net/global-voices/lukic-trial-ruling-provokes-outcry.

[110] United Nations, 'Judgement Summary for Milan Lukić and Sredoje Lukić,' July 20 2009, Judgement Summary, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_judg_summary_en.pdf.

[111] United Nations, 'In Trial Chamber III Prosecutor v Milan Lukić Sredoje Lukić Decision on Prosecution motion seeking leave to amend the second amended indictment and on Prosecution motion to include UN security resolution 1820 (2008) as additional supporting material to proposed third amended indictment,' July 08, 2008, CaseNo.IT-98-32/1-D344-D3417, 25, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tdec/en/080708.pdf

[112] Ibid,9.

[113] Nerma Jelacic et al. "Visegrad Rape Victims Say Their Cries Go Unheard," BalkanInsight, December 10 2007, https://balkaninsight.com/2007/12/10/visegrad-rape-victims-say-their-cries-go-unheard/.

victims in Višegrad, and raises the question of whether the grave nature of sexual violence was overlooked during the court proceedings, despite institutional intentions to prosecute.

The rapes of Lukić and Lukić were not legally recognised, but the incidents were used to rebut alibis and highlight that the accused were present at a particular place and time.[114] For example, Milan Lukić was indicted with house-burning in Bikavac.[115] This occurred 27 June 1992.[116] The prosecution used evidence from multiple witnesses including, VG035 and VG063 to prove that Lukić was in the area between the 20-30th June.[117] The witnesses gave detailed accounts of the rapes they endured from him. The use of sexual violence to rebut alibis, suggests that the witnesses were deemed to be reliable by the prosecution. The inability and potential unwillingness of the prosecution to prioritise, investigate and utilise evidence of mass sexual violence to indict Lukić and Lukić of these crimes, further suggests that the recognition of systematic sexual violence in this case was lost during the indictment process of the ICTY and questions whether the court proceedings of the ICTY were suitable to address sexual violence and bring justice to victims.

2.3 Rape as an Organised Crime

Recognising the scale in which rape occurred is crucial to reveal the truth of what happened and to bring justice for victims. However, contextualising these systematic rapes and understanding why they occurred and how they were utilised is vital to recognise the extremity of the violence and indict accordingly. An isolated, opportunistic incident of rape would be categorised differently than rape as an act of genocide. There is much scholarly debate regarding the use of rape in warfare. For example, scholar Beverley Allen claims that systematic rape of women can constitute a form of biological warfare, a form of genetic engineering for the purposes of genocide, a desire to impregnate women to destroy the undesirable other genes.' [118] Or when it is used systematically rape targeting both men and women can be utilized 'as one form of torture preceding death.'[119] However other feminist scholars, such as Susan Brownmiller, assert that rape is a mere crime of violence. The act 'demonstrates to the female she is conquered,' as a violent power game.[120] Conflicting interpretations of rape highlight the differing ways in which rape can be characterised. Thus, the contextualisation of rape is crucial to understanding its purpose, identifying rape as a war crime, providing greater understanding of the crime a perpetrator had committed and enabling the court to hold the organisers and perpetrators accountable.

Whilst the Kunarac et al case contextualised rape as a violent act used as a method of enslavement this was only applicable in individual cases. The organised nature of the widespread sexual violence has not been addressed throughout the court proceedings. Thousands of women are believed to have been sexually assaulted in various large detention centres in Foča, however less than one hundred women were recognised as victims in the

[114] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,' Case No. IT-98-32/1-T, July 20, 2009, 18, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf.
[115] Ibid, 118.
[116] Ibid, 209.
[117] Ibid, 227.
[118] Beverley Allen, *Rape Warfare: The Hidden genocide in Bosnia- Herzegovina and Croatia*, (University of Minnesota Press, 1996), 139.
[119] Ibid, 91.
[120] Stephen P. Pistono, "Susan Brownmiller and the history of rape", *Women's Studies: An Interdisciplinary Journal* 14, no.3 (1987):265, DOI: 10.1080/00497878.1988.9978703.

indictment.[121] Kunarac's indictment included the 'removal of women from Partizan taking them to Ulica Osmana Dikica no 16 where he either personally raped them or was present in the house while other soldiers raped the women.'[122] Similarly Kovač kept four victims in his apartment and raped them many times sometimes inviting his friends to his apartment and allowing them to rape one of the girls.'[123] The rapes were indicted as isolated incidents, no organiser of the large scale operation was identified. [123] This is problematic as it suggests that the truth of the systematic rape was not truly recognised and contextualised meaning individuals could not be held truly accountable for the organisation of the crimes committed, reducing the ICTY's ability to administer justice to thousands of victims. Comparatively the OTP alleged that Milan Lukić was a paramilitary leader 'organising a group of local paramilitaries some referred to as White Eagles and Avengers.'[124] These 'paramilitaries worked in exacting a reign of terror upon the local Muslim population.'[125] The judgement of Lukić and Lukić stated that this reign of terror included committing crimes such as 'murder, rape and forcibly taking people away.'[126] Lukić was deemed to 'play a dominant role in both the Pionirska street and Bikavac incidents in which at least 60 people were burned alive.' Such crimes were described as 'obviously premeditated and calculated' which added to the 'viciousness' of the attacks organised by Milan Lukić. [127] However rape as an organised method of terror was overlooked in this case. Furthermore, comparison of the description of the indicted crimes in the case of Kunarac et al and Lukić and Lukić demonstrate discrepancies in the ICTY ability to contextualise crimes, indict and address crimes as premeditated. Failing to address sexual violence as premeditated or identify a motivation, suggests that the rapes were opportunistic, and fails to address why such high numbers of rapes occurred and the motivation for keeping women in detention centres, limiting the truth of the crimes. Furthermore, the indictments focusing on a small number of women belittles the enormity of the systematic rapes and fails to hold the perpetrators accountable for such crimes. In contrast the court successfully recognises the mass murder committed by Lukić and Lukić holding them accountable. Analysis of Kunarac et al and Lukić and Lukić suggests that despite institutional intentions the widescale violent attack on Muslim women was overlooked by the ICTY and only a few individual cases were contextualised and truly understood. This draws into question the ICTY's ability to prosecute sexual violence on a large scale and find individuals accountable for the organisation of such crimes.

2.4 Sexual Violence was not Recognised as an Act of Persecution.

The indicted crimes of Lukić and Lukić were not only indicted as premeditated but as acts of persecution. Persecution falls under two categories of persecutory acts (actus reus) and persecutory intent (mens rea).[128] Persecutory acts involve 'gross or blatant denials of fundamental rights, laid down in international customary or treaty law.'[128] Persecution often 'refers to a series of acts with a cumulative effect. This can include terrorisation, psychological abuse, theft.'[128] However, a single act or omission may be sufficient to qualify as persecution, as long as it was carried out with the intention to discriminate on the grounds of 'political,

[121] Kate Vigneswaran and Michelle Jarvis, "Challenges to Successful Outcomes in Sexual Violence", in *Prosecuting Conflict- Related Sexual Violence at the ICTY*, ed. Baron Serge Brammertz and Michelle Jarvis, (Oxford University Press, 2016), 53.
[122] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement.'10.
[123] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' 225.
[124] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement.'11.
[125] International Criminal Tribunal for the Former Yugoslavia, 'Second Amended Indictment of the Prosecutor of the Tribunal against Milan Lukić, Sredoje Lukić and Mitar Vasiljević.'
[126] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement', 27.
[127] United Nations, 'Judgement Summary for Milan Lukić and Sredoje Lukić.'
[128] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement', 301.

racial or religious grounds.'[129] Meanwhile persecutory intent (mens rea) consists of the intent 'to consciously discriminate against victims.'[129] Milan Lukić was found to have committed persecutory acts with a 'discriminatory mindset towards Muslims' thus was indicted with persecution.[130] The same was found for Sredoje Lukić. Arguably the mass rapes instilled psychological terror. Witness VG035 testified that during one of the many instances of rape by Milan Lukić he said 'you're going to carry a Serb child. Serb children shall be born.'[131] Furthermore, VG063 described how she and other women were raped multiple times and similar comments made including that 'he could make a little Milan to each and every one of us.'[131] Such comments suggest an intention to ethnically cleanse and hint at a persecutory motivation behind the mass rapes of mostly Muslim women.[132] However, the intention of the rapes were not investigated and the rapes perpetrated by Lukić and Lukić were not indicted. This suggests either a lack of resources or unwillingness of the ICTY to recognise and contextualise the mass rapes, in these cases, to understand them as a form of persecution. Similarly, in the Kunarac et al case, despite men being indicted for rape and sexual enslavement there was no reference to Muslim women being persecuted through rape and sexual violence hinting at a lack of understanding as to how the victims were selected and ignorance towards the largely Muslim women population that were at risk of these crimes. This raises the question as to whether the severity and psychological impact of rape was dismissed throughout the court proceedings in both cases. Failure to recognise victim impact or reasons why they were targeted suggests a failure in 'drawing out facts necessary for wider accountability', potentially limiting the support victims would need following the atrocity (this will be explored more in chapter three).[133] During proceedings of these court cases the ICTY overlooked key elements of the rapes, failed to understand the rapes in their entirety and risk revealing the truth that rape was a method of persecution and indicting accordingly. These cases further question whether the extreme violent use of rape, as a method of persecution, was overlooked through the duration of these court proceedings, questioning the effectiveness of the court in exposing the whole truth and prosecuting sexual violence as a violent crime.

2.5 Conclusion

Overall, based on evaluation of Kunarac et al and Lukić and Lukić, the premeditated and organised nature of the rapes was overlooked throughout the court process. Comparison of Vuković's unindicted rape of FWS-48 versus the indicted rape of FWS-50 demonstrates the unrealistically high evidentiary standard to prosecute rape. Such high evidentiary standards supports the need for prosecution of sexual violence to be more tailored to the unique circumstances of how rape usually occurs e.g a private act. Furthermore, Kunarac et al demonstrates a case-by-case approach was adopted, overlooking the systematic nature and culture of sexual violence that existed. Thus, whilst the ICTY was significant in terms of deciding to recognise the rapes, the high evidentiary standard required, alongside an inability to address the volume of crimes, limited the effectiveness of the court process in prosecuting rape. A survivor- centred approach, in which victims should not be 'expected to recall every detail of their abuse or their validity is scrutinised,' should be further developed.[132] 'Ongoing

[129] Ibid, 302.
[130] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement.'303.
[131] Ibid, 227.
[132] Robert Fisk, "Bosnia War Crimes: The rapes went on day and night": Robert Fisk, in Moster, gathers detailed evidence of the systematic sexual assaults on Muslim women by Serbian 'White Eagle' gunmen", The Independent, February 8 1993, https://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-the-systematic-sexual-assaults-on-muslim-women-by-serbian-white-eagle-gunmen-1471656.html.
[133] Pillay, "Establishing Effective Accountability Mechanisms for Human Rights Violations."

denial of survivors' stories and their connection to systematic abuse risks further dehumanising Bosniak women' suggesting the ICTY court process was not entirely successful in revealing the full truth of the crimes inflicted by Kunarac et al.[134] Furthermore, the Lukić and Lukić case highlights how the OTP failed to amend the indictment to include rape, despite having evidence of sexual violence and using this evidence as alibi rebuttal. Such actions raise the question of whether bias against victims and prioritisation of other crimes resulted in the sexual violence in Višegrad being ignored. Furthermore, comparison of Kunarac et al and Lukić and Lukić, suggests that the organised systematic nature of rape was not addressed as the ICTY failed to hold organisers of rape accountable resulting in prosecution of few perpetrators with very few victims legally recognised, and only small-scale prosecution of sexual violence. Finally, the OTP failed to explain why largely Muslim women were victims of sexual violence. In both Kunarac et al and Lukić and Lukić, court proceedings resulted in systematic sexual nature being overlooked and potentially mischaracterised, potentially overlooking rape as a form of persecution, meaning the crime has not been truly recognised. If the truth of a crime is not revealed and the justice process for victims thus hindered, it draws into question the effectiveness of the ICTY's court process in prosecuting sexual violence.

[134] Sara Milenkovska, "Hague Tribunal's blind Spots Marred Wartime Sexual Violence Cases."

Chapter 3: The Institution of the ICTY, Judgement and the Aftermath

The ICTY aimed to 'render justice to thousands of victims and their families' and 'deter future crimes.'[135] Scholars Nicholas A Jones, Stephan Parmentier and Elmar G.M. Weietekamp argue justice involves four key steps: truth about the past, accountability, reparation and providing reconciliation.[136] The ICTY's ability to reveal the truth about the past and hold perpetrators accountable has been discussed through the case studies of Kunarac et al and Lukić and Lukić, in chapters one and two. The first two chapters primarily focused on the ICTY's first organ, the OTP. This chapter will question to what extent the ICTY's judgement and sentencing in the cases of Kunarac et al and Lukić and Lukić achieved justice for the victims of sexual violence. Initially this chapter will focus on the ICTY's second organ, the trial chamber, and its final judgement of Kunarac et al and Milan and Sredoje Lukić, to further assess the concept of 'accountability' in these two cases. The second part of this chapter will discuss the ICTY's third organ, the registry, to assess whether 'reparation' and 'reconciliation', key elements of justice, have been addressed by the ICTY. It will be argued that the ICTY's sentencing of Kunarac et al and Milan and Sredoje Lukić demonstrates a methodical approach, ensuring perpetrators were held accountable for the indicted crime and that their sentence reflected the atrocity they were convicted of. However, both Kunarac et al and Lukić and Lukić were found 'not guilty' and acquitted of several indicted crimes. Consequently, the courts' ability to administer justice may be compromised as some offences were not legally recognised, thus no one could be held accountable and sentenced accordingly. Furthermore, the ICTY is limited in its authority to promote transitional justice in the form of reconciliation in society, police reform or provide long term support for victims of mass sexual violence. Thus, long term, the ICTY cannot be relied upon as an institution responsible for administering transitional justice. National efforts and more research into victim reconciliation is required.

3.1 ICTY Method of Sentencing

The recognition and indictment of a crime are the first steps to sentencing thus it is important to understand the institutional processes and logistical challenges, as discussed in chapter one and two. Imposing appropriate sentencing is one step towards establishing accountability for offenders and providing reparation for victims, thus is crucial in the movement for justice. The trial chamber is one of the three main organs of the ICTY and is responsible for determining the guilt or innocence of the accused and sentencing accordingly.[137] To decide a sentence length the Trial Chamber must consider the gravity of the offence, the individual circumstances of the convicted person, any aggravating or mitigating circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[138] The ICTY wished to maintain a working relationship with the Bosnian judicial institutions 'to help stabilize the country,' and facilitate the

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[135] IRMCT, "About the ICTY," Legacy Website of the ICTY, TPIY, MSKJ, Accessed: September 22, 2023, https://www.icty.org/en/about#:~:text=By%20bringing%20perpetrators%20to%20trial%2C%20the%20ICTY%20aims,to%20a%20lasting%20peace%20in%20the%20former%20Yugoslavia.

[136] Nicholas A Jones, Stephan Parmentier and Elmar G.M. Weietekamp , "Dealing with international crimes in post-war Bosnia: A look through the lens of the affected population," *European Journal of Criminology 9*, no.5 (2012): 555. https://doi.org/10.1177/1477370812454645.

[137] IRMCT, "Chambers", Legacy website of the ICTY, TPIY, MKSJ, Accessed December 15 2023, https://www.peaceinsight.org/en/articles/ict-bosnia-and-herzegovina/?location=western-balkans&theme=human-rights.

[138] Goran Šimić, "Searching for reparation: has the ICTY brought real justice for the victims in Bosnia and Herzegovina", July 30, 2023, https://www.peaceinsight.org/en/articles/ict-bosnia-and-herzegovina/?location=western-balkans&theme=human-rights.

work on all war crime cases, delegating cases to the court of the BiH. [139]Aggravating circumstances are not exhaustively defined but include position in leadership, level in the command structure or role in the broader context of the conflict in carrying out the crimes, the duration of criminal conduct, the large number of victims involved and systematic nature, special vulnerability of the victims, including their young age'.[140] Mitigating circumstances potentially reduce the sentence and include factors such as 'the genuine and sincere expression of remorse by the accused' or 'voluntary admission of guilt.'[140] These factors act as guidelines and the statute states the objective gravity of each crime category, or its related sentence length, however, it is the decision of the individual judge to determine the final sentence. Crimes are delt with on a case-by-case basis. [141] Consequently the sentencing has been criticised as inconsistent and confusing. [142] It is vital that the criminal justice system is consistent in sentencing to reduce corruption and sporadic instances of accountability.

3.2 Sentencing of Kunarac et al and Lukić and Lukić

The Kunarac et al case marks the unprecedented sentencing of rape and enslavement as a crime against humanity requiring the judge to act on first principles and apply sentencing guidelines accordingly. Dragoljub Kunarac was found guilty of eleven charges, acquitted of six and sentenced to twenty-eight years in prison. Nine victims were formally recognised whilst the indictment claimed crimes were committed against at least fourteen victims.[143] There were several aggravating factors to his case which impacted his sentencing. These include 'the youthful age of his victims' including 'FWS-87 who was about fifteen and a half years old, A.S. and D.B were about nineteen years old, FWS-50 was about sixteen years old, FWS-191 was about seventeen years old and FWS-186 was about sixteen and a half years old.[144] Furthermore whilst Kunarac could not be established as a commander, 'evidence clearly shows that this accused played a leading organisational role and that he had substantial influence over some of the other perpetrators.'[11] Kunarac committed some crimes over an extended period, evidenced by his enslavement of FWS-191 and FWS-186 over two months.[11] Meanwhile mitigating circumstances in this case were limited and included Kunarac 'voluntarily surrendered to the International Tribunal' and expressed remorse for the fact that 'FWS-75 was gangraped.'[11]

Radomir Kovač was found guilty of count 22- enslavement, count 23- rape as crime against humanity, count 24 rape- as violation of the laws or customs of war and count 25- outrages upon personal dignity as a violation of the laws or customs of war.[145] Four victims were formally recognised. Kovač was sentenced to twenty years in prison but granted early release

[139] "Judicial Reform and Reconciliation in Bosnia and Herzegovina," Post Conflict Research Centre, March 30, 2023, https://p-crc.org/2023/03/30/judicial-reform-and-reconciliation-in-bosnia-and-herzegovina/
[140] United Nations, United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,' July 20, 2009, Case No. IT-98-32/1-T, 319, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf.
[141] Barbora Holá, Catrien Bijleveld, and Alette Smeulers, "Consistency of International Sentencing: ICTY and ICTR Case Study," *European Journal of Criminology* 9, no.5 (2012): 543 https://doi.org/10.1177/1477370812453112 .
[142] Ibid, 540.
[143] International Criminal Tribunal for the former Yugoslavia, "Dragoljub Kunarac is the first accused of rape and torture of Bosnian Muslim women, to turn himself in," Press Release, March 4, 1998, https://www.icty.org/en/press/dragoljub-kunarac-first-accused-rape-and-torture-bosnian-muslim-women-turn-himself.
[144] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,' Case No. IT-96-23-T & IT-96-23/1-T, February 22 2001, 276, https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.
[145] Ibid, 282.

March 27, 2013. He served just under fourteen years.[146] Kovač had young victims including A.B. of about twelve years old. Kovač committed these atrocities over an extended period with FWS-87 and A.S. enslaved for four months, and enslaved FWS-75 and A.B. for a period of about a month.[147] These facts acted as aggravating factors for his sentencing, however his status as a sub commander of the military police did not feature.

Zoran Vuković was found guilty under 'count 33 of torture as a crime against humanity, count 34 of rape as a crime against humanity, count 35 of torture as a violation of the laws or customs of war, and count 36 of rape as a violation of the laws or customs of war.'[148] Aggravating circumstances in Vuković case include the 'youthful age of FWS-50.' Despite accusations of multiple rapes, Vuković was sentenced for the rape of one individual. Vuković received a twelve-year sentence, but was granted an early release on 11 March 2008, serving time for just under eight and a half years.

Kunarac et al were judged by Judge Florence Ndepele Mwachande Mumba, Judge David Hunt and Judge Fausto Pocar.[149] The specifics of how judges reach their sentencing decision is unknown, yet the evidence suggests that the sentences administered to Kunarac et al, by the ICTY, were in line with the institution's internal method of sentencing. Kunarac was given the longest sentence and was found to have perpetrated crimes against the most victims, holding the highest military status with several aggravating factors at play. Both Vuković and Kovač were found to be 'sub-commanders of the military police of the VRS' with Vuković a member of the paramilitary and Kovač a paramilitary leader in the town of Foča. Their lower status arguably contributed to the shorter sentence. In the case of Kunarac et al the method of sentencing does not appear to be sporadic, but instead measures and justified, suggesting that wartime violence against women will be taken seriously. This is important as suggests that the severe harm endured by their victims including 'permanent gynaecological harm, alongside psychological and emotional harm' was rendered serious by the judge in this case.[150] Furthermore comparison of Kunarac et al sentencing vs Lukić and Lukić reiterates this claim. Milan Lukić was sentenced to life imprisonment, convicted in relation to six distinct incidents, including 'the killing of five Muslim civilian men at the Drina River on or about 7 June 1992 and the killing of seven Muslim civilian men at the Varda factory in Višegrad.'[151] Milan Lukić's sentence was the first time the appeals chamber has upheld a sentence of life imprisonment.[152] Milan Lukić's sentence was justified due to the particular gravity of the abuse described as 'maximising suffering' whilst being held responsible for at least one hundred and thirty-two deaths.[153] Further aggravating factors included his lack of co-operation with the prosecution. Milan Lukić receiving the longest sentence, of the studied cases, reflects the vast number of

[146] United Nations, "FOČA" (IT-96-23 and 23/1) Kunarac, Kovač and Vuković," Accessed December 17, 2023, https://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf.
[147] United Nations, 'Prosecutor V Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic Judgement,'278.
[148] Ibid, 282.
[149] Ibid, i.
[150] International Criminal Tribunal for the former Yugoslavia, "Dragoljub Kunarac is the first accused of rape and torture of Bosnian Muslim women, to turn himself in."
International Criminal Tribunal for the former Yugoslavia, "Life imprisonment for Milan Lukić confirmed, Sredoje Lukić's sentence reduced," Press Release, December 4, 2012, https://www.icty.org/en/press/life-imprisonment-milan-luki%C4%87-confirmed-sredoje-luki%C4%87%E2%80%99s-sentence-reduced.
[151] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,' 323.
[152] International Criminal Tribunal for the former Yugoslavia, "Life imprisonment for Milan Lukić confirmed, Sredoje Lukić's sentence reduced,", Press Release, December 4, 2012, https://www.icty.org/en/press/life-imprisonment-milan-luki%C4%87-confirmed-sredoje-luki%C4%87%E2%80%99s-sentence-reduced.

[153] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,'323.

victims and his responsibility for their death thus sporadic sentencing is not evident in these cases. Similarly, Sredoje Lukić was initially sentenced to 30 years imprisonment, but his crimes were later appealed and his sentence was reduced to 27 years imprisonment.[154] Sredoje Lukić bears criminal responsibility as an aider and abettor for the deaths of at least 59 people in the Pionirska incident, a mass killing whereby over a hundred people were locked in a house in which Milan Lukić and others placed an explosive device into a room and set the house alight.[155] Furthermore, Sredoje Lukić bears criminal responsibility as a direct perpetrator for the beating of several men in the Uzamnica camp.[155] The official charges show Lukić and Lukić to have acted with depravity and had significantly more individual victims than Kunarac et al collectively, thus warranted the greatest punishment. Upholding appropriate sentencing is crucial to maintaining justice not only for accountability but to ensure that the victim feels recognised and indicates the depth and gravity of their suffering has been understood.[156]

The ICTY trial chamber declared that sentencing would also be influenced by the court of Bosnia and Herzegovina (BiH), where the crimes took place. The criminal code of Bosnia and Herzegovina states that grave forms of serious criminal offences perpetrated with intent, should ensure 'long-term imprisonment for a term of twenty-one to forty-five years may be prescribed.'[157] The ICTY Trial Chamber states 'that Lukić and Lukić participation in the Pionirska street fire and the Bikavac fires, in which they were both participants, exemplify the worst acts of inhumanity that one person may inflict upon others.[158] Thus the sentence awarded to Lukić and Lukić for these crimes, appears to be justified and in line with the general practice of prison sentences in the courts of former Yugoslavia. As discussed in chapter one, Gojko Janković and Radovan Stanković were originally on the Kunarac et al indictment but transferred to BiH.[159] Gojko Janković was found guilty of multiple crimes against humanity, including murder and rape and was sentenced to thirty four years imprisonment. [159] Radovan Stanković was found guilty of multiple crimes against humanity, including 'establishing a detention centre, detaining at least nine female persons and inciting soldiers to rape them', highlighting his involvement to organise the crimes. Furthermore, he was found guilty of raping and sexually assaulting multiple other women, he was convicted to twenty years in prison.[160] Article 14 of the criminal code of Bosnia and Herzegovina states that 'thirty-five years in the case of a criminal offence for which a punishment of long-term imprisonment is prescribed' meanwhile 'twenty years in the case of a criminal offence for which the punishment of imprisonment for a term exceeding ten years is prescribed.'[157] Neither Janković or Stanković received a maximum sentence, raising the question of the gravity in which sexual violence is understood within the BiH. The sentencing of these men mirrors the sentencing of Kunarac et al by the ICTY, and suggests BiH standards were influential. The similarity in crimes discussed and sentence lengths suggest that the ICTY had a methodical and fair approach to sentencing

[154] United Nations, "VIŠEGRAD» (IT-98-32/1) Milan Lukić and Sredoje Lukić," Accessed December 20, 2023, https://www.icty.org/x/cases/milan_lukic_sredoje_lukic/cis/en/cis_lukic_lukic_en.pdf.
[155] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,'125.
[156] Matias Hellman, "Challenges and Limitations of Outreach: From the ICTY to the ICC." In *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn, (Cambridge: Cambridge University Press, 2015), 259.
[157] Constitution of Bosnia and Herzegovina, *Criminal Code of Bosnia and Herzegovina- Unofficial Consolidated Version*, June 18 2003, 10, https://rm.coe.int/bih-criminal-code-consolidated-text/16806415c8.
[158] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,'321.
[159] "Prosecutors Office of Bosnia and Herzegovina v. Gojko Janković," International Crimes Database, Accessed December 12, 2023, https://www.internationalcrimesdatabase.org/Case/1027/Jankovi%C4%87-(Gojko)/#:~:text=On%2016%20February%202007%2C%20the%20Trial%20Panel%20of,humanity%20and%20sentenced%20him%20to%2034%20years%E2%80%99%20imprisonment.
[160] "Prosecutors Office of Bosnia and Herzegovina v. Radovan Stankovic," International Crimes Database, Accessed December 12, 2023, https://www.internationalcrimesdatabase.org/Case/3259/Stankovic/.

Kunarac et al and the Lukić and Lukić and thus to this extent it suggests that the ICTY was a good institution for holding perpetrators accountable and administering justice for sexual violence.

Sentences imposed by the ICTY are only able to hold individuals accountable for convicted cases. The Trial Chamber made it clear that an accused "can only be sentenced for what [he has] been convicted for, and if [he has not] been convicted, [he] can't be sentenced for it."[161] This raises a problem as in both Kunarac et al and Lukić and Lukić trial, there were a number of indicted cases that resulted in acquittals or 'not guilty' verdicts, alongside unindicted crimes which were not included as a result of evidentiary standards and the ICTY's completion strategy (aforementioned in chapter one and two). In Kunarac et al three men were sentenced for harming a small number of women, yet the systematic use of rape as a method of terror and reference to 'rape camps' were not addressed in the sentencing, meaning that the ICTY has failed to reveal the truth of what happened at Foča and failed to hold anyone accountable for the mass scale of the rapes. Similarly, despite Lukić and Lukić receiving long sentences, neither of them were prosecuted for the rapes in which they were accused or that took place in Visegrád, where they were operating. Consequently, the success of the ICTY's sentencing of these cases is limited by investigative and institutional failures to reveal the truth of the mass sexual violence in indictments and prosecute accordingly.

3.3 Transitional Justice

The distribution of justice goes beyond the sentencing of crimes and arguably requires community reconciliation.[162] Transitional justice is a multifaceted concept and largely refers to how societies respond to the legacies of massive and serious human rights violation. [163] The key questions of transitional justice include: how to seek truth, establish accountability for offenders, provide reparation to victims, promote reconciliation, deal with trauma and build trust.[164] Transitional justice is crucial to not only confront the past but to transform a state, in this case from wartime to peacetime to ensure that crimes are not forgotten, victims are supported, and risk of retaliation or further oppression is minimised as relationships are reconciled. As an international court the ICTY has authoritative limitations on a country's transformation, dealing with trauma and building trust. Consequently, local structures are required to be put in place to support those affected by the conflict in the territories of former Yugoslavia. Specifics on how to investigate and provide long term support and reconcile a post-war society is beyond the scope of this paper but it is an academic area that requires further research should true transitional justice be achieved.

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[161] Goran Šimić, "Searching for reparation: has the ICTY brought real justice for the victims in Bosnia and Herzegovina," Peace Insight, July 30, 2013, https://www.peaceinsight.org/en/articles/ict-bosnia-and-herzegovina/?location=western-balkans&theme=human-rights.

[162] "OHCHR: Transitional justice and human rights," United Nations, Accessed January 6, 2024, https://www.ohchr.org/en/transitional-justice.

[163] "What is Transitional Justice," ICTJ, Accessed December 15, 2023, https://www.ictj.org/what-transitional-justice#:~:text=Transitional%20justice%20refers%20to%20how%20societies%20respond%20to,dilemmas.%20Above%20all%2C%20transitional%20justice%20is%20about%20victims.

[164] Nicholas A Jones, Stephan Parmentier and Elmar G.M. Weietekamp, "Dealing with international crimes in post-war Bosnia: A look through the lens of the affected population," 553.

3.4 Reconciliation

Claude Jorda, president of the ICTY from 1999 to 2003 claimed justice goes beyond truth and accountability.[165] Mr Jorda stated that the ICTY intended to 'assuage the suffering of victims and help them to reintegrate into a society which has been reconciled.'[165] Reintegration into a cohesive society is vital to ensure that 'a climate of a hatred and virulent nationalism' is not sustained, as it runs the risk of leading to revenge and future wars.[166] Thus the importance of transitional justice and reconciliation is recognised by the ICTY and consequently means that 'trials alone are not enough' to restore justice and that other measures are required to truly distribute justice. [167]

Limitations in the international Tribunal's 'peace making' abilities are noted by Mr Jorda, as the ICTY 'cannot try all perpetrators of serious violations of humanitarian law committed during a conflict which lasted more than five years' as it would 'require too much time.' [168] Similar observations have been discussed throughout this dissertation. However, measures can be taken to ensure that victims of the tried perpetrators are empowered and protected, to ensure they are not further traumatised through the trial and are able to access justice. The ICTY's office of the registry is the third institutional organ and is 'responsible for bringing witnesses to testify in court, protecting them when necessary and providing them with expert psychological support.'[169] Protection of witnesses includes 'withholding the witness' name from all public records, screens to sit behind while testifying, electronic distortion of the witness' face and voice in the court video feed.' [170] Furthermore, to reduce the trial stress the witness was permitted to testify from their home country through video link in case when absence from home location might compromise security.[170] These measures highlight the ICTY's recognition of the unique vulnerability of witnesses. However, the ICTY is limited in their ability to provide long term protection and support for victims of sexual violence in reconciling back into society.

A further challenge is prominent as this war was "of macabre intimacy in which people knew their torturers."[171] For example the systematic sexual violence, alongside other atrocities, heavily involved the local police force. [172] One example of this is Sredoje Lukić who had been a police officer in Visegrád, 'using his authority to abuse and murder his Muslim neighbours.'[173] This dynamic hinders societal reconciliation and highlights the need for post-war police reform to transform the police from 'instruments of war into reliable institutions in the service of the rule of law in a democratic society.'[172] Restoring trust in the legal system is crucial and ensuring that victims of sexual violence do not remain under the legal power of their previous perpetrators, is a priority. The ICTY's authority did not extend to this national reform, it is beyond their powers to secure this reconciliation for victims. Consequently, the

[165] IRMCT, "Former Presidents," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 16, 2023, https://www.icty.org/en/about/chambers/former-presidents.
[166] Claude Jorda, "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina," Transcript of speech delivered at Sarajevo, May 17, 2001, https://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-bosnia-and-herzegovina.
[167] Goran Šimić, "Searching for reparation: has the ICTY brought real justice for the victims in Bosnia and Herzegovina."
[168] Claude Jorda, "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina."
[169] IRMCT, "Registry," Legacy Website of the ICTY, TPIY, MKSJ, Accessed December 18, 2023, https://www.icty.org/en/about/registry.
[170] IRMCT, "Innovative Procedures", Legacy Website of the ICTY, TPIY, MKSJ, Accessed December 18, 2023, https://www.icty.org/en/features/crimes-sexual-violence/innovative-procedures
[171] Iva Vukušić "Archives of Mass Violence: Understanding and Using ICTY Trial Records" *Comparative Southeast European Studies* 70, no. 4 (2022): 600. https://doi.org/10.1515/soeu-2021-0050
[172] Christian Axboe Nielsen*, Mass atrocities and the Police: A new history of ethnic cleansing in Bosnia and Herzegovina,* (Bloomsbury Publishing, 2022), 152.
[173] United Nations, 'Trial Chamber III Prosecutor v Milan Lukić, Sredoje Lukić Judgement,'329.

ICTY is shown to be limited in its ability to achieve transitional justice in full. I do not argue that it is the ICTY responsibility to produce transformative and restorative societal effects as domestic political commitment to justice goals would be required, however the cases analysed have highlighted the importance of further research and facilities to support long term justice for future wartime victims of sexual violence.

Not only is there a need to protect women and reconcile them with authoritative figures there is a need to further understand the systematic attack on women if true justice is ever to be achieved. In the Lukić and Lukić case sexual violence was not charged, meanwhile in the Kunarac et al case it was charged, yet motivations were not determined. This is problematic not only in the distribution of justice as not all women were recognised, but problematic in that the unique vulnerability of being a woman, was not being addressed. Failure to explicitly understand the motivation of gendered violence in war restricts the ability to impose preventative measures and protect women in future conflict. There is a need for systematic consideration of men targeting women, in policy making around gender-based violence. [174] According to UN Women, the fact that police and legal systems are dominated by men is the reason why they fail to enforce laws on gender-based violence.[175] This should be a further area courts should address in future international tribunals and highlights the shortcomings in the ICTY for not explicitly recognising ethnic/gender threats in Kunarac et al or Lukić and Lukić.

3.5 Reparations

Scholars Nicholas A Jones, Stephan Parmentier and Elmar G.M. Weietekamp claim that a further step to achieving justice are 'reparations.' 'Reparation' refers to providing a range of material and symbolic benefits to victims or their families as well as affected communities, which can include but is not limited to psychological and economic support.[176] The ICTY made no economic resources explicitly available for the sexual violence victims in Kunarac et al, nor for the communities affected by Lukić and Lukić. Reparations do not necessarily equate to victims receiving a service but can come in the form of community satisfaction.[176] They can take many forms including memorials and truth commissions which ensure that crimes are not erased from history. The ICTY supports several community outreach programmes including one in Foča, in which conferences discussing Kunarac et al crimes occur to ensure efforts persist to bring to justice perpetrators for this crime and the ICTY's preparedness to continue to 'assist domestic authorities in bringing further prosecutions.''[177] This is crucial to ensuring that sexual violence crimes are remembered and not erased from history, ensuring that the truth stays known, a key element in transitional justice and thus the Kunarac et al case demonstrates the ICTY attempt to ensure sexual violence victims of convicted criminals are remembered. However, no such outreach programme occurred in Visegrád, where Lukić and Lukić atrocities were committed which threatens the community satisfaction that can be offered. However, neither Milan nor Sredoje Lukić were convicted of sexual violence, thus in the eyes of the law these crimes were not proven to have occurred, thus no victims can be identified and would not have access to an outreach programme and would be excluded from reparation programs or planning for memorials. If the

[174] Aude Juillerat, Alicia Joha, Marie Ferri, "Responding to sexual and gender-based violence: why masculinities matter," Foraus, December 10, 2023, https://foraus.ch/fr/posts/responding-to-sexual-and-gender-based-violence-why-masculinities-matter/.

[175] "Strengthening police responses to gender-based violence crucial in lead up to Generation Equality Forum in Paris," UN Women, May 25, 2021, https://www.unwomen.org/en/news/stories/2021/5/news-strengthening-police-response-to-gender-based-violence.

[176] OHCHR, "Reparations", United Nations, Accessed December 19, 2023, https://www.ohchr.org/en/transitional-justice/reparations.

[177] IRMCT, "Bridging the Gap - Foča, Bosnia and Herzegovina", Legacy Website of the ICTY, TPIY, MKSJ, Accessed December 19, 2023, https://www.icty.org/en/outreach/bridging-the-gap-with-local-communities/foca .

prosecution or the court does not carry out their judicial mandate to a high standard, and willingly overlooks victims no amount of outreach and explaining will put it right.[178] This is further highlighted as despite Milan Lukić receiving a life sentence, female rape victims have stated that 'justice had not been done for them.'[179]

3.6 Conclusion

Overall, it can be argued that bringing justice and 'accountability to the former Yugoslavia is an essential investment in the peace and future of south-eastern Europe,' a step towards reconciliation between communities. [180] Transitional justice is required to come to terms with legacy of large-scale past conflict and human right abuses, focusing on long term justice. Comparing the ICTY's trial chamber in light of Kunarac et al case and Lukić and Lukić suggests that there is a measured approach in the sentencing of varying crimes, suggesting that the perpetrators were held truly accountable for the crimes they were charged with. However, sentences alone do not reflect the entirety of the crime, their ability to hold perpetrators accountable has been limited and calls into question the ICTY's ability to provide justice for victims of sexual violence. Furthermore, it must be acknowledged that the ability to provide transitional justice and support victims of sexual violence long term requires national co-operation and further research into means of support and facilities set up, for reconciliation and reparations to take place and is a potential area for further research.

[178] Matias Hellman, "Challenges and Limitations of Outreach: From the ICTY to the ICC," In *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn, (Cambridge: Cambridge University Press, 2015) 257.
[179] Ibid, 258.
[180] IRMCT, "The Cost of Justice," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 15 2023, https://www.icty.org/en/about/tribunal/the-cost-of-justice.

Conclusion

The ICTY alleges it 'played a historic role in the prosecution of wartime sexual violence in the former Yugoslavia and has paved the way for a more robust adjudication of such crimes worldwide.'[181] However various feminist organisations, including NGO Women's Media Center, have stated that while the court 'has set major legal precedent for the prosecution of rape' it remains ineffective with 'low level convictions and overturned verdicts troubling for those seeking justice.'[182] This thesis contributes to this debate on the ICTY's effectiveness prosecuting sexual violence. Whilst other scholars have largely focused on either individual cases before the court or on the functionality of the ICTY as a whole this thesis provides a **comparative analysis of Kunarac et al and the Lukić and Lukić cases to assess what they reveal about the prosecution of sexual violence by the ICTY**? This thesis argues that the ICTY intended to expose the truth and prosecute systematic rape, holding perpetrators accountable and bringing justice to the victims. The Kunarac et al case was a significant landmark for recognising sexual violence as a violent war crime. However, analysis of Kunarac et al indictments reveal that only isolated instances of rape were successfully contextualised and prosecuted. Comparative analyse of Kunarac et al and Lukić and Lukić's prosecutions, reveal structural limitations in the courts ability to prosecute mass rape. Failure to recognise the systematic nature of rapes resulted in a large numbers of victims being ignored and overlooked rape as a form of persecution. Thus, these cases question the ICTY's ability to reveal the truth of the crimes, hold individuals fully accountable through prosecution and to offer justice to victims. Moreover, analysis of the trial chamber and registry's operations, suggest that further research and infrastructure, external to the court, would be required to ensure victims receive long term support and that society is reconciled.

This thesis was structured into three chapters. The first chapter questioned how the institution of the ICTY was set up to prosecute sexual violence, in the cases of Kunarac et al and Milan and Sredoje Lukić? I argue the intention of the ICTY was to prosecute sexual violence, evidenced by the unprecedented mandate which 'specifically defined rape and sexual enslavement under customary law.'[183] Furthermore the introduction of a legal advisor for gender issues, demonstrates the institutional commitment to dedicate resources and investigate sexual violence.[184] Sellers was instrumental in contextualising rape and recognising it constituted enslavement, evident in Kunarac et al.[185] However the institutional design for the prosecution of sexual violence was complicated by the court's completion strategy. The completion strategy structured the operation of the ICTY's OTP and required the ICTY to achieve its objectives and ensure that 'all investigations were completed by the end of 2004' and finalised all work in 2010.[186] Analysis of the completion strategy in the cases of Kunarac et al and the Lukić and Lukić trial, reveals conceptual errors around 'accountability' and the 'seriousness' of rape, compared to other war crimes. These institutional misconceptions

[181] IRMCT, "Crimes of Sexual Violence," Legacy website of the ICTY, TPIY, MKSJ, Accessed January 8, 2024, https://www.icty.org/en/features/crimes-sexual-violence .
[182] Louise Hogan, "Seeking justice through the ICTY: Frustration, skepticism, hope," Women's Media Centre, Accessed January 8, 2024, https://womensmediacenter.com/women-under-siege/seeking-justice-through-the-icty-frustration-skepticism-hope.
[183] IRMCT, "Crimes of Sexual Violence."
[184] "Patricia Viseur Sellers," LSE, Accessed January 12, 2023, https://www.lse.ac.uk/women-peace-security/people/patricia-viseur-sellers .
[185] IRMCT, "Landmark Cases," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 28, 2023, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.
[186] IRMCT, "Completion Strategy," Legacy website of the ICTY, TPIY, MKSJ, Accessed December 13, 2023, https://www.icty.org/en/about/tribunal/completion-strategy.

resulted in much sexual violence being overlooked, in these cases. These findings suggest there are institutional limitations inherent within the set-up of the ICTY, which failed to fully understand sexual violence, thus restricted the courts ability to successfully prosecute the crime.

The second chapter questions whether the court proceedings of the ICTY addressed sexual violence in the cases of Kunarac et al and Lukić and Lukić? The court proceedings reveal that the indicted sexual violence of Kunarac et al mark a legal breakthrough, as isolated instances of rape were recognised and prosecuted as enslavement, a crime against humanity.[187] In these instances the ICTY successfully recognised how rape was utilised, revealing the truth of a crime, and contributing towards the distribution of justice to victims. However close analysis of Kunarac et al revealed high evidentiary standards were required to indict a crime, including the need for a witness to have seen sexual violence take place. Assessment of the indicted rape of two different victims highlight that had the sexual violence not been so grotesque and public, even fewer crimes would have been prosecuted. Consequently, court proceedings of Kunarac et al failed to address the systematic nature of the sexual violence that took place in Foča. Similar observations were found during the court proceedings of the Lukić and Lukić. Despite the OTP obtaining knowledge and evidence of systematic sexual violence in Višegrad, these crimes were not prioritized and indicted, instead instances of rape were merely used as alibi rebuttal. Comparison of the two cases highlights that in these cases the ICTY court proceedings failed to address mass sexual violence and prosecute the organisers, consequently very few victims were legally recognised. Further research is required to understand how future international criminal tribunals can effectively prosecute mass rape, a crime that largely takes place in private settings with no witnesses other than the victim.

The third chapter discusses the ICTY's prosecution of Kunarac et al and Lukić and Lukić, and the impact of the court's judgement on victims receiving justice. This questioned the extent to which the ICTY's judgement and sentencing of Kunarac et al and Lukić and Lukić achieved justice for the victims of sexual violence. Comparison of the cases demonstrated the court had a methodical approach when sentencing sexual violence, suggesting convicted perpetrators were truly held accountable for sexual violence. However, the ability for the trial chamber to hold perpetrators of sexual violence accountable is limited by the failures of the office of the prosecutors to reveal the truth and indict systematic sexual violence. Furthermore, this thesis highlights that in the cases of Kunarac et al and of Lukić and Lukić, the prosecution of crimes by an international criminal tribunal was not enough to provide justice to victims. Further infrastructure offering psychological and other forms of long-term support would have been required to help victims reconcile in society and obtain some form of justice.

Conclusions drawn throughout this research are heavily reliant on a wide range of primary sources produced by the ICTY and UN. These primary sources document the establishment of the ICTY, witness statements, indictments and their amendments, final judgements, amongst other information. This thesis utilised primary sources, to assess pre-existing scholarship, amalgamate information on the prosecution of sexual violence in Kunarac et al and Lukić and Lukić and formulate arguments. However, it is important to note some limitations of the sources used. First, several court documents were redacted, including court transcripts, limiting understanding of exactly how sentences were understood or the judge's interpretation of the crime. Furthermore, data collected stems from the ICTY, thus there are limitations in

[187] IRMCT, "Landmark Cases."

understanding how many victims were overlooked in each case and the impact of these crimes. Understanding impact is crucial when providing victims support and reconciling society.

Overall, analysis of Kunarac et al and Lukić and Lukić contributes to the discussion of effective prosecution for victims of wartime sexual violence. Rape is an ongoing method of warfare globally and understanding on how to prosecute and distribute justice is crucial for the future safety of women in war. Assessment of these historical events allows for deeper analysis of the international criminal tribunal's prosecution of sexual violence, and offers reflections on justice for victims. For the purposes of this research, the key attributes of justice were: truth, accountability, reconciliation, and reparation.[188] Chapter one and two focused on the ability of the institutional intention and court proceeding's ability to reveal the truth of sexual violence in these cases and suggests that when future international criminal tribunals are established, further research is required to prioritise and investigate both the systematic nature of rape and how it is utilised. Specifically, further research of rape as a method of persecution. Chapter two assessed the ICTY's ability to hold perpetrators accountable through indictments. Chapter three assessed the ICTY's ability to sentence perpetrators and organisers, and hold them accountable for their crime, and demonstrated limitations in prosecuting organisers of systematic crimes. Finally, chapter three highlighted that a criminal justice court is limited in its ability to reconcile and offer reparations to victims of sexual violence. Further research is necessary to understand exactly how systematic sexual violence disrupts society after war and investigate further infrastructure to understand what justice to victims of sexual violence means and provide long term support to victims of these atrocities.

[188] Nicholas A Jones, Stephan Parmentier and Elmar G.M. Weietekamp,"Dealing with international crimes in post-war Bosnia: A look through the lens of the affected population*," European Journal of Criminology* 9, no.5 (2012): 555. https://doi.org/10.1177/1477370812454645.

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Version September 2014

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