Study

“… and that it does not happen to anyone anywhere in the world”

The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yogoslavia

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Foreword

Sexualised war crimes have been a key issue for *medica mondiale* for the last 17 years. Since the very beginning, the organisation has pursued two goals: putting an end to the impunity of offenders who committed war rapes as well as to the trivialisation of war rapes as an inevitable collateral damage.

War rapes were seldom prosecuted in the past. On the rare occasions where perpetrators were prosecuted, the aim was to reestablish military order and discipline. After the end of World War II, international law entered into a new era. Justice for rape victims played, however, only a minor role.

Two examples: Rapes and other forms of sexualised violence were not prosecuted during the Nuremberg Trials. Even though the French and the Sowjet prosecutor both described rapes, sexual mutilations and forced abortions and also mentioned brothels inside concentration camps, none of these crimes were prosecuted. The soldiers of the Japanese army were infamous for the rapes they committed during their campaign in the Asian-Pacific region. The Military Tribunal in Tokyo, however, dealt only with those cases that had made the world headlines and could thus not be ignored, namely the mass rapes during the invasion of the Chinese city of Nanking in 1937. The large-scale, well-organised and systematic sexual enslavement of Asian women in so-called 'comfort stations' was totally neglected. Up until today, the few remaining survivors are fighting for recognition, or at least the right to die in dignity.

In 1992 Bosnian women first broke the silence around war rapes and, at least at the beginning, told every journalist about their experiences to prevent it from ever happening again. Women's groups raised public awareness and called for an end of impunity.

In consequence, two *ad hoc* Tribunals for the Former Yugoslavia and Rwanda were created. *medica mondiale* has always supported the efforts of the International Criminal Tribunal for the Former Yugoslavia (ICTY) striving for an effective prosecution. At the same time *medica mondiale* remained conscious of the fact that its responsibility lies primarily with women as potential witnesses.

15 years ago, international prosecution was still in its infancy and many mistakes were made. At the beginning the protection of witnesses was, for instance, particularly neglected and the witness protection unit at the court was completely understaffed and underfunded. *medica mondiale* received many complaints. Witnesses bemoaned the lack of respect towards them; they felt abused and were not informed about the proceedings during the trials etc.. They lived in constant fear, while the majority of perpetrators still ran free and lead their lives undisturbed. In the Lasva-Valley in Central Bosnia war criminals lived, for example, next door to their victims. There was no need to threaten witnesses directly to intimidate them.

medica mondiale has had bitter experiences with the ICTY as well. The tribunal in The Hague ordered Medica Zenica to disclose the confidential medical and psychosocial record of one of its clients who testified as a victim witness in court. The trust of clients was betrayed and the entire future cooperation with courts was at stake. Are therapy sessions possible if a client cannot rely on the therapist-patient privilege? A relationship of trust is necessary for all survivors to reconstruct the pieces of their world.

Ever since *medica mondiale* has been promoting the privilege on confidentiality for physicians and psychologists in the communication with their clients. The International Criminal Court now recognises the physician-patient privilege, though only as a discretionary provision. Legal justice should not be obtained at the expense of the individual process of coming to terms with traumatic experiences.

While testifying in court is not part of the healing process *per se*, it should not lead to a retraumatisation or undermine the trust relationship that is needed for psychological treatment. At the same time, it is crucial that survivors can contribute to prosecuting the perpetrators. The example of Holocaust-survivors has shown us, that testifying in court was vital for them „to become part of the world again". This is particularly true for offenses such as sexualised violence, as these offenses are often trivialised and denied. This subsequently leads to the isolation of affected women, which enhances the destruction that was triggered by the actual offense.

Criticism of the witness protection was taken into account and the proceedings have changed in recent years. This study shows that many witnesses feel treated with respect by the ICTY. The example of Bosnian courts described in this study, shows that this is, however, not the norm everywhere. The witness protection unit of the War Crimes Chamber in Sarajevo is dramatically understaffed and does not exist at all in the Cantonal and District Courts in Bosnia and Herzegovina. A lot depends on arbitrary and individual decisions and the individual expertise of prosecutors and police officers. The prosecutor's office of the War Crimes Chamber is particularly overburdened. The high workload is due to a sheer flood of pending trials as well as the permanent lack of funding

and staff and leads to a situation where communication with witnesses is reduced to a minimum.

Several witnesses that were interviewed for this study described in no uncertain terms, that it is essential to treat witnesses with respect. Support and protection of witnesses should, according to them, be given a higher priority in terms of staff and funding. This applies, particularly, to the Cantonal and District Courts that need to be improved in this respect. As numerous direct perpetrators and rapists are prosecuted on this level and as many of the victims live close by, their support and protection is even more important.

The study reveals different shortcomings of the prosecution and the actual proceedings of the trials at both courts. It does, however, also challenge the myth of a particular patriarchal Bosnian society and particular shameful Muslim. In 1992/1993 media coverage shaped the public discourse about war rapes. The first news reports and documentaries about rapes during the war in Bosnia stated that the Muslim society is particularly patriarchal. This perception still prevails. The US-American journalist and Pulitzer-Price-Winner Roy Gutman wrote, for example: "In the conservative society in which the Muslims of rural Bosnia grew up, women traditionally remain chaste until marriage. Rape is a trauma with far-reaching consequences for these victims, who have well-founded fears of rejection and ostracism and of lives without marriage or children."[1] Muslim women, who had survived rapes, were thus pigeonholed as particularly coy and therefore often described as extremely silent.

Sexualised violence certainly remains an enormous taboo in our societies and is often associated with a social stigma. However, the idea that the Muslim society in Bosnia-Herzegovina is particularly prone to stigmatisation is utterly wrong and was used at the time to draw a line. The subliminal message was: Bosnian Muslim men and women cannot be part of a civilised Europe, as they, in contrast to all other countries in (Western and Northern) Europe, mistreat „their" women.

It is astonishing how long such a myth prevails, in spite of all evidence to contrary. In the summer of 1992, no journalist would have been able to write a single word about war rapes, if Bosnian women had not spoken about these crimes directly in front of their cameras. They talked about these crimes with openness and anger, not shame. While the Catholic Church in Croatia still condemns abortions even if pregnancies are the result of rapes, the Muslim society, as well as their religious leaders, see things differently. As early as 1992, a fatwa declared that the Muslim society should recognise raped women as victims and treat them with respect. The young imam of Zenica, where Medica Zenica, the first therapy centre for raped women, was established in April 1993, did his utmost to support their work. He told refugee women from the countryside to seek advice from Medica Zenica, and he explicitly allowed rape survivors to abort up to the fourth month of their pregnancy.

The Federation of Bosnia and Herzegovina, one of the two entities that compose the state of Bosnia and Herzegovina, is the only post-conflict zone in the world where rape survivors are explicitly recognised as war victims and can thus claim a war pension. Although the present study underlines some weaknesses in the application of this law, it is a milestone in the social recognition and reparation for survivors of war rapes.

All of this would not have been possible without the commitment of women's organisations in Bosnia and Herzegovina and of the rape survivors themselves, the very women that were supposedly silenced by shame.

The present study reveals how an important number of women were supported by their families when testifying in court. It also shows that many women are highly motivated to bear witness because they want the offenders to be held responsible and accountable. They will not be silenced by fear or shame. Furthermore, this study demonstrates that while most witnesses want to testify *in camera*, they have very different reasons to do so. The general conclusion is that rape survivors do not fit into any stereotype and want to be perceived as individuals. More often than not courts are reluctant to admit their own responsibility in the numerous cases where survivors of sexualised violence refuse to testify. Instead of analysing why only a fraction of all witnesses are women and why many rape survivors decline to bear witness, courts turn to convenient stereotypes blaming the women themselves or society as a whole. However, not only rape survivors but also the investigators, prosecutors and judges themselves struggle with sexual shame and this influences their perception of the witnesses as well as their communication with them. An important first step would consist of introducing compulsory training on this issue for all court members, allowing them to reflect on their own discomfort and enabling them to deal with the issue in a more relaxed way. An interdisciplinary approach in legal training is also necessary.

Sexualised war violence can only be successfully prosecuted if investigation strategies are at the same time comprehensive and focused. At the same time courts need to change their attitude towards the victims. Instead of intimidating witnesses or luring them into testifying with false promises, courts should think how they can earn the cooperation of these women.

The present study shows that it is important for many women to speak about their rape in court. It is part of a broader reflection on the issue of "Law and Justice" introduced by *medica mondiale*. Several questions are important in this context: To which extent do legal institutions give raped women a sense of justice, thus strengthening them for the future? Which obstacles need to be eliminated to achieve this? In many countries and especially in post-conflict zones, women have only limited access to justice mechanisms and rape survivors do often not obtain justice in court. This creates the need to find justice through alternative mechanisms: What standards or practices to find justice have women developed in different countries? What is the contribution of symbolic tribunals, such as the Women's Tribunal held in Tokyo in 2000 that, strictly respecting legal proceedings, succeeded where the Tokyo Trials failed and finally gave former 'comfort women' the opportunity to testify in court? How can local or traditional dispute resolution mechanisms, such as the women's courts of arbitration that are successfully used in cases of domestic violence in some regions of India, be adapted to women's specific needs?

These are only some of the questions that were discussed during an international workshop organised by *medica mondiale* in 2008[2] with 50 international experts in the field of sexualised violence in armed conflicts, including lawyers and activists from 30 countries. The first conclusion was that the divide between international judicial institutions or legal aspects in general and the daily lives of women on the ground can often not be bridged. There are two worlds with two different languages and only limited connections. Only a small number of women will be able to participate actively in the trials. The second result of the workshop was that the liability of international tribunals and courts is not limited to the witnesses themselves but must include the activists who make contact with potential witnesses and are thus in great danger during and after a war. The third conclusion was that the search for alternative and practical justice mechanisms should be intensified and that future international standards should be developed on the basis of existing approaches used by women because they are more compatible with their reality than existing legal frameworks on state level.

Social justice is not reducible to legal justice. Trials are nonetheless an important step towards justice because they give social recognition to the suffering of victims. They (should) show the solidarity of society with survivors and marginalise the perpetrators and not the victims. This recognition is particularly important for victims of sexualised violence.The international and national prosecution of war crimes is, fortunately, increasing. The International Criminal Court came into being in 2002 and can prosecute war crimes and crimes against humanity worldwide, albeit with restrictions. Sierra Leone, Cambodia and soon Bangladesh try to come to terms with their past through war crime courts. In 2010, the first war crimes trial based on the new international criminal law will open in Germany. Ignace Murwanashyaka, the leader of the Hutu rebel group FDLR (Forces Democratiques de Liberation du Rwanda) is currently under investigation for war crimes and crimes against humanity committed in the Democratic Republic of Congo. This presents the German legal system with unprecedented challenges in terms of witness support and protection. It is therefore important to share experiences: What worked well, what did not, what are the challenges, what can lawyers and jurists learn from other experts, such as psychologists or former witnesses who must be recognised as experts in their own right as is the case in the present study.

Dr. Monika Hauser

Introduction by the Authors

This study was inspired by Binaifer Nowrojee, the current director of the Open Society Initiative for East Africa. In 2005, she critically reviewed the practice and results of the prosecution of sexualised violence before the International Criminal Tribunal for Rwanda (ICTR) from the perspective of Rwandan women who survived the genocide and multiple rape.[3] Just as the ICTR, the International Criminal Tribunal for the former Yugoslavia (ICTY) did pioneer and landmark work on gender and sexualised violence crimes. However, the number of women who testify in court is relatively small and the vast majority of those who testify did so under strong protective measures. While much analysis has been done over the past years on the legal aspects of prosecuting sexualised violence before both courts[4], we know little about the experiences of rape witnesses: What made them testify? How do they feel about their testimonies? What are their notions of justice for sexualised crimes? How do they perceive the short- and long-term effects of testifying? Do they feel justice is being done? What are their thoughts and recommendations on encouraging more women to testify on rape?

The only study that has so far analysed the experiences of witnesses before the ICTY was conducted by Eric Stover, Director of the Human Rights Centre of the University of California in Berkely.[5] Stover's study, however, does not differentiate in terms of gender or type of crime. In the beginning, our research intended no more than to fill this gap at least in part by focusing on the experiences of female witnesses who testified on rape or other forms of sexualised violence before the ICTY. However, in 2005, the ICTY started referring cases to the War Crimes Chamber (WCC) of the Court of Bosnia and Herzegovina. The first two referral cases[6] focused on crimes of sexualised violence and the third one contained several rape charges[7]. It made sense to take a closer look. This 'closer look' became more intensive when from 2006 onward an increasing number of independent cases before the WCC included rape charges. In the end, it became imperative to integrate the WCC in our research fully as more and more witnesses we interviewed had testified either before both courts or solely before the WCC.

Overview of Themes and Methodology

Part One: The Prosecution of Rape before the International Criminal Tribunal for the Former Yugoslavia and the War Crimes Chambers

The following report has 2 major parts. Part One informs about the mandate and legal basis of both the ICTY and the WCC, about special provisions on sexualised violence and about indictments, convictions and acquittals in sexualised violence cases. Chapter 1 gives an account on the major findings of the Commission of Experts tasked by the United Nations to identify serious breaches of international humanitarian law. The Commission paid special attention to rape and its report remains to date the most comprehensive account of the pattern of rape and sexualised violence during the war in Bosnia and Herzegovina 1992-95. However, distinctions made between "ethnic cleansing" rape and "opportunistic" rape carries problems which are discussed at the end of the chapter.

Chapters 2 and 3 outline the mandate and legal basis of ICTY and WCC. For the WCC this required a more extensive discussion of the political and legal system of Bosnia and Herzegovina, as the country is – politically and administratively – still divided in two major entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Chapter 3 discussed several issues of major concern in respect to the prosecution of sexualised violence like the definition of rape, the special evidentiary rules for rape and sexualised violence referring to prior sexual conduct, consent and corroboration. In addition, the political division of the country entails a general legal uncertainty. 3 criminal codes are in effect that differ significantly with respect to definitions of crimes committed during the war.

Chapter 4 gives a detailed overview of indictments, trials, convictions and acquittals with regard to sexualised violence cases before the ICTY and includes a discussion of shortcomings in prosecuting sexualised violence before both courts. Neither the ICTY nor the WCC keep any statistics on cases that differentiate by gender or nature of the crime. Therefore, the data in this chapter are based solely on our own research. After some start-up difficulties several cases mainly against direct perpetrators were successfully prosecuted at the ICTY. However, the Foča cases remained the only one which attempted to display the complex gendered pattern of sexualised violence in this war. There is also, among others, a troubling tendency of first instance acquittals of rape charges in leadership cases.

In respect to the WCC we identified that about 37% of all completed cases (up to June 2009) included charges of rape and sexualised violence. While the conviction rate with over 80% is relatively high several cases are discussed in which rape charges were dismissed because the Panel found the witnesses not credible or testimonies not reliable. Witness' credibility and evidentiary issues in rape cases play a larger role at the WCC as was the case at the ICTY. This is also discussed further down in Chapter 6.

Part Two: Views of Witnesses and Court Members

Part Two of the report is based on interviews conducted with former witnesses who testified on rape before the ICTY and/or the WCC, as well as on interviews and conversations with officials from both courts, namely judges and prosecutors. In Chapter 5 former female witnesses talk about their motives to testify, their experiences in court, the support they received, their notions of justice and what they identify as good or bad practices. Many have a very clear opinion on their role within the justice process and on how they want to be treated. The Chapter shows that while each woman manages the challenges of testifying differently they all ask to be respected in both, their pains and their will to move on. The Chapter closes with a list of practices that the witnesses interviewed identified as either good or bad.

Chapter 6 explores some of the issues judges and prosecutors from the WCC identified as specifically difficult in rape cases. Two major challenges emerged from the interviews. The first referred to the interaction with rape witnesses. This included issues relating to witness' trauma, communication with witnesses, getting them to cooperate, establishing a relationship of trust with witnesses. The second major challenge concerned the problem of evidence in rape cases. A significant lack and need of training in trauma- and gender-sensitive examination of rape survivors could be identified. The Chapter also shows that there is a tendency to assign the difficulties experienced to stereotypes of either "traditional" Bosnia or "shameful" rape survivors. Such stereotypes can hinder the search for solutions that lie within the scope of one's own practice and profession. However, judges, prosecutors and all other members of the court can only do their job well if equipped with necessary resources.

Chapter 7 deals specifically with issues of protection, safety and security. Our research shows that the vast majority of rape survivors not only testified under pseudonym but also in hearing closed to public. Again, the data had to be retrieved from judgements, as the courts do not keep any data in this respect. The first 2 sub-chapters give an overview of the protection policy of both courts. The focus lies on the WCC, as the issue is particularly complicated here. The chapter shows that the legal provisions themselves are a source of confusion in respect to different categories of protected witnesses. This leads, as our discussion shows, to misinterpretations and in some cases to the dismissal of rape testimony. At the same time, there is an observed tendency to view testimony in closed session as less credible as testimony in open session, which again has serious implications for rape testimonies as most of them are given in closed session. The Chapter shows that over 90% of women who testified on sexualised violence at the WCC did so under protective measures.

Chapter 7 concludes with a discussion of how the witnesses interviewed perceived the protection policies of the court. In general, there is a profound confusion around the different forms and meanings of protective measures. It shows that more information is needed from either the office of the prosecutor or from independent sources. While there are many examples of witnesses who want to testify in open court and under full name, the vast majority of the women we interviewed clearly opted for high protective measures, if not the highest possible. However, the reasons they gave varied, and shame, often suggested as a major reason, ranked lowest.

Legal justice is just a small part of social justice. The lack of the latter seriously hampers the willingness of women to testify. Chapter 8 shows that most witness participants of the study live in insecure situations in terms of economy, housing and health. The vast majority struggles with physical and psychological consequences of wartime violence and the lack of support is a continued source of further distress and humiliation. The chapter discusses in particular the limited access rape survivors have to reparation. While all political entities have regulations that include rape survivors there is no binding law for the whole state. Thus, only in the Federation of Bosnia and Herzegovina proof of at least 60% physical disability is not needed for rape survivors to be granted the status of a civilian victim of war and to be entitled for a pension. Even so, the pensions are small and the application procedure is open for abuse by those in charge. Health care and psychological support is non-existent and left completely to the limited resources of women's organisations and NGOs.

The last chapter finally compiles 2 sets of recommendations. The first set comes from the witnesses interviewed and is addressed to courts, NGOs and other female survivors of wartime rape. The second part of the chapter compiles recommendations of *medica mondiale* based on the findings of this research.

Methodology

The research consisted of interviews, group discussions, field observations, trial monitoring and a statistical analysis of indictments and judgements from both the ICTY and the WCC. The field research lasted from summer 2006 until spring 2009 with 130 interviews conducted with former witnesses, members of both courts, legal experts, psychologists and members of local women's or-

ganisations, NGOs and international organisations like OSCE and OHCHR.

Relevant for this report are interviews with former witnesses who testified on rape before both courts and with members of the WCC and the Prosecutor's office in Sarajevo. Structured and semi-structured interviews of 49 women were conducted in Bosnia and Herzegovina. 45 of them had personally testified before either the ICTY or the WCC on being raped during war; several of them in both courts or, in addition, in a lower cantonal or district court in Bosnia and Herzegovina. In addition, 3 group discussions were held with a group of 8 to 10 former witnesses.[8] Semi-structured interviews were also held with 7 judges of the War Crimes Chamber and 7 prosecutors from office of the prosecutor in Sarajevo. In addition, a round table discussion was conducted with 7 judges, one witness protection officer and 2 legal advisors at the WCC.

The research for this report was initiated, conceived and coordinated by Gabriela Mischkowski and Sara Sharratt. They developed the proposal to the Open Society Institute & Soros Foundations Network and took responsibility for data gathering, data analysis and the overall supervision of the project. They conducted all semi-structured interviews with witnesses, NGO activists, experts, and most interviews with court members and prosecutors. Some of the latter were also conducted by members of a local support team: Gorana Mlinarevic as local researcher, Slobodanka Dekic as assistant, and Ivana Draco who monitored trials before the WCC from May to December 2008 following a monitoring schedule developed by the 2 coordinators. The local researchers functioned also as interpreters during interviews or as translators of transcripts. In addition, 2 local females with extensive contacts and a trust relationship with many rape survivors conducted, after training, a series of interviews with former witnesses following a structured questionnaire with both closed and open-ended questions. For reasons of confidentiality the names of these 2 women remain concealed. A structured questionnaire with closed and open-ended questions was also developed for members of the ICTY and the WCC. The questionnaire was distributed through the respective registry and the prosecutor's offices. However, due to low backflow the analysis remains limited.

In addition to the interviews, all published indictments and judgements of both ICTY and WCC were reviewed and analysed in respect to sexualised violence charges, convictions and acquittals, protective measures of witnesses who testified on rape.

We kept a strict policy of confidentiality. Most witnesses we interviewed had testified under pseudonyms to protect their identity. In addition, no details about the crime itself were asked. Evidentiary issues of the trials they testified in were also not discussed in order not to compromise their status as protected witnesses. In most cases, we were permitted to record the interviews. The transcripts were anonymised and so are all quotes from participants. The same applies to the interviews with court members and prosecutors.

Limitations

According to our own research, we found that approximately 60 women have so far testified before the ICTY and about 90 before the WCC on sexualised violence. An unknown number of those who testified many years ago before the ICTY lives today in another country, either in Europe, the US or in Australia. They were out of reach for this study. In addition, journalists and international researchers have been 'chasing' women who survived rape for interviews over the past 15 years. Many women in Bosnia and Herzegovina were tired of giving interviews and local women groups or victim organisations supporting them have become, in part, very protective. Nevertheless, many groups or counselling centres found this project important and were willing to facilitate first contacts. As most witnesses testified under some kind of protective measures with their identities concealed from the public this was the only way. It was a long and slow process stretching over more than 2 years.

The restrictions in finding witnesses and establishing contact with them did not permit to ensure a representative sample. We had no other choice than to move from witness to witness which was often rewarded with the facilitation of new contacts. Therefore, criteria like time of testimony in court, 'ethnic' belonging, kind of charges, circumstances of crime etc. could not be taken into account.

Neither ICTY nor WCC keep comprehensive data on trials, charges, and witnesses. Only the Victim and Witness section of the ICTY provides useful gender segregated data. For the most part, we therefore had to compile our own data based only on information that is publicly available like indictments, judgements and – for the ICTY only – trial transcripts. This approach is limited, as those documents can be rather incomplete. In particular, WCC judgements often lack information in regard to number of witnesses and kind of protection they received. This information was supplemented, if possible, through other sources like trial monitoring or information by court members.

Trial monitoring at the WCC had also some limitations as for many rape testimonies the public is excluded. Last but not least, 2 remarks must be made with respect to the language used in this study. First, following the practice of *medica mondiale* we speak of "sexualised violence" rather than "sexual violence" to put the emphasis on violence that is committed, albeit in a particular, i. e. sexualised way. Two, we hold that national or ethnic identities are social constructions and not a natural or biological given. Although terms like "Muslim", "Serb" and "Croat" could not always be avoided the reader should have this reservation in mind. Note, that the official term in Bosnia and Herzegovina for "Muslim" today is "Bosniak" which we also use as a term when referring to recent developments.

Eric Stover gave, as he himself put it, a “first systematic glimpse into the world of witnesses who have appeared before an international war crimes tribunal”.[9] With this study we hope to have supplemented this “glimpse” and shown that the world of witnesses is gendered.

Acknowledgements

As researchers and authors of the study we have to thank many persons for their contributions. This study would not have been possible without the willingness of many women to share with us their experiences of testifying on war rape in court. Many welcomed us in their homes, some spontaneously, and they showed much patience when we needed to call them more than ten times asking for directions. Even though we did not ask to be told details of the violent acts something always broke through that needed to be told. We acknowledge all the more the extent to which they responded to all our questions.

We would also like to thank the activists of women's organisations and members of NGOs who supported the study with much advice and practical help: Centar za žrtve torture (Centre for torture victims) – Sarajevo, GERC Sumejja – Mostar, Izvor – Prijedor, Medica – Zenica, Sekcija žena logorašica, Udruženje logoraša Kantona Sarajevo (Women's Association of Women Camp Survivors within the Association of Concentration Camp Survivors of Canton Sarajevo), Vive Zene – Tuzla, and Zene Zenama (Women for women) – Sarajevo.

Important for the study had been, of course, all interview partners from the different sections of both the International Tribunal for the former Yugoslavia and the Court of Bosnia and Herzegovina who were willing to talk to us in spite of permanent time restrictions. We thank the judges and prosecutors of the WCC for their personal accounts on irritations and challenges in rape cases and the President of the Court of Bosnia and Herzegovina Judge Meddzida Kreso as well as the Head of the War Crime Section of the Prosecutor's Office David Schwendiman for the support they gave this study.

Much valuable advice was given to us by employees of ICTY Outreach and experts from different fields, like legal experts or psychologists working with traumatised women. Members of WCC Witness Support gave advice as well and invaluable practical support. Members of different organisations such as OSCE and OHCHR granted us much time for background conversations and exchange of information. Monitors from BIRN, the Balkan Investigative Reporting Network, shared with us their experiences and rich knowledge of trial events. We thank them all as we could not have accomplished our task without them.

Abbreviations

ABiH	Army of Bosnia-Herzegovina
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
HJPC	High Judiciary and Prosecutorial Council
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
JNA	Yugoslav People's Army
KLA	Kosovo Liberation Army
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
RS	Republika Srpska
SFRJ	Socijalisti ka Federatvna Republika Jugoslavija (Socialist Federal Republic of Yugoslavia)
SIPA	State Investigation and Protection Agency
UNPROFOR	United Nations Protection Force
VWS / VWU	Victims and Witnesses Support Unit
WCC	War Crimes Chamber

Part One
The Prosecution of Rape before the International Criminal Tribunal for the Former Yugoslavia and the War Crimes Chamber

1. War Rape in Bosnia and Herzegovina – The Commission of Experts' Report

On 6 October 1992, the United Nations (UN) Security Council requested the Secretary-General to establish a Commission of Experts to examine and analyse information on crimes against humanity and war crimes committed in the territory of the former Yugoslavia. The Commission submitted its first interim report about 3 months later, on 10 February 1993. The report confirmed serious violations of international humanitarian law, including widespread rape. The systematic and widespread character of sexualised assaults became one of the focal areas of the Commission's further investigation.[10]

Without adequate human and financial resources, the Commission of Experts was hindered in its work rather than supported.[11] One of the Commission's most important members, the American Law professor Cherif Bassiouni, summed up later, "we had zero resources to lead an investigation into war crimes that the UN Security Council … had entrusted to us".[12] Bassiouni himself raised 1 million dollars in funding and persuaded his law school at DePaul University in Chicago to help set up a database and donate space for a documentation centre.

Bassiouni's role in the Commission was also decisive for the investigation of rape. After he took over the chair in Autumn 1993[13] he changed the composition of the originally all-male Commission by appointing Prof. Christine Cleiren to examine the legal basis for prosecuting sexualised violence in war, and Judge Hanne Sophie Greve to investigate crimes around Prijedor in the detention camps of Omarska, Keraterm and Trnopolje. He also diverted funds to conduct a thorough investigation into sexualised violence.[14] A team of about 40 almost exclusively female lawyers, mental health specialists and interpreters was identified for the fieldwork in February and March 1994. Nancy Patterson, a highly experienced prosecutor from New York, who had specialised in sex crimes and child abuse, joined as legal coordinator. The team conducted 223 interviews using techniques that were gender and trauma sensitive and ensured the protection and privacy of interviewees.[15] The UN terminated the Commission's work in April 1994, 3 months earlier than scheduled leaving over 200 rape victims in Croatia and Bosnia, 7 in Serbia and an unknown number in Turkey unheard.[16]

Rape Evidence

The Final Report of the Commission addressed the issue of "rape and other forms of sexualised assault" in about 70 pages focusing on its possible strategic dimension.[17] Although the war continued until the signing of the Dayton Peace Agreement in November 1995, the Commission's report remains to this day the most authoritative and comprehensive investigation of sexualised violence during the war in former Yugoslavia.

Faced with "tens of thousands of allegations of rape and sexualised assault"[18] the Commission discarded the most general allegations and identified 1,100 cases of rape with close to 800 identifiable victims who gave specific information as to either the place, time, or names of perpetrators. The Commission refrained from making any estimation of numbers not only because the data did not hold but also because it would distort the picture, given that a high number of multiple rapes and gang rapes were reported. However, the Commission allowed for "about 10,000 additional victims the reports could eventually lead to".[19] The Commission also acknowledged that generally the social stigma of rape causes a high number of cases to go unreported, and specifically so in war. About 55% of the 1,100 reported cases referred to rapes and sexualised assaults in detention sites of which about 160 could be identified. The 'Serb' forces were in charge of approximately half of these detention sites, 'Croatian' or 'Muslim' forces or both jointly ran one fourth of them; and one fourth was under unknown command. Of the 223 persons interviewed by the Commission, 82 gave statements on rape or sexualised assaults. A total of 42 of them were female and 6 were male victims of rape. The rest had witnessed rapes or sexualised assaults on other persons.[20]

The overall report of the Commission on all violations of international law shows that in all areas where the fighting took place, the faction in command treated the civilian population of the other group with cruelty. However, while the Commission found clear evidence of atrocities committed by all sides, it also held "that there is no factual basis for arguing that there is a 'moral equivalent' between the warring factions".[21] The Commission found sufficient evidence of a systematic and organised pattern of attacks against the non-Serb population with the apparent aim of rendering certain areas of Bosnia

and Herzegovina ethnically homogeneous. This was achieved, the Commission stated, through forced expulsion, organised detention and deportation, mass murder and mass rapes. During the war, the same means were, in part and to a lesser degree, employed by the Bosnian Croatian and the Bosnian Muslim forces; although the Bosnian Muslims did not show intention of what was termed 'ethnic cleansing'.[22]

Rape Patterns

In the analysis of the data concerning rape and sexualised assault, the Commission distinguished random or 'opportunistic' rape from rape and sexualised assault as an integral part of attacks. The focus of investigation lay on the latter, i.e. on the nexus between rape and 'ethnic cleansing'.
The Commission categorised rape and sexualised assault by identifying 5 different patterns, regardless of the ethnicity of the perpetrator or the victims.[23]

Outside detention sites:
- Rape and sexualised assaults were committed before widespread fighting broke out in an area. These attacks were committed in homes during looting, house searches and to intimidate of the target ethnic group.
- Rape and sexualised assaults were committed in conjunction with fighting in an area, often in public.

Inside detention sites:
- Women and girls were raped and some gang-raped repeatedly over a period of weeks or months by different men in general detention sites.
- Women and girls were raped in particular detention sites for the mere purpose of being raped and sexually assaulted.
- Women and girls were held in detention sites as rewards for soldiers and other figthers.

According to the Commission, rapes in the first category of detention took place in 'collection centres' set up right after the targeted population of a certain area was rounded up. Soldiers, guards, paramilitaries and other civilians had more or less free access to the sites and the detainees at these 'collection centres'. They are reported to have walked in, picked out women and girls individually or in groups and took them to different places for rape, often in the presence of others. The women so taken would either be killed or brought back to the centres.

The Commission referred to the second category of detention sites as specific facilities where women and girls were held for the purpose of rape and where all of them were raped frequently. Women who became pregnant were detained until it was too late for abortion. The Commission classified such sites "as part of the policy of 'ethnic cleansing'".[24]

The third category of detention sites identified by the Commission were the so-called 'brothels' or 'bordellos' where women and girls were kept for the purpose of providing sexualised services for soldiers or other men. These were hotels or private houses that women and girls were taken to, from their homes or from other detention sites. The Commission found that women in such sites were reportedly more often killed than exchanged, unlike the women in the other camps.

The Commission also found significant evidence of a number of sexualised assaults against men. The assaults included genital mutilation (forced circumcision, castration, genital beatings, biting off the genitals, tying wires around penis or testicles), objects like bottles or sticks inserted into the anus and forced fellatio. The report suggests that sexualised attacks on men were characteristically carried out publicly for the purpose of humiliation.[25]

Reports of rape declined from November 1993, which corresponds with an increase in media reports about rape which indicated, as the Commission states, that commanders could control the alleged perpetrators if they wanted to.[26]

Conclusions

The Commission confirmed the widespread character of rape and detected certain patterns of sexualised violence against women and men, albeit to a lesser degree, against men. The Commission also found that rapes were committed on all sides, however the largest number of reported victims were Bosnian Muslim women, and the largest number of reported perpetrators Bosnian Serb men. The patterns of rape "suggest that a systematic rape policy existed in certain areas, but it remains to be proven whether such an overall policy existed which was to apply to all non-Serbs".[27] Therefore, the Commission suggested to neglect what they termed 'opportunistic' rape and to focus the investigation and prosecution on "the use of rape and sexual assault as a method of 'ethnic cleansing'".[28]

The work of the Commission was outstanding in particular if we take into account the limitations in terms of time, resources, politics and an ongoing war, which made an on-site investigation impossible. In addition, the investigation team developed an exemplary gender sensitive methodology.[29] From the perspective of today, however, some of the parameters in establishing the patterns of rape are questionable, in particular the catego-

risation of detention sites and the distinction and hierarchisation of 'opportunistic' and 'ethnic cleansing' rapes.

With the second category of detention sites, the Commission referred to camps, which the media at the time had commonly termed 'rape camps', i.e. camps established solely for the purpose of raping and impregnating women. For the Commission these particular detention facilities constituted a part of an "ethnic cleansing" policy. This is problematic for 2 reasons. First, the key elements of this category as named by the Commission – frequent rapes, beatings, torture, and statements of rapists to act upon order or with the purpose to impregnate – can be found in many rape accounts from other detention sites. The research that is done to date on the different forms, patterns and functions of sexualised violence during the war in former Yugoslavia is still sketchy. Therefore, we do not know whether such camps with such specific rape purpose did exist at all or if so, on a larger scale. What we can say, however, is that all charges before either the International Tribunal for the former Yugoslavia or the War Crimes Chamber on rape in detention pertain to either general collection centres or to so called 'bordellos'. It might very well be that the large extent of sexualised violence committed in many general detention sites let to the early assumption that some of them were established solely for the purpose of rape. Therefore, the category of 'rape camps' must be handled with much caution.

Secondly, the Commission's hierarchical categorisation of rape and detention sites formed the ground for the Commission's recommendation to focus further investigation and prosecution on "ethnic cleansing" rapes and to neglect rapes and sexualised violence committed for other purposes. However, as the Commission had stated itself the most deadly detention for women and girls was to be enslaved in 'bordellos', i.e. in many small detention sites like private houses for the purpose of providing sexual services for soldiers. From here, many women and girls were reported as missing. The neglect of what the Commission had classified as "opportunistic" rapes – either in general detention sites, during house searches or in 'bordellos' – meant to neglect not only thousands of rapes but also many if not the majority of those resulting in death.

During the early years of the ICTY the focus of prosecuting sexualised violence lay on its definition as a crime under the different legal provisions of the Tribunal rather than focusing on specific types or functions of sexualised violence. However, as we will see further down in Chapter 4.1 the hierarchical distinction between "ethnic cleansing" rapes and "opportunistic" rapes recurred in some judgements and in later indictments against higher-ranking accused. It is also reflected in the fact that there is no perceptible strategy to investigate and prosecute the full scale of rape and sexualised violence in this war and its different dimensions and contexts. Thus, for example, before the ICTY no trials dealt specifically with rapes in coincidence with death or with enforced prostitution or trafficking.[30]

2. The International Criminal Tribunal for the Former Yugoslavia

Even before the Commission of Experts had finalised its work, the UN Security Council established in Resolution 827 the International Criminal Tribunal for the former Yugoslavia (ICTY) on 25 May 1993. In the Resolution, the Council expressed its "great alarm" at violations of international humanitarian law, "including reports of mass killings, massive, organised and systematic detention and rape of women".[31]

The initial establishment of the tribunal was, however, not in the least promising and the court officials faced serious challenges. The first 11 judges found themselves in the same situation as the Commission did before: no offices, no logistics, and no money, not even for their own salaries. There was also no prison, no prosecutor, and it was unclear whether the Court would have any power to enforce arrest warrants. It quickly turned out that the UN Security Council member states had no intention of providing the Court with such powers or of tasking UNPROFOR, the UN Protection Forces, with arresting suspects. In the beginning, the Court looked very much like a toothless paper tiger.[32] The UN Security Council had "produced a big bang", as Judge Georges Abi-Saab from Egypt put it,

"in nearly celestial terms 'Let there be a tribunal', without conducting feasibility studies, without according a budget, without thinking of anything. The result is that we were unable to hire anyone for more than three months. How do you expect us to find qualified people, with high responsibilities in their own countries under such conditions?".[33]

After the UN Security Council had established the ICTY, one could almost say that the factual realisation of the Court was practically done against the Council's will. Years after the first meeting of judges, the Court's first president, Antonio Cassese, confessed: "The governments wanted to hide their political impotence behind the existence of the tribunal. Nobody in fact believed that it was actually going to exist."[34] Eventually, they managed to rent 3 small rooms at the Peace Palace in The Hague, but when they could not pay the rent, they were nearly kicked out. In spite of all those difficulties, the judges started to work.

2.1 Mandate and Legal Basis

The Tribunal was mandated "to prosecute persons responsible for serious violations of international humanitarian law on the territory of former Yugoslavia since 1991" (author's emphasis).[35] Since there can be no punishment without law, only existing law recognised as universally binding – termed as customary law or *jus cogens* – could constitute the legal basis for the Tribunal. As such, the drafters recognised the following 4 violations in international law as crimes in the ICTY statute:

- Grave breaches of the Geneva Conventions of 1949
- Violations of the laws or customs of war (Hague Convention of 1907 and the four Geneva Conventions)
- Genocide
- Crimes against humanity.

Each category of violation was further specified with a list of prohibited acts defined similarly as in international customary law. The definition of genocide was taken from the Genocide Convention, which does not mention rape or other forms of sexualised violence. In the Geneva and Hague Conventions, rape is marginalised as an 'honour crime'.[36] The marginalisation of sexualised violence is, in particular, reflected in the absence of rape from the list of those war crimes considered to be most serious, the so-called 'grave breaches' of the Geneva Conventions, such as willful killing, torture or inhuman treatment, extensive destruction of property or unlawful deportation. Only 'grave breaches' fall under universial juristiction placing all nations who are party to these treaties under the obligation to enact and enforce legislation penalising these crimes regardless of where they had been committed or by whom such as willful killing, torture or inhuman treatement, destruction of property or deportation. Only 'grave breaches' place an obligation on each nation who is party to these treaties to enact and enforce legislation penalising these crimes regardless of where they had been committed or by whom. The existing laws not only ignore the gravity of sexualised violence in all its different forms, but they also ignore women's experience of war in general. Indeed, they "reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life".[37] The drafters of the ICTY statute thus left the gender bias within existing humanitarian law unchallenged, with the only exception being that rape was added explicitly to the crimes listed under Crimes against humanity.[38]

As the ICTY statute only recognised rape, other forms of sexualised violence remained, yet again, unnamed. The failure to inscribe all other forms of sexualised violence in the statute was astounding, given that UN Security Council debates at the time "support the proposition that sexualised violence against women was one of the foremost concerns in establishing the ICTY".[39]

2.2 Special Rules for Sexualised Violence Cases

Rule 96 of the ICTY limits the evidence the accused can bring in cases of sexualised violence. The rule states that in cases of sexual assault:

(i) *"no corroboration of the victim's testimony shall be required;*
(ii) *consent shall not be allowed as a defence if the victim*
   a. has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
   b. reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) *prior sexual conduct of the victim shall not be admitted in evidence."*[40]

This evidentiary rule, set out by the first panel of judges of the ICTY, marks a fundamental renunciation of the entrenched legal distrust of women alleging rape. The rule counteracts the discriminatory effects of rape stigma caused by socially reproduced and culturally shared gender stereotypes. In no other crime (the rape of a woman by a man constitutes over 90% of all rape cases[41]) can the blame and shame of the act be so easily transferred from the perpetrator to the victim. The courtroom is not free of the negative perception that a rape survivor somehow provoked or 'invited' the rape. Such culturally and socially produced perceptions as well as behavioural expectations of how a 'decent' woman or girl should behave enter into the evidentiary process if no countermeasures are taken. Thus ways of dressing or an active sexualised life of the injured woman often appear in court as evidence of consent to sexual intercourse and therefore as proof of false accusations.

Without corroborative evidence, rape victims are more often than not suspected of making false allegations. Since most rapes happen without witnesses, many women decide not to report the attack. They do not want to submit to humiliating procedures only to see the rapist walk out of the courtroom a free man. It is one of the reasons why rape is one of the most underreported crimes worldwide.

The last 2 decades have witnessed a departure from the formal requirement of corroboration in many common law systems. However, the underlying assumptions that required corroboration are still widely effective in all legal systems.[42] The sub-rule on corroboration therefore "accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault."[43] The sub-rule on consent is revolutionary, as it prohibits any consent defence if the rape was committed under coercive circumstances. The sub-rule prohibiting the prior sexual conduct of the victim as evidence makes it clear that sexual behaviour of a victim is irrelevant to any trial of sexualised violence.

The special rules for evidence in sexualised violence cases were achieved through the efforts of 2 women judges. Some of their male colleagues held back, while others supported the rule. "The experience," Judge Gabrielle McDonald recalled several years later, "of working with a woman they respected enabled them to at least camouflage their perspective".[44] Another reason might have been the fact that the Court would only deal with rapes committed in the context of war, i.e. with some linkage to general attacks and persecutions. It made it difficult to argue that women consented to sexual intercourse with men armed to the teeth who were looting their houses, killing their families, and expelling them from their homes. However, despite the context, doubt and unfounded fear of false accusations lingered on and led to an early amendment of Rule 96 in January 1995, which allowed for consent defence if the accused can prove to the Chamber "that the evidence is relevant and credible".[45]

Rule 96 has remained a disputed rule. Issues of consent or prior sexual conduct were raised several times by the defence without intervention by the judges. Nevertheless, none of the Chambers ever accepted such evidence and indeed, in one of the cases, one such piece of evidence was even deleted from the court records retrospectively upon the motion of the prosecutor.[46]

2.3 The Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia and Referrals to the War Crimes Chamber

The ICTY could not take the role of prosecuting all the cases nor was this the basis of its establishment in 1993. The UN Security Council stated that it was not its intention

"to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures".[47]

The mandate of the ICTY was to try the leaders and those with most responsibility for the violations and not the mid-level rank and file of the armed forces. In addition, it was clear that cases would also have to be tried in Bosnia and Herzegovina, Croatia and Serbia, so that

justice and truth would not remain distant, not to mention the practical impossibility for the ICTY to handle large numbers of cases.

In Bosnia and Herzegowina, war crime trials had been conducted immediately after the war. However, many of these cases were marked by allegations of arbitrary arrests and unfair trials.[48] Therefore, to secure the fairness of future trials, the Rome Agreement was signed on 18 February 1996. According to this agreement,

"persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal".[49]

Following the Rome Agreement, an office of Rules of the Road Unit within the Office of the Prosecutor of the ICTY was established. From 1996 to 2004, this office reviewed all domestic war crime cases and the accompanying evidence. According to OSCE data[50], during this period, requests to prosecute 846 individuals met international criteria. The office of the Rules of the Road Unit ended its work on 1 October 2004, and its role was taken up by the Special Department for War Crimes at the Prosecutor's Office of Bosnia and Herzegovina in 2005.[51]

As part of the completion strategy for the ICTY, Rule 11*bis*, which was first introduced in November 1997 and later amended to the current formulation, allowed for the transfer of cases from the ICTY to the national level. For this to be feasible, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Transfer of Cases[52] on 14 December 2004. In the same year, the UN Security Council decided in Resolution 1503 on the completion strategy of the ICTY by which all investigations were to be terminated by 2004, all trials by 2008, and all appeals by 2010. The current deadline for trials is now 2011 and for appeals 2013, accompanied by a general downsizing process in staffing.[53]

At the request of the ICTY Prosecutor and in line with its mandate, the OSCE agreed to monitor and report on Rule 11*bis* cases, i.e. the cases moved to the national courts for prosecution, which have been generally considered a test of the fairness and efficiency of the judicial system of Bosnia and Herzegovina.[54] The indictees eligible for referral to national jurisdictions must be in the category of lower or intermediate level accused in terms of the seniority and responsibility according to the criteria set forth in UN Security Council resolutions 1503 (2003)[55] and 1534 (2004).[56]

3. The Court of Bosnia and Herzegovina and the War Crimes Chamber

3.1 The Legal System in Bosnia and Herzegovina

In order for the reader to understand court procedures in Bosnia and Herzegovina it is important to briefly describe the legal system and the judiciary in Bosnia and Herzegovina. Administratively speaking, Bosnia and Herzegovina is a complex state, and thus its judicial system is complex as well. Upon the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina (hereafter referred to as the Dayton Peace Agreement) on 14 December 1995, the new Constitution of Bosnia and Herzegovina was established as Annex 4 to the Dayton Peace Agreement.[57] In Annex 10, the Dayton Peace Agreement also provided for the mandate of the High Representative, to be appointed in accordance with relevant UN Security Council resolutions to, among other things, monitor the implementation of the peace settlement.[58] The High Representative also has the authority to facilitate the resolution of any difficulties arising in connection with civilian implementation. This authority was further strengthened by the Conclusions of the Peace Implementation Conference held in Bonn on 9–10 December 1997.[59] The mandate of the High Representative for Bosnia and Herzegovina is still in force.

The Constitution of Bosnia and Herzegovina[60] provides for 2 entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. The Federation of Bosnia and Herzegovina is organised as a decentralised administrative unit with 10 cantons, each of which has its own government, while the Republika Srpska is a centralised administrative unit with some form of local self-government. In addition to this administrative division, the Brcko District of Bosnia and Herzegovina[61] has been established as a local self-governing unit under the sovereignty of Bosnia and Herzegovina. The decision was recently confirmed by the First Amendment to the Constitution.[62]

Although the state is the signatory of many significant international documents, which ensures the respect, protection, and fulfilment of the economic, social, and cultural rights on the entire territory of Bosnia and Herzegovina, due to the administrative divisions of the competences these are not ensured equally and without discrimination everywhere.[63] Among the laws that we considered in this report, and through which the economic, social, and cultural rights are secured, are laws dealing with civilian victims of war. These laws are adopted at entity levels. The laws are not harmonised, and this as we will see in Chapter 8 creates many problems for women who survived rape and are now living in different parts of Bosnia and Herzegovina.

The Judiciary

This ambiguity with respect to the responsibilities of the state and entities has played a role with respect to the judicial system too. It has mainly been reflected in the discussions relating to the War Crimes Chamber (WCC). However, before we discuss the Court, it is necessary to briefly describe the judicial system. The judiciary in Bosnia and Herzegovina has gone through significant reforms under the supervision of the international community in recent times, beginning in 1996, but more actively since 2001 when the High Representative appointed the Independent Judiciary Commission.[64] In 2002, the High Representative directly intervened in the reform of the judicial system in Bosnia and Herzegovina, first by enacting laws regarding the High Judiciary and Prosecution Councils (hereinafter HJPC) for the state and entities, and subsequently by appointing their members. He also intervened in the reorganisation of the courts by adopting 11 decisions on amendments to the law regarding courts and court service in Republika Srpska and 10 decisions on amendments to the cantonal laws regarding courts in the Federation of Bosnia and Herzegovina.[65] The amendments mainly pertained to numbers and the location of the courts after reorganisation, their chambers, and special commercial courts. Although the laws were passed in 2002, they officially entered into force only after the re-election and reappointment of the judges in those courts after the finalisation of the transitional period in mid-2004.

Currently, the court system consists of 48 first instance courts (28 Municipal Courts in the Federation of Bosnia and Herzegovina, 19 Basic Courts in Republika Srpska and one Basic Court in Brcko District) and 16 second instance courts (10 Cantonal Courts in the Federation of Bosnia and Herzegovina, 5 County Courts in Republika Srpska and 1 Appellate Court in Brcko District). In addition, each entity has its Supreme Court as the highest appellate court of the entity.[66] The prosecution system consists of 10 Cantonal Prosecutor's offices in the Federation of Bosnia and Herzegovina, 5 County Prosecutor's Offices in Republika Srpska, 1 Prosecutor's Office of Brcko District, and 2 Prosecutor's Offices on entity levels.[67] In addition, the Federation of Bosnia and Herzegovina and Republika Srpska have their Constitutional Courts with the mandate to protect the constitutions of their respective entities.

With respect to the state level courts the situation is constantly contested. Commonly, the Constitution of Bosnia and Herzegovina is interpreted as assigning jurisdiction over the courts to the entities because the Constitutional Court of Bosnia and Herzegovina is the only court explicitly referred to in the Constitution of Bosnia and Herzegovina.[68] This has created many difficulties and debates

with respect to the establishment of the Court of Bosnia and Herzegovina, especially on the part of political forces that could potentially end up before the Court for organised crimes or even war crimes.

3.2 Establishment and Mandate of the Court of Bosnia and Herzegovina

The Court of Bosnia and Herzegovina was established in accordance with the Law on the Court of Bosnia and Herzegovina by the High Representative acting as a substitute for the Parliamentary Assembly of Bosnia and Herzegovina on 12 November 2000.[69] The primary aim for the establishment of the Court was not to process war crime trials, but to address organised crime. It was only 5 years later that the Court held its first war crimes trial.

The political sensitivity surrounding the Court of Bosnia and Herzegovina is obvious from the fact that the Law on the Court of Bosnia and Herzegovina had to be imposed by the High Representative. The High Representative said that the reasons for use of his authority in this matter were to fulfill a pre-condition for the establishment of the rule of law in the State of Bosnia and Herzegovina, as the Court needs to provide judicial remedies in matters that lie within the competence of the State under the Constitution. These matters were to ensure a functioning economy throughout Bosnia and Herzegovina, to provide judicial remedies in fields such as citizenship, foreign trade, and investment, to ensure legal certainty, and generally to protect the interests of the citizens of Bosnia and Herzegovina.[70] There was no specific reference to war crime trials and/or to transitional justice.

In March 2001, 25 representatives of the National Assembly of the Republika Srpska questioned the constitutionality of the Law.[71] Nevertheless, the Constitutional Court of Bosnia and Herzegovina declared that the Law on the Court of Bosnia and Herzegovina is in conformity with the Constitution. The Constitutional Court said that setting up the Court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention was necessary for the exercise of responsibilities of Bosnia and Herzegovina as a democratic state.[72] The same text of the law went through the parliamentary procedure in July 2002. The law provided for the jurisdictions and structure of the Court of Bosnia and Herzegovina.

In the beginning, the Court of Bosnia and Herzegovina was envisioned as primarily a national court, but in January 2003 the High Representative introduced the possibility of electing international judges for the transitional period.[73] This period was to last no longer than 5 years.

Only in an amendment adopted by the Parliamentary Assembly on 2 December 2004 did the Court of Bosnia and Herzegovina get explicit jurisdiction over genocide, crimes against humanity, war crimes, and violations of the laws and practices of warfare and individual criminal responsibility related to those crimes, ex officio or at the request of any court of the entities or of the Brcko District of Bosnia and Herzegovina. Article 8 of this amendment, within the Criminal Division of the Court of Bosnia and Herzegovina, formed Section I for War Crimes, and Section II for Organised Crime, Economic Crime and Corruption, and Section III for all other crimes under the jurisdiction of the Court. This amendment was adopted upon the announcement of the Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia in 2003 when it became obvious that the Court of Bosnia and Herzegovina (and the Prosecutor's Office of Bosnia and Herzegovina) should have jurisdiction over the prosecution of war crimes and that they should take over the war crime cases from the Hague Tribunal.

The Criminal Section of the Court of Bosnia and Herzegovina started its operations in January 2003. The first decisions were related to cases on forgery, trafficking, and the illegal drug trade. The first war crime trial was completed on 4 April 2006 upon the adoption of an appeal judgement in case No. KPZ 32/05 (K-127/04) against Abduladhim Maktouf. The main hearing started on 23 June 2005 and the first instance judgement was delivered on 1 July 2005. The accused Abduladhim Maktouf was found guilty of war crimes against civilians and sentenced to 5 years imprisonment. This was confirmed by the Appellate decision on 4 April 2006.

3.2.1 Prosecutor's Office of Bosnia and Herzegovina

The Prosecutor's Office of Bosnia and Herzegovina has a similar history as the Court of Bosnia and Herzegovina. The High Representative enacted the Law on the Prosecutor's Office of Bosnia and Herzegovina by his Decision of 6 August 2002.[74] This Law went through parliamentary procedure in October 2003. The amendments to the Law on the Prosecutor's Office of Bosnia and Herzegovina reflected the Amendments to the Court of Bosnia and Herzegovina. Jurisdiction over the prosecution of war crimes was given to the Prosecutor's Office of Bosnia and Herzegovina in the same package as the WCC in December 2004.[75] In January 2005 the third department, the War Crimes Section, was established within the Prosecutor's Office of Bosnia and Herzegovina and prosecutes war crime cases. The Prosecutor's Office also has a hybrid structure like the Court of Bosnia and Herzegovina.

3.2.2 Cantonal and District Courts

Apart from the trials at the WCC that will be discussed later, cases have been tried at lower level courts in the Federation of Bosnia and Herzegovina, the Republika Srpska, and in the District Brcko. Unfortunately, there are no adequate statistics nor accurate data on the total number of the war crime cases before the lower courts in Bosnia and Herzegovina.

The State Strategy for Work on the War Crime Cases recognised this problem and provided for the creation of a centralised data base at the WCC starting from 1 March 2003 when it acquired real jurisdiction over the war crime cases. All courts were to send the required data to the WCC, and evidence is to be updated regularly. Unfortunately, this data is not available yet. The High Judicial and Prosecution Council in its quarterly reports now include numbers of resolved and unresolved war crime cases before each court within the reporting period, but nothing more than that. The available data does not include more detailed information on the cases such as the category of crimes committed during the war, the number and type of charges, the number of witnesses, or regions of war crimes.

3.2.3 Legal Basis for Prosecuting Sexualised Violence

The Criminal Code of Bosnia and Herzegovina, adopted in 2003, provided legal foundations and definitions for war crime trials at the WCC. However, at lower courts different criminal codes are being applied. In Republika Srpska and Brcko District the Criminal Code of the Socialist Federal Republic of Yugoslavia is mainly used, which was in force during the conflict. In the Federation of Bosnia and Herzegovina, in addition to the Criminal Code of the Socialist Federal Republic of Yugoslavia, the Criminal Code of the Federation of Bosnia and Herzegovina adopted in 1998 has been used in some cases.[76] The 3 criminal codes differ significantly with respect to definitions of the crimes committed during the war, the definition of command responsibility, and instructions with respect to the prescription of sentences. This problem has been recognised by many relevant institutions in Bosnia and Herzegovina, but the changes have still not been made.[77]

Only the Criminal Code of Bosnia and Herzegovina recognises rape and acts of sexualised violence as crimes against humanity. The Criminal Code of the Socialist Federal Republic of Yugoslavia and the 1998 Criminal Code of the Federation of Bosnia and Herzegovina recognise rape and forced prostitution only as war crimes against civilians. Other forms of sexualised violence are not recognised at all. Thus, discussions to harmonise the application of criminal codes in war crime cases urgently need to include a gender perspective. Although the Criminal Code of Bosnia and Herzegovina is also gender biased, it is currently the most adequate one for war crime trials involving sexualised violence.

The Criminal Code of Bosnia and Herzegovina and the Criminal Procedure Code of Bosnia and Herzegovina adopted in 2003 introduced several new institutions and procedures in the criminal system of Bosnia and Herzegovina. Important innovations are the introduction of the adversarial procedure and the introduction of plea agreements. The system in force is similar to the ICTY. Responsibility for investigation has shifted from the judges to the police and the prosecutors and the questioning of the witnesses is no longer done by the judges but through cross-examination by prosecutors and defence attorneys who are in charge of presenting the evidence to support their cases.[78] However, Articles 261 and 262 of the Criminal Procedure Code provide for the judges to take an active role in the examination.

3.2.4 Plea Bargaining

The second innovation in the criminal system of Bosnia and Herzegovina is the institution of plea agreements.[79] Until 30 June 2009, the WCC handed down 7 sentences based on a plea bargain for war-crimes charges.[80]

The practice of plea bargaining in war crime trials is criticised in the public discourse of Bosnia and Herzegovina. As noted by the legal advisor for the State Ministry of Justice, Elmerina Ahmetaj Hrelja,[81] the existing Criminal Procedures Code of Bosnia and Herzegovina does not provide for the participation of the victim in the plea bargaining procedure. This prevents victims from having access to the evidence, does not allow them to dispute the statements of the defendant, and introduces additional evidence which may be in violation of the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, and therefore adds to the feeling of alienation and dissatisfaction with the court proceedings among the victims. Given the overload of war crime cases in Bosnia and Herzegovina[82], it can be recognised that through plea bargaining more perpetrators will be sentenced. With respect to the plea agreements in cases that included sexualised violence charges, it should be pointed out that of the 6 judgements reached through plea agreements[83] only 1 (*Bjelic Veiz*) had sexualised violence charges in the indictment (war crime against civilians – rape). In the plea agreement in *Veiz* the charges remained the same as in the indictment, unlike the cases at the ICTY, where, for example, in the plea agreement in *Zelenovic*, 7 out of 14 charges of sexualised violence were 'lost'.

3.2.5 Provisions Concerning Sexualised Violence

Like the ICTY, the WCC must follow special rules in relation to sexualised violence cases. Article 86, § 5 and Article 264 of the Criminal Procedure Code prohibit questions on prior sexual conduct or sexual orientation.[84] Article 264 of the Criminal Procedure Code also states that "in the case of the criminal offence against humanity and values protected by international law, the consent of the victim may not be used in a favour of the defence". This approach is very similar to the first version (proposed by judges on 11 February 1994) of Rule 96[85] of the ICTY's Rules of Procedures and Evidence.

Non-consent Clause

A few inconsistencies, however, need to be discussed here. First, the non-consent clause is only explicitly stated with respect to crimes against humanity. Whether sexualised violence when defined as a war crime against civilians will be understood as a "criminal offence against values protected by international law" remains to be seen. In practice, consent was raised before the court in *Vukovic Radmilo*[86] and *Pincic Zrinko*[87]; in both cases the charges pertained to war crimes against civilians. In both first instance cases the Trial Panel emphasised coercion rather than non-consent.[88] However, the Appellate Panel in *Vukovic*, stating that the credibility of the witness was questionable since they found "a whole range of unacceptable inconsistencies and lack of logic in her description of the event",[89] decided to trust the accused who based his defence on the issue of consent claiming he was in a love relationship with the witness. *Pincic* is currently on appeal and it remains to be seen whether the Appellate Panel will confirm the first instance's position.

Corroboration of Evidence

The Criminal Procedure Code of Bosnia and Herzegovina does not mention the issue of non-corroboration of the victim's testimony. On the other hand, following ICTY case law there is a general assumption that non-corroboration is required. Material evidence is not required since it is obvious, as Kelly Askin, an expert on international law, noted, that "during wartime situations, it is extremely unlikely that corroborative evidence, such as semen, blood, or other physical or medical evidence will be available as supporting evidence".[90] Nevertheless, as chapter 6.1 will show, most judges and prosecutors we interviewed noted that the lack of material evidence in sexualised violence cases creates a major problem. Furthermore, the failure to explicitly establish non-corroboration of the victim witness testimony in sexualised violence cases allowed for the establishment of a case law in which either the witnesses' testimony needs to be confirmed by someone in open session, or the witness needs to testify in open session.

The latter stems from a misunderstanding of Article 23 of the Law on the Protection of Witnesses: "The Court shall not base a conviction solely on evidence provided according to Articles 11 or 14 through 22 of this Law." Article 11 makes it clear that this refers to 'protected witnesses' who do not appear at the main trial and whose statements are read out loud. However, judges tend to also apply this provision to a different category of witnesses, the 'vulnerable' witness, which again is most often applied to rape survivors. Such an interpretation of the rules means that a verdict cannot be based on the testimony of a 'vulnerable' witness when she testifies in closed session. It needs corroboration.[91] While it makes sense that a verdict cannot be based on the testimony of an absent witness that cannot be questioned and cross-examined, it does not make any sense that the testimony of a rape survivor is less credible when she testifies under highly protective measures, i.e. in closed session.

In *Samardzic*, for example, the first instance Trial Panel stated that "the Court does not doubt the testimony of the witness G with regard to the account of the events".[92] However, they stated that the Prosecutor based his argument solely on the testimony of one witness without further evidence. Since the witness "enjoyed the highest protective measures during her testimony, basing the verdict solely on her testimony would be a violation of Article 23 of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses".[93] From the first instance judgement in *Samardzic* it is obvious that witness G testified in the main hearing, although in closed session and under a pseudonym. Thus the defence had a chance to cross-examine her. Consequently, the reasons for applying Article 23 of the Law on Witness Protection did not exist. The Appeals Chamber, however, did not correct this erroneous application of law. It decided to accept the testimony of the witness G only because it found confirmation of her statement in the testimony of the witness L who was found to be a credible witness.

These problems were confirmed in an interview with 2 prosecutors from the WCC, when they pointed out that the case law of the WCC has been established in such way that rape cases can be only based on the statement of a witness that is not protected. This understanding was also confirmed to us by one witness who told us that she testified in public because the prosecutor told her that the guilty verdict for the rape charges can only be reached if one of the rape witnesses testified in public session.

3.2.6 Rape Definition

In *Pincic*, the Trial Panel noted that:

"Like torture, rape is also used with the aim of intimidation, degradation, humiliation, discrimination, punishment, control over or destruction of a person. Like torture, rape represents ravishment of personal dignity and rape actually represents torture when it is carried out by or on the incentive or with approval or with consent of a state official or other persons in official capacity. The Panel defines rape as physical invasion of a sexual nature committed against a person under circumstances which are coercive".[94]

Analysing the international and national definition of rape, the Trial Panel reached its definition, holding that the following elements can be accepted as objective elements of rape:

"(i) sexual penetration, regardless of how insignificant it may be, of
  a) vagina or anus of the victim by penis of the perpetrator or by any other object used by the perpetrator;
  (b) mouth of the victim by penis of the perpetrator;
(ii) with use of coercion or force or with threat of force against the victim or a third person."[95]

Emphasis is placed on coercion rather than proof of non-consent.

The Criminal Code of Bosnia and Herzegovina recognises acts of rape and sexualised violence committed during war as acts either pertaining to crimes against humanity or as war crimes against the civilian population.[96] While within the Criminal Code of Bosnia and Herzegovina[97] there is no specific definition of what pertains to rape, in the Commentary on the Criminal Codes of Bosnia and Herzegovina it is noted that penetration (no matter how slight) is required for the act to be recognised as rape. In current practice at the WCC, rape is charged if the perpetrator anally or vaginally penetrated the victim. As noted above, the definition of rape reached by the Trial Chamber in *Pincic* requires either vaginal or anal penetration or penetration of the victim's mouth by the penis of the perpetrator.

Forced Fellatio

In spite of the *Pincic* definition of rape, there has been no uniform charging of forced fellatio as rape. For example, in *Jadranko Palija* the charges exclusively refer to rape without mentioning forced fellatio. Nevertheless, in the reasoning part of the judgement and in the description of the witness' testimony, forced fellatio and rape are differentiated:[98] "he firstly forced her to fellatio and then he raped her." The accused is found guilty of rape.

Following the Geneva Conventions, the Criminal Court of Bosnia and Herzegovina distinguishes between prisoners of war (POW) and civilians. Article 175 defines the war crimes against POWs. Rape, however, is only included in Article 173, which defines war crimes against civilians. In 2 cases (*Kurtovic* and *Lazarevic et al.*) where men were forced to perform fellatio there were no rape or sexualised violence charges. In *Kurtovic*[99], the charges related to POWs; thus there was no legal ground for charges of rape. Forced fellatio was charged as torture. In *Lazarevic et al.*[100], the defendant was charged with war crimes against civilians under Article 173 paragraph 1.c. He was charged with

"killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health".[101]

The prosecutor reasoned those charges, among other things, for permitting

"on an undetermined day, unidentified soldiers abused the prisoners sexually by forcing them to put their sexual organs into one another's mouth, and thus, among other things, they forced the prisoner Ramis Smajlovic to do that to another unidentified prisoner – a Romany by ethnicity".[102]

It seems that it depends on individual prosecutors or the Trial Chamber how rape and forced fellatio are defined. Although in this case forced fellatio is understood as an act of sexual nature, it is not charged as sexual violence or rape.

Gender-biased Approach to Rape – Problems of Defining Rape and Sexualised Violence

The Criminal Code of Bosnia and Herzegovina, with respect to the issues relating to crimes committed during the war, is gender biased. Sexualised violence is not recognised as a war crime against prisoners of war but only as a crime against civilians. It implies that women cannot be prisoners of war (and consequently cannot be soldiers either), and that men cannot be raped (as the assumption is that men are soldiers and are the only ones who can be prisoners of war). The other side of the assumption is that, of course, women are civilians and thus rape and sexualised violence can be charged as war crimes against civilians.

Furthermore, under the Criminal Code of Bosnia and Herzegovina only rape and forced prostitution can be charged as a war crime (Article 173, Crimes Against Civilians) while under Article 172 (Crimes against Humanity) in addition to rape, forced prostitution, forced impregnation, forced sterilisation "any other form of sexual violence of comparable gravity" is recognised. Thus the only way to charge other forms of sexualised violence as war crimes is to charge them as torture or inhuman acts. In addition, those other forms of sexualised violence are not clearly defined. The Commentary on the Criminal Codes of Bosnia and Herzegovina[103] says that "any other form of sexual violence" must be of a "sexual nature", forcefully committed against one or more persons, or that the perpetrator forced another person or persons to engage in acts of a "sexual nature". Apart from the obvious, that sexual violence has to be of 'sexual nature' and forcefully committed, legal practitioners in Bosnia and Herzegovina are struggling to define sexualised violence. The WCC has been inconsistent in its definitions. In *Lelek*[104], forcing someone to strip naked was not seen as sexualised violence but as torture. On the other hand, forcing someone to "touch him on the genitals and stroke his penis, while he slapped and beat her, and cursed her Turkish mother"[105] was not seen as torture but as coercing another by force to other forms of sexualised violence of comparable gravity. In addition, in *Veselinovic*[106], the ill-treatment of one witness was described. She was stopped by the defendant, who "grabbed her breasts, pushed her to a tree, leaned her against the tree and fired a number of bullets above her head," but the defendant was not charged with anything of a 'sexual nature'. Finally, our trial monitor noted that often examinations of male or female witnesses on sexualised violence perpetrated against other women were not detailed, and it is even questionable whether witnesses, or even prosecutors, knew how to define an 'act of sexual violence'. For example, in *Bundalo et al.*[107] witness R.R. testified that members of the paramilitary unit forced detained women to strip naked and held them in that way for approximately 40 minutes. The prosecutor did not examine witness R.R. as a victim of sexualised violence, and the trial monitor realised that humiliating women by forcing them to strip and stay naked was not perceived as sexually abusive. It is therefore very important to define what "sexual violence" or "other forms of sexual violence of comparable gravity" mean.

3.3 Gender Composition of the War Crimes Chamber and the Prosecutor's Office

The War Crimes Chamber

The Court of Bosnia and Herzegovina has 40 national judges (including the president of the Court) and 10 international judges. Of those, 16 national judges and 3 international judges are women. The President of the Court is a woman. The War Crime Chamber comprises 17 judges, 13 national and 4 international, of which 5 national judges and 1 international judge are women.

There are 2 different panels of judges, the trial and appellate panels, each consisting of international and national judges. The national judge is the president of the panel. The appeals procedure usually does not involve witness testimonies before the panel as is the case in the trial panels. With respect to the war crime cases involving sexualised violence charges,[108] of the 17 trial panels, 12 were composed of 1 woman and 2 men (in 5 of these cases women were presiding judges). A total of 4 trial panels were completely composed of men. It is very important to note that in 3 of the 4 trials with a large number of female witnesses (*Stankovic*, *Simsic* and *Radic*), the panels had exclusively male judges. According to Article 22 of the rules of procedure of the WCC,[109] cases are assigned by a computerised system. The rules should be amended to allow the system to ensure that female witnesses testifying on sexualised violence committed during the war do not testify before an exclusively male panel. It is thus imperative that the judges' panel is gender balanced, ensuring that women are a part of the panel in cases that involve sexualised violence charges.

The problem could be resolved if more women were appointed as judges in the War Crime Chamber. Note that of the 2 trials concerning sexual violence against men, 1 trial panel was composed exclusively of women (this was the only trial panel in war crime cases involving sexualised violence that was composed entirely of women).

The Prosecutor's Office

Similar to the WCC, the Prosecutor's Office also has the hybrid structure with domestic and international prosecutors and staff working on cases. The first 4 National Prosecutors were appointed on 16 January 2002 and the first International Prosecutor was appointed by the High Representative in March 2003. Currently the Prosecutor's Office has 37 prosecutors, of which 9 are international. 14 of these (37%) prosecutors are women, and all of them are national prosecutors. The chief prosecutor is a man. The War Crime Section of the Prosecutor's Office consists of 18 prosecutors (14 national and 4 international). The chief of this Section is a male international prosecutor. 6 national prosecutors in the War Crime Section are women (33%).

The international judges and prosecutors have a mandate until the end of 2009. The need for an extension of the mandate of the international prosecutors and judges has been expressed by both the Court and Prosecutor's

Office of Bosnia and Herzegovina and the High Judicial and Prosecution Council of Bosnia and Herzegovina.[110] The extension of the mandate was supported by the president of the ICTY, Patrick Robinson[111] during his visit to Bosnia and Herzegovina in June 2009. However, the government of Bosnia and Herzegovina has not yet extended the mandate.[112] Witnesses and other actors in war crime trials in Bosnia and Herzegovina stated, without undermining the knowledge and capabilities of the national judges and prosecutors, that the presence of the international judges and prosecutors creates among the witnesses a sense of greater neutrality and independence of the Court and Prosecutor's Office of Bosnia and Herzegovina. While several of the witnesses we interviewed for this study stressed the importance of having war crime trials at the national level, and specifically at the Court of Bosnia and Herzegovina, they also pointed to the importance of having international judges and prosecutors as part of those trials. One of the witnesses even suggested to engage the international judges at the lower level courts (Cantonal and County Courts) in war crimes cases. It is not so much the knowledge and experience of international judges that create a sense of impartiality but rather the idea that they do not belong to any of the ethnic groups of Bosnia and Herzegovina. This is reassuring for the witnesses.

There are 8 investigators within the Prosecutor's Office. 4 are national and 4 international. Only 1 (national) investigator is a woman. Unlike with judges, investigators are usually the first ones from the court/Prosecutor's Office to make contact with the witnesses. Women victims and survivors shared that they are generally more comfortable speaking to women investigators about sexualised violence crimes. "While it is up to individual women", one investigator noted, "some women find it difficult to talk about rape with male investigators."[113] In small towns or rural areas of Bosnia-Herzegovina, a woman's visit to another woman raises less suspicion or curious questions from neighbours. This is particularly important since many women who are living in small communities do not want to be recognised or identified as a survivor and potential witness of sexualised violence. This is particularily important in areas with mixed communities and in which the potenial witness belongs to the ethnic or religious minority. There is still much distrust among the ethnic groups and women fear that neighbours of different ethnic groups will disclose their identities to the family of the accused.

4. The Prosecution of Sexualised Violence

4.1 International Criminal Tribunal for the Former Yugoslavia: Indictments, Convictions and Acquittals

The ICTY does not keep any statistics that provide details on charges, trials, judgements, and witnesses with regard to sexualised violence. The following statistical background is exclusively based on our own research. It takes into account all indictments that include charges of rape and other forms of sexualised violence. In the early years of the ICTY charges against direct perpetrators with lower or mid-level command responsibility dominated. Rape charges are clearly visible here as separate counts. In later years, as the number of trials against high-level accused grew, rape was increasingly prosecuted as a form of persecution only. "Rape and sexual assault" or "sexual violence" was often summarily subsumed among other charges, sometimes hardly recognisable in the indictments. This does not, however, mean that rape evidence did not form a relevant evidentiary part of the case.

The focus here lies on cases concluded as of July 2009, i.e. cases with appeal judgements. However, first instance judgements and ongoing trials are also included to outline tendencies. With 2 high-ranking accused still at large (Mladic and Hadzic) there may be 2 more cases that include sexualised violence charges but there is no scope for any new indictments. The data presented below therefore offers a near complete picture.

4.1.1 Indictments

As of October 1996, 41% of all indictees had been charged with sexualised assault.[114] This figure has not changed very much except to drop a little. As of July 2009, out of 167 accused in total, 67 (40,1%) were charged, among others, with rape or sexualised assault committed against women or men.[115] This number includes cases with many charges pertaining to rape or sexualised violence as well as cases in which sexualised violence played a minor role, hardly mentioned in the indictment. The number of accused does not always match the number of cases as often several accused are charged in joint indictments. If we look at cases rather than accused only 37 (33.6%), out of a total of 110 cases include rape or sexual assault charges.[116] Only 2 of these cases dealt exclusively with rape. In one case, the leader of a para-military group was sentenced to 10 years for aiding and abetting the rape of a woman as part of torture.[117] The other case dealt exclusively with rape and (sexual) enslavement – the so called 'Foča Case', which contained a total of 25 counts against 3 accused.[118]

4.1.2 Conviction Rate

If one looks at the number of accused in concluded cases, i.e. cases with final judgements by the Appeals Chamber, one finds that as of July 2009, out of 71[119] accused 35 had been charged among others with rape, 'sexual assault' or 'sexual violence' committed against either women or men; 24 of them were found guilty while 11 had been acquitted of these charges. Only 3 of those 11 had been acquitted of all charges, the remaining 9 accused were found guilty of other than sexualised violence charges. The conviction rate in cases including rape and/or sexual assault charges is about 9.2% less compared to accused not charged with rape and/or other forms of sexualised violence.

Figure 2 below shows all accused included in the statistics differentiated by name, by convictions or acquittals of sexualised violence charges, and by rank. Behind the names in brackets the sex of the targeted victims is indicated by, "f", "m" or "n" (if the sex was not given), as well as settlement of cases by plea agreement. Accused

Accused charged with sexualised violence		Accused not charged with sexualised violence		Total
35		36		71
49.3%		50.7%		
Convicted	**Acquitted**	**Convicted**	**Acquitted**	
24	11	28	8	
68.6%	31.4%	77.8%	22.2%	73.2%

Figure 1: Conviction rates of accused charged with sexualised violence in concluded cases

who were acquitted of all charges are marked with “A” in the 'Sentence' column. In addition, we included cases finished by first instance verdicts with appeals pending as they show a troublesome tendency of acquittals. The numbers in the 'Sentence' column refer to the final sentence the accused received for all crimes committed.

Convictions				Acquittals			
Concluded (24)		**On Appeal (1)**		**Concluded (11)**		**On Appeal (8)**	
Leadership cases							
	Sentence		Sentence		Sentence		Sentence
Brdjanin (f+m)	32	Pavkovic (f)	22	Krajisnik (n/f)	20	Delic, Rasim (f)	3
Martic (n)	35			Milutinovic (f)	A	Lazarevic (f)	15
Plavsic (n, plea)	22					Lukic, Sreten (f)	22
Stakic (f)	40					Ojdanic (f)	15
						Sainovic (f)	22
Medium ranking soldiers, local political leaders, camp commanders and deputies							
Delic, Hazim* (f)	18			Delalic (f, m)	A	Haradinaj (f)	A
Music (f, m)	9			Kvocka (f)	7	Balaj (f)	A
Nikolic (f, plea)	20			Mrksic (f)	20	Brahimi (f)	6
Rajic (f, plea)	12			Radic, Miroslav			
Simic (m, plea)	5			(f)	A		
Tadic* (f+m)	20			Sikirica			
Todorovic				(f+m, plea)	15		
(m, plea)	10			Slivancanin (f)	17		
Kordic (n)	25						
Cerkez (n)	6						
Low ranking paramilitaries, civilians, soldiers or camp guards							
Banovic (n, plea)	8			Dosen (f+m, plea)	5		
Bralo (f, plea)	20			Kolundzija			
Cecis (m, plea)	18			(f+m, plea)	3		
Furundzija (f)	10			Zigic (f)	25		
Kos (f)	6						
Kovac (f)	20						
Kunarac (f)	28						
Prcac (f)	5						
Radic, Mlado (f)	20						
Vukovic (f)	12						
Zelenovic (f, plea)	15						

A = acquitted of all charges
f = female victims in indictment
m = male victims in indictment
n = sex of victims not mentioned in indictment; f or m indicate sex of victims named in judgement
plea = accused pleaded guilty to all or some charges after negotiation with the Prosecutor
Numbers give sentences, in appeal cases sentence of 1st instance.

* Delic was found guilty of raping 2 women in Omarska Camp, he was acquitted of superior responsibility for male sexual assaults. Tadic was originally indicted for both, sexualised assault on male and female detainees of Omarska Camp. However, the prosecutor withdrew the rape charges at the beginning of the trial.

Figure 2: Convictions and acquittals by names and ranks of accused

3 accused were acquitted of all charges by final judgements (Milutinovic, Delalic, Radic) and 2 by first instance judgements (Haradinaj, Balaj). Several accused were charged with sexualised attacks against female and male victims, 2 of them (Tadic, Delic) were found guilty only for attacks on either males or females. They are listed as found guilty but their acquittal are also indicated by an asterisk with further explanation below the table.

4.1.3 Ranks of Accused

As figure 2 shows, over 80% (29 of 35) of the accused with final judgements were men of middle- or lower-grade ranks. Those classified here as low ranking were, for example, camp guards, members of regular troops or paramilitary groups, civilians without official authority. However, some of them had commanding power, for example, as shift leaders of guards in detention camps or as local leaders of paramilitary units. All of them were indicted as direct perpetrators of torture, ill-treatment, murder and other crimes. 7 of them were found guilty for personally raping or committing sexualised assaults on either women or men.[120] The others were indicted and in part found guilty of indirect participation in sexualised violence, through, for example, aiding and abetting or being a member of what is termed as Joint Criminal Enterprise (JCE).[121]

Those classified as men ranked at mid-level are authorities such as chiefs of police, mid- ranking military officials, leading members of local or regional political decision-making bodies, camp commanders and their deputies. They too were often directly and personally involved in torturing, killing or raping victims. With regard to sexualised violence, 3 of them were accused and found guilty of directly committing sexualised violence. Rasim Delic, Deputy Commander of a camp run by Bosnian Muslim and Bosnian Croat forces in the Konjic area (Celebici Camp), was found guilty of raping 2 female detainees several times. Stevan Todorovic, Chief of Police and member of the Serb crisis staff in Bosanski Samac, was found guilty of forcing 6 male detainees to perform fellatio on each other at the police station. The commander of Susica Camp in Vlasenica, Dragan Nikolic, was originally charged with rape in one case and in participating in rape in several other cases committed by guards under his command. However, as a result of plea bargaining he was found guilty only of aiding and abetting. The other men in this category were charged with different forms of liability for sexualised violence, either as superiors responsible for the acts of their subordinates, or as members of JCE.

Only few of the concluded cases against men in leadership positions dealt with sexualised violence. A different story emerges from cases that are currently on appeal, on trial or in pre-trial. Figure 2 shows under the appeal columns the names of 6 high-ranking (and 3 mid-ranking) accused charged with sexualised violence. As of July 2009 these cases are on appeal. In addition, 11 other cases (not shown in Figure 2) are in the trial or pre-trial stage.[122] If all accused in cases that are either concluded, on appeal or on trial and pre-trial are taken into account, the number of high-ranking accused charged with sexualised violence increases from 6 (17%) to 12 (27%) and to 23 (42%). As Figure 3 shows, the total number of lower-ranking accused charged with sexualised violence remains unchanged at 14.[123]

Many of the highest-ranking accused were arrested only in recent years. In the early years, the leading political powers involved in settling the conflict displayed an ambivalent attitude towards the ICTY regardless of the fact that they themselves had established the court. This is also reflected in the scandalous lack of personal and financial resources of the early years.[124] The leading coun-

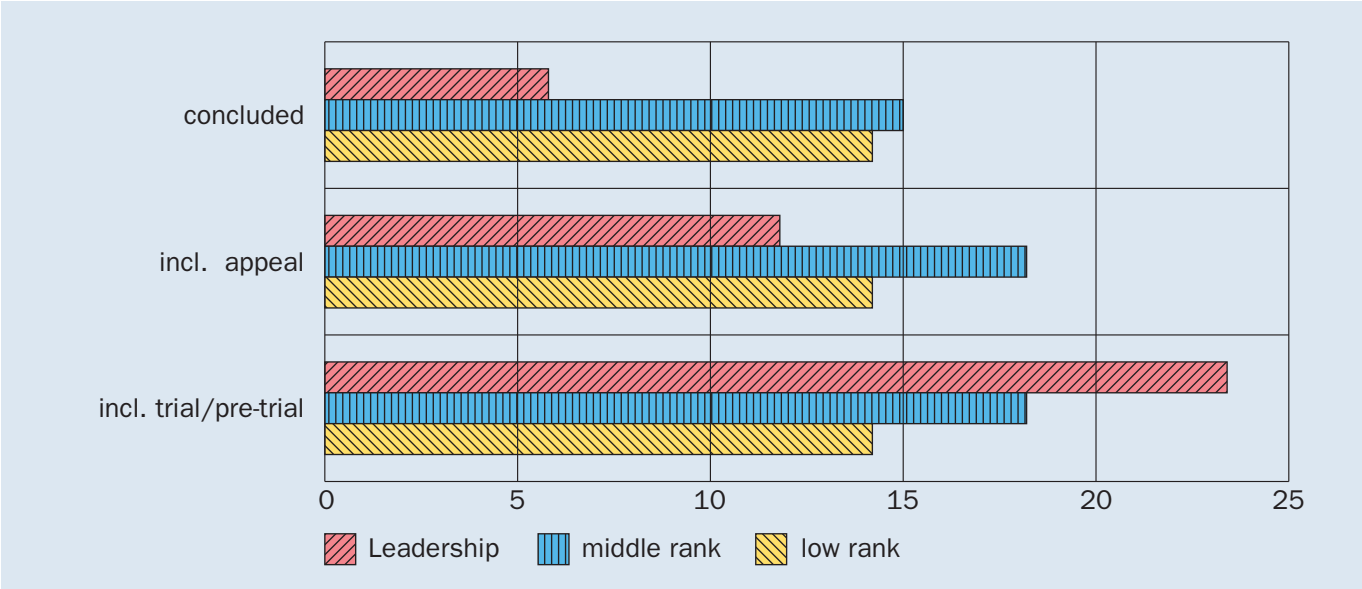

Figure 3: Indictments by rank of accused in cases concluded, on appeal, trial or pre-trial

tries were not willing to arrest anybody, in particular not those with whom they were simultaneously negotiating about ending the conflict. However, this attitude changed by the end of 1997 and several countries began arresting indicted persons. This change of policy can be largely assigned to the constant pressure Chief Prosecutor Louise Arbour exerted publicly and behind the scenes, highlighted by the conspiratorial kidnapping arrest in June 1997 of Dokmanovic, the former major of Vukovar to which she had given the green light.

During the first 3 years of the Tribunal's existence, only 11 accused had been arrested or had turned themselves in. From September 1997 to December 1998, 24 followed either voluntarily or by force. Among them was a large group of mid-ranking members of the Bosnian Croat forces (HVO) as well as a few high-ranking officials such as General Krstic, Deputy Commander of the Drina Corps that had attacked Srbrenica in July 1995.[125] The majority of high-ranking military or political leaders were transferred to the Tribunal only in the following 10 years, with Milosevic as the most prominent one in June 2001 and Karadzic as the latest in July 2008.

4.1.4 Sex of Victims

The immages most commonly evoked by reports on widespread rape or sexualised war violence are pictures of multiple rape of women in detention camps, of young women and girls enslaved in private houses, or of women raped during house searches and during interrogations. It is therefore surprising to note that many rape or sexualised assault charges before the ICTY refer to male victims. The sociologist Kirsten Campbell examined sexualised violence cases at the ICTY to determine how and to what effects sexualised violence is constructed as a criminal harm. She arrived at a surprising conclusion: over 40% of the concluded cases with sexualised assaults charges include men as victims.[126] The conclusion is baffling for at least two reasons. On the one hand sexualised attacks against men had been nearly completely absent in the public discourse on sexualised violence during the war. On the other hand, there are no indications that sexualised attacks on men followed similar patterns and were committed on as large a scale as the sexualised attacks on women. It must be acknowledged, however, that the ICTY prosecutors did not neglect sexualised violence against men. Its now common knowledge that sexualised violence against men in wars and during detention is also used as an efficient tool of humiliation. There is little empirical research on the subject but it is clear that the taboo and shame that accompanies this kind of violence and attacks against masculine identity is enormous.

Campbell criticises the overrepresentation of male sexual assault as it does not reflect "the generally agreed differential scale of gendered assaults".[127] Campbell's findings are based on 17 concluded cases in 2007. Of the 17 cases, 7 included counts of sexualised violence solely against female victims, 3 against male victims while 4 cases involved both male and female victims. Thus, a total of 7 cases, i.e. slightly more than 40%, included charges with men as victims of sexualised violence. In 3 cases of the Campbell data, the sex of the victims was not mentioned in the indictments.

To date, there are 5 more concluded cases and with 7 more accused. With more cases included in the survey, the picture differs from Campbell's findings in 2 ways. One, there is an increase of cases in which the indictments are silent on the gender of the victim and two, the proportion of cases with female victims rises, particularly on inclusion of first instance cases.

As of July 2009, 18 accused in 10 concluded cases had been charged with sexualised violence directed against women or girls. 3 cases with 3 accused included charges of sexualised attacks against men, 4 cases with 8 accused involved male and female victims, and in 5 cases with 6 accused the sex of the victims was not explicitly named. Figures 4 and 5 show the percentage by concluded cases and by accused:

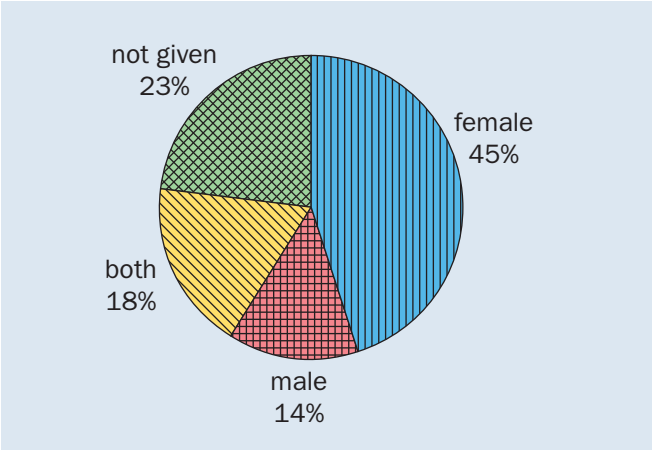

Figure 4: Gender of victims by concluded cases

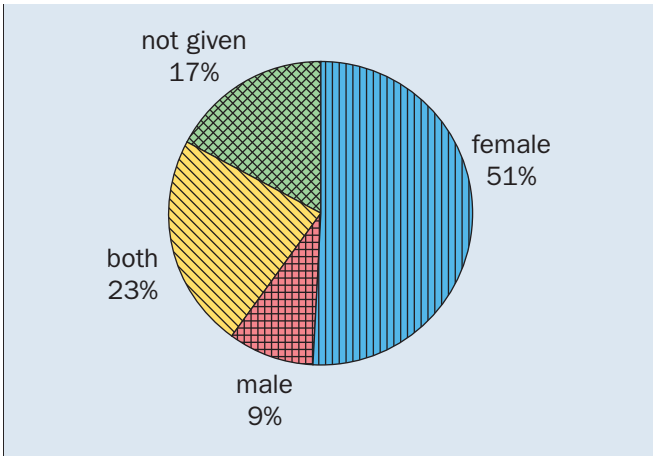

Figure 5: Gender of victims by accused in concluded cases

The figures show that in 45.5% of the cases (10 out of 22) women and girls had been the sole victims of sexualised violence and in 31.8% of the cases (7 out of 22) they were men. The number of female victims is higher if the count is based on accused persons rather than cases. 51.4% of the accused (18 out of 35) were charged with rape or sexualised assaults against women or girls, while the number of cases involving attacks on male victims dropped to 24%.

A look at all cases before the ICTY that include sexualised violence charges, i.e. concluded cases, cases on appeal, on trial and pre-trial leads to the following conclusions.[128]

Of a total of 30 cases (concluded, on appeal, trial, pre-trial) 15 (50%) refer solely to female victims; if the "both" cases are included this totals 20 cases (67%), which included charges with female victims. The number of cases with solely male victims has not changed since 2007 (3 cases), while the total number of cases with male victims of sexualised attacks increased by only one case to 8 in total (27%). This is significantly less than the over 40% representation of male sexualised assault victims found in 2007 by Campbell.

A closer look at the judgements of the cases where the victim's sex is not specified reveals that the evidence of sexualised violence includes in 5 cases male victims, in 4 female victims. 2 cases (*Martic, Banovic*) refer to male victims[129], 1 case (*Kordic & Cerkez*) to female victims, and 3 cases (*Plavsic, Krajisnik, Karadzic*) to victims of both. Plavsic and Krajisnic had originally been indicted jointly. The case against Biljana Plavsic was settled in a plea agreement without naming the rape victim's gender, however, in the Krajisnik trial the evidence pertaining to sexualised violence against female victims was much broader as compared to evidence of sexualised assaults on men. The trial against Seselj (sex of victims not given) is ongoing and the *Karadzic* case (sex of victims not given) is in pre-trial. However, as leadership cases they cover regions for which sexualised assaults against both, women and men, have already been established as adjudicated facts in other trials. It is therefore more likely than not that the evidence brought forward will refer to both sexes with a focus on female sexualised assault.

Based on the above data, one can draw the conclusion that in terms of quantity there is a clear focus on sexualised violence committed against women. However, the high number of indictments with female and male sexualised assault victims or gender neutral phrasing supports Campbell's critique of an increasingly undifferentiated representation of female and male sexualised assault, not so much with respect to quantity but certainly with respect to the patterns and experiences of the victims.

2 possible explanations may be presented that explain this tendency. One, there is a focus on detention camps in which both men and women had been detained, albeit separately. There were, for example, 8 concluded trials and 2 pre-trials dealing with crimes committed in the municipality of Prijedor focusing on the detention camps of Omarska, Keraterm and Trnepolje.[130] *Music et al.* also involved sexualised violence directed against both female and male detainees in Celebici Camp while 2 other camp cases referred to either solely male sexualised assault victims (*Cecis*, Luka Camp in Brcko) or solely female victims (*Nikolic*, Susica Camp at Vlasenica).

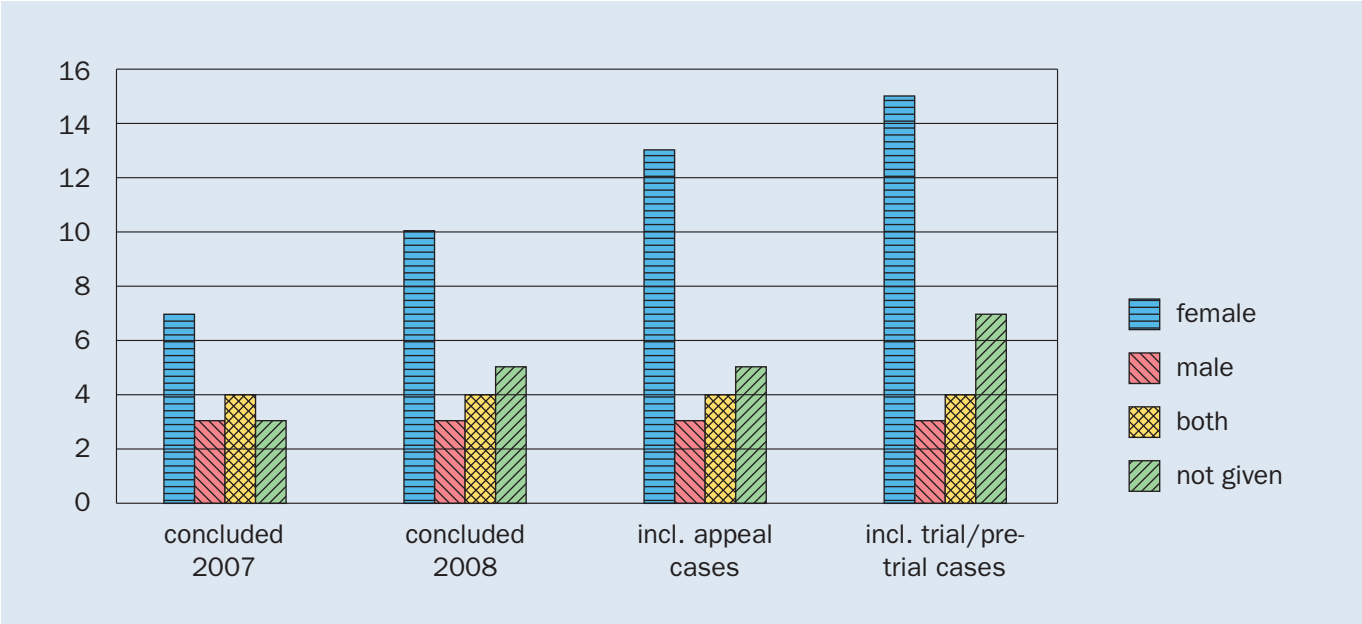

Figure 6: Gender of victims by concluded and ongoing cases

Two cases against accused in positions of leadership tend to build upon adjudicated facts and investigations done for earlier trials rather than establishing new evidence of sexualised violence. Thus, the ICTY produced only 1 case, i.e. *Kunarac et al*, commonly referred to as the Foča case, in which the prosecution demonstrated the complex pattern of sexualised violence against women in a certain region. Although the trial had to focus on crimes committed by the 3 accused, the prosecution's case was built in a way that allowed more insight into what has been termed systematic rape, ranging from rape during house searches, through rape in detention camps, to sexual enslavement in private houses.[131]

Charging male and female sexualised assault as gender-neutral carries the danger that the specific gendered patterns of sexualised war violence and the possible legal implications escape prosecution. This might be important, for example, for the question of the "foreseeability" of rape, which can be crucial in particular in determining the responsibility of high-ranking leaders. As we will see below, several rape charges failed exactly at this point at least in first instance.

As the Report of the Expert Commission had pointed out and as the facts in some indictments show, the gendered pattern of sexualised assaults on men differed significantly from sexualised attacks against women or girls. Contrary to what was often written about rape in this war, most of the incidents brought before the ICTY (and to date before the WCC) did not happen in open public spaces, not even necessarily in front of other persons. However, all of the indicted sexualised attacks on men took place in the presence of other prisoners as well as camp guards or soldiers watching. Not surprisingly, none of these cases involves penetration of a male detainee by a captor. The most common kind of sexualised assault against men is either genital mutilation or forcing 2 male prisoners to commit fellatio with each other. The public character of these acts is essential because of the symbolic homosexualisation of the victimised man which is witnessed by others. Symbolic homosexualisation and feminisation can also be achieved through penetration as the sociologist Dubravka Zarkov notes, "in the Balkan context, (…), there is a difference between these 2 acts of violence. While castration is a symbolic appropriation of the male's phallic power, rape is not. In Balkan norms of sexuality, both men involved in the sexual act are homosexualised. Thus, the drastic difference in the acts of sexual violence performed by the camp guards and the prisoners themselves, (…). It seems that prison guards have mutilated and assaulted male prisoners with foreign objects in public, but have not raped them in public."[132]

As noted at the end of Chapter 1 the Expert Commission's categorisation of rape patterns had certain implications for evaluating the gravity of different rape contexts. Oddly enough, those contexts, which led most likely to the murder of women and girls after a period of sexual enslavement, were categorised as 'opportunistic' rapes for the recreation of soldiers, i.e. as negligible crimes for a suggested prosecution strategy that was supposed to focus on "ethnic cleansing" rapes. While the Commission had very little time for a comprehensive analysis, the Prosecutor of the ICTY, however, should have taken a more comprehensive approach. The ICTY did not come out with a case focusing on rape in coincidence with murder, even though evidence of the selective murder of women did appear in some cases.[133] There is also only the Foča case that dealt with sexual enslavement and there is also no systematic investigation done by the ICTY on forced prostitution or trafficking. Glimpses of this were only presented in the Foča case.

At the same time, there is also no case focusing on male sexualised assault. The case against the former Chief of Police in Bosanski Samac, Stevan Todorovic, would have had the potential for that as he had ordered 6 men in the police station to perform fellatio on each other. As the case was settled with plea agreement no public attention was given to it.[134]

4.1.5 Plea Agreements

According to the rules of the ICTY, the prosecutor and the defendant can negotiate to lower the charges in exchange for a guilty plea from the accused to one or more counts of the indictment. Such plea bargaining includes agreements on a specific sentence proposed jointly to the Chamber. Although the Trial Chamber is not bound by such agreements, in most cases it is followed through if the Chamber is satisfied that the guilty plea was given voluntarily and the accused was informed to what he pleaded guilty. Guilty pleas are rewarded with lesser sentences.

In most cases the accused give statements of remorse and not all of them can be dismissed as insincere.[135] The rationale behind plea agreements is twofold. First, they save time because they render a trial unnecessary and lead directly to a sentence hearing. A sentence hearing can still resemble a trial process with hearing of the witnesses as was the case, for example, in *Nikolic* (see below). Second, it helps to establish the truth through the accused's admission of guilt and, in some cases, his or her readiness to supply more information or testify in other trials. None of this, however, is a condition for plea agreements.

It is also often emphasised by the Court that plea agreements spare victims from reliving painful testimonies and that guilty pleas can contribute to reconciliation. How-

ever, for some or many victims, including those of sexualised violence as the present study shows, it is of utmost importance to testify and to use the court as a forum to bring forward their side of the story and to feel that justice is being done. They view plea agreements that often reduce charges and sentences as unjust and do not feel by any means reconciled. This is also due to the fact that victim witnesses are excluded from plea bargaining procedures.[136]

To date, of the 60 accused found guilty at the ICTY in concluded cases, 20 pleaded guilty and their cases were settled in plea agreements (33%). 11 of those who pleaded guilty had been also charged with sexualised violence. Thus nearly a third of the cases with sexualised assault charges were settled with plea agreements (11 out of 35). As noted before, all 3 cases involving solely male sexualised assaults (*Cecis, Todorovic, Simic*) were settled in plea agreements.

None of the accused that pleaded guilty to rape mentioned rape in their statements of remorse. Zelenovic, who had been originally charged along with Kunarac, Kovac and Vukovic exclusively with the multiple rape of women and girls in Foča, pleaded guilty after he was arrested in 2005. He kept his statement short and did not mention the gender of his victims. For him, "this is a war that didn't make anybody happy. Guided by biblical teachings that the truth is not to be feared because that is the only thing that will help all, I have confessed as to my guilt, and I am prepared to bear all the consequences of that. I know that not a single form of punishment can erase the suffering sustained by my victims".[137]

There is only one case in which sexualised violence charges were fully dropped in plea bargaining (*Sikirica et al.*). This case was a weak case with respect to rape (see below "Acquittal"). As already mentioned, in *Nikolic*, the original rape charges were reduced to aiding and abetting. In fact, sexualised assault charges against Nikolic, the commander of Susica camp in Vlasenica, underwent constant changes. The initial indictment by Prosecutor Goldstone did not contain any rape charges and provoked the intervention of Judge Gabrielle MacDonald.[138] The first amended indictment of 1999 by Prosecutor Louise Arbour contained 8 different incidents of rape and sexualised assault with a total of 38 counts of rape and torture as crimes against humanity and a grave breach of the Geneva Conventions. The second amendment significantly reduced the number of all charges from 80 to 8 and that of sexualised violence to 3. The third amendment dropped all allegations of Nikolic personally having raped one woman. In the Plea Agreement Nikolic pleaded guilty to persecution, incorporating murder, rape and torture and was sentenced to 23 years. The Trial Chamber found that he had personally removed women of all ages from the hangar where they had been detained and handed them over to other men knowing they would be raped.

4.1.6 Acquittals in concluded cases

11 accused charged with sexualised violence were acquitted of these charges. Of those, 3 were acquitted in general of either superior or JCE responsibility for all crimes charged.[139] The remaining 8 were acquitted of sexualised violence because the Chamber found either the facts or the responsibility of the accused for the commitment of sexualised crimes not proven.[140] All these accused had been charged with superior responsibility, namely as members of a joint criminal enterprise.

The legal construction of JCE is used to establish liability and responsibility for collective mass crimes committed by different persons of different rank. They need not necessarily act in direct concert to commit a crime, for example as torturers acting in different roles. Sharing a common purpose suffices to make them part of a JCE. Military leaders, camp commanders, camp guards and local politicians can, for example, be held responsible for all crimes committed in a detention camp if they contribute to the running of the camp and share the intent of ill-treatment of the detainees. In other words, nobody who plays a regular role in a camp with some kind of authority, be it a commander, a guard or an administrative aide, can talk his or her way out by saying 'I didn't do it myself ' or 'I was only writing lists' or 'I was just watching the door'. JCEs can thus link the highest politicians or military leaders to the crimes committed on the ground.

The legal concept of JCEs, however, is disputed, which has implications for the charging of rape and sexualised violence. In 2004, the former gender legal advisor of the Prosecutor's office, Patricia Sellers, outlined how the prosecution of sexualised violence can benefit from the development of JCE tracing the emergence of common criminal purpose through the ICTY jurisdiction from *Tadic*, to *Furundzija, Krstic and Kvocka*.[141] Some of the cases discussed below (*Krajisnik and Milutinovic*) cast a shadow on such hopes.

Rape not proven: *Mrksic et al. (Vukovar Hospital, Croatia):*

3 former officers of the Yugoslav People's Army (JNA), Mrksic, Radic and Slivancanin were accused of participating in the attacks on Vukovar Hospital in Croatia, including the killings of over 260 Croats at the Ovcara farm. While Radic was fully acquitted, the 2 others were found guilty of aiding and abetting the murders at Ovcara. The indictment had also alleged that at the Ovcara farm at least one woman had been raped and subsequently killed. However, the indictment gave no specifics about the incident. The Trial Chamber did not find any evidence

to establish this as fact as the only witness was too unprecise.[142] Mrksic was sentenced to 20 years and Slivancanin to 17.

Security Commander had no knowledge: *Sikirica et al. (Keraterm Camp, Prijedor):*
Sikirica, Dosen and Kolundzija had all been part of the security system of the Keraterm Camp by Prijedor. Sikirca was the commander of security at Keraterm Camp and originally indicted with genocide. At the close of the prosecution case, the Trial Chamber acquitted him of genocide and all 3 accused eventually entered a guilty plea. Sikirica pleaded guilty to persecutions and admitted that rapes took place in Keraterm. However, the prosecution accepted that he did not know of them nor had he been in any position to know about them.[143] Dosen, a shift leader of guards at Keraterm, pleaded guilty to torture, beatings, harassment, confinement and humiliation as persecution but not to rape. The other shift leader, Kolundzija, pleaded guilty only to confinement. Sikirca was sentenced to 15 years imprisonment, Dosen to 5 and Kolundzjia only to 3. The documents that are available in public do not give any reason why rape specifically was excluded from the admitted crimes.

Camp Commander out of office: *Kvocka (Omarska Camp, Prijedor):*
In the Omarska case against *Kvocka et al.* only one of the guard shift leaders, Mlado Radic, was accused of having personally raped and otherwise sexually abused several female detainees in Omarska. Kvocka had the function of deputy camp commander of Omarska Camp for about 1 month, Prcac had acted as administrative aide and Kos was another shift leader. The fourth, Zigic, was a civilian (see below). All accused were charged with JCE responsibility for persecutions, including rape; Radic was charged in addition with directly committing rape in a separate charge. 36 women had been detained in Omarska Camp, 10 of them testified in Court about constant sexualised assaults from touching body parts to multiple rapes.

The Trial Chamber found all accused persons guilty as members of a Joint Criminal Enterprise and made an important point by saying that "crimes committed in furtherance of the joint criminal enterprise that were natural or foreseeable consequences of the enterprise can be attributed to any who knowingly participated in a significant way in the enterprise".

The Trial Chamber in *Kvocka* found that rapes and sexualised violence were foreseeable under such conditions:
"In Omarska Camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in the light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation. Liability for foreseeable crimes flows to aiders and abettors as well as co-perpetrators of the criminal enterprise."[144]

The Appeals Chamber uphold the Trial Chamber's finding that Kvocka was guilty as a co-perpetrator of crimes committed in Omarska as part of the joint criminal enterprise. However, the Appeals Chamber quashed the conviction of Kvocka on the charge of rape for lack of evidence that the rapes took place during the time he acted as deputy camp commander since the testimonies of the witnesses did not provide any dates. The Trial Chamber sentenced Kvocka to 7 years. His defence argued that given the severe punishment for rape in *Kunarac et al.*, Kvokka's sentence should be reduced substantially.[145] The Appeals Chamber disagreed because "the overall picture of criminal conduct has not changed so substantially".[146] Kvocka's sentence of 7 years was confirmed leaving open the question of the gravity accorded to sexualised violence in the determination of the sentence.

The other accused charged with rape in this case were found guilty.

No significant contribution to Joint Criminal Enterprise: *Zoran Zigic (Omarska Camp):*
Zoran Zigic had been indicted along with *Kvocka et al.* for crimes committed in Omarska camp. He was a taxi driver at the time and entered the camps of Omarska and Keraterm whenever he wanted to particpate in the torture and humiliation of the detainees. Upon appeal Zoran Zigic was acquitted from all charges with regard to crimes in Omarska and charges as member of a JCE. While the Appeals Chamber found that he acted with extreme brutality, it held that he could be held liable for crimes committed in Omarska only if his contribution to the functioning of the camp had been "significant". The Chamber found this was not the case and acquitted him of all crimes committed in Omarska in general, including sexualised violence.[147]

Rape was no common purpose of Joint Criminal Enterprise: *Momcilo Krajisnik:*
Krajisnik was one of the highest-ranking politicians in the trials before the ICTY. He was a leading member of the Bosnian arm of the Serbian Democratic Party (SDS) and president of the Bosnian Serb Assembly working closely with Karadzic. He took part in the negotiations leading to the Dayton agreement and after Karadzic was forced

to step back Krajisnik became the most powerful man in the Srpska Republica.

Krajisnik war originally indicted together with Biljana Plavsic, a former university professor, a leading member of the Bosnian SDS, former president of the Srpska Republica, and finally the Vice-president and member of the Supreme Command of the armed forced of the Republic Srpska. Biljana Plavsic is the only woman indicted by the ICTY. Both, Plavsic and Kraijsnik were held responsible for participating in a JCE together with other political and military leaders like Karadzic, Milosevic or Mladic; they were charged with genocide, extermination, murder and persecutions, including sexualised violence.

In 2001, Plavsic surrendered to the ICTY in 2002 and, pleaded guilty to the charges listed under persecution as Crime against Humanity, including sexualised assaults. The genocide charges was dropped. Consequent to the plea agreement, Plavsic was sentenced to only 11 years.

Kraijsnik was arrested in April 2000, he refused to plead guilty and stood trial. During the trial, the Prosecutor produced a load of adjudicated facts,[148] and written witness statements on atrocities from all over Bosnia, including evidence of rape.[149] At least one witness testified in person and in an open session (with pseudonym). Her testimony was clear, detailed and precise. When she needed a break and Judge Orie tried to comfort her by saying that she need not be ashamed of her emotions she told him that indeed, the testimony is most painful: "But I still want to continue with this testimony. I want to tell the truth and nothing but the truth. I want to inform you about the truth. I want the criminals to be punished. I want the crime to be punished. That's my own goal."[150] She continued with her account without any interruption by the Prosecutor and also described her rape without any hesitation.

While the Trial Chamber found that the Prosecutor did not prove the genocidal intent, it nevertheless held Krajisnik guilty as member of a JCE sharing with other accused persons the common purpose of extermination, murder, deportation, forced transfer and persecutions, including sexualised assaults. The trial chamber found that at the beginning the common objective of the JCE was confined to deportation and forced transfer. However, in the course of the enforcement of these objectives the scope of crimes expanded and other crimes of persecution were committed, such as murder, extermination, inhuman treatment and sexualised assaults. Since the members of the JCE were informed about those crimes, did not employ any effective measures to prevent them and insisted on the continued implementation of the deportations, all other crimes that went along with those deportations became de facto part of the JCE. Krajisnik was sentenced to 27 years.

Kraijsnik appealed the judgement and was successful in part. In March 2009, the Appeals Chamber found that Kraijsnik's participation in a JCE was proven in regard to the original common purpose, i.e. crimes of deportation and forcible transfer. However, the Appeals Chamber did not hold him responsible for what the Trial Chamber had called "expanded crimes", which included rape and sexualised violence. The Appeals Chamber criticised that no specific findings were made as to when the expanded crimes were added to the common objective of the JCE, whether all JCE members knew about the other crimes, whether or not they tried to prevent them and whether they persisted in continuing the implementation of the JCE.[151] The significant point to note is the fact that the Trial Chamber did not base its judgement on foreseeability of the "expanded crimes".

Krajisnik was consequently acquitted of all charges except those that concerned deportation and forcible transfer. Thus, one of the men with high political responsibility for the war was not held responsible for any crime of sexualised violence committed during the attacks or the occupation. Krajisnik's sentence was reduced to 20 years.

While Mrksic, Slivancanin, Sikirica, Dosen, Kolundzija, Kvocka, Zigic and Krajisnik were acquitted of all rape charges the following 3 were partially acquitted of rape or other forms of sexualised violence.

Rape charges dropped, conviction of male sexualised assault: *Dusko Tadic*

Many observers of the ICTY noted that the first trial dealing with sexualised violence had an unsuccessful takeoff. Dusko Tadic, a Bosnian Serb, was accused of participating in 'ethnic cleansing' in the municipality of Prijedor in the Northwest of Bosnia and Herzegovina. Among others, he was indicted with participating in the torture of 12 female detainees of the Trnepolje camp including gang rapes, with "forcible sexual intercourse" of Witness F in Omarska Camp and with forcing 2 male prisoners "to commit oral sexual acts" on a third prisoner. All these acts were charged as war crimes, crimes against humanity and grave breaches of the Geneva Conventions.

At the outset of the trial, the prosecution withdrew all charges of rape. Since the case is well known and the withdrawal of the charges caused much uproar at the time, the case has been included in the present discussion of acquittals. Before the trial commenced, the main witness against Tadic on rape withdrew her testimony. Her identity had been leaked and made public on a German radio programme following which she lost trust in the court at that point.[152] Upon her withdrawal, the prosecutor dropped all rape charges. The fact that is often overlooked however is that another woman did testify in

this trial under her full name and in public. "She was very clear" said Patricia Sellers, "that she wanted the perpetrators within the camp to see her and know that she survived."[153] She was raped multiple times in the military barracks of Prijedor during interrogations, in her flat by a former colleague during a house search, in the police station and several times in the Omarska camp where she was among the women called out during the night for rape.[154] Her testimony and the hearsay testimony of 2 medical witnesses to whom many women had confided about their own rape and the rape of other women, were accepted as evidence that women were subjected to sexualised violence in Omarska.

Tadic was not held guilty for personally raping or sexually assaulting women. However, he was found guilty of aiding and abetting male sexualised assault through active or tacit encouragement.

Acquitted of male sexualised assault, convicted of rape: *Hazim Delic*

Hazim Delic was Deputy Commander of the Celebici camp by Konjic run jointly by Bosnian Croat and Bosnian Muslim forces. Among the 4 accused he was the only one charged and found guilty for directly raping at least 2 women.[155] Delic was also charged with superior responsibility for other crimes committed at Celebici, including forced fellatio. However, the Chamber found that the prosecution did not prove beyond a reasonable doubt that Delic stood within the chain of command in Celebici camp and had the power to issue orders to subordinates or to prevent or punish their acts.[156] The Chamber therefore concluded that Delic is not responsible for the acts of others, including for forced fellatio.

The Celebici Case was among the early cases of the ICTY and the legal concept of JCE as an Article 7 form of liability was not yet developed by the prosecution. However, even if he had been charged with JCE responsibility the cases against *Sikirica et al.* or *Kvocka et al.* show that this is not a guarantee for conviction.

Insufficient evidence: *Kordic & Cerkez:*

The case against Kordic & Cerkez is one of 8 cases (with 13 accused) against Bosnian Croats committed in an area in Central Bosnia named "Lasva Valley", after the river Lasva running through the valley.[157] 3 indictments contained sexualised violence charges. 2 accused, Furundzija and Bralo, were convicted of rape as part of torture.[158] The other 2, Kordic and Cerkez, were found responsible for one incident of rape.

Dario Kordic was one of the leading political figures in Bosnian Croat community from 1991 until 1995. He was president of the Croatian Democratic Union in Bosnia (HDZ-Bosnia and Herzegovina) which became later the Croatian Republic of Herceg-Bosna forming one part of today's Federation of Bosnia and Herzegovina. Mario Cerkez was Commander of the Vitez Brigade of the Croatian Defence Council (HVO). Both were charged with individual and superior responsibility for persecutions of Bosnian Muslim civilians in the municipalities of Zenica, Vitez, Busovaca and Novi Travnik as Crime against Humanity. In addition, they were charged with murder, inhuman acts, wilful killing, unlawful attacks as War Crimes.

Many rapes had been committed in the Lasva Valley area not only by paramilitary units like the 'Jokers' but also by HVO soldiers. The indictment against *Kordic & Cerkez*, however, enumerates "sexual assaults" among other crimes in the general description of charges. There is no specific count, and rape is not mentioned as part of persecutions. Nevertheless, prosecution brought some sketchy evidence of rape during trial but no victim witness was called in to testify. Instead, one female doctor testified that she had received several complaints of women who had been raped in the headquarter of a paramilitary unit called 'Jokers'. Other evidence of rape was taken from the trial against the high-ranking HVO Commander Blaskic who was, as a matter of fact, not charged with rape at all.[159] In one incident, a Muslim woman from Vitez had testified that armed men searching her house for weapons had sexually assaulted her.[160] A former British UN soldier described the other incident. He visited a village that had been attacked by HVO soldiers and found the dead body of a woman with clear evidence that she had been raped before she was killed.

Based on this evidence, the Trial Chamber accepted that rape was established as a fact and thus accepted the rapes alongside other inhuman acts as evidence for persecutions and war crimes. Kordic was sentenced to 25 years and Cerkez to 15.

The Appeals Chamber did not change the sentences but reversed many of the factual findings of the Trial Chamber. With regard to the rapes at the Joker's headquarter mentioned by the doctor, the Appeals Chamber held that the witness as well as the Trial Chamber had mixed up 2 places with similar names. Therefore, the Appeals Chamber dismissed this incident as evidence for inhuman acts.[161] With regard to the testimony taken from *Blaskic*, the Appeals Chamber noted that the reported incidence of the house search left open the question of the identity of the attackers, whether they were civilians or soldiers and whether they were Croats or Muslims. This incident was therefore also dismissed as evidence of persecution. Only the third incident reported by the UN soldier was accepted as evidence of rape and thus as a crime of unlawful attack on civilians.[162] The statistics in the beginning of this chapter therefore counts *Kordic & Cerkez* as convicted for rape only with much reservation.

Acquittals by Trial Judgements

This section discusses the cases that were decided in first instance with appeals pending as of July 2009. The most striking feature here is that of the 9 accused, 8 (in 3 cases) were acquitted of all rape charges (see figure 2). The other notable fact is that 2 of these cases dealt with crimes committed in Kosovo.

Unforeseeability and non-discrimination of rape:
Milutinovic et al.:
The first instance judgement in the case of 6 high-level officials of the Federal Republic of Yugoslavia and Serbia accused of crimes committed in the territory of Kosovo is another example of the pitfalls of charging rape under JCE responsibility. The prosecution charged Milosevic, the President of Serbia, Milan Milutinovic alongside with Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic, and Sreten Lukic of forming a joint criminal enterprise with the common purpose to modify the ethnic balance in Kosovo and to ensure Serbian control over the province. The implementation of the JCE included deportation, killings, forcible transfer and persecutions directed at the Kosovo Albanian population. Sexualised assaults were charged under the counts of deportation, forcible transfer and persecutions.

6 Kosovo Albanian women witnesses testified to sexualised violence (stripping and being touched all over in the pretext of body searches for money) and to rape. One woman testified under her full name and in open session whereby her testimony was presented in form of a written statement;[163] 5 other women testified under pseudonym and in closed session.[164] 2 witnesses testified that during the attack on their village of Cirez/Quirez by forces of the Federal Republic of Yugoslavia (VJ), they were taken in a group of about 20 into a barn by the soldiers. Later, the women were taken out one by one and searched. They had to lift their blouses and were touched all over. Younger women had to endure this treatment repeatedly. 5 young girls were taken out and came back terrified with clothes in disorder and unwilling to speak. 8 women were shot. Evidence of the rape of 8 women who had been drowned in a well was also presented.

3 other witnesses testified of being sexually assaulted in Pristina/Prishtina by VJ soldiers. One woman said she was gang-raped in her apartment by 3 soldiers, the second woman who was still a girl at the time, was taken by Serb policemen to a hotel and raped after they had sprayed her with laughing gas. The third witness testified that she had taken her injured younger brother to a hospital where she was locked into a room in the basement with 10 to 15 women. She was called out and gang-raped. During the attack on the village of Decani/Decan, all villagers were searched for valuables, money and documents. All women had to undress for the search and they were taken to a separate room. During the night the soldiers took out 20 young women and girls and among them was another witness. She told the court she was raped by 4 VJ soldiers in sequence, and that she could hear other girls screaming.

The Chamber was impressed by the detailed and strong testimony of these witnesses and found them all credible and reliable. Nevertheless, several of these rapes were not accepted as evidence and for the remaining only one of the accused, Pavkovic, was held responsible. The judgement not only denies justice to many sexually targeted women in Kosovo during the attacks and expulsion campaign by VJ and Serb police forces, it also demonstrates the problem of charging rape exclusively as evidence of other "larger" crimes and of interpreting JCE responsibility with respect to rape.

a) Rape as part of persecutions
The prosecution had charged all rapes as a crime against humanity, however, not as a separate count but as part of persecutions. The statute of the ICTY limits the discriminatory intent of persecutions to political, racial and religious grounds and does not include other grounds such as gender, age, or any other discriminative ground. In the cases of Quirez and Decan the Chamber accepted that the rapes were acts of persecutions, i.e. that the women had been targeted because they were Kosovo Albanians. The Chamber did not accept this in case of the rapes reported from Prishtina. The overall circumstances of the systematic attack against the Kosovo Albanian population in Prishtina were the same as in the other places but the witnesses from Prishtina did not explicitly refer to any verbal insult concerning their ethnicity.[165] As a consequence, the rapes from Prishtina were not accepted as evidence of persecutions. Since the prosecutor had not charged them independently as crimes against humanity the accused were not held responsible for them.

b) Foreseeability of sexualised violence
Except Milutinovic, who was acquitted of all charges, the other 5 accused were sentenced to either 15 or 22 years imprisonment. However, only Pavkovic, Chief of General Staff of the VJ, was found guilty for rape and sexualised assaults. Just like the Appeals Chamber had found in *Krajisnik*, the Trial Chamber in *Milutinovic et al.* was not convinced that "murder, sexual assault, or the destruction or damage or religious property was within the common purpose" of the joint criminal enterprise. It found that only deportation and forcible transport were originally part of it. The Chamber did not discuss the question of expansion of the common purpose but only considered "whether these crimes were reasonably foreseeable in the execution of the common purpose when addressing each of the Accused".[166]

In other words, the Chamber considered whether the actions of the group of which the accused were members, were likely to lead to killings, destructions and sexualised violence. In case of Ojdanic and Lazarevic, the Chamber found that they had not been members of JCE but had given practical assistance and support to the deportations. They had had no knowledge that the VJ forces had the intent to kill or sexually assault Kosovo Albanian civilians. In case of Sainovic, Lukic and Pavkovic, the Chamber confirmed their JCE membership and held that all 3 could have foreseen killings and destructions of religious property. However, the Chamber also held that only Pavkovic could also have foreseen rape.

Only Judge Chowhan saw this differently and submitted a dissenting opinion:

"I respectfully differ from the view expressed by the majority regarding the foreseeability of sexual assault of Kosovo Albanian women to members of the joint criminal enterprise. In a conflict like the one we are addressing, which involved able-bodied military and security forces acting pursuant to a common plan to use violence to remove large numbers of Kosovo Albanian civilians, including women, from their homes, prudence and common sense, as well as the past history of conflicts in the region, lead me to think that sexual assaults, like murders, were certainly foreseeable realities. Thus, I consider that it was foreseeable to the Accused found to have participated in the joint criminal enterprise that Kosovo Albanian women and girls would be raped and sexually assaulted in the execution of their criminal enterprise, and would find them responsible by way of the third form of joint criminal enterprise for the sexual assaults proved in the present case."[167]

The case is on appeal.

No identification: *Haradinaj et al.:*
The second case involved 3 members of the Kosovo Liberation Army (KLA) Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj. All 3 were charged with participation in a joint criminal enterprise with the purpose of consolidating total control over the KLA operational zone through the removal of Serb civilians and the violent suppression of real or perceived collaboration with Serbs by Albanians or Roma civilians. In 1 count they were also charged with rape as a Crime against Humanity. Balaj was accused of raping Witness 61 while the other 2 were charged with superior responsibility. The Trial Chamber acquitted all 3 of participation in a joint criminal enterprise. With respect to the rape, the Trial chamber held that KLA soldiers raped Witness 61 but it was not proven that Balaj had raped the witness since the witness could not identify him in court. Haradinaj and Balaj were acquitted of all charges and Brahimaj was sentenced to 6 years for torture.

The case is on appeal.

Mistake of fact: *Rasim Delic:*
Rasim Delic was the Commander of the Main Staff of the Army of Bosnia-Herzegovina. He was charged with murder, cruel treatment and rape as war crimes. According to the indictment, 3 Serb women had been captured and taken for 2 nights to the Kamenica Camp nearby Zavidovici, in Central Bosnia. The camp was run by El Mujahed fighters incorporated in the Army of Bosnia and Herzegovina (ABiH). The women were kept separate from male prisoners, beaten, kicked and raped.

The indictment had placed the sexualised assaults against the 3 women in Kamenica Camp while the testimony in court by one of the women showed that they in fact took place in the steel factory in Zenica. During trial, the prosecution moved to withdraw the rape charges. The motion was denied on grounds that it "would not be in the interests of justice because the accused could be tried again on that count and because he is entitled to a formal verdict on that count".[168] The Chamber held that the women had been abused but since the sexualised attacks did not happen in the place alleged in the indictment, Delic was acquitted of superior responsibility for rape.[169]

A review of the acquittal cases above allows for some cautious conclusions. In all cases in which rape survivors testified the Chambers emphasised that they had found the witnesses credible. As for the concluded cases, the evidence presented by the prosecution was so poor that it is hard to recognise a serious will to prosecute rape. In *Mrksic et al.* the Chamber found the prosecution did not present any evidence for rape. In *Sikirica et al.* the prosecutor accepted that the accused could not have known about the rapes and was obviously easily ready to drop the rape charges against the other 2 accused. In *Kvocka et al.* the prosecutor agreed, that she did not prove the accused's presence. In *Kordic & Cerkez et al.* evidence of rape was less than sketchy and no witness testified. In *Delic* (first instance) the prosecutor confused sites. In *Haradinaj et al.* (first instance) identification failed. However, at least in the latter case the prosecutor appealed against the rape acquittal.

The situation in leadership cases is different. In *Krajisnik* all facts were proven but the Appeals Chamber found they did not fulfil the legal requirement of JCE responsibility. The same applies for *Milutinovic et al.* (first instance). The prosecutor appealed here as well against the rape aquittals. However, even if the Appeals Chamber reverses the Trial Chamber judgement which it should the developoment described above shows that the mere listing of "rape and sexual assault" among many other crimes under persecution, genocide or as JCE responsibility clearly runs the risk of loosing the cases.

Cases with sexualised violence evidence but no charges

There are several cases before the ICTY that do not contain charges of rape or sexualised assault but in which evidence of rape is nevertheless brought forward during trial. One of them was already mentioned in the context of the trial against Kordic and Cerkez. A high-ranking HVO commander, Tihomir Blaskic, was charged with persecutions, murder, unlawful attacks, and extensive destructions. Sexualised violence was not included in the indictment but was brought forward during trial to prove inhumane acts. Most rape evidence in *Kordic & Cerkez* was based on testimonies from the *Blaskic* trial. However, in *Blaskic* as well no rape survivor testified directly. One man described a scene from a detention site in which a woman taken out by HVO soldiers came back crying and telling that she had been raped. A female witness confirmed that young women were taken out at night and that the walls in the school were full of frightening drawings and written threats like "this is how we would rape Muslim women".[170] These accounts played only a tiny part in the Blaskic trial but the Chamber accepted them as evidence of inhuman treatment. *Blaskic* was sentenced to 45 years in first instance. The Appeals Chamber, however, quashed most of the Trial Chambers findings and reduced the sentence to 9 years.

Similar sketchy evidence of rape was found in several other trials.[171] In some cases the Court accepted it as evidence for persecutions.

At this point, the recently concluded trial against Milan and Sredoje Lukic needs to be given special attention. Milan Lukic was the leader of the notorious 'White Eagles', a group of local Bosnian Serb paramilitaries in Visegrad known for their incredible cruelty and relentlessness. Both were charged with persecutions, murder, inhuman acts and extermination as crimes against humanity. Many women in Bosnia have waited for long to see in particular Milan Lukic tried.

Visegrad is situated in south-eastern Bosnia and was one of the first towns to be taken by the Yugoslav People's army in April 1992. Many Muslim men, women and children were killed by local Serbian police and paramilitaries. Those who escaped the murders were detained in various locations in the town. The former Spa "Vilina Vlas" became known world-wide as a place of torture and rape. Many of the media reports from 1992/93 reported about mass rapes that took place in and around Visegrad from about Spring to Autumn 1992. The Report of the Expert Commission contained 33 reports on rapes in Visegrad:

"The Hotel Vilina Vlas was the subject of many reports. The Hotel is located in a forest, about seven kilometres outside Visegrad, and is known as a spa or mineral thermal cure resort. It was apparently the site of many rapes. One report estimates that 200 women, primarily Muslim, were detained at the hotel and sexually assaulted. It states that five victims committed suicide and many others were killed. One report claims that younger girls were taken to the hotel while older women were taken to other locations, such as occupied or abandoned houses, and raped. The number and consistency of the reports provides reasonable confirmation that a large number of rapes did in fact occur in this hotel. (…) Other sites of alleged sexual abuse included a large fire station, a home for retarded children at Visegrad, the Visegrad Hotel, Hotel Bikavac, and a camp set up in a building above a tunnel."[172]

The initial indictment goes back to 1998; it did not contain any rape charges. In 2001, Chief Prosecutor Carla del Ponte amended the indictment but did not add any rape charges. The 2 cousins were eventually transferred to the ICTY in 2005. The new Chief Prosecutor Serge Brammertz moved the Court to amend the indictment. The Trial Chamber however denied the request on the ground that the Prosecution had failed to provide adequate notice to the defence and that an amendment shortly before the beginning of the trial would "unfairly prejudice the Accused".[173] In its decision, the Trial Chamber also quoted former Chief Prosecutor Carla del Ponte who "had taken the position that fulfilling her obligations to conclude the work of the Prosecutor in the time frame mandated by the UN Security Council did not permit an amendment to add sex crimes to charges which … would add to the length of the trial".[174]

Under Carla del Ponte (1999-2007) the commitment in prosecuting rape dropped significantly, not only at the ICTY but even more dramatically at the ICTR. The number of new indictments declined increasingly. Many of the acquittal cases mentioned before fall under her responsibility. At the ICTY all major rape cases fall in the early period of the court. Del Ponte did not hide her lack of interest in prosecuting sexualised violence. In a particular case before the ICTR she ordered her team to withdraw a rape amendment and is quoted to having said that "I can do this because I am a woman. If I were a man, there would be a fuss".[175]

On 20 July 2009 the Trial Chamber sentenced Milan Lukic to life and Sredoje Lukic to 30 years imprisonment. Rape was not charged but rape evidence dominated during trial through the testimony of 8 women. However, this had no effect on the sentence and it served largely to rebut Milan Lukic's alibi.[176] The colossal failure to prosecute rape commited in Visegrad, amounts to a serious denial of justice for many women who had waited long for the Lukic trial.

Ongoing trials and pre-trials

The picture would remain incomplete without any mention of some of the ongoing cases that include sexualised violence charges. All of these are cases involving persons in leadership positions. In *Prlic et al.* are 6 men indicted, among them are some of the highest-ranking representatives of "Herceg-Bosna." All of them are charged with JCE responsibility for, among others, rape and for sexualised assault as inhuman treatment referring to events that took place in the municipalities of Prozor, Mostar and Vares. The case includes multiple rapes of Muslim women from Mostar detained in Vojno Camp. While the indictment is clear with regard to the gender of the victims when it talks about rape and sexualised attacks against women, allegations of male sexualised assault can only be inferred from phrases like HVO soldiers forced detainees "to perform sexual acts".[177] The trial commenced in April 2006 and is ongoing. Several women testified about their own rape.

The case against *Dordevic* is based on the same charges as *Milutinovic* and it remains to be seen whether this case will also lead to acquittals on rape charges. The president of the Serbian Radical Party and founder of the Cetnik movement, Vojislav Seselj is charged with persecutions, sexualised violence is enumerated under this count. Cases against 2 leading Bosnian Serb politicians, Stanisic and Zupljanin, are currently in pre-trial stage and they are also charged with sexualised assault under the count of persecution.

The ICTY's current most prominent detainee is Radovan Karadzic. He is charged primarily with genocide and also with murders, unlawful killings, extermination, persecution, deportations and inhuman acts. So far, none of the accused before the ICTY has been convicted for genocide. "Rape and other acts of sexual violence" are listed as part of genocide, persecutions and as inhuman acts during attacks on the civilian population and in detention sites.[178] With this indictment, the Court missed its last opportunity to charge rape separately as torture and as crime against humanity, and to pin the responsibility for sexual enslavement to one of the high-level politicians. The Foča Trial will thus remain the only case in which enslavement as a particular pattern of sexualised violence against women was charged and convicted. The selling of women and girls as well as rape in conincidence with murder remains uncharged before the ICTY.

4.2 Women's Roles in Successful Prosecutions of Sexualised Violence

The shortcomings of prosecuting sexualised violence before the ICTY are only part of the picture. Both, the ICTY and the ICTR succeeded in inscribing rape and other forms of sexualised violence in internationale criminal law. Case upon case the courts established rape as crime against humanity, as grave breach of the Geneva Conventions, as violation of the Laws and Customs of War, and as part of Genocide.[179] Thus, the ICTY (and the ICTR) by expanding humanitarian law created a new legal basis for prosecuting sexual war violence.

However, both the tribunals had to navigate through many unknown waters and the investigation and prosecution of sexualised war violence was one of them. Given the complete failure of prosecuting war rape in the past, one would have hoped for certain proactive measures to ensure that such crimes are adequately and coherently addressed. Such meausres could have been, for example, a gender balanced composition of all organs of the court as well as qualfication programmes to secure the expertise in gender and sexualised violence. The ICTY did not implement any of this. Neither the Statute nor the Rules of Procedure and Evidence require the Court to have a minimum quota in the employment of women and staff with expertise in regarding sexualised violence. The only rule asking for "due consideration" of qualified women in the appointment of staff is Rule 34 (B) referring to the Victim and Witness Section.

It must be stated therefore that had it not been for a handful of highly committed women and men it is doubtful whether the 2 courts would have made even fewer progress at all in prosecuting sexualised violence. It was already pointed out that despite the widespread publicity of rape and sexualised violence from 1992 onward, the first thorough investigation of sexualised violence would not have taken place without the commitment of the head of the Expert Commission, Cherif Bassiouni. The appointment of a special investigative team with experienced members such as Nancy Patterson was a precondition for its swift and effective work under extreme difficult situations.

Similarly, the first Chief Prosecutor of the ICTY Richard Goldstone was aware that the existing international law had turned a blind eye on rape because "the laws were conceived of and drafted by men".[180] He therefore appointed Patricia Viseur Sellers as gender legal adviser to the Office of the Prosecutor. Since the prosecution of large-scale sexualised war violence had practically no precedence, and faced with limited provisions in the ICTY statute prohibiting such violence, her task was enormous. She was involved in most of the ICTY's precedence cases on sexualised violence. However, her mandate was limi-

ted to "advice" and her position was not institutionalised in a way that gave her authority to ensure exhaustive, coherent and persistent investigation and prosecution. Since she left in 2006, she has not been replaced.

The history of the ICTY shows that the prosecution of sexualised violence requires political will of the Chief Prosecutor, a gender-balanced and qualified staff to develop a comprehensive prosecution strategy, special investigative teams and a coherent policy to monitor and evaluate the work and progress done.

The UN General Assembly elected 11 judges for the ICTY after 10 rounds of scrutiny. When they met at a noble Spa in The Hague in November 1993, to discuss the task before them, there were only 2 women among them: Judge Elizabeth Odio Benito from Costa Rica and Judge Gabrielle Kirk McDonald from the United States. Despite the public commitment of the UN to deal seriously with sexualised violence crimes directed in particular against women, the UN did not follow Bassouini's example to ensure the implementation of the commitment. "The first unpleasant surprise came," recalled Judge Odio Bentio 6 years later, "when only two women got elected to the Tribunal out of a total of 11 judges. To me that was a bad sign because I had hoped that if more women were part of the Tribunal, their presence would serve to make these crimes more important in the proceedings. The two of us have had a long difficult struggle, although we were supported by some of our colleagues. (…) But the need for more women has been painfully evident during these years".[181]

There are no official data available reflecting the gender composition of the Court. According to Kathrin Greve, who examined the prosecution of sexualised violence before the ICTY and the ICTR up to 2004, the percentage of female judges until 2004 was never higher than 24 and sometimes it was even down to 12.5. The Ruanda Tribunal faired better with up to 40% female judges. On an average, 18% were female judges at the ICTY and 22% at the ICTR.[182] In 2009, the percentage is 23 with only 2 of the permanent judges and 4 of the 12 *at litem* judges being female.

"In spite of (…) Judge Goldstone's efforts," Judge Elizabeth Odio Benito recalled in 1999, "the indictments that followed did not reflect the crimes committed against women".[183] Judge Odio Benito intervened several times in the Pre Trial phase because "I was worried that once again we were going to invisibilise what had happened to women on the pretext that we did not have any evidence or that no one was talking about rape".[184] On 8 November 1994, she publicly appealed to Chief Prosecutor Goldstone not to forget crimes against women in the indictment against Dusko Tadic.[185] About a year later, she was one of the 3 judges to confirm the first indictment of the ICTY. Dragan Nikolic, the commander of the Susica Detention Camp in Vlasenica, eastern Bosnia, was charged with murder, torture and persecutions of non-Serb camp detainees. Athough there had been numerous reports on rapes in that area, the indictment did not contain any rape charges. During the confirmation hearing,[186] several witnesses talked about rape. Judge Odio Benito ensured that everyone heard them. In its decision to confirm the indictment, the Trial Chamber invited the Prosecutor to amend the indictment with charges on rape and sexualised assault. The Trial Chamber found that the witness statements submitted by the Prosecutor himself suggest "that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Susica camp. Dragan Nikolic and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances".[187] The Prosecutor amended the indictment subsequently.[188]

Similarly, Gabrielle Kirk McDonald too had to intervene when confronted with an indictment that did not contain any rape charges:

"There were one, two, three Indictments, major Indictments and while rape had been charged in one Indictment, it was not charged in the major one. As soon as I looked at the Indictment, I called the prosecutor assigned to the case and asked him about it and he said, 'We do not have any statements. There is no support for it.' So I said, 'You know me. I am going to go through every single page, every single page of this material, and if I find something, I am going to tell you.' I worked through it all and I found numerous statements referring to rape. One of the physicians who had treated rape victims had not even been contacted to find out whether there were any who would want to talk about it. In the statements, the women said that they would be willing to testify. It was not like they were saying, 'This happened to me and I don't want to talk about it.' That is usually the excuse given, that they do not want to talk about it. (…) I called a legal assistant and I said, 'We have some problems here and I need you to help me.' We prepared a whole list of references to rape in the material. So when I confirmed the Indictment I said, 'Now I want to get into something else. Rape has not been charged. Let me go through what I have found.' I went through it affidavit by affidavit. I turned each page and just kept on going, affidavit by affidavit. Then, in one Indictment, rape was charged (…) In another Indictment, the whole affidavit was in there but was not charging rape. They were shocked by that. So I say that before you get a monument, you have to earn it, meaning that rape has to be charged; it has to be brought out; it has to be part of the trial." [189]

All of the ICTY's most important precedent cases on rape and female sexualised assault involved the active participation of women at the Court, both on the bench and in the prosecutorial team.

1. The Celebici Case

The so-called 'Celebici' trial took place in 1998 with 4 accused held responsible. The case was about a camp situated nearby the village of Celebici in Central Bosnia jointly run by Bosnian Croat and Bosnian Muslim. The accused were Delalic, a military commander of the region; Mucic, the camp commander; Delic, the deputy camp commander, and Landzo, a guard of the camp. Except for Landzo all were charged with superior responsibility for the crimes committed in the camp, including rape and male sexualised assaults. In addition, Delic was charged with rape as a form of torture constituting a grave breach of the four Geneva Conventions.

2 female witnesses testified under their full name and in open session on being repeatedly raped by Delic. Witness Cecez was raped during interrogation by the accused Delic and in view of other soldiers. The accused instructed her not to tell anybody about it. Later, 4 soldiers raped her in detention room one after another. 2 of them told her not tell anyone about it, the third left in a hurry after he heard noises in the hallway and while the fourth one said: "Do you see how a Turkish cock can fuck?"[190] The sixth instance of her rape was when Delic handed her over to a civilian whom she could not recognise because they turned off the lights. She besieged him not to rape her saying that she does not know anything about the whereabouts of other family members. However, the man only said: "We won't talk about that. Let's talk about sex", following which he raped her.[191]

Witness Antic was raped at least 3 times by Delic. During her first interrogation, the accused Mucic asked her if she was married. When she denied, he said to Delic: "This is just the right type for you."[192] Later in the night, Delic ordered her into his room and asked her name and address. He then cursed her "Cetnik mother", ordered her to take off her tracksuit and asked her why she was not dressed nicely, following which he raped her. The next morning he came into the room where she was detained with other women and asked her how she felt. When she cried he said: "Why are you crying? This will not be your last time." The next time Delic ordered her through a guard to take a shower, "to take a really good bath to wash myself very clearly, very much because some doctors would come to examine us." After the shower she was taken to Delic's room where he raped her trying out different positions.[193]

The Trial Chamber in *Celebici* was composed of 3 judges; 2 men, Judge Karibi-Whyte and Judge Saad Saood Jan, and 1 woman, Judge Elizabeth Odio Benito. The Chamber set a very important precedence by qualifying all the rapes including those that took place in context of interrogation as torture. The Chamber stated that the rapes, "causes severe pain and suffering, both physical and psychological".[194] The purpose of torture, it found, cannot be reduced to obtaining information, as the defence had alleged, but such purpose includes punishment, intimidation, coercion and discrimination of any kind, including gender. In addition to intimidation, punishment etc., the Chamber stated, "the violence suffered by Ms. Cecez in the form of rape, was inflicted upon her by Delic because she is a woman".[195] The Chamber noted the same for the rapes of Ms. Antic.

Such a judgement that clearly stated the gravity of rape would not have been possible if rape would have been charged as an act of persecution.[196]

Furundzija and Bralo

The *Furundzija* judgement was issued one month after the *Celebici* judgement. The case involved 2 members of the Bosnian Croat paramilitary group, called 'Jokers' operating together with the Croat defence forces HVO in the area of Lasva valley. When the trial against Furundzija took place, the second man, Bralo, was still at large. Both had commanding functions within the group. Their headquarters was situated near Vitez, often referred to as 'the Bungalow'. During the so-called 'war in war' in 1993 between Bosnian Croat and Muslim forces, non-Croat civilians, mostly Muslims, were detained and tortured in 'the Bungalow'.

Patricia Viseur-Sellers led the prosecution on this case. Witness A was raped in context of interrogation. While Furundzija questioned Witness A, Bralo threatened her with a knife. Witness A was also forced to sit undressed before several soldiers and Bralo raped her repeatedly during the breaks of the interrogation. He even stopped another soldier from beating the Witness "as he had 'other methods' for women".[197] Furundzjia was charged with rape as torture and outrage upon personal dignity, both constituting war crimes.

The Trial Chamber with Judge Florence Mumba presiding, held that there is no doubt that Furundzija and the other commander (Bralo) "divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D".[198] Furundzija

was convicted of torture and of aiding and abetting in rape as outrage upon personal dignity. He was sentenced to 10 years of imprisonment.

Miroslav Bralo surrendered in 2004. He was accused of several other crimes, among them the participation in the attack of the village of Ahmici and thereby killing at least 14 persons. For those acts and other killings he was charged with persecutions, murder, torture; for the acts he committed against Witness A he was charged with rape in a separate count as war crime and as grave breach of the Geneva Conventions. Bralo pleaded guilty to all counts; the Trial Chamber found that he had undergone a personal transformation since the commission of his crimes but nevertheless sentenced him to 20 years imprisonment because of the gravity of crimes he had committed.

The Foča Trial

The ICTY's most prominent case involving rape was the Foča Trial, which demonstrated the gendered realities of war. The 3 accused in this case were: Dragoljub Kunarac, an alleged commander of a group of mostly Montenegrin volunteer soldiers, Radomir Kovac and Zoran Vukovic, both members of a military detachment of Bosnian-Serb forces based in Foča. All 3 were accused of multiple rapes. Kunarac and Kovac were charged in addition with enslavement of young women. They were charged with 29 counts of crimes against humanity and war crimes.

The Foča trial revealed the ways in which racism and sexism interacted to constitute an environment in which the female part of the Muslim population of one region was targeted and became fair game with the approval, albeit tacit, of the majority Serb population. The many female witnesses of the defence called in to prove alibi or to discredit the prosecution witnesses only confirmed the extent of their support to the systematic attack through their readiness to deny and lie for the accused.

With the exception of one woman who was raped by Kunarac and 2 other men in the context of a house search, all other women who testified in trial had been detained in collective centres like schools or sport halls after being taken hostage. At night, soldiers would take them elsewhere and rape them. A couple of guards tried to prevent it without much success. Most guards either joined in or looked the other way. Many participated in the crimes, including the chief of police Gagovic.[199] Kunarac's gang, a small group of soldiers often tasked by the local battalion with reconnoitring resided in a house close to the Aladza mosque, which was eventually completely destroyed. Kunarac brought several young women and girls from the detention site to this house to 'serve his men' in all respects. Sometimes the women were gang-raped.

Women and girls were also held in a house called the Karaman's house in a small town close by, where soldiers led by a military leader Pero Elez resided. Young women and girls taken hostage from either detention sites or directly from their homes were held in this house. The youngest were barely 13 years old. Elez was killed later in broad daylight. From Kunarac's testimony it can be inferred that the 2 gangs quarrelled over "their" women and that during one such fight, Kunarac's best friend was also killed. After Elez's death, a former policeman from Foča, Radovan Stankovic, took over the command of Karaman's house. Kunarac himself came frequently to rape some of the girls he had moved there from his headquarter. Together with a former Café owner in Foča, Gojko Jankovic[200], Kunarac also held at least 2 girls hostage in another house. They treated them as property and it was clear who "belonged" to whom. There was also a female soldier Jadranka in this house promoting the rape of these young women and treating them with utmost cruelty.

The accused Kovac also held at least 2 young women hostage together with his comrade Kostic in an apartment building. Here too, the men ensured that the women knew who they had to obey. From time to time, he also brought in other women as well as other soldiers who would rape them. In the trial, Kovac tried to pass off the enslavement as a love affair. He frequently took out 'his' girl to parties or to a café where she had to pretend being his girlfriend, while everybody knew this was not the case. By then, all Muslims in and around Foča had either been killed, deported or detained. During the trial, many witnesses talked about of many other 'houses' where women were taken to and passed on from one soldier to another.

Some, maybe many women were sold to weekend fighters from Montenegro and there is also evidence that those in charge of the 'bordellos', as the Bassiouni report had termed such houses, took money from other soldiers or whatever was valuable and scarce at that time in exchange for procuring women for them. These facts could easily be termed small scale trafficking in women and girls.

The trial refers to 2 large groups of women detained in Foča or nearby Kalinovik – each up to 60 or 70 persons, including children and a few elderly men. The trial did not give a total number but it can be inferred from the testimomies that the groups the witnesses came from were not, by any means, the only ones. Other sources[201] confirmed that rapes took place in other places as well like, for example, the hospital. There are no estimates of how many women were raped during house searches and how many men kept girls and women in their flats.

Foča became a place where men who wanted access to women for sex were constrained only by the ownership

claims of other men and by ethnic affiliation of both, perpetrators and victims. Some would even take the girls to their parent's homes, give them Serb names and introduce them as girlfriends. It is impossible that crimes of such scale could have taken place in a small place like Foča without, at the very least, the tacit consent of the remaining Serb population.

This case was investigated and put together by a team of mainly 3 women. Hildegard Uertz-Retzlaf, a prosecutor from Germany, headed the investigation from 1995 onward; Tejshree Thapa, a lawyer from Nepal, conduced most of the first interviews with rape survivors; and Peggy Kuo, an Asian America trial attorney, played an important role in the trial phase. The team was supported by female Croat interpreters and received advise from Patricia Sellers and Nancy Patterson. Thanks to this all female team, the Foča trial not only dealt effectively with the separate acts that had been charged, but the trial also placed the acts into the overall context of both, the general attack on the Muslim population in that region and the specific attack on the whole of female Muslim population used as 'war rewards or booty' for the warring soldiers.

31 witnesses testified for the prosecution, among them were 24 women who had survived a nightmare of continuous rapes, gang rapes and enslavement. 6 more women testified as survivors, in part mothers or close relatives of those who had been raped. Without these witnesses and the witnesses in all other cases, none of those responsible for rape and other forms of sexualised assault would have been held responsible. Kunarac was sentenced to 28 years of imprisonment, Kovac to 20 and Vukovic to 12 years.

4.3. Sexualised Violence Trials in Bosnia and Herzegovina

Like the ICTY, the WCC does not keep a data base on trials. To establish a tendency in regard to conviction rate and charges we conducted an analysis of the judgements published on the website of the WCC up to 1 June 2009. Those were both first instance and appeals judgements. The findings are based mainly on judgements since contrary to the ICTY transcripts of trial proceedings are not available online. This is a very limited source as the written judgements at the WCC are rather short as compared to the comprehensive descriptions of facts and legal discussions of ICTY judgements. Additional data were taken from the annual report of the WCC published by the Registry and from the (BIRN)[202] reports; however the latter did not entirely match with the data from the judgements. Since it takes several months to publish judgements on the website the judgements we analysed were rendered from 1 July 2005 until 20 February 2009 only.

A total of 45 cases was reviewed.[203] 30 cases were completed (appeal judgement reached). 11 (36.7%) completed cases[204] and 4 (26.7%) cases in which the first instance judgements were reached included sexualised violence charges.

If we look instead of cases into the statistics relating to individual accused then we have 67 accused in total. 20 of them (all men) were accused of sexualised violence.[205] 11 of them had their cases completed, 9 were found guilty for, among others, sexualised violence against women. Figure 7 gives the conviction rate of accused charged with sexualised violence as compared with accused not charged with sexualised violence in completed cases.

Only 31.4% of individuals were accused of sexualised violence. The conviction rate of those accused of sexualised violence was 81.8%, as compared to a higher conviction rate of 91.7% in case of those not accused of sexualised violence. While this data might not allow for a statistically significant conclusion it does mark a tendency.

The cases on appeal at the time of conclusion of the review, had 9 men charged with sexualised violence, all of whom have been found guilty in first instance.

Sexualised violence charges

In the case of the 20 men charged with sexualised violence all victims were females. 17 of those men were charged with sexualised violence under crimes against humanity, and 3[206] were charged under war crimes against civilians (in the completed cases, this ratio is 9 charges crimes against humanity and 2 charges for war crime against civilians). One of the accused charged under war crimes against civilians, Pincic Zrinko, was charged exclusively with sexualised violence. In 2 cases in which the accused persons[207] forced 2 men to engage in oral sex (forced fellatio), the charges were characterised as torture, as war crimes against prisoners, and as war crime against civilians.[208]

Finally, when viewing the cases that involve sexualised violence charges it needs to be pointed out that 8 cases[209] refer to mass rapes (mainly in detention). These accused, apart from 2 cases (*Tanaskovic* – aiding and abetting and *Mejakic et al.* – command responsibility), were charged as direct perpetrators. Nedjo Samardzic and Gojko Jankovic have directly been found guilty, among other things, for sexual slavery.

Plea agreements

6 cases were concluded based on plea bargaining. Only one case included sexualised violence charges[210] and in his plea the accused pleaded guilty to rape.

Accused charged with sexualised violence		Accused not charged with sexualised violence		Total
11		24		35
31.4%		68,6%		
Convictions	**Acquittals**	**Convictions**	**Acquittals**	
9	2	22	2	
81.8%	18.2%	91.7%	8.3%	88,6%

Figure 7: Conviction rate of accused charged with sexualised violence

Acquittals

Several sexualised violence cases failed either in first or second instance because the judges found either the witnesses not credible or their testimonies unreliable. Thus, for example, the Appeals Panel dismissed the rape charges in *Vukovic Radmilo* and *Vukovic Ranko et al.* because the witnesses were found not credible. In some cases, rape charges were dismissed in first instance but the decision was reversed in appeal (for example in *Samardzic*). A closer look at the reasoning of the judges and the descriptions of testimonies given in the judgements reveals that several acquittals were influenced by everyday theories on rape and stereotyped behavioural expectations of rape survivors. In addition, our own observations in trial monitoring in 2008 confirmed that many of the disputed inconsistencies in testimonies could have been avoided if the witnesses had been prepared better by the prosecutors, indeed if the prosecutors had known their own witnesses better.

In the following we take a closer look at some cases.

The case Samardzic[211]:
The trial against Samardzic is closely connected with the other 'Foča trials', i.e. with the ICTY trial against *Kunarac et al.*, and with the WCC trials against *Stankovic* and *Jankovic.* Nedjo Samardjic had been a soldier in the Republica Srpska Army and he was accused of committing and aiding to commit killings, force relocations of persons, deprivations of liberty, sexual slavery, rapes of and persecutions against Bosniak inhabitants on "political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law" in the period between April 1992 and March 1993, on the territory of the Foča municipality (Art. 172, item 1h of the Criminal Code of Bosnia and Herzegovina). According to the indictment Samardzic beat up and raped a woman together with a group of soldiers in June 1992. Together with his brother, the accused forced the woman out of the house, took her to the Motel where she was repeatedly raped over a period of 7 days. Furthermore, he was accused of keeping a number of women and girls of Bosniak ethnicity in sexual slavery in the so-called 'Karaman's House' in Miljevina together with Radovan Stanković and Nikola Brcic. The Women and girls were, coerced into sexual intercourse as well as physical labour. He was also charged with having raped a number of women on several occasions in the period of July – August 1992 and of raping female patients in the Foča Hospital together with Radovan Stankovic, Dragomir Kunarac and other soldiers.

In 2006, the Trial Panel acquitted Samardzic of nearly all rape charges because they found the witnesses not credible or their statements not reliable. In some cases, testimonies were dismissed because of discrepancies between the statement the witness gave in court and several statements she had given several years before in other situations. Many of those discrepancies were of minor nature and could have been clarified if the Prosecutor had been better prepared and if he had also prepared the witnesses more properly. In other cases, women were not believed to have been imprisoned and enslaved in Karaman's House because they had a key to the house. Note, that most of these women have been girls between 12 and 18 years at the time of war and that in the whole area all Muslims had been killed, deported or imprisoned. They had no chance to escape. In another case, the Panel interpreted the words "they lived together" used by a witness to paraphrase the imprisonment and continuous rape of another young girl as "a community of two people without duress". The Trial Chamber failed completely to integrate the individual statements into the broader context of the attacks and the occupation of the area by Serb forces.

The acquittal of nearly all rape charges caused public uproar and the case went into re-trial eventually. While the main trial was held in closed session, the re-trial was

open to the public and audio records of the testimonies were played in court. In the trial judgement, Samardzic appeared as not much more than a hanger-on who aided and abetted in holding women and girls in sexual slavery. The testimonies now heard in public told a different story. Samaradzic comes out as a soldier who was particularly brutal and active in the commitment of crimes and belonged to the more influential local leaders. The Appellate Panel gave full credit to this and reversed most of the Trial Panel's acquittals emphasising the credibility of the witnesses. The sentence of 12 years given by the Trial Panel was increased to 24 years.[212]

The case Vukovic Radmilo:
Radmilo Vukovic was charged for raping witness A several times in his house in Foča as a result of which she bore a child. He was charged with killings, torture, inhuman treatment and rape as war crimes against civilians.

Although there were some inconsistencies in the testimony of Witness A, namely pertaining to the question whether or not she had had an intimate relationship with the accused before the war, the first instance court gave full credit to witness A even though the panel found that the witness had lied in regard to her former relationship:

"Witness A unequivocally described the act of being raped by the accused Radmilo Vukovic, while the testimony of witness B (sister – the authors) was clear, logical and complementary in a manner that leaves no space for any doubts as to its accuracy. In fact, the testimonies are utterly consistent and correspondent in their essential and important elements, and the few varying interpretations of certain facts do not raise suspicion in relation to the authenticity and credibility of the accounts, given that these discrepancies are normal in the witnesses' psychological processes and do not refer to any of the crucial facts."[213]

Vukovic was sentenced to 5 years imprisonment. However, the Appelate Panel took the opposing view and gave significantly more weight to inconsistencies in the testimonies of both witnesses, in particular to the alleged lie of the victim witness about her previous relationship with the accused.

"Taking into account that the testimony of the injured party is a key piece of evidence in the case, it is absolutely necessary to consider that testimony very carefully starting from her first giving the information about the event itself and the perpetrator up to the completion of the main hearing in the case. The testimony of the injured party must not raise any suspicion as to its exactness and truthfulness, credibility and integrity of the witness exactly because the act of rape, as a rule, is never attended by a witness who might decisively support the testimony of the injured party.
This was particularly required in the instant case, since this was not a typical rape, characteristic for that period of time and the territory where the women were brought to the collection centres, repeatedly raped by a number of unknown persons, frequently detained and without any contact with the outside world, when, as a rule, there were witnesses to their apprehension or the act of rape itself, and where an incomplete or wrong perception of the victim might have occurred, caused by such specific circumstances, circumstances of long-term detention and multiple rapes by unknown persons."[214]

The Appellate Panel also found that the witness' behaviour afterwards (she tried to keep her pregnancy a secret but did not get an abortion while it was still time) was not logical as well as the fact that the accused had brought up the topic of contraceptive. "Such a behaviour", the Appellate Panel found, "by which the rapist brings the attention to the pregnancy problem is not a usual or logical behaviour of the person charged with the rape".[215] Vukovic was consequently acquitted.

The fact that the Appellate Panel based its verdict, among others, on speculations about 'logical' or 'illogical' behaviour of both the accused and the injured party is most troublesome. Such behavioural expectations are based on stereotypes that are closely linked to rape stigma. What the Panel did not discuss was the question why a woman after she had kept the rapes painfully secret would want to expose herself many years later. Upon our own observations after the first instance verdict we found that many people within the WCC from different sections had no doubt that the witness had lied about her prior relationship with the accused.

Without taking prejudice towards neither the witness nor the accused the gender biased argumentation of the Appellate Panel reveals lack of knowledge in terms of victimology and the psychology of giving testimony in rape cases.

Boban Simsic case
Boban Simsic was charged with the criminal offences of crimes against humanity – persecution in conjunction with, among others, rape. During war, Boban Simsic acted as a police officer in Visegrad. His case is connected with the ICTY trial again Milan and Sredoje Lukic as he acted together with Lukic' paramilitary group, the 'White Eagles'. Simsic was charged with murder, forcible transfer of the Muslim population, imprisonment, torture, other inhumane acts and rape. In 4 counts, he was accused of sexually assaulting women, in particular in participating in at least 2 different situations in gang-rapes

of several girls and women and in handing them over to other soldiers for the purpose of rape. 21 female witnesses testified to these charges, at least 9 women said they had witnessed other women being taken out for rape and at least 6 witnesses testified they had been raped or forced to strip naked by either Simsic or by the soldiers he had handed them over to.

In 2006, the Trial Panel convicted Simsic to only 5 years and found him not guilty of having raped personally any of the women. He was, however, convicted for singling out girls and young women who had been detained in a school building "to procure them to members of the Serb Army, who carried out multiple rapes, beating and humiliation of several female persons"[216] The Appellate Panel confirmed the acquittals of rape but increased the sentence to 14 years as the Panel reversed several other acquittals concerning killings, enforced disappearance and torture. Thus, aside from the acquittals of all personal rapes the low sentences of both panels indicate that they considered the aiding and abetting in rape and sexual harassment of at least 9 women not as serious crimes. In this context, an ICTY judgement in a similar case is noteworthy. The camp commander Nikolic was – upon plea agreement – also found guilty for "procuring women to other soldiers". However, the Chamber did not minimise Nikolic' guilt because he "just" aided and abetted in rape but convicted them as "participation in sexual violence".[217]

Simsic' acquittal of having personally raped several women needs to be put into perspective. In a certain way, the trial was a disaster. The Trial Chamber found most testimonies on rape unreliable and several witnesses not credible. As all rape testimonies were held in closed session and as the judgements do not quote directly from testimonies it is impossible to assess the judgement in this respect. On the one hand, the inconsistencies in several statements as presented in the judgement seemed indeed to have been serious. On the other hand, several of the reasons that constituted the Panel's doubts on the witnesses' credibility are doubtful themselves. The Panel complained, for example, about some of the witnesses' hostile attitudes towards the defence counsel, about "standardised and schematic statements" like "Boban was in charge" or "Boban was always present", and referred to inconsistencies between testimony in court and former statements. Thus, the Panel took the fact that a witness had not mentioned the accused in her earliest statement many years ago when "by the nature of things, memory is the freshest" as evidence for lying. However, such contradictions between statements are quite common for several reasons as, for example, the different interests of the respective questioners, who steer the direction of the interview.[218] The Panel also dismissed trauma as a reason for inconsistencies because, as the Panel argued, the witnesses had received support from the Witness Support section.[219] Quoting Thomas Aquinas the Panel found that "neither wholeness nor coherence, and even less, clarity, were preserved in the statements" of the majority of the prosecution witnesses.[220]

The Trial Panel's judgement on the witnesses' credibility was overshadowed and certainly influenced by the voluntarily given confession of a witness that the president of the Association of Women War Victims had threatened her to take away her pension unless she testified against Simsic even though she did not see him commit any crimes. The witness even rose and shook hands with Simsic.

As can also be seen in the discussions in chapters 3 and 6 many judges and prosecutors struggle with evidentiary issues in cases with sexualised violence. There are major differences in what is perceived as minor or large discrepancies in testimonies. In some judgements, it seems that any inconsistency casts doubt on the truthfulness of the testimony of a rape survivor. Other judgements, as it was the case in the first instance judgment in *Vukovic Radmilo*, are sensitive of the victimologic particularities in rape cases. As the interviews with judges in Chapter 6 show, at least some court members are aware of these discrepancies and inconsistencies in judgements and willing to improve through expert exchange and training. At the same time, prosecutors also need to acknowledge that several rape acquittals are also due to lack of consistent strategy and thorough preparation. The interviews with witnesses in Chapter 5 demonstrate what witnesses need to be strong and "precise" in the courtroom.

The case of Ranko Vukovic et al.
Ranko Vukovic participated as a member of the Bosnian Serb forces persecuting the Muslim population in the municipality of Foča. He was charged with crimes against humanity for, among others, "coercing another by force to sexual intercourse (rape)". The indictment alleged that some time in July 1992 he raped witness A in Miljevina, Foča.

In 2008, the Trial Panel as well as the Appellate Panel acquitted Vukovic of rape because of inconsistencies in the statement of witness A. The court accepted that the witness had been raped several times by soldiers coming by at night to her flat but did not accept that the accused Vukovic was the first one who raped her for mainly 2 reasons: First, inconsistencies in her statements. Witness A had not mentioned the accused in her first statement to UN Forces in 2003 although she mentioned other rapists. She talked about the indicted rape for the first time in her statement during the investigation phase in which she claimed the accused had first cursed her mother, then thrown her on a sofa, ripped off her clothes and raped her. However, in court, she testified that Vukovic after some small talk had asked her to undress which she did

and he then forced himself upon her on a sofa and raped her. He never came again but others started coming and continued to rape her. Witness A could not explain the discrepancies. The Trial Panel found "that the act of rape remains etched on a woman's memory and cannot easily be forgotten, particularly having in mind that, according to witness A, it was the first time she was raped. The Court does not view as convincing witness A's statement that she does not remember the manner of commission of the act..."[221] Second, 3 female neighbours of Witness A, described by the judgement as friends, testified for the defence. They stated that they knew that witness A's husband had been taken away but that witness A had never complained about rapes and that even though they had seen her often during that time they never saw any sign of distress on her or of having been raped.

The Appellate Panel also found it "illogical" that witness A forgot the course of events of her first rape and that she did not mention it to the UN Forces in 2003 when she "not only had an opportunity but also the obligation to say the whole truth about all circumstances of such, for her certainly, traumatic event".[222] The Panel also "expected that a victim of such a heinous act feels the need to label the perpetrator as a rapist as soon as possible, especially if she knows his identity, in order to bring him to justice".[223]

Psychologists, social workers as well as lawyers representing rape victims in civil law courts as a third party could easily explain the 'logic' of discrepancies as well as the illogicality of applying unscrutinised criteria as 'logical' or 'illogical' behavioural patterns of rape survivors. It is not by chance that some of the witnesses we interviewed recommended to prosecutors to allow prior reading of former statements and to bring in expert witnesses on rape and trauma. Others recommended to other women not to give any statement to anybody if they ever want to testify in court.[224]

OSCE trial Monitoring

At the request of the ICTY Prosecutor and in line with its mandate, the OSCE agreed to monitor and report on the Rule 11*bis* cases i.e. on the cases moved to the national courts. Those cases were generally considered a test of the fairness and efficiency of the judicial system of Bosnia and Herzegovina. It is noteworthy, that 2 of the first cases referred to the WCC were major sexualised violence cases in connection with the ICTY's Foča Case.

To date 6 cases involving 10 accused were ordered by a Special Chamber to be referred to the WCC. Of the 10 accused transferred to the WCC, 4 have had their cases fully concluded. These are the cases against Radovan Stankovic, Gojko Jankovic, Mitar Rasevic, and Savo Todovic. 2 other accused, Pasko Ljubicic and Dusan Fustar, pleaded guilty. Out of those cases, 2 cases (*Stankovic* and *Jankovic*) involved sexualised violence charges. As of June 2009, the case against 3 accused was on appeal: Zeljko Mejakic, Momcilo Gruban and Dusko Knezevic. All 3 accused are charged with sexualised violence as to crimes against humanity.[225] The trial of one accused, Milorad Trbic, is currently ongoing and it does not have sexualised violence charges.

As of June 2009 the OSCE Mission to Bosnia and Herzegovina submitted to the ICTY Prosecutor's Office 50 regular reports on these cases[226] and sent one confidential report submitted to the ICTY Prosecutor on 10 October 2006. The reports are compiled on a quarterly basis. These reports describe the main developments in each case and focus on any challenges identified by the OSCE monitors as being from the perspective of human rights standards, as well as on positive steps that have been undertaken to address these challenges.[227] The monitoring of the cases conducted by the OSCE is useful, especially with respect to securing a fair trial for the defendant. The comments and involvement of the OSCE have made an impact on the war crime procedures before the WCC.

Although the gender component is not systematically included in the OSCE trial monitoring their reports on the cases that include sexualised violence charges facilitated several improvements in the WCC. In its reports on *Jankovic*, the OSCE made several significant observations. Thus, in the second report,[228] the OSCE noted the lack of uniform application of protective measures in *Stankovic* and *Jankovic*, and noted that certain provisions of the Law on Protection of Witnesses lack clarity or do not sufficiently regulate all matters at issue. Furthermore, in the same report the OSCE noted:

"An additional procedural issue, on which there does not appear to be an established practice, is the question as to whether the parties can provide witnesses that they have summoned with records of their prior statements or depositions, so as to refresh their memory prior to their oral testimony before the court."[229]

As can be seen in Chapter 5 several witnesses we interviewed stated that prior reading of statements they gave many years ago was pivotal for their own feeling of safety and self-assurance. In Chapter 6 several prosecutors describe the statement marathon some witnesses ran over the years. According to OSCE the Presiding Judge in *Jankovic* "expressed her personal opinion that it would not be good to present a witness with prior statements before their oral testimony, although the Court would allow during the examination of the witness that he/she be reminded of what they have stated earlier, if they cannot recall".[230] The OSCE did not take position on this issue. They only stated that it is important to clarify

whether this practice is accepted in the court in order to eliminate the danger of different panels applying different standards.[231]

This decision is of particular relevance for rape witnesses given the emphasis judges put on consistent statements and their reluctance to give a guilty verdict without corroboration.[232]

In its third report on *Jankovic*, the OSCE did a significant intervention when "the Prosecution asked certain witnesses whether they were virgins before they were raped, while the Trial Panel did not disallow such questions".[233] The prosecutor referred to virginity to make in an aggravating circumstance for sentencing. The OSCE called upon the Bosnia and Herzegovina Criminal Procedure Code provisions prohibiting questions about the injured parties' prior sexual conduct, as well as questions that are irrelevant to the establishment of the facts alleged in the indictment.

In light of discussions in our study in Chapter 8 it is important to note that in its fifth report on *Mejakic et al.*, the OSCE monitors noted that following previous OSCE comments:

"The Trial Panel has begun asking injured parties about their desire to have their compensation claims settled in the criminal proceedings. However, in at least two instances it was rather evident that injured parties did not understand sufficiently the instruction on their right."[234]

In the same report, the OSCE has urged "the authorities to consider creating mechanisms to ensure the respect for injured parties interests",[235] and the encouragement to the "courts to exercise continued vigilance in explaining and ensuring that each injured party comprehends the scope of their right to compensation".[236]

Apart from the OSCE, the cases are regularly being monitored and reported on by the BIRN. Just as the OSCE reports those reports are very important and extreme useful, in particular for informing the public on an everyday basis on what is happening in the war crime trials in the WCC. However, to date no systematic and sustainable trial monitoring with a clear gender focus exists.

Part Two
Views of Witnesses and Court Members

5. Witnesses' Perspectives

This section discusses what witnesses who testified about sexualised violence had to say on various aspects of their experiences in testifying. They spoke about their reasons for testifying, their positive and negative experiences in the courts, the kind of support they received or lack thereof, and their views on various aspects of being survivors of sexualised war violence.

Limited access to legal justice for women

However, before we turn to the experiences and perspectives of female witnesses, 2 things need to be pointed out: on the one hand, significantly less women than men testified before both courts while on the other hand, much more women than men testified on sexualised violence.

As of June 2009 5,494 witnesses had been assisted by the Victim and Witness Section of the ICTY.[237] As no statistics were kept in the first years of the Tribunal, this figure does not reflect the exact number of witnesses that testified since 1996. The number includes prosecution, defence and chamber witnesses. 5,107 (93%) were fact witnesses and 387 (7%) expert witnesses. Out of the 5,494 witnesses only 790, i.e. 14.4 % were women. At the WCC, no such statistics are available. According to our own research based on 45 first instance judgements up to June 2009 out of a total of 848 identified witness statements 26.2% were given by women.[238]

These numbers signify a limited chance for women to participate in the legal process and to use it as a forum of justice, with all its limitations. This is all the more the case when we take into account that women are often called as witnesses to testify about crimes committed against others, mainly male relatives, rather than on crimes committed directly against themselves.[239] In his study on the experiences of witnesses before the ICTY, Eric Stover found that 90% of the witnesses he had interviewed "said it was their 'moral duty' to testify", a duty mainly grounded in obligations to family and community "to ensure that the truth about the death of family members, neighbours, and colleagues was duly recorded and acknowledged".[240] He also emphasised that all witnesses expressed a compelling need 'to tell their story'. Thus victims and witnesses see the ICTY and other War Crime Courts as "a forum for discharging their perceived moral duty",[241] to set a score right, to contribute to the establishment of truth, and to memorise and honour those who perished. Even though, Stover continues, testifying is by no means a healing experience, and indeed can be re-traumatising, 77% of the study participants found testifying before the ICTY a positive experience.[242] Given the numbers above, it is so mainly for men because with only around 14% of female witnesses women are largely excluded from this experience.

Estimated number of rape testimonies

"The lesser number of female witnesses", Wendy Lobwein, the former head of the Support Unit of VWS had stated on a conference in 2003, "can be attributed to the fact that women are witnesses predominantly in cases involving rape and sexual assault".[243] None of the courts offers any data in respect to the sex of witnesses in relation to the types of crimes they testified on. Based on our own research we found that at the WCC up to June 2009, 87.7% of statements on sexualised violence crimes were given by women (93 out of 106).[244] We do not have comparable data for the ICTY, however the Fočca trial, i.e. the only ICTY trial that dealt exclusively with large scale sexualised violence, is the only trial in which significantly more women testified than men.

The total number of women that so far testified on rape or sexualised violence can only be estimated. Based on a systematic analysis of all ICTY indictments and judgements in cases that included charges of rape and/or sexualised violence we found that between 1996 and September 2009 approximately 60 women testified before the ICTY on having been raped or sexually attacked personally. In addition, an estimated number of 10-15 women testified as corroborating witnesses of rape. The number of witnesses can differ slightly as it was not in every case possible to infer the exact number of rape testimonies from the judgements.[245] A few more witnesses can be expected to testify on rape in the trial against Radovan Karadzic. Nearly half of those who testified on their own rape or on sexualised assault (28) did so in 2 trials: 18 in *Kunarac et al.* (Foča trial) and 10 in *Kvocka et al.* (Omarska Camp). The other 2 trials with a larger number of rape survivors testifying were *Milosevic* (6) and *Milutinovic et al.* (6).

At the ICTY, no more than 2 or 3 women testified more than once. From the interviews with witnesses and court members, we know that the number of multiple testimonies is significantly higher at the WCC. However, given the confidential measures under which most testimonies

on rape and sexualised violence are given, the number of women who testified more than once on rape cannot be reconstructed from public records. Considering these difficulties, we can only say with great caution that up to September 2009 probably no more than 120 to 150 women have so far testified on rape or sexualised violence before the ICTY and the WCC – as direct victim witnesses or as corroborating witnesses. The number of women who testified before Cantonal or District Court in Bosnia and Herzegovina is completely unknown.

On Interviews, Methodology and Participants

Over 50 women shared their experiences with us on testifying before the ICTY and the WCC, and to a lesser degree before Cantonal or District courts. 49 of these women participated in either structured interviews (32) or semi-structured interviews (17). A few more joined in 3 group discussions with one camp survivor group.

45 of the women interviewed had personally testified in court.[246] All except one woman had experienced rape or other forms of sexualised violence during the war. Of those who testified, 41 (91%) spoke of their own experience of rape. While all women testified also on other issues than rape, 32 women were called as witnesses in particular to testify about sexualised violence. The majority of the witnesses testified only once but 15 did so several times – 7 testified twice and 5 testified 3 to 5 times. 3 other women testified so often that they lost count saying they may have testified 9, 10 or even 20 times. In such high numbering women often included statements they gave to police, investigators or other officials over the time. They nevertheless indicate the readiness and willingness of some women to testify whenever necessary.

About two-thirds of the study participants testified before the WCC, and one-third before the ICTY. 9 witnesses testified at least twice at different courts – either before the ICTY and the WCC, or before a County Court[247] and either the ICTY or the WCC.

32 participants of the study were interviewed on a structured questionnaire which contained both closed and open-ended questions; some allowed for multiple responses.[248] The data of 5 other witnesses who participated in the pilot phase of the study in semi-structured interviews have been integrated. Thus, the data of what is termed in the following as Questionnaire Group reflect the answers of a total of 37 women. In addition, we conducted 12 semi-structured interviews and held 3 group discussions in which 6 to 10 women participated. The latter is referred to as Camp Survivor Group. Most of them had also been interviewed individually based on the questionnaire.

As mentioned in the introduction one limitation of the study has to do with protection. The vast majority of rape survivors testify under some kind of protective measures with their identity concealed from the public. This required a cautious and flexible approach in establishing contacts and a strict policy of confidentiality. First contacts were facilitated by local women groups, counselling centres and individual psychologists that all supported the study. Later on, interviewed witnesses themselves facilitated further contacts. The restrictions of confidentiality, however, did not allow ensuring a representative sample of witnesses. We simply moved on from witness to witness rather than choosing participants systematically by criteria as for example, regions with high or low rate of reported war rapes, pre-war residency, 'ethnic' or trials. Nevertheless, certain concentrations emerged through the snowball system. However, the same restrictions do not allow giving too detailed information about places of pre-war or present residence of study participants. The total number of witnesses is relatively small and "Bosnia is a place where everybody knows everybody", as many interviewed women pointed out; therefore such information might reveal the identity of individual participants. Because of this and because of the relatively small sample of interviewed women, we cannot offer a comparison between answers given and different categories of interviewed witnesses in terms of regions or cases.

All 49 women we interviewed still live in Bosnia and Herzegovina; 2 found a second home in another country but kept their house in Bosnia and commute frequently. 8% lived in the Republika Srpska at the time of interview, 92% in the Federation of Bosnia and Herzegovina. 95% gave their national identification as Muslim/Bosniak.[249] 8 women lived in their pre-war homes. Of the other 41 women about 60 % could not or did not want to return to their previous homes due to the political situation. The other 40% had decided to continue their life in the place where they had found refuge and where they had founded a family, made new friendships, found a workplace.

15 years after the war, 5 women were still living in collective centres, and about 60% of all women interviewed lived under very poor economic conditions with hardly enough money to sustain their families. In some cases the whole family, including grown-up children lived on the small pension of approximately 250 Euro. The pre-war professions ranged from factory worker to economist, retailer and judge. About 35% described themselves as housewives. At the time of the interview over 50% were unemployed.

All semi-structured interviews as well as all group discussions were carried out by at least one of the 2 main researchers. The structured interviews were carried out

by members of the local research team and, after training, by 2 additional women (one psychologist, one member of a victim support organisation).

The interviews and group discussions focused on the experiences of testifying. No questions were asked about details of the experienced violence. Evidentiary issues of the trials in which the participants had testified were also not discussed in order not to compromise their status as protected witnesses.[250]

5.1 On Reasons for Testifying

The testimonies at the various courts reveal a number of reasons why women testify before courts about their experiences of sexualised violence. The study added depth and analysis to these reasons and new explanations as to why women testified. The following section summarises witness responses on the issue.

Motivated to Testify

84% of the Questionnaire Group felt it very important to testify on rape. For one woman, who was ready to testify wherever necessary, it was important to prove that rape was "a strategy that was not only going on in the camp where they took me to, but also in other places, other camps, prisons and so on". "It is really important to testify on rape", a former ICTY witness said. "If it happened and everybody knows anyway that I survived it why should I hide it? Investigators should know and the state should have my statement. Why should I keep that to myself, why should I not testify?" Of all study participants, only one woman said it is not really important to testify on rape. When asked to explain she said, "because the punishment for perpetrators is zero". She felt that rape was not taken seriously enough by the courts.

The motives for the study participants to testify, either in general or specifically on rape were numerous, but some were named significantly more often than others – such as to make the perpetrator accountable for what he did and to see him punished, to prevent other women and girls from being raped, and to tell "what really happened" in a place "where it would make a difference", as one witness said.

Punishment

Punishment of perpetrators was central to all study participants. When specifically asked, 92% of the Questionnaire Group named punishment as their personal motive to testify. The same responses were provided by those questioned in semi-structured interviews. "They have to be punished", one woman insisted, "and that's the only way". Punishment also ranked highest when the study participants described their notions of justice. 86.5% of the Questionnaire Group said justice means punishing the perpetrator. This is no surprise in an interview that turns on legal justice. As can be seen in Chapter 8 the scope of answers widened when the topics of the interviews turned to the situation today.

For many women punishment was very personal. "If the court punished them it would be recognition of my suffering", one woman said. "You get some kind of satisfaction when you are able to say what happened and when criminals get their punishment", another witness stated. At the same time, most participants were not at all content with the sentences perpetrators, rapists in particular, received. ICTY sentences for rape range from 9 to 28 years imprisonment. "It's not fair for victims to let criminals get too light sentences in The Hague", one participant said, referring to a case in which the 4 accused were sentenced to imprisonment for 7 and 25 years. The man who was directly accused of raping women in a prison camp was sentenced to 20 years. About a man who was sentenced to 28 years for multiple rape and sexual enslavement, one woman said, "I will never be satisfied with that kind of punishment." Another witness was particularly angry that the man responsible for his soldiers killing many people in her village, raping her and other women received only 12 years upon plea agreement. "He can stand that on one leg", she said. "Sentences are low. I don't know what criteria they use, but sentences are really low. When you experience on your own skin what I have and sees such ridiculous sentence – it hurts a lot."

Most participants made it clear that they feel imprisonment alone is not enough. "They should be put into jail for the rest of their lives", one witness said. 67% of the women who answered the questionnaire agreed with that. Statements like, "there is justice only if all perpetrators would get life sentence", and "justice is when they never go out of prison" were heard frequently. In many statements, prison years were balanced against either personal suffering or the suffering of others. "I have to take drugs to calm down and you give him two years?" one woman said angrily. "In my opinion", another witness said about the man who had raped her, "he should get life sentence because of everything, not only because of me. There are so many victims and everything". "Life sentence!" yet another witness said firmly. "I would say life sentence because people lost their lives and he should at least look at the ceiling for the rest of his life."

Punishment Does Not Satisfy My Soul

Within the legal justice system the hierarchical gravity of crimes becomes visible by the number of years perpetrators have to serve in prison. Victims often perceive it as equivalent to the extent of the acknowledgement they receive from society for the violations they had to suffer. Low sentences therefore for rape also means less acknowledgement of the seriousness of the crime of rape. Particularly, as one witness pointed out when she compared rape during war with rape in Bosnia today. "I don't know what would really satisfy me," she said, "but sometimes when I hear on the radio what is going on in our country today, all the pedophilia and rapes, and when I hear that the perpetrators of sexual violence crimes got 10 years, then I say, 'That is a low sentence'".

Most participants also acknowledged that balancing suffering against years in prison does not really help. Even the highest punishment will not give them a lasting feeling of satisfaction, not to mention a lasting feeling of justice. "Punishment might be justice", one participant conceded, "but that does not satisfy me and my soul". Acknowledgement of crimes through punishment is extremely important, as participants emphasised, but it is simply not enough as expressed in the following statements from 2 women:

"Yes of course. The way they punished us for nothing they should be punished too. They raped us while their women stayed at home and slept in bed. Maybe they even wore my clothes while I stayed in camp for six months wearing the same underwear, and of course I had my period meanwhile and it was humiliating. Everything else they did like destroying my property can be fixed but they cannot give me back my dignity – that's what hurts me the most and I'm sorry for the health I lost."

"I always ask myself if there's any justice at all. There is nothing that can replace my suffering, although you get some kind of satisfaction when you are able to speak about what happened to you and when criminals get punished, although I think that the sentences are really low. But that's another story, sentences are something else. But at least you feel a little better when the criminals get punished; when they are not, you feel that there's no point in saying anything."

There is another reason why imprisonment as punishment is not really experienced as satisfactory. Some participants felt that life in a modern prison might not be so bad compared to the daily constraints they themselves have to face. "All convicted have better status then we", one woman felt. She referred to the former Vice-president of the RS, Biljana Plavsic "now writing some books that are hurting us again". "I know they will be put into jail", another participant said, "but they will have a better life than our people". Yet another woman complained that the accused obviously have enough money and get enough support to pay expensive lawyers while she cannot afford to pay one for a civil suit against those who disclosed her story to the public.

Women who testified did not often mention revenge as a motive. Only 4 said they were strongly motivated by such feelings, and for 5 it was somewhat important. But several women wanted the perpetrators to somehow suffer, the same way they did. "It doesn't matter how many years they get", one woman explained, "it is not humiliating for them. […] He will never experience the same suffering as I did during rape. I don't know what can be compared to my suffering and pain". To make them feel the same emotional pain that they had inflicted on others, is what some women named as a possible way to feel a bit more satisfied. Not to become perpetrators themselves, not to torture the former perpetrator – but to make them understand what they did in some meaningful and perceptible way. One witness said that instead of punishment she would "prefer if they could feel – not remorse, but pain and suffering to be aware of what they have done. […] I know that I am asking for the impossible, but that would be my satisfaction". Limitation of freedom of movement for life named another witness "so that they could realise just a little bit of what we have been through". Another witness stated that for her the whole purpose of testifying lay in the hope that "perpetrators would also understand that they did something wrong when they raped me".

In plea agreements before the ICTY, perpetrators give statements of apology. We asked the witnesses what such apologies meant to them. 12 women (32%) of the Questionnaire Group said they would want perpetrators to apologise. At the same time, they also doubted, as did most witnesses, that any of those apologies would be serious. "I would doubt the honesty of that apology", one witness said. "They do it only to get lower sentences." Most witnesses said clearly, "I don't need apologies"; "I would never accept an apology"; "It would not mean anything to me"; and "I would not give him a chance for excuses". In one case the accused was the commander of the troops who had raped one of the witnesses, and he apologised to her during her testimony. "I only laughed at him", she said, "because he wasn't the direct perpetrator. […] He apologised on behalf of that unit for everything that happened to me. I only laughed and told him that he wouldn't have to apologise if he had thought of it in time".

Yet 22 participants from the Questionnaire group (60%) wanted perpetrators to confess what they did, and 18 (48.6%) wanted them to do this publicly, facing the victi-

mised community. "There is no revenge", one witness said, "I want that he responds to everything he did". For another woman justice meant "when somebody commits a crime he should be held responsible".

As stated in the earlier sections, since many sentences are cumulative, i.e. one sentence for many different charges, a meaningful comparison between sentences for rape and other crimes is not possible. However, it is very understandable that victims view plea agreements with disdain because the statements of remorse by perpetrators of plea agreements cannot be accepted as serious and because they are excluded from negotiations.

Prevention of Rape and Rebuilding Society

Some participants emphasised during the semi-structured interviews their rejection of ethnic segregation. They expressed hopes that stigmatising and excluding individual war criminals would prevent further outbreaks of ethnic violence and help re-establish political and social peace in their communities. "I believe in God", one woman said, "that only God saved me, but I also believe that he left me alive in order to finish this process, to prove that not an entire people committed crimes but that a criminal has a name and a surname". Such political issues were in particular the concern of several women living in mixed communities in the Federation. Some take great risks when testifying as they are known in their communities and have been threatened and attacked several times.

"It is important that there is no hatred in us, no hatred towards anyone. It is better to put 10 of them today in prison then to have 150 of them in a few years. Because people will see him walk around freely, saying, here you are, I did this and this and no one said nothing to me. Then others will think why couldn't I then do the same to him. […] We are all the same – when you look at Croatian women, Bosniak women, and Serb women – we all have same eyes and noses. We are one people."

Many women were not only concerned about the continuation of ethnically expressed violence, they also feared a continuation of violence against women and girls generally regardless of the ethnic identity of the perpetrator. 73% of the Questionnaire Group hoped their testimony would contribute to spareing other women and girls from the experience of rape, which was also their reason for testifying. "I don't want that anybody has to go through what we went through", one woman said. She was pregnant during her time of imprisonment and nevertheless raped, partly in front of her children. "No matter if the woman is Bosniak, Serb or Croat", she continued, "I don't want that anybody, even my biggest enemy, experiences what I did in the seventh month of pregnancy. I feel humiliated as long as I live". Such statements do not exclusively refer to war situations, because, as one participant said in one of the group discussions, "a person who was capable of raping a child, killing a child, harassing a child, that person is capable of doing that again". Another woman added, "I decided to testify to protect our children so they do not experience what we have survived. We had to testify to remove war criminals from the streets".

Indeed, the assumption that several of the former war criminals are now, for example, engaged in trafficking would not be far off the mark. According to the 2008 Trafficking in Persons Report of the U.S. State Department, Bosnia and Herzegovina is not only a destination and transit country for women and girls trafficked from other eastern European countries; it is also a country of origin for domestic trafficking. The number of trafficked victims, the Report found, "dramatically increased over the past year".[251] During the interviews with several participants in April 2009, all women talked about an incident that had happened on the premises of the State Court in Sarajevo on 22 April, 2009. A convicted trafficker knocked down a woman who asked him about her 2 under-aged nieces who had died under suspicious circumstances. What shocked the women most was that none of the security guards intervened. "How can we trust our courts", one woman said, "if things like this happen?".

In a discussion with the Camp Survivor Group, all agreed that war criminals of all sides need to get off the streets "to prevent them from becoming role models to others. Until now they are national heroes according to their ethnic affiliation". Celebrating war criminals as heroes serves not only as catalyst for ethnic violence, it also constitutes a permanent threat to all women of all ethnicities because what is celebrated as role model is the image of aggressive masculinity. Thus, as much as daughters must be protected from rape, mothers also want to protect their sons from identifying with such national heroes.

Thus, Eastern Bosnia near the border to Montenegro or the Foča regions remained for a long time a favourite hiding place for wanted Serb war criminals. Karadzic and Mladić are for many in the RS still men to worship. Another, albeit smaller hero is, for example, Ante Furundzija, the former commander of a Bosnian Croat militia group, called the Jokers. As detailed above, he was sentenced by the ICTY to 10 years for aiding and abetting in rape and torture of a Bosniak woman. During the armed conflict between Bosnian Muslim and Bosnian Croat forces, it was well known in central Bosnia and to UNPROFOR that the Jokers had a bungalow near the town of Vitez in which Muslim women were tortured and raped.[252] When Furundzija returned to Vitez following early release in 2004, he was hailed and received with a big welcome.

Another even more famous war hero is Naser Oric, the celebrated commander of Bosniak armed forces in Srebrenica. He was charged before the ICTY with multiple murder, cruel treatment, and wanton destruction of Serb dwellings. He was acquitted upon appeal. Despite many rumours about his involvement in illegal affairs, questioning his reputation was taboo until his arrest in October 2008, when he was charged with extorting money and illegal possession of weapons and ammunition.

Removing criminals from the street sends a signal to everybody about what is right and what is wrong. One woman saw the court as a means to reach that goal and she saw her own contribution with much self-confidence:

"Rapists, killers should be taken from the streets and our daily life so that our children can live in a safer surrounding. The court will not be able to do that without the assistance of us, the victims. These persons cannot be idols and role models to future generations. The only way to prevent this is to reveal the truth about them."

Personal Truth

Truth, truth, nothing but truth – to use the court as a forum to tell their version of the story was a strong motive for many women. Personal truth was just as important as proving that rape really happened. "It is very important to prove the truth, because as long as we keep silent about it, it will be as if nothing had happened", one woman said. About 67% of the Questionnaire Group said they wanted to prove they were victimised, and 60% said it is important to testify so that the truth about what happened to women becomes known. "I wanted to talk about what I survived. I didn't want to hide anything", one witness who had testified on her rape before the War Crime Chamber said. "I wanted to testify about everything that happened", another witness explained. "If we hadn't spoken about the things we survived, nothing would be known. We do a very good thing through our testimony."

For some, the need to be "able to say these things in a place where it would make some difference", as one woman said, i.e. where her side of the story is heard and where it has consequences for those who did wrong, was overwhelming. Several witnesses could not wait to testify, and they could not understand why other women who had been imprisoned with them would not do the same. Some women became very angry when thinking of them. "I would go crazy if I couldn't speak about it", one witness said. "I wanted to tell that", another witness said. "I couldn't carry it in my soul. Like people who lost their legs and hands, whose legs and hands were amputated, I felt like my soul was amputated. Therefore I decided to testify about rape."

One woman who had been imprisoned and raped over months in a private house together with other women had not yet testified at the time of the interview, but was desperate to do so: "I put myself at risk … but I don't care, I want the truth to come out and even if they kill me, it will be known what we survived. I was even in front of television and talked about rape."

To prove the truth and to tell what happened in cases of rape is a more compelling reason than getting even with perpetrators; it is also about setting a record straight with one's own community. To speak the truth also means to prove, as one woman said, "that rape is not your shame, but that of the criminal himself". Women who testify in court want rape to be acknowledged as a wrongdoing and a crime and not only as a damage that stigmatises them for the rest of their lives. A few witnesses had experiences of direct accusations. One participant had testified against one of her rapists at a County Court, before the War Crime Chamber in Sarajevo was established. Prior to her testimony in court, her identity was leaked and the media picked up her story, published her picture, and accused her of lying. "I never felt shame", she said, "because I know I am not guilty. But it was very painful and unpleasant that they all read it. It became just a story". When she was asked why she still wanted to testify, she said: "Everybody knew and thought I was a whore. So I wanted to tell the truth, I believed in the truth." In the end, justice was denied to her and the accused, a well-known and influential politician, was acquitted. Nevertheless, she made the decision not to be silenced and had her side of the story published in a book in Germany.[253]

Right after the war, many women experienced blame by neighbours or in refugee camps. As one witness said, "it was the biggest disaster. They started referring to them as 'chetnik whores' and everything. […] That was probably one of the worst periods after the war". In particular, women from eastern Bosnia who had been deported to refugee camps in Macedonia were sneered at: "When I came to Macedonia, one man said, you Balia[254] should be killed and raped, you aren't for life. […] Because the whole world accused us like we were guilty persons, I wanted to prove that I am one innocent person", she explained her motive for testifying.

Apart from such experiences in the direct aftermath, it is important to note that most women said they were not ostracised, neither by their families nor by their communities, because of rape.[255] Yet they also did not feel they were met with respect outside their families: "Let me tell you", one woman clarified, "you return from the camp and then you see in their eyes that question, 'what happened to her?' No one asked me, but I see that question in their eyes. They were in camp, they were raped, and

you realise and want to prove that it is not a characteristic description of yourself". Although most women are aware that legal proceedings offer them very limited space 'to tell your story', they do see it as a chance to fend off stigmatisation. "We should not hide", one participant said, who had testified twice on rape, both, before the ICTY and a County Court. "We should not bear and hide that for years, and also people should not point fingers, they should not talk about that. Instead, if it happened to her, a woman should know where to go in order to report it. It's something that should be reported, and that's the way how things should be told." Her mother, who had also been imprisoned and testified, supported her:

"There is gossiping. There is no place where there is no gossiping. […] And if they talk that means they don't respect you and the fact that your child was underage. […] Of course, women want that people look at her in a way that society respects her, not to look at us as women victims but to respect us, not to humiliate us every time and feel shamed by our neighbours."

In other words, what is expressed here is a rejection of victim identity and of being reduced to the fantasised image or a raped woman. "I don't want to be seen solely as a woman who went through something like that", one witness said, referring to rape. To testify in court about rape can therefore also be a means to reclaim ownership over your own story and life.

For Other Women

Nearly 68% of the Questionnaire Group said yes, they wanted to honour other women who were also sexually assaulted and killed later, or whom they knew very well. "I am very sorry", one witness said, "for girls who were raped, and I am very sorry for mothers who tried to protect their daughters but soldiers beat them". She would testify again "for the sake of women who survived the same like me". In particular, those who were detained with them and died should be remembered: "I was motivated by 5 women who did not survive", one witness said. Another witness said she wanted to tell the truth "about other women's experiences, who did not survive, and what perpetrators did to them". It was mainly in this context that women said they felt an obligation to testify: "I felt obliged to testify because of my sister and my friend", one witness said. Both had been detained with her and are missing to date.

Promises

Other witnesses felt obliged because they had promised themselves or each other to testify when the time came. Nearly 60% of the Questionnaire group named this as a motive. "I testified because I survived three or four rapes; and I said then: 'If I leave this place alive I will speak about everything I survived". Other women said similar things, "I gave the promise to myself that I will testify if I have a chance". Some women who had been detained for a longer period in the same camp had also "promised each other to tell everyone all the things that happened to us, we swore to do that in order to punish the criminals". In this case, they were two women, and both kept their promise.

Relief and Other Reasons

Many study participants named several other motives for testifying. Nearly half of the Questionnaire group had hoped to get some kind of relief from testifying. Testifying is "the only way to set yourself free from the past", one woman said. Another witness said she "wanted to get rid of it somehow", and yet another wanted to release a burden she had felt for years.

Very few said they testified out of moral reasons and because they owed it to victims in general. Some were especially motivated because the perpetrator was somebody they had known for a long time, or they hoped that through their testimony and the trial, other perpetrators would be unmasked. One woman simply felt it might be the last chance "to say it at the right place".

Confrontation

To confront the perpetrator and to look into his eyes was a topic mainly brought up by several women who had not (yet) testified but were burning to do so. "When I will be able to be in front of the perpetrator and say: 'Yes, you are the man who did that', I feel that a big rock would be taken away from my heart." The woman who said that did not get this chance because her perpetrator died last year. "That is the hardest thing for me", she said, "because I will not be able to sit in front of him and say: 'That's you, your are one of them'". "I can't wait to see his face", said another woman who had not yet testified on her rape, "to look into his eyes and to tell him what he did to me. Trust me, I would love to have a coffee with him, talk to him and ask him, 'what was your motive to humiliate me so much?'" One of the participants was raped by her neighbour. She, too, "would just like to look at his eyes and ask him how he lives through it now, because he knew me since I was a child". The issue of confrontation was also brought up by witnesses when they described what they felt when they were testifying.

On Experience Testifying

Most participants experienced testifying in court about rape as traumatic. 65% of the Questionnaire group said so. "No matter how strong you are", said one woman

who testified several times before different courts, "no matter how much you are motivated to testify – of course it is always very hard, stressful and traumatizing". Many felt thrown back into the darkest hours of their life when they had experienced themselves as most vulnerable, exposed to arbitrariness and the tyranny of others. "I felt so bad", one witness said, "as if I was living it through again. Now that person was sitting two meters away from me". While for some women it was important "to look into his eyes", other tried to avoid it and could hardly bear to sit in the same room as their torturer(s). Several witnesses took advantage of the opportunity to testify from another room by video link, and it helped. In particular, when they had to describe the details of the attacks: "When you testify, you have to tell everything – what did he do to you, how did he do it. It's really terrible to speak about the rape you survived. When I spoke about it, I was watching the person who raped me by video link, and I felt very strong!" Several witnesses confirmed that the detailed description of the different sexual acts was most difficult in their testimony:

"They asked me, what happened exactly? And I had to tell literally everything. […] I had to say it was rape and also to describe how it happened and to explain the position of my body and his body. It was really hard for me to say and to hear my voice… Oh, my god. Horrible, horrible, horrible. I had to say it, and I hated myself when I talked about that, and when I heard myself. I don't know. I hated myself. It would be better for me just to say, yes, I was sexually abused, or I was raped, just that. But I understand it is the law and I must do it."

Many found it hard to wait for several hours to testify. Sometimes testimonies were postponed for weeks because of mistakes by the prosecution or due to other procedural delays. For some, the days prior to testifying are most difficult. "I don't feel well before", one woman who had testified twice said. "I constantly thought about it, how it will go, because I forgot many things, especially those details, and it all comes back. When everything is done, then I do not think about it anymore." The same woman then used a technique in court that is effective in trauma therapy:

"What was helpful for me was that when I prepared myself I said okay, it happened to me, but when I speak I will speak as if another woman survived this, not me. Then it is easy for me to speak. I always try to look at that as if it has happened to somebody else and not to me personally. I do not feel well when I talk about it, but I feel somehow better when I think that somebody else experienced it instead of me."

Moments of Satisfaction

Nearly all talked about painful struggles during testimony, emotional ups and downs including outbursts of tears. However, some also had triumphant moments. Witnesses are often told by prosecutors not to look into the direction of the accused. Some of the study participants did not comply with this. "I did look. I felt angry. When I said 'you humiliated me', then I looked into their eyes." This witness had to face 5 accused in the courtroom, and she felt, "[t]his was the best thing, to look into their eyes and to tell them what I think of them. I feel satisfied. I am only sad when I think about the other women who were raped but did not survive". For another woman, a different moment signified a reversal of power:

"I was happiest when I saw him in the hallway. He used to be the big soldier, one big authority, sitting there, battering, hitting – and in court he goes through the hallway hands cuffed, followed by two guards, his head bent down. I was beaten like a devil for not wanting to put my head down, and they kept beating me. No one told him to keep his head down, he did it himself. Hey, is that power when he demonstrated his manhood through firearms, shotguns, and knifes?"

"It is important to testify", said another witness who wanted to encourage other women who had been raped to come forward, "because she will know that she is not alone, she will express her emotions, she will know that she is alive to see a defendant on his knees like she was – that justice is reachable sometimes".

To confront the perpetrator can mean to demonstrate to him, to oneself and the world that he lost his power over you. It can be an act of reclaiming control over one's life, leaving the position of the helpless victim behind. The ultimate goal of the captor, Judith Herman wrote, referring to situations of domestic violence, is not just enslavement, "simple compliance rarely satisfies him; he appears to have a psychological need to justify his crimes, and for this he needs the victim's affirmation. Thus he relentlessly demands from his victim professions of respect, gratitude, or even love. His ultimate goal appears to be the creation of a willing victim".[256] Indeed, accounts of war rape survivors on situations of enslavement show that when a captor claims ownership over one or more women, he often arranges settings in which he appears as 'the nice guy'. Women who had to endure weeks under most unhygienic conditions in camps are suddenly offered a shower, clean towels, and new dresses. Some Commanders liked to appear as knights in shining armour rescuing a woman from the filthy rank-and-file crowd. Rapists often say, 'I will show you something nice and you will like it'. The self-promotion of these perpe-

trators can even mimic love relationships and resemble situations of domestic violence. In the ICTY's most important trial about sexualised violence that dealt exclusively with rape and sexual enslavement, the accused Radomir Kovac took his victim, a 15-year-old girl, out to bars and parties. As a Muslim girl in the all-Serb town of Foča, she didn't have the slightest choice but to comply with his cynical theatre. The commander of a small para-military group, Dragoljub Kunarac, took a fancy to order a young girl of 16 to come to him while he was lying idly on the couch, like a husband who had returned from work, only he had instead returned from the battlefield. The girl then had to undress him and initiate her own rape. Later on in court, his fantasy became his defence. He claimed she had seduced him, as a man he had no manoeuvering space, and he literally said it happened 'against his will'. For the victim, who was one of the prosecution's chief witnesses against him, this rape was more humiliating than many others she experienced exactly because she had to pretend to be taking the initiative.[257]

Perpetrators act as tyrants, and "[t]he desire for total control over another person is the common denominator of all forms of tyranny".[258] It takes courage and inner strength to free oneself from this psychological domination and to testify against them. For some, confronting the former perpetrator is "the best experience because I said that when I got out from camp we will meet one day, him on that one side of the table and me on the other side".

Not all witnesses could harbour such triumphant feelings during testimony and testifying was not important to every woman. Some went only because they were pressured by courts. But once in the courtroom, they all had their own agenda. "I got the chance to look into his eyes and say, 'you killed my brothers', and to tell him everything that happened", said one witness, who had been very reluctant to testify for many years. "I cannot take revenge", she continued, "but I can stand in front of him and say, 'Because of you my mom cries every day'". The accused in her case, a famous and most brutal military leader, could not stand her glance.

Truth and Responsibility

Another issue raised by several women as very difficult was the responsibility of being a witness. They all came to tell the truth. But defence lawyers tried their best to confuse them and undermine their credibility:

"It is an extremely difficult, difficult task, a difficult assignment and you have to be fully concentrated. […] you are going there to tell the truth and the one sitting on the other side, the defendant and his defence crew, keep telling lies because they have nothing else. They can't confront you with anything else. You have to fight their lies with your own truth. You are exposed to various insults on their part because the fact that he is telling lies and insulting you means that you have to be fully concentrated and try not to loose your composure because of his constant vulgar words, lies […]. It is very difficult to prove the truth, […] and you cannot tell all that had happened to you at that moment. You are saying the words, but you skip so many things, and you keep returning to all of that and virtually be at that moment where you had been."

Struggling with your own truth also means not to allow anybody to interfere with it, neither friend nor foe. Some women reported that there had been efforts by different parties to influence their testimony. Relatives of the accused tried to bribe witnesses to withdraw their testimony or self-declared representatives of victims pressured witnesses to add something to their statements that they had not witnessed themselves. In some cases, the persuasion went to the extreme of telephone terror or threats to counteract the woman's application for war victim's pension. "I think", one witness commented on such an experience, "if a woman says something like that it could result in horrible consequences at the court. She wouldn't accomplish anything with that at the trial. She would only feel guilty. Thank God I didn't agree to that". It is not by chance that one of the recommendations participants give to other witnesses is – to tell the truth and nothing but the truth.[259]

In fact, some witnesses made clear that if they had not been absolutely sure about identifying the accused, they would have accepted 'reasonable doubts' rather than accusing somebody just because they wanted sombody to be punished for what was done to them. After more than 10 years, the man in camouflage uniform, unshaven, with bandages around the head, hardly resembles the accused in the courtroom in his nice suit, shaven, and with freshly cut hair. "It wasn't a good experience for me", said one witness who had to identify 2 accused:

"I felt so much pressure in my head. […] I didn't want to tell, yes, it is him if I wasn't sure. You know I felt a pressure in my head and they asked me to identify him. When I saw him something happened to my eyes, I couldn't see anything anymore. At that moment I was afraid that something happened to me, with my voice and everything. It was such a bad experience for me to look at him. At the end I had to ask that he please stand up, and then I recognised him. I wanted to be sure so when he stood up, I recognised him. It was only after that I realised how big was my responsibility as a witness. That was horrifying."

Similar feelings of responsibility were communicated in various ways. One woman who had to testify in a County

Court with a hostile crowed calling her a whore believed so much in the court that she stayed calm and asked to go closer to the accused when she could not recognise him at first: "I didn't want to make a mistake", she said. Another woman found that among the 3 accused, one had not been among the rapists. "I could not lie", she said, "he was not among those 3 men. After my testimony he asked to have a word and then he thanked me for not lying and accusing him, and he also said that after his trial he will say who did it. I don't know if he lied then, but that's what he said and that was positive on his part".

The issue of responsibility was also raised at the last meeting with the Camp Survivor Group. "Look", one of them addressed us while the others nodded in agreement:

"This is a venture of great responsibility, and someone's life depends on my concentration. It's not easy to take the stand. You need to be fully concentrated and tell the things as they are, and try not to say any word more that you need to. I am myself a victim, and I was afraid I would say an extra word because this word can cost someone their life, they can convict him. But at the same time, if you miss a word he can be acquitted and then your life will be again at stake."

Relief

Testimony in court has hardly healing impact but there can be relief. The majority of the study participants felt relieved after the testimony. Given the choice of 'very happy', 'somewhat happy' and 'unhappy' 21 women (57%) from the Questionnaire group felt 'very happy' right after the testimony, 8 felt 'somewhat happy' and 4 'unhappy'. They felt relieved because they could share their story and put it behind them. "I was just a small woman", one witness said, "who spoke against 5 men. That felt good. I was proud when I was finished. It was the first time I spoke about it, I could share it and say how the perpetrators humiliated me". Other witnesses said similar things – "I was satisfied", "I felt better", "I was proud of myself", and "I felt super". Then again, others were not so sure – they felt "lost", "very strange", "like from space", "both sad and happy", and "very mixed". And some did not feel relieved at all. "After testimony, I felt distant for days. It was as if I wasn't in reality. I didn't feel good, although people from the court had told me that many women who testified felt relieved afterwards."

The positive feelings after the testimony changed for some women in the course of time. "Immediately afterwards I felt better", one witness who had testified several times said, "but later I get depressed, especially when there are some events that remind me of what happened". 16 women (43%) felt still 'very happy' when they returned home, and 12 (32%) would say so for themselves today. "When I left the court", one witness said, "I was screaming with happiness but when I saw the lights of my town coming close, I started crying. […] You need someone you are close to, someone who understands how you feel, who breathes like you".

On the other hand, the number of those who felt 'somewhat happy' increased from 8 right after the testimony, to 12 when back home, and 15 today. Of course, the reasons for feeling good or bad today are manifold and determined by many other things, including health, social and economic living conditions, therapy. Most of the study participants had some kind of psychotherapy and counselling. In fact, as we established contact to many through women support groups or counselling centres this was to be expected. Such statements about feeling better or not can only indicate a tendency warranting further inquiry.

5.2 On Support for Testifying

31 women from the Questionnaire Group (84%) said that they had informed some family members that they would testify about rape. About 38% also named friends. Over half of the Questionnaire Group (54%) felt directly supported by family members and named husbands most frequently (27%), followed by children (13%) and mothers (11%). They also felt supported by friends, NGOs, court members and therapists or doctors. Only one woman said she went through her testimony all alone.

This finding stands contrary to the wide-spread myth that rape survivors in Bosnia are especially ostracised. As a matter of fact, only 3 women said they were blamed as liars and called 'whores'. In 2 cases, the accusations came from the family or community of the accused. Only in the third case did it come from the husband. "He used to blame me for being in camp, he used to tell me that I did it willingly – he was really jealous and he used to abuse me physically and psychologically, and I felt as if I was in another camp." Eventually she divorced him. 2 other participants had to deal with violent husbands and were also not willing "to put up with that". "Sometimes", one of them said, "I wonder is it my fault, but I know it is not. I have raised my head up during therapy. I don't want to keep silent". She insisted that domestic violence should be a public topic, and she had reported her husband to the police.

A psychologist who had treated a great number of rape survivors over many years knew of only one case where a husband left his wife because she had been raped during the war. Of course, couples divorce for many reasons after the war, but in her opinion, it is not predominantly connected to rape. She also referred to the fact that mar-

ried couples were often imprisoned together during the war. They were in different houses or rooms, but they were together in one camp. They shared the experiences of humiliation and being at the mercy of their captors. Another woman who worked with camp survivors also knew of only one case where the husband left his wife because she was raped. She also referred to a different case of a woman who survived rape and who had "a great, beautiful relationship" with her husband, who had not been imprisoned. "It varies from case to case", she said. One can also not just say this happens more in rural areas where people are more traditional. In the example above, the couple lived in a tiny village.

"They really supported me", said one study participant, referring to her family, "especially my husband. He went with me to the court. […] My husband knew about my situation before we started dating. […] My father was in prison – when he came back he told me 'accept it as it never happened'. All the time he was supportive, he never blamed me." One woman who was accompanied to the court by her son-in-law had not told anybody in her family about her rape for 2 years. When she eventually decided to tell her husband, "it was very difficult for him to understand why I didn't tell him earlier. Afterwards, my husband told my daughters, so my children know too". Others were accompanied to the courts by their mothers, sisters, daughters, brothers, even son-in-laws. "The problem with reintegration into the family and remaining silent is", as another witness said, "not because of that sense of false shame and humiliation, but of pain and not wanting to hurt the person you want to tell it to".

Of course, not all husbands were understanding of the situation. 4 women said their husbands left them after a while for several reasons. One did not tell him, because they had other problems in their marriage and she thought he would not really understand what it meant for her.

Often the silence in families has to do with death rather than with rape. Where daughters or sons, fathers or mothers were killed, every mention of the war or other sufferings is like walking on a minefield. In the case of 2 witnesses who were teenagers at the time of the war, their mothers had also testified in court as witnesses. Their mutual support was visible during the interviews. In the case of another young woman, the situation was different. Her brothers and her father were killed during the war, and she did not want her mother or anybody from her family except her husband to know about her testimony because she wanted to protect her mother from more pain: "We haven't mentioned father nor brothers since 1992, but every weekend I look at my mother and see how hard it is for her (…) I have to live with it, but I cannot bear to see her like that and to know that they are gone."

The Power of the Group

For some women friends, among them other women who had survived the same, were their biggest and most important support. This is particularly so with a group of camp survivors who organised themselves for mutual support. For many years, they had supported each other in practical ways and met on social events. "We encouraged each other, but we never spoke individually about what we've been through", the spokesperson of the group said. "Never, not even today. I never told her of her my tragedy; although we are in the same circle, we know some details, but not the entire story." Together they decided not to testify before the ICTY because they did not trust the international community as UN peace keeping soldiers had actually escorted them when they were transported to the camp. They wanted to testify in Bosnia and waited for the Court in Sarajevo to be established. Then they testified.

When the prosecution contacted the Camp Survivor Group, they were in a much stronger negotiating position than individual and isolated women, and they used it with a lot of self-confidence. The prosecutor was a foreigner and, "we told him, if you are going to do your PhD on us, you can drink coffee and goodbye. If you come to put war criminals behind bars, you have 2 months time for an indictment and you will have all support from the victims. He did it in 2 months". Every potential witness was contacted only through the group and all security and protective measure were negotiated together. After the arrest of the alleged perpetrators, over 170 witnesses of both sexes came forward, and 50 testified in the end. The Camp Survivor Group took their fate in their own hands and not only participated actively in the legal justice process, but speeded it up significantly.

They also took care of their own preparation for testimony and visits to the Court:

"We needed to visit the Court, we had no idea what the courtroom is like and what is waiting there for us. Then one day we went sightseeing, met the girls from the department for support of witnesses, saw the courtroom, saw how big they were, who's going to sit where, learned what it means to be a protected witness (…). We left as a group and we got answers to everything what we wanted to know."

The mutual support of the group, the feeling of taking care of each other, was also most important after testimony. One participant said:

"No one, not even my own mother if she were alive, nor my brother or sister-in-law, could make me feel better

after coming back from court, except the persons with whom I went. […] When five or six of us gather and meet you in front of the court building, it's like the entire burden you've been carrying just falls off to see them waiting. You needn't speak, their look is enough, they are there, waiting for you and giving you their support."

Therefore, all women of the group rejected the imposition by the prosecutor not to contact each other in any way until the last of them had testified. Obviously, the prosecutor wanted to make sure that the defense would not challenge his case on the ground of arranged testimonies. "They always insinuate", one woman said, "that we talk each other into something, that's why I say we are put on the same level like criminals."

Witnesses who testified before the ICTY also described the importance of an ad hoc group support in a different situation. The testimonies of a group of witnesses from the same area were scheduled one after the other so that the Victim and Witness Section of the Tribunal made arrangements for the whole group to come together to The Hague. 3 or 4 of the women in this group testified about being raped themselves, and one of them said:

"This was the best thing. We all had separate rooms in the hotel, but in the evening we would sit together, drink coffee, and I could share my fears with them. I was fine when I was with them but when I left to go into my room I was afraid that somebody might watch me or attack me. Later when I spoke about this to the group, they said 'why didn't you tell us, we would have come immediately if you are afraid and support you'. This mutual support was very important for all of us."

It was planned that after the testimony, the witnesses would return home immediately. However, they wanted to stay together until the last one of them had testified, and their request was granted.

5.3 On Good and Bad Practices

This section summarises what witness found especially good or helpful while testifying at the different courts. Both, the ICTY and WCC have sections to support and assist all witnesses. The Victim and Witness Support Section (VWS) at the ICTY is, in addition, responsible for the security of the witnesses during their stay in The Hague and during their travel to the court and back. In Bosnia and Herzegovina SIPA is responsible for all security issues and the mandate of the VWS is limited to practical and psychological assistance. On the whole, both sections received good marks. However, major differences can be found in witnesses' evaluation of their treatment by members of the Office of the Prosecutor (OTP). Neither the prosecutors of the ICTY nor those at the WCC have developed consistent and binding procedures in the treatment of witnesses. Therefore, much depends on individual engagement, personal backgrounds, trainings, and experiences.

The present compilation of good and bad practices from the perspective of witnesses who testified on rape should not be read only as praising one court and criticising the other. The exercise is to learn and develop an understanding of what strengthens and weakens witnesses in their efforts to contribute to justice.

With a few exceptions, those witnesses who testified before either the ICTY or the WCC did not feel re-traumatised or psychologically wounded by the way court members treated them. In fact, 21 of the Questionnaire Group (56.8%) did not want the Courts to do anything differently, and several witnesses were full of praise. 43% felt supported by the courts and nearly 38% felt supported "a great deal". However, there were also serious complaints about security with respect to the WCC.

17 of the study participants had testified at the ICTY, 31 at the WCC and 9 at other courts, including County Courts. Although most participants described the testimony as traumatic, it did not apply to the treatment from officials of both, the ICTY and WCC. During the first years of the ICTY, complaints from witnesses about lack of protection and respect had been the rule rather than the exception. Of those participants who testified in the late 1990s, 2 felt that they would have wanted more contact and support after their testimony and return to Bosnia. One said she felt very alone since she could not go back to her hometown, had nobody to talk to and there was no psychological help available. "While I was in The Hague", she said, "I had professional help and I worked with the people from the witness department […] but when I came back to Bosnia I had problems; you have nothing like that in Bosnia. You are all alone when you come back". The other witness would have appreciated if somebody from the court had kept in contact with her in some way after the judgement.

All witnesses who had testified at the ICTY during the last 2 to 3 years described in part with enthusiasm how much they felt valued and respected by the court officials they had contact with – from the Victim and Witness Section, the Office of the Prosecutor, court management, and the judges in their cases. If they had any complaints, it was about defence lawyers, but, as one witness said, "they just do their job and you have to be aware of it".

The experience of the witnesses who testified at the WCC was different. Although several participants expressed their reluctance to criticise "their court", there were more

complaints about lack of preparation, security, and disrespectful treatment. However, there was also much satisfaction with the way witnesses were treated by the Victim and Witness Section.

Preparation and Information

What witnesses found most supportive in terms of preparation was to review former statements, either alone or together with the prosecutor. Several witnesses were given this possibility at the ICTY, but none at the WCC. Many witnesses had given many different statements to different authorities during the past 15 years. One witness said:

"I talked about it about 100 times, and something is always forgotten, or added, and remembered. Sometimes that small piece of information does not mean anything, but sometimes it means a lot. The first statements I gave under a lot of stress, and those are brief and clear statements. Later on when we were more relaxed, the statements were longer, but the defence sticks to the first statements. For example, they say 'you said only this', and I say 'when I gave that statement I was just rescued, I was naked, without footwear, hungry, and thirsty, and I only gave the statement to get it over'."

The defence always uses different statements of witnesses given at different times, dwelling on contradictions to question the credibility of the witness. Therefore, re-reading those statements is certainly one of the best preparations because the witness can refresh her memory. She will also be a better witness because she feels more self-assured.

Witnesses appreciated not only the explanations regarding procedures, but also to see for themselves the settings of the courtroom and to listen in on a session of another trial. It helped them prepare themselves emotionally, and they felt less intimidated. As mentioned above, the camp survivor group had organised this themselves with the help of the VWS in Sarajevo. Apart from that, such preparations were only communicated from witnesses who testified before the ICTY.

On the whole, ICTY witnesses felt well informed, with 2 exceptions. In one case, there was a lot of confusion as to whether they needed the person's statement or not, appointments with investigators were cancelled without explanation or even notification. Another witness was not informed that she was obliged to come and testify when called, and found herself eventually pressured with a subpoena. "At the Bosnia and Herzegovina Court", she said laughingly, "you know that you have to come, but at the ICTY they give you some kind of space to think about it. They are somewhat more subtle, I would say". Nevertheless, she decided to go only when she was convinced that her testimony would be essential. As it turned out later, it was indeed, and the perpetrators received some of the highest sentences.

Again, with the exception of the camp survivor group, WCC witnesses had less contact with prosecutors and felt less informed. None mentioned long meetings with prosecutors or the offer to read former statements. A member of the study team that had monitored trials at WCC said that most of the witnesses had met the prosecutor only about half an hour before testimony. The same experience was reported by one of the study participants. She was informed about the procedures half an hour before the trial session started. Earlier she had been told that testifying is "no big deal. You have to go in and it will be finished in one hour". At that time, the witness was not doing well psychologically and asked for a postponement based on a medical certificate. "The prosecutor only told me: 'If you can't do it I have to bring an expert to confirm results of your medical exam.' […] He said that I wouldn't have to testify only if the expert found me crazy or something like that." The witness testified, but was very clear that she would never testify again.

Other WCC witnesses were obviously not well informed about formal proceedings. For example, one witness was shocked and took it as an insult when one of the judges instructed her in the beginning of her testimony not to lie. As the section on protection states, there was also a lot of confusion as to protective measures from both ICTY and WCC witnesses.

Respect

On the whole, all ICTY witnesses felt they were treated well and respected. They valued what some called the 'human approach'. They felt that investigators and prosecutors spent a lot of time with them in general to prepare, support and motivate them. One witness felt her fears and worries reduced, and her self-confidence lifted. The prosecutor "motivated me", she said, "telling me to take time to think when necessary. She supported me all the time, saying: 'You can do it.' […] I liked the fact that she was gentle and kept saying to me all the time: 'Truth, truth, and only truth'". Another witness asked, "Can you imagine how I felt when the prosecutor came to greet me afterwards to say thank you, and to accompany me when I was going back? I mean I felt like a human".

Witnesses also appreciated very much the work of the Victim and Witness Section. They felt taken care of "like a little baby", as one witness put it. "They were super! Everybody", she added. There was always someone who saw

that they got what they needed – be it a glass of water, a cigarette, or a visit to the dentist. To take such seemingly small worries off their shoulders helped them relax and stay focused on the task that they had come for.

Some witnesses felt they found friends at the Tribunal who kept in contact with them, calling them to inform them about new developments or just to see how they are. Investigators, too, kept contact and visited them from time to time to have a coffee.

The experience of WCC witnesses is mixed. Several women wanted more support and felt confused in the court building. One woman who had also testified in The Hague went with a friend who had to testify before the WCC. She found the whole atmosphere different. When she asked for a glass of water for her friend, she was told to look for one herself. "That's so pathetic", she commented. "I think they should be more sensitive about those things." And indeed, her friend, who had also testified at the ICTY, underlined several times in the interview the symbolic value of offering such 'banalities' as tissues and a glass of water. This simple politeness signifies respect, and it is the absence of it that sends the message, 'we, the court, are important, and you, the witness, are not'. When you know that any minute you have to go through your nightmare again, such things can make a world of difference.

The same applies to the manner the witnesses are summoned for testimony. "They only get summons to appear on that date and time, related to this or that case", one activist working in a camp survivor association told us. "For example, SIPA investigators came to me (…) and I wasn't prepared at all. It's not nice, and I'm saying it again, but you just get an envelope with notification saying 'You are called to appear on that date and time. If you fail to appear you have to pay a fine of 5,000 BAM.[260] Everybody is shocked, I mean, 5,000 BAM?!"

Several witnesses made a clear distinction between the way they felt treated by the WCC in general and individual persons from either the Office of the Prosecutor or the witness section. They mainly complained that the court only contacted them when they wanted them to come and testify again. One of the interviewers summarised her impressions as follows: "Victims testify and feel abused that they were only used for testifying and then abandoned afterwards. Then they open up some other case … if you understand what I mean. The time will come when they [the victims] will just not go."

The camp survivor group as well found that the court gives too little relevance to the Victim and Witness Section:

"The women and girls working in the VWS are truly giving their best, but their actions are limited, and when we analyse this we can say that the court has put the victim in some sort of a marginalised position because the staff of the VWS has not been involved from the very beginning, […]. It makes all the difference when you get to the stage of testifying and these professionals take over. We all went through this, they give you strength, security, relief, but it doesn't last long, which made me sad many times. Anyway, two or three days before, they call you, talk to you, ask you how you feel, and that's all they can do, so it's very short, their possibilities are small. When you arrive, they meet you, and their smile and positive energy glow […]. We have said this many times, as soon as you walk through that door, they meet you and right then your burden falls off, so the very meeting with them is a relief in itself. And what happens? The testimonies are over, and they're gone. No one cares, except what they do on their own – they called to see how we were, but it wasn't required of them. After a while, you start feeling like a little dust cloth that someone used and after they are finished, they throw it away. Our contacts with that staff and their humane approach – I don't like pity, I don't like the word itself – their tactful way to call us and ask about the group, send regards, that's all a part of good interpersonal relations. So, this part should be given more relevance."

And another woman of the group added:

"I can't tell you how much it means when someone calls you and asks how you are doing, whether you need anything. A kind word means a lot. The girls that stayed in touch with us did that on their own initiative, but it should definitely be a practice by the court, and they need to be urged to do this."

The Victim and Witness Section of the ICTY recently adopted a new policy of calling up former witnesses every 6 months after testimony to see how they are. A long-term follow-up survey on former witnesses is planned.

Conclusion

The witness participants found the prosecution of rape and sexualised violence important in order to demonstrate the gravity of the crime of rape. Their personal motives to testify were manifold but punishment of perpetrators was central as acknowledgment of what they suffered. At the same time, for some it was important "to get the criminals off the street" and to prevent them from becoming role models as celebrated heroes. They saw this a an essential precondition for rebuilding society.

For most participants testifying was a traumatic experience but that did not necessarily influence their choice of

whether or not they should testify again. Some were determined to testify whenever necessary; others were more reluctant or would not testify again. Those who had more support or could act in a group had significantly more negotiating power to defend their interests as witnesses. There was a high level or responsibility expressed to fulfill their role as witnesses in determining the guilt of the accused.

Respect and "human approach" was named as the best way to win their cooperation. Good preparation by prosecutors, in particular the reading of former statements, was seen as most helpful.

It might well be that if we had interviewed other women we would have received different answers to the same questions. Relatively few women who see themselves as belonging to the 'Serb' or 'Croat' community testified before the ICTY or the WCC. We will not even say how many of them participated in the study in order not to disclose their identities. However, with a greater number of them different topics and views would probably have emerged. In addition, we did not succeed in interviewing witnesses from Kosova. They would most certainly have told a very different story about stigma, marginalisation and ostracism. There are cases where women have been raped in their own community after the war because they were looked upon as fair bait. However, what the interviews show and what more interviews with more women would confirm is the picture of diversity as opposed to stigmatising everyday theories on 'typical' rape victims or rape witnesses. Such stereotypes are, as Chapter 6 will show, also effective in the communication between court members and witnesses.The interviews also display a picture of women who want to have acknowledgement for both – their pain and their will to move on, their desperations and their struggle to come to terms, their victimhood and their individual personality.

To pay respect and to acknowledge the diversity of rape witnesses are important prerequisites for working against rape stigma. The stigma of rape is not only based on gendered notion of sexuality but also on stereotyping rape survivors as disabled, damaged, fragile, emotional, weak and shameful. This issue will be further highlighted in Chapter 7 where we discuss the views of the study participants on security, safety and protection. Most rape survivors testify under heavy protective measures, often in closed sessions. On a social and political level the exclusion of the public from rape testimonies can recreate rape as an issue of secrecy and shame with the potential of adding to the stigma. On the personal level, however, protection of privacy is necessary and we will see that the witnesses have very different reasons for requesting this, reasons which cannot be reduced to shame and fear of stigmatisation.

6. Some Perspectives from Judges and Prosecutors at the War Crimes Chamber

14 semi-structured interviews with judges and prosecutors from the WCC were conducted: 7 judges (5 men and 2 women) and 7 prosecutors (4 men and 3 women). 2 more judges (1 man, 1 woman) participated in a round table discussion of judges.[261] All of them had been involved in cases with rape charges. Some of them had worked in several such cases, others did so for the first time when interviewed.

Chapter 6 tries to capture some of the major personal challenges of rape charges as named by the judges and prosecutors we interviewed. The focus lies on these 2 groups because they facilitate the testimony of rape witnesses in the courtroom. However, views of legal advisors, investigators, members of court management and of the Victim Witness Team are included.

Gender of speakers is indicated. While no representativeness is claimed it does indicate tendencies, differences, and sometimes surprising agreement. At the same time it shows that while 'gender matters' gender sensitivity matters just as much.

The sensitive nature of some of the questions might have prevented to receive open and honest answers. Interviewees were therefore assured strict confidentiality.

In Chapter 6.2 statements from several highly experienced judges from the ICTY are included.[262]

6.1 Challenges of Rape Trials

2 major challenges expressed by judges and prosecutors faced with rape cases emerged from the interviews. The first referred to the interaction with rape witnesses. This included issues relating to witness' trauma, communicating with witnesses, getting them to cooperate, establishing a relationship of trust with witnesses. The second major challenge concerned the problem of evidence in rape cases.

We asked court members and prosecutors whether rape cases were different or more difficult for them personally to handle and if so, why. All agreed they were. "Prosecutors do not like rape cases", one (male) prosecutor from the WCC said. Several statements were similar. Some prosecutors – as well as some judges – found themselves caught between 'investing more' and 'getting less' when it comes to prosecution of war rape. On the one hand there is always 'more' required: more protection, more sensitivity, more patience, more time, more emotions, more trauma. On the other hand, there is less: less witnesses willing to testify and less, in fact no material evidence. "Rape", one experienced (female) prosecutor said,

"is difficult to convict and prosecutors, especially when time constraints are present, prefer to prosecute other crimes as they want to invest their time where they have more probability of getting a conviction. It is also the case that victim witnesses require more time, patience – again making the case more demanding."

Emotions

More male than female judges and prosecutors emphasised the emotional challenge rape testimonies present for them. "You just never know what you might encounter", one (male) judge said. "Is it going to be too emotional? Are there going to be enough words?" A (male) judge who had sat in several rape cases found it "harder to deal with rape cases because you have to meet victims when they come to testify. You see all the terror that she had to go through. She has to live with all that dread and despair. You can feel it, perceive it. Whilst in murder cases you don't have to deal with victims". Another (male) judge had just started his tenure at the time of the interview and was sitting in his first case with rape charges. "Those stories are so difficult", he stated, "you can feel your throat constricting. It doesn't matter whether you are a professional or not; it's just difficult".

Some (male) prosecutors expressed similar reservations. One had successfully prosecuted several rapists but nevertheless admitted, "I would prefer only murder cases. […] For one I have a daughter. These cases are more emotional for me while in other cases I can distance myself more". He found it more appropriate if those cases are handled mainly by women. "It is the hardest for me to listen to all those details", another prosecutor stated.

None of the few women interviewed named the emotional challenge first. "For me", a very experienced female judge said, "it is not the hardest to listen to the details of rape, that's not the problem. [For me] it is hardest to make sure the witness gets through her testimony well. What causes most anxiety is to fulfill my obligation to protect the witness". The protection of witnesses played a critical role in all our interviews with male and female interviewees.

Trauma

Everybody interviewed acknowledged traumatic consequences of rape. Many perceived rape survivors as belonging to the most vulnerable category of witnesses. "With rape cases", one member of court management

stated, "the alert level goes up immediately because these women are most vulnerable and could be stigmatised." A (male) judge who was relatively new at the court but had experience with civil rape cases stated that "the fact that women were objects of sexual violence orders us to be sensitive". Judges, he added, should react in time, "that we are not the ones who cause them to be more traumatised than they already are or to be re-traumatised. I would not allow this".

All male and female judges emphasised they would not allow witnesses to get harassed in court. This does, however, not reflect the praxis at the court. The team's trial monitor observed in general that neither the presiding judges nor the other 2 members of the Panel intervene much.[263] Referring to a trial with several rape witnesses one prosecutor told that at the beginning of the trial "the defense council were very rude to the witnesses, shouting at them and more, harassing them. Finally, after 4 witnesses the presiding judge told them to stop – but that also only after training. After the training all got better. I myself became more assertive". The training had been organised ad hoc by the Victim Witness Section. Afterwards the presiding judge started each session by giving conduct warning to the parties and by stating which questions were allowed and which not.

Trauma is not only perceived as a call for sensitivity but also as an obstacle for "getting the facts". Most prosecutors stated that it is hard to work with rape survivors because of their trauma. "They are of unstable character", one female prosecutor said, for example. "It is hard to get into their mind. We need to return her to that time when the rape occurred. The hardest is to get into her mind. They will not speak openly; they hide that somewhere in their minds."

2 prosecutors, 1 national and 2 international, felt they needed support from a psychologist working exclusively in the Prosecutor's office. "I would like to have psychiatrist as my assistant and at my disposal", one said, "to prepare witnesses and to harmonise my needs with those of the witnesses as opposed to protecting them as the Victim Witnesses Section does. They tell me, she's traumatised so don't touch her". This was a prosecutor with many years of experience representing torture victims in other national courts. The other prosecutor had had a paralysing experience with one witness and agreed:

"We need to have psychologists here. The Victim Unit at the Court is only included in the phase after the indictment is opened. Before that, the victims are left on their own. Few days ago, I just had one witness calling me and saying that she cannot stand it anymore and that she is going to kill herself. I wish I had someone, a psychologist to whom I could give the phone. I do not know what to do in such situation as I am not trained for that."

One (male) investigator confirmed the problem from his perspective as he found that "investigators often serve as psychologists, social workers for prosecutors". He thought the Victim Witness Team of the court should be involved in working with witnesses even before the indictment is issued because, "unfortunately, witnesses are usually left feeling exploited and deserted".

One (female) psychologist who supported a rape witness to the court described the prosecutors she met as "very committed and wonderful people". At a certain moment she found herself coaching them in what to do when a witness breaks down emotionally.

"When I talked to this one prosecutor I compared the situation with our weakness as grown-ups when our children confront us with such strong emotional outbreaks. I did not say this to equal victims with children but what is similar is our reaction to it. We are paralysed then because we feel responsible for this and we cannot endure it. Sometimes it is just enough to be there and sit with them and endure it. This is what you can do. This is what people in the court lack or don't know no matter how compassionate they are."

Cultural stigma and 'female' shame

Just as with trauma most interviewees acknowledged the existence of social stigma of rape. Rape stigma was seen as responsible for the particular vulnerability of rape victims, their reluctance to speak and to go into detail. Rape victims, a (male) prosecutor stated "will not speak openly". "They hide what happened from surroundings and family", a (female) judge added. There was a general consensus that the difficulty in getting rape victims to testify or to talk about details had to do with the blame society burdens on rape survivors. In this context, nearly all male interviewees, regardless whether national or international saw Bosnia and Herzegovina, in particular the Bosniak community, as very traditional in this respect.

"This is a very traditional culture about sex", one international (male) prosecutor said, "which makes it even more problematic". "Stigma", another international (male) prosecutor found, "is a problem of the Bosnian culture". A national (male) member of court management agreed: "This is a very conservative society – to come forward and testify that you were raped has implications that go beyond the fear of the perpetrator." In this context, Bosnian women were also seen as traditional. As one national (male) judge stated:

"The affected women find it more difficult to tell what happened because we are a traditional society. […] They have problems to open because of our traditional society. […] Rape is shameful. You know it is. Our country is – I don't know. It is shameful. It is shameful to be raped. Women are still traditional. […] I believe that most of the women in this country think so, because they would first have to cope with social antagonism, so it would be difficult to tell anyone what happened."

A national (male) prosecutor referred to "our mentality, closed communities, villages, Muslim cult around women. In those areas where it [rape] mainly occurred, the communities are very traditional. Those women are still seen as having a special role. And for them it is the worst that they lost their 'honor'. […] The honor is protected more than anything else". One international (male) prosecutor found that "40% of all women are shy and modest about these things". For him the typical Bosnian woman was "discreet, modest and shy". He found that most women could cope facing the accused, however "it is more shyness and shame that makes them uncomfortable about revealing their names to members of the public – because of their ethnicity and of the opposite ethnicity". For him the challenge was to persuade a reluctant witness to testify: „Decency limits the degree of pressure that one can humanely impose. Usually I find that a witness who initially refuses to testify will continue to refuse."

The notions of 'traditional' Bosnia and 'shameful' Bosnian women, in particular Muslim/Bosniak women, expressed here women call for an interruption of the account of challenges and for objections. First, the Federation of Bosnia and Herzegovina is to date the only political unity in which rape survivors are recognised as civil war victims entitled to receive a pension. Bosnian women groups, including raped women, campaigned for this law. Second, Bosnian women spoke up in anger while the rapes were still going on. If they had not done so ferociously, it is doubtful that journalists would have seen it and that war crime courts would prosecute it now. Third, a well-known and very influential women's association in Bosnia, the Association of Women War Victims, organises exclusively raped women. This is rather unique. Fourth, one example from the court itself shows that even strong feelings of shame and dishonor do not necessarily contradict public testimony:

In June 2008 a women testified under the pseudonym Witness 4 and with image distortion in open session on rape. She was breathing heavily and refused to look at the (male) prosecutor. Without being asked, she volunteered the information about a rape that was not charged. When questioned on the indicted rape she spoke with visible embarrassment. "I was ashamed of being raped", she stated. "I couldn't talk about it. Rape wasn't something to brag about. I have disgraced my mother, my father, my brothers." She even cut her hair to punish herself. She did not report the other rape because of shame. She became pregnant from the rape and had an abortion. When the defence lawyer insinuated that the accused only wanted to help she became angry and yelled at him.[264]

Although this study does not examine reasons why many women might choose not to testify from the sample of witnesses interviewed, it can be seen that women have different reasons 'to hide what happened' from the public even when they decide to testify. As will be seen in Chapter 7.3 shame and embarrassment do not rank highest as a reason given by the interviewed witnesses for testifying in closed session. Many felt more responsible for others and wanted to protect husbands, children or mothers because they thought they would not be able to bear it. Several court members we interviewed acknowledged this themselves and even named additional reasons for women to refuse further testimony. "Women who live abroad", one (male) judge explained, "mainly do not want to testify. A lot of time has passed. They have new lives, families. They do not want to return again to that". In addition, many women had witnessed many different atrocities or were raped many times by different perpetrators. If these men are tried at different times in different cases, these women are called to testify more than once. One woman interviewed claimed she testified (or gave statements) over 20 times. "I can understand that in war crime rape cases", one (male) prosecutor stated,

"a girl is going to be questioned by a couple of activists on the side that won the war, is going to be questioned by some police officials, and is going to be questions by some prosecutors. I think that it's very unlikely to be on the scale with girls that were brought to ICTY investigations. They were usually questioned in a sequence like this: once they reached safety, the representatives of the agencies present there would question them at length, open and in the form that would be admissible in court. But probably it was just as moving for the girls. And there will be debriefing sessions and examinations by doctors. Then after a year or two, they will be seen by the ICTY investigators and they would be questioned at huge length initially by specialist investigators, then by the prosecutors. Then they would be testifying in one or more ICTY trials which are probably the biggest trials they would see in their lives. And then, after they thought that it was all over, they would be asked to go through it once again in our court. That is about twice of what would normally happen to a girl that had been raped. So, when I tell you that most of our rape victims were pretty well fed up with the whole experiences it is not surprising."

Another (male) prosecutor gave another example: "Some witnesses testify so often they become professional witnesses. There was one pregnant woman who testified [on rape] in the morning in one trial, and in the afternoon in the other. This is traumatizing for witnesses."

When asked in general about obstacles of prosecuting rape many prosecutors and judges referred to the particular traditionalism in Bosnia as the main reason for their difficulties to win the cooperation of rape survivors. However, a much more diverse picture emerged when the general level was left and concrete experiences with witnesses were addressed. The statements differed much from the former: "There is no such thing as a typical rape victim", the same (male) prosecutor said who had pictured Bosnian/Bosniak women before as "modest and shy". "Raped women are the most vulnerable", another (male) prosecutor said, "but my women are okay". With 'my women' he referred to women witnesses in one of the cases.

Some of the interviewees had emphasised the differences from the beginning. "Some witnesses do very well in court", one (male) judge said, "and describe their experiences in a very convincing and extremely authentic way while others are still scared and suffer from traumas; and some of the witnesses simply don't know to answer some quite logical questions […] It varies from witness to witness". A (female) prosecutor observed, "In respect to trauma some women look as if it did not leave any trace on them; they continue with their lives. Some though have lots of difficulties". A (female) judge found that "some are really tough rape victims, not vulnerable any more; they are angry".

When leaving the level of generalisations male vulnerability and shame moves into sight as well. "From my experience", one (male) prosecutor said, "I can say that men are also deeply traumatised in cases of torture. It's the same pattern in difficulties to speak, breaking down, physically traumatised". One prosecutor pointed out that contrary to women men are socially not allowed to acknowledge their pain and show painful emotions. "Tortured men", he found, "nearly all testify. They never seem to know how traumatised they are. Maybe because men are told not to be. They are traumatised, severely damaged when they testify". On the other hand, a (male) investigator argued, "It is much easier to talk with women, since men are usually too proud. I have been investigating cases of rape in detention camp where only two men out of ten admitted being raped". Another (male) prosecutor stated: "I think women victims of sexual violence are the same traumatised as male victims of torture. Both have gradual disclosure of the story and both feel shame. Males feel the shame because of humiliation and powerlessness."

The jurisprudence of the ICTY has included rape as a classification of torture. Both, the ICTY and the WCC brought to light that rape and sexualised attacks on men were quite common during the war. "Men", a (female) judge observed, "feel more embarrassed than women victims to talk about being raped".

It is embarrassing to talk about 'it'

Not only male and female witnesses feel embarrassed to talk about rape. Male court members and prosecutors brought up this topic during the interviews very honestly. "I am not entirely comfortable talking to them [rape witnesses]" – one committed male prosecutors confessed. "I think that being more sensitive is a good approach. It is a job and I do it, I have to do it. Sometimes – it's not asking the question – but I felt discomfort thinking they will be uncomfortable." Another (male) prosecutor would actually prefer what women organisations demand – that only women should question female rape survivors. The witnesses, he said, are more embarrassed when he has to ask them about all the details of the rape. On second thought, however, he admitted, that he himself felt uncomfortable: "It embarrasses me to ask all the questions. It is very hard for me." He then referred to a particular group of women he had to question: "When I ask them about details they would get angry and say to me, I said rape! What do you think this means?" Another international male prosecutor also observed that, "rape cases – me being a male is a disadvantage. Ideally, only female prosecutors or investigators should interview rape victims to save the victims from further trauma or embarrassment".

In the adversarial fact-finding approach practiced by both the ICTY and the WCC, judges do not conduct the examination of the witnesses. Rape witnesses are first examined by the prosecutor and then cross-examined by the defence. If necessary, the questioning of both sides continues. While judges can ask additional or clarifying question the evidentiary process and thus the questioning of rape survivors is mainly the task of the prosecutor. Some of the judges admitted to be quite glad that it is not their task to ask the difficult questions about the details of rape. "It is certainly more difficult for prosecutors than for judges", one (male) judge said. "The prosecutor is the one who has to ask most of the questions. He is doing the interrogation. In that situation, it is easier for me than for the prosecutor. I would certainly feel more uncomfortable as a prosecutor than as a judge in that kind of situation. It is hard to pose questions in that situation. It is very, very hard."

"Survivors", a (female) member of Victim Witness Support commented such statements, "are much stronger than we give them credit for and we often underestimate

their strength. The problem is more our own discomfort. It is embarrassing for the people who have to listen to it, for you and for me. […] People want justice and we should not take it always from them by saying they are too traumatised. They can be prepared and supported beforehand much more than is done now."

This statement points to the importance to acknowledge that all actors in the legal justice process interact with each other and react to each other. The assumed shame of rape survivors can, at times, be a projection of one's own sexual shame which might then materialise in behavioural patterns of the examined witness in an effort to live up to such expectations. If a 'true' rape victim feels ashamed the credibility of those who act differently is easily at stake.

Workload is Unbearable

In Chapter 5 several witnesses described they felt treated disrespectfully by court members at the WCC – with the exception of the Victim Witness Team. In respect to prosecutors witnesses complained in particular that they did not feel prepared. At the same time, those witnesses who had testified within the last 2 years at the ICTY were full of praise. They found it particularly helpful and less a burden when they could read former statements, they had made many years ago. The defence often uses such statements to involve the witness in contradictions and to undermine her credibility. The trial monitor of the research team confirmed that she witnessed several cases in which witnesses met the prosecutor for the first time in the courtroom and were not informed on the circumstance of testifying.[265] Several of the interviewed judges also remarked that unprepared witnesses increase the problem of evidence. Various sources in the court – court management, Victim and Witness Section, judges – confirmed there is no uniform procedure in the Prosecutor's office. One (male) judge informed us that in his case one female witness suddenly started talking about her rape. It was obvious to the judge that the prosecutor did not know anything about it. When he asked the witness why she did not mention it before, she explained the prosecutor never took her statement. Instead, SIPA investigators had taken her statement and she could not have told 'those kids' that she was raped. "Things should be done differently", the judge concluded, "as they are done now. I think that's essential. They have to deal with witnesses, to examine them, to know what they are going to testify". One (male) prosecutor himself pointed out "rape victims were often briefed or questioned by intelligence or security agencies after the war. These statements often contain sweeping exaggerations and inaccuracies that contaminate the credibility and reliability of later evidence". This makes preparation more urgent.

All prosecutors we interviewed were aware of the problem. They are no less and no more committed as their colleagues at the ICTY nor do they have less empathy for witnesses. When the court does not accept the testimony of a rape witness, one (male) prosecutor said, "you feel like you cannot help the victim. You loose a lot with the victim. Not only in the proceedings but when you know what they lived through". Another (male) prosecutor emphasised he would rather loose a case then pressure a rape survivor to testify. However, we received different information from witnesses who did feel pressured and threatened with subpoena.

There was a general agreement among the interviewed prosecutors that rape cases require more sensitivity and more time because of the stigma attached to it. However, time is something that in particular prosecutors at the WCC do not have. As of June 2009 there were 18 prosecutors with 21 legal advisors working on war crimes with around 4,000 cases pending.[266] "Due to overload", one (male) prosecutor pointed out, "the prosecutors usually do not have enough time needed to dedicate to victims of rape, to prepare them for testimony and similar". Another prosecutor explained they not only struggle with lack of time but with lack of resources in general. "Most of the witnesses fly in a day before, maximum 2 days before", he said. "You get to see them only shortly before they go to testify. […] There is no time to prepare them for testifying. […] For preparation of witnesses who do not live here certain amount of money is needed." In such cases lack of resources has impact on protection measures as the same prosecutor stated, "Protection is given more out of pragmatic reasons. […] As for them to be here to be assessed by experts, this costs a lot of money which the court does not have. It is easier to offer them closed session". He admitted, "there is a sense of exploitation but there is no time to reflect on it. All that is overwhelming: rush, pressure, management of evidence and traumatised witnesses".

The prosecutors also referred to other problems of resources: "In respect to laboratories, they are not sufficiently equipped and there are not enough experts in Bosnia and Herzegovina who could be involved in such expert analysis." Judges as well complained about pressures. "There is not enough time for detailed and sufficiently tentative approach to the victims", one (female) judge stated, "as we are bound by the legal deadlines within the trial". This situation is clearly dissatisfactory for all sides, prosecutors, judges and witnesses.

Training and Capacity Building for Sexualised Violence Cases

Aside from the already mentioned ad hoc training for the judges in one particular case, we received information

only about 2 other trainings: One one-day training for judges, which included protection issues for sexualised violence cases in 2007[267]; and a two-day training on protection in 2006. Both seminars covered a broader scope of issues with sexualised violence playing a subordinated role. The one-day training in 2007 was embedded in a general seminar for judges; issue addressed in the context of sexualised violence referred mainly to protection such as issuing warnings to both parties on proper conduct, prohibited questions, removal of accused from the courtroom if he continues harassing the witness, etc. The picture looks similar for prosecutors and investigators.

There is no systematic and comprehensive capacity building on the questions that judges and prosecutors addressed as particularly challenging and troubling for them in sexualised violence cases. Several of the judges and prosecutors we interviewed expressed their willingness and interest in further training on gender issues as well as on communication with rape witnesses.

"I would gladly attend that kind of training", one (male) judge said. The same judge suggested additional training on trauma effects and, most importantly "every education about the ways to get the most out of the victim's testimony would be very helpful for judges. It would be also helpful for them to learn how to understand the victim, how to eventually analyse her testimony from the psychological aspect. […]" .

He also recommended communication training in particular for prosecutors, as they are the ones who have to pose all the detailed and embarrassing questions to rape survivors. "One part of the training should certainly be focused on that issue of communication, too." One (male) prosecutor found the questioning of rape survivors should be done by women as a rule. If that is not possible he would find communication training helpful.

Only one female prosecutor felt she did not need any additional training after 20 years of praxis in national courts, including rape cases. And one judge felt he learnt in 12 years to establish such good and warm relations with witnesses that it became his second nature. All other interviewees found further capacity building in the field of sexualised violence in respect to evidentiary matters, communication and trust building as well as gender crimes relevant and desirable. The proposals differed regarding the form and degree of compulsory attendance. Several members of the Victim and Witness Section found that continued education should be made obligatory for all staff. "If you feel more comfortable", one said, "you do a better job."

"Judges", one (male) prosecutor said, "are not willing to attend any additional education courses, so it is much better to use the dialog." However, judges had their own ideas. "We had some training", one judge who sat in at least 2 major rape cases, "but all of these were more like lectures, I prefer a workshop method." "More intensive training with role-play", a very experienced judge suggested. Another judge recommended on-the-job training through older and more experienced colleagues as it had helped him much in a particular case. When he faced as presiding judge a rape witness about to break down a colleague advised him not take a break because it would be worse afterwards. "So we just continued and she was okay." This counselling judge had also lectured his colleagues on communication in the courtroom: "I give space for witnesses to cry. It's important not to take a break then because that's the big and important moment when it is about to come out. In one case I waited for 3 ½ minutes while the female witness stayed silent until she said, I am ready to continue. Then it came naturally." Another judge picked up the thread of training through colleagues and expanded the idea: "They should ask their older and more experienced colleagues for an opinion on any dilemma they might have. Older, more experienced judges might explain to them what could happen or how to act in a specific situation. It would be similar to assemblies in ancient Greece. They gathered – and to express our opinions and ideas, we would be much stronger. Unfortunately, now we have a situation where the Councils take different stands on the same issues. They just cannot reach an agreement."

Without corroboration, rape conviction is "mission impossible"

It has often been claimed that many rapes during the war in former Yugoslavia were carried out publicly in order to maximise the terrorising effect. So far, however, none of the cases brought before either the ICTY or the WCC dealt with such cases. On the contrary, one of the major evidentiary problems for rape cases named by court members and prosecutors is lack of eyewitnesses. "Rape", one (male) legal advisor commented, "is usually committed without any witnesses, for that reason it is difficult to prove".

In general, to the question what makes rape cases particularly difficult many judges, male and female answered: "getting sufficient evidence." There is "no material evidence", "we have fewer facts", "no eye-witnesses", "we only have victim's testimony". "Rape cases", one judge said, "are the most unpleasant trials, since […] you do not have any material evidence. You have to deal with her and his story. It demands dedication". While all judges conceded that corroborative evidence is not required[268] in particular national judges found "that one witness' statement, with no other direct or indirect evidence to support it, cannot lead to a guilty verdict. […] I

accept the possibility that this act occurred but I repeat that, unfortunately, in war crime cases there is usually lack of material evidence. If there are even no other witnesses except the victim herself to testify it becomes mission impossible". One judge who has been involved in at least 4 cases with sexualised violence charges at the time of the interview stated:

"If the witness cannot present all the facts and information that we find important, it makes it harder to establish eventual criminal responsibility, because in rape cases there is no material evidence. Usually, rape victims didn't report the crime right after it happened. In the […] case, for example, rape was reported but only after 10 years. Therefore, we don't have material evidence, and we don't expect to have this and because of that we have to rely only on witnesses' testimonies. We only have victim's testimony, and maybe some testimony of witnesses who saw the victim right after the incident or to whom victim told what had happened to her. However, in some instance we don't even have indirect witnesses, because many witnesses wanted to conceal what happened to them so they haven't told it to anybody for a very long time. They even tried to cover it up with different types of behaviour. Maybe they tended to behave differently, not as rape victims generally do. So, these are our main problems concerning rape cases. We have to base our decision solely on witnesses' testimonies, and if we find him guilty, sentences are terribly long. But he might also be acquitted. So, it's a large range of possible verdicts."

Most national judges stated clearly that the chance that they will convict someone for at least 10 years without corroborative evidence is nearly zero. "We don't need much", one judge said, "as judges, we are more prone to believe that rape really happened […] but we need more evidence to prove it".

In addition, many judges state they do not get enough details from the witnesses. "I think", one judge said, "that rape cases are certainly more difficult than cases involving beating or torture. As a judge, I find those cases more difficult. […] Prosecutors often don't ask enough questions. They think it's sufficient but I don't agree. In many cases, it's not enough. I would like to know more. […] The fact is that I'm lacking details, more flesh, more material." This judge admitted that while he often believes that "something" did happen he does have doubts whether it "really" happened this way. Rape witnesses in war crimes cases, he found, "omit details. Witnesses are usually blocked, they are somehow inhibited, bounded".

Taken all those evidentiary problems together it is not surprising that some judges do not like rape cases as stated above. "When I see rape charges", one judge stated, "I'm instantly concerned how is the prosecutor going to prove it." Correspondently, one prosecutor stated that his first thought is "how to get the evidence out of the victim". Just as the judges, most prosecutors were deeply concerned about evidence in rape charges. Only one international prosecutor found that in war crime cases "the standard of proof is much lower" than in non war cases. "In England", he continued, "conviction in rape cases is famous because it's so hard to prove rape. In war crime cases, it is easy; it's falling off the log".

The question of 'details' was a major issue during a round table discussion with 6 judges, 2 legal advisors and one member of the VWS. There are 2 different kind of 'details' asked for. One set of required 'details' refers to circumstances, i.e. to questions as, what preceded the act, how did she meet the perpetrator, did she know him, was anybody else around, what happened afterwards. The other set of 'details' refers to the exact description of the act of rape, i.e. penetration, whether by penis or object, whether anal, vaginal, or fellatio, 'about every detail of that act'. As one (female) judge pointed out the latter bears the problem of becoming eroticised. "We need to distinguish", the judge said, "between the difficulty to talk about sex and the stigma attached to rape victims. We need to protect witnesses from the pornographic search for details, which are used, for example, by journalists. Some details can become eroticised and titillating".

In general, the judges and prosecutors interviewed found that rape witnesses give less details then other witnesses. However, during the interview some also remembered cases of, for example, a girl "which testified about witnessing of killing of her parents. She could not speak". Another (female) judge compared rape testimony to the testimony of a mother who witnessed the killing of her child. She held that the mother "can tell us details more clearly than rape victims". She therefore concluded that the lack of details in rape survivors' testimonies is "due to stigma".

While some judges required prosecutors to ask more details, one prosecutor found that judges themselves could go into more details "even though this is the prosecutor's task to secure sufficient evidence they still should ask questions in order to get sufficient details needed for decision".

If details are seen as essential and the rape survivors are perceived as unable to deliver the required details the decision on guilty or not guilty balances on the knife point of the victim's credibility. As noted before in Chapter 4.3 the credibility of rape witnesses is questioned at

the WCC more often than it was the case before the ICTY. Everyday theories on 'logical' or 'Illogical' behaviour of rape survivors play a big role here but the exact reasons for this difference would require more in-depth research. However, the question of how to establish credibility and reliability of a female rape survivor was a major issue for all court members and prosecutors from the WCC we talked to.

6.2 Some Experiences from the International Criminal Tribunal for the Former Yugoslavia

At the outset of the research for this study, we developed a questionnaire that was distributed with the support of the ICTY Registry and the Office of the Prosecutor to judges and prosecutors. We had no influence on the backflow, which was disappointingly low. We received only 27 responses in total, 6 from judges and 6 from prosecutors. Therefore, we had to refrain from using the results for the purpose of this study.[269] However, some of the most experienced judges and prosecutors regarding sexualised violence cases added more extensive comments as 'lessons learnt' and agreed to interviews. These give additional insight.

Two female judges raised the question of "how may/should judges react to the Prosecutor's reluctance/refusal to include charges of sexualised violence in the indictments". As we already saw in Chapter 4.2 this was a major problem at the ICTY. In the beginning of the Tribunal, judges had intervened in such cases; many members of the legal community did not find this to be appropriate for a judge.[270] "Judges with common law background", one judge wrote in the questionnaire,

"are reluctant to involve themselves in the process of determining what charges should be brought against the accused, although the ICTY gives them a role as they are called upon to confirm the indictments and although the ICTY is an international tribunal, not bound to any national system. Training sessions should emphasise the uniqueness of international courts and their mandate, encouraging judges to evolve and not be wedded to the judicial system from which they came. Most importantly, training designed to show how one's view of the nature, consequences and ranking of sexual violence compared with other crimes can influence the charging process may make judges aware of the dynamics which make sexual violence under-charged and the need for them to intercede should they find evidence of such acts which have not been charged."

The same judge outlined 2 other issues judges in war crime cases should be aware of and feel responsible for. The first referred to the acknowledgement of the witness as a person. The role courts play, the judge wrote, in restoring and maintaining peace is limited:

"To reach even this limited goal, the trial process must be about more than the guilt or innocence of the accused (although the trial is first and foremost about such). This approach is different from trials in municipal courts and judges at the ICTY need to appreciate this. Trials can be empowering to victims and witnesses, but only if the full trial story is told. It should not be assumed that witnesses of sexual violence do not want to testify more openly during trial. Judgements should include details about sexual violence and its impact on the region even though all such acts may not relate directly to the accused".

The judge further raised the point that judges who sit in rape cases must be aware of and scrutinise their own prejudices they bring along with them into the courtroom:

"Judges may have misguided and generalised opinions about how the effect of sexual violence against women impacts their capacity to offer testimony. It may be assumed that such witnesses are so frail their testimony needs to be abbreviated and judges may unnecessarily limit their testimony. Judges themselves may have difficulty hearing such testimony and may consciously or unconsciously limit their testimony. Hidden biases may affect judges' receipt of such testimony. The goal of having an expeditious trial may intrude on the equally important goal of affording such witnesses an opportunity to fully tell their story. A balance should be found."

Similar issues were brought up by 2 other female judges during interviews. They both gave examples from their tenure where they had to struggle with their colleagues to take the issue seriously. In one case, the 2 (male) co-judges did not want to deal with evidence of male sexualised assault, "they just did not want to talk about it", one female judge said. She found that talking about rape is not only difficult for rape survivors. "Judges need training in that as well." She also found that to give more space for "the wider picture of what happened to the woman" would contribute to de-stigmatise rape, as she would become visible as a whole person. "As judges", she said, "we put blinders on to focus on the charges only and ignore the larger context. We do not want to talk about it [rape] and that makes us even blinder to the relevance of what does not want to be talked about". And she admitted: "As women judges, we are expected to take the lead but we ourselves have trouble doing it."

"I often found myself tutoring my male colleagues of what it means to a woman to be raped", another female judge said in an interview. "You have to be insistent that this was a serious crime and the women could not have consented to it under the situation they were in." She belie-

ved that "judges who had direct work with victims before are more sensitive and understanding of victims. They are more patient. They tend not to hurry the victim and let them finish their story instead of looking at your watch."

One (male) judge raised the issue of the role of judges. Criticising in particular the right of the accused to cross-examine – which is possible in both the ICTY and the WCC – he strongly suggested to moderate the way of questioning. As presiding judge, he asked them to write down their questions, which he would then pose in a more human fashion.

Challenges for Prosecutors

Several female prosecutors emphasised in their comments the importance of developing consistent legal strategies in prosecuting sexualised violence. They found it most challenging to "work out legal positions on sexual violence issues in international criminal law", as this "often involves working from first-principle, given that there is not a developed body of case law". This includes, as another female prosecutor wrote, "finding creative but legally valid ways to reconceptualise existing crimes, such as genocide, to include sexual violence crimes".

One female prosecutor referred to the reluctance to charge sexualised violence at the ICTY. She found it most challenging during her tenure to get "the leadership of the OTP to take the cases seriously and devote the necessary resources". For her, the resistance was closely linked to myths around rape survivors. It was a challenge, she wrote,

"(…) to ensure that ignorance of gender issues and outdated attitudes among staff, did not present a barrier to dealing with sexual violence issues in a progressive, informed and sensitive manner. This applied both in developing legal positions within the office and also to investigating and prosecuting sexual violence. It seems that in the early days both at ICTY and ICTR myths about the refusal of women to come forward to testify about sexual violence for cultural reasons were used as justifications for not making an effort to seek out women and hear their stories. The lesson from the ad hoc tribunals is that, notwithstanding cultural difficulties, women will come forward, provided they are treated in sensitive and appropriate ways".[271]

To ensure prosecution of gender crimes and sexualised violence, one prosecutor suggested that training on gender issues is necessary but not sufficient. "I also think", she wrote, "that management must find ways to hold staff accountable for their performance on gender issues and to give them incentive to spend time and effort improving their expertise in this area".

7. Protection and Security

"Victims should be treated with compassion and respect for their dignity.
They are entitled to access to the mechanisms of justice and to prompt redress (...).
The responsiveness (...) to the needs of victims should be facilitated by:
Informing victims of their role and the scope, timing and progress of the proceedings (...).
Allowing the views and concerns of victims to be presented and considered (...).
Providing proper assistance to victims throughout the legal process(...).
Taking measures to minimise inconvenience to victims, protect their privacy (...).
and ensure their safety, as well as that of their families(...)."[272]

In Chapter 5.4 we described some of the practices before both courts which the witnesses we interviewed identified as good or bad. This chapter focuses on protection. As a rule, rape survivors testify in both courts with pseudonyms, behind screens and increasingly in closed session. At the WCC they are automatically categorised as most vulnerable. As we discussed in Chapter 6 this has implications for the way they are treated. This Chapter starts with a discussion of the laws and rules guiding the policy of protection of both courts and their application. Subsequently the views and experiences of the witness participants of our study are presented. Most of them do request to testify under the highest possible protective measures. Their reasons, however, are manifold and cannot be reduced to shame and embarrassment or fear of stigmatisation.

7.1 Protective Measures of the International Criminal Tribunal for the Former Yugoslavia

The Nuremberg Tribunal after World War II had no rules for the protection of victim witnesses; in fact, the prosecution's case was mainly built on documents with only 33 witnesses called into the stand against all 24 accused.[273] Contrary to Nuremberg, witnesses at the ICTY are crucial but similar to Nuremberg, the role of victim witnesses at the ICTY is limited to support the evidentiary process of the prosecution. Victims and witnesses are not entitled to reparations[274] and they have no right to participate actively in the legal process and to be legally represented. Such rights became major innovations of the International Criminal Court.[275] However, the statute of the ICTY does address the question of witness protection. Article 22 states that the court can protect the identity of a witness and exclude the public from proceedings.[276]

When the Secretary General introduced the statute to the UN Security Council he added that Article 22 shall pertain "especially in cases of rape or sexual assault".[277] With this he met demands put forward by many women groups as well as feminist activists and lawyers. Fearing stigmatisation of rape survivors in their communities, fearing exploitation through the media, and fearing abusive defence strategies as well as disrespectful treatment of rape witnesses by court members prompted activists to campaign not only to prosecute sexualised violence adequately but also to ensure special protection and special procedural rules for rape cases. Thus, for example, the International Women's Human Rights Law Clinic in New York delivered a proposal to the ICTY, which included

"at a minimum, gender sensitivity training of all personnel as well as the establishment of a special sex crimes unit staffed primarily by women experienced in eliciting evidence in an empowering as opposed to a traumatizing way. In respect to indictments and trials, survivors should not be publicly identified without their consent; certain proceedings should be held in camera with safeguards to prevent abuse; victims should be able to testify without face-to-face confrontation with the perpetrators while preserving the accused's rights through video and one-way observation; rules of evidence should forbid reference to a woman's prior sexual conduct, restrict the consent defence, and control cross-examination to prevent abuse as well as distortion; expert testimony on trauma should be permitted but not required; and victims should be entitled to the assistance of their own counsel and counsellors".[278]

These demands refer to 4 important aspects that any protection policy should take into account: First, interviewing and questioning should be empowering rather than traumatising for witnesses; second, this requires that investigators, prosecutors as well as judges are trained to do so; third, protective measures require the consent of the victim/witness when applied; and four, cross-examination must be controlled. As we will see in this Chapter the protection policy of both ICTY and the WCC often follows a paternalistic concept of protection rather than one which empowers female rape survivors respecting their will and their ability to make decisions.

Protective measures in the Rules of Procedures

The ability of the ICTY to protect victim witnesses physically is severely limited. Operating outside national legal systems, the ICTY has no means, except for cooperation, to enforce protection outside the court. Therefore, confidentiality within the proceedings from investigation until much after the trial is closed is one of the most important tools of protection. The Chamber can assign different protective measures upon its own initiative, upon the request of either parties, or upon the request from the Victims and Witness Section (VWS). Victim and witnesses may also request it themselves but since their role in the proceedings is reduced to testifying, their wishes are filtered through and influenced by either the prosecutor or the VWS.

In summary, the following protective measures are authorised by the rules of the tribunal[279]:

- Any identifying information like names and addresses can be withheld from the media and the public and in exceptional cases also from the accused.[280]
- Pseudonyms can be assigned and names removed from all court documents.
- Witnesses can testify behind screens and through image- or voice-altering devices[281] or closed circuit television.
- Testimony can also be given in a separate room through one-way closed circuit television permitting witnesses not to face the accused directly.
- The public can be excluded from parts of or the whole testimony.

Rule 79 gives 3 reasons to exclude the public from proceedings – "public order or morality", "safety, security or non-disclosure of the identity of victim or witness," and "protection of the interest of justice".

The Victim and Witness Section

The VWS became operational in April 1995. Their mandate is to secure the safety and security of witnesses during their stay in The Hague, to organise all logistics involved and to assist witnesses medically, psychologically and emotionally. It is divided in 2 separate teams, the Support and Operational Team and the Protection Unit for all security issues. This section of the court is the only one called upon by the Rules of Procedure to employ qualified women.

In the beginning, the task was underestimated which led to many complaints in particular by prosecution witnesses who did not feel protected at all. One common complaint was that victim witnesses found themselves sitting side by side with defence witness in the airplane or meeting them in the hotel. A staff of 4 was not only supposed to support hundreds of witnesses emotionally and psychologically but also to deal with an overwhelming magnitude of logistics required to bring witnesses safely from many different countries to The Hague. A member of the unit gave us a vivid picture of the early days which demonstrates the complexity of the task:

"It was a nightmare. There were witnesses who might be seeking asylum and a country of residence, who had no secure status, no documentation, no passports or who came from the region of the conflict. […] And every country that witnesses might be residing in has a different set of policies and procedures and documents required to allow them exit and re-entry. […] So, in those early days – it was just picking up people from the airport, going in and out of hotels, in and out of tribunal, bringing lunch packets. We were running like wild things just trying […] to get the witnesses in front of the court in time. […] I had my ears tuned to witnesses who wanted to testify – what would prevent them became my job. So, witnesses said, I want to come and testify but I've got nobody to feed the chickens or the goat. I had to find substitute care, compensation for lost wages. So that was how that policy was born. I want to come but I've got a five-year-old and a seven-year-old in school, I can't leave them. The children policy was born. I want to come but I am responsible for my disabled father who stood on a landmine. The dependent persons policy was born. […] Through these barriers that may have prevented witnesses to testify we started to develop that framework of support services. […] To organise a nursing care for a dependent elderly person in a home of a protected witness means, how do you explain to contracted carers where the family is going without breaching their privacy? It became very individual focused on the needs of witnesses: what are your needs, what story will work for you, how do we cover your movements?"[282]

Until 1999, there was no budget to hire more staff for providing care for witnesses during their stay in The Hague. The employment of witness assistants was only possible through donations. These staff members who spoke not only Dutch and English but most importantly the language of the witnesses were most important: "They stayed with them overnight, they ate with them, they took care of meals, they helped them phone home, they do walks on the beach for relaxation, go shopping for necessities, organise coffee just for calming talks. They alert me for people who have got particular briefing or debriefing needs or they have identified symptoms of really strong stress or anxiety."[283] On the same basis, field assistants deployed in the region were hired to help witnesses when necessary when travelling. "They collect witnesses from their homes, collect flight tickets, visas, organise movements in airports, transit and they fly with them."

Some of the witnesses we interviewed for this study had testified within the last 3 years before the ICTY. They had no complaints; in fact they were highly satisfied. They felt protected and respected.[284] As the ICTY is closing the VWS has recently adopted a new policy calling up former witnesses half a year after their testimony to see how they are. They are also preparing a long-term follow-up research on protected ICTY witnesses.[285] As the description of the dramatic first years indicates the VWS has come a long way. It is of high value for all existing and future war crime courts and tribunals to evaluate their experiences, the failures as well as the progress made.

Protective measures in Sexualised Violence Cases

As mentioned before in Chapter 5 we found that up to 1 September 2009 approximately 60 women had testified on having been personally raped or otherwise sexually attacked. According to our findings only 4 of these witnesses testified under their full name and without any protective measure. 3 more women testified under their name, but in closed session when they talked about rape. All others (approx. 87%) testified under pseudonyms and with protective measures like face and image distortion. 28, nearly half of them, testified in closed sessions in addition to pseudonyms. For the time being, in lack of statistics there is no means to compare these findings systematically with other cases in which other witnesses testified in closed sessions. However, communications with court members confirm the presumption that closed sessions in rape cases take place disproportionately more often. The only other category of witnesses with so many testimonies in closed session are "insider witnesses", as a member of the OTP thought, i.e. persons (mostly man) who had been working closely with political, military and police leaders.

Closed session not only means that the public is excluded from hearing the testimony. In addition, the testimony is also removed from all public records.[286] As we will see further down most of the women we interviewed wanted high level protection, including closed session. We will also see that the reasons for that are valid, manifold and need to be respected. However, it also means that a large and significant part of women's experiences in this war is excluded from the historical record. This does not only concern rape and sexualised violence. Rape survivors testify not only to rape or other forms of sexualised violence. Often their testimony refers not only to patterns of attack but also to their life under occupation. In many situations, only women and girls were either allowed or dared to leave the house to take care of the cattle or to organise food and water. Women were at home during house searches while men were either already deported or killed, in hiding or fighting. All these scenarios entail uncounted situations of threat, violations and humiliation. If all this is told in closed session it is also lost for the historical record as it is often the case with women's experiences in war.

It also runs contrary to what many witnesses themselves want – that the world should know what happened to them. Some women we interviewed had found a solution. As they had been together in the same situation during the war they decided that some of them should testify in open session to ensure that the whole story is being told and publicly recorded. Ultimately however, it is on the judges to decide whether or not these stories are lost for collective memory. In their judgements they can give space to those accounts without compromising confidentiality. This requires, however, that they are aware of the discriminative effects if rape in war is yet once more rendered invisible, and that war crime trials "must be about more than the guilt or innocence of the accused", as one female ICTY judge said.[287]

While the rules of protection at the ICTY are clear the issue is more complicated at the WCC.

7.2 Protection Policy of the War Crimes Chamber

At the ICTY issues of witness protection are regulated in one set of Rules of Procedures; at the Court of Bosnia and Herzegovina the issue is regulated in 3 different documents. The rules for examination of all witnesses are regulated in the Criminal Procedure Code. In addition, there is the Law on Protection of Witnesses under Threat and Vulnerable Witnesses (hereinafter Law on Protection of Witnesses) and the Rules of Procedures on Protection of Witnesses. The way the documents are written creates confusion as to which category of witnesses is entitled for which kind of protective measures. In addition, the division of witness protection into different categories of witnesses has impact on the evaluation of rape testimony.

On threats and vulnerability

The Law on Protection of Witnesses of Bosnia and Herzegovina defines 2 different categories of witnesses to which protection measures may be applied: witnesses under threat and vulnerable witnesses. According to Article 3 of the Law on Protection of Witnesses:

"a witness under threat is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony or a witness who has reasonable grounds to

fear that such a danger is likely to result from his testimony."[288]

The second category of witnesses is described as follows:

"a vulnerable witness is a witness who has been severely physically or mentally traumatised by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile."[289]

The Law on Protection of Witnesses does not differentiate between the 2 categories in terms of protection measures, leaving room for the possibility of the application of more than one measure at any given time.[290] The Rules of the Procedures for the Protection of Witnesses of the Court of Bosnia and Herzegovina (hereinafter "Protection Rules") however differentiate which protection measures can be assigned to different groups. The principles for the application of protective measures are provided for in Article 3 of the Protection Rules. It states that certain protection measures are more appropriate for some witnesses than others.

Witnesses under threat can be granted a limitation of the right of an accused and his defence attorney to inspect files and documentation (Article 12)[291] as well as a witness protection hearing which implies that the protected witness' identity will be known only to the members of the Court and the minute taker of the Court.(Article 14-22). The statement given at the protection hearing is read out in Court *in lieu* of the witness (Article 19.2 c, 21).[292] He or she cannot be compelled to answer questions that may reveal his or her identity or the identity of the members of his or her family (Article 19.2).

The vulnerable witnesses, on the other hand, may be assigned psychological and social assistance and professional help, including the presence of an "appropriate professional" during trial (Article 6). In cases of vulnerable witnesses, the judges are awarded a larger role, which allows them to control the manner of the examination of witnesses (particularly to protect the witness from harassment and confusion) (Article 8). They are also allowed, upon the consent of the parties and the defense attorney, "to hear a vulnerable witness by posing questions directly to the witness on behalf of the parties and the defence attorney".[293]

Certain protective measures can be applied to both "vulnerable witnesses" and "witnesses under threat". Testimony by using technical means for transferring image and sound as provided by Article 9 of the Law on Witness Protection and the exception from the imminent presentation of evidence as provided by Article 11 of the same law, are available for both groups of witnesses. At the main hearing the Court may hear witnesses under threat and vulnerable witnesses at the earliest possible time, and in a different order from the one stipulated by the Criminal Procedure Code of Bosnia and Herzegovina.[294]

What causes complications is the fact that both the Law on Protection and the Protection Rules, introduce a third category without defining it properly. This is the category of "protected witnesses". The term itself is confusing as any witness who receives any kind of protection is commonly also called protected witness, as both other categories of witnesses are also entitled to protective measures. The difference between protected witnesses in general and "protected witnesses" under Article 14 is that under exceptional circumstances[295] the testimony of the latter can be heard in a closed protection hearing before the Panel of judges only. The statement of the witnesses is later read out during trial without presence of the witness. Since this implies that the defence cannot cross-eaxmine the witness Article 23 of the Law on Protection provides that no verdict can be based solely on the testimony of a "protected witness", i.e. a witness that did not give oral testimony in the main hearing.[296]

Even though the "protected witness" has more similarities with a "witness under threat", based on our trial observations we found that, in pratice, the confusion is with "vulnerable" witnesses, i.e. in particular with rape witnesses. This has severe consequences for the evidentiary value of rape testimony as it can lead to its dismissal not for reasons of credibility but for reasons of the status of the witness. As discussed in Chapter 3.2.5 in the case against Samardzic a rape witness was classified by the Panel as "protected witness" because "she enjoyed the highest protective measures during her testimony"[297], although she did testify in person in the main hearing, albeit in closed session. The Panel found her testimony credible however as there was no corroborative evidence the judges dismissed her statement by falsely applying Article 23. In the Samardzic judgement, "testimony in closed session" became "testimony as protected witness". If so, this is not by chance. We saw in Chapter 6.1 that lack of evidence and corroboration was seen as one of the largest challenges in rape trials by judges and prosecutors we interviewed. In face of this confusion, a statement made by one of the prosecutors becomes clearer. "When the sessions are open it is easier", he said. "The evidence is stronger, when women testify publicly, when the public knows about everything. Then the judges are more aware. It is different when it is closed. The decision of the court is different when it is closed to public. (…) I will never ask for closed session." If testimony in closed session is less credible than testimony in open session many accused before the ICTY would have been

acquitted of rape charges. Such a judgement is in particular problematic in the light of the fact that closed session protection is much more readily applied for rape testimonies than for other testimonies or witnesses – sometimes even against the will of the witness.

The issue of the evidentiary value of closed session testimony touches the general problem of corroborative evidence.[298] The ICTY rules do not require corroboration for rape testimony. This is not explicitly established at the WCC. However, as the comments of judges and prosecutors we interviewed show it is generally accepted that corroboration is not required. On the other hand, this means, as one judge had put it, "mission impossible".[299] The reasoning in *Mejakic et al.*[300] and *Radic et al.*[301] confirm a policy that not only requires corroboration for rape testimonies but also corroboration from an unprotected witness. This was the case in both trials.

A threatened witness can be a vulnerable witness, and a vulnerable witness can be a threatened witness. The tendency however seems to be to assign vulnerability to women, in particular rape survivors, and threats to men.[302] This is confirmed by the statements of many judges and prosecutors we interviewed. [303] The category of "vulnerable witness" gives credit to the high amount of traumatisation of both, men and women. However, in practice when applied routinely to rape survivors it also became a tool to protect their identities and privacy from media exploitation, i.e. from further stigmatisation. While the intention to protect the witnesses is valuable, the automatic categorisation of female rape survivors who testify as "vulnerable witnesses" has ambiguous social consequences. On one hand the position of vulnerable witnesses secures women certain rights that they otherwise would not have. Article 6 of the Law on Protection of Witnesses provides that the witness is to be psychologically supported and psychologists can be present during questionings and at trial. On the other hand assigning vulnerability to women only is a double-edged sword as it reaffirms the image of female weakness. This is all the more so as the term "vulnerable witness" includes children and juveniles, i.e. highly dependent persons. Many "vulnerable" witnesses are, as our study shows, extremely strong and determined. Emotional break downs during testimony do not contradict clear thinking and acting the next moment. If "vulnerable" means traumatised than it should be said so. Some women do not really want their stories to be known, while others insist on "the world to know".

Policy of Closed Sessions

As we will see in Chapter 7.3 the witnesses we interviewed gave different reasons for their wish for closed sessions. The reasons given by the court for excluding the public refer on the one hand all to the particular vulnerability of witnesses who testify on rape – on the other hand they display other interests as well. The issue is complicated, in particular as they can serve to protect both, the courts' and witnesses' interest. There is no doubt; women and girls have a right to be protected from sensationalist media as well as from either curious or revengeful neighbours gossiping. Their choice whom they had spoken to before and to whom not, must in any case be respected. Therefore, it would be wrong to dismiss such special protective measures. On the other hand, as the confusion around the issue shows, it is not always clear to which extent witnesses are involved in decisions about protective measures. There are also examples of Panels imposing closed sessions against the will of witnesses or interrupting them when they bring up the topic of rape spontaneously in the middle of a testimony. Protection becomes stigmatising and disempowering when the women who opt for closed session to protect their interests have to prove vulnerability. As mentioned before, closed session also means that these experiences will not become part of public record and social memory. Judges can write their judgements in ways that disclose not the identity of the victims but the criminality of the act and the responsibility of the accused as well as the pattern of this very specific form of violence. Unfortunately, some judgements at the WCC are in part written like porn scripts.[304]

In the following some examples of closed session policies are given outlining the reasoning of the Panels. The Law on the Protection of Witnesses clarifies that protective measures require the consent of the witness and need to be necessary and proportionate. The application of a more severe measure is not allowed if the same effect can be achieved by application of a less severe measure. In practice, however, things looked differently.

The trial against Radovan Stankovic was one of the first ICTY referral cases at the WCC. The entire main hearing was closed for the public, among other things because the defendant threatened to disclose the names of the protected witnesses.[305] Furthermore, the defendant was first transferred to a special room from which he could follow the trial because he insulted the Court and the members of the Panel. Since he continued with disruptions he was removed from one of the hearings. After this removal, the defendant refused to further attend the hearings. The trial remained closed because:

"In the opinion of the panel, that was necessary to preserve morality and protect the personal and intimate life of the injured parties and the interests of the witnesses, given that these are the witnesses who should testify in respect to a great number of rapes and other humiliating procedures, which might tarnish their reputation and

damage family life, that a majority of them were very young at the time of commission of the criminal offence and who, in the meantime, founded their families and have a new personal and family life. Testifying in public about such delicate and sensitive matters, even with certain measures of protection, in the opinion of the Court, always represents a risk for private and personal lives of the witnesses-victims, because in a small community an controlled small detail of the story might be enough to reveal the identity of a protected witness."[306]

In its monitoring report the OSCE named additional reasons given orally by the Panel at the time: testimony might endanger their families, witnesses will testify in up to 5 more cases, witnesses might disclose identity of other potential indictees from the same region as the accused (Foča). The policy of excluding the public from the whole trial was widely criticised and looked upon as protecting the court from public critique rather then the witnesses from public abuse.[307]

Note, that closed session does not mean that there is no audience at all.[308] The Panel can permit academics, international monitors such as OSCE and even relatives of the accused to attend closed session. In *Stankovic*, the accused's relatives were allowed to attend which made the protection of the witnesses questionable as Foča is a relatively small town where people know each other.

Upon public critique, the Panel later asked 6 out of 10 witnesses who had testified on rape whether they would mind having their testimonies publicised in a redacted form. All of them refused:

"One witness did not want to allow her redacted statement to be publicised because she was concerned about her husband and children, so that her 'stories' and what happened to her would not be known. Another witness refused because of her and her children's safety. Yet another answered: 'No, why would I give it in public, I don't know what to say, it's fine, but it doesn't suit me at all, I am afraid'."[309]

The OSCE report pointed out that mistakes were made by not leaving the witnesses the option to testify in public (if they desired so) and that the protection measures were not assigned on the case-by-case basis (but rather to the group).[310]

The trial against Nedjo Samardzic was another trial after *Stankovic* and *Jankovic* dealing with crimes against women in Foča. On 13 February 2006 the Prosecutor motioned for closed session "considering that some of those witnesses were victims of rape and other humiliating acts, that many of them were underage at the time when those crimes were committed and that many of them even today have psychological and physical problems (:..)".[311] The motion was supported by the defence and granted by the Panel. The arguments were similar as in *Stankovic*. For a second time, a Panel argued "it was very likely that the witnesses could give names of persons who were linked to the criminal offences or rape and sexual slavery and some of those persons could be prosecuted".[312] While this, of course, can always happen it is in the first place a question of preparing witnesses and of questioning techniques during trial. There is no reason to assume that rape survivors would more easily blurt out names than other witnesses. The reasoning also shows that not only the witnesses but also the prosecution is protected.

Upon strong criticism by legal experts, analysts and victim representatives, the judicial council of the WCC overturned the decision, and on March 30 the trial was reopened for the public.[313] At that time, however, all rape testimony was already given.

The third case in which a significant part of the trial was closed for the public was the case against Boban Simsic. This time, in addition to the privacy of the witnesses public morale was supposed to be protected as well. Here the Panel stated explicitly that closed session was decided against the will of several witnesses:

"The Court accepted the motions of the parties and the defense counsel and excluded the public <u>because it concerned testimonies of women who claimed to have been victims of rape, abuse and other type of humiliation</u> […]The Court could only reasonably expect that the testimony would concern rape which was quite sufficient to render the decision of the exclusion of the general public. However, besides the reason of the protection of the personal and intimate life of female witnesses and their exposure to the repeated traumatisation in the presence of the public, which testimony before the Court almost inevitably includes, the Court was guided by the reason of <u>protection of morality in a democratic society</u>, having in mind the traditional position of a woman in the Bosnia-Herzegovina milieu, <u>even where some female witnesses expressed readiness to confront openly with the accused during their public confession</u> (emphasis by authors)."[314]

In its judgement, the Panel reversed its decision on having all rape testimonies held in closed session:

"[T]he Court notes a distinction between the need to exclude the public during the presentation of the contents of some testimonies when it proved necessary [for] the purpose of the witness identity. During the proceedings there were no motions submitted either by the prosecu-

tion or by the defense to protect the identity of any of the witnesses proposed. In particular, due to the fact that protective measures are applied only with the consent of the witnesses […]. None of the examined witnesses requested anything like that […]."[315]

It is not known whether the witnesses were consulted before this decision was taken. Given that the Panel ignored the wish of the witnesses to testify openly it can be assumed that they were also not asked when the decision was reversed.

While in *Stankovic*, *Samardzic*, and *Simsic* the exclusion of the public was given summarily for all rape testimonies Trial Panels in later cases took a different approach by deciding protective measures on a case-to-case basis. In the trials against Savic and Mucibabic[316], the prosecutor requested only a pseudonym for a witness testifying on rape stating that this was her wish. The Panel insisted on hearing the witnesses' reasons without presence of the public. After the hearing the Trial Panel's Chairwoman said that the witness would testify behind the curtain. She stated that witness H was afraid because she "often visits the area near Nevesinje", (where the crimes took place) and does not want to have any problems with her neighbours.[317] Later Mucibabic's defense attorney revealed the witnesses' identity, saying her name during the cross-examination.

The Trial Panel in *Palija*[318] also determined protective measures on a case-to-case basis. One witness who testified on her own rape was permitted to testify in closed session and from another room per video link. The Panel stated that this was the only witness granted such extensive protective measures "which indicates an utterly critical approach taken by the Court when deciding whether to deviate from the usual procedure of examining the witnesses, but also that the application of this measure was absolutely necessary due to the severe trauma which the injured party still stuffers".[319]

Lack of Protection and Safety

While closed session is sometimes assigned despite the wish of some of the witnesses to speak publicly, the disclosure of witness identity is often not prevented. In *Mucibabic*, for example, the witness' identity was revealed by the defense lawyer during cross-examination. During the *Stankovic* trial the name of the father of a rape witness was disclosed, although the witness testified under pseudonym. Slip of the tongue happens more often than not also on the side of prosecutors and judges. There are also examples that visitors listening into trials know a witness; and when she testifies under pseudonym but openly her name is out in a minute. This happens especially in trials that attract broader attention.[320]

Aside from disclosing identities witnesses also face harassment in court. Judges often do not use their power to intervene as the trial monitor of the research team observed. In *Bastah*, for example, judges did not intervene when defense attorneys or indictees attacked the witness. In another trial in which most rape testimonies were given in closed session the judges reacted to the aggressive attacks of the accused only after 3 days and an ad hoc training for the judges was organised.[321] At the beginning judges did also not intervene when questions prohibited in cases of sexualised violence were asked. Thus, for example, in *Stankovic* and *Jankovic* the judges did not intervene when the prosecutors – aiming for aggravating circumstances – questioned the witness whether she had been a virgin before being raped. Such questions are prohibited by the special rules for sexualised violence cases as they refer to prior sexual conduct.[322] When such arguments are introduced as evidence the defense could walk through this door as well in cross-examination.

The judges interviewed assured that before rape testimonies they now all give prior warning to what is allowed or prohibited to ask. However, it is recommendable to implement a permanent gender-sensitive monitoring of all trials that included charges of sexualised violence. The monitoring could assist to identify pratices which violate the dignity of the witnesses. While the trial is about guilt or non-guilt of the accused it cannot be carried out without victim witnesses. As one of the former judges of the ICTY demanded, testifying should not only be not re-traumatising but empowering.[323]

Security

Witnesses can be granted measures to protect their privacy as well as their security. Outside the court this is the task of the SIPA. They are in charge of both visiting witnesses during the investigation stage and protecting them during the trials. Witnesses do not always feel protected by them. On the contrary, several of the study participants felt compromised. In one case a witness told that SIPA would schedule an investigative meeting in a public place where everyone could see them. Given the fact that this was happening in a small town a meeting with officials in a public place would not pass unnoticed. In another case, SIPA officers were to pick up one witness and take her to the Court for testimony. They scheduled to meet her on the main road where all the neighbours could see her getting into the official SIPA car.

In another case, SIPA contacted the local police to summons a protected witness to appear before the WCC. The woman knew the police officer and he knew her, and now he also knew that she would testify in Sarajevo which she had reasons to keep confidential. "SIPA", she told

us, "took all the data, for example, about my child, how old he is, where he goes to school, where does my husband work, what is his job, everything. […] It seemed to me that they wanted to know everything, even where my bathroom is. […] Then I was granted protection for 8 hours". And protection meant: On the day of her testimony, she was picked up at half past 4 in the morning. "It was dark outside. They introduced themselves as, I don't know, Djordje and Predrag[324]. They were very unprofessional. They listened to some music all the time and smelled badly. […] It was frightening. I mean, those 2 men came so early in the morning. Maybe they should send a woman. They should do that in future. […] I would have felt more protected if I had gone by bus." She also felt disturbed that every time somebody from the court called it was somebody new and the number would not show on the display.

Although such negligence has been criticised from the beginning the interviews with witnesses confirmed that they still take place, in particular in context with testimonies before lower courts.

Different protective measures

None of the aforementioned documents regulating the protection of the witnesses in the WCC gives a comprehensive list of the protective measures that can be assigned to witnesses. The Protection Rules provide that all protective measures of the witnesses must be necessary, proportionate, the weakest possible and consented to be the witness.[325] Several protection measures can be applied at the same time.[326]

The following list derived from analysed judgements illustrates applicable protective measures:

- Testifying under pseudonym
- The personal data (name, image) is protected from the public and publishing in media
- Testifying behind the curtain but in the same room
- Testifying from other room using the audio and visual link
- Testifying from other room with image distortion
- Testifying from other room with voice distortion
- Testifying in closed session
- Anonymity (this implies that the name and personal data are not known even to the defense).

All those protective measures can be combined and have been combined by the WCC. Thus it is possible to testify under pseudonym in the closed session from other room with voice and image distortion. Also, it is possible that the closed session is assigned but no personal data protected from the public. Here, we need to point out that due to the principle of fair trial the defense lawyers are, apart from some exceptional cases, informed in advance about the witnesses (at least 15 or 30 days in advance).

Unlike all other courts in Bosnia and Herzegovina, the WCC is equipped with adequate technical means for transferring image and sound, and for protection of the witnesses during the trial. Nevertheless, the fact is that most of the witnesses are coming from small towns where everyone knows everything. One of the witnesses interviewed observed that just from reading what is written in the judgement, even though the names are protected, she can recognise all the witnesses, and thus she assumes all her neighbours could do so as well.

Cantonal and District Courts

In spite of all flaws it is important to organise the system of protection in such way that witnesses are allowed to have a choice and the power to protect their rights and interests. This right is in particular important, since on the level of county courts no attention is paid to the protective measures. Protection issues are even more delicate here as these courts are technically not adequately equipped (no video links, separate rooms, screens, etc.) and the awareness for protective measures is low. While decisions at the WCC in regard to protective measures sometimes drift towards overprotection, the opposite is the case on the entity level. This is in particular dangerous for all victim witnesses as here the 'small fish' are tried, direct perpetrators who are locally well known and supported.

Although the research focused on ICTY and WCC on the district and cantonal courts, we received many disturbing accounts from the witnesses interviewed. The witnesses were summoned under the treat of imprisonment or high financial fines[327] so they did not have other choice but to come to the trials. Although some of the trials are held in the area from which witnesses were expelled, their travel is not facilitated by the courts or any other security agency. Those witnesses are exposed to the possibility of both direct physical treat of the defendant's family, friends or neighbours and reliving the trauma by sometimes for the first time returning to the places of crimes.

5 of the study participants had testified also before lower (cantonal or county) courts. We asked 2 of them for more details. Both were appalled. There was no security, no protection, no support, no information. "They told me nothing, nothing, nothing when I entered the courtroom. They did not give me a glass of water not to mention ask me whether I agree to testify in front of the audience. This happens to everybody not just to me." The women were notified without warning that they had to appear at a certain time, otherwise police would come and get them. As protected witnesses, they had to sit and wait in

the public hallway sometimes the whole day. One witness sat and waited beneath the brother of the accused. "From now on", one witness said, "I will not go there without a lawyer even if I have to borrow the money. There is no protection, nothing". She felt attacked by the defence lawyer who shouted at her without any interference from the bench.

Witness support at the War Crimes Chamber

At the Court of Bosnia and Herzegovina a special unit for support of witnesses has been established within the Registry of Bosnia and Herzegovina. The Registry that we are referring to is the separate institution that has mandate to manage and provide administrative, legal, and other support services to Section I for War Crimes and Section II for Organised Crime, Economic Crime, and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina, as well as to provide support services to Special Departments of the Prosecutor's Office.[328] The Registry consists of 5 departments: Court Support, Criminal Defense Section, Prosecution Support Section, Finance and Administration.

The study focused on the Court Support department and specifically on the Witness and Victim Support Section within that Department. The Witness and Victim Support Section (WSU) is responsible for the support of witnesses involved in all cases in Section I for War Crimes and Section II for Organised Crime, Economic Crime, and Corruption of the WCC, for both the Prosecution and the Defense.[329] The main task of WSU is to provide psychological support and assistance to witnesses before, during and after trial.[330] The WSU is tasked to coordinate with the Witness Protection Department within SIPA on issues related to vulnerable witnesses and witnesses under threat.[331]

According to the Annual Report of the Registry[332] in 2008 the WSU provided support to a total of 1,178 witnesses in cases pending before Sections I, II, and III of the Court of Bosnia and Herzegovina. Given the fact that this unit employs only 8 people (3 psychologist, 1 social worker, 3 assistants and 1 professional advisor – all women), their capacity to provide support to this number of witnesses is extremely limited. All interviews with witnesses, prosecutors, investigators and different experts from the field clearly brought out the significance of witness support officers and the need for them to be involved and work with witnesses from as early in the trial process as possible.

One witness, who belonged to the most outspoken and determined participants of the study told us about the moment when she broke down and felt totally left alone and unprotected. The court, i.e. the judges, prosecutor, defence lawyers, the accused and the witness went to the crime scene. She had not been there since the time of her captivity:

"In the morning I went with an enormous pressure […]. The investigation lasted from 10 to 3 p.m. I broke down when I faced again the places where people were killed, where they were raped, harassed – it was horrible. I don't even know how I got back from there, I was so bitter […]. There was a court staff member, the only woman apart from me who was there for something else but she was by my side, which wasn't her job, but she did what any human being would do. […] It made me sad that the court, as an institution, that they just said, okay, you are here, you need to do this and that, what happens to you, how you feel – we don't care. That morning the girls from witness section called me saying they were sorry they could not come […]. It was the court's decision, there was no financial means for that."

Such inconsiderate policy on behalf of the court is hard to understand given that taking another person with them would have cost not more than a lunch and per diem.

Protective Measures by Gender of Witness

The Annual Reports of the Registry of the Court of Bosnia and Herzegovina give the number of witnesses who testified before the WCC and received support by the Witness Support Section. Those data include prosecution and defense witnesses. Based on these data a total of 2,229 witnesses were supported by Witness Support from 2006 until end of 2008.[333] The data do not distinguish by gender and reflect neither the number of protected witnesses nor the reasons for protective measures.

To identify at least the approximate number of protected prosecution witnesses distinguished by gender we analysed the data on testimonie given by all 45 first instance judgements as published on the WCC website up to 1 June 2009.[334] As the judgements often lack details and precision in the assigned protective measures this method carries limitations. However, if not free of mistakes it does indicate a tendency. The comparison was done based on a) all 45 first instance cases, b) cases without sexualised violence charges, c) cases with sexualised violence charges, and d) testimonies on rape and sexualised violence. We were only able to account for witness' testimonies and could not confirm if any of the witnesses testified in more than one case. Thus, the numbers presented are of the witness testimonies rather than of the numbers of witnesses.

The numbers given below must be adjusted and qualified in so far as several witnesses testified twice or even more times.There are no data available to establish how many. However, since this applies to male and female witnesses the deviations from the numbers given below should not be of significance for the proportions of female and male witnesses. For more preciseness read 'testimonies' instead of 'witnesses'.

a) 45 cases in total until 1 June 2009:
- Witness' testimonies by gender: Out of 848 identified prosecution witnesses were 222 female (26.2%) and 626 male (73.8%).
- Protection by gender: 221 witnesses (26%) received some kind of protective measure: 93 female testimonies (42.1%) and 128 male testimonies (57.9%). This means that 41.9% of women testified under protective measures as compared to 20.4% of male witnesses.

Similar as to the ICTY the number of female witnesses is significantly lower although with 26.2% higher than in The Hague. Protection measures are also assigned disproportionally more often to women than to the men.

b) Cases without charges on rape or sexualised violence:
- Witness' testimonies by gender: Out of 507 (59.8%) prosecution witnesses 80 were female testimonies (15.8%) and 427 male testimonies (84.2%).
- Protection by gender: some kind of protection measures were granted 83 times (16.4%) for 4 women (4.8%) and 79 men (95.2%). Here 5% of the women testified under protective measures as compared to 18.5% men.

These figures show an ever greater discrepancy between male and female witnesses in general. A closer look displays that women are also not called in higher numbers in the cases of disappearances of their family members. In cases dealing primarily with executions of men after they had been separated from women and children the difference makes sense. However, they are important eye-witnesses for circumstantial evidence and also need to confirm names of victims. In the genocide cases of Skelani/Kravice and Srebrenica (*Mitrovic Petar, Milso Stupar et al.* and *Bozic Zdravko et al.*) the majority of witnesses were men. The same witnesses testified in the cases *Mitrovic Petar* and *Milso Stupar et al.* Among 52 prosecution witnesses 48 were men and only 4 women. Here, the highest protective measures were given to the few survivors of the massacre as well as to insider witnesses. Witness S4 made a deal with the Prosecutor's Office – plea bargaining and immunity for testifying. He testified in closed session, his personal data was declared confidential and public presentation of photos or video records in electronic, print and other media prohibited. The Panel based most of the guilty sentence on the statements of protected witness S4, statements of the accused himself and witness Miladin Stevanovic. Many others of the male witnesses had been in the same army as the accused. In the case of *Zdravko Bozic et al.* only 15 male witnesses testified. 4 testified under relatively high protective measures (under pseudonym, all personal data protected and testified from other room with the distorted image). 3 of them were treated as witnesses under threat since they testified as part of their plea/immunity agreement.

Although more in-depth analysis on single case basis is required to receive a complete and differentiated picture of the proportion of female and male witnesses in cases without sexualised violence charges the fact that only 5% of female witnesses in cases without rape charges testify under protective measure affirms the assumption that "rape attracts protection", as one of the interviewed prosecutors put it. The question to be posted would be whether female testimony in other than rape cases is viewed as less important in terms of exposure to either threats or trauma.

c) Cases with charges of rape and sexualised violence among other charges[335]:
- Witness' testimonies by gender: Out of 341 witness' testimonies 142 were given by women (41.6%) and 199 by men (58.4%)
- Protection by gender: some kind of protection measures were granted 138 times; 89 (64.5%) for female testimonies and 49 (35.5%) for male testimonies. It follows that in these cases 62.7% of the women testified under protective measures and 24.6% of the men.

Note that the majority of these cases refer to many different crimes aside from rape which explains the higher number of male witnesses.

d) Witnesses on rape/sexualised violence:
- Witness' testimonies by gender: out of 106 witness' testimonies 93 were given by women (87.7%) as compared to 13 testimonies given by men or 12.3%.
- Protection by gender: some kind of protection measures were granted 89 times; 86 for female testimonies (96.6%) and 3 for male testimonies (3.4%). Out of a total number of female witnesses 92.5% testified under protective measures compared to 23.1% of men.

Even if we allow for some divergence as the judgements on which the calculation is based are not always 100% exact in their specifications this does show a clear ten-

dency with 90 from 106 women's testimonies being given under protective measures.

Out of the 3 men who testified under protective measures on sexualised violence 2 testified on being sexually attacked themselves. Sexualised violence against men committed during the war is a greater taboo in Bosnia and Herzegovina than sexualised violence against women. 2 male witnesses who testified on being forced to commit fellatio with each other in the trial against Kurtovic Zijad received high protection (pseudonym and closed session). In the trial against Sreten Lazarevic on the other hand the male witness testified openly on being sexually assaulted.

If the 2 cases in which men testified on sexualised assaults against men are excluded from the statistics we find that nearly only women testified on sexualised violence and rape against women. Out of 97 testimonies on sexualised violence against women 93 (95.9%) were female testimonies. Out of 87 witness' testimonies (89.7%) given under protective measures 86 or 98.9% were female testimonies. From 4 men who testified on sexualised violence against women only 1 was protected. This was in the case against Damjanovic Dragan and concerned the rape committed against his wife. For the part of his testimony that related to the rape of his wife the public was excluded; the same applied for the injured women herself. However, their identities were not protected and their names were published in the judgement. Another man, who testified about sexualised violence against women, testified without protection about the rape of his daughter.[336] The protection rate in these cases is 91.6%.

Based on the analysis of published judgements so far (up to June 2009) and regardless of protective measures 4 men testified on sexualised violence against women and 9 men on sexualised violence against men. 3 of the 9 men were victim witnesses. 2 testified under protection measures.

To conclude, 95.9% of witnesses on sexualised violence or rape committed against women are women. Out of 222 testimonies given by women before the WCC, 142 (64%) were given in the cases involving sexualised violence and 93 (41.9%) were given exclusively on sexualised violence or rape committed against women. Out of 93 female witness' testimonies which were granted some kind of protective measures 89 (95.7%) were testimonies in the cases involving sexualised violence or rape. 82 (92.5%) were testimonies on sexualised violence or rape.

Protection of personal data

According to Article 13 of the Law on Protection of Witnesses, only the Court may revoke the decision on data protection, either ex officio or upon the motion of parties or defence attorney. The Article states that upon the granting of this protective measure the personal details of the witness "remain confidential for such period as may be determined to be necessary, but in any event not exceeding 30 years". The judges mainly opt for the longest protection period of 30 years. This means that the witnesses (and in majority of the cases those are also injured parties) cannot talk about testifying at the trial openly. The consequence that arises from this, for example, is that they cannot ask for compensation in the civil proceedings to which they are entitled to if the defendant is found guilty.

7.3 Witness' Perspectives on Protection and Security

We asked all witness participants of the study to give us their opinion on the protective measures they received: Did they ask for them and if so, why? Did they get what they wanted? Were they satisfied? The first finding is that there is a lot of confusion around protective measures. In regard to the WCC this reflects in part the confusion around these measures within the court itself. The second finding is at first sight puzzling. Although most witnesses found protective measures basically useless they nevertheless wanted them, if possible the highest. The third finding is that they have very different reasons for their desire of protective measures. Shame to talk about rape did not rank highest as would many people expect.[337]

When we asked about protective measures we often received very different answers. Those witnesses who had been well prepared by either investigators or prosecutors explained the different measures and under which ones they testified. Some witnesses seemed not really to care and were just focused on their testimony. "I didn't care which part of my testimony was in open or closed session", one witness said. "I just remember the man who announced open or closed. I just concentrated on my story." Many witnesses, however, found the whole issue of protective measures rather confusing. Detailed questions like, "Were you in the same room as the accused?" "Was the public present?" "Could they see you?", would sometimes only add to the confusion of everybody. Less then half of the Questionnaire Group said they received information about different kind of protective measures but 40.5% did not give any answer at all. However, it was also clear that many of the witnesses we talked to

did not believe in protection regardless of whether they were well informed or not.

Protective measures are useless …

Many women found protective measures, in particular at courts in Bosnia, basically useless. "I consider those protective measures more as a psychological protection", one woman said, who testified confidentially but had often spoken publicly about her time in camp, including being raped. "The defence can see you, and the accused can see you, and then the defence reveals your name on purpose to distract you." When her name was leaked after testimony, she was very upset and found it very difficult to deal with, but later she realised that everyone knew anyway. Another woman who had testified in Bosnia as a protected witness found her photograph later in the internet. She also found one of her early statements, filed as confidential by the ICTY, printed in a book about atrocities in her region. Other protected witnesses found their names or photos in the newspaper. Several pointed out that Bosnia is small and everybody knows everybody. Therefore, they found the effectiveness of protective measures in particular questionable in the Bosnian Courts on all levels. One incident at the WCC can illustrate this. In a public session one listener wrote down the names of witnesses who testified with pseudonyms. When the presiding judge confronted this person she said she knew the witnesses but did not know she was not allowed to note their names. After this incident the session was closed for the public.[338]

The Cantonal and District Courts in particular lack qualified staff and resources to offer any meaningful protection and support.[339] "I think I would not testify here at the Cantonal Court in an open session", said one participant, who had testified in The Hague. "I would be afraid of revenge, not for me, but for my children." One psychologist who works with a camp survivor association found that women who testified before the ICTY felt more safe than those who testified in Bosnia, in particular those who testified before Cantonal or District Courts. These county courts lack resources for appropriate staff and equipment required for any effective protection like sufficient rooms for witnesses to wait separately, video link, privacy screens etc.

… but necessary

In Chapter 7.2 we saw that protective measures, in particular, closed session are sometimes imposed on rape survivors even though they do not want them. In our sample 2 women said they did not want to testify in closed session but the judges decided so. The majority of the witnesses we interviewed took a different view. Even though most of them were aware that there is no absolute protection and that their identity can be leaked any time most of them insisted on getting whatever they can. About 76% of the Questionnaire Group had asked for protective measures, and 82% of them had received what they wanted. Those who did not said that the prosecutor in their case decided otherwise. 73% from the Questionnaire Group testified in closed session, and 89% of them had requested it that way.

Only 6 witnesses of all we interviewed said they testified without any protective measure, i.e. under their full name and in public. One did so together with another woman because they had promised each to testify and to tell everything that happened openly. 2 others did so upon agreement with other women witnesses from the same area who wanted to testify in closed session. They felt that at least 2 of them should tell the whole story publicly.[340]

When asked if other measures that do not allow the public to see the witness or hear her original voice would not be sufficient, the answer was often no. "I don't agree with you", said one participant who had testified before the ICTY. "Although their voice and images have been distorted, people are often recognised because they have to give their personal data. At the beginning they asked me about my job and other things that might lead to where I live." This witness had a high opinion of the court but she did not have sufficient trust that a partial testimony in closed session would have been sufficient. In this case the witness was concerned about her mother who knew about her rape, supported her but would not have wanted her to testify. There are however, as pointed out before, many examples from the WCC when defence lawyers, prosecutors, or even judges had a slip of the tongue and mentioned names or places that may give a clue as to the identity of the witness. *Jankovic*, for example, the accused referred several times to the witness in court or to other witnesses by name.

Security and safety

One study participant who testified both before the ICTY and a county court emphasised: "It was always closed session and that is the most important." When she came to the court to testify the media was present. "I immediately asked that all audience leaves the courtroom or I won't testify." The judges then made a decision accordingly. "I asked for every protective measure", another participant who testified before the ICTY said, "because I was concerned for my future". When asked why, the main reason participants gave was security. "I did it for safety reasons primarily", one woman said. Another woman speaking for a group of witnesses who testified in closed session confirmed this: "It is primarily because of security issues that they decided to testify in

closed session." Several women said they did not want so much to protect themselves, but to protect their children or younger siblings.

10 women from the Questionnaire Group had received threats of some kind and most of them before testimony. These threats included 3 death threats and 2 threats to kill their children. Other threads were more subtle like someone mentioning that "this might have consequences" or suspicious phone calls. The threats came from many sources, including the accused himself, his wife, combat friends, friends of the accused, and neighbours. The attackers were in most cases either friends or family members of the accused. In one case, the wife of the accused first tried to bribe the witness and then threatened her and her daughter. During a reconstruction at the crime scene, the accused's wife brought her children. They stood only 3 meters away from the house in which the witness had been kept imprisoned and raped. They yelled at her "you are a whore" and spat on her. Nobody among the court or police officials present intervened.

4 women said they reported these threats to the police. Only in one case a person was arrested. One woman who did not yet testify but spoke openly on TV about the crimes committed against her, including rape, received an SMS threat on her mobile phone saying "if you go to The Hague your daughter will go through everything that you have been through, even worse". She reported this to the police but they could not track down the sender of this message. They asked her instead to change her number. The other study participants said they did not receive direct threats to either stop them from testifying or to take revenge. However, many believed that as long as the political situation in Bosnia and Herzegovina remains ethnically segregated and as long as war criminals of different sides are worshiped as national heroes, the general atmosphere of fear and suspicion will remain.

The security situation is especially difficult in mixed communities. Those from the ethnic minority do not easily go to the police to report assaults. A woman from a small village who does not want to testify for security reasons still lives just a few meters away from the place where she was raped. When 2 men from SIPA came to take her statement about war crimes, neighbours immediately asked who they were and what they wanted. She said, "they watch over everything". She and her entire family fear reprisals, although nobody attacked them directly. "The atmosphere is tense", she said, "and you simply do not talk to many people". However, shortly after she had returned to her house after living several years as a refugee in a nearby town, she overheard a conversation of 3 men talking about her. "One said 'if I had known that they raped her we would have, too. At the time when she was in that house I could have raped her, but I didn't want to. But when I heard that other soldier raped her, I said to myself why didn't I do it, too?' They are all neighbours. That is why I am hiding it." She feels particularly isolated because other women who had been raped in the village had left. We do not know for how many women in Bosnia threats or fear of reprisals are reasons not to testify. However, it makes sense that lack of security and safety is more of a reason for many women not to come forward and testify than, for example, 'shame'. This is particularly the case for women who live in isolation. "The fact is", one woman from the camp survivor group said, "that we can't even say openly we were witnesses and victims, and it will take a long time before this changes".

We already noted in Chapter 5.4 how the witness participants evaluated some of the security measures taken before testimony. While those witnesses who testified recently before the ICTY were fairly satisfied, the picture is different in Bosnia itself. Sometimes measures designed to take care of the witness' security are perceived as threats. In the tense atmosphere in Bosnia it needs little to trigger off fears. After a war of neighbour against neighbour, one has very little reason to trust anybody. Witnesses often referred to Bosnia as a village where everybody knows everybody and where confidentiality is a joke anyway. This is particularly the case in rural areas, but it is just as true for neighbourhoods in larger cities. Suspicion is everywhere. One witness told that the day before she testified at the War Crime Chamber in Sarajevo, she received a call allegedly from the court. The person asked her many questions – who takes care of your son, does he go to kindergarten, where does your husband work, etc. She answered the questions but could hardly sleep at night because she did not understand what this was about. Later on it turned out that the call had, indeed, been a security and support call from the court to check whether her children are taken care of while she was away to testify. A female expert witness told a similar story, "I told my mother not to go out with my son while I was in Sarajevo that day", she said laughingly. "I was so nervous during my testimony because of that, and afterwards I immediately called home to check whether everything is alright." Thus, the well-meant effort by a support officer of the court caused the opposite – fear rather than feelings of security.

Self-help

Several of the witnesses had moral support by friends and families in dealing with the court. Some would consult with one or 2 other witnesses. It was experienced as comforting and empowering not have to deal alone with court authorities or young men from SIPA sweating

out testosterone. At least one can joke about it together. "We created our own strategy of protection", participants from the camp survivor group said. There had been 2 attempts of intimidation before they testified. They immediately called the prosecutor, and the person was arrested and indicted for obstruction of justice. They recorded another effort to bribe them into not testifying. When people saw that they were well organised, they stopped threatening them.

The camp survivor group also took their own precautions. They made it clear from the very beginning to have just one or 2 contact persons of the court and their group. They also ensured that everything they received from the court is in writing and they never reacted to phone calls from anybody from the court they did not know personally. They also made it clear to the prosecutor in their case that they would fully cooperate only if the local police would be kept out of the process, "because we didn't trust them".

Protected witnesses as protectors

While security was a recurring issue, other reasons for protective measures were also forwarded. Some women wanted to protect close relatives, mostly mothers or children, and therefore maintained silent on what happened to them. In one case, the mother knew about the rape of her daughter but not about her testimony in court. The witness was sure this would be too much for her mother. If you do not want your mother to know, this often means you cannot tell anyone in the family. As one participant said, "I made that decision because nobody knows, not even my sister; and for security reasons also".

The different emphasis participants put on security and protection of privacy or on both seems to have something to do with the different situations in their lives. Women who lived in communities with continued ethnic tensions or women who belonged to the victimised minority in their region were more concerned about physical security than women in other communities. The main concern of women who did not tell their families about being raped was not that they feared rejection but that they wanted to protect them. They did not want to increase their families' worries by disclosing how much they had to struggle themselves. Even if they feel no shame or guilt, their parents belong to an older generation and might feel they failed to protect them.

Protecting family members can also mean self-protection, because it adds to your own burden when you feel those you love cannot handle it. It also keeps you in control of the situation.

Rejection of rape victim identity

Younger women who wanted both to see justice done and to move on with their lives and finish their education or work at their careers, simply wanted to be perceived by others as what they were now, i.e. they did not want to be perceived only as victims of the war. One woman stated she remained silent because she wanted to avoid gossip not on her rape but on her as a witness:

"Everybody in town knows what happened to me. A lot of women survived rape during the war, but I and [she names 2 others] are the only ones that the community knows about. All protection measures were for the purpose that people do not talk behind my back when I pass by, and that they cannot say, 'Did you know that she was at the court again'."

Another young self-assured woman, who had found new commitments in her life, feared to be reduced to a rape victim. "I don't want the public to know what I lived through", she said. "I don't want to be seen solely as a woman who went through something like that." And a woman who had been a highly respected professional before the war felt she became "a professional victim" that being perceived like this made it difficult for her to find employment as an academic. Several women expressed that they do want their pains acknowledged but they do not want this experience to dominate their relationship and interaction with neighbours or work colleagues: "I don't want my neighbours to know and feel pity for me knowing that I have been raped."

Study participants did not link the social stigma attached to rape exclusively to blame and social ostracism. What they feared most was to be pathologised and not to be seen and accepted as 'normal' by their environment. This is an important message on all actors in the courts as well as to Non Governmental Organisations (NGO) at least not to add to the image of the 'totally destroyed' rape victim stereotype.

As we saw it is not always clear whom or what the protection policies of the criminal courts actually protect when they categorise rape survivors as most vulnerable and in need of high protection. The trouble with 'protection' is not only that protection in its paternalistic version tends to reinforces the image of naturally helpless women, but also that the protectors often exert ownership of those they claim to protect. Sometimes women and NGOs who had contacts with rape victims and witnesses made it very difficult for us or even refused to assist with contacting witnesses. At first, this was understandable because of the longstanding history of abuse of victims and activists in Bosnia by foreign journalists or researchers who came for a juicy story or to write their

Ph.Ds. Building trust is a long process. However, we learned from several witness participants that some local activists became abusive themselves. This is, in particular the case in the context of applying for the status of a civil war victim.[341] One activist announced at a conference that she was the only one with 'copyright' on rape stories. Once we succeeded in establishing independent contact to some witnesses it was apparent that many rape survivors and witnesses themselves were much more open and willing to talk than some 'protectors' would have wanted us to believe. Once they understood the purpose of the study, many women were proactive and called up other witnesses and helped with establishing contacts. At the same time, many local women NGOs supported the study from the very beginning. Without their support this study would not have been as successfully accomplished.

Legal Aid

The camp survivor group protected themselves with mutual support and making decisions together. Legal representation is another possibility, in particular for more isolated women to feel safe and in control of the situation. According to the Law on Protecting, "Any witness under threat and a vulnerable witness shall be entitled to legal aid". (Article 5 (2)). However, the formal entitlement to rape does not cover the costs.

"The accused", one participant said, "have very expensive lawyers while I barely manage to find a lawyer; and when I find one who knows what kind of lawyer he is and whether he will be able to do things in a proper way". Competent and experienced lawyers hardly render services to war victims who cannot afford to pay them. The participant was looking for a lawyer to file a civil suit against 2 men who published her story in a book with her full name without even asking her. She had sought for help at the ICTY and the county court as she had testified before both. While somebody from the ICTY tried to help by confirming she is a protected witness in the end she was told she needs a lawyer to apply for an interim order. She also said that if she has to testify again before a county court she would take a lawyer along to protect her rights.

UNHCR funds a program of legal aid for asylum seeker, refugees, international protection seekers, and victims of trafficking. We talked to the local director of the programme who had represented several victims of traffikking in court. The work is formalised on a Memorandum of Cooperation with the Ministry of Security. She gave us an example of her work:

"One girl that suffered a great trauma and was later moved to a third country. She testified before the Cantonal Court Sarajevo and in the Bosnia and Herzegovina State Court. My first contact with her was in a psychiatric hospital. […] I explained who I was and what my possibilities are to help her. I told her she did not have to speak to the prosecutor if her legal representative was not present. She used this in a situation that was really ugly. We were told she was going to be moved from the hospital to a save house but she was moved 2 days earlier. She was taken from the hospital straight to the prosecutor. He was very rude, he shouted at her. And she said she would not talk to him unless her legal representative was present. She said I won't tell you a single word. He was stunned and he fell silent and returned her to the safe house. Then they asked me to come and to talk to her and she told me how unkind he was to her. After intervention through the legal representative the prosecutor apologised to the injured woman."

In trafficking cases the legal representative as well as a psychologist are also allowed to sit with the witness in the courtroom during closed session or, if she testified by video-link in the video room. She is not allowed to talk directly to the witness but she can interrupt the proceedings by asking for a break if needed.

When we told several participants about the existence of legal aid for victims of trafficking they immediately agreed that this would be most important and probably encourage more women to testify.

8. Social Justice

8.1 Witnesses' Perspectives

The present study focuses on legal justice. It shows that the witnesses we interviewed expect that all perpetrators – those who raped directly or those who were responsible as commanders – are held accountable for the crimes they committed. Most witnesses also wanted life sentences for them as much as they concede that this too would not really satisfy "their soul" or their expectation of justice.

The abstract question as to what in their eyes would qualify as justice was difficult to answer. Many participants laughed or shrugged their shoulders, saying there is no real justice "because they cannot give me back my dignity", or "because nobody can cure your wounded soul". Some had found personal satisfaction in seeing the former perpetrator handcuffed and reduced to his small size. Others felt they received some kind of justice because they could tell their story "in a place where it makes a difference".

Not one of the study participants had had unrealistic expectations of the courts. In the early days of the ICTY many witnesses expected healing and some kind of material support as court members recalled. However, those we spoke to found that social and political justice cannot be achieved through criminal prosecution – at least not alone. As several of them saw it, the question was how they can support the court rather then what the court could do for them because, as one woman said, "the court will not be able to do justice without our assistance".

While punishing perpetrators and ending impunity ranked highest, 75.7% of the Questionnaire group named financial and emotional support for victims to rebuild their lives as an element of justice, followed by 62.3% who found social recognition of their suffering integral to justice. Over half of the Questionnaire group wanted the State or community to work against wars and about 40% demanded recognition in society.

When asked what survivors of rape need and deserve, around 80% named a permanent pension, financial compensation, housing, psychotherapy and medical care. Most participants of the Questionnaire Group said they were financially and emotionally worse off than before the war. It is indeed hard to imagine anyone feeling better after surviving a war. 45% of all participants were married at the time of the interview, 26.5% widowed, 14.3% were divorced and about the same percentage were single.

Health was a very important topic. Many were still struggling with trauma symptoms such as depression, suicide attempts, anxiety, disassociate identity disorder, sleep disturbances, high blood pressure, heart conditions, and other chronic diseases. Several women miscarried. One woman who had been a teenager at the time of the crime had 3 high-risk pregnancies and lost one child.

Some women showed bags filled with medications that they had to take and pay for themselves. "Each day, each day I take them", one woman said half laughingly, and taking out one package she said, "these are sleeping pills. I stopped using them after I fell and broke my tooth". A woman who has lived in a collective centre for 15 years said: "I visit a doctor constantly. I feel bad most the time." "See how much drugs I am taking", another woman who feared to be expelled from her temporary home said, "I pay for them most of the time, although I have health insurance but they are from foreign countries". She said she received a full pension as civil victim of war which is about 514 KM (250 €) "but my medicines cost over 300 KM per month".

Poor financial and insecure housing situations make things worse. "At first", one woman said, "I lived in a collective center (…) but my health was really bad, so they transferred me to one apartment, but I was kicked out, and then I came to this apartment, but once a year I am getting warnings that I will again be kicked out. I do not have any money, incomes; I feed myself in the public kitchen. (…) I also have that on paper – permanent personality disorder. (…) I am depressive, I just wake up in the morning and I don't want to live anymore. I used to get up in the middle of the night and go down in my underwear, frightened from nightmares".

Housing ranked high for those women who cannot and do not want to return to their former place of residence because it is simply not safe. "I can't go back there," one participant insisted. "They tell me in the municipality office you have no right to ask for an alternative place to live in because you have a house there. (…) They don't care that you cannot go back to that house. I can't go back with my son now, he is 25." She was afraid that friends or family members of the man who had raped her and against whom she had testified in court would take revenge on her son. Many study participants still lived as refugees. "It would be nice," one of them said, "if the state would not treat us as homeless any longer". Many of their temporary houses are in poor condition and often very small. "I was 12 years in a collective centre", one woman said. "After then the state gave me an alternative accommodation where mice were walking." Another participant had to share 36 square metres with her 4 children, of whom one was an invalid.

Some women returned to their homes. However, given the political division of the country, 'returning home' means in most cases to become part of a discriminated minority group. "I don't belong", one woman expressed her feelings. She lives now as a Muslim in the Republika Srpska and cannot benefit from the war victim pension law, which only applies to the Federation of Bosnia and Herzegovina. She feels in general that victims are better off in the Federation of Bosnia and Herzegovina and have more chances. There is a sense of bitterness and feelings of continued injustice as expressed by one woman who testified several years ago before the ICTY. At the time of the interview she lived in her home town which now belongs to the Republika Srpska:

"It's very difficult for me to take the fact that I don't belong anywhere, not in the Republika Srpska not in the Federation. Nobody cares for me, Hague doesn't care for me (…). I am very ill and I would like to go to officials in Republika Srpska to ask for any kind of help. They wouldn't help me especially knowing that I testified in The Hague. (…) I don't get anything because I testified against them. (…) And the Federation as well, they don't care about us. I cannot register in the Federation because they tell me I'm from Republika Srpska. I also don't want to register in the Federation because it confirms ethnic cleansing – so where do I belong? I am citizen of Bosnia and Herzegovina. All Bosnia and Herzegovina should care for me."

In the interviews and further conversations with the witnesses another urgent issue was brought forward. All mothers of under-aged children were concerned about education and security. However, many women had been detained along with their children. There are many young people now who witnessed many atrocities as children, and many saw the humiliation and rape of their mothers. Some children were no older than 2 or 5 years. It is only now that the traumatic events manifest themselves in severe symptoms. Many women said they do not know how to handle this and whom to turn.

Some of the younger women managed to finish their education with the help of local women's centres, others found a job or set up a small business. Several said that the vocational training they received from women's organisations in the years after the war enabled them to gain a foothold. Although they, talked about physical and psychological health problems they were in a better position to build up their lives as they did not have to struggle for economical survival on a daily basis.

The failure to deliver economic, social, and political rights through national legal frameworks in accordance with international standards undermines the much sought-after stability and human security following societal trauma (including food, health, gender, and physical security). This further lessens the ability or willingness of victims and witnesses to participate in the formal processes of criminal justice.

8.2 Reparation

Laws on civilian victims of war

The state of Bosnia and Herzegovina has taken very limited steps towards meeting the requirements of reparation. Women who survived sexualised violence during the war do not have the legal status of civilian war victims throughout the whole territory of Bosnia and Herzegovina. In 2006 women raped during the conflict were recognised with a legal status in one part of the country, the Federation of Bosnia and Herzegovina, which allowed them some benefits of a pension. Such recognition was effected through the Amendment to the Law on the Basis of Social Protection, Protection of Civilian War Victims, and Protection of the Families with Children in Federation of Bosnia and Herzegovina.[342] Yet, the implementation of this law is problematic. The fact that it regulates the status of civilian victims of war with the other social welfare categories only creates additional problems.

In other parts of the country, female survivors of sexualised violence have not yet been recognised as a separate category. In the Republika Srpska rape victims have been explicitly included in the Law on the Protection of Civilian Victims of War of the Republika Srpska from 1993[343]. However, the status is granted only to persons with at least 60% physical disability. The situation is similar in the District of Brcko. Here, the Decision on the Protection of Civilian Victims of War from 2008[344] grants the status of civilian war victims as well only to persons with at least 60% physical disability. In addition, rape victims are granted this status if they are "permanently psychologically disabled". The 2006 amendment in the Federation of Bosnia and Herzegovina recognised women who survived rape as a separate category in the law to which the 60% disability provision does not apply.

A large number of women who survived sexualised violence during the war used to live in the part of Bosnia and Herzegovina that is now Republika Srpska and were expelled during the war from their original residential areas. These laws are now an additional reason for women to remain either in the Federation of Bosnia and Herzegovina or outside of Bosnia and Herzegovina. Although Article 33 of the Amendment to the Federation Law provides for the continued enjoyment of those rights if women return to Republika Srpska or District Brcko, there are no guidelines on how to transfer these rights from one entity to the other. The pensions, health care,

housing and social security are under the administrative responsibility of the 2 entities and of Brcko District, and given the way they function, the provision of this article does not look very feasible. Another issue is that the amendment of the law in the Federation of Bosnia and Herzegovina only took place in 2006. Women who returned to their pre-war homes in the Republika Srpska prior to 2006 could therefore not apply for the legal status, at least not based on having been raped.

In the Federation of Bosnia and Herzegovina, the requirements and procedures for rape survivors to achieve the status of civilian war victims are regulated in Article 23 of the Law on Amendment. Proof of rape can be obtained through the documentation of the events by an NGO. The procedures are further detailed by Instructions.[345] Item 3.d) of these Instructions provides that in order for women to be recognised under this status, they need to submit documentation forms to the association of Women Victims of War documenting the consequences of the violence and rape along with medical documentation. Other organisations assisting women who survived sexualised violence and rape can also provide this documentation, however they need an extra written agreement of the Federal Ministry of Labor and Social Affairs. In the Instructions, these arrangements are presented as temporary, until a competent institution or association on the level of the Federation of Bosnia and Herzegovina is established. To date, this institution or association has not been created. Few other organisations succeeded in obtaining this agreement after numerous problems of administrative nature.

The association of Women Victims of War took – alongside other local women's organisations – a prominent role in lobbying for the recognition of the civilian victim of war status for rape victims. However, to assign almost exclusive permission on issuing the required documentation to one specific NGO is problematic in several respects. One, to authorise one NGO among others through the Ministry causes damaging friction within the NGO community; two, there are no rules set out in respect of confidentiality and qualification for taking statements; third, no provisions hold the NGO or any individual providing the documentation accountable for breaching confidentiality or abuse of power.

Furthermore, in the Federation of Bosnia and Herzegovina, civilian victims of war have, apart from the monthly pension, the right to be trained for work (professional rehabilitation, prequalification and additional qualification); they have priority in employment, housing, psychological, and legal aid. Women who survived sexualised war violence however are excluded from the additional benefits and only entitled to receive a pension, which is largely insufficient for a decent life. To date, only women's organisations and local NGOs like the Centre for Torture Victims in Sarajevo, Vive Zene in Tuzla and Medica Zenica in Zenica provide psychological support.

The State is inactive in the matter of providing psychological support and depends exclusively on the NGOs to provide these services. Such organisations depend on donors funds and can provide support only for small groups. During the period of the present research, one such programme had to be closed down for lack of donor's continued financial support. The organisation applied to state institutions for support to continue the extremely necessary programme but their request was turned down. In addition, the law on Amendment to the Law provides for the Cantons of the Federation of Bosnia and Herzegovina to give specially priority in housing to those civilian victims of war who testified in Court. Through this provision, the law on the one hand entices victims to testify. On the other hand it excludes all those witnesses whose identity is protected for 20-30 years upon decision of the WCC, i.e. the majority of women who testified on rape.

Over 80% of all study participants were granted the status of civilian victim of war and received a monthly pension of a maximum of 514 BAM (260 €). For many of them, it was not sufficient as in some cases the whole family including husbands, sons and families of sons and daughters survived on it. To date, nearly 500 women receive a pension based on the Law on the Status of Civilian Victim of War in the Federation of Bosnia and Herzegovina because they had been raped.[346]

Many participants felt positive about the existence of the law but had complaints about the lack of information and the procedures. "It's a really complicated and very slow process. At the beginning you need 3 documents, and when you go there to submit them, then you are informed that you also need some additional documents." One participant said she knew more about the procedure than the local director of the Centre for Social Work who asked her about it.

With few exceptions, the application procedure for rape victims is to give a statement with details of what had happened to them to the association of Women Victims of War in Sarajevo. What most women are not aware of is that these procedures are linked at least informally to the prosecution of war crimes. Their statements are not kept confidential, and it is not clear how and with whom they are shared. One woman who came from a small village was told that she had to go to a certain women's organisation in Sarajevo to get the pension. She had no other information. When she went there she realised she had to tell her story, which was put on record. "When they started asking me it was like a blow for me. I was

so angry. I wanted to throw something. (…) I was there for 2 hours, and it was very difficult for me, and I felt ill afterwards." 2 or 3 months later, 2 men from the SIPA came to her house to take an official statement. They confirmed that they had received the information from the association of Women Victim of War. Due to her situation in the village, she does not want to testify for security reasons. Nobody had informed her that her statement had been passed to the SIPA.

While some women said they had no problem with giving their statement to the organisation, others felt pressured, not only to testify, but also to say more than they had actually witnessed or experienced. They rejected such pressure and were appalled by it. Several women were angry because members of the association would blurt out confidential information on rape or testimonies in the presence of others. One woman said, "What do they do with it? I am sick of getting manipulated by everybody".

After they give their statement to the association, women have to undergo a medical examination by a commission of 4 or 5 doctors, psychiatrists and psychologists. They mainly examine medical documents and ask additional questions. Some women said it was no big deal, while other women felt humiliated. "They said you are not missing a hand, leg, or nose, so what?" one participant said, shaking her head. Another said "they tried to minimise my experience and said I should not apply because my parents could take care of me". The participant is in her late twenties and has long lived independently from her parents. She told us:

"Then it culminated. It became such a mess and I started to cry. They also said that I didn't have any physical disability. They said it because I was clean and dressed, with no physical disability visible. So they estimated it wasn't so bad (…). I started screaming and told them I wanted to get over with it, that I didn't want anything from them. Suddenly they tried to calm me down, saying: 'You are a child.' They immediately changed their approach after I started screaming and crying. At the end, they said that there was no need for me to come any more and they sent the document to my home address. (…) It seemed that I had to become half crazy, go there in a wheelchair in order to get that status. (…) It shows that those persons have to get some education."

Compensation for women who testified

Women who testified at the WCC have the right to seek compensation from the perpetrator. Article 198, paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina provides for the Court to either decide on a compensation award to the injured parties, or to refer the injured parties to a civil lawsuit:

"In a verdict pronouncing the accused guilty, the Court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the Court shall instruct the injured party that he may take civil action to pursue his entire claim under property law."

However, in the war crime cases thus far, the Court of Bosnia and Herzegovina has not awarded any compensation.

It took several years for the Court of Bosnia and Herzegovina and Prosecutors' Office of Bosnia and Herzegovina to begin asking the injured parties about property claims. But when they did, they referred them to civil lawsuits. The first problem with such a referral is that it is only written in the judgement, which many of the witnesses did not read or could not understand. Secondly, the Court did not give an explanation as to why the claim was referred to civil proceedings and not decided upon by the Court itself. The only excuse used for the transfer of this responsibility is the insufficient time given the backlog of the war crime cases at the WCC.

The issue especially arises when the Court refers those witnesses/injured parties with protected witness status, which is the case with most of the witnesses who survived sexualised violence during the war. Due to the fact that their identities are protected for up to 30 years,[347] there is no way to start a civil proceedings case, as for any claim they would have to disclose the protected information. Those witnesses can only secure their rights if the Court of Bosnia and Herzegovina awards them compensation during the war crime trial. In addition, most of the witnesses are not willing to go to civil proceedings, since they just want to continue with their lives.

Although the court has a duty to inform the victims/witnesses that they have the right to receive compensation, slightly more than half of the Questionnaire Group of the present study had not been told that they could get compensation from a convicted perpetrator through civil proceedings. Only 9 had staked their claim to compensation. Of those 9, 7 of the cases are still under appeal, and the other 2 did not get it – in one case because the perpetrator was found innocent. The remaining 7 are struggling with the request for compensation in the civil proceedings because they were protected witnesses and cannot disclose their names. While the WCC releases the perpetrators from all court expenses, it does not even symbolically acknowledge the victims' rights to compensation.

9. Conclusions and Recommendations

9.1 Recommendations from Witnesses

The following section is a compilation of recommendations from witnesses given to the research team. The recommendations to the Courts and state authorities are taken out of numerous statements from participants and summarised. The recommendations to other women and to NGOs were given as answers to direct questions. They are recorded without further comment.

Recommendations to courts

- Victim and Witness Sections of courts must be duly staffed and financed to fulfil their task. They must be involved from the beginning of investigations and keep contact with former witnesses.
- All county courts should set up a Victim and Witness Section following the example of ICTY and WCC by adopting their provisions.
- Courts should have an emergency medical unit with medical practitioners and psychologists.
- Investigators should fully explain and inform persons they take statements from about their rights and obligations.
- Teams which investigate crimes of rape or sexualised assaults should include women if the witness wishes so.
- Prosecutors should take their time and prepare witnesses well explaining procedures, protective measures, rights and obligations as well as possible defence strategies to undermine the witness' credibility.
- Witnesses should be allowed to read former statements before testifying to refresh their memory and to be prepared for efforts of defence lawyers to confuse the witness.
- Witnesses should be shown the courtrooms and invited to listen to other procedures to get a sensory impression for themselves.
- Witnesses should only be contacted by persons from the court known to them.
- Witnesses should be informed in advance about security measures.
- Witnesses should not be prohibited to be in contact with each other after testimony because they need the mutual emotional support.
- Judges should intervene when defence lawyers become insulting.
- Witnesses should have access to free legal aid and counselling. They also should have support to be able to file suits against those who disclose their identity to the public.
- Psychotherapists and/or other support persons should be allowed to be present in the courtroom during testimony even in closed session.
- Expert witnesses on trauma and rape should be heard to prove that confusion of a witness does not mean that her testimony is not reliable.
- Persons who do not want to testify should have the option to do so and they should not be coerced by the court.
- Witnesses should be supported afterwards to counter possible guilt feelings
- The Victim and Witness Section of the WCC should set up a network of witness support units in Bosnia and Herzegovina in cooperation with Social Service Centres to support witnesses after testimony. A team of doctors and psychologists should be included.
- A public place should be found to put down all names of convicted rapists with the message that something like this should never happen again.

Recommendations to other women who survived rape

- "They should not hide it because it makes them feel even worse."
- "I would advise every woman no matter to which ethnicity she belongs to say what happened to her, not to be ashamed because it's the only way she can contribute punishing criminals and prevent future rapes."
- "Yes, it is a painful and hard experience but as we already lived through it and survived everything women should gather their strength and courage to testify so the perpetrators are punished and that it does not ever happen to anyone anywhere in the world."
- "She can decide herself under which protective measures she wants to testify."
- "Rape survivors should testify."
- "They should tell only the truth. I know it's hard but the hardest thing is to carry it in your soul."
- "They should think about their rights."
- "She should prepare herself before she goes to testify. If she has a choice she has to decide herself whether she wants to testify or not. She has to realise what it means for her personally if the indictee gets convicted or acquitted. Does it really matter for her? That part is really hard and you have to live with it."
- "She should think that she might get the chance to testify only once in her life."
- "I would recommend to every woman to have a close friend or therapist sitting in the courtroom also in closed session because too many things happen in there."
- "Women should not feel bad and guilty because of the defence. They just do their job to defend the accused.

I would like every woman to know that, so that she does not feel guilty afterwards. They try to destroy your credibility."
- "Don't give statements to too many persons. You might be confronted with them in court."
- "It helped me to look at myself as if it had happened to somebody else. I feel somehow better when I talk about it like that."
- "Do not accept phone calls by persons you don't know. Get everything in written. Get phone numbers from persons in court you trust."
- "Inform the court when you are threatened."

To NGOs:

- "They should try to build an international association of rape survivors."
- "NGOs taking statements from rape survivors should be more sensible and professional. They should not try to influence women in what they should say, they should explain what happens with the statement and they should keep everything confidential."
- "All associations should have some kind of working ethics. They should not harass and pressure anybody."
- "When associations invite women to give a statement they should tell you that the Court might invite you to testify and how they are going to use your statement. Actually, I would say that in future it would be most important to explain that your statement could be used in court as evidence."
- "Organisations of Victims and Camp Survivors of all sides should work together for the benefit of all victims."

Recommendations to the State of Bosnia and Herzegovina, the authorities of the Federation of Bosnia and Herzegovina and the Republika Srpska:

- Create a uniform state law on the Status of Civilian War Victim.
- Improve information about the rape victims' rights to apply for the Status of Civilian War Victim and make the procedure and its implications transparent.
- Persons who take statements of rape victims or sit on the medical commission for final evaluation should have extensive experience with rape survivors and training in respectful conduct.

9.2. Recommendations of *medica mondiale*

In this study *medica mondiale* has emphasised the needs and rights of war rape survivors who testified before the International Criminal Tribunal for the former Yugoslavia and the courts in Bosnia and Herzegovina. Based on the findings of the study, *medica mondiale* puts forth a set of recommendations outlined below. The implementation of the recommendations would assure women survivors of war crimes and sexualised violence a real chance to find their way back into society through access to justice and healing. The recommendations also urges state actors to assume responsibility to support rape survivors by opening new and enlarging existing entry-points to the state institutions and justice system and equip these systems adequately enhancing their capacities to do justice. We entirely support all recommendations made by amnesty international in their recent report: "Whose Justice? Bosnia and Herzegovina's women still waiting", from September 2009. Therefore only recommendations tailored to our specific findings and experiences are here mentioned additionally.

medica mondiale calls on the State Court of Bosnia and Herzegovina to:

- Establish a high-level position of a gender legal officer with decision-making powers to develop, supervise and implement a coherent strategy to prosecute all forms of sexualised violence during the war;
- Increase the number of staff working at the Witness Support Section and enlarge their mandate to provide support to the women testifying;
- Enlarge mandate of Witness Support Section to continue contact with the women after they have testified to check on their well being;
- Diversify and gender segregate the data collected at the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Registry of the Court of Bosnia and Herzegovina and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina to include data such as different war crime charges, gender segregated number of witnesses and types of protection measures issued;
- Include witnesses in negotiations about plea-agreements.

medica mondiale calls on the Bosnia and Herzegovina's Council of Ministers to:

- Amend The Law on Civilian Victims of War in both entities and make it applicable at the state level to ensure that women survivors of sexualised violence throughout Bosnia and Herzegovina would be afforded

the same status of civilian victims of war and thereby enjoy the same rights;
- Amend the Criminal Code of Bosnia and Herzegovina to include the following provisions:
  - State clearly that no corroboration of witnesses' testimony in cases of sexualised violence is required;
  - Recognise rape as war crime against prisoners of war;
  - Identify the various forms of sexualised violence crimes and provide a non-exhaustive list;
  - Adjust the status of victims and witnesses to comply with the international standards as represented in the Statute of the International Criminal Court including the right to participate in the legal proceedings at all levels and the entitlement to legal representation equipped with the same powers as at the International Criminal Court;
- Establish new mechanisms at appropriate state institutions with power to officially recognise and register women survivors as civilian victims of war;
- Ensure that victim witnesses receive legal counseling and practical legal aid to realise their interest in getting the status of a civilian victim of war and consequently the financial compensation;
- Establish a state strategy for reparation for victims of war crimes of sexualised violence that includes restitution, compensation, rehabilitation and guarantees of non repetition. It should be developed in consultation with credible civil society organisations, especially the survivors' organisations and women NGOs with profound expertise in this field;
- Make it mandatory that the Court of Bosnia and Herzegovina implements the compensation provision of Article 198 of the Criminal Procedure Code directly to all the witnesses including the protected witnesses without passing them to civil litigation processes.

medica mondiale calls on the Prosecutor's Office of Bosnia and Herzegovina to:

- Set up a gender-segregated database that distinguishes between the different types of crimes, protection and convictions;
- Ensure support to the Witness Support Office in providing financial allowances to witnesses when necessary and facilitate the experience of providing testimony;
- Secure sufficient trial preparation for witnesses prior and during testifying;
- Identify the support needs of the survivors and their families;
- Establish cantonal/district units and/or contact points at the centers for social welfare to help women if they are threatened or are in need of psycho-social support without endangering their protection as witnesses. Those units would not only secure the anonymity of witnesses as they are close to the places of residence but also give them holistic support;
- Make available former statements to refresh memories of the witnesses;
- Provide comprehensive information on protective measures and the procedures of applying for protection;
- Provide comprehensive information on the defense strategies and their possible line of questioning;
- Provide comprehensive information on the trial procedures and their evidentiary role in the process;
- Identify the obstacles of successful prosecution of rape and other war crimes of sexualised violence and address them.

medica mondiale calls on the High Judicial and Prosecutorial Council to:

- Establish a state commission tasked with collecting gender-segregated information on rape and other crimes of sexualised violence during the war;
- Make sure that trainings for judges and prosecutors are designed and implemented to enhance knowledge on the victimology in rape cases and to heighten their capacities to develop gender sensitive interviewing techniques, questioning and examination skills of gender crimes and the working and communication with victims of sexualised violence;
- Appoint more gender-conscious and -sensitive female judges and prosecutors;
- Organise expert exchange workshop and lectures on issues of charging sexualised crimes, categorizing sexualised crimes, procedural safeguards of prosecuting sexualised crimes and evidence in cases of sexualised war violence.

medica mondiale calls on the Judges to:

- Use their power to intervene during examination in trial:
  - to protect the interest and dignity of the victim witnesses from harassment by the defense or the accused;
  - to protect the victim witness from being asked prohibited questions;
  - to ensure that the witness is properly informed on protective measures;
  - to ensure that no protective measures are applied against the will and expressed consent of the witness.

medica mondiale calls on the State Investigation and Protection Agency (SIPA) to:

- Ensure that the right to privacy, security and safety of the survivors of sexualised violence and witnesses is not violated in the course of their investigation;
- Establish measures to build capacity on handling sensitive issues regarding the privacy and security of the victim witnesses in a gender- and trauma-sensitive way;
- Institute legal proceedings against those who reveal the identity of protected witnesses violating their privacy by publishing their stories or by any other means.

medica mondiale calls on the International Donors to:

- Increase funding for legal aid services and information networks as a prerequisite for women's access to justice;
- Continue financially supporting the key organs which support the War Crimes Chamber and ensure similar funding to the cantonal and district courts often charged with handling (sexualised) war crimes trials;
- Place emphasis on financing the establishment of centres for mental health and health support services for survivors of sexualised violence;
- Finance gender-sensitive trial-monitoring at the State Court of Bosnia and Herzegovina and the cantonal and district courts;
- Coordinate efforts to ensure essential assistance is provided to the cantonal and district courts to facilitate fair and effective war crimes trials;
- Increase the financing of services that provide capacity building measures for staff of all state and judicial institutions in Bosnia and Herzegovina on trauma-sensitive treatment and accompaniment of rape survivors.

Bibliography

Books and Articles

Amann, Diane Marie. 1999. Prosecutor v. Akayesu Case ICTR - 96 - 4 - T, in: The American Journal of Law, [Vol.93, No.1, January 1999].

Amery, Jean. 1989. At the Mind's limits: Contemplations by a Survivor of Auschwitz and its Realities. New York.

Arbour, Louise. 2006. Economics and Social Justice for Societies in Transition, Working Paper No. 10.

Askin, Kelly D. 1999. Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status. in American Journal of International Law, [Vol. 93, No. 1, January 1999] 97-123.

Askin, Kelly D. 1997. War Crimes Against Women: Prosecution in International War Crimes Tribunals. Martinus Nijhoff. The Hague.

Babic, Milos et al. 2005. Komentari krivicnih/kaznenih zakona u Bosni i Hercegovine. Knj. 1, 2. Sarajevo: Savjet/Vijece Evrope; Evropska komisija.

Bringa, Toni. 1995. Being Muslim the Bosnian Way – Identity and Community in a Central Bosnian Village, Princeton University Press, Princeton.

Campbell, Kirsten. 2007. The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia, in: The International Journal of Transitional Justice, [Vol. 1, No. 3, December 2007]. 411-432

Carlson, Eric Steiner. 2006. The hidden prevalence of male sexual assault during war. Observation on Blunt Trauma to the Male Genitals, in: British Journal of Criminology. [Vol. 46, No. 1, January 2006]. 16-25

Cavelius, Alexandra. 2000. Leila. Ein bosnisches Mädchen, München.

Charlesworth, Hilary and Christine Chinkin. 1993. The Gender of Jus Cogens, in Human Rights Quarterly [Vol. 15, No. 1, February 1993]. 63-76

Copelon, Rhonda. 1998. Surfacing Gender – Reconceptualizing Crimes Against Women in Times of War, in: The Women and War Reader, eds. Lois Ann Lorentzen and Jennifer Turpin, New York University Press, New York.

de Brouwer, Anne-Marie. 2005. Supranational Criminal Prosecution of Sexual Violence – The ICC and the Practice of the ICTY and the ICTR, Oxford, Intersentia: Antwerpen, Oxford.

Fitzgerald, Kate. 1997. Problems of Prosecution and Adjucation of Rape and other Sexual Assaults under International Law, BEJIL, No. 4, 638-684.

Gardam, Judith G., and Jarvis, Michelle J. 2001. Women, Armed Conflict and International Law. Kluwer Law International, The Hague, London & Boston.

Greve, Kathrin. 2008. Vergewaltigung als Völkermord. Aufklärung sexueller Gewalt gegen Frauen vor internationalen Strafgerichten, Baden-Baden.

Gutman, Roy. 1993. Forword, in Alexandra Stiglmayer (ed.), The War Against Women in Bosnia-Herzegovina, University of Nebraska Press, Oxford.

Hagan, John. 2003. Justice in the Balkans – Prosecuting War Criminals in The Hague Tribunal, University of Chicago Press.

Hazan, Pierre. 2004. Justice in a Time of War – The True Story Behind the International Criminal Tribunal for the Former Yugoslavia, A & M University Press, Texas.

Herman, Judith. L. 1992. Trauma and Recovery: The Aftermath of Violence – from Domestic Abuse to Political Terror. Basic Books. New York.

Lamb, Sharon. 1999. New Versions of Victims. Feminist Struggle with the Concept, New York University Press, New York.

Hrelja, Elmerina Ahmetaj. 2008. Imperative istine i tranzicijska pravda: Prikladnost pregovaranja o krivici u me unarodnim krivi nim predmetima u Bosni i Hercegovini, in: Pulsdemokratije, 23 October 2008. available at www.pulsdemokratije.net/index.php?id=1145&l=bs [accessed 20 December 2009]

Lobwein, Wendy. 2003. The work of the Victims and Witness Section of the International Criminal Tribunal for the Former Yugoslavia, in: Der Internationale Strafgerichtshof. Fünf Jahre nach Rom. Dokumentation der Fachtagung 27.-28. Juni 2003 (conference documentation).

Mischkowski, Gabriela. 2004. Sexualisierte Gewalt im Krieg. Eine Chronik. in: *medica mondiale* e.V. (ed.): Sexualisierte Kriegsgewalt und ihre Folgen. Mabuse-Verlag, Frankfurt am Main

Mischkowski, Gabriela. 1999. Kriegsvergewaltigungen in Bosnien-Herzegowina im öffentlichen Diskurs der BRD, in: *medica mondiale*, M. Fröse, I. Volpp-Teuscher (ed.) Krieg, Geschlecht und Traumatisierung, Frankfurt/M.

Möller, Christina. 2003. Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte, in: Beiträge zur Strafrechtswissenschaft Bd. 7, Münster, Hamburg, London.

Morris, Virginia, and Scharf, Michael P. 1995. An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia – Vol. I, Transnational Publishers, New York.

Nowrojee, Binaifer. 2005. Your Justice is too Slow. Will the ICTR Fail Rwanda's Rape Victims? United Nations Research Institute for Social Development (UNRISD). Occasional Paper 10, November 2005.

Ross, Fiona C. 2003. Bearing Witness. Women and the Truth and Reconciliation Commission in South Africa, Pluto Press, London.

Sellers, Patricia Viseur. 2004. Individual(s) Liability for Collective Sexual Violence, in: Karen Knop (ed.), Gender and Human Rights, Oxford University Press, Oxford. 153-194.

Sharratt, Sara. 1999. Interview with Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia. In: Sharratt, Sara and Kaschak, Ellyn (eds.) Assault on the Soul – Women in the Former Yugoslavia, Harworth Press, New York, London, Oxford. 23-38.

Sharatt, Sara and Kaschak, Ellyn. 1999. (eds.), Assault on the Soul – Women in the Former Yugoslavia, Harworth Press, New York, London, Oxford.

Stover, Eric. 2005. The Witnesses – War Crimes and the Promise of Justice in The Hague, University of Pennsylvania Press, Philadelphia.

Stover, Eric. 2004. Witnesses and the Promise of Justice in The Hague, in: Eric Stover and Harvey M. Weinstein (ed.), My Neighbour, My Enemy, Justice and Community in the Aftermath of Mass Atrocity, Cambridge University Press, Cambridge.

Tokaca, Mirsad (ed.). 1999. Grijeh sutnje, rizik govora. Komisija za prikupljanje cinjenica o ratnim zlocinima u Bosni i Hercegovini, Sarajevo.

Wald, Patricia. 2002. Dealing with witnesses in war crime trials: Lessons from the Yugoslav Tribunal, in: Yale Human Rights & Development Law Journal [Vol. 5, 2002], 217-239

Zarkov, Dubravka. 2007. The Body of War: Media, Ethnicity, and Gender in the Break-up of Yugoslavia. Duke University Press, Durham.

Legal and International Documents

Diplomatic Conference (Geneva), Convention (IV) relative to the Protection of Civilian Persons in Time of War. 12 August 1949, available at: www.icrc.org/ihl.nsf/INTRO/380 [accessed 20 December 2009].

General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, BiH-FRY-Croatia, available at www.ohr.int/dpa/default.asp?content_id=380 [accessed 20 December 2009].

International Conferences (The Hague). Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: www.unhcr.org/refworld/docid/4374cae64.html [accessed 20 December 2009].

PIC Bonn Conclusions, Bosnia and Herzegovina 1998: Self-sustaining Structures, 10 December 1997, available at www.ohr.int/pic/default.asp?content_id=5182 [accessed 20 December 2009].

Polizeiliche Kriminalstatistik 2008, Bundesrepublik Deutschland, hrsg. V. Bundeskriminalamt, Wiesbaden 2008.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at: www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 [accessed 20 December 2009].

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, available at: www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545 [accessed 20 December 2009].

Rome Agreement, 18 February 1996, BiH-FRY-Croatia, available at www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093 [accessed 20 December 2009].

UN, Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Interim Report of the, 26 January 1993, S/25274.

UN, Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Final Report, 27 May 1994, S/1994/674.

UN, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998.

UN, General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, A/RES/40/34

UN, General Assembly, Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, Report of the Secretary-General, 25 October 1996, A/51/557, available at www.un.org/documents/ga/docs/51/plenary/a51-557.htm [accessed 20 December 2009].

UN, ICTY, Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.2, 4 October 1994, available at: www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev2_en.pdf [accessed 20 December 2009].

UN, ICTY, Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.4, 3 May 1995, available at: www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev4_en.pdf [accessed 20 December 2009].

UN, Security Council, Letter Dated 14 May 2009 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, 18 May 2009, S/2009/252, available at www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2009_en.pdf [accessed 20 December 2009].

UN, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, available at www.un.org/ga/search/view_doc.asp?symbol=S/25704 [accessed 20 December 2009].

UN, Security Council, Resolution 827 (1993), 25 May 1993, [on establishment of the International Criminal Tribunal for the Former Yugoslavia], RES/827/1993.

UN, Security Council, Resolution 1503 (2003), [International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda], 28 August 2003, S/RES/1503 (2003), available at daccessdds.un.org/doc/UNDOC/GEN/N03/481/70/PDF/N0348170.pdf, [accessed 20 December 2009].

UN, Security Council, Resolution 1534 (2004) [on necessity of trial of persons indicted by the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda], 26 March 2004, S/RES/1534 (2004), available at www.unhcr.org/refworld/category,LEGAL,,,SVN,4113684c4,0.html [accessed 20 December 2009].

UN, Statute of the International Criminal Tribunal for the Former Yugoslavia, [Res. 1877/2009, Res. 1837/2008, Res. 1668/2006, Res. 1660/2006, Res. 1597/2005, Res. 1481/2003, Res. 1431/2002, Res. 1411/2002, Res.1329/2000, Res. 1166/1998, Res. 827/1993], available at the ICTY website: www.icty.org/sections/LegalLibrary/StatuteoftheTribunal [accessed 20 December 2009].

UN, Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994), available at www.ictr.org/ENGLISH/basicdocs/statute.html [accessed 20 December 2009].

Legal documents Bosnia and Herzegovina

Amendment I to the Constitution of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 25/09).

Constitutional Court of Bosnia and Herzegovina, Decision U 5/98 (4 partial decisions) – 29 January 2000, 18 February 2000, 1 July 2000, 18 August 2000.

Constitutional Court of Bosnia and Herzegovina, Decision U 26/01 of 28 September 2001.

Constitution of Bosnia and Herzegovina [Annex 4 to the Dayton Peace Agreement], available at ccbh.ba/eng/p_stream.php?kat=518, [accessed 20 December 2009].

Council of Ministers of Bosnia and Herzegovina, National War Crimes Strategy, December 2008, available at www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf (version in Bosnian, Croatian and Serbian languages) and www.adh-geneva.ch/RULAC/news/War-Crimes-Strategy-f-18-12-08.pdf (English version) [accessed 20 December 2009].

Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07).

Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09).

Decision on Protection of Civilian War Victims of Brcko District (Official Gazette of Brcko District 7/08).

Law on Basis of Social Protection, Protection of Civilian War Victims of Federation of Bosnia and Herzegovina (Official Gazette of Federation of Bosnia and Herzegovina 36/99, 54/04, 39/06, 14/09).

Law on Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07, 49/09, 74/09).

Law on Protection of Civilian War Victims of Republika Srpska (Official Gazette of Republika Srpska 25/93, 32/94, 37/07, 60/07.

Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 03/03, 21/03, 61/04, 55/05).

Law on Transfer of Cases from the ICTY to the Prosecutor's Offices of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 61/04, 46/06, 53/06, 76/06).

Office of High Representative for Bosnia and Herzegovina (OHR), Decision Imposing the Law on the State Court of Bosnia and Herzegovina, 12 November 2000, available at www.ohr.int/decisions/judicialrdec/default.asp?content_id=5228 [accessed 20 December 2009].

Office of High Representative for Bosnia and Herzegovina (OHR), Decision on the Establishment of the Brcko District of Bosnia and Herzegovina, 8 March 2000, available at www.ohr.int/ohroffices/brcko/arbitration/default.asp?content_id=5265, [accessed 20 December 2009].

Rules of Procedures of the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 82/05).

Rules of Procedures on Protection of Witnesses at the Court of Bosnia and Herzegovina, available at www.sudbih.gov.ba/files/docs/Pravilnik_o_zastiti_svjedoka.pdf [accessed 20 December 2009].

Decision, Judgements and Court/Tribunal Orders

ICTR, Okays, Jean Paul (ICTR-96-4), Trial Chamber Judgement, 2 September 1998.

ICTY, ANOVA, (IT-02-65/1), Consolidated Indictment, 5 July 2002.

ICTY, Blaskic (Lasva Valley), (IT-95-14), Trial Transcripts, 18 November 1997.

ICTY, Delalic et al. (Celebici Camp), (IT-96-21), Trial Transcript, 17 March 1997.

ICTY, Delalic et al. (Celebici Camp), (IT-96-21), Trial Transcript, 18 March 1997.

ICTY, Delalic et al. (Celebici Camp), (IT-96-21), Trial Transcript, 3 April 1997.

ICTY, Delalic et al. (Celebici Camp), (IT-96-21), Trial Chamber Judgement, 16 November 1998.

ICTY, Delic, (IT-04-83), Trial Judgement, 15 September 2008.

ICTY, Furundzija, (IT-95-17/1), Trial Judgement, 10 December 1998.

ICTY, Furundzija, (IT-95-17/1), Appeals Judgement, 21 July 2001.

ICTY, Karadzic, (IT-95-5/18-I), Prosecution's second amended indictment, 18 February 2009.

ICTY, Kordic & Cerkez, (Lasva Valley), (IT-95-14/2), Trial Chamber Judgement, 26 February 2001.

ICTY, Kordic & Cerkez, (Lasva Valley), (IT-95-14/2), Appeals Judgement, 17 December 2004.

ICTY, Krajisnik, (IT-00-39), Trial Transcript, 6 February 2004.

ICTY, Krajisnik, (IT-00-39), Appeals Chamber Judgement, 17 March 2009.

ICTY, Kunarac et al. (Foča Case), (IT-95-9/1), Third Amended Indictment, 8 November 1999.

ICTY, Kunarac et al. (Foča Case), (IT-95-9/1), Trial Transcript, 6 July 2000.

ICTY, Kunarac et al. (Foča Case), (IT-96-23 & 23/1), Trial Chamber Judgement, 22 February 2001.

ICTY, Kunarac et al. (Foča Case), (IT-96-23 & 23/1), Appeals Chamber Judgement, 12 June 2001.

ICTY, Kvocka et al. (Omarska, Keraterm & Trnopolje Camps), (IT-98-30/1), Trial Chamber Judgement, 2 November 2001.

ICTY, Kvocka et al. (Omarska, Keraterm & Trnopolje Camps), (IT-98-30/1), Appeals Judgement, 28 February 2005.

ICTY, Kvocka et al. (Omarska, Keraterm & Trnopolje Camps), (IT-98-30/1), Appeals Judgement Summary, 28 February 2005.

ICTY, Milan Lukic & Sredoje Lukic (IT-98-32/1), Decision on Prosecution Motion seeking leave to amend the second amended indictment, 8 July 2008.

ICTY, Milan Lukic & Sredoje Lukic (IT-98-32/1), Trial Chamber Judgement, 20 July 2009.

ICTY, Martic, (RSK case) (IT-95-11), Trial Chamber Judgement, 12 June 2007.

ICTY, Milutinovic et al., (IT-05-87), Trial Chamber Judgement, 26 Feb 2009.

ICTY, Milutinovic et al., (IT-05-87), Trial Chamber Judgement Summary, 26 Feb 2009.

ICTY, Mrksic et al. (Vukovar Hospital case), (IT-95-13/1), Trial Chamber Judgement, 27 September 2007.

ICTY, Music et al., (IT-96-21-T), Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997.

ICTY, Nikolic, Dragan (IT-94-2), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995.

ICTY, Prlic et al., (IT-04-74), Amended Indictment, 16 November 2005.

ICTY, Sikirica et al. (Keraterm Camp case), (IT-95-8), Second Amended Indictment, 3 January 2001.

ICTY, Sikirica et al. (Keraterm Camp case), (IT-95-8), Sentencing Judgement, 13 November 2001.

ICTY, Tadic (Prijedor case), (IT-94-1), Trial Transcript, 8 July 1996.

Court of BiH, Jankovic Gojko case, X-KRZ-05/161, First Instance Judgement, 16 February 2007.

Court of BiH, Kurtovic Zijad case, X-KRZ-06/299, First Instance Judgement, 3 April 2008.

Court of BiH, Lazarevic Sreten case, X-KR-06/243, First Instance Judgement, 29 September 2008.

Court of BiH, Lelek Zeljko case, X-KRZ-06/202, First Instance Judgement, 23 May 2008.

Court of BiH, Mejakic Zeljko et al. case, X-KRZ-06/200, First Instance Judgement, 30 May 2008.

Court of BiH, Palija Jadranko case, X-KR-06/290, First Instance Judgement, 28 November 2007.

Court of BiH, Palija Jadranko case, X-KR-06/290, Second Instance Judgement, 24 April 2008.

Court of BiH, Pincic Zrinko case, X-KR-08/52, First Instance Judgement, 28 November 2008.

Court of BiH, Radic Marko et al. case, X-KRZ-05/139, First Instance Judgement, 20 February 2009.

Court of BiH, Samardzic Nedjo case, X-KRZ-05/49, First Instance Judgement, 7 April 2006.

Court of BiH, Samardzic Nedjo case, X-KRZ-05/49, Second Instance Judgement, 13 December 2006.

Court of BiH, Simsic Boban case, X-KRZ-05/04, First Instance Judgement, 11 July 2006.

Court of BiH, Stankovic Radovan case, X-KRZ-05/70, First Instance Judgement, 14 November 2006.

Court of BiH, Stankovic Radovan case, X-KRZ-05/70, Second Instance Judgement, 28 March 2007.

Court of BiH, Veselinovic Rade case, X-KR-05/46, Indictment, 25 April 2008.

Court of BiH, Vukovic Radmilo case, X-KRZ-06/217, First Instance Judgement, 16 April 2007.

Court of BiH, Vukovic Radmilo case, X-KRZ-06/217, Second Instance Judgement, 13 August 2008.

Court of BiH, Vukovic Ranko et al. case, X-KRZ-07/405, First Instance Judgement, 4 February 2008.

Court of BiH, Vukovic Ranko et al. case, X-KRZ-07/405, Partial Second Instance Judgement, 2 September 2008.

Other Reports and documents

Amnesty International. 2009. Whose justice? Bosnia and Herzegovina's women still waiting. 30 September 2009, available at www.amnesty.org/en/library/asset/EUR63/006/2009/en/6330934f-d46e-4943-b32bb3962095173a/eur630062009en.pdf [accessed 20 December 2009].

Balkan Investigative Reporting Network (BIRN). 2009. Agreement on Cooperation between Two Prosecutors' Offices, 15 June 2009, available at www.bim.ba/en/171/10/20238/ [accessed 20 December 2009].

Balkan Investigative Reporting Network (BIRN). 2009. Bosnian Council of Ministers Rejects Proposal to Keep Foreign Judges and Prosecutors, 5 June 2009, available at www.bim.ba/en/169/10/19921/ [accessed 20 December 2009].

Balkan Investigative Reporting Network (BIRN). 2009. Bosnian Judiciary Still Needs International Staff, 15 June 2009, available at www.bim.ba/en/171/10/20246/ [accessed 20 December 2009].

Balkan Investigative Reporting Network (BIRN). 2006. Samardzic Trial Reopens. 30 March 2006, available at www.bim.ba/en/5/10/825/ [accessed 20 December 2009].

Balkan Investigative Reporting Network (BIRN). 2009. Veselinovic: Seven and a Half Years in Prison, 30 June 2009, available at www.bim.ba/en/173/10/20665/ [accessed 20 December 2009].

Ivanisevic, Bogdan. 2008. The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court, International Centre for Transitional Justice (ICTJ), available at www.ictj.org/images/content/1/0/1088.pdf [accessed 20 December 2009].

High Judical and Prosecutorial Council (HJPC). 2009. Annual Report for 2008, available at www.hjpc.ba/intro/gizvjestaj/?cid=4276,2,1 [accessed 20 December 2009].

High Judicial and Prosecutorial Council (HJPC), History and Role of Independent Judiciary Commission, available at www.hjpc.ba/docs/ijcarch/?cid=160,2,1 [accessed 20 December 2009].

Human Rights Watch (HRW). 2008. Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts, 10 July 2008, available at www.hrw.org/sites/default/files/reports/bosnia0708_1.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Fifth Report in the *Zeljko Mejakic et al.* Case – Transferred to the State Court pursuant to Rule 11*bis*, September 2007, page 2, available at www.oscebih.org/documents/14020-eng.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Monitoring and Reporting on Rule 11*bis* cases, available at www.oscebih.org/human_rights/monitoring.asp?d=1 [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina. Moving towards a Harmonised Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina. August 2008, available at www.oscebih.org/documents/12615-eng.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Second Report: Case of Defendant Gojko Jankovic – Transferred to the State Court pursuant to Rule 11*bis*, July 2006, available at www.oscebih.org/documents/13970-eng.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Second OSCE Report: Case of Defendant Radovan Stankovic – Transferred to the State Court pursuant to Rule 11*bis*, May 2006, available at www.oscebih.org/documents/14066-eng.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Third OSCE Report in the Gojko Jankovic Case: Transferred to the State Court pursuant to Rule 11*bis*, October 2006, page 1, available at www.oscebih.org/documents/13971-eng.pdf [accessed 20 December 2009].

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina, Third OSCE Report: Case of Defendant Radovan Stankovic – Transferred to the State Court pursuant to Rule 11*bis*, May 2006.

Organization for Security and Co-operation in Europe (OSCE), Mission to Bosnia and Herzegovina. War Crime Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles. March 2005, available at www.oscebih.org/documents/1407-eng.pdf [accessed 20 December 2009].

Prosecutor's Office of Bosnia and Herzegovina, History, available at www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=1&id=2&jezik=e [accessed 20 December 2009].

Registry of Court of BiH, About the Registry, available at www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=1&jezik=e [accessed 20 December 2009].

Registry of Court of BiH. 2009. Annual Report 2008 for Sections I and II of the Court of Bosnia and Herzegovina and Special Department of the Prosecutor's Office of Bosnia and Herzegovina, available at www.registrarbih.gov.ba/files/docs/REPORT_2008_FINAL.pdf [accessed 20 December 2009].

Registry of Court of BiH. 2008. Annual Report 2007 for Section I for War Crimes and Section II for Organized Crimes, Economic Crime and Corruption of the Criminal and Appellate Division of the Court of Bosnia and Herzegovina and Special Departments for War Crimes and for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, available at www.registrarbih.gov.ba/files/docs/ANNUAL_2007_report_2.pdf [accessed 20 December 2009].

Registry of Court of BiH. 2007. Annual Report 2006 for Section I for War Crimes and Section II for Organized Crimes, Economic Crime and Corruption of the Criminal and Appellate Division of the Court of Bosnia and Herzegovina and Special Departments for War Crimes and for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, available at www.registrarbih.gov.ba/files/docs/RAR_Eng_Final.pdf [accessed 20 December 2009].

Registry of Court of BiH, Witness and Victims Support Section, available at www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=12&kat=2&podkat=3&jezik=e [accessed 20 December 2009].

U.S. Department of State. 2008. Trafficking in Persons Report 2008, available at www.state.gov/g/tip/rls/tiprpt/2008/ [accessed 20 December 2009].

Questionnaire for Witnesses

Setting the stage:

A: Short introduction of researchers, study time and format of the interview

- introduce yourself
- explain aim of study
  - We are interested in finding out about the experiences of women who testified about rape and/or sexual assault before the courts in Sarajevo and the ICTY in The Hague.
  - When it comes to justice, the voices of women are seldom heard particularly in cases of sexual assault. While we hope that agreeing to an interview will be helpful to you, we see also your taking the time to answer some questions to be very important and helpful for women who will testify about rape and sexual violence. You have gone thorough it and can share what worked for you, what did not work and what you hope victims in the future get from the courts and from the judicial system. Your contribution is invaluable for them.
  - We would like to know what made you want to testify, what were your expectations and experiences, what happened afterwards? Who supported you? How do you live today? Do you feel you got justice? What should be done for survivors of sexual assault?
  - Timeframe: We would like to thank you for your trust and for sitting with us for this interview. It will take about 1 ½ hour. Some of the questions will be very specific, some more general

B: Policy of confidentiality

- We will keep your responses confidential. Neither your name will be written down anywhere nor will there be any way to identify you. For the purpose of our internal communication, we need a name to go with the interview and we will ask you later to select one.
- In the beginning of the interview we will ask you some general questions to get an overall picture of the women who have helped us with this project. All of this will stay completely anonymous.
- It would help us to tape the interview so we do not miss important information you give us. This again will be kept confidential. Is it okay to tape it? Yes/no
- Do you have any questions?

C: Feedback

- The study will not be published before Spring 2009. Currently the project has funds only to publish the whole study in English. However, a summary will be published in Bosnian and we are looking for additional funds to translate the whole study.
- How would you like to be informed about the results of this project?
- Would you like to have the summary in Bosnian language?
- How can we stay in contact?

Interview

I. Personal Information

Choose a name rather than your own

1. **Age now**
2. **Age at time crime occurred**
3. **Age at time of testimony**
4. **Residence now. If BiH, specify if Federation of Bosnia and Herzegovina or Republic of Srpska**
5. **Residence at time crime occurred**
6. **Residence at time of testimony**
7. **National Origin**
8. **Marital Status Now**
9. **Marital Status at time crime occurred**
10. **Marital Status at time of testimony**
11. **Whom do you live with now?**
12. **Whom did you live with at time crime occurred?**
13. **Whom did you live with at time of testimony?**
14. **Children**
    - ☐ now
    - ☐ at time crime occurred
    - ☐ at time of testimony
15. **Education**
16. **Profession**
    - ☐ now
    - ☐ at time crime occurred
    - ☐ at time of testimony
17. **Employment before war, during, after and now**
18. **Have you ever been displaced from your house?**
19. **Are you financially speaking better same or worse than before the war?**
20. **Are you emotionally**
    - ☐ better
    - ☐ the same
    - ☐ or worse than before the war?

II. Kind of Testimony

1. **How many times did you testify?**
2. **Where did you testify? (ICTY, Bosnian Court, both?)**
3. **What did you testify about?**
   Interviewer: Use numbers in order to differentiate between different testimonies and specify where testimony took place
   a. On your own experience of rape or of sexual violence? ☐☐☐☐
   b. On rape or sexual violence of other women ☐☐☐☐
   c. Mainly on other issues but also on rape or sexual violence of her own ☐☐☐☐
1. **Was accused the direct perpetrator?** ☐
2. **Was accused not direct perpetrator but a commander?** ☐
3. **Was accused not the direct perpetrator but charged with aiding and abetting?** ☐
   Interviewer: Explain and give examples of what this means (being ordered by the accused to go with another man who raped her, for example).
4. **Who knew you were testifying about rape and sexual violence?**
   a. Nobody
   b. Family members – who?
   c. Friends
   d. Neighbours
   e. Therapist
   f. Doctor
   g. Religious leaders
   h. Others
5. **If nobody what made difficult to tell them?**

III. Support and Protection

1. **Who supported (encourage you, went to court with) you about testifying?**
   a. Family – specify whom
   b. NGOs
   c. Friends
   d. Therapist, doctors
   e. Religious leaders
   f. Members of the court
   g. Anybody else (specify)

2. Was someone against your testifying?
If YES whom and why?

3. How much support did you receive from the Court?
☐ A great deal
☐ They were helpful
☐ Not much
Interviewers: go into detail about who and how?

4. Did you receive any threats at any time before, during or after testimony?
Interviewer: make sure the witness tells you exactly; especially her understanding of threat; ask the questions below
If YES
a. ☐ before ☐ during ☐ after trial
b. what kind of threats?
c. from whom?
d. Did it make you think about not testifying?
e. Did you tell officials about the threats?
f. If YES, what officials?
g. What did they do?

5. Did any members of her family receive threats?
Interviewers: Make sure the witness tells you exactly what the threats were. Then ask the questions below:
If YES
a. ☐ before ☐ during ☐ after trial
b. What kind of threats?
c. From whom?
d. Did it make you think about not testifying?
e. Did you tell officials about the threats?
f. If YES, what officials?
g. What did they do?

6. Were you offered any bribe, by someone connected to the accused, not to testify or did someone tried to persuade you to alter your testimony?
If YES from whom and how? Be specific

7. Were you ever asked to alter your testimony?
If YES how?

8. Did you ask the court for any specific protection?
If NO, why not?
Checklist for interviewers:
☐ I did not want any, everybody should know.
☐ I did not know that was possible.
☐ I was too nervous or upset to think of this.
If YES
a) Who did you ask?
b) How was the reaction?
c) Did you get what you asked for?

9. What kind of information were you given by the court about different ways to be protected?
Who gave you this information?
Interviewers: Listen first, don't specify here the different protective measures. Encourage the witness to remember and describe what she remembers.

10. Did you testify in open session?
Interviewers: Explain now differences listed below. For example, ask witness, who was sitting in the gallery if she remembers, was she sitting in the same room as accused, was her real name used? etc.
☐ Yes ☐ No
If YES
☐ With pseudonym
☐ With image distortion but sitting in courtroom
☐ With image and voice distortion but sitting in courtroom
☐ Video link in the court building but not in the same room as accused
☐ with distorted image ☐ distorted voice
☐ Video link outside the court building
☐ with distorted image ☐ distorted voice
☐ None of the above – totally public

11. If you testified in a closed session (completely closed to the general public) is that how you wanted to testify?
☐ Yes
☐ No
If NO, please explain why not.

12. How was the final decision made?
a. The prosecutor made the decision. ☐
b. The witness and Protection Unit made the decision. ☐
c. The judges made the decision. ☐
d. I made the decision. ☐
e. The prosecutor and I made the decision. ☐
f. I do not know who made the decision. ☐
g. Other ☐

13. Did you have any contact with the court after testimony?
☐ No
☐ If YES, please explain:
What kind of contacts?
Who contacted you?

14. Overall, did you feel protected?
If not, why not?

IV. Motivation and Reactions

1. How important do you think it is for women who were raped or sexually assaulted to testify in Court?

a. Very important ☐
b. Somewhat important ☐
c. Not very important ☐

2. If 'not very important' please explain why?

3. If very or somewhat important how come?

Interviewers: Listen first and then, if necessary, check more than one response. If witness does not answer at all, note this and then read the possible answers.

a. Rape and sexual assault is a crime and needs to be punished. ☐
b. Rape and sexual assault victims need to be honoured. ☐
c. What happens to women needs to be known. ☐
d. Sexual assault is among the very serious crimes. ☐
e. Men who sexually assault women are especially evil and need to be punished. ☐
f. So it won't happen to other women. ☐
g. Other reasons ☐

4. What made you personally want to testify in court about the sexual assault?

Interviewer: Listen carefully first, and then mark responses listed below. If witness does not answer, note this and then read possible answers. More than one answer is possible.

a. Wanted perpetrator(s) to get punished
   i. Very important ☐
   ii. Somewhat important ☐
   iii. Unimportant ☐
b. Wanted revenge
   i. Very important ☐
   ii. Somewhat important ☐
   iii. Unimportant ☐
c. Did not want other women to go through same experience
d. Did not want daughters or children to ever go through it
e. Wanted to prove that she was victimized
   i. Very important ☐
   ii. Somewhat important ☐
   iii. Unimportant ☐
f. Wanted to prove her innocence to (can mark more than one answer)
   i. Parents ☐ Yes ☐ No
   ii. Husband ☐ Yes ☐ No
   iii. Children ☐ Yes ☐ No
   iv. Neighbours ☐ Yes ☐ No
g. Did not want to testify but was pressured to
   If so, by whom?
h. Wanted to honour all the women who were sexually assaulted during the war
i. Wanted to honour other women who were assaulted and died
j. Wanted to honour other women whom she knew and witnessed being sexually assaulted
k. Wanted the whole world to know what had happened
l. Hoped I would feel better afterwards
m. Wanted to keep a promise I made at time of crime
n. Other

5. How did you feel after the testimony then?

Interviewers: If testified more than one time check if the feelings are the same or different and mark with numbers each different testimony. Then ask to specify how come.

a. Very happy ☐☐☐☐
b. Somewhat happy ☐☐☐☐
c. Unhappy ☐☐☐☐

6. Feelings when returned home. Did it change?

a. Very happy ☐☐☐☐
b. Somewhat happy ☐☐☐☐
c. Unhappy ☐☐☐☐

7. Feelings now

a. Very happy ☐☐☐☐
b. Somewhat happy ☐☐☐☐
c. Unhappy ☐☐☐☐

8. Did any of the following happened to you after testimony?

Interviewers: Read the questions.

a. Was your name or any confidential information leaked to the public?
   ☐ Yes ☐ No If YES, how?
b. Did friends and members of the community isolated you?
   ☐ Yes ☐ No
c. Were you attacked and sexually abused afterwards?
   ☐ Yes ☐ No
d. Did you feel in any way blamed?
   ☐ Yes ☐ No
   If YES, how?
   Interviewer: Try to get a specific response.
e. Did your husband or family leave you?
   ☐ Yes ☐ No
f. Did your family become more supportive later?
   ☐ Yes ☐ No
g. Did you feel better about yourself?
   ☐ Yes ☐ No

h. Did you find the court experience was too traumatic?
☐ Yes ☐ No If YES, please explain how
i. Did you become very upset and go to psychotherapy?
☐ Yes ☐ No
j. If you went to psychotherapy are you still going?
☐ Yes ☐ No
k. Did your husband or partner became more supportive later?
☐ Yes ☐ No
l. Did you feel relieved afterwards and did life became easier?
☐ Yes ☐ No
m. Did you feel you had fulfilled your responsibility?
☐ Yes ☐ No
n. Other

9. If you were asked to testify again what would be your choice?
a. I would say yes immediately.
☐ Yes ☐ No If YES, please explain why
b. I would have to think about it.
☐ Yes ☐ No If YES, please explain what you would consider.
c. I would not testify again

Interviewers: Ask reasons, then check the following list (more than one answer possible).

i. I was stigmatized
ii. I was tired of testifying so many times.
iii. Other perpetrators are still walking the streets.
iv. I was re-traumatized with the court experience. Please explain if not already done so above.
v. The testimony was dismissed. If YES, do you know the reasons? Who told you?
vi. It did not bring any positive change in my life (financially, emotionally, physically) or made it worse.
vii. The sentence was too light.
viii. The accused was found innocent.
ix. I did not get a fair trial.
x. The court made promises they never kept. Please explain in more detail.
xi. Other reasons

10. Looking back would you do anything different regarding testifying or would you ask for anything different?

11. Would you choose different protective measures?

12. Would you want the Court to have done something different?
Interviewers: Ask specifically: prosecutors, investigators, judges, witness section.

13. What would be the most important recommendation you have for other women who want to testify on sexual assault?

V. Justice

1. What does justice mean to you?
Interviewers: First listen carefully. Then read all the responses not given at first by the witness.
a. ending impunity ☐
b. punishment of the accused ☐
c. apologies from perpetrator ☐
d. apologies from the state ☐
e. financial and emotional support for victims to rebuild their lives (provided for by state or international community) ☐
f. recognition of your innocence ☐
g. recognition of your sufferings ☐
h. reconciliation in society ☐
i. state and community work against wars ☐
j. other ☐

2. Did you get any of the above?
☐ No ☐ Yes If YES, which ones?

3. What do survivors of rape and sexual assault need and deserve?
Interviewers: First listen. Note which of the answers from the list below witness gives herself. If witness does not answer, note that, then read out possible answer.
a. Financial compensation and tools to rebuild their lives ☐
b. Treat them as any other survivor of the war ☐
c. Provide psychotherapy and medical care ☐
d. Provide them with permanent house ☐
e. Help them relocate ☐
f. Give them a permanent pension ☐
g. Apologies should be given by the perpetrator ☐
h. Apologies by government, state, and community ☐
i. Change the laws so that they are recognized as war casualties ☐
j. Improve the status of all women in society so that they achieve equality with men ☐
k. Support national and international campaigns about eliminating violence against women at home and outside the home. ☐

4. Did you get any of the above?
☐ No ☐ Yes If YES, which ones?

5. What should be done with perpetrators?
Interviewers: First listen. Note which of the answers from the list below witness gives herself. If witness does not know note that as well, then read out possible or remaining the answers.
a. Forget about them
b. Arrest them and try them in local and/or international courts
c. Have them confess
d. Have them compensate the victim
e. Have them face the community
f. Forgive them
g. Reintegrate them into the community
h. Put them in jail for the rest of their lives
i. Have them apologize to the victim
If YES, ☐ in private ☐ publicly
j. other

6. How should survivors of sexual assault be remembered?
Interviewers: First listen. Note which of the answers from the list below witness gives herself. If witness does not know, note that as well, then read out possible or remaining the answers.
a. Memorials ☐
b. Films ☐
c. Official day to remember ☐
d. Documentation and books ☐
e. Forget about remembering. It does not help ☐
f. Trials are enough ☐
g. Equal status with war veterans ☐
h. Other ☐

7. Do you feel you got a just trial?
☐ Yes
☐ If NO, why not?

VI. Compensation and Reparation

1. Were you told you could get compensation from the convicted perpetrator through civil proceedings?
☐ No
☐ If YES, did you ask for it? What happened? Did you get it?

2. Did you apply for the status of war victim because of sexual assault or rape?
☐ If NO, why not?
☐ If YES, what happened?
a) Did you get it?
b) Do you receive a pension now?
c) Is it sufficient?

Foreword

1 Roy Gutman, Foreword to Alexandra Stiglmayer (Ed.), Mass Rape. The War against Women in Bosnia-Herzegovina, University of Nebraska Press, Lincoln and London 1994, p.ix
2 Seeking justice/ Auf der Suche nach Gerechtigkeit, Conference report of *medica mondiale* of September 2008 in Bad Honnef, *medica mondiale*, September 2008, available in German: www.medicamondiale.org

Introduction by the Authors

3 Binaifer Nowrojee, Your Justice is too slow. Will the ICTR Fail Rwanda's Rape Victims?, United National Research Institute for Social Development, Occasional Paper 10
4 See, for example, Kelly Dawn Askin, War Crimes Against women. Prosecution in International War Crimes Tribunals, Kluwer Law International 1997; Ann-Marie-L.M. de Brouwer, Supranational Criminal Prosecution of *Sexualized Violence*. The ICC and the Practice of the ICTY and ICTR, Intersentia 2005; Judith G. Gradam and Michelle J. Jarvis, Women, Armed Conflict and International Law, Kluwer Law International 2001
5 Eric Stover, The Witnesses. War Crimes and the Promise of Justice in The Hague, University of Pennsylvania Press, Philadelphia 2005
6 The cases against *Radovan Stankovic* and *Gojko Jankovic* (Foča municipality)
7 The case against *Meakic et al.* (Omarska Camp)
8 For more details of the sample of witnesses see Chapter 5.
9 Stover (2005), p. xii

Part One

1. War Rape in Bosnia Herzegovina – The Commission of Experts Report

10 Interim Report of the Commission of Experts Established Pursuant to UN Security Council Resolution 780 (1992), 26 January 1993, S/25274, p. 17
11 For more details on the political struggles nearly paralysing the work of the Commission see Pierre Hazan, Justice in a time of war. The true story behind the International Criminal Tribunal for the Former Yugoslavia, Texas A&M University Press, 2004; John Hagan, Justice in the Balkans. Prosecuting war criminal in the Hague Tribunal, University of Chicago Press, 2003
12 Quote from Hazan (2004), p. 27
13 The British government had blocked Bassiouni's appointment as chairperson of the Commission and later as the first Chief Prosecutor to the ICTY. Bassouni believed he was seen as a Muslim who was 'too victim-oriented' and therefore biased. See his foreword in Hazan (2003).
14 Judith G. Gardam and Michelle J. Jarvis, Women, Armed Conflict and International Law, Kluwer Law International, The Hague, London, Boston 2001, p. 157
15 For further reading on difficulties and limitations see the Final Report of the UN Commission of Experts (1992), Annex IX.A "Sexual assault investigation"
16 Kathrin Greve, Vergewaltigung als Völkermord. Aufklärung sexueller Gewalt gegen Frauen vor internationalen Strafgerichtshöfen, Baden-Baden 2008, p. 76, Fn 471
17 Mainly in Annex II and IX of the Final Report of the UN Commission of Experts (1992)
18 Final Report (1994), Annex IX, p. 4
19 Final Report (1994), Annex IX, p. 7
20 It is important to note that the Commission worked on the data when the war in the former Yugoslavia was at its peak. For its own fieldwork, the Commission depended on the permission of those in control of the different territories and therefore the Commission accomplished fieldwork only in the refugee camps in Croatia and to a lesser degree in Slovenia. The authorities in control of Serbia and Montenegro, who hosted many refugees as well, did not give permission for interviews.
21 Final Report (1992), p. 37, § 149
22 Final Report (1992), pp. 29-37, §§ 110-150
23 Final Report (1992), Annex IX C. Summary Analysis
24 Final Report (1992), p. 59, § 248
25 For widespread forms of sexualised attacks on men and male rape see Eric Steiner Carlson, The hidden prevalence of male sexualised assault during war. Observation on Blunt Trauma to the Male Genitals, in: British Journal of Criminology (2005) – Advance access published April 27, 2005
26 Final Report (1992), p. 56, § 237
27 Final Report (1992), p. 60, § 253
28 Final Report (1992), Annex IX, p. 9, § 10
29 Final Report (1992), Annex IX.A, "Sexual assault investigation"
30 Only the Foča trial contained one or 2 charges pertaining to the selling of sexual services of enslaved women to other soldiers and to the selling of some girls themselves. For more details, see Chapter 4.2. However, there has been no systematic investigation into this topic.

2. The International Criminal Tribunal for the Former Yugoslavia

31 UNSC Res. 827/1993, 25 May 993
32 For more background information on this see Hazan (2004)
33 Hazan (2004), p. 44
34 Hazan (2004), p. 49
35 Statute of the International Criminal Tribunal for the Former Yugoslavia, available at the ICTY website: www.icty.org/sections/LegalLibrary/StatuteofTheTribunal
36 The Hague Convention of 1907 does not mention rape but Art. 46 provides that "family honour and rights, the lives of persons, and private property must be protected, as well as that religious convictions and practice must be respected." The fourth Geneva Convention of 1948 mentions rape and enforced prostitution explicitly in Art. 27, but again characterises them as honour crimes: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Thus, while protection is afforded to male ownership over women in the Hague Convention, chastity is sought to be protected in the Geneva Conventions. The Expert Commission had suggested including both Additional Protocols of the Geneva Conventions, which prohibit in Art. 74 resp. 4 "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" in international and internal armed conflict. This was not done at the ICTY. However, the Rwanda Tribunal did include violations of Common Art. 3 and Additional Protocol II as quoted, in the statute.
37 Hilary Charlesworth and Christine Chinkin, The Gender of Jus Cogens", (1993), 15 Human Rights Quarterly, p. 63
38 The irrefutable evidence in the Commission of Experts' report was largely responsible for this crucial inclusion. Crimes against humanity was first formulated in the Statute of the Nuremberg Tribunal in 1945. Different than war crimes and 'grave breaches', crimes against humanity are not necessarily linked to an armed conflict. Their constituting elements are that they must be either systematic or widespread, taking place in the context of some kind of attack upon a civilian population.
39 Judith G. Gardam and Michelle J. Jarvis, Women, Armed Conflict and International Law, Kluwer Law International, The Hague 2001, p. 150. See also Fn 93, p. 150 in which the authors give detailed reference to contributions of SC members.
40 Rule 96, ICTY Rules of Procedure and Evidence as of 4 October 1994 available at www.icty.org/sid/136
41 The 2008 statistics on crime in Germany note that 99.2% of the perpetrators were male and 95.5% of all rape victims were female. Polizeiliche Kriminalstatistik 2008, Bundesrepublik Deutschland, hrsg. V. Bundeskriminalamt, Wiesbaden 2008
42 The civil law system does not need corroboration as a formal requirement.
43 Virginia Morris and Michael P. Scharf, An Insiders' Guide to the International Criminal Tribunal for the Former Yugoslavia, New York, Translational Publishers, 1995, Vol. 1, p. 263
44 Gabrielle Kirk McDonald, in: Sara Sharratt, Ellyn Kaschak (ed.): Assault on the Soul. Women in the Former Yugoslavia, Harworth Press, New York, London, Oxford 1999, p. 26
45 Rule 96, ICTY Rules of Procedure and Evidence as of 3 May 1995
46 *Music et al.* Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, IT-96-21-T. The defence tried to question the credibility of the rape witness by claiming she was lying about an abortion that she allegedly had had. In the case against *Kunarac et al.* (Foča Case) both Trial and Appeal Chambers referred to Rule 96 when the accused Kovac demanded corroboration of the testimony of one witness.
47 UN, Report of the Secretary-General Pursuant to Paragraph 2 of UN Security Council Resolution 808 (1993) Presented 3 May 1993 (S/25704), available at www.un.org/icty/legaldoce/basic/statut/s25704.htm

48 OSCE, Mission to Bosnia and Herzegovina, War Crime Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles, March 2005, p. 4, available at www.oscebih.org/documents/1407-eng.pdf
49 Text of Rome Agreement available at www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093
50 OSCE, War Crime Trials Before the Domestic Courts of Bosnia and Herzegovina (2005), ibid, p. 6
51 However, the role taken by the Special Department for War Crimes at the WCC is not an adequate replacement of the Rules of the Road Unit. As noted by the ICTJ in their Report, the Prosecutor's Office of Bosnia and Herzegovina lacks coordination with the entity offices of prosecutors and the Special Department for War Crimes cannot issue binding instructions to cantonal and district prosecutors. See International Centre for Transitional Justice and Bogdan Ivanisevic (ICTJ), The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court, 2008, p. 31, available at www.ictj.org/images/content/1/0/1088.pdf
Furthermore, there is a lack of regional cooperation (between Bosnia and Herzegovina and neighbouring countries) which still, even after 14 years since the signing of the Dayton peace agreement, allows for political manipulations. For example, as noted by BIRN: "The Sarajevo and Belgrade Prosecutions are currently conducting two parallel investigations. One concerns crimes committed against the Yugoslav National Army, JNA, convoy in Tuzla in May 1992, while the other concerns the attack on a group of JNA soldiers in Sarajevo in May 1992. The Belgrade Prosecution filed an indictment against Ilija Jurisic, whose trial is underway, for his alleged co-participation in the crime committed in Tuzla. Later, it requested the filing of an international warrant against 13 individuals who are associated with the incident that took place in Sarajevo in May 1992. Both of these initiatives were widely criticised in Bosnia and Herzegovina." BIRN, Agreement on Cooperation between Two Prosecutors' Offices, 15 June 2009, available at www.bim.ba/en/171/10/20238/
52 The Law on the Transfer of Cases from the ICTY to the Prosecutor's Offices of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 61/04,46/06, 53/06, 76/06)
53 See the latest progress report to the UN Security Council at www.icty.org/tabs/14/2
54 OSCE, Mission to Bosnia and Herzegovina, Monitoring and Reporting on Rule 11*bis* cases, available at www.oscebih.org/human_rights/monitoring.asp?d=1
55 UN Security Council Resolution 1503 (2003), International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, available at daccessdds.un.org/doc/UNDOC/GEN/N03/481/70/PDF/N0348170.pdf
56 UN Security Council Resolution 1534 (2004) International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda available at daccessdds.un.org/doc/UNDOC/GEN/N04/286/29/PDF/N0428629.pdf

3. The Court of Bosnia and Herzegovina and the War Crimes Chamber

57 The full text of the Dayton Peace Agreement available at www.ohr.int/dpa/default.asp?content_id=380
58 Annex 10 of the Dayton Peace Agreement: Civilian implementation, available at www.ohr.int/dpa/default.asp?content_id=366
59 PIC Bonn Conclusions, full text available at www.ohr.int/pic/default.asp?content_id=5182
60 Constitution of Bosnia and Herzegovina, Article I.3, full text available at ccbh.ba/eng/p_stream.php?kat=518
61 The High Representative's Decision on the Establishment of the Brcko District of Bosnia and Herzegovina, 8 March 2000 available at www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5265
62 Amendment I to the Constitution of Bosnia and Herzegovina, adopted by the Parliamentary Assembly of Bosnia and Herzegovina (in the House of Representatives on 25 March 2009 and in the House of Peoples on 26 March 2009) available at ccbh.ba/eng/article.php?pid=1527&kat=518&pkat=500
63 See General Framework for Peace in Bosnia and Herzegovina, Constitution of Bosnia and Herzegovina and Decisions of the Constitutional Court of Bosnia and Herzegovina U 26/01 and U 5/98. Decisions available at www.ccbh.ba/eng/odluke/
64 High Judicial and Prosecutorial Council, History and Role of Indenpendant Judiciary Commission, available at www.hjpc.ba/docs/ijcarch/?cid=160,2,1
65 Enacted laws available at www.ohr.int/decisions/judicialrdec/archive.asp?m=&yr=2002
66 High Judical and Prosecutorial Council, Annual Report 2008, p. 61. available at www.hjpc.ba/intro/gizvjestaj/?cid=4276,2,1
67 ibid.
68 Article VI of the Constitution of Bosnia and Herzegovina, available at ccbh.ba/eng/article.php?pid=835&kat=518&pkat=500
69 OHR, Decision imposing the Law on the State Court of Bosnia and Herzegovina, available at www.ohr.int/decisions/judicialrdec/default.asp?content_id=5228
70 ibid.
71 Constitutional Court of Bosnia and Herzegovina, Decision No. U 26/01
72 ibid.
73 Amendment to the Law published in Official Gazette of Bosnia and Herzegovina 3/03, the Law on Court of Bosnia and Herzegovina with all the amendments available in English at www.sudbih.gov.ba/?opcija=sadrzaj&kat=6&id=20&jezik=e
74 Enacted laws available at www.ohr.int/decisions/judicialrdec/archive.asp?m=&yr=2002
75 see Prosecutor's Office of Bosnia and Herzegovina, History, available at www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=1&id=2&jezik=e
76 OSCE, Mission to Bosnia and Herzegovina, Moving towards a Harmonised Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina, August 2008, p. 5, available at www.oscebih.org/documents/12615-eng.pdf
77 OSCE, HRW and ICTJ discuss this issue in their reports referred to in this study.
78 ibid.
79 For a discussion on plea agreements in ICTY see chapter 4.1
80 BIRN Bosnia and Herzegovina, Justice Report, Veselinovic: Seven and a Half Years in Prison, 30 June 2009, available at www.bim.ba/en/173/10/20665/
81 Elmerina Ahmetaj Hrelja, Imperatv istine i tranzicijska pravda: Prikladnost pregovaranja o krivici u me unarodnim krivi nim predmetima u Bosni i Hercegovini (Imperative of justice and transitional justice: adequacy of plea bargaining in the international criminal cases in Bosnia and Herzegovina), Puls-demokratije, 23. October 2008.
82 According to recent estimates, there are around 6000 potential war crime cases awaiting trial before the WCC.
83 The decisions published on the website of the Court of Bosnia and Herzegovina by 1 June 2009
84 Art. 86 (5) reads: It shall not be allowed to ask an injured party about his sexual experience prior to commission of the criminal offense and if such a question has already been posed, the Court decision cannot be based on such statement. Art. 264 reads: The evidence offered to prove that injured party was engaged in other events related to sexual behavior and to prove a sexual predisposition of the injured party is not admissible.
85 The Rule 96 provides for rules of evidence in cases of sexualised assault. The first version read as follows: "In case of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence; (iii) prior sexual conduct of the victim shall not be admitted in evidence."
86 *Vukovic Radmilo* case, X-KRZ-06/217
87 *Pincic Zrinko* case, X-KR-08/52
88 First Instance Judgement in the *Vukovic Radmilo* case, X-KR/06/217 of 16 April 2007, p. 11
First Instance Judgement in *Pincic Zrinko* case, X-KR-08/05 of 28 November 2008, p. 3
89 Second instance judgment in the Vukovic Radmilo case, X-KRZ-06/217 of 13 August 2008, p. 5
90 Askin, "Sexual Violence", p. 111, Fn. 7
91 see discussion on the protection of witnesses below
92 First Instance Judgement in *Nedjo Samardzic* case, (X-KRZ-05/49), p. 35
93 ibid.
94 First Instance Judgement in *Pincic Zrinko* case, p. 30
95 ibid.
96 See Art. 172 and 173 of the Criminal Code of Bosnia and Herzegovina
97 *Miloš Babi et al.*, Komentari krivi nih/kaznenih zakona u Bosni i Hercegovine. Knj. 1, 2. Sarajevo: Savjet/Vije e Evrope; Evropska komisija, (Com-

mentary of the Criminal codes of Bosnia and Herzegovina, vol. 1 and 2, Sarajevo: Council of Europe) 2005, p. 567
98 First Instance Judgement in the *Palija Jadranko* case, X-KR-06/290 of 28 November 2007, p. 42 of version in Bosnian language
99 *Kurtovic Zijad et al.*, X-KR-06/299
100 *Lazarevic Sreten et al.*, X-KR-06/243
101 First Instance Judgement in *Lazarevic Sreten* case, X-KR-06/243 of 29 September 2008
102 ibid.
103 *Miloš Babi et al.* ibid.
104 *Lelek Zeljko case*, X-KRZ-06/202
105 ibid.
106 *Veselinovic Rade* case, X-KR-05/46
107 *Bundalo Ratko et al. Case*, X-KR-07/419
108 Of all the cases where the first instance judgements were published on the website of the Court of Bosnia and Herzegovina, War Crime Chamber, concluding as on 1 June 2009, there is a total of 15 cases involving sexualised violence charges and 2 cases involving sexualised violence against men charged as torture.
109 Rules of procedure of the Court of Bosnia and Herzegovina, available at www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=65&jezik=b
110 See for example BIRN, Justice Report, *Bosnian Council of Ministers Rejects Proposal to Keep Foreign Judges and Prosecutors*, 5 June 2009, available at www.bim.ba/en/169/10/19921/
111 See for example BIRN, Justice Report, *Bosnian Judiciary Still Needs International Staff*, 15 June 2009, available at www.bim.ba/en/171/10/20246/
112 Finally, in the session held on 24 July 2009 the Council of Ministers proposed to the Parliament the version of the solution for extension of the mandate of international judges pending confirmation in the parliamentary procedure.
113 Personal Communication with investigator

4. The Prosecution of Sexualised Violence

114 Report of the UN Secretary-General, Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, 25 October 1995, A/51/557
115 This includes all indictments ever issued. Several accused died before or during trial, other cases have been transferred to the State Court of Bosnia and Herzegovina and 2 accused are still at large.
116 The ICTY website gives a total of 161 accused in 104 cases: www.icty.org Go to: Key figures of ICTY cases. 6 accused that died after transfer to the Tribunal have been included and some, like Milosevic, were also charged with rape.
117 *Prosecutor v Furundzja*, (IT-95-17/1), Appeals Judgement, 21 July 2001, p. 21
118 *Prosecutor v Kunarac et al.*, (IT-95-9/1), Third Amended Indictment, 8 November 1999, p. 4
119 The ICTY website gives a total of 86 accused but they include cases referred to the War Crime Chamber which were not included here since the objective is to study conviction rate at the ICTY.
120 Bralo, Cecis, Kovac, Kunarac, Radic, Vukovic, Zelenovic
121 For more information about joint criminal enterprises see further down in this chapter
122 On trial: Prlic, Stoijc, Prljak, Petkovic, Coric, Pusic (high ranking HVO commanders), Seselj (President of the Serbian Radical Party), Dordevic (Chief of Serbian Public Security Department, responsible for all units in Kosovo). On pre-trial: Stanisic & Zupljanin, (high-ranking politicians of the Republika Srpska), Karadzic. Indicted but still at large: Mladic, Hadzic. All of them are cases of accused who were in leadership positions.
123 The numbers do not include accused persons charged with sexualised assault but who may have either died before or during the proceedings (6) or were referred to the State WCC (6).
124 For the political struggles behind the scenes and in public see Hagan (2003), Hazan (2004)
125 For more details see Hagan (2003), Chapter 4. He also offers a detailed table on the cases transferred to the Tribunal from April 1995 to July 2001 (p. 110). Only France did not participate in the arrests and the region under French control in Eastern Bosnia remained a refuge for many war criminals walking the streets openly.
126 Campbell (2007), p. 422
127 Campbell (2007), p. 242
128 The data from 2007 are based on Campbells's findings.
129 In case of *Martic* the incidents of sexualised abuse like "forced mutual oral sex or oral sex with prison guards, and mutual masturbation" referred to male detainees in the hospital of Knin. *Prosecutor v Martic*, (IT-95-11-T) Trial Judgement, 12 June 2007, Fn 899. In the case of *Banovic* the operative consolidated indictment of July 2002 refers only to "sexualised violence" but early indictments were more specific charging *Banovic* with participating in forced fellatio in Keraterm; see second amendment of the indictment *Prosecutor v Sikirica et al.*, (IT-95-8), 03 January 2001, count 22.
130 This includes cases of persons in positions of leadership and with responsibility for large territories.
131 For more details on the case see further chapter 4.3
132 Zarkov (2007), p. 166
133 For example in *Nikolic* or *Milutinovic et al.* In the first cases there was evidence of mass graves of women, in the latter evidence was presented of 8 women raped, killed and thrown into 3 wells in Kosova.
134 *Prosecutor v Todorovic*, (IT-95-9/1)
135 Statements of remorse are published on www.icty.org/sid/203
136 See Chapter 3.2.4 on plea bargaining before the WCC and Chapter 5. Witnesses' Perspectives
137 See his statement published on the www.icty.org
138 See further down this Chapter 4.3
139 Delalic, Miroslav Radic, Milutinovic
140 Kraisnik, Kvocka, Zigic, Mrksic, Slivancanin, Sikirica, Dosen, Koloundzjia
141 Patricia Viseur Sellers, Individual(s') Liability for Collective sexualised Violence, in: Karen Knop (Ed.), Gender and Human Rights, Oxford: Oxford University Press, 2004, p. 153-194
142 *Prosecutor v Mrksic et al.*, (IT-95-13/1), Trial Judgement, 27 September 2007, § 529
143 *Prosecutor v Sikirica et al.*, Sentencing Judgement, 13 November 2001, § 125
144 *Prosecutor v Kvocka et al.*, Trial Judgement, § 326
145 *Prosecutor v Kvocka et al.*, Appeals Chamber Judgement, § 330
146 ibid., § 684
147 *Prosecutor v Kvocka et al.*, Appeals Chamber Judgement, Summary
148 Rule 94B allows the Chamber to decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings.
149 Rule 92*bis* of the Rules of Procedure and Evidence allows the Court to accept the evidence of a witness as written statement or transcripts from other trials in lieu of oral testimony if the evidence does not directly concern the acts and conduct of the accused. Rule 92ter also allows for cross-examination and questioning by the Judges if the witness is present in court and is available.
150 *Prosecutor v Krajisnik*, (IT-00-39), Witness KRAJ-224, Transcript p. 590
151 *Prosecutor v Krajisnik*, Appeal Judgement, § 171
152 However, it must also be noted that the same witness testified later in another trial on rape.
153 Crimes of sexualised Violence, in: The sin of silence – risk of speech, Collection of reports from international conference held in Sarajevo on 10th and 11th March 1999, titled "Violation for the Human Rights of Women in Bosnia and Herzegovina during the war 92-95", Sarajevo 1999, 357-365, p. 364
154 *Prosecutor v Tadic*, (IT-94-1-T), Transcript 3631-3765
155 For more on the case see further down, Chapter 4.3
156 *Prosecutor v Delalic*, IT-96-21-T, § 810
157 Aleksovski (commander of Kaonik prison by Busovaca), Blaskic (General of the Croatian Devence Council – HVO,) Bralo (commanding member of paramilitary unit 'Jokers'), Furundzija (commanding member of 'Jokers'), Kordic & Cerkez, *Kupreskic et al.* (Ahmici massacre), Ljubicic (highest ranking HVO member), Naletilic & Martinovic (middle ranking Bosnian Croat military commanders)
158 More on this see further down, Chapter 4.3
159 More on this see below: Cases without sexualised violence charges
160 Note that at this point the Trial Chamber went into private session arguing that names of protected women may be mentioned accidentally. (*Prosecutor v Kordic et al.*, T p. 7940)
161 *Prosecutor v Kordic et al.*, (IT-95-14/2), Appeal Judgement, 17 December 2004, § 492f
162 ibid., § 537-539
163 According to Rule 92ter, instead of the oral testimony of a witness a written statement of him or her can also be read out in court provided the wit-

ness confirms the correctness and is available for cross-examination or questions of the judges.
164 3 of them had testified as well in the Kosovo case against Milosevic alongside with 3 more rape witnesses.
165 *Prosecutor v Milutinovic et al.*, (IT-05-87), Trial Judgement, 26 February 2009, § 1188, § 1224
166 *Prosecutor v Milutinovic et al.*, (IT-05-87-PT), Judgement Summary
167 *Prosecutor v Milutinovic et al.*, (IT-05-87), Trial Judgement, Vol 3, p. 481
168 *Prosecutor v Delic*, (IT-04-83-T), Trial Judgement, 15 September 2008, § 20
169 ibid., §318-320
170 *Prosecutor v Blaskic*, (IT-95-14), T 3266, 3966-3969
171 Krstic, Halilovic, Vasiljevic, Deronjic
172 Bassouni Report, Annex IX, Rape and sexualised assault, § 53.
173 *Prosecutor v Lukic & Lukic*,(IT-98-32/1), Trial Judgement, 20 July 2009, § 1152
174 *Prosecutor v Lukic & Lukic*, Decision on Prosecution Motion seeking leave to amend the second amended indictment, 8 July 2008, § 60
175 Binaifer Nowrojee, Your Justice is too Slow. Will the ICTR Fail Rwanda's Rape Victims? The United Nations Research Institute for Social Development (UNRISD) Occasional Paper 10, November 2005
176 ibid., § 37
177 *Prosecutor v Prlic et al.*, (IT-04.74), Amended Indictment, 16 November 2005, § 55
178 *Prosecutor v Karadzic*, (IT_95-5/18-PT), 2nd amendet indictment 18 February 2009
179 ICTY prosecuted rape and sexualised assault successfully under all provisions except genocide. ICTR defined rape also as part of genocide (Akayesu case). The Rome Statute of the permanent International Criminal Court, 1998 has widened the scope of sexualised violence crimes significantly. It also prohibits any kind of discrimination in the application and interpretation of law on grounds of, among others, gender (21). See also Anne-Marie L.M. de Brouwer: Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR, Antwerpen, Oxford 2005; Gradam (2001); Askin (1997)
180 Gardam/Jarvis (2001), p. 217
181 Sharratt, (1999), p. 44f
182 Greve (2008), p. 145
183 Sharratt (1999) p. 44
184 Sharratt (1999) p. 42
185 Tadic was arrested in Germany. The initial indictment, issued in February 1995 contained rape charges. The Prosecutor however had to withdraw them after the main witness on rape withdrew her testimony shortly before commencement of trial. Confidential information about her testimony was leaked and she lost trust in the court.
186 This was the first hearing based on Rule 61 where the Tribunal has been unable to obtain custody of an accused. In such hearings, the Trial Chamber examines an indictment and supporting evidence in public. If it determines that there are reasonable grounds to believe that the accused committed any or all of the crimes charged, the Chamber confirms the indictment and issues an international arrest warrant. The only other Rule 61 hearing was held against Karadzic and Mladic.
187 *Prosecutor v Nikolic*, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, (IT-94-2-R61), § 33
188 However, see the discussion of *Nikolic* above.
189 Interview with Gabrielle Kirk McDonald, in: Sharratt (1999), p. 30f
190 *Prosecutor v Delalic*, (IT-96-21-T), Transcript p. 501-503
191 ibid., p. 525-527
192 ibid., p. 1774
193 ibid., p. 1782-1784
194 *Prosecutor v Delalic*, Trial Judgement, 16 November 1998, § 495
195 ibid. § 941
196 Note that none of the acts in *Celebici* was charged as constituting persecutions.
197 ibid., § 87
198 *Prosecutor v Furundzija*, (IT-95-17/1-T), Trial judgement, 10 December 1998, § 130
199 He had also been indicted but was killed during an attempt to arrest.
200 Stankovic and Jankovic were later tried at the WCC.
201 Research and Documentation Centre Sarajevo; see also the discussion of other Foca trials before the WCC in Chapter 4.3
202 BIRN is the only agency regulary monitoring trials at the WCC and issuing reports (even though not gender sensitive)
203 45 Reviewed Cases: *Alic Sefik, Andrun Nikola, Bjelic Veiz, Bozic Zdravko et al., Damjanovic Dragan, Damjanovic Goran i Zoran, Fustar Dusan, Jankovic Gojko, Jankovic Zoran, Kapic Suad, Kovacevic Nikola, Kurtovic Zijad, Lazaraevic Sreten et al., Lelek Zeljko, Ljubicic Pasko, Ljubinac Radisav, Lucic Kreso, Maktouf Abduladhim, Mandic Momcilo, Mejakic Zeljko et al., Mihaljevic Zdravko, Mitrovic Petar, Nikacevic Miodrag, Palija Jadranko, Paunovic Dragoje, Pekez Mirko et al., Pincic Zrinko, Radic Marko et al., Ramic Niset, Rasevic Mitar et al., Sakic Salko, Samradzic Nedjo, Samardzija Marko, Simsic Boban, Sipic Idhan, Skrobic Marko, Stankovic Radovan, Stevanovic Miladin, Stupar Milos et al., Tanaskovic Nenad, Todorovic Mirko et al., Todorovic Vaso, Vrdoljak Ivica, Vukovic Radmilo, Vukovic Ranko et al.*
204 NOTE: in the case *Vukovic Ranko et al.* by the time the review concluded,(1 June 2009) the final judgement was reached in respect to sexualised violence charges, while other charges were still deliberated on in appeal proceedings. The case was treated as completed for the purpose of the present analysis.
205 In the group cases, the situation is as follows: in the case *Ranko Vukovic et al.* – Ranko Vukovic was charged with rape but aquitted of those charges; in *Mejakic et al.* 3 were charged with sexualised violence, while the case of the fourth defendent, Dusan Fustara, was separated due to plea bargaining but he was not charged with sexualised violence; in case of *Radic Marko* all 4 accused are charged with sexualised violence.
206 Bjelic Veiz, Vukovic Radmilo and Pincic Zrinko
207 Kurtovic Zijad
208 See discussion on forced fellatio in Chapter 3.2 on rape definition
209 *Samardzic Nedjo, Sismsic Boban, Stankovic Radovan, Jankovic Gojko, Tanaskovic Nenad, Lelek Zeljko, Mejakic Zeljko et al., Radic Marko et al.*
210 *Bjelic Veiz*
211 Note that aside from the famous Foča case at the ICTY there are several cases held before the WCC focusing on sexualised violence committed in that area; see, for example, *Stankovic, Jankovic*
212 *Samardzic Nedjo* case (X-KRZ-05/49), First instance judgement, 7 April 2006; appeals judgement 13 December 2006.
213 *Vukovic Radmilo* case (X-KRZ-05/217), First instance Judgement, 16 April 2007, p. 10
214 *Vukovic Radmilo* case, Appeals Judgement, 13 August 2008, p. 5
215 *Vukovic Radmilo* case, Appeals Judgement, 13 August 2008, p. 8
216 *Simsic Boban* case (X-KR-05/04), First Instance Verdict, 11 July 2006, p. 2
217 *The Prosecutor v Nikolic* (IT-01-46-1), Trial Judgement, 18 December 2003, § 68, p. 18
218 *Simsic Boban* case (X-KR-05/04) First Instance Verdict, 11 July 2006, pp. 25-27
219 ibid., p. 25
220 ibid., p. 27
221 *Vukovic Ranko et al.* case (X-KR/07/405) First Instance Verdict, 4 February 2008, p. 27
222 *Vukovic Ranko et al. case* (X-KR/07/405) Appeals Verdict, 2 September 2008, p. 10
223 ibid., p. 10
224 See Chapter 8.1
225 Zeljko Mejakic – command responsibility, Momcilo Gruban – command responsibility and aiding and abbetting, Dusko Knezevic – aiding and abetting
226 in *Gojko Jankovic* case – 8 reports, in *Zeljko Mejakic et al.* case – 11 reports, in *Milorad Trbic* case – 7 reports, in *Pasko Ljubicic* case – 9 reports, in *Radovan Stankovic* – 5 reports and one, third report, was classified confidential and thus not published, in *Mitar Rasevic* and *Savo Todovic* case – 10 reports
227 OSCE, Mission to Bosnia and Herzegovina, Monitoring and Reporting on Rule 11*bis* cases, ibid.
228 OSCE, Mission to Bosnia and Herzegovina, Second Report: Case of Defendant Gojko Jankovic – Transferred to the State Court pursuant to Rule 11*bis*, July 2006, available at www.oscebih.org/documents/13970-eng.pdf
229 ibid., p. 2
230 ibid.
231 For further disscussion on this issue see Chapter 5 of this study
232 For more details see Chapter 6.1
233 OSCE, Mission to Bosnia and Herzegovina, Third OSCE Report in the *Gojko Jankovic* case: Transferred to the State Court pursuant to Rule 11*bis*, October 2006, p. 1, available at http://www.oscebih.org/documents/13971-eng.pdf
234 OSCE, Mission to Bosnia and Herzegovina, Fifth Report in the *Zeljko Mejakic et al.* case – Transferred to the State Court pursuant to Rule 11*bis*, Sep-

tember 2007, p. 2, available at http://www.oscebih.org/documents/14020-eng.pdf
235 ibid.
236 ibid.

Part Two

5. Witnesses' perspectives

237 The VWS is the only section of the court that keeps and provides useful data. The following figures were kindly provided to us by the VWS. The figures published on the ICTY website do not contain those that distinguish by gender: www.icty.org/sid/10175
238 For more details see Chapter 7.2
239 See, for example, Fiona C. Ross, Bearing Witness. Women and the Truth and Reconciliation Commission in South Africa, London 2003. She found that 79% of women testified about violations committed against men, while only 8% of men testified on violations against women, p. 17.
240 Eric Stover, The Witnesses. War Crimes and the Promise of Justice in The Hague, University of Pennsylvania Press, Philadelphia 2005, pp. 76, 126
241 Eric Stover, Witnesses and the promise of Justice in The Hague, in: Eric Stover and Hervey M. Weinstein (Ed.): My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity, Cambridge University Press 2004, p. 108
242 Stover (2005), p. 134
243 Wendy Lobwein, The work of the Victims and Witness Section of the International Criminal Tribunal for the Former Yugoslavia, in: Der Internationale Strafgerichtshof. Fünf Jahre nach Rom. Dokumentation der Fachtagung 27.-28. June 2003 (conference documentation), p. 68
244 See Chapter 7.2. This number includes testimonies on personal rapes as well as corroborative testimonies on sexualised violence.
245 There were also rape testimonies in trials in which rape was not charged, for example in *Blaskic, Vasiljevic* or *Lukic et al.*. We included those testimonies but other trials might have slipped our attention. In addition, in some cases it was not possible to infer from the judgements whether a written statement (according to rule 92*bis* and 92*ter*) was written out in court *in lieu* of oral testimony.
246 2 other had given statements to investigators and were waiting to be called for testimony; 2 did not want to testify.
247 As explained before war crime cases are also brought before Cantonal Courts in the Federation of Bosnia and Herzegovina or District Courts in the RS. For reasons of confidentiality we will term them here indiscriminately "County Courts".
248 See Annex 1
249 To date, very few women of other national identity testified.
250 In particular women who testified in closed session are bound to confidentiality. The status of a protected witness can only be lifted by the court itself.
251 U.S. Department of State: Trafficking in Persons Report 2008, p. 74, available at: www.state.gov/g/tip/rls/tiprpt/2008/
252 Personal experiences of members of *medica mondiale* during the war
253 Alexandra Cavelius, Leila. Ein bosnisches Mädchen, München 2000
254 Abusive term for Bosniak women
255 See the section below on support
256 Judith L. Herman, Trauma and Recovery, New York 1992, p. 75
257 *Kunarac et al.*, (IT-96-23-T & IT-96-23/1-5), Transcript p. 4543
258 Herman, (1992), p. 76
259 See Chapter 8.1
260 Approx. 2,500 €

6. Some Perspectives from Judges and Prosecutors at the War Crimes Chamber

261 In addition, we talked to 2 legal advisors, 2 investigators, 3 members of court management, and 3 members of the Victim Witness Team.
262 The same questionnaire was also distributed through the Registry and the Office of the Prosecutor (OTP) at the ICTY. However, the very low backflow does not allow any meaningful interpretation of the statistical data. We did, however, include some experiences written down by several highly experienced female judges as free comments or in answer of open-ended questions.
263 More on this in Chapter 7
264 Internal Report of Research Team, Trial Monitor on *Case: X-KG-07/500 – Nika evi , Miodrag*, June 10 2008
265 For example *Case: X-KR-08/489 – Kovac, Ante*
266 National War Crimes Strategy (2008) states that there have been around 4000 unresolved cases/accused before the Prosecutor's Office of Bosnia and Herzegovina. The latest estimations presented in the Amnesty International report: Whose justice? Bosnia and Herzegovina's women still waiting (2009) gives a number between 6000 and 16000 unresolved war crimes cases in different stages of the process registered in all 14 jurisdictions in Bosnia and Herzegovina. National War Crimes Strategy available on www.adh-geneva.ch/RULAC/news/War-Crimes-Strategy-f-18-12-08.pdf; Amnesty's report available on www.amnesty.org/en/news-and-updates/report/women-raped-during-bosnia-herzegovina-conflict-waiting-justice-20090930
267 See "Judicial Council 2007" for the judges of the Court of Bosnia and Herzegovina held in Neum on June 11 2007
268 See Chapter 2.3.4. Procedural rules on sexualised violence. While 'consent' and 'prior sexual conduct' are explicitly prohibited to be raised as defence the Criminal Procedural Code of Bosnia and Herzegovina is actually silent on the question of whether or not evidence that corroborates the victim witness testimony is required. However, the provisions of ICTY's Rule 96 are commonly accepted among judges at the WCC; and Rule 96 states that no corroboration is required, (Chapter 2.2.).
269 The Questionnaire was also distributed in the WCC with a backflow only slightly higher as from the ICTY (34 responses). While some general tendencies could be drawn, the results lost meaning when broken down into the different categories of professions.
270 Other judges would at least mention in judgements that rape evidence was presented but not charged. In his dissenting opinion in *Deronjic* Judge Schomburg criticised harshly among others that sexualised assaults had not been charged. It is not by chance that Judge Schomburg has a civil law background. *Prosecutor vs. Deronji*, (IT-02-61-S), Dissenting opinion of Judge Wolfgang Schomburg, p. 85, § 6c
271 It is noteworthy that only one person from ICTY named "finding witnesses" as a major challenge in rape cases.

7. Protection and Security

272 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly on 29 November 1985, A/RES/40/34
273 Patricia Wald, Dealing with witnesses in war crime trials: Lessons from the Yugoslav Tribunal, in: Yale Human Rights & Development L.J., Vol. 5, 2002, p. 218
274 For more details see Chapter 8
275 The International Criminal Court (ICC) was founded when the Rome Statute from 1998 entered into force on 1 July 2002 after ratification by 61 countries. Contrary to the ICTY and the ICTR, the ICC is not a UN based court but governed by States Parties. For more information see the ICC website on www.icc-cpi.int/Menus/ICC/Home . For more information about victim witness status see also the website of the Vitim's Rights Working Group, a non governmental organisation sub-group of the Coalition for an International Court on www.vrwg.org
276 For the full text of the Statute as well as Rules of Procedures of the ICTY see www.icty.org
277 Report of the UN Secretary-General pursuant to § 2 of UN Security Council Resolution 808 (1993), 4 May 1993. UN Doc. S/25704, § 108
278 See Rhonda Copelon, Surfacing Gender. Reconceptualising Crimes against women in time of war, in: The Women & War Reader, ed. by Lois Ann Lorentzen and Jennifer Turpin, New York University Press, New York 1998, p. 73
279 See Rule 69, 75, and 79
280 Complete anonymity was granted only once at the ICTY for a victim of male sexualised assault in the *Tadic* case.
281 All proceedings before the ICTY are videotaped and broadcasted with 15 minutes delay to the public gallery and through the internet.
282 Interview with former support officer
283 Interview with former support officer
284 See Chapter 5 on witnesses' perspectives
285 Communication with VWS member
286 Testimonies given in closed session are also removed from public transcripts only in one case (Milosevic) the redaction of 6 rape testimonies was reversed upon protest of journalists.

287 See Chapter 6.2, Experiences from the ICTY
288 Art. 3 of the Law on Protection of Witnesses, Official Gazette of Bosnia and Herzegovina Nos. 03/03, 21/03, 61/04 and 55/05
289 ibid.
290 Art. 4 of the Law on Protection of Witnesses, Official Gazette of Bosnia and Herzegovina Nos. 03/03, 21/03, 61/04 and 55/05
291 Articles listed in brackets refer to the Law on Protection of Witnesses under threat and vulnerable witnesses
292 ICTY rules 92*bis* and 92ter regulate the evidentiary value of written statements or transcripts in lieu of oral testimony more clearly.
293 Art. 8 of the Law on Protection of Witnesses
294 Art. 7 of the Law on Protection of Witnesses
295 Special circumstances are defined as "risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony" (Art. 14 of the Law on Protection).
296 All this is regulated in Protection Rule Art. 3 (2) referring to Art. 14-22 of the Law on Protection which regulate the Protection Hearing.
297 First Instance Judgement, *Samardzic Case-No. X-KR-05/49* of 7 April 2006, p. 35
298 See Chapter 3.2.5 on procedural rules on sexualised violence cases.
299 See Chapter 6.1 Perspectives of Judges and Prosecutors.
300 First Instance Judgement in the case of *Zeljko Mejakic et al.,* (X-KR-06/200) of 30 May 2008
301 First Instance Judgement in the case of *Marko Radic et al.*, (X-KR-05/139) of 20 February 2009
302 Note, that we cannot verify this statistically as the judgements are often not clear about this.
303 See Chapter 6.1
304 For example the *Nikacevic* Judgement, (X-KR-08/500) of 19 February 2009
305 First Instance Judgement in *Radovan Stankovic* case, p. 12-13
306 Verdict in *Prosecutor vs. Radovan Stankovic* case, (X-KR-05/70), 14 November 2006, p. 12f
307 See Second OSCE Report, Case of Defendant *Radovan Stankovic*, May 2006, p. 5
308 Art. 236 of the Criminal Procedure Code
309 Third Confidential OSCE Report, May 2006, p. 6
310 ibid.
311 *Samardzic*, First Instance Judgement, p. 8
312 ibid., p. 8
313 BIRN Report No 5, 30 March 2006
314 First Instance Judgement, Simsic case, p. 9
315 First Instance Judgement, Simsic case, p. 10
316 *Savic Krsto et al.* case, (X-KR-07/400)
317 Observation Trial Monitor of Research Team
318 First Instance Judgement in the case of *Jadranko Palija*, (X-KR-06/190) of 28 November 2007
319 First Instance Judgement in the case of *Jadranko Palija*, (X-KR-06/190) of 28 November 2007, p. 17
320 For more examples see below Chapter 7.3 Witnesses' Perspectives on Protection
321 Related to us by one of the court members interviewed, see Chapter 6.1.
322 See Chapter 3.4; Third OSCE Report in the *Goijko Jankovic* Case, October 2006
323 See Chapter 6.2
324 Typical Serb names
325 Art 2 of the Rules of Procedure on the Protection of Wltnesses, available in Bosnian on WCC webpage www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=65&jezik=b
326 ibid.
327 Art. 81 of the Criminal Procedure Code of Bosnia and Herzegovina
328 See Registry, About the Registry, available at www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=1&jezik=e
329 ibid.
330 See Registry, Witness and Victims Support Section available on www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=12&kat=2&podkat=3&jezik=e
331 ibid.
332 See Registry, Annual Report 2008
333 The reports are available at www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=1&jezik=e
334 Same judgements as used for the analysis of conviction rates, see also Chapter 4
335 This includes cases of sexualised assault against men charged as torture (i.e. *Zijad Kurtovic* and *Sreten Lazarevic* cases).
336 *Radovan Stankovic* case.
337 On the issues of the compensation see our discussion in chapter 8
338 See our discussion of Perspectives from Judges and Prosecutors in Chapter 6
339 Amnesty International, Whose Justice? The women of Bosnia and Herzegowina are still waiting, September 2009, pp. 29
340 Another participant testified as a defence witness mainly because she wanted to use the possibility to publicly say that she had been raped. Together with several other women and girls, she had been imprisoned and was raped frequently. All other women had been killed and the prosecutor of a County Court had told her that he would need 2 other rape witnesses before he could file an indictment. Therefore, when she was asked to testify in another case for the defence she used the chance to say what was most important for her.
341 See Chapter 8

8. Social Justice

342 Official Gazette of Federation of Bosnia and Herzegovina 39/06
343 Official Gazette of Republika Srpska 25/93, 32/94, 37/07, 60/07
344 Official Gazette of Brcko District 7/08
345 Official Gazette 62/06 of the Federation of Bosnia and Herzegovina
346 It is important to note, however, that women can also received the status of civilian victim of war on other grounds that existed prior to the 2006 amendments, such as detention camp surrvivor, mother/daughter of the dissapeared/killed person, wounded, tortured etc. Many women opted for this possibility.
347 Art. 20 of the Law on Protection of Witnesses

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