

**PROSECUTION OF WARTIME SEXUALIZED
VIOLENCE AT THE COURT OF BOSNIA AND
HERZEGOVINA:**

**WHAT HAPPENED TO THE
INTEREST OF JUSTICE?**

**AN ANALYSIS AND RECOMMENDATIONS ON GENDER
SENSITIVE TRIAL MONITORING FOR WARTIME
SEXUALIZED VIOLENCE CASES IN BOSNIA AND
HERZEGOVINA FOR THE PERIOD**

23/05/2011 – 25/05/2012.

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ACRONYMS

BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
ECHR	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
HJPC	High Judicial and Prosecutorial Council
ICTJ	International Center for Transitional Justice
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OSCE	Organization for Security and Co-operation in Europe
RS	Republika Srpska
SFRJ	Socialist Federal Republic of Yugoslavia
UN	United Nations

EXECUTIVE SUMMARY

A product of a yearlong gender sensitive trial monitoring of wartime sexualized violence cases at the Court of BiH, this report identifies flaws in the prosecution of those cases and recommends ways of overcoming those issues from a gender sensitive perspective. As such, it can be a useful tool for judges, prosecutors and others who work at the institutional level with survivors of wartime sexualized crimes in order to reduce the mechanisms of trauma and processes of retraumatisation during their testimonies. Considering the increased stigmatization of women survivors of wartime sexualized violence, gender sensitive trial monitoring is important because it points at the ways that would make courtrooms a more responsive environment for women's testifying. The interest of the women survivors is at the very core of the research and analysis conducted. This analysis is a constructive contribution to the BiH Court and Prosecutor's Office in order for them to acknowledge the wrongful treatment of women witnesses and survivors of wartime sexualized violence and to take steps to permanently remedy the mistreatment of those witnesses.

In order to attain a bigger picture on the complexity of testifying in court for those who experienced wartime sexualized violence, the report presents the context of the achievements at both the international and local level in terms of processing wartime sexualized violence in Bosnia and Herzegovina. It also describes the research methodology and challenges that the monitors faced. The second part tackles the history of prosecution of rape as a war crime and the merits the feminist law experts hold for it. The local context of war crime trials, with all its idiosyncrasies, are presented in detail and commented on in an elaborate manner. The third part of the analysis is dedicated to the issue of the level of transparency of the Court of BiH, and the consequences that such multidimensional opacity has on public perception of both wartime sexualized crime and its survivor. The importance of transparency is explained from several angles, after which the situation at the Court of BiH, in terms of its transparency (or lack of it), is scrutinised and explained. The most important part of the study deals with the challenges occurring in a yearlong gender-sensitive trial monitoring, and the gender sensitive analysis of testimonies given by women survivors of sexualized crimes. This part of the report abounds in concrete material from the hearings, notes, analyses, critical reviews and recommendations for different solutions of certain problematic spots. Finally, it contains a review of the present-day situation in terms of statistics at the Court of BiH and an explanation of why it is important to have a sex-disaggregated data for further research in this field. The recommendations for the Court, stemming from all the previous analyses and conclusions, are listed at the end of the report. The annex brings topics which are important, but are not directly connected with the core issue of this report, such as analyses of the verdicts for rape, trial costs, advising the survivors to pursue civil lawsuits, gender perspective of violent behaviour i.e. a woman as the accused, and other topics.

This report is an attempt to motivate the jurisprudence to question its methods related to approaching people who survived wartime sexualized violence, in order to reduce additional suffering and trauma of the survivors, vividly present during their testimonies. The project is the first academic attempt of this kind in Bosnia and Herzegovina and the authors certainly hope it initiates positive and much needed changes towards more humane legal procedures.

SECTION I

INTRODUCTION

I-1. INTRODUCTION TO THE PROJECT AND RESEARCH METHODOLOGY IN THE CONTEXT OF PROCESSING WAR CRIME CASES AT THE COURT OF BOSNIA AND HERZEGOVINA

This report was created as a result of the project “Introducing Gender-Sensitive Trial Monitoring for Wartime Sexualized Violence Cases in Bosnia and Herzegovina”, which was implemented in order to monitor the prosecution of wartime sexualized violence cases at the Court of Bosnia and Herzegovina, to collect sex-disaggregated data on these trial cases, and to analyze the conditions under which female survivors of wartime sexualized violence testify before the Court of BiH. Moreover, through gender-sensitive monitoring and reporting activities, the goal of the project is to raise awareness among judges, prosecutors and the general public for the need for gender sensitive approaches to justice and war crime trials, specifically for war crime trials containing wartime sexualized violence charges. Additionally, it aims to raise awareness among judges and prosecutors on how gendered attitudes¹ may interfere with the prosecution and judgments of cases of wartime sexualized violence, in particular as a result of possible biases and prejudices towards women witnesses who survived wartime sexualized violence. The project looks to identify several areas for improvements regarding the conditions under which women that are survivors of wartime sexualized violence testify.

In order to introduce gender-sensitive trial monitoring at the Court of Bosnia and Herzegovina, this project followed and analyzed the prosecution of the wartime sexualized violence cases before the Court, aiming to draw conclusions about good and bad practices measured against gender sensitivity. The applied methodology endeavoured to identify gendered

attitudes, or the extent to which such attitudes influenced the prosecution of wartime sexualized violence cases, which includes a lack of understanding about the history of gender-based power relations and control in male-female relationships within patriarchal societies and the use of sexualized violence in war. For the purposes of the project, two trial monitors were selected and specifically trained. During a yearlong trial monitoring process, they monitored trials for wartime sexualized violence in BiH and collected data on the conditions under which female witnesses testified during the monitored trials. Additionally, they collected gender-sensitive data from available court records (including annual reports, indictments and judgments), analyzed the collected data and produced regular reports and findings. This report is a final and comprehensive report on the gender-sensitive trial monitoring process, and includes recommendations that were developed in order to raise awareness of judges, prosecutors and other relevant stakeholders on the importance of using gender-sensitive approaches in the prosecution of wartime sexualized violence cases.

However, during the implementation of the project, insurmountable obstacles hindered the ACIPS project team. The most important obstacle was the change in the BiH Court’s and Prosecutor’s Office transparency policies, where once relatively transparent institutions became almost completely closed to the public. These decisions influence how a society deals with the past, and in particular the gender mainstreaming aspect of dealing with the past. These new procedures brought difficulties in terms of collecting the data and accessing the hearings from which the public is excluded, which will be discussed in more details later on in this report.

This report identifies capacity gaps and provides recommendations for overcoming the gaps in prosecuting wartime sexualized violence cases in a gender sensitive

manner. Therefore, it may serve as a useful tool for judges and prosecutors in their future work. Moreover, since there is no proper sex-disaggregated database at the Court of BiH, which is an impediment for monitoring and researching wartime trials, the sample of data collected for the project will be presented in the report, as well as some suggestions for the type of data that should be collected and included in annual reports at the Court and Prosecutor's Office of BiH.

I-2. ISSUE OF LIMITED RESPONSE TO REQUESTS TO GET ACCESS TO HEARINGS FROM WHICH THE PUBLIC IS EXCLUDED

Nevertheless, as noted above, the implementation of this project was significantly affected with the non-transparency of the Court of BiH. The trend of ignoring the requests and providing formal answers with no information followed the implementation of this project from the very beginning of the trial monitoring experience. In total, 14 requests were submitted by ACIPS to obtain permission for the Trial Monitors to attend hearings from which the public was excluded in cases that had protected witnesses. Out of all the requests, ACIPS received six responses in the reporting period. Three approvals were granted for the trial monitors to be present at hearings that were open to the public and those from which the public was excluded. Two approvals stated that the Judicial Panel should be contacted immediately before the start of the hearing in cases from which the public was excluded in order to seek permission to attend the hearing. Request was denied for one case, and eight requests did not receive a response. Furthermore, two out of three blank permissions to attend the hearings from which the public was excluded were later withdrawn as the transparency of the Court deteriorated. This created several problems that hampered the work of trial monitors. While it seems completely fair that the Judicial Panel should grant permission for requests to attend hearings from which the public is excluded on every separate occasion instead of issuing blank permission to attend all hearings in a specific case, in practice this is hardly possible. First, the protocol regarding hearings renders judges unreachable immediately prior to the start of hearings that are deemed to be inaccessible to the public, and decisions on the

exclusion of public from hearings are often made on an ad hoc basis. Second, the information provided by the Court on its web site regarding the scheduling of hearings is not reliable, and it has happened that a hearing is rescheduled without providing updated information about the time. Not having blank permission to attend all hearings with respect to specific trial meant that trial monitors were placed in a situation that forced them to "plot" how to "ambush" the members of the Judicial Panel entering the courtroom.

Furthermore, the lack of response to the requests to attend the hearings from which the public was excluded in the specific cases was astonishing; especially since the project team received a non-objection letter from the President of the Court for access to the relevant trials, provided that each separate Judicial Panel allowed it. While denials of access to hearings that excluded the public to the representatives of the scientific community and/or trial observers from civil society may be sometimes based on objective circumstances and judged on a case-by-case basis, the tendency to not respond to requests to attend closed hearings is a cause for concern.

All the requests that were sent in order to attend hearings inaccessible to the public were based on Article 236, paragraph 2 of the Criminal Procedure Code of BiH, which states that the Chairperson or Judicial Panel may grant the presence at a closed hearing, such as to scientists and public workers. The ACIPS trial monitors are researchers with academic background, and the aim of trial monitoring/researching was primarily to identify the best possible ways to improve court proceedings in order to make the experience of testifying in court for the women survivors of wartime sexualized violence as empowering as possible. Unfortunately, the lack of cooperation by the BiH Court was incomprehensible. The aim of this project is not to criticize the Court and Prosecutors Office, The interests of women survivors is the core of this project. Thus, it needs to be emphasized that there is room for improvement when it comes to the adequate preparation of prosecutors and judges to deal with wartime sexualized violence crimes. This applies to other employees that work with witnesses, such as those that provide witness protection. They should ensure that witnesses receive adequate support as they undergo the difficult experience of testifying in court without having to endure serious backlash. Given that the majority of women

who survived sexualized violence testify under protective measures, most often in hearings from which the public is excluded, it was of utmost importance that the ACIPS trial monitors be allowed to attend sessions that are not open to the public so that they can observe and analyze conditions under which women testify. Unfortunately, not even an initiative to sign a Confidentiality agreement with the Court of BiH, pursuant to Article 236 paragraph 3 of the Criminal Procedure Code of BiH, provided ACIPS with access to hearings closed to the public.

It has to be noted here that the trial monitors experienced first-hand the change of the Court's policy with respect to its transparency. After the Court initially expressed its willingness to cooperate, the political pressures on the Court and Prosecutor's Office significantly increased, which led to scathing attacks on work of the Court and the Prosecutor's Office. Political pressure on the Court and Prosecutor's Office was exerted since the establishment of these institutions. Their establishment was used for the political contestations of the ethno-political elites in power. After the imposition of the laws on the Court and Prosecutor's Office by the High Representatives, several constitutional review procedures were initiated before the Constitutional Court of BiH. Only after the laws were found to be in accordance with the Constitution of BiH did the sufficient majority of parliamentary representatives agree to pass the laws and establish the Court and Prosecutor's Office of BiH. What is mainly forgotten, but is potentially the main reason for the exertion of political pressure, is that the Court of BiH was primarily established to prosecute organized crime. Only later did it procure the competence to prosecute war crimes. Later, the war crimes prosecutions became a tool for political contestations, but to a lesser extent. This can be seen in the continuous debates about the presence of international judges and prosecutors from 2008-2009, when in the end it was agreed by all political elites that the mandate of international judges and prosecutors be extended for several years in war crime trials, but not in trials dealing with organized crime. Just before the start of our trial monitoring exercise one of the most serious threats to the independence of the judiciary of BiH, as identified by the High Judicial and Prosecutorial Council, occurred in March 2011 when the National Assembly of Republika Srpska decided to hold a referendum challenging the existence of the Court of BiH and the Prosecutor's

Office of BiH². Even though the referendum decision was withdrawn and replaced with dialogue under the auspice of the European Union, the Court and the Prosecutor's Office of BiH remain a popular political target

Unfortunately, the aforementioned pressure resulted with the Court's closing to the public, and this is what our trial monitors experienced first hand. The Court's reaction is at the very least odd. While both politicians and the media make daily efforts through distorted writings, reactions and comments to make negative impact on and destroy trials (and even some sensationalist writing leads to cases in which the right of the accused to presumption of innocence is violated), closing the Court to the public is disproportionate and inadequate action. Only by acting in a transparent manner can the trust and support of the public be secured. Once this is secured, political pressure on the Court will decrease. Objective reporting on the issues deliberated at the Court will help to establish the rule of law.

Furthermore, it needs to be pointed out that this trial monitoring project was not a media reporting exercise. It was intended to examine what is required for the establishment of gender sensitive trial monitoring of war crimes in BiH that are to be conducted by the civil society sector in Bosnia and Herzegovina. The research conducted was based on an activist and academic feminist platform. At the moment, war crimes trials at the Court of BiH (and some lower level courts) are monitored by BIRN as part of an attempt to establish objective media reporting and to provide unbiased information. The OSCE assists in assessing the needs for capacity building. However, these do not focus exclusively on the experiences of women and sexualized violence cases. In order to decrease stigmatization of women survivors of wartime sexualized violence, gender sensitive trial monitoring is imperative. It will establish a courtroom that is more responsive to the specific needs for female survivors who testify.

SECTION II

RECOGNIZING WARTIME SEXUALIZED VIOLENCE AS A WAR CRIME

II-1. INTRODUCTION - WARTIME SEXUALIZED VIOLENCE AS A WAR CRIME

The war in Bosnia and Herzegovina (BiH) during the early 1990's (Mid 1991 – December 1995) was marked with mass atrocities that once again brought to attention debates about the establishment of international bodies for the prosecution of war crimes. The international bodies would try the most important wartime cases on an international level (even during the war) and monitor the prosecution of war crimes on a national level (once the war was over). The greatest international outrage was caused by reports from the UN Fact Finding Mission (Bassiouni Commission³) and numerous media outlet reports about ethnic cleansing, genocide, mass rapes, concentration camps, the siege of Sarajevo and the indiscriminate shelling of civilian areas.

Feminists and other activists for women's human rights across the globe, who were already mobilizing around campaigns to end violence against women, were outraged by the reports on mass rapes. The reports provided detailed accounts of rape camps and the use of rape as a systematic weapon of war as part of the genocide and ethnic cleansing campaign. The exact scale of wartime sexualized violence and rapes will never be known, and different groups for ethno-political reasons will always contest it. In Bosnia and Herzegovina, the exact number of women (mainly Muslim) raped during the war is not known, and estimates vary widely, ranging from 10,000 to as many as 60,000, according to a European Community fact-finding team in 1992.⁴

As the atrocities against women committed during the war in Bosnia and Herzegovina (and Rwanda) became known in the 1990s, and after pressure from both international feminist movements and those in the region of South-East Europe, for the first time in history

rape was recognized as a war crime and crime against humanity. The first prosecutions of wartime sexualized violence took place in the international arena at the International Criminal Tribunal for the former Yugoslavia⁵ (ICTY, established in May 1993), the International Criminal Tribunal for Rwanda (ICTR, established in November 1994) and under the watchful eyes of international feminist activists. The Kunarac case was the first one in the judicial history of Europe where the accused was found guilty of these crimes.⁶

In the second half of the 1990's and during first half of 2000's, and following the establishment of the ICTY and the ICTR, many advances were made in international and even national law with regard to the prosecution of gender-based crimes committed during the war. The rulings of these tribunals have:

- Established rape in war as a crime against humanity and war crime
- Established a single act of rape in the context of a widespread attack as a crime against humanity
- Established sexualized violence as torture
- Reversed the assumption that sexualized abuse in conflict is inevitable
- Changed the rules of evidence to limit the use of the defence of consent in sexualized assault cases where circumstances surrounding sexualized violence, such as armed conflict, does infer non-consent
- Prohibited the survivor's past sexual history to be used as evidence.⁷

The adoption of the Rome Statute and the establishment of the International Criminal Court in 1998 and in 2002 marked a new phase of International Criminal Law, in which rape, sexual enslavement, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexualized violence of comparable gravity during wartime

are defined as a crime against humanity and war crimes.

However, after the ultimate goal of the majority of internationally active feminists was fulfilled through the recognition of wartime sexualized violence, the feminist energy in respect to the prosecution of sexualized violence crimes dissipated to a certain extent (especially in the second half of the 2000s). It seems that it was somehow expected that the trials would take their adequate course, and feminists had many other issues to focus on. The reduced feminist alertness facilitated the reinforcement of patriarchal attitudes. In a world in which patriarchal values prevail, the reason for this regression is obvious. Until the entire world, or at least all the actors with the power to make decisions in the courtroom are not gender-sensitive and emancipated, there needs to be supervision and monitoring of the ways that they approach and deal with the survivors and witnesses of gender-based violence.

II-2. PROSECUTION OF RAPE AS A WAR CRIME IN BOSNIA AND HERZEGOVINA

The Court of BiH and the Prosecutor's Office at the state level was established in 2002 after the laws on the Court and Prosecutor's Office of BiH imposed by the High Representative in 2000 were passed in the Parliamentary Assembly of BiH. The primary aim for the establishment of the Court was to address organized crime, and not war crime trials. Only after it became clear to the international actors involved in the prosecution of war crimes at the ICTY that certain cases will have to be tried in Bosnia and Herzegovina (so that justice and truth would not remain distant, and because the ICTY would not be able to handle a huge number of cases) did the Court and Prosecutor's Office of BiH procure the competence to try war crime cases. The War Crimes Section was established in 2003 and its first trial procedure began in 2005.

The ICTY stopped issuing new indictments in 2004.⁸ In 2005, the Court and the Prosecutor's Office of BiH took over from ICTY the majority of war crime cases. The ICTY has only been left with trying political leaders and high-ranking military leaders with command responsibility. The majority of the cases involving wartime sexualized violence charges have been transferred to the state or lower level courts on the basis that these cases

are "less severe" (as compared to cases of command responsibility). It is important to note in this regard that the Court of BiH and lower level courts in BiH⁹ are prosecuting cases that deal with direct perpetrators.

The Criminal Code of BiH adopted in 2003 provided the legal background and definitions for the war crime trials at the Court of BiH. However, confusion inevitably emerges, since in the war crime cases (especially at lower level courts) the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRJ), which was in force during the conflict, is still applied. In addition to the Criminal Code of SFRJ, the Criminal Code of the Federation of BiH, which was adopted in 1998, has been used in some cases.¹⁰ The three criminal codes differ significantly regarding the definition of crimes committed during the war, as well as the definition of command responsibility and instructions in respect to prescriptions of the sentences. Many relevant institutions working in BiH have recognized this problem, but changes have still not been made.¹¹

In the cases of sexualized violence committed during the war, which are still ignored, it needs to be pointed out that only the Criminal Code of BiH recognizes rape and acts of sexualized violence as crimes against humanity. The Criminal Code of SFRJ and the 1998 Criminal Code of the Federation of BiH only recognize rape and forced prostitution as war crimes against civilians. Other forms of sexualized violence are not recognized at all. Thus, in the discussions about the harmonization of the application of criminal codes in war crime cases the gender perspective urgently needs to be included. Even though the Criminal Code of BiH is also gendered, at the moment it is the most adequate law for the war crime trials involving sexualized violence. Thus, there should be greater insistence that in the war crime trials involving sexualized violence, the Criminal Code of BiH is the only Code that should be applied.

In the Criminal Code of BiH, which applies to the prosecutions of war crimes before the Court of BiH¹², only two articles mention rape as a war crime against humanity (Article 172) and as a war crime against a civilian population (Article 173)¹³, but not as a separate crime in itself. Rather, rape is listed as one of the elements of other crimes and is listed together with other crimes (not separately). Moreover, rape is not specified as a crime against prisoners of war (Article 175), suggesting

a gender bias of the Criminal Code. It is implied here that only women are civilians and they are the ones that can be subjected to rape. On the other hand, it is implied that prisoners of war are only men, and that they cannot be raped. However, the numerous cases of sexualized violence against men and prisoners of war were recorded during the war in Bosnia and Herzegovina.

II-3. TRIAL MONITORING OF THE WAR CRIMES CASES AT THE COURT OF BiH

Before allowing war crimes trials to be tried in Bosnia and Herzegovina, the international community needed to secure the impartiality of such trials. Thus, on 18 February 1996 the Rome Agreement was reached as a political agreement of three parties, which regulated that:

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.¹⁴

Following the Rome Agreement, the Rules of the Road Unit with the ICTY Office of the Prosecutor was established. Through its operation from 1996-2004, this office reviewed all domestic war crimes cases with any accompanying evidence. According to OSCE data¹⁵, during this period, requests concerning 846 individuals met the international criteria necessary to warrant proceeding with prosecution. Due to the work on the closure of the ICTY, 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 Prosecutors' Office of BiH in 2005.

Furthermore, as the part of the completion strategy for the ICTY Rule 11 *bis* that was first introduced in November 1997, and later amended to the current formulation¹⁶, it allowed for the transfer of the cases from the ICTY to the national level. For this to be feasible at the national level in Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor's Offices of Bosnia and Herzegovina and the Use of Evidence Collected by the International Criminal

Tribunal for the Former Yugoslavia in Proceedings before the Courts in Bosnia and Herzegovina on 14 December 2004¹⁷. 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, which were generally considered as a test of fairness and efficiency of the judicial system of Bosnia and Herzegovina¹⁸. The accused that were eligible for referral to national jurisdictions had to be in the category of lower or intermediate level accused in terms of the seniority and responsibility, and according to the criteria set forth in Security Council resolutions 1503 (2003)¹⁹ and 1534 (2004)²⁰. All the six cases involved ten indicted are completed, which were ordered by a special chamber to be referred to the Court of BiH. Of the ten accused that were transferred to the Court of BiH, eight (Radovan Stankovic, Gojko Jankovic, Mitar Rasevic, Savo Todovic, Milorad Trbic, Zeljko Mejacic, Momcilo Gruban and Dusko Knezevic) had their cases fully concluded through the appeals stage. Two others that were accused, Pasko Ljubicic and Dusan Fustar, pleaded guilty, and their cases were final without the need for an appeal. Out of those cases, three cases (Radovan Stankovic, Gojko Jankovic and joint case Zeljko Mejacic, Dusan Fustar, Momcilo Gruban and Dusko Knezevic) involved sexualized violence charges.

In respect to the monitoring of the cases referred to the Court of BiH, they were conducted by the Prosecutors office of the ICTY through the OSCE Mission in Bosnia and Herzegovina. Until the end of its monitoring mandate of 11*b/s* cases in October 2010 (when the appeals procedure for the final case against Milorad Trbic was completed), the OSCE Mission to BiH submitted to the ICTY Prosecutor's Office over 55 regular reports on these cases, two confidential spot reports on witness protection related issues and three thematic reports²¹. The reports were compiled on a quarterly basis. These reports described the main developments in each case and focused 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.²² The monitoring of the cases conducted by the OSCE was useful, especially in respect to securing a fair trial for the defendant. The comments and involvement of the OSCE made an impact on the war crime procedures before the Court of BiH. However, in respect to the sexualized

violence war crime cases, the OSCE mission did not really apply gender sensitive monitoring.²³

The Balkan Investigative Reporting Network (BIRN) conducts the only other monitoring of the war crimes cases at the Court of BiH. BIRN is the only daily public information service that deals with the prosecution of war crimes in Bosnia and Herzegovina at all court levels. However, gender sensitive trial monitoring is not included in BIRN's mandate.

SECTION III

LACK OF TRANSPARENCY OF THE COURT OF BiH

III-1. IMPORTANCE OF TRANSPARENCY

The biggest problem that the ACIPS project team encountered while working on the project was directly caused with the abovementioned (non-) transparency²⁴ of the Court and Prosecutor's Office and closure to the public, and even to the expert/scientific community ACIPS project team represented. The closure of the Court and Prosecutor's Office was manifold. From the withdrawal of the indictments and judgments from the Court's website, through a lack of response to requests (for attendance of the hearings from which the public was excluded) that ACIPS sent to the panels of the judges deciding on the cases with rape charges, to the closing of the vast majority of testimonies about rape to the public. We understand that institutions dealing with criminal justice have special status regarding the exemption to disclose the information to the public with respect to crime prevention and any preliminary criminal investigation provided by Article 6 of the Freedom of Information Act of BiH. However, the Court of BiH (or more exactly War Crime Section of the Court of BiH) is the institution that, in addition to its obligation to prosecute and punish war criminals, also plays other roles that are both practical and symbolic. War crimes trials are an important element in discovering the truth about the war, preventing repetition of similar crimes, availing the legal remedies and tangible compensations for the survivors, contributing to reconciliation in the region. On the symbolic level these trials need to provide a feeling of justice for the survivors and a belief in fairness and justice in society. The court must never forget that the interest of justice needs to be its primary goal.

All of the mentioned purposes of war crimes trials can be achieved only if the trial is public. So, if it is known that some of the main objectives of war crimes

are to establish the truth and to punish the perpetrators of war crimes (and even to establish individual guilt in order to not condemn an entire social group), this would provide at least some kind of relief for the survivors. It would also publicly condemn such crimes in order to reaffirm social non-acceptance and rejection of such criminal behaviours and crimes (both at international and national levels), so it is really illogical to hide the information about the trial process such as indictments, names of the perpetrators, names of the places the war crimes were committed, etc. Once the indictment is confirmed there is no reason to hide the indictment from the public, except in exceptional cases where there is a need to protect minors or certain witnesses, or if there is a fear that certain data may compromise the proceedings. Theoretically, one might problematize the right to privacy of the accused (which is one of the arguments of the Court and Prosecutor's Office for such behaviour), but when it comes to war crimes and those accused of war crimes, references to the right to privacy entirely undermine the purpose of the war crimes trials. Furthermore, if we consider that the arrest warrants and arrests of the accused of the war crimes are all public, the decision to hide indictments and anonymize the judgments becomes even more nonsensical. In addition, we need to keep in mind the current situation, in which the trials are open to the public so that the name of the accused is disclosed during the trial procedure (e.g. on the website of the Court), while the published judgment is anonymized. Also, the absurdity continues with the first instance judgments reached during previous years being published on the Court's website under full names, while in the second instance judgments reached during the last several months are anonymized. Even if the logic of the Court and the Prosecutor's office is followed, according to which defendants' rights are sacred, isn't it in the interest of the defendant, if found

not guilty, that his/her name be publicly cleared? On the other hand, there is no justification to keep personal data (such as name and surname) of anyone found guilty for war crimes protected. In the war crimes cases it is really questionable whether there is any justifiable reason to protect personal data of the accused.

Transparency, as an ideal and a quality of state institutions, is perceived as an overall public accomplishment that is expressed through an institution's willingness and openness to provide their data, which is of interest to the public and is important to the wider community, as much as possible. This demonstrates a responsibility to the society in which they operate. Only through access to information controlled by the public institution, public analysis, evaluation or debate about the quality of work and justification of purposes of existence of these institutions are made possible. As noted recently by Anisa Sućeska-Vekić from BIRN during the round table organized by the Trial and University of Cambridge²⁵: "In an open and democratic society, the principle of transparency ensures that citizens have access to all relevant information in order to exercise their rights and obligations to be well informed and responsible citizens of their states." Transparency should not be selective because only consistently insisting on the ideals that it implies may terminate misuse of information, relativizations of legal truth, and ultimately, reconciliation. According to Anisa Sućeska-Vekić,

"In cases in which the accused had a fair trial and in which they are convicted of crimes, there are very few good reasons to justify their identities to remain confidential. Society as a whole has a right to know who is convicted of a criminal offense. As for the victims, the publication of the identity of the perpetrator or perpetrators are often an important part of the healing process, it helps to stop the process of denying crimes."²⁶

Thus, concealing the information from the public prevents a society from dealing with the past and even stalls the healing process of the survivors.

Furthermore, given the recent debates about the legacy of the ICTY, it is relevant to note Richard H. Steinberg's observation about what this legacy actually is. He notes the ICTY's legacy may be conceptualized broadly as "that which the Tribunal will hand down to successors and others," including:

- The factual findings on the crimes that occurred and the responsibility of the accused for those crimes.
- The legal legacy of the Tribunal, including its rules of procedure and evidence; practices of the Tribunal, the Office of the Prosecutor, and the Registrar; and - perhaps most significantly - its judgments and decisions, which define the legal elements of crimes that must be established beyond reasonable doubt to establish the responsibility of the accused. These judgments, decisions and practices represent a contribution to the development of substantive and procedural international humanitarian law and international criminal law.
- The records of the Tribunal, including audiovisual recordings of the proceedings, transcripts and the evidence admitted into its cases, and collections of material gathered in the course of investigations. Combined, this material, some of it confidential, will constitute the archive of the Tribunal's work.-
- The institutional legacy of the Tribunal, including its contribution to the creation of other international and hybrid criminal courts, particularly the development of the local judiciaries in the former Yugoslavia and their capacity to hold fair and effective war crimes proceedings.
- The Tribunal's regional legacy, promoting the rule of law in the former Yugoslavia and contributing to peace and stability in that region. Coupled with this impact is the Tribunal's contribution to the national prosecution process and generally to providing a sense of justice to victims of the crimes committed during the wars in the former Yugoslavia, as well as to the local communities and the society at large.
- The international community's normative legacy, expressed through its support for creation and operation of the Tribunal, staking humanity's claim to justice and increasing awareness of the struggle against impunity for serious crimes under international law.²⁷

Given the role in prosecuting the war crimes, all these elements are applicable to the Court of BiH, and

anonymization of the judgments hidden indictments do not secure the way forward in preserving the Court's legacy. Also, for the Court this is the first time that norms for the national legal system's prosecution of war crimes were established. These experiences can be relevant not only for the lower courts in BiH, which undoubtedly also prosecute the war crimes, but also for other national systems worldwide. In the context of the ICTY's legacy, Patrick L. Robinson notes that

It must be emphasized how important it is to be honest about the experiences and results of the ICTY. Enduring legacy is not possible without full transparency and a critical assessment of the ICTY so that future generations can learn from our mistakes and achievements. The ICTY has clearly demonstrated that impunity for the horrific crimes against international law can not be tolerated. To make this vision translated into reality, it takes a lot of concrete work, because, otherwise, we are faced with the risk that our accomplishments disappear.²⁸

As previously noted, transparency is the key factor in the work of these institutions. In order to preserve their accomplishments, both the Court of BiH and the Prosecutor's Office should be aware of those tasks.

The one-year experience of ACIPS's cooperation with the Court of BiH showed that the institution perceives itself as being open to the public and, in general, open to any kind of cooperation that is of importance to the community. However, formal openness was not sufficient to provide concrete cooperation, and in our case, through monitoring and analysis of the trials in which women survivors of rape in war testified. The court has concerns that confidential information may be inappropriately disclosed to the public. This fear is justified. However, in order to avoid this, the court should conduct training for journalists, even for an expert audience interested to monitor certain aspects of the trial, e.g. to train stakeholders in order to know how to relate to the information. On the other hand, the Court itself should organize additional training for its employees in various interdisciplinary areas, such as the area of gender and gendered approach to justice.

Once again, we have to stress that this report does not aim to undermine the Court, but to assist the Court in improving its work and making the courtroom a responsive and even comfortable space for survivors/witnesses to tell their stories of suffering and survival in their pursuit of justice. The domestic legal system does not have a comprehensive training in the field of gender

studies, which would provide a much deeper and more comprehensive interdisciplinary and transdisciplinary insight into the problems associated with justice, rights, prosecution, reparation systems and everything else that concerns the people affected by the war. In that sense, the authors are pointing out to some of the practices of the Court that need to be changed, such as non-transparency. It is important for all the survivors/witnesses that the perpetrators of war crimes be recognized, arrested, tried, and adequately punished. It is just as important that the survivors/witnesses' stories of suffering are publicly recognized (which includes public condemnation of the war criminals and the war crimes they committed). It is incomprehensible as to why the Court and the Prosecutor's Office refuse to work in a transparent manner, and at this point it seems that they are either protecting war criminals (which the authors refuse to believe, since that would mean that they work directly against the principles for which they were established) or themselves (in order to hide their insecurities and lack of knowledge).

III-2. REMOVAL OF THE INDICTMENT FROM THE COURT'S WEBSITE, ANONYMIZATION OF DECISIONS AND LIMITED ACCESS TO INFORMATION

In March 2012 the Court issued a Decision on Anonymization and the Amendments to the Rulebook on Public Access to Information under the Court's Control and Community Outreach, which restricts access to the relevant information. The prosecution of war crimes was not exempt from this order on anonymization. This was preceded by the instruction in 2011 from the Agency for the Protection of Personal Data, which requested that the judicial institution anonymize the personal data in the confirmed indictments, and adopted verdicts passed even for the most serious crimes. Even before the Court issued the Anonymization Decision, the Prosecutor's Office removed the indictments from the websites of the Court of BiH. The decision of the Court additionally introduced the use of initials instead of full names of the convicted in its judgments. As already mentioned, the entire situation reached a new level of absurdity, where the arrests were previously made public and appeared in the media, which included the full name and picture.

Generally, in accordance with this instruction of the Court of BiH the names and surnames of all in the proceedings are to be presented with initials. The names of legal subjects are to be replaced with the first letter of the name of the company, while the names of the institutions are to be replaced with the generic name for the institution (Court of BiH becomes just Court). For example, Radovan Stankovic, who was found guilty for enslavement and rape of women in Foča Municipality, becomes R.S. guilty of crimes against humanity in F. Municipality. According to, this logic, one has to ask, isn't the judgment that states that the A.H, who commanded the Army organized the Holocaust in the Municipalities A., T., D., and etc..., pretty much meaningless?²⁹ As noted by Anisa Sućeska-Vekić,

The Court of BiH may object saying that the editing of personal data from the verdict does not mean that they are inaccessible to the public. However, it is very difficult to see what kind of public assistance in any way constitutes a reading of the judgment which only states the initials of the convicted, and the initials of the places where the crimes were committed. Indeed, sharing of information in such a limited way can be dangerous and have undesirable consequences, spurring rumors and speculation about the identities of the accused or convicted. This climate of disinformation and misinformation will seriously hamper the work of the Court and will adversely affect the public perception of the Court. The only potential winners are those politicians, interest groups and individuals who want the closure of the Court. It seems that it would be much better for the Court to provide information about their work and their judgments in a transparent manner.³⁰

In addition to the anonymization of the decisions, the Court *de facto* strictly limited access to the information about the hearings, whether it is online, audio or video recordings. Unlike the ICTY, which has all the transcripts from the trials available online, the Court of BiH has never established this practice. The Rulebook of 20 March 2012 provides for the terms and procedures for deciding on applications for the right to access to information by the media or stakeholders. The judge who is presiding over the hearing, or the presiding judge in the case of the judicial panel makes decisions in almost all cases:

The decision is made in a way that makes it, at least theoretically, impossible and untimely to orderly transfer information to the public or the parties, and therefore results in an indirect censorship.³¹

All this raises concerns for the future of the judiciary in Bosnia and Herzegovina and asks the Court of BiH about its own understanding of its mission.

Also, the Prosecutor's Office decided to grant anonymized indictments only to the parties to the proceedings and not to the public, even if the request was made in accordance with the **Freedom of Information Act**. Thus, the anonymization of war crimes treats indictments as simply a private matter. War crimes and war criminals must be presented to the public. Otherwise, the initial idea of war crimes is totally lost, because it is not known who committed crimes. The scope for manipulation and speculation opens up, while witnesses and the public are losing confidence in the justice system, and the idea of securing justice becomes futile. The availability of information about who committed crimes and where they were committed is important for the survivors and their families. This is especially important in a situation where they do not have access to reparations, and this represents the only moral satisfaction. Anonymization also complicates the investigation in the field and a willingness to testify in the war crimes case.³²

Therefore, war criminals must not be reduced in the public to their initials. In fact, the practice of Anonymization in cases involving war crimes places the entire story in a paradoxical situation in which the public condemnation of war crimes cannot be implemented, since it is not known who carried out the atrocities of war and where it occurred. This also influences the attempts of individualization of guilt. The academic and professional circles hold the opinion that, in the Balkans, only the removal of the stigma of collective responsibility can be the basis for further development and reconciliation:

The process of individualization of guilt for the most serious crimes is a direct result of the proper work of an independent judiciary, but most importantly of transparency of these processes. It is not enough that justice is done, it must be seen through the eyes of citizens.³³

Furthermore, the court is a social stage on which the society supports or re-establishes its standards, while punishing serious violations of human rights and other fundamental social values. The significance of the criminal proceedings for society substantially increases in cases of war crimes, as these are crimes that not only affect the individual survivors of crimes, but also society as a whole. It is generally accepted that society has to deal with the legacy of the recent past of mass violence and crimes in order to facilitate its reconciliation and stabilization: "Restricting access to information about ongoing court

cases and convictions for war crimes greatly harms the judicial system and the state themselves."³⁴ Seen in this light, the Court's decision to withhold such information and documents to the public is a strange strategy that weakens the Court itself.

As Christian Axboe Nielsen points out in his article on the problem of the closure of the Court to the public³⁵, all of these mechanisms of closure to the public are causes for the concern about the future of the judiciary in Bosnia and Herzegovina. Nielsen, an analyst of judicial practice, further states that in designing these new policies, the Court stated that they only implemented the requirements imposed by the Agency for the Protection of Personal Data. These requirements are allegedly associated with attempts to harmonize data protection and the protection of confidential information with EU standards. He further adds:

However, as I can attest from my own experience of working in archives in neighbouring Croatia, the implementation of such standards is often carried out in such a way as to severely restrict the access of the public and of professional researchers to information that is normally publicly available in EU member states. In open and democratic societies, the principle of transparency ensures that citizens have access to all relevant information so that they exercise their rights and obligations to be well-informed, responsible citizens of their states.³⁶

Yet, democracies have remedies for these situations, and recalling the Freedom of Information Act allows citizens, who justify their need for such information, to seek and gain access to confidential information.

The work of the criminal justice system constitutes an important element of the functioning of a modern state. Although there are many variations in the judiciaries of democratic states, the documentation and information generated by the court system is generally publicly accessible with the aim of ensuring the transparency of the judicial process.³⁷

When all things are considered, the closure of the Court to the public shows that a lot of work still needs to be done within the Court itself, such as education of court staff, and providing guidelines to the public for those interested in following the trial and how to deal with information.

Finally, it needs to be mentioned that Article 6 (1) of the European Convention for Human Rights and Fundamental Freedoms that is applied directly in BiH debates about the transparency of the trial to the public. According to provision of the Article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

So, given that in the war crimes trials courts have been focused on the perpetrator rather than the survivors and society, it is important to note that the public hearing is one of the components of a fair trial. Article 6 (1) recognizes that the public and media may be excluded from the hearing due to specific reasons. The anonymization, as it has been ordered by the Court of BiH, seems to be an odd example in contravention with the practice of the European Court of Human Rights, especially taking into account that it applies to war crimes. Neither the Instructions nor the Rulebook provide reasons for anonymity as referred to in Article 6 (1). Instead, as the legal basis for the Instructions and the Rulebook, the Court cites Article 11 (g) of the Law on the Court of Bosnia and Herzegovina that regulates the responsibilities of the President of the Court and authorizes the President of the Court to manage the work of the employees of the Court.

In addition, the attitudes of the Court of BiH and the Prosecutor's Office with respect to obligations arising from the Freedom of Information Act are at the very least strange. In June 2012, ACIPS sent the request in accordance with the Freedom of Information Act to the Court of BiH asking for certain statistical sex disaggregated data on a number of protected witnesses in war rape cases, the number of the adopted judgments in the cases containing the war rape charges, the percentage of acquittals in the cases containing the war rape charges, and the average length of the pronounced sentence in the cases containing the war rape charges. The ACIPS project team also requested access to judgments and indictments in the cases containing the war rape charges, and asked for the information on how many defendants in trial proceedings are not in detention but are coming to trials from their homes and in which cases.

The Court replied in a timely manner. However, the ruling only contained the information regarding the number of the defendants in custody. The way that this information was provided (just stating that on a certain date a certain number of people were in detention in relation to their cases conducted before the War Crime Chamber) was completely useless. Based solely on this number, there was no way to establish the patterns for what war crimes charges the defendants are being detained in custody. Regarding access to the judgments, the Court informed us that they are available on the Court website. They did not even state which judgments contained the sexualized violence charges. Also, the several judgments that were previously available at the Court website, such as Alić Šefik, case No X-KR-06/294 first instance judgment from 11 April 2008, were removed from the website. So it is impossible to receive the exact relevant information based on judgements available from the website. Also, on its website the Court has a disclaimer stating that "All documents provided herein are for information only and are not to be considered as official records of the Court". Thus, even the Court's instruction referring us to incomplete unofficial data can only be seen as the Court's non-compliance with the Freedom of Information Act. Furthermore, they completely ignored our request to obtain access to the indictments.

With respect to other information the Court rejected our request, explaining that it was unable to provide us with the requested information on statistical information about witnesses "because these data, in terms of procedure, are not relevant and, therefore, the Court does not keep their records in a way that you desire." However, the Freedom of Information Act provides for the right to access of information in the control of a public authority, which directly applies to this case. While the requested statistical data perhaps might not be relevant in terms of procedure, it is definitely relevant for the analysis and evaluation of the quality of the work of the Court of BiH, and is in the control of the Court of BiH. Also, in accordance with Article 22 of the Law on Gender Equality, all statistics and information that is collected, recorded and processed in government bodies at all levels, public services and institutions, public and private corporations and other entities must be disaggregated by sex and must be an integral part of statistical records and publicly available³⁸. For example, the Court keeps

data on the number of witnesses, but this data is not sex disaggregated. The overall data on witnesses was part of the Annual reports on the work of the Court of BiH, which used to be available on the Court's website, but even this good practice has ceased (and even previously published annual reports were withdrawn from the website). This is just additional proof that the Court is not concerned about survivors at all, since the data collected by the Court does not at all consider the possibility of evaluating the experiences of testifying at the Court. Thus, one has to ask exactly what is considered to be relevant data on procedure. However, the Court's disregard for the obligations arising from the Freedom of Information Act appears insignificant when it comes to the Prosecutor's Office's violations of the Act. In July 2012, ACIPS sent the request in accordance with the Freedom of Information Act to the Prosecutor's Office of BiH and requested sex disaggregated information, similar to the request sent to Court of BiH. However, even after several urgencies upon the expiration of the deadline for the reply to our request, we were met with silence from the Prosecutor's Office.

Only during the revision of our final report in November 2012, and nearly four months after the submission of our request, ACIPS received a reply from the Prosecutor's Office. Regarding our request to access the indictments, we received a ruling rejecting our request. Thus, the protection of private data was valued more than public interest: "Contents of the indictment is legally prescribed, and it contains personal information of the accused, the survivor, witnesses, and other persons who are in some way linked to the criminal case in question. In addition, the relevant factual events and results of investigation and proposed evidence contain facts and information from which it is possible to determine a person's identity, which is also considered to be personal data." Following this logic, in the case of Ratko Mladić who is accused of genocide in Srebrenica, the public is not to know his name, facts about how the genocide was committed or the names of the survivors. So once again one has to ask whose personal data is supposed to be protected. What about the cases of missing persons and the potentials to find out what happened to them? And with respect to the protected witnesses, the indictments anyway must not include their names (instead, initials or pseudonyms are used).

An additional reason the Prosecutor's Office used to reject our request to access the indictments is a reference to the Criminal Procedure Code that states: "The Criminal Procedure Code provides that the Prosecution submits an indictment to the Court or the judge for preliminary hearing, who, after confirming some or all counts in the indictment, delivers it to the defendant and his counsel. Thus, the Criminal Procedure Code expressly stipulates who is to receive the indictment. By submitting the indictment to the third party, the Prosecutor's Office of BiH would act in the manner that is not prescribed by the Criminal Procedure Code, and it would thus deal with the personal data contained in the indictment in a manner that is not purposeful for the criminal proceedings." This is just the interpretation of the Criminal Procedure Code offered by the Prosecutor's Office without referring to the specific Article. While it stipulates who must receive an indictment, the Criminal Procedure Code does not stipulate who should not receive it nor does it prohibit the delivery of the indictment (after it is confirmed) to the third Party. Furthermore, the interpretation of the Criminal Procedure Code offered by the Prosecutor's Office takes away the right from the survivors to access the indictment, and once again reduces them merely to eyewitnesses and not as parties to the procedure.

What is even more puzzling is that the same Criminal Procedure Code was in force when all the indictments were published and available on the website of the Court of BiH. If they did not violate the Criminal Procedure Code then, why is it now considered a violation? Also, the unavailability of indictments (especially ones after completion of a case) completely reduces the transparency of the work of the Prosecutor's Office and prevents any analysis of the quality of their work. One is compelled to wonder whether the Prosecutor's Office is protecting itself, its incapability and is trying to hide its mistakes. Once again, the question is (since the Prosecutor's Office did not do the proper public interest test as provided by the Freedom of Information Act) why is the protection of personal data of war criminals more important than public interest? Where is the interest of justice? The entire ruling rejecting ACIPS' request to access the indictments does not consider specificities of the war crimes cases. Thus, it is logical to inquire whether the war crime cases should be tried in the specific institution dedicated exclusively to the prosecution of war

crimes. Maybe only then would survivors and society be regarded as relevant parties in the cases.

Regarding our request for gender disaggregated statistics, the Prosecutor Office delivered separate conclusions (again, almost four months after the request was submitted) stating that they do not keep separate records on such data. Just like the Court of BiH, the Prosecutor's Office is in violation of Article 22 of the Law on Gender Equality. Finally, it also needs to be noted that, if nothing else, the Prosecutor's Office was in direct violation of the Freedom of Information Act regarding timing. This tendency is really worrying given that the instructions from the Agency for the Protection of Personal Data, which are not legally binding, were respected, while the legally binding obligations arising out of the Public Information Act are not taken seriously.

III-3. EXCLUSION OF THE PUBLIC AND THE EXPERT PUBLIC

During the one-year period our monitoring project (23/05/2011 – 25/05/2012), 24 women testified in 26 rape related testimonies (two women testified twice): 15 in which the public was excluded, and 9 open to public. Out of 9 testimonies open to the public, 6 witnesses only mentioned they had been raped (by someone else, not by the accused) while testifying on other crimes of the accused. Therefore, these testimonies that were open to the public were not *rape-related testimonies*, because they were not *about* the rape. Additional 14 testimonies were direct rape testimonies and the public was excluded from all of them. Only 3 direct rape testimonies were open to the public. This indicates that testifying on rape is a serious problem.

The Court's established pattern of closing all or majority of testimonies of rape to the public raises several issues. Already in medica³⁹ mondiale's report it was noted that the issue of the sessions in rape testimonies from which the public is excluded is a complicated issue, particularly since they can serve to protect both the courts' and witnesses' interests:

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 judgments 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 judgments at the WCC are in part written like porn scripts.⁴⁰

Thus, on the one hand there is the willingness of women to testify only in the hearings from which the public is excluded for numerous different reasons, and their wishes should be respected. However, it is not always clear whether women are sufficiently informed about the meaning of the hearings from which the public is excluded and whether they are cajoled into it by different actors in the trial procedure. The hearings from which the public is excluded indicates that the stories of sexualized violence will never be told the way women experienced sexualized violence. Instead, their stories are subjected to the interpretations of judges and prosecutors. Also, in the hearings from which the public is excluded there is no one to monitor how the process of examination of witnesses/survivors is conducted and whether the witnesses/survivors are exposed to new traumas, humiliation and re-traumatization.

Furthermore, our trial monitoring experience has shown that women face numerous issues during their testimonies. For example, in September 2001 a protected State Prosecution witness S3 testified at the hearing from which the public was excluded after the Prosecutor explained that the witness had kept her experiences a secret and had not even told her family out of fear and shame. The prosecutor also said that in case her family would find out about what had happened to her, it would cause problems for witness S3. From the prosecutor's words we can easily detect the major problems that the survivors of rape face: taboos and silencing of sexualized violence, lack of family and/or community support, blaming the survivor for shaming the honour of the family instead of the perpetrator. The result is double

victimhood, and subsequent coping with stigma and guilt, all of which benefits the perpetrators while the survivors suffer from lack of moral support as well as an effective and necessary psychosocial rehabilitation. While we understand the needs of the survivors for protection, the role of the prosecution is also to explain to the survivors the role of the war crime trials in raising public awareness about the true nature of rape as a war crime and crime against humanity. Given such an understanding, survivors and others would understand that they are not to blame. The perpetrators are solely to blame, and the survivors have a role in enabling the prosecution of the perpetrators. It is also important for the survivors to be aware that by asking for the exclusion of the public during their testimonies they are serving the interest of the perpetrators as the hearings from which the public is excluded provide them an opportunity to keep a low profile. Finally, it is important to point out that the witnesses have the right to have their facial image distorted and voice scrambled during open hearings, which provides them proper protection while the perpetrators have to face the public.

This problem, which is the central theme of our report, will be discussed in detail in the fourth chapter. It deals with the analysis of specific testimonies and trials. Nevertheless, the concern about the influence on further stigmatization of survivors in society as a consequence of the closing of testimonies and survivors stories of rape to the public needs to be mentioned here. While the protection measures available to the survivors/witnesses are not sufficient for securing their safety, the closing of the testimonies is not contributing to the improvement of their safety either. It is only the public that is prevented from hearing the stories told by the survivors themselves. The protection measures of distorted image and voice, using initials or awarding pseudonyms to the witnesses and testimony from other rooms are providing the same amount of protection to the witness as the hearing from which the public is excluded.

The additional problem that needs to be raised here is that the reasons for exclusion of the public from the part of the trial provided by Article 235 of the Criminal Procedure Code of BiH are "the interest of the national security, or if it is necessary to preserve a national, military, official or important business secret, if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate

life of the accused or the injured party or to protect the interest of a minor or a witness."⁴¹ So, one cannot avoid thinking that, given the established pattern of exclusion of testimonies of survivors of wartime sexualized violence to the public, the judges perception as the guardians of morality in a democratic society may play the role in deciding on the closing of such hearings. In this way the stories are only reduced to certain parts presented in the judgments over which the judges have entire control. So the judges, assuming the role of the guardians of morality in Bosnian and Herzegovinian society, decide which stories are told and how they are told.

Furthermore, the practice excluding the public during the hearings of the protected witnesses allows for the judges, prosecutors and defence lawyers to not have to watch how they behave and speak. The public is also excluded for the protection of judges, prosecutors and defence lawyers. It is not rare that the names of the protected witnesses or the personal data are either accidentally, unconsciously, or purposely revealed and mentioned by the actors in the trials. Interestingly enough, in one of the cases the ACIPS project team monitored, it was the defence attorney who asked the Judicial Panel to publicly mention the full name of a women who had, according to the testimony of the deceased witness read by the prosecutor, been raped by the accused. The defence lawyer also added that the women in question "lives somewhere in the USA, and was not contacted regarding this case". This reveals a double standard, since the prosecution cares neither for proving the mentioned rape case or whether the woman in question wants her identity to be disclosed.

Moreover, if we are to talk about the exclusion of the public as the exclusive protection measure it is important to note that in a hearing from which the public is excluded the defence is still present, and in the majority of cases they are aware of the identity of the witness. They are still cross-examining the witness/survivor. So women are not spared of "uncomfortable" situations. On the other hand, as already mentioned, the exclusion of the public means that no one can monitor how women are treated and questioned by the defence (but also by the prosecution and judges) and whether the prohibited questions, about the survivor's past sexual history or consent in sexualized assault are asked. The exclusion of the public only prevents someone from accidentally

revealing the identity of the witness to the public. But this is a mistake that the judges and prosecutors may also make. So, the question that arises is who is protecting whom with the hearings from which the public is excluded?

However, as noted in the medica mondiale's report from 2009, many of the names of protected witnesses who testified in sessions from which the public was excluded were leaked to the public anyway. When international feminists lobbied at the ICTY (and later at the ICC) for the protection measures, it was for the purpose of creating more comfortable conditions for women to testify, e.g. if women do not want to face the perpetrators, or securing the real safety for women later in the community (whether from the security breaches by defendant's friends and relatives or stigmatization by the community). It was not expected that the use of the hearings from which the public is excluded would be used as widely as is the case in the Court of BiH. However, in cases of sexualized violence testimonies this occurrence is disproportional and this established pattern of closing almost all sexualized violence testimonies to the public should be re-examined, as it only contributes to the further stigmatization of women survivors. In this way, their stories are hidden and only presented to the public via the interpretation of judges. Real stories are translated in dry legal language and deprived of any humanity.

SECTION IV

ANALYSIS OF TRIAL MONITORING

IV-1. INTRODUCTION

It is important to follow up on the positive developments that have taken place since the inception of the ICTY and the ICTR by building national capacities of the justice system. Up until now, around 30 cases involving wartime sexualized violence charges have been tried before the Court of BiH, and around 150 women survivors testified before the Court⁴². It is expected that the number of these cases will increase in the years to come, because many of the suspects have still not been arrested. Hopefully, the survivors of wartime sexualized violence will be encouraged by the verdicts of the Court and the Court's approach to the survivors/witnesses.

In 2007-2009, medica mondiale conducted a study about the experience of women witnesses who testified before the Court of BiH in cases of sexualized wartime violence. Among other things, the study observed that judges and prosecutors lacked gender education and that the biases, stereotyping and prejudices that women had to face in trials could lead to re-traumatization. In addition, BiH society does not show much support for women witnesses, and most of the population is ignorant about the experiences women have to go through. In particular, the stigma of sexualized violence is very present in society, even though the facts about systematic mass rapes are widely known.

IV-2. CHALLENGES ENCOUNTERED DURING THE TWELVE MONTHS OF TRIAL MONITORING

This chapter deals with all the problems and issues the authors identified within the scope of the project. In addition, we highlight the problems and issues

we identified that are not in direct connection with the very purpose of our project, but have to do with the context in which the witnesses are testifying that are problematic from a gender studies aspects. Furthermore, in this part we include the problems encountered by the trial monitoring team, which sometimes directly prevented our work. While some of the identified issues might not appear to have a direct connection with gendered aspects of the prosecution of war crimes, we consider that only a holistic approach may adequately address and challenge the gendered nature of the institutions such as the Court and the Prosecutor's Office of BiH.

Mapping of the problems

During the twelve months of monitoring trials for wartime sexualized violence in the Court of BiH, the ACIPS project team faced the following challenges:

1. Limited response to requests to get access to hearings from which the public was excluded;
2. Testimonies of wartime sexualized violence survivors;
3. Attitude of the Defence towards a highly traumatized person;
4. Safety of protected witnesses;
5. The issue of witnesses who want to testify after a trial has begun;
6. Lack of statistics about the witnesses;
7. The importance of using gender-sensitive language;
8. Missed opportunities during hearings to elaborate on testimonies indicating that acts of sexualized violence and tortures took place;
9. Discomfort of witnesses during testimonies on sexualized assaults;
10. Lack of empathy;
11. Some facts about rape survivors from the

testimony of the expert-witness;

12. Tabooization of wartime rape and emphasizing moral element of the crime over the violent element.

Elaboration of the problems

1. Limited response to requests to get access to hearings from which the public is excluded

As previously mentioned in Section I.2, 14 requests were submitted by ACIPS requesting permission from the Trial Monitors to attend hearings from which the public was excluded in cases of protected witnesses. Out of those, ACIPS received six responses in the reporting period - three approvals for the trial monitors to be present at both hearings of a trial open to the public and from which the public is excluded, and one stating that the Judicial Panel should be contacted immediately before the start of the hearing from which the public is excluded to seek permission to attend the respective hearing. In one case the request was denied. 8 of the requests did not receive a response. Furthermore, the two granted permissions that were issued in June 2011 were later withdrawn due to increased political pressure on the Court of BiH.

While the ACIPS project team does not dispute the rights of the Judicial Panel (or its Chairperson) to refuse our request, ACIPS finds it incomprehensible that its requests were ignored. In addition to what was already stated above in Section I.2, our entire experience of communication with the Court of BiH left us with the impression that the research work of local research teams is not seen as important or relevant. From our previous research experiences with the Court conducted under the umbrella of international organizations or support by international researches, it seems that the Court is more responsive to the representatives of the "international community" than to local researchers. Then again, the lack of response and "inaccessibility" of the Court to our requests may be the result of the deterioration of the Court's transparency. However, we got the impression that the Court did not meet the gender sensitive

trial monitoring with acceptance, nor did the Court consider our work to be serious or relevant. At our request, the Court rarely answered and consequently we did not receive permission to attend the hearings from which the public is excluded, even though we thoroughly explained each time the purpose of our trial monitoring and expressed our knowledge about the protection and confidentiality rules that ACIPS is obliged to respect. ACIPS was open to any kind of obligation imposed by the Court BH as a condition of obtaining the opportunity to monitor a hearing from which the public is excluded.

2. Testimonies of wartime sexualized violence survivors

During the twelve months of trial monitoring (23/05/2011 – 25/05/2012), 24 women testified in 26 rape related testimonies (two women testified twice). All of Section IV is dedicated to this issue, but to summarize:

- 15 women witnesses and wartime rape survivors testified on rape in the hearings from which the public was excluded;
- 6 women witnesses and wartime rape survivors testified on something else and just along the way mentioned they were raped but the accused was not the perpetrator testified in an open hearing; and
- 3 women witnesses and wartime rape survivors testified on rape in an open hearing.

Trial Monitors could not attend the testimonies in the hearings from which the public was excluded, since they did not have permission to attend these hearings. Every time it was presented that the witness requested the public to be excluded from the hearing. However, it is surprising that only 18 women testified on their survival of rape in 4 cases during this one year period, and having in mind that about 10 ongoing cases include, among others, charges for wartime sexualized violence. The accused in these cases were direct perpetrators. Out of those 4 cases in the Vlahović case 10 women testified (2 in hearings open to the public and 8 in hearings from which the public was excluded) and in the Gazdić case 6 women testified (5 in hearings from which the public was excluded). The reason for this is not clear. However, it might reflect the reluctance of women

to testify as a result of numerous reasons that include social stigma, lack of adequate support, the separation between convictions for war crimes (criminal cases) and compensation claims (civil cases), and having to answer questions from the alleged perpetrators in cases where the defendants act as their own defence counsel in court. Also, it may reflect the reluctance of the prosecutors to charge wartime rape, since for them it represents one of the greatest challenges in the prosecution. As noted in the *medica mondiale* report the major challenges expressed by judges and prosecutors faced with rape cases are interaction with rape witnesses relating to witness trauma, communicating with witnesses, getting them to cooperate, establishing a relationship of trust with witnesses and the problem of material evidence in rape cases.⁴³

3. Attitude of the Defence towards a highly traumatized person

There were several gender-problematic issues at one of the hearings in the Vlahović case. First, the attitude of the Defence towards a highly traumatized person was arrogant, at times sarcastic, and overall unsympathetic. The Panel of judges and the Prosecutor did not seem to react until it became evident that the witness started to shake and was visibly appalled by the Defence's questions. The aggressiveness of the Defence is one of the biggest issues. The survivors of grave sexualized violence, who dare to take a stand in court to speak about their traumas, are being exposed to an interrogation by the Defence that does not respect professional ethics. Sarcasm and patronizing make up some of the unrestricted patterns of behaviour when it comes to the style of the Defence and the Prosecution. Openly provocative questions or ethically unprofessional remarks become a rule rather than an exception during the hearings.

It needs to be pointed out that the Criminal code of BiH and the Criminal Procedure Code of BiH adopted in 2003 introduced several new institutions and procedures in the criminal system of BiH. As ICTJ noted important innovations are the introduction of an adversarial procedure in the system, which had used a form of accusatorial procedure, and the introduction of a plea agreement⁴⁴. Apart from changes in the responsibility to

conduct the investigation from the judges to the police and the prosecutors, the trial proceeding is conducted in an adversarial manner. Instead of having judges conduct the questioning of the witnesses, which was previously the case, this is being done by prosecutors and defence attorneys who are in charge of presenting evidence to support their cases⁴⁵. However, Articles 261 and 262 of the Criminal Procedure Code provide for the judges to take an active role in the examination. Furthermore, in cases of protected witnesses (which a majority of the witnesses who survived sexualized violence are) the judges are awarded an even greater role by Article 8 of the Law on the Protection of Witnesses, according to which they control the manner of the examination of witnesses (particularly to protect the witness from harassment and confusion) and are even allowed, upon the consent of the parties and the defence attorney, "to hear a vulnerable witness by posing questions directly to the witness on behalf of the parties and the defence attorney"⁴⁶.

Nevertheless, the judges do not use these provisions much; especially concerning issues related to sexualized violence charges. This may be due to a lack of experience with the system, but this is not a justifiable excuse. During the prosecution of 11*bis* cases, in the trials of Stankovic and Jankovic, OSCE monitors noted that the judges did not intervene or took active participation when the prosecutors asked certain witnesses whether they were virgins before they were raped. After objections of the OSCE there was some improvement in this respect.

Fortunately, there was a member of the Judicial Panel in the Vlahović case who always posed the right questions, dealt professionally with the witness and remained serious during the whole trial. For example, he interrupted the defence attorney when he repeated the question to which the witness said she did not know the answer, interrupted any indication of provocation by the defence attorney towards the witness, and if the witness did not understand the question, he explained it with patience.

On the other hand, during the same trial, there was a spirit of "relaxedness" in the courtroom. One judge was occasionally laughing while talking to the Defence, probably in an attempt to make the atmosphere less gloomy. This behaviour is wholly unprofessional and exhibits an attitude of insensitivity towards the witness. Since the events the witnesses talked about were

very traumatic and extremely serious, laughter in the courtroom was certainly inappropriate.

During the cross-examination of witnesses in the Albina Terzić case, the Defence used the phrase “object of rape” when referring to a woman with mental disabilities who was sexually abused. This is an extremely politically incorrect term and is gender insensitive. Even though the woman was not present in the room this construction should not be used, as it shows disrespect towards the wartime rape survivors. Thus, the defence should have been warned by the judges that this term should not be used.

The presiding judge in the Terzić case was full of patience every time the witnesses gave incoherent answers and for the difficulties they had with understanding the questions of the Defence. He was also very protective of the witnesses every time the Defence became more “aggressive” (i.e. when the defence aggressively insisted, for the second time, that the witness should precisely tell them the time of the traumatic event, the presiding judge interrupted the defence and asked them to proceed with the questions). This should be exemplary for all the judges dealing with cases of sexualized violence that serve to protect witnesses and survivors of sexualized violence.

In the Gazdić case the Defence had a very aggressive approach while questioning women witnesses who, even though they were not raped by the accused and testified on rape other women experienced, they are still the survivors of wartime rape and should be treated with due respect for their wartime traumas. However, the Defence Attorney launched a litany of verbally aggressive remarks, and used intimidating body language while questioning the witnesses. He also mentioned that he personally knew the witness well. This remark was not relevant to the trial and seemed inappropriate. In this case the presiding judge did intervene. However, the presiding judge had to interrupt him frequently in order to prevent the further harassment of the witness. The witness was visibly agitated and frustrated because of the Attorney’s aggressive behaviour. This cross-examination was exemplary for an ethically unprofessional approach to wartime sexualized violence survivors. As stated, the presiding judge, fortunately, reacted frequently, but this could not stop the process of re-traumatization of the witness. Thus, the code of conduct prior to the hearings should be introduced.

Also, questions about the details of a perpetrator’s weapons or shoes or exact hair colour seem redundant, given that nearly 20 years have transpired since the events, and keeping in mind the traumatic circumstances. Obviously, this is used by the defence to confuse the witnesses and undermine their credibility (especially in cases built on witness testimonies), but in the process of the evaluation of evidence and credibility of witnesses this should not be taken into consideration (or at least the amount of time gone by since the events occurred and the traumatic circumstances should also play a significant role in such evaluations). Only then will the pressure of providing evidence steer away from the witness and be placed on the defence (as instead of trying to prove that the witness is lying, the defence should focus on proving the innocence of the accused). Generally, in the rape cases the burden of proof is placed on survivors and this should never be the case.

Moreover, the Defence questioned the truthfulness of the testimony of the woman who was raped (and this had happened before) because she gave her first statement to the Association “Women – Victims of the War” and not to the police. The Defence insinuated that the witness did so because of the pension she would receive as a rape survivor, putting the witness in a position to defend and justify her motives for seeking help from the association and, on the other hand, her willingness to testify in court. Given the fact that Bosnian and Herzegovinian society is overly patriarchal, such questioning of the motives is really excessive. Most of the women who had the possibility to receive recognition of their civil war survivor status through any other category (such as camp prisoners) in the majority of the cases opted for such statuses in order not to be labelled as wartime rape survivors (as this category in Bosnia and Herzegovina unfortunately does not provide them with dignity). Furthermore, by questioning the motives of women in such a way the defence actually questions the legal provisions concerning the recognition of wartime rape survivors status. While these provisions definitely need improvement in order to be more sensitive towards the needs of wartime sexualized violence survivors, the questioning of the motives of women (who in order to receive the reparation awarded through the recognized status of civilian survivors of war need to pass lengthy, complicated, demanding and even retraumatizing

procedure) for demanding recognition of minimal rights that rightfully belong to them is wholly chauvinistic. In the situations in which we need to both talk about securing the proper implementation of reparation mechanisms and look for ways to secure restorative justice mechanisms for wartime sexualized violence survivors, it is very dangerous to allow for already secured rights to be challenged. Finally, the questioning of whom the women confided in first about their experience of surviving wartime rape is completely irrelevant for the case. As will be discussed later in the text (under 11. below), the Bosnian and Herzegovinian society is no different with respect to the phenomenon of "the conspiracy of silence". The majority of women do not disclose their wartime rape experience to anyone, and when and if they decide to disclose it the police are not necessarily the first institution they turn to (if ever). It is just logical to turn to those who you believe will be more sensitive and compassionate towards the experiences of your trauma, and the police does not appear to be the most compassionate and trauma and gender sensitive institution.

4. Safety of protected witnesses

At the trial in case of Saša Baričanin, the issue of the safety of protected witnesses (a survivor of rape) was identified as one of the issues to be addressed in this report. Protective measures are applied so the survivors can testify without retribution or fear for their safety. The Protected witness S2⁴⁷ told her psychiatrist that some individuals harassed her because her name had appeared on the Internet after her testimony in May 2011 in the case of Saša Baričanin. The psychiatrist mentioned this to the Judicial at the hearing in August 2011. However, after not being able to specifically indicate where her name appeared on the Internet, the issue was dismissed by the Court instead of initiating a contempt proceeding in this case for breaching protective measures. It is really unclear why it was so hard to investigate the psychiatrist's allegations even though the psychiatrist could not specify the Internet page. This shows that the protective measures are not taken seriously by the Court, but rather as a formal means of protection.

The Defence attorney of Saša Baričanin asked the Judicial Panel to allow him and the defendant to invite the prosecution-protected witness S2 again, although

the witness had already testified (May 2011). The defence attorney, who was the third appointed defence attorney of Saša Baričanin, said that he believed that his predecessors, the first and the second defence attorney of Baričanin, had not cross-examined the protected witness S2. The reasons why the defence did not cross-examine the witness when they had the opportunity remained unclear. When the presiding judge on the Panel of Judges said that testifying again could be a very traumatic experience for S2, the defence attorney explained that the defendant had "a small advantage" over the survivor according to the Criminal Procedure Code of BiH. The Defence attorney believed that re-testifying would not be traumatic for S2, while the Prosecutor believed that it would be an extremely traumatic experience. Her psychological condition was very severe, and her psychiatrist had already confirmed this in his testimony. In September 2011, the Judicial Panel decided that the protected witness S2 would have to testify again (in the second half of October 2011) as the defence witness. This is very problematic for several reasons. First, this establishes the practice in which the defence can manipulate and intimidate the protected witnesses. Second, the interpretation of the Criminal Procedure Code as giving "a small advantage" to the defendant against the wartime survivor in war crimes cases is more than questionable as the wartime trials are, among other things, seen as instruments of awarding minimum justice to the survivors. Giving the advantage to anyone accused of war crimes over survivor of war crimes is, to say the least, hypocritical. Third, and not the least important, is that no matter what the defence and prosecutor claim, testifying is itself a traumatic experience and forces the protected witness (who was awarded protection measure because she is, among other things, vulnerable) to go through another trauma just for sake of the defence correcting its mistakes and doing something it omitted to do the first time. This is inadmissible and does not serve the interest of justice, which should be the core value of any judiciary institution).

In the Gazdić case during one hearing, the prosecutor stated the exact name of the film planned for the screening at the next hearing from which the public was excluded. By doing so he directly compromised the protection measures awarded to the witness. The public was to be excluded from the screening of the film since the

full name of the protected witness was stated in the film. In the film the witness describes her trauma and rape by the accused. The film can easily be found on the Internet, which means a direct disclosure of the identity of the protected witness. The fact that the public was excluded from her testimony and presentation of this film was nothing but a superficial gesture and routine procedure that, in this particular case, did not protect the identity of witnesses. Once again, the understanding of the purpose of protected measures and their implementation by the prosecutors and judges at the Court and Prosecutor's Office was brought into question. This reinforces the need to re-examine the application of protective measures and how they are implemented.

5. The issue of witnesses who want to testify after a trial has begun

At the trial for Bogdanović Velibor, at the final session for evidence hearing by the prosecution, the prosecutor said that five new witnesses had contacted her claiming they had suffered offences by the defendant "similar" to those presented at the trial (abuse and rape). The Judicial Panel rejected the request from the prosecutor to include testimonies from these women, saying it was too late and the evidence hearing was finished. The prosecutor explained that those persons found out about the Bogdanović trial from the newspaper, which explains the timing of the request. The request was definitely rejected.

Here again, as with the case of the non-disclosure of indictments, the ACIPS project team would like to stress the importance of war crimes trials compared to "regular" criminal trials with reference to their purpose. In this case, judges could interpret the Criminal Procedures Code of BiH more leniently (Art. 275-277 allows for that) and allows the witnesses to be heard. This would not in any sense undermine the rights to a fair trial of the defendants, as the defence can always receive additional time to prepare. The courtroom in the war crimes cases also needs to be understood as a space for survivors to tell their stories, and in this case all five witnesses undoubtedly had something relevant to say.

However, the responsibility of the prosecutor's office to fully investigate the case before it goes to trial must not be overlooked. This example may raise questions

about the efficiency of the Prosecutor's Office, and why it did not collect all available information on committed crimes before the indictment was filed. Apparently, the Prosecutor's Office was not prepared properly since it failed to collect all relevant information beforehand. It appears that the prosecution office is restricted in its capacity for the same reasons as those that prevent women from testifying, e.g. social stigma, to obtain evidence.

Still, underlining once again the fact that those trials are war crimes trials that usually incorporate numerous individual (and mass) crimes, we can accept that the circumstances arise in which the prosecutors cannot always be able to access all the relevant information. In this case it was the media report that triggered the potential witnesses to contact the Prosecutor's Office. Given the non-existence of an outreach office within the Court's and Prosecutor's Office which could establish cooperation with different NGOs working in the field, as well as with media outlets in order to support the collection of relevant evidence and information, there is enough space to conclude that the survivors and potential witnesses in this case were not aware about any investigation concerning the defendant. Also, this shows that the trust in the institutions involved in the investigation and prosecution of war crimes in Bosnia and Herzegovina is not established, or simply that people did not know whom to contact in order to report war crimes. Rejecting them and refusing to hear their stories only because of poor timing is tantamount to rejecting them access to justice.

Bearing in mind that the aforementioned purpose of the war crimes trials, which is not just prosecution of the wartime criminals (even though it being the main purpose), we consider it of utmost importance that the judges are more open to the incorporation of new and possibly important testimonies after trials begin and even after the final evidentiary proceedings finish. This is an important step towards wartime trials becoming more efficient mechanisms for dealing with the past in a society that is still affected with war traumas. Also, in this way witnesses who hesitate to testify at the court and who need more time to decide whether they are capable of sharing their traumas or not, will be given an opportunity to testify before the closing arguments at the end of the trial.

6. Lack of statistics about the witnesses

Although a large number of surviving men and women testified at the Court of BiH about wartime sexualized violence, there is no statistical data available about it. Data is not available on the exact number of testimonies, how many women and how many men have testified, how many witnesses were protected and what type of protective measures they were assigned, etc... Because of a lack of data, it is almost impossible to make any witness oriented analysis or research. Furthermore, the lack of data segregated by sex prevents the detailed and precise gender sensitive analysis of the war crimes trials. All of Section IV is dedicated to this issue.

7. The importance of using gender-sensitive language

In the several examples, the authors will describe the lack of sensitivity in the use of language.

The wording of the oath is gender insensitive. It exclusively utilizes masculine terms, even when a woman takes the oath. Although this may seem as an irrelevant comment, it is important to point out that language is a complex social and cultural construction that reflects gendered attitudes and serves as a basis for opinion forming. When a woman reads the oath formulated for men she may not (consciously or unconsciously) relate to the statement, since it does not reflect her sex. Moreover, female survivors of wartime sexualized violence that take an oath as using male terms may add to the emotional stress of testifying in court and demonstrates disrespect toward the witness. It is not difficult to incorporate a gender-sensitive oath. Therefore, the oath should be written in two versions, one for each sex (i.e. for the female witnesses „... o svemu što budem pitana...“, for the male witnesses „... o svemu što budem pitan...“) so the female witnesses could feel more comfortable with what they are saying.

Using gender-sensitive language contributes to clarity and precision. Otherwise, the prosecutor's announcement of witnesses was unclear and confusing in terms of their gender (Gazdić and Vlahović cases). “The witness asked exclusion of the public since he is a rape survivor, and his testimony will be on the circumstances of the rape. He will also testify on circumstances of rape

of his closest relative; he was minor at that time”, said the prosecutor of the Public Prosecutor's Office of BiH, asking for the public to be excluded from the trial. Also, the second example can be seen in an introduction speech of a prosecutor: “The witness will speak about the rape that he experienced as well as his closest relative”, where the word “relative” was also used in the masculine form. It turned out that the prosecutor was talking about two women, using masculine nouns and pronouns all the time. It remains unclear why a great deal of court language is gender insensitive because it is not in the spirit of justice to be inexact and ambiguous. Using gender insensitive language creates confusion – both the prosecutor and the presiding judge spoke about measures to protect “the witness F”, using pronouns “he”, “him”, “his”. It turned out it was about two female persons.

When it comes to the Vlahović case, the lawyers consistently used gender insensitive language when speaking about the witnesses and used the masculine form of the word witness. However, when a witness is mentioned in the context of rape, they automatically employ the feminine noun for the word. It is obvious that the lawyers feel it is unnatural to use the masculine noun for a woman only when she is mentioned as a survivor of rape. So, it was not “unnatural” to speak about a woman using the male nouns, but it became “unnatural” when the term rape was applied to a “male witness”. Once again, gender stereotypes engulfed in subconscious spheres of language emerge to the surface.

The discourse that defence lawyers use to represent their clients is also insensitive from other points of view. Here is an example of a defence lawyer defending his client through the use of titles such as “gentleman”, “this unfortunate man”, and “small, miserable and unfortunate people”. All of this is offensive to the survivors of the crimes with which the accused is charged, as well as to the public. The ethical dimension of this discursive representation will not be touched upon here.

8. Missed opportunities during hearings to elaborate on testimonies indicating that acts of sexualized violence and tortures took place

At the trial in the case against Veselin Vlahović in September 2011 and during the hearing of a protected State Prosecution witness S14, neither the Prosecutor

nor the Judge used the opportunity to ask follow-up questions when the witness implied in his testimony that sexualized violence had taken place at the barracks where the witness was kept with his wife. Here, it is important to note that the evidence collected during investigations are used for raising indictments against suspected perpetrators, and the prosecution and the defence have the main responsibility for presenting evidence to the court. However, in addition to the prosecution and the defence, the judges may also examine the witnesses and call in additional evidence.

It is important for judges to appreciate that while the Court does not control the investigation of war crimes cases, it can ask questions in the courtroom and thereby provide support in revealing evidence that can be used to reach a verdict or possibly issue a new indictment on the basis of such new evidence. Given the fact that general academic opinion praised judge Pillay, who showed genuine interest in witness testimonies in the Akayesu case, it subsequently resulted in an amendment of indictment⁴⁸ in respect to the sexualized violence charges.⁴⁹ The inactivity of judges presents a danger for allowing sexualized violence charges to not be charged (remain unpunished).

In the Vlahović case, however, the opportunity to do so appears to have been missed. At one point, the protected witness S14 says: "Everything was there, the beating, the harassing, hard work... all the things, things that a person cannot even say." Instead of using the opportunity to explain to the witness the importance of informing the court about everything he had witnessed because of its potential relevance for the prosecution of the case, and to ask the witness some questions to assist him in doing so, the prosecution and the judges did not ask any further questions. It is possible that the prosecution might have been intimidated to ask further questions given that the witness might have been too embarrassed to talk about what he witnessed. However, the duty of the Court should be to assist the witness to discuss further his eye witness account and experiences at the barracks for the sake of pursuing justice, even if it is not possible to amend the indictments to allow for the recording of survivor stories (see the discussion below on testimonies of wartime rape survivors – Gazdić case). Witness S14 also mentioned that Vlahović had harassed his wife while he, (the witness) was in the other room of his apartment

with another soldier. S14 said his wife later told him that Vlahović had threatened he would cut her throat, that he had pushed her on the bed and laid on top of her, after which she could not stand on her feet for two days. The event itself implies a possibility of sexualized violence, but neither the Prosecutor, nor the Panel of judges asked any further question about it.

It is important to mention here that one of the witnesses stressed that she had been raped and tortured by two men who were never arrested and tried for this crime, adding that she would never come to testify in this case had she not been kindly asked by another survivor (because she was also a witness of her rape). She openly showed how much she did not trust the court as an institution to deliver justice. This should be a matter of concern for the Court and the Prosecutor's Office as, especially since the more time passes, fewer and fewer witnesses will remain available and living. Without the trust in institutions the surviving witnesses will not want to expose themselves through unnecessary re-traumatizations.

9. Discomfort of witnesses during testimonies on sexualized assaults

In the following examples, we will show how both the witnesses and the lawyers spoke of rape with discomfort and lack of precision. Uneasiness and lack of precision result from the fact that the treatment of witnesses did not allow them to feel empowered. They did not attend psychological treatments that would help them separate, in their conscious and subconscious mind, the offence they suffered from their sexuality and sexuality in general. It is unacceptable in the courtrooms to have the crime of rape related more to sexuality instead to the serious crime (violent offence of physical torture and abuse).

The discomfort during testimonies on sexualized assaults is palpable. The situation mainly includes descriptive words, gestures or intonational stress (all descriptive words directly correspond to typical elements of the sphere of male-female stereotypes), and when the need arises to use the actual word, slang is used (licking, blowing). Words are uttered with uneasiness, pauses, and reluctance and under obvious stress: "AB2 told me he was forced to have sex with Stoja, (...) to rehabilitate

(...). He could not “do it” (the phrase “do it” was followed by “you know what I mean” facial expression), so he was forced to engage in perverse actions (...) like (...) licking.” “NN told me how he was forced by a soldier to “do the job” (stressed by the tone of voice), if he was to get food.”

An example of stereotypes in a question made by the defence: “Did AB2 say anything about having any contact with Stoja, as man and woman?” The Defence Attorney seems to believe that “contact” between sexes must be of a sexual nature, which is a stereotype that does not belong in legal discourse.

While speaking about Stoja, the witness was the first person in the courtroom to actually name the action inflicted upon this women precisely. “I was there when they took four or five young men to rape Stoja.” Finally, after many testimonies, someone used a legal term to name the act Stoja suffered in the camp (even though the courtroom was full of lawyers it was a non-lawyer who did this). Anyone who spoke of the “action that Stoja suffered” was uncomfortable to name the action. Instead, descriptive and inaccurate phrases were used, such as sexual intercourse (as if it was consensual), sexual activity, “doing it”, and etc...

10. Lack of empathy

The tragedy suffered by war survivors of rape is further amplified by the fact that the survivors find no compassion anywhere, not even amongst members of the same ethnic group who have also suffered.

The witness in the Terzić case, a former camp prisoner, said that when they met after the war, five of the former camp prisoners talked about everything that had happened to a female prisoner (rape and “camp wedding”) and laughed – “We laughed, just like them”. This example shows the deep tragedy of a person who is marginalized in so many ways – it is a woman, a woman with a mental disability, who suffered the most ruthless treatment from enemy soldiers. Unfortunately, this does not trigger any compassion and empathy, even among members belonging to the same ethnic group. Patriarchal matrix is the same in all sides in a conflict, and is nearly always devoid of compassion and mercy and gravitates towards the abuse of women (physical or verbal). This witness also testified that men ridiculed and molested a woman from their community, which appears to be

irrelevant in a misogynistic culture.

11. Some facts about rape survivors from the testimony of the expert-witness

A neuropsychiatrist with extensive experience in dealing with raped men and women, Senadin Ljubović, spoke of the influence of sexualized violence on personality, sexuality and the general functionality of survivors. He had no doubts concerning the truthfulness of the testimonies of four witnesses he had examined. He stated that the most accurate information are given to medical staff and that only long and patient examining in a comforting surrounding will make it possible to reach the survivors. He personally found the story of witness A the most compelling, who needed the most time and who was emotionally exhausted, since the witness was only 12 when she was raped and was abused nine times. When asked why survivors keep silent for years, Ljubović spoke of the phenomenon of “the conspiracy of silence”, and that only 20% of survivors decide to talk about it, while the majority permanently encapsulates the trauma. He stressed that society had failed to “do what we can to make it easier for the survivors”.

On the basis of the team findings, neuropsychiatrist Mirjana Mišković and psychologist Tatjana Dragišić have determined that the injured party S.S.⁵⁰ had suffered from schizophrenia for more than ten years and that she be placed in the Institution for Mental Patients, near Modriča, where would be on constant medical treatment. Her IQ is 61. The expert witnesses said that a person with such a mental disease was not capable of working and, as such, she could not be a reliable witness at any trial. On the other hand, both of the expert witnesses confirmed that S.S. suffered from PTSP, and that she never changed her story through the course of almost 10 years. The Defence tried to connect her PTSP syndromes with her mental condition, but the expert witnesses rejected that possibility.

12. Tabooization of wartime rape and emphasizing the moral element of the crime over the violent element

As previously underlined data reveals in the twelve months of our trial monitoring, out of the 18

women who testified on direct rape, 15 women testified in the hearings from which the public was excluded. This shows us that testifying on rape is a serious and complex taboo. By making a taboo out of rape crimes and testimonies on them, the Court only solidifies public prejudices on the subject and adds to the stigmatization of survivors. Such a practice does not help the wartime rape survivors in the long run, and include major problems that the survivors of rape face continue to exist: silence, lack of family support, coping with stigma and guilt and tabooing sexualized violence, all of which leads to a lack of an effective and necessary psycho-social rehabilitation.

For example, in the closing words in the Bogdanović case⁵¹ the Prosecutor said that the injured party first spoke about the rape in 2009, adding that she reported the case to the police afterwards. **“She was afraid of how her family and other people would react if they found out what she had been through. Her dignity has been violated”**, the prosecutor said. From this sentence, a variety of problems that survivors of rape and other forms of sexualized violence face become evident: the tabooing of sexualized violence, silence, lack of support and empathy, denial, coping with stigma and guilt, self blame, silencing by their environment, and lack of effective psycho-social rehabilitation. Furthermore, the question of dignity is put forward as the most important aspect of the crime of rape. Dignity is a social, psychological, legal and internationally guaranteed category, and it is clear that rape most often destroys the dignity of a person. However, the emphasis on the moral side of the crime of rape undermines the suffering caused by injuries to the physical and mental integrity of women. Thus, moral dignity must not be emphasized over the fact that the rape is primarily a violent crime at the same level with murder, torture and cruel and inhumane behaviour.

IV-3. SEXUALIZED VIOLENCE-RELATED TESTIMONIES

As already stated, out of the 18 testimonies on rape given by the rape survivors, only 3 were hearings from which the public was not excluded. Given that our trial monitors in the end could not access the hearings from which the public was excluded, below is a presentation and analysis of common characteristics of

those three hearings in which the rape survivors were submitted to cross-examination. Furthermore, the types of unacceptable courtroom practice, from the perspective of a gender-sensitive approach to witnesses is explained. In addition, analyses of certain details from the hearings that did not have rape as a topic, but where sexualized violence was mentioned, are also included.

Three rape testimonies

1. Rape testimony (The hearings of a survivor of multiple rapes in the Vlahović case)

The hearing of protected witness S4, a survivor of multiple rapes, pointed out the importance of this project in a very clear way. The judicial mechanism fails at treating the survivors of sexualized violence and rape survivors with an appropriate sensitivity on so many levels. Even though the tone of the Prosecutor was kind and respectful, the questions he concentrated on seemed absurd, irrelevant, or sometimes offensive from the perspective of the witnesses.

But this is not the Prosecutor’s mistake. It is the procedural form of hearings and questioning that is insensitive to the traumas of rape survivors. After the witness said: “...Then he raped me”, the Prosecutor’s question was “Was there a full sexual penetration?” The witness replied, “I don’t know what you mean by that.” The question was problematic on several levels. Firstly, why there was the need to establish whether there was full sexual penetration when, according to the Criminal Code of BiH Commentary⁵², the “intensity” of penetration is not relevant? Furthermore, while the definition of rape requires the establishment of the penetration (no matter how slight), the use of an exact word is really odd. The word penetration is not a commonly used word in a patriarchal society such as Bosnia and Herzegovina, where an open discussion of sexuality is still a taboo subject. Thus, the prosecutor could expect that the non-lawyer or non-medical worker such as the witness potentially does not know the word. On the other hand, since penetration is not a commonly used word, the prosecutor’s use of it potentially shows his discomfort in talking about sex. In this sense, given the formality of the language used, there is a difference between the witness saying “he raped me” and “he sexually penetrated me”.

Why does the Court perceive as valid only the positive answers to dry, dehumanized, medical questions which involve, for example, terms like “sexual penetration”, when it deals with rape?

Here, it needs to be recognized that with respect to establishment of the penetration there is always the danger of going into too many details that very often may result with the requests for statements that border on pornography (as will be seen below under 2. – Gazdić case). As noted in the *medica mondiale*'s⁵³ report the judges and prosecutors stress that the rape witnesses give fewer details than other witnesses. However, the required details are divided in two sets of details. One set refers to the circumstances and the other set refers to the exact description of the act of rape⁵⁴. The question arises as to whether it is possible, once the sufficient details about the circumstances are obtained, to reduce to minimum details about the act of rape using words that are adequate and understandable to the witness.

Furthermore, even though the witness herself referred to the act as rape, the Prosecutor used the phrase “sexual intercourse” throughout the hearing. While again, “sexual intercourse” is part of the definition of the rape, insisting on the use of this phrase in which the stress is on sex rather than on the criminal violent act (which is rape), is undermining and humiliates the experience of the victim. It once again shows how deeply problematic the issue of rape is within a patriarchal environment.

Another inappropriate question was “Were you exposed to any violence (during the act)?” to which the witness replied in the best possible way by saying “The very act is violence itself. What else do you need?” This seems to be a clumsy attempt to place emphasis on the act of coercion, but posed in this way it completely undermines the violent nature of the act of rape. This inadequate approach to the examination of the rape survivor demonstrates the Prosecution and the Court's gender insensitivity in dealing with survivors of wartime sexualized violence (see discussion below under 3 – Vlahović case).

During this testimony, the question of shame was once again reopened. The witness articulately explained how ashamed she felt when it happened, but also how various workshops within women's support groups and associations helped her to not feel ashamed about it and encouraged her to speak up about this crime. Yet, the

witness herself is still trapped with the patriarchal codes of the society in which she lives, because she could never tell her family members what had happened to her. It is a different topic, but it was interesting how she first said that she could never tell her father or her son what had happened to her. She did not provide any additional reasoning as for why she could not talk to male members of her family about what she had been through. However, she explained why she couldn't confide in her sister about surviving the rape by saying “She is, you know, very religious and patriarchal, she's not like me”.

Other issues detected during this hearing:

- The presiding judge laughing. (Even though his intentions were good, it seemed inappropriate in a situation where the witness is re-traumatized.)
- The Defence Attorney first said that he would not ask any rape-related questions, and that he would stick to the medical condition of the witness. However, after questioning the witness about the medications she was taking and whether they influenced her concentration, and after asking her about the detention of her neighbours the Defence Attorney said to the witness “Just one question about the rape”. Then he asked her why in her statement of 2010 she said it happened in May? Then he continued with other questions such as “Why did you hide this? “You said to your doctor that you were raped for months, from where are the differences in statements coming?” and etc... The tone of the Defence Attorney was really aggressive, addressing the witness as if she was guilty and as if she was in the police station under an investigation for a criminal act. This tactic of “confusing the enemy” was especially visible since the Defence Attorney started talking to the witness really slowly, almost gently with compassion, as if understanding and respecting her trauma, followed by a sudden shift to the questions of rape and witness credibility. A female member of the Panel of Judges only stopped him when he became really aggressive by asking the witness questions she had already answered.
- Even though the witness explained why she had not told anyone about her experience

immediately after the war, and waited until after she was encouraged after continuous therapy, the Defence Attorney ignored her response and repeated the same question.

2. Rape testimony (The Gazdić case)

This hearing was the first one in the Gazdić case from which the public was not excluded, and one of the few since the beginning of the project where the monitors could hear the story of a rape survivor and monitor the way the Court treated her.

There were several problematic aspects from a gender sensitive angle in the way that the hearing was conducted. This time, the least problematic was the standard gender insensitive language of the Court. The most shocking part of the interrogation was questions like: Did you have your underwear on? What did he do with your underwear? What position were you in when he took off your clothes? Did he lay over you then? Was it a vaginal intercourse or of some other kind? These questions were asked after the witness explained how the rape happened, meaning that she was put through the process of traumatising once again. Since the Prosecutor asked the questions, it is obvious that there was no intention of provoking the witness, but the goal of such questioning was to prove something. As mentioned above this detailed questioning borders on pornography and tends to eroticize the act of rape.

Regardless of the intention, the witness was needlessly re-traumatized. She mentioned that she was still under treatment because of what had happened to her and her family, and that she had a miscarriage several years after the rape when she tried to have another child. She also said that she still suffered from rape-related nightmares. The witness should still have been treated in a more humane way, even if she had not mentioned the consequences of the rape. The questions she was asked possibly made her feel humiliated for a second time, given that she had to give answers which exposed some intimate details.

The Court system would have to find some new ways to get adequate answers from the survivors of wartime sexualized violence. Insisting on specific, embarrassing and traumatising details that often eroticize the act of rape needs to be altered with a more ethically

professional approach. It is not enough to just have a kind tone while asking a question. It is necessary to avoid further scarring the witness during hearings. Furthermore, since the majority of the survivors of wartime sexualized violence are women and the perpetrators are men, the Court should also keep in mind that socially encouraged gender relations, which even apply in a trial, play an important part regarding the lack of power that women have in the courtroom.

Other issues detected during this hearing:

- This testimony can serve as an example as to why wartime sexualized violence survivors may choose to not testify in court: Starting from the unfamiliar, alienating surrounding of a courtroom and the court in general, over the traumatizing questioning, to the feeling that the accused is more protected than a witness/survivor. The defendant is in a position where he can calmly sit in the courtroom and not be interrogated by anyone. Furthermore, the defendant himself can ask the witness up to three questions. She is the one who endures mistreatment with the questions.
- It also seems unfair that the survivor is left to prove that she was indeed a victim/survivor, having only her disturbing, painful, traumatizing-for-life memories as a tool. The Defence is re-examining her memory and if there is some discrepancy with her previous statements, (see below testimonies of a survivor of rape, item 2. Gazdić case) the painful digging through her memory starts (e.g. why in the previous statement she said she saw two cars and now during the hearing she is saying she saw three cars, why did she say he had dark hair and now she is saying she doesn't remember well, and etc...). The Defence is questioning the credibility of the witness and trying to prove that the survivor is lying by insisting on insignificant details that the witness does not remember nearly 20 years since the crime took place. The Defence should always keep in mind that in cases like this, the witnesses are first and foremost survivors of an overwhelming attack on both their body and personality, so they should

be approached differently than other witnesses.

- On a positive note, the Panel of Judges in this particular case treated the witness in a very delicate way. The Presiding judge was very sensitive while explaining the rules to the witness at the beginning of the hearing, while remaining very helpful throughout the session.

3. Rape testimony (The Vlahović case)

This hearing was both the last one the monitors could attend and the second one in the Vlahović case from which the public was not excluded. Also, this hearing is one of only four open hearings at the Court of BiH on wartime sexualized violence (including the testimony of a male witness in the Terzić case) since the beginning of the monitoring project. It is hardly possible to formulate solid conclusions on the practice of the Court on the basis of four testimonies related to wartime sexualized violence. The hearing of protected witness S12, a survivor of rape and torture, was different from previous testimonies by a small number of questions related to the rape. As the two previous testimonies have shown, the judicial mechanism fails at treating the wartime rape survivors with an appropriate sensitivity on several levels.

The protected witness said that an unknown man, who came with the accused to her apartment, raped her while the accused searched the apartment, and that afterwards the accused “did the same” to her. Both the Prosecutor and the Defence concentrated on the questions related to the additional torture that she had suffered – the accused brutally hit her in the head and also broke her arm. Through additional questions she had to explain if the blood was pouring out her head, what the accused used to strike her head and arm, why she could not remember precisely when she had been raped, and etc...

Even though the tone of the Prosecutor and the Defence was respectful during questioning, the questions they concentrated on were absurd and irrelevant, such as: “Was there *full* sexual penetration?”, “Did he use his *fist* to hit you?”, and possibly offensive and pornographic-sounding from the perspective of the witness – “How did the *sexual intercourse* look like?” (even though the witness herself characterised the act as *rape*). As mentioned previously, it is the procedural form of hearings

and questioning that is insensitive to the trauma of rape survivors.

Other issues detected during this hearing:

- The suggestion is that terms like sexual penetration and sexual intercourse during examinations of rape survivors and generally in rape-related cases, should not be used for several reasons. First, these terms are offensive: offensive for the witnesses/survivors because for them there is nothing sexual about the act of violence, and the brutality and horror that are inherent in the crime of rape. Second, using these terms in cases of rape may lead to the conclusion that the judicial mechanisms consider rape primarily as a variant of sexual intercourse and not as a crime.

Testimony of a rape survivor

When women witnesses who were raped during the war publicly testify, they do not testify about the rape committed against them, but against someone else, or on other crimes committed by the accused. Since the accused was not the perpetrator, they only mentioned that they were raped. As already mentioned, one of the witnesses stressed that she had been raped and tortured by two men who were never arrested and tried for this crime, adding that she would never come to testify in this case had she not been kindly asked by another survivor (because she was also a witness of her rape). She openly demonstrated her distrust of the Court as an institution for delivering justice.

1. The hearing of a survivor of the rape (The Gazdić case)

This testimony was not really a testimony, but merely mentioning, since the accused was not the one who performed the rape. Since the indictment is unavailable, we do not know if the accused had the command responsibility regarding the rape of this witness, or if he had facilitated it. If the accused had any form of responsibility, the story of the rape of the witness should not end with this reference.

Witness F was a third woman who testified in the Gazdić case. In two previous testimonies the public was excluded, and the Judicial Panel prohibited the team of trial monitors to be present at those two hearings. Witness F was calm during the entire testimony and provided clear, detailed and vivid descriptions of events devoid of anxiety and intense emotions. She appeared stoic and strong. She testified for witness D, who was sexually molested the entire night, raped and tortured by different men, and the accused was one of the perpetrators. The Defence questioned the truthfulness of this statement and tried to prove that the witness was unable to link the identity and physical features of the accused with the criminal who raped witness D. The witness spoke of the rape she suffered in two sentences, providing scarce details, while her testimony on the rape of witness D contained more details and was told with significantly greater emotion. Neither the Prosecutor, or the Judicial Panel or the Defence asked additional questions that would provide more details about the rape

All that the witness was allowed to say about the sexual molestation she suffered (by several men) was the following:

"I was taken to the bathroom and raped."

"I was sexually abused by Jure the entire night."

The need to publicly speak of rape during war is indirectly evident in cases where a woman testifies to confirm the truthfulness of someone else's testimony and uses the opportunity to say that she was raped herself (not by the accused). It happened to her as well; the witness felt the need to say that she was raped during the war, although her statement had no effect on the case. Still, she needed the space to tell her story and sought acknowledgement. While the information provided in these stories do not seem relevant for the prosecution of the current case, the judges and the prosecutor should allow women to tell their stories. If nothing else, this provides the opportunity for the stories to be recorded, and it is a practice used by the judges in the ICTY and the ICC.⁵⁵

Without being asked additional questions, and without the opportunity for her to talk about it, one can only guess what witness F was going through as she connected the details she mentioned "casually": while she was being raped in the bathroom, she was listening to screams, cries and calls for help from witness D, as well as vicious laughter of several men raping witness D

in the other room. During that time, her young son was alone in the apartment with many unknown, drunk and euphoric men. Just after she was raped in the bathroom, a person called Jure took her out to the room where he raped her and abused her in different ways throughout the entire night. She could hear her hungry and scared child screaming. The testimony of this witness served as the corroboration of evidence for the testimonies given in the hearings from which the public was excluded.

Since the accused was not directly involved in what she had suffered through, her personal experience was considered irrelevant. The witness did not get a chance to talk about the entire traumatic experience (since the men who raped her were not arrested), but she gave a detailed description of what happened to witness D. Even though questions by the Defence were provocative, the witness remained calm.

Here is an example of a highly cynical, irrelevant and cruel comment from the Defence Attorney directed to the witness:

Defence: You said earlier that Gazdić was keeping himself aside from what was going on?

Witness F: Yes.

Defence: Does it mean he was less important or less powerful than the rest?

Witness F: He was there, so he was just like the others.

Defence: *Well, you were there too!*

Witness F: But not by my own will.

In addition, since witness F had previously given a statement to the association of "Women Victims of War", the Defence Attorney asked ironically: "Did "Women Victims of War" try to tell you how Gazdić looked like?" This question aimed at several things, stemming from the inability of the witness to provide any details on how the accused looked like that night nearly 20 years ago. Her inability is completely justified. The accused was not the one who raped her, and she was sexually abused the entire night in front of her young child. It is therefore understandable that she does not remember the colour of his uniform, the type of weapon he had, and "what else he looked like"). Attempts to prove that the witness did not see the accused in the apartment she was abused in (or that she was manipulated by the aforementioned association) diminish the importance of her experience and denies the trauma that she was put through.

2. From the hearing of a survivor of the rape (The Gazdić case)

Even though the witness in the Gazdić case did not testify about her own wartime sexual trauma, she should have been treated as a wartime survivor of sexualized violence. However, the Defence Attorney employed a barrage of verbally aggressive language as well as intimidating body language during questioning. He also mentioned that he knew the witness well, which was inappropriate and irrelevant to the case. The presiding judge had to interrupt him frequently in order to prevent him from further harassing the witness.

The witness was visibly agitated and frustrated because of the Attorney's aggressive behaviour. This cross-examination exemplifies an insensitive approach to wartime sexualized violence survivors. The defence attorney aggressively insisted that the witness should provide detailed answers regarding the appearance of the defendant, such as whether he was "more black-haired" or "less black-haired" (because the witness described him as "black-haired"). Subsequently, he urged her to answer whether the perpetrator had a two-piece or a one-piece uniform. While we understand that circumstantial evidence needs to be established, these kinds of details must not be used to undermine the credibility of the witness. The *medica mondiale's* report notes that the credibility of a rape witness is questioned at the Court of BiH (War Crime Section) more than at the ICTY. However, we need to bear in mind that "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 survivor's credibility."⁵⁶

At the end of this excruciating, paradoxical, and needless interrogation, the defence attorney asked the witness whether the guns that the accused were holding had long or short barrels. Completely shaken, the witness powerlessly said at one point: "Put yourself in my position. A child left at home... Imagine what happened to me." Not to mention how inadmissible the witness' position is when she has to "defend" herself from the defence attorneys. This is something that frequently happens.

Fortunately, the presiding judge frequently reacted, but it could not stop the process of re-traumatization of the witness. The Defence should be

warned and interrupted when using an aggressive tone with a survivor of sexualized violence. Any kind of irony, sarcasm, or open and belligerent disbelief during the examination of such witnesses should be banned, especially if a person is still under medical treatment. Also, expecting witnesses to answer very specific questions about the details of a perpetrator's weapons, shoes or exact hair colour 20 years after the crime was committed seems unnecessary, especially for a crime that caused severe trauma for the victim.

Testimonies on attempted sexualized torture

1. Sexualized violence in front of a child – attempt to force oral sex (Vlahović case)

The female witness S17 was anxious and shaken while testifying about the sexualized violence she was subjected to by the accused. Thus, she spoke fast, causing the presiding Judge to interrupt her occasionally. She was asked to speak slower. The witness explicitly and directly testified what the accused forced her to go through. The witness said that her hair was pulled and she was beaten in the head while being forced to give oral sex to the perpetrator. Since her three-year-old son was in the same room with them, crying and screaming, the accused grabbed him by his neck, placed a bayonet knife on the child's neck and threatened to kill him if she did not obey. She begged him to put the child in another room, saying that she would do anything he wanted, but the accused ignored her pleas. So she continued to fight him in agony, and even thought about committing suicide by jumping through the window, but it was too far away. At some point, two soldiers who came in her apartment with Vlahović managed to persuade him to let her go because of the child. Still, he threatened he would come back to finish what he had started. As soon as they left she and her son hid in a neighbor's apartment. Vlahović returned soon after, but could not find her.

The Prosecutor did not ask any questions about the violence the witness suffered. The Defence concentrated on questioning the witness's ability to recognize the perpetrator in an aggressive and ironic attitude. The questions of the Defence were numerous and exhausting whose aim was to confuse the witness (one of the questions, posed in a suspicious tone, was:

“How come you don’t remember other faces, but only Batko’s?” The witness replied: “Even now, when I walk, I have this feeling he’s behind me.”)

She was needlessly exposed to re-traumatisation and was also addressed by the Defence as though she was the accused and not the victim, because there were some differences or inconsistencies between a statement she had previously given and her testimony in the Court. Those differences had nothing to do with her traumatic experience, yet the Defence used them as a way to discredit her story and ability to recognize the perpetrator. The Prosecutor objected rather late. The Judicial Council did not intervene during the Defence’s interrogation of the witness. It is not unusual that the survivor remembers the face of her perpetrator (because he was the one who abused her and her child), but does not remember the faces of other people involved in the crime. The Defence continued to question why the witness could not recall the faces of the two soldiers, as a way to cast doubt on the veracity of her testimony. The logical fallacy in the Defence’s line of questioning is apparent, so this line of questioning did not make any sense to the witness. The Prosecutor or one of the judges should have prevented the maltreatment of the witness by the Defence. This particular hearing points to a disturbing fact: the judicial mechanisms in place expect survivors of wartime sexualized violence to be precise and answer all questions in a “logical” way, while simultaneously ignoring the trauma and the scars left on the survivors and the re-traumatisation they face during the hearings.

Also, the question of the existence of several statements appears here. Given that the women who survived rape in Bosnia and Herzegovina were amongst the first women to speak up about the rape and sexualized violence they experienced during the war, it is not surprising that numerous statements were taken from them. It is rare that the statement given to different people under different circumstances can be exactly the same. Also, during the testimonies witnesses are asked to reiterate the exact words they stated almost 20 years ago. Even if the Prosecutors assisted witnesses in preparing witness statements (which is rarely the case), we have to keep in mind that women survivors were subjected to many interviews. Thus, it is possible that statements survivors gave to researchers and media outlets appeared in the courtroom without the prior

knowledge of the Prosecutor. Thus, the inconsistencies between statements provided in Court and statements that were given a long time ago should not undermine the credibility of the witness.

2. Attempt of forced sexual intercourse with a dead woman and witnessing another rape (Vlahović case)

The testimony described here precisely affirms our stance that wartime sexualized violence is still a huge taboo in families. The analysis of this testimony reveals how a traumatic experience affects trust, intimacy, and empathy between spouses.

The protected male witness S39 testified on two crimes of wartime sexualized violence. The first one involves him directly and the other involves him as a witness of a rape. After being brutally beaten by the accused, he was taken to a destroyed shop where a dead woman with her throat slit was lying on the floor. The accused then ordered the witness to have sexual intercourse with the slaughtered woman or else he would be “ripped like a fish”. (The witness spoke slowly, a bit chaotically, visibly shaken and embarrassed after recounting his experiences. He admitted he had not taken his medication that morning, which was prescribed by a psychiatrist because of the trauma that was inflicted on him by the accused.) S39 said that he had not done anything to the body of the dead woman despite the threats. He said that he only looked down in silence. After a while, the accused took him away and asked for money.

While he was being taken down the street with the accused and two other soldiers, a girl in her late teens (this description was provided by the witness) was passing by and the accused stopped her to ask for her name. The witness recalls that she had a Muslim name. The accused then forced her into another destroyed shop, while S39 stayed in the street with the two soldiers. He turned his head in the direction of the shop and saw the accused lying over the screaming girl. One of the soldiers hit him in the head because he was looking in that direction, so he did not dare turn his head again. He saw the accused and the girl leave the shop. Her hair was disheveled and she had scars and blood on her body and face. The accused then forced her in his car and they drove away. The witness never saw the girl again.

The Defence concentrated on the fact that the witness did not mention the very word “rape” in his previous statements. After explaining what he had seen again, the Defence attorney said, mockingly: “But scratching is not rape, don’t you agree?” The Presiding Judge intervened at this point and said that the Judicial Panel would decide if it was rape. Another thing that needs to be mentioned here is the importance in understanding what might be the reason S39 did not mention the word “rape” in his previous statements. He said he assumed that his wife was raped (she is also a protected witness in this case), but never directly asked her. He said they never talked about the sexual violence that they had experienced. It was obvious that the witness was highly traumatised, especially regarding the trauma of sexual violence. (The Defence even asked him if he took his therapy that morning, because his speech was chaotic and inconsequent. The witness replied negatively, even though he stated he had been taking medicines prescribed by his psychiatrist to reduce the effects of the torture he survived). Despite this, the Defence still exhibited an insensitive approach towards him.

3. Protected witness S15: possible rape?

S15 did not testify as a survivor of sexualized violence, but at one point she said: “Batko pulled out his knife and ordered me to lie down on the bed, threatening he would slit my throat. But he did not do it... When they finally left, we were in complete shock. I could not stand on my feet for five days.” The Prosecutor did not ask any additional questions. It is unclear if he did not ask any more questions because he did not want to re-traumatise the witness or because it did not occur to him that this statement indicated that sexual violence had occurred.

IV-4. CONCLUSION

While the overall conclusions and recommendations will be provided below in Section VI, we find it important to separately address some of the common issues that appeared during our trial monitoring exercise:

- The practice of aggressive and provocative interrogation of survivors of wartime sexualized violence by the Defence must be abandoned. This is not the appropriate way to question people who are severely traumatized. Their trauma is continuously reinforced because they live in a highly patriarchal society and the Court must not serve as a place to aggravate their trauma;
- Attempts to discredit the truthfulness of the testimony of the survivors of rape by the Defence should not be done using accusatory overtones and innuendos in order to attempt to prove that their testimonies are fabricated so the woman could receive compensation as a civilian survivor of war, or to propose that she was persuaded by the Association of Women to testify against the accused;
- The witness protection system is not consistent because, for example, it is unacceptable to state the name of a documentary film in which one of the protected witnesses is presented using her full name;
- It is important that the questions posed to the witness in relation to the act of rape be carefully designed in order to avoid the possibility of the witness experiencing them as cynical, offensive, and/or unnecessary. Although the ACIPS project team is aware of the legal discourse and interrogation procedures for proving the facts, questioning of survivors who experienced a brutal trauma must be especially sensitive;
- The term “sexual relationship” used in legal discourse in courtrooms, as a synonym for “rape”, should not be synonymous terms. “Sexual Relationship” is a phrase that explains an action involving a sexual act that is consensual. Rape is a criminal and torturous act. Also, this phrase is too vague to adequately describe the torture that people suffered;

- The balance in favour of respecting the rights of the accused to a fair trial as opposed to the rights of a highly traumatized witness (rape survivor) to not testify again is highly questionable. It strongly indicates the Court's lack of understanding and care for the situation of the rape survivors. Moreover, the Court's approval of the request of the Defence encourages unprofessionalism, such as the deliberate obstruction of the trial by the Defence Attorneys.

SECTION V

STATISTICAL DATA ON THE BIH COURT

V-1. DATA ON WAR CRIMES TRIALS IN BOSNIA AND HERZEGOVINA

As already noted, apart from the trials at the Court of BiH, cases have been tried at the lower level courts in the Federation of BiH, Republika Srpska and District Brčko. Unfortunately, there are no adequate statistics and data on the total number of war crimes cases before the lower courts in BiH. This is also noted in the OSCE's report from 2011 *Delivering Justice in Bosnia and Herzegovina*, where the difficulties to obtain a thorough overview of the number and nature of war crimes case files located at the Court and Prosecutor's offices throughout BiH were noted.⁵⁷ The numbers on war crimes cases in Bosnia and Herzegovina can only be seen in the annual reports of the High Judicial and Prosecutorial Council⁵⁸. These are not separately analysed. They are listed under the individual court data and are presented in the numbers of the cases for that year. So, for 2011 it is possible to extract the following information:

- At the Court of BiH there were 903 cases related to war crimes in 2011 under different designations. Out of those, the first instance had 722 and the appeal instance had 181 cases. Out of these numbers 42 cases were in the trial procedure before the first instance (designation K), and the appeals chamber had in procedure 16 cases (designation Kž) of which the first instance judgment was delivered in trials.
- At the Supreme Court of Federation of BiH there were 17 cases related to war crimes
- At the Supreme Court of Repulika Srpska there were 9 cases related to war crimes
- At the Cantonal Court of Bihac there were 10 cases related to war crimes
- At the Cantonal Court of Odzak there were 0

cases related to war crimes

- At the Cantonal Court of Tuzla there were 2 cases related to war crimes
- At the Cantonal Court of Zenica there were 0 cases related to war crimes
- At the Cantonal Court of Gorazde there were 0 cases related to war crimes
- At the Cantonal Court of Novi Travnik there was 1 case related to war crimes
- At the Cantonal Court of Mostar there were 3 cases related to war crimes
- At the Cantonal Court of Siroki Brijeg there were 0 cases related to war crimes
- At the Cantonal Court of Sarajevo there were 2 cases related to war crimes
- At the Cantonal Court of Livno there were 2 cases related to war crimes
- At the County Court of Banja Luka there were 2 cases related to war crimes
- At the County Court of Bijeljina there were 4 cases related to war crimes
- At the County Court of Doboj there was 1 case related to war crimes
- At the County Court of Trebinje there was 1 case related to war crimes
- At the County Court of East Sarajevo there was 3 cases related to war crimes.

Consequently, out of this data it is only possible to conclude that in 2011 there were around 116 trials before different level courts in BiH that dealt with war crimes. Also, it is possible to conclude that there were around 977 cases related to war crimes that were dealt with in some respect at the courts in BiH. Apart from this imprecise data, there is hardly any other information available. The available data does not include the more detailed information on the cases such as the category

(or nature) of crimes committed during the war, number of and type of charges, the number of witnesses or the regions where the war crimes took place.⁵⁹

The data on the war crime trials must not be so scarce. It must be presented better, clearer and be reliable. During this research it was very problematic to obtain any data, especially data that concerns the witnesses, their gender and protective measures assigned to them. Also, it is almost impossible to determine which cases deal with sexualized violence before the publication of the judgment, since indictments are no longer available and no other data differentiates the war crimes cases (apart from the fact that they are war crimes cases unless the judgment is read and it is not known what crimes are being charged).

The only thing that all the documents referred to in this research agree on is that the significant increase of the war crimes cases before the lower courts was expected. Given that only monitoring of cases on the lower level, if it is done at all, is done by the OSCE and that the data provided by the courts is inadequate, it proves that the trial monitoring (especially gender sensitive trial monitoring) should be established during the war crimes trials in the Court of BiH and in the lower courts in BiH. The non-existing data on the types of war crimes trials and witnesses (such as sex-disaggregated number of witnesses, sex-disaggregated data on what witnesses testify about, sex-disaggregated data on protection measures and sessions from which the public is excluded) shows that the courts are not really witness-oriented. The need for trial monitoring is further strengthened because chaos has been created by the different criminal codes that are being applied in those trials.

V-2. CURRENT SITUATION AT THE COURT OF BIH

Since 2005, there have been numerous war crimes trials in the Court of BiH. The War Crime Section at the Court of BiH has been established within the scope of the ICTY's completion strategy with the task to prosecute all mid and low-level perpetrators of war crimes in BiH during the war in the 1990s. It is a unique institution in the world, where war crimes are prosecuted at the national level. Only the Special Court of Sierra

Leone bears some similarities. The experiences of the war crimes prosecutions at this Court are important, since with the establishment of the International Criminal Court it is expected that more and more war crimes trials will be taking place at the national levels (with ICC prosecuting high-ranking cases and national courts in post-war countries prosecuting mid and low-level cases).

With this in mind, it needs to be noted that numerous survivors have already testified before the Court of BiH and the number of cases and witnesses should increase over the next few years. Within the Court of BiH, the Common Secretariat and Registry Office prepare and manage the statistics of the Court activities: they include various parameters (number of detainees by sections, courtroom usage per month in days, duration of hearings in hours by sections, etc...). However, there is no gender-segregated data or statistical data on witnesses (protection measures – e.g. if women or men are more often assigned protection measures –, types of these measures, type of cases they are testifying for – e.g. if women are only testifying in sexualized violence cases, etc...). Even when data is available, it is not properly presented (it needs to be collected from the judgments). The presentation of data is done in such a way so as to just reflect the quantity of the cases and witnesses that the Court of BiH has to deal with, but there is no data presented that examines the quality of the work of the Court (e.g. needed for analytical analysis, or to see how charges are made, protection measure assigned and similar data).

Compiling a sex-disaggregated database has not been a court practice in the countries of the former Yugoslavia, or even at the ICTY. Accordingly, there is currently no gender perspective on war crimes related prosecution and testimony in BiH and it is extremely difficult to establish a gender perspective on how war crimes are prosecuted and adjudicated in BiH. However, the Court of BiH has the obligation that is stated in Article 22 of the Law on Gender Equality to differentiate by sex all statistics and information that is collected, to keep it as an integral part of statistical records and to make it publicly available.

V-3. IMPORTANCE OF STATISTICS

The study by *medica mondiale* represented the first step towards opening a public debate on gender-sensitiveness in war crimes trials in BiH. It strongly recommends diversifying and segregating the data collected in war crimes trials according to sex so as to build an empirical evidence base concerning this issue. It especially recommends including sex-disaggregated data on the types of war crimes charges, number of witnesses, and types of protection measures issued for men and women witnesses during the trials. The creation of the proposed sex-disaggregated database would allow for the first reliable gender-sensitive assessment of BiH war crimes trial processes and thus allow for first evidence-based analyses on this topic. Such empirical data would offer a space for apolitical and non-ideological information and thus represent an irrefutable basis upon which advocacy in favor of a more gender-sensitive treatment of women witnesses and survivors in war crimes trials could be built upon.

In addition, the way data should be presented should allow for more analytical and qualitative analyses to be conducted in respect to the prosecution of war crimes in Bosnia and Herzegovina. For instance, since rape and sexualized violence are not treated as a separate crime in the Criminal Code of BiH, data can only be collected through a detailed analysis of the criminal charges, and not only by the list of articles to which the indictments refer. Only through a deeper analysis of the entire indictment would it be possible to know how many defendants have been charged specifically for rape in war. Unfortunately, the information provided at the moment by the Court of BiH (and is available on the website of the Court of BiH) is presented in the short variants charges (from the indictments), from which it is impossible to determine any statistics related to rape and sexualized violence charges.

The creation of a gender-disaggregated database would offer a first reliable gender-sensitive assessment of BiH war crimes trial processes and thus allow for first evidence-based analyses on this topic. This hard data will offer a politically and ideologically unbiased proof and thus represent an irrefutable basis upon which advocacy in favor of a more gender-sensitive treatment of women witnesses and survivors in war crimes trials could be

built. In addition, the way in which the data is presented should allow for a more analytical and qualitative analyses to be conducted in respect to the prosecution of war crimes in Bosnia and Herzegovina. This can lead not only to the establishment of different trends in respect to the prosecution of war crimes, writing of the recommendations and policies for the improvement of the prosecution of war crimes in BiH, but it can also be the basis for improving the international approach to the prosecution of war crimes.

Beyond the discussion about the treatment of women witnesses and survivors in war crime trials, the gathered gender-disaggregated data may be used to inform many other discussions. They may inform the public debate on women's position in Bosnian society, or offer evidence to support or inform campaigns in favor of good practice in trial processes, be it towards women or men, be it in BiH or at the international level, as some international judges and prosecutors were appointed at the Court and Prosecutor's Office of BiH and participated in the war crimes trials. The ICC and the ICTY may also be interested in this data. Also, international human rights organizations such as Amnesty International, Human Rights Watch, and etc... may find this data helpful for their analysis, as well as numerous academics that deal with war crimes. Last, the gathered gender-disaggregated data may very well inform the discussion about transitional justice, as it is of the utmost importance that women feel free to testify as witnesses or survivors in war crimes trials without fearing stigma, disdain or condemnation from judges, prosecutors and the society in which they live.

SECTION VI

CONCLUSION AND RECOMMENDATIONS

This entire analysis includes comments on practices used in terms of the environment that the ACIPS project team believe is harmful to people who survived some form of sexualized violence or rape during the war, and on activities of the Court and the Prosecutor's Office in BiH that the ACIPS project team found to be inappropriate in terms of feminist and gender sensitivity. The ACIPS project team have analysed these aspects by providing explanations as to why such practices are unacceptable, and, wherever it was possible, considering our competencies, the ACIPS project team provided suggestions for overcoming these upsetting practices.

Here is a short summary (the ideas have already been elaborated in the report) of recommendations the ACIPS project team believes could be used to support a shift in an awareness of society regarding psychological, economic, symbolic, health, social and any other contexts in which these stigmatised (publicly or privately) women and survivors of war rape live.

1. Increase the transparency of the Court of BiH and Prosecutor's Office.
 - Stop the practice of anonymization.
 - Make the confirmed indictments available on the website.
 - Respect the obligations stemming from the Freedom of Information Act.
 - Reconsider the practice to close almost all the rape testimonies to the public.
2. In order to make sure that the correct information is provided to the public and that the protected data is not leaked, the Court and Prosecutor's Office should conduct training for journalists, even for an expert audience interested to monitor certain aspects of the trial, e.g. to train stakeholders in order to know how to relate to the information.
3. The establishment of a gender sensitive trial

monitoring by civil society in BiH in the cases of war crimes is strongly encouraged, especially in cases containing charges for sexualized violence at all judicial levels.

4. The Court of BiH and Prosecutor's Office are invited to file the gender disaggregate data in accordance with Article 22 of the Gender Equality Law.
5. The judges and prosecutors are encouraged to make an investigation when a testimony reveals that there were incidents of sexualized violence not mentioned in the charges (at least for the purpose of making a record of it).
6. The Court of BiH and Prosecutor's Office are invited to make the courtroom a more responsive place for the stories of women survivors. With this aim in mind, one of the first actions should be that the Court and Prosecutor's Office themselves organize additional training for its employees in various interdisciplinary areas, such as the area of gender and a gendered approach to justice.
7. While we understand the importance of securing fair trials, this has been perverted to the extent where everything is subordinated to the rights of the accused, while the survivors, already living at the margins of the society, are being neglected. We strongly recommend more survivor-oriented procedures in the courtroom.
8. While on one hand it is easier to process rape within a group of other crimes, on the other hand this practice undermines such crimes because it allows for the existence of a hierarchy of crimes. In a way, it makes sexualized violence less relevant than the "encompassing" crime from the indictments (i.e. torture).
9. The Defence should always be warned and interrupted when using an aggressive tone with a survivor of

sexualized violence. Any kind of irony, sarcasm, or open and belligerent disbelief during the examination of such witnesses should be banned, especially if a person is still under medical treatment.

Both men and women, as witnesses or survivors, are involved in these trials, but for women survivors and witnesses, without proper gender sensitiveness and adequate education of the actors involved in the trial processes, the experience of testifying before the Court may be particularly difficult.

Without proper gender sensitization and adequate education and training of all the actors involved in the trial processes, the experiences of testifying in the court for women survivors will continue to be an unwanted and traumatizing experience. The only way the survivors of wartime rape and sexualized violence can possibly get any kind of satisfaction is to ensure them that the juridical system works properly, that it is responsive to their needs and the perpetrators are being punished. Furthermore, the crucial thing for encouragement and empowerment of the people who do not want to be witnesses (out of fear or distrust in the juridical system and protection of witnesses) is a functional mechanism of justice and a high level of sensibility in terms of how the court treats the witnesses/survivors.

ENDNOTES

- 1 Cultural norms and values of the society are forming the basis for understanding gender roles and stereotypes.
- 2 With respect to these events the High Judicial and Prosecutorial Council notes the following in its 2011 Annual Report:

It remains unclear what the consequences would be for these institutions and the rule of law in Bosnia and Herzegovina and Republika Srpska if the referendum had been held on 13 June, and if it were successful. However, the OHR, the EU and the OSCE, as well as a number of local entities, severely criticized the decision to hold a referendum.

This issue was resolved in a way that the authorities of the Republika Srpska withdrew the decision to hold a referendum and agreed to have their complaints resolved within the framework of the structured dialogue about justice organized by the European Union, which began in mid-year (High Judicial and Prosecutorial Council, Annual report 2011, page 66).
- 3 United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992). The Resolution: <http://www.ohr.int/other-doc/un-res-bih/pdf/s92r780e.pdf>

The final report: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf <http://www.his.com/~twarrick/commxyu1.htm>
- 4 For more information please see, <http://www.idc.org.ba/> and <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm#Scale%20of%20the%20problem>
- 5 The ICTY came about as a result of the Bassiouni Commission of Experts' first interim report of 9 February 1993. The Statute of the Court is available at <http://untreaty.un.org/cod/avl/ha/icty/icty.html>
- 6 On 22 February 2001, Dragoljub Kunarac was sentenced to 28 years' imprisonment for torture, rape and enslavement as crimes against humanity and torture and rape as violations of the laws or customs of war. More on ICTY and sexualized violence crimes: <http://www.icty.org/sid/10312>.

The Akayesu case at the ICTR was the first time in history that a defendant was convicted of rape as an instrument of genocide and as a crime against humanity. See 2011-2012 Progress of the World's Women Report – In Pursuit of Justice, p. 86
- 7 Source of information: 2011-2012 Progress of the World's Women Report – In Pursuit of Justice, p. 86-87.
- 8 Information at the ICTY official website: <http://www.icty.org/sections/Outreach/CapacityBuilding>
- 9 Cantonal Courts in the Federation of BiH, County Courts in Republika Srpska and Basic Court in Brcko District.
- 10 OSCE, Mission to Bosnia and Herzegovina, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, August 2008, page 5, available at <http://www.oscebih.org/documents/12615-eng.pdf>
- 11 OSCE, HRW and ICTJ discuss this issue in their reports
- 12 The Court of BiH applies the Criminal Code of Bosnia and Herzegovina from 2003 in the majority of cases, and there are just three verdicts for war crimes where the law from the former state has been applied instead.

Reference to the Criminal Code of the Socialist Federative Republic of Yugoslavia: On 18 April 2012 Panel of the Appellate Division of Section I found the accused Đorđislav Aškraba guilty under the Criminal Code of the former Yugoslavia and not the Criminal Code of Bosnia and Herzegovina, under which he was indicted because it was more favorable for the defendant.
- 13 **Article 172, paragraph 1, point (g):** Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, **to sexual intercourse or an equivalent sexual act (rape)**, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;

Article 173, paragraph 1, point (e): Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, **to sexual intercourse or an equivalent sexual act (rape)** or forcible prostitution, application of measures of intimidation and terror, taking of hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial, forcible service in the armed forces of enemy's army or in its intelligence service or administration
- 14 Text of Rome Agreement available at http://www.ohr.int/ohr-dept/hr-rol/thedep/war-crime-tr/default.asp?content_id=6093
- 15 OSCE, Mission to Bosnia and Herzegovina, *War Crime Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, March 2005, available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf, page 6
- 16 **Rule 11 bis Referral of the Indictment to Another Court (Adopted 12 Nov 1997, revised 30 Sept 2002)**

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

 - (i) in whose territory the crime was committed; or
 - (ii) in which the accused was arrested; or (Amended 10 June 2004)
 - (iii) having jurisdiction and being willing and adequately prepared to accept such a case,
(Amended 10 June 2004) so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Revised 30 Sept 2002, amended 11 Feb 2005)

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Revised 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005)

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused. (Revised 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005)

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Referral Bench may order that protective measures for certain witnesses or survivors remain in force; (Amended 11 Feb 2005)

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf. (Revised 30 Sept 2002)

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial. (Revised 30 Sept 2002, amended 11 Feb 2005)

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10. (Revised 30 Sept 2002, amended 11 Feb 2005)

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused. (Revised 30 Sept 2002, amended 11 Feb 2005)

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules. (Amended 11 Feb 2005)

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision. (Amended 11 Feb 2005)

17 Official Gazette of BiH, 61/04,46/06, 53/06, 76/06

18 OSCE, Mission to Bosnia and Herzegovina, *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE Monitoring*, 2010, available at http://www.oscebih.org/documents/osce_bih_doc_2010122314321282eng.pdf

19 UN, Security Council resolution 1503 (2003) International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/481/70/PDF/N0348170.pdf?OpenElement>

20 UN, Security Council resolution 1534 (2004) International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/286/29/PDF/N0428629.pdf?OpenElement>

21 See OCSE *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina*, *ibid* page 10,.

22 *Ibid*.

23 Nevertheless in its reports in Jankovic case the OSCE made several significant observations. In the second report in the case of Jankovic (OSCE, Mission to Bosnia and Herzegovina, Second Report: Case of Defendant Gojko Jankovic -Transferred to the State Court pursuant to Rule 11bis, July 2006) OSCE noted the lack of uniform application of protective measures in cases Stankovic and Jankovic and noted that certain provisions of the Law on Witness Protection lack clarity or do not sufficiently regulate all matters at issue. Furthermore, in the same report the OSCE noted that "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." We believe that this is significant for the women who testify, since they gave too many statements to too many different persons sometimes not even being aware that they were giving the statements. In the cases of sexualized violence women sometimes did not disclose that they were sexually assaulted due to different reasons which in the patriarchal society and especially in small places are understandable. Unfortunately, apart from disclosing what happened in the trials and noting that "at the session of 6 June, the Presiding Judge 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" 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 double standards. In its third report the significant intervention by OSCE was made when "the Prosecution asked certain witnesses whether they were virgins before they were raped, while the Trial Panel did not disallow such questions." (OSCE, Mission to Bosnia and Herzegovina, Third OSCE Report in the Gojko Jankovic Case: Transferred to the State Court pursuant to Rule 11bis, October 2006, page 1). The OSCE called upon the BiH Criminal Procedure Code provisions prohibiting questions about the injured parties' previous sexual experience, as well as questions that are irrelevant to the establishment of the facts alleged in the indictment. Furthermore, in Jankovic case the OSCE made two more significant interventions in its Fifth Report: "The first issue concerns the transparency of the proceedings, in that the Court refused to allow journalists access to information that is prima facie public, on the basis of an insufficiently justified decision, lacking any material facts to support it... The second issue concerns... the necessity for courts to adopt a clear policy regulating judicial involvement in plea agreement negotiations [and]... to ensure that judges have a proper understanding of their role in safeguarding the interests of justice in these proceedings and would dispel questions about respect for the presumption of innocence prior to the formal pronouncement of the verdict." (OSCE, Mission to Bosnia and Herzegovina, Fifth Report in the Gojko Jankovic Case - Transferred to the State Court pursuant to Rule 11bis, May 2007, page 2). In addition, in its fifth report in Mejacic et al case 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.” (OSCE, Mission to Bosnia and Herzegovina, Fifth Report in the Zeljko Mejakic et al. Case - Transferred to the State Court pursuant to Rule 11bis, September 2007, page 2) Also in the same report the OSCE noted the lack of free legal aid to injured parties, and with that regard the significant were the OSCE’s “urging the authorities to consider creating mechanisms to ensure the respect for injured parties interests” 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.” However, in its Fifth Report in Jankovic case for example the OSCE only noted without any comment the fact that the Panel considered the Defendant’s family status, being father of three children, as a the mitigating circumstance. Given the fact that Jankovic was found guilty for crimes against humanity for 5 counts of sexualized violence - direct perpetrator for rape (3 counts), co-perpetrator (1 count) and sexual slavery (1 count) and aiding and abetting (3 counts) - the fact that he is married father of three children should rather be taken as aggravating circumstances. This is one of the issues that point out for the need for gender sensitive monitoring.

- 24 While seemingly the Court of BiH is open to the public and is fulfilling its obligations arising out of the BiH legislation (primarily Criminal Procedure Code, Law on Protection of Witnesses under Threat and Vulnerable Witnesses and Freedom of Information Act) and its task to discover the truth about the war (through prosecution of the war crimes), this is only matter of “keeping up appearances”. The Court of BiH within its Registry Office has the Public Information and Outreach Section that each day updates the Court’s website and provides information on activities of the Court to the Media. However, while the Court’s website is updated everyday and the PR of the Court appears on the news outlets on regular basis, these are emptied of the important information, either hidden behind the legal language or anonymous data on perpetrators, survivors and acts. Also, while it appears that needed information is not immediately available through website but may be obtained if appropriately requested (by filling in and submitting the numerous request forms such as AV request, Visit to the Court Request, Interview Request, Request of the public access to information under the court’s control and community outreach etc.), in reality this is not the case. The Court has specialized in finding excuses to avoid providing the information, and if unable to find adequate excuse to simply ignore the requests. The Office of the Prosecutor is even more successful in this game of “keeping up appearances”.
- 25 Sućeska-Vekić, Anisa, Discussion “Public Outreach and Legal Support in Bosnia and Herzegovina” organized within the project *Localising International Law Research Project*, by University of Cambridge, Economic and Social Research Council and Trial, in Sarajevo 20 September 2012
- 26 Ibid.
- 27 Richard H. Steinberg, “Constructing the Legacy of the ICTY”, in Richard H. Steinberg ed. *Assessing the Legacy of the ICTY*, Martinus Nijhoff Publishers, Leiden: 2011, 3-4
- 28 Patrick L. Robinson “National Ownership: The Key Concept Of The Tribunal’s Legacy Vision”, in Richard H. Steinberg ed. *Assessing the Legacy of the ICTY*, Martinus Nijhoff Publishers, Leiden: 2011, 11
- 29 Sućeska-Vekić, Anisa, *ibid.*
- 30 Ibid.
- 31 Ibid.
- 32 Paraphrased according to <http://www.rtvusk.ba/content/transparentnost-od-izuzetne-va%C5%BEnosti-za-%C5%BErtve-i-njihove-porodice>
- 33 Sućeska-Vekić, Anisa, *ibid.*
- 34 Ibid.
- 35 Christian Axboe Nielsen, Sud BiH doprinosi vlastitom uštkivanju, jun 2012, dostupno na <http://www.bim.ba/bh/325/10/35254/>
- 36 Ibid.
- 37 Ibid.
- 38 Law on Gender Equality of BiH – Amended Text, *Official Gazette 32/10*
- 39 medica mondiale is a non-governmental organisation based in Germany which stands up for women and girls in war and crisis zones throughout the world. Medica Mondiale supports women and girls who have experienced sexualised violence, regardless of political, ethnic or religious affiliation. Together with women from around the world, Medica Mondiale is committed to helping women to lead a dignified and self-determined life.
- 40 Mischkowski, Gabriela and Gorana Mlinarevic, “...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 Yugoslavia, medica mondiale e.V., 2009, available at http://www.medicamondiale.org/fileadmin/content/07_Infothek/Gerechtigkeit/medica_mondiale_Zeuginnenstudie_englisch_december_2009.pdf
- 41 Criminal Procedure Code of BiH, *Official Gazette of BiH 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.*
- 42 Unfortunately, the exact data is not available to the public and these are only our estimates based on the information received from the judgments published at the Court of BiH website.
- 43 Mischkowski G. and Mlinarevic G, *ibid*, page 65.
- 44 Ivanišević Bogdan, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*. International Center for Transitional Justice (ICTJ), 2008, page 13
- 45 Ibid.
- 46 Article 8 of the Law on Protection of Witnesses, *Official Gazette of BiH Nos. 03/03, 21/03, 61/04 and 55/05*

- 47 The protected witness S2 had protective measures that included prohibition of disclosure of identity – personal information and pictures. Also, the public was excluded during the testimony of the protected witness S2. She testified in the courtroom before the Panel of judges and the accused.
- 48 It is significant to point out that the initial indictment did not contain the sexualized violence charges (see paras 23 and 417, *Prosecutor v. Akayesu*, (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)). The Trial Chamber in its judgment in para 417 noted that it “understands that the amendment of the Indictment resulted from the spontaneous testimony of sexualized violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure” *Akayesu case*, *ibid*
- 49 According to Diane Marie Amann it was thanks to judge Pillay, the sole women judge on the panel and pressure by human rights groups that the indictment was amended with rape charges against Akayesu. pp.196, Diane Marie Amann, *Prosecutor v. Akayesu*. Case ICTR-96-4-T, *The American Journal of International Law*, Vol. 93, No. 1. (Jan., 1999), pp. 195-199.
- 50 Case of Albina Terzić
- 51 According to the State Prosecution indictment, Bogdanović, who was accompanied by five members of the Croatian Defence Council, HVO, came to a Bosniak couple’s apartment in Mostar at night on May 25, 1993. He raped the woman there. After that, he and the other soldiers took her husband to Heliodrom detention camp, where he stayed for 30 days.
- 52 Babić at al. (2005) *Komentar krivičnih/kaznenih zakona u Bosni i Hercegovini*, Sarajevo: Savjet/Vijeće Evrope i Evropska Komisija, 566-7
- 53 Mischkowski and Mlinarevic, *ibid*, 71.
- 54 *Ibid*.
- 55 See for example ICC’s Thomas Lubanga Dyllo trial which did not have sexualized violence charges but judge Elizabeth Odio Benito asked the witnesses to clarify statements about the girl child soldiers and pregnancies. Also, the Akayesu case (ICTR) serves as an example for this issue – see the story about the first indictment for rape in: Mlinarević, Gorana (2008). “Sexual violence against women as a war crime”. *Dijalog*, br.3-4, pp. 53-85
- 56 Mischkowski and Mlinarevic, *ibid*. 71.
- 57 OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, 2011, available at http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf
- 58 High Judicial and Prosecutorial Council of BiH, *Annual Report for 2011*, available at <http://www.hjpc.ba/intro/gizvjestaj/pdf/GodisnjilzvjestajVSTSBiH2011.pdf>
- 59 The State Strategy for Work on the War Crime Cases that was adopted in December 2008 recognized this problem and provided for the formation of centralized single evidence with the Court of BiH starting from the 1 March 2003 since it has real competence over the war crime cases. All courts were to send the required data to the Court of BiH and evidence is to be updated regularly. Unfortunately this data is not available yet. The High Judicial and Prosecutorial Council in its quarterly reports now includes numbers of resolved and unresolved war crime cases before each court within the reporting period but nothing more than that.

In this section we first give some data on war crimes trials in BiH, followed by a summary and grounds for indictments for the monitored cases as an addition to the analyses of the testimonies from the report. It includes analyses of five verdicts in the cases of wartime rape, with an emphasis on how the punishment was adjudged and how the mitigating circumstances were determined. These are analysed from a perspective of gender-awareness. Also, this section deals with several important issues that are not directly connected with the core topic of this research. These issues relate to the trial costs after the accused is sentenced and advising the “injured parties” to pursue civil lawsuits. In the end, the ACIPS project team propose a model that can be developed and expanded and used for collecting gender-segregated statistical data.

ANNEX 1: SHORT DESCRIPTION OF MONITORED CASES

In the period 23/05/2011 – 25/05/2012, 11 cases were monitored under the ACIPS’s project “Introducing Gender Trial Monitoring for Wartime Sexualized Violence Cases in Bosnia and Herzegovina”. The Trial Monitors were present at 148 hearings. Out of approximately 60 war crime cases (in Section I), and according to the scarce information from the indictments currently available on the website of the Court of BiH (see more on the unavailability of indictments above), 11 cases (Vlahović, Baričanin, Bogdanović, Lalović, Novalić, Tripković, Terzić, Gazdić, Krsmanović, Bojadžić, Bašić et al.) contain charges concerning rape and other forms of sexualized violence. Out of approximately 60 indictments for war crimes, only one defendant during the monitored period was a woman (Albina Terzić).

Charges and factual allegations in the indictment of the accused¹

Veselin Vlahović was charged with the criminal offense of Crimes Against Humanity pursuant to Article 172(1) (h) in conjunction with (a)(c)(e)(g)(i)(k) and 173(1)(f) of the Criminal Code of Bosnia and Herzegovina (CC BiH), all in conjunction with Article 180(1) of the CC of BiH. The Indictment alleges, *inter alia*, that the accused Vlahović, as a member of the paramilitary forces of the so-called Serb Republic of BiH, later Republika Srpska, persecuted the civilian non-Serb population from Grbavica, Vraca and Kovačići settlements in Novo Sarajevo Municipality. As a part of the persecution on national, ethnic and religious grounds, the accused Vlahović allegedly committed the crimes of deprivation of life (murder), slavery, rape, unlawful detention, physical and mental abuse (inhumane treatment), robbery and enforced disappearance of the civilian non-Serb population.

Saša Baričanin was charged with the criminal offense of Crimes Against Humanity pursuant to Article 172(1)(a) (c)(g)(k) of the Criminal Code of Bosnia and Herzegovina (CC BiH), all in conjunction with Article 180(1) of the CC of BiH. As alleged in the Indictment, the accused Baričanin in the month of July 1992, together with Veselin Vlahović, also known as Batko, in the Sarajevo neighborhood of Grbavica, inhumanely treated the detained civilians with the intention of inflicting serious physical and mental suffering, robbed them and deprived the life of three civilians. As alleged in the Indictment, the accused Baričanin repeatedly raped a female person whom he detained in an apartment, during which time he enabled another unidentified person to rape her. On 7 June 2012, The Bosnian State Court confirmed **the first instant verdict to 18 years of prison**. Baričanin is guilty for involvement in the murder of three members of the Bosniak family, and for multiple rapes and enslaving a woman in the Sarajevo neighborhood of Grbavica in 1992.

Novica Tripković was charged with the criminal offence of Crimes against Humanity in violation of Article 172(1)(a)(g)(k) of the Criminal Code of BiH (CC BiH), in conjunction with Article 180(1) (individual criminal responsibility) of CC BiH. As alleged in the Indictment, the accused Tripković, on 30 April 1992, arrived armed to a house in the settlement of Donje Polje in Foča in the evening hours and raped a female using force and threat. The accused Tripković, allegedly, in the same house in the settlement of Donje Polje, also mentally abused the same person several times. On an undetermined date in late June 1992, the accused Tripković also killed a man at an entrance to a house. On 7 June 2011, Novica Tripković was sentenced to **8 years in prison (first instance verdict)**. Tripković is guilty for the rape and physical and mental abuse of one woman from the end of April to June 1992 and the murder of Vejsil Delić in Donje Polje village/ Foča municipality in June 1992.

Slavko Lalović was charged with War Crimes against Civilians pursuant to Article 173(1)(c)(e) of the Criminal Code of BiH (CC BiH) in conjunction with Article 31 and Article 180(1) of CC BiH (Individual Criminal Responsibility). According to the Indictment, Lalović, as a reserve police officer in the Kalinovik Public Security Station, while guarding a prison for unlawfully detained civilians in Miladin Radojević Elementary School, allowed soldiers to enter and commit violence against detained civilians. By doing so, Defendant Lalović, acting contrary to his duty to protect the detained civilians, aided in the violence committed against the civilians. In the evening of an unknown date in late August 1992, Defendant Lalović allowed two members of the Army of the Serb Republic of BiH to enter a room in which they raped a female detainee. As further alleged in the Indictment, Defendant Lalović intimidated and terrorized the civilians detained in said school in August 1992. On 29 August 2011, Slavko Lalović was **sentenced to 5 years in prison (first instance verdict)**. Lalović is guilty for permitting two members of the Army of Republika Srpska to enter the school/camp in Kalinovik and rape a female detainee.

Jasko Gazdić is charged with the criminal offence of Crimes against Humanity in violation of Article 172(1)(g) (k) of the Criminal Code of BiH (CC BiH), in conjunction with Article 180(1) (individual criminal responsibility) of

CC BiH. The Indictment *inter alia* alleges that the accused Jasko Gazdić, as a member of the military forces of the so-called Serb Republic of BiH, in the territory of Foča Municipality, committed the act of rape against several women of Bosniak ethnicity who were detained in the sports hall "Partizan". As the Indictment alleges, the accused Gazdić sexually enslaved an underage female using force and physical abuse. He enabled others to rape women with the intent to inflict serious bodily and mental injuries on them, and he inhumanely treated civilians. On 9 November 2012, Jasko Gazdić was **sentenced to 17 years in prison (first instance verdict) for the rape of several women as well as for enabling other men to rape women**.

Velibor Bogdanović was charged with **War Crimes against Civilians** pursuant to Article 173(1)(e) of the Criminal Code of BiH (CC BiH) in conjunction with Article 180(1) of CC BiH (Individual Criminal Responsibility). As alleged in the Indictment, the accused Bogdanović, as a member of the Croatian Defence Council (HVO), on the night of 25/26 May 1993, together with five unidentified and armed soldiers, entered into the apartment of a Bosniak married couple in Mostar. Upon entering the apartment they searched it and took jewellery, a vehicle and a certain amount of money. The accused Bogdanović, threatened the woman and raped her. The accused, together with the other soldiers, unlawfully took her husband to "Heliodrom" prison where he was detained for thirty days. On August 29, 2011, Velibor Bogdanović was **sentenced to 6 years in prison (first instance verdict)**. Bogdanović is guilty of rape and unlawful imprisonment of civilians in Mostar in 1993. Velibor Bogdanović is currently on the run.

Ćerim Novalić was charged with War Crimes Against Civilians pursuant to Article 173(1)(e) (rape) of the Criminal Code of Bosnia and Herzegovina (CC BiH) in conjunction with Article 180(1) of CC BiH (individual criminal responsibility). As alleged in the Indictment, during the armed conflict between the Army of Republic BiH (R BiH) and the Army of Republika Srpska in the territory of the Konjic Municipality, the Accused Novalić, as a member of the Army of R BiH, during the month of September 1992, in the village of Džepi, Konjic Municipality, together with one unidentified soldier entered a house and allegedly

forced a female person to have *sexual intercourse* (raped her). On 21 May 2011, Ćerim Novalić was sentenced to 7 years in prison (first instance verdict). On 14 June 2011, after the prosecution appealed, he was **sentenced to 8 years and 6 months in prison** (second instance verdict). Novalić is guilty of rape of a female person in Džepa village, Konjic municipality, in September 1992.

Albina Terzić was charged with War Crimes against Civilians in violation of Article 173(1)(c)(e) of the Criminal Code of Bosnia and Herzegovina (CC BiH) in conjunction with Article 180(1) of CC BiH (individual criminal responsibility). As *inter alia* alleged in the Indictment, the accused Albina Terzić, during the period from May 1992 until mid- July 1992, as a member of the Military Police of the Croat Defence Council (HVO), alone or together with other HVO members, took part in the inhumane treatment of Serb civilians. Civilians were unlawfully detained on the premises of the Elementary School in Odžak as well as in the Strolit factory, also in Odžak. On October 19 2012, Albina Terzić was **sentenced to 5 years in prison (first instance verdict)**.

Oliver Krsmanović is charged with the criminal offence of Crimes against Humanity in violation of Article 172(1) (a)(e)(f)(i)(k) of the Criminal Code of BiH (CC BiH), in conjunction with Article 180(1) (individual criminal responsibility) and Article 29 of CC BiH. The Indictment alleges *inter alia* that in the period from spring 1992 to the fall 1995, the Accused Oliver Krsmanović, as a member of the 2nd Podrinjska Light Infantry Brigade, perpetrated and aided in the murders and enforced disappearances of the non-Serb civilian population of Višegrad Municipality. According to the Indictment, the Accused Krsmanović participated in severe deprivation of physical liberty and other inhumane acts intentionally causing strong bodily and mental pain and suffering to the non-Serb civilians. It is also alleged that on 27 June 1992, the accused Krsmanović, together with Milan Lukić and members of his group, participated in an unlawful imprisonment of 70 Bosniak civilians and their killing in the settlement of Bikavac, Višegrad Municipality. In early June 1992, the accused Krsmanović participated in the rape and other forms of grave sexualized abuse of Bosniak women unlawfully detained in the *Vilina Vlas* hotel in Višegrad Municipality.

Nihad Bojadžić is charged with War Crimes against Civilians in violation of Article 173(1)(c)(e)(f) and War crimes against Prisoners of war in violation of Article 175(1)(a)(b) all in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH). The Indictment reads, among other things, that the Accused Nihad Bojadžić, as a Deputy Commander of the Special Detachment for Special Purposes Zulfikar of the Supreme Command Staff of the Army of the Republic of Bosnia and Herzegovina, participated in torture, inhumane treatment, forced labor, infliction of grave bodily injuries, sexualized abuse and rape of civilians of Croat ethnicity and members of the Croatian Defence Council, incarcerated in the prison facility Muzej – Bitka on the Neretva River in Jablanica.

Muhidin Bašić and Mirsad Šijak are charged with War Crimes against Civilians in violation of Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (CC BiH) in conjunction with Article 180(1) of CC BiH (individual criminal responsibility). The Indictment suggests that on 25 January 1994 the accused Muhidin Bašić, as Chief of the State Security Service Olovo Wartime Department and the accused Mirsad Šijak, a Military Police Officer, a member of 122nd Light Brigade of the BiH Army, together with two unknown members of the BiH Army had forced sexual intercourse with a women who was visiting a prisoner in the prison in Vareš.

ANNEX 2: ANALYSIS OF THE VERDICTS

This section deals with the factors constituting mitigating circumstances for the accused that are used to lessen minimum sentences for the war crime of rape. Also, it tackles the way the war crime of rape has been treated in verdicts, and questions the mitigating circumstances on the basis of the provisions of Articles 49 and 50 of the Criminal Code of BiH that have been used to alleviate sentences for the war crime of rape below the minimum of 10 years imprisonment. Five verdicts for the war crime of rape were chosen to exemplify the issue where none of the accused for war crimes against civilians and crimes against humanity was given the minimum sentence of 10 years imprisonment. The sentences were reduced for each of them due to mitigating circumstances. An

analysis of the legal framework and the verdicts from a gender perspective is followed by comments on the mitigating circumstances in these particular cases.

The Criminal Code of BiH, of course, does not say much about the deeper (sociological, psychological or cultural) reason for the reduction of punishment. The Article 49 of this Law reads:

The court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:

- a) When law provides the possibility of reducing the punishment; and
- b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.²

As an explanation of this article, Article 50 on Limitations in Reduction of Punishments says:

(1) When the conditions for the reduction of punishment referred to in Article 49 (Reduction of Punishment) of this Code exist, the punishment shall be reduced within the following limits:

- a) If a punishment of imprisonment of ten or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to five years of imprisonment;
- b) If a punishment of imprisonment of three or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to one year of imprisonment;
- c) If a punishment of imprisonment of two years is prescribed as the lowest punishment for the criminal offence, it may be reduced to six months of imprisonment;

(...)

(2) When deciding on the extent of reducing punishments in accordance with the rules set forth in paragraph 1 of this Article, the court shall take into special consideration the smallest and the largest punishment prescribed for the particular criminal offence.³

ANNEX 2.1. RAPE AND MITIGATING CIRCUMSTANCES IN THE VERDICTS OF THE COURT OF BIH

Since the beginning of the project until its end, the first instance verdicts⁴ in 4 cases (Novica Tripković, Velibor Bogdanović, Slavko Lalović, Saša Baričanin), and the second instance verdict in 1 case (Ćerim Novalić) have been reached. A first instance verdict, which was reached before the project began (Miodrag Marković), is also included (actually, the case is not yet closed because of the appeal of the Prosecution). For the purpose of clearer understanding, the paraphrased passages from the survivors testimonies are at the beginning. What follows is how the Court assessed the penalty against the background of mitigating circumstances, which resulted in all instances in sentences less than the minimum punishment for the war crime of rape.

1. Miodrag Marković – 7 years in prison for raping a minor female person (decision reached 15 April 2011)

The survivor's testimony

In the evening hours, Marković came to the survivor's family house and banged loudly at the door, yelling and threatening he would kill them all, firing his gun up in the air. After the survivor's mother opened the door he demanded her to give him her "pretty daughter", aiming the gun at the head of her son (a child with a disability). The survivor then went out of the house, crying, and as she told her mother and brothers to run from the house, Marković hit her in the neck with the gun handle. He then pulled her off to a meadow across the road where he tore off her shirt, ordered her to undress and then raped her. After that, he told her she must not tell anyone what had happened or else he would rape her again and kill everyone in her family.

Assessing the penalty and the mitigating circumstances

"The Court considers the consequences of the act to be grave, having in mind that the act, in the moment of doing, is humiliating for the survivor and leaves the survivor traumatised for a longer period of time. The survivor herself said that she was humiliated and in a

state of shock, and that she still feels the consequences of this act. The Court also kept in mind that in this particular case, the accused raped one person, and that he executed the act once. Regarding the level of criminal responsibility, the Court affirmed that the accused acted with a direct intent, meaning that he was aware his action was illegal but pursued it anyway.”⁵

“On the other hand, the Court took into consideration that the accused is **a family man, a father of three children out of whom one is seriously ill**, as well as the **difficult material situation** and the low financial assets. Also, the Court took into account that the accused was **never charged before and his good demeanour and behaviour** at the Court. **All of these mitigating circumstances together make the circumstances particularly mitigating**, so that the Court has decided to apply provisions of Articles 49 and 50 of the Penal Code of BiH which refer to alleviation of sentence, assuming that the said circumstances indicate that **even by a reduced sentence the purpose of punishment can be achieved** (...) During the assessment of the penalty, the Panel of Judges was aware of the need to make such a decision that would publicly stigmatize the crime of the accused, thus expressing repugnance over the gravity of this crime, and stigmatize the perpetrator himself. But, on the other hand, the Panel also took into account the **rehabilitation of the accused, the most responsible person in his multi-member family, which will have expectations from him** in the future, and which now finds itself in an even worse social situation because of the crime of the accused.”⁶

Comment

In the case of **Miodrag Marković**, the first instance verdict is 7 years in prison for rape and psychological and physical abuse of an underage girl. It is not clear why the Court chose to underline the fact that he raped one person and executed the act once, rather than that he raped a minor girl. This choice points to the Court’s sympathy towards the defendant, as if the Court is saying that “he was obviously in the position of power and if he was really a bad man he could have raped more women, but since he raped one person once, he is not such a bad man” (and the fact that she was underage is not so important).

Furthermore, after the extremely touching and

traumatizing testimony of the survivor, the argument that the accused is “a family man, a poor father of three children who behaved well during the trial” seems dishonest and cynical. **Firstly**, the rape of a minor would in most cases be an aggravating factor and as such should be measured against the mitigating factors. Given such a balance, the decision to reduce the sentence below the minimum penalty for the crime of rape is questionable. **Secondly**, it is very important to keep in mind the deliberate military strategy to target women and children as the most vulnerable members of the targeted religious and ethnic group because they could not put up a very effective resistance. Moreover, the purpose of rape as a component of deliberate military strategy was, among others, aimed at intimidating the target population and eventually coercing its members to flee a certain area, e.g. forced expulsion to gain territorial control. To conclude, the fact that the accused raped a minor and the purpose of rape, as a tactic of war, should be balanced against the mitigating factors and thereby not necessarily lead to a reduced sentence.

2. Novica Tripković – 8 years in prison for raping a female and killing a civilian (first instance decision reached 7 June 2011)

The survivor’s testimony

Tripković at first claimed he would protect the survivor and her children, so when he came to her home one evening, she let him in. He brought three litres of wine and asked for a needle. He then pierced his finger with it and told her to suck the blood out of his finger because they would bond that way. Her daughter was with them (the son was sleeping) when he started to pull the survivor around, trying to kiss her, and the little girl said she would tell her father everything. After the survivor’s daughter fell asleep, Tripković forced her to drink with him. She never drank before. He threatened he would cut the throats of all of them if she said anything to anyone and raped her on the kitchen floor. Afterwards he told her: “I haven’t raped a better “balijka” (pejorative for a Muslim woman) than you” and fell asleep. When he woke up, he repeated to her that he would cut her throat if she mentioned anything to anyone, so she remained silent and kept it from the neighbours and the police. During

the following days Tripković would frequently come to her home, harassing her and once he beat her and left her in bruises. On another occasion, when the survivor ran away from him, Tripković killed a civilian by shooting him in the head because he believed the man was hiding her in his house and he was a Bosniak.

Assessing the penalty and the mitigating circumstances

“Upon the assessment of penalty, (...) the Court took into account the gravity of the crime the accused admitted, and the fact that he had **also been charged in the past**, but also the mitigating circumstances on the side of the accused. **The admission of guilt and a sincere regret of the accused represent mitigating factors.** Principally, the Panel of Judges believes that the confession of guilt is of **huge significance from a human side and from the angle of mitigating the consequences for the survivor, in particular when the accused admits his guilt and accepts his personal responsibility without any reservations, which can certainly be a sign of sincere remorse.** The Panel believes that the confession of guilt by the accused, together with his behaviour after the events from the indictment **show that he is sincerely remorseful.** The Panel assumes that the confession of guilt and remorse could reflect positively on the rehabilitation of the crime survivors and their broader community, and a general acceptance of the facts about these crimes. The Court also had in mind some other mitigating circumstances, like the fact the accused is **in his seventies**, that the medical report states his **poor health**, as well as the fact that he is **a father of three children and that he behaved appropriately during the court proceedings.**”⁷

Comment:

In the case of **Novica Tripković**, the first instance verdict is 8 years in prison. Tripković is guilty for raping a female person and killing one person. Mitigating circumstances are the admission of guilt and regret over having committed these criminal offences. A plea bargain (Guilt agreement) is a special and debated judicial issue and will not be analyzed here. The manipulative nature of it, however, is clearly presented and shortly explained by a BIRN journalist:

Courts in Bosnia increasingly rely on guilty pleas to speed

up trials and secure verdicts – but many victims groups feel justice is being sacrificed in the name of expediency. The Prosecution of Bosnia and Herzegovina, the State Prosecution, defends them, saying guilt admission agreements reduce the duration of court proceedings, obtain information needed for other cases and ensure the accused are in fact sentenced. But the Court of Bosnia and Herzegovina, the State Court, says there are negative aspects to these deals, because in some instances the accused who has concluded a guilt admission agreement does not offer any new information to the prosecution.⁸

This last point is of particular relevance because the justification for guilty pleas is their benefits, including that they are an important litigation tool, as a plea agreement may involve the accused testifying against higher-ranking individuals. This can thereby help secure convictions against other perpetrators. If that is not the case, as suggested in the BIRN news report, using them is defeating the purpose. It may be added that the admission of guilt can be a tactical move and an indicator of manipulating with the law. From this perspective, the admission of guilt as a mitigating circumstance is another “slap” in the face of the survivors who are asking that the penalty imposed to be proportionate to the gravity of the crime, the harm caused to survivors, and the degree of responsibility of the offender. In addition, in one of its recommendations the *medica mondiale* also recognized the need to include the witnesses/survivors in the negotiations about plea agreements as, at the moment, survivors’ exclusion from the negotiations prevents them

“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.”⁹

While “[g]iven the overload of war crimes cases in Bosnia and Herzegovina, it can be recognized that through plea bargaining more perpetrators will be sentenced”¹⁰, all the above stated also must be taken into consideration when opting for such solutions in order to satisfy the interest of justice.

Moreover, the willingness of the perpetrator to admit his guilt should not necessarily be considered a mitigating factor as it does not convey a fundamental understanding about the conditions under which rape and sexualized violence is committed in war. One of the most important things, in the pursuit of justice for the survivors,

is to convey an understanding about the conditions under which rape and sexualized violence was committed. For instance, given the coercive war situation, the opportunity structure for abusing command authority or the power of the gun, the strategies women and girls can resort to for protection and survival are sometimes limited to what has been termed “survival sex”, including being the sexual partner of a certain military commander or soldier. Such a relationship might appear to be consensual on the surface, resulting in a negative judgment about the women in question, while this is far from the case, especially given the coercive circumstances. It is thus very important to understand the limited options women have under coercive circumstances of war, independently from the perpetrator’s willingness to admit their guilt or not. The bottom line is that mitigating factors should always be measured against aggravating factors and despite a guilty plea, the court would always have to consider that the penalty imposed meets the standards of justice and fairness in being proportionate to the gravity of the crime, the harm caused to survivors, and the degree of responsibility of the offender.

Also, another mitigating circumstance in this case is that the accused is very old – in the seventh decade of his life. “Very young” or “very old” are really offensive arguments to the survivors, keeping in mind that all of the accused were adults at the time and capable of inflicting physical and mental harm to other human beings.

3. **Ćerim Novalić – 8 years and 6 months in prison for raping a female (decision reached on 14 June 2011)**¹¹

The survivor’s testimony (she did not ask to be a protected witness)

The survivor said that the night when the offence happened, the electricity went out and she was awake with her husband, while her paralysed mother-in-law and the children were sleeping. Somebody knocked on the door, saying it was the military police. She opened the door and two armed men in camouflage uniforms came in (Novalić being one of them). The two men then took her and her seriously ill husband to the lower floor of their house, asking them if they were hiding certain people in there. Then one of the soldiers told her to go

upstairs to her children. Novalić followed her to the living room where he ordered her to take her clothes off. When she asked why he told her to undress and to be silent or else he would kill her. He then pushed her to the bed and raped her. She did not defend herself due to fear of the repercussions. The mother-in-law and the children were sleeping in the other room. After the rape, Novalić left the house and she heard a shooting coming from the yard. Her husband then entered the room and she told him she was raped. He comforted her and told her he was not beaten, but that the soldier he stayed with only held his gun to his forehead.

Assessing the penalty:

“Upon the assessment of penalty for the accused Ćerim Novalić, the Court firstly evaluated the gravity of the criminal act and the level of his criminal responsibility. (...) The Court considers the consequences of the act grave, having in mind that the act, in the moment of doing, is humiliating for the survivor and leaves the survivor traumatized for a longer period of time. The survivor herself said that in the time of the execution of the act she felt humiliated and squeamish, and that she still feels the consequences of this act. The Court also kept in mind that in this particular case the accused **raped one person**, and that **he committed the act once**. Regarding the level of criminal responsibility, the Court affirmed that the accused acted with a direct intent, meaning that he was aware his action was illegal but pursued it anyway.”

“On the other hand, the Court took into account that at the time the accused was a **very young person**, **he was only twenty years old**, meaning that he was a younger adult, which represents a mitigating circumstance. Also, the Court took into account that he had not been charged before or after the committal of the said act, then **his good behaviour during the trial, as well as his private matters**. In the Court’s opinion, all of these mitigating circumstances are sufficient, so the Court reduced the prescribed penalty of minimum ten years in prison and pronounced the sentence of seven years in prison. The Court believes that the pronounced sentence is proportional to the gravity of the committed criminal act, the level of criminal responsibility of the accused, the circumstances and motives under which the accused committed the act, as well as to the consequences which followed. The Court believes that this (...) will

raise the awareness of the accused and all the other individuals about the forbiddingness, criminality and public condemnation of crimes, and avert the said persons from committing crimes in future.”¹²

Comment:

In the case of **Ćerim Novalić**, the second instance verdict is 8 years and 6 months in prison. Novalić is guilty for raping a female. The mitigating circumstances are: he was 20 years old at the time of committing the act (“very young”), he has no criminal record other than this, and his good behaviour at the Court. The age and criminal record, as mitigating circumstances, are explained in the previous case, as well as the Court’s insistence on the rape being committed against “only” one person and “only” once. Good behaviour at the Court should not have been taken into consideration when assessing penalties for serious crimes such as war crimes. Behaving badly at the Court, however, could be taken into consideration as an aggravating circumstance in the assessment of a punishment, as in that case is the question of respect of the Court.

4. Velibor Bogdanović - the first instance verdict 6 years in prison.

Bogdanović is guilty for the rape and unlawful imprisonment of civilians in the Mostar area in 1993. The mitigating circumstances are his young age. He was 22 years old at the time the crimes were committed, he has no criminal record other than this, and he is a father of three children. It is not clear how his age at the time of the crime merits a milder punishment for his abusive and criminal behaviour. The age of a person could be important, for example, for a crime like theft (it could be understandable if a person in their teens, or someone who is extremely poor in their late sixties, stole something). However, for crimes (especially war crimes, which are systematically organized and conceived) like murder or rape, the age of a perpetrator should not be used as a mitigating circumstance. After all, there is a legal differentiation between a minor and an adult, the age of 18 being the dividing line.

In this particular case, another mitigating circumstance, that Bogdanović is a father of three,

proves to be irrelevant because he escaped and left his children. According to the information from the State Court, the warrant was issued on 31st August this year after Bogdanović was not found at the address given to the Court. The fact that a perpetrator became a father does not necessarily mean he should receive a reduced punishment. The mitigating circumstance that the accused has no criminal record, other than the crimes he committed during the war, is somewhat cynical from the perspective of survivors, to justice, and from a sociological view.

5. Slavko Lalović - the first instance verdict is 5 years in prison.

Lalović is guilty for allowing two members of the Army of Republika Srpska to enter the school/camp in Kalinovik and rape a female detainee (acting contrary to his duty as a reserve police officer to protect the detained civilians) and also guilty for intimidating and terrorizing the civilians detained in the said school in August 1992. The mitigating circumstance is that Lalović is a father of four children.

When compared with the previous cases, it seems paradoxical that the number of children is relevant to the number of years in prison. In these two specific cases, three children reduced the sentence to six years, while four children reduced it to five years in prison. Would having ten children liberate the perpetrator then? Moreover, the fact that someone is a parent could also be seen as an aggravating factor, if nothing else but to “educate” children as to what is allowed and what is not (in this case to commit war crimes)? And finally, is it not damaging for the children’s development to live under the same roof as a war criminal and rapist as a father?

General Comment

Keeping in mind the atrocities committed by the evildoers during the wartime rapes that represent the overall physical, mental, emotional, and sexual trauma of the survivors, the mitigating circumstances used in verdicts should be minimal. General statements like “family man”, “good behaviour during the trial”, etc., have

nothing to do with the context of the crime committed. Furthermore, if the accused is a “family man”, then that should represent a huge threat for the well being of his family and his surroundings. Not to mention the discrepancy between the accurate legal discourse and the usage of arbitrary and colloquial phrases like “a family man”.

The examination of the data collected during the trial monitoring and the verdicts included looking into the description of actions that preceded the rape, the description of the coercive circumstances surrounding the rapes, the treatment of the survivors during and after the rapes, description of how the women survivors felt during and after the rape, and what the perpetrators were talking about while they were beating and torturing their survivors. On the basis of this examination, the reference to the aforementioned mitigating factors and circumstances used to justify the sentence reduction below the minimum in each particular verdict is questionable and provokes anger and a feeling of injustice and powerlessness before the law among the survivors.

ANNEX 3: EXEMPTION FROM PAYING THE COSTS OF THE PROCEDURE AND ADVISING THE “INJURED PARTIES” TO PURSUE CIVIL LAWSUITS

It seems illogical that the people found guilty of war crimes have been exempted from paying the costs of the trial after the guilty verdict. Their trials are in fact financed from the tax money paid by the citizens of Bosnia and Herzegovina, which is ironic. On the other hand the witnesses are not even awarded any symbolic compensations.

Even though it is authorized under Article 198 paragraph 2 of the Criminal Procedure Code to decide in full or in part on the compensation request of the injured party, the Court of BiH has not done this in any of the war crimes cases yet. The survivors-witnesses (injured parties), who have requested compensation, have been referred to the civil proceedings. While the Court may justify those decisions to refer the compensation claims by the lack of time because of the backlog of cases, this practice opens a logical question with respect to the

status and interests of protected witnesses. Given that their identities are protected, how are the protected witnesses supposed to start civil proceedings to claim compensations on the basis of a conviction of a war criminal? Such court decisions put wartime rape and sexualized violence survivors, the majority of whom are assigned protection measures, in an impossible and paradoxical situation. Once again we would call upon the judges when deciding on such cases to take into consideration the entire purposes of war crimes.

Potentially, a separate Criminal Proceedings Code for war crimes trials could be considered for an adoption in which due consideration would be given to the overall purposes of war crimes prosecutions. In this regard, the Statue of the International Criminal Court could serve as a precedent as it provides for court-ordered reparations as well as protection and assistance for survivors.

ANNEX 4: SUGGESTED MODEL FOR GENDER-BASED COLLECTION OF STATISTICAL DATA

Data collected during the one-year trial monitoring (25 May 2011 until 25 May 2012) of wartime sexualized violence cases conducted before the War Crimes Chamber of the Court of BiH as a potential sample for data collection.

1. How many cases were dealt with in this period that included the charges of rape?

NO.	CASE	JUDGMENTS	SENTNECE	NOTE
1.	Novica Tripković	First instance judgment	Sentenced to 8 years imprisonment	
2.	Saša Baričanin	Second instance judgment	Sentenced to 18 years imprisonment	
3.	Slavko Lalović	Second instance judgment	Sentenced to 5 years imprisonment	
4.	Velibor Bogdanović	Second instance judgment	Sentenced to 5 years imprisonment	(On the run)
5.	Ćerim Novalić	Second instance judgment	Sentenced to 8 years and 6 months imprisonment	Sentence increased in the second instance
6.	Miodrag Marković	First instance judgment	Sentenced to 7 years imprisonment	
7.	Vlahović Veselin			Not sentenced yet
8.	Albina Terzić	First instance judgment	Sentenced to 5 years imprisonment	Not guilty on sexualized violence charges
9.	Oliver Krsmanović			Not sentenced yet
10.	Jasko Gazdić		Sentenced to 17 years	
11.	Jukić Željko			Not sentenced yet
12.	Bastah Predrag	Second instance judgment	Sentenced to 22 years imprisonment	
13.	Dolić Darko			Found not guilty
14.	Kličković Gojko			Found not guilty, second instance quashed the decision, new procedure

2. How many women and men testified in the cases containing sexualized violence charges?

Women - around 80 Men – around 80

3. How many women and men testified about the sexualized violence charges?

Women - 24 Men – around 3

4. How many women and men testified about the sexualized violence charges that happened to them?

Women - 18 Men – 1

5. How many women and men received protected measures during the testimony?

Women - around 50 Men – around 12

6. What were the protection measures issued to women and men witnesses?

15 women witnesses were awarded all possible protection measures (non disclosure of identity,

exclusion of public, some testified from another room)

Other women witnesses had complete protection of personal data, their image was not to be published in media, but everyone in the courtroom could see them.

The protected male witnesses had total protection of personal data and their image was not to be published in media, but all could see them in the courtroom.

7. How many judgments were adopted in the cases containing sexualized violence charges?

5 judgments for cases concerning rape during war: Tripković, Baričanin, Lalović, Bogdanović, Novalić.

8. What is the percentage of not-guilty judgments out of the total number?

In this period there was no not guilty judgments

9. What is the average sentence in the cases containing sexualized violence charges?

9 years (the average was increased by Sasa Baricanin sentence of 18 years imprisonment. The other 4 defendants received, on average, 7 years of imprisonment)

10. How many defendants are defending from freedom and how many of them are in custody (and what are the charges for each category)

Currently there are 54 defendants in custody, while 6/7 are defending from freedom (there is no data on the charges)

11. How many war criminals found guilty, among other things for wartime rape, are on the run?

One (Velibor Bogdanović).

The creation of the gender-segregated database will offer a first reliable gender-sensitive assessment of BiH war crimes trial processes and thus allow for first evidence-based analyses on this topic. This hard data will offer politically and ideologically unbiased proofs and thus represent an irrefutable basis upon which advocacy in favour of a more gender-sensitive treatment of women witnesses and survivors in war crimes trials will be able to build. In addition, the way that the data is going to be presented will allow for more analytical and qualitative analyses to be conducted in respect to the prosecution of war crimes in Bosnia and Herzegovina.

ENDNOTES (ANNEX)

- 1 Source: web site of the Court of BiH - <http://www.sudbih.gov.ba/?jezik=e>
- 2 Criminal Code of BiH, *Official Gazette* 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10
- 3 Ibid.
- 4 First instance verdict is the first verdict of the Panel of judges, against which the Defence or the Prosecution can appeal. Second instance verdict comes after the appeal.
- 5 From the First instance verdict in the Marković case, available on the web site of the Court (<http://www.sudbih.gov.ba/?opcija=presude&godina=2011&odjel=1&jezik=b>) Translation of the verdict: the ACIPS monitoring team.
- 6 From the First instance verdict in the Marković case.
- 7 From the First instance verdict in the Tripković case.
- 8 **Selma Učanbarlić, BIRN – Justice Report**, 23 September 2011. <http://www.bim.ba/en/288/10/33406/>
- 9 Mischkowski and Mlinarević, *ibid*, 22.
- 10 Ibid.
- 11 On 21/5/2010 he was sentenced to 7 years in prison by the first instance verdict, yet by the second instance verdict, pronounced on 14/6/2011, he is sentenced to 8 years and 6 months in prison.
- 12 From the First instance verdict in the Novalić case.



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