



**„... and that it does
not happen to
anyone anywhere in
the world“**

**Summary
and conclusions**

Author:
Gabriela Mischkowski

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

Editorial staff:
Britta Amorin, Jessica Mosbahi

Layout: Ute Bley

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Introduction

Sexualised violence in war has been at the centre of *medica mondiale's* work for 17 years. From the outset, *medica mondiale* has advocated an end to impunity for war rapes and spoke up against playing rape down as an inevitable by-product of war.

In the past, war rape was very rarely prosecuted. In the few cases in which perpetrators were sentenced, the main goal was to restore military order and discipline rather than punish them for the rape they had committed. In the initial stages of international criminal law after World War II, giving rights and bringing justice to rape victims hardly played any role.

In 1992, when the war began in the former Yugoslavia, something unusual happened. Bosnian women talked to journalists about numerous rapes inside and outside of detention camps. This led to a wave of outrage and solidarity. Women's organisations across the globe mobilised the public and called for an end to impunity for rape. This eventually led to the UN's establishment of the first war crimes tribunal. Right from the start, *medica mondiale* has supported the efforts of the International Criminal Tribunal for the former Yugoslavia (ICTY) aiming at an effective prosecution. However, *medica mondiale* has always been aware of its main responsibility towards women as potential witnesses.

After 17 years of experience in and with criminal prosecution of sexualised violence in war, the time has come to take stock. Over the years, numerous legal analyses have been compiled about different forms of sexualised violence as crimes. This study is special among them, because it also includes the perspectives of women who took the burden upon themselves to testify on sexualised violence in court.

The study consists of two major parts. The first part tries to give an overview of how sexualised violence during the war in the former Yugoslavia (1992-1995) was prosecuted, including the war in Kosovo (1998-1999). This overview comprises all trials which took place at both the ICTY and the Sarajevo War Crimes Chamber until July 2009. The impunity for sexualised violence in war came to an end with the ICTY. This is basically a positive result. The study, however, also points out problems and worrying trends at both courts. They are mainly linked to an absence of institutionalised investigation and indictment strategies. Since neither court compiles statistics, this part of the study is based on trial monitoring and research by the authors.

The second part of the study is primarily based on interviews with witnesses – mostly Bosnian and Muslim – who testified in one of the courts or both on sexualised violence in war. They are complemented and sometimes juxtaposed with interviews with judges and prosecutors, mainly from the Sarajevo War Crimes Chamber. Both interviewed groups described their views on the peculiarities and problems of rape trials and rape indictments. The experience as well as the assessments of the witnesses should be taken seriously and should serve as guidelines for future witness counselling services. The different opinions expressed by the interviewed women impressively contradicted the stereotype clichés of the "totally devastated raped woman", the "particularly modest Muslim woman" and the "patriarchal Muslim society". Such stereotypes only foster stigmatisation and social isolation. The study reveals that they are also effective in court as can be seen in, for example, patronising protection policies or behavioural expectations shaped by gendered stereotypes.

The summary's structure does not correspond to the study's order of chapters. Each chapter the summary refers to, is identified in footnotes.

Part I

The development and prosecution of sexualised violence in war

1. Prosecution of sexualised violence in war at the Yugoslavia Tribunal in The Hague¹

In autumn 1992 through winter 1993, the public in Europe and the U.S. was swamped with media reports on atrocities and mass rapes during the war in the former Yugoslavia. There was widespread outrage and repeated calls for sanctions. In October 1992, not least due to the public outrage, the UN Security Council established a commission to investigate violations of international humanitarian law. The commission published two reports. The final report in particular contained detailed descriptions of the scale of sexualised violence in war and its forms. When the ICTY was established on 25 May 1993, Chief Prosecutor Richard Goldstone stated his intention to firmly establish sexualised violence in international law as a severe crime.

The study examines the question of what has happened to this plan 17 years after the founding of the Tribunal now shortly before it is closed down. The answers are as follows:

1.1 Successful implementation of sexualised violence in applicable law

The Tribunal was based on international law which was applicable at the beginning of the 1990s. These comprised the Genocide Convention, the Geneva Conventions of 1949, and the Hague Convention on Land Warfare as well as the category of crimes against humanity which was first introduced in the Nuremberg trials. The Conventions hardly mentioned sexualised violence in war and where they did, rape was exclusively considered a crime of honour. They did not offer a direct legal instrument for making those responsible for the wars also accountable for the massive scale of sexualised violence in war. Without long-lasting international negotiations, only the list of crimes against humanity could be expanded to explicitly include rape as a crime.

This meant that sexualised violence could not be indicted immediately as genocide or as a severe violation of the

Geneva Conventions, nor as a war crime pursuant to the provisions of the Hague Convention. The first challenge for the court was to explicitly establish rape and other forms of sexualised violence as a crime under international criminal law. Trial by trial, rapes were indicted differently as crimes already recognised in international law, e.g. as inhumane treatment, serious physical injury, torture, intentional infliction of great pain etc. While rape is often used in politics as a metaphor for the worst possible crime, in the world of law the evidence for rape as a severe crime still needed to be furnished. With each of their rulings, the Tribunal together with the Rwanda Tribunal created a new legal basis for prosecuting sexualised violence in war.

The recognition of war rape as torture or inhumane treatment according to international criminal law has consequences for national criminal law as well. Torture and inhumane acts constitute severe violations of the Geneva Conventions and are thus subject to universal jurisdiction. This means that every state in the world may and shall prosecute these crimes independently of where and by whom they have been committed. This is an important step for identifying the severity of the offence, although hardly any state has acted upon this principle of universality.

1.2 Not enough indictments

The indictments of about 40 percent of all the accused at the ICTY also include rape or other forms of sexualised violence. This result may look satisfactory at first glance, but it needs to be put into perspective. On the one hand, only four persons were on trial exclusively for sexualised violence, three of them in the so-called Foca trial³. The Foca trial was the only trial at the ICTY targeting patterns and functions of rape and sexual enslavement of girls and women. On the other hand, if Richard Goldstone's priorities had been implemented more consistently, the number of the accused could have been much higher. Despite well-grounded indications, the initial indictments did not contain rape charges. While Richard Goldstone and his successor Louise Arbour corrected this during their

1 Chapters 4 and 2.1 of the study

2 The International Criminal Tribunal for Rwanda was founded by the United Nations on 8 November 1994. It aims at punishing the persons responsible for the genocide and other violations of international criminal law which were committed in Rwanda between 1 January and 31 January 1994. More information can be found at www.icttr.org

3 See section 1.5 "Not enough commitment, not enough gender representation" for more information

terms in office, investigations on sexualised violence fell more and more into the background under the third Chief Prosecutor Carla del Ponte. Several rape charges disappeared in plea agreements in which the accused agree to plead partially guilty in exchange for dropping some of the charges in their indictment. Other rape charges were thinned out or dropped in order to accelerate the trial. In one case, this practice was particularly scandalous, because the dimension of its rape charges would have qualified it for a second "Foca trial"⁴.

It is yet unclear to what extent the Tribunal will manage to charge the political and military leaders with the massive number of rapes. As high-ranking leaders were arrested relatively late, their trials were not over or had only just started at the time the study was concluded. However, against the backdrop of previous acquittals, it is not inappropriate to have some misgivings.

From 1993 until July 2009, 166 men and one woman were indicted by the ICTY; the charges against 67 (about 40 percent) of them included rape or other forms of sexualised violence. By July 2009, a total number of 71 persons had been finally convicted, of which 35 cases included sentences for sexualised violence. With a conviction rate of 68.6 percent, sexualised violence ranked nine percent lower than other crimes (77.8 percent). At the end of the survey period, nine cases containing charges for sexualised violence were on appeal and another 11 cases were still in the trial phase. Six cases including accusations of sexualised violence were transferred to the Sarajevo War Crimes Chamber. Six of the accused died or were murdered before or during the proceedings, including, most prominently, Slobodan Milosevic.

1.3 Too many acquittals

Previous acquittals can be partly traced back to indictments expressing indifference. Only in one case, in the case against Dusko Tadic, rape charges had to be withdrawn because the main witness herself did not want to testify any more. Other rape charges were dismissed for other reasons altogether. In some cases, rape was charged, but only peripherally and little to weak evidence was brought forward in court. Thus, it happened that prosecutors confused the crime scenes, did not provide evidence for the presence of the accused at the time of the crime, did not even try to relate an anonymous perpetrator to a specific group or failed to present any witness at all. Testimonies of rape victims were only rarely dis-

puted as sufficient evidence. But even in these cases, the chambers assumed that the witness herself was credible, that she indeed had been raped, but that she was unable to uniquely identify the accused.

High-ranking politicians and military commanders, in particular, proved to be difficult to be sentenced for mass rapes. The study concludes that the acquittals in their cases were due to certain indictment strategies, but also due to judges being unfamiliar with how sexualised violence in war works. This problem can be illustrated with the example of the first instance judgement against six high-ranking Serbian politicians and commanders (*Milutinovic et al.*).

The six accused were charged to be jointly responsible for deportation, forcible transfer, and murder as well as for other atrocities, including rape, committed by Serb soldiers and militia as part of a campaign of persecution against the Kosovo-Albanian population based on political, racial, or religious grounds. Murder charges appeared as both, as a means of persecution and as separate crimes against humanity or violations of the laws of war. Rape charges, however, were exclusively charged as a part of persecutions. This had grave consequences because, according to the Statute of the Tribunal, persecution as a crime requires evidence that the crime, be it murder, torture, or rape, was "politically, racially, or religiously" motivated. The Trial Chamber found that the prosecutor could prove such an intention only in some of the rape charges. The other rape charges were dismissed, although the court acknowledged that the rapes themselves had happened. This meant that three witnesses whose testimonies were considered credible and reliable by the Chamber had testified in vain. This would not have happened if these rapes had been indicted in their own right as crimes against humanity or war crimes.

However, this would not have happened either, if the Chamber had not relied solely on the reported statements of the rapists themselves for determining whether there was any "political, racial, or religious" intention. In the Chamber's reasoning, it was indeed only the absence of religiously pejorative insults which distinguished these cases from all the other cases of rape which the Chamber accepted as part of persecutions. Possibly, the witnesses had not even been asked that question during trial. Even if the rapists had committed the many rapes without additional verbal insults, the circumstances of the crime, as described in the judgement itself, would have provided enough evidence for a discriminatory intent as defined by the Statute.

⁴ This refers to the trial against the leader and member of a Bosnian Serbian militia, the White Eagle, which became infamous internationally for their extreme cruelty and countless rapes not only in the town of Visegrad.

In the end, only one of the six accused was found guilty even for those rapes the Chamber had acknowledged as part of persecutions. The Prosecutor at the ICTY applies the legal construct of a “joint criminal enterprise” (JCE) in order to hold political and military leaders accountable for the multitude of collective crimes committed in the course of a deportation policy they had carried out, instigated or propagated. In such a case, it is irrelevant whether the crimes have been directly commanded by the accused or only indirectly intended. Eventually, an indictment based on JCE charges aims to prosecute everyone who has substantially contributed to fulfilling the purpose of the enterprise e.g. the displacement of a specific ethnic group. These persons could be generals or prime ministers or local mayors, militia leaders or the shift supervisor for the security staff in detention camps. Furthermore, leading members of a joint criminal enterprise can also be charged with crimes which were not part of the enterprise's original plan, but which were foreseeable in the given circumstances and had been approved tacitly.

In the case of *Milutinovic et al.*, the Chamber ruled that two of the six high-ranking accused were responsible for murders and inhumane acts even though these had not been part of the original purpose and aim of the enterprise. The Chamber was of the opinion that these crimes had been foreseeable in the context of the large-scale displacement activities the accused had backed. The majority of the Chamber stated explicitly, however, that the principle of foreseeability did not apply to rapes. This opinion was contested by one judge only in a minority vote. The ruling unveils a fundamental lack of knowledge about the dynamics of sexualised violence in war. The Prosecutor appealed the ruling and it remains to be seen whether the Appeals Chamber will revoke this judicial error.

The rapes described in the testimonies below for the trial against Milutinovic et al. were found proven by the Trial Chamber but were not contained in the judgement, because they were not considered to be part of persecutions. All women were Kosovo Albanians and in the course of the trial the perpetrators were identified as Serbian soldiers and policemen.

“K62 testified that on 1 April 1999 she was alone in her home when three men wearing green camouflage uniforms and “some hats and masks on their faces” arrived. Two of them started searching the apartment, while the third man pushed K62 to the floor and raped her. A second man then raped her as well, and the third one put his penis in her mouth. After the men had left, K62 managed to contact her husband (...) She subsequently met a woman who told her that the same thing had happened to many other women in Priština/Prishtina.”

“K14 was in her mid-teens in May 1999 when she too was raped in Priština/Prishtina (...) K14 described how in late May 1999 a group of policemen came to her home. They were wearing blue and green camouflage uniforms with blue ribbons tied on their right arms. All three men spoke Serbian, and two of them spoke a bit of Albanian. K14 and her sister were taken by these policemen to a car parked outside. However, her sister was allowed to return to the house before the car departed. K14 was put in the back seat with one of the policemen, who hit her on her hip with the butt of his gun. He also slapped her face, bit her on the neck, and sprayed her on her face and neck with a clear liquid contained in a small clear plastic spray bottle. After five minutes she felt relaxed and started laughing. At the Bozhur Hotel in the centre of Priština/Prishtina K14 was taken through the basement to a room on the second floor where one of the policemen raped her. The other policeman stayed outside. Afterwards the one who had raped her told her that he would not let the other policeman in if she promised to come back on Monday and bring her sister for his friend. K14 agreed because she wanted him to leave. When she got back home, she told one of her friends what had happened to her. Her friend told K14 that the same thing had happened to her, and that she had been taken to a civilian house, had been raped by four men. That same day and the next the policeman who had raped her, and the other who had not, drove past the house several times and honked the car horn. At 4:00 a.m. the following Monday, when she was supposed to go back to the hotel, K14 and her family fled Priština/Prishtina.”

“K31 was in her late-teens in May 1999 when she was raped by three “Serb soldiers” at a hospital in Priština/Prishtina town. Towards the end of May 1999, she and her injured brother were taken from Kačanik/Kaçanik municipality to a hospital in Priština/Prishtina town. K31 testified that on the way one soldier sexually assaulted her in the vehicle. When they arrived at the hospital in Priština/Prishtina, K31 was taken to the basement and put in a locked, dark room with no furniture and about 10 to 15 other women inside, all Kosovo Albanian. About 20 minutes later a soldier entered and, using a torch, selected K31 and took her into another room in the basement. He and two other soldiers beat her and forced her to drink something with a bitter taste, after which she felt as if something had hit her on the head. After two of the soldiers left the room, K31 was raped by the one who had first selected her; he bit her shoulders, arms, and breasts, and covered her mouth with his hand. While K31 was still on the floor, a second soldier came into the room and raped her twice. Af-

terwards this soldier called the third into the room. K31 then lost consciousness. This soldier may also have raped her while she was unconscious, but the next thing she could remember was waking up naked and on her back in the empty room. K31 then found her brother on the fifth floor and hid near him for almost two weeks. She and her brother finally left the hospital around mid-June 1999."

(ICTY, first instance judgement of 26 February 2009 – Case No. IT-05-87-A, Milutinovic et al., volume 2, p. 318 et seqq.)

The crime of joint criminal enterprise is interpreted differently by different chambers. Momcilo Krajsnik, who played a central role in the Bosnian Serbian leadership group surrounding Karadzic, was convicted in first instance for crimes, including rape, which were committed in the context of the expulsion policy for which he was co-responsible. Biljana Plavsic, who was another member of this leadership group was charged with the same crimes; she pleaded guilty and was convicted accordingly. The Appeals Chamber, however, acquitted Krajsnik of all crimes which were not part of the original purpose of the criminal enterprise. In the trial against three Kosovo-Albanian leading UÇK members, the trial Chamber dismissed the entire accusation of joint criminal enterprise and all related rape charges. In the latter case, the Prosecutor has requested that the case be reopened.

All rape charges in the four still on-going trials against high-ranking leaders are based on similar indictment patterns. The accused are charged with membership of a joint criminal enterprise and with the exception of one case, all of them are charged with rape as part of persecutions or part of genocide. It remains to be seen whether the indictments will prove to be more successful in these cases.

The 1993 UN Expert Commission's report set the course already for reducing the prosecution of sexualised violence in war to a specific understanding of "ethnic" rape, i.e. rape as a means of "ethnic cleansing". The Commission recommended that the investigations focus on this context, although it had established that rape outside this context led more frequently to the death of girls and women. This was the case for example when women and young girls were held in private homes, where they were raped by different soldiers on a daily basis, and forced into prostitution. Many of them disappeared forever. The Commission tended to consider these cases as opportunistic rapes and negligible in the prosecution.⁵

1.4 Insufficient gender-sensitivity

The indictments on the basis of sexualised violence mainly refer to female victims. It is, however, to the Tribunal's merit to have also indicted cases of sexualised violence against men. They have thus drawn public awareness to another taboo. However, the tendency to charge sexualised violence as a gender-neutral crime causes again problems. This tendency can be seen for example in the fact that some of the later indictment do not identify the victim as either male or female. This strategy, however, blurs fundamental differences, patterns, and functions of this type of violence. It bears the risk of renewed blind spots. According to present knowledge, sexualised violence against men in this war consisted mainly of mutilating genitalia in public and forcing detainees to carry out sexual acts (fellatio) on each other in front of an audience. These were public acts of humiliation which were usually committed in detention camps or police stations.

Sexualised violence against women and girls does not seem to have been committed in front of larger audiences, contrary to all previous belief. The Courts' frequent complaint about failing to find eyewitnesses can be seen as one of the indicators. This violence, however, took place in many different locations: in camps, during house raids, in hospitals, in the course of sexual enslavement in private homes or as forced prostitution in especially established brothels, during interrogations, groping in passing etc. An undifferentiated approach might be partly responsible for the fact that the ICTY does not systematically investigate forced prostitution, trafficking in girls, sexual enslavement or rape in coincidence with murder. The Foca trial of 2002 was the only one tackling all these crimes. Rather than being its climax and end point, it should have been the starting point and benchmark for similar systematic investigations in other regions and for other groups of perpetrators.

In altogether 30 concluded and on-going trials concerning sexualised violence (sometimes involving several accused), the victims were female in fifteen cases, male in three cases, and of both genders in five cases. In seven on-going trials containing sexualised violence charges, the gender of the victims cannot be deducted from the bill of indictment.

1.5 Insufficient commitment, insufficient gender representation⁶

The initial indictments did not contain rape allegations. They were added only later after two female judges had

⁵ Chapter 1

⁶ Chapter 4.2

persistently submitted inquiries and reminders about this issue. Many of their colleagues considered such interventions as undue, because the chambers must not interfere with the indictments, according to Anglo-Saxon legislation in particular. Women played a decisive role in all the important, groundbreaking indictments and judgments on sexualised violence against women and girls. For the outstanding Foca trial a women only team was responsible for carrying out all investigations and for drawing up the prosecution strategy, though later on a male prosecutor who had just started his term at the court, was appointed to head the team during trial. Although the trial focused on the personal responsibility of the accused for individual crimes, the charges against the original eight accused were constructed in such a way that they covered nearly the entire range of sexualised violence in this war, at least for a specific region: rape during house raids, rape during interrogations, rape in detention camps, sexual enslavement in private homes, forced prostitution, and trafficking in women and girls. The trial also revealed various dynamics which contributed to the spiral of rape, such as power struggles among different militia over women, exchanging alcohol for women, triumph after victories in fights, anger at defeat, and tacit agreement among the population as long as only the women "of the other side" were affected. At the end of the trial, the presiding female judge used harsh words when delivering the verdict: The shame is not the victim's, but the perpetrator's⁷.

Another female judge in another trial clarified that in the case of rape as torture not only the discriminative intention is not only based on ethnic, religious or political grounds but also on gender. With these female judges, a decision such as the one in Milutinovic et al. implying that rapes are not foreseeable in the context of extensive forced deportations would have hardly been possible.

The study concludes that a successful and comprehensive prosecution of sexualised violence in war is left too much to chance unless there is obligatory training for all members of the court to enhance their understanding of sexualised violence in war. Whether women and men with a gender-sensitive understanding are involved or not makes a difference. Richard Goldstone attached great importance to the prosecution of sexualised violence when he took office. This led to the appointment of a female gender legal officer. She was responsible for much of the described progress, especially for the establishment of rape and other forms of sexualised violence as severe crimes in international criminal law. Her influence, however, was limited right from the outset. She had only

an advisory capacity and no decision-making authority, and no staff or financial resources to speak of to implement a consistent indictment strategy.

There are no official statistics on the gender composition of the judicial bodies. The representation of women in the chambers was, however, never more than 24 percent. It was not possible to compile data on the gender composition of the Prosecutor's Office because according to their written response, this information was confidential.

⁷ Gabriela Mischkowski, „Damit die Welt es erfährt“ – „Sexualisierte Gewalt im Krieg vor Gericht. Der Foca Prozess vor dem Internationalen Kriegsverbrechertribunal zum ehemaligen Jugoslawien“, in Materialien zur Gleichstellungspolitik 95/2002. Editor: Federal Ministry of Family Affairs, Senior Citizens, Women and Youth in cooperation with medica mondiale, Bonn 2002, to be found at: www.medicamondiale.org

2. Prosecution of sexualised violence in war at the Sarajevo War Crimes Chamber⁸

The first trial at the Sarajevo War Crimes Chamber took place in mid 2005. By July 2009, 20 of the 67 accused (about 30 percent) were charged inter alia with sexualised violence against women and men. Subtracting the number of cases which the ICTY had referred to the War Crimes Chamber leaves 15 accused charged with sexualised violence on the basis of investigations by the Prosecutor's office in Bosnia and Herzegovina. This is a disappointingly low number. No information could be obtained about the number of rape cases at local courts in Bosnia and Herzegovina.

The prosecution of sexualised violence in Bosnia and Herzegovina is generally characterised by a widespread legal uncertainty. The Rules of Procedure are confusing and, in combination with gender stereotypes, they adversely affect the trials and the witnesses. The general legal system of Bosnia and Herzegovina and the legal foundations of the War Crimes Chamber need to be explained in more detail for a better understanding of the situation.

2.1 Legal uncertainty

Bosnia and Herzegovina is still an internally disrupted state under the direct influence of the international community. The High Representative who was appointed by the United Nations – acting since 2002 also as EU Special Representative for Bosnia and Herzegovina - supervises the implementation of the Dayton Peace Agreement of 1995. He has extensive powers and can dismiss entire governments, set up new authorities, and enact laws. He was instrumental in all substantial legal reforms in the country and involved in setting up the War Crimes Chamber.

The War Crimes Chamber is one of three divisions of the Bosnia and Herzegovina State Court. The other chambers are responsible for cases relating to white-collar crime, organised crime and civil law offences. The War Crimes Chamber was founded in 2004. It is responsible for the prosecution of genocide, crimes against humanity, and war crimes which were committed on the territory of Bosnia and Herzegovina during the war from 1992 to 1995. Its establishment was a precondition for being able to terminate the ICTY's work. All its pending cases were referred to the Sarajevo War Crimes Chamber or to other corresponding courts in Croatia and Serbia. The Code of Criminal Procedure in Bosnia and Herzegovina is

now no longer based on the Yugoslav system of the past, but on the Anglo-Saxon adversarial system instead, including cross-examinations and a limitation of the judge's function. Like the ICTY, the court allows for plea bargaining, resulting in lighter sentences.

Contrary to the ICTY, the Prosecutor's Office is not part of the court, but an independent authority. Since 2004, it has been responsible for the investigation and indictment of war crimes.

The War Crimes Chamber as well as the Prosecutor's Office are staffed with national and international personnel for a transitional period of time that was originally planned to expire in 2009. The number of international staff is being gradually diminished.

The War Crimes Chamber is not, however, the only court in which war crimes are tried in Bosnia and Herzegovina. The Dayton Agreement divided the country into two large political entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Additionally, there is a small special administrative unit around the city Brcko which is governed by both entities. The two entities differ in their administrative structures and have their own executive and legislative branches. The Cantonal and District Courts of both entities are also responsible for cases relating to war crimes, but their legal basis is not the same. There is no information at all on how many rapes were indicted by these courts. Due to this legal uncertainty, the competence of the War Crimes Chamber at the State Court of Bosnia and Herzegovina in Sarajevo is often challenged.

The different legal foundations of the courts have an impact on the prosecution of sexualised violence. The Criminal Code of Bosnia and Herzegovina is the only one which acknowledges rape as a crime against humanity. The Criminal Codes of the two political entities define rape and forced prostitution solely as crimes against civilians and do not mention any other form of sexualised violence.

Uncertainties and contradictions can also be found in the Criminal Procedure Code of the War Crimes Chamber and they have an impact on the prosecution of sexualised violence. Similar to the ICTY, it contains specific provisions for rape cases which are discriminatory and meant to prevent some questions during the interrogations, including questions about the victim's sex life. The study shows, however, that there is great uncertainty about the application of the provisions. The uncertainty is augmented by contradictory rules on the evidential value of

testimonies by different categories of protected witnesses.⁹

During the survey period, the State Court of Bosnia and Herzegovina employed 40 national and 10 international judges. Sixteen of the national judges and three of the international judges were female. The court was presided over by a woman. This means that 38 percent of all the judges were women. The War Crimes Chamber was composed of thirteen national and four international judges. Six of them were female: five national ones and one international judge. The representation of women thus amounted to more than 35 percent. The Prosecutor's Office had 37 national and international prosecutors. The nine international ones were all male, and fourteen of the national ones are female. The office was headed by a male Chief Prosecutor. The representation of women amounted to a total of 37 percent. The war crimes division consisted of eighteen prosecutors: fourteen of them national and four international ones. They were headed by a male international prosecutor. Six of the national prosecutors were female; the representation of women was slightly higher than 33 percent.

The Prosecutor's Office had eight investigators: four national and four international ones. Only one of them was female.

2.2 Gender stereotypes and their impact on the elements of crime

There are similar uncertainties in the chambers' definition of what constitutes rape or other forms of sexualised violence. Some judgements include forced oral sex in the general definition of rape whereas others make a clear distinction between rape and forced oral sex. The latter is often included in cases of sexualised violence against men. Here, the act often consists of forcing male prisoners to have oral sex with each other. The definitions of rape in different judgements of the ICTY have consistently included oral sex. The contradictions in the judgements of the War Crimes Chamber suggest that rape is considered as a crime in which only women appear to be the victims of rape (by men). The Criminal Procedure Code supports this gender stereotype by additionally differentiating between sexualised violence against prisoners of war and against civilians. Rape is not envisaged as a crime against prisoners of war who are allegedly all male, but only as a crime against civilians who are allegedly all female. Thus there is no legal ground for charges of sexualised violence against male and female pri-

soners of war. The indictment has to go an indirect way via other crimes, similar to the early phases of the ICTY. It remains to be seen whether this will only be a transitional phase, as in the case of the ICTY, or whether legal interpretations of rape will be different depending on the victim's gender.

From 2005 to July 2009, the War Crimes Chamber indicted 67 men. The indictment against 20 of them contained sexualised violence charges (almost 30 percent). The final 11 verdicts included nine cases in which the accused were found guilty of rape. The conviction rate for sexualised violence is roughly 10 percent less than the current conviction rate for other crimes.

2.3 Problems of evidence in rape cases

In contrast to the ICTY, several indictments for rape failed at the War Crimes Chamber because the judges did not find the witnesses credible and considered their testimonies unreliable. This was particularly true in the initial first instance trials. In the Nedo Samardzic case, numerous rape charges were dismissed due to some minor contradictions in the testimonies of the witnesses. Just like the accused in the Foca trial at the ICTY, Samardzic belonged to a group of soldiers who kept several women and girls captive in a private home near Foca and turned them into sex slaves. The first instance judgement led to numerous public protests by women's organisations in the Federation. Almost all acquittals were revoked upon appeal.

The reasoning in the judgements show that the credibility of a witness was often judged on the basis of behavioural expectations based on gender stereotypes. This becomes most poignantly apparent in the trial against a Bosnian Serbian soldier named Radmilo Vukovic. He was convicted in the first instance, but acquitted upon appeal. This was a case of repeated rape of a former (Muslim) colleague as a result of which a child was born whom she gave up for adoption. Vukovic claimed that before the war he had an intimate relationship with the witness which she constantly denied. The judges of the first instance assumed that there was a previous relationship, but believed the witness to have later been raped by the accused and sentenced him to seven years of imprisonment for committing a war crime. However, they interpreted the alleged previous relationship as a mitigating circumstance. The judges of the second instance revoked the verdict, because they doubted the credibility of the witness' behaviour in general, especially after the

⁹ More details under "Protection of witnesses"

rapes. The fact that the witness kept her pregnancy secret and did not abort the child was used against her. Similarly, they described other forms of her behaviour as "illogical". During the trial, a rumour spread throughout the court and outside of it that the witness, who had been living abroad for many years, was after financial gains with her false accusations as funds were available for raped women.

A comparison between the credibility credited to the witnesses at the ICTY and those at the War Crimes Chamber might lead to the impression that the ICTY had better witnesses. However, some women who testified at the ICTY on rapes also testified later on at the War Crimes Chamber on the same context, although the accused were not the same. It sometimes happened that the same witness, who was deemed notably credible before an ICTY chamber, was considered utterly unreliable before the War Crimes Chamber. The problem does not lie with the witnesses, but with the court itself. This became also evident in the interviews with judges and prosecutor at the War Crimes Chamber¹⁰

3. Conclusion

The experiences at the ICTY and the War Crimes Chamber have shown that an institutional framework is needed for developing and diligently implementing a consistent strategy to prosecute sexualised violence in war. Such an institution needs to be given far-reaching competencies and be staffed with a highly qualified person who has access to sufficient human and financial resources. This is an important precondition for not leaving the prosecution of sexualised violence to chance or to commitments by individuals only. It would also prevent limiting the prosecution to only some aspects of sexualised violence in war. A suggestion made by sociologist Kirsten Campbell is noteworthy in this context. She suggested the introduction of sexualised violence as a separate category into international criminal law alongside genocide, crimes against humanity, and war crimes.

Sexualised violence is incomparable to any other kind of violence. Sexualised violence in war and its various individual and social dimensions need to be analysed in obligatory qualification and training programmes for everyone actively working in the field of international criminal law. A cross-sector exchange is necessary to give a new impetus to the prosecution of sexualised violence. Sexualised violence in war has its own dynamics beyond orders and purposes of a joint criminal enterprise which requires all political decision-makers and military leaders across all levels to take preventive action. The failure to act must have legal consequences and fulfilling the elements of crime such as omission, tacit approval, or aiding and abetting rape and sexualised violence as a crime against humanity. International criminal law may not be able to prevent wars or war crimes from happening, but the judgements that are passed in courts at present will carry a symbolic meaning. They will send out a message to the world on what is right and what is wrong. Great progress has already been achieved and sexualised violence is taken seriously in criminal prosecution. The message needs to be, however, that political and military leaders cannot hide behind ignorance when it comes to sexualised violence in war.

¹⁰ See below: "Challenges from the perspective of judges and prosecutors"

Part II

Perspectives of witnesses, judges, and prosecutors

With respect to testimonies on war rapes to be given in court, there is the usual complaint that most female victims do not want to talk. The reasons for this are usually sought in the shame that these women feel and their fear of stigmatisation in society. This applies especially to Muslim women and Muslim communities, which are perceived as particularly shameful or particularly patriarchal by the political West and North. The media discourse at the beginning of the 90s was full of clichés like this about Bosnia and Bosnian Muslim women. The judges and prosecutors at the Sarajevo War Crimes Chamber, who were interviewed for this study, were not free from these preconceptions either. These ideas gave rise to the conviction that the problems related to rape trials had their origins outside the courts and therefore could only be solved outside the courts too. No one wondered what the courts themselves could do to gain the cooperation of women living in a socially precarious situation. The question of how the courts themselves contributed to the rape stigma was not asked either.

These questions are the central theme of the second part of the study. Responses are sought in trial-monitoring and interviews with experts, i.e. witnesses who testified in both courts, as well as judges and prosecutors working at the Sarajevo War Crimes Chamber.

Women are underrepresented as witnesses in general and thus limited in their participation in bringing about justice. This is true for both courts. The figures compiled for the War Crimes Chamber show that women primarily testify on rape and sexualised violence. This gender-specific imbalance requires an explanation, but researching it would have exceeded the framework of the present study. It is certain, however, that investigation strategies play an important role, e.g. in what way and via which institutions or organisations the witnesses are contacted. For a review and analysis, the courts themselves would need to collect (anonymised) data on witnesses continuously and sort them by age, gender, category of crime, and protective measures.

The authors of the study found out that between December 1994 and September 2009 about 60 women te-

stified before the ICTY on sexualised violence as victims and main witnesses of the prosecution¹¹. Fifty percent of them testified in only two trials, one of them was the Foca trial. There is an additional unknown number of women who witnessed sexualised violence but had not been affected by it themselves.

Between 2004 and June 2009, the Sarajevo War Crimes Chamber saw a total of 93 female testimonies referring exclusively to sexualised violence¹². This figure, however, does not reflect the absolute number of women testifying on sexualised violence, since an unknown number of women testified multiple times in different trials, sometimes up to three or four times. The figure neither gives any indication of how many of these women had been victims of sexualised violence themselves. Nonetheless, it can be assumed that more women testified on sexualised violence before the Sarajevo War Crimes Chamber in the past four years than in the past 15 years at the ICTY.

Neither the chambers nor the Prosecutor's Offices at the ICTY or the War Crimes Chamber keep statistics on the number of female and male witnesses. Only the Victim and Witness Protection Section at the ICTY has a data base of witnesses whom they support (of both the prosecution and the defence) separated by gender. According to this source, 5,494 persons testified between 1996 and June 2009 and only 790 of them were women (14 percent)¹³.

No comparable figures were available from the War Crimes Chamber. According to research by the authors themselves, 848 persons testified for the prosecution in 45 first instance trials up to 2009, 222 of them were female, i.e. 26.2 percent. In Sarajevo, 88 percent of the persons testifying on sexualised violence were women. In other words, of all the 222 testimonies by women in 45 trials from 2004 to June 2009, 142 testimonies (64 percent) were given in trials including rape charges and 93 testimonies (42 percent) were on sexualised violence exclusively. Only 13 men testified on sexualised violence¹⁴.

11 Chapter 7.1

12 Chapter 7.2

13 Chapter 5

14 Chapter 7.2

4. Witnesses' motives for and experiences of testifying¹⁵

The study outlines that witnesses who testify on sexualised violence have strong but also totally different reasons for doing so. They all share the wish to see the perpetrator punished as severely as possible, although this does not necessarily bring them their desired inner peace as some women explained. Apart from that, they all have different reasons for testifying: Some think that the society only has a chance to be rebuilt if the youth of either side does not take those who committed war crimes as their role models. Others have promised it to each other during their internment or wish to speak for those who did not survive. Some hope for psychological relief while for others it is important to talk about their truth and their stories where and only where it leads to consequences for the perpetrators. Several women wish to prevent the same happening to other women or their daughters by testifying and having the perpetrators sentenced for their crimes.

Most of the interviewed witnesses perceived giving testimony as stressful and traumatising. Many had expected that and explained that this alone would not prevent them from testifying another time. For some, the detailed description of the rapes was the most difficult aspect and for others it was the confrontation with the perpetrator. Some women, however, described moments of gratification when they were able to speak to the perpetrator face-to-face and - most importantly- could see him deprived of his almightiness as a defendant in court.

Some witnesses described the burden of their responsibility which they often only became aware of once they were standing in court as the main witness or because they did not want to make any false accusations.

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

Witness, ICTY, 15 years old at the time of the crime

More than 50 percent of the interviewed women were supported by their families, particularly their husbands and children, when testifying in court. This contradicts the usual stereotypes about an especially patriarchal Muslim society. Only one woman had no one with her. The mutual support within the group of victims is something that needs to be highlighted, especially with reference to what empowers women. Although the prosecutors did not like to see witnesses stay in touch with each other during the trial, several women said that this was exactly what they needed. Apparently there are no uniform rules at the courts in this regard. In at least one case at the ICTY the witnesses were encouraged to communicate with one another, while communication was prohibited by the prosecutors in Sarajevo.

"No one, not even my own mother if she were alive, nor my brother or sister-in-law, could make me feel better after coming back from court, except the persons with whom I went. [...] When five or six of us gather and meet you in front of the court building, it's like the entire burden you've been carrying just falls off to see them waiting. You needn't speak, their look is enough, they are there, waiting for you and giving you their support."

Witness, War Crimes Chamber, 25 years old at the time of the crime

The interviewed witnesses had clear notions about what helped them when testifying and what increased their insecurities. Respectful treatment by court members was mentioned often as helpful and the lack of respect as negative. Generally speaking, witnesses before the ICTY had a more positive experience in court than the witnesses who testified before the War Crimes Chamber. This may be a sign of the learning process that the ICTY went through. In its initial phase, the court was generally given bad grades by witnesses. Many of them felt exploited. This had changed fundamentally in the case of the witnesses interviewed for the study. They felt "taken care of like a little baby" as one witness put it beamingly. In addition to appreciating to be welcomed and seen off by the prosecutors themselves, they mostly valued it if a prosecutor took extensive time to prepare the testimony and give explanations. All this helped the witnesses and motivated them and abated their nervousness at least a little bit.

Those witnesses who were given the opportunity to read earlier statements felt more secure. Many of the women had talked to many people wanting to document their sto-

ries: UN soldiers, the Sarajevo War Crimes Commission, journalists, police, investigators at the Tribunal and others. The defence lawyers usually try to use contradictions in the statements in order to undermine the credibility of the witnesses. Reviewing their own former statements not only helped their memory, but made them feel secure and in control for knowing what to expect in court. Witnesses were able to describe more clearly what they said or did not say when and why.

The experience of War Crimes Chamber witnesses was more mixed. Those women who had the support of their group and discussed everything there and for example, organised a tour of the court room before their testimonies were in a strong negotiating position and were able to reach concessions which were unthinkable for women who were isolated as the only witness living in a distant village. These separated women felt more helpless and were generally not as well informed. Sometimes, simple things such as a missing glass of water was enough to make the witness feel she was not appreciated. The women mostly complained about missing preparation; the witness would often meet the prosecutor only 30 minutes before her testimony was due. Some witnesses mentioned that the court's threat to force the witnesses to speak or punish them if they refused to speak did not help to improve trust between the court and the witness. The witnesses who testified before the War Crimes Chamber stressed the significance of the Victim and Witness Section which is the only section at the court to consist of women only. Some witnesses interpreted the fact that the section did not have much staff and was funded poorly as a reflection of how insignificant they themselves were.

More than 50 women participated in interviews or group discussions for the study: 32 women were interviewed by Bosnian native speakers using structured questionnaires and 17 women took part in semi-structured interviews conducted by the authors of the study and project staff. There were another four to six women participating in three discussion rounds especially organised for a group of former camp inmates. All interviews were treated with confidentiality and were anonymised for use in the study.

Of the interviewed women, 41 testified on their own rape, about two-thirds of them before the War Crimes Chamber and one-third before the ICTY. The majority of the women testified only once. Fifteen of them multiple time, sometimes up to five times.

All the interviewed women still live in Bosnia and Herzegovina, 92 percent of them live in the Federation. 95 percent identify themselves as Bosnian Muslim or Bosniak.¹⁶ Sixty percent of the women could not or did not want to return to where they had lived before the war.

¹⁶ The official term for Bosnian Muslims has been Bosniak for several years.

5. Challenges from the perspective of judges and prosecutors¹⁷

Fourteen judges and prosecutors at the Sarajevo War Crimes Chamber were interviewed for the study. In different ways, they described two main challenges they were faced with in rape trials. The first challenge was the communication and interaction with witnesses who had experienced sexualised violence. The second challenge concerned evidentiary problems.

5.1 Problems of communication

Too much input, not enough results – this could be the bottom line of the first problem. Several people, primarily male prosecutors but also judges, expressed their feelings of unease with rape cases. Rape indictments required more of their time, more effort, more protection and more sensitivity, but on the other hand they hold out the prospect of fewer witnesses, less evidence, and less success. As one judge noted, they never knew what was in store for them in these cases, whether there would be too many emotions or whether the witness would not be able to utter a single word. Some of the judges and prosecutors were moved more deeply by the details of the rape stories than by other crimes.

Generally speaking, raped women were perceived as more severely traumatised than victims of other forms of violence. There was consensus among all the interviewed judges and prosecutors that this trauma required more sensitivity, but also made it more difficult to "get the facts". Some of the prosecutors openly admitted that they sometimes felt overwhelmed when dealing with rape victims and would have liked the support of psychologists in dealing with them and for having their office lend support to the witnesses. They sometimes felt that the Victims and Witness Section was rather an obstacle than help in their attempt to "get the facts".

All interviewed persons were aware of the social stigma of rape. They thought that this was the main reason for the alleged reluctance of women to speak on rapes. It was surprising that international as well as national judges and prosecutors agreed that the Bosnian society was a particularly traditional and patriarchal one and that Bosnian women were especially reserved. Terms such as "Bosnian", "Muslim" and "Bosniak" were used interchangeably.

"The affected women find it more difficult to tell what happened because we are a traditional society. [...]"

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

(Judge from Bosnia)

These clichés clash heavily with the fact that Bosnian Muslim women were the ones to make the rapes public when hundreds of them spoke up. They also contradict the experience of judges and prosecutors themselves when for example women started talking about their rape in court without having been asked about it. Some prosecutors and judges contradicted themselves when they stereotyped female victims on the one hand but on the other hand, when talking about their own experience, insisted that there was no typical rape victim. Sometime they contradicted themselves within one single sentence. An (international) prosecutor noted that raped women were the most vulnerable victims by far, but that "his" witnesses were totally different. Personal experience was seen as an exception to the rule and not as an illustration that raped women were all different and reacted differently to what happened to them.

Through the lens of personal experiences the vulnerability of male victims as well became apparent for example when a prosecutor talked about male victims of torture in a visibly distressed manner. Astonishing insights were revealed in this context. One prosecutor explained that tortured men all wanted to testify in contrast to women, because they did not and as men must not see their own traumatising. The prosecutor pointed out, however, that men refused to talk in cases of sexualised violence and that it was almost easier to talk to female victims of sexualised violence.

The interviews have brought another aspect to light which has the potential of destroying the stereotype of the particular shameful Bosnian woman and the particular patriarchal Bosnian society: the acceptance of personal shame. Some of the male (national and international) prosecutors and judges were most commendably very honest and admitted their own embarrassment when asking witnesses about details of the rape. Some thought that it would be better for the hearing to be conducted by women and saw their maleness as an additional obstacle. A possible conclusion could be that the shame and the embarrassment of the examiner spreads to the witness who in turn interprets that as expected be-

behaviour and reacts in a "stereotypical" way. "Only when I started to cry, I became credible", a witness reported after testifying before a medical commission. Prosecutors and judges should therefore ask themselves in what way they themselves contribute to the specific problems of communicating with rape victims they described.

The challenges related to the stigma of rape should not be left to the women and the society alone. Instead, the courts should review what they can and must change. If court members had to undergo additional obligatory qualification which allowed them to consider their own shame and their own vulnerability as well as a secondary traumatising, their communication skills could be improved. This holds true for all courts and Prosecutor's Offices whose staff are continuously confronted with horrifying mass crimes and harrowing traumatisations; in particular when dealing with sexualised violence. Several of the interviewed judges and prosecutors said they needed more training with respect to sexualised violence in war, rape traumas, and dealing with traumatised witnesses. In view of the abundance of trials which the judges and prosecutors are responsible for, such additional training must aim to make their work easier. It would help them to convert the uneasiness they feel when dealing with rape indictments into a positive challenge.

5.2 Problems of evidence

A judge at the War Crimes Chamber called rape trials a "mission impossible" if the indictment was solely based on the raped woman's statement. He said this although he held that legally no further evidence or corroboration was needed for confirming the rape victim's statement. Nonetheless, for almost everyone among the interviewed prosecutors and judges the question of evidence was considered to be the biggest problem aside from interacting with rape witnesses. They all complained that they had only a few facts, almost zero existence of eye witnesses and no material proof to work with. Judging by the vehemence of their complaints, the current conviction rate of 82 percent in rape cases is surprisingly high.

As there is often no material evidence, there seems to be more need for details which, according to the judges and prosecutors, is something the witnesses refuse to give because of their alleged shame and trauma. Some judges explained that believing a witness was not the problem, but they needed more material evidence, "more details, more flesh, more material" as one judge put it. This is possibly yet another communication problem. As one witness explained, she hated to talk about the details, but she understood it was necessary.

Asking for more details in rape trials confronts some judges with another problem: the "pornographisation" of the trial as one female judge described it. There was the concern that the media especially would use the details that are necessary for finding the truth and report about them in an eroticised and provocative manner.

If the details of the crime are decisive and the witness is unable to provide them, the conviction then depends largely on the credibility of the witness. An assessment of the victim's credibility requires special knowledge of gender and victimology as well as an understanding of the psychology of testimonies which is lacking in most cases and is instead subconsciously replaced by expectations of stereotypical behaviour. Initial research found that the credibility of witnesses in rape trials was doubted relatively often at the War Crimes Chamber.¹⁸

¹⁸ Chapter 4.3, see also preceding paragraph on the War Crimes Chamber

6. Protection of witnesses¹⁹

Voyeurism and stigma seem to call for special measures to protect raped women's private sphere. A protection of these women's private sphere was repeatedly asked for by many women's organisations and feminist activists. However, a patronising type of protection mechanism can also enhance stigmatisation. On the one hand, the high number of testimonies in closed session and whole trials conducted behind closed doors, which happened twice in Sarajevo, help to conceal the rapes again and make them taboo. On the other hand, the protection which is particularly given to women presents women as naturally vulnerable in contrast to men and thus reproduces ideas of women to be predestined rape victims. The question is: How can the interests and the private sphere of women who experienced sexualised violence be protected without confirming or reinforcing existing myths about womanhood? Furthermore, as shown in the study, "protection" can also become a problem for the witnesses themselves.

Both courts offer different types of protection for witnesses against repercussions and revenge. The ICTY does not have any police authority and thus the physical protection of witnesses is limited to their time in The Hague and when travelling there and back. The most important instrument of protection is the guarantee of confidentiality, i.e. protecting the identity of the witness or very personal details from public access and thereby from potential threats. There are different degrees of confidentiality. The highest one, the complete anonymity of the witness, including anonymity vis-à-vis the accused, was granted by the Tribunal in one of the first trials and only once and that was the case of a man who was sexually assaulted. The most common type of protection is the use of pseudonyms. Upon request by the witness or the prosecutor, the witness can also be allowed to testify behind a screen or via a video link from an adjacent room. In some cases, the public can be excluded during specific testimonies. Both courts have sections dedicated to supporting especially protected witnesses, although they do so in different ways. The witnesses' physical security, for example, is in the hands of the Victims and Witness Section at the Tribunal, whereas in Bosnia and Herzegovina the SIPA, a special security police, is responsible for it.

The study's research revealed that 87 percent of all the female witnesses who testified on rape before the Yugoslavia Tribunal, used a pseudonym and also made use of additional means to keep their identity secret. Almost 50 percent of them testified in closed sessions. This has been a growing trend over the years in The Hague, whe-

reas Sarajevo went the opposite way. At the beginning, the public was automatically excluded from all rape trials, but after much protest the decision for or against allowing the public access to the trials was taken by the chambers on a case by case basis. Observations of trials during the survey period showed that the chambers sometimes decided to exclude the public against the will of the witness. A closer look at the reasoning revealed that the chamber might have aimed at protecting itself against unwanted public criticism rather than at protecting the witnesses. Sometimes even the Prosecutor's Office applied for closed session by claiming to protect their prosecution policy as they were afraid that the names of perpetrators who had not been arrested yet would be mentioned accidentally. As this can happen all the time, almost all trials would need to be held in closed session.

It became apparent in the interviews that some prosecutors, however, were strictly against testimonies in closed sessions. They were of the opinion that the court would consider a testimony in closed session less credible than a testimony given in a public trial. This view might possibly be aggravated by confusing rules and regulations in Sarajevo with respect to the evidentiary value of testimonies by protected witnesses. There had been cases in which these rules were misinterpreted to the disadvantage of the witness.

The protection of witnesses at the ICTY is stipulated in its Rules of Procedure. They have been repeatedly amended over the course of time. Conversely, there are three different sets of rules regulating the protection and status of witnesses at the Sarajevo court. This generates a lot of confusion. Witnesses are entitled to special protection if they are either "threatened" or especially "vulnerable". Men tend to be put in the category of "threatened" whereas women, in particular raped women, are often classified as "vulnerable". The interviews with witnesses have shown, however, that many female witnesses feel physically threatened as well as vulnerable in their private sphere. This is why these categorisations by gender are in some aspects discriminatory.

7. Witnesses' views on protection and security²⁰

The responses and opinions given by the interviewed witnesses concerning protection were confusing on the one hand, but crystal clear on the other. There was great uncertainty about the exact way in which they testified and what protection they were granted. This was especially true for the witnesses testifying before the War Crimes Chamber and is a clear indicator of the general confusion there. At the same time, the witnesses agreed that effective protection was not possible anyway. Repeatedly, several women brought forward new examples of their names and stories appearing in newspapers and their confidential testimonies appearing in books. This also happened when they had testified in closed session. The judges and the prosecutors all agreed that Bosnia was like a large village in which everybody knew everybody else and nothing could be kept secret for long. The witnesses thought that one reason why confidentiality could not be guaranteed was the fact that the identity of the witnesses was known to the accused and the defence. There is the additional problem at the War Crimes Chamber that a closed session does not imply the complete exclusion of the public. Upon request, relatives of the accused may also attend the session as well as international observers, e.g. the Organization for Security and Cooperation in Europe or academics. It became indeed apparent throughout trial-monitoring sessions that not only witnesses, but also judges, prosecutors, and defence lawyers mentioned the name of protected witnesses accidentally or provided information with which their identities could be determined.

In light of these assessments it is even more surprising that the majority of the interviewed witnesses preferred to testify without disclosing their identity or better still in closed session. Seventy-three percent of them had testified in closed session and 90 percent of them willingly so. Many of them were aware of the contradiction, but they wanted to do everything they could to protect themselves and others. The reasons for protected testimonies are manifold: sexual shame does not rank first among them.

One important reason the women mentioned was the aspect of security which international observers often dismiss as no longer topical. Ten women had received threats, including five with murder. Other attempts of intimidation were more subtle, e.g. phone calls with no one talking on the other end. Even though immediate fighting has stopped in Bosnia, there are still tensions between the majority and the minority populations in the respective regions. Fear and suspicion are still on the agenda

in many places and the perpetrators' networks are often far-reaching.

Another reason the witnesses gave was their feelings of responsibility for others. Their silence about what happened or about their testimony in court was a caring silence with which they wished to protect their relatives, particularly their parents and children, but also their husbands. They either did not want them to worry too much or wanted to be vilified e.g. by other children. They also wished not to tough other grief in their families they perceived as deeper such as the death of siblings, fathers or husbands. For this reason they sometimes kept their testimony in court secret from their families.

Testimonies in secret can also be used for self-protection purposes. With the help of therapy, victims learn how to live with their past but parents or siblings are often not included in the process. These are usually helpless in how to deal with "it" which can lead to alienation or overly protective care and in turn lead to more stress for the women themselves. Some witnesses pointed out that they had had enough of being seen as victims. "I don't want the public to know what I lived through", one woman said. "I don't want to be seen solely as a woman who went through something like that."

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

Witness, ICTY and War Crimes Chamber, 16 years old at the time of the crime

All the reasons that the study enlists show that women have good reasons beyond sexual shame and social marginalisation to protect their private lives. Young women, in particular, wish to move on and start a new life.

For some witnesses, however, the protective measures of the Sarajevo War Crimes Chamber were more a threat than helpful. As yet, there is no structured or gender-sensitive security concept involving adequately trained staff. Some women described how SIPA members who for security reasons were supposed to accompany them to the Sarajevo court, wanted to meet them in public places or asked local policemen for directions to their houses. This meant that the whole village knew what was happening. Others received phone calls from strangers asking them questions about who looked after their children or where

their husbands were going to be during her testimony. The calls were intended to offer day care for children by the court if necessary, but nobody in Bosnia and Herzegovina trusts phone calls by strangers in such a situation.

A confidential testimony can also have financial effects. Only the court itself can lift a protection status it has once granted. It is usually granted for 30 years. A compensation claim under civil law, however, requires the applicant party's identity to be disclosed. However, such a claim cannot be made as long as their status has not been officially lifted.

The women must strengthen their negotiating position as witnesses in order to prevent the measures intended for their protection to harm them in the short or long run. As shown by the examples in the study, joint action and joint appearances help strengthen the victims' positions. While many accused had expensive lawyers, the interviewed women were often not able to even afford a lawyer for a civil lawsuit against those who published their names in violation of a court order. They have no one to turn to for competent and independent advice on how they should best behave vis-à-vis the courts and as witnesses. Although "threatened and vulnerable" witnesses are entitled to legal counselling, this often does not happen due to a lack of funds. One possibility for solving the problem could be to extend the existing UNHCR's legal aid programme for victims of trafficking in women and girls to also include witnesses in war crime trials. On the basis of an agreement with the Bosnian Ministry of Security, the lawyers of this programme are equipped with all competencies necessary to be legal representatives. The witness would be able to have more control and influence on her protection and pursue her individual interests.

8. Social justice

In the interviews with witnesses, it became apparent that the witnesses did not have any unrealistic expectations of the courts. Most women were aware of the limitations of the law for bringing about justice. For most women, justice included punishment for the perpetrators. The most important elements for establishing social justice were the following:

- financial and emotional support
- social recognition of their suffering
- war pension
- entitlement to decent housing, as well as medical and therapeutical care.

Differing living conditions were responsible for different priorities the women expressed. Health issues were almost always a central topic in the interviews. Almost all the women had to take medication; many of them had had several operations or suffered from chronic diseases. For others, their housing situation has priority. As refugees they were threatened with expulsion from their temporary accommodation, but they did not wish to go back to where they had been raped and where they would be exposed to discrimination as a minority. Those who did return often realised bitterly that in fact they did not belong anywhere. Some (Muslim) women whose hometown now belonged to the Republika Srpska were not only victims of much discrimination, but were not even able to claim the war pension granted by the Federation. Although some of them were economically much better off due to personal circumstances than most women in the Federation, they felt isolated and left alone by everyone. Other women were most worried about their children, not only with respect to providing them with a good education, but also because they had witnessed the rapes as infants and showed increasingly alarming symptoms as they were growing up. Young women, on the other hand, were striving for a new start, wished to conclude their schooling, find a job, have a family - despite their health problems and their psychological problems, despite many depressions and many dark moments.

9. War pension

In Bosnia and Herzegovina there is no uniform state regulation for the compensation of victims nor a victim's pension. The two political entities have different regulations for this as for many other matters. The Federation has recognised raped women explicitly as victims of war since 2006 and in contrast to the Republika Srpska this status is independent of a 60 percent physical damage. By September 2009, about 500 women in the Federation had successfully applied for a monthly pension of a maximum of 260 € on the basis of this law. Many women, who were also raped, prefer, however, to apply for a pension as former prisoners of camps, because a confirmation of the Red Cross is sufficient for this pension. More than 80 percent of the interviewed witnesses receive a war pension. Their 260 € are often used to support large families, including grandparents, parents-in-law and grandchildren.

The study reveals that the procedure for applying for a victim's pension in the Federation is the main problem. According to a legal directive, the women must give a statement to a non-governmental organisation which documents their statements and provides them with a certificate as proof of their rapes. However, the directive only identifies a single organisation in Sarajevo, the Women Victims of War Association. By its own account, this organisation's members consist solely of raped women who are generally willing to testify in court. The problem is multi-layered. Many women neither know how and where to apply for such a pension, nor what they need to do in exchange for it. Many women reported how surprised they were when they arrived at the Women Victims of War Association after being referred there for their pension application and were asked to tell their entire story. They were not even told that their statement was going to be submitted to the Prosecutor's Office at the War Crimes Chamber. This indicates that confidentiality is not granted in the current procedure. Additionally, there is no control whatsoever over what happens to the women's statements. Some women reported that members of the organisation pressured them to testify in court and did not refrain from even threatening to withdraw the certificate they needed for the pension.

Some non-governmental women's organisations campaign for modifying the procedure, but no amendment was in sight by the time the study was concluded.

10. Demands and recommendations²¹

The study concludes with a series of recommendations which were made during the interviews by the witnesses themselves, but also lists recommendations by *medica mondiale* based on the findings of the study. The following represents the most important recommendations:

10.1 Recommendations from Witnesses

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

Recommendations to courts

- Victim and Witness Sections of courts must be duly staffed and financed to fulfil their task. They must be involved from the beginning of investigations and keep contact with former witnesses.
- All county courts should set up a Victim and Witness Section following the example of ICTY and WCC by adopting their provisions.
- Courts should have an emergency medical unit with medical practitioners and psychologists.
- Investigators should fully explain and inform persons they take statements from about their rights and obligations.
- Teams which investigate crimes of rape or sexualised assaults should include women if the witness wishes so.
- Prosecutors should take their time and prepare witnesses well explaining procedures, protective measures, rights and obligations as well as possible defence strategies to undermine the witness' credibility.
- Witnesses should be allowed to read former statements before testifying to refresh their memory and to be prepared for efforts of defence lawyers to confuse the witness.
- Witnesses should be shown the courtrooms and invited to listen to other procedures to get a sensory impression for themselves.
- Witnesses should only be contacted by persons from the court known to them.
- Witnesses should be informed in advance about security measures.
- Witnesses should not be prohibited to be in contact with each other after testimony because they need the mutual emotional support.

- Judges should intervene when defence lawyers become insulting.
- Witnesses should have access to free legal aid and counselling. They also should have support to be able to file suits against those who disclose their identity to the public.
- Psychotherapists and/or other support persons should be allowed to be present in the courtroom during testimony even in closed session.
- Expert witnesses on trauma and rape should be heard to prove that confusion of a witness does not mean that her testimony is not reliable.
- Persons who do not want to testify should have the option to do so and they should not be coerced by the court.
- Witnesses should be supported afterwards to counter possible guilt feelings
- The Victim and Witness Section of the WCC should set up a network of witness support units in Bosnia and Herzegovina in cooperation with Social Service Centres to support witnesses after testimony. A team of doctors and psychologists should be included.
- A public place should be found to put down all names of convicted rapists with the message that something like this should never happen again.

Recommendations to other women who survived rape

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

- “I would recommend to every woman to have a close friend or therapist sitting in the courtroom also in closed session because too many things happen in there.”
- “Women should not feel bad and guilty because of the defence. They just do their job to defend the accused. I would like every woman to know that, so that she does not feel guilty afterwards. They try to destroy your credibility.”
- “Don’t give statements to too many persons. You might be confronted with them in court.”
- “It helped me to look at myself as if it had happened to somebody else. I feel somehow better when I talk about it like that.”
- “Do not accept phone calls by persons you don’t know. Get everything in written. Get phone numbers from persons in court you trust.”
- “Inform the court when you are threatened.”

To NGOs:

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

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

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

10.2 Recommendations of *medica mondiale*

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

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

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

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

- Amend The Law on Civilian Victims of War in both entities and make it applicable at the state level to ensure that women survivors of sexualised violence throughout Bosnia and Herzegovina would be afforded the same status of civilian victims of war and thereby enjoys the same rights;
- Amend the Criminal Code of Bosnia and Herzegovina to include the following provisions:

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

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

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

sures and the procedures of applying for protection;

- Provide comprehensive information on the defense strategies and their possible line of questioning;
- Provide comprehensive information on the trial procedures and their evidentiary role in the process;
- Identify the obstacles of successful prosecution of rape and other war crimes of sexualised violence and address them.

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

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

medica mondiale calls on the Judges to:

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

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

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

medica mondiale calls on the International Donors to:

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