

**THE FORGOTTEN SURVIVORS: A CASE STUDY ON ACCESS TO  
JUSTICE AND REMEDIES FOR VICTIMS OF SEXUAL VIOLENCE IN  
BOSNIA AND HERZEGOVINA**

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## EXECUTIVE SUMMARY

Sexual violence during conflict has always been committed yet little was done to help women in the aftermath of rape. In Bosnia and Herzegovina, women experienced widespread systematic crimes of sexual violence and for the first time efforts to prosecute crimes of sexual violence occurred. International Criminal Tribunals for former Yugoslavia and Rwanda have successfully developed sexual violence jurisprudence in International Criminal Law that many national courts in the Balkans have adopted into their jurisprudence.

With ICTY's mandate coming to an end, jurisdiction for prosecution of sexual violence has been transferred to Bosnia and Herzegovina (BiH). Simultaneously, a War Crimes Chamber (WCC) has been opened, under the supervision of international prosecutors and judges in the State Court. Crimes of sexual violence can be prosecuted in the WCC or in the two semi-independent entities: *Federacija Bosne i Hercegovine*/Federation of Bosnia and Herzegovina (FBiH) or in *Republika Srpska* (RS). Seven years since the transfer of jurisdiction, it is important to examine the issue of justice and remedies for victims of sexual violence in BiH.

The aim of this thesis is to observe whether victims of sexual violence have access to justice and appropriate remedies such as psycho-social care and reparation schemes in a decentralized judicial and legislative system since the transfer of jurisdiction from ICTY in 2004. It is important to analyze how victims of sexual violence are treated in a country of ethnic pluralism and lack of harmonization. The first component of the thesis is a comparison of jurisprudence of sexual violence between ICTY and Bosnia courts to examine if WCC and entity courts are following international standards of sexual violence prosecutions. The

second component is a comparison of the legislative and judicial structure between the state and entities.

Under the current political and judicial structure, criminal prosecutions of sexual violence are not a comprehensive form of justice. Moreover, it is likely that adequate remedies are not available in FBiH and RS. That being said, it is necessary to explore Transitional Justice, Restorative Justice and other non-judicial approaches to help women recover from the trauma.

## DEDICATIONS

I dedicate this thesis to my wonderful parents Sabahudin and Sabiha Muslija; for I would not be here today without your encouragement, love and support. You have been my ultimate inspiration.

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# MAP OF BOSNIA AND HERZEGOVINA: ENTITIES AND CANTONS



Figure 1: Map illustrating the borders between the two entities: *Republika Srpska* (outer region on the right) and Federation of Bosnia and Herzegovina (inner region on the left). (Source: maps.nationmaster.com)

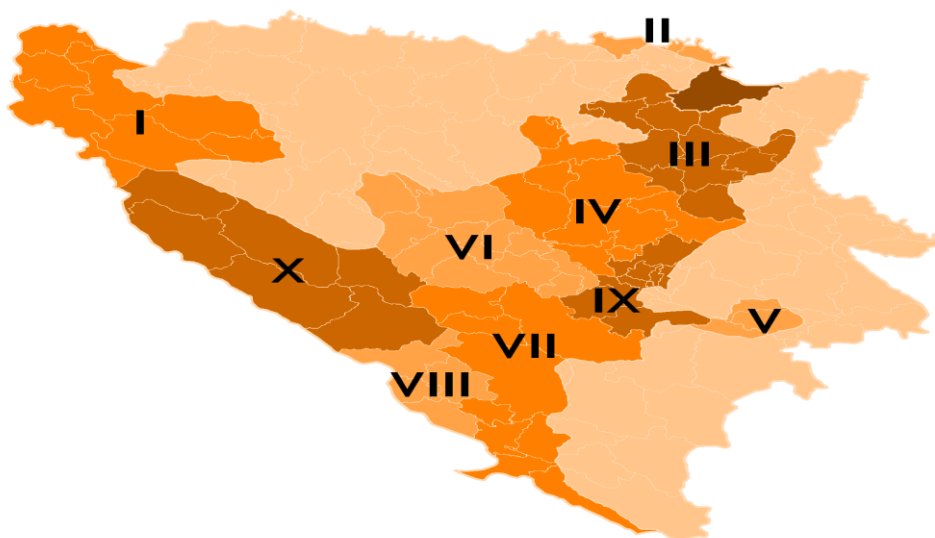


Figure 2: Map of Federation of BiH – the ten semi-independent cantons (Source: Google images)

## LIST OF ACRONYMS

BiH:	Bosnia and Herzegovina
CAT:	Committee against Torture
CAVR:	Commission for Reception, Truth and Reconciliation
CCIAT:	Criminal Code Implementation Assessment Team
CPO:	Cantonal Prosecutor's Office
CPC:	Criminal Procedural Code
CRP:	Community Reconciliation Process
CSW:	Center for Social Welfare
CTV:	Center for Torture Victims
ECHR:	European Convention of Human Rights
ECtHR:	European Court of Human Rights
FBiH:	Federation of Bosnia and Herzegovina
FPO:	Federation Prosecutor's Office
HJPC:	High Judicial and Prosecutorial Council
HRW:	Human Rights Watch
ICL:	International Criminal Law
ICCPR:	International Covenant for Civil and Political Rights
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for former Yugoslavia
JNA:	Yugoslav People's Army
KM:	Convertible Marks
OHR:	Office of the High Representative
OSCE:	Organization for Security and Co-operation Europe
PTSD:	Posttraumatic Stress Disorder
RoR:	Rules of the Road Process

RS:	Republika Srpska
SIPA:	State Investigation and Protection Agency
SFRY:	Socialist Federal Republic of Yugoslavia
VWS:	Victim & Witness Section
VWU:	Victim Witness Unit.
WCC:	War Crimes Chamber
WSO:	Witness Support Office

## INTRODUCTION

Sexual violence<sup>1</sup> is a common weapon of war used to humiliate and degrade women; the use of sexual violence in Bosnia and Herzegovina (BiH) was no exception. Unlike previous conflicts the international community was willing to recognize the widespread presence of systematic rape in BiH. International attention and survivors who were willing to speak led to groundbreaking research on crimes of sexual violence in international criminal law.<sup>2</sup> International experts determined that mass rape was a systematic strategy—one that was used by the Bosnian Serb army as a campaign of terror to push out the Bosniak population from their communities and to destroy an ethnic group through forced impregnation.<sup>3</sup> According to Committee on the Elimination of Discrimination against Women (CEDAW),

The mass and systematic rape of non-Serbian woman of all ages [had been] one of the most complex manifestations of aggression, ethnic cleansing and a particular form of genocide... Those actions were premeditated, carefully organized and meant as acts to humiliate, shame, and degrade the entire community.<sup>4</sup>

The exact number of rape victims is unknown and it will never be known because of the stigma associated with rape victims in Bosnia and Herzegovina. International organizations estimate that between 20,000 and 50,000 women have been raped between 1992 and 1995.<sup>5</sup> According to the Bosnian Association of Women Victims of War, their current database contains 25,000 victims of sexual violence.<sup>6</sup>

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<sup>1</sup> Sexual violence in this thesis refers to rape, forced impregnation, enslavement and sexual slavery.

<sup>2</sup> Inger Skjelsbaek, Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia and Herzegovina, 16 *Feminism & Psychology* 373(2006).

<sup>3</sup> Adriana Kovalovska, Rape of Muslim Women in Wartime Bosnia 3 *ILSA Journal of Int'l & Comparative Law* 931, 934 (1996).

<sup>4</sup> Committee on Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Bosnia and Herzegovina, Special Report, ¶734 Excerpted from: Supplement No. 38 (A/49/38) *available at* [http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING\\_COMMENTS/Bosnia\\_and\\_Herzegovina/Bosnia\\_and\\_Herzegovina-Special\\_report.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Bosnia_and_Herzegovina/Bosnia_and_Herzegovina-Special_report.pdf) (February 1, 1994).

<sup>5</sup> Anna-Marie L.M de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 9 (2005).

<sup>6</sup> Association: Women Victims of War, Information Pamphlet, 13 (2010).

## i. Background

The armed conflict in BiH started in 1992 after the dissolution of the Socialist Federalist Republic of Yugoslavia (SFRY) and ended with the signing of the Dayton Agreement in 1995. Prior to the war, Bosnia and Herzegovina was known as a multiethnic country of tolerance with the highest number of inter-ethnic marriages in comparison to the rest of the SFRY.<sup>7</sup> The three predominant ethnic groups were and still are Bosniaks (Muslims), Croats (Catholics) and Serbs (Orthodox). Between February 29<sup>th</sup> and March 1<sup>st</sup>, 1992, a referendum of independence was held in Bosnia and Herzegovina.<sup>8</sup> The turnout was 63 percent due to the boycott by Bosnian Serbs. Out of the 63 percent voter turnout, 99.4 percent voted for independence.<sup>9</sup> On April 1<sup>st</sup>, with the help of the Yugoslav People's Army (JNA) and paramilitary forces of Milosevic's Serbia, Bosnian Serbs began an attack on the civilian population in North-eastern Bosnia.<sup>10</sup>

During this three year conflict, women became a target of widespread, systematic human rights abuses across BiH. Women were subjected to mass rape in their homes with their family present, in concentration camps, rape camps and facilities that were turned into brothels.<sup>11</sup> In addition to rape, women were subjected to forced impregnation, prostitution, torture, sexual slavery, enslavement and human trafficking.<sup>12</sup> There have been reports that girls as young as seven have been raped.<sup>13</sup> Although women in general were targets of sexual violence, the majority of victims are Bosniak women and girls.<sup>14</sup>

<sup>7</sup> Jean-Marie Le Goff & Francesco Giuddici Pa Vie-Unil, Transitions to Marriage in former Yugoslavia: Interethnic differences across cohorts 1, 3 (2009) available at <http://www.giovaniesocieta.unibo.it/paper/10a/legoff.pdf>

<sup>8</sup> Marko Attila Hoare, The History of Bosnia: From the Middle Ages to the Present Day 363 (2006).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* at 364.

<sup>11</sup> Inger Skjelsbaek *supra* note 2 at 374.

<sup>12</sup> Karen Angel, Feminism and its (Dis)Contents: Criminalizing wartime rape in Bosnian and Herzegovina 99 *American Society of Int'l L.* 778, 784 (2005). It has also been determined in ICTY case law through the Furundzija case, Kuranac, Kovac and Vukovic, Celebic case (to list a few cases).

<sup>13</sup> Inger Skjelsbaek *supra* note 2 at 374.

<sup>14</sup> *Id.* at 375.

Upon signing of the Dayton agreement, the country was divided along ethnic lines into the Serb run *Republika Srpska* (RS) and the Croat-Bosniak power-sharing *Federacija Bosne i Hercegovine* or as it is known in English: Federation of Bosnia and Herzegovina (FBiH). The government authority was allocated to the RS and FBiH entities and a three-person presidency was created to represent each ethnic group (see maps attached).<sup>15</sup> The FBiH is further broken down into ten semi-independent cantons that have judiciary and administrative independence from the state.<sup>16</sup> In the RS, there are five separate administrative units. In addition, an Office of High Representative (OHR) was established to oversee the entity governments, help rebuild government institutions and initiate legal reform in the country.<sup>17</sup>

Bosnia's judicial and legislative system is decentralized. This means that most political and judicial power is allocated to the FBiH and RS entities. The decentralized system has made it difficult to reconcile the three ethnic groups because of marginalization promoted by politicians. Through political rhetoric and physical separation of the country, the cooperation between three ethnic groups is minimal.<sup>18</sup> Today, many rape survivors suffer in silence and in shame without adequate medical or psychological support because rape victims are stigmatized in all three ethnic communities.<sup>19</sup> Criminal justice has been the only available mechanism for truth, justice and redress for victims of sexual violence in BiH)

## ii. The Research Problem and Research Question

<sup>15</sup> William W. Burke-White, The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina 46 Colum. J. Transnat'l L. 279, 286 (2007).

<sup>16</sup> *Ibid.*

<sup>17</sup> Christopher DeNicola, "Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism," 2 (2010) available at [http://works.bepress.com/christopher\\_denicola/1](http://works.bepress.com/christopher_denicola/1)

<sup>18</sup> Kristen Juhl, The Problem of Ethnic Politics and Trust: The Missing Person's Institute of Bosnia 4 Genocide Studies and Prevention 239, 240 (2009).

<sup>19</sup> Adriana Kovalovska *supra* note 3 at 935.

With the transfer of jurisdiction from ICTY to the Bosnian State Court in 2005, many believed that the War Crimes Chamber (WCC)<sup>20</sup> would bring justice and remedies to those who suffered mass atrocities during the war. Despite the establishment of the War Crimes Chamber in the Bosnian State Court, victims of sexual violence have not been provided with adequate access to justice or with proper remedies. Over the last seven years, 174 cases of war-related sexual violence have been processed on the national level and twelve convictions have been made in WCC.<sup>21</sup> Amnesty International and the Committee against Torture (CAT) have raised concerns about the current judicial system in BiH, stating that available mechanisms are not adequate enough to provide justice to victims of sexual violence.<sup>22</sup> If proper investigations are not being conducted and vulnerable victims are not provided sufficient protection and support, it is likely that victims with high psychological trauma will not come forward out of fear for their safety and because of fear of re-traumatization.

Outside the judicial system, government sponsored reparations and the support programs are non-existent. Most victims do not have any socio-economic and psychological support that should be provided by entity governments. This means most women continue to suffer from war related psychological disorders. As a result women are not psychologically stable to report the crime or testify in court. Victims also face stigmatization from their communities thus making it harder for women to speak up about their suffering.<sup>23</sup> After a recent visit, the UN Special Rapporteur on violence against women has emphasized the need,

“For government authorities at all levels to recognize the existence of civilian women victims of rape and torture, regardless of their ethnic or religious backgrounds, and to

<sup>20</sup> The State Court of Bosnia and Herzegovina is the actual institution, the War Crimes Chamber is part of the State court.

<sup>21</sup> U.N. Secretary-General, *Conflict-related sexual violence: Rep. of the Secretary-General* ¶75, U.N. DOC A/66/657-S/2012/33 (January 13, 2012).

<sup>22</sup> Amnesty International, *Whose Justice? Women of Bosnia and Herzegovina are still Waiting*. EUR 63/06/2009, 5 (September 2009).

<sup>23</sup> *Id.* at 9.

ensure that they have equal access to remedies and services, regardless of their physical location within the country.”<sup>24</sup>

Taking the concerns outlined above into consideration, the questions that will be explored in this thesis are: What is the reason for the lack of prosecutions of sexual violence in Bosnian courts and why have women not been provided with adequate remedies to help them recover from the trauma of sexual violence?

### **iii. Literature Review**

Previous literature discussing prosecution of sexual violence and government sponsored remedy programs in Bosnia and Herzegovina is limited. The most recent debate has been about the definition of rape adopted in the Criminal Code of BiH and how that may cause impunity. Other concerns that have been expressed in previous literature are regarding the decentralized judicial structure and the treatment of vulnerable witnesses during trials. Since WCC was one of the first hybrid tribunals to take over ICTY’s jurisdiction, most literature has focused on this court. There have been discussions about the reasons why the Bosnian government has forgotten victims of sexual violence and those explanations will be addressed here.

Teodora Todorova argues that the reason why victims of sexual violence have been ignored by the government and the judiciary is because of the division among ethnic groups in Bosnia’s post-conflict society. More specifically, war-time sexual violence has been included in the Bosniak victimization narrative in an attempt to re-establish social normality. This has caused “individual women’s experiences of wartime rape to be marginalized and silenced.”<sup>25</sup> By combining women’s suffering together with the Bosniak, Croat or Serb

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<sup>24</sup> U.N. Special Rapporteur, Special Rapporteur on Violence against women finalises country mission to Bosnia and Herzegovina, Press Release (November 5, 2012), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12742&LangID=E>

<sup>25</sup> Teodora Todorova, ‘Giving Memory a Future’: Confronting the Legacy of Mass Rape in Post-conflict Bosnia-Herzegovina 12 *Journal of Int’l. Women’s Studies Special Issue* 3, 5 (2011).



narrative, victims of sexual violence are ignored and no longer seen by the Bosnian authorities as a vulnerable group of people that need special attention. Moreover, since victims have been marginalized into ethnicities, the government has been able to avoid creating support programs to help victims of sexual violence. Many victims fear that, because there is no support from the authorities to recognize women's suffering, an amnesty will be enforced for [the society] to move on.<sup>26</sup> Todorova's argument is very important for this research problem because she has been able to explain how the competing victimization between the three ethnicities has overshadowed the suffering of victims of sexual violence.

From a legal perspective, one of the leading concerns has been the definition of rape adopted in the 2003 Criminal Code of Bosnia and Herzegovina (hereinafter Criminal Code of BiH). Angela J. Edman explains that the definition of rape which WCC relies on is not adequate under International Criminal Law and because of this definition women have been denied justice. The definition in the Criminal Code of BiH includes the element of 'force or a threat of force' which makes it possible for perpetrators to walk away free of charge.<sup>27</sup> Edman believes that the use of this definition of rape accounts for a low number of prosecutions of sexual violence in WCC. Although a legitimate concern, she does not acknowledge that crimes of sexual violence can also be prosecuted in FBiH and RS courts (hereinafter entity courts) and that this could also be an issue.

More recent academia has concentrated on the security concerns in the WCC and the issue of case backlog. Clair Garbett has acknowledged that WCC has been able to "conduct fair and transparent trials in accordance with international standards [however], the extensive backlog of cases, poor coordination with district and cantonal prosecutors' offices and the lack of effort to develop an efficient program of witness protection" has a negative impact on

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<sup>26</sup> Sophie Arie, *After war, what next?* BMJ, 6 Dec, 2010.

<sup>27</sup> Angela J. Edman, *Crimes of Sexual Violence in the War Crimes Chamber of State Court of Bosnia and Herzegovina: Successes and Challenges*, 16 Hum. Rights Brief, 21 (2008).

victims' willingness to testify before WCC.<sup>28</sup> The research presented in this article is relevant because it identifies challenges for victims seeking justice.

According to Garbett's research there are 1,381 cases pertaining to 8,249 suspects waiting to be processed in courts of BiH.<sup>29</sup> The extensive backlog has helped individuals who held high positions in the military or paramilitary evade justice. Based on recent data, from the first eight months of 2011 Bosnia's State Prosecutor has failed to indict suspects who held leadership positions in the military.<sup>30</sup> From the information provided in this article, it is clear that the backlog of cases has caused an extreme delay in prosecutions. For this thesis, it is important to identify the specific challenges survivors of sexual violence face as a result of the backlog of cases.

The relationship between the state and cantonal prosecutors is also a challenge for victims of sexual violence. Garbett argues that because of the lack of coordination between state and cantonal prosecutors, "a database record of incomplete cases has not been designed yet."<sup>31</sup> Without an active database of incomplete cases, prosecutors can exclude cases, making impunity more likely. Garbett has pointed out that lack of structure and coordination between the entity and state courts has created impunity. Since the focus of this thesis is on challenges affecting victims of sexual violence, it is important to analyze the structure of Bosnian judicial system and coordination between the state and entity courts. By examining the judicial system, it will be possible to see if the decentralized judicial system has stalled the prosecution of sexual violence.

Garbett also identifies that ineffectiveness of the witness protection program has discouraged victims from testifying before WCC. Regrettably, she does not go into details

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<sup>28</sup> Clair Garbett, Transitional Justice and 'National Ownership': An Assessment of the International Development of the War Crimes Chamber of Bosnia and Herzegovina 13 Hum. Rights Rev. 65, 75 (2012).

<sup>29</sup> *Id.* at 74.

<sup>30</sup> *Id.* at 76.

<sup>31</sup> *Id.* at 75.

regarding this issue.<sup>32</sup> Based on the analysis of the Bosnian witness protection and witness support mechanisms made by Azra Sehic, the Bosnian system is not adequate enough to protect vulnerable witnesses.<sup>33</sup> There is an indication that government officials have ignored the needs of vulnerable witnesses and that laws pertaining to witness protection and witness support have not been implemented. An in depth analysis is needed on the state and cantonal laws and whether any special measures for victims of sexual violence are available. Furthermore, it is important to compare witness protection in the state and entity courts to see whether witnesses are protected equally in all courts.

It is evident that the literature reviewed focuses more on the challenges in the judicial system. As important as retributive justice is for victims of sexual violence, this is not the only reason that victims of sexual violence have become invisible. There is a need to address not only the problem with the judicial structure in BiH but also other factors that may be responsible for the failure to provide adequate remedies, access to justice and reconciliation for victims of sexual violence.

#### **iv. Thesis Statement and Hypothesis**

The intent of this thesis is to prove that the failure to provide women with proper access to justice, remedies and reconciliation stems from the decentralized legislative and judicial system and lack of political will to create programs and other transitional justice mechanisms to help women recover. To better understand how the decentralization of the country has affected women in BiH, this thesis will analyze available mechanisms of justice and redress for victims of sexual violence on the state and entity level.

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<sup>32</sup> *Ibid.*

<sup>33</sup> Azra Sehic, *Protection of Victims/Witnesses of Genocide, Crimes against Humanity and War Crimes before the Courts in BiH* in ACCESS TO JUSTICE: BOSNIA AND HERZEGOVINA, COLLECTION OF PUBLIC POLICY ANALYSIS IN THE FIELD OF JUDICIARY 11-28, 27 (2011).

Since Bosnia and Herzegovina is an ethnically divided country with a backlog of cases, other transitional justice mechanisms in addition to criminal trials must be adapted into the system to help women reintegrate back into their communities. Government support is just as crucial as civil society in providing victims with programs of social rehabilitation, reintegration and reparation. In BiH, victims want the perpetrators to be persecuted, to get back to a sense of normalcy. One survivor told Amnesty International,

“My biggest wish is that the case is prosecuted. That would be the moment of my great happiness! I cannot live normally until it happens...I want them to arrest him so that I could be at peace again.”<sup>34</sup>

As this testimony demonstrates, most victims think that telling their stories in a trial will bring them peace. Unfortunately, victims realize that they are limited to answering questions posed by the legal counsel thus; alternatives to criminal trials must be found. Since women of rape have been stigmatized, the first step is to bring awareness to the public about wartime sexual violence to remove the stigma from the victim. Other important steps include providing psychological support and vocational training to help women reintegrate back into the society. Lastly, even though criminal trials are necessary in BiH, survivors of rape should be given an opportunity to tell their stories to help them recover.

Through the course of this thesis, I aim to provide a clear outline of the retributive justice process and government sponsored programs available to victims of sexual violence today in BiH. In the first part, I intend to look at the criminal justice system on the state and entity level, the current witness support and witness protection programs available and social support afforded to victims of sexual violence. In the second part, I intend to explore internationally established transitional justice mechanisms for the purpose of examining whether these mechanisms can help in BiH. Lastly, I will provide recommendations which I believe can improve the recovery mechanisms for victims of sexual violence.

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<sup>34</sup> Aida's Testimony in Amnesty International, *Whose Justice?* Report *supra* note 22 at 28.

## **v. Limitation of the Study**

Although men were also victims of sexual violence during the 1992 to 1995 conflict, this thesis is strictly focusing on women victims due to the extent of available information about female victims. Thus, throughout the thesis, the pronoun ‘she’ will be used in replacement of the word survivor or victim.

## **vi. Thesis Structure**

This thesis will be divided into five chapters. The first chapter will discuss the development of sexual violence definition under war crimes and crimes against humanity in the ICTY. Since there have been issues with the Bosnian definition of rape, a thorough analysis of the definition of sexual violence used in Bosnian courts will be included. This chapter will also compare the prosecution process of sexual violence between WCC and entity courts.

The second chapter will explain the present framework of the Bosnian judicial system and its relation to the ICTY. The aim of this chapter is to identify structural problems in prosecuting sexual violence and to determine if these problems have been the reason for lack of prosecution of sexual violence. This involves mapping out the exact structure between the entity courts and the State Court as well the relationship between the state prosecutor and the entity prosecutors. It is important to analyze the prosecution of sexual violence cases in the WCC and in entity courts to see whether the courts are following international standards.

Chapter three will discuss the witness protection programs available in the WCC and entity courts. The chapter will describe ICTY’s witness protection and witness support programs as an example of international standards of witness protection and support. This will be followed by a discussion on the legislative and procedural mechanisms of witness protection and witness support in the State Court and entity courts. An analysis of the witness

support and protection programs is necessary to determine if these programs have discouraged victims from testifying.

Chapter four will analyze the level of NGO and government support for victims of sexual violence. Since the country is divided into two entities, I will look at the social support policies towards victims of sexual violence in the FBiH and RS. The aim of this chapter is to analyze the importance of psycho-social support by examining how the governments have helped victims of sexual violence outside the courts.

Chapter five will explore international mechanisms of transitional justice. The intent of this chapter is to examine four case studies and see if any would be applicable to victims of sexual violence in BiH. I will look at how these problems have been addressed in other countries. The discussion will be on amnesties, the truth and reconciliation commissions in Sierra Leone, Guatemala's special tribunal for women and Restorative Justice Mechanisms applied in Timor-Leste.

## **vii. Methodology**

The research relies mostly on secondary sources such as books, scholarly articles, jurisprudence from Bosnian courts and ICTY. NGO Reports, semi-official documents and written news media from Bosnian newspapers from 2010 until 2012 have been taken into account to provide examples of current government treatment of victims. Victim testimonies from documentaries and NGO reports have been included to present a personal perspective of challenges experienced by victims. Lastly, personal interviews have been conducted with Bakira Hasecic, an activist and director of Sarajevo based association Women Victims of War; Alma Taso Deljkovic, head of the Witness Support Office at the War Crimes Chamber; a former staff member at the Office of the Prosecutor BiH who has requested anonymity and Aleksandra Petric, program director for NGO "United Women" Banja Luka.

## CHAPTER 1: DEFINITION OF SEXUAL VIOLENCE IN ICTY AND BOSNIAN CRIMINAL CODE.

Over the past decade, significant developments have been made in international criminal law jurisprudence regarding the crime of sexual violence. Before the establishment of the ICTY and ICTR, provisions addressed crimes of sexual violence in the Geneva Conventions and Additional Protocol I. However, rape was categorized as a crime of violence and an attack upon the body and women's honor.<sup>35</sup> ICTY and ICTR have played a crucial role in establishing an internationally recognized definition of rape by determining that rape and acts of sexual violence can amount to war crimes, crimes against humanity and even genocide.<sup>36</sup> In 2008, the UN Security Council passed Resolution 1820. This resolution calls on all states to end impunity for crimes of sexual violence.<sup>37</sup> Bosnia and Herzegovina has taken on the responsibility to continue prosecuting war crimes and crimes against humanity.

This chapter intends to examine the development of sexual violence as a crime under International Criminal Law (ICL). The focus will be on ICTY's case law because the Tribunal has paved the way for prosecution of sexual violence and created a legacy that continues in Bosnian courts today. More importantly, the transfer of jurisdiction to Bosnian courts makes it mandatory for the judiciary to follow the standards established by ICTY. The first part of the chapter will discuss the crimes that can be prosecuted as sexual violence. The second part will look at the developments of the sexual violence definition in Bosnian courts and whether the definition of rape is consistent with standards established under International Criminal Law.

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<sup>35</sup> Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation* OHCHR at 7, available at [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf).

<sup>36</sup> ICTY, *Landmark Cases*, available at <http://www.icty.org/sid/10314>, (last visited October 23, 2012).

<sup>37</sup> S.C Res 1820, ¶ 4, U.N SCOR, 63<sup>rd</sup> year, U.N Doc S/RES/1820 (June 19<sup>th</sup>, 2008)

## 1.1. Sexual Violence Jurisprudence in ICTY

When the ICTY Statute was created, rape was the only crime listed as a crime against humanity under Article 5(g).<sup>38</sup> Over the years, the prosecution of sexual violence expanded beyond the charge of rape listed under Article 5(g).<sup>39</sup> The Tribunal decided that the crime of rape can be prosecuted as outrages upon personal dignity, humiliating and degrading treatment, enforced prostitution and any form of indecent assault characterized as a serious violation of Common Article 3.<sup>40</sup> The Tribunal has also been successful in prosecuting sexual violence for crimes not related to acts of sexual violence. These include torture, enslavement, persecution and other inhuman acts listed under crimes against humanity; causing serious bodily or mental harm to members of a group as genocide; willfully causing great suffering or serious injury to body or health as grave breaches; humiliating and degrading treatment; and rape as an individual crime under the laws of customs of war.<sup>41</sup>

### 1.1.1. Definition of Rape

Cases that have helped advance the definition of rape and the jurisprudence for charges of sexual violence have been *Furundzija*, *Celebici*, *Kunarac*, *Kovac and Vukovic* (ICTY) and *Akayesu* (ICTR).<sup>42</sup> Although rape has been classified as a war crime as early as 1474,<sup>43</sup> there has not been any attempt to define rape under international customary law until ICTY and ICTR.<sup>44</sup> There are three cases that established different standards and elements for the definition of rape. The *Furundzija* (ICTY) case sets precedence for a mechanical

<sup>38</sup> Amnesty International Report, *Whose Justice?* *supra* note 22 at 9.

<sup>39</sup> Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practices of the ICTY and ICTR*, 17 (2005).

<sup>40</sup> *Id.* at 17,

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Center on Law and Globalization, *Rape may be a war crime*, available at [http://clg.portalxm.com/library/keytext.cfm?format\\_tables=0&keytext\\_id=203](http://clg.portalxm.com/library/keytext.cfm?format_tables=0&keytext_id=203).

<sup>44</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 104.



definition of rape,<sup>45</sup> the Akayesu (ICTR) case determined that rape could amount to genocide and the *Kunarac, Kovac and Vukovic* case expanded the definition of rape developed in *Furundzija* by reinstating the element of coercive circumstance.<sup>46</sup>

The first definition of rape in international law came from the *Akayesu* judgment. According to the Trial Chamber, rape is defined as

“A physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed: a) as part of a wide spread or systematic attack; b) on a civilian population; c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial or religious grounds.”<sup>47</sup>

There are two important developments in the *Akayesu* definition of rape that must be addressed: “physical invasion of a sexual nature” and “coercive circumstances.”<sup>48</sup> Physical invasion refers to acts of sexual violence committed beyond penetration with a penis. Other forms of sexual violence, such as the insertion of rough objects into the vagina or anus and mutilation of sexual organs, were included in the definition.<sup>49</sup> The term ‘invasion’ is important due to its emphasis on forced acts of sexual nature that have been committed without the perpetrator using his penis.<sup>50</sup>

Coercive circumstance is the other important element of this definition. The Trial Chamber emphasized that there does not need to be a presence of physical force to constitute sexual violence.<sup>51</sup> Other factors such as “threats, intimidation, extortion and other forms of duress which prey on fear or desperation” may constitute coercion.<sup>52</sup> According to legal experts, including consent in the definition of rape in the context of International Criminal

<sup>45</sup> *Id.* at 114: referred to as mechanical due to the Trial Chambers decision to refer to the national jurisdiction in an attempt to define it because the Akayesu definition was too wide.

<sup>46</sup> *Id.* at 105

<sup>47</sup> Prosecutor v. Jean- Paul Akayesu Case No. ICTR-96-4-T, Judgment, ¶ 598, (2 September 1998).

<sup>48</sup> *ibid.*

<sup>49</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 106, Akayesu Judgment, ¶ 686.

<sup>50</sup> *Id.* at 107.

<sup>51</sup> Akayesu Judgment *supra* note 47 at ¶ 688.

<sup>52</sup> *Ibid.*

Law is irrelevant because ICL is used to prosecute crimes committed during conflicts while sexual violence is usually committed under a threat of force or coercive circumstances.<sup>53</sup>

The second definition of rape was developed during the *Furundzija* trial. Revising the definition was necessary because according to the Trial Chamber, the *Akayesu* definition did not include certain elements of rape.<sup>54</sup> In the *Furundzija* case, the definition of rape is defined as:

- “(i) sexual penetration, however slight:
  - (a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) Of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.”<sup>55</sup>

In contrast to the *Akayesu* definition, this definition is more descriptive and narrow because it specifically lists what body parts need to be involved to constitute the act of rape. Also, the concept of the ‘threat of force’ is emphasized in this definition as opposed to ‘coercive circumstances’ used in the *Akayesu* definition. The Trial Chamber also included oral sex in the definition and the presence of a third person, referring to cases where a man may have been forced to rape another man or woman.<sup>56</sup> The issue raised by international experts with this definition is the risk of excluding other forms of sexual violence because there is a greater focus on penetration. As a result other forms of sexual violence would not constitute a violation of human dignity.<sup>57</sup> The *Furundzija* trial was the only case that used this specific definition of rape.<sup>58</sup>

The third definition of rape was developed in the *Kunarac, Kovac and Vukovic* case. The major debate during the trial was the exclusion of consent from the definition of rape.

<sup>53</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 120.

<sup>54</sup> *Id.* at 112.

<sup>55</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶185 (Int’l Crim. Trib. For the Former Yugoslavia, Dec 10, 1998).

<sup>56</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 115.

<sup>57</sup> *Id.* at 114.

<sup>58</sup> *Id.* at 115.

The Trial Chamber considered that the narrow focus on ‘force or threat of force’ in the *Furundzija* definition of rape played in favor of the perpetrator: if there is more focus on the issue of consent than on the physical force, it is more likely that the perpetrator will evade liability for the crime.<sup>59</sup> Thus, the Trial Chamber in this case defined rape as,

“Sexual penetration, however slight: (a) of vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”<sup>60</sup>

This definition emphasizes the circumstances in which rape was committed before consent can be used as an argument. The creation of *Rule 96* in the ICTY’s Rules of Procedure and Evidence echoes the lack of support for using consent as an argument.

Rule 96 was introduced in the Rules and Procedures of Evidence in ICTY and ICTR to solve the debate regarding consent in cases of sexual violence. There have been three amendments to this rule.<sup>61</sup> The final version states,

“In cases of sexual assault:

- (i) No corroboration of the victim’s testimony shall be required;
- (ii) Consent shall not be allowed as a defence if the victim
  - (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression,
  - or
  - (b) Reasonably believes that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) Before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible
- (iv) Prior sexual conduct of the victim shall not be admitted in evidence.”<sup>62</sup>

The Tribunal has not put a blanket ban on using consent during a trial. Nonetheless, it is up to the accused to prove that there was not a threat of violence, detention or psychological

<sup>59</sup> *Id* at 119.

<sup>60</sup> Prosecutor v. Kunarac, Kovac and Vukovic Case No. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 460, (Int’l Crim. Trib. for the Former Yugoslavia Feb 22, 2001).

<sup>61</sup> Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights* 359, (2003).

<sup>62</sup> ICTY Rules and Procedures of Evidence, IT/32/Rev.46, 101 (2011).

oppression against the victim or a third person.<sup>63</sup> The main purpose of *Rule 96* is to regulate corroboration, prevent the use of consent as a defense and prevent the use of evidence of previous sexual history in a trial of sexual violence.<sup>64</sup> This is an immense development since in national criminal codes, such as the Socialist Federal Republic of Yugoslavia (SFRY), the victim had to prove that she did not consent to the act for the court to rule it was rape.<sup>65</sup>

Enforcing *Rule 96* proves necessary since in many cases of war rape, the women were exposed to brutality. As long as there is a possibility that struggling against the perpetrator would result in more brutality, consent is an irrelevant factor.<sup>66</sup> As a result, many women that were raped in concentration camps in Bosnia and Herzegovina did not resist.<sup>67</sup> Furthermore, asking the victim to prove she resisted during the rape has been determined to undermine her suffering and it can prevent future victims from testifying. This rule also confirms once and for all that consent does not belong in International Criminal Law.

### 1.1.2. Sexual Violence as Enslavement

Categorized as a crime against humanity under customary international law, the Trial Chamber in *Kunarac, Kovac and Vukovic* also established a definition of enslavement under International Criminal Law.<sup>68</sup> The Trial Chamber identified a list of indicators that constitutes the crime of enslavement. The first set of indicators pertains to the freedom of movement. For the crime to be considered enslavement there must be a clear demonstration of control of the individual's autonomy, ownership or control of individual and restriction to freedom of movement.<sup>69</sup> The second set of indicators identified by the Trial Chamber is forced labour or service, often without compensation and usually but not necessarily

<sup>63</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 121.

<sup>64</sup> Claire De Than & Edwin Shorts, *supra* note 61 at 357 (2003).

<sup>65</sup> *Kunarac et al.* Trial Judgment, *supra* note 60 at ¶ 453.

<sup>66</sup> Prosecutor v. *Kunarac, Kovac and Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, Appeals Judgment, ¶129, (Int'l Crim. Trib. for the Former Yugoslavia Jun 12, 2002).

<sup>67</sup> See examples of testimonies given by witnesses in the *Kunarac et al.* Trial Judgment, ¶ 350-357.

<sup>68</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 90.

<sup>69</sup> *Kunarac et al.*, Trial Judgment *supra* note 60 at ¶542.

involving physical hardship.<sup>70</sup> The hardship refers to rape, prostitution and human trafficking. The duration of the exercised power that the captor has over the victim is the third factor that must be taken into consideration.<sup>71</sup> Regarding this crime, consent is irrelevant because in cases of enslavement the “victim is vulnerable, has a fear of violence, deception or false promises, [fear of captivity], psychological oppression or socio-economic conditions.”<sup>72</sup> Even though these indicators must be looked at in cases of enslavement, there is a possibility that the Trial Chamber will include other indicators as well.<sup>73</sup>

Concerning the facts of the *Kunarac, Kovac and Vukovic* case, the Trial Chamber ruled that the primary purpose for the detainment of the women was for rape and not for household chores.<sup>74</sup> Despite this ruling, ICTY charged *Kovac* and *Kunarac* with enslavement rather than sexual slavery for three reasons. First, there is no basis for the prosecution of sexual slavery in the ICTY Statute.<sup>75</sup> Thus, the Trial Chamber chose to charge these crimes as enslavement under crimes against humanity. Second, in addition to rape, forced and compulsory services that the women had to perform during captivity were included under the crime of enslavement.<sup>76</sup> Third, the Tribunal concluded that enslavement can include sexual violence.<sup>77</sup> Although charging *Kunarac* and *Kovac* with sexual slavery would have been more appropriate given the facts of the case, the definition of enslavement established in this context made the boundaries more clear.

### 1.1.3. Sexual violence as Torture

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<sup>70</sup> *Id.* at ¶ 542.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Anne-Marie L.M. de Brouwer *supra* note 39 at 92.

<sup>75</sup> *Id.* at 93.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

In the ICTY Statute, torture is listed as a crime against humanity under Article 5(f) and as Grave breaches of the Geneva Conventions of 1949 under Article 2(b).<sup>78</sup> Factors that constitute torture under crimes against humanity have not been identified. Nonetheless, the ICTY case law has shed light on some of these factors.<sup>79</sup> The Trial Chamber charged *Kunarac* and *Vukovic* with torture for committing sexual violence. This was made possible by defining torture in the sphere of International Humanitarian Law which has ‘become part of customary international law’.<sup>80</sup> Based on international conventions for prevention of torture, the following factors comprise the definition of torture under crimes against humanity:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental,
- (ii) The act or omission must be intentional,
- (iii) The act or omission must aim at obtaining information or a confession or at punishing intimidating or coercing the victim or third person, or at discriminating, on any ground, against the victim or a third person.<sup>81</sup>

The Appeals Chamber for the *Kunarac, Kovac and Vukovic* case upheld this definition.<sup>82</sup> The Appeals Chamber also provided a further explanation of sexual violence as torture under crimes against humanity.<sup>83</sup>

As established by ICTY, the crime is considered torture once the intent and severe physical and psychological pain have been determined to be part of the act.<sup>84</sup> In this case, rape and other forms of sexual violence can be prosecuted as torture because these acts cause severe physical and psychological pain and in many cases, women are raped for the purpose of obtaining information, punishment and discrimination on the basis of gender and ethnicity.<sup>85</sup> The Appeals Chamber held that pain and suffering does not have to be visible on

<sup>78</sup> United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 5 (2008).

<sup>79</sup> United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, (1993).

<sup>80</sup> Anne-Marie L.M. de Brouwer *supra* note 39 at 98.

<sup>81</sup> *Kunarac, et al.* Trial Judgment *supra* note 60 at ¶ 497.

<sup>82</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 98.

<sup>83</sup> *Kunarac et al.* Appeal Judgment *supra* note 66 at ¶ 144.

<sup>84</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 191.

<sup>85</sup> *Id.* at 186 n. 52. and 198 n.79.

the person for it to constitute torture, as long as the act of sexual violence has been proven.<sup>86</sup> Thus, the severe pain and suffering, whether it is mental or physical cannot be challenged by the defence.<sup>87</sup> Furthermore, the Tribunal emphasized that “sexual violence necessarily gives rise to severe pain and suffering whether physical or mental, and in this way justifies its characterization as an act of torture.”<sup>88</sup>

The element of intent is another issue discussed in the *Kunarac, Kovac and Vukovic* Appeal Judgement. The Appeals Chamber explains how the intent to commit a crime of sexual nature can be torture. First and foremost, acts of sexual violence are non-consenting, thus, instantly causing pain and suffering to the victim. Second, even if the perpetrator’s motive is sexual in nature, pain and suffering as a result of the sexual conduct is logical.<sup>89</sup> In other words, once the court has established that the perpetrator committed rape, the pain and suffering – mental or physical – is automatically included as one of the outcomes of the act. The same standards of intent apply when rape is prosecuted under article 2 of the Statute.

Even though, rape is not listed in the provisions of Grave Breaches of the Geneva Conventions,<sup>90</sup> and victims of sexual violence were not classified as protected civilians under the Geneva Conventions of 1949 in previous case law, the *Celebici, Furundzija and Tadic* cases have created significant developments in the ICTY case law regarding this question. The *Celebici* Trial Chamber explored two questions – 1. Who is considered a protected civilian under current international conflicts and 2. How can rape be charged as a grave breach of torture?<sup>91</sup> The ‘Convention IV Relative to the Protection of Civilian Persons in Time of War’ defines ‘protected civilians’ as stateless persons, refugees and nationals of a state party to the conflict who find themselves in occupied territory, enemy territory or the

<sup>86</sup> *Kunarac et al.* Appeal Judgment *supra* note 66 at ¶151.

<sup>87</sup> *Id.* at ¶151.

<sup>88</sup> *Id.* at ¶150.

<sup>89</sup> *Id.* at ¶153.

<sup>90</sup> *Prosecutor v. Mucic et al.* (*Celebici* case), Case No. IT-96-21-T, Judgment, ¶475 (Int’l Crim. Trib for the Former Yugoslavia, November 16, 1998).

<sup>91</sup> *Id.* at ¶476.

combat zone.<sup>92</sup> Due to the shift from international conflicts to inter-ethnic conflicts, the Appeal Chamber in the *Prosecutor v. Tadic* concluded that,

“In modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance.”<sup>93</sup>

Taking into consideration the presence of inter-ethnic conflicts, ICTY has included victims of sexual violence as ‘protected civilians’ under the Geneva Conventions of 1949.<sup>94</sup> Simultaneously, the *Furundzija* Trial Chamber also ruled that rape can “amount to a grave breach of the Geneva Conventions.”<sup>95</sup> ICTY has been successful in prosecuting Brdjanin in the *Prosecutor v. Brdjanin* case and Delic in the *Celebici* case for rape as grave breach of torture.<sup>96</sup>

In the *Celebici* case, the Trial Chamber emphasized that *Delic* repeatedly raped two women for two months.<sup>97</sup> *Delic* used rape to obtain information and to punish the victim for her inability to provide information.<sup>98</sup> The reason rape was used as the form of punishment was because the detainees were women; thus, the Trial Chamber declared this as a form of discrimination based on gender. In the *Brdjanin* case, the Trial Chamber ruled that the rapes amounted to torture because detainees in the *Keraterm*, *Trnopolje* and *Omarska* camps were discriminated against on the basis of their gender and ethnicity.<sup>99</sup>

#### 1.1.4. Sexual violence as inhumane treatment

<sup>92</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 164 ((Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999).

<sup>93</sup> *Id.* at ¶166.

<sup>94</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 180, 181, lists other organs that classify rape and other forms of sexual violence as grave breaches. These are *Aide- Memoire* of the ICRC, in the annex to the report of the Yugoslav UN Commission of Experts and the US support on the issue, n, 26 – 27.

<sup>95</sup> *Prosecutor v. Furundzija*, Trial Judgment *supra* note 53 at ¶172.

<sup>96</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 189.

<sup>97</sup> *Id.* at 190.

<sup>98</sup> *Id.* at 191.

<sup>99</sup> *id.* at 193 n. 100.



In addition to torture, sexual violence can also be charged as inhumane treatment.<sup>100</sup>

The *Celebici* Trial Chamber defines inhumane treatment as,

“An intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”<sup>101</sup>

As in the crime of torture, deliberate physical or mental suffering is one of the elements that must be present to constitute inhumane treatment. The distinguishing factor between torture and inhuman treatment is the “serious attack on human dignity” for the latter. From ICTY case law, it has been recognized that acts considered as inhuman treatment are forced acts of fellatio, rape and mutilation.<sup>102</sup> *Tadic* was convicted of grave breaches of torture or inhuman treatment during the Appeals Trial for forcing a detainee to perform fellatio on another detainee and to bite off one of his testicle at the *Omarska* concentration camp.<sup>103</sup> *Mucic*, an accused from the *Celebici* case also forced a detainee to perform fellatio and the Trial Chamber found that such acts are an attack on human dignity.<sup>104</sup>

## 1.2. Sexual Violence Jurisprudence in Bosnian Courts

With the transfer of jurisdiction from ICTY to the Bosnian State Court in 2005, it is important that Bosnia continue to prosecute crimes of sexual violence under International Criminal Law. This means that courts on the state and entity level must use an internationally recognized definition of rape and prosecute crimes of sexual violence according to standards set out in the ICTY and ICTR. According to previous literature, the definition of rape that WCC applies does not meet the standards set out in ICTY. That being said, it is important to analyze whether this has been addressed. Moreover, prosecutions of sexual violence in entity

<sup>100</sup> *Id.* at 194.

<sup>101</sup> *Celebici* Judgment, *supra* note 90 at ¶543, Anne-Marie L.M. de Brouwer 194.

<sup>102</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 194.

<sup>103</sup> *Id.* at 195

<sup>104</sup> *Celebici* Judgment *supra* note 90, ¶1066.

courts in adherence to international standards have not been examined. Before discussing the definition of sexual violence in Bosnia courts, a brief explanation of the legal reform is necessary for better understanding of the current criminal law system.

Prior to 1992, civil law was practiced in Bosnia and Herzegovina and the courts relied on the Criminal Code from the Socialist Federal Republic of Yugoslavia (SFRY) when prosecuting war crimes and crimes against humanity.<sup>105</sup> During the conflict in Bosnia and Herzegovina the criminal system collapsed but the Criminal Code from SFRY remained valid.<sup>106</sup> There was an attempt to indict war criminals under the same criminal code during and after the conflict. The death penalty under the SFRY criminal code violated the European Convention of Human Rights (ECHR) and other conventions that Bosnia and Herzegovina signed upon independence in 1992.<sup>107</sup> Chapter 16 in the SFRY criminal code is designated for prosecution of war crimes and genocide.<sup>108</sup> In regards to crimes of sexual violence, rape and forcible prostitution are the only recognized war crimes in the criminal code.<sup>109</sup>

After the conflict and with the launch of prosecutions of war crimes in ICTY, there was an attempt habitually in FBiH courts and the *Brcko District* court to prosecute the less serious war crimes using the SFRY Criminal Code.<sup>110</sup> This was problematic because of the lack of structure in the legal system and the absence of an internationally compatible definition of rape in the SFRY Criminal Code. As a result, crimes of sexual violence were not likely to be prosecuted.

<sup>105</sup> Christopher DeNicola, *supra* note 16 at 2.

<sup>106</sup> *Id.* at 2.

<sup>107</sup> The case of Borislav Herak reported in the *Fighter*, New York Times, 27 Nov 1992 reprinted in M Cherif Bassiouni and Duane Layton, *"Ethnic Cleansing" by Serbs in Former Yugoslavia* (1993).

<sup>108</sup> SFRY Criminal Code, Article 141 (1976) available at [http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode\\_fry.htm#chap\\_16](http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16)

<sup>109</sup> *Id.* at 142.

<sup>110</sup> OSCE, *Accountability for War Crimes*, 2 (2012).

Legal reform started in 2001 while the new criminal codes for the state of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina (FBiH), *Republika Srpska* (RS) and *Brcko District* were established in 2003.<sup>111</sup> The current legal system in Bosnia and Herzegovina is a mix of the common and civil law procedures that closely resembles the ICTY structure.<sup>112</sup> The purpose of the legal reform was to strengthen the procedural efficiency in BiH courts so that war crimes can be prosecuted domestically in accordance with international standards.<sup>113</sup> In the last seven years effort has been made to indict and prosecute crimes of war time sexual violence, yet problems with the definition of rape and the decentralized legal system have stalled the process.

### 1.2.1. Definition of Sexual Violence

In the new Criminal Code of Bosnia and Herzegovina (*hereinafter* BiH Criminal Code/ Criminal Code of BiH), crimes of sexual violence have been included under crimes against humanity and war crimes. The Criminal Code of BiH defines sexual violence under Crimes against Humanity as

“coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.”<sup>114</sup>

On the other hand, the Federation of Bosnia and Herzegovina Criminal Code, the *Republika Srpska* Criminal Code (*hereinafter* FBiH Criminal Code, RS Criminal Code) and *Brcko District* Criminal Code do not have any provisions relating to war crimes or crimes against humanity. Instead, the entity and district courts continue to use the SFRY criminal code.<sup>115</sup>

Rape and forced prostitution are mentioned under “war crimes against the civilian

<sup>111</sup> Christopher DeNicola, *supra* note 16 at 2.

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Ibid.*

<sup>114</sup> Bosnian Criminal Code, Article 172 (g) (2003).

<sup>115</sup> International Criminal Law and Practice Training Manual, War Crimes *available at* [http://wcjp.unicti.it/deliverables/docs/Module\\_8\\_War\\_crimes.pdf](http://wcjp.unicti.it/deliverables/docs/Module_8_War_crimes.pdf) p.64

population” in Article 142<sup>116</sup> but are not included in the SFRY Criminal Code. There are two ongoing issues with the definition of sexual violence in BiH. The first issue is the use of coercion in the sexual violence definition in the BiH Criminal Code. The definition is inconsistent with the one established under International Criminal Law. The second issue is the ability of entity courts to use the SFRY Criminal Code as a result of the decentralized system. The inconsistency with the definition of sexual violence and the decentralized legal system makes it easier for perpetrators to avoid prosecution for sexual violence crimes.

Based on the current definition of sexual violence in the BiH Criminal Code, to prove sexual violence was perpetrated, there must be evidence that ‘force or a threat of an immediate attack’ was present when the rape occurred. In many situations when women were raped, there was neither a force nor a threat of immediate attack present. For example, many women in *Foca* were imprisoned in houses for the purpose of pleasing soldiers and cooking and cleaning for as long as three months.<sup>117</sup> In such situations, it is hard to determine if there was a presence of force or a threat of immediate attack. Under the current definition of rape used in BiH, it would be hard for the prosecutor to prove that rape took place in situations such as *Foca*.

As it has been determined earlier in the chapter, coercive circumstances are not consistent with international standards. The *Kunarac, Kovac and Vukovic* Trial Chamber dismissed the ‘force or threat of force’ element used in the *Furundzija* definition of rape because it leaves the possibility for the perpetrator to evade liability for the crime.<sup>118</sup> The *Akayesu* trial also concluded that coercive circumstances do not have to be evident through

<sup>116</sup> Social Federal Republic of Yugoslavia Criminal Code (*hereinafter* SFRY Criminal Code), Article 142 (1976) available at [http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode\\_fry.htm#chap\\_16](http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16)

<sup>117</sup> Testimony of FWS-75 Prosecutor v. Kunarac Judgment *supra* note 60 at 176.

<sup>118</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 115.

physical force.<sup>119</sup> Creating a state of fear through threats, intimidation, extortion and other forms of duress can constitute coercion.<sup>120</sup> The *Akayesu* Trial Chamber also established that “coercion may be inherent in certain circumstances, such as armed conflicts.”<sup>121</sup> For Bosnia’s courts to increase its conviction rate for crimes of sexual violence, coercive circumstances must be removed from the present definition.

Application of the SFRY Criminal Code in entity courts has also contributed to the low prosecution of sexual violence cases. The SFRY Criminal Code is outdated; it does not include all charges of sexual violence found in the BiH Criminal Code and it lacks an internationally recognized definition of rape. Applying an outdated criminal code increases the chance of impunity as it contains the gaps and loopholes that have been deemed unacceptable under ICTY’s case law.

With an estimated 25,000 survivors of sexual violence living in Bosnia and Herzegovina, the WCC cannot possibly prosecute all the cases. For many women, entity courts are the only source for justice. Unfortunately, the outdated SFRY Criminal Code makes it unfeasible for entity courts to prosecute crimes of enslavement, forced pregnancy, sexual slavery, torture and systematic rape. In contrast, these crimes can be prosecuted under Article 172 and 173 of the BiH Criminal Code. Rape and forced prostitutions are the only crimes of sexual violence identified as crimes against humanity in the SFRY Criminal Code, yet the former is not defined. Being among numerous cases, many women will have not have the option of testifying in the WCC and will instead have to report the crime to an entity prosecutor. Unfortunately, many will not obtain justice through Cantonal and District courts as long as the SFRY Criminal Code is applied.

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<sup>119</sup> *Ibid.*

<sup>120</sup> Amnesty International, *Whose Justice?* Report *supra* note 22 at 21.

<sup>121</sup> Clair de Than & Edwin Shorts, International Criminal Law and Human Rights 104 (2003).

Allowing entity courts to indict perpetrators of sexual violence under the SFRY Criminal Code also runs the risk of prosecuting the crime as an ordinary crime.<sup>122</sup> Since it may be difficult to file a charge of rape under the SFRY code due to the lack of definition, some prosecutors may be tempted to charge war time rape as an ordinary crime. If prosecuted as an ordinary crime, the accused can be sentence between one and ten years for rape,<sup>123</sup> as oppose to minimum ten years to long-term imprisonment, if prosecuted under the Criminal Code of BiH.<sup>124</sup> In the *Brcko District* court, the *Jaric et al.* case is an example where three out of the four charged with murder and rape were sentenced to short prison terms because it was prosecuted as an ordinary crime.<sup>125</sup> The accused received “three years and ten months, two years and six months respectively for raping of two female civilians during the war.”<sup>126</sup> In reviewing the case, no discussion was provided behind the rationale for prosecuting this case as an ordinary crime.

In the 2009 report, Amnesty International expressed concern about the inconsistency of BiH’s definition of sexual violence and recommended it be altered to the fit the international standard.<sup>127</sup> In February 2010, when BiH was undergoing the Universal Period Review, Denmark addressed the issue of inconsistency between the definition of rape in state and entity criminal codes in addition to the lack of sexual violence prosecutions.<sup>128</sup> According to state actors, the use of the BiH Criminal Code in State and Entity Courts is possible. Judges from the Appellate Division of the BiH Court, Supreme Courts of FBiH and RS and the Appellate Court of *Brcko District* have ruled that the application of the Criminal Code of

<sup>122</sup> Interview with Bakira Hasecic , Head of the Association of Women Victims of War (NGO) in Sarajevo, BiH, March 2012.

<sup>123</sup> Criminal Code of Republika Srpska. Article 193 (2003)

<sup>124</sup> Criminal Code of Bosnia and Herzegovina, Article 172 (2003).

<sup>125</sup> Prosecutor v. Jaric *et al.* (2005) KP-9/02 (Osnovni Sud Brcko Distrikta) [Basic court of Brcko District].

<sup>126</sup> *Ibid.*

<sup>127</sup> Amnesty International, *Whose Justice?* Report. *supra* note 22 at 21.

<sup>128</sup> Universal Period Review, Advanced Questions to Bosnia and Herzegovina- Denmark, 1 (2010).

BiH in entity courts is legal and recommended.<sup>129</sup> In 2011 a meeting of the Criminal Code Implementation Assessment Team (CCIAT) was organized to resolve the issue of the sexual violence definition and the use of one criminal code. Despite expressed support by the CCIAT, both issues were left unresolved because “another issue has taken priority.”<sup>130</sup> From the current information available, there seems to be little interest in resolving this problem. Whether this inaction is politically influenced or not, prosecution for sexual violence will not increase until the definition of rape is fixed and the BiH Criminal Code is applied in both entities.

### 1.3. Further Developments of Sexual Violence in BiH Criminal Code

Although issues exist with the current definition of rape, BiH has also improved the definition of sexual violence by including sexual slavery and forced pregnancy under the crime against humanity definition. In addition, BiH did not include how an armed conflict factors into the crimes against humanity definition. Originally, Article 5 of the ICTY Statute defined crimes against humanity based on “crimes committed in armed conflict, whether international or internal in character against any civilian population.”<sup>131</sup> In the *Tadic* Appeal Judgment, it was determined that crimes against humanity can occur during peace time therefore rape and other crimes of sexual violence must be prosecuted even if it did not occur during the time of fighting.<sup>132</sup> Even though Article 5 was never amended, Bosnian courts followed the *Tadic* decision where crimes against humanity are defined in the criminal code as “part of a widespread or systematic attack directed against any civilian population.”<sup>133</sup> This demonstrates that BiH has started adopting ICTY’s case law; crimes of sexual violence will

<sup>129</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005-2010*, 70 (2011).

<sup>130</sup> TRIAL (Swiss Association against Impunity), *Association of the Concentration Camp Detainees Bosnia and Herzegovina et al.*, *supra* note 98 at 6.

<sup>131</sup> See ICTY Statute Article 5.

<sup>132</sup> Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *Fordham Int’l L. Journal*, 457, 478 – 480 nn.147, 148, (1998).

<sup>133</sup> Bosnian Criminal Code, Article 172 (1) (2003)

not be excluded since an armed conflict is not taken into consideration when defining crimes against humanity.

The incorporation of the crime of sexual slavery, forced impregnation, enforced prostitution and enforced sterilization under crimes against humanity in the BiH Criminal Code<sup>134</sup> makes it possible for victims who have suffered these crimes to come forward. In the ICTY, enslavement is the closest crime to sexual slavery that has been prosecuted under crimes against humanity.<sup>135</sup> In the *Kunarac, Kovac and Vukovic* case, *Kunarac* and *Kovac* were charged with enslavement instead of sexual slavery because there was not a basis for the prosecution of sexual violence under the ICTY Statute. In the WCC, individuals have been charged under sexual slavery—an act listed as a crime against humanity. An example is the *Samardžić* case in which charges of sexual slavery were included for forcing victims to have sexual intercourse, to do housework and to entertain soldiers per request.<sup>136</sup> In regards to the other crimes included under in Article 172(1), no one has been charged thus far.<sup>137</sup> According to the president of Women Victims of War, victims of forced pregnancy refuse to report the crimes because many women have kept it a secret and this issue is barely addressed publicly.

#### 1.4. Conclusion

It is evident from the ICTY case law that immense progress has been made in prosecuting crimes of sexual violence. The ICTY has also played a crucial role in helping create a hybrid court system to continue the prosecution of war crimes after ICTY ceases operation. Seven years since its establishment, there have been reports acknowledging that WCC has achieved some success in convicting war criminals although there have also been

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<sup>134</sup> *Ibid.*

<sup>135</sup> Anne-Marie L.M. de Brouwer, *supra* note 39 at 93.

<sup>136</sup> Amnesty International *Whose Justice?* Report, *supra* note 22 at 24.

<sup>137</sup> Interview with Bakira Hasecic, Head of the Association of Women Victims of War (NGO) in Sarajevo, BiH, March 2012.



concerns raised about bias and political influence in courts.<sup>138</sup> Despite the available reports and sources, there is a lack of information regarding the practice of war crimes prosecutions, especially crimes of sexual violence in Bosnian Courts and the level of influence that the ICTY has had when it comes to prosecuting war crimes.

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<sup>138</sup> Maurice Van Der Velden, Transitional Justice in Bosnia and Herzegovina: tiny steps forward 9 Effective Justice Solutions 1,4 (2010) *available at* [http://effectius.com/yahoo\\_site\\_admin/assets/docs/TransitionalJusticeinBosniaandHerzegovinatinastepsforward\\_Maurice\\_Newsletter9\\_WDW.301102451.pdf](http://effectius.com/yahoo_site_admin/assets/docs/TransitionalJusticeinBosniaandHerzegovinatinastepsforward_Maurice_Newsletter9_WDW.301102451.pdf)

## CHAPTER 2: LEGAL FRAMEWORK FOR PROSECUTION OF SEXUAL VIOLENCE CASES IN BOSNIAN COURTS

In an ethnically divided country, victims of sexual violence are faced with numerous challenges on a daily basis. The decentralized judicial system is one of those challenges; therefore an in depth investigation of the current Bosnian judicial system is essential to better understand how crimes of sexual violence are processed in state and entity courts. Since ICTY has been a vast influence on the development of WCC, it is important to discuss the relationship between ICTY and Bosnian courts before and after the transfer of jurisdiction. In addition the relationship between WCC and Entity courts will also be discussed. An outline of the current judicial system and the relationship between state and entity courts will provide a better understanding of the existing challenges relating to accessibility of justice for victims of sexual violence.

### 2.1. Transfer of Jurisdiction from ICTY to Bosnian Courts

Although ICTY has handed its jurisdiction over to WCC and the transfer of cases under Rule 11 *bis* ended in 2011, the Tribunal continues its cooperation with the state court.<sup>139</sup> The International Tribunal has committed itself to sharing expert advice with lawyers and other legal professionals on the national level to ensure that an effective and capable institution is left behind.<sup>140</sup> After evaluating the definition of sexual violence in chapter one, it is important to speak about the relationship between ICTY and WCC. This is necessary to better understand the procedural relationship between the two courts and how this, if at all has helped improve prosecution of sexual violence in domestic courts.

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<sup>139</sup> Interview with former Office of the Prosecutor BiH personnel, March 14, 2012, Sarajevo, BiH.

<sup>140</sup> *Ibid.*

### 2.1.1. Cooperation between ICTY and Bosnian Courts before the transfer of jurisdiction

Before the transfer of full jurisdiction was made to the State Court of Bosnia and Herzegovina, ICTY had primacy over all cases of war crimes; however its jurisdiction was concurrent as opposed to exclusive.<sup>141</sup> As determined by ICTY's 'Rules of Procedure and Evidence', the jurisdiction was shared with national courts of the former Yugoslavia, though ICTY was able to take over a case at any stage and national courts were obliged to comply with the request.<sup>142</sup> This mechanism enabled the Tribunal to take over or defer a case if the proceedings were not impartial and independent, if a war crime in question was characterized as an ordinary crime by the entity courts, or if it was a matter of a legal fact or question that would have implications on the work within the Tribunal.<sup>143</sup> In this section a closer look will be taken at the relationship between ICTY and Bosnian courts to get a better understanding of the transfer of cases between ICTY and BiH and whether a priority was placed on crimes of sexual violence.

#### a) *Rule 11 bis*

Rule 11 *bis* was amended to help ICTY with its completion strategy. This was an important step in establishing national jurisdiction. With the amendment of Rule 11 *bis* of the 'Rules of Procedures and Evidence' it became possible to transfer a confirmed indictment from the Tribunal to Bosnia and Herzegovina, either by request or as a decision from the Office of the Prosecutor.<sup>144</sup> The amendment made it so that the transferred indictment must either go to the courts of the territory where the crime was committed, where the accused was

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<sup>141</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, 12 (May 2011).

<sup>142</sup> Ruth Mackenzie, Cesare P.R Romano *et al*, Manual on International Courts and Tribunals 196 (2010)

<sup>143</sup> *Id at*. 196.

<sup>144</sup> *Id at* 197.

arrested, or to a court that has jurisdiction and is prepared to prosecute the case.<sup>145</sup> With the amendment of Rule 11 *bis*, ICTY stopped taking cases from national court and has begun transferring more cases to domestic courts.<sup>146</sup> Rule 11 *bis* has been the primary component for helping ICTY move toward its completion strategy, and according to ICTY a majority of transferred cases include charges of sexual violence.<sup>147</sup> The question is whether domestic court benefits victims since courts were more accessible.

Unfortunately the amendment of Rule 11 *bis* did not benefit victims of sexual violence because ICTY could no longer defer a case back to The Hague if proceedings were not impartial or independent. Even though the High Judicial Prosecutorial Council (HJPC) has been designated with oversight of criminal prosecutions in Bosnian courts as a replacement of the ICTY<sup>148</sup> challenges in Bosnian courts are ongoing. There have been attempts to launch more local prosecutions but many obstacles remain.<sup>149</sup> The entity courts and the Prosecutors Office face practical issues in filing indictments for war crimes.<sup>150</sup> These issues are the lack of willingness to investigate crimes by the police, lack of expertise and resources in the Office of the Prosecutor as well as a failure to make use of the evidence available.<sup>151</sup> The process and the fairness of the cases within the Courts of Bosnia and Herzegovina are hard to determine since ICTY is not the monitoring body anymore.<sup>152</sup> Until 2004, ICTY was able to examine cases in domestic proceedings. Today, the lack of

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> ICTY – Crimes of Sexual Violence, <http://www.icty.org/sid/10312>.

<sup>148</sup> HJPC is an independent monitoring body that is responsible for overseeing the prosecution of criminal cases in Bosnian courts and promoting access to justice, protecting the independence of justice and making sure that all courts are efficient. More information about HJPC, High Judicial and Prosecutorial Council of Bosnia and Herzegovina, “Vision, Mission and Strategic Plan” available at <http://www.hjpc.ba/intro/?cid=3479,2,1>, (Last Visited November 10, 2012).

<sup>149</sup> Graham Blewitt, *Relationship between International Law and National Law in “Justice for Crimes against Humanity”* 151 (2003).

<sup>150</sup> TRIAL (Swiss Association against Impunity), Association of the Concentration Camp Detainees Bosnia and Herzegovina, Written Information For the follow-up to the concluding observations of the committee against torture on Bosnia and Herzegovina’s combined second to fifth periodic report 6, (2011).

<sup>151</sup> *Ibid.*

<sup>152</sup> Graham Blewitt *supra* note 149 at 151.

relationship between the Bosnian courts and ICTY has made access to justice harder for victims.

***b) Rules of the Road process***

Rules of the Road Process was another mechanism created to help ICTY monitor the indictment procedures filed by entity prosecutors. Since some courts in BiH began prosecuting war crimes after the war, the international community was concerned about the possibility of arbitrary arrests.<sup>153</sup> An incident involving the arrest of *General Djukic*<sup>154</sup> by the Bosniak officials demonstrated that there was a threat to freedom of movement for the returnees. Many displaced persons and refugees who returned to their homes feared arbitrary arrest on suspicions of war crimes.<sup>155</sup>

The “Rules of the Road” (RoR) procedure was created in 1996 to prevent arbitrary arrests. The “Rules of the Road” was operated by the ICTY Office of the Prosecutor and it required the Prosecutors on the state level to submit case files for review before an arrest can take place.<sup>156</sup> That meant that an arrest could not be carried out until the ICTY’s Prosecutor had assessed and decided that the case contains credible charges. After analysis, cases with credible evidence were returned to the prosecutor who originally filed the case.<sup>157</sup>

Between 1996 and 2004, case files against a total of 5,789 persons suspected of war crimes were submitted to ICTY’s ‘Rules of the Road’ Unit.<sup>158</sup> Out of that number only 846 cases had sufficient evidence, the rest were insufficient or needed to be resubmitted when further evidence was collected. According to an OSCE report, eleven percent of those

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<sup>153</sup> Graham Blewitt *supra* note 149 at 151.

<sup>154</sup> *Id.* at 151.

<sup>155</sup> ICTY – About ICTY, <http://www.icty.org/sid/96>

<sup>156</sup> *Ibid.*

<sup>157</sup> OSCE, *War Crimes Trials before Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, 16 (March 2005)

<sup>158</sup> *Ibid.*

returned cases reached the trial stage. There is only information about one case of sexual violence that was prosecuted in the Sarajevo Cantonal Court.<sup>159</sup> *Ratko Gasovic* was found guilty of “war crimes against civilians (in relation to rape, forced labour and inhumane treatment)” in 2004.<sup>160</sup> The original sentence was ten years in prison but it was reduced to eight years by the Supreme Court of the Federation of Bosnia and Herzegovina.

During the 1996 to 2004 period, it is evident that the lack of monitoring of entity and district courts by ICTY and the lack of cooperation between entities reflect the eleven percent of transferred cases that ended up on trial. With such low numbers, it is unsurprising that cases of sexual violence were not a concern or a priority for the courts. One of the reasons there was not a focus on prosecutions of sexual violence cases is because the RoR procedure has not provided ICTY with the authority to specify where the returned cases should be prosecuted.<sup>161</sup> As a result, those cases that ICTY categorized as ‘high priority’ do not seem to be treated with the same priority by the entity courts.<sup>162</sup> This has left many victims frustrated because in some regions prioritization has been politically influenced or ethnically biased thus resulting in a slow trial or in some regions no trials at all.<sup>163</sup> Courts in *Trebinje*, *Stolac*, *Uborak- Prozor*, *Nevesinje* among others have not prosecuted any war crimes cases.<sup>164</sup> The two measures discussed above provide a better understanding of ICTY’s relations between entity courts before WCC was established.

## 2.2. Structure of Bosnian Judicial System since 2004

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<sup>159</sup> *Id.* at 7

<sup>160</sup> *Id.* at 7.

<sup>161</sup> Statement made by OHR representative in OSCE, *War Crimes Trials before Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, 15 March 2005.

<sup>162</sup> TRIAL (Swiss Association against Impunity), Association of the Concentration Camp Detainees Bosnia and Herzegovina et al, Written Information For the follow-up to the concluding observations of the committee against torture on Bosnia and Herzegovina’s combined second to fifth periodic report 9, 2011.

<sup>163</sup> *Id.* at 9.

<sup>164</sup> *Ibid.*

The current judicial system is divided into four independent jurisdictions; *Republika Srpska* (RS), Federation of Bosnia and Herzegovina (FBiH), *Brcko District*, and the State Court of Bosnia and Herzegovina.<sup>165</sup> Each entity and *Brcko District* has a Prosecutor's office for indictments of war crimes. The Special Department for War Crimes within the Prosecutor's Office of Bosnia and Herzegovina is designated for indictments of war crimes and crimes against humanity in the War Crimes Chamber. Since the 2003 legal reform, the State Court of BiH has jurisdiction over war crimes cases.<sup>166</sup> It is important to note that the State Court is not an appellate body for the entire state of Bosnia and Herzegovina. The structure of the Bosnian judicial system is complex; thus a thorough explanation is necessary to better understand how the decentralized system affects the justice and redress process of sexual violence victims.

### 2.2.1. Entity Courts

At the moment there are thirteen jurisdictions in which charges of war crimes and crimes against humanity can be prosecuted with the referral from the State Prosecutors Office.<sup>167</sup> That means that war crime trials can take place in ten cantonal courts in FBiH, in five district courts in RS and in the Basic court of *Brcko District*.<sup>168</sup> The appeals can be made at the Supreme Courts in RS, FBiH and the Appellate Court of *Brcko District*.<sup>169</sup> The reason that WCC maintains a concurrent jurisdiction is because under the National War Crimes Strategy, adopted in 2008 cases are grouped and divided into the jurisdiction according to where the crime was committed.<sup>170</sup> Only the most sensitive war crimes cases are prosecuted

<sup>165</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina* *supra* note 141 at 71.

<sup>166</sup> OSCE, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacle*, 17 (March 2005).

<sup>167</sup> Amnesty International, *Whose Justice?* Report, *supra* note 22 at 18.

<sup>168</sup> *Id.* at 18.

<sup>169</sup> *Id.* at 13.

<sup>170</sup> National War Crimes Strategy. 3 (2008) available at: [http://www.geneva-academy.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf)

on the state level while cases initiated before the 2003 criminal code and lower-ranking will be prosecuted in entity and district courts.<sup>171</sup>

### 2.2.2. The Prosecutors Office

The work within the Office of the Prosecutor is very important for the efficiency and fairness of cases, especially since war crimes cases are being prosecuted by different courts under different criminal codes. The Office of the Prosecutor on the state level is not dependant on any external body; however it is not superior to the entity prosecutors.<sup>172</sup> The Prosecutor's Office in FBiH is superior to the Cantonal Prosecutor's Offices, the RS Prosecutor's Office is superior to the District Prosecutor's Office and the Public Prosecutor in *Brcko District* is independent.<sup>173</sup>

At the moment there are fifteen (fourteen National and one International Prosecutor) working in the Special Department for War Crimes.<sup>174</sup> In FBiH, there is one Federation Prosecutor's Office (FPO) and ten Cantonal Prosecutor's Offices (CPO).<sup>175</sup> The FPO has designated nine Prosecutors to work on war crimes cases. Nevertheless the FPO does not have a special unit for war crimes while the RS Prosecutor's Office and the Public Prosecutor's Office of *Brcko District* each have one.<sup>176</sup> In the RS Prosecutor's Office, there are three prosecutors designated for war crimes cases and in *Brcko District* there are six.<sup>177</sup> In some Cantonal Prosecutor's offices there is a designated War Crimes Department.<sup>178</sup> Out of

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<sup>171</sup> *Id.* at 29.

<sup>172</sup> About the Prosecutor's Office Jurisdiction. The Prosecutor's Office of BiH, [www.tuzilastvo.gov.ba](http://www.tuzilastvo.gov.ba) (Last visited March 23, 2012).

<sup>173</sup> *Ibid.*

<sup>174</sup> Special Department for War Crimes, The Prosecutor's Office of BiH, [www.tuzilastvo.gov.ba](http://www.tuzilastvo.gov.ba) (Last visited March 22, 2012).

<sup>175</sup> Morten Bergsmo, Kjetil Helvig *et al.* The Backlog of Core International Crimes Cases Files in Bosnia and Herzegovina, 15 (2010)

<sup>176</sup> National War Crimes Strategy, figure 6 chart at 17 (2008) available at [http://www.geneva-academy.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf)

<sup>177</sup> *Id.* at 17.

<sup>178</sup> *Ibid.*



the ten cantonal offices, four do not have a war crimes department.<sup>179</sup> All prosecutors are selected by the High Judicial and Prosecutorial Council (HJPC).<sup>180</sup>

### 2.3. Prosecution of Sexual Violence in War Crimes Chamber and Entity Courts

With the official start in March 2005, the War Crimes Chamber (WCC) was tasked with a backlog of war crimes cases. It is estimated that there are between 6,000 and 16,000 cases to prosecute.<sup>181</sup> Statistics on how many of those are cases of sexual violence are unknown because the authorities in Bosnia and Herzegovina have never collected any data regarding this issue. The primary goal of WCC is to prosecute cases transferred from the ICTY under Rule 11 *bis*, indictments filed by the State Prosecutor's Office and those transferred from entities categorized as 'highly sensitive' cases. The relationship between WCC and Entity Courts and the *Brcko District* Court is highly complex, thus this section will discuss the legal procedure of war crimes prosecutions within the Courts of BiH. More specifically an analysis of the transfer procedure of cases, how indictments of crimes of sexual violence are handled by the Offices of the Prosecutors, and what the current relationship between the state and entity prosecutors is will be the focus.

#### 2.3.1. Transfer Procedure of Cases between State and Entity Courts

Since the jurisdiction in Bosnian courts overlaps, a proper guideline was mandatory to help identify the cases that need to be prosecuted and where they will be prosecuted. The 2003 Criminal Procedure Code (CPC) gives authority to the state prosecutor jurisdiction to review allegations of war crimes filed by entity courts under Article 215 (3) of the BiH CPC.<sup>182</sup> As for war crimes cases on the entity level that were in the pre-indictment phase

<sup>179</sup> *Ibid.*

<sup>180</sup> Morten Bergsmo, Kjetil Helvig *et al. supra* note 175 at 15.

<sup>181</sup> Amnesty International, *Whose Justice?* *supra* note 169.

<sup>182</sup> OSCE, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina supra* note 156 at 17 (March 2005).

before the 2003 legal reform, they must be reported to the State Prosecutor. During the review of the cases by the state prosecutor, the entity prosecutor must continue working on the case because post review, the State Court decides whether to keep the case or return it back to the entity prosecutor.<sup>183</sup> For cases in the post-indictment phase no reference is needed from the State Court.<sup>184</sup>

There are a few important documents that the State Prosecutor relies on when deciding to transfer a case. There is the National War Crimes Strategy, Article 27 (a) and Article 449(2) of the CPC. A ‘Book of Rules on the Review of War Crimes Cases’ has also been established in 2004 as a guideline for identifying ‘highly sensitive’ and ‘sensitive’ cases however this was replaced by the Complexity Criteria found in the National War Crimes Strategy.<sup>185</sup> At the moment the Complexity Criteria and the transfer laws from the CPC are the key guideline for transfer of cases. .

#### *a) The National Strategy*

The purpose of the National War Crimes Strategy (hereinafter the Strategy) is to help prosecute the outstanding number of war crimes cases, centralize the record of all war crimes cases pending in BiH, harmonize the court practices, create a functional distribution mechanism between the state, entities and *Brcko District*, and provide protection and equal treatment to all victims and witnesses.<sup>186</sup> The goal set by the Strategy as of 2008 is to prosecute top priority war crimes cases within seven years and less serious in fifteen years.<sup>187</sup>

The National Strategy attempts to divide the cases up between the entity prosecutors and the State Prosecutor. For that reason cases have been divided into groups. Group I cases

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<sup>183</sup> *Id.* at 17.

<sup>184</sup> *Ibid.*

<sup>185</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina* *supra* note 141 at 25.

<sup>186</sup> National War Crimes Strategy, 4 (2008) available at [http://www.geneva-academy.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf).

<sup>187</sup> *Id.* at 4.

are those received after the enforcement of the 2003 Criminal Code and Criminal Procedure Code of BiH. These cases fall under the jurisdiction of the Prosecutor's Office of BiH and WCC however they can be transferred to entity prosecutors in accordance with Article 27 (a) of the CPC.<sup>188</sup> Group II cases are those also categorized as outstanding because they have been sent to the entity courts and *Brcko District* prior to the 2003 legal reform. As a result the courts that received these cases are obliged to complete them nonetheless BiH Prosecutor can take over the case anytime.<sup>189</sup> According to the Strategy, for a transfer to occur the State Prosecution Office must file a request with the Court of BiH and the Court then decides the complexity of the case. If the case is marked as less complex than it will be sent to an entity Court.<sup>190</sup>

To improve the efficiency of prosecutions all entity courts and prosecutors are required under the National Strategy to submit reports to the Court of BiH.<sup>191</sup> These reports are necessary in determining if the State court needs to take over a case as prescribed under Article 27 (a) and Article 449 (2) of the CPC. Another reason for the reports is to make sure that there is no overlapping of indictments between entities and the state prosecutor.<sup>192</sup>

### ***b) Laws for Transfer***

Article 27 (a) and Article 449 (2) are the two main laws that set the guidelines for a case transfer. Article 27 (a) determines the deadline of when the case can be transferred and what must be taken into consideration when analyzing the complexity of the case. A transfer is possible under Article 27(a) if

“proceedings are pending for [Articles 171 through 183 in the Criminal Code of BiH]<sup>193</sup>, the Court may transfer the proceedings to another court in whose

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<sup>188</sup> *Id.* at 12.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Id.* at 13.

<sup>191</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina* *supra* note 141 at 23.

<sup>192</sup> *Id.* at 23.

<sup>193</sup> This is in reference to articles under Chapter XVII, classified as Crimes against Humanity and Values Protected by International Law, Criminal Code of Bosnia and Herzegovina. (2003).

area the criminal offense was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case”<sup>194</sup>

Article 449 is necessary in dealing with war crimes cases that have been transferred to entity levels before the legal reform in BiH and explaining when a transfer can occur. Article 449 states the following:

- (1) “In cases falling under the competence of the Court that are pending before other courts prior to entry into force of this Code shall be finalized by these Courts if the indictment is confirmed or in legal effect in these cases.
- (2) Cases falling within the competence of the Court which are pending before other courts or prosecutor’s offices and in which the indictment is legally effective or confirmed, shall be finalized by the courts to which have territorial jurisdiction unless the Court ex officio or upon the reasoned proposal of the parties or defense attorney decides to take such a case while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.”<sup>195</sup>

The two laws must be applied whenever a transfer is in question however before the transfer is considered the State Prosecutor must apply the complexity criteria to determine if the case will stay or go to the Entity level.

### *c) Case Complexity Criteria*

According to the latest OSCE and Amnesty International reports the *Case Complexity Criteria* found in Annex A of the National War Crimes Strategy has not been as effective as first anticipated due to its broadness and lack of clarity.<sup>196</sup> The current criteria provide the State Prosecutor with a list of factors that determine a complex case. Cases considered complex are offences of genocide, crimes against humanity and war crimes against the civilian population or prisoners of war.<sup>197</sup> These crimes must also be characterized as

<sup>194</sup> Criminal Procedure Code BiH, Article 27 (a) (2003).

<sup>195</sup> Criminal Procedure Code Bosnia and Herzegovina, Article 449 (2003)

<sup>196</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, 25 (May 2011). & Amnesty International, *Whose Justice? Bosnia and Herzegovina’s Women Still Waiting*, 24 (2009).

<sup>197</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, 25 (May 2011).

complex if they are mass or systematic in nature, if the accused held a higher position at the time the crime was committed (i.e. managing a concentration camp) and if there is an association with other cases or perpetrators.<sup>198</sup>

When it comes to cases that contain charges of sexual violence, there is nothing that suggests these cases should be automatically categorized as complex. However there are indicators for what kind of cases must be prioritized and this includes cases of systematic rape and sexual slavery over individual sexual assaults.<sup>199</sup> The Prosecutor can also take into consideration the age of the victim at time of the crime, the consequences that the trial might have on the victim and where the accused lives and works post conflict.<sup>200</sup> According to a previous employee of the Prosecutor's Office in BiH, when it comes to determining whether a case is complex, the Prosecutor tends to use his instincts more than the guidebook.<sup>201</sup> If the suspect lives post-conflict in the same town as the victim, if the victim is underage and if the suspect holds a public service job such as a police officer, the Prosecutor will categorize it as a complex case.<sup>202</sup> The fact that the prosecutors are creating their own criteria demonstrates the ineffectiveness of the current criteria.

The way that the current criteria have been structured aims to direct as many cases as possible to the entity prosecutors. During this process, prosecutors do not think about the victim's well being when deciding to transfer a case to an entity court or if the court has proper means to protect the victim. Cases that involve charges of sexual violence are all sensitive matters because the victims need the best witness protection and psychological support during and after the trial. The problem is that most entity courts do not have either and if that was taken into consideration, all cases of sexual violence would be tried in WCC.

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<sup>198</sup> *Id.* at 25

<sup>199</sup> OSCE, *Delivering Justice* report *supra* note 141 at 26 and Amnesty International, *Whose Justice?* Report, *supra* note 22 at 34.

<sup>200</sup> Interview with former Office of the Prosecutor personnel in Sarajevo, BiH, March 14, 2012.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

Unfortunately, this is not the case and in the past, crimes of sexual violence have been prosecuted in entity courts.<sup>203</sup>

### 2.3.2. The Relationship between the State Courts and Entity Courts

At present time, the prosecutors in FBiH, RS, and *Brcko District* can file indictments for charges of war crimes and crimes against humanity under Chapter XVI of the SFRY Criminal Code,<sup>204</sup> if the case was initiated before March 1<sup>st</sup>, 2003.<sup>205</sup> That being said, under the National War Crimes Strategy the state prosecutor or court can request that the entity court prosecutes the case under the Criminal Code of BiH.<sup>206</sup> This has been problematic for achieving justice because there is a lack of consistency in prosecutions and sentencing between entity courts and the State Court. This means a victim's chance at a fair trial and justice depends on how the crime is classified by the entity prosecutor.

Although cases that include charges of sexual violence can be classified as sensitive and should be tried in WCC, many end up in entity courts because there are too many cases for one court to prosecute. Since the definition of sexual violence in SFRY Criminal Code is outdated, filing indictments for sexual violence in entity courts is problematic. This creates a risk of exclusion of crimes that are not listed in the SFRY Criminal Code such as sexual slavery. As a result many cases of sexual violence never reach a trial stage while other cases are prosecuted as ordinary crimes.<sup>207</sup>

This is not to say that there has not been any effort to prosecute war criminals in entity courts or that it is not legally possible to use the Criminal Code of BiH. As demonstrated by the *Trifkovic et al.* case in March 2009 by the *Tuzla Cantonal Court*, it is

<sup>203</sup> An example is *Bukvic* discussed earlier in the chapter.

<sup>204</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina supra* note 141 at 70.

<sup>205</sup> On March 1<sup>st</sup>, 2003 the new Criminal Code of BiH and the Criminal Procedure of BiH came into force, *see* International Centre for Transitional Justice, Bosnia and Herzegovina- Submission to the Universal Periodic Review of the UN Human Rights Council.2010.pp.2

<sup>206</sup> National War Crimes Strategy *supra* note 169 at 13.

<sup>207</sup> See examples of *Jaric et al.* discussed in section 1.1 of this chapter.

possible to file an indictment using the Criminal Code of BiH.<sup>208</sup> This case was first of its kind to be tried under the BiH Criminal Code. As a result it opened doors for other entity prosecutors to begin using the Criminal Code of BiH when filing indictments for crimes against humanity and war crimes.<sup>209</sup>

There have also been cases where the Entity Prosecutors have changed charges of murder and rape from ordinary crimes to war crimes during the trial.<sup>210</sup> The cases of *Milanko Vujanovic*, *Gogic et al.* and *Trivic et al.* in Banja Luka's District and the case of *Ris* in the Bihac Cantonal Court are examples of effort to hold a fair trial.<sup>211</sup> Unfortunately, there has not been much effort put forward by entity prosecutors to continue this practice.<sup>212</sup>

In 2009 the Court of BiH transferred the *Bukvic* case to the Mostar Cantonal Court and the *Jurinovic* case to the Banja Luka District Court.<sup>213</sup> Both cases had indictments under the BiH Criminal Code however in both cases the judges decided to reclassify the offences under the SFRY Criminal Code.<sup>214</sup> The fact that entity courts have the ability to change and/or decide under what criminal code the indictment will be demonstrates the lack of harmonized practice between the Entity Courts and the WCC. The decentralized system does not provide equal access to justice throughout the country. As a result this can discourage victims from reporting the crime since the judicial process and sentences for the war crime are more lenient in Entity Courts than in the WCC.<sup>215</sup> Although Entity Supreme Courts have the potential to encourage harmonization of the courts, there are still limitations.

### 2.3.3. Appeals Procedure in Entity Courts

<sup>208</sup> OSCE, *Delivering Justice* *supra* note 141 at 70.

<sup>209</sup> *Id.* at 71

<sup>210</sup> *Id.* at 70

<sup>211</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina* *supra* note 141 at 70 n.202.

<sup>212</sup> *Id.* at 71.

<sup>213</sup> *Id.* at 71

<sup>214</sup> *Ibid.*

<sup>215</sup> Interview with Bakira Hasecic, Head of Association of Women Victims of War (NGO) in Sarajevo, BiH, March 15, 2012.

The Supreme Court of FBiH and RS have the right to review the legality of the application of the SFRY Criminal Code only if the issue is raised by either of the parties in the appeal. The *Vlahovljak et al.* case is the only reported example in which the appeal questioned the issue of trying war crimes under SFRY's Criminal Code. The Supreme Court of FBiH determined that the *Vlahovljak et al.* case should be prosecuted under the Criminal Code of BiH because the war crimes provisions adhere to international criminal law standards.<sup>216</sup> This case set the precedent which determined that the BiH Criminal Code can be used to prosecute war crimes in entity courts even if the crime has been committed during the time that the SFRY Criminal Code was in place. Unfortunately, this precedent is not being followed by other entity courts; instead the use of the BiH Criminal Code depends on the judge's decision.<sup>217</sup>

## 2.4. Conclusion

After carefully analyzing the current judicial system in BiH, the lack of harmonization between the state and entity courts has had a significant impact on the prosecution of sexual violence. Worst of all, many victims have give up on the possibility of seeing justice served for the crimes they have suffered. With lack of regulation of the entity courts, the concern regarding crimes of sexual violence is whether they will be prosecuted as a war crime. From the analysis and previous case law, entity courts are less likely to prosecute a case of sexual violence by international standards. That being said, the unification of the legal system is of the utmost importance for victims of sexual violence. Until that is achieved, entity prosecutors have a responsibility to use the Criminal Code of BiH when dealing with war crimes and crimes against humanity, regardless if the indictment is filed in FBiH or RS.

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<sup>216</sup> OSCE, *Delivering Justice in Bosnia and Herzegovina* supra note 141 at 71.

<sup>217</sup> *Id.* at 71.



## CHAPTER 3: EXISTING MEASURES OF WITNESS PROTECTION IN BOSNIAN COURTS

Witnesses play a fundamental role in the justice process. As a result functioning witness protection and witness support programs are necessary to encourage vulnerable witnesses to come forward and testify.<sup>218</sup> For victims of sexual violence, witness protection and witness support is even more significant because there is a risk of re-traumatization during the testimony and safety concerns during and after the trial.<sup>219</sup> In BiH there has been an issue with the enforcement of witness protection laws, lack of funding for adequate witness protection and witness support and to some extent lack of will to provide any form of safety and support during the trial. The fear of invasion of privacy and threat to security has discouraged victims from reporting their crimes or testifying.<sup>220</sup>

It is important to compare the security measures available for victim-witnesses of sexual violence in state and entity courts to understand how witness protection works under a decentralized judicial system. Furthermore, it is important to examine if the issues in BiH discourage victims of sexual violence from testifying. To better understand the witness protection and witness support system in BiH, an examination of the legislation and the practices in state and entity courts is essential to understanding whether the lack of state and entity witness protection has discouraged victims of sexual violence from testifying. Before focusing on witness protection in BiH, the protection and support programs practiced in ICTY will be outlined as an example of international practice.

### 3.1 Protection of Witnesses

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<sup>218</sup> Huma Haider, Timothy Welch, *The Protection of Witnesses in Bosnian War Crimes Trials: A Fair Balance Between Interests of Victims and the Rights of the Accused?*, 20 *The Denning L.J.* 55, 60 (2008).

<sup>219</sup> Anne M. Hoefgen, *“There Will be no Justice Unless Women are Part of that Justice”: Rape in Bosnia, The ICTY and “Gender Sensitive” Prosecution*, 14 *Wis. Women’s L.J.* 155, 170 (1999).

<sup>220</sup> OSCE, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a year after Adoption of the National Strategy for War Crimes Processing*, 7 January 2010.

Similar to the rights of the accused, witness protection is also an internationally recognized right that courts must apply. Article 14(1) of the ICCPR usually refers to the rights of the accused however this article also protects the rights of the witness. Article 14(1) states that

“The press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or when the interest of the private lives of the parties so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicly would prejudice the interest of justice.”<sup>221</sup>

Measures such as exclusion of press and the public are very important in war crimes trials, especially when vulnerable witnesses are involved.

Now that Bosnian courts have taken over the war crimes prosecutions, the state and court officials have a responsibility to provide special protection to victims of sexual violence. ECtHR has also determined that victim-witnesses of sexual violence require special support and protection because there is often a stigma attached to their injuries.<sup>222</sup> In *Doorson v. The Netherlands* ECtHR ruled that states have a responsibility to protect the interests of the victim-witnesses.<sup>223</sup> Since ICTY is closely associated with WCC, it is important to discuss ICTY’s witness protection program and compare it to the witness protection program currently available in BiH. The intent is to see whether any special protection measures that have been established in ICTY have been adopted in Bosnian courts.

### 3.1.1. Witness Protection Measures in ICTY

The witness protection measures are outlined in the Rules of Procedures and Evidence. Article 22 has allowed the Tribunal to include all necessary measures for

<sup>221</sup> International Covenant for Civil and Political Rights [hereinafter ICCPR], Article 14(1).

<sup>222</sup> Azra Sehic, *Protection of Victims/Witnesses of Genocide, Crimes against Humanity and War crimes Before the Courts of BiH* in Access to Justice in Bosnia and Herzegovina: Collection of Public Policy analysis in the field of judiciary, 10 (Justice Network in Bosnia and Herzegovina ,2011).

<sup>223</sup> *Id* at 11.

protection of the victim's identity. The most common safety measures are pseudonyms, non-disclosure of information and witness' identity to the public, testifying in closed session, testifying via video and voice and video distortion.<sup>224</sup> In exceptional circumstances, Rule 69 (A) allows for "non-disclosure of identity of a victim or witness who may be in danger."<sup>225</sup> Nevertheless the non-disclosure can only last until the victim-witness is brought under the protection of the Tribunal.<sup>226</sup> The Trial Chamber in the *Prosecutor v. Stanasic and Simovic* outlined that a delayed disclosure under Rule 69(A) can occur if there is a likelihood of intimidation of the Prosecutor's witness upon revelation of the identity. This measure will be granted by the court if the prosecutor can prove that non-disclosure is able to protect the individual witness.<sup>227</sup> Moreover, the disclosure of victim's identity to the defense must take place during a reasonable length of time before trial.<sup>228</sup> The non-disclosure of evidence is important for protection of vulnerable witnesses because it can reduce the risk of a witness withdrawing her testimony.

Confidentiality and anonymity have also been applied in the early years of the Tribunal. Confidentiality protects victims and witnesses from the public and media whereas anonymity prevents the defense and the accused from knowing the identity of the victim-witness throughout the trial.<sup>229</sup> Anonymity was granted to three victims of sexual violence during the *Tadic* trial because of the fear of re-traumatization.<sup>230</sup> The Trial Chamber believed anonymity would best protect the witnesses since the trial was taking place right after the war and the Tribunal did not have a long term witness protection program to protect witness'

<sup>224</sup> ICTY Rules of Procedure and Evidence, Rule 75, Rule 79, ICTY Website, Witnesses page, *supra* note 255.

<sup>225</sup> ICTY Rules of Procedure and Evidence, Rule 69(A).

<sup>226</sup> *Ibid.*

<sup>227</sup> Huma Haider, Timothy Welch *supra* note 218 at 64.

<sup>228</sup> *Ibid.*

<sup>229</sup> Natasha A. Affolder *Tadic, the Anonymous Witness and the Sources of International Procedural Law* 19 Mich.J Int'l L. 445, 452 (1997).

<sup>230</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the prosecutor's motion requesting protective measures for victims and witnesses, ¶4, 84 (Int'l Crim. Trib. For the former Yugoslavia).

families that were a potential target for revenge.<sup>231</sup> Since the *Tadic* trial, the Trial Chamber in the *Brdjanin*, *Talic* and *Perisic* cases ruled that the situation in former Yugoslavia cannot be used as an exceptional circumstance when seeking anonymity.<sup>232</sup> However, with such a high risk of re-traumatization judges have agreed that special protection mechanisms are sometimes necessary to protect vulnerable witnesses thus anonymity has not been removed from Rules of Procedures and Evidence.<sup>233</sup> Currently, confidentiality is usually applied when vulnerable witnesses take the stand.

The Tribunal has also established measures to regulate disclosure of information. The parties are bound by Rule 77 to protect the witness' identity.<sup>234</sup> Threatening, bribing or intimidating a current or previous witness is also punishable under Rule 77.<sup>235</sup> If any information or the identity of the protected witness is revealed "the party could be held in contempt and be liable to a maximum penalty 100,000 Euros and a term of imprisonment for seven years."<sup>236</sup> Although ICTY believes this preventive measure can protect witnesses, there have been instances in which the accused has revealed the identities and information of protected witnesses. *Vojislav Seselj* has been charged with contempt twice since his trial began in 2006 because he revealed the identities of protected witnesses in his books.<sup>237</sup>

Holding the party in contempt is not an effective witness protection measure because once the identity is revealed, the witness-victim is automatically in danger of intimidation, bribes and threats from supporters of the accused. The responsibility to protect the witness then becomes the state's responsibility and if witnesses are not protected, it becomes increasingly difficult to have them testify in court. In the *Hardinaj* case, widespread witness

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<sup>231</sup> *Id.* at ¶65.

<sup>232</sup> Human Haider & Timothy Welch, *supra* note 218 at 64.

<sup>233</sup> *Id.* at 65.

<sup>234</sup> ICTY Rules of Procedure and Evidence, Rule 77(A) (ii).

<sup>235</sup> *Id.* at Rule 77 (A)(iv).

<sup>236</sup> ICTY website, Witnesses, <http://www.icty.org/sid/158>, (Last visited September 12, 2012).

<sup>237</sup> ICTY, Press Release, "Vojislav Seselj Charged with Contempt of Court," The Hague, February 5, 2010, <http://www.icty.org/sid/10321> (Last visited: September 12, 2012).

intimidation resulted in a retrial because witnesses refused to testify.<sup>238</sup> For victims of sexual violence in BiH, proper witness protection is crucial because many women currently live in places where they are a minority and there is a fear of retaliation from the perpetrator's family or supporters. If proper protection is not provided by the courts, most witnesses will be reluctant to testify as it happened in the *Haradinaj* case. The Victims and Witnesses Section (VWS) encourage witnesses to contact the Field Office in Sarajevo if they fear for their safety. As reported in recent research ICTY does not have a mandate to provide permanent witness protection and support.<sup>239</sup> That being said, ICTY's VWS will contact Bosnian authorities, if a witness has safety concerns.<sup>240</sup>

### 3.1.2. Witness Protection and Witness Support Laws in Bosnia and Herzegovina

The protection of witnesses in Bosnian Courts is regulated by five laws. Three legislations are applicable in the State Court.<sup>241</sup> The *BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses* (hereinafter the Witness Protection Law), Article 235, and 237 of the BiH CPC and the *BiH Witness Protection Program* law are applicable in the State Court.<sup>242</sup> The *Law on the Protection of Witnesses under Threat and Vulnerable Witnesses* is the only law adopted by the entities and *Brcko District*.<sup>243</sup> In addition to the legislations, the *Rule Book on Protection of Witnesses* outlines the standards of witness protection for WCC only.

<sup>238</sup> Prosecutor v. Ramush Haradinaj *et al.* IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release ¶37-39 (Int'l Crim. Trib. For the Former Yugoslavia September 10, 2010).

<sup>239</sup> Azra Sehic, *supra* note 222 at 16.

<sup>240</sup> ICTY, About ICTY- Frequently Asked Questions available at <http://www.icty.org/sid/290#7> (Last accessed November 9, 2012).

<sup>241</sup> International Criminal Law Services, *Victims and Witnesses: Supporting the Transfer of Knowledge and Materials of War Crimes Cases from ICTY to National Jurisdictions, funded by the European Union*, [hereinafter International Criminal Law Services], Mod. 14 International Criminal Law and Practice Training Material, 52 (2010)

<sup>242</sup> *Id.* at 53.

<sup>243</sup> *Ibid.*

**a) *BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses***

The main purpose of the *BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses* is to provide protection during the trial to those who fear for their personal security and the security of their family. The witness protection law also offers support mechanisms during the trial to witnesses who have been “severely physically or mentally traumatized.”<sup>244</sup> There are three types of protective measures that can be applied to make testifying at a war crimes trial easier for the victim-witness. These measures depend on what the court wants to protect the victims from during the trial. The law aims to protect victims from re-traumatization, intimidation and public danger. Applying protective measures to victims of sexual violence is important for preservation the witnesses’ dignity.<sup>245</sup>

Since repeated traumatization is common in victim-witnesses, the measures established in this law can be very effective if applied properly. First and foremost, this law has identified the importance of psychological and social assistance. As a result the court has a responsibility to provide vulnerable witnesses with psychological and social assistance and professional help during the investigation and trial.<sup>246</sup> In the WCC there is a Witness Support Office (WSO) that provides psychological and emotional support to all witnesses.<sup>247</sup> WSO is responsible for contacting the vulnerable witness before the trial starts to explain the process and to make sure that the witness appears on trial.<sup>248</sup> WSO also makes a follow-up phone call to see how the witness is coping post trial. In addition to providing psychological support during the trial, motivational support is available.<sup>249</sup> Motivational support means that WSO

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<sup>244</sup> Law on Protection of Witnesses under Threat and Vulnerable Witnesses, [hereinafter Law on Protection of Witnesses] Article 3, 21/03, 55/05, 61/04.

<sup>245</sup> Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia’s War Crimes Chamber* at 29 (2007)

<sup>246</sup> *id.* at Article 6.

<sup>247</sup> Witness Support Office, The Court of Bosnia and Herzegovina, <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=4&id=8&jezik=e> (last visited: September 5<sup>th</sup>, 2012).

<sup>248</sup> Interview with Alma Taso-Deljkovic, Witness Support Office, The Court of Bosnia and Herzegovina, March 20<sup>th</sup>, 2012

<sup>249</sup> *Ibid.*

staff sits with the witness throughout the trial in case the witness feels intimidated or traumatized while answering questions.<sup>250</sup> Victims of sexual violence that have to testify at the WCC are more willing to testify in comparison to victims designated to testify in entity courts because the WCC is financially stable to provide better social and psychological support.<sup>251</sup>

The law also protects witnesses from harassment and intimidation during the examination.<sup>252</sup> The judge is able to question the vulnerable witness on behalf of the parties and defense council, if this is in the best interest of the witness.<sup>253</sup> This however can only happen if consent is given from both parties to the case.<sup>254</sup> Other measures that enable witnesses to safely testify are via video from another room, while concealing the witness' identity.<sup>255</sup> Testifying from a separate room via video or concealing the victim's identity is crucial in sexual violence trials because being in a separate room from the accused can reduce the chance of re-traumatization.<sup>256</sup>

With concern to personal safety, there are also technical procedures prescribed by this law. The witness has a choice of testify from another room via video,<sup>257</sup> behind a screen using voice and /or image distortion<sup>258</sup> or the accused can be taken out and follow the trial via video per request from the witness or the prosecutor.<sup>259</sup> There is also a possibility of using

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<sup>250</sup> *Ibid.*

<sup>251</sup> OSCE, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a year after Adoption of the National Strategy for War Crimes Processing*, 17 (January 2010).

<sup>252</sup> Law on Protection of Witnesses, *supra* note 244 at Article 8 (1).

<sup>253</sup> *Id.* at Article 8(2).

<sup>254</sup> *Ibid.*

<sup>255</sup> *Id.* at Article 9.

<sup>256</sup> Interview with Alma Taso-Deljkovic, Witness Support Office, The Court of Bosnia and Herzegovina, March 20<sup>th</sup>, 2012

<sup>257</sup> <sup>257</sup> Law on Protection of Witnesses *supra* note 244 at Article 9.

<sup>258</sup> *Id.* at Article 13.

<sup>259</sup> *Id.* at Article 10.

recorded or written testimony if there is a threat to the witness or her family during or after the trial.<sup>260</sup> At the moment the most common measure is the application of pseudonyms.

In regards to protection of identity, under this law it is possible to keep all personal details confidential in preliminary proceedings for as long as needed. This can only be applied if there is a serious threat to the safety of the witness.<sup>261</sup> Similar to the practice in ICTY, sufficient information about the witness must be revealed closer to the trial so that the defense can properly prepare for the case.<sup>262</sup> A provision regarding the disclosure of evidence is also included in the law. If information from the trial is presented outside of court by anyone, it is a criminal offence.<sup>263</sup>

Lastly, Article 235 of the CPC gives the judges the right to exclude the public from a trial in part or as a whole to maintain peace and order.<sup>264</sup> In the *Kurtovic* case the WCC Trial Chamber held that under Article 235 the public can also be excluded to protect the witness' identity.<sup>265</sup> Article 235 allows for an appeal if a decision is made to exclude the public.<sup>266</sup> These are all important measures that can only be effective if enforced properly by the Trial Chamber.

#### ***b) BiH Witness Protection Program Law***

The *BiH Witness Protection Program* law is the second applicable measure on the state level. The Witness Protection Department (WPD) within the State Investigation and Protection Agency (SIPA) is responsible for enforcing this law. The state prosecutor's office decides who requires protection by SIPA and the protection is applicable as long as there is

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<sup>260</sup> *Id.* at Article 11.

<sup>261</sup> *Id.* at Article 12(1)

<sup>262</sup> *Id.* at Article 12 (8)

<sup>263</sup> *Id.* at Article 24. (2)

<sup>264</sup> BiH Criminal Procedural Code, Article 235, (2003).

<sup>265</sup> International Criminal Law Services, *supra* note 241 at 68.

<sup>266</sup> BiH CPC *supra* note 264 at Article 237.



danger to the witness' safety, health or life.<sup>267</sup> SIPA is responsible for bringing the witness to and from WCC during the trial. After the trial, the witness can contact the Witness Protection Department if there are safety concerns. If there is imminent risk to personal safety, SIPA contacts the police in the entity that the victim-witness lives in until they can address it.<sup>268</sup> Contacting local police is an issue because if the witness is a minority in the community, it is likely that she does not trust the local police.

Other long term protective measures available are relocation and temporary change of identity.<sup>269</sup> Relocation is offered under the Witness Protection Program but to be considered, the witness must meet specific qualifications.<sup>270</sup> According to SIPA, to qualify for relocation,

“[the witness must have a specific level of vulnerability], the scope and way in which his/her personal security is threatened” must be clear. Each case is assessed by the Witness Protection Department in accordance with the Law on Witness Protection Programme of BiH.”<sup>271</sup>

The Witness Protection Program Law fails to identify the eligibility criteria for relocation or change of identity. SIPA's personal qualifications are vague and allowing the WPD to decide who qualifies and who does not without any guidelines creates a potential for abuse. A rulebook defining vulnerable witnesses and potential situations should be published to provide WPD with guidelines for granting relocation or change of identity. This is important to prevent arbitrary denial of witness protection measures to witnesses that may be under serious danger.

### ***c) Witness Protection Rulebook***

<sup>267</sup> BiH Witness Protection Program Law, Article 2(2), Article 3(4), BiH Official Gazette 29/04.

<sup>268</sup> Human Rights Watch, *Narrowing the Impunity Gap*: *supra* note 245 at 37.

<sup>269</sup> *Id.* at Article 7.

<sup>270</sup> Azra Sehic, *supra* note 222 at 17.

<sup>271</sup> SIPA website, Frequently Asked Questions, [http://www.sipa.gov.ba/en/struktura/organizacione\\_jedinice.php](http://www.sipa.gov.ba/en/struktura/organizacione_jedinice.php) (last visited September 14, 2012).

In addition to the laws, a rule book has been published to help enforce the measures. The *Rulebook on Protection of Witnesses* is only applicable in the WCC and it reiterates the importance of enforcing all necessary mechanisms to protect witnesses regardless of the reasons for the protection. The protection must be carried out in accordance with the BiH CPC and the BiH Law on the Protection of Witnesses.<sup>272</sup> The Rulebook also places responsibility on the judges to enforcing witness protection measures, especially when it comes to vulnerable witnesses.<sup>273</sup> Although it is not a law, it is an important document that places the responsibility on court officials to protect witnesses according to the laws adopted in Bosnia.

### 3.1.3. Current Issues with Protective Measures in WCC and Entity Courts

Following the summary of witness protection legislation, the question is whether witnesses under threat are actually granted appropriate protection in WCC and entity courts. From the laws, it is clear that there are measures that guarantee witnesses safety in and out of courts. In practice, however, the witness protection program, on the state and entity levels is inadequate. Inconsistency with the application of witness protection measures and the failure to investigate reports of threats, intimidation and bribes to witnesses with urgency are the main issues.<sup>274</sup>

WCC has also taken steps to protect vulnerable witnesses in sexual violence cases by holding closed sessions, using pseudonyms, allowing testimonies via video and using voice and video distortion. Even though these measures can help victims of sexual violence, consistency is very important. In the past WCC has been inconsistent with the application of these measures. During the *Samardžić* trial, rape victims testified in a closed session because there was a chance the public would identify the witness based on her testimony. Some

<sup>272</sup> Pravilnik o Zastiti Svjedoka, Article 2, (The Rulebook on Protection of Witnesses).

<sup>273</sup> *Id.* at Article 15, 16,17,18.

<sup>274</sup> OSCE *Witness Protection and Support*, *supra* note 251 at 13.

women wanted protection because they kept the crime a secret while other women had general privacy concerns.<sup>275</sup>

The *Jankovic* trial contained similar allegations of sexual violence nonetheless the trial was open to the public for all testimonies but two.<sup>276</sup> The contradiction lays in the fact that many of the witnesses already testified in the *Samardzic* trial<sup>277</sup> and if the intent of the closed session was to protect the victims' privacy than this was necessary in the *Jankovic* trial as well. As Human Rights Watch reports, one witness in the *Jankovic* trial raised a concern about testifying in front of the public because her family did not know she had been raped. The presiding judge reminded the attendees to not discuss the information presented in court in the public.<sup>278</sup> Another example from a personal observation demonstrates this is an ongoing issue. In March 2012, I had a chance to observe the *Prosecutor v. Veselin (Batko) Vlahovic* case (ongoing at the time of writing)<sup>279</sup> and even though the witnesses were testifying via video, their faces were very visible to the public. As in the *Jankovic* case, the judge reminded the public to not disclose any of the information witnessed during the trial. Since the trial is accessible to anyone, protected witnesses should not be relying on the public to keep their identities a secret. In addition the family of the accused was present as well as various media outlets.

For witnesses testifying in entity courts, effective witness protection measures are non-existent as a result of lack of material resources and lack of will from the officials.<sup>280</sup> The

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<sup>275</sup> *Prosecutor v. Samardzic*, Case No. X-KRZ-05/49, First instance 9 (BiH) available at [http://www.sudbih.gov.ba/files/docs/presude/2006/Samardzic\\_ENG\\_X-KR-05-49.pdf](http://www.sudbih.gov.ba/files/docs/presude/2006/Samardzic_ENG_X-KR-05-49.pdf)

<sup>276</sup> The testimonies of witness E and J were held in a close session while all other witnesses testified via video which was visible to the Trial Judges. *Prosecutor v. Jovanovic*, Case No. X-KRZ-05/161, First Instance 27 (BiH) (2005) available at

[http://www.sudbih.gov.ba/files/docs/presude/2007/X05161\\_JANKOVIC\\_GOJKO\\_VERDICT\\_160207\\_1.pdf](http://www.sudbih.gov.ba/files/docs/presude/2007/X05161_JANKOVIC_GOJKO_VERDICT_160207_1.pdf)

<sup>277</sup> *Prosecutor v. Jovanovic*, Case No. X-KRZ-05/161, First Instance 20 (BiH) (2005) available at

[http://www.sudbih.gov.ba/files/docs/presude/2007/X05161\\_JANKOVIC\\_GOJKO\\_VERDICT\\_160207\\_1.pdf](http://www.sudbih.gov.ba/files/docs/presude/2007/X05161_JANKOVIC_GOJKO_VERDICT_160207_1.pdf)

<sup>278</sup> Human Rights Watch, *Narrowing the Impunity Gap*: *supra* note 245 at 34 n. 142.

<sup>279</sup> *Prosecutor v. Veselin Vlahovic*, Case No. S1 K 004659 11 KRI, Case in Trial (BiH). Present at the trial proceedings on March 14, 2012 at the War Crimes Chamber in Bosnia and Herzegovina.

<sup>280</sup> OSCE, *Witness protection and Support*, *supra* note 251 at 14.

entity courts cannot afford video links or voice distortion.<sup>281</sup> The courtrooms do not have separate entrances or separation screens to protect witnesses from the accused or the public.<sup>282</sup> Some courts such as the District Court in *Doboj* (RS) have created a room where protected witnesses can testify from.<sup>283</sup> The Sarajevo Court has also upgraded its courtrooms by installing internationally approved audio/video technology to improve its witness protection program.<sup>284</sup>

Unfortunately many courts in the RS and FBiH have not only failed to make an effort to protect witnesses, court officials have also denied witnesses protection and told witnesses it was unnecessary.<sup>285</sup> During the *Stanovic* case in the *Trebinje* Court (RS) a victim of rape known as Z.R. requested to be a protected witness. The Prosecutor promised she was protected on the basis of a closed hearing.<sup>286</sup> To her surprise, the trial was open to the media and the public and her identity was broadcasted across the country.<sup>287</sup> Moreover, she was also held in the same room as the accused and journalists before the trial.<sup>288</sup> As a result of her experience she] started living in fear and she believes that will be the case until she dies.<sup>289</sup> Z.R.'s story is not an isolated case; many victims are left feeling this way after the trial.

Despite the fact that entity courts have a lower operating budget than the WCC, OSCE has suggested some low cost protective means that can be applied.<sup>290</sup> Measures such as the use of pseudonyms, using the door that judges use to prevent the interaction between

<sup>281</sup> *Id.* at 15.

<sup>282</sup> *Ibid.*

<sup>283</sup> BIRN, 'Witnesses Left Unprotected', 28, February, 2008, available at <http://www.bim.ba/en/104/10/8168/?tpl=30> (Last visited September 16, 2012).

<sup>284</sup> Opcinski Sud Sarajevo, Bilten: Svecano Otvorena Rekonstruisana Palata Pravde u Sarajevu, (Grand opening of the Reconstructed Court in Sarajevo) February 2010, vol.16, visit <http://www.oss.ba/dokumenti/OSS%20bilten%2016%20finalni.pdf>, (last visited September 16, 2012), pp.2

<sup>285</sup> BIRN has reported that denial of witness protection has occurred in Mostar, Zenica and Doboj. <http://www.bim.ba/en/104/10/8168/?tpl=30> (last visited, September 16, 2012).

<sup>286</sup> Institute for War & Peace Reporting, *Bosnia: Unprotected*, YOUTUBE (November 21, 2012) [http://www.youtube.com/watch?feature=player\\_embedded&v=Agfd6AYd\\_RY#!](http://www.youtube.com/watch?feature=player_embedded&v=Agfd6AYd_RY#!)

<sup>287</sup> *Ibid.* Z.R.'s testimony.

<sup>288</sup> *Ibid.*,

<sup>289</sup> *Ibid.*

<sup>290</sup> A Budget for courts in has not been published however News Europe Online has reported that the budget for 2012 is around 700 Million Euros and out of that around 128 Million Euros will go into Bosnian institutions. <http://www.neurope.eu/article/bih-parliament-adopts-2012-budget> (Last visited: September 16, 2012).

the accused and the witness and using makeshift screens to hide the witness' identity from the public are some of the suggestions.<sup>291</sup> The failure to implement even simple measures of witness protection illustrates the lack of will by the judiciary. Until more protective measures are applied, witnesses will not come forward.

Another major issue is the lack of witness protection outside the courts before and after a trial. On the state level SIPA is responsible for the safety of war crimes witnesses by coordinating with the Prosecutor's office and WCC when the witness begins testifying.<sup>292</sup> According to OSCE, the only protective measure offered by SIPA has been transporting witnesses to court and back home. The lack of protection is blamed on a small budget however not everything affects the budget. There have been instances where SIPA has failed to protect the victim. In situations where the witness was at risk, SIPA was not able to react to the emergency quickly enough.<sup>293</sup> More concerning are reports which state that there have been cases in which SIPA has released names of witnesses to the public.<sup>294</sup> The lack of protection allows for ongoing intimidation of witnesses which continues discouraging witnesses from testifying.

In contrast to the witness protection on the state level, witnesses in entities do not have any protection outside the courts. In case of intimidation or threats, reports must be made to the local police station. Local police protection has put many victims and witnesses in danger as a result of testifying. In June 2012, a day after testifying at a war crimes trial in the *Brcko District* Court, a witness reported that gun shots were fired at his house.<sup>295</sup> This incident alone demonstrates that intimidation and threats are very likely in FBiH and RS because there is not an existing witness protection program.

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<sup>291</sup> OSCE, *Witness Protection and Support*, *supra* note 251 at 16.

<sup>292</sup> Azra Sehic, *supra* note 222 at 21.

<sup>293</sup> *Id.* at 22.

<sup>294</sup> *Ibid.* at 22.

<sup>295</sup> BIRN Justice Report, Brcko: Protection of Witnesses Required, June 29, 2012, <http://www.bim.ba/en/328/10/35406/> (last visited September 16, 2012).

### 3.2. Support Measures for Vulnerable Witnesses

Along with having adequate witness protection, victims of sexual violence require proper psychological and emotional support before, during and after the trial to help prepare the witness for their testimony, to reduce the risk of re-traumatization during the trial and to provide support post-testimony. For victims of sexual violence, witness support is as important as witness protection because most women need psychological support during the trial process. If that is not offered it is less likely that a woman will want to testify. Since the establishment of the ICTY, there has been more emphasis on providing psychological support to vulnerable witnesses and WCC has followed in the footsteps of the Tribunal. This subsection will provide an overview of the witness support measures available in Bosnian courts but only after a brief discussion takes place about ICTY's witness support program.

#### 3.2.1. Witness Support in ICTY

ICTY witness support program provides witnesses with social and psychological counseling.<sup>296</sup> The assistance provided extends beyond the Tribunal. The staff from VWS helps prepare witnesses upon arrival, with administrative procedures and testifying. There is also always someone available from the VWS to assist the witness if needed in their hotel room.<sup>297</sup> For witnesses who experience anxiety, stress and sadness, psychological council is available before, during and after the testimony.<sup>298</sup> The support officer can also attend to the witness in their hotel room.<sup>299</sup> Witnesses also get a financial stipend for food for the duration of the trial but once the trial ends, psychological support and financial reparation is no longer

<sup>296</sup> ICTY Registry, *Information Booklet for ICTY Witnesses*, 9 available at [http://www.icty.org/x/file/About/Registry/Witnesses/witnesses\\_booklet\\_en.pdf](http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf) (2007).

<sup>297</sup> Azra Sehic, *supra* note 222 at 9.

<sup>298</sup> *Id.* at 16.

<sup>299</sup> *Ibid.*

available.<sup>300</sup> This is understandable since witnesses must return to their home countries after the trial however for the duration of the trial; the Tribunal staff makes sure that witnesses do not experience any repeated trauma. Further, BiH should insure that all witnesses, testifying in ICTY and domestic courts are provided ongoing treatment. According to Bakira Hasecic, a victim who has testified in ICTY and Bosnia courts prefers ICTY's support services because the staff is very accommodating to the victim's needs.<sup>301</sup>

### **3.2.2. Available Support Measures for Vulnerable Witnesses on the State and Entity Level**

In WCC the witness support program provides vulnerable witnesses psychological and motivational support during the testimony.<sup>302</sup> Currently there are five psychologists working in the Victim Witness Unit (VWU) and their role is to provide psychological assistance, provide advice to judges regarding the treatment of witnesses on the stand and per request sit with the witness during the trial.<sup>303</sup> The staff also contacts the vulnerable witness before the trial to explain the procedures and post-trial to check up on the witness's wellbeing.<sup>304</sup> Since there is not a program to help vulnerable witnesses outside the courtroom,<sup>305</sup> VWU cannot do much else after the trial has ended.

In the entities, the government does not finance witness support programs for war crimes trials.<sup>306</sup> Instead, by law social welfare centers are responsible for providing psycho-social support to vulnerable witnesses however most centers are not financially capable of

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<sup>300</sup> *id* at 16.

<sup>301</sup> Interview with Bakira Hasecic, Head of the Association of Women Victims of War (NGO) in Sarajevo, BiH, March 2012

<sup>302</sup> Interview with Alma Taso-Deljkovic, Witness Support Office, The Court of Bosnia and Herzegovina, March 20<sup>th</sup>, 2012

<sup>303</sup> Interview with Alma Taso-Deljkovic, Witness Support Office, The Court of Bosnia and Herzegovina, March 20<sup>th</sup>, 2012.

<sup>304</sup> *Ibid.*

<sup>305</sup> Azra Sehic, *supra* note 222 at 22.

<sup>306</sup> OSCE, *Witness Protection and Support* *supra* note 250 at 19.

fulfilling this task.<sup>307</sup> Some Prosecutor's Offices and courts have created a relationship with local NGOs that can provide psycho-social support during and after the trial.<sup>308</sup> *Vive Zene Tuzla* is an NGO that provides psycho-social support and protection to torture victims and witnesses testifying before the Cantonal Court of *Tuzla*.<sup>309</sup> On one hand NGO support is more beneficial than in court witness support programs because the victim can continue using the services after the trial is over. The prosecutors are concerned that support provided by the NGO "can compromise the integrity of the criminal process or the rights of witnesses."<sup>310</sup> Moreover, the NGO support programs for witnesses are not consistent throughout BiH and in many regions victims have no support at all.

Although NGO programs are necessary, a government sponsored, centralized witness support program is crucial to ensure witnesses are provided with equal access to support. NGO support and government sponsored programs are important and would help witnesses better cope post testimony and should be accessible to all vulnerable victims pre and post-trial. The National War Crimes Strategy has also emphasized the importance of a country-wide network of witness and victims support. As of 2010 entity courts have started developing witness support programs. Currently, the Sarajevo Cantonal Court and Prosecutor's Office as well as the District and Prosecutor's office of Banja Luka have functioning witness support programs.<sup>311</sup> The support program in the Prosecutor's office is offered depending on the complexity of the case.<sup>312</sup> The fact that some entity courts are establishing their own witness support programs demonstrates that some courts want to prosecute war crimes however all victims must have the same support throughout the country.

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<sup>307</sup> *Id.* 19.

<sup>308</sup> Referring to *Vive Zene Tuzla*, Medica zenica

<sup>309</sup> *Vive Zene*, About us, <http://www.vivezene.ba/eng/onama.htm> (Last visited September 17, 2012).

<sup>310</sup> OSCE, *Witness Protection and support supra* note 251 at 20.

<sup>311</sup> Azra Sehic, *supra* note 222 at 23.

<sup>312</sup> *Id.* at 23 n. 36.



### 3.3. Conclusion

After an in depth analysis of the present witness protection and witness support laws, it is clear that there are inconsistencies in the application of law as well as a lack of will to protect witnesses. For victims of sexual violence trust in the courts is vital. According to the Special Representative of the Secretary-General on Sexual Violence in Conflict

“many women who testified before the national court said they would never repeat the ordeal, due to the tendency to interrogate the conduct of the victim in ways that are humiliating and legally irrelevant. This is compounded by logistical hurdles, a lack of emotional support and inadequate follow-up on the progress of cases.”<sup>313</sup>

In a recent interview with BIRN Justice Network, many victims expressed the same concern. Out of eleven victims interviewed five refused to file a charge even though they knew who the perpetrator was.<sup>314</sup> The lack of will from officials in Bosnian courts and security services to implement the adopted laws has instilled a fear in the witnesses. As it is evident from current events and international concerns, safety and support to victim-witnesses is crucial. Until officials inside and outside the courtroom are willing to protect witnesses to their fullest ability, witnesses will keep silent and those who speak up risk their safety.

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<sup>313</sup> TRIAL, Written Information for the Adoption of the List of Issues by the Committee on the Elimination of Discrimination of Violence against Women, September 2012, originally found in Special Representative of the Secretary-General on Sexual Violence in Conflict, *Report on the Mission to BiH*, 1 February 2011

<sup>314</sup> Sehic, *supra* note 222 at 20. The identity of the victim is not listed but is known to the author.

## CHAPTER 4: GOVERNMENT AND NGO SUPPORT FOR VICTIMS OF SEXUAL VIOLENCE IN BOSNIA

Under customary international law and international treaties, states have an obligation to provide support and reparation to victims of gross human rights abuses.<sup>315</sup> The General Assembly resolution: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter Basic Principles and Guidelines) has emphasized the importance of state administered reparation.<sup>316</sup> The general assembly identifies restitution, compensation, satisfaction and guarantees of non-repetition as four measures that can be used to repair the harm suffered by civilian victims of war.

The impact of war time sexual violence is severe and it has an effect on every aspect of a woman's life. Many women suffer from serious health, psychological and gynecological problems.<sup>317</sup> Depression, anxiety and Post-Traumatic Stress Disorder (PTSD) are also very common.<sup>318</sup> According to medical research, social support is crucial and lack of support has an impact on the recovery procedure.<sup>319</sup> Similarly, medical and psychological treatment is very important to healing the trauma. Unfortunately most victims are stuck in a vicious cycle of poverty. Many women are unemployed or cannot work as a result of their medical problems and without an income victims cannot afford medical treatment. This chapter intends to analyze the necessity of victim support outside the court room and how the lack of support has affected victims of sexual violence in BiH. To answer this question, it is

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<sup>315</sup> G.A Res 60/147 ¶ 1 U.N Doc A/RES/60/147 (16 December 2005)

<sup>316</sup> *Id.* at Preamble.

<sup>317</sup> Udruzenje Zena Zrtava Rata, The Association "Women Victims of War" Pamphlet, Cober d.o.o Sarajevo, 16 (2010).

<sup>318</sup> Lauren Harris, Julie Freccero, *Sexual Violence: Medical and Psychosocial Support*, 3 (Working paper, Human Rights Center: University of California, Berkeley 2011) available at: [http://www.law.berkeley.edu/HRCweb/pdfs/SVA\\_MedPsych.pdf](http://www.law.berkeley.edu/HRCweb/pdfs/SVA_MedPsych.pdf)

<sup>319</sup> *Viktorija 99* reports that six persons per year commit suicide, 60 percent being women in the town of Jajce. Amnesty International, *Whose Justice? Bosnia and Herzegovina's Women Still Waiting*, at 54 nn.228 (2009)

important to analyze the psychological and social support available in the entities and the role of women's NGOs in the recovery and reconciliation process.

#### **4.1. Importance of Psychological and Social Support for Rehabilitation of Victims of Sexual Violence**

For victims of sexual violence in BiH, psychological and social support is crucial for recovery because a woman loses a sense of safety, her self esteem and the ability to trust. The feeling of guilt and shame often results in self blame.<sup>320</sup> The intent of this section is to illustrate the importance of therapy and social support to the recovery process. In this context social support means financial reparation, vocational training to help victims gain their independence and educational programs directed at the community to eliminate the stigma attached to victims of sexual violence.

Over the years extensive research has gone into mental health treatment of trauma survivors.<sup>321</sup> It has been proven that “strong social support protects survivors from prolonged and more severe psychological consequences of rape.”<sup>322</sup> Studies have determined that recovery from PTSD, anxiety and other trauma related disorders is possible by revisiting the memory of trauma, engaging in trauma-related thoughts and sharing the reactions and feelings with others.<sup>323</sup> Cognitive behavioral therapy has been proven to treat PTSD and other trauma related disorders.<sup>324</sup> In recent years exposure therapy has been studied more closely and it has been proven to be very effective in curing victims of sexual violence. Exposure

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<sup>320</sup> Viola Schreiber, Babette Renneberg and Andreas Maercker, Seeking Psychosocial Care After Interpersonal Violence: An Integrative Model, 322 *Violence and Victims* 24, 322(2009)

<sup>321</sup> *Id* at 322.

<sup>322</sup> Thomas Callender and Liz Dartnall, *Mental Health Responses for Victims of Sexual Violence and Rape in Resource-Poor Settings* in SEXUAL VIOLENCE RESEARCH INITIATIVE, WORLD HEALTH ORGANIZATION, 3( January 2011) available at <http://www.svri.org/MentalHealthResponse.pdf>

<sup>323</sup> Edna B Foa, Carmen P McLean, Prolonged exposure therapy for post-traumatic stress disorder: a review of evidence and dissemination 11 *Expert Review of Neurotherapeutics* 1151, 1155 n. 36 (2011).

<sup>324</sup> Priscilla M. Schulz, Davorka Markovic-Johnson, L. Christian Huber, Cognitive-Behavioral Treatment of Rape- and War-Related Posttraumatic Stress Disorder With a Female, Bosnian Refugee 5, *Clinical Case Study* 191, 192 (2006).

therapy allows victims to confront the memories of the traumatic events by writing, imagining or speaking about the experience.<sup>325</sup> The therapist also teaches the patient various coping mechanism for their anxiety such as controlled breathing techniques.<sup>326</sup> The therapy is carried out until the anxiety diminishes. According to one study, a Bosnian rape victim underwent treatment for over nine months, each session lasting two hours and at the end of the session the victim reported low symptoms of PTSD and an ability to pursue daily activities.<sup>327</sup>

Other modes of therapy that can help victims of sexual violence are group therapies. Group therapies have proven to be effective for victims of sexual violence that suffer from anxiety and depression. This form of therapy can be very effective especially in countries that cannot afford one-on-one therapy.<sup>328</sup> Group therapies teach victims to express their feelings and it brings them out of isolation.<sup>329</sup> Group therapies can also help victims cope better because of the shared experiences with other participants. The US National Center for PTSD states that the lasting traumatic impacts as a result of sexual violence can be reduced or even prevented as long as there is structured psychological support.<sup>330</sup>

Along with psychological treatment, victims must also have access to a range of services and benefits to help in the recovery process.<sup>331</sup> Compensation is crucial to the rehabilitation process for victims of sexual violence because many women have health issues such as cardio-vascular disease<sup>332</sup> and need money for medical expenses. Health plays a

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<sup>325</sup> Priscilla M. Schulz *et. al. supra* note 324 at 192.

<sup>326</sup> Nenad Paunovic, Lars-Goran Ost, Cognitive-behavior therapy vs exposure therapy in the treatment of PTSD in refugees 39 Behaviour Research Therapy 1183, 1189 (2001).

<sup>327</sup> Priscilla M. Schulz *et. al. supra* note 324 at 199.

<sup>328</sup> Thomas Callender *et al. supra* note 322 at 11.

<sup>329</sup> Priscilla M. Schulz *et. al. supra* note 324 at 199

<sup>330</sup> Thomas Callender *et al. supra* note 322 at 4.

<sup>331</sup> Amnesty International, *Whose Justice? Women of Bosnia and Herzegovina are Still Waiting*. EUR 63/06/2009, 36 (September 2009)

<sup>332</sup> Udruzenje Zena Zrtava Rata (Association Women Victims of War) Information Pamphlet 16 (2010)

crucial role in an individual's economic stability. Those who are sick are less likely to find a stable job and are more likely to live in poverty therefore compensating victims of sexual violence is necessary to help them recover psychologically and physically. Once victims recover, it is more likely they will be able to support themselves. Furthermore vocational training is also important to empower women by providing them with a skill for economic stability and to contribute to the community.

#### 4.2. Social Protection and Support for Victims of Sexual Violence in Bosnia

In Bosnia and Herzegovina there is no state level law that regulates social protection instead each entity has its own law on social protection for civilian victims of war. In the FBiH the *Law on Principles of Social Protection, Protection of all Civilian Victims of War and Protection of Families with Children* (hereinafter FBiH law on social protection) has been adopted to provide social protection to civilian victims of war. In FBiH the social protection system is further broken down into independent administrative cantons. Each of the ten cantons has its own law on social protection and ministries for social welfare.<sup>333</sup> The FBiH law on social protection is the primary law in the Federation yet there is not a provision that makes the enforcement of this law obligatory across the territory of FBiH.<sup>334</sup>

<sup>333</sup> These laws are titled, 1) Law on Basics of Social Protection, Protection of Civilian War Victims with Children of Sarajevo (Official Gazette 16/02), 2) Law on Social Protection of Civilian War Victims with Children of Zenica- Dobož Canton (Official Gazette 13/07), 3) Law on Social Care of Herzegovina-Neretva Canton (Official Gazette 3/05), 4) Law on Social Protection, Protection on Civilian War Victims and Protection of families with Children of West Herzegovina Canton (Official Gazette 16/01, 11/02, 4,04, 9,05), 5) Law on Social Protection, Protection of Civilian War Victims and Protection of Families with Children (Official Gazette 12/00, 05/02, 13/03, 8/06), 6) Law on Social Protection, Protection of Civilian War Victims and Protection of Families with Children (Official Gazette 5/00, 7/01), 7) Law on Social Protection, Protection on Civilian War Victims and Protection of families with Children of Bosansko-podrinjski (Gorazde) Canton (Official Gazette 10/00, 10/03), 8) Law on Social Protection, Protection on Civilian War Victims and Protection of families with Children of Livno (Peoples' Gazette 5/98), 9), Law on Social Protection, Protection on Civilian War Victims and Protection of families with Children of Central-Bosnia Canton (Official Gazette 10/05, 2/06), 10) Law on Social Protection Posavina Canton (Peoples' Gazette 5/04).

<sup>334</sup> INITIATIVE AND CIVIL ACTION(ICVA), WHY WE ARE NOT EQUAL IN RIGHTS TO SOCIAL PROTECTION – ANALYSIS AND RECOMMENDATIONS, European Union and Open Society BiH 4 (2010)

In Republika Srpska, *Law on Protection of Civilian Victims of War in the Republika Srpska* (hereinafter RS law on social protection) outlines social protection for civilian victims of war. *Brcko District* has adopted its own law on social protection however there are no provisions protecting civilian victims of war.<sup>335</sup> Due to lack of information about this issue further discussion on *Brcko District* will not take place. To better understand the rights of social protection granted to victims of sexual violence in Bosnia and Herzegovina, it is important to compare the laws available in the two entities.

#### 4.2.1. Legislation on Social Protection in the Federation of Bosnia and Herzegovina

The FBiH law on social protection defines a civilian victim of war as persons who have serious physical, mental or health issues or family members of those who have died or disappeared as a result of immediate threat of war, injury or torture.<sup>336</sup> A special provision identifying victims of sexual violence has been included in the 2006 amended version<sup>337</sup> because the previous definition disregarded victims who suffered psychological damages. Under the FBiH law, the pension for victims of sexual violence is KM 514.00 (Convertible Marks) (€263).<sup>338</sup> In addition to monetary support, the law also outlines available social support for civilian victims of war. The basic rights available are a monthly pension, personal assistance, funding for medicine and orthopedic support, career training, employment assistance, housing, psychological and legal assistance.<sup>339</sup>

<sup>335</sup> Law on Social Protection (Official Gazette of Brcko District 1/03)

<sup>336</sup> ZAKON O OSNOVAMA SOCIJALNE ZASTITE, ZASTITE CIVILNIH ZRTAVA RATA I ZASTITE PORODICE SA DJECOM, [Law on principles of social protection, protection of civilian victims of war and protection of families with children] “Sluzbene Novine Federacije BiH” 36/99, 54/04, 39/06, 14/09. Article 54.

<sup>337</sup> See Article 54 of ZAKON O OSNOVAMA SOCIJALNE ZASTITE, ZASTITE CIVILNIH ZRTAVA RATA I ZASTITE PORODICE SA DJECOM, [Law on principles of social protection, protection of civilian victims of war and protection of families with children] “Sluzbene Novine Federacije BiH” 36/99, 54/04, 39/06, 14/09.

<sup>338</sup> Interview with the President of Women Victims of War, Bakira Hasecic, October 5, 2012. E-mail correspondence.

<sup>339</sup> Law on principles of social protection, protection of civilian victims of war of FBiH *supra* note 364 at Article 58.

This law is applicable to all nationals of Bosnia and Herzegovina, including individuals that hold a citizenship to Republika Srpska and have permanent residence in the territory of FBiH. The law allows civilian victims of war to return to their permanent residence without losing their pension. Those who decide to leave FBiH, prior to their return to the RS or *Brcko District* “their claim is decided by the competent municipal authority of the last place of temporary residence.”<sup>340</sup> Civilian victims of war who claim social assistance under this law cannot claim social assistance in *Republika Srpska*.

To qualify for the status of a civilian victim of war, Article 79 outlines the requirements that need to be fulfilled by the victim. Medical records made immediately after the injury of disability and under what circumstances the injury has been caused must be presented.<sup>341</sup> Many victims of sexual violence were not able to obtain medical records immediately after the crime as a result of ongoing conflict however the law does not specify any guidelines regarding this issue. In addition to medical proof, the victim must also provide proof of the circumstances in which the injury took place, issued by a competent body such as a local NGO or associations that provides assistance to civilian victims of war.<sup>342</sup> For victims of sexual violence, proof of recognition on the status of rape and sexual violence must be granted by the Sarajevo based Association “*Zene Zrtava Rata*” (Association “Women Victims of War”).<sup>343</sup>

The implementation of the law is allocated to the cantonal ministries of social protection. The Federal Ministry of Labor and Social Policy is responsible for providing 70

<sup>340</sup> ICMP, Guide for Civilian Victims of War: How to enjoy the right to protection as a civilian victim of war in the Federation of Bosnia and Herzegovina, 7, 8 (2007)

<sup>341</sup> Law on Principles of Social Protection of Civilian Victims of War of FBiH at Article 79(2), ICMP Guide for FBiH *supra* note 340 at 19.

<sup>342</sup> Law on Principles of Social Protection of Civilian Victims of War of FBiH *supra* note 339 at Article 79(2).

<sup>343</sup> Interview with Bakira Hasecic, March 15, 2012 at the Women Victims of War Office in Sarajevo. This fact was also confirmed by former personnel from Office of the Prosecutor interviewed on March 16, 2012 in Sarajevo.

percent of the funding for the civilian victims of war pension.<sup>344</sup> As well as “overseeing the implementation of international conventions and bilateral agreements in the area of social protection, employment, protection of civilian victims of war and family protection.”<sup>345</sup> Cantonal Ministries are responsible for providing the other 30 percent of the pension and financing the social assistance programs.<sup>346</sup>

The distribution of assistance is provided by the Municipal Centers for Social Work (CSW) in RS and Cantonal Centers for Social Work on the cantonal level of FBiH.<sup>347</sup> The task of these centers is to identify and provide assistance to individuals who fulfill the criteria under the legislation.<sup>348</sup> CSWs are divided into two categories: centers that provide financial benefits and centers that provide counseling, advice and housing assistance.<sup>349</sup> Cantons decide what services will be provided and unfortunately in most cantonal legislations on social protection, psychological assistance and other programs to help victims of sexual violence are excluded. *Brcko District* has a Department of Social Protection however center for social work have not been established.

In addition to having the authority over implementation of programs, each of the cantons has adopted their own law on social protection and most are not compatible with the FBiH law. More concerning is the fact that cantonal laws are not required under any provision in the FBiH law to follow federal legislation. As a result cantons are given full freedom for implementation of social protection services. The problem with such a decentralized system is that social service programs vary from canton to canton. Some CWS's have psychological assistance while others only provide financial assistance and

<sup>344</sup> ICMP Guide for FBiH *supra* note 340 at 11.

<sup>345</sup> *Id.* at 37.

<sup>346</sup> *Ibid.*

<sup>347</sup> European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, Social Protection and Social Inclusion in Bosnia and Herzegovina, 41 (2008).

<sup>348</sup> *Id.* at 42.

<sup>349</sup> *Id.* at 42.



health insurance. In some cantons such as the *Neretva-Herzegovina* Canton, there is not a legislative framework for social protection for civilian victims of war at all.<sup>350</sup> For victims of sexual violence who live in the *Una-Sana* Canton, receiving social support is more difficult than for victims living in the *Zenica-Doboj* Canton because the law in the *Una-Sana* Canton does not include any measure that can help victims of sexual violence suffering from psychological or emotional disorders.<sup>351</sup> On the contrary, *Zenica-Doboj* Canton has created programs to help victims of sexual violence recover. A further analysis will be made on the practices in the cantonal ministries for social services in the following sub sub-section.

#### 4.2.2. Social Protection Legislation in the Republika Srpska

The law on protection of civilian victims of war in Republika Srpska is applicable to all citizens of RS, the Former Yugoslav Republic and those who have suffered damages to their bodies in Croatia and currently reside in the RS.<sup>352</sup> RS considers individuals who have suffered 60 percent of damage to their bodies as a result of assault, rape, wounding or imprisonment civilian victims of war.<sup>353</sup> Also families of those who have been killed, died or went missing during the conflict have a right to claim a pension.<sup>354</sup> The distribution of social assistance has been left up to the districts. In Republika Srpska the social assistance and the budget for Civilian Victims of War is the responsibility of the Ministry of Health and Social Protection, while Centers for Social Work in the municipalities implement the programs of social protection.<sup>355</sup>

<sup>350</sup> Initiative and Civil Action (ICVA) *supra* note 334 at 4.

<sup>351</sup> ZAKON O SOCIJALNOJ ZASTITI, ZASTITI CIVILNIH ZRTAVA RATA I ZASTITI PORODICE SA DJECOM [The law on social protection, protection of civilian victims of war with children], "Sluzbeni Glasnik Unsko-Sanskog Kantona" broj: 5/00, Article 92.

<sup>352</sup> ZAKON O ZASTITI CIVILNIH ZRTAVA RATA [The Law on protection of civilian victims of war in the Republika Srpska] "Sluzbeni Glasnik Republike Srpske" broj: 25/93, 32/94, 37/07, 60/07, 111/09, 118/09, Article 1.

<sup>353</sup> *Id* at Article 2(1), (2).

<sup>354</sup> *Id.* at Article 2(2).

<sup>355</sup> European Commission Directorate *supra* note 347 at 39, 40.

Unlike in the FBiH, a rape victim in RS must prove that she has suffered at least 60 percent damage to the body.<sup>356</sup> The discrimination against victims of sexual violence is evident because crimes of sexual violence usually cause psychological damages mostly. Moreover, victims must submit medical records and documents dated at least one year from the day that the injuries occurred to qualify for the pension.<sup>357</sup> Since there is not a specific pension designated for victims of sexual violence, it is up to the medical committee to decide based on physical damage what the monthly pension will be.<sup>358</sup> The maximum claim for war time disability is KM 351.00 (€179).<sup>359</sup> Individuals with 100 percent physical disability that require assistance from another person are eligible for this amount.<sup>360</sup> As the law suggests, the lower the physical disability, the less the pension becomes.

The RS law on social protection also has a deadline for claiming a pension. All individuals seeking social support had to submit their application by December 31<sup>st</sup>, 2007.<sup>361</sup> Many victims of sexual violence did not return to their pre-war homes in RS before the deadline which means that many returnees have no government support. The conditions that have been established in this law make it impossible for victims of sexual violence to make a claim for social protection. That being said, words on paper and law in practice are two different things thus it is important to analyze how the law on social protection in the FBiH and in RS have helped victims of sexual violence in the rehabilitation process.

#### **4.3. Implementation of Government Sponsored Social Protection Programs**

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<sup>356</sup> International Commission on Missing Persons, Guide for Civilian Victims of War: How to enjoy the right to protection as a civilian victim of war in the Republika Srpska, Sarajevo, 4 (2007).

<sup>357</sup> *Id.* at 4.

<sup>358</sup> The Law on protection of civilian victims of war in the Republika Srpska 25/93, 32/94, 37/07, 60/07 Article 9.

<sup>359</sup> *Id.* at Article 9 (4).

<sup>360</sup> *Id.* at Article 9(3).

<sup>361</sup> *Ibid.*

The current system of social protection is highly disorganized, inefficient and discriminatory towards victims of sexual violence. Due to the decentralized structure of the state, the entities do not have much regulation. As a result the cantonal and municipal governments tend to exclude specific groups from social assistance and protection. According to a recent report, 12.4 percent of the Bosnian population receives benefits and out of that number only 17 percent are reported to be in need of the benefits.<sup>362</sup> Further, 72 percent of those recipients are reported to be veterans.<sup>363</sup> Veterans also receive the highest pensions in both entities while most victims of sexual violence do not have a pension or proper access to health or psychological services. According to the latest Amnesty International report, in most cases BiH authorities have failed to provide all victims of sexual violence with monetary assistance, employment training, health insurance, accessible health care and psychological services.<sup>364</sup>

#### 4.3.1. Monetary Assistance

The information about the number of victims of sexual violence that receive monetary assistance is scarce. The Ministry of Human Rights and Refugees reports around 1,800 victims of sexual violence receive a pension<sup>365</sup> while Amnesty International reports the number is closer to 500 recipients.<sup>366</sup> Based on the analysis of the laws, compensation to victims of sexual violence has not been the priority of any of the governments and today most victims do not have any government support.

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<sup>362</sup> Initiative and Civil Action (ICVA) *supra* note 334 at 1.

<sup>363</sup> *Id.* at 1.

<sup>364</sup> Amnesty International, *Whose Justice?* Report *supra* note 331 at 50-58.

<sup>365</sup> Sophie Arie, *After War What Next?* BMJ (7 December 2010), 341:c6910

<http://www.bmj.com/content/341/bmj.c6910>

<sup>366</sup> Amnesty International, *Whose Justice?* Report *supra* note 331 at 46.

In RS it has been reported that victims of sexual violence who have managed to secure compensation under the law on social protection, receive KM 100 (€49.50).<sup>367</sup> One woman who asked for help from the Social Welfare Center in the RS was denied assistance because she was not disabled.<sup>368</sup> In FBiH, the benefits for victims of sexual violence are better than in RS, however the application process is challenging and the pensions are not consistent. Victims interested in applying for civilian victims of war status must travel to Sarajevo and have an interview with the NGO Women Victims of War.<sup>369</sup> The organization does not have any psychologists to help victims during the testimony, making re-traumatization highly possible. Due to the fear of trauma and lack of privacy during the application process, many women have been discouraged from apply.<sup>370</sup> Many victims also live in rural parts of the country and do not have money to travel to Sarajevo just to give a testimony in hopes of being granted a pension.

The current economic situation in BiH is also a concern for civilian victims of war. According to reports from recipients the pension never comes in on time. The portion from the Federation comes in while the cantons are usually late.<sup>371</sup> This is a serious problem for victims of sexual violence because for most, this is the main source of income and a delay in payment may prevent victims from adequate access to health care or an adequate standard of living.

#### 4.3.2. Employment and Housing Assistance

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<sup>367</sup> *Id.* at 43.

<sup>368</sup> *Id.* at 42.

<sup>369</sup> *Id.* at 45.

<sup>370</sup> Victim interview (name withheld) in Amnesty International, *Whose Justice?* Report *supra* note 331 at 49.

<sup>371</sup> Interview with Nejra (last name withheld), Amnesty International, *Whose Justice?* *Supra* note 331 at 47.

In the FBiH and cantonal legislation, employment training is listed as one of the rights for all civilian victims of war.<sup>372</sup> *Republika Srpska* does not provide any employment or vocational support for victims of sexual violence. In general only 23.3 percent of women are employed, compared to 42.2 percent of men throughout BiH.<sup>373</sup> Since most victims of sexual violence are women, access to vocational training and programs are vital for economical empowerment. According to victims of sexual violence a job would have a positive impact on their psychological well being and most women prefer having the security of a pension and health insurance over monthly assistance.<sup>374</sup> Even though employment training is included in the FBiH Law on Social Protection, this measure has not been implemented in any of the regions to date.<sup>375</sup>

#### 4.3.3. Access to Medical Care and Psychological Services

Since most women do not receive a pension or cannot afford health insurance, they do not receive any medical or psychological care. Even women who have managed to secure the status of civilian victims of war do not have proper health insurance.<sup>376</sup> The health insurance provided by the state grants a refund of the two cheapest prescriptions.<sup>377</sup> Victims of sexual violence take on average five prescription medications which cost between KM 100 and KM 150.<sup>378</sup> For victims receiving the pension, 25 percent of that pension goes into medication. For those that do not have any government compensation, purchasing medication becomes

<sup>372</sup> All legislations in the Entities and Cantons have included this provision but for further information please refer to Article 105 (7) of the Law on Social Protection, Protection on Civilian War Victims and Protection of families with Children of Central-Bosnia Canton (Official Gazette 10/05, 2/06).

<sup>373</sup> Lejla Somun-Krupalija, Table 1: Principle population characteristics by activity and gender in BiH 2008, 2009, 2010 in *Gender and Employment in Bosnia and Herzegovina - A Country Study*, 2011 Bureau for Gender Equality – Int'l Labor Office, 2. Available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_170832.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_170832.pdf)

<sup>374</sup> Amnesty International, *Whose Justice? Report supra* note 331 at 51.

<sup>375</sup> Interview with Aleksandra Petric, Program Director for NGO 'United Women' Banja Luka, Email correspondence, October 15, 2012.

<sup>376</sup> Amnesty International, *Old Crimes, Same Suffering: No Justice for Survivors of War Time Rape in North-East Bosnia and Herzegovina*, 9 (March 2012) EUR/63/002/2012

<sup>377</sup> *Id.* at 9.

<sup>378</sup> *Ibid.*

nearly impossible. As one victim states, “when I have money I can buy my medicines. When I [do not] have any money, I have to go without.”<sup>379</sup> A majority of victims rely on medication because they cannot afford therapy.

Most women require prolonged therapy; unfortunately the insurance does not cover that and welfare centers refuse to help women without insurance.<sup>380</sup> CSWs are responsible for providing psychological assistance to victims affected by the war. There are 114 CSWs across Bosnia and Herzegovina which employ approximately 29 psychologists.<sup>381</sup> The centers are poorly equipped, understaffed and many of the centers do not have psychologists or social workers.<sup>382</sup> In addition to CSWs there are also government sponsored Mental Health Centers. On average there is one center for Mental Health for 40,000 to 50,000 inhabitants.<sup>383</sup> In some regions of *Republika Srpska* there are no mental health centers. Centers that do have psychologists and social workers need to be trained to provide better services to victims of sexual violence.<sup>384</sup> Due to the extent of injuries suffered by victims of sexual violence, they have special psychological needs. That means well trained and compassionate full-time psychologists are necessary because the healing process is long and victims need all the support possible. At this time many medical and social work centers are overcrowded, under budget and unable to help those without insurance.<sup>385</sup> Women that seek psychological help at these centers are usually sent to local NGOs.

#### 4.4. NGO Support for Victims of Sexual Violence

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<sup>379</sup> Amnesty International, *Old Crimes, Same Suffering* Report *supra* note 376 at 9.

<sup>380</sup> *Id.* at 9.

<sup>381</sup> United Nations Development Programme (UNDP), PENSION REFORM AND SOCIAL PROTECTION SYSTEMS IN BOSNIA AND HERZEGOVINA 73 (2007) [hereinafter UNDP Pension Reform Report] available at <http://www.undp.ba/upload/publications/Pension%20Reform.pdf>

<sup>382</sup> *Id.* at 73.

<sup>383</sup> Amnesty International, *Whose Justice?* *supra* note 331 at 53.

<sup>384</sup> Interview with Aleksandra Petric, Program Director of the NGO “United Women” Banja Luka, October 15, 2012. E-mail Correspondence.

<sup>385</sup> *Ibid.*

With such a poor government sponsored support system for victims of sexual violence local NGOs have become the only place where women can turn to. There are NGOs that provide support to victims of sexual violence however most are scarce in numbers and located in the major cities of BiH. Information about the number of NGOs that provide social protection to victims of sexual violence is not available however from personal research approximately ten NGOs across BiH provide psycho-social support for victims of sexual violence. Lack of political will to address the issue of sexual violence, problems securing a yearly budget and the lack of harmonization between the entities as well as the cantons has affected the accessibility of NGO based programs. That being said, it is important to look into the activities of the NGOs, what support is available for victims of sexual violence and what role NGOs have played in the reconciliation process.

#### 4.4.1. NGO Funding in BiH

Financial and political support is very important to enable NGOs to provide valuable support to victims of sexual violence. Unfortunately in Bosnia, politicians do not care about civil society<sup>386</sup> and financial support is becoming harder to secure. According to a report conducted by the International Institute for Middle East and Balkans Studies (IFIMES) NGOs helping Bosniak and Croat victims of war received KM 211,309(€107,940) in 2010 from the RS government.<sup>387</sup> In FBiH, the non-profit budget in 2011 was KM 6,039.500 (€3,085,101). From the non-profit budget only KM 1,000 (€510, 82) was allocated to NGOs.<sup>388</sup> All the

<sup>386</sup> Interview with Bakira Hasecic, President of Association for Women Victims of War, In person interview at the Office of Women Victims of War, Sarajevo (March 15, 2012). During out interview, Bakira expressed frustration about the lack of effort from FBiH politicians to help NGOs such as Women Victims of War stay in operation.

<sup>387</sup> IFIMES, "Who is Manipulating the Civilian Victims of War?" *available at* <http://www.ifimes.org/default.cfm?Jezik=En&Kat=10&ID=559> , (2010), (Last visited October 13, 2012)

<sup>388</sup> Predstavnički Dom [House of Representatives], Budzet Federacije Bosne i Hercegovine za 2011 [Budget for the Federation of Bosnia and Herzegovina for 2011], page 11, economic code 615300, It is important to note that according to the House of Representatives, the rest of the money allocated for non profit organizations went to Churches and Mosques. *available at* [http://predstavnickidom-pfbih.gov.ba/upload/file/zakoni\\_2011/budzet\\_Federacije\\_Bosne\\_i\\_Hercegovine\\_za\\_2011\\_godinu.pdf](http://predstavnickidom-pfbih.gov.ba/upload/file/zakoni_2011/budzet_Federacije_Bosne_i_Hercegovine_za_2011_godinu.pdf)

NGOs that provide treatment to victims of sexual violence depend on donations from local ministries and international organizations.<sup>389</sup> The lack of funding from entity governments to NGOs demonstrates the lack of will to support the rehabilitation process of civilian victims of war. As a result the ongoing NGO supported rehabilitation programs depend on funding from external actors.

With the continuing economic crisis, it has become more challenging for Bosnian NGOs to secure funding. This has resulted in a decrease of programs, further limiting the intake of new patients at many NGOs that provide psychological support.<sup>390</sup> According to the Sarajevo Based Center for Torture Victims (CTV) funding is scarce to the point that only KM 1,200(€600) can be allocated for medication while the center has 6,000 patients.<sup>391</sup> Although CTV has the capability to help victims of sexual violence, the lack of funding has also made it difficult for the NGO to accept new patients.<sup>392</sup> Since already existing NGOs are having trouble securing funding, chances of expanding programs into other regions of the country are unlikely.

Another issue that local NGOs are struggling with is trying to maintain relations with international donors since external funding keeps these organizations in operation.<sup>393</sup> Consequently, many women's NGOs have failed to connect with the local population.<sup>394</sup> As a result, a majority of Bosnian citizens are not aware of the suffering of sexual violence victims. With the lack of financial support from the entity governments, and a growing number of NGOs due to the weak social protection system, the competitiveness among

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<sup>389</sup> The full list of Donors can be found on the NGO websites Medica Zenica, Viva Zene, Zene Zenama, Viktorija 99.

<sup>390</sup> Amnesty International, *Whose Justice?* Report *supra* note 331 at 55

<sup>391</sup> Sophie Arie, *supra* note 365 at 5.

<sup>392</sup> *Id.* at 5.

<sup>393</sup> Evans-Kent, Bronwyn and Bleiker, Roland, 'NGOs and Reconstructing Civil Society in Bosnia and Herzegovina', *International Peacekeeping*, 10:1, 103 — 119, 108 (2003).

<sup>394</sup> Vanessa Pupavac, *Empowering Women? An Assessment of International Gender Policies in Bosnia* 12 *Int'l Peacekeeping* 391, 397 (2005).



Bosnian NGOs has been immense. Today, local NGOs must fulfill the criteria listed by the international donors. Most international donors seek multi-ethnic organizations to encourage reconciliation.<sup>395</sup> Even though this may seem like a good incentive for reconciliation, it is difficult to have a multi-ethnic women's NGO when the country is divided along ethnic lines. Furthermore, women's NGOs began portraying themselves as multi-ethnic just to increase their chances of securing funding. In reality, the focus to gain funding takes away from providing adequate services to women in need but without funding the NGO would not exist. All in all women's NGOs are stuck in a 'double-edge sword' situation and many women's organizations find it challenging to provide effective support to victims of sexual violence.

#### **4.4.2. Support Programs Available for Victims of Sexual Violence in Bosnia and Herzegovina**

The support programs for victims of sexual violence range from psychological assistance, employment help, women's empowerment and medical attention. Most NGOs are not able to provide all the services mentioned above thus the rehabilitation program from organization to organization varies. One of the most common services available is psychological treatment. The most common measures offered to victims of sexual violence are general practitioner's treatment, group and individual therapy and in some cases psychological advice. In some women's organizations psychological advice was launched because other treatment options were not available. In *Republika Srpska*, Forum Zena–Bratunac began a psychological advice program to help victims of sexual speak up about their suffering.<sup>396</sup>

<sup>395</sup> Annika Bjorkdahl, *A Gender-Just Peace? Exploring the Post-Dayton Peace Process in Bosnia* 37 Peace, History Society and Wiley Periodicals Inc. 286, 304 (2012).

<sup>396</sup> Forum Zena-Bratunac, "Savjetovaliste za Zene I Djevojke" [Advice for Women and Girls] available at <http://www.forumzena.org/?strana=124&podstrana=94&kolona=3> (Last Visited October 13, 2012)

The more predominant NGOs such as *Medica Zenica* and CTV offer medical services in addition to other programs. In 2010 *Medica Zenica* started a mobile emergency gynecologist program for women living in rural areas of *Zenica-Doboj* Canton.<sup>397</sup> The main reason for the mobile emergency gynecologist program is to assist women who suffered gynecological problems as a result of sexual violence.<sup>398</sup> According to the data provided by *Medica Zenica*, this mobile program has helped 56 women in 2010.<sup>399</sup> Mobility programs are important because it demonstrates to women in rural areas that they have not been forgotten. Moreover, it also encourages women to seek further medical and psychological treatment.

Legal support, vocational training and women's empowerment programs have also been included in the mandate of some of the NGOs. Victims seeking advice about testifying at a trial or wishing to gain the status of a civilian victim of war can use legal support program.<sup>400</sup> There are not many NGOs that offer legal advice. In FBiH *Vive Zene Tuzla* is one of the NGOs that provide legal support however only women who live in the vicinity of Tuzla have access to this program. Employment and vocational training is another important mechanism for rehabilitation, similarly not many NGOs provide this service.

Women's empowerment, education and vocational training go hand in hand. Today, there are two NGOs that run women's empowerment programs. *Medica Zenica* and *Zene Zenama – Tuzla*. *Medica Zenica* organizes a six month vocational program that helps women in city and rural parts of *Zenica-Doboj* Canton learn a new trade as a way of enabling women

<sup>397</sup> Medica Zenica, "Medicinsko Zbrinjavanje" [Medical Care], available at [http://www.medicazenica.org/index.php?option=com\\_content&view=article&id=61&Itemid=27](http://www.medicazenica.org/index.php?option=com_content&view=article&id=61&Itemid=27) (Last Visited, October 12, 2012).

<sup>398</sup> Medica Zenica, "Mobilna Ginekolosko Ambulanta 'marta'" [Mobile gynecological ambulance 'Marta'], available at [http://www.medicazenica.org/index.php?option=com\\_content&view=article&id=62&Itemid=34](http://www.medicazenica.org/index.php?option=com_content&view=article&id=62&Itemid=34) (Last Visited October 12, 2012).

<sup>399</sup> Ibid.

<sup>400</sup> Vive Zene Tuzla, "Programs: Treatments", Web: <http://www.vivezene.ba/eng/programi1.htm> (Last Visited October 12, 2012).

to reach economic security.<sup>401</sup> In 2011, 67 women received government certificates from this program.<sup>402</sup> Although a great program, government support is crucial. According to Aleksandra Petric, Program Director at “United Women” Banja Luka, for economic empowerment programs to be successful,

“Incentives to companies that would employ women victims [after vocational training] would help a lot. This requires a systematic and long term approach from the official institutions at all levels in BiH.”<sup>403</sup>

*Zene Zenama* – *Tuzla* on the other hand has been focusing on women’s empowerment through lobbying for women’s rights. *Zene Zenama* believes that involving women in issues that affect them the most will help in the peace-building process.<sup>404</sup> The issue with their programs is the lack of focus on victims of sexual violence. There need to be more grassroots movements that encourage women to speak up and educate the public about the current status of victims of sexual violence, to remove the stigma associated with these victims.

NGO programs are extremely important for the rehabilitation process of women, unfortunately there are not enough programs or NGOs available when out of 25,000 victims of sexual violence only 10 percent have access to some form of treatment.<sup>405</sup> NGOs have also attempted to start a reconciliation process between women. Unfortunately with a divided country and lack of political support both victims of sexual violence and women’s NGOs are left to fend for themselves.

#### 4.4.3. Reconciliation through Civil Society

<sup>401</sup> Medica Zenica, “Ekonomsko Osnazivanje” [Economic Empowerment], Web: [http://www.medicazenica.org/index.php?option=com\\_content&view=article&id=47&Itemid=41](http://www.medicazenica.org/index.php?option=com_content&view=article&id=47&Itemid=41) (Last Visited October 12, 2012).

<sup>402</sup> Ibid.

<sup>403</sup> Interview with Aleksandra Petric, Director of NGO “United Women” Banja Luka, E-mail correspondence (October 15, 2012).

<sup>404</sup> *Zene Zenama* – *Tuzla*, “Javno Djelovanje” [Public Action], available at [http://www.zenezenama.org/zene/index.php?option=com\\_content&view=category&layout=blog&id=38&Itemid=104&lang=en](http://www.zenezenama.org/zene/index.php?option=com_content&view=category&layout=blog&id=38&Itemid=104&lang=en) (Last Visited October 12, 2012).

<sup>405</sup> Amnesty International, *Whose Justice?* Report *supra* note 331 at 55.

As it has been illustrated thus far, living in a state divided along ethnic lines, it is difficult for local NGOs to provide adequate assistance to all victims of sexual violence. Furthermore, the decentralized system has made it difficult for NGOs to attract women from all three ethnic groups because women's identities have been redefined through nationalism, culture and religion.<sup>406</sup> In other words, women are not able to share their experiences without including their ethnic identity into the narrative. With such a division promoted by the nationalist governments, NGOs are having a difficult time creating a reconciliation process.

Women's NGOs from FBiH and RS have been making an effort to build trust between the two entities nonetheless it is difficult to bring women from all ethnicities together when most Bosniak victims live in heavily populated Bosniaks parts of FBiH, Croat victims in heavily populated Croat parts of FBiH and Serb victims in RS.<sup>407</sup> Even though these NGOs are attempting to build trust, during cross-entity meetings, discussion about ethnicity or nationality is a very sensitive subject.<sup>408</sup> It is clear that there is an attempt to break down nationalist barriers yet the physical structure of the state continues to prevent victims of sexual violence from sharing their experiences and from realizing that all victims of sexual violence were targeted as a result of their gender.

#### 4.5. Conclusion

From the evidence presented in this chapter, the current legislative system is damaging to the well being of women. Women continue to suffer from medical and psychological issues. There is no public dialogue about this matter thus stigmatization of rape victims is ongoing. The lack of harmonization between the entities, has made the recovery and reconciliation process for victims of sexual violence impossible. That being said, a state

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<sup>406</sup> Annika Bjorkdahl *supra* note 395 at 289.

<sup>407</sup> *Ibid.*

<sup>408</sup> Elissa Helms, Women as Agents of Ethnic Reconciliation? Women's NGOs and International Intervention in Postwar Bosnia-Herzegovina 26 Women's Studies Int'l Forum 15, 23 (2003).

based strategy to address the status and the rights of victims of sexual violence is crucial. Unfortunately, that does not seem likely in the near future; for that reason other transitional justice mechanisms have to be explored to finally bring women peace, security, support and reconciliation.

## CHAPTER 5: INTERNATIONAL RECONCILIATION MECHANISMS

In Bosnia and Herzegovina, the truth and reconciliation process for victims of sexual violence thus far has taken place through retributive justice. Even though prosecution of sexual violence is important for accountability, it is impossible to prosecute all the perpetrators. In BiH there are approximately 50,000 to 60,000 cases of war time sexual violence left to prosecute.<sup>409</sup> Attempting to indict all war crimes cases would collapse BiH's judicial system because of the existing backlog of cases. For victims of sexual violence to recover, more than punishment of perpetrator is required. Programs to empower women and restore their dignity, public dialogue to erase the stigma associated with victims of sexual violence and direct participation in the truth and reconciliation process are all crucial for victims to effectively recover. It is necessary to emphasize the importance of a reconciliation process in which the issue of sexual violence is seen as a gender issue and not an attack on an ethnic group. The only way stigmatization of victims and restoration of dignity can occur is if women from all three ethnic are included in the reconciliation process.

Transitional Justice (TJ) is important for the promotion of justice for past human rights abuses, prevention of impunity, reconciliation and national unity.<sup>410</sup> In the past, states and international actors have applied amnesty, established traditional mechanisms and truth commissions in hopes of creating reconciliation and national unity.<sup>411</sup> As evidence from previous chapters illustrates, the needs of sexual violence victims in BiH have not been met. As a result it is necessary to explore the current standards of redress and reconciliation in the

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<sup>409</sup> Michael Humphrey, *Victims, civil society and transitional justice in Bosnia and Herzegovina* 10 *Zrtve kriminaliteta I rata* (Victims of war crimes) 59, 62 (2012).

<sup>410</sup> Yasmin Louise Sooka, *The Politics of Transitional Justice*, in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 21, 21 (Chandra Lekha Sruran and Suren Pillay ed., 2009).

<sup>411</sup> Chandra Lekha Sriram, *Transitional Justice and Peacebuilding* in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 1, 3 (Chandra Lekha Sruran and Suren Pillay ed., 2009).

transitional justice context and whether these standards would be applicable in Bosnia and Herzegovina. Prior to discussing international standards of TJ, it is important to focus the current TJ mechanisms available for victims of sexual violence in BiH.

### 5.1. Transitional Justice in Bosnia and Herzegovina

In the last seventeen years, international intergovernmental and non-governmental organizations in BiH have focused mostly on political reform, searching for the missing and reconciliation by returns to pre-war homes.<sup>412</sup> Victims of sexual violence, on the other hand have not been part of this reconciliation process thus far. Annika Bjorkdahl believes this is because women are marginalized in political decision making and excluded from the peace and reconstruction processes.<sup>413</sup> Other attempted TJ mechanisms were truth-seeking commissions, unfortunately all three attempts failed because there is a lack of trust between the three ethnic groups.<sup>414</sup> In 2009, a new transitional justice proposal was drafted by the UNDP- Bosnia and Herzegovina in an effort to re-start the reconciliation process. According to the International Center for Transitional Justice (ICTJ), the project has yet to be voted by the BiH Parliament,<sup>415</sup> three years after the initial proposal was presented. It is evident that the structural division of the country and lack of political will has made reconciliation impossible.

The UNDP project *Access to Justice: Facing the Past and Building Confidence for the Future* (hereinafter Access to Justice) aims at increasing accessibility to legal institutions

<sup>412</sup> Michael Humphrey *supra* note 409 at 59, 63.

<sup>413</sup> Annika Bjorkdahl, *A Gender-Just Peace? Exploring Post-Dayton Peace Process in Bosnia* 37 Peace and Change 286, 290 (2012).

<sup>414</sup> Kristen Juhl, *The Problem of Ethnic Politics and Trust: The Missing Persons Institute of Bosnia-Herzegovina* 4 Genocide Studies and Prevention 239, 248 (2009).

<sup>415</sup> *Bosnia's Transitional Justice Strategy Requires Political Support*, International Center for Transitional Justice (ICTJ) (Oct. 9, 2012), <http://ictj.org/news/bosnia%E2%80%99s-transitional-justice-strategy-requires-political-support> (Last visited October 18, 2012).

and services as well as creating confidence building in government institutions.<sup>416</sup> UNDP believes this can be achieved “by providing technical advice and facilitation to the government appointed working group for drafting a National Strategy in transitional justice, by

“[developing models of transitional justice in truth-seeking and reparations that would be appropriate for BiH] and [strengthening the local civil society organizations to help deliver transitional justice remedies]”<sup>417</sup>

As this is a comprehensive plan, the intent is to evaluate if this strategy has included a framework for victims of sexual violence as well.

A gender strategy has been included in UNDP’s transitional justice plan. The main focus of the strategy is to enhance legal awareness, provide legal aid and to educate women on means of seeking legal help.<sup>418</sup> Civil society organizations have been designated to provide these services once the program is approved.<sup>419</sup> The problem with the gender strategy is its focus on legal assistance only. Even though retributive justice has not been effective in the reconciliation and redress process for victims of sexual violence, this is the only mechanisms available for women under UNDP’s strategy. This strategy will not help victims of sexual violence because trials are not a healing experience for women. As Julie Mertus has observed,

“Despite [women’s] initial faith that they could use international crimes tribunals to their own purposes, witnesses almost universally experience the trials as dehumanizing and re-traumatizing experiences.”<sup>420</sup>

<sup>416</sup> UNDP, *Access to Justice: Facing the Past and Building Confidence for the Future*, 2 (2009-2011).

<sup>417</sup> *Id.* at 15.

<sup>418</sup> *Id.* at 16.

<sup>419</sup> *Ibid.*

<sup>420</sup> Julie Mertus, *Shouting from the Bottom of a Well: The Impact of International Trials for Wartime Rape on Women’s Agency* 6, *International Feminist Journal of Politics* 110, 112 (2004).



This is not to say that war crimes trials are not necessary nevertheless alternative initiatives must be created for public recognition of women's suffering and to meet the needs of survivors.

Martha Minow believes that "public remembering creates an opportunity for public recognition of what happened."<sup>421</sup> UNDP's Access to Justice Program does emphasize the importance of public awareness campaigns on gender based violence and gender equality. The campaign, however aims at educating the public about gender based violence in general. With such a strong sense of stigmatization of victims of sexual violence in BiH, there needs to be a separate program that addresses the issue of war time sexual violence. Such a program is necessary to bring together Bosniak, Croat and Serb victims of sexual violence to acknowledge that rape was not solely utilized as a systematic weapon against Bosniak women. Instead sexual violence in BiH must be viewed as a crime committed by men against women. In BiH, once sexual violence is viewed as a crime against women, trust between Bosniak, Croat and Serb women will begin to develop. That being said, UNDP's plan does not help victims of sexual violence in the reconciliation process therefore other international mechanisms must be analyzed.

## **5.2. International Transitional Justice Mechanisms**

The intent of this section is to discuss international programs that have benefited victims of sexual violence in the redress and reconciliation process in other countries. The amnesty process in South Africa, the Truth and Reconciliation Commission in Sierra Leone, Restorative Justice in Timor-Leste and Guatemala's Tribunal of Consciousness for women survivors of sexual violence will be the four case studies.

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<sup>421</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), Julie Mertus *supra* note 420 at 111.

### 5.2.1. Amnesty: South Africa

From an international law perspective amnesties have always been, in some way a controversial TJ measure because there is a risk of impunity and potential reoccurrence of violence. In addition, states have a legal responsibility to prosecute gross violations of human right under international humanitarian law.<sup>422</sup> That being said a recent study reports that 420 amnesty processes worldwide have been established thus far.<sup>423</sup> An amnesty can be defined as a transitional process that is used to end a conflict by granting a pardon to those who committed offences during that war.<sup>424</sup> There are two types of amnesties; a blanket amnesty and a partial amnesty. A blanket amnesty means that all crimes, regardless of the seriousness and who committed them are immune to prosecutions.<sup>425</sup> In Argentina and Chile blanket amnesties were issued by outgoing governments.<sup>426</sup> Partial amnesties provide immunity for specific crimes and to certain groups of perpetrators.<sup>427</sup> Partial amnesties are usually used in truth commissions as seen in South Africa and Sierra Leone.<sup>428</sup> Although three categories of amnesty exist only the amnesty applied through truth commissions will be discussed. By analyzing amnesty in the context of South Africa, it will be possible to observe whether a partial amnesty would help in the redress and reconciliation process for victims of sexual violence in BiH.

<sup>422</sup> ICRC, *Rule 158: Prosecution of War Crimes*, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule158](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule158) (Last visited October 12, 2012).

<sup>423</sup> Yasmin Louise Sooka *supra* note 410 at 26 nn. 22.

<sup>424</sup> Oxford Dictionaries, *Definition of 'Amnesty'*, available at <http://oxforddictionaries.com/definition/english/amnesty> (Last visited October 12, 2012).

<sup>425</sup> Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 The Geo. Wash. Int'l L. Review 577, 582 (2011).

<sup>426</sup> *Id.* at 582, 583.

<sup>427</sup> *Id.* at 583.

<sup>428</sup> *Id.* at 588, 589.

In South Africa amnesty was used to restore national unity and reconciliation.<sup>429</sup> Individuals had to apply for amnesty and disclose their activities and prove that the crimes committed had political objectives.<sup>430</sup> The Amnesty Committee (AC) in South Africa was created to grant amnesty to perpetrators of political crimes. The Amnesty Committee looked at “the motive for the crime, the objective and the context, whether the deed was officially authorized, its legal and factual nature and its proportionality to a political goal.”<sup>431</sup> Interestingly enough remorse did not have to be expressed by the applicant.<sup>432</sup> Those who do not come forward or were denied amnesty could be prosecuted and those who were granted amnesty were free from prosecution and compensation.<sup>433</sup> As the experience from the South African example demonstrates, top officials in the military did not want to participate in the amnesty program because they believe that their actions did not amount to gross violations of human rights since they waged a just war.<sup>434</sup> It was only the lower level soldiers that claimed amnesty.

Even though Archbishop Desmond Tutu praises amnesty to be “another kind of justice...which is concerned with correcting imbalances and focuses on the experiences of the victim,”<sup>435</sup> this method would not be an effective reconciliation measure for victims of sexual violence in BiH. This is because crimes of sexual violence have had a devastating impact on victims in Bosnia and Herzegovina and participation in an amnesty program would further destroy the victim’s livelihood. Many people praise the Amnesty Commission in South Africa however the damage to the victim may have large consequence than truth and reconciliation.

<sup>429</sup> Reports of the Amnesty Commission, *Some Reflections on the Amnesty Process*, Vol. 6, Sec. 1 Ch. 5, 83 (2003).

<sup>430</sup> Reports of the Amnesty Commission, *The Legal Basis of the Amnesty Process*, Vol. 6, Sec. 1, Ch.1, 5 (2003).

<sup>431</sup> Yasmin Louise Sooka *supra* note 410 at 30. nn. 42.

<sup>432</sup> *id.* at 30.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Id.* at 33.

<sup>435</sup> ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 217 (2009)

It is clear from Amnesty Commission's narrow mandate on politically motivated offences that amnesty programs are not for all type of crimes. In one sense this is because states have a legal obligation to prosecute perpetrators who committed crimes against humanity, war crimes and genocide. A shift from prosecutions to amnesty would only cause tensions between the victims and the state because victims would feel the perpetrators are being rewarded for the crimes they committed. In South Africa's AC, many victims reported re-victimization when perpetrators were describing the crimes.<sup>436</sup> In Bosnia most women have not been provided proper psychological treatment hence most victims would not even consider this kind of a process.

In regards to victim participation, many participants in the AC felt that the Commission allowed victims to challenge the perpetrator which resulted in accountability.<sup>437</sup> Other victims felt that this gave the perpetrators another chance to torture the former victims "by reminding them how quickly they broke and gave up their comrades under torture."<sup>438</sup> For some perpetrators AC brought on guilt but for others, this was a chance to justify their actions. Hence once the victims see there is no remorse, it only causes them more pain. For victims of sexual violence, the pain will not disappear if they confront the perpetrator. The trauma and pain must be cured by other means. Also community support is crucial and at the moment most people in BiH do not speak of this crime. For the reasons listed above, amnesty would not help victims of sexual violence in BiH.

### **5.2.2. Truth and Reconciliation Commission: Sierra Leone**

In the last twenty years, truth and reconciliation commissions have become a popular post-conflict reform mechanism. This is because TRCs can be relied on to achieve various

<sup>436</sup> Reports of the Amnesty Commission, *Some Reflections on the Amnesty Process*, Vol. 6, Sec. 1 Ch. 5, 90 (2003).

<sup>437</sup> Antje du Bois-Pedain *supra* note 435 at 225.

<sup>438</sup> *Id.* at 226 nn. 31.

aims. States use truth and reconciliation commissions to recover the truth of the conflict, remove the denial of greater public for crimes committed and to provide a platform to address crimes that may be a taboo.<sup>439</sup> TRCs also provide victims with a chance to tell their narratives and receive an apology from the perpetrators. Simultaneously, in some TRCs the aim is to create institutional reforms and promote reconciliation.<sup>440</sup> Interestingly enough, TRCs usually fail to provide special attention to crimes directed at women and girls. Sierra Leone's Truth and Reconciliation Committee was one of the first to include a special mandate to help women affected by sexual violence.<sup>441</sup> This is an important case study that will help determine whether truth and reconciliation commissions can address the issues affecting victims of sexual violence in BiH.

The crimes committed against women in Sierra Leone resemble the ones committed in Bosnia and Herzegovina. Similar to the situation in BiH, women in Sierra Leone were abducted, raped, tortured, forced into sexual slavery and borne children as a result of rape.<sup>442</sup> As a result of their horrific experience, the society has ostracized them.<sup>443</sup> The TRC made sure that proper mechanisms were put into place to help protect victims, create a safe and trusting environment, prevent re-traumatization and ensure confidentiality.<sup>444</sup> The reason the commission had a special focus on victims of sexual violence was to remove the stigma associated with this crime and to hold the perpetrators accountable. Based on the information from the TRC report women were employed in key positions to document the testimonies.<sup>445</sup> The TRC was able to reach out to victims, recruit women and discuss the crime of sexual

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<sup>439</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY, 25 (2001)

<sup>440</sup> Alexander L. Boraine, Transitional Justice: A Holistic Interpretation 60 Journal of Int'l Affairs 17, 22 (2006).

<sup>441</sup> Yasmin Louise Sooka *supra* note 410 at 36.

<sup>442</sup> TRUTH AND RECONCILIATION COMMISSION, WITNESSES TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, VOLUME 3B, at 86 ¶ 8. (2004).

<sup>443</sup> *Ibid.*

<sup>444</sup> *Id.* at 88 ¶16.

<sup>445</sup> Yasmin Louise Sooka *supra* note 410 at 36.

violence in public.<sup>446</sup> Furthermore, women hired to partake in this project were trained in statement taking and providing support to victims.<sup>447</sup>

The project began in 2002 with statement takers going to various regions in hopes of finding survivors that would participate in the TRC.<sup>448</sup> TRC's final report praised the large turnout of women and girls during the statement-taking process.<sup>449</sup> Once all the statements were gathered, special hearings were organized to give women a chance to testify in front of the Commission.<sup>450</sup> Per request of the women, the sessions could either be open or closed to the public and hearings were completed via video.<sup>451</sup>

In rural areas, the TRC reports that women wanted to testify in public to let the community hear their experiences.<sup>452</sup> Those that decided to testify had councilors' support before, during and after the hearing to explain the importance of the process. Transportation and accommodations were also granted when necessary.<sup>453</sup> The commissioners were trained on ways to protect the witness, sexual violence in international law and how to interview rape victims.<sup>454</sup> In addition to seeking accountability and removing the stigma, the TRC recommended that the state provides victims of sexual violence with health care, psychological support and a compensation for the rest of their lives.<sup>455</sup>

TRC's final report illustrates a very positive picture of women's experience during the hearing nevertheless; criticisms must also be addressed as well. Issues with funding, lack of experience dealing with victims of sexual violence and tensions between the Special Court

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<sup>446</sup> TRUTH AND RECONCILIATION COMMISSION *supra* note 442 at 88.

<sup>447</sup> *Ibid.*

<sup>448</sup> *Id.* at 89.

<sup>449</sup> *Id.* at 89 ¶22.

<sup>450</sup> *Id.* at 89 ¶23.

<sup>451</sup> *Id.* at 89 ¶25.

<sup>452</sup> *Id.* at 90 ¶27.

<sup>453</sup> *Id.* at 89 ¶26.

<sup>454</sup> Binaifer Nowrojee, Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims 18 Harv. Hum Rts. J. 85, 93 (2005).

<sup>455</sup> TRUTH AND RECONCILIATION COMMISSION, WITNESSES TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, VOLUME 1 at 19, ¶ 51 (2004)

for Sierra Leone (SCSL) and the Sierra Leone's TRC hindered the process. TRC's budget was only US \$4.6 million in comparison to US \$150 million granted to the SCSL.<sup>456</sup> The lack of funding made it difficult for the TRC to attract support from local women's organizations.<sup>457</sup> As a result support and assistance to witnesses in the TRC was limited.

Sensitivity is very important when speaking to victims about their traumatic past. The TRC panel consisted of men and women; some with previous experience in dealing with crimes of sexual violence and some with strict traditional views.<sup>458</sup> Although the commissioners received training, some members of the panel were very insensitive during questioning of victims. The treatment of victims by the commissioners is very important because if the woman does not feel comfortable, she is less likely to tell the story in detail. In his research, Tim Kelsall found that victims tend to "circle around the truth" because they feel intimidated by the public and the TRC panel.<sup>459</sup> With that in mind, the commissioners must be well trained to work with victims of sexual violence and be able to provide necessary support for women to be able to openly speak about their experiences.

With a creation of the TRC and the SCSL, a difficulty in distinguishing between the two organs was a problem for many locals.<sup>460</sup> The overlap has discouraged perpetrators from testifying in the TRC because of fear that the Commission may hand over the statements to the SCSL.<sup>461</sup> Another serious issue was the lack of a consultative process between SCSL and the TRC. This lack of communication resulted in a disagreement regarding individuals that

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<sup>456</sup> John L. Hirsch, *Peace and Justice: Mozambique and Sierra Leone Compared in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA* 202, 211 (Chandra Lekha Sruran and Suren Pillay ed., 2009).

<sup>457</sup> Binaifer Nowrojee *supra* note 454 at 95.

<sup>458</sup> *Id.* at 93.

<sup>459</sup> Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone* 27 *Human Rights Quarterly* 361, 369, 382 (2005).

<sup>460</sup> John L. Hirsch, *Peace and Justice: Mozambique and Sierra Leone Compared in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA* 202, 211 ((Chandra Lekha Sruran and Suren Pillay ed., 2009).

<sup>461</sup> *Id.* at 211.

should testify in front of the SCSL and the TRC. In one instance TRC wanted the head of Civil Defense Forces (CDF) Sam ‘Hing’ Norman to testify because the commissioners believed his testimony was important to uncovering the truth.<sup>462</sup> The SCSL, on the other hand wanted to prosecute him because of his high ranking and participation in the war.<sup>463</sup> Events such as these caused suspicion among the greater Sierra Leone public.

If there is one lesson to take away from the Sierra Leone’s TRC, it is the importance of political will. Even though there were technical challenges, this program would not have worked if there was no political will to address gender crimes. The TRC put forth great efforts to attract victims of sexual violence. That being said, would this approach help women in BiH seventeen years after the end of the conflict? Taking into account the lack of political and institutional harmonization of BiH and lack of political will as a result of the decentralization, truth and reconciliation programs are impossible to organize in BiH. This will be the case as long as citizens are classified by ethnicity; there is lack of cross-community government structures and lack of cooperation.<sup>464</sup> Moreover, the failure of three TRCs proposals in the past further illustrates the lack of political will for reconciliation.

The TRC in BiH would also be difficult to establish due to the ongoing prosecution of sexual violence in courts across the country. Hybrid courts have been responsible for prosecution of sexual violence since 2005 and if a TRC was established there is a chance an overlap between the two organs would occur, as it did in Sierra Leone. Unlike in Sierra Leone, state, cantonal and district courts are responsible for the prosecutions. With only the presence of courts, the cooperation between the three levels is currently lacking. Adding a

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<sup>462</sup> John L. Hirsch, *Peace and Justice: Mozambique and Sierra Leone Compared in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA* 202, 211 ((Chandra Lekha Sruran and Suren Pillay ed., 2009).

<sup>463</sup> *Ibid.*

<sup>464</sup> Sarah Wagner, Identifying Srebrenica’s Missing: The “Shaky Balance” of Universalism and Particularism *in TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE* 25, 37 (Alexander Laban Hinton ed., 2010)



TRC may make the process of justice and reconciliation even more complicated because perpetrators may fear prosecution if they participate in a TRC. As a result it is highly unlikely that perpetrators would come forward. For those reasons, politicians also tend to avoid this form of a system.

### 5.2.3. Restorative Justice: Timor-Leste

Over the last 30 years Restorative Justice (RJ) has been commonly used in the local context to address less serious crimes. More recently, societies affected by ethnic conflict and genocide have also started relying on restorative justice mechanisms. Restorative justice is a victim centered approach that brings together the victim, the offender and the community through dialogue, mediation, conferencing and community circle models.<sup>465</sup> Restorative justice practices provide an opportunity for the victim to explain their injuries to the perpetrator. The perpetrator has an opportunity to acknowledge the crime committed, apologize to the victim and offer some form of reparation.<sup>466</sup> It is important to mention that restorative justice can only take place after the guilt of the individual has been determined or after an individual has taken responsibility for the crime.<sup>467</sup> Timor-Leste will be used as an example to better understand restorative justice in practice. Prior to exploring the experience of restorative justice in Timor-Leste, it is important to look at the restorative justice framework more closely.

Restorative justice provides a set of guidelines that must be followed by the participants. During the reconciliation process the victim and the perpetrator are expected to explain the crime, injury it caused and the effect of the injury to the victim and the greater

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<sup>465</sup> Carrie Menkel-Meadow, Restorative Justice: What Is It and Does It Work? 3, *Annu.Rev.Law Soc. Sci.* 161, 162 (2007).

<sup>466</sup> *Id.* at 163.

<sup>467</sup> Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand 18-25 April, *Workshop 2: Enhancing Criminal Justice Reform Including Restorative Justice*, Daniel W. Van Ness, *An Overview of Restorative Justice around the World*, 4.

community.<sup>468</sup> Acceptance of guilt and a public apology for the harm committed is the minimum expectation from the perpetrator however the community can also decide that the perpetrator must pay the victim, provide community service or receive a formal punishment.<sup>469</sup> The participants must also forgive the perpetrator and try to understand what the root cause of the crime is.<sup>470</sup> Lastly the perpetrator must be reintegrated into the community by rebuilding relationships with the people of the community.<sup>471</sup> Although Restorative Justice is very different from Transitional Justice mechanisms, many scholars express enthusiasm over it because there is more focus on the needs of the victims.<sup>472</sup> The case study of Timor-Leste will be a good way to see whether restorative justice mechanisms work in practice and if this can help victims of sexual violence.

Timor-Leste is unique because the truth telling was conducted through a TRC while the reconciliation and restoration process relied on restorative justice mechanisms and customary practices. The Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR) was created to uncover the truth about the atrocities and violence that occurred between 1974 and 1999.<sup>473</sup> Under the CAVR a sub group, Community Reconciliation Process (CRP) was created to help restore justice in the communities.<sup>474</sup> In addition there were also two internationally operated tribunals established; one in Indonesia and one in Timor-Leste to prosecute those responsible for the 1999 referendum violence.<sup>475</sup> The reconciliation process

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<sup>468</sup> *Id.* at 164.

<sup>469</sup> *Ibid.*, David Androff, *Working in the Mud: Community Reconciliation and Restorative Justice in Timor Leste* in RESTORATIVE JUSTICE: ACROSS EAST AND WEST 124, 132 (Katherine Van Wormer ed., 2008) available at <http://www.uta.edu/ssw/delliott/6305/Global%20Social%20justice.pdf>

<sup>470</sup> Carrie Menkel-Meadow *supra* note 463 at 164.

<sup>471</sup> *Ibid.*

<sup>472</sup> David Androff, *supra* note 469 at 124.

<sup>473</sup> Elizabeth F. Drexler, *The Failure of International Justice in East Timor and Indonesia* in TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE 49, 51 (Alexander Laban Hinton ed., 2010)

<sup>474</sup> *Id.* at 51, David Androff, *supra* note 469 at 130.

<sup>475</sup> Elizabeth F. Drexler, *supra* note 473 at 51.

in Timor-Leste is interesting because three different mechanisms were used to deliver, justice, truth and reconciliation.

The Community Reconciliation Process has incorporated a traditional approach that brings together the committee of CRP, the disputing parties, their families and the wider community. The reconciliation process takes place on a large mat.<sup>476</sup> Prior to the start of the mediation process a ceremony by the elders known as ‘men of spiritual and customary law’ is performed.<sup>477</sup> This follows a statement and an apology from the perpetrator.<sup>478</sup> After the apologies have been made, the community and the victim can ask the perpetrator questions and tell their stories.<sup>479</sup> The last step is determining the reparation measures.<sup>480</sup> In this case, the perpetrators were required to either rebuild burned houses, pay a fine or participate in community services along the lines of planting trees or repairing public property.<sup>481</sup> At the end of the reconciliation process an agreement had to be signed detailing the crime which had to be sent to the national courts for approval.<sup>482</sup> Immunity is granted to the perpetrator upon court approval.<sup>483</sup> According to the CAVR report, 1,541 requests to participate in the CRP were made and 1,371 cases were completed.<sup>484</sup> Out of that number 32 cases were dismissed because the crimes were too serious to forgive or the community refused to accept the individual back into the community.<sup>485</sup>

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<sup>476</sup> *Id.* at 131.

<sup>477</sup> *Ibid.*

<sup>478</sup> COMISSAO DE ACOLHIMENTO, VERDADE E RECONCILIACAO DE TIMOR LESTE (CAVR) [Timor-Leste Commission for Reception, Truth and Reconciliation] <http://www.cavr-timorleste.org/en/reconciliation.htm> (last visited October 23, 2012).

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

<sup>481</sup> David Androff, *supra* note 469 at 133.

<sup>482</sup> *Ibid.*

<sup>483</sup> *Ibid.*

<sup>484</sup> COMISSAO DE ACOLHIMENTO, VERDADE E RECONCILIACAO DE TIMOR LESTE (CAVR) *supra* note 478

<sup>485</sup> *Ibid.*

The CRP panel was chaired by a CAVR regional commissioner along with community leaders, village elders, women and local Catholic clergymen.<sup>486</sup> The admission process was decided by the CAVR.<sup>487</sup> The perpetrators were able to participate by contacting the CAVR and confessing guilt to a crime.<sup>488</sup> This would follow a review of the offence and if the crime was categorized as “less serious” and “appropriate for the CRP” than the individual would be invited to participate.<sup>489</sup> If the CAVR rules the crimes as more serious, the case is forwarded to the tribunal.

Based on the Timorese experience, the CRP was successful. Unfortunately survivors of sexual violence were not included in the mandate because of the seriousness of the crime. Crimes of war time sexual violence must be prosecuted in Timorese courts. Regrettably the attitude towards justice for women in Timor-Leste has been passive hence women have turned to the community programs for help regardless of what the mandate states.<sup>490</sup> According to the NGO Judicial System Monitoring Program (JSMP), women have been participating more in the mediation programs than relying on the legal system because it is more effective.<sup>491</sup> Restorative justice has been able to help Timorese women in the reconciliation process because the idea of community is a large part of the Timorese culture.<sup>492</sup>

In Bosnia and Herzegovina a restorative justice approach to truth, redress and reconciliation such as the one performed in Timor-Leste would not be successful because

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<sup>486</sup> *Id.* at 133.

<sup>487</sup> *Id.* at 132.

<sup>488</sup> *Ibid.*

<sup>489</sup> *Ibid.*

<sup>490</sup> Ben Larke, ‘...And the Truth Shall Set You Free’: Confessional Trade-offs and Community Reconciliation in East Timor, 37 Asian Journal of Soc. Sci., 647, 658 (2009).

<sup>491</sup> Humanitarian News and Analysis, *Timor-Leste: Sexual assault survivors face long legal delays* available at <http://www.irinnews.org/Report/91377/TIMOR-LESTE-Sexual-assault-survivors-face-long-legal-delays> (Last visited October 24, 2012), IRIN news, *Sexual assault survivors face long legal delays, Timor-Leste*, 37 Law & Policy/Reproductive Health Matters, 202, 203.

<sup>492</sup> David Androff, *supra* note 469 at 131

there are three different ethnic communities that have been marginalized as a result of the physical division of the country. Conces argues that “categorizing people by ethnicity weakens the solidarity of the larger community.”<sup>493</sup> In BiH, due to the lack of solidarity, it is impossible to create reconciliation between the Serbs, the Croats and the Bosniaks through community based means. More worrisome is the fact that the country has been divided along ethnic lines and politicians remain in power by promoting a nationalist rhetoric.<sup>494</sup> Being categorized by ethnic lines has further discouraged people to seek reconciliation and for the reasons mentioned above a CRP would never work in Bosnia and Herzegovina.

#### **5.2.4. Special Tribunals: Guatemala’s Tribunal of Conscience for Women Survivors of Sexual Violence**

It is evident that the Transitional Justice mechanisms examined thus far would be unsuccessful in the recovery and reconciliation process of sexual violence victims in BiH. For victims in BiH, there is a need for a program that provides a spotlight on women to help them reintegrate into their communities and begin a reconciliation process with women from other ethnic backgrounds. Creating a program that focuses on the victims’ experiences helps women overcome a fear of isolation, it encourages other victims to follow in their footsteps and it helps the greater community understand their suffering.<sup>495</sup>

Recently a Tribunal of Conscience for Women Survivors of Sexual Violence (hereinafter Tribunal of Conscience) was created in Guatemala to uncover the truth about the sexual violence against Mayan women over the last 36 years ago. Additionally, the goal of the Tribunal was to eliminate the stigma associated with raped women and to encourage public recognition of sexual violence against Mayan women. This Tribunal has provided

<sup>493</sup> Rory Conces, Unified Pluralism: Fostering Reconciliation and the Demise of Ethnic Nationalism 54 *Studies in East European Thought* 285, 286 (2002).

<sup>494</sup> *Ibid.*

<sup>495</sup> Ben Larke, *supra* note 490 at 650.

victims with an opportunity to bring forth the issue of sexual violence into the public sphere. As a historic moment for women in Guatemala, it is important to examine the structure of the tribunal and if it would be possible to adopt this concept in Bosnia and Herzegovina.

Prior to exploring the functionality of the Tribunal of Conscience, a brief explanation on the background of Guatemala's conflict is necessary. The violence and atrocities in Guatemala against the Mayan people ended in 1996.<sup>496</sup> The source of tension was cultural, economic and political. The conflict was fought between the *Ladinos* (Guatemalans of European and Mayan descent), inhabiting the East part of Guatemala and Mayans, an indigenous majority located in the West part of Guatemala.<sup>497</sup> The conflict resulted in genocide and systematic use of sexual violence against the Mayan women throughout the war.<sup>498</sup> It has been reported that women were raped by *Ladino* led militias as well as Mayans. Consequently, after the conflict many women feared to speak about the crime because many perpetrators lived in the same communities as the women.<sup>499</sup> Other perpetrators occupied high-level positions in government institutions and the society.<sup>500</sup> Approximately forty truth and reconciliation programs were established throughout the country. In all the commissions, women did not speak about their experiences.<sup>501</sup> As a result in 2010, the Tribunal of Conscience was established by Guatemala's civil society and international organizations.

With the support of international and national NGOs, women were given the opportunity to come forward and speak about crimes of sexual violence committed against

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<sup>496</sup> Debra H. Rodman, *Forgetting Guatemala: Genocide, Truth and Denial in Guatemala's Oriente in GENOCIDE: TRUTH, MEMORY AND REPRESENTATION* 192, 195 (Alexander Laban Hinton, Kevin Lewis, O'Neill ed., 2009).

<sup>497</sup> *Ibid.*

<sup>498</sup> Alison Crosby, M. Brinton Lykes, Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala 5, *Int'l. Journal of Trans. Justice* 456, 461 (2011)..

<sup>499</sup> Colleen Duggan, Claudia Paz y Paz Bailey, Julie Guillerot, Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru 2, *The Int'l Journal of Trans. Justice* 192, 205 (2008).

<sup>500</sup> Alison Crosby, *supra* note 498 at 462.

<sup>501</sup> *Id.* at 461.

them. The aim of the Tribunal for Conscience was to provide survivors of sexual violence with a chance to tell their stories to encourage public dialogue and to erase the stigma associated with victims of sexual violence.<sup>502</sup> A total of 54 women participated in the process.<sup>503</sup> Before the commencement of the Tribunal of Conscience, civil society actors prepared the women by organizing support groups and educating the communities about the Tribunal and sexual violence against Mayan women through a campaign called *Neither Forgetting Nor Silence*.<sup>504</sup> As a result of the campaigns, civil societies were able to mobilize the public and create enough awareness about the issue.

The actual Tribunal proceedings were structured in a form of a mock trial. The Tribunal consisted of survivors and activists from Japan, Peru, Uganda and Guatemala that played the role of judges, prosecutors, victim testimonies and expert witness reports.<sup>505</sup> The program was divided into two days. The first day was designated for victim's testimonies while the second day was for expert witness testimonies.<sup>506</sup> During the testimonies, women's identity was concealed because many feared the perpetrator would recognize them.<sup>507</sup> While the victim testimonies were necessary for giving women a voice, expert witness reports helped the public understand the context of the conflict and genocide. More importantly, the public learned how women were targeted during the conflict. At the end of the testimonies the panel of judges read a 'symbolic sentence' that had to be signed by the honorary witnesses.<sup>508</sup> The proceedings were attended by local politicians, international actors,

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<sup>502</sup> Guatemala Human Rights Commission/USA, Court of Conscience against Sexual Violence during the International Armed Conflict available at [http://www.ghrc-usa.org/Resources/2010/tribunal\\_de\\_conciencia.htm#one](http://www.ghrc-usa.org/Resources/2010/tribunal_de_conciencia.htm#one). Only available document that has translated parts of the report on the tribunal from Spanish to English.

<sup>503</sup> Alison Crosby, *supra* note 498 at 466.

<sup>504</sup> *Id.* at 467.

<sup>505</sup> *Ibid.*

<sup>506</sup> *Ibid.*

<sup>507</sup> Guatemala Human Rights Commission/USA, Court of Conscience against Sexual Violence during the International Armed Conflict available at [http://www.ghrc-usa.org/Resources/2010/tribunal\\_de\\_conciencia.htm#one](http://www.ghrc-usa.org/Resources/2010/tribunal_de_conciencia.htm#one).

<sup>508</sup> Alison Crosby, *supra* note 107 at 468.

prosecutors and the greater public.<sup>509</sup> The proceedings were also live-streamed on the internet and broadcasted by a feminist radio station.<sup>510</sup> Making the testimonies accessible was a way of encouraging the greater public to learn more about the issue.

The participants were satisfied with the procedure because it helped them realize that all the women shared the same experiences and that this has occurred in other countries.<sup>511</sup> The women were also satisfied with the presence of Guatemalan officials because it provided them with a new hope that politicians would invest more effort towards justice and support for victims.<sup>512</sup> The Tribunal was able to empower women because a place of security and trust was created to help the survivors tell their stories. Moreover, granting access to the greater public brought more awareness to the issue and emphasized that the women are not to blame because sexual violence is an unfortunate part of war.

The downside of the Tribunal is the fact that the perpetrators are still free.<sup>513</sup> That being said, this program has not been created on the basis of a criminal tribunal. Instead, this is a program that can bring empowerment to women which can lead to prosecutions and reparation in the future. Removing the stigma associated with sexual violence and empowering women to speak up about their past is the first step. With a strong community support system and the ability for women to openly speak about their past, further lobbying for reparation, legislation to protect women and prosecutions are more likely to be successful. In Guatemala, the Tribunal for Women has helped bring the crime of sexual violence into the public sphere which has been dubbed a ‘historic accomplishment.’<sup>514</sup> Shifting the focus back to BiH, would a Tribunal of Conscience be beneficial to the reconciliation and remedy process to victims there.

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<sup>509</sup> *Id.* at 467.

<sup>510</sup> *Id.* at 468.

<sup>511</sup> *Id.* at 469.

<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*

<sup>514</sup> *Id.* at 471.



Establishing a Tribunal of Conscience in BiH is conceivable, as long as it is organized by civil society. In Guatemala, the organization and functionality of the Tribunal was in the hands of women's NGOs. To reiterate a statement from Chapter four, in BiH, women's NGOs from RS and FBiH have been attempting to build trust while local politicians have avoided victims of sexual violence at all costs.<sup>515</sup> For that reason, this Tribunal would only work under the guidance of women's NGOs. A women's only tribunal does have a potential to improve remedies and begin a reconciliation process with women from other ethnic groups. Additionally, this can be used as a platform for women's empowerment and education about sexual violence. The tribunal would help women establish a support network with other victim and bring more attention to the suffering of survivors.

### **5.3. Conclusion**

It is clear that Transitional Justice in BiH is limited and programs that have been established do not help victims of sexual violence. The failure to implement UNDP's Access to Justice program illustrates the lack of political will from FBiH and RS to address the issue of sexual violence. Unfortunately, due to lack of political will most of the TJ programs discussed in this chapter would not thrive. In a country of ethnic polarization, the Tribunal of Conscience is the only plausible solution to attracting attention to victims of sexual violence.

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<sup>515</sup> Annika Bjorkdahl, *A Gender-Just Peace? Exploring the Post-Dayton Peace Process in Bosnia* 37 Peace, History Society and Wiley Periodicals Inc. 286, 289 (2012).

## CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

Upon a lengthy discussion regarding the root causes for lack of remedies and low numbers of sexual violence prosecutions, it is clear that an institutional reform and victim centered approach to transitional justice is urgent. Criminal procedures are necessary for prosecution of high ranking officials and perpetrators of systematic rape, sexual slavery, forced impregnation and sexual enslavement. As it has been illustrated in chapter four, psychological and social support is mandatory to prevent re-traumatization during testimony and to help women recover from the trauma of the crime. Lastly, since all crimes of sexual violence cannot be prosecuted, an alternative to criminal trials must be established. A tribunal for women would benefit victims who do not trust BiH's criminal system or do not know who the perpetrator is. Furthermore, such a tribunal can help reintegrate victims into their respected communities and help build reconciliation between the Bosniak, Croat and Serb women. Reconciliation is important for eliminating ethnic polarization and victims of sexual violence have the potential to lead the way.

### 6.1. Recommendations

With only twelve convictions of sexual violence completed thus far, the state and entity courts must adopt appropriate security measures that will eliminate any chance of impunity for crimes of sexual violence. First and foremost, entity courts must immediately start prosecuting war crimes under the Criminal Code of Bosnia and Herzegovina. This would improve the relationship between the state and entity prosecutors and make the transfer of cases more efficient. Simultaneously, the definition of rape in the Criminal Code of BiH must be amended to a definition acceptable under International Criminal Law. These are the crucial issues that require mandatory modification to improve the prosecution of sexual violence in WCC and entity courts.

To encourage women to testify, court staff must be trained to provide proper support to victims of sexual violence. Employing more female judges and prosecutors, especially in entity courts can ensure that crimes against women are properly charged and prosecuted. According to Naraghi-Andarlini's research,

“With female judges on the bench...the substance of procedures improved. Male witnesses spoke more freely to women judges, and male defense attorneys were more respectful of a female witness when a women judge presided. Witness protection programmes improved, and the inclusion of women investigators enabled the court to draw on more female witnesses.”<sup>516</sup>

In addition, the presence of a female prosecutor or a judge makes it easier for the victim to testify.

The witness protection program on the state and entity level has discouraged victims from coming forward. Entity courts must institute an ample witness protection and witness support programs to protect vulnerable witnesses. The state court must be more consistent with the protective measures when victims of sexual violence are testifying. Further, witness protection outside the court is as important as during the trial. The Bosnian government must allocate enough funding to SIPA's Witness Protection Program. Witnesses must have the option of relocation and change of identity when necessary. Driving victims to and from court is not an adequate witness protection measure. Entity courts must adopt a witness protection law immediately because some victims are a minority in the community and they fear retaliation from the perpetrator's sympathizers if they testify.

As discussed in chapter four, government support and the reparation system for victims of sexual violence are inadequate. Most women do not have access to any psychological or financial support. A state strategy ensuring reparation, compensation, rehabilitation and guarantees of non-repetition to victims of sexual violence must be adopted.

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<sup>516</sup> Sanam Naraghi-Andarlini, Women and Peace through Justice 48 Society for International Development 2005 103, 105 (2005).

Victims in all regions of the country must have access to adequate health care, psychological treatment and legal aid. Social welfare law in the entities and cantons must be amended to guarantee that all victims have equal access to social benefits. FBiH and RS authorities need to implement vocational programs to economically empower women.

Civil Society also plays a significant role in the redress and reconciliation process. As it is apparent from the research presented in chapter four, most women-based NGO are not financially capable to provide victims with adequate redress programs. Moreover, most NGOs have become a medical clinic, a welfare center and a therapist's office because women do not have access to government sponsored programs. The government should increase the funding for women based NGOs to enable organizations to create programs for women's empowerment and to start advocating for women's reintegration and reconciliation.

State and entity governments need to start collaborating with women based NGOs to create awareness campaigns about the current situation of victims of sexual violence. NGOs and state and entity governments have a responsibility to all victims of sexual violence to educate the community and create a public discourse about crimes committed against women during the conflict. Educating the public about this issue is also necessary to transfer the stigmatization from the victim onto the perpetrator. Simultaneously, a victim centered program must also be created to allow all women regardless of their ethnicity to tell their stories to the public.

Criminal trials – although necessary – do not provide women with a chance to express their anguish. Women that testify are usually disappointed and traumatized while other women are not willing to testify out of fear for their safety.<sup>517</sup> When asked what would be the best solutions for reintegration and reconciliation, Bakira Hasecic suggested a “program that

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<sup>517</sup> Huma Haider & Timothy Welch, *The Protection of Witnesses in Bosnian War Crimes Trials: A Fair Balance Between the Interests of Victims and the Right of the Accused?* 20 The Denning Law Journal 55, 60 (2008).

brings women from FBiH and RS to together.”<sup>518</sup> That being said, it is recommended that a women’s only tribunal of consciousness, similar to the one in Guatemala is established. Such a tribunal has a potential to succeed because the focus is on victims of sexual violence only. It is not a criminal trial which gives women the freedom to talk about their experiences the way they want to. The most important actors for the success of the tribunal are women’s NGOs from both entities and international organizations.

This tribunal would serve as a platform for women to tell their stories; help reintegrate them into their respected communities and begin a reconciliation process by bringing together experiences from Bosniak, Croat and Serb victims. By including victims from all three ethnic groups, this would send a message that all the victims, regardless of their nationality or ethnicity were targets of sexual violence, primarily because they are women.<sup>519</sup> That being said victims can start building a bond based on their experiences as women and not as Bosniak, Croat or Serb victims. Once this idea of victims as women can be accepted, survivors and women’s NGOs can become more involved in advocacy.

Civil society involvement is necessary because women based NGOs would be designated to promote this program to victims and prepare victims for their testimony. NGOs must also visit rural areas to promote the tribunal’s strategy because many women have kept the crime a secret and this gives them a chance to come forward. The tribunal shall have a panel made up of international and local academics and gender experts. It is important that all panel members are women and experts in the gender field because victims must be treated with dignity and addressed in a sensitive manner.

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<sup>518</sup> Interview with Bakira Hasecic, President of Association for Women Victims of War, March 14, 2012. Sarajevo, BiH.

<sup>519</sup> Inger Skjelsbaek, *Victims Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina* 16 *Feminism & Psychology* 373, 388 (2006).

The proceedings should accommodate the victim's needs. Women should have a choice of testifying anonymously or being visible to the public. Psychologists must be present before, during and after the testimony. The presence of politicians, prosecutors, judges and lawyers is very important in demonstrating respect and willingness to help the victim. The testimonies must be open to the public and broadcasted on television for the purpose of education and elimination of stigma associated with victims of sexual violence.

In addition to holding testimonies, a forum for academics, judges, politicians and international actors is suggested to discuss strategies to help victims of sexual violence. NGOs should also organize multi-ethnic support groups to continue the bond between women from both entities. In that sense, Bosniak, Serb and Croat women can lead in the reconciliation process.

## **6.2. Conclusion**

Over the course of this thesis, it has been proven that victims of sexual violence have not been provided with adequate judicial and social support. It is also clear that a decentralized judicial and legislation system, led by hard-line nationalist politicians has made it difficult to prosecute crimes of sexual violence and help women recover. State actors have become passive towards women's struggles and it is clear that they simply do not care about victims of sexual violence.

That being said state and entity governments have a responsibility to provide social rehabilitation, reintegration and reparation. For victims of sexual violence psycho-social support, health care and monetary reparation is necessary for survival because without it women cannot complete everyday tasks. In words of one victim, "the current system treats

war criminals better than victims.”<sup>520</sup> It is time to facilitate community dialogues and empower women, to build tolerance and to remove the stigma of sexual violence from victims. Women are an essential part of every society and it is time that Bosnia and Herzegovina recognizes that fact.

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<sup>520</sup> Z.R. statement, Institute for War & Peace Reporting, *Bosnia: Unprotected*, YOUTUBE (November 21, 2012) [http://www.youtube.com/watch?feature=player\\_embedded&v=Agfd6AYd\\_RY#!](http://www.youtube.com/watch?feature=player_embedded&v=Agfd6AYd_RY#!)

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