

**Feminist Justice in Practice:
Witness Experiences of Survivors of Wartime Sexual Violence in the Sud BiH**

Smith-Hams, Brett A.

Academic Director: Benderly, Jill.

Project Advisor: Beč-Neumann, Janja

University of California, Berkeley

Gender and Women's Studies

Europe, Bosnia and Herzegovina, Sarajevo

Submitted in Partial Fulfillment of the Requirements for The Balkans: Gender,
Transformation, and Civil Society, Fall 2006

“When you’ve suffered a great deal in life, each additional pain is both unbearable and trifling.”

Yann Martel

Abstract

Wartime sexual violence is currently being prosecuted in numerous legal institutions across the world. In order for survivors of this sexual violence to have the best possible experiences, many improvements in the care, protection, and support of those who come forward to testify in these institutions need to be made. This study looks at the practices of one particular legal institution, the National Court of Bosnia and Herzegovina, which is currently in the midst of trying several war crimes cases, many of which involve incidents of mass, systematic sexual violence as part of a larger military campaign in the region in the 1990s. In observing how this institution addresses issues of protecting the rights of survivors and improving their experiences as witnesses in the court, the study hopes to make recommendations as to how survivors might be more sensitively dealt with by international and local legal institutions that need the cooperation of survivors in order to go forward with war crimes trials.

Acknowledgements

Thanks are due to all of those whose opinions, thoughts, and ideas helped shape this work and make it what it is. Thank you to everyone who shared their time with me in interviews and conversations. Thank you to Jill Benderly, Goga Borić, and Janja Beć-Neumann for helping me to find necessary sources and contacts, without which this work would never have been possible. Finally, thank you to everyone at Sud BiH who endured my continual visits and helped me to find accurate and truthful information.

Table of Contents

Personal Preface.....	6
Introduction.....	8
Levels of the Study.....	12
Methodology of the Study.....	14
Limitations of the Study.....	15
Post-Trauma Testimony.....	17
Legal Precedents.....	19
The ECHR.....	19
The ICTY.....	21
The Sud BiH.....	24
Witness Support Office.....	24
Criminal Procedure Code.....	28
Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses.....	32
Case Study.....	34
Non-Court Institutions Involved in Witness Support.....	41
Conclusions.....	55
Personal Reflections.....	62
Bibliography.....	66

Personal Preface

As a feminist scholar, I have grappled with the issue of sexual violence on multiple levels. What I find, time and time again, is that the problem is not static, does not exist as a singular issue facing one kind of woman, and certainly does not affect every survivor in the same way. For this reason, I see a desperate need for sexual violence to be addressed in a detailed and thoughtful manner in international law. Sexual violence is perpetrated internationally, and where international law is being used to prosecute sexual violence, there must be relevant and practical guidelines within this law. More importantly, the need for recognition and support of survivors of sexual violence is glaringly obvious.

My strong personal conviction that there is not enough being done to represent survivors of sexual violence under the law is the foundation for this research. With that in mind frame, I approached a relatively new legal institution tasked with prosecuting war crimes, the National Court of Bosnia-Herzegovina¹. Part of this work is prosecuting men who committed systematic sexual violence against women during the wars in the former Yugoslavia in the early to mid 1990s. I thought that delving into the way this court dealt with survivors of sexual violence would be an incredible opportunity to see how the law is representing women who survived sexual violence, and later became involved in prosecuting those who committed the violence against them². Not only is this particular court charged with flawlessly upholding international human rights standards, but it is also a new court and therefore has a unique position of being able to perhaps do things differently from other, more traditional institutions. I wanted to find out how this

¹ Hereinafter: the Sud BiH

² Hereinafter, this group of women will most often be referred to as survivor witnesses

institution takes advantage (or does not) of its unique position both in BiH and the international legal community to better serve, support, and protect survivors of sexual violence.

Exploring the witness experiences of survivors of sexual violence in the Sud BiH gave me the ability to ascertain both how the court is approaching the issue in terms of the law, as well as how it is carrying out that law in every day practice and interaction with the survivor witnesses. On a local level, this research allows me to see how survivor witnesses are addressed by the law, if the laws are relevant to their particular situations, and what their needs are in terms of the Sud BiH. On a more global level, this is a small look at a larger issue; the symbolic representation of women under the law and the failure to utilize or carry out any of the laws that would actually improve their situations. Merging these two allows me to discover how international law (and local variations on it) is and is not useful to particular and unique communities of women, as well as how law representing women in general, and survivors of sexual violence in particular, can be modified in order to be used more often and more effectively in legal practice. The title of this study perhaps represents its goal, as well: to find a way to reconcile feminism with the law and put the two into practice together in order to improve the experiences of women who survive trauma and seek justice within a legal system which claims to fairly represent them.

Introduction

Background on the Conflict in the Former Yugoslavia

By 1991, when Croatia and Slovenia declared independence from the former Socialist Federal Republic of Yugoslavia, Bosnia-Herzegovina³ was the most politically complicated nation in the former Yugoslavia. In “A Brief History of the State of Bosnia-Herzegovina”, Nataša Mrvić-Petrović mentions that as opposed to Croatia and Slovenia, which declared independence as homogenous nations, Bosnia-Herzegovina declared independence along the lines of three separate ethnic groups (Mrvić-Petrović 12). By April, 1992, Bosnia-Herzegovina existed independently in three separate parts – Bosnia-Herzegovina proper, Republika Srpska, and the Croatian Community of Herzeg-Bosna (Ibid). Because of this unique situation, in addition to the primary conflict with the Federal Republic of Yugoslavia, a civil war erupted in Bosnia-Herzegovina, which most heavily affected the civilian population (Ibid 15). When the Dayton Peace Accords were agreed upon and the conflict in BiH came to an end in 1995, it and all of the nations of the former Yugoslavia were left with an incredibly challenging and necessary project: dealing with the past and working toward reconciliation in order to avoid future conflicts.

Background on Wartime Sexual Violence

Sexual violence in times of war is a phenomenon that is neither unfamiliar, nor lacking an extensive history. In her article “Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia”, Catherine Niarchos states, “As in peacetime, rape has always occurred in war. Since the beginning, it has ranked along with plunder as one of war’s ‘unfortunate byproducts’ (271).” Until the late twentieth century,

³ Hereinafter, may be referred to as BiH

rape was considered as just another deplorable act of war, but never as a military strategy. While “something like war rape seems virtually ubiquitous (8)”, as Roland Littlewood comments in his article “Military Rape”, and “an explicit justification frequently made by the soldiers who rape women is that it is to degrade and humiliate them (9)”, wartime rape was never prosecuted as a crime against humanity until the International Criminal Tribunal for the Former Yugoslavia⁴ was established, and it “has yet to be recognized as a crime of gender (Niarchos 272).”

The particular nature of the sexual violence that was perpetrated in the former Yugoslavia from 1991-1995 caused the international community to rethink the way it prosecuted wartime sexual violence under international law. Danijela Dugandžić explains some of the details of this sexual violence, focusing on the area with the highest recorded level of violence, BiH, in her paper “Rape as a violation of human rights”. In BiH alone, “official statistics report around 20,000 raped women. . . mostly Muslims (5).” One NGO she spoke with reported treating “approximately 12,000 women and reported that some of them were raped 150 times, others . . . 20 times a day (Ibid).” It is well documented that Serbian soldiers would rape Bosniak women until they became pregnant, and then detain them until it was too late for them to obtain an abortion. The mass scale of this rape cannot be ignored as merely an “unfortunate byproduct” of the conflict of the former Yugoslavia. It is quite clear that sexual violence in this instance was, as Mrdja Tanja tells us in her work “Asymmetrical Warfare: Rape as a Weapon of War”, “a method of persecution and intimidation of an ethnic, cultural, or religious

⁴ Hereinafter: ICTY

group (21).” In the former Yugoslavia, and especially in BiH, sexual violence was not a byproduct of war, but a deliberate tool used to wage it. As Niarchos says,

The war in the former Yugoslavia involves savage rape on a horrifying scale. It is rape as torture, mutilation, femicide, and genocide. It is war fought on and through women’s bodies. It is rape as a military strategy. It is rape that, at last, has caught the world’s attention (272).

As a result of this, for the first time in history, rape was classified as a crime against humanity, and began to be prosecuted as such in both the ICTY and the International Criminal Tribunal for Rwanda⁵ (Dugandžić 8).

Background on the National Court of Bosnia-Herzegovina

Since 1995, the nations of the former Yugoslavia have struggled with different methods of dealing with the past and moving toward reconciliation. One of the ways of doing this has been through transitional justice. Bodies such as the ICTY in The Hague are continually working to bring war criminals to justice and give some sense of closure to all who suffered so much during the wars in the nineties. Of course, all efforts toward justice cannot be confined within the international community; to be able to truly participate in conflict resolution, the nations of the former Yugoslavia must take on their own projects of justice. One of these projects is currently taking place in the Sud BiH, where an independent War Crimes Section of the court has been established.

The Sud BiH was established on July 3, 2002, when the Parliament of BiH adopted the Law on the Court of BiH. The Office of the High Representative of BiH had been promulgating this law since November 12, 2000. According to the court’s website, among other goals, the Sud BiH was established in order to “fight against war crimes” and “establish the rule of law” in BiH. The court’s structure is made up of three divisions: the Criminal (including the war crimes chamber), Administrative, and Appellate

⁵ Hereinafter: ICTR

Divisions. Upon the court's establishment, there was a significant international presence among all of its legal divisions and working units. While this is still the case to a certain degree, the international staff has been slowly removing itself and transferring jurisdiction over to the local staff. The current goal is for the international staff to be completely removed from the court by 2009.

Levels of the Study

This study looks at women survivors of sexual violence during the wars in the former Yugoslavia in the 90s and their experiences as witnesses in the Sud BiH on three separate levels. The first level of the study is that of the precedents set by other international legal institutions. It is necessary to look at institutions such as the European Court of Human Rights⁶ and the ICTY and the kinds of laws they have established in terms of witness support. Doing so gives an important perspective on the Sud BiH, examining from where it has acquired procedures and legal practices, and how it has made modifications in order to more adequately serve the local population of BiH. Without this context, the Sud BiH would seem to exist independently from international and historical context, which is inaccurate.

The next level of the study delves more deeply into the internal legal practices and systems that are in place to deal with survivor witnesses in the Sud BiH itself. Focusing on the Sud BiH is the primary level of this study for several reasons. The Sud BiH is in the unique position of being able to set new international standards of witness support and care within the legal system. As such, reviewing its internal practices and seeing how it has managed such an opportunity is vital. Also, the Sud BiH is the primary conduit of transitional justice in BiH. It is the sole state institution tasked with prosecuting war criminals and bringing them to justice. Therefore, observing how it approaches this particular aspect of war crimes prosecution is a necessary step in discovering how the court is serving the civilians who suffered during the war, and have the greatest need to see results in the court. Lastly, looking at the Sud BiH in depth is the only way to truly

⁶ Hereinafter: ECHR

grasp what the experiences of witnesses are like. In observing war crimes cases and talking with staff in the court, it becomes possible to understand more clearly what women who survived sexual violence and are now testifying in the court must go through in order to give their testimony and participate in the process of justice.

The third level of this study focuses on the institutions, individuals, and organizations independent from the court that work with the same witnesses. Clearly, women who survived sexual violence during the war and have now decided to testify at the Sud BiH do not and should not have to depend solely on the services of the court as their sole support system. There are numerous non-governmental organizations (NGOs) involved in the support process. Some of these organizations work in tandem with the court, while others prefer to do their work independently. All play an important role in the process of supporting women who choose to testify before the court, and excluding these organizations from the study would eliminate a vital perspective. The people who work with witnesses outside of the context of the court and the legal systems in play there focus more on the direct impact of testifying on the survivor witnesses, and is as close to the direct perspective of the survivor herself as this study will be able to achieve.

Methodology of the Study

The guidelines for the methodology used in this study came from a blend of my ethical responsibilities as a researcher, the academic discipline from which I am approaching this topic, and the time frame of the work I am doing. These factors influenced whom I decided to approach for information and how I would later use that information in my writing.

The information used in this study was obtained through interviews and through consulting publications and official documents from the region. All of the interviews were conducted in person. My observations were conducted at the Sud BiH itself, where I observed one primary case, that of Neđo Samardžić, who is in the process of an appeals trial. I observed this case on two separate days in the same week, for about four hours each time. I was able to observe five witness testimonies, including one made by a survivor of sexual violence, through audio and visual recordings made in the courtroom itself. The documents I used were obtained either through internet research, or through contacts made during my research. Many documents I consulted were given to me by my academic advisor for the project, Janja Beč-Neumann.

In order to gain the information I needed to complete this study, I consulted people within the Sud BiH itself, people from NGOs and international organizations, and many publications, mostly by local authors. All of these together enabled me to have a fairly thorough perspective on the subject. While it would have clearly been useful to consult survivors themselves in order to hear about their experiences, this was simply not an option during the course of the study. However, my observations of the Samardžić

trial allowed me to observe the experiences of survivor witnesses myself, in which case I was able to evaluate their treatment in the courtroom according to my own opinions.

Limitations of the Study

There are many limitations of this study that must be mentioned before moving forward. First and foremost, my perspective as a feminist scholar, coming from an academic background rooted in feminist theory and methodologies, makes me a biased researcher. My opinions, no matter how well founded in the truth of what I discover during this research, are inevitably influenced by my personal experiences and convictions, which clearly cause my research to advocate on behalf of the survivor. In no way should this study be considered an objective academic observation of legal procedures. In fact, this is an attempt to make a strong academic argument in favor of stronger and more rigorous protections and care of women who survive sexual violence and decide to testify against those who committed violence against them.

Second, the time limits of this study disallow it to be as thorough and detailed as it perhaps should be. There are numerous issues involved with this study – compensation for survivors of wartime violence, cultural and social influences in the court and outside of it that need to be explored in detail, and more detailed explorations of international law and legal procedures, to name a few – that would need to be fully expounded upon in order for this study to truly be as thorough as it needs to be. Thus, the study should be evaluated as a preliminary analysis, with potential for more thorough exploration.

Another limitation of the study, and perhaps its most important limitation, is the fact that I did not consult directly with survivor witnesses in order to hear their own perspectives on their experiences in the Sud BiH. It is absolutely doubtless that every

woman who survived sexual violence during the wars in the nineties and later testified before the Sud BiH has had a completely different experience, and it is not the purpose of this study to make generalizations about their experiences. As Chandra Mohanty brilliantly states in “Under Western Eyes: Feminist Scholarship and Colonial Discourses”,

“The relationship between “Woman” – a cultural and ideological composite Other constructed through diverse representational discourses (scientific, literary, juridical, linguistic, cinematic, etc.) – and “women” – real, material subjects of their collective histories – is one of the central questions the practice of feminist scholarship seeks to address. This connection between women as historical subjects and the re-presentation of Woman produced by hegemonic discourses is not a relation of direct identity, or a relation of correspondence or simple implication. It is an arbitrary relation set up by particular cultures (197).”

As a cultural outsider in BiH, it would be easy for me to categorize all survivors into one particular version of “Woman”, and use that throughout this study. However, it is not my intent to homogenize the experiences or identities of women in BiH who survived sexual violence during the conflict in the nineties. Clearly, these women are not only situated in particular cultures and histories, but they also have multiple identities extending beyond their experiences as survivors.

The purpose of the research is not to eliminate the heterogeneities of the experiences of survivors, but rather to evaluate the procedures regarding the care and support of survivor witness in a particular legal institution, and to make suggestions as to how these procedures can be strengthened. As such, while the perspectives of the survivor witnesses themselves are clearly vital in understanding the issues at hand, I had to accept that my work would make an effort to improve their experiences, despite the fact that some or all of these women may perceive those experiences as completely satisfactory.

Post-Trauma Testimony

In order to understand the importance of support for survivor witnesses, it is necessary to understand the kind of trauma that can be suffered from the act of testifying itself. The women who are testifying in the court against those who assaulted them are telling stories of severe trauma; perhaps stories that they never planned on revisiting or retelling at any point in their lives. The culture of silence and shame associated with sexual violence in BiH is incredibly strong, and even today has a considerable influence on survivors' decisions to speak about their experiences. In addition, many witnesses have been isolated in small communities where violence occurred during the war with no knowledge of or access to the institutions that would be able to record their stories and help them pursue justice. Given these factors, it can be concluded that although the war crimes chamber in the Sud BiH is dealing with crimes committed almost fifteen years ago, some survivors might never have told their story to anyone, in which case the potential for retraumatization during the testifying process is significant. Even when survivors have shared their stories once, four, or twenty times before testifying in the court, the actual delivery of the testimony can be incredibly traumatizing.

In the report "Women's Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina", Julie Mertus reminds us that "The act of witnessing alone can cause trauma (16)." While every witness will clearly react in his or her own way to the courtroom circumstances, it is a legitimate concern that some witnesses simply will not be able to handle the stress of being in the presence of the accused; a Judge from the ICTY recalls one witness who "openly pled with the court to stop the accused from threatening her with his eyes (Ibid)."

The Sud BiH, or any court wishing to engage a survivor in the act of testifying in the courtroom, must seriously consider how that act will affect the survivor before asking her to do so. Catherine Niarchos points out specific problems with relating stories of sexual violence before the court in “Women, War, and Rape” when she states

“Describing the act of sexual abuse in a courtroom is difficult, not only because the violation is so personal, but also because rape is still a misunderstood crime. Rape victims are made to feel tainted not only by the acts committed, but also by describing those acts in a public forum. The woman becomes a sexual spectacle . . . (305)”

Here, Niarchos makes it clear that while the court may wish to think of witnesses as just witnesses, the particularities of the experience of a survivor of sexual violence makes her experience as a witness different from that of other witnesses. It is important to remember what survivors are being asked to do, and to be put through, when they are recruited as witnesses by the Sud BiH or any legal institution.

Despite the concern for retraumatization, survivors of sexual violence have the capacity to be very powerful agents in the courtroom, and their experiences should not discount their ability to act as truth-tellers and to relate important facts. Julie Mertus states “even in the most traumatic situations, women still exercise agency (17).” Women who survive sexual violence are often viewed as hysterical, unreliable, or prone to exaggerating their stories. If survivors are truly going to be treated with the dignity they deserve in the courtroom, they must be treated sensitively, but not as mentally ill. The court asking for a survivor’s testimony must respect her experience, but also respect the fact that she is exercising agency in choosing to tell her story. Balancing the ability to provide services for the survivor witness while still allowing her to simply tell her story is crucial in improving the witness experiences of survivors.

Legal Precedents

The Sud BiH has numerous legal guidelines for the treatment of witnesses. While some of these guidelines are drawn directly from the Criminal Procedure Code for BiH⁷, many are drawn from the laws of other legal institutions. The ICTY and the ECHR have both set important standards in the prosecution of wartime sexual violence, as well as in the legal procedures of dealing with witnesses and protecting witness' rights. In order to understand where the laws on the rights of the witness in the Sud BiH originated and in what context they operate, it is necessary to briefly consider these other legal institutions.

The European Court of Human Rights

Perhaps the most difficult part of protecting a witness' rights arises when also attempting to protect the rights of the accused. Each is given strict and rigorous protections under international law, but in particular cases, especially involving those of sexual violence, it can be challenging to maintain the balance of the rights of the two. In an interoffice memorandum to a Judge in the Sud BiH entitled "Balancing the Rights of the Defendant Against the Rights of a Victim", Elma Karović, Julia Thibord, and Mirjam Blom (employees of the Sud BiH) report on the ECHR's legal precedents in doing so. The ECHR has made several important decisions concerning this balance; for instance, judgments in the cases *Baegen v. the Netherlands*, *S.N. v. Sweden*, *Bocos-Cuesta v. the Netherlands*, and *Accardi and others v. Italy* were the impetus for this declaration from the ECHR:

"The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings

⁷ Hereinafter: CPC of BiH, or simply CPC

an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (Karović, Thibord, and Blom 7).”

The ECHR clearly recognizes the rights of the witness in sensitive cases, and specifically those dealing with sexual violence. As such, this decision rendered by the court requires the utmost concern and care for the protection of the rights of the witness in cases of sexual violence, in so far as it does not significantly hinder the rights of the accused, for all legal institutions guided by the decisions of the ECHR (which the Sud BiH is).

Another concern in protecting witness rights, particularly in the case of sexual violence, is the right to anonymity and protection from having one’s identity revealed to the accused, or to the public. In such cases, the ECHR makes this statement, as laid out in Article 6, Paragraph 1 of the Convention for the Protection of Human Rights⁸:

“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Courts, while obligated to fulfill the rights of the accused to a public hearing, must also consider the rights of the witness and take them into account in deciding at which points of the trial to exclude the press or a public audience.

In addition, BiH law allows for the accused to directly question witnesses as part of the rights of a fair trial. Clearly, this is a conflict of interest for survivors of sexual

⁸ Hereinafter: CPHR, or simply, the Convention

violence, and indeed survivors of any trauma. Being questioned directly by the accused, who may have had in the past or may still have the power to intimidate and threaten a witness both inside and outside of the courtroom, could easily violate the rights of survivor witnesses. Especially in the case of survivors of sexual violence, being questioned by the person who perpetrated the violence against them is hardly a favorable option, and the potential for retraumatization in such a situation is greatly heightened.

While the CPHR does grant the right to examine witnesses to the accused, the ECHR has stated:

“[T]he Court reiterates that all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, however. As a general rule, paragraphs 1 and 3 (d) of Article 6 cannot be interpreted as requiring in all cases that questions be put directly by the accused or his lawyer, whether by means of cross-examination or by any other means, but rather that the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (Karović, Thibord, and Blom 10).”

It is important to remember that the Sud BiH, while subject first and foremost to the CPC, is in addition subject to the regulations of the Convention and the precedents set forth by the ECHR. As the ECHR considers restricting the rights of the accused to directly cross-examine the witness a reasonable measure, the Sud BiH should also consider it as such. At this point, the Sud BiH does allow for the accused to directly cross-examine witnesses, and it is up to the Judges to restrict or allow this practice in each individual case.

The International Criminal Tribunal for the Former Yugoslavia

Just as the Sud BiH can learn and draw from the ECHR’s decisions on the protections of the rights of the witness, so can it from the lessons learned by the ICTY in

prosecuting the war crimes committed in the conflicts in the former Yugoslavia. Part of the ICTY's main role in prosecuting war crimes in The Hague was to take the most sensitive cases out of the region itself. Because of the unstable nature of the region post-conflict, most war criminals remained in the towns and local communities where they had lived before the war, and most likely where they had committed war crimes. Thus, prosecuting war criminals locally would not only have been a complicated legal project for emerging post-conflict nations, but it would have also been a serious danger to people who decided to testify in local courts, where their identities could in no way be guaranteed to be protected. It was the ICTY's role to bring these people out of their local communities and into a protected international legal space in which they could safely tell their stories.

One of the main bodies set up by the ICTY that set a crucial precedent for the Sud BiH was that of the Victims and Witnesses Section⁹. The ICTY's statute includes the requirement for witness protection, and the Rules of Procedure and Evidence for the ICTY require the establishment of a VWS (Rohne 1-2). As a part of the VWS, the Support Unit was specifically designed for the "social and psychological counseling and assistance provided for the witnesses (Ibid 7)." The tribunal was established in 1993, while the conflict was still going on. When people first came to the ICTY to testify and tell their stories, very little time had been allowed to pass and the trauma was still relatively raw. Establishing a professional staff with the sole purpose of supporting people through the testimony process was absolutely necessary in the ICTY. In addition, having this staff present to make recommendations to the court about questions such as

⁹ Hereinafter: VWS

allowing the witness' identity to be revealed to the accused or to the public, and about closing the trial to the press and public, was vital in making the witness' experiences as painless as possible, given the circumstances. It is this model that the Sud BiH follows with its own Witness Support Office, and without this, many witnesses would be unable or unwilling to testify before the court.

The ICTY also set standards for prosecuting those not physically responsible for sexual violence, but high officials who were either aware of the sexual violence and did nothing to stop it, or who directly ordered it or endured it as part of a larger military strategy. In her presentation "Sexual Violence Practice in Leadership Cases at the International Criminal Tribunal for the Former Yugoslavia: Background to Oral Presentation", Patricia Sellers states,

"Today, international crimes that include allegations of sexual violence, against accused in leadership positions, are nearing the trial stage. Joint criminal enterprise, a form of committing under Article 7(1) of the ICTY Statute as well as superior responsibility under Article 7(3) of the Statute have and will provide the emerging "lessons learned" for the conviction of high level perpetrators of sexual violence (1)."

As the ICTY continues to provide legal precedents for prosecuting those indirectly responsible for war crimes, more perpetrators of sexual violence can be brought to justice in the Sud BiH using these decisions as the basis for their own judgments.

The Sud BiH

There are numerous ways in which the Sud BiH works to protect the rights of the witness. Their Witness Support Office¹⁰ is in place to provide psychological services and aid to witnesses, should they need or request it. The CPC sets in place many legal procedures that work to support and protect the witness. In addition, there is a separate Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, which directly addresses the needs of witnesses in sensitive situations, such as women who are sexual violence survivors testifying before the court. The Judges, Prosecutors, and members of the Defense Council are also all made aware of the witness' rights and have the legal obligation to uphold those rights to the best of their ability under the law. Together, all of these mechanisms work to secure the rights of the witness in the Sud BiH.

Witness Support Office

The WSO of the Sud BiH is a vital component in the protection of the rights of witnesses. Without it, there would be no body independent of the Prosecution and Defense working to make the decisions that are right for each individual witness, and work to protect his or her well-being above all else. The staff members in the WSO are licensed mental health professionals in place to assess the needs of each witness and guide him or her through the testifying process. Lucia Dighiero, the head of the WSO, believes¹¹ that it is the independence of the WSO from the details of each case that gives it the ability to consider the well-being of the witnesses they see above the wishes and

¹⁰ Hereinafter: WSO

¹¹ In my personal interview with Lucia, she spent a great deal of time discussing the importance of the WSO's independence from the legal councils in cases, and how this allowed the WSO staff to better do their work, and focus on the witness.

desires of the prosecution or defense. The staff of the WSO works directly under the Judges in each case, and the highest supervisor of the office is in fact the President of the Court herself. Lucia makes it very clear that the job of the WSO is to do all it can for a witness in any given case at any given time, and that its duty to stay separate from the prosecution and defense is crucial in doing its job effectively.

In terms of deciding who will be brought to court to testify, the WSO plays a very small role. The prosecutor or defense council can decide to bring in a member of the WSO staff to help decide whether or not a witness should be brought to testify. Lucia stated that about 20% of people who are approached by the court are reluctant to testify because they are concerned about the emotional effects of giving testimony, or they do not want their families to know what happened to them during the war. Lucia stated that in terms of sensitivity to retraumatizing sexual violence survivors by asking them to testify, there is a difference between male and female prosecutors, the female prosecutors tending to be more sensitive to the particular issue of sexual violence. However, she did say that if the WSO is brought in to determine the emotional state of a witness and concludes that the witness is just too fragile to give testimony, almost all prosecutors will take the WSO's advice and refrain from listing the witness in the official indictment. When it is determined that witnesses may be asked to testify in a given case, the initial investigation of the witness commences.

Unfortunately, there is no regulation that the WSO be involved in the initial investigation of witnesses. While the prosecution or defense can request the presence of a member of the WSO to be present at an initial investigation, it is perfectly acceptable for investigation of a witness to go forth without this measure. It is only when a case is taken

before a court and an indictment announced that individual witnesses are presented to the WSO. Lucia mentioned that it is up to each individual legal council to decide whether or not to bring in a member of the WSO staff to an initial investigation, and that the sensitivity to a witness' emotional well-being varies greatly from person to person. She also mentioned that most witnesses are generally very poorly informed as to their legal rights, so it is safe to assume that most witnesses are unaware that they have the right to ask for a member of the WSO staff to be with them during an initial investigation. Currently, the court has no official educational program for witnesses to help them understand their rights and learn about the process of testifying.

Once a case is taken by the court and a list of witnesses is confirmed in the indictment, the true work of the WSO begins. A staff member makes initial contact with each witness by phone and assesses each individual's needs. This staff member makes it clear to witnesses that the WSO is available for support at any time the witness should require it. Before the trial, the WSO calls the witness back to check that he or she has no specific needs before coming in to testify. In certain cases, the WSO can bring a witness to the courtroom when it is empty before he or she testifies, in order to allow the witness to become familiar with the surroundings, which can be intimidating during the testimony process. When the time comes to testify, the costs of travel to and from the court are covered by the WSO. Should the witness be required to stay overnight in order to give multiple testimonies, the court will also cover those costs. The witness is brought into the court through a separate entrance so as to avoid contact with individuals that might endanger or upset him or her. The witness is also given an individual waiting room separate from the court's public quarters, which has a restroom and a television on which

the proceeding of the trial can be viewed, and in which only the witness and a technician are allowed. During testimony, a witness can request that a member of the WSO staff be present with him or her at all times. This WSO staff member can provide emotional support to the witness, and make suggestions to the Judge during testimony, such that a break be taken, etc. If a witness does not specifically request the presence of a WSO staff member in the court, the WSO monitors all cases on television screens simultaneously, and can be in the court room at a moment's notice should their presence be required.

Post-testimony, the WSO makes one follow-up call with witnesses. Should the WSO assess that a witness has been seriously retraumatized by giving testimony and requires more long-term psychological care, it can refer that witness to a mental health professional unaffiliated with the court. Lucia stated that this is a very rare occurrence. Also, the cost of an independent psychological counselor is not covered by the court, so it is unlikely that a witness would be willing to take on such costs on his or her own. This last phone call is the end of the WSO's officially prescribed contact with witnesses. However, Lucia said that the WSO makes several more phone calls to witnesses than is required. If witnesses are interested in the final verdict of a case, they must tell the WSO this to initiate the process, but they will be informed when a verdict is reached should they request it. Lucia approximates that 80% of witnesses who utilize the services of the WSO are completely satisfied, 10% are not satisfied with the court itself, and the last 10% are unsatisfied because of personal circumstances unrelated to the court. However, the only mode for witness feedback is a direct conversation between witness and WSO staff member post-testimony. There is no anonymous feedback system provided by the WSO, so it is likely that they are not receiving completely frank and honest feedback. In

addition, it seems unlikely that every aspect of the WSO's work would be examined in this post-testimony phone conversation.¹²

The WSO was originally created as part of the international staff under the international Registrar of the Sud BiH. In what Lucia calls a "great victory", the WSO was transferred to local staff members, to be kept on as a permanent office in the court. This is indeed an important step in securing the rights of witnesses beyond 2009 when the international community will leave the Sud BiH. In addition, as the court has no official witness outreach or education programs, keeping the WSO as a permanent fixture in the court increases its potential to expand and take on other projects to assist witnesses.

Criminal Procedure Code

The CPC is, as one Judge at the Sud BiH stated, "the bible" of court procedures¹³. Above all other international laws, conventions, and declarations, the court is obligated to uphold the laws set forth in the CPC. Thus, the legal procedures concerning witnesses in the CPC are of the utmost importance in determining the level of support available to witnesses in the Sud BiH. The CPC itself has several specific sections that refer to the rights of the witness. In the CPC, most of the power in making decisions about the witness is given to the Judge, so the witness is often directly under the care of the Judge, as far as his or her well-being and rights are concerned.

¹² In my interview with her, Lucia mentioned that the one officially required phone call to witnesses is the WSO's only method of gathering feedback. After listening to her assessment of how many witnesses were "satisfied" with their experiences, I wondered how she was evaluating satisfaction, given that there is no official, anonymous feedback questionnaire with standard questions, etc. It seems that such a system would benefit the WSO greatly in evaluating and improving its own work.

¹³ Personal Interview, Judge Shireen Fisher

The first provision of the CPC pertaining to witnesses is in Article 235, which gives the Judge the right to use his or her own discretion in deciding whether or not to exclude the public from a trial. The Article states:

“From the opening to the end of the main trial, the judge or the Panel of judges may at any time, *ex officio* or on motion of the parties and the defense attorney, but always after hearing the parties and the defense attorney, exclude the public for the entire main trial or a part of it if that is in the interest of the national security, or if it is necessary to preserve a national, military, official or important business secret, if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness.”

Giving the Judge the power to exclude the public negates the possibility of the defense council or prosecution making the decision and potentially harming a witness of the opposing party. In addition, protecting the privacy of women who are survivors of wartime sexual violence is one of the key factors in securing their cooperation as witnesses.¹⁴ As such, this law benefits both the party that is bringing forth the witness and the witness herself.

Perhaps the most important law pertaining to witness' rights is in Article 259 of the CPC, the law giving the accused the right to directly question a witness testifying against him or her. The Article states:

“The judge or the presiding judge shall warn the accused to carefully follow the course of the main trial and shall instruct him that he may present facts and propose evidence in his favor, that he may question codefendants, witnesses and experts and that he may offer explanations regarding their testimony.”

While this Article clearly gives the accused the right to question witnesses, it is loosely

¹⁴ In my interview with Lucia Dighiero, she mentioned that even above psychological support, survivors of sexual violence who come to the Sud BiH to testify want to be sure that the court will protect their privacy.

stated and can be interpreted in many different ways. It should be pointed out that the Article does not explicitly state that the accused should be allowed to *directly* question the witness, in which case his or her questions could be posed through a defense council or a Judge in order to prevent emotional distress or discomfort on the part of the witness. Additionally, Karović, Thibord, and Blom point out that nowhere in this Article is it stated that the accused should be allowed to question the witness orally, and as such it is logical that the questions could be submitted in writing and again administered to the witness by a defense attorney or a Judge (11). The right to question detailed in this Article need also be regulated by a law in Section (3) of Article 262 of the CPC, which declares:

“The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence so that the examination of and presentation of evidence is effective to ascertain the truth, to avoid loss of time and to protect the witnesses from harassment and confusion.”

This provision clearly gives the Judge the ability to limit or restrict the right of the accused to question a witness should he or she feel that such questioning would be a form or harassing the witness, or making the witness feel confused.

In considering the rights of survivor witnesses in particular, the CPC has several additional provisions. For example, Article 264 of the CPC is entitled “Special Evidentiary Rules When Dealing With Cases of Sexual Misconduct”, and deals exclusively with ensuring that evidence provided in such a case is first and foremost admitted with the well-being of the injured party in mind. Articles 195.2 and 198.1-3 all ensure the right of the injured party (including survivor witnesses) to file for

compensation under BIH property law for the crimes committed against him or her. Perhaps most interesting is the right of the injured party (including survivor witnesses) to participate in the trial, including but not limited to “the right to be present, understand, and even speak at the trial” (Karović, Thibord, and Blom 14), the right to “have a legal representative and also a power of attorney who has the same rights to be present at trial as the injured party (Ibid), and the right to “make a closing argument to the Judge (Ibid).” This last right is very impressive, as it “would in fact give the victim the opportunity to participate in sentencing recommendations (Ibid)”, which is almost the highest level of participation for an injured party that one can expect to find. This law is generally not observed in the court, however, and the project of providing legal representatives who can help witnesses utilize all of their rights in the courtroom is mostly the concern of organizations outside of the court working for witness’s rights.¹⁵

Other sections of the CPC provide various other rights for witnesses in general, and for survivors of sexual violence in particular. Articles 251, 238, and 252.3 protect witnesses from having to repeat testimonies (Karović, Thibord, and Blom 12), and Article 273 allows witnesses to defend and explain previously given statements should they be questioned about them during the trial (Ibid). Crucial to cases involving sexual violence is Article 86.5, which states:

“It shall not be allowed to ask an injured party about his sexual experience prior to commission of the criminal offense and if such a question has already been posed, the Court decision cannot be based on such statement.”

¹⁵ For example, I learned in my interview with Koen Marquering and Viktorija Ruzićić that the United Nations Office of the High Commissioner for Human Rights discusses this issue in its presentations on the rights of injured parties.

The survivor is clearly given the right to protection from harassment from the court on this issue. This is vital in making sure that no part of the survivor's sexual history becomes part of deciding the guilt of the accused for the crime in question.¹⁶

Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses

Besides these general protections for witnesses laid out in the CPC, the Sud BiH must also follow the special Law on the Protection of Witnesses under Threat and Vulnerable Witnesses¹⁷. This law has many special provisions for witnesses who feel immediate threat to their lives should they testify, or who are vulnerable as witnesses because of the nature of the crime committed against them. The category of vulnerable witnesses is defined as follows in Article 3(2) of the Law:

“a ‘witness who has been severely physically or mentally traumatized by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive’ (Karović, Thibord, and Blom 16)”

Survivors of sexual violence certainly meet the criteria in this definition, and as such the Law is another crucial element in protecting their rights as they go through the testifying process.

Regarding vulnerable witnesses, the Law takes important steps in making the protection of the rights of survivor witnesses more rigorous. Many of the provisions of

¹⁶ This law would generally be used to protect women from having their sexual experience used against them in the court. However, it is also in place to prevent other aspects of sexual history from being considered in a case. For example, in one case in the Sud BiH, a Prosecutor believed he could add to the sentences of criminals by proving that several of his witnesses were virgins when the accused raped them. Unfortunately, this sets a dangerous legal precedent in which sexual violence against women with no previous sexual experience is somehow worse than that against women with previous sexual experience. This section of the CPC is in place for a reason: to be sure that sexual violence is evaluated on the basis of the facts of the case, and not the sexual history of the injured party.

¹⁷ Hereinafter in this section, simply the Law

the Law simply expand upon the rights given to the witness in the CPC. However, Articles 6 and 8 of the Law, pertaining solely to vulnerable witnesses, provide special, detailed explanations on the rights of the witness that seriously affect survivor witnesses.

Article 6 states:

“During the investigation, the Prosecutor, and after the indictment has been issued, the Court, shall ensure that the body responsible for issues of social care is aware of the involvement of the vulnerable witness in the proceedings and shall enable the assistance of this body as well as psychological support to the witness, including the presence of appropriate professionals at examination or hearings.”

This Article clearly gives the witness the right to psychological assistance at any point during investigations, collection of statements, and during the trial. This should be considered during the initial investigation of witnesses who are named in the confirmed indictment, in which Lucia of the WSO told me that a psychological support person is rarely made available to the survivor witness, even when she has the right to one.

Article 8 of the Law states:

- (1) The judge or the presiding judge shall exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is examined, particularly to protect the witness from harassment and confusion.
- (2) In exceptional circumstances, the Court may, with the consent of the parties and the defense attorney, hear a vulnerable witness by posing questions directly to the witness on behalf of the parties and the defense attorney.

Article 8 of the Law again makes it clear that the right of the accused to question the witness is neither absolute nor inflexible. Article 8 can be used as another referent document if and when Judges decide to restrict this particular right of the accused.

While the CPC provides general guidelines for protection of the witness' rights in the courtroom, the Law goes one step further in making provisions for dealing with witnesses in more sensitive situations. It deals with particular concerns of witnesses in such situations, such as protection from having one's identity revealed, a law allowing

the Judge to order that the accused be removed from the courtroom, and a law allowing testimony to be given by a witness outside of the courtroom, should entering the courtroom be determined a significant risk to the witness or the witness' statement. The Law is absolutely necessary in giving more specific rules by which the court must abide to ensure that the well-being, health, and life of the witness is being protected to the best of the court's ability under the law.

Case Study

While it is important to know and understand all of the legal and non-legal structures in place to guarantee the rights of the survivor witness, what is crucial is how these structures are put into practice. From the investigation of the witness to her post-trial care, it needs to be ensured that her rights are upheld to the highest degree. I was able to observe one aspect of this process on the ground: the treatment of the witness in the actual courtroom. Of all the parts of the testifying process, the experience of the witness in the courtroom is of the greatest significance. This is when the witness finds herself under the greatest pressure to deliver her story as clearly and in as much detail as possible, while attempting to remain as collected as possible in order to retain her credibility before the court. Thus, the treatment of the survivor witness from the moment she walks in the court until the moment she leaves it is vital to her well-being and for the protection of her rights as a witness.

The case I observed was that of Neđo Samardžić, being tried before an appellate panel in the war crimes section of the Sud BiH. His revised indictment in the appellate case has ten counts. Counts one through three are all related to abuse of civilians in the form of beating, abduction, imprisonment, and murder. Counts four through ten (excepting count nine) of the indictment are all related to various offences of sexual violence carried out in the municipality of Foča from May to November of 1992. All of the offences he is charged with are stated in the indictment as deliberate acts that were part of a systematic attack on the Bosniak population in the municipality of Foča. His first instance verdict from the main hearing was revoked on the claim that the criminal proceedings inhibited the rights of the accused. His appellate case is being carried out

with the original panel of judges, with Judge Azra Miletić¹⁸ presiding. All witness testimonies, in order to avoid recalling the original witnesses, are being re-administered to the court through audio and video recordings made at the main trial.

The testimony that I observed (by way of a video recording) was that of N. S.¹⁹, giving testimony related to count four of Samardžić's revised indictment. This count charges Samardžić with physical abuse and rape, stating that in May, 1992, he raped and physically assaulted one N.S., after which he took her outside, tied her with rope to a post outside of her home, and left her. While the witness's statement included many offences beyond what is charged in count four of the indictment, her testimony was used in relation to that count. She was brought into the court as the Prosecution's witness, and did not request or receive any protection or anonymity services.

In order to understand how difficult the testifying process can be for some survivor witnesses, it is necessary to unfold certain details of N.S.'s experiences during the war. At the start of the war, she lived with her husband and sons in Miljevina, in the municipality of Foča. On two occasions, the dates of which she could not recall, her husband was abducted and taken for "questioning". After the first abduction, he was returned to her. However, on the second occasion, he was abducted with one of her sons, after which her son was returned to her but her husband was killed. His body was recently (within the last year) discovered, and she was finally able to bury him. After this, Samardžić and his brother, Zoran began to regularly search and burgle her apartment. At

¹⁸ This name is taken from an oral translation during the hearing; I was unable to find the name in writing and as such the spelling may not be correct

¹⁹ While this witness' name was released during the trial, her testimony was closed to the public during the first trial and as such it seemed inappropriate to include her full name on the sole basis that it was heard during the retrial. As such, I will use only her initials as used in Samardžić's indictment and in the original trial.

some point during one of these encounters, Neđo began to physically and sexually abuse her. He beat her, hitting her on the back of her head with a rifle butt, kicking her, slapping her, and so on. On one particular occasion, Zoran beat her so badly in the elevator of her apartment building that she had no teeth left in her mouth. One night, Neđo and Zoran arrived at her apartment, took almost everything that belonged to her, and raped her. On that particular night as Neđo raped her, he forced her to eat her own hair and stabbed her multiple times with a bayonet. After Zoran raped her as well, Neđo took her out of her home in only her nightgown, drove her to an undisclosed location, and tied her to a post with rope, leaving her there. Later, a friend untied her and kept her safe in his home for two weeks. Unfortunately, N.S. was eventually discovered and taken to the police station, where she was beaten and many of her bones were broken. The police officers that beat her compelled her to make a false statement about what Neđo and Zoran had done to her. She was then taken back to her apartment, where Neđo and Zoran continued to return separately and rape her on several occasions. This happened five or six times.

Finally, in approximately June of 1992, N.S. was forced to leave her hometown with hundreds of women and children from her community. They were taken to a place called Partizan Hall, where Neđo again found N.S., took her to a barn near the hall, and raped her. She stated that seventeen other men were at the hall, and she observed countless sexual offences carried out against women and young girls during her stay there. She was at last taken to Goražde, on the Bosniak side of the frontlines. She presumed that she would be safe from harm there, as the soldiers working there were her countrymen and were fighting the men who had abused her. However, she was further abused when some soldiers accused her of betraying them and of poisoning their water, at

which point one of them broke her finger and the rest of them beat her. She was also pregnant from the repeated rapes, and had to undergo an abortion at six months of pregnancy. When the war was over, she had to stay in Germany for three years of medical treatment. She underwent seven operations, during one of which twenty-four centimeters of her own hair was found in her liver. Clearly, the events that N.S. experienced are traumas that will stay with her forever. In cases with survivor witnesses who endured so much trauma and will have to discuss it in a public forum, it is obvious just how necessary it is to preserve the rights of the witness in so far as it is possible to do so within the law.

First the presiding Judge questioned the witness about her personal information. Because this witness had no anonymity or protection services, her full name, the names of her parents, her birth date, and her current address were read before the court. She made her oath to tell the truth, after which the Prosecutor was able to begin questioning. I noticed throughout the duration of his questioning that he asked very specific questions, asking N.S. to share only the details that pertained to events with the accused, and not pushing her to reveal details that made her uncomfortable. While he did not ask her if she needed a break at any point, he was generally sensitive and kept his questioning as brief as possible so as to not drag out the testifying process. Whenever he noticed that she felt flustered, emotional, or pressured to answer a question, he reminded her that she could take her time in answering and that there was no rush. At no point during the Prosecutor's questioning did the Judge have to intervene, and N.S. was able to maintain her composure throughout the duration of his questioning.

When the defense council began his cross-examination, it became obvious that he was attempting to shake the witness's statement and to make her appear less credible. He asked her to recall exactly how many statements she had made and on what dates, and to whom, and began to question her about these previous statements. He said, "you stated something in one of your previous statements that you failed to mention today. Didn't you state that Zoran Samardžić raped you?". When she said yes, he began to ask her detailed questions about the incident in the elevator, even asking her if the elevator was moving when Zoran was raping her. However, at this point, the Prosecution objected, stating that he hadn't asked N.S. about this incident because he hadn't wanted to force her to tell a traumatizing story that didn't pertain to the accused, Neđo. After a stern warning from the Judge to follow the rules of cross-examination and ask the witness questions pertaining only to the Prosecution's line of questioning, the defense council ended his questioning. The questioning that followed from the Judges' panel was brief, and included no inquiries that seemed to further upset or traumatize N.S.

Given what I observed in the courtroom, I was able to make several conclusions about the practices of supporting witnesses and protecting their rights. I noticed that there was no member of the Witness Support Office in the courtroom with N.S. (although I was aware that they would be observing the case in another part of the court building and would be available instantaneously should the need arise). While she may not have asked for this support, it would perhaps be prudent, especially during the testimony of such a highly traumatized witness, to have a WSO officer on hand, even simply to request a break to the Judge. As this office is the one most intimately familiar with the concerns

and needs of each individual witness, it seems logical to have someone on the staff present when the actual questioning of the witness takes place.

I also noticed that the Prosecutor in this case seemed to be particularly sensitive to the issues of sexual violence in this case. While I would generally argue that it would be better to have the female presiding Judge on the panel posing the questions of the Prosecutor and the defense council to the witness, I was pleased with the conduct of the Prosecutor, and with the genuine concern with which he treated the witness. On the other hand, I was almost astonished by the behavior of the defense council. Not only did he violate the rules of cross-examination by asking the witness a question not pertaining to the Prosecution's line of questioning, but he also forced her to recount traumatizing events without any apparent concern for her well-being. Perhaps even more concerning was the fact that the Judge failed to intervene in this questioning, and that the Prosecutor had to object before the Judge put a stop to the inappropriate behavior of the defense council.

Something that was fairly alarming to me was the way in which non-public testimonies were unceremoniously made public in the retrial. Due to the sensitive nature of the charges against Samardžić, the original trial was closed to the public. However, in a matter of only a moment or two, the Judges and the Prosecutor decided to allow the public to observe the retrial and decide on a case-by-case basis whether or not to exclude the public from hearing individual testimonies. On the day I heard N.S.'s testimony, the Judge raised the issue before the Prosecution that not only had this testimony been closed to the public in the original trial, but that this testimony also included the names of several protected witnesses whose names had not been released during the original trial.

After a brief argument from the Prosecutor that to withhold this testimony from the public would be to deny it important information about the accused, the Judge decided to go forward with the testimony, allowing the public to hear it and to decide on a case-by-case basis whether or not to exclude the public from hearing other testimonies. In regards to the members of press in the room, the Prosecutor made a brief comment stating that perhaps they could withhold the names of protected witnesses in their writing, but this was not explored further by the Judges. I was sincerely concerned by this decision, and expected the court would have at the very least contacted witnesses prior to making such an important decision concerning their privacy.

Generally, I was neither delighted nor appalled by the treatment of this particular witness in the Samardžić case. While I believed that she was generally treated with respect, and with concern for preserving her dignity, I was concerned with the behavior of the defense council, and also with the court not suggesting at any point a break in the questioning, or inquiring at any point during the questioning about N.S.'s well-being, her wishes, or her state of mind. However, N.S. seemed confident in her statements and rather unshaken by the testimony process, and from what I observed, the court did little to participate in any kind of retraumatization of the survivor witness in this case.²⁰

²⁰ Something that struck me, in this case in particular, was the male to female ratio in the court. Not only was the Prosecutor a male, but the ratio on the Judges' panel was also 2:1 men to women. While I would not generally argue that women are inherently more sensitive when it comes to issues of sexual violence, and that there are plenty of men with the capacity for immense compassion in such cases, cultural context in this case is important. N.S., and the other women who Neđo allegedly raped during the war, are Muslim women. Their culture concerning sexual violence is deeply embedded with silence and shame, and discussing such events in front of men could be a serious problem. In such a case, I wondered if the court had even considered having a majority of women on the Judges' panel, for the sake of the comfort of the witnesses sharing their traumas with the court.

Non-Court Institutions Involved in Witness Support

While the legal supports in place for witnesses are of the utmost importance, it is clear that these supports are incapable of covering every aspect of a witness's needs. Especially in the case of survivor witnesses, the court's supports are simply not rigorous or long-term enough to ensure that every woman get through the testifying process with the least amount of retraumatization and emotional distress. In addition, because the prosecution and defense are unable to go over a witness' statement before he or she actually enters the courtroom, witnesses are very often unprepared and for the kind of questioning that will occur in the courtroom, and as such suffer additional distress during the time of testifying. For these and many other reasons, it is crucial that outside sources contribute to witness support in the court, and be allowed to participate in making suggestions and critiques of the court's system in order to ensure that witness support and the protection of the rights of witnesses are at their absolute best in the Sud BiH.

The media must be allowed to observe trials and speak with court staff in order to keep the public informed as to the court's role in witness support. Without this transparency, it will be difficult for the public to have faith in the court's procedures, and it will most likely be more difficult to convince other witnesses to come forward if they are unaware of the supports available to them. In addition, the cooperation of local NGOs must be secured in order to show the people of BiH that the court has a vested interest in the local population, and as such is continually engaged in public and community outreach. Lastly, as a new institution, the Sud BiH can obviously benefit from the experience and perspective of international organizations working in the region. In cooperating with these organizations and ensuring that they be allowed to contribute to

the court's improvement, the Sud BiH will show that it is dedicated to making all necessary adjustments in order to set the standard for legal institutions in BiH.

One investigative reporting organization, the Balkan Investigative Reporting Network²¹, is highly involved in keeping track of the Sud BiH and the cases it is trying. Nerma Jelačić is the country director for BIRN, and has much insight to offer into the Sud BiH. Her background as a reporter and her relationship with the reporting staff at BIRN allows her to gain feedback and gather information that would otherwise not be heard about the Sud BiH. She has connections with survivors of sexual violence who have testified at the court, and has a different perspective to offer from that of the staff at the Sud BiH.

When I asked her about the experiences of survivor witnesses in the Sud BiH, one of Nerma's first comments was that "they are not happy." She gave several reasons for this. First, she discussed that fact that most survivors feel that they *do* receive adequate support from the court "particularly in that time when their testimony is needed." However, as soon as they leave the court after testifying before the court, Nerma says, "there is no mechanism in place to take care of them after." This observation seems consistent with the practices of the court, and of the WSO, that Lucia Dighiero explained. While there are strong support mechanisms in place while the witness is needed for the purpose of a case, as soon as she gives her testimony and serves her purpose, she receives little support or follow-up care from the court. Nerma said, as Lucia did, that witnesses generally get one phone call and the name and phone number of a counselor should they want or need one, but that is the extent of the court's follow-up with survivor witnesses.

²¹ Hereinafter: BIRN

While it is perhaps not the role of the court to provide long-term psychological care for a witness, it is important for the court to remember that the survivor would never be dealing with issues of retraumatization, anxiety, or any other emotional affects of testifying, had the court not summoned her to begin with. Thus, while it should not be expected that the court take on all responsibility for the survivor's well-being post-testimony, it absolutely cannot be absolved of all responsibility once the witness walks out of the courtroom.

Another reason for some survivor witnesses' discontent with the court, according to Nerma, is the inconsistency with which it can be run.²² As a new institution, it is clear that the Sud BiH has a staff that is continually learning from its own mistakes and refining its practices. This shows in the practices of some Judges in highly sensitive cases, including cases dealing with issues of sexual violence. Nerma mentioned that on certain occasions, when the defendant is able to question the witness directly and asks something inappropriate or begins to harass the witness, some Judges have done nothing to stop such behavior. Because it is clearly stated in the CPC that the Judge has the responsibility to stop this kind of harassing behavior, it is alarming that the regulation of the questioning of the accused has not been more rigorous.

In a similar instance, Nerma related the story of the closing arguments of the defense council in the Stanković case. In this case, the council (a female legal professional) argued that the counts of sexual violence against Stanković should be dropped, because it was well known in the town where the alleged crimes were

²² Nerma discussed in great depth the fact that the court staff is still learning the regulations to which it is subject, and as such, witnesses often feel that their treatment is inconsistent and sometimes unfair.

perpetrated that he was a very handsome and popular man, and therefore the women who testified against him must have wanted to date him and invented stories that he raped them when they became jealous of his subsequent relationships. This lawyer also attempted to discredit some of the witnesses by making the argument that it is “a well-known fact” that a women cannot have children after someone rapes her, and so some of the witnesses who had children therefore must have been lying in their testimonies. In such an absurd and obviously illogical argument before the court, the Judge has the right to step in, to stop the closing argument, and even to sanction the lawyer.²³ However, the Judge in this case took no such action, and allowed the defense council to make this offensive and atrocious argument.

Nerma also brought up the issue of the Samardžić case and the releasing of previously protected witness statements to the public. Many of her concerns were in line with the observations I had made in the courtroom. However, a story of hers contributed to the general impression that the court’s conduct in this particular issue of the Samardžić case is questionable. One of her staff members returned from her observation of the case confused as to whose names she was allowed to release to the public in her writing (the names of protected witnesses were not specified by the court). In order to clarify the situation, she contacted the Judge to make sure she would not be endangering a witness by releasing her name to the public. The Judge told this journalist that she should use her judgment in deciding whom she would be endangering by releasing a name to the public.

²³ Nerma discussed the fact that in such cases, the Judge can even recommend that the legal council in question be sanctioned by his or her licensing association (equivalent to the American Bar Association). She also stated that she thought that in the ICTY, this kind of behavior on the part of a legal representative would have been stopped immediately.

Such a blatant violation of witnesses' rights is alarming, and demonstrates a need for the court to pay closer attention to the details of witnesses' rights and the regulations of testimony in order to ensure that no witness is endangered, humiliated, or made to feel uncomfortable by the court's decisions regarding her statements.

In terms of informing witnesses as to their rights, reaching out to them, and keeping them apprised of the cases in which they testify, Nerma stated many problems. In general, she seems to think that the court has a problem with outreach. She stated that the information that witnesses receive about cases generally doesn't come from the court but from other sources such as the media. She also mentioned that many outside sources have been pushing the court to establish a "proper outreach program." The Court Support Network²⁴ is a form of outreach, in which the WSO of the Sud BiH and NGOs in all municipalities of Sud BiH are supposed to work together to do witness outreach work. While it seems wonderful in theory, Lucia from the WSO says that it functions only on the most basic of levels, and even then not every well. Nerma even stated that "it doesn't function", and that as soon as the court formed it, it was forgotten and became the sole responsibility of NGOs, and the NGOs are confused as to their exact responsibilities in the CSN. Nerma emphasized the fact that the Sud BiH needs to learn from the ICTY, and as such should understand the importance of community outreach when most people outside of Sarajevo have no idea what is going on in The Hague because of the lack of outreach from the ICTY.

One story Nerma told must not be overlooked because of its demonstration of how blatantly a witness' rights can be violated by legal institutions. In the particular

²⁴ Hereinafter: CSN

situation Nerma related, a survivor was working on the outskirts of Sarajevo in a professional office. One day, completely unannounced by the court or any other officials, officers from the Bosnian State Investigative Protection Agency²⁵ showed up in her place of work. Not only did they physically escort her out of the office, but before doing so, announced in front of everyone working in the office that she was required to go with them in order to testify in a rape case. At the time, she was not being escorted to the courtroom under any summons motion; but SIPA was simply investigating her and hoping to take her statement. While Nerma pointed out that this is an extreme case, it points to a larger discrepancy in the system of the initial approach of witnesses. If the guidelines for the initial approach of a witness are so loose that she can be approached or contacted by multiple institutions and individuals, even multiple times, there is clearly a need for the system to be regulated and standardized.²⁶ Only when there are official guidelines from the court concerning the manner in which a witness can be approached, and by whom she may be approached, can it be more certain that the witness's right to privacy will be protected from the first moments of investigation.

Another non-court organization working on witness support issues is the United Nations Office of the High Commissioner for Human Rights.²⁷ The UNOHCHR in Sarajevo is working on many issues associated with survivors of the war. Particularly, it is working on issues of reparations for survivors of the war. This includes but is not

²⁵ Hereinafter: SIPA

²⁶ Viktorija Ruzićić mentioned in my interview with her that sometimes, a witness is initially contacted to come make a statement by the office of the Prosecutor from the Sud BiH, and a few days later is contacted by SIPA again for the same purpose. She said that witnesses find this confusing and frustrating, demonstrating further that the Sud BiH needs to set clearer standards for the initial contacting of witnesses.

²⁷ Hereinafter: UNOHCHR

limited to assisting war survivors with securing financial aid from the state and seeking restitution of property that was lost to them during the war. Their work is very important to understanding the concerns of survivor witnesses, because they are able to put the process of giving testimony into a broader social context. As such, it is important to consider the work of the UNOHCHR and how it can be tied in with the work of the Sud BiH in order to make the experiences of survivor witnesses more positive and beneficial for all parties involved.

Viktorija Ruzicic and Koen Marquering, Human Rights Officers with the UNOHCHR in Sarajevo, spoke about some of the broader, more overarching concerns of war survivors who are now testifying in the Sud BiH. In terms of working specifically with survivor witnesses, Koen and Viktorija explained that they are focused on meeting with representatives of victims' associations (specifically for torture victims, including survivors of sexual violence, and families of missing persons) and working with them to explain in greater detail their rights, the "legal framework" of testifying, and the CPC. Viktorija mentioned that survivor witnesses "are not aware of their rights", so the UNOHCHR is able to step in and "provide some kind of legal assistance." Viktorija noted that one serious oversight on the part of the Sud BiH is its failure to inform injured parties as to their right to have legal representation in the courtroom. The CPC provides injured parties with unprecedented rights to participation in the courtroom, and the fact that witnesses are unaware of those rights is unacceptable. With the help of the UNOHCHR, survivor witnesses are able to obtain the information they need in order to better understand their rights as witnesses of the Sud BiH. The legal framework is explained to survivor witnesses in non-legal jargon that they can understand; this is

crucial in the process of apprising survivor witnesses of their rights and giving them the ability to defend those rights should the need arise during the testimony giving process.

One problem with the testifying process that Viktorija raised is that many survivor witnesses “feel that they are betrayed or used not only in the court of BiH but also in the ICTY.” Some survivor witnesses feel this way because after giving testimony, they have the sense that “no one cares about them.” Koen said, “maybe they’ve had some support during the trial, but nothing afterwards, like not even a phone call.” If the WSO is unable to even fulfill the minimal requirement of making one follow-up call with witnesses, the support framework for witnesses in the Sud BiH is clearly struggling. Especially with survivor witnesses, sometimes the greatest need for support and care arises after the testimony is given in the courtroom, and as such, it would be encouraging to see a greater effort on behalf of the court to provide witnesses with post-testimony care and support. This is a concern that most non-court affiliated individuals and institutions share²⁸; when witnesses have given testimony, the court seems to wash its hands of them and move on. It seems clear that some larger framework for supporting and caring for witnesses post-testimony is necessary.

Looking at the larger social context for survivor witnesses, Viktorija and Koen were able to provide some enlightening information as to why some witnesses may resist testifying, or feel that they should be taken better care of once they have testified. The biggest problem in this larger context is that “there is no comprehensive reparations program at the state level” for survivors of wartime violence in general, including for

²⁸ This is the opinion I gathered from my very narrow sample of unaffiliated organizations; Nerma from BIRN and Koen and Viktorija from the UNOHCHR all shared the opinion that witnesses typically fall off the court’s radar after testifying.

survivors of wartime sexual violence. Often, this means that survivors are living in conditions of significant poverty, and have been unable to secure restitution of their pre-war property from the state, and as such are living in unfamiliar locations and conditions. For instance, Viktorija mentioned that the highest monthly allowance that a survivor of wartime sexual violence can receive is fifty-six KM. Considering the fact that many of these women are living in households with many family members, have children to support, and are perhaps the sole source of family income, this allowance is not nearly high enough. In addition, if a survivor is living outside of cantonal Sarajevo²⁹, it is incredibly difficult for her to find state-provided psychosocial support or rehabilitation services.³⁰ Of course, as Viktorija reinforced, the UNOHCHR does not expect that the ICTY or Sud BiH should be responsible for resolving these difficult social and living conditions that survivor witnesses are enduring. However, it seems only logical for the Sud BiH to consider all of these circumstances in designing a realistic and truly practical support system for survivor witnesses.

Generally, in terms of the Sud BiH's approach to survivor witnesses, Koen expressed his opinion very clearly when he noted, "in theory the mechanisms are in place but in practice they don't function." This observation seemed mostly rooted in the belief that the Sud BiH is new and slowly learning how to use all of the theoretical mechanisms

²⁹ The Federation of Bosnia and Herzegovina is separated into ten cantons, one of which is Sarajevo and the surrounding area.

³⁰ Viktorija mentioned that even in cantonal Sarajevo, most of the services are provided by NGOs, not the state itself. In terms of the state institutions that do offer psychosocial support free of charge, Viktorija stated that all these institutions are really doing is providing survivors with tranquilizer pills, as opposed to investing any kind of longer term psychological support.

provided by the law on a practical level.³¹ Both he and Viktorija noted several problems with protecting the witness' rights in the courtroom, mostly having to do with the Judges focusing more on protecting the rights of the accused than those of the witness. For instance, Viktorija noted one case in which witnesses were asked about their sexual history. She also mentioned several cases in which family members of the accused, or the defense council actually insulted a witness in the courtroom, and the Judges present took no action to put a stop to such behavior. Koen also brought up issues with balancing the rights of the accused and the witness, in terms of the defense council attempting to confuse witnesses, and of Judges failing to intervene in such cases. Most of the concerns that Koen and Viktorija voiced about the processes concerning witnesses in the Sud BiH were mentioned by others as well³², and it would appear that from the consistency of the complaints of the court's practices, some of the less complicated, more solvable issues need to be resolved without further delay.

The women's NGO *Žene Ženama*³³ is another organization unaffiliated with the court that has been doing work with survivor witnesses. It was established in 1994 "by three women of different ethnic and religious backgrounds (Maria Theresa Maan Besić, Personal Interview)." The goals of *Žene Ženama* are numerous, but they are primarily focused on the empowerment of women and human rights issues in BiH. They address these goals through public advocacy work, education, and volunteer programs within the organization. Maria Theresa Besić (Terry) is the head of Public Relations at *Žene*

³¹ Koen mentioned that the court is continually improving, but that its status as a new institution makes it more prone to mistakes and oversights.

³² Their comments were consistent with my own observations, some comments made by Lucia in my interview with her, and with most of Nerma's observations.

³³ This means "women to women" in the Bosnian language.

Ženama, and discussed some of the programs that the organization is working on that effect survivor witnesses.

First and foremost, Žene Ženama is working as the lead organization in the Court Support Network for the Sud BiH. Terry explained that Žene Ženama provides training to other NGOs in order to build their capacity to work with survivors and guide them through the court case process. In theory, the CSN was established to directly support court cases from the grassroots level. It does so by hosting roundtables and workshops in different municipalities all over BiH with people from those communities in order to gather and share information as to what is going on in the court, and gather feedback as to what could be done better. These workshops, funded by the Spanish Embassy, began in September of 2005 and will, according to Terry's calculations, continue until the middle of 2007. When the roundtables and workshops have concluded, the information gathered will be used to produce an official document with regulations for NGOs dealing with survivor witnesses and how to most effectively help them. Terry also mentioned that another goal of the CSN is simply to establish a more formal network of NGOs in the region that have the capacity to work with, and provide support to, survivor witnesses.

Terry's assessment of the CSN leads to the conclusion that communication between NGOs and the Sud BiH needs significant improvement. Her account of the CSN and its progress directly contradicts that of Lucia's from the WSO in the Sud BiH who stated that the CSN is completely non-functional. This points to a fundamental lack of communication between the Sud BiH and the NGO community in BiH. Indeed, Nerma Jelačić pointed out that when the international registrar left the Sud BiH, the dialogue between the court and NGOs was completely lost for nine months, from March until

November of this year (Personal Interview). Without a consistent dialogue, exchange of information, and sharing of progress between the Sud BiH and NGOs, it is unlikely that the work of NGOs will be able to very effectively help the Sud BiH in its own work with survivor witnesses. Terry's comments about the CSN also point to specific goals and dates of completion, none of which Lucia seemed to be aware. If the Sud BiH is unaware of the goals of the CSN, it is unlikely that it will be able to use the network to its full advantage once it has been fully established. Again, it seems that a lack of communication has caused a significant lack of understanding on the part of the Sud BiH. Hopefully, the dialogue between the court and NGOs will be reopened, and together they can look at the goals of the CSN, and reassess them if necessary, in order to most effectively serve survivor witnesses both in and outside of the court.

In 2001, Žene Ženama began providing psychological care for women. This is an important part of the role the organization plays in support survivor witnesses. Terry mentioned that Žene Ženama tries to work in partnership with state social institutions in providing this care, but that the organization itself can provide psychological support if necessary. As Viktorija and Koen from the UNOHCHR pointed out, securing psychological care can be a very difficult task for survivors, so NGOs like Žene Ženama that provide this care free of charge are of the utmost importance in maintaining the well-being of survivor witness, especially post-testimony. Another way in which Žene Ženama directly affects survivor witnesses is through its public advocacy work. Through this work, it attempts to give survivors a voice in the public arena, and works to secure their rights in social and legal realms. Terry noted that with the increase of advocacy in the

region, more and more women are beginning to speak out about what happened to them during the war.

Clearly, the work of NGOs like Žene Ženama is crucial in contributing to the number of services available to survivor witnesses. Without such organizations, most survivor witnesses would have little to no support on the grassroots level of their own communities. Particularly for women living outside of Sarajevo, NGOs are almost the only source of information in terms of what is happening in the Sud BiH, and NGOs are also the first point of contact for women seeking any kind of psychological support. If Žene Ženama is able to continue to take the lead on making the CSN a truly functional and solid network, the services available to survivor witnesses both in and outside of Sarajevo will not only be more widely available, but the guidelines for providing these services will be a great deal clearer to the NGOs providing them. In addition, the reestablishment of a consistent and clear dialogue between NGOs and the Sud BiH is a necessary step in ensuring that the court is apprised of the work going on in local communities, and that women in local communities are apprised of the work going in the court. Once the CSN is able to institute common goals for supporting survivor witnesses, and is able to share those goals with the WSO in the Sud BiH, the voices of survivors from local communities all over Sud BiH will finally be heard and used in the official guidelines for support of future survivor witnesses.

Clearly, the Sud BiH is unable to address all of the multifarious needs of survivor witnesses on its own. While it should not be held responsible for the long term support of care of survivor witnesses, as the institution putting these women through time-intensive and potentially traumatizing experiences, it does have an obligation to work with

institutions outside of the court to ensure the well-being of witnesses once they have given their testimony in the courtroom. It is clear from the vast number of concerns voiced by the people in just three organizations outside of the court, there are many issues that need to be addressed. With a more integrative and outreach-focused approach, the Sud BiH would be able to not only better serve survivor witnesses but also improve its reputation as a legitimate and fully functional legal institution. Thus, a focus on better serving the community it was established to bring justice to would be mutually beneficial and would ultimately improve the community's opinion of the court as well as improve the situations of the members of the community participating in its processes.

Conclusions

International legal precedents and local BiH law function together to establish guidelines for the Sud BiH to utilize in protecting witness's rights. However, without the commitment of all of the court's staff involved in working with witnesses to follow and take advantage of these guidelines, the laws are simply symbolic protections without the potential for practical application. In addition, if the external institutions supposedly working in partnership with the Sud BiH are unaware as to the specific roles intended for them, it is unlikely that a functional network of support systems can be created for survivor witnesses throughout the entire duration of their testifying process. The significant emotional effects of retelling a traumatizing story in a public forum, combined with the larger social and economic concerns of survivor witnesses makes them a particularly vulnerable group of people. The Sud BiH needs to take the first step in recognizing this, and establishing trust between itself and witnesses in order to make the process of testifying mutually beneficial.

The legal precedents set by courts in the international community have the potential to serve survivor witnesses from BiH testifying in the Sud BiH. The decisions set forth in several cases in the ECHR are designed to set important precedents in protecting the rights of witnesses, and in particular the rights of survivors of sexual violence who are acting as witnesses in court. The Sud BiH is legally able to refer to these decisions as legitimate foundations for some of its own decisions, and as such should consider some of the more rigorous protections for the witness set forth by the ECHR. The ICTY has set an important international standard in prosecuting wartime sexual violence. However, it too was once a new institution and as such has made many

mistakes and had to learn from them. The Sud BiH should learn from those mistakes as well, in order to prevent making the same mistakes that can destroy trust between local communities and legal institutions, and therefore eliminating the possibility that injured parties will willingly come forward to act as witnesses in the court.

The CPC of BiH and the Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses both provide necessary and important protections for witnesses under BiH law. However, two aspects of the CPC seem to greatly hinder the practices of the court and make giving testimony for the witness much more difficult. The first of these is the broad and general rule allowing the accused to directly cross-examine a witness. There are two problems with this law; first, that it is not more specific in and of itself, and second that Judges interpret it broadly and make different restrictions not only in different cases, which would generally seem appropriate, but even in different cases involving sexual violence, which does not seem at all appropriate. It would seem entirely acceptable to limit this right in cases involving sexual violence in the law itself. However, as it does not, it is necessary to set a standard by which Judges can abide, restricting or eliminating this right in cases involving sexual violence. It is shown by both the ECHR and even in the CPC itself that this law is not limitless, and that the Judge has the responsibility above all others in the court to protect the witness from harassment and confusion. Allowing the defense council or a Judge to pose the questions of the accused is a perfectly acceptable alternative, hardly a drastic limitation of the rights of the accused, and makes a significant difference in the comfort and emotional well-being of the survivor witness.

The second law that significantly affects a survivor witness's ability to testify effectively is the law restricting legal representatives from going over witness's statements with them before they give their testimony in the courtroom. A prosecutor at the Sud BiH, Philip Alcock, said himself when asked how he prepared witnesses for trial that he could only do it "very badly." While he believes that he must spend "at least twenty minutes" with a witness before he or she gives a testimony in court, this is not the case with many prosecutors, according to both him and Lucia from the WSO. Lucia stated that there are some prosecutors who see their witnesses for the first time in court, which Alcock calls "devastating" to one's case. Especially in the war crimes section of the Sud BiH, which is has people of trial for crimes they allegedly committed almost fifteen years ago, witnesses have had years and years to give statements, and most have given at least one other statement than the one they will give in front of the Sud BiH. Often these statements will vary because of the time and circumstances under which they were given.³⁴ Given the inevitable inconsistencies, it is important to be able to go over stories with witnesses, and establish which details they remember and those that have since evaded them. This way, in the courtroom, the prosecutor can then go over only the facts that the witness clearly remembers and that are consistent with previously given statements. Doing so would deprive the defense council of the opportunity to spend a

³⁴Philip Alcock went into this problem in great detail in my personal interview with him. Koen Marquering also mentioned this problem in my interview with him and Viktorija from the UNOHCHR. Statements were taken by local police during the conflict, by NGOs during and directly following the conflict, by SIPA, by cantonal courts in BiH, and so on and so forth. Many initial statements were found to be made under duress or in areas where the alleged perpetrators still held significant political and social clout. In addition, Prosecutor Alcock noted that other statements taken by NGOs or other non-legal institutions are subject to no statement collection standard, and as such some very solid and detailed statements are not accepted in court because of the person who recorded the statement.

great deal of time going over each statement ever given by a witness and attempting to discredit him or her by finding the inconsistencies and asking impossibly detailed questions about those discrepancies.³⁵

The WSO in the Sud BiH could also benefit from some internal improvements. Judging from the interview with Lucia Dighiero, while the office and its staff are clearly focused on the needs of the witness and his or her psychological well-being before and during the testifying process, their focus is incredibly narrow. The lack of dedication to creating any kind of large scale, court-sponsored witness outreach program, and to working with local NGOs in order to have a presence in local communities and gain the trust of potential witnesses living there is truly limiting the WSO's effectiveness. Without any apparent interest in the local communities of the Sud BiH, the WSO is restricting its ability to build trust with potential witnesses. The support it provides witnesses before and during the giving of testimony in the courtroom is no doubt incredibly important, and, it seems, generally effective and helpful. However, it is the more long-term concerns of survivor witnesses that have the greatest impact on their lives, and that seem to be the least important to the WSO. If the Sud BiH truly wants to take part in transitional justice

³⁵ I observed an extreme case of this practice of the defense council during the cross-examination of the witness H.K in the Samardžić case. She had testified that she had seen some events from the balcony of her apartment, and the defense council spent almost ten minutes going over the exact location of the trees and other vegetation around the apartment she had lived in nearly fifteen years ago in order to try to discount the statement that she had been able to witness events from her balcony. The witness became understandable confused and shaken, and her statement about being able to witness events from her balcony then became considerably weaker. Had the Prosecutor been able to go over those details of her statement with her before questioning her in the courtroom, he would have known that she could not remember clearly and could have left that part of his questioning out of the proceedings.

in Sud BiH, then it needs to take an active interest in the communities it is attempting to serve. As Nerma Jelačić so aptly pointed out, “Who is the court for, anyway?”

Organizations unaffiliated with the court are all doing exceptional work on their own to improve the experiences of survivor witnesses both in the court itself, pressuring the Sud BiH to engage in more transparent and consistent practices, and outside of the court in broader social, economic, and public health contexts. However, the work of these organizations will never reach its true potential in helping survivor witnesses until coalitions are built between organizations working on different aspects of the witness’s experience. When that happens, the organizations will not only become stronger in their own work, but also will be able to clearly identify their own roles in the process, eliminating extra work that another organization can take on, and eradicating overlap in the work of different organizations. In addition, all of these organizations need to continue an open dialogue with the Sud BiH itself. A significant part of this responsibility lies on the part of the Sud BiH in establishing a dedication and commitment to community outreach, which at the moment is certainly does not have.³⁶ The Sud BiH and external organizations supporting the court’s work need to establish the roles of each in making the processes of the court as transparent and effective as possible. If this happens, survivor witnesses will certainly begin to benefit from the improved capacity of both the court and NGOs to serve them and directly address their needs.

³⁶ Nerma Jelačić indicated the serious lack of any commitment to the community on the part of the Sud BiH when she mentioned that when it was requested of the court to go into the communities in which it handed down a sentence and explain the sentence to locals, it flat out refused and claimed that it was not its responsibility to do so. This and other stories cause me to believe that the Sud BiH has a long way to come in showing its commitment to the communities of BiH.

The Sud BiH is a new institution with great responsibility, and plays an important role in the success of transitional justice not only in BiH itself, but also in the region of the former Yugoslavia as a whole. It should not be forgotten that as a new legal institution, the Sud BiH has handed down unprecedented and absolutely important sentences for war criminals that committed some of the most devastating crimes during the war in BiH in the 1990s. However, these decisions and the positive effect they have no doubt had on the healing of a nation do not absolve the court of improving the more minute aspects of its practices. A legal institution must constantly scrutinize its own practices in order to be sure that it is fairly and equally serving all parties involved in the cases it takes on. Witnesses play an absolutely vital role in the work of the Sud BiH; as stated by Peter McCloskey, a Senior Trial Attorney in the Office of the Prosecutor at the ICTY at a conference titled “Role of Witness in War Crimes Prosecutions”,

“The witnesses in adversarial system³⁷, largely based on British common law, play an absolutely critical role in the presentation of evidence largely because witness’ statements are not considered generally as evidence and are not admissible as evidence.³⁸ There is no dossier before the judges to speak of and it’s a Prosecution’s burden to prove its case beyond reasonable doubt by placing live witnesses before the panel of three judges (10).”

Given the importance of witnesses in prosecuting war crimes cases in the Sud BiH, it is only logical that the court would do everything in its power to protect the rights of the witness and establish trust in communities where potential witnesses live. Using precedents set in international law, its own national laws, and working together with the media, NGOs, and international organizations, the Sud BiH can improve its practices

³⁷ This is the system used in the Sud BiH

³⁸ This is indeed true in the Sid BiH and stated in the CPC of BiH; the only reasons for a witness’ statement to be admitted in court as evidence are if the witness has since died, or if, for very specific reasons, the witness is absolutely unable to appear in court.

regarding witnesses. Until it does, it is unlikely that survivor witnesses will receive the kind of support and care that they need when going through such a difficult experience.

Personal Reflections

When I began this project, I had little but my own personal experiences and convictions guiding my expectations. From what I had previously observed in international law, I expected to find many symbolic laws protecting women who survived sexual violence and later decided to take part in the prosecution of the perpetrators of that violence, but little being done about them in practice. I was concerned that I would find people at the court unwilling to talk with me, and people outside of the court anxious to criticize its practices. What I found in reality was an amalgamation of my original expectations and what I learned through doing extensive reading, interviewing, and observing.

Unexpectedly, I found that my first interviews and observations became available within the court itself. I was surprised to find the head of the WSO willing to speak with me almost as soon as I arrived in BiH, and the cases I wanted to observe open to my observation. Even before I had my first meeting with anyone outside of the court, I had conducted two interviews with court employees and observed the Samardžić case extensively. At first, I think wide-eyed with the impressiveness of the court and grateful to have access to people working there, I accepted everything I heard and found myself fairly impressed with the structures in place for witness support. However, I found that toward the end of this period of time, I began to feel a great deal of frustration. I felt that the information I was hearing from court employees was seriously inconsistent with what I was finding in my observations in the court, and with the concerns that were forming in my mind as I continued my research. I found that there were no real answers for my more

difficult questions, and the people I spoke with seemed to think the work I was doing was either insignificant, irrelevant, or needed to be changed.

A large part of the frustration I felt while researching in the court was due to the attitudes of the staff members toward survivors testifying at the Sud BiH. Each member of the staff I interviewed – Lucia in the WSO, Judge Shireen Fisher, and Prosecutor Philip Alcock, all had personal biases that kept them from looking holistically at the needs of survivor witnesses. For instance, Lucia and Judge Fisher seemed to feel that it was necessary to remind me that these were crimes that happened a very long time ago. For Lucia, this seemed to mean that psychological support was not the primary concern of survivor witnesses. I was surprised by how quickly she seemed to dismiss the importance of psychological care for witnesses when she herself had seen the kind of trauma testifying could cause these women. For Judge Fisher, the amount of time passed since the crimes seemed also to lessen the importance of being sensitive to the needs of survivor witnesses. Prosecutor Alcock is hindered by the thinking of a good lawyer trying to make his case in attempting sensitivity toward survivors. For instance, he compared women's injuries acquired during a sexual assault for their impact in court, negating the importance of a cigarette burn on the ribs in comparison to a nipple bitten off. Comments from these staff members angered and frustrated me, and made me feel that no progress could ever be made in the court so long as the personal biases of people working there prevented them from taking the necessary action to protect and support survivor witnesses.

Once I was able to talk with people outside of the court, my frustrations finally met something other than a huge brick wall. I found in the statements of people working

to improve the court's treatment of witnesses an echo of my own concerns. It was only when I began talking with these people that I was truly able to form the opinions that shaped this paper. Instead of using my intuition, I was able to use the statements of people working in the region and facing the same obstacles that I ran up against while attempting to research this topic in order to guide my work. While I did not necessarily engage in conversations with these people that in any way consisted solely of bashing the court, I was able to have honest discussion with them about the limitations of the court and what it could be doing better, as opposed to trying to apologize for my opinions and criticisms to court employees who seemed unwilling to recognize any flaws in the system.

When I finished all of my interviews, I found that while I was as discouraged about the current practices of the Sud BiH concerning survivor witnesses as I had expected to be, I also felt optimistic about the potential for change. The laws that are in place are truly remarkable, and can be used to the advantage of the survivor witness, if only the initiative to do so will be taken on by Judges, Witness Support Officers, and legal representatives working within the court. In addition, the commitment to serving the people of BiH is clear in the media, in NGOs, and in international organizations, and all the court need do is take advantage of the opportunity to build trust in local communities in order to improve its reputation in the country, and even to increase its potential for recruiting witnesses that can help it convict war criminals. I truly believe that the Sud BiH can show the international community that it is a legal institution with an unprecedented presence in local communities, and with the absolute highest standard of witness support and care. With the proper planning and commitment, I have no doubt that

the Sud BiH can transform itself into an institution in which survivor witnesses know they will receive better support and care than in any other court.

Researching such a difficult and emotional subject was obviously a personal challenge. As a scholar of Gender and Women's Studies, I am often closer to violence against women than I ever care to be. However, it is when I become intimately familiar with the concerns of survivors of sexual violence that I am able to renew my conviction that everything possible needs to be done within the law to protect and support them. If there is one thing that I am certain of, it is that violence against women is a problem needing immediate and comprehensive attention in international legal systems. It was this conviction, and the renewal of it with every horrifying story I heard, that allowed me to continue this work in order to possibly contribute to change. It is my belief that if this work can touch even one person, or move even one person to make a change in the treatment of survivor witnesses under the law, it will be a great success.

Bibliography

- Alcock, Philip. Personal Interview. December 4, 2006.
- Council of Europe. "Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11". Registry of the European Court of Human Rights: September 2003. Obtained from: <http://www.echr.coe.int>
- Criminal Procedure Code of Bosnia and Herzegovina. Official Gazette of Bosnia and Herzegovina No. 03/03. 2003. Obtained from: <http://www.legislationonline.org>
- Dugandžić, Danijela. "Rape as a violation of human rights". University of Utrecht Faculty of Law. 2003.
- Dighiero, Lucia. Personal Interview. November 23, 2006.
- Fisher, Shireen. Personal Interview. November 28, 2006.
- Jelačić, Nerma. Personal Interview. November 30, 2006.
- Karović, Elma, Thibord, Julia, and Blom, Mirjam. "The Balancing Rights of the Defendant Against the Rights of a Victim". Interoffice Memorandum to Judge Shireen Fisher. Sud BiH, January 2006.
- Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses. *Official Gazette of Bosnia and Herzegovina*. No. 102/03 (2003). Obtained from: <http://www.lexadin.nl>
- Littlewood, Roland. "Military Rape". *Anthropology Today*. 13.2 (1997): 7-16.
- Maan Besić, Maria Theresa. Personal Interview. December 6, 2006.
- Marquering, Koen, and Ruzićić, Viktorija. Personal Interview. December 5, 2006.
- Mertus, Julie. "Women's Participation in the International Criminal Tribunal for the

- Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina”.
Hunt Alternative Fund, 2004.
- Mohanty, Chandra. “Under Western Eyes: Feminist Scholarship and Colonial Discourses”. *Colonial Discourse & Post-Colonial Theory: A Reader*. New York: Columbia University Press, 1994. 196-220.
- Mrdja, Tanja. “Asymmetrical Warfare: Rape as a Weapon of War”. Master’s Thesis. University of Sarajevo – University of Bologna. 2006.
- Mrvić-Petrović, Nataša. “A brief history of the state of Bosnia – Herzegovina (from its origins to the 1995 Dayton peace accords)”. *Women, Violence, and War*. Ed. Vesna Nikolić – Ristanović. Budapest: Central European University Press, 2000.
- Niarchos, Catherine. “Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia”. *Women’s Rights*. Ed. Bert B. Lockwood. Baltimore: Johns Hopkins University Press, 2006.
- Rohne, Holger. “The Victims and Witnesses Section at the ICTY”. Max Planck Institute for Foreign and International Criminal Law. 2003. Obtained from:
http://www.iuscrim.mpg.de/forsch/krim/docs/ewald2_LobweinICTY.pdf
- Role of Witness in War Crimes Prosecutions. Conference Transcript. Banja Luka: Open Society Fund Bosnia & Herzegovina, 2002.
- Sellers, Patricia. ‘Sexual Violence in Leadership Cases at the International Criminal Tribunal for the Former Yugoslavia: Background to Oral Presentation’. 2006.
- Sud BiH Website. <http://www.sudbih.gov.ba/?jezik=e>.