

Bosnia and Herzegovina

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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ALL SURVIVORS PROJECT

All Survivors Project¹ is presenting this submission to the United Nations (UN) Human Rights Committee (the Committee) ahead of its review of Bosnia and Herzegovina's (BiH) third periodic report on the implementation of the International Covenant on Civil and Political Rights (the Covenant). This document highlights All Survivors Project's concerns with respect to a number of questions on the Committee's List of Issues (LOI) which will be taken up in connection with this consideration of the BiH State Report.

All Survivors Project has specific concerns relating to BiH's failure to respect, protect and fulfil the right to effective remedy for serious human rights violations committed during the 1992-1995 armed conflict in BiH (Article 2.3 of the Covenant).² These concerns relate to:

- The ongoing failure of national authorities to provide full, appropriate and effective access to justice for all survivors of sexual violence during the conflict;

¹ All Survivors Project is a pioneering fact-finding effort into sexual and gender based violence against boys and men across different situations of armed conflict and displacement. This project is housed at the Williams Institute, UCLA School of Law. It will produce a series of national situational analysis reports on sexual and gender-based violence against boys and men, provide recommendations to improve the protection of survivors, and inform the global response to sexual violence. Additional information is available here: <http://williamsinstitute.law.ucla.edu/all-survivors-project/>

² All Survivors Project research in BiH from December-February 2017 aims to gather information on national responses in providing access to justice and reparations for survivors of sexual violence committed during the 1992-1995 armed conflict. The organization will meet all relevant local and international stakeholders, including state authorities, representatives of civil society, victims' associations and a number of survivors of sexual violence including representatives of international organisations present in the country.

- The absence of systematic provision of effective support for survivors/witnesses³ in the war crimes cases prosecuted before domestic courts in the country.⁴

Introduction

Twenty-two years after the end of the conflict in BiH the right of all survivors of serious human rights violations to effective remedy and other rights remain unaddressed. Survivors of conflict-related sexual violence (CRSV) are a particularly vulnerable category. The lack of systematic redress and support for this category has a negative impact on their lives as well as the lives of their family members. In this regard male survivors in BiH were seriously neglected.

The state of BiH failed to establish adequate and accurate mechanisms to collect information and maintain a database for the identification of survivors. Torture and sexual violence has been documented by the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁵ NGOs and victims' associations, but these records have not been systematically collected. The methodology of documentation also differs in approach and reach. Crucially, these mechanisms do not absolve the State of its duty to identify survivors of CRSV and address their needs. The estimates on the

³ In the BH context it is important to distinguish between two different categories of witnesses in war crime cases: survivors/witnesses and witnesses. This distinction is needed since there is a difference in the level of trauma between the survivors called to testify and give evidence of their personal experiences, and persons who were "solely" witnesses to certain crimes. The need for survivors/witnesses to testify inevitably opens up the risk of survivors being re-traumatised.

⁴ This is of crucial importance in the context in which the National War Crimes Strategy in Bosnia and Herzegovina was adopted in 2008 and that the EU- BiH Structured Dialogue on Justice commenced in 2011. These processes envisaged the transfer of a number of less complex war crime cases from the State Level Prosecutor's Office to the Cantonal and District Prosecutor' Offices and Courts for further prosecution.

⁵ For example Prosecutor v. Kunarac, Kovac and Vukovic, Judgement of 22 February 2001, ICTY Trial Chamber. Available at: <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

number of survivors of CRSV range from 20,000 to 50,000, but no precise data exists.⁶ These number include both female and male survivors. Sexual violence predominantly targets women, but there are some estimates⁷ of men and boys being survivors of CRSV in BiH.

The issue of male survivors has received limited attention. This is largely due to societal stigmatisation, including self-stigmatisation by survivors; and the absence of initiatives, both on the part of the state and civil society, to provide appropriate assistance to male survivors. Information on male survivors receiving support and recognition is mostly anecdotal and sporadic.

Despite the large numbers of survivors of CRSV, no comprehensive programs of reparations which specifically provided support to these survivors were developed within the then newly emerged post-conflict state. While various civil society organisations endeavoured to fill the gap, they are still trying to fully understand this issue through various formal and non-formal mechanisms.

1. CONSTITUTIONAL AND LEGAL FRAMEWORK

Concerns with Criminal Codes

⁶ Generally, estimates of survivors of conflict related sexual violence in BiH are unreliable as there was no systematic and state owned service of documentation and providing support to survivors. The numbers stated here are unverifiable and are estimates without any guidance on how they were derived.

⁷ European External Action Service (2013): Report: EU Member States annual meeting on UNSCR 1325 Transitional justice and gender: reducing impunity, Brussels, 27 May 2013. European Commission, Brussels. Available at: http://eeas.europa.eu/archives/features/features-working-women/working-with-women/docs/11-eu-ms-annual-meeting-on-unscr-27052013_en.pdf. This estimate of 3000 was put forward by Impunity Watch but care is advised in using this number as it is not an official statistic and the methodology used to arrive at this figure is unclear and appears to be a guesstimate.

Key concerns: Bosnia and Herzegovina has a clear legislative framework for the prosecution of sexual violence both as a war crime and a crime against humanity on all levels of government. The state level legislation covering this issue is the BiH Criminal Code and the Criminal Procedure Code of BiH , while the entities and Brčko District have their own equivalents: Criminal Code of Republika Srpska (RS), the Criminal Procedure Code of RS, Criminal Code of Federation of BiH (FBiH) , the Criminal Procedure Code of FBiH the Criminal Code of Brcko District (BD) and Criminal Procedure Code of BD. The legislation has gone through a number of amendments over the years, yet concerns regarding its inconsistency with international law, standards and jurisprudence still persist.

The state Criminal Code's Article 172(1) (g) prohibits rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as crimes against humanity. Article 173 defines rape and forced prostitution as war crimes. However, the Acts of sexual violence prescribed by this article are considerably narrower than those provided by international law. Article 173(1)(e) includes only "sexual intercourse or an equivalent sexual act (rape) or forcible prostitution", in marked contrast to the Rome Statute of the ICC which recognizes as war crimes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (Article 8.1(b)(xxii)).⁸

⁸ Organization for Security and Cooperation in Europe, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges, An Analysis of Criminal Proceedings Before the Court of Bosnia and Herzegovina between 2005 and 2013', 2014, pp 31.

The SFRY (Socialist Federal Republic of Yugoslavia) Criminal Code of 1976 is applied in the majority of war crimes cases at entity and cantonal level, as well as within basic and district courts as the law in force at the time when the violation occurred.⁹ There are, however, clear legislative gaps and shortcomings in this legislative instrument. The SFRY Criminal Code of 1976 defines sexual violence in the most narrow of terms of rape and clear penetrative acts.¹⁰ This does not reflect international law and jurisprudence with respect to the definition and criminalization of conflict-related sexual violence as war crimes, crimes against humanity and genocide. The absence of crimes against humanity from the SFRY Criminal Code means that sexual violence crimes committed as part of widespread or systematic attack against a civilian population are not adequately criminalized under its provisions, and thus the Code does not comply with international law with regard to the duty to investigate and prosecute sexual violence as a crime against humanity.¹¹ These gaps and shortcomings lead to high number of acquittals and very lenient sentences for conflict related sexual violence of both women and men.

Recommendation

⁹ In July, 2013 the European Court of Human Rights issued a ruling in the case **Maktouf and Damjanovic vs. Bosnia and Herzegovina**, with regard to the non-retroactive application of criminal law to war crimes cases. The case concerned two applicants ([Maktouf](#) and [Damjanovic](#)), convicted for war crimes against civilians committed during the 1992-1995 war in BiH, who successfully claimed that their sentencing violated Article 7 of ECHR because the 2003 BiH Criminal Code was retroactively applied to them. While the judgment only stated that retroactivity is non-applicable in this and similar cases, in BiH it has been applied universally to all cases of war crimes.

¹⁰ Article 142. of SFRY Criminal Code.

¹¹ Anne-Marrie de Brouwer (2005): *Supranational Criminal Prosecution of Sexual Violence"- the ICC and the practice of the ICTY and ICTR*, Intersentia, Antwerpen, Oxford.

New amendments to all Criminal Codes should expand the definition of sexual violence and clearly codify these acts to be up to par with accepted international law and jurisprudence.

Draft Strategy on transitional justice

Key concerns: The Draft Strategy on Transitional Justice in Bosnia and Herzegovina, developed with the support of the UNDP and unveiled in 2010 was to be presented to the Parliamentary Assembly of BiH in the second half of 2012 for adoption. However, the Strategy was never presented to the Parliamentary Assembly, even though certain elements listed in the strategy have been implemented throughout the country by international actors, primarily the UNDP and other UN agencies, and, on a smaller scale, by civil society organisations and AoS. The strategy represents a sound base for improvement of the respect, protection and fulfilment of the right to effective remedy and other rights of a larger number of conflict related sexual violence survivors across the country. This strategy, *inter alia*, recognizes the need of programs of psychosocial support for CRSV survivors, whereby the specific traumas and needs of women, children and **men**, would be recognized and adequately addressed.¹²

Recommendation: Due to the set time frame of 2012-2016, the Draft Strategy on Transitional Justice in Bosnia and Herzegovina needs a sound

¹² Transitional Justice Strategy in Bosnia and Herzegovina, 2012-2016, pp. 71., <http://www.mpr.gov.ba/aktuelnosti/propisi/konsultacije/Strategija%20TP%20-%20bosanski%20jezik%20fin%20doc.pdf>

update in order to reflect the new situation in the field. Once updated and amended the Strategy should be adopted and implemented.

2. DELAYED PROSECUTIONS

Key concerns: The State conducted limited criminal proceedings, and as a consequence impunity for sexual violence prevails. Delays in prosecutions in Bosnia and Herzegovina have complex root-causes and are partially caused by the sheer number of potential war crime related prosecutions. Some of the most striking problems leading to delays in prosecutions are (mis)management and operation of the Prosecutor's Office of BiH, nature of the indictments, backlog of cases (including transfers from ICTY, and to lower level courts), lack of witness protection programs especially in cases dealing with crimes of sexual violence, High Judicial and Prosecutorial Councils' evaluation system of the work done by judges and prosecutors ("Quota" of completed cases), and the aforementioned issues with the Criminal Procedure Codes.¹³ Understaffing and underfunding of courts and prosecutor's offices on all levels is a grave concern and leads to slow resolution of the backlog of cases.

Of special concern is the absence of a witness/victims support system, where protected witnesses (and most witnesses in sexual violence cases fall within this category) had their identities released by the media,¹⁴ or

¹³ Joanna Korner (2016): *Processing of War Crimes at the State Level in Bosnia and Herzegovina*. OSCE, Sarajevo. Available at: <http://www.osce.org/bih/247221?download=true>.

¹⁴ Illustrative to this is the case of Krunislav Malenica, the editor, and Eset Muračević, a reporter for "Bum" Magazine who intentionally revealed the identity of a protected witness in their magazine at least twice. Malenica and Muračević published the name, photographs and sections of testimony of a protected witness, and later pleaded guilty and a six-month conditional sentence was pronounced in their case. This resulted in the first indictment in Bosnia and Herzegovina on charges of revealing the identity of a protected witness, http://www.justice-report.com/en/en-audio/malenica-and-muracevic-consideration-of-agreement>_

through the slip up of judges and prosecutors. Additionally, due to the mismanagement of the working of the Committee dealing with assigning these protections and as a result of it not being formed in the prescribed period, during 6 months in 2014 protected witnesses were left with no protections.¹⁵ In addition to the social stigma attached to sexual violence of men in BiH, the fact that identities of protected witnesses are hard to conceal represents an additional factor preventing men from coming forward and testifying in war crimes trials, and consequently seeking the status of a survivor.

Recommendation: Management, understaffing and underfunding of Prosecutor's Offices, especially at the state level, needs to be addressed as a matter of priority. Concrete measures for sustainable and effective witness protection programmes are required to guarantee protection to witnesses and encourage them to come forward. This is especially important for male survivors of conflict related sexual violence.

3. REPARATIONS: BENEFITS AND OTHER SERVICES

Key concerns: Serious shortcomings exist in the area of providing survivors of CRSV with systematic administrative reparation. Under national legislation civilian survivors of war, including conflict related sexual violence survivors, are entitled to certain benefits provided under the umbrella of social protections. However, these are not harmonized among the two entities and BD.

¹⁵ Bosnian Bureaucratic Failures Endangered Protected Witnesses, <http://www.justice-report.com/en/articles/bosnian-bureaucratic-failures-endangered-protected-witnesses#sthash.mu9pqDhe.dpuf>

In Federation of BiH the Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children, under which the survivors of sexual violence and rape are recognized as a special category, is an umbrella law for ten cantonal legal frameworks. The RS Law on Protection of Civilian Victims of War prescribes a deadline for the submission of a request for civilian victim of war status which expired in December 2007 and thus a number of survivors, both female and male, are now prevented from seeking this status and access the rights arising from the status. In June 2015 the Assembly of Brčko District adopted amendments to the Decision on Protection of Civilian War Victims, which ensured that CRSV survivors are no longer required to provide an appeals court judgment against the perpetrator in order to obtain the status of a civilian victim of war and consequently access the related rights. However, the Commission envisioned by the amendments of the Decision in BD, which was to be tasked with examining claims of survivors and recognising their survivor status, has never been established.

The range of rights and social benefits survivors are entitled to differ between these three entities in BiH and this results in a differential treatment of survivors based on their place of residence. This not only applies to the benefits¹⁶ but also to the services survivors are entitled to arising from the status.

¹⁶ The minimum monthly amount in the Republic of Srpska for 2014 is BAM 121.67 as reported by the As reported by the RS Ministry of Labour and Veterans the monthly allowance for the CRSV survivors in 2014 equalled around 121 BAM, while in FBiH it was around 514 BAM. In the Federation of BiH 70% of allowances is to be paid by the Government of FBiH while the Cantons should pay remaining 30%. The latter case leaves the room for differential treatment based on budgetary funds at are on disposal in each Canton.

Recommendations: Entity level legislation needs to comply with international law, standards and jurisprudence. It must be harmonized throughout the territory of Bosnia and Herzegovina in order to ensure equal treatment of all survivors. Additionally, no timeframes for applying to be recognized as a survivor should be set and legal provisions imposing such deadlines should be removed.

4. LACK OF REHABILITATIVE SERVICES AND CARE

Concerns: Since the BiH state has not been successful in providing survivors of CRSV with systematic reparation on the whole territory of BiH, for numerous reasons male survivors were generally excluded from existing schemes providing rehabilitative and psychosocial services. Provision of these services to all CRSV survivors as a part of reparation measures in BiH was in the first place initiated and led by civil society and predominantly arose from survivors/witness support networks. In that regard, survivors of CRSV do not have equal access to psychosocial support and other rehabilitation services on the territory of the whole country. Male survivors are particularly vulnerable in this regard due to the fact that many of them have not self-identified as survivors to seek status either as survivors of torture or as survivors of CRSV. In addition, the availability of rehabilitation and psychosocial support services for CRSV survivors remains uneven both in terms of quality and uniform availability throughout the country.

Recommendations: The reparation program should ensure non-discriminatory treatment to encompass all CRSV survivors, regardless of their gender and place of residence. In order to eliminate differential

treatment of CRSV survivors the state should prioritise sensitization of all actors dealing with CRSV survivors about the specific psychosocial and rehabilitation needs of male and female survivors.