

# Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges

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An analysis of criminal proceedings  
before the courts of the Federation of  
Bosnia and Herzegovina, Republika  
Srpska and Brčko District BiH  
between 2004 and 2014

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## Executive Summary

This report is the second of a two-part series that examines the treatment of conflict-related sexual violence cases by the criminal justice system of Bosnia and Herzegovina (BiH). The analysis, findings, and recommendations contained in this series are based on findings from the Trial Monitoring Programme of the OSCE Mission to BiH (OSCE Mission).

Volume 1 of this series focused on the practice of State-level criminal justice institutions. The present volume examines the progress and obstacles that exist in investigating, prosecuting and adjudicating cases of conflict-related sexual violence within the entity level and Brčko District BiH criminal justice systems of BiH. It considers to what extent judicial and prosecutorial authorities in the Federation of BiH (FBiH), Republika Srpska (RS), and Brčko District BiH are succeeding in tackling impunity for wartime sexual violence, and whether the applicable legal framework is adequate to ensure effective prosecution of such crimes.

Over the last decade, more than 170 war crimes cases against over 260 defendants have been concluded at the entity level and Brčko District BiH courts. Of these cases, 35 involved allegations of sexual violence against 45 defendants, wherein 34 perpetrators were convicted in 27 cases – representing a conviction rate of around 75 per cent. At the end of December 2014, proceedings in 20 cases involving allegations of sexual violence were ongoing before the courts, while many more such cases were under investigation.

The number of unresolved cases concerning conflict-related sexual violence remains largely unknown to the public. Moreover, the overall number of conflict-related sexual violence cases that have been brought to trial remains low in comparison to the prevalence of such crimes in the 1992-1995 conflict in BiH – during which an estimated 20,000 women and girls and an unknown number of men and boys were victimized. This frustrates the wishes of victims and their families to know what progress is being made in investigating the crimes against them.

This report contains an analysis of the treatment of the crimes of rape, other acts of sexual violence, and rape and sexual violence as the crime of torture, by the entity level and Brčko District BiH courts. The analysis should serve to inform ongoing policy discussions regarding responses to conflict-related sexual violence and the delivery of justice to victims.

This report makes the following key findings:

- The judicial authorities in the entities and Brčko District BiH overall display a genuine commitment to delivering justice to victims of wartime sexual violence, although considerable challenges remain.

- Though some lie beyond the control of the criminal justice system, there are a number of varied obstacles to investigating and prosecuting these cases, including: lack of availability of evidence and suspects; lack of gender expertise in managing and conducting investigations and adjudicating sexual violence cases; insufficient prioritization of war crimes cases that include gender as a basis for prosecution; and varying degrees of support by law enforcement agencies to the entity level and Brčko District BiH prosecutor's offices. Additionally, witness protection programmes do not exist at the entity level, though certain progress has been made in enhancing witness support mechanisms and in-court protection.
- Overall, the judicial authorities in the entities and Brčko District BiH demonstrate different understandings of the elements of the crime of rape and other forms of sexual violence, ranging from excessively narrow and outdated interpretations to sound understanding, as evidenced in the more recent cases based on established international jurisprudence.
- Of particular concern are the cases in which conflict-related sexual violence is prosecuted as the "ordinary" offence of rape (i.e. not qualified as a war crime), as incorrect legal qualification may ultimately result in impunity for perpetrators of war crimes.
- With regard to sentencing, courts have shown a tendency not to adequately elaborate on mitigating and aggravating factors, especially regarding the consequences of sexual violence for the victims and society.

This report follows its analyses with a series of recommendations, mainly directed at BiH judicial authorities, to address core problems and increase their capacity to effectively and fairly process conflict-related sexual violence cases in line with established international jurisprudence. The OSCE Mission stands ready to support the judiciary's efforts to implement these recommendations and will use the findings of this report to inform its capacity building initiatives, including targeted trainings and workshops for legal professionals seeking accountability for these grave crimes.

# 1. Introduction

## 1.1 Jurisdictional Issues

The map of jurisdictions responsible for war crimes cases in Bosnia and Herzegovina (BiH) is rather complex, as it comprises the following institutions: the Court of BiH (BiH Court) and the BiH Prosecutor's Office at the State level; ten cantonal courts and an equivalent number of prosecutor's offices in the Federation of Bosnia and Herzegovina (FBiH); five district courts and an equivalent number of prosecutor's offices in Republika Srpska (RS); and the Basic Court and Prosecutor's Office in Brčko District BiH. This complex judicial system is remarkably fragmented; no formal hierarchy exists between the jurisdictions at the State and entity level. As a result, appeals are conducted by four different courts: the Appellate Division of the BiH Court, the FBiH Supreme Court, the RS Supreme Court and the Brčko District BiH Appellate Court.

Issues of conflict or overlap among the different jurisdictions represent a serious problem for the overall functioning of the BiH judicial system. When it comes to war crimes processing, the matter becomes even more intricate because, in addition to the traditional criteria to determine territorial and subject-matter jurisdiction, more elaborate and flexible criteria have been included for the purpose of efficiently allocating the large war crimes caseload among the various jurisdictions (over 1,000 investigations). The applicable criteria for determining whether a case should be tried by the BiH Court or at the entity level have changed from those provided by the "Book of Rules on the Review of War Crimes Cases",<sup>1</sup> which focused on the sensitivity of the case, to the criteria enumerated in the 2008 National War Crimes Strategy (hereinafter the National Strategy)<sup>2</sup> which focus on the complexity of the case.

Adoption of the National Strategy in 2008 was an important milestone for BiH in terms of affirming its commitment to accountability for war crimes. It sets out a plan to better equip and organize the judiciary to process war crimes cases in a manner compliant with international legal norms and human rights standards. The National Strategy was adopted with the aim of providing a systematic approach to resolving the country's sizeable war crimes backlog in an efficient and effective manner. Toward this end, one of its key objectives is the transfer of war crimes cases deemed "less complex" from the BiH Court

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1 *Book of Rules on the Review of War Crimes Cases - Orientation Criteria for Sensitive Rules of the Road Cases* (Prosecutor's Office of BiH, 28 December 2004), issued by the Collegium of Prosecutors of BiH. By August 2004, the ICTY had turned over responsibility for the *Rules of the Road* process to the BiH Prosecutor's Office. In December 2004, the *Book of Rules on the Review of War Crimes Cases* was introduced, which provided a mechanism for the BiH Prosecutor's Office to review war crimes cases initiated at the entity level in order to retain those considered highly sensitive due to their gravity or status of the perpetrator.

2 National Strategy for War Crimes Processing, adopted by the BiH Council of Ministers on 29 December 2008; in local language, *Državna Strategija za Rad na Predmetima Ratnih Zločina* (available at [http://www.mpr.gov.ba/web\\_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf](http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf)).

to courts in the entities and Brčko District BiH. The complexity criteria in the National Strategy are linked to features of the case such as the gravity of the crime, the level of responsibility of the accused, and other circumstances like the correlation between the case and other cases, the interests of victims and witnesses and the consequences of the crime for the local community.

These criteria provide enough flexibility to allow the transfer of sexual violence cases to the entity level if they involve, for example, single instances of rape by a direct perpetrator, and if adequate witness protection capacity is available at the cantonal or district court in question. In line with these criteria, it can be expected that the number of investigative case-files concerning sexual violence transferred to the entity level will continue to increase.

Previous reports prepared by the OSCE Mission to BiH (OSCE Mission) have examined the efficiency and effectiveness of both the State and entity level criminal justice systems in resolving war crimes cases.<sup>3</sup> This report explores the efforts of the entity level courts and prosecutor's offices specifically to tackle cases that include wartime rape and other forms of conflict-related sexual violence.

## 1.2 Scope of Report and Methodology

This report is the second of a two-part series that examines the achievements of the BiH criminal justice system in addressing conflict-related sexual violence crimes, as well as the outstanding obstacles to the resolution of these cases in accordance with international and domestic standards. Volume 1 of this series focused on the practice of State-level criminal justice institutions.<sup>4</sup> The present report deals solely with the processing of conflict-related sexual violence cases before the courts in the FBiH, RS and Brčko District BiH. Other important, but distinct, matters connected to dealing with the legacy of war crimes, such as legal recognition of the status of "survivors of sexual violence", social benefits for victims, or reparation to victims and their families, are not within the scope of this report.

The analysis and recommendations contained in this report are based on findings from the **OSCE Mission's Trial Monitoring Programme**. The report's findings encompass the

3 OSCE Mission to BiH, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010* (May 2011), (available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2011051909500706eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf)); OSCE Mission to BiH, *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles (March 2005)*, (available at [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122311024992eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf)); OSCE Mission to BiH, *The Processing of ICTY Rule 11bis cases in Bosnia & Herzegovina* (January 2010), (available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314321282eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314321282eng.pdf)) and 60 OSCE Mission to BiH *Reports on 11bis Cases*, (available at: <http://www.oscebih.org/Documents.aspx?id=146&lang=EN>). See also OSCE Mission to BiH, *Witness Protection and Support in BiH War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing* (May 2010), (available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314375593eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf)); OSCE Mission to BiH *Spot Report on Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions* (December 2009), (available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314120729eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314120729eng.pdf)); and OSCE Mission to BiH, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina* (August 2008), (available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122311504393eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf)).

4 *Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges, An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013*, available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2014040217332026eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2014040217332026eng.pdf).



period from 2004, when the OSCE Mission began to monitor war crimes cases in the domestic criminal justice system, to 31 December 2014. All war crimes proceedings taking place before cantonal or district courts in the FBiH and RS respectively, and the Brčko District BiH Basic Court, are monitored from the time that the indictment is filed until sentencing or appeal. The OSCE Mission has monitored or obtained information on 288 war crimes cases (both completed and ongoing) before the entity level and Brčko District BiH courts between 2004 and 2014, including 55 sexual violence cases (35 completed cases plus 20 ongoing).<sup>5</sup> The findings of this report are mainly drawn from analyses of the 35 sexual violence cases completed by the entity level and Brčko District BiH courts.

As a supplementary source of information that sheds light on the investigative phase of proceedings, in December 2011 and January 2012 the OSCE Mission conducted a structured survey of all cantonal and district level and Brčko District BiH prosecutor's offices ("the OSCE Survey"). The purpose of the OSCE Survey was to elucidate the views of prosecutors on the problems that exist in initiating and proceeding with conflict-related sexual violence cases.<sup>6</sup> As regards the gender composition of the interviewees, of 29 prosecutors interviewed across 16 prosecutor's offices in the FBiH, RS and Brčko District BiH, 13 were female and 16 were male. Of these, 27 had experience working on war crimes cases. The majority of prosecutors interviewed had either worked on conflict-related sexual violence cases in the past or, at the time of the OSCE Survey, were conducting investigations into cases involving such allegations.

In addition, interviews and discussions with members of the judiciary, legal practitioners and other relevant actors conducted for the purposes of this report, and during the regular course of OSCE Mission activities, have been taken into consideration in the formulation of the findings and recommendations contained herein.

### 1.3 Structure of Report

This report proceeds as follows. Chapter 2 discusses some of the core challenges encountered when seeking justice for victims of conflict-related sexual violence and focuses on some of the progress and trends demonstrated by these cases.

Chapter 3 sets forth the international and national legal frameworks applied by the entity level and Brčko District BiH courts to sexual violence as war crimes, crimes against humanity, and genocide.

Chapter 4 contains a detailed analysis of the application of law by the entity level and Brčko District BiH courts to cases concerning conflict-related sexual violence. This analysis illustrates the extent to which the entity level and Brčko District BiH institutions are succeeding in delivering justice in conflict-related sexual violence cases and highlights outstanding concerns and challenges. Each of the issues identified in this chapter in turn gives rise to a series of recommendations.

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5 As of 31 December 2014. For the purpose of this report, a case is considered completed once the final and binding verdict has been made publicly available.

6 The OSCE Survey contained comprehensive questions designed to explore issues related to the processing of conflict-related sexual violence cases. Similar surveys were conducted previously by the OSCE Mission, including for the OSCE Mission War Crimes Reports 2005 and 2011.

Chapter 5 examines the progress made in the entities and Brčko District BiH toward establishing adequate witness protection and support. This includes a discussion of several related issues, such as the reluctance of victims to testify, the stigma attached to their victimhood, and lack of family support.

Chapter 6 presents the challenges faced by the entity level and Brčko District BiH prosecuting authorities.

Chapter 7 concludes the report with a series of recommendations to members of the BiH judiciary, domestic legal practitioners and the international community.

## 2. Challenges, Progress and Trends

### 2.1 Core Challenges

The most reliable estimate of the number of female victims of conflict-related sexual violence in BiH is **20,000**.<sup>7</sup> Next to this figure, the number of perpetrators prosecuted by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the BiH criminal justice system to date – **146 individuals in total** – appears disappointingly low. As explained in Volume 1 of this report, there are several factors that should be borne in mind in assessing the progress of the authorities in BiH in effectively prosecuting cases of sexual violence:

- Many of the challenges to the effective overall processing of war crimes cases are equally applicable to wartime sexual violence cases. These include political opposition from certain quarters to an integrated and cohesive judicial system able to tackle serious crime; a fragmented legal and institutional framework; limited and uncertain funding to judicial institutions; and a lack of availability of suspects, physical evidence and witnesses willing to testify.<sup>8</sup>
- Many survivors of sexual violence may not have reported the crimes they were subjected to for a number of reasons, including possible feelings of shame and stigma attached to being a victim of sexual violence as well as mistrust of criminal justice actors.<sup>9</sup>
- The public is not always adequately informed about the progress of wartime sexual violence cases, leading to understandable frustration felt by survivors and victims' associations about the lack of information and consultation concerning the steps taken by authorities to combat impunity for these crimes.

The international community, civil society and the national authorities themselves have shown determination in ensuring sustained political commitment to tackling impunity for sexual violence in BiH. In November 2014, the OSCE Mission and the British Embassy in BiH, in collaboration with local partners, jointly launched the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Moreover, a number of

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7 See Parliamentary Assembly of the Council of Europe, *Resolution 1670 (2009), Sexual violence against women in armed conflict*, adopted on 29 May 2009, para. 6 (“To this day, the exact figures are disputed, but it is estimated that upward of 20,000 Bosniak, Croat and Serb women were raped, often gang-raped, and sometimes sexually enslaved and forcibly impregnated in so-called ‘rape camps’ by armies and paramilitary groups.”).

8 OSCE Mission to BiH, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010* (May 2011), page 14.

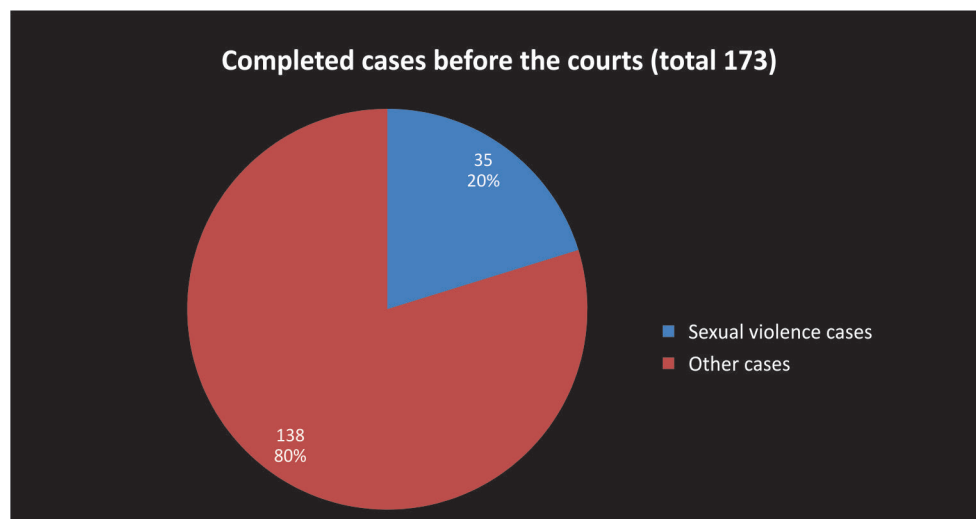
9 See Amnesty International, *Old crimes, same suffering*, page 6 (noting that many survivors have given multiple statements to ICTY and BiH investigators without noticeable progress on their cases).

trainings for judges, prosecutors, police investigators, and witness support staff on sexual violence investigation, prosecution, and adjudication have been organized by the OSCE Mission with the support of international donors.<sup>10</sup> Following these awareness-raising and capacity-building initiatives, most prosecutor's offices in BiH have shown an increased effort to place greater prioritization on prosecuting sexual violence cases in their offices' individual action plans.

Considering the magnitude of sexual violence that occurred during the conflict in the territory of BiH, the fact remains that the majority of perpetrators of sexual violence continue to enjoy impunity. The failure to provide accountability for these crimes will continue to have a debilitating impact on survivors of sexual violence and serves as an impediment to post-conflict reconciliation and the establishment of full respect for human rights and the rule of law in BiH.<sup>11</sup> Nevertheless, as noted in Volume 1 of this report, BiH is among the domestic jurisdictions that have completed the highest number of cases involving conflict-related sexual violence crimes. The lessons learned in its efforts to address these crimes through the criminal justice system will continue to serve as a useful tool not only for BiH institutions at all levels, but also for other societies struggling to combat impunity and deliver justice to victims.

## 2.2 Progress and Trends

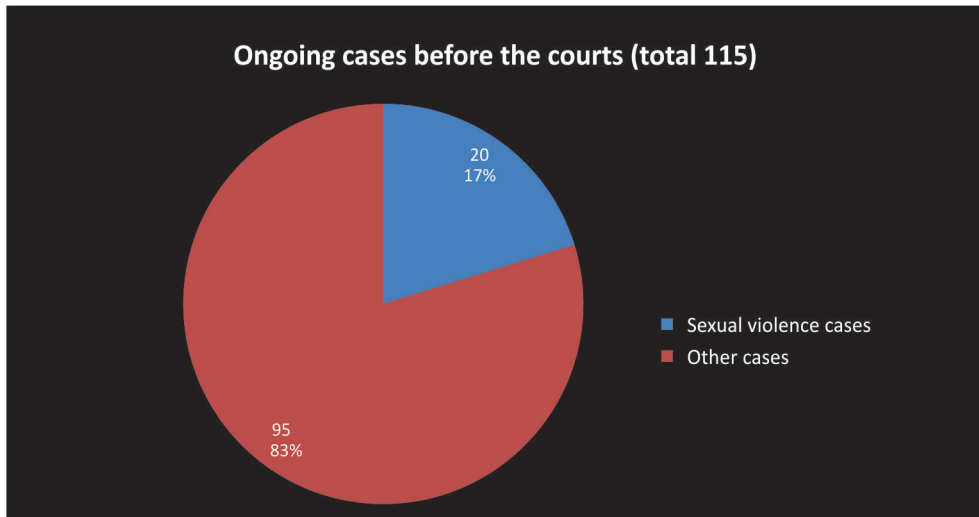
Between 2004 and the end of 2014, to the OSCE Mission's knowledge, the FBiH, RS and Brčko District BiH courts have completed **173** war crimes cases. Of these, **35** involved charges of sexual violence qualified as a war crime. This means that conflict-related sexual violence featured in around 20 per cent of completed war crimes cases before the courts in the entities and Brčko District BiH.



<sup>10</sup> Donors include the United Kingdom, the United States, Germany, Norway, Switzerland, and Italy.

<sup>11</sup> See, e.g., UN Security Council Resolution 1820 (2008), Operative Paragraph (OP) 4 ("ending impunity for [conflict-related sexual violence] acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation in post-conflict societies").

At the close of 2014, 20 of the 115 ongoing war crime cases in the post-indictment phase involved sexual violence charges, meaning that sexual violence crimes feature in around 17 per cent of war crimes cases before the courts in the entities and Brčko District BiH. In three of these ongoing cases, three of the accused are at large; therefore, these cases cannot advance beyond confirmation of indictment.<sup>12</sup>

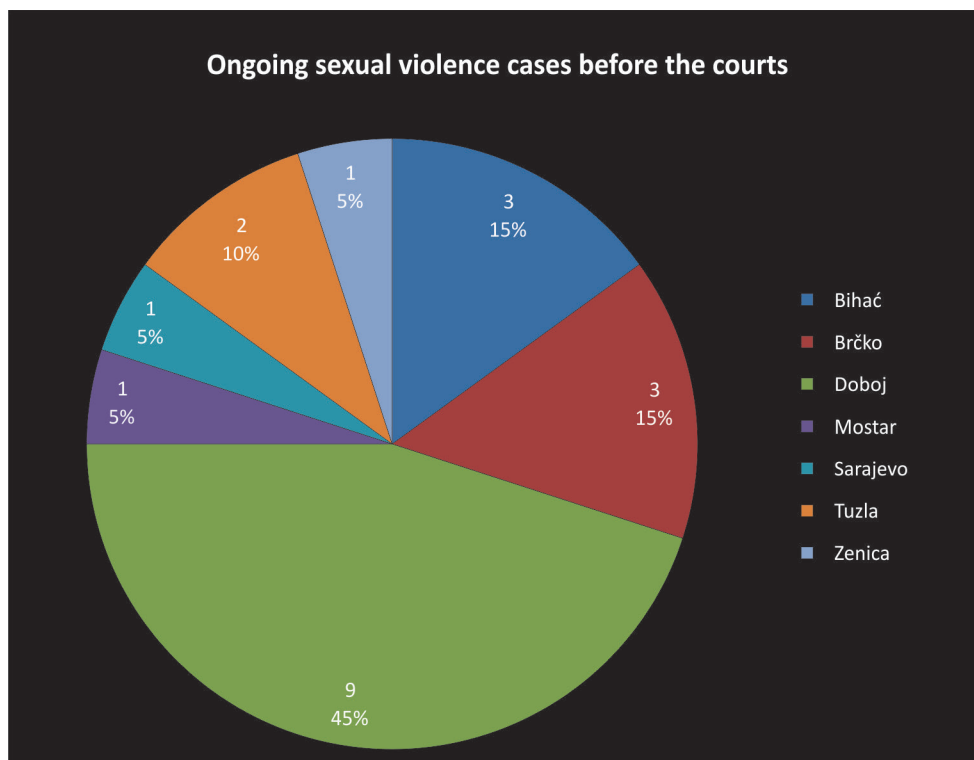


According to the information available to the OSCE Mission at the time of writing this report, since 2009 the State-level BiH Court has transferred proceedings in 394 war crimes cases to courts in the entities and Brčko District BiH in accordance with the National War Crimes Strategy.<sup>13</sup> Of these, 38 have included sexual violence allegations (i.e. around 9.5 per cent of all transferred cases). Since 2010, the BiH Court has denied requests by the BiH Prosecutor's Office to transfer 25 cases involving wartime sexual violence allegations.

The OSCE Mission is also aware of numerous cases in the investigative stage that include allegations of sexual violence and thus may result in charges for these crimes. To the OSCE Mission's knowledge, there are approximately 400 cases under pre-investigation and investigation before the entity level and Brčko District BiH prosecutor's offices, with around 50 of them including allegations of sexual violence.

<sup>12</sup> *Slabić and Štuc*, Dobož District Court; *Radomir Škiljević*, severed from *Spasojević et al.*, Cantonal Court Tuzla.

<sup>13</sup> Pursuant to Article 27 and 27(a) of the BiH Criminal Procedure Code. These cases include those transferred at both the investigation and post-indictment phases. See Chapter 2.3 of Volume 1 of this report for a more detailed discussion of the transfer of cases between the State and entity level.



The **35** cases involving wartime sexual violence allegations completed before the courts in the entities and Brčko District BiH involved **45** defendants. Of these, **34** perpetrators in **27** cases were convicted of sexual violence crimes, including ten who were found guilty pursuant to a plea bargaining agreement.

Seven defendants were acquitted of charges of sexual violence as a war crime. In one other case, sexual violence allegations were charged in the initial indictment, but the court omitted them from the charges recounted in the verdict because the prosecution had not presented any related evidence at the main trial.<sup>14</sup> In other completed cases, one defendant died after the indictment was confirmed,<sup>15</sup> and two are at large.<sup>16</sup>

All but one defendant accused of sexual violence as a war crime were male. The only woman charged with sexual violence offences was acquitted of those charges.<sup>17</sup> Of the 34 convicted perpetrators, 26 were combatants, 6 were camp officials, and 2 were civilians.<sup>18</sup> The convicts were all low-ranking perpetrators except for one detention camp

<sup>14</sup> *Marijanović and Buhovac*, Mostar Cantonal Court.

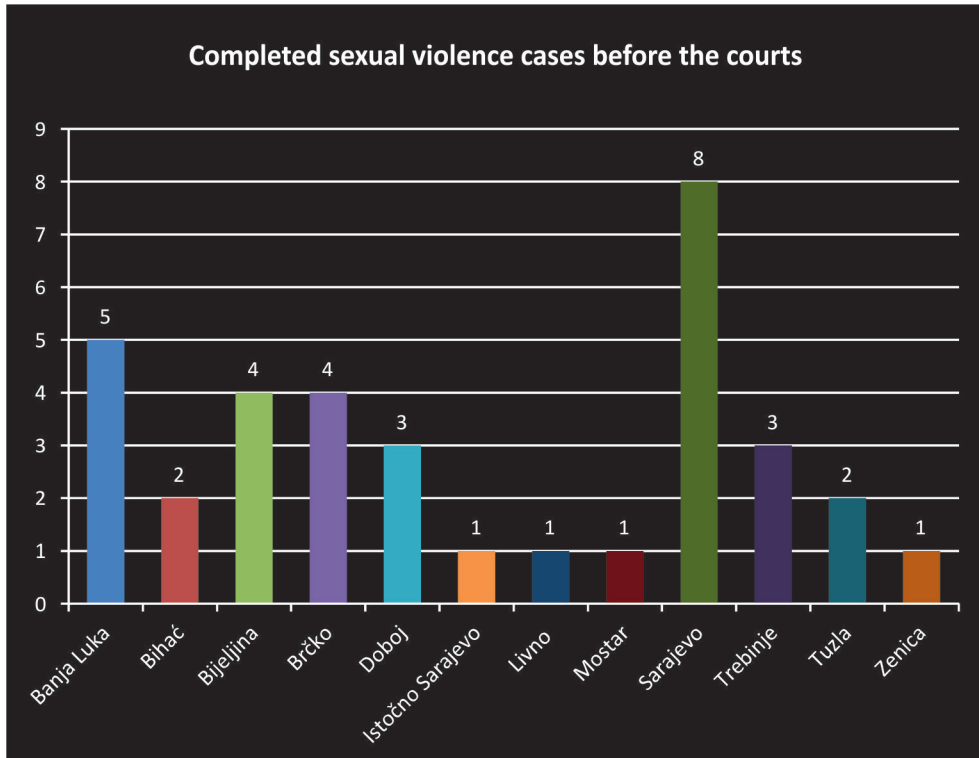
<sup>15</sup> *Ivanković*, Doboј District Court.

<sup>16</sup> *Trivić et al.* and *Trivić and Bajić*, Banja Luka District Court (Siniša Miložčić was at large in both cases); *Spasojević et al.*, Tuzla Cantonal Court (Radimir Škiljević was inaccessible to the court).

<sup>17</sup> *Karan-Ilić*, Brčko Basic Court.

<sup>18</sup> Additionally, in six cases of conflict-related sexual violence tried as the ordinary offence of rape, all perpetrators were combatants.

commander.<sup>19</sup> All convicted persons were direct perpetrators except for one convicted as an “aider”.<sup>20</sup> None were found guilty for superior responsibility or other forms of participation.



The victims of sexual violence in completed cases were men, women and children, including three female<sup>21</sup> and two male<sup>22</sup> child victims.

While most cases have involved female victims, the prosecutor’s offices have also investigated and prosecuted sexual violence against male prisoners in detention camps. Types of sexual violence against males included forced nudity, forced oral sex and other forms of sexual humiliation. Four such cases resulted in convictions.<sup>23</sup>

In 11 cases that resulted in conviction, the victims were raped or otherwise sexually assaulted more than once. In seven cases, the victims were raped by more than one perpetrator. One of these gang rape cases involved two female juvenile victims, one involved a woman who had given birth three days before the crime, and one victim was killed after gang rape. In several cases, victims were raped or sexually assaulted in front of others, including family members. Rape and sexual violence crimes were committed

<sup>19</sup> *Simonović*, Brčko Basic Court.

<sup>20</sup> *Milanović*, Sarajevo Cantonal Court.

<sup>21</sup> *Trivić and Bajić*, Banja Luka District Court; *Bajić et al.*, Bihać Cantonal Court; *Lukić*, Bijeljina District Court.

<sup>22</sup> *Spasojević et al.*, Tuzla Cantonal Court.

<sup>23</sup> *Spasojević et al.*, Tuzla Cantonal Court; *Milanović*, FBiH Supreme Court; *Koler*, Tuzla Cantonal Court; *Minić et al.*, Bijeljina District Court.

in various locations, such as at the victims' homes (or near their homes), in the open, in detention camps and in other locations.

In addition to the 35 completed cases of sexual violence qualified as a war crime, the OSCE Mission monitored or obtained information about six cases of conflict-related sexual violence that were tried as the "ordinary" crime of rape, which resulted in the conviction of eight perpetrators. In one of these cases, one defendant was acquitted.<sup>24</sup> Furthermore the Mission is aware of one ongoing case of conflict-related sexual violence that is being tried as the ordinary crime of rape.<sup>25</sup> The manner of qualification of these crimes and the issues arising are addressed in Chapter 4.

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<sup>24</sup> *Jarić et al.*, Brčko Basic Court. Fatima Karamehić was convicted of the ordinary offence of rape as an accomplice.

<sup>25</sup> *Božić et al.*, Kotor Varoš Basic Court.



### 3. Legal Framework Applicable to the Investigation, Prosecution and Adjudication of Conflict-Related Sexual Violence

This chapter analyses the legal and procedural framework applicable to conflict-related sexual violence cases before the entity level and Brčko District BiH courts and the extent of their compliance with the international standards detailed in Volume 1 of this report. How these provisions are applied by the courts in practice is then addressed in the following chapter.

#### 3.1 Applicable Criminal Codes

In BiH, war crimes, crimes against humanity and genocide are mainly tried under two criminal codes: the 2003 BiH Criminal Code and the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY Criminal Code).<sup>26</sup> Over the past decade, the 2003 BiH Criminal Code was generally applied in war crimes cases at the State level, while courts in the entities and Brčko District BiH have applied the SFRY Criminal Code, which was the law in force during the period of armed conflict.<sup>27</sup> The diverging approaches adopted by the BiH Court and the courts in the entities and Brčko District BiH resulted from differences in interpreting the “principle of leniency”, which requires that, if the law has been changed or amended after the commission of the crime, the law that is more lenient to the accused should be applied.<sup>28</sup>

Application of the 2003 BiH Criminal Code by the BiH Court has resulted in a number of convicted persons successfully challenging the sentences they received on the basis of Article 7(1) of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) addressed this legal dispute in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* and found that applying the sentencing provision of the 2003 Code, rather than the 1976 Code, constituted a violation of Article 7 in both applicants’ cases. The ECtHR emphasized that this conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code

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26 The SFRY Criminal Code prescribed the death penalty. However, with the adoption of the BiH Constitution in December 1995, the death penalty could no longer be imposed or executed. The Constitution is the fourth Annex of the Dayton Peace Agreement reached in Dayton, Ohio, USA on 21 November 1995 and formally signed in Paris on 14 December 1995.

27 The vast majority of cases at the entity level are processed under the SFRY Criminal Code, the law in force at the time of the conflict. The issue of the legality of the application of the 2003 BiH Criminal Code at the entity level has hardly ever been raised in war crimes appeals. To the knowledge of the OSCE Mission, this has happened only in the case of *Vlahovljak et al.*, tried in the first instance at Mostar Cantonal Court. In this case, the FBiH Supreme Court changed the qualification of the offence from war crimes under the SFRY Criminal Code to war crimes under the 2003 BiH Criminal Code. See *Vlahovljak et al.*, Verdict of 18 September 2008.

28 Article 5, FBiH Criminal Code, Article 4, RS Criminal Code and Article 5, Brčko District BiH Criminal Code.

should have been applied. The ECtHR dismissed the BiH Government's argument that the 2003 Code was more lenient than the 1976 Code because the latter provided for the death penalty. The ECtHR noted that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code while neither of the applicants was held criminally liable for crimes belonging to that category. The ECtHR found that "In these circumstances, it is of particular relevance in the present case which Code was more lenient in respect of the minimum sentence, and this was without doubt the 1976 Code".<sup>29</sup> Moreover, it further held that "the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity".<sup>30</sup>

The *Maktouf-Damjanović* Judgment did not provide further guidance with regard to the compatibility of sentences fitting in the higher range of punishment with Article 7 of ECHR.<sup>31</sup> Nonetheless, subsequent decisions by the Constitutional Court applied the decision to cases involving convictions for serious war crimes and genocide offences with high sentences, finding that they too should be sentenced under the 1976 Code. While this interpretation has significantly impacted the practice of the State-level BiH Court, which had previously been sentencing serious offenders under the 2003 code, the impact on entity courts has been minimal, since these courts have been applying the 1976 Code from the outset.

### 3.2 Sexual Violence Offences as War Crimes, Crimes against Humanity and Genocide

The SFRY Criminal Code, Chapter XVI, titled "Crimes against Humanity and International Law", proscribes war crimes and genocide. The full range of crimes of sexual violence recognized under international law is not explicitly proscribed in the SFRY Criminal Code. Forced prostitution and rape as war crimes against civilians are the only forms of sexual violence explicitly proscribed under the SFRY Criminal Code (Article 142), while the provisions on genocide (Article 141), war crimes against the wounded and sick (Article 143) and war crimes against prisoners of war (Article 144) do not explicitly criminalize any sexual misconduct.<sup>32</sup>

<sup>29</sup> See *Maktouf & Damjanović v. Bosnia and Herzegovina* (Applications nos. 2312/08 and 34179/08), Judgment of the Grand Chamber (18 July 2013), para. 69.

<sup>30</sup> *Ibid*, para 72.

<sup>31</sup> As a result, the SFRY Criminal Code has been applied, on appeal, in only two cases involving sexual violence before the BiH Court to date, and thus the majority of cases have been decided under the 2003 Criminal Code. See *Pinčić* (S1 1 K 014434 13 Krž) and *Andrun* (S1 1 K 014269 13 Kžk), BiH Court.

<sup>32</sup> See Annex 1 for a complete reproduction of these articles of the SFRY Criminal Code. In comparison to the 2003 BiH Criminal Code, which defines crimes of sexual violence as crimes against humanity and rape and other forms of sexual violence as war crimes against the civilian population, the SFRY Criminal Code fails to include definitions of these crimes at all.

Article 172(1)(g), BiH Criminal Code governing crimes against humanity, proscribes:

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

Article 173(1)(e), BiH Criminal Code governing war crimes, proscribes, in the relevant part:

"Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) or forcible prostitution [...]"

The omission of explicit references to other forms of sexual violence that may amount to war crimes under international law (e.g., sexual slavery, forced pregnancy and enforced sterilization, and “any other form of sexual violence constituting a serious violation of Article 3 common to the four Geneva Conventions”<sup>33</sup>) makes the SFRY Criminal Code an inadequate normative framework for the effective repression of sexual violence in armed conflicts.

Nevertheless, sexual violence can be prosecuted as torture, inhuman treatment or the causing of great suffering or serious injury to bodily integrity or health under any provision for war crimes in the SFRY Criminal Code. Likewise, sexual violence may constitute genocide and can be prosecuted as “the inflicting of serious bodily injuries or serious disturbance of physical or mental health” or imposing measures “intended to prevent births within the group”. The latter constitutes the inherent recognition of forced sterilization as genocide.

The SFRY Criminal Code does not provide for the prosecution of crimes against humanity, which are only mentioned in the title of its Chapter XVI, nor is there a provision governing command responsibility. The absence of crimes against humanity from the SFRY Criminal Code means that widespread and systematic sexual violence crimes against a civilian population are not adequately criminalized.

The limits of the SFRY Criminal Code did not seem to be a particular source of concern for many prosecutors who took part in the OSCE Survey. Half of the prosecutors expressed the view that it makes little difference to the outcome of the case whether rape and sexual violence are classified as war crimes or crimes against humanity. Still, a significant number of prosecutors emphasized the importance of proper classification and recognized that recasting a crime against humanity as a war crime fails to reflect the nature of the offence and negatively impacts the sentences and victims. In addition, some prosecutors noted the difficult burden of proving that crimes were committed in the context of widespread and systematic attacks in crimes against humanity cases.

Such difficulty notwithstanding, the prosecution of conflict-related sexual violence as crimes against humanity is important because it shows the broader context in which such crimes were committed and the policies that motivated them. If these issues are not presented by evidence at trial, there is failure on the part of the criminal justice system to recognize the systematic nature and use of sexual violence during the armed conflict.

### 3.3 Special Evidentiary Rules in Sexual Violence Cases

Criminal procedure codes in the entities and Brčko District BiH contain special provisions on evidentiary rules concerning sexual violence crimes.<sup>34</sup> These rules are designed to protect victims of sexual violence from added trauma and take into consideration the

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In January 2011, in its concluding observations in relation to BiH, the United Nations (UN) Committee Against Torture (CAT) recommended that BiH amend Articles 172 and 173 of the 2003 BiH Criminal Code to bring them in line with international standards and “remove the condition of ‘force or threat of immediate attack’ from the present definition”. BiH was given a year to adequately respond to the CAT’s recommendations. However, over four years have passed since the UN CAT recommendation, yet the process has still not been completed by the BiH Parliament.

33 See Article 8(2)(e)(vi), Rome Statute.

34 Article 279, FBiH Criminal Procedure Code (CPC); Article 279, RS CPC; Article 264, Brčko District BiH CPC.

particular nature of sexual violence crimes. The provisions prohibit questioning victims of sexual violence “about any sexual experiences prior to the commission of the criminal offence in question. Any evidence offered to show, or tend to show the injured party’s involvement in any previous sexual experience, behaviour, or sexual orientation, shall not be admissible.”<sup>35</sup> While prohibiting the questioning of victims of sexual violence about their prior sexual history satisfies an important requirement of international standards, these provisions do not provide for as much protection as the broader International Criminal Court (ICC) Rules that prohibit questioning about subsequent sexual conduct as well.<sup>36</sup>

The entity and Brčko District BiH criminal procedure codes also forbid raising the issue of consent in cases of war crimes, crimes against humanity and genocide: “In the case of commission of crimes against humanity and values protected by international law, the consent of the victim may not be used in favour of the defence.”<sup>37</sup> A plain reading of this provision suggests that evidence of consent in war crimes, crimes against humanity and genocide cases may not be used for the benefit of the defence under any circumstances. It seems that the *ratio* of the provision is that the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish lack of consent as an element of the crime. In the recent *Kovačević* case, the Doboj District Court explained that the time and circumstances of perpetration “diminish or even completely exclude” the capacity of the injured to give “voluntary and genuine consent” and concluded that the issue of consent in cases of war crimes, crimes against humanity and genocide cannot be raised in favour of defence.<sup>38</sup>

The OSCE Mission has already expressed concern that a complete ban on the presentation of evidence that a purported victim consented to sexual intercourse would violate the right of the accused to a fair trial, including, in particular, the rights to introduce evidence and witnesses and cross-examine the prosecution’s evidence.<sup>39</sup>

From the entity and Brčko District BiH verdicts analysed for the purpose of this report, it does not appear that evidence of consent has been adduced in practice. Only in *Pandurević* did the defence raise the issue of consent. The Sarajevo Cantonal Court excluded the public from the part of the main trial when the victims of rape gave evidence, but it does not appear from the verdict that the appropriate *in camera* hearing was conducted. However, this case was tried under the 1998 FBiH Criminal Procedure Code, which contained a prohibition against questioning a victim of sexual violence about their prior sexual history in criminal offences against “personal dignity and morality” (Article 226(5)) but did not require probing evidence of consent in an *in camera* procedure. Accordingly, though

35 Article 279(1), FBiH CPC; Article 279(1), RS CPC; Article 264(1), Brčko District BiH CPC.

36 See Rule 70 of the ICC Rules of Procedure and Evidence. See also Special Court for Sierra Leone (SCSL) Rules of Procedure and Evidence, Rule 96, titled “Rules of Evidence in Cases of Sexual Assault”, which sets forth the same principles.

37 Article 279(3), FBiH CPC; Article 264(3), Brčko District BiH CPC. The formulation in the RS CPC varies only slightly: “In the case of crimes against humanity and international humanitarian law, the consent of the victim shall not be used in favour of the defendant”. Article 279(3), RS CPC.

38 *Kovačević*, Doboj District Court Verdict of 2 December 2013.

39 See ICCPR, Article 14 (d); ECHR, Article 6(c). This issue was addressed by the OSCE Mission in Volume 1 of this report.

compliant with the 1998 Code, the court did not follow the practice of international tribunals that, before admitting such evidence, its relevance and credibility should be probed in an *in camera* procedure.<sup>40</sup>

### 3.4 Absence of Requirement for Corroboration

Two prosecutors who participated in the OSCE survey considered that physical evidence to support victim testimony is either difficult to collect or completely lacking in cases of sexual violence. According to one prosecutor, there is usually only the accused and one witness with no other evidence available and, because of the *in dubio pro reo*<sup>41</sup> principle, the case may result in acquittal. This belief may be problematic as corroboration, or the requirement for additional witness testimony or physical evidence to support victim testimony, is not a legal requirement for proving crimes of sexual violence under international standards. It follows from the ICTY Rules of Procedure and Evidence<sup>42</sup> and jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) that the testimony of a single victim is sufficient, if reliable and credible.<sup>43</sup>

Criminal procedure codes in the entities and Brčko District BiH do not contain provisions specifying that corroboration is not required to prove crimes of sexual violence provided that the testimony is credible. However, from the *Stevanović* and *Gašević* cases, it is evident that the corroboration of victim testimony has not been required by the courts. In *Stevanović*,<sup>44</sup> the Trebinje District Court held that “rape is a criminal offence which is often proved and established exclusively on the basis of victim’s testimony, as there are no other eyewitnesses, and very often there is no medical documentation.” Similarly, the Sarajevo Cantonal Court in *Gašević*<sup>45</sup> found that both wartime and peacetime rape is often proved and established exclusively on the basis and careful analysis of the victim’s and the accused’s statements, as often other evidence is not available.

**The OSCE Mission welcomes the practice of courts to affirm that corroboration of a victim’s evidence concerning sexual violence is not required.**

<sup>40</sup> Volume 1, Chapter 3.1.3 of this report.

<sup>41</sup> The *In dubio pro reo* principle is enshrined in Articles 3(2) FBiH, RS and Brčko District BiH Criminal Procedure Codes: “A doubt with respect to the existence of facts composing characteristics of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be resolved by the court by a decision and in a manner that is the most favourable for the accused”.

<sup>42</sup> Rule 96(i), ICTY Rules of Procedure and Evidence.

<sup>43</sup> *Akayesu* Trial Judgment, page 135 “(...) the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible”; *Muhimana* Trial Judgment, para. 273; see also *Tadić* ICTY Trial Judgment, paras. 535-539.

<sup>44</sup> *Stevanović*, Trebinje District Court Verdict of 17 May 2012, page 12.

<sup>45</sup> *Gašević*, Sarajevo Cantonal Court Verdict of 9 February 2004, page 14.

## 4. Sexual Violence Cases before the Entity Level and Brčko District BiH Courts

This chapter analyses the adjudication of conflict-related sexual violence cases by the entity level and Brčko District BiH courts and discusses the progress achieved and outstanding concerns in light of international standards. While a detailed description of the international jurisprudence on sexual violence crimes is contained in Chapter 4 of Volume 1 of this series, this chapter begins with a summary of some of the key points of international jurisprudence to provide an appropriate comparative context for the discussion of entity level and Brčko District BiH cases.

### 4.1 International Jurisprudence on Rape, Torture and Other Acts of Sexual Violence

The definition of rape as a war crime, crime against humanity or underlying act of genocide has evolved through a series of judgments of the *ad hoc* international tribunals.<sup>46</sup> The ICTY Trial Chamber in the *Kunarac* case articulated the objective elements of rape as follows:

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>47</sup>

In addition to defining the prohibited acts, the international tribunals have addressed the issue of whether the requisite sexual penetration was non-consensual. In *Akayesu*, the ICTR referred to "coercive circumstances", explaining that not only physical force but a variety of other factors can demonstrate coercive circumstances, including "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation".<sup>48</sup> Furthermore, coercion may be inherent in certain circumstances, such as armed conflict or those in which the military is present.<sup>49</sup> In *Furundžija*, the ICTY found that "coercion or force or threat of force against a victim or third person" may render sexual penetration

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<sup>46</sup> For a more detailed description, see Chapter 4.1.1 in Volume 1 of this series. See also *Akayesu* Trial Judgment, paras. 596-98, 686; *Čelebići* Trial Judgment, para. 479; *Furundžija* Trial Judgment, para. 185; *Kunarac et al.*, Trial Judgment, paras. 438, 460.

<sup>47</sup> *Kunarac et al.* Trial Judgment, para. 460.

<sup>48</sup> *Akayesu* Trial Judgment, para. 688.

<sup>49</sup> *Ibid*; *Čelebići* Trial Judgment, para. 495.

non-consensual, and any form of captivity negates the possibility of consent to sexual penetration.<sup>50</sup> The *Kunarac* Appeal Chamber emphasized that in most cases involving war crimes or crimes against humanity, the circumstances will almost always be coercive, thus precluding the possibility of consent.<sup>51</sup> *Kunarac* also clarified that there is no requirement to show that the victim resisted in order to prove the victim's lack of consent.<sup>52</sup>

In the *Gacumbitsi* case, the ICTR Appeals Chamber provided further insight into the *Kunarac* definition, holding that "the Prosecution can prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible" and that in order to do so, the Prosecution need not "introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator" or evidence "of force" but that "the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim".<sup>53</sup>

Lack of consent or the impossibility to exercise sexual autonomy due to coercive circumstances is what distinguishes unlawful from lawful sexual activity. Without using force, a perpetrator may take advantage of a "coercive environment", such as disorder, confusion and lawlessness, to commit rape and other forms of sexual violence.<sup>54</sup> The manifestly coercive circumstances that exist in all armed conflict situations, due to the pervasive potential for violence, establish a presumption of non-consent that negates the need for the prosecution to establish a lack of consent as an element of the criminal offence.<sup>55</sup> In *Akayesu*, for example, the ICTR established that coercion may be inherent in armed conflict and that the military presence among displaced persons was sufficient to make the situation inherently coercive.<sup>56</sup>

In addition to rape, the ICTY and ICTR Statutes criminalize torture as both a crime against humanity<sup>57</sup> and a war crime.<sup>58</sup> The ICTY and ICTR have held that rape and other forms of sexual violence can constitute torture if the elements of torture are met.<sup>59</sup> The ICTY and ICTR have also held that sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental. The first element of torture, namely that the perpetrator

<sup>50</sup> *Furundžija* Trial Judgment, paras. 185, 271.

<sup>51</sup> *Kunarac et al.* Appeal Judgment, para. 130. See also *Kunarac* Appeal Judgment, para. 129 (clarifying that rather than renouncing the Tribunal's earlier jurisprudence, the *Kunarac* definition sought to explain the relationship between force and consent; namely, that force or threat of force is not an element of rape but rather evidence of non-consent). See also *Gacumbitsi* (ICTR) Appeal Judgment, para. 155.

<sup>52</sup> *Kunarac* Appeal Judgment, para. 128 (noting that it is "wrong on the law and absurd on the facts").

<sup>53</sup> *Gacumbitsi* Appeal Judgment, para. 155.

<sup>54</sup> Article 7 (1)(g) and Article 8 (2)(b)(xxii) of the ICC Elements of Crimes.

<sup>55</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report / submitted by Gay J. McDougall, Special Rapporteur*, 22 June 1998, E/CN.4/Sub.2/1998/13, available at: <http://www.refworld.org/docid/3boof44114.html> [accessed 17 March 2015], para. 25.

<sup>56</sup> *Akayesu* Trial Judgment, para. 688.

<sup>57</sup> ICTY Statute, Article 5(f); ICTR Statute, Article 3(f).

<sup>58</sup> ICTY Statute, Article 2(b); ICTR Statute, Article 4(a).

<sup>59</sup> *Akayesu* Trial Judgment, para. 597; *Čelebići* Trial Judgment, paras. 495-496; *Furundžija* Trial Judgment, para. 171; *Kunarac* Trial Judgment, paras. 655-656; *Kvočka* Trial Judgment, para. 561; *Semanza* Trial Judgment, para. 483. See *Volume 1, pages 51-53*.

inflicted severe physical or mental pain or suffering, is thus automatically established once rape has been proved.<sup>60</sup>

Additionally, the Rome Statute provides for the prosecution of “any other form of sexual violence” as a crime against humanity in Article 7(1)(g) and as a war crime in Articles 8(2)(b)(xxii) and 8(2)(e)(vi). For crimes against humanity, this conduct must be of a comparable gravity to the other offences in Article 7(1)(g) of the Statute.<sup>61</sup> For war crimes, the conduct must be of comparable gravity to that of a grave breach of the Geneva Conventions<sup>62</sup> or to that of a serious violation of Common Article 3 of the Geneva Conventions I-IV.<sup>63</sup>

While the standalone crime of sexual violence is not codified in the statutes of the ICTY and the ICTR, *Akayesu* held that sexual violence can also fall within the scope of other inhumane acts as a crime against humanity; outrages upon personal dignity as a war crime; and causing serious bodily or mental harm to members of the group as a form of genocide.<sup>64</sup> In *Akayesu*, the ICTR first articulated the elements of sexual violence as:

[...] any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.<sup>65</sup>

Thus, other acts of sexual violence may include rape but are not limited to it. The ICTY endorsed this definition in the *Kvočka* case, adding that sexual violence is broader than rape and includes such crimes as sexual slavery or molestation, sexual mutilation, forced marriage, forced abortion, and the gender-related crimes explicitly listed in the Rome Statute.<sup>66</sup> In the *Furundžija* case, the ICTY added that the prohibition of sexual violence “embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity”.<sup>67</sup>

60 *Kunarac* Appeal Judgment, paras. 150-151. See also *Semanza* Trial Judgment para. 485 (finding that “by encouraging a crowd to rape women because of their ethnicity, the accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes” and that he thus “was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture”). See also Rome Statute, Articles 7(1)(f), 8(2)(a)(ii) and 8(2)(c)(1); ICC Elements of Crimes, Article 8(2)(a)(ii) – 1.

61 ICC Elements of Crimes, Article 7 (1)(g) – 6, para 2.

62 *Ibid*, Article 8(2)(b)(xxii) – 6 (war crime of sexual violence).

63 *Ibid*, Article 8(2)(e)(vi) – 6 (war crime of sexual violence).

64 See *Akayesu*, para. 688, citing ICTR Statute Articles 2(2)(b) – causing serious bodily or mental harm to members of the group as a form of genocide, 3(i), - other inhumane acts as a crime against humanity, and 4(e) – outrages upon personal dignity as a war crime.

65 *Akayesu* Trial Judgment, paras. 598, 688.

66 *Kvočka et al.* Trial Judgment, para. 180 and fn. 343.

67 *Furundžija* Trial Judgment, para. 186.



## 4.2 Entity Level and Brčko District BiH Jurisprudence on Rape

Out of the 35 cases involving conflict-related sexual violence completed by the courts in the FBiH, RS and Brčko District BiH, 25 cases included charges of rape. In 20 cases, 25 accused were convicted of rape as a war crime against civilians. All victims in these cases were women.

Over much of the past decade, there has been a tendency by courts to adopt a narrow, traditional interpretation of the elements of rape that requires the use of force or threat of force, as well as proof of physical resistance. While such an interpretation is clearly not in line with international standards and contemporary trends, the more recent jurisprudence in BiH does appear to be evolving toward closer harmony with international standards.

An approach to sexual violence crimes that requires proof of the use or threat of force or physical resistance may lead to impunity for perpetrators of rape and sexual violence who took advantage of the coercive circumstances without applying physical force. Historically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of jurisdictions. However, as the ECtHR has articulated, “the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved”, and the last decades “have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area”.<sup>68</sup> Moreover, the jurisprudence of the ICTY and the ICTR has consistently rejected force or threat of force as elements of rape *per se* and established that crimes of sexual violence must be committed under coercive circumstances but not necessarily by physical force.<sup>69</sup> Thus coercion, rather than force, has been recognized as an essential element of the crime of rape and of other sexual crimes in contemporary criminal law and constitutes a significant development as it recognizes an inequality between the perpetrator and victim.<sup>70</sup> Accordingly, in the context of armed conflict, the international tribunals have established that taking advantage of coercive circumstances to proceed with acts of rape and sexual violence is punishable by law.<sup>71</sup>

The international tribunals have also consistently rejected the requirement that a victim resist.<sup>72</sup> Consideration of the possibility of resistance in cases of rape and sexual

68 See *MC v. Bulgaria*, ECtHR Judgment, 4 December 2003, paras. 155-157.

69 *Kunarac et al.* Trial Judgment, paras. 458-460; *Akayesu* Trial Judgment, para. 688: “The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women (...); affirmed in *Čelebići* Trial Judgment, paras. 478-479.

70 See *MC v. Bulgaria*, ECtHR Judgment, 4 December 2003, para. 161: “Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (‘coercion’, ‘violence’, ‘duress’, ‘threat’, ‘ruse’, ‘surprise’ or others) and through a context-sensitive assessment of the evidence”.

71 *Ibid.*, para. 163.

72 *Kunarac et al.* Appeal Judgment, page 128: “The Appellants’ bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts”. *Kvočka* Appeal Judgment, pages 393, 395.

violence places emphasis on the victim's behaviour rather than the defendant's acts. Discussion about whether or not a female victim was in a position to resist also alludes to the existence of rape myths<sup>73</sup> and stereotypes of femininity, such as that only a certain type of woman is sexually assaulted, prevailing over principles of physical integrity and sexual liberty within the criminal justice system. The myth that the woman could offer resistance or consider the possibility of resistance demonstrates an attitude of shifting blame to the victim, or the victim sharing the burden with the perpetrator. Commenting on the problematic references in international law that link sexual violence to notions of morality and honour, a UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict stated that "international humanitarian law as well as municipal laws have often contained provisions for the protection of women's 'honour', implying that the survivor of sexual violence is somehow 'dishonoured' in the attack. (...) the only party without honour in any rape or in any situation of sexual violence is the perpetrator. While rape is indeed an assault on human dignity and bodily integrity, it is first and foremost a crime of violence".<sup>74</sup>

As noted above, a number of cases heard before the entity level courts, particularly during the period 2004-2007, did not follow these standards. For instance, a narrow, outdated interpretation of the elements of rape was demonstrated in cases such as *Pandurević*, which included charges for the rape of two women. Affirming the acquittal due to lack of evidence, the FBiH Supreme Court panel of judges considered that "(...)in relation to the elements of the criminal offence of rape, which are identical for both peacetime and wartime, the first instance court also considered these elements – the 'use of force and threat' – and, accepting the aforementioned expert witness evaluation that it was impossible for the victims to actively resist the perpetrator, noted that this resistance had to be preceded by the use of force or threat by the accused (...)".<sup>75</sup>

Similarly, in *Mihajlović*, a defendant charged *inter alia* with the rape of two women as war crimes against the civilian population was acquitted for one of the rapes. The Zenica Cantonal Court found the following elements of rape to be lacking: the presence of the use of force or threat and serious and lasting resistance by the victim of one rape.<sup>76</sup>

73 Sexual Assaults Linked to "Date-Rape Drugs", Council of Europe doc. 11038, Report of the Committee on Equal Opportunities for Women and Men, 2 October 2006, fn. 1: "Common myths include: Only certain types of women get raped (those who are promiscuous or have poor judgment); women provoke rapes by the way they dress or the way they flirt; men rape women because they are sexually aroused or have been sexually deprived (in fact, men rape women to exert control and humiliate)".

74 See *supra* note 55, para. 16. In addition, a report by the UN Special Rapporteur on Violence against Women has criticized "systemic obstacles and discrimination in the form of unreasonable evidentiary requirements, the rejection of the victim's uncorroborated testimony, the evocation of a victim's past history, the focus on the victim's resistance, the emphasis on the overt use of force and requirement to prove chastity". UN Doc. E/CN.4/1997/47, 12 February 1997, para. 28. In particular, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly calls on States to take all "appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". Article 5(a).

75 *Pandurević*, FBiH Supreme Court Verdict of 13 July 2005, page 4.

76 In addition, the court could not establish beyond reasonable doubt that the accused had been reliably identified as the perpetrator of the alleged rape. *Mihajlović*, Zenica Cantonal Court Verdict of 2 June 2005, page 74. The FBiH Supreme Court upheld the acquittal on the basis of the unreliable identification and refrained from any discussion of the elements of rape, thus failing to provide further guidance on their proper application. *Mihajlović*, FBiH Supreme Court Verdict of 8 March 2006, page 7.

Elaborating on these elements, the court held that rape is “committed by a person who compels another person to sexual intercourse or any other sexual act by use of force, or threat of immediate physical attack upon that person or upon someone close to that person. The condition is that the threat of killing or inflicting bodily harm must be directed against the life or limb of the victim or a person close to the victim and that it is carried out immediately or that the attack is imminent (...)”. The court further said “Force or threat are directed at overcoming the resistance of the female person in order to have sexual intercourse with her and should be of such intensity that is sufficient to crush the victim’s resistance”. With regards to the resistance of the victim, the court said it “must be real and lasting and the coercion of the perpetrator must be opposed by significant resistance of the attacked female person. Lasting resistance implies that it must continue until the criminal offence is completed and it must correspond to the limits of victim’s physical strength and the actual opportunities she has to defend herself”.<sup>77</sup> The act of pushing the victim to the couch, according to the court, did not constitute force of such intensity that it could break down the victim’s resistance since, as the victim stated, she showed no physical resistance. Moreover, the court did not accept that the victim had no possibility of defending herself, as she could have called for her half-brother who was in the kitchen at the time.<sup>78</sup>

Unsurprisingly, the notions of coercion or coercive environment<sup>79</sup> are not even mentioned, let alone endorsed, in *Mihajlović*. Though the court considered the general circumstances surrounding the event – the curfew time, the involvement of an armed policeman and the fact that the victim expressed fear – these circumstances were found, on their own, not sufficient, because the passive attitude of the victim would only be legally relevant insofar as it follows force or threat, which in this particular case the court found could not be established.<sup>80</sup>

In two other cases, the Sarajevo Cantonal Court provided both a narrow definition of rape and unnecessarily addressed the question of whether the victim could resist. In *Knežević*, which involved the rape of two women in their homes, the court said that rape includes “two acts, coercion and sexual intercourse, whereby coercion to sexual intercourse is perpetrated through the use of force or threat of immediate attack on life or limb of a passive victim, which, according to the court’s finding, was exactly what had transpired in the case at hand”.<sup>81</sup> The Sarajevo Cantonal Court in this case concluded that the “witness felt great fear and was not in a position to resist at the time of the rape”. The same court in *Mišković* articulated identical elements of rape.<sup>82</sup> The case involved the rape of a woman on more than one occasion, with the court noting in its verdict that the victim testified she “was not in a position to resist as she was on her own, unprotected, a Muslim, and the two attackers were men, stronger than her and armed” and also concluded that “later on a separate occasion, when the accused came alone and raped her again, the victim was in no position to resist or to turn to anybody for help”.<sup>83</sup>

77 *Mihajlović*, Zenica Cantonal Court Verdict of 2 June 2005, page 71.

78 *Ibid*, page 72.

79 *See supra* note 54; ICC Rules of Procedure and Evidence, Rule 70.

80 *Mihajlović*, Zenica Cantonal Court Verdict of 2 June 2005, page 72.

81 *Knežević*, Sarajevo Cantonal Court Verdict of 8 December 2004, page 10.

82 *Mišković*, Sarajevo Cantonal Court Verdict of 12 February 2007, page 19.

83 *Ibid*, pages 5, 19.

A similar legal standard was applied in the *Hasanović and Pavić* case, which addressed the multiple, simultaneous rape of a woman. The Basic Court of Brčko District BiH stated that the criminal offence of rape included “compelling another person to sexual intercourse by use of force or threat of direct attack on life or limb. The perpetration of the said criminal offence consists of two acts - coercion to sexual intercourse and sexual intercourse itself. The court found that the rape was committed using a threat which implied to the victim that she would come to harm in the form of decisive actions”. The court concluded that the victim “could expect attack upon her life or limb unless she acted upon the orders of the accused. In such a situation the victim could not have been expected to offer resistance sufficient to oppose the attackers (...). In view of the presented evidence, it is proved beyond doubt that the victim did not willingly consent to sexual intercourse”.<sup>84</sup>

The Brčko District BiH Appellate Court’s reasoning in *Hasanović and Pavić* also demonstrated a misunderstanding of coercion as the proper essential element of rape. The court opined that:

[...] the main element of this form of war crimes against civilians (rape) is the act of the accused, who, in violation of rules of international humanitarian law during war, as members of the armed forces of one party to the conflict, compel the victim to sexual intercourse without her consent. In such circumstances the ‘force or threat’ required to overcome the victim’s supposed resistance assumes a specific character of coercion, which, pursuant to Article 142 [of the SFRY Criminal Code], constitutes sexual penetration (intercourse), in this case of vaginal and oral nature, without the victim’s consent. In such a situation, intercourse (rape) is a direct consequence of coercion (direct threat to the life of the victim) because it is perpetrated under circumstances which render impossible any resistance on the side of the victim. (...) in the case of such a specific form of coercion any possibility of consent being given to sexual intercourse is excluded.<sup>85</sup>

Encouragingly, this trend of concerning cases appears to have mostly subsided in later years, and **courts in the entities and Brčko District BiH are generally coming to accept the notions of coercion and coercive environment in line with international standards.** Most of the recent jurisprudence, particularly in three cases, has demonstrated a sound understanding of these notions. In the 2008 *Govedarica* case, the Trebinje District Court established that “(...) the accused performed sexual penetration of the injured without her consent. Resistance is not a condition for the existence of this incrimination taking into account the atmosphere of coercion in which the act was perpetrated. The circumstances of coercion do not have to be proven with manifestation of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion”.<sup>86</sup> The Trebinje District Court reaffirmed this reasoning in the *Stevanović* case in 2012.<sup>87</sup> Likewise, in the 2013 *Kojić* case, the Doboj District Court affirmed that resistance and the manifestation of physical force are not necessary conditions, although physical force was used in that particular case.<sup>88</sup> In its verdict, the court also

84 *Hasanović and Pavić*, Basic Court of Brčko District BiH Verdict of 2 February 2009, page 19.

85 *Hasanović and Pavić*, Appellate Court of Brčko District BiH Verdict of 11 May 2009, page 10.

86 *Govedarica*, Trebinje District Court Verdict of 10 July 2008, pages 14-15.

87 *Stevanović*, Trebinje District Court Verdict of 17 May 2012, page 13.

88 *Kojić*, Doboj District Court Verdict of 30 April 2013, page 10.

described the general circumstances surrounding the crime in that particular area during the armed conflict in July 1992.

An isolated exception to the positive developments in recent cases was the March 2014 verdict of the Bijeljina District Court in *Lukić*, which involved a juvenile rape victim. The court held that “there is a causal link between the acts of the accused, war and armed conflict, and the civilian who was raped with the use of force and threat of force which are, according to the assessment of this court, essential elements so that the acts of the accused can be qualified as the criminal offence of war crimes against the civilian population”.<sup>89</sup> This interpretation not only disregards the ICTY and ICTR jurisprudence finding that crimes of sexual violence may be committed under “coercive circumstances”, and not necessarily under force or the threat of force,<sup>90</sup> the Bijeljina Court’s approach also fails to capture the reality of how children are targeted for sexual violence and their vulnerability.<sup>91</sup>

**A trend toward closer alignment with international standards is also evident in some cases that demonstrated an effort to adopt international standards yet still struggled to overcome an unnecessary focus on force and resistance.**

For example, in the 2013 *Kostić* case, the Brčko District BiH Appellate Court discussed coercive circumstances in the following context:

Thus, the objection of the defence that the court failed to establish that the accused used force to break the victim’s resistance or that the victim offered resistance is irrelevant because these need not be established considering that the crime was perpetrated under circumstances in which armed members of one party to the armed conflict had complete control over unarmed civilians of the occupied settlement (...), whose freedom of movement and free will were restricted to the extent that any opposition to violence and terror would mean putting their own lives at risk. Consequently, the order the accused gave to the victim, holding a weapon in his hand, to ‘lie down; I will not repeat this twice’ represented more than a serious threat, which eliminated any option for the victim to offer resistance and prevent the accused in carrying out his intentions.<sup>92</sup>

The court in *Kostić* apparently considered that resistance on the part of the victim is a relevant question of fact that can be overcome by coercive circumstances such as armed conflict. This reasoning does not fully appreciate that, while a victim’s resistance may indicate non-consent, resistance is not a required element for the commission of sexual violence crimes. Coercion itself, without any inquiry into the possibility of resistance, is sufficient to show that sexual autonomy cannot be exercised.

In the recent *Kovačević* case, the Doboj District Court cited the ICTY definition of rape from *Kunarac*:

<sup>89</sup> *Lukić*, Bijeljina District Court Verdict of 4 March 2014, page 4.

<sup>90</sup> *Kunarac et al.* Trial Judgment, paras. 458-460.

<sup>91</sup> See *MC vs. Bulgaria*, ECtHR Judgment, 4 December 2003, para 183: “The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors”.

<sup>92</sup> *Kostić*, Brčko District BiH Appellate Court Verdict of 13 September 2007, pages 8-9.

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.<sup>93</sup>

Based on this definition, the court concluded that victim resistance is not an element of rape as a war crime and properly focused on the "existence or non-existence of voluntary and genuine consent" of the victim. The court further explained the existence of "threat of force and force" in these types of crimes is presumed because the time and circumstances of perpetration "diminish or even completely exclude" the capacity of the injured to give "voluntary and genuine consent". The court concluded that "silence, verbal agreement or non-resistance cannot be considered as the victim's consent which under different circumstances would exclude the existence of a criminal offence".<sup>94</sup>

The court's reliance on *Kunarac* and finding that the circumstances excluded the possibility of consent closely reflect international standards. However, the court's reasoning that the "threat of force and force" were presumed with regards to conflict-related sexual violence fails to recognize that the concept of coercion is wider than the use of force or threat of force; it puts rape and sexual violence in context and emphasizes the inequality between the victim and the perpetrator. An interpretation of coercion that takes gender into consideration includes various forms such as "fear of violence, duress, detention, psychological oppression or abuse of power".<sup>95</sup> Coercion may be inherent in certain circumstances such as armed conflict, where non-consent is presumed. The coercion standard properly shifts the focus from the victim's state of mind to the acts of the perpetrator.<sup>96</sup> In order to fully protect the rights of victims, it is essential for the prosecution and court to assess all the surrounding circumstances when appraising the perpetrator's *mens rea*.<sup>97</sup>

To summarize, much of the recent jurisprudence demonstrates a sound understanding of the elements of rape in line with international standards, while some cases, such as *Kostić* and *Kovačević*, may show that courts are striving, yet struggling, to align their reasoning with international standards. It is hoped that the trend toward international standards will continue and that the outdated interpretation of the elements of rape applied by some courts becomes a thing of the past.

**The OSCE Mission welcomes the increasing tendency of several courts in BiH to demonstrate a sound understanding of the elements of rape in accordance with international standards and encourages other courts in BiH to do the same.**

93 *Kovačević*, Doboj District Court Verdict of 2 December 2013, page 9.

94 *Ibid.*

95 ICC, The Elements of Crimes, Article 7 (1) (g)-1; see also *Akayesu* Trial Judgment, para. 688.

96 See *South African Law Reform Commission, Discussion Paper 85 (Project 107) Part A: Sexual Offences: the Substantive Law*, page 114, para. 3.4.7.3.14., 12 August 1999: "A shift from 'absence of consent' to 'coercion' represents a shift in the focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties (...) This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organizational power".

97 See *MC vs. Bulgaria*, ECtHR judgment, 4 December 2003, para. 180.

### 4.3 Entity Level and Brčko District BiH Jurisprudence on Torture and Other Acts of Sexual Violence

To date, only one case has been tried before the courts in the entities and Brčko District BiH in which it was held that rape and sexual violence constituted torture. The case of *Spasojević et al.* concerned four detention camp guards and involved one female and several male victims of rape and sexual violence that were qualified as a form of torture.<sup>98</sup> The notion that rape and sexual violence can constitute torture was then confirmed by the FBiH Supreme Court, which found that coercing prisoners of war and detained civilians to “sexual intercourse and other forms of sexual acts” has the character of torture. Taking into account the context of detention in which these acts were committed, and in line with international standards and jurisprudence,<sup>99</sup> the Supreme Court held that “detainees were in a completely inferior position in relation to the accused and in a unique mental state (...) the acts were committed in the presence of other detainees and with the aim to, *inter alia*, humiliate, intimidate and discriminate against detainees, and as such inflicted severe mental pain or suffering on detainees, of which the accused were aware because of the mere nature of the acts which they forced upon detainees and the circumstances in which they undertook the acts, which amount to torture”.<sup>100</sup>

With regard to other acts of sexual violence, the entity level and Brčko District BiH courts have completed eight cases. In five of these cases that resulted in conviction, the courts found that acts of sexual violence, in addition to other charges, constituted inhuman treatment as a war crime against civilians pursuant to Article 142(1) of the SFRY Criminal Code. Such were the findings in *Kalajdžija*,<sup>101</sup> where the accused ordered three women to take off their clothes, threatening to rape and kill them, and violated the physical integrity of one victim by injuring her with a knife; and in *Zjajić*,<sup>102</sup> where the accused attempted to rape, and succeeded in wounding, one woman.

In *Glišić*, a commander of a women’s labour squad forced members of the squad to clean apartments occupied by soldiers, knowing that some of them, including two victims who testified in court, were raped in these apartments by the soldiers.<sup>103</sup> Overall, the court found these acts to constitute inhuman treatment and that they were a “serious attack on human dignity, exposing victims to insults and public inquisitiveness and sexual abuse,

98 *Spasojević et al.*, Tuzla Cantonal Court. The case resulted in three separate criminal proceedings. Radomir Škiljević was at large, Mirko Pantić concluded a plea bargain agreement, and Dušan Spasojević and Ratko Todorović were convicted of war crimes against prisoners of war (Article 144) and war crimes against the civilian population (Article 142).

99 In *Kunarac*, (Trial Judgment, para. 497), the ICTY defined the elements of torture as:

- I. *The infliction, by act or omission, of severe pain or suffering, whether physical or mental.*
- II. *The act or omission must be intentional.*
- III. *The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.*

See also Rome Statute, art. 8(2)(c)(1).

100 *Spasojević et al.*, FBiH Supreme Court Verdict of 29 October 2008, page 13.

101 *Kalajdžija*, Banja Luka District Court Verdict of 1 July 2008.

102 *Zjajić*, Livno Cantonal Court Verdict of 5 January 2010.

103 *Glišić*, FBiH Supreme Court Verdict of 18 September 2006, page 12.



discriminating against them on the basis of nationality and religion” which caused serious humiliation, degradation and outrage upon the dignity of the victims.

In *Koler*, a detention camp guard demanded that two detained brothers take off their clothes and engage in sexual intercourse, while threatening them with genital mutilation. After one detainee could not do it, the accused insulted and humiliated him.<sup>104</sup>

Finally, in *Milanović*, the accused detention camp guard allowed members of military and para-military forces to enter the camp and force two male detainees to strip naked and jump on trimmed bushes and then to “force them to engage in sexual acts”.<sup>105</sup> However, it is not clear from the verdict whether penetration actually occurred, so it cannot be decisively concluded whether the underlying act itself could have been legally qualified or assessed as rape.

#### 4.4 Elements of Rape with regard to Gender

A review of cases involving male victims of sexual violence suggests that the elements of rape are sometimes applied differently depending on the gender of the victims. For example, while the issue of consent and whether the victim could resist were considered by the courts in several cases involving female victims, these issues were not raised in the cases of *Milanović*<sup>106</sup> or *Minić et al.*, which involved male victims.

In *Minić et al.*, the Bijeljina District Court found the accused guilty *inter alia* of forcing male prisoners to perform fellatio on each other. Although forced fellatio has been recognized as rape in the jurisprudence of the international tribunals,<sup>107</sup> these acts were not qualified or assessed as rape either in the indictment or in the verdict. In this particular case, the Bijeljina District Court found that the accused committed war crimes against prisoners of war by “intentionally inflicting bodily injuries, severe physical and psychological pain and suffering, outrage upon their personal dignity and inhuman treatment.”<sup>108</sup>

In the *Milanović* case, as explained above, a detention camp guard allowed members of military and para-military forces to enter the camp and force two male detainees to strip naked and jump on trimmed bushes and then to “force them to engage in sexual intercourse”.<sup>109</sup> These acts were not qualified or assessed as rape either in the indictment or the verdict, but rather as aiding a “serious attack on the human dignity” of detained civilians, which constituted a “violation of physical and personal integrity” and “serious

<sup>104</sup> *Koler*, FBiH Supreme Court Verdict of 11 March 2013.

<sup>105</sup> *Milanović*, FBiH Supreme Court Verdict of 15 February 2013. The court stated that the defendant aided a “serious attack on the human dignity” of detained civilians and these acts constituted a “violation of physical and personal integrity” and “serious abuse and humiliation” (page 17).

<sup>106</sup> *Ibid.*

<sup>107</sup> See, e.g., *Furundžija* Trial Judgment, paras. 183-185 (holding that “forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity”, that “such an extremely serious sexual outrage as forced oral penetration should be classified as rape”, and accordingly, that the elements of rape include sexual penetration of the mouth of the victim by the penis of the perpetrator).

<sup>108</sup> *Minić et al.*, Bijeljina District Court Verdict of 11 April 2014, page 2.

<sup>109</sup> See *supra* note 105.



abuse and humiliation". However, as noted earlier, since it is not clear from the verdict whether penetration actually occurred, it cannot be decisively concluded whether the underlying act itself could have been qualified or assessed as rape.

**The aforementioned cases seem to indicate that the elements of rape are applied differently depending on the gender of the victims.** The definitions of rape and sexual violence have evolved, and will further evolve, in order to depict the experiences of all victims and, as such, are gender neutral and not confined to gender stereotypes. Therefore, it is of paramount importance that the interpretation of gender neutral provisions be free from gender stereotypes in order to avoid past discrimination patterns which may affect persons differently depending on their gender.<sup>110</sup>

In international criminal law, a central issue remains the concept of "non-consent" on the part of women and "the extent to which women are subjected to the most intrusive questioning in order to establish the 'nature' of the assault".<sup>111</sup> It appears that non-consent on the part of women is a central issue in the BiH criminal justice system. This may deter and re-traumatize women in the criminal justice process who are consistently encouraged to come forward and testify before the courts about their experiences. As a former Gender Advisor and Prosecutor at the ICTY pointed out,

Human rights protection now augurs for more refined and responsive right to equal access to justice under the humanitarian norms and international criminal law for women and girls. Those rights must encompass procedural and substantive aspects of access to justice that are not mired in gender-weighted myths about sexual violence nor legal inaction nor inappropriate actions, especially when dealing with the crime of rape. Tellingly, if the "impact" of the lack of consent element in rape, is sanctioned and raised more frequently with female victim/survivors, even when rape is prosecuted under another crime, like persecution or torture, or sexual slavery, a disproportionate gendered chilling effect will descend on the females' exercise of their rights to access humanitarian norms.

She further emphasized that "due diligence, on the part of judges to resist any sexist interpretations of the laws, elements, procedural rules and the evidence, remains critical to the endeavour of constructing a non-discriminatory international justice system".<sup>112</sup>

<sup>110</sup> See General Recommendation No. 25, on Article 4, para. 1, On temporary measures, UN Doc. HRI/GEN/1/Rev.7, (2004), CEDAW note 1: "Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men". Available at: [http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf).

<sup>111</sup> UN High Commissioner Navanethem Pillay: *Sexual Violence: Standing by the Victim*, Case W. Res. J. Int'l L (Vol. 42:459 2009), page 461.

<sup>112</sup> Patricia Viseur Sellers: *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, published by OHCHR, available at: [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf).

The judges and prosecutors in the BiH criminal justice system should be mindful that the gender neutrality of rape and sexual violence does not exclude taking gender into consideration whilst investigating and processing rape and sexual violence cases, yet requires acknowledging victims in an equal manner without resorting to gender stereotypes.

#### 4.5 Conflict-related Sexual Violence Qualified as the ‘Ordinary’ Offence of Rape at Entity Level and Brčko District BiH Courts

Of particular concern are the six completed cases identified by the OSCE Mission in which conflict-related sexual violence was qualified as an “ordinary” crime (i.e. not as a war crime). These cases resulted in the conviction of eight perpetrators. In one of these cases, a defendant was acquitted.<sup>113</sup>

Generally, the failure to properly qualify conflict-related sexual violence as a war crime was often aimed at denying or trivializing the gravity of the crime and was widespread in cases initiated by military courts against soldiers of the same army during the armed conflict in BiH. Many such cases were inherited by the entity and Brčko District BiH prosecutors after the conflict.<sup>114</sup> It is the duty of these prosecutors to re-qualify the alleged crime as a war crime based on the evidence.<sup>115</sup> To the OSCE Mission’s knowledge, this happened in two cases of conflict-related sexual violence before the Banja Luka District Court, in which initial charges were changed to war crimes by the prosecutor in charge.<sup>116</sup> As the OSCE Mission noted in its previous reports on war crimes proceedings, this clearly demonstrates that some entity and Brčko District BiH prosecutors are willing to recognize the real nature of the alleged criminal conduct.<sup>117</sup> However, the pattern of conflict-related sexual violence being charged and tried as the ordinary offence of rape remains a cause for concern.

In addition to failing to appreciate the true nature and gravity of the crime, **the mischarging of conflict-related sexual violence as an ordinary offence may also result in impunity.** For example, in *Jarić et al.*, which concerned the rape of two women by three soldiers during the armed conflict in 1992, the crime was qualified and tried as an ordinary criminal offence, even though the allegation that the perpetrators took the victims from a detention camp and were wearing uniforms would strongly indicate that the rapes in question constituted war crimes. The investigation against one of the suspects

<sup>113</sup> *Jarić et al.*, Brčko Basic Court Verdict of 14 January 2005. Fatima Karamehić was convicted of the ordinary offence of rape as an accomplice.

<sup>114</sup> See the OSCE Mission Report *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010*, page 70, available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2011051909500706eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf).

<sup>115</sup> During the OSCE Survey, one prosecutor expressed the view that charging conflict-related sexual violence as non-war crime (i.e. ordinary) offences was related to the ignorance of prosecutors and judges responsible at the time. One prosecutor interviewed, who represented such a case before the court, honestly admitted that she did not have any experience with war crimes prosecution at the time. Therefore, the legal qualification was not changed in that particular case and the court accepted the qualification as an ordinary crime. Today, this prosecutor said that she would change the legal qualification of the offence without hesitation.

<sup>116</sup> *Trivić and Bajić and Trivić et al.*, Banja Luka District Court.

<sup>117</sup> See *supra* note 114.

was abandoned, because “during the proceedings for issuing a decision on conducting an investigation, the new FBiH Criminal Code, which did not envisage the criminal offence of lechery as an individual criminal offence, entered into force”.<sup>118</sup> This suggests that, if these charges had been investigated as war crimes, the investigation against this suspect might not have been dropped, and the perpetrator may not have avoided responsibility for this act of conflict-related sexual violence.

In the *Dilberović* case,<sup>119</sup> the defendant looted apartments and raped a woman with a group of armed men during the armed conflict in 1993, which resulted in his being charged and convicted for the ordinary offence of rape.<sup>120</sup> Remarkably, a female witness testified that she was forced to perform fellatio by the defendant and another perpetrator, yet the defendant did not face any charges for this additional act of sexual violence. This may be due to the fact that, under the old criminal legislation and legal interpretation, forced fellatio would not be considered a form of rape but rather categorized as a lewd act or lechery.<sup>121</sup>

Another noteworthy case was *Brekalo*, tried by the Mostar Municipal Court.<sup>122</sup> The case concerned a military policeman who, in 1993, led the victim out of a truck in which she was crammed together with 25 expelled civilians, brought her to his apartment, and raped her. The accused was tried and convicted *in absentia* for the ordinary offence of rape but later petitioned for the reopening of proceedings. By that stage, it was impossible for the court or prosecutor to change the legal qualification of the crime, because it was already tried *in absentia* and completed with a final and binding verdict. The application of a more severe charge, to the detriment of the defendant, would have constituted a breach of the principle of the prohibition of *reformatio in peius*.<sup>123</sup> After the accused petitioned for the reopening of proceedings, the court again found him guilty of rape as an ordinary offence.

Though it could not requalify the rape charge as a war crime, the Appellate Court in *Brekalo* demonstrated an inclination to adapt to the evolution of sexual violence law and overcame a redundant definition of ordinary rape, which even included marital immunity,<sup>124</sup> by interpreting the relevant provisions in light of the context surrounding the criminal offence. Though the court accepted the defence’s view that coercion to sexual intercourse consists of the use of force or threat of force, the court rejected the argument that the threat could not be considered serious insofar as the perpetrator did not use weapons. The court emphasized the specific circumstances surrounding the crime, finding that the

<sup>118</sup> *Jarić et al.*, Brčko District BiH Appellate Court Verdict of 9 October 2006, page 8.

<sup>119</sup> *Dilberović*, Sokolac Basic Court.

<sup>120</sup> Article 88(1) of 1992 RS Criminal Code provides that “whoever coerces a female person to whom he is not married into sexual intercourse by force or threat to endanger her life or body or that of someone close to her will be sentenced to between one and ten years in prison.” An identical provision is found in Article 88(1) of the FBiH Criminal Code.

<sup>121</sup> See *Commentary to Criminal Code of the Federation of Bosnia and Herzegovina (Special Part)*, published in 2000 by the OSCE Mission, within the Legislation Commentary Project, Article 221 (Rape) page 279 and Article 226 (Lechery) page 279.

<sup>122</sup> *Brekalo*, Mostar Municipal Court Verdict of 8 March 2013.

<sup>123</sup> Prohibition of *reformatio in peius* essentially means that a person should not be placed in a worse position as a result of filing an appeal (see Article 322 FBiH CPC, Article 313 RS CPC and Article 307 Brčko District BiH CPC).

<sup>124</sup> See *supra* note 120.

victim could not consent to sexual intercourse given that she was separated from a group of people who were forced from their homes and that she was taken to his apartment against her will.<sup>125</sup>

The *Stjepić* case was also tried *in absentia* in 2002 before the Mostar Municipal Court. The defendant was a soldier who, during the armed conflict in 1993, looted civilian property and raped a woman. The proceedings were reopened after the defendant filed a petition. As in *Brekalo*, by this point it was not possible for the court or prosecutor to requalify the offence. Furthermore, the second instance court in *Stjepić* dismissed the charges for robbery pursuant to the FBiH Law on Amnesty.<sup>126</sup> If the rape and looting had been charged as war crimes from the outset, it is more likely that the accused would have been held accountable for additional crimes.<sup>127</sup>

The OSCE Mission has identified two further completed cases where conflict-related sexual violence was charged as the ordinary crime of rape. These include the *Mihić* case, before the Dobož Basic Court, where a soldier went to the victim's house, accused her of hiding deserters, and raped her.<sup>128</sup> Likewise, the defendant in *Perić* was a soldier who was occupying the victim's brother's house at the time and went to her house in the middle of the night, threatened to shoot her, and then raped her.<sup>129</sup> Finally, the OSCE Mission is aware of one ongoing case of conflict-related sexual violence that is qualified as the ordinary crime of rape. The case concerns the rape of five women by three soldiers.<sup>130</sup>

The mischarging of conflict-related sexual violence crimes hinders progress towards justice for wartime atrocities by failing to accurately reflect the real nature and gravity of the crimes, while processing these as ordinary rape has also led to impunity for specific crimes. **Prosecutors and judges are urged to ensure that allegations of sexual violence committed during the armed conflict are properly qualified to avoid perpetrator impunity and so that the full nature and extent of the harm suffered by the victims is reflected in verdicts and sentences.**

## 4.6 Sentencing and Identification of Mitigating and Aggravating Circumstances

The fact that sexual violence is an underlying act of war crimes and, in some cases, a single sentence is handed down for the totality of the defendant's conduct, makes it difficult to determine what the range of sentences has been for conflict-related sexual violence before the courts.

<sup>125</sup> *Brekalo*, Mostar Cantonal Court Verdict of 19 June 2013, page 2.

<sup>126</sup> *Stjepić*, Mostar Cantonal Court Verdict of 17 March 2010, page 1.

<sup>127</sup> A similar situation also arose during the investigation of the aforementioned *Dilberović* case. The prosecutor's office in this case issued an order for cessation of investigation against the accused and another person for certain criminal offences because the acts were covered by amnesty pursuant to the RS Law on Amnesty. *Memo from Istočno Sarajevo District Prosecutor's Office to the injured party*, 17 April 2007.

<sup>128</sup> *Mihić*, Dobož Basic Court Verdict of 5 May 2013.

<sup>129</sup> *Perić*, Bijeljina Basic Court Verdict of 29 December 2012.

<sup>130</sup> *Božić et al.*, Kotor Varoš Basic Court.

In general, mitigating factors accepted by the entity level and Brčko District BiH courts are:

- The defendant is a family man
- The defendant is in poor health
- The defendant has children
- Special hardship for the defendant's family
- The defendant admitted guilt
- The defendant expressed remorse
- The defendant had no prior criminal record
- The defendant's age when the offence was committed
- The lapse of time since the perpetration of the offence
- The defendant's good behaviour before the court
- The defendant's difficult financial situation
- The defendant's assistance to some victims

Aggravating circumstances accepted by the entity level and Brčko District BiH courts generally included the number of criminal acts, the degree of danger or injury to the protected object, the time of perpetration, incorrect behaviour during the main trial, ruthlessness, a previous criminal record, the number of victims, persistence, wantonness, the consequences of the criminal offence, the circumstances in which the offence was committed, the degree of liability, the manner of perpetration, the motives for perpetrating the offence, impudence, and the degrading manner of perpetration.

In most of the verdicts analysed for the purposes of this report, circumstances accepted in the aggravation and mitigation of a sentence are simply listed, with no detailed discussion as to their impact on the severity of the sentence. This leaves the impression that aggravating and mitigating circumstances are only *pro forma* listed in judgments. For example, in the *Nemanja Jovičić* case, a lack of discussion about aggravating and mitigating circumstances in the verdicts leaves it unclear why the second instance court considered the punishment meted out by the first instance court too harsh in spite of the proper assessment of aggravating circumstances<sup>131</sup> and why a reduced term of imprisonment better served the purpose of punishment. In another case of two defendants who both repeatedly raped a civilian victim, the second instance court reduced the term of imprisonment from six to five years without considering the consequences to the victim in any detail, merely finding that the punishment "was not appropriate to the particular act and real consequences deriving from committing this criminal offence upon the physical and psychological integrity of the injured".<sup>132</sup>

As for aggravating circumstances, it is evident from the verdicts analysed that the majority of courts took into account the consequence of the criminal offence. However, in cases that included other charges in addition to sexual violence, the consequences of each crime were not differentiated. In only four cases that resulted in conviction was an

<sup>131</sup> *Jovičić*, FBiH Supreme Court Verdict of 29 April 2010.

<sup>132</sup> *Hasanović and Pavić*, Brčko District BiH Appellate Court Verdict of 11 May 2009.

explicit reference made to the lasting consequences of the rape itself and considered by the court as an aggravating circumstance.<sup>133</sup> **It is therefore important that judges and prosecutors broaden their understanding of the harmful consequences to victims of sexual violence, so that these can be more adequately explained in judgments and reflected in sentences.**

The consequences of conflict-related rape and sexual violence impact not only the victim, but also society as a whole. The consequences of rape “continue beyond the actual attack or attacks, often lasting for the rest of the women’s lives”.<sup>134</sup> As underscored by the ICTR in *Akayesu*, rape results in the physical and psychological destruction of victims, their families and their communities.<sup>135</sup> In calling for a response to the issue of systematic rape, sexual slavery, and slavery-like practices in armed conflict, the UN Special Rapporteur has stressed that “it is imperative to acknowledge the immeasurable injury to body, mind and spirit that is inflicted by these acts”.<sup>136</sup> BiH judges should be mindful to do the same.

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<sup>133</sup> *Mišković*, Sarajevo Cantonal Court Verdict of 12 February 2007; *Delić*, Bihać Cantonal Court Verdict of 7 December 2012; *Kojić*, Doboj District Court Verdict of 30 April 2013; *Knežević*, Sarajevo Cantonal Court Verdict of 8 December 2004.

<sup>134</sup> Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 *European Journal of International Law* 326, available at: [www.law-lib.utoronto.ca/Diana/fulltext/chin2.htm](http://www.law-lib.utoronto.ca/Diana/fulltext/chin2.htm).

<sup>135</sup> *Akayesu* Trial Judgment, para. 731: “Rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm. (...) These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities”.

<sup>136</sup> See *supra* note 55, para. 9.

## 5. Witness Protection and Support

### 5.1 Reluctance to Testify, Stigma and Lack of Family Support

As recognized by the ECtHR, victims of sexual violence have heightened interest in privacy because of the stigma attached to their injuries.<sup>137</sup>

In the OSCE Survey, prosecutors stated that there were a number of cases in which the victim's testimony could not be used due to the victim's refusal to testify. Several prosecutors also believed that many cases of conflict-related sexual violence have not been reported due to fear of social stigma and that many women are still hiding the fact that they were raped during the war. These prosecutors stressed that they face problems with victims refusing to testify despite assurances that all available protection would be afforded to them, and they emphasized that victims are often stigmatized in their local communities. One prosecutor openly stated that BiH is a conservative society where victims of rape are broadly understood to have consented to sexual intercourse. Another prosecutor opined that victim unwillingness to testify about events that took place 20 years ago stems from having a current stable family life that may be ruined, or jeopardized, by that testimony. Other prosecutors also said that members of the victim's family are often not aware of what the victim went through during the war and, as a consequence, in order to avoid stigmatization and reliving the trauma, many victims opt not to report the crime or to testify.

The aforementioned was underscored in the *Knežević* trial verdict. In its reasoning, the court took into account the social context and the community perception of rape, noting that "even today rape is considered as a shame on women about which it is better not to talk (...) witnesses claimed that many women who were raped in the area of (...) don't want to talk about that, especially those who were single at the time but after the war got married".<sup>138</sup> During her testimony before the court, the rape survivor stated that, "if she had known", she would not have reported the crime, because she was exposed to disgrace and, in her view, "it is better to remain silent and be 'honest'".<sup>139</sup>

Prosecutors have cited several examples of male victims of sexual violence who refused to testify, including one male victim who did not even want criminal proceedings to begin. In another case, a male juvenile victim of sexual violence reportedly refused to testify at the main trial, and therefore only other eye-witness testimony was presented. However, at trial the eye-witness departed from the evidence he gave at the investigation phase and, as a result, this particular allegation of sexual violence was not proved before the court. The

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<sup>137</sup> See, e.g., *Bocos-Cuesta v. the Netherlands*, ECtHR, 10 November 2005, para. 69; *Accardi et al. v. Italy*, ECtHR, 20 January 2005, para. 1.

<sup>138</sup> *Knežević*, Sarajevo Cantonal Court Verdict of 8 December 2004, page 12.

<sup>139</sup> *Ibid.*

male victim in another case, after realizing that the investigators had information about the sexual violence he survived, not only refused to testify but also stopped co-operating with the prosecution in relation to the entire case. In the case of *Monika Karan-Ilić*, the male victim of alleged sexual violence refused to testify before the court. The prosecutor read the most relevant parts of his investigative statement and the victim-witness only confirmed. The defence was not in a position to cross-examine this witness, as the witness stated that he did not feel well, did not remember what he was saying at the time, and did not want to recall the alleged event.<sup>140</sup>

Regarding lack of family support, one prosecutor shared an example of a victim who refused to give a statement because her husband did not allow her to testify. This type of situation has also been observed by OSCE Mission trial monitoring. For example, the OSCE Mission monitored *Trivić et al.*,<sup>141</sup> in which a witness who became distressed while testifying and who could not identify the perpetrators indirectly revealed that she was severely ill-treated and raped. The indictment in this case was filed by the military prosecutor in 1994 and, because this particular charge was based on a statement by the victim's husband who did not want to testify about the rape his wife survived, the indictment did not include this allegation. When the court attempted to calm the witness and encourage her to testify about the rape, she immediately refused to say anything. The witness also stated that her late husband had blamed her for what had happened to her. In the same case, this and other witnesses revealed at trial that, the same night, another family was attacked by the same perpetrators and a woman was raped.<sup>142</sup> However, members of this other family, who were summoned by the court, explicitly refused in writing to testify, asserting that they wanted to forget the past.

Furthermore, according to prosecutors, long investigations and lenient sentences have discouraged victims from testifying. The prosecutors also pointed out that, due to the lapse of time, collecting evidence is very difficult and hinders the prosecution of all war crimes cases, especially those with allegations of sexual violence. In addition, according to the prosecutors, in a number of cases, the identity of the perpetrator is unknown to the victim.

## 5.2 Witness Protection and Support Capacity in the Entities and Brčko District BiH

The testimony of victims of rape and sexual violence as witnesses is critical to the outcome of cases, since there is usually little or no other evidence available, yet they may feel a particular reluctance to testify as a result of numerous factors. Through its Trial Monitoring Programme, the OSCE Mission has identified several issues regarding the need for witness protection measures, the proper application of witness protection measures, the lack of availability of witness support at the entity and Brčko District BiH level, and the negative consequences for witnesses of repeat testimony. The OSCE Mission has also documented some serious breaches of witness protection measures.<sup>143</sup>

<sup>140</sup> *Karan-Ilić*, Appellate Court of Brčko District BiH Verdict of 1 October 2013, page 12.

<sup>141</sup> *Trivić et al.*, Banja Luka District Court.

<sup>142</sup> *Ibid*, Verdict of 13 December 2010, page 20.

<sup>143</sup> For further details, see the OSCE Mission report *Witness Protection and Support in BiH War Crimes Trials: Progress and Obstacles a Year after Adoption of the National Strategy on War Crimes Processing*, available at: [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122314375593eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf).



Since 2011, progress toward better protection and support has been achieved mainly as a result of international donor-funded projects.<sup>144</sup> The High Judicial and Prosecutorial Council BiH authorized initiatives funded by the European Union (EU), the UN Development Programme (UNDP) and the United States to renovate at least one courtroom in each court conducting war crimes trials. This created the appropriate technical conditions for the application of witness protection measures and included the reconstruction of courtrooms, the provision of technical means for transferring image and sound and the capability to distort image and sound. In most courts, where technical conditions permitted, witness antechambers were also constructed.<sup>145</sup> Furthermore, through the UNDP Witness Support Project and EU funding, witness support has become available in a number of jurisdictions where witness support officers were recruited by courts and/or prosecutor's offices.<sup>146</sup>

No progress has been observed with regards to strengthening the capacity of Social Welfare Centres which are, under the Laws on the Protection of Witnesses under Threat and Vulnerable Witnesses,<sup>147</sup> required to provide psychosocial support to witnesses. In practice, they still lack capacity to do so. Instead, certain prosecutor's offices rely on the services of regional or thematic NGOs<sup>148</sup> to provide support to witnesses. One notable situation is in the war crimes unit within the Brčko District BiH police which, in October 2012, assigned a psychologist to provide support to traumatized witnesses.

The most frequent witness protection measure applied in cases of conflict-related sexual violence qualified as war crimes before the entity level and Brčko District BiH courts (excluding cases concluded by plea bargain agreement) has been the exclusion of the public from all, or part, of the trial pursuant to the criminal procedure codes. Other measures that did not depend on the availability of resources, such as the assigning of pseudonyms, have been granted in only a few cases. In the past, the lack of sufficient technical conditions for in-court witness protection has had a negative impact even on the implementation of protective measures that do not depend on these resources.<sup>149</sup> It remains to be seen to what extent, and how, judicial actors will use the witness protection capacities now in place in future investigations and trials.

<sup>144</sup> These projects have included: an EU-funded renovation of courthouses; a UNDP Witness Support Project; a Regional EU-funded project on physical witness protection, WINPRO; a project to develop a rulebook on witness protection at the entity level supported by the UK Embassy; and UK-funded projects to develop training curricula on conflict-related sexual violence for judges, prosecutors and investigators.

<sup>145</sup> At the time of writing, only the Bihac Cantonal Court still lacked the necessary equipment.

<sup>146</sup> Witness support staff have been hired in Sarajevo, Banja Luka, Novi Travnik and Travnik, Bihac, Brčko, Mostar, Istočno Sarajevo, Tuzla, Trebinje, Dobojo and Zenica.

<sup>147</sup> On 1 March 2003, as part of a set of reform measures "designed to ensure that the Court of BiH can fight organised crime and corruption effectively", the OHR High Representative imposed the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Official Gazette (hereinafter 'OG') of BiH 3/03, 21/03, 61/04, 55/05. Subsequently, equivalent laws were adopted at the entity level, RS OG 48/03 and FBiH OG 36/03.

<sup>148</sup> The NGOs *Vive Žene* in Tuzla and *Medica Zenica* in Zenica are consistently active in this area. Several regional NGO networks have signed protocols on co-operation with regional authorities in order to set up support mechanisms for conflict-affected victims/witnesses in court proceedings. At the time of writing this report, protocols have been signed covering Zenica-Dobojo Canton, Una-Sana Canton, Central Bosnia Canton, Tuzla Canton, Herzegovina-Neretva Canton, and Banja Luka City. Additional regional networks are expected to be formalized as a result of an EU-funded project supporting their creation.

<sup>149</sup> See *supra* note 143, pages 15-16.

In addition, concerns remain regarding the physical protection of witnesses outside of court. Out-of-court or physical witness protection continues to be available only at the State level in BiH and may be implemented by the State Investigation and Protection Agency. There is no concrete legal or systemic provision for a witness protection programme at the entity and Brčko District BiH level. On 28 July 2011, the BiH Council of Ministers adopted a Decision on the Establishment of the Working Group for Drafting the Law on the Witness Protection Programme of BiH.<sup>150</sup> Its establishment is viewed as a very positive step towards improving witness protection in BiH. In November 2011, the Working Group finalized the draft law but, regrettably, the proposal did not include provisions for witnesses testifying before the entity level and Brčko District BiH courts to be included in the witness protection programme. The Law on the Witness Protection Programme of BiH was finally adopted by the BiH Parliament and entered into force on 20 May 2014.<sup>151</sup>

In addition, the entity police agencies do not have specialized witness protection units to carry out risk assessments and implement other operational protective measures, such as out-of-court protection. Therefore, **insufficient witness protection capacity, including the absence of witness protection programmes, remains a problem in the entities**, although both the National Strategy on War Crimes Processing and the BiH Strategy to Fight against Organized Crime highlighted the need to remedy this situation.

**BiH authorities should initiate concrete legal and systemic steps to create conditions for the application of adequate witness protection measures at the entity level, including enhanced capacity for out-of-court protection and a functional witness protection programme.**

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<sup>150</sup> In 2009, the BiH Parliament rejected a proposal to amend the Law on the Witness Protection Programme of BiH which would extend the powers of the State Investigation and Protection Agency to include implementing the out-of-court witness protection programme at the entity level for war crimes cases and other categories of cases on the basis that such a function falls within the competencies of the entity police agencies rather than the State authorities.

<sup>151</sup> Official Gazette of BiH 36/14.

## 6. Criteria for Allocation, Prioritization of Cases and Capacities for Investigation

One of the main factors contributing to the difficulty of processing cases of wartime sexual violence is the lack of gender expertise at prosecutor's offices relating to managing and conducting investigations into sexual violence crimes.<sup>152</sup> The investigation and prosecution of wartime sexual violence requires a focused and sensitive approach that should be employed from the earliest possible stage in an investigation.

Effective investigation and prosecution of these cases requires that all personnel involved have the necessary expertise and knowledge to deal with gender-based crimes. The need for sensitivity, including gender considerations, is not limited to conducting an empathic interview – it applies to the whole cycle, from the identification of witnesses, to the first contact, to the interview, to post-interview support, to indictment and to post-trial support.

At the time of the OSCE Survey, prosecutors cited a lack of investigative capacity in the entity level prosecutor's offices and an absence of training to deal with wartime rape and sexual violence cases. Indeed, the results of the OSCE Survey revealed that out of 29 prosecutors interviewed, only one had received training on handling sexual violence cases. The OSCE Mission responded to fill this training gap by organizing several specialized trainings for judges and prosecutors on conflict-related sexual violence in 2013 and 2014 that were delivered by experts as part of the UK-led Preventing Sexual Violence Initiative.

Additionally, according to available information, the degree of support from law enforcement agencies to prosecutor's offices and the gender composition of police officers both vary widely. In five territorial jurisdictions, all police investigators providing support in war crimes investigations are male and, in one jurisdiction, all female. There has been a recent increase in law enforcement expertise on wartime sexual violence investigations owing to a UK-funded project implemented by the OSCE Mission that trained over 100 war crimes investigators in BiH on this subject in 2014. Both entity Ministries of Interior have also incorporated wartime sexual violence investigation training into their standard police academy curricula.

Ideally, gender expertise should be mainstreamed throughout the prosecutorial and police services of BiH. There are currently no prosecutorial guidelines or policy initiatives in the entities that include either a gender perspective or that introduce specific policy obligations to investigate and bring to trial instances of conflict-related sexual violence. Ideally, every prosecutor's office should have a gender advisor, though this may not be possible presently due to limited resources. Prosecutors and law enforcement officers who deal with war crimes cases should undertake specific and continuous training for working on sexual violence cases.

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<sup>152</sup> See *supra* note 55, para. 109.

Moreover, the practices of selection, classification and allocation of cases play an important role in ensuring sexual violence cases are brought to trial. However, it generally appears that there are no particular criteria for case allocation in place. In one prosecutor's office, it is an unwritten rule that cases of sexual violence are assigned to female prosecutors, while in another prosecutor's office, the practice is that the prosecutor responsible for the case is of the same ethnicity as the victim. In another prosecutor's office with an established war crimes department, the head of that department is responsible for case allocation.

The procedure for determining case priority has also varied significantly among prosecutor's offices, from prioritizing war crimes cases in general, to dealing with cases in chronological order, to prioritizing based on factors such as the complexity of the case, the number of victims, the availability of suspects and witnesses, the status of the victim, the quality of the evidence/statements, the gravity of the charge, and/or the seriousness and consequences of the criminal act. It would be beneficial for the prosecuting authorities in the entities and Brčko District BiH to further develop their prosecutorial policies and criteria for the prioritization of war crimes cases which would include gender as a basis for prosecution. Such policies and criteria should adhere to the principle of mandatory prosecution enshrined in BiH law,<sup>153</sup> the complexity prioritization requirements elaborated in the National War Crimes Strategy, and the principles of transparency, consistency, accountability and efficiency. Recent efforts by prosecutor's offices to prioritize wartime sexual violence crimes and other complex cases in their individual action plans are a welcome step in the right direction.

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<sup>153</sup> Article 18, FBiH CPC; Article 17, RS CPC; Article 17, Brčko District BiH CPC.

## **7. Summary of Recommendations**

### **7.1 To Judges and Prosecutors in the Entities and Brčko District BiH**

- i. In the absence of relevant provisions within the SFRY Criminal Code, the courts in the entities should standardize their practice of recognizing the lack of any requirement for threat of force, force or resistance as elements of the crime in sexual violence cases, in order to ensure that all forms of sexual violence crimes are acknowledged in all proceedings before the courts. In this regard, appellate-level courts in the entities and Brčko District BiH should consider holding joint sessions in order to harmonize the application of criminal law.
- ii. Prosecutors should ensure that allegations of sexual violence in all its forms are included in indictments and properly qualified in order to avoid possible perpetrator impunity, and so that the full nature and extent of the harm suffered by the victims of sexual violence are presented to the court.
- iii. The prosecuting authorities in the entities and Brčko District BiH should develop their prosecutorial policies and criteria for the prioritization of war crimes cases to include gender as a basis for prosecution, while adhering to the principle of mandatory prosecution enshrined in BiH law, the complexity prioritization requirements elaborated in the National War Crimes Strategy, and the principles of transparency, consistency, accountability and efficiency. These criteria should be made publicly available, particularly to sexual violence survivors.
- iv. Judges should ensure that allegations of sexual violence in all its forms are properly assessed and qualified accordingly in verdicts in order to avoid possible perpetrator impunity and to ensure that the full nature and extent of the harm suffered by the victims is reflected in the verdict and subsequent sentence.

### **7.2 To Law Enforcement Agencies**

- v. Law enforcement agencies should pay special attention to the gender balance of police units providing support in war crimes investigations. These police investigators should continue to be provided with necessary expertise to deal with gender-based crimes such as conflict-related sexual violence.

### 7.3 To the High Judicial and Prosecutorial Council BiH

- vi. The High Judicial and Prosecutorial Council BiH should ensure that all judges, prosecutors, investigators, and relevant support staff in the entities and Brčko District BiH have the opportunity to receive appropriate training and to engage in peer-to-peer exchanges on best practices for investigating, prosecuting and adjudicating cases of conflict-related sexual violence.

### 7.4 To the Judicial and Prosecutorial Training Centres of RS and FBiH

- vii. The Judicial and Prosecutorial Training Centres should provide additional specialized training on conflict-related sexual violence covering the following areas:
  - Definitions of rape and other forms of sexual violence
  - International jurisprudence on conflict-related sexual violence
  - Techniques for questioning witnesses on sexual violence
  - Impact of trauma on witnesses and preventing the re-traumatization of witnesses
  - Identifying and analysing evidence of conduct that may constitute rape, sexual slavery, molestation, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, enforced sterilization, sexual humiliation, and any other form of sexual violence of comparable gravity
  - Gender issues, including differences in the motivation to testify

### 7.5 To the Executive and Legislative Authorities

- viii. Executive and legislative authorities should initiate concrete legal and systemic steps to create conditions for the application of adequate witness protection measures at the entity level, including enhanced capacity for out-of-court protection and a functional witness protection programme, and to strengthen capacity for witness support in co-operation with relevant NGOs.

### 7.6 To the International Community

- xi. Given the increased responsibility of the entities and Brčko District BiH to process conflict-related sexual violence cases and address the large backlog of unresolved war crimes cases more generally, the OSCE Mission recalls its recommendation to the international community to ensure continued diplomatic and financial support to domestic efforts to combat impunity for conflict-related sexual violence by the BiH criminal justice institutions through efforts such as the United Kingdom's Preventing Sexual Violence Initiative, as well as increased support to NGOs and victims' associations.

# **Annex 1 – Applicable Provisions under the SFRY Criminal Code**

## **Genocide**

### Article 141

Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

## **War crime against the civilian population**

### Article 142(1)

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forced prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forced service in the armed forces of enemy's army or in its intelligence service or administration; forced labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

### **War crime against the wounded and sick**

#### Article 143

Whoever, in violation of the rules of international law at the time of war or armed conflict, orders murders, tortures, inhuman treatment of the wounded, sick, the shipwrecked persons or medical personnel, including therein biological experiments, causing of great sufferings or serious injury to the bodily integrity or health; or whoever orders unlawful and arbitrary destruction or large-scale appropriation of material and stocks of medical facilities or units which is not justified by military needs, or whoever commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

### **War crime against prisoners of war**

#### Article 144

Whoever, in violation of the rules of international law, orders murders, tortures or inhuman treatment of prisoners of war, including therein biological experiments, causing of great sufferings or serious injury to the bodily integrity or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.



## **Annex 2 – Alphabetical List of Conflict-Related Sexual Violence Cases at Courts in Entities and Brčko District BiH – 31 December 2014**

### **A. COMPLETED CASES AT ENTITY LEVEL AND BRČKO DISTRICT BIH COURTS**

#### **BANJA LUKA DISTRICT COURT**

**1. KALAJDŽIJA**

*Prosecutor v. Goran Kalajdžija*, Case No. 11 o K 000004 o8 K, First Instance Verdict of 1 July 2008

**2. LIPOVAC AND NIKIĆ**

*Prosecutor v. Saša Lipovac*, Case No. 118 o K 000599 10 KŽŽ, Second Instance Verdict of 25 November 2010 (RS Supreme Court)

*Prosecutor v. Dražen Nikić*, Case No. 118 o KŽŽ 09 000010, Second Instance Verdict of 8 December 2009 (RS Supreme Court)

*Prosecutor v. Saša Lipovac et al.*, Case No. 011 o K 06 00074, First Instance Verdict of 19 February 2007

**3. TRIVIĆ AND BAJIĆ**

*Prosecutor v. Miladin Trivić and Slobodan Bajić*, Case No. 11 o K 003543 10 Kž 3, Second Instance Verdict of 25 January 2011 (RS Supreme Court)

*Prosecutor v. Miladin Trivić and Slobodan Bajić*, Case No. 011 o K 003543 10 K, First Instance Verdict of 20 September 2010

**4. TRIVIĆ ET AL.**

*Prosecutor v. Miladin Trivić et al.*, Case No. 11 o K 004950 11 Kž, Second Instance Verdict of 14 July 2011 (RS Supreme Court)

*Prosecutor v. Miladin Trivić et al.*, Case No. 11 o K 004950 10 K, First Instance Verdict of 13 December 2010

**5. ZEC**

*Prosecutor v. Radovan Zec*, Case No. 11 o K 004012 10 K, First Instance Verdict of 13 September 2010

## BIHAĆ CANTONAL COURT

### 1. DELIĆ

*Prosecutor v. Safet Delić*, Case No. 01 o K 007112 12 K, First Instance Verdict of 7 December 2012

### 2. BAJIĆ ET AL.

*Prosecutor v. Slobodan Dragić*, Case No. 01 o K 008741 14 K; First Instance Verdict of 28 April 2014

*Prosecutor v. Predrag Bajić & Siniša Babić* Case No. 01 o K 008800 14 K, First Instance Verdict of 22 May 2014

*Prosecutor v. Nenad Bajić* Case No. 01 o K 008820 14 K, First Instance Verdict of 13 June 2014

## BIJELJINA DISTRICT COURT

### 1. SPASOJEVIĆ

*Prosecutor v. Danilo Spasojević*, Case No. 12 o K 000955 12 KŽ, Second Instance Verdict of 30 October 2012 (RS Supreme Court)

*Prosecutor v. Danilo Spasojević*, Case No. 12 o K 000955 09 K, First Instance Verdict of 25 January 2012

### 2. LUKIĆ

*Prosecutor v. Mirko Lukić*, Case No. 12 o K 003572 14 KŽ, Second Instance Verdict of 10 June 2014

*Prosecutor v. Mirko Lukić*, Case No. 12 o K 003572 13 K, First Instance Verdict of 4 March 2014

### 3. MINIĆ ET AL.

*Prosecutor v. Ostoja Minić et al.*, Case No 12 o K 000929 14 KŽ, Second Instance Verdict of 9 October 2014

*Prosecutor v. Ostoja Minić et al.*, Case No 12 o K 000929 10 K, First Instance Verdict of 11 April 2014

### 4. SALIHOVIĆ AND JAKUBOVIĆ

*Prosecutor v. Huso Salihović and Ibro Jakubović*, Case No 12 o K 000956 14 KŽk, Second Instance Verdict of 10 December 2014

*Prosecutor v. Huso Salihović and Ibro Jakubović*, Case No 12 o K 000956 13 K2, First Instance Verdict of 29 October 2013

## BRČKO BASIC COURT

### 1. HASANOVIĆ AND PAVIĆ

*Prosecutor v. Fikret Hasanović and Pepo Pavić*, Case No. 097-o-KŽ-09-000039, Second Instance Verdict of 11 May 2009

*Prosecutor v. Fikret Hasanović and Pepo Pavić*, Case No. 096-o-K-08-000109, First Instance Verdict of 2 February 2009

### 2. ILIĆ-KARAN

*Prosecutor v. Monika Ilić-Karan*, Case No. 96 o K 040290 13 KŽ 12, Second Instance Verdict of 1 October 2013

*Prosecutor v. Monika Ilić-Karan*, Case No. 96 o K 040290 12 K, First Instance Verdict of 17 May 2013

**3. KOSTIĆ ET AL.**

*Prosecutor v. Kosta Kostić et al.*, Case No. 097-o-KŽ-07-000066, Second Instance Verdict of 13 September 2007

*Prosecutor v. Kosta Kostić et al.*, Case No. 096-o-K-06-000120, First Instance Verdict of 20 April 2007

**4. SIMONOVIĆ**

*Prosecutor v. Konstantin Simonović*, Case No. K-218/05, First Instance Verdict of 18 October 2005

**DOBOJ DISTRICT COURT****1. IVANKOVIĆ**

*Prosecutor v. Zoran Ivanković*, Case No. 13 o K 002151 12 Kps, Decision on Discontinuation of Proceedings of 1 August 2013

**2. KOJIĆ**

*Prosecutor v. Dragoljub Kojić*, Case No. 13 o K 002269 13 KŽ, Second Instance Verdict of 19 November 2013 (RS Supreme Court)

*Prosecutor v. Dragoljub Kojić*, Case No. 13 o K 002269 12 K, First Instance Verdict of 30 April 2013

**3. KOVAČEVIĆ**

*Prosecutor v. Mirko Kovačević* case No. 13 o K 001923 14 KŽ 2, Second Instance Verdict of 27 March 2014 (RS Supreme Court)

*Prosecutor v. Mirko Kovačević* case No. 13 o K 001923 13 K 2, First Instance Verdict of 2 December 2013

*Prosecutor v. Mirko Kovačević* case No. 13 o K 001923 12 K, First Instance Verdict of 6 December 2012

**ISTOČNO SARAJEVO DISTRICT COURT****1. MARKOVIĆ**

*Prosecutor v. Mladen Marković*, Case No. 14 o K 001589 13 KŽ, Second Instance Verdict of 24 October 2013 (RS Supreme Court)

*Prosecutor v. Mladen Marković*, Case No. 14 o K 001589 11 K, First Instance Verdict of 27 May 2013

**LIVNO CANTONAL COURT****1. ZJAJIĆ**

*Prosecutor v. Dragan Zjajić*, Case No. 10 o K 000273 09 K, First Instance Verdict of 5 January 2010

**MOSTAR CANTONAL COURT****1. MARIJANOVIĆ AND BUHOVAC**

*Prosecutor v. Miroslav Marijanović and Ante Buhovac*, Case No. 070 o KŽ 07 000313, Second Instance Verdict of 12 June 2008 (FBiH Supreme Court)

*Prosecutor v. Miroslav Marijanović and Ante Buhovac*, Case No. 007 o K 06 000017, First Instance Verdict of 10 April 2007

## SARAJEVO CANTONAL COURT

### 1. GAŠEVIĆ

*Prosecutor v. Ratko Gašević*, Case No. Kž-137/04, Second Instance Verdict of 6 October 2003 (FBiH Supreme Court)

*Prosecutor v. Ratko Gašević*, Case No. K-41/03, First Instance Verdict of 9 February 2003

### 2. GLIŠIĆ

*Prosecutor v. Momir Glišić*, Case No. 070 o Kžž 06 000001, Third Instance Verdict of 21 February 2007 (FBiH Supreme Court)

*Prosecutor v. Momir Glišić*, Case No. 070 o Kžk 06 000006, Second Instance Verdict of 18 September 2006 (FBiH Supreme Court)

*Prosecutor v. Momir Glišić*, Case No. K-8/05, First Instance Verdict of 20 September 2005

### 3. JOVIČIĆ

*Prosecutor v. Nemanja Jovičić*, Case No. 09 o K 000 506 10 Kž 10, Second Instance Verdict of 10 November 2010 (FBiH Supreme Court)

*Prosecutor v. Nemanja Jovičić*, Case No. 09 o K 000 506 08 K, First Instance Verdict of 29 April 2010

### 4. KNEŽEVIĆ

*Prosecutor v. Zoran Knežević*, Case No. Kž-126/05, Second Instance Verdict of 14 April 2005 (FBiH Supreme Court)

*Prosecutor v. Zoran Knežević*, Case No. 13/04, First Instance Verdict of 8 December 2004

### 5. MILANOVIĆ

*Prosecutor v. Mladen Milanović*, Case No. 09 o K 000748 13 Kžž, Third Instance Verdict of 19 December 2013 (FBiH Supreme Court)

*Prosecutor v. Mladen Milanović*, Case No. 09 o K 000748 11 Kžk, Second Instance Verdict of 15 February 2013 (FBiH Supreme Court)

*Prosecutor v. Mladen Milanović*, Case No. 09 o K 000748 08 K, First Instance Verdict of 10 November 2008

### 6. MIŠKOVIĆ

*Prosecutor v. Predrag Mišković*, Case No. 070-0-Kž-07-000225, Second Instance Verdict of 2 August 2007 (FBiH Supreme Court)

*Prosecutor v. Predrag Mišković*, Case No. 009-0-K-06 000040, First Instance Verdict of 12 February 2007

### 7. PANDUREVIĆ

*Prosecutor v. Žarko Pandurević*, Case No. Kž-505/03, Second Instance Verdict of 13 July 2005 (FBiH Supreme Court)

*Prosecutor v. Žarko Pandurević*, Case No. K-134/02, First Instance Verdict of 21 April 2003

### 8. RODIĆ

*Prosecutor v. Milorad Rodić*, Case No. K-65/04, First Instance Verdict of 9 July 2004

## TREBINJE DISTRICT COURT

### 1. GOVEDARICA

*Prosecutor v. Mileta Govedarica*, Case No. 118 o Kž 08 000 166, Second Instance Verdict of 4 November 2008 (RS Supreme Court)

*Prosecutor v. Mileta Govedarica*, Case No. 015 o K 07 000 008, First Instance Verdict of 10 July 2008

### 2. SKAKAVAC

*Prosecutor v. Momir Skakavac*, Case No. 118 o Kž 06 000 151, Second Instance Verdict of 3 April 2007 (RS Supreme Court)

*Prosecutor v. Momir Skakavac*, Case No. K 5/05, First Instance Verdict of 27 March 2006

### 3. STEVANOVIĆ

*Prosecutor v. Ranko Stevanović*, Case No. 15 o K 001005 12 Kž 4, Second Instance Verdict of 16 October 2012 (RS Supreme Court)

*Prosecutor v. Ranko Stevanović*, Case No. 15 o K 001005 11 K, First Instance Verdict of 17 May 2012

## TUZLA CANTONAL COURT

### 1. SPASOJEVIĆ ET AL.

*Prosecutor v. Dušan Spasojević and Ratko Todorović*, Case No. 070 o Kž 08 000381, Second Instance Verdict of 29 October 2008 (FBiH Supreme Court)

*Prosecutor v. Dušan Spasojević and Ratko Todorović*, Case No. 003 o K 06 000018, First Instance Verdict of 12 May 2008

*Prosecutor v. Mirko Pantić*, Case No. 003 o K 06 000026, First Instance Verdict of 6 June 2006

### 2. KOLER

*Prosecutor v. Ivan Koler*, Case No 03 o K 006047 13 Kžž, Third Instance Verdict of 22 May 2014

*Prosecutor v. Ivan Koler*, Case No 03 o K 006047 12 Kžk, Second Instance Verdict of 11 March 2013

*Prosecutor v. Ivan Koler*, Case No. 03 o K 006047 10 K, First Instance Verdict of 23 September 2011

## ZENICA CANTONAL COURT

### 1. MIHAJLOVIĆ

*Prosecutor v. Tomo Mihajlović*, Case No. Kž 483/05, Second Instance Verdict of 8 March 2006 (FBiH Supreme Court)

*Prosecutor v. Tomo Mihajlović*, Case No. K 35/00, First Instance Verdict of 2 June 2005

## B. ONGOING CASES AT ENTITY LEVEL AND BRČKO DISTRICT BIH COURTS

### BIHAĆ CANTONAL COURT

1. **BEGANOVIĆ**  
*Prosecutor v. Redžep Beganović*, Case No. 01 o K 006344 13 K
2. **ĆORALIĆ**  
*Prosecutor v. Amir Ćoralić*, Indictment No. 01 o K 0013555 12 K
3. **SOLEŠA**  
*Prosecutor v. Duško Soleša*, Case No. 01 o K 008271 13 Kps

### DOBOJ DISTRICT COURT

1. **BREKALO**  
*Prosecutor v. Goran Brekalo*, Case No. 13 o K 002271 12 Kps
2. **GRBIĆ**  
*Prosecutor v. Stojan Grbić*, Case No. 13 o K 003304 14 K
3. **JOZIĆ**  
*Prosecutor v. Luka Jozić*, Case No. 13 o K 001549 12 Kps
4. **MILANOVIĆ**  
*Prosecutor v. Branko Milanović*, Case No. 13 o K 002899 14 K
5. **MILOŠ**  
*Prosecutor v. Marko Miloš*, Case No. 13 o K 001338 11 Kps
6. **PIJUNOVIĆ**  
*Prosecutor v. Miroslav Pijunović*, Case No. 13 o K 002141 12 K
7. **SLABIĆ**  
*Prosecutor v. Dalibor Slabić*, Case No. 13 o K 000642 10 Kps
8. **ŠIŠIĆ**  
*Prosecutor v. Vladimir Šišić*, Case No. 13 o K 003295 14 K
9. **ŠTUC**  
*Prosecutor v. Anto Štuc*, Case No. 13 o K 001491 11 Kps

### MOSTAR CANTONAL COURT

1. **ŽILIĆ AND GAKIĆ**  
*Prosecutor v. Ramo Žilić and Esad Gakić*, Case No. 07 o K 011492 14 K

## SARAJEVO CANTONAL COURT

1. ĐUROVIĆ

*Prosecutor v. Predrag Đurović, Case No. K 022246 14 Kps*

## TUZLA CANTONAL COURT

1. MATANOVIĆ

*Prosecutor v. Božo Matanović, Case No. 02 o K 000764 13 Kps 2*

2. ŠKILJEVIĆ

*Prosecutor v. Radomir Škiljević, Case No. Kps.3575/06*

## ZENICA CANTONAL COURT

1. KADIĆ

*Prosecutor v. Asim Kadić, Case No. 04 o K 005141 12 K, First Instance Verdict of 6 February 2014*

## C. COMPLETED CONFLICT-RELATED SEXUAL VIOLENCE CASES QUALIFIED AS AN ORDINARY OFFENCE

### BIJELJINA BASIC COURT

1. **PERIĆ**

*Prosecutor v. Radoslav Perić*, Case No. 80 o K 00 2031 09 KŽ4, Second Instance Verdict of 29 April 2009 (Bijeljina District Court)

*Prosecutor v. Radoslav Perić*, Case No 80 o K 002031 06 K, First Instance Verdict of 29 December 2008

### BRČKO BASIC COURT

1. **JARIĆ ET AL.**

*Prosecutor v. Stjepan Jarić et al.*, Case No. KŽ-50/05, Second Instance Verdict of 9 October 2006 (Brčko Appellate Court)

*Prosecutor v. Stjepan Jarić et al.*, Case No. KP-9/02, First Instance Verdict of 14 January 2005

### DOBOJ BASIC COURT

1. **MIHIĆ**

*Prosecutor v. Dušan Mihić*, Case No. 85 o K 001385 13 KŽ 3, Second Instance Verdict of 20 September 2013 (Doboj District Court)

*Prosecutor v. Dušan Mihić*, Case No. 85 o K 001385 12 K 3, First Instance Verdict of 5 July 2013

### MOSTAR MUNICIPAL COURT

1. **BREKALO**

*Prosecutor v. Damir Brekalo*, Case No. 58 o K 915719 13 KŽ, Second Instance Verdict of 19 June 2013 (Mostar Cantonal Court)

*Prosecutor v. Damir Brekalo*, Case No. 07 58 K 915719 05 K, First Instance Verdict of 8 March 2013

2. **STJEPIĆ**

*Prosecutor v. Dragan Stjepić*, Case No. 58 o K 015278 10 KŽ, Second Instance Verdict of 17 March 2010 (Mostar Cantonal Court)

*Prosecutor v. Dragan Stjepić*, Case No. 07 58 K 015278 00 K, First Instance Verdict of 19 November 2009

### SOKOLAC BASIC COURT

1. **DILBEROVIĆ**

*Prosecutor v. Jadranko Dilberović*, Case No. 89 1 K 000112 10 KŽK, Second Instance Verdict of 12 July 2010 (Istočno Sarajevo District Court)

*Prosecutor v. Jadranko Dilberović*, Case No. 89 1 K 000112 07 K, First Instance Verdict of 12 March 2010



**D. ONGOING CONFLICT RELATED SEXUAL VIOLENCE CASES QUALIFIED AS AN ORDINARY OFFENCE**

**KOTOR VAROŠ BASIC COURT**

**1. BOŽIĆ ET AL.**

*Prosecutor v. Božić et al.*, Indictment IVTK 395/93 of 1 November 1993

