

# **Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016**

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## **1. Executive Summary**

More than two decades after the end of the 1992–1995 armed conflict in Bosnia and Herzegovina (BiH), many victims and survivors are still waiting for justice. Among other war crimes, conflict-related sexual violence (CRSV) is a sensitive and complex issue that must be addressed by the justice sector in order to establish accountability.

Survivors of conflict-related sexual violence are often the most difficult to identify and this type of crime is easily misunderstood. CRSV can be more challenging to investigate and to prove than other categories of war crimes. Some CRSV survivors are reluctant to come forward because of associated trauma and stigma. Collecting statements and testimony in such cases requires special training and a sensitive approach that fully respects the rights of a survivor while meeting rigorous criminal evidentiary standards.

In spite of these obstacles, the justice sector in BiH has made significant strides in addressing conflict-related sexual violence cases. The number and complexity of CRSV cases tried in BiH since 2004 has endowed the country with one of the most advanced bodies of CRSV jurisprudence in the world. The country's prioritization of these cases in recent years is evident not only in the number of crimes tried, but also in tangible qualitative improvements to judicial and prosecutorial approach in such cases.

As presented in this report, from the beginning of 2014 through the end of 2016, the OSCE Mission to Bosnia and Herzegovina has observed marked advancements on several frontiers in the handling of CRSV cases. The first such area of improvement has been noted in the strengthening of technical aspects of investigation, prosecution, and adjudication, including a more nuanced demonstration of international law knowledge, expanded and more consistent application of witness protection measures, and greater respect for special evidentiary rules in sexual violence cases.

Furthermore, investigators, prosecutors, and judges are steadily improving their approach to survivors of sexual violence, including conducting of more sensitive questioning and provision of psychological support services prior to and during trial. A major innovation in this regard has been the introduction of witness support officers in nearly every institution handling war crimes cases across the country. The positive impact of these qualified specialists during proceedings is reflected in both the courtroom and in the case law.

Finally, novel procedures and approaches to delivering justice for conflict-related sexual violence crimes are increasingly taking hold in judicial institutions. Starting in 2015, an increasing number of successful non-material damage compensation claims have been brought before courts in CRSV cases. In awarding these claims, the judiciary sends a clear message that those who suffer the enduring trauma of sexual violence – and who have

historically been treated as mere sources of evidence during criminal proceedings – must also be restored through the process.

Further improvements will continue to consolidate these positive developments. In a small number of cases decided between 2014 and 2016, some courts and prosecutors' offices demonstrated a limited understanding of the legal elements of sexual violence crimes and of proper qualification of these crimes. Practices in some judicial institutions in BiH pertaining to sentencing, plea deals, and possible case fragmentation also raise concerns. Furthermore, some institutions continue to lack dedicated witness support officers, leaving gaps in the provision of critical support services to survivors of CRSV.

The OSCE Mission to Bosnia and Herzegovina notes the remarkable achievements made by the justice sector in BiH on delivering justice to survivors of CRSV, and is ready to continue supporting further progress in this respect. Recommendations aimed at addressing the challenge areas are provided throughout this report and compiled at the end of the document. The Mission remains a committed partner in the provision of technical assistance and support in the implementation of these and other recommendations in order to end impunity for CRSV in BiH and bring justice to its victims.



## 2. Introduction

This report represents the third volume in a series of reports on the prosecution of conflict-related sexual violence (CRSV) cases in BiH. The first volume covered cases before the Court of BiH between 2004 and 2013. The second volume examined cases before entity courts in BiH between 2004 and 2014. This final report pertains to all CRSV cases completed by all courts in BiH up to the end of 2016, commencing where the previous reports concluded.

Systematic examination of cases completed between 2014 and 2016 allows for an assessment of progress made on CRSV cases in light of increased attention given to the issue during this period. In recent years, justice sector actors in BiH and the international community have jointly invested tremendous effort and resources toward improving the justice sector's capacity to investigate, prosecute, and adjudicate CRSV crimes. The OSCE Mission to Bosnia and Herzegovina (the Mission) has devoted sustained attention to the issue since 2011, when it began monitoring CRSV cases as a priority. The Mission has used the findings from its trial monitoring programme to design and conduct specialized trainings for judges, prosecutors, and legal associates on CRSV, targeting specific areas for improvement identified through case observation. Since 2013, the Mission has carried out eight such trainings,<sup>1</sup> which are supported by specialized modules developed by the Mission and its partners and tailored to the unique needs of the judiciary in BiH<sup>2</sup>.

The Preventing Sexual Violence Initiative (PSVI) led by the UK's Foreign and Commonwealth Office has assumed a central role in coordinating and advancing efforts to punish and prevent sexual violence in armed conflict. Having recently marked its fifth year of implementation,<sup>3</sup> the PSVI counts among its achievements the development of a comprehensive International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, now in its second edition<sup>4</sup>.

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<sup>1</sup> See Annex C: Thematic Trainings Carried out by OSCE Mission to Bosnia and Herzegovina 2013–2016 for a list of Mission trainings on CRSV.

<sup>2</sup> These include *INVESTIGATING WARTIME SEXUAL VIOLENCE: A TRAINING COURSE FOR POLICE INVESTIGATORS IN BOSNIA AND HERZEGOVINA* (2012), available at <https://polis.osce.org/node/349>; and the *INVESTIGATION MANUAL FOR WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE IN BOSNIA AND HERZEGOVINA* (2013), containing a specialized unit on investigating CRSV, available at <http://www.osce.org/bih/281491>

<sup>3</sup> See UK Foreign and Commonwealth Office press release, “*UK Continues to Lead on Preventing Sexual Violence in Conflict*,” 13 March 2017, <https://www.gov.uk/government/news/uk-continues-to-lead-on-preventing-sexual-violence-in-conflict>

<sup>4</sup> *INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT*, 2<sup>nd</sup> ed. (2017), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/598335/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf)

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The United Nations Country Team in BiH has also prioritized the fight against impunity for CRSV. Since 2014, a joint agency initiative implemented by IOM, UNDP, UNFPA, and UN Women, funded by the governments of the UK and Canada, has contributed to the improvement of redress mechanisms for survivors of CRSV, including through data collection and needs assessments, improvement of services and employment opportunities, and advocacy work aimed at reducing stigma.<sup>5</sup> In addition, with the support of the U.S. government, UNDP has made substantial contributions to the improvement of witness support and protection mechanisms across BiH.<sup>6</sup>

Finally, the International Criminal Tribunal for the former Yugoslavia (ICTY) has in recent years placed particular emphasis on the transfer of knowledge and skills accumulated through its rich experience in the investigation and prosecution of CRSV to the judiciary in BiH and the region. Its latest contribution in this regard has been in the recent publication of an edited volume that compiles, analyses, and draws lessons from the Office of the Prosecutor's experience in investigating and prosecuting CRSV.<sup>7</sup>

The results of these combined efforts and the sustained commitment by the judiciary in BiH to improve the quality, sensitivity, and efficiency of CRSV case processing are evident in the findings of this report. Problematic areas which continue to require attention are also clearly identified through the analysis provided herein.

## 2.1. Methodology

As in previous Mission reports on criminal proceedings in BiH, the analysis presented in this report is based on findings of the Mission's trial monitoring programme. Since the beginning of 2011, the Mission has prioritized the monitoring of cases involving CRSV at the Court of BiH. Furthermore, all war crimes proceedings taking place before cantonal or district courts in the Federation of BiH (FBiH), the Republika Srpska (RS), and Brčko District BiH (BDBiH), including all CRSV cases, are monitored from the filing of the indictment through sentencing or appeal. In the period covered by this report, the Mission has monitored or obtained information on 429 war crimes cases (both completed and ongoing), including 109 CRSV cases. Since entity-level cases through the end of 2014

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<sup>5</sup> For more on the joint program, see United Nations in Bosnia and Herzegovina, *Seeking Care, Support and Justice for Survivors of Conflict-Related Sexual Violence in BiH* (2014–2017), [http://ba.one.un.org/content/unct/bosnia\\_and\\_herzegovina/en/home/what-we-do/joint-projects/care--support-and-justice-for-survivors-of-conflict-related-sexu.html](http://ba.one.un.org/content/unct/bosnia_and_herzegovina/en/home/what-we-do/joint-projects/care--support-and-justice-for-survivors-of-conflict-related-sexu.html)

<sup>6</sup> For details on the project, see UNDP BiH, *Introduction of Victim/Witness Support Services Project* (2012–2016), [http://www.ba.undp.org/content/bosnia\\_and\\_herzegovina/en/home/operations/projects/crisis\\_prevention\\_and\\_recovery/introduction-of-victim-witness-support-services-project.html](http://www.ba.undp.org/content/bosnia_and_herzegovina/en/home/operations/projects/crisis_prevention_and_recovery/introduction-of-victim-witness-support-services-project.html)

<sup>7</sup> PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (Brammertz & Jarvis, eds.) (2016). A translated edition has been printed and distributed to justice sector actors in BiH with the support of the OSCE Mission to Bosnia and Herzegovina.

were covered in the Mission’s last report in this series, the current report analysed a total of 40 cases closed with a final and binding verdict at the entity and State levels. In the cases discussed in this report, where a main trial hearing is cited as the source, a Mission trial monitor was present in the courtroom observing the associated proceedings.

The report presents the processing of CRSV cases by courts in BiH beginning with the legal qualification of acts of CRSV and proceeding through the applicable legal framework determined by the court, the elements of sexual violence crimes analysed by panels, the standards applied in the evaluation of evidence, sentencing practices in CRSV cases, and finally the provision of witness protection and support, which encompasses the entire process.

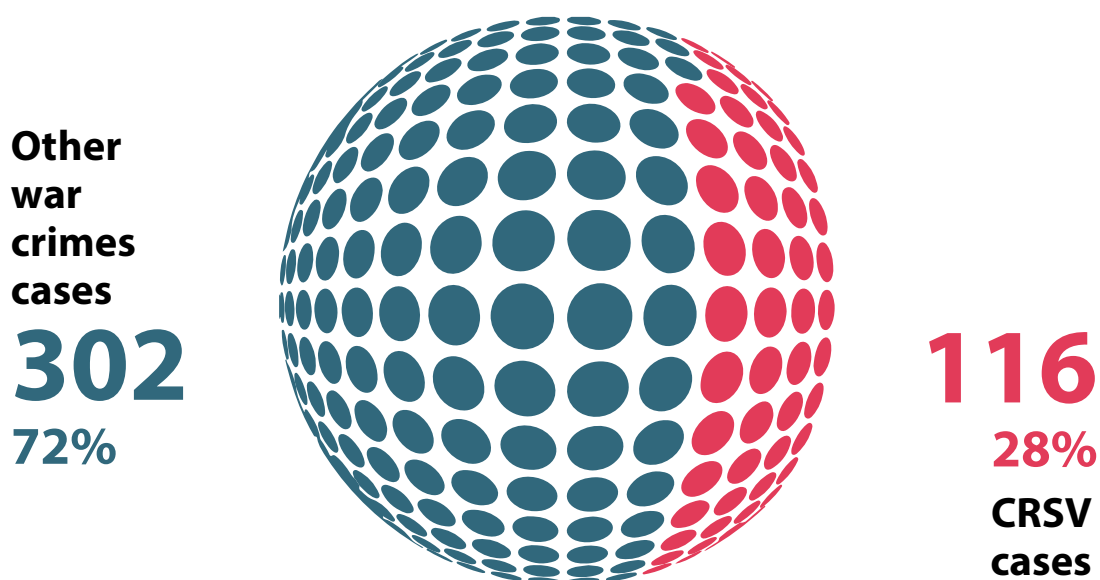
Finally, the report advances several new recommendations regarding the processing of CRSV cases for judges, prosecutors, witness support providers in judicial institutions and in NGOs, as well as for the international community in BiH. Based on its analytical findings, the report also examines the implementation status of previous recommendations set forth by the Mission.

## 2.2. Overview of completed conflict-related sexual violence cases in BiH

To better understand the broader context in which CRSV crimes have been addressed before courts in BiH, it is useful to consider the extent of such cases.

### **Completed war crime cases before courts in BiH, 2004–2016**

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Between 2004 and 2016, to the Mission’s knowledge, courts in BiH have completed 418 war crimes cases relating to 614 defendants. Of these, 116 cases with 162 defendants involved charges of sexual violence (among other charges in many cases). This suggests that approximately 28 per cent of completed war crimes cases before courts in BiH contained at least one element of CRSV.

An increased prioritization of CRSV cases in recent years is evident from their growing proportion as compared to all cases. Between 2011 and 2013, for example, approximately one out of every four war crimes cases completed before courts in BiH contained an element of sexual violence. From 2014 to 2016, CRSV cases represented nearly one in every three completed war crimes cases.

### *2.2.1. Handling of CRSV cases by jurisdiction*

Since 2004, the majority of CRSV cases were completed at the Court of BiH. However, nearly as many cases have been handled in total before all entity-level courts. This reflects the objective outlined in the National Strategy for Processing of War Crimes Cases to transfer non-complex cases to the entity level.<sup>8</sup>

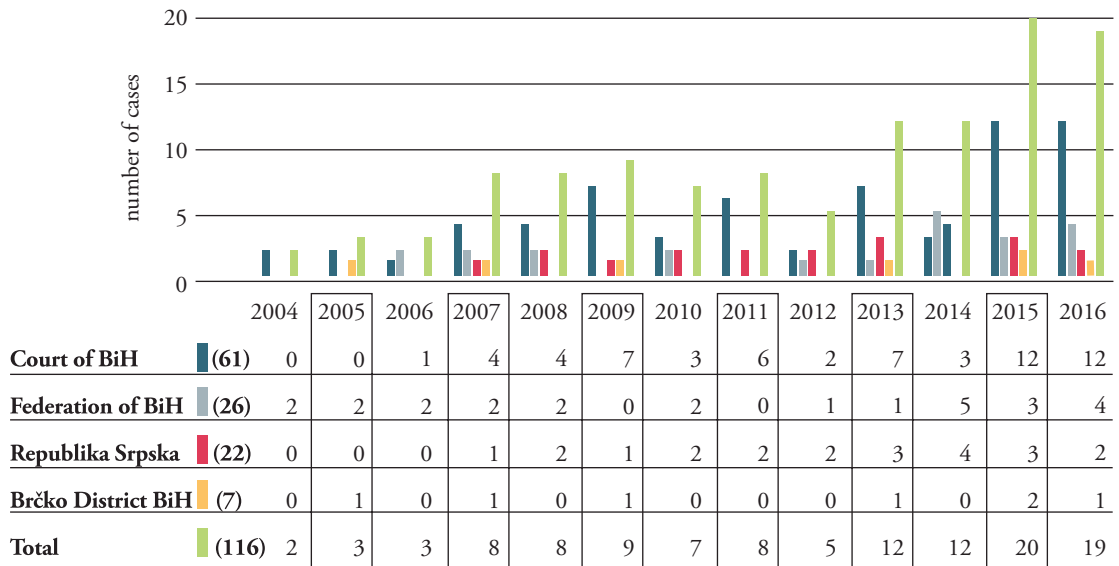
### **Completed CRSV cases 2004–2016**

<b>Jurisdiction (% of all cases)</b>	Court of BiH (53%)	Federation of BiH (22%)	Republika Srpska (19%)	Brčko District BiH (6%)
<b>Cases</b>	61	26	22	7
<b>Defendants</b>	90	30	28	14

<sup>8</sup> National Strategy for Processing of War Crimes Cases, pp. 11–15, [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)

The general upward trend in the processing of sexual violence cases holds true across every jurisdiction in BiH. As presented in the chart below, the highest collective number of CRSV cases completed by courts in BiH was registered in 2015 and 2016.

### Completed CRSV cases per jurisdiction 2004–2016



#### 2.2.2. Outcomes in completed CRSV cases

Outcomes in CRSV cases have varied over time and by jurisdiction. Overall, between 2004 and 2016, out of 162 defendants (in 116 cases involving CRSV allegations completed before courts in BiH), 123 perpetrators were convicted of sexual violence crimes. Of these, 20 were found guilty pursuant to a plea bargaining agreement. This represents an overall conviction rate of approximately 76 per cent.<sup>9</sup>

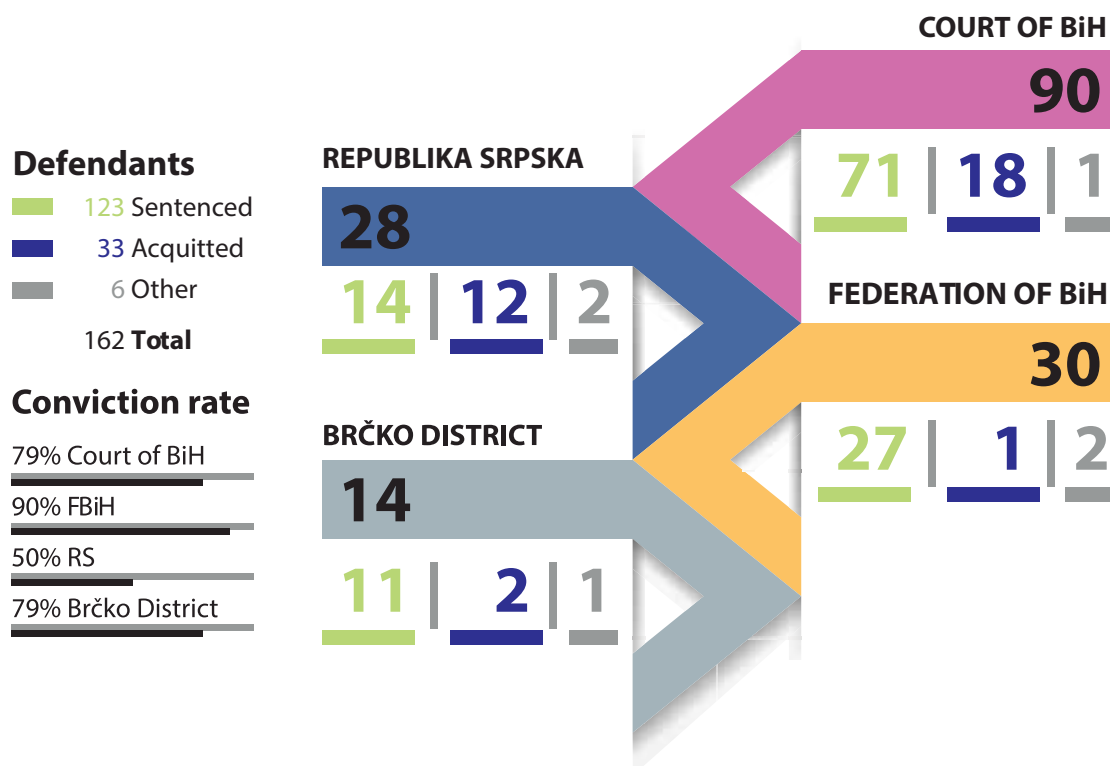
### Outcomes in CRSV cases, 2004–2016

Defendants	Court of BiH	Federation of BiH	Republika Srpska	Brčko District BiH
<b>Sentenced</b> (123)	71	27	14	11
<b>Acquitted</b> (33)	18	1	12	2
<b>Other</b> (6)	1	2	2	1
<b>Total</b> (162)	90	30	28	14

<sup>9</sup> From the total number of cases, 33 defendants were acquitted of charges of sexual violence, two defendants died after the indictment was confirmed, in one case the indictment was rejected, two cases were transferred to Serbia for further processing, and in one case proceedings were discontinued due to the mental incapacity of the defendant and his consequent inability to stand trial.

Conviction rates for CRSV cases varied according to the jurisdiction in which they were tried. As presented in the chart below, acquittals in such cases occurred more frequently in RS entity courts than in courts of other jurisdictions. Conversely, the conviction rate in this category of cases in the FBiH courts was higher than average.

### CRSV case outcomes by jurisdiction, 2004–2016



#### 2.2.3. CRSV cases qualified as “ordinary” crimes

In addition to the 116 completed cases of sexual violence qualified as a war crime or crime against humanity, the Mission monitored or obtained information about ten cases of CRSV pertaining to 17 defendants that were tried as the “ordinary” crime of rape, which resulted in the conviction of 15 perpetrators. In two of these cases, two defendants were acquitted. Furthermore, the Mission is aware of three ongoing cases of CRSV that are being tried as ordinary crimes.

#### 2.2.4. Ongoing CRSV cases

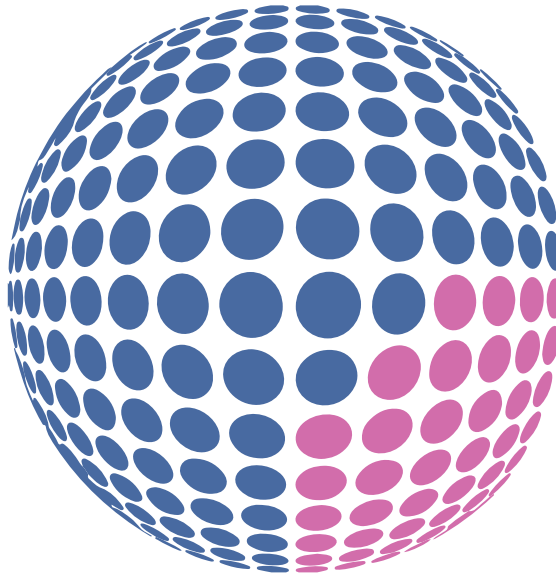
On 31 December 2016, 58 of the 257 ongoing war crime cases in the post-indictment phase involved sexual violence charges, meaning that about 23 per cent of war crimes cases that are currently before courts in BiH concern at least one sexual violence crime.

## Ongoing war-crime cases before courts in BiH

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**Other  
war  
crimes  
cases**

**199**  
**77%**



**58**  
**23%**  
**CRSV  
cases**

### *2.2.5. Transferred proceedings involving allegations of CRSV*

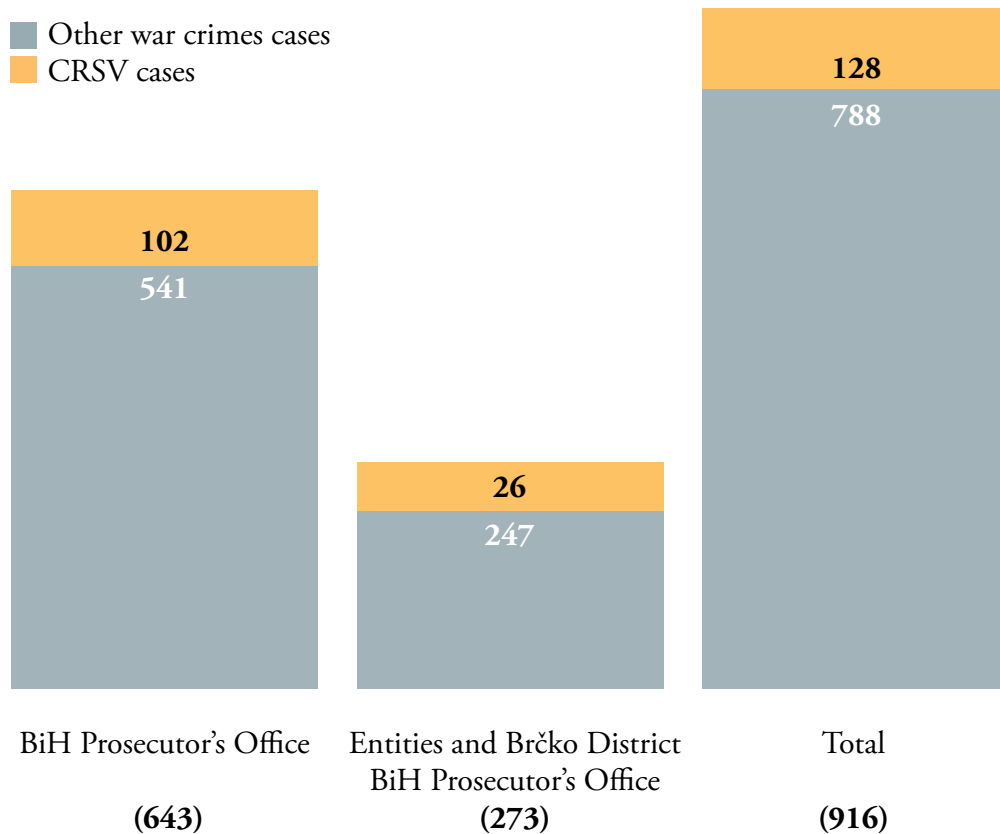
According to the information available to the Mission, since 2009 the Court of BiH has transferred proceedings in a total of 457 war crimes cases to courts in the entities and BDBiH in accordance with the National Strategy for Processing of War Crimes Cases. Of these, 43 have included sexual violence allegations (i.e. slightly less than ten per cent of all transferred cases). Since 2010, the Court of BiH has denied requests by the BiH Prosecutor's Office to transfer a total of 27 cases involving CRSV allegations.

### **2.3. CRSV cases under investigation**

In addition to the completed cases outlined above, the Mission is 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 Mission's knowledge, as of 31 December 2016, 128 of the 916 war crimes cases under pre-investigation and investigation before prosecutors' offices across BiH included allegations of sexual violence.

## CRSV cases in the investigation stage

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### **3. Applicable legal framework**

As described in detail in the Mission's 2014 and 2015 reports on the processing of CRSV cases in BiH,<sup>10</sup> the substantive domestic legislative framework applicable to CRSV crimes in BiH consists of two criminal codes: the amended 2003 Criminal Code of BiH (BiH CC) and the Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC), which was in force at the time of the armed conflict that took place in Bosnia and Herzegovina between 1992 and 1995.<sup>11</sup> The BiH CC explicitly provides for the prosecution of crimes against humanity, including sexual violence crimes, whereas the SFRY CC, while proscribing a specified set of war crimes against civilians and prisoners of war, as well as the crime of genocide, does not provide for the prosecution of crimes against humanity, including those involving sexual violence.

Following the 2013 decision by the European Court of Human Rights (ECtHR) in the *Maktouf and Damjanović* case,<sup>12</sup> the Court of BiH and courts in the FBiH, RS, and BDBiH have applied the SFRY CC in the processing of nearly all war crimes cases.<sup>13</sup> As previously observed by the Mission, the ECtHR's decision in that case did not provide guidance as to whether sentences falling within the higher range of punishment offered by the BiH CC would be compatible with Article 7 of the European Convention on Human Rights. In spite of this, subsequent decisions by the BiH Constitutional Court interpreted this ECtHR ruling as applicable to cases for war crimes and genocide offences for which high sentences have been handed down, finding that such cases should also be sentenced according to the guidelines contained in the SFRY CC. This interpretation has dramatically impacted sentencing practices at the Court of BiH and in a number of cases analysed for the purpose of this report. The Court of BiH has also interpreted the *Maktouf* decision as requiring the re-qualification of acts charged under the BiH CC by the Prosecutor's Office of BiH in order to apply the SFRY CC.<sup>14</sup>

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<sup>10</sup> OSCE Mission to Bosnia and Herzegovina, *Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges* (Court of BiH) (2014) [hereinafter OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013)]; OSCE Mission to Bosnia and Herzegovina, *Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges* (FBiH, RS, and Brčko District Courts) (2015) [hereinafter OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014)].

<sup>11</sup> For a detailed description of the legal framework and its application at the State level, see OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 28–32; for a detailed description of the legal framework and its application at the entity level, see OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 17–19.

<sup>12</sup> *Maktouf and Damjanović v. Bosnia and Herzegovina*, App. Nos. 2312/08 and 34179/08, Eur. Ct. H.R. (2013).

<sup>13</sup> For more details on the *Maktouf* case and its effect on war crimes proceedings in BiH, see OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 17–18.

<sup>14</sup> See, e.g., *Ibro Macić*, Court of BiH, First Instance Verdict, 17 April 2015, paras. 41–48; *Josip Tolić*, Court of BiH, First Instance Verdict, 20 March 2015, para. 78; *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, paras. 36–43; *Bosiljko Marković and Ostoja Marković*, Court of BiH,

Furthermore, a number of individuals convicted for war crimes with a final and binding verdict under the BiH CC have relied on the ECtHR's *Maktouf* decision to challenge their sentences before the Constitutional Court of BiH. These petitions for review of sentences resulted in lower sentences for several individuals convicted of wartime sexual violence.<sup>15</sup> Cases that are qualified by the Prosecutor's Office of BiH as crimes against humanity, however, including some sexual violence cases, have continued to be tried under the BiH CC.<sup>16</sup>

### 3.1. Lack of force or threat of immediate attack requirement in substantive law on rape

In December 2015, the 2003 Criminal Code of BiH was amended in accordance with recommendations made by the Committee against Torture (CAT), the OSCE Mission, and other relevant actors.<sup>17</sup> The Mission supported the CAT recommendation in a written submission to the Criminal Codes Implementation Assessment Team (CCIAT), a BiH State-level body led by the BiH Ministry of Justice and comprising legal experts from both entities and BDBiH. The CCIAT met on a periodic basis until January 2013.<sup>18</sup> On 29 January the CCIAT unanimously accepted the CAT's proposal that the words "by force or by threat of direct attack upon his life or limb, or the life or limb of a person close to him/her" be deleted from the definitions of rape in Articles 172(1)(g) and 173(1)(e) of the 2003 BiH Criminal Code.<sup>19</sup> The current definition<sup>20</sup> is in line with international

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First Instance Verdict, 24 June 2015, paras. 57–60.

<sup>15</sup> Prior to their re-opening and adjustment of sentences, the cases were analysed in the first OSCE Mission report on conflict-related sexual violence (OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013)). The relevant verdicts are as follows: *Velibor Bogdanović*, Court of BiH, Second Instance Verdict, 18 September 2015 (reducing sentence from six years to five years following re-opening after the BiH Constitutional Court's decision); *Miodrag Marković*, Court of BiH, Second Instance Verdict, 9 April 2015 (sentence reduced from seven years to six years); *Sreten Lazarević and others*, Court of BiH, Second Instance Verdict, 9 June 2015 (sentence reduced from nine years to seven years); *Ante Kovač*, Court of BiH, Second Instance Verdict, 17 December 2014 (sentence reduced from nine years to eight years).

<sup>16</sup> *E.g.*, *Petar Kovačević*, Court of BiH, First Instance Verdict, 2 November 2015, paras. 83–94 (considering whether article 7(1) of the European Convention on Human Rights allows for the application of the BiH CC in the instant case, which concerns crimes against humanity, and concluding that it does).

<sup>17</sup> See OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 29–30, 64.

<sup>18</sup> OSCE Mission to Bosnia and Herzegovina, Comments to Proposed Amendments to the Criminal Codes of BiH subject to review by the CCIAT of the BiH Ministry of Justice, August 2012.

<sup>19</sup> Official Gazette of Bosnia and Herzegovina, 40/15.

<sup>20</sup> BiH Criminal Code, art. 172(1)(g) (Crimes Against Humanity) ("Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates... sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity... shall be punished by imprisonment..."); art. 173(1)(e) (War Crimes Against Civilians) ("Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates... sexual intercourse or an equivalent sexual act (rape) or forcible prostitution... shall be punished by

standards articulated in ICTY, International Criminal Tribunal for Rwanda (ICTR), and International Criminal Court (ICC) jurisprudence, which recognize the existence of coercive circumstances in situations of armed conflict that may negate a victim's ability to consent to sexual contact.

Under these standards, it is not necessary that the prosecution show an explicit demonstration of force or threat of attack by the perpetrator to prove lack of consent by the victim. Although force and threat may be indicative of a lack of consent, international jurisprudence recognizes that other circumstantial factors can also affect an individual's ability to consent to sexual contact during armed conflict or attacks against civilian populations.

The role of such coercive circumstances and how they affect consent was articulated by the ICTR Trial Chamber in its *Akayesu* judgment:

[C]oercive 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 at the bureau communal.<sup>21</sup>

This widely-accepted formulation of coercive circumstances was most recently adopted by the ICC in its *Bemba* judgment.<sup>22</sup> The Trial Chamber in that case expanded upon the *Akayesu* definition to explain how coercive circumstances can be inherent in a number of conflict-related scenarios.

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imprisonment...”)

<sup>21</sup> *Jean Paul Akayesu*, ICTR Trial Chamber, Judgment (ICTR-96-4-T), 2 September 1998, para 688. *See also Édouard Karemera & Matthieu Ngirumpatse*, ICTR Trial Chamber, Judgment (ICTR-98-44-T), 2 February 2012, paras 1676–1677 (“Rape as a crime against humanity is the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent in this regard refers to voluntary consent, which results from the victim’s free will. Non-consent can be inferred from the existence of coercive background circumstances under which meaningful consent is not possible. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. The accused must have the intention to effect prohibited sexual penetration, and the knowledge that it occurs without the consent of the victim. Awareness of the coercive circumstances that undermine the possibility of genuine consent may prove knowledge of non-consent.” [citations and paragraph numbers omitted]).

<sup>22</sup> *Jean-Pierre Bemba Gombo*, ICC Trial Chamber, Judgment (ICC-01/05-01/08), 21 March 2016, para. 103.

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The Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape. Further, the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes.<sup>23</sup>

The Trial Chamber furthermore explained how demonstrating that a perpetrator took advantage of such circumstances makes it unnecessary for the prosecution to prove that the victim did not consent to the sexual contact.<sup>24</sup>

In its *Dorđević* judgment, the ICTY Appeals Chamber confirmed the formulation of “coercive circumstances” with regards to sexual assault elaborated in the *Milutinović et al* trial judgment. Citing the *Kvočka* and *Kunarac* appeal judgments, the Appeals Chamber recalled how a victim’s detention status affects consent:

With regard to the issue of consent, the Appeals Chamber considers that any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress and generally oppressive surrounding circumstances, may constitute proof of lack of consent and usually is an indication thereof. In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.<sup>25</sup>

The amendments to the Criminal Code of BiH with respect to CRSV crimes reflect these international standards. By removing the elements of “force or threat of immediate attack” from the legal provisions on sexual violence as a crime against humanity and rape as a war crime, the legislature of BiH acknowledged that coercion negating consent can occur beyond direct force or threat, especially in times of armed conflict. In this way, the law now reflects a consent-based standard as adopted by the ICC, ICTY, and ICTR.

As discussed in the OSCE Mission’s 2014 report on CRSV, although the unamended Criminal Code of BiH was unduly narrow with respect to the definition of CRSV crimes, many courts around the country had already begun interpreting the applicable legislation in

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<sup>23</sup> *Ibid.*, para. 104.

<sup>24</sup> *Ibid.*, para. 106 (“[W]here ‘force’, ‘threat of force or coercion’, or ‘taking advantage of coercive environment’ is proven, the Chamber considers that the Prosecution does not need to prove the victim’s lack of consent.”).

<sup>25</sup> *Vlastimir Đorđević*, ICTY Appeals Chamber, Judgment (IT-05-87/1-A), 27 January 2014, para. 852 (citations to *Milutinović*, *Kvočka*, and *Kunarac* omitted).

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line with international standards, effectively substituting the requirement for a showing of force with a demonstration that coercive circumstances negated the possibility of consent. As will be elaborated further in this report, this positive trend has continued in courts across BiH, particularly since the introduction of the amendments. However, several cases described in this report – including cases that were completed before the adoption of the amendments to the BiH CC – still explicitly treat the use of force or threat of immediate attack as an element of crimes of CRSV.

The OSCE Mission lauds the important achievement by the legislature of BiH in amending the substantive law to fully reflect current international standards pertaining to rape in conflict, and encourages courts across BiH to continue to advance the application of these standards on coercive circumstances in their adjudication of CRSV cases.

### 3.2. Procedural law and evidentiary rules

The procedural codes applicable to war crimes cases in BiH vary across the State and entity levels, but are harmonized with regards to special evidentiary rules relating to sexual violence crimes.<sup>26</sup> Specifically, the Criminal Procedure Codes (CPCs) of BiH, FBiH, RS, and BDBiH require that, in cases of “sexual misconduct:”

- Evidence of a victim’s prior sexual conduct is not admissible;<sup>27</sup>
- In cases concerning violations of international law and crimes against humanity, the victim’s consent may not be used in favour of the defence.<sup>28</sup>

Such evidentiary standards are designed to prevent irrelevant and potentially harmful questioning by the defence in a manner intended to discredit a victim on moral grounds. The second of the above provisions moreover recognizes the inherently coercive circumstances present in times of war. As described in the international jurisprudence above, the assumption underlying the CPC provisions is that, if the existence of an armed conflict has been proven by the prosecution, as well as the link between the conflict and the sexual crime – the “nexus” element – then an individual’s ability to consent to sexual contact is effectively negated.

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<sup>26</sup> For a more complete discussion of special evidentiary rules in sexual violence cases in BiH, see OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 32–26; and OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 19–21.

<sup>27</sup> Art. 264(1), BiH CPC; Art. 279(1), FBiH CPC; Art. 279(1), RS CPC; Art. 264(1), BDBiH CPC.

<sup>28</sup> Art. 264(3), BiH CPC; Art. 279(3), FBiH CPC; Art. 279(3), RS CPC; Art. 264(3), BDBiH CPC.

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## **4. CRSV Cases before the Court of BiH and Entity Courts 2014–2016**

Between 2014 and 2016, the Mission has observed a series of generally positive trends in the investigation, prosecution, and adjudication of CRSV cases by courts across BiH. Notably, courts have shown an increasing understanding of the elements of these crimes, have more consistently applied relevant evidentiary standards, and have improved the level of protection and support provided to vulnerable victim-witnesses. In spite of this progress, challenges remain in some courts.

### **4.1. Legal qualification**

Combating impunity for CRSV begins with the proper recognition of the criminal act during the investigation stage and correct legal qualification by the prosecution. In many cases of rape committed during the armed conflict in BiH between 1992 and 1995, this is a fairly straightforward task due to an increasingly large body of international and national jurisprudence defining the crime. As discussed in the Mission's 2014 report on CRSV cases at the Court of BiH<sup>29</sup> and its 2015 report on CRSV cases at entity-level courts,<sup>30</sup> the jurisprudence on all levels in BiH increasingly conformed to international standards on rape and other forms of sexual violence. Encouragingly, this trend has continued since the publication of these reports. However, the Mission has concerns with regard to developments in a few cases at both the State and entity levels that were analysed for the present report.

#### *4.1.1. Appropriately charging sexual violence crimes*

In a majority of CRSV cases completed between 2014 and 2016, courts in BiH have exhibited a sound understanding of the elements of sexual violence crimes, as discussed in more detail below.<sup>31</sup> In a few cases, however, sexual violence crimes appear to have been improperly qualified or not charged at all.<sup>32</sup> Charging sexual violence crimes accurately and to the fullest extent possible under the applicable criminal code is critical to ensure both that perpetrators do not enjoy impunity for their actions and that the various forms of sexual violence are viewed in the broader context of the armed conflict and with their specific purpose(s) in mind. Taking this approach is crucial for overcoming

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<sup>29</sup> OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 41–42.

<sup>30</sup> OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 25–30.

<sup>31</sup> See section 4.2 below on elements of crimes for a more detailed discussion.

<sup>32</sup> *Slavko Savić*, Court of BiH (It was evident from the victim's testimony that she became pregnant as a result of the rape committed by the perpetrator, and that she had stated so in her investigative statement. However, this fact was omitted from the indictment of 8 December 2014. Although pregnancy is not a constitutive element of the crime of rape as a war crime against civilians – the act for which the perpetrator was charged – it still bears relevance for a determination of the consequences to the victim, and its exclusion from the indictment is troubling).

the damaging stereotype that such crimes are merely opportunistic, isolated, or carried out for personal gratification, which ignores their potentially systematic nature and their possible role in broader surrounding violence.<sup>33</sup>

In two recently completed cases before the Court of BiH, it is questionable whether the prosecution charged sexual violence to the most accurate extent permissible under the law. In the *Vlahović* case (aka *Batko*), the accused was charged, *inter alia*, with the abduction of an elderly couple – who were taken to an unknown location and killed – and their daughter, who was kept in an apartment for several days before also disappearing and presumed killed. At trial, protected witness S-25 testified that he saw the victim together with the accused, who introduced her as his wife, and that the accused and the victim slept together in one room of the apartment while S-25 slept in another. For these acts, Vlahović was charged with – and convicted of – enslavement, other inhumane acts, and enforced disappearance as crimes against humanity.<sup>34</sup> In another count of the *Batko* indictment, the accused was charged with the abduction of five family members from an apartment, three of whom – two males and an elderly female – were taken to an unknown location and shot in the head, while two younger females were taken to other locations. One of the female victims was held captive in an apartment and raped several times. She sustained grave and permanent injuries by eventually managing to escape by jumping through a window. For these crimes, Vlahović was charged with, and convicted of, persecution as a crime against humanity in the form of rape and enslavement.<sup>35</sup>

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<sup>33</sup> See Laurel Baig, Michelle Jarvis, Elena Martin Salgado, & Giulia Pinzauti, *Contextualizing Sexual Violence: Selection of Crimes*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (Brammertz & Jarvis, eds.) (2016), p. 217 (“Placing sexual violence in proper context and accurately seeing links between sexual violence and other violent crimes is essential and has been the golden thread running through the [ICTY Office of the Prosecutor]’s successes. Misconceptions that obscure the violent nature of rape and similar acts or that perpetuate stereotypes of sexual violence as necessarily ‘personally-motivated’, and/or ‘isolated’, or less serious than other crimes will thwart the objective of contextualizing sexual violence and linking it to senior officials in appropriate cases. . . . To minimize the risk that these misconceptions will adversely affect cases, prosecutors should approach sexual violence with the initial working assumption that it is related to the armed conflict/widespread or systematic attack against a civilian population and that it is committed with the same intent as other violent crimes committed in a similar context, unless there are clear factors to the contrary. Prosecutors should be prepared to present evidence and argument in court to substantiate this hypothesis.”). See also Rebecca L. Haffajee, 29 HARVARD J. LAW & GENDER 201, 205 (“Rape historically has been characterized as a private crime, committed in isolated and discrete cases. Viewed as an incidental by-product of war, sexual violence has been overlooked by the international community in the past. Rather than an occasional act committed by a delinquent soldier, the conflicts in Rwanda and the former Yugoslavia demonstrate that rape and sexual violence in situations of armed conflict can be systematic and integral to genocidal violence and an overarching political framework; the acts often have no ‘sexual’ element at all. During these conflicts, rape and other forms of sexual violence, such as forced nudity and torture, perpetrated against predominantly female civilians were ordered, encouraged, and overlooked by superiors.”).

<sup>34</sup> *Veselin Vlahović Batko*, Court of BiH, First Instance Verdict, 29 March 2013, para. 778.

<sup>35</sup> *Ibid.*, para. 864.

It is questionable why neither the prosecutor nor the Court qualified the above-mentioned acts as sexual slavery, given that the facts established by the Court in its verdict bear elements of that crime as a “particularized form” of enslavement.<sup>36</sup> As elaborated in the previous Court of BiH case of *Kujundžić*,<sup>37</sup> in addition to the crime’s connection to a widespread or systematic attack against a civilian population and the knowledge of such attack, the elements of sexual slavery are as follows: “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such persons, or by imposing on them a similar deprivation of liberty; [and] the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”<sup>38</sup> In the above-described circumstances, accepted by the trial and appellate chambers as credible accounts, the accused did exercise control of ownership over the victims, controlling their movement by keeping them confined in an apartment and forcing them to engage in acts of a sexual nature. It is unclear why the prosecution did not charge these acts as sexual slavery, or why the court did not re-qualify them as such given the fact pattern.

The *Soldo* case also raises questions about proper qualification of sexual violence crimes, among other likely deficits in the investigation and prosecution of the case. In *Soldo*, the Prosecutor’s Office of BiH charged the accused, who was a member of the Army of Republika Srpska (VRS), with war crimes against civilians in the form of rape, among other underlying acts including forced labour, religious conversion, and violation of bodily

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<sup>36</sup> *Prosecutor v. Sesay, Kallon and Gbao* (“RUF Case”), Case No. SCSL-04-15-T, Trial Judgment (2 March 2009), paras. 155, 159–160; see OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), p. 45.

<sup>37</sup> *Predrag Kujundžić*, Court of BiH, First Instance Verdict, 30 October 2009, paras. 556–557 (“556. The Panel concluded beyond any reasonable doubt from the adduced evidence that the aggrieved party did the described actions against her own will, bearing in mind that she was not in a situation to give any true consent, and that she was subjected to conditions constituting sexual slavery. The above-described conditions clearly constitute the intentional exercise of one authority or of all authorities of the Accused in connection with the right to ownership over the person 2. ... 557. Further, the Panel finds established that the Accused treated Witness 2 as described in the Reasoning of the Verdict, in such a way that, during a widespread and systematic attack on non-Serb civilians in the Municipality of Doboj, knowing of such attack, he kept her in sexual slavery, thereby breaching the fundamental rules of international law, whereby he committed the criminal offence of *Crimes against Humanity* in violation of Article 172(1)g) of the BiH CC as read with Articles 29 and 30 in conjunction with Article 180(1) of the BiH CC.”)

<sup>38</sup> *Ibid.*, para. 512. See also *Gojko Janković*, Court of BiH, Second Instance Verdict, 23 October 2007, pp. 14–15 (“The First Instance Panel legitimately applied the following elements that constitute the crime of sexual slavery: i) intentional exercise of any or all of the powers related to the right of ownership over a person; ii) the perpetrator subjected a victim to sexual intercourse on one or more occasions. The First Instance Panel legitimately concluded, based on the presented evidence, that the injured parties were placed in the house in Trnovača against their will since they did not have the opportunity to genuinely consent to it, and that the witnesses FWS-186 and FWS-191 were subjugated to the conditions that amount to sexual slavery.”).



integrity.<sup>39</sup> The accused was found to have locked a Bosniak woman in a bungalow at the Boračko jezero military campsite for a month between June and July 1992, where he raped her repeatedly and allowed other members of the VRS and soldiers from Serbia who were also stationed at the campsite to rape her as well.<sup>40</sup> The accused forced the victim to do menial tasks such as cleaning bungalows, washing military uniforms and cleaning boots; he also forced her to convert to Christianity and to change her name upon threat to her life.<sup>41</sup> For these crimes, the accused ultimately accepted a plea deal which provided for five years' imprisonment.<sup>42</sup>

It is unclear why the Prosecutor's Office of BiH charged Soldo with war crimes instead of crimes against humanity. His acts bear clear elements of sexual slavery, a crime against humanity, as defined in *Kujundžić*, provided that they occurred as part of a widespread or systematic attack against a civilian population and he knew about the attack.<sup>43</sup> The factual basis provided in the indictment as well as context provided by the related *Krsto Savić* case suggest that his acts fulfil all of the requisite elements for a crimes against humanity charge.

To understand the context in which the crimes described in the Soldo case took place, it is necessary to examine the closely connected *Krsto Savić* case, which was concluded before the Court of BiH in 2011.<sup>44</sup> Savić was ultimately convicted of crimes against humanity in several forms in the areas of Gacko, Bileća, Kalinovik and Nevesinje.<sup>45</sup> The Court of BiH concluded that there was an ongoing widespread and systematic attack against Bosniak and Croat civilians by the VRS in the surrounding area from mid-June 1992 until the end of 1992.<sup>46</sup> The *Savić* trial judgment described how one victim, protected witness "F", had been arrested and imprisoned by the Nevesinje

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<sup>39</sup> *Radivoje Soldo*, Prosecutor's Office of BiH, Indictment, 24 August 2015, p. 2.

<sup>40</sup> *Radivoje Soldo*, Court of BiH, First Instance Verdict, 3 November 2015, para. 49.

<sup>41</sup> *Ibid.*, paras. 49–50.

<sup>42</sup> *Radivoje Soldo*, Court of BiH, First Instance Verdict, 3 November 2015, p. 4, para. 58.

<sup>43</sup> *Predrag Kujundžić*, Court of BiH, First Instance Verdict, 30 October 2009, para. 512; see also ICC Elements of Crimes, art. 7(1) (g)-2, Crime against humanity of sexual slavery: "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature; 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

<sup>44</sup> *Krsto Savić*, Court of BiH, Second Instance Verdict, 11 April 2011.

<sup>45</sup> *Ibid.*, para. 294.

<sup>46</sup> *Ibid.*, para. 47 ("[T]he Panel holds that it has been indisputably determined that at the relevant time, that is, from 16 June 1992 until the end of 1992 in the area of municipalities of Gacko, Bileća, Nevesinje and Kalinovik there was a widespread and systematic attack of the Army of the Republic of Srpska (VRS), paramilitary and police units against the Bosniak and Croat civilians.")

Public Security Station (SJB)<sup>47</sup> as part of a widespread and systematic attack against the civilian population, then taken to the headquarters of the Red Berets at Boračko jezero camp, where she “remained in sexual slavery for seven and a half months with a changed identity.”<sup>48</sup> In its appeal judgment, the Court of BiH removed the sexual slavery of witness “F” from the factual description of the charges, finding that Krsto Savić could not be held responsible for what happened to her after she was taken away from the Nevesinje SJB by a perpetrator she explicitly identified at trial in 2008<sup>49</sup> as Radivoje Soldo.<sup>50</sup> The indictment against Soldo for war crimes was filed seven years later, more

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<sup>47</sup> *Krsto Savić*, Court of BiH, First Instance Verdict, 24 March 2009, paras. 327–336 (findings related to sexual slavery at Boračko jezero) (“It is on the testimony of witnesses Irfan Ćatić, Kemo Bulić and ‘F’ as well as documentary evidence T-38, T-39, T-42 and T-43 that the Panel based the key determinations in connection with the event that occurred in late June 1992, which is when police officers of the Nevesinje SJB imprisoned the civilians Osman Abaz, Jozo Jarak and ‘F’ on the basement premises of the Nevesinje SJB and, after several days of imprisonment, handed them over to unknown members of paramilitary formations, knowing that they were exposing them to mortal danger, violence and mental traumas. Those civilians were taken to the Boračko lake, Konjic Municipality, where they were killed. The bodies of Osman Abaz and Jozo Jarak were exhumed from and identified at the *Borisavac* pit **whereas ‘F’ was held in sexual slavery with a changed identity and she managed to survive the war...** In light of these established facts and bearing in mind all other circumstances and events that occurred in the area of Nevesinje Municipality at the relevant time, the Panel has concluded that the Accused Krsto Savić, at the time when he uttered the cited words, claimed that ‘F’ would be in sexual slavery solely on account of her religious, national and ethnic affiliation; for that reason, it is clear that there was intent on the part of the Accused Krsto Savić to carry out persecution of the non-Serb population from the municipalities of Nevesinje, Gacko, Bileća and Kalinovik also by means of rape.” *Ibid.*, paras. 327, 335 (emphasis added)).

<sup>48</sup> *Ibid.*, para. 333.

<sup>49</sup> During the trial against Savić, protected witness “F” testified that Serb soldiers had attacked her village and arrested her and her family as they were running away, after which she was taken to the Police Station in Nevesinje, where Krsto Savić told her that she needed to change her religion to Orthodoxy and that she would be staying with his forces. She testified that she spent the following three days in detention there with other Bosniac prisoners, after which a soldier named Radivoje Soldo took her to Boračko Jezero camp, where she was raped and beaten for seven and a half months.

<sup>50</sup> *Krsto Savić*, Court of BiH, Second Instance Verdict, 11 April 2011, paras. 255–258. (“Although the Panel accepts as truthful the testimony of witness F that the Accused [Krsto Savić] stated: ‘...it would be pity to send this for exchange, we will not send this for exchange, it will be ours, we will convert her to Christianity, we will change her name to Mileva and she will be ours...’, the Panel cannot conclude beyond a reasonable doubt that the Accused was connected with the further consequences pertaining to the sexual slavery imposed on this witness. . . . Even though the Accused stated that he would keep the witness and that she would be theirs, there is no evidence that he undertook any specific actions forming a nexus between this statement and the ensuing consequences. Accordingly, the Accused’s participation in the further stages of the perpetration of this criminal offence and his awareness that the victim would be taken to the Boračko Lake by the paramilitary formations have not been proven. This especially in view of the victim’s statement that following her detention on the MUP premises she was taken by members of the paramilitary formations together with Jozo Jarak and Osman Abaz to the Boračko Lake and that she did not observe any policemen while she was leaving the police building. Immediately upon her arrival at the Boračko Lake she was taken to the detention camp where the Red Berets HQ was located and where she was held for seven and a half months in sexual slavery, with her name changed. . . . In her

than four years after the *Savić* case concluded.<sup>51</sup>

This suggests that the Prosecutor’s Office of BiH did not follow a coherent charging policy with regards to the same facts and failed to follow the jurisprudence that would qualify this event as a crime against humanity. The testimony of witness “F” and the *Savić* verdict indicate that the crimes committed by Radivoje Soldo were in fact connected to a widespread and systematic attack against a civilian population, and that Soldo was aware of that connection – the essential elements distinguishing a crime against humanity from a war crime.<sup>52</sup> When viewed in light of the ongoing conflict in the area, and the complete circumstances surrounding the sexual slavery of witness “F” – including her arrest, imprisonment, and forcible religious conversion – charging Soldo with war crimes against a single civilian for the crimes described in the case against him ignores the broader picture giving context to those crimes. Given that even a single sexual violence incident can constitute a crime against humanity when it forms part of an attack against a civilian population,<sup>53</sup> it is difficult to understand why the Prosecutor’s Office of BiH did not charge Soldo with sexual slavery as a crime against humanity for his crimes, which persisted for at least a month.

The *Soldo* case raises the possibility that the prosecution may have viewed the sexual violence crime committed against the victim as occurring in isolation from the broader context of the attack against the civilian population, a phenomenon that has been documented with regards to prosecution of sexual violence crimes at the ICTY.<sup>54</sup> This is problematic because it fails to capture the true nature of conflict related sexual violence as forming part of a broader atmosphere of terror and oppression – the atmosphere which was established in the *Krsto Savić* case. Such a narrow approach risks perpetuating the

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account of the suffering she was subjected to, the witness explicitly identified the person who took her to be converted to Christianity while she was detained in the camp, one Radivoje Soldo, who told her that it was for her own good and that it would save her life. Her name was changed to Biljana Jovanović (and not Mileva as the Accused asserted). Therefore, after she was taken out of the Police Station, victim F was ‘in the hands’ and under the exclusive control of the mentioned paramilitary formations which cannot be brought into connection with any acts performed by Krsto Savić.” (paragraph numbers and citations omitted)).

<sup>51</sup> *Radivoje Soldo*, Prosecutor’s Office of BiH, Indictment, 24 August 2015.

<sup>52</sup> Antonio Cassese, *INTERNATIONAL CRIMINAL LAW*, p. 82 (2003).

<sup>53</sup> Baig et al., *supra* note 31, , p. 182–183 (“ICTY case law recognizes that only the attack, not the individual acts forming part of it, must be widespread or systematic. Accordingly, it is not sexual violence per se that must be shown to be widespread or systematic, but rather the attack of which the sexual violence formed part. . . . A single or relatively limited number of sexual violence crimes can qualify as a crime against humanity, unless those crimes are truly isolated in the sense that they are not part of the overall attack. . . . A crime committed before or after the main attack or in a geographically removed location is not automatically excluded as an isolated act.” (citations omitted)).

<sup>54</sup> See Michelle Jarvis & Kate Vigneswaran, *Challenges to successful Outcomes in Sexual Violence Cases*, in *PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY* (Brammertz & Jarvis, eds.) (2016), p. 38.

stereotype that sexual violence is inherently a “private” matter. Furthermore, it suggests an inconsistent charging policy by the Prosecutor’s Office of BiH concerning related events taking place during the armed conflict, with connected crimes being charged as crimes against humanity in some cases and war crimes in other cases.<sup>55</sup> Coherent practice in qualification of crimes is critical for both fairness and public confidence in the judiciary.<sup>56</sup>

It is possible that the prosecution did consider the broader context but still did not find evidence that the crime was linked to a widespread or systematic attack (or that Soldo was aware of that attack), in spite of the *Krsto Savić* verdict. In that case, however, it is questionable whether the case was complex enough to have been tried at the Court of BiH, rather than at the entity level, as envisaged by the National Strategy for Processing of War Crimes Cases.<sup>57</sup> This possibility raises concern that this case stemmed from a potential practice of “fragmentation” – the splitting of large cases concerning a cluster of related crimes into several smaller cases, which can carry several damaging side effects – at the Prosecutor’s Office of BiH.<sup>58</sup> Perhaps the most alarming outcome of such case-splitting concerns the rights of traumatized witness-victims. When large cases are fragmented into smaller cases, each with one accused, victims are forced to provide multiple statements and testify numerous times. Although it is unclear whether and if so, how many times the victim in *Soldo* testified previously, the indictment shows that she gave at least seven different statements to investigators between 1996 and 2015.<sup>59</sup>

A final reason for why the Prosecutor’s Office of BiH may have failed to qualify Soldo’s acts as crimes against humanity is charge bargaining. It is possible that the prosecution offered a lower charge as part of the plea agreement in return for Soldo’s testimony in other cases, which is supported by the relevant prosecutor’s public statements.<sup>60</sup> Assuming this is

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<sup>55</sup> This concerning practice has been documented in many cases indicted by the Prosecutor’s Office of BiH, along with several grounds cited for its perpetuation. See Judge Joanna Korner, OSCE Mission to BiH, *Processing of War Crimes at the State Level in Bosnia & Herzegovina* (2016), paras. 83–92.

<sup>56</sup> See *ibid.*, paras. 23–24 (“Consistency of approach by a prosecutor’s office both evidentially and in the legal characterisation of the crimes is a sine qua non in order to ensure equality before the law and maintain public confidence in the process.”).

<sup>57</sup> The National War Crimes Strategy foresees the transfer of “less complex” cases from the Court of BiH to entity-level courts. See OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 7–9.

<sup>58</sup> See Judge Joanna Korner, OSCE Mission to BiH, *Processing of War Crimes at the State Level in Bosnia & Herzegovina* (2016), paras. 72–82.

<sup>59</sup> *Radivoje Soldo*, Prosecutor’s Office of BiH, Indictment, 24 August 2015, p. 6 (citing as basis for the indictment seven statements taken from the victim – one in 1996, two in 2007, two in 2012, one in 2014, and one in 2015).

<sup>60</sup> Dragana Erjavec, *Bosnian Serb Soldier Jailed for Raping Captive*, DETEKTOR, 3 November 2015, <http://detektor.ba/en/bosnian-serb-soldier-jailed-for-raping-captive/> (“The most important thing for us is that the injured party agreed with the signing of this [plea bargain] agreement, that defendant Soldo expressed his apology in public and that he will testify in cases linked to crimes committed in the Konjic

the reason, it calls into question whether such charge bargaining – that is, the prosecution’s offering of a lower charge in exchange for a guilty plea and/or co-operation in future cases – is appropriate in cases involving such serious violations of international law, particularly when the same benefits can be achieved through reducing a sentencing recommendation.<sup>61</sup>

As in previous cases described by the OSCE Mission,<sup>62</sup> it seems that in *Batko* and *Soldo*, the Prosecutor’s Office of BiH and the Court of BiH may have missed important opportunities to charge sexual violence crimes to the most accurate extent allowed by the domestic legal framework. In *Batko*, the Court could have clarified that the crimes committed by the perpetrator amounted to sexual slavery as a particularized form of crime against humanity, while in *Soldo*, the Prosecutor’s Office seemingly failed to recognize the criminal act as a crime against humanity altogether. Charging these crimes appropriately would have allowed for further development of the Court’s jurisprudence on these issues and would also have fully acknowledged the connection of sexual violence with armed conflict. It is hoped that in future cases with similar fact patterns, prosecutor’s offices and courts at all levels will qualify sexual violence crimes appropriately to reflect existing standards.

#### 4.1.2. Gender of victim and legal qualification

One factor that apparently continues to affect legal qualification in cases monitored by the OSCE Mission is the gender of a victim of sexual violence. As discussed in previous OSCE Mission reports, cases involving male victims are frequently qualified as inhuman treatment rather than rape, calling into question whether prosecutors and judges are applying the appropriate legal provisions in a gender-neutral manner.<sup>63</sup>

### International jurisprudence on sexual violence against males

Most of the cases involving sexual violence against males monitored by the OSCE Mission pertained to forced sexual acts between two male victims. The ICTY has held that such acts, specifically forced oral sex between two or more victims, constitutes a

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and Nevesinje area,’ prosecutor Sanja Jukic said.”).

<sup>61</sup> Furthermore, the OSCE Mission has repeatedly questioned whether charge bargaining is consistent with the law in BiH. See, e.g., OSCE Mission to BiH, *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (2<sup>nd</sup> ed., 2006), p. 8; OSCE Mission to BiH, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010* (2011), p. 55; OSCE Mission to BiH, *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE Monitoring* (2011), pp. 23, 25.

<sup>62</sup> See OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 45–51.

<sup>63</sup> See OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 42–43 (emphasis added).

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“fundamental attack on human dignity” which could have been qualified as rape by the prosecution:

The Trial Chamber finds that the act of forcing [the two male victims] to perform fellatio on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhuman treatment under Article 2 of the Statute, and cruel treatment under Article 3 of the Statute. The Trial Chamber notes that the aforementioned act could constitute rape for which liability could have been found if pleaded in the appropriate manner.<sup>64</sup>

The ICTY’s Sentencing Judgment in the *Češić* case supports this qualification. In that case, Češić was found to have forced two brothers to carry out fellatio on one another. For these acts, the prosecution charged Češić for war crimes in the form of inhuman treatment, but also for crimes against humanity in the form of rape.<sup>65</sup> Češić accepted a plea deal, and in its sentencing verdict the Court found that he was guilty of rape as a crime against humanity for these acts.<sup>66</sup>

International jurisprudence on sexual violence against males has most recently been advanced by the ICC in its 2016 *Bemba* judgment. In finding the defendant criminally responsible for acts of sexual violence against males,<sup>67</sup> the Court adopted the ICTY’s characterization of forced oral penetration:

The Chamber notes that the definition of rape encompasses acts of “invasion” of any part of a victim’s body, including the victim’s mouth, by a sexual organ. Indeed, as supported by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), oral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration.<sup>68</sup>

The ICC went further by stressing the gender-neutral nature of the ICC statute:

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<sup>64</sup> *Mucić et al* (“Čelebići Case”), ICTY Trial Chamber, Judgment (IT-96-21-T), 16 November 1998, para. 1066.

<sup>65</sup> *Ranko Češić*, ICTY, Third Amended Indictment (IT-95-10/1), 26 November 2002, Counts 7–8.

<sup>66</sup> *Ranko Češić*, ICTY, Sentencing Judgment (IT-95-10/1), 11 March 2004, paras. 53–54 (analyzing the element of humiliation during the rape as an aggravating factor for the purpose of sentencing).

<sup>67</sup> *Jean-Pierre Bemba Gombo*, ICC Trial Chamber, Judgment (ICC-01/05-01/08), 21 March 2016, para. 633 (finding that male protected witnesses P23 and P69 were raped by the perpetrators).

<sup>68</sup> *Ibid.*, para. 101.

The Chamber emphasises that, according to the Elements of Crimes, “the concept of ‘invasion’ is intended to be broad enough to be gender-neutral”. Accordingly, “invasion”, in the Court’s legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.<sup>69</sup>

### Recent BiH case law

Since the publication of the Mission’s 2015 report on CRSV, a landmark case at the Court of BiH appears to have established the qualification of forced sexual acts between male victims as rape. In other cases, however, courts have failed to accurately qualify similar acts.

The *Begović* case sets a new positive standard for BiH jurisprudence with regard to the qualification of sexual violence perpetrated against males, in spite of some slight ambiguity in the Court’s reasoning. In that case, the Prosecutor’s Office of BiH charged the accused with, *inter alia*, a series of acts of sexual violence against male prisoners in the Batković prison camp, which were qualified as war crimes against prisoners of war in the indictment under art. 144 of the SFRY Criminal Code.<sup>70</sup> The Court ultimately convicted Begović of criminal acts including forcing several pairs of male prisoners to perform oral sex on one another,<sup>71</sup> as well as pushing the barrel of his automatic rifle into the anus of one prisoner.<sup>72</sup> For these acts, the Court found the accused guilty of war crimes against civilians under art. 142(1) of the SFRY Criminal Code (finding that the prosecution had not shown them to be prisoners of war) in the form of inhuman treatment and rape.

The Court plainly refers to the acts of sexual violence as “rape” in several parts of the verdict, setting a new standard for Court of BiH jurisprudence pertaining to sexual violence against males.<sup>73</sup> Notwithstanding some inconsistency in the use of qualifying terminology throughout the verdict (alternately “inhuman treatment,”<sup>74</sup> “rape,”<sup>75</sup> and “rape as inhuman treatment”<sup>76</sup>), the Court clearly recognized the sexual violence perpetrated against male

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<sup>69</sup> *Ibid.*, para. 100.

<sup>70</sup> *Glignor Begović*, Prosecutor’s Office of BiH, Indictment, 12 September 2014, Counts 1, 2, 3, and 13.

<sup>71</sup> *Glignor Begović*, Court of BiH, First Instance Verdict, 11 December 2015, pp. 61–67.

<sup>72</sup> *Ibid.*, pp. 61.

<sup>73</sup> As described in the last OSCE Mission report on CRSV cases at the Court of BiH, until this point, sexual violence against males had not yet been recognized as rape by national courts. See OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), p. 43.

<sup>74</sup> *Glignor Begović*, Court of BiH, First Instance Verdict, 11 December 2015, p. 67.

<sup>75</sup> *Ibid.*, pp. 84–85.

<sup>76</sup> *Ibid.*, p. 60 (in describing the individual counts for which the court had examined the evidence and found the defendant guilty, the court refers to the acts described in counts 1, 2, 3, and 13 – relating to the sexual violence committed against male detainees – as “rape as inhuman treatment” in one paragraph

detainees as rape. This has advanced jurisprudence in BiH and demonstrated a gender-neutral approach to the applicable legal standards.

The Court begins by clearly defining the legal framework for rape as a war crime. In describing the charges, the Court provides an extensive review of the international jurisprudence on rape, as well as the basis for its prohibition in non-international armed conflicts in Common Article 3 of the Geneva Conventions.<sup>77</sup> The Court notes that “rape, as a form of war crime, represents one of the most serious crimes used by perpetrators for the realization of different objectives such as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”<sup>78</sup> In defining rape under international law, the Court sets forth the definition developed by the ICTY in its *Kunarac* verdict, expanding upon that definition with the Court of BiH’s holding in *Pinčić* to find that “[a]ll serious abuses of a sexual nature carried out against bodily or moral integrity of a person by using coercion, threat or intimidation in a manner that is degrading and humiliating for the victim’s dignity are prohibited by international law.”<sup>79</sup>

After its thorough review of jurisprudence and elements of rape as a war crime, the Court goes on to describe the charges of sexual violence as “rape as a form of inhuman treatment,” rather than referring to these acts as rape outright.<sup>80</sup> Later in the judgment, in reviewing the evidence relating to the sexual violence charges (counts 1, 2, 3, and 13), the Court finds that the perpetrators carried out all of the acts described by several witnesses:

[T]he Court established beyond reasonable doubt that the accused, acting in the manner described in the counts one, two, three, and 13 of the convicting part of the verdict, committed acts of serious sexual abuse against the victim attacking the bodily and moral integrity of a person, using force in a manner that was degrading and humiliating to the victim. This Panel qualified these acts as “Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act.”<sup>81</sup>

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and “rape as a form of inhuman treatment” in another paragraph on the same page).

<sup>77</sup> *Ibid.*, p. 58.

<sup>78</sup> *Ibid.*, p. 59.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, p. 60. It is possible that by referring to the acts as “rape as inhuman treatment,” instead of simply rape, the Court was attempting to draw a connection to the underlying international law basis, Art. 3(1) (c) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (4th Geneva Convention), which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment.” In spite of this, the Court’s qualification of the acts as rape – and not inhuman treatment – under art. 142(1) of the SFRY Criminal Code remains clear from its discussion later in the verdict.

<sup>81</sup> *Ibid.*, pp. 66–67.

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The Court therefore makes clear that the acts committed by the perpetrators meet the legal definition of rape set forth in the verdict's review of the jurisprudence. However, the Court also concludes that with these acts of sexual violence, the perpetrators "inhumanly treated" the victims with their actions<sup>82</sup> – failing to explicitly qualify them as rape.

In the final part of the verdict, while outlining the criminal responsibility of the accused, the Court reinforces its initial qualification of the acts of forced oral sex as "rape":

Further, with regard to the counts 1, 2, 3, and 13 of the convicting part of the verdict, upon reviewing the statements of the questioned witnesses, the Panel finds that the accused raped the injured parties N.M., M.Š., A.B., [M.K.], A.H., and B.M. by personally forcing them to place their sexual organs into each other's mouths on multiple occasions, the unequivocal purpose of which was their degradation, humiliation and intimidation. Consequently, the Panel finds that the accused acted with a direct intent with the aim of violating the personal dignity of the victim and that he executed the crime through especially offensive and degrading acts, always in the presence of others who were watching. At the same time, these acts were committed on the imprisoned civilians who were helpless and subjected to beatings on a daily basis, which was a fact the accused was fully aware of.<sup>83</sup>

In meting out the sentence, the Court remains consistent with this qualification, citing as aggravating factors the harmful consequences for the injured parties caused by the accused's actions, including the "rape of several persons."<sup>84</sup>

In spite of the few ambiguities about qualification in the judgment, the *Begović* verdict represents a landmark ruling for its recognition of forced sexual acts between two or more male victims as rape, and the Mission lauds the efforts of the Court of BiH to correctly articulate and apply the elements of rape as a war crime under national and international law, including qualifying forced oral sex between prisoners such.

Although the Court of BiH appeals panel affirmed the conviction of the accused for the sexual violence against male prisoners described above in the *Begović* case, it declined to characterize these acts as "rape" in its verdict, instead referring to the crimes more vaguely as "sexual abuse."<sup>85</sup> The appeals panel thus missed an important opportunity to elucidate the reasoning of the first instance panel and failed to set a clear standard regarding the legal

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<sup>82</sup> *Ibid.*, p. 67.

<sup>83</sup> *Ibid.*, pp. 84–85.

<sup>84</sup> *Ibid.*, p. 90.

<sup>85</sup> *Gligor Begović*, Court of BiH, Second Instance Verdict, para. 77.

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qualification of this type of sexual violence against males as rape.

Similarly, in *Zelenika*, the Court of BiH recognized similar acts against male detainees as sexual violence, but declined to explicitly characterize them as rape. In that case, the Court found one accused – a female member of the Croatian Defence Forces (HOS) – guilty of forcing detainees to perform oral sex, an act which the Court referred to as “equivalent to sexual intercourse.”<sup>86</sup> Instead of ultimately characterizing the acts as rape, however, the Court found the perpetrator had committed crimes against humanity involving physical abuse, including sexual abuse.<sup>87</sup>

Other recent cases before the Court of BiH have also failed to demonstrate progress in terms of accurately qualifying sexual violence against males. In the *Vlačo* case, for example, the Court of BiH found the accused responsible for allowing two soldiers to force two male civilian detainees to “engage in sexual intercourse,” finding credible and reliable the statement of one prosecution witness who testified that the two detainees had been “forced to oral sex”<sup>88</sup> and the testimony of another who said he was present when the two men were forced to take their clothes off and “to have homosexual intercourse.”<sup>89</sup> Based on these accounts, the Court found the accused guilty of inhuman treatment causing great suffering.<sup>90</sup> Neither the indictment nor the final verdict qualified these acts as rape.

The *Macić* case involved a similar set of circumstances. The Court of BiH found that the accused forced two male detainees to perform oral sex on each other and to attempt anal intercourse with each other; he also participated in the scorching of the men’s genitalia with a piece of burning wood.<sup>91</sup> In discussing its findings, the Court repeatedly refers to these acts as “sexual intercourse,” for example:

Corroborating the testimony of the witness A1, the witness A2, after recounting how he was tortured by Ibro Macić immediately upon his arrival, testified that in mid-August 1993 he, together with the witnesses S, A1 and I. Đ., was taken to a room with a fire burning in the middle of it. He identified Ibro Macić, Ramo Žilić, and Osmo as the soldiers he saw there, along with another two, three, maybe five soldiers he did not know. The witnesses A2, S, A1 and I. Đ. were ordered to take off their clothes – “take off your clothes, Ustashas”. While taking off their clothes, the soldiers were hitting them with laths. Then they were forced to oral sex and then to sexual intercourse by

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<sup>86</sup> *Ivan Zelenika et al*, Court of BiH, First Instance Verdict, 14 April 2015, para. 743.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Branko Vlačo*, Court of BiH, First Instance Verdict, 4 July 2014, para. 317.

<sup>89</sup> *Ibid.*, para. 319.

<sup>90</sup> *Ibid.*, para. 336.

<sup>91</sup> *Ibro Macić*, Court of BiH, First Instance Verdict, 17 April 2015, paras. 273–274, 276–277, 282–283.

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standing one behind the other and placing their sexual organ into the anus of another. Then they were pushed to the floor. Witness A2 said that someone was holding him down and Ibro took a lath which was burning on one end and burned his crotch with it. Other guards who were there also did it. The whole time they burned them with a burning lath, they were also hitting them and when they would lose consciousness from the blows and abuse they would urinate or pour water on them.<sup>92</sup>

Yet despite explicitly acknowledging these acts as sexual intercourse, the Court ultimately found the accused guilty of inhuman treatment, rather than rape.<sup>93</sup>

The failure by a majority of prosecutors and courts in BiH to qualify acts of sexual violence against males as rape, although they meet the legal definition of such, calls into question whether the sex of the victims, and the stigma attached to sexual violence survivors, may affect how these crimes are treated by the national judiciary. As noted by Patricia Viseur Sellers, the former Legal Advisor for Gender Related Crimes and Acting Senior Trial Attorney in the Prosecutor's Offices of the ICTY and ICTR, admitting gender bias into charging and conviction decisions can privilege male survivors of CRSV crimes over females.<sup>94</sup>

In one final case of relevance reviewed for the present analysis, the gender of a *perpetrator* may have influenced the qualification of the sexual violence acts alleged. In the *Kamerić* case, the accused was a female military member found guilty of participating in the “torture and inhuman treatment” of prisoners in a detention camp.<sup>95</sup> The indictment against her alleged that she participated in the sexual abuse of two detainees by forcing a female civilian inmate to sit on a male detainee's lap, after which the accused ordered the male victim to squeeze the female victim's breast and genitals and to rip her underwear and put it in his pocket.<sup>96</sup>

During the *Kamerić* trial, one witness and both victims testified that, in addition to the

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<sup>92</sup> *Ibid.*, para. 276.

<sup>93</sup> *Ibid.*, paras. 341–342 (finding the accused guilty of inhuman treatment as a war crime against civilians).

<sup>94</sup> Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: the Importance of Human Rights as Means of Interpretation* (Office of the High Commissioner on Human Rights Special Commissioned Report) (2008), p. 39 (“Charging provisions such as torture, persecution, inhumane acts etc., unlike rape are not dependant [sic] upon the establishment of coercive circumstances or lack of the victim's consent. Characterizing male sexual assault acts under crimes such as torture or inhumane acts, spare and possibly privilege male victim/survivors over women. One male witness who testified in the Milosevic case demonstrated how evidence about the multiple, group rapes of men charged as persecution under crimes against humanity ‘avoided’ the consent issues.”). Paper available at [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf)

<sup>95</sup> *Indira Kamerić*, Court of BiH, First Instance Verdict, 17 April 2015, para. 137.

<sup>96</sup> *Indira Kamerić*, Prosecutor's Office of BiH, Indictment, 11 November 2013, p. 2 (count 2).

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acts alleged in the indictment, the male detainee was also forced to penetrate the female victim with his finger,<sup>97</sup> which would qualify as rape under the definition adopted by the BiH Court in its previous jurisprudence.<sup>98</sup> However, the prosecution failed to amend the indictment appropriately to include this additional factual description, effectively barring the Court from using its discretion to re-qualify the act as rape in its decision – an oversight which the Court emphasized in its verdict.<sup>99</sup>

The prosecutor's omission in *Kamerić* raises the possibility that the perpetrator was not charged with rape due to her gender, a concern considering that gender stereotypes typically hold that women are victims, not rapists.<sup>100</sup> Another possibility is that the prosecutor lacked the requisite understanding of the elements of rape as a war crime to make the appropriate amendments.<sup>101</sup>

The apparent progress by the Court of BiH towards acknowledging the gender-neutral nature of sexual violence crimes represents a positive shift in the judiciary's approach, but this progress has yet to be reflected in the verdicts of all panels at the State and entity levels. Prosecutors and judges in all jurisdictions across BiH have the opportunity in the future to expand upon this emerging practice and ensure that sexual violence is recognized in all its forms, regardless of the gender of the victim or the perpetrator.

#### 4.1.3. CRSV charged as “ordinary” crime and *ne bis in idem* bar

Another issue that the Mission continues to observe in some cases is the incorrect qualification of CRSV as a regular crime, that is, the failure by the prosecution to acknowledge that the crime was related to the existence of an ongoing armed conflict (the “nexus” chapeau element). This practice is problematic from at least three standpoints. First, it fails to acknowledge the conflict-related element in crimes of sexual violence and thus denies

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<sup>97</sup> *Indira Kamerić*, Court of BiH, First Instance Verdict, 17 April 2015, paras. 140, 142, 158, 165.

<sup>98</sup> See OSCE Mission to BiH, OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 41–42 (noting that the CBiH court has, on numerous occasions, relied on the Kunarac definition of the actus reus of rape, namely, “the 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) the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim.” (emphasis added)).

<sup>99</sup> *Indira Kamerić*, Court of BiH, First Instance Verdict, 17 April 2015, para. 165 (noting that the prosecutor did not amend the indictment appropriately in accordance with new evidence presented at trial).

<sup>100</sup> For a detailed analysis of this phenomenon, see Dara Kay Cohen, *Female Combatants and Violence: Wartime Rape in the Sierra Leone Civil War*, 63(3) *WORLD POLITICS* 383 (2013) (Citing a study finding that in the DRC, for example, 41 percent of female sexual violence victims reported that their tormentors had been female. *Ibid.*, p. 385).

<sup>101</sup> A final possibility is that this oversight resulted from repeated changes of the prosecutor in charge of the case at trial. The OSCE Mission observed that five different prosecutors handled the case at different stages of the proceedings.

the public record and survivors an acknowledgement of the specific trauma associated with such crimes. Second, it deprives the legal process – and thus the victims – of the benefit of the special evidentiary rule associated with wartime sexual violence cases described above, namely, a prohibition on the use of consent as a defence where violations of international law are concerned, which acknowledges coercive circumstances in war. Third and final, charging such cases incorrectly as ordinary rape means that the absolute statute of limitations – 20 years for rape cases<sup>102</sup> – bars any further prosecution for these crimes. War crimes prosecutions are not barred by any statute of limitations.<sup>103</sup>

The *Ljubić* case from the Mostar Cantonal Court provides a striking, if unusual, example. The defendant was first charged in 1994 for the rape of a minor female civilian during the war, qualified as an ordinary crime under the Criminal Code of the Republic of BiH (based in its entirety on the SFRY CC, which contained a provision for charging rape as a war crime). The first instance court – the Military Court of East Mostar – tried the defendant in absentia (permissible under the applicable criminal procedure code at that time) and found that in 1993, the accused slapped the victim, threatened to shoot her, forced her to strip naked in a vehicle and raped her multiple times in the car and later in his apartment.<sup>104</sup> The convicting verdict was upheld by the second instance court, which reduced the sentence from eight years to five years.<sup>105</sup> However, the judgment was not executed and the accused never served this sentence.<sup>106</sup>

Ljubić petitioned for re-opening of the proceedings, permitted by the applicable CPC as a result of the *in absentia* trial. The petition was initially rejected on jurisdiction grounds by the Military Court of West Mostar, where the petition was filed – a decision that was revoked on appeal by the Supreme Court of Herceg Bosna, which ordered the Military Court of West Mostar to obtain the case file from the Military Court of East Mostar to decide on reopening of proceedings. In April 1997, the Military Court of West Mostar duly requested the case file through the FBiH Ministry of Justice. In response to the inquiry, however, the Military Court of East Mostar forwarded only copies of the first and second instance verdicts, whereas the entire case file would have been required for the re-opening and processing of the case. The proceedings were never re-opened. In the meantime the accused was released from custody without a reasoned court decision. In 2004, the unresolved case was taken over by the Mostar Cantonal Court, although it is not

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<sup>102</sup> SFRY Criminal Code, art. 96(6), read together with art. 95(3). The law provides that the “absolute bar” to prosecution is twice the regular statute of limitations for a particular crime, which was 10 years for rape under the substantive criminal codes in place at the time of the armed conflict.

<sup>103</sup> BiH Criminal Code, art. 19; SFRY Criminal Code, art. 100.

<sup>104</sup> *Tihomir Ljubić*, Military Court of East Mostar, First Instance Verdict, 31 January 1994.

<sup>105</sup> *Tihomir Ljubić*, Supreme Court of Bosnia and Herzegovina, Second Instance Verdict, 23 March 1994.

<sup>106</sup> *Tihomir Ljubić*, Herzegovina-Neretva Canton Prosecutor’s Office, Indictment, 15 March 2016 (rejected by the Mostar Cantonal Court), pp. 5–6.

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known whether the case file obtained by the Court at that time was complete.<sup>107</sup>

In light of the non-execution of the sentence and the fact that the crime had been incorrectly qualified as an ordinary rape, in 2016, the Mostar Cantonal Prosecutor's Office filed an indictment against the accused for the same and additional criminal acts – for example, oral rape, which was not part of the initial charges – qualifying them as rape and inhuman treatment as a war crime against civilians under the SFRY CC.<sup>108</sup> The Mostar Cantonal Court rejected the indictment on the basis of the *ne bis in idem* (*res judicata*) bar to prosecuting an individual twice for the same criminal acts.<sup>109</sup> Although the case could still have been re-opened under the previously applicable CPC,<sup>110</sup> now the absolute statute of limitations for ordinary offences has run (as of 2014), preventing a new trial or the execution of any criminal sanction against the perpetrator – effectively granting him impunity for this crime.

The *Smiljanić et al* case before the Banja Luka District Court provides another concerning example of how a court's application of the *ne bis in idem* principle may have granted impunity to a perpetrator of CRSV. In that case, the Banja Luka District Prosecutor's Office filed an indictment against four co-accused for war crimes against civilians, charging that in November 1992 the co-perpetrators forcibly entered a house within the Catholic parish where they found a Croat priest and a female Croat civilian.<sup>111</sup> According to the indictment, the four then robbed and beat the priest and raped the female civilian.<sup>112</sup>

The four alleged perpetrators were initially charged in 1993 under the RS Criminal Code for the robbery of the priest<sup>113</sup> – but not the rape, which was not mentioned in the original indictment.<sup>114</sup> The criminal proceedings against one of the defendants, G.P., who was a minor at the time of the offence, were ceased based upon the “principle of opportunity” following a motion of the public prosecutor.<sup>115</sup> The rape victim provided her

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<sup>107</sup> The Mostar Cantonal Prosecutor's Office attempted to obtain a copy of the case file from the Mostar Cantonal Court, but to the Mission's knowledge the request went unanswered.

<sup>108</sup> *Ibid.*, p. 7.

<sup>109</sup> *Tihomir Ljubić*, Mostar Cantonal Court, Decision Rejecting Indictment, 22 April 2016 (rejecting the indictment for the war crime because the defendant had already been convicted and sentenced at the second instance for the same rape as an ordinary offence. In June 2016 the prosecutor of the FBiH petitioned the Prosecutor's Office of BiH to take over the case to be tried at the Court of BiH, a request which was rejected on the basis of the legal foundation cited for the proposed takeover).

<sup>110</sup> The CPC in place at the time of the first trial allowed for re-opening of cases tried *in absentia* where doing so was in favour of the accused. Art. 410, CPC of the SFRY.

<sup>111</sup> *Smiljanić et al*, Banja Luka District Prosecutor's Office, Indictment, 28 December 2015, p. 2.

<sup>112</sup> *Ibid.*, pp. 2–3.

<sup>113</sup> The co-perpetrators were charged with the criminal offence of robbery under art. 150 of the RS CC, which prescribed a sentence of one to 12 years. *Ibid.*, p. 4.

<sup>114</sup> *Ibid.*

<sup>115</sup> Under the procedural law in place at the relevant time, the “principle of opportunity” presented grounds

first official statement to the prosecution in 2010. Due to the emergence of these new facts, the Banja Luka District Prosecutor's Office filed its 2015 indictment against the same four co-perpetrators for rape and inhuman treatment as war crimes.<sup>116</sup>

The Banja Luka District Court confirmed the indictment for three of the co-accused but rejected it for the fourth, G.P., due to the application of the *ne bis in idem* principle. In doing so, the Court found that the factual circumstances alleged in the new indictment were identical to the initial charges against G.P., which were ceased in 1994. The Banja Luka District Court reasoned that this cessation of proceedings constituted a final and binding decision, and thus new proceedings for the same factual circumstances were barred.<sup>117</sup> The Banja Luka District Prosecutor's Office appealed on the grounds that: a) The proceedings conducted and ceased in 1994 and 1995 against G.P. were conducted for the criminal offence of robbery, not rape; b) the court in the earlier proceedings did not render a decision on the merits condemning or acquitting the suspect but a decision on cessation; therefore, in accordance with Article 4 of Protocol 7 to the European Convention on Human Rights, the incident could not be considered *res judicata*; and c) the 2015 indictment charged G.P. for war crimes against civilians encompassing rape and robbery, while the ceased preparatory proceedings encompassed only robbery as an ordinary crime, and for this reason the new indictment covered a broader set of circumstances and principles protected by international law, thus going beyond the scope of the charges dismissed previously.<sup>118</sup>

Nevertheless, the Court rejected the district prosecutor's appeal and confirmed its earlier decision, thus barring the prosecution of G.P. for the rape.<sup>119</sup> In its decision the Court reasoned that the factual inclusion of the rape in the new war crimes indictment was not enough, on its own, to overcome the preliminary hearing judge's findings with

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upon which a minor offender could be pardoned for certain offences without facing trial or punishment. Art. 468(1) of the SFRY Criminal Procedure Code provided: "The public prosecutor can decide not to initiate criminal proceedings against a minor for criminal offences for which the prescribed sentence is up to three years of imprisonment or a fine in spite of having enough evidence that the minor committed the criminal offence if the public prosecutor considers that it would not be purposeful to conduct proceedings against a minor bearing in mind the nature of the criminal offence and the circumstances under which the criminal offence was committed, the previous life of the minor and his/her personality." Note that under the applicable criminal code, the offence of robbery was not subject to dismissal under the principle of opportunity since it carried a maximum sentence of 12 years (while the principle of opportunity can be extended only to criminal offences with a maximum sentence of three years). See note 114 above.

<sup>116</sup> *Smiljanić et al*, Banja Luka District Prosecutor's Office, Indictment, 28 December 2015, p. 4.

<sup>117</sup> *Smiljanić et al*, Banja Luka District Court, Decision on Confirmation of the Indictment, 21 January 2016.

<sup>118</sup> *Smiljanić et al*, Banja Luka District Prosecutor, Appeal against Banja Luka District Court Decision Rejecting the Indictment, 25 January 2016, p. 3.

<sup>119</sup> *Smiljanić et al*, Banja Luka District Court, Criminal Panel Decision Rejecting the Appeal of the Banja Luka District Prosecutor, 29 January 2016.

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regards to *ne bis in idem*, especially “considering the circumstances related to [G.P.] as a juvenile perpetrator against whom previous proceedings were terminated.”<sup>120</sup> No further explanation was provided as to how the perpetrator’s “circumstances” were relevant to the specific appeal grounds provided by the prosecutor.

The opaque reasoning of the Banja Luka District Court in the *Smiljanić et al* case evinces a questionable understanding of the *ne bis in idem* doctrine. For the reasons stated by the prosecution in its appeal, it appears that the new criminal charges against G.P. were not barred from review under the applicable standard of *res judicata* found in the European Convention on Human Rights, which prohibits trial or punishment in criminal proceedings “for an offence for which [one] has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”<sup>121</sup> The case against G.P. for the robbery of the priest had been dismissed, meaning it did not end in a final acquittal or conviction. Thus the RS CPC did not bar new criminal proceedings.<sup>122</sup> Furthermore, G.P. (and the other perpetrators) had never been charged with the rape – a separate criminal offence, which also demonstrates that the charges were not barred by the CPC. Having failed to address these issues, the Banja Luka District Court appears, in this case, to have taken an approach that equates *ever having been charged* with a lesser offence that later evidence shows to be linked to a war crime, with having been adjudicated with a final and binding verdict for the war crime itself.<sup>123</sup> This interpretation is concerning and raises the

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<sup>120</sup> *Ibid.*, p. 4.

<sup>121</sup> Furthermore, the second paragraph of the article allows for the re-opening of proceedings if new facts have emerged, which did in fact occur in the *Smiljanić* case after the victim reported she was raped in 2010. Article 4 of Protocol 7 to the European Convention on Human Rights provides: “1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State; 2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case....”

<sup>122</sup> The RS CPC’s provision on *ne bis in idem* is similarly worded to the applicable provision in the ECHR: “No person shall be prosecuted again for the same offence **he has been already tried for** and received a **final and binding verdict.**” RS CPC, art. 4 (emphasis added).

<sup>123</sup> This is suggested by the Court’s reasoning in its decision rejecting the appeal, where it seems that the Court considers the fact that the charged act – rape as a war crime – occurred in the same location and around the same time as the previously charged offence of rape, demonstrates that the two are one and the same criminal offence. (“The fact that the crime was described in detail in the indictment, placing the event that took place in the Parish Office of the Kulasi Catholic Church on 27 November 1992 around 10:30 p.m., in the context of the war crime against civilian population under Article 142, paragraph 1, as read with Article 22 of the Criminal Code of SFRY, on its own and in the context of Goran Prodanović who had previously been tried as an underage perpetrator (the trial was discontinued) does not cast doubt as to the correctness of the said conclusion of the preliminary hearing judge or the reasons he gave for refusing to confirm the indictment against him.”) *Smiljanić et al*, Banja Luka District Court, Criminal Panel Decision Rejecting the Appeal of the Banja Luka District Prosecutor, 29 January



possibility that other perpetrators could enjoy impunity in similar cases in the future.

It is illustrative to observe that, under a similar set of circumstances, the Court of BiH came to the exact opposite conclusion with regards to the *ne bis in idem* issue as compared to the Banja Luka District Court. In the *Vojić and Mešić* case, the Prosecutor's Office of BiH charged the two co-defendants with rape as a war crime.<sup>124</sup> The accused had already been tried and convicted in 1994 by the Bihać Military Court for the criminal offence of "violent behaviour" towards several victims, including the sexual violence victim ("D-1") identified in the 2014 indictment.<sup>125</sup> The acts they were convicted of in 1994 included robbery and beating of D-1 and others. The original verdict also found them guilty of attempting to force D-1 and a male victim to have sexual intercourse with each other.<sup>126</sup> However, the 1994 verdict did not mention that the co-accused Vojić and Mešić then took D-1 to a nearby meadow, where each of them raped her – an act that was not charged by the initial military prosecutor, although the victim had reported this fact during the investigation. The 2014 indictment of Vojić and Mešić by the Prosecutor's Office of BiH charged the two only with the rape of D-1.<sup>127</sup> During the trial, defence counsel argued that the proceedings were barred by the principle of *ne bis in idem*, since the co-accused had already been tried and convicted for their crimes.

The Court of BiH dismissed the *ne bis in idem* challenge due to the fact that the rape had not been charged in the prior proceedings.<sup>128</sup> In its verdict, the Panel took special notice of the fact that the victim had in fact reported the rape to the prosecutor at the time of the original investigation in 1994, and the victim had stated during her testimony in the new trial that she was surprised to find that the matter of her rape did not appear in the Bihać Military Court's verdict when she received it much later:

[T]he Panel notes that the injured party herself openly said in the trial that when she had mentioned that she was raped during the trial before the District Military Court in Bihać, she was told that that would be "dealt with later on". She also said that she was provided with the verdict of the District Military Court only after the fact, when she asked for it, although she was supposed to

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2016, p. 4.

<sup>124</sup> *Adil Vojić and Bekir Mešić*, Prosecutor's Office of BiH, Indictment, 19 December 2014.

<sup>125</sup> *Ibid.*, p. 2.

<sup>126</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 196–197 (quoting the 1994 judgment in its factual description of the acts of the co-accused).

<sup>127</sup> *Adil Vojić and Bekir Mešić*, Prosecutor's Office of BiH, Indictment, 19 December 2014.

<sup>128</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 299–300 (contrasting the charges under the present indictment to those dealt with in the decision of the Bihać Military Court in its 1994 judgment against the defendant for other criminal acts against the same victim, and ultimately finding that the matter of the rape was not *res judicata* since it constituted an entirely separate criminal offence).

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receive the verdict as the injured party at the same time as other parties and the defence counsel. Furthermore, the injured party convincingly described in her statement the disappointment she felt when she subsequently acquired the verdict, which, in the opinion of this Panel, contributed to the depth of the psychological trauma of the injured party: “Well, what can I tell you, I, I simply felt awful, it made me feel even more depressed and even mo-..., more angry when, when they didn’t let me speak before the court of what I needed to speak of. When I wanted to say it and when I wanted to tell them why and asked them to give me everything from the hospital, they said that would come, that, we have that and we will keep it, and the trial will be later on. This is only for now, just to, as the first summons, there will be more”.<sup>129</sup>

The decision of the Court of BiH in *Vojić and Mešić* with regards to the *ne bis in idem* challenge by the defence is positive for two reasons. First, by determining that the acts charged in the more recent indictment did not overlap with those previously prosecuted, the Court ensured that two perpetrators of conflict related sexual violence did not enjoy impunity for their actions on account of the lack of due diligence by a previous prosecutor. In addition, the Court sent a clear signal regarding the rights of victims to see justice done for the crimes committed against them, while also acknowledging the suffering that participating in the criminal justice process itself can entail for traumatized individuals.

At the entity level, the *Kadić* case before the Zenica Cantonal Court also demonstrates an approach to a *ne bis in idem* challenge that differs from that of the Banja Luka District Court, although under somewhat different circumstances. In *Kadić*, the accused was charged with rape as a war crime against civilians. The defence challenged the proceedings on the basis of *ne bis in idem*, citing a 1997 decision by the Municipal Court of Visoko ordering the cessation of an investigation against the accused for rape as an ordinary criminal offence under the criminal code in place at that time.<sup>130</sup> In dismissing the appeal by the defence on these grounds, the Supreme Court of FBiH found that the war crime proceedings were not barred by *res judicata*:

[T]his is for the reason that it is neither the same criminal offence nor was a merits-based, final and binding verdict, either acquitting or guilty, reached in relation to the criminal offence of rape under Article 88(1) R BiH CC. First of all, the criminal offence of war crime is not subject to the statute of limitations, it is significantly broader than criminal offence of rape because it is directed against both humanity and international humanitarian law and

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<sup>129</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, para. 305.

<sup>130</sup> *Asim Kadić*, Supreme Court of FBiH, Second Instance Verdict, 20 November 2014, p. 3 (upholding decision on the *res judicata* issue by the Zenica Cantonal Court. *Asim Kadić*, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, p. 12).

therefore it cannot be held that it is the same offence, nor it is about the reopening of proceedings...<sup>131</sup>

The reasoning by the FBiH Supreme Court in the *Kadić* case thus reflects an understanding of rape as a war crime as encompassing different acts than those prescribed by the criminal offence of rape as an ordinary crime.

The OSCE Mission notes the importance of the *ne bis in idem* principle in upholding a defendant's right to a fair trial and freedom from undue harassment relating to closed criminal proceedings. At the same time, the Mission observes with concern that overbroad application of this principle could lead to impunity for perpetrators of serious crimes, including CRSV crimes, such as in the *Smiljanić et al* proceedings before the Banja Luka District Court. In this regard, the Mission therefore considers the practice of undertaking a careful legal analysis of the *ne bis in idem* issue, as by the Court of BiH in its *Vojić and Mešić* verdict, as well as by the FBiH Supreme Court in its *Kadić* verdict, as positive and balanced.

The Mission recommends that Court of BiH and entity-level courts harmonize their practice with regards to the interpretation of the *ne bis in idem* doctrine in sexual violence cases and other war crimes proceedings to avoid granting impunity to perpetrators of such crimes, while ensuring legal predictability for accused. In addition, it is recommended that judges at both the State and entity levels undertake particularly careful analysis when determining whether a war crimes indictment is barred by previous proceedings when the initial factual circumstances did not encompass the sexual violence crime.

## 4.2. Elements of sexual violence crimes

The understanding and application of correct legal elements of CRSV crimes have gradually improved in courts across BiH since 2004, and even further advancements have been made in the reporting period. Provided a proper qualification by the prosecution, courts across BiH generally continue to demonstrate a solid understanding of the elements of sexual violence crimes and their basis in international treaty law and jurisprudence, including the individual *chapeau* elements of war crimes as well as the particular characteristics of different types of sexual violence perpetrated in conflict.

### 4.2.1. Elements of rape as a war crime

In the cases analysed for this report, verdicts produced by courts across BiH generally displayed clear and well-reasoned decisions based on national and international standards.

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<sup>131</sup> *Ibid.*, pp. 5–6.

The increasing level of expertise in interpreting and applying appropriate standards is manifest in a number of ways, including routine reference to and correct application of international jurisprudence on CRSV.

In a large majority of cases tried at the State level, the Court of BiH explicitly cites ICTY and ICTR case law on elements of sexual violence crimes.<sup>132</sup> In particular, courts reference most frequently to international cases discussed in the OSCE Mission's previous reports on conflict-related sexual violence cases,<sup>133</sup> including the ICTR's *Akayesu* Trial Judgment and the ICTY's *Kunarac*, *Kvočka*, and *Furundžija* Trial Judgments.

The reasoning in the verdicts citing these decisions show that reference to the jurisprudence is not merely superficial, but actually informs the reasoning of the panels in reaching their decisions. In the *Batko* trial judgment discussed above, for example, the Court of BiH demonstrated a clear understanding of the presiding standards applicable in rape cases in order to address a discrepancy in the evidentiary record regarding the form of the sexual violence perpetrated against the victim. Specifically, the Court correctly dismissed as irrelevant the inconsistency between the testimonies of two witnesses as to whether the victim (who did not herself testify) had been raped vaginally or orally, noting that the substantive law does not distinguish between the two,<sup>134</sup> and that the witnesses were otherwise credible, ultimately finding the defendant guilty of rape.<sup>135</sup>

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<sup>132</sup> See, e.g., *Petar Kovačević*, Court of BiH, First Instance Verdict, 2 November 2015, paras. 197–199 (citing *Kunarac* definition of rape); *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, para. 111 (citing *Kunarac*); *Zoran Dragičević*, Court of BiH, First Instance Verdict, 22 November 2013, paras. 163–165 (citing *Kvočka*, *Furundžija*, and *Kunarac*); *Josip Tolić*, Court of BiH, First Instance Verdict, 20 March 2015, paras. 79–82 (reviewing ICTY jurisprudence to define rape); *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 180–191 (reviewing the international case law defining rape in armed conflict, including *Akayesu*, *Furundžija*, *Kunarac*, *Kvočka*); *Muhidin Bašić and Mirsad Šijak*, Court of BiH, First Instance Verdict, 18 January 2013, paras. 121–128 (citing ICTY case law in *Kunarac*, *Kvočka*, and *Furundžija* to define the elements of wartime rape); *Gligor Begović*, Court of BiH, First Instance Verdict, 11 December 2015 (court conducts review of ICTY jurisprudence defining rape as a war crime); *Asim Kadić*, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, pp. 9–10 (citing ICTY jurisprudence to define rape).

<sup>133</sup> See OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 38–40; OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 22–24.

<sup>134</sup> *Veselin Vlahović Batko*, Court of BiH, First Instance Verdict, 29 March 2013, paras. 229–230, 236.

<sup>135</sup> Note that this understanding of the elements of rape is based upon the Court of BiH adopting the international standard articulated in *Kunarac*: “[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.” *Dragoljub Kunarac et al*, ICTY Appeals Chamber, Judgment (IT-96-23), 12 June 2002, para. 127. This standard was first adopted by the Court of BiH in its 2006 *Šimšić* judgment. See OSCE

At the entity level, too, courts show an evolving understanding of what constitutes CRSV beyond a narrow definition of rape, recognizing circumstances that are designed to humiliate and degrade victims in a sexual manner. For example, in the *Škiljević* case tried before the Tuzla Cantonal Court, one of the co-accused was charged, *inter alia*, with beating and burning detainees on their genitals, which was qualified as inhuman treatment in the indictment.<sup>136</sup> The accused accepted a plea deal, and in its verdict, the Court clearly characterized these acts as “sexual violence,” pointing out that this was a re-characterization from what was provided in the indictment.<sup>137</sup>

#### 4.2.2. Armed conflict, nexus, and existence of coercive circumstances

The existence of an armed conflict, the link between the armed conflict and the criminal act, and the protected status of the victim are the elements distinguishing an ordinary crime from a war crime. The body of jurisprudence on CRSV produced by courts across BiH in 2014–2016 provides ample evidence that judges increasingly understand and apply the appropriate legal standards relating to this relationship, although challenges remain.

The Court of BiH’s first instance verdict in *Vojić and Mešić* noted above provides an illustrative example of a well-reasoned, careful analysis of each chapeau element with regards to a sexual violence case.<sup>138</sup> Importantly, both the Court of BiH and entity-level courts increasingly rely on the definition and jurisprudence provided by the ICTR and ICTY in defining “coercive circumstances” to explain the link between the sexual violence act and the armed conflict, as well as in explaining how such circumstances negate a victim’s ability to consent to sexual contact and thus eliminate the need for the prosecution to prove a victim’s lack of consent.<sup>139</sup>

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Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), p. 41.

<sup>136</sup> *Radomir Škiljević*, Tuzla Cantonal Prosecutor’s Office, Indictment, 27 February 2006.

<sup>137</sup> *Radomir Škiljević*, Tuzla Cantonal Court, First Instance Verdict, 26 February 2015, p. 1. It is also notable that the Supreme Court of the Federation of BiH had earlier qualified these acts as torture in the form of sexual violence (in the case against Škiljević’s co-perpetrators; Škiljević himself was tried later since he was at large for the course of the main trial). *Ratko Todorović and Dušan Spasojević*, Supreme Court of FBiH, Second Instance Verdict, 29 October 2008, p. 13.

<sup>138</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 170–177 (court establishes a well-structured and clearly explicated link between the alleged criminal acts and the armed conflict).

<sup>139</sup> See, e.g., *Petar Kovačević*, Court of BiH, First Instance Verdict, 2 November 2015, paras. 247–248 (explaining how the accused used his position of authority and exploited the fear of the victim to rape her on discriminatory grounds); *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, para. 111 (citing *Kunarac* in explanation of coercive circumstances); *Zoran Dragičević*, Court of BiH, First Instance Verdict, 22 November 2013, paras. 163–165 (citing approvingly ICTY jurisprudence on the nature of coercive circumstances in order to show that the overall circumstances existing in the area at the relevant time where the rape took place negated the victim’s ability to consent, eviscerating the defence claim that because the perpetrator did not act rudely towards the victim, the sexual contact was

In *Dragičević*, for example, in rejecting the defence’s attempt to find that the relationship between the defendant and the victim was consensual, the Court of BiH provided a clearly articulated reasoning based upon the concept of coercive circumstances. The Court explained how the overall circumstances surrounding the sexual contact eliminated the possibility that the victim could have consented to the sexual contact:

Hints of kindness, such as different treatment of the victim, bringing her food and similar, as was the case here (the statement of the victim indicated that the accused offered her a drink and a coffee), cannot possibly annul the existence of force. Namely, in addition to the above said, and based on the evidence, we have to bear in mind that Grbavica was isolated from the rest of Sarajevo at the relevant time. Namely, on the one hand, the citizens, among whom was the injured party, lived together with the enemy army, i.e. surrounded by it, where they had to leave their flats and building entrance unlocked for the unannounced and spontaneous incursions and controls by different military formations, while a somewhat more normal life was led on the other side of the Miljacka river, across the Bratsvo i jedinstvo bridge. Also, the injured party is a Bosniak and the injured party herself emphasizes this fact to describe her fear during the relevant event, which is natural, logical, and to be expected.<sup>140</sup>

In *Laličić*, the Court of BiH also clearly identified the link between the armed conflict and the sexual violence crime. In so doing, the Court explicitly invoked the prohibition on evidence of consent provided in the CPC BiH,<sup>141</sup> and provided a clear explanation of how

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consensual); *Josip Tolić*, Court of BiH, First Instance Verdict, 20 March 2015, para. 188 (“In the opinion of the Court, in the circumstances the injured party was in, this threat was real and serious, given her status of a detainee and the fact that the accused was a member of the HVO (Croatian Defence Council) Military Police and as such was a guard in the detention facility she was in. This demonstrates that the accused made a threat he was able to realize, aware of his position and all the circumstances, and the injured party took this threat seriously in the circumstances she was in and had a reason to fear that she would be raped by a number of the members of HVO if she does not consent to sexual intercourse with the accused.”); *Željko Jović*, Banja Luka District Court, First Instance Verdict, 28 September 2015, p. 25 (finding that the existence of an armed conflict by itself constitutes a “coercive environment”); *Asim Kadić*, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, pp. 9–10 (citing the ICTY *Kvočka* case, the Court of BiH Pinčić case, and the Supreme Court of FBiH *Stanković* case to find the link of the perpetrator’s acts to the armed conflict, and noting that the victim was in a vulnerable position, she feared for her life, the perpetrator was in uniform and carrying a rifle and was aware of the state of war, his status as a soldier, and the victim’s status as a civilian; and that there is no requirement to show the victim’s resistance in such cases.).

<sup>140</sup> *Zoran Dragičević*, Court of BiH, First Instance Verdict, 22 November 2013, para. 165.

<sup>141</sup> *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, paras. 111–112 (“With regards to the issue of use of force, in accordance with the international law and the national legislation, the use of duress, force or threat of use of force annuls the existence of consent on the part of the victim... Thus the Article 264, Paragraph 3 of the CPC BiH stipulates that “(3) In the case of the criminal offence against

the victim's detention negated her ability to consent:

[T]he fact that the injured party was in a detention facility and the presence of guards in itself implies the existence of force, even when there is no resistance, because as the victim believed, and with reason, that if she did not comply with what was asked of her or offering any kind of resistance could place her, and especially her detained child, in mortal danger.<sup>142</sup>

The Court goes on to explain the full set of coercive circumstances, including the power imbalance between the victim and the perpetrator:

The reasons and explanations given by the injured party support the conclusion by the Panel given in Paragraph 141 of this verdict. In addition, the Panel finds that in a situation where the injured party is detained for a longer period of time (from 18 May 1992 until the exchange on 9 May 1993) during which time she, as she said “had her fill of fear”, in the knowledge that the accused could commit prohibited acts which she could not report to anyone, because of the direct threat of the accused that she was not to tell anyone of the beatings. It is understandable that this created the feeling of helplessness and submissiveness in the injured party, and also the decision that for her own sake, and especially for the sake of her child, she would keep quiet, both about the beatings by the accused and about the rapes which followed the beatings. In this context, the lack of resistance of the victim is not a condition which precludes the existence of rape, nor can her silence be interpreted as a sign of consent.<sup>143</sup>

At the entity level, the Bihać Cantonal Court conducted a similar evaluation of the circumstances in the *Soleša* case, acknowledging the victim's vulnerability in light of the perpetrator's position of authority:

The manner in which the Bosniaks were treated during the armed conflict in BiH, one of whom was [the victim], i.e. the way they were treated by the members of the Army of Republika Srpska the defendant Duško Soleša belonged to, inevitably caused fear and desperation. In such coercive circumstances, using his military position, the defendant used the hopeless situation the injured party was in and, first gaining her trust and offering her hope that he would get her mother back to her (although he knew she had been killed) and then using blackmail, threatening that he would not

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humanity and values protected by the international law, the consent of the victim may not be used in favour of the defence of the accused.” (citations omitted)).

<sup>142</sup> *Ibid.*, para. 141.

<sup>143</sup> *Ibid.*, para. 145.

get her mother back, he raped her... Based on the injured party's testimony, the court established that the defendant committed the act of sexual penetration on her, without her consent. The fact that the injured party did not try to resist the attack is not requisite to prove the existence of this crime considering the coercive circumstances in which the act was committed. The mere fact that the defendant was a soldier, that he was armed, that he used the situation in which the injured party was and gained her trust, her desire and her efforts to get back her mother and the fear and desperation she felt, unquestionably are coercive circumstances in which the act was perpetrated.<sup>144</sup>

Not all verdicts demonstrate a solid understanding of these elements, however, with some panels worryingly departing from established national and international norms in conflict-related sexual violence cases. The *Milovanović* case at the Bijeljina District Court provides an alarming example of a divergence from the basic elements of CRSV crimes. In that case, the accused, as a member of the VRS, was charged with the wartime rape of his neighbour, a Croat civilian married to a Bosniak, a few days after her husband went missing.<sup>145</sup> The prosecution alleged that the accused had used his military status and position of power during the armed conflict in order to coerce the victim to coming to his home, where he raped her at knifepoint.<sup>146</sup>

In acquitting the defendant of the crime, however, the Bijeljina District Court found no evidence of the nexus between the defendant's criminal acts and the armed conflict.<sup>147</sup> In explanation, the Court stated that the prosecution failed to prove "that the criminal offence which could have certainly happened without the existence of conflict as well, was committed against the victim exactly because of this conflict."<sup>148</sup> The Court's explanation of what must be shown by the prosecution illustrates its flawed understanding of the existing national and international standards:

The Court considers that the accused did not commit the established criminal acts that he is charged with in the indictment during the armed conflict under his official authority directly or acting on the orders of a superior officer, which are the essential elements for the criminal offence of war crimes against civilian under Article 142.1 of the SFRY CC. In fact, by no evidence did the

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<sup>144</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, pp. 11–12, 13; however, see section 4.2.2 below for a discussion on how the court analyzed the "resistance" requirement.

<sup>145</sup> *Radosav Milovanović*, Bijeljina District Prosecutor's Office, Consolidated Indictment, 16 October 2015, p. 1 (The proceedings were conducted upon the confirmed indictment of the BiH Prosecutor's Office of 20 January 2015, which was later transferred to the Bijeljina District Court pursuant to the decision of the Court of BiH).

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

<sup>147</sup> *Radosav Milovanović*, Bijeljina District Court, First Instance Verdict, 22 January 2016, pp. 5–6.

<sup>148</sup> *Ibid.*

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prosecution prove that at the time in connection with which the accused is charged in the indictment was the area where the incident happened affected by the movement of conflicting armed forces or that on the territory of village Sase due to the existence of an armed conflict there existed a proximity of combat operations, the frequency of movement of military units, a special regime imposed on the civilian population, such as a curfew, irregular supply; the victim was not in a collective accommodation, etc., nor did the prosecution prove that the criminal offence that could have certainly happened without the existence of conflict as well, was committed against the victim exactly because of this conflict. For the existence of this criminal offence there needs to be a violation of international law, that imposes obligations on active participants in armed conflict (the prosecution has failed to prove that the accused at the relevant time was an active participant in an armed conflict), and therefore the perpetrator of this criminal offence can only be a member of a military organization which is a party to the conflict, as well as any person who is in its service. According to the Court's findings, a person who is outside of thus accepted organizational structure and commits any of the acts listed in Article. 142.1 of the SFRY CC (e.g. a rape), such act, despite the fact that it was committed during the armed conflict will have no elements of a war crime. So, for the existence of the criminal offence of war crimes against civilians under Article 142.1 of the SFRY CC, several conditions have to cumulatively be fulfilled, and those are that there was an armed conflict, that the victims are civilians, that the perpetrator was an active member of the military formations as an organized formation and that there is a causal link between armed conflict, civilians, member of military and the consequence, which in this particular case is reflected in a forcible sexual intercourse - rape.<sup>149</sup>

This standard on the nexus element is in direct contradiction to an extensive body of national and international jurisprudence. It is well-established that, for the nexus element to be shown, it is enough to demonstrate that an ongoing armed conflict had disrupted the flow of life in a particular area – there need not be active hostilities in the relevant area at the time of the crime. For example, the RS Supreme Court held in its *Đurić and Bešir* judgment:

As for the territorial application of the [Fourth Geneva] Convention, it applies to the entire area controlled by the warring parties. The area in which there is a movement of the armed formations involved in the conflict, is not limited only to the narrow front line. Moreover, the meaning of Article

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<sup>149</sup> *Ibid.*

3 of the Convention is to protect civilians who, by nature of things, are rarely found in the combat zone, and therefore **the territory where there is an armed conflict within the meaning of the Convention should be understood as the territory on which due to the existence of an armed conflict life is not running the way it usually does during the peacetime.** Factors which are important for assessing whether there is an armed conflict in a certain territory are, among other things, proximity of the zone of direct combat operations, the existence of general mobilization, the frequency of movement of military formations, special regimes imposed on the civilian population, such as curfew, irregular supply activities, etc.<sup>150</sup>

The *Milovanović* judgment misinterprets this jurisprudence by requiring that the prosecution prove the existence of several of the potential indicators mentioned in the *Đurić and Bešir* judgment, rather than taking into account the overall circumstances suggesting that life for civilians in the relevant area – Sase village – was not normal for civilians at the time the crime was committed. One prosecution witness in the *Milovanović* case testified extensively as to how the ongoing armed conflict had affected life in that area at the time.<sup>151</sup> This witness's testimony and the circumstances it described were not mentioned at all in the Bijeljina District Court's verdict.

The *Milovanović* verdict also mistakenly required that, in order for the rape to have been a war crime, it must have occurred as a direct result of the armed conflict. This flies in the face of a large body of established law holding that the armed conflict need not have been causal to the commission of the crime. In *Kunarac*, for example, the ICTY

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<sup>150</sup> *Đurić and Bešir*, Republika Srpska Supreme Court, Second Instance Verdict, 27 March 2007, p. 6 (emphasis added)

<sup>151</sup> Prosecution witness E.K. testified extensively during the main trial as to the ongoing situation in Sase village, including in May 1992 when the rape allegedly occurred. In her testimony, she described how, in March 1992, Serb women and children had left the neighbouring village of Donja Kolonija while men, who were dressed in military uniforms and armed, established a check point at the entrance to the village. The witness stated the residents of the village felt insecure during the period when the war started in Srebrenica, so all Bosniak families left their houses and went to a nearby forest where they felt safer. They spent almost 15 days in the forest but every two or three days they would come to the house for some food and other supplies and after that they would again return to the forest. She stated that on one occasion when she, together with her father and aunt, came to the house to take some supplies from the house, they were arrested by local Serb forces and taken away to the administration building of Sase mine. When they were brought to the building they found some other Bosniak women and children who were also arrested and detained by the Serb forces. Asked by the prosecutor whether the witness could recall some names of the people who were detained, the witness recalled the names of four families, including the family of the sexual violence victim in the *Milovanović* case. The witness said she remembered that the victim, G.O., was detained with her two children, and that another victim, N.O., was detained with his two sons. As she stated, "it was approximately 30 detainees, mostly women, children and a few elderly men." *Radosav Milovanović*, Bijeljina District Court, Main Trial Hearing of 25 May 2015.

Appeals Chamber held that:

The armed conflict **need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed** or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict...<sup>152</sup>

In light of the departure from the national and international precedents seen in its verdict, the Bijeljina District Court's reasoning with regard to the link between the rape and the armed conflict does not reflect the state of the law and it raises grave concerns about the Court's understanding and interpretation of the chapeau elements of war crimes, including sexual violence cases.

#### 4.2.3. No resistance requirement

As described above in section 3.1, for cases decided prior to December 2015, "use of force" was still a constitutive element of the codified crime of conflict-related rape in cases before the Court of BiH. However, even prior to the BiH Criminal Code's amendment to remove this element, many panels had been applying international standards providing that in cases of conflict-related rape, it is not necessary for the prosecution to show explicit use of force,<sup>153</sup> although it can still serve as one of several indicators that the sexual conduct was non-consensual.

The corollary to the lack of a requirement to show use of force is the absence of any requirement to show that a victim of sexual assault physically resisted the attack. The OSCE Mission recalls that the ICTY has emphatically rejected the premise that the prosecution must show a victim's resistance to prove that rape has been committed. As stated by the appeals chamber in *Kunarac*:

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<sup>152</sup> *Dragoljub Kunarac et al*, ICTY Appeals Chamber, Judgment (IT-96-23/1-A), 12 June 2002, para. 58 (emphasis added); see also *Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (IT-94-1), 2 October 1995, para. 70 (finding that for a nexus to be shown, it is "sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.").

<sup>153</sup> See, e.g., *Muhidin Bašić and Mirsad Šijak*, Court of BiH, Second Instance Verdict, 5 November 2013, para. 55 (emphasizing that the use of force is not a separate element of rape under international law); see also OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 41–42.

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[The Appeals Chamber] rejects the Appellants’ “resistance” requirement, an addition for which they have offered no basis in customary international law. 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.<sup>154</sup>

Encouragingly, in many verdicts, courts in BiH have explicitly disavowed the consideration – often upon contention by the defence – of “resistance” as a constitutive element of sexual violence crimes.<sup>155</sup> In *Vojić and Mešić*, for example, the Court of BiH cited *Kunarac* in finding that resistance is not an element of the crime of rape.<sup>156</sup> The Panel went on to examine the sexual acts committed against the victim instead from the perspective of whether or not she was able to give her full and voluntary consent; the Court found based on this analysis that she was not able to do so, and the accused were aware of this fact, resulting in their conviction for her rape.<sup>157</sup> Although the Court also does identify and discuss the forceful nature of the attack against the victim, as noted above in section 3.1, these factors may still be relevant to a finding of rape – however, they are not requisite.

In a similarly positive verdict, in the *Begović* case discussed above, the Court clearly rejects resistance as an element of the crime of rape and explains how the use of force may be relevant, but not required, for sexual conduct to constitute rape: “Resistance is not requisite. The use of force or the threat of use of force is certainly a clear evidence of the lack of consent, but the use of force is not in itself an element of the crime of rape. There are other factors, besides the use of force, due to which sexual penetration may be considered an act to which the victim did not consent or did not want.”<sup>158</sup>

These cases demonstrate a general trend towards an analysis of sexual violence that focuses on the victim’s lack of consent, rather than his or her outward signs of physical struggle. In a few recent cases, however, courts in BiH have continued to examine whether or not a victim provided physical resistance to sexual assault. This occurs even in some cases in which a court finds that coercive circumstances present in armed conflict negate a victim’s ability to consent, calling into question the understanding of some judges about the elements of rape during armed conflict.

In the *Savić* case, for example, although the Court of BiH clearly identified the existence

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<sup>154</sup> *Dragoljub Kunarac et al*, ICTY Appeals Chamber, Judgment (IT-96-23), 12 June 2002, para. 128.

<sup>155</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, pp. 11–12.

<sup>156</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, para. 191 (“In the *Kunarac* case the Chamber explains that there is no requirement of proving that the victim offered resistance in order to prove the lack of victim’s consent.”).

<sup>157</sup> *Ibid.*, paras. 262, 318–319.

<sup>158</sup> *Gligor Begović*, Court of BiH, First Instance Verdict, 11 December 2015, pp. 59–60.

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of coercive circumstances which the defendant used to commit the rape, it conducted an unnecessary analysis relating to the victim's ability to resist:

The Panel concludes that the victim **could not offer any resistance** as the person who took her (the Panel established that this person was the accused...) used force, i.e. he used a gun, and because she feared for her life and the life of her underage daughter and their safety (which the victim described with the following words: "I was so afraid I couldn't speak"). In addition, at the time when the armed person came to get her, the victim was alone in the house with her underage daughter.<sup>159</sup>

Similarly, in the *Šekarić* and *Racković* cases, the Court of BiH properly analyses the context of the crimes to find that coercive circumstances negated the victim's ability to consent. However, both verdicts continue on to explain – in identical wording – that under these circumstances the victim "was not able to provide any form of resistance to successfully thwart the accused in his attempt."<sup>160</sup> The panel in the *Zelenika* case used almost the same phrasing to describe how coercive circumstances prevented the victim from providing "active resistance" to the rape she experienced in a detention camp.<sup>161</sup> The Bihać Cantonal Court inserts a similarly unnecessary analysis of the resistance requirement in the *Soleša* case, quoted above, where it notes that the victim was not able to provide resistance, in spite of having highlighted in the same paragraph that resistance

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<sup>159</sup> *Slavko Savić*, Court of BiH, First Instance Verdict, 29 June 2015, para. 218 (emphasis added). At the time of the first and second instance verdicts, "use of force" was still a constitutive element of the crime (art. 173(1)(e) - rape as war crime against civilians); thus although the court's finding on the use of force was strictly correct according to the law in place at the time, it is in contradiction with international standards regarding use of force and the interpretation of many previous CBiH and entity-level decisions.

<sup>160</sup> *Dragan Šekarić*, Court of BiH, First Instance Verdict, 13 February 2015, paras. 233–237 (citing the proper definition of rape from the *Furundžija* and *Kunarac* cases but still taking note of the victim's ability to resist: "In this context, the Panel assessed the relevant objective circumstances which demonstrated, beyond reasonable doubt, that the sexual intercourse between the accused and the injured party S-1 occurred without the consent of the injured party, and that she was not able to provide any form of resistance to successfully thwart the accused in his attempt." *Ibid.* at para 237.); *Vitomir Racković*, Court of BiH, First Instance Verdict, 11 May 2015, paras. 204–205 ("Therefore, considering all the said circumstances it is obvious that the injured party RV-5 was in such a state that she could not offer any resistance, and then she was raped against her will. Considering whether the sexual intercourse between the injured party RV-5 and the accuses was against her will, the Panel took into account all the circumstances including also the acts of the accused before the event itself, his behaviour during and after the event itself as well as the overall situation in Višegrad at the time concluding beyond reasonable doubt that the sexual intercourse between the accused and the injured party RV-5 occurred without her consent and that the injured party could not offer any resistance during the rape which could successfully thwart the accused's attempt.").

<sup>161</sup> *Ivan Zelenika et al.*, Court of BiH, First Instance Verdict, 14 April 2015, paras. 702, 704 ("...the injured party was not able to offer any kind of resistance when she was raped that would successfully thwart the accused in his intention.").

is not an element of the crime.<sup>162</sup>

In the *Dragičević* case, the prosecutor himself asked the victim during direct examination whether she “offered any resistance” to the perpetrator.<sup>163</sup> Although the Court of BiH ultimately found the perpetrator guilty of rape, the prosecutor’s question reflected a limited understanding of the elements of the crime of rape under BiH law.

The *Milovanović* case mentioned above presents a particularly troubling exception to the generally improving practice of courts with regards to the recognition of coercive circumstances and the lack of a resistance requirement. In that case, the Bijeljina District Court acquitted the perpetrator of the rape of his neighbour, finding that the victim “was not forcibly removed from her house” and that she “could have given resistance” instead of going to the house of the accused, where he locked the door and forced her to sexual intercourse at knifepoint, according to her testimony:

The victim... confirmed at the main trial that on 14 May 1992 she was in the village of Sase in Srebrenica municipality with her family in the house of her mother-in-law (she was not forcibly removed from her house, i.e. there is no evidence on the record about it), that on the same day her husband... and his brother went to look for cigarettes and coffee because of the shortage of the same (there was no mention of the shortage of bread but cigarettes only), and they did not return, and that on the third day of their departure, their neighbour Radosav Milovanović came to their house to allegedly visit them as the victim said, and when he told her to come to his parents’ house in the dusk to give her cigarettes and coffee, which was witnessed by her mother-in-law and Muriz and her children as well and that her mother-in-law and Muriz heard this but she’s not sure whether her children heard it (so it is not about the night hours, it is not about an unknown person who was in a uniform but not armed nor it was a person on a mission), she did it and went to the accused’s parent’s family house in her dressing gown on the same day in the dusk (it is about the victim who in such circumstances could have given resistance, i.e. not to go to the house of the accused, and as she herself says “I came to him”), when as per her statement, the accused locked the door of the house, and after the conversation and the use of a knife forces her and performs a forcible sexual intercourse - rape of the victim, although the victim

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<sup>162</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, p. 13 (“Considering the injured party was underage, that she was alone, without parents and considering the indisputable fact that the defendant was by far physically superior to her, it is entirely understandable that the injured party could not offer resistance and thus the accused did not have to use force in order to realize his intent.”).

<sup>163</sup> *Zoran Dragičević*, Court of BiH, Second Instance Verdict, 28 February 2014, para. 57.

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told to the accused that she has her period, after which she went home and he threatened her that she must not to tell anyone anything about the incident.<sup>164</sup>

In this flawed analysis, the Court ignores that a victim's resistance is not an element of the crime of rape. The Court also failed to take into account the existence of coercive circumstances existing at the time, notably that the perpetrator came to the victim's house in his military uniform during a period in which the ongoing armed conflict in Bosnia and Herzegovina had disrupted the normal flow of life in the area, particularly for the non-Serb population, and just three days after the disappearance of the victim's husband. By assessing whether the victim "could have given resistance," the Court makes an assessment of the victim's consent and violates the RS CPC provision allowing for the admission of such evidence in wartime sexual violence cases. It is concerning that the RS Supreme Court affirmed the lower court's reasoning on appeal.<sup>165</sup>

By introducing the element of resistance in an analysis of the elements of conflict-related rape, some courts in BiH appear to be conflating a lack of resistance with a form of consent. This approach evinces a subtle but underlying shifting of blame to a victim who does not, or cannot, physically resist a perpetrator's attack. This in turn serves to perpetuate stereotypes in the jurisprudence about the nature of consent and sexual violence – stereotypes which are all too evident in the case of *Milovanović*, for example.

To address this concern, the OSCE Mission recommends that all judges in the Court of BiH and in entity level courts clearly acknowledge in their judgments that resistance is not an element of the crime of rape, as already done by the *Vojić and Mešić* and *Begović* panels. This will ensure full compliance with the applicable criminal code and reduce the chance of exacerbating stigma for sexual violence victims.

### 4.3. Evidentiary standards

#### 4.3.1. Analysis of consent in favour of the defence

As described above, courts across BiH are increasingly recognizing the existence of coercive circumstances and their role in negating the victim's ability to consent to sexual conduct. In most cases, in accordance with the applicable evidentiary standard in the relevant CPC, courts have rejected attempts by the defence to admit evidence of victim consent. However, in some cases, courts have incorrectly undertaken an analysis of the relationship between the victim and perpetrator despite the existence of coercive circumstances which would vitiate the victim's ability to consent.

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<sup>164</sup> *Radosav Milovanović*, Bijeljina District Court, First Instance Verdict, 22 January 2016, p. 4 (emphasis added).

<sup>165</sup> *Radosav Milovanović*, Republika Srpska Supreme Court, Second Instance Verdict, 24 March 2016.

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In *Batko*, for example, the Court of BiH undertook an unusual and legally unnecessary assessment of the victim's circumstances to find that she did not consent to the sexual contact with the accused. Specifically, the Court dismisses the accounts of two defence witnesses who testified that a consensual sexual relationship existed between the perpetrator and the victim; in so doing, the court attributed any appearance of a relationship to "Stockholm syndrome," by which in light of her circumstances – including the geographic isolation of Grbavica, the hostile military presence there, and the fact that the victim was a woman on her own – the victim "bonded with the perpetrator" and "unwittingly and haphazardly [lost] her own identity in order to submit to her rapist."<sup>166</sup> The Court goes on to say that "bearing in mind the overall chaotic and extraordinary context the events took place in, this does not imply at all that the victim voluntarily consented to the realized sexual contact."<sup>167</sup> This analysis of the victim's mental state was entirely unnecessary and also in contradiction with the CPC's prohibition on admission of evidence of consent in wartime sexual violence cases. Once the Court had found the existence of coercive circumstances, there was no need to examine the defence's contention that the victim consented to the sexual contact. It would have sufficed to explain why the defence's contentions were irrelevant as opposed to examining their merit.

Similarly, in the first instance *Tolić* verdict, the Court of BiH assessed the veracity of defendant's testimony that he was engaged in a romantic, consensual relationship with the victim – who was a detainee at the prison camp where he was a guard during the armed conflict. The Court ultimately found that the defendant's claims lacked merit.<sup>168</sup> While the Court did find the defendant guilty of rape under the circumstances, it was unnecessary and a possible violation of the CPC for the Court to undertake an assessment of consent at all, since the manifestly coercive circumstances described in the very next paragraph – the victim's status as a camp detainee – would certainly negate her ability to consent.<sup>169</sup>

While acknowledging that the Court of BiH attempted to define coercive circumstances in *Batko* and *Tolić*, the OSCE Mission observes that the Court's assessment of consent in these cases is unnecessary and strays from the standard set forth in the BiH CPC and national jurisprudence. It is sufficient for the prosecution to show the existence of coercive circumstances which the perpetrator took advantage of in order to commit the rape. After this point the victim's lack of consent does not need to be proven; sexual autonomy under such circumstances cannot be freely and voluntarily exercised. In cases of physical apprehension in the context of an armed conflict – including in detention centres – such coercive circumstances will be manifest. This principle has been repeatedly confirmed in

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<sup>166</sup> *Veselin Vlahović Batko*, Court of BiH, First Instance Verdict, 29 March 2013, para. 885.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Josip Tolić*, Court of BiH, First Instance Verdict, 20 March 2015, paras. 186–187.

<sup>169</sup> *Ibid.*

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ICTY jurisprudence, for example in the Trial Chamber's *Milutinović* judgment:

Any form of coercion, including acts or threats of violence, detention, and generally oppressive surrounding circumstances, is simply evidence that goes to proof of lack of consent. In addition, the Trial Chamber is of the view that **when a person is detained, particularly during an armed conflict, coercion and lack of consent can be inferred from these circumstances.**<sup>170</sup>

The OSCE Mission notes that extensive national and international jurisprudence have established that once a court has determined that a perpetrator used coercive circumstances to commit an act of sexual violence during armed conflict, it is not necessary to examine the issue of the victim's consent. This is also clearly reflected in the criminal procedure codes of BiH and FBiH, the RS, and BDBiH.

#### 4.3.2. *Prior sexual conduct*

In a particularly positive development, courts across the country apply fairly consistently the evidentiary standard prohibiting defence (or prosecution) questioning on a victim's prior sexual conduct,<sup>171</sup> as urged by the OSCE Mission in previous reports.<sup>172</sup> This includes both direct questioning about prior sexual activity and indirect insinuations of such.<sup>173</sup>

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<sup>170</sup> *Milan Milutinović et al*, ICTY Trial Judgment (IT-05-87-T), Vol. I, 26 February 2009, para. 200 (emphasis added). See also *Anto Furundžija*, ICTY Trial Judgment (IT-95-17/1-T), 10 December 1998, para. 271 ("The elements of rape, as discussed in paragraph 185 of this Judgement, were met when Accused B penetrated Witness A's mouth, vagina and anus with his penis. Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that any form of captivity vitiates consent." (emphasis added)); *Vlastimir Đorđević*, ICTY Appeals Chamber, Judgment (IT-05-87/1-A), 27 January 2014, para. 852.

<sup>171</sup> *Vladimir Šišić*, Doboј District Court, Main Trial (in which the president of the panel underlined that questioning as to the victim's prior sexual conduct is inadmissible); *Asim Kadić*, Zenica Cantonal Court, Main Trial (court rejected questioning by defence attorney tending to imply a prior sexual relationship between the victim and another individual. It is, however, concerning that the prosecutor himself asked the victim during direct examination whether the rape was her first sexual encounter.).

<sup>172</sup> OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), p. 33.

<sup>173</sup> See, e.g., *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, para. 292 (court rejects defence witness statements relating to men visiting the victim's house prior to the rape, finding that the purpose of such testimony was to present the victim as a promiscuous person, although the court does not explicitly cite the CPC prohibition of evidence of victim's prior sexual conduct in doing so); see, however, *Slavko Savić*, Court of BiH, First Instance Verdict, 29 June 2015, paras. 326–330 (Protected defence witness "D" testified as to the victim's consorting with many men prior to the incident and made insinuations as to her sexual conduct. Although the court ultimately rejected "D"'s testimony, it did so on credibility grounds, citing numerous inconsistencies in her statements. Pursuant to Article 264, para. 1 of CPC BiH, no evidence proving the previous sexual experience, behaviour or sexual orientation of the victim shall not be admissible).

The *Soleša* case provides a compelling example of good court practice in this regard. During cross-examination of the victim-witness, the Bihać Cantonal Court promptly ordered the defence to cease impermissible questioning relating to the victim's prior sexual conduct, emphasizing the reasons for doing so in its first instance convicting verdict:

In cross-examination, the defence tried to discredit the injured party's testimony by attempting to question her about her previous sexual life which the court did not allow because such facts may not be used as evidence and may not be the basis for a judicial decision. When the defence counsel showed her the photograph of a certain [individual], the injured party confirmed that she knew him and that he was her boyfriend when she was in Ripce. The court deemed this entirely irrelevant and an attempt to discredit the injured party's statement by posing impermissible questions.<sup>174</sup>

In affirming the lower court's conviction in *Soleša*, the FBiH Supreme Court cited the Bihać Cantonal Court's practice with approval, rejecting the defence grounds for appeal that the victim was "sexually mature" and had engaged in sexual relations with another individual previously, emphasizing that reference to a victim's prior sexual conduct is not permissible on appeal.<sup>175</sup>

In spite of the positive improvements in this regard, the OSCE Mission must note that in at least two recent cases, the prosecutor himself asked the victim about her prior sexual experiences, apparently in an attempt to show a victim's lack of experience and thus to emphasize the extent of the harm caused by the sexual violence.<sup>176</sup> The OSCE Mission notes that questioning a victim about her prior sexual conduct is a violation of the applicable evidentiary standards set by the CPCs regardless of whether the question is posed by the prosecution or the defence or whether it is aimed at establishing aggravating circumstances.

#### 4.3.3. *No corroboration requirement*

As noted in previous OSCE Mission reports, courts in BiH have in recent years found, in line with national and international jurisprudence, that there is no requirement for corroboration to the testimony of a sexual violence victim.<sup>177</sup> This trend has continued in a positive direction, with many courts explicitly citing international jurisprudence and the ICTY Rules of Procedure and Evidence as the basis for a decision for accepting a victim's

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<sup>174</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, p. 8.

<sup>175</sup> *Duško Soleša*, Supreme Court of the Federation of BiH, Second Instance Verdict, 22 May 2015, p. 10.

<sup>176</sup> *E.g., Asim Kadić*, Zenica Cantonal Court; the other relevant case is ongoing before the Court of BiH.

<sup>177</sup> OSCE Mission, *Combating Impunity for CRSV* (Court of BiH, 2005–2013), pp. 35–36; OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), p. 21.

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sole testimony when it is reliable and credible.<sup>178</sup> In the *Soleša* case, for example, the Bihac Cantonal Court explained:

Rape is a crime most often proven and established exclusively on the basis of the testimony of the injured party, because most often there are no other eye witnesses and very often there is no medical documentation either... The court considered very carefully the testimonies of prosecution and defence witnesses in the context of presented material evidence before accepting the testimony of the injured party as the basis for rendering the decision on the guilt of the defendant. In doing this, the court also took into account the ICTY jurisprudence pursuant to the Rule 96 of the Rules of Procedure and Evidence stipulating that no corroboration of the victim's testimony shall be required in cases of sexual crime. The said Rule 96 of the Rules of Procedure and Evidence of the ICTY and ICTR provides that in a case of a sexual assault the prior sexual conduct of the victim shall not be admitted in evidence and that no corroboration of the victim's testimony shall be required. Applying this rule, the ICTR trial panel found that the panel may base its findings only on one testimony if this testimony is relevant and credible...<sup>179</sup>

On the other hand, in some sexual violence cases, courts in BiH have also acquitted defendants of sexual violence crimes where the victim's sole testimony did not appear credible or where she or he was unable to convincingly identify the perpetrator – evidence that courts are striking a proper balance between the lack of a requirement for corroboration and the *in dubio pro reo* principle.<sup>180</sup>

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<sup>178</sup> *Dragan Šekarić*, Court of BiH, Second Instance Verdict, 30 September 2015, paras. 153–155 (“The Appellate Panel notes that the inherent right of a court is to establish facts based on the principle of free assessment of evidence and in accordance with the deep personal convictions of each of the judges. This is a broadly set discretionary right which is subject to a certain number of limitations. However, the principle *unus testis nullus testis* (one witness is not enough) which requires corroborating the testimony of the only witness to a relevant fact by another witness, is not recalled by almost any modern continental legal system. Therefore, the decisive criterion for establishing the relevancy of facts is the quality of a testimony, and not the mere amount of evidence. This is supported by the opinion of the International Criminal Tribunal for Ruanda (ICTR), in which the Trial Chamber applying Rule 96 of the Rules on Procedure and Evidence of ICTY and ICTR concluded ‘that the Chamber can base its conclusions on only one statement if that statement is relevant and credible.’”); *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 266–268 (citing ICTY *Tadić* decision in rejecting *unus testis nullus testis* principle); *Vitomir Racković*, First Instance Verdict, 11 May 2015, para. 208; *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, paras. 156–182; *Muhidin Bašić and Mirsad Šijak*, Court of BiH, First Instance Verdict, 18 January 2013, para. 201; *Muhidin Bašić and Mirsad Šijak*, Court of BiH, Second Instance Verdict, 5 November 2013, paras. 47, 72.

<sup>179</sup> *Duško Soleša*, Bihac Cantonal Court, First Instance Verdict of 19 September 2014 (upheld on appeal), pp. 12–13).

<sup>180</sup> *See, e.g., Dževad Dulić*, Court of BiH, First Instance Verdict, 11 September 2015, para. 134 (acquitting

The *Milovanović* case before the Bijeljina District Court, mentioned several times above, again provides a worrying exception to the almost universal acceptance by courts in BiH of uncorroborated testimony of victims of sexual violence. In its analysis of the evidence presented, the Court held that:

[S]ince the indictment is entirely based on the testimony of the injured party [name omitted], which is not corroborated by any material evidence, the court could not have accepted the testimony of this witness and other indirect witnesses given at the main trial when placing them in relation to material evidence, in the measure to determine the direct criminal responsibility of the accused for such a serious criminal offence that he is charged with under the amended indictment (as indirect witnesses, depending on their ethnicity and affiliation to parties to the conflict and personal motivation for the outcome of these proceedings, or family or other relationship with the accused or the injured party and the way they acquired the knowledge about the event in question, testify differently about the important circumstances from the indictment.).<sup>181</sup>

By requiring that the victim's testimony be corroborated by the accounts of other witnesses, the court defied an extensive body of national and international jurisprudence and ignored the fact that, as explained in the *Soleša* case, a victim is very often the sole witness of a sexual violence crime. The Bijeljina District Court's expectation of corroboration may negatively affect outcomes in future conflict-related sexual violence cases falling within its jurisdiction.

It should also be noted that some entity level courts have no examples in their

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the defendant for rape based on numerous inconsistencies in the victim's testimony and between her testimony and that of other witnesses); *Goran Popović*, Court of BiH, First Instance Verdict, 30 April 2015, paras. 84–94, and *Goran Popović*, Court of BiH, Second Instance Verdict, 29 February 2016, para. 37 (acquitting defendant for crimes against humanity in the form of, *inter alia*, forced sexual intercourse, based on broad discrepancies between the statements of witnesses given in investigation and at trial, in particular noting the fact that one victim, in her earlier statements, never mentioned the name of the defendant, but was later shown a picture of him by the Association "Žene-Žrtve Rata," and afterwards identified him as the perpetrator); *Oliver Krsmanović*, Court of BiH, First Instance Verdict, 31 August 2015, para. 313 (acquitting defendant for the charge of persecution as a crime against humanity in the form of forced sexual intercourse, due to the victim's inability to recognize him as the perpetrator, since the man who raped her was wearing camouflage paint at the time of the crime; affirmed on appeal); *Predrag Milisavljević et al*, Court of BiH, First Instance Verdict, 28 October 2014 (acquitting defendant for sexual violence crime because victim was not able to recognize him); *Mato Čondrić*, Court of BiH, First Instance Verdict, 18 September 2015, para. 50 (acquitting defendant for rape of female prisoner in detention facility where he was a guard because she was unable to identify him and testified that she learned of his identity from other individuals).

<sup>181</sup> *Radosav Milovanović*, Bijeljina District Court, First Instance Verdict, 22 January 2016, p. 6.

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jurisprudence of cases where the victim's testimony is the sole evidence. It is possible that in some cases, prosecutors avoid indicting perpetrators for fear that the court will not find the evidence sufficient. For this reason, it is hoped that prosecutors at all levels properly assess the credibility of a victim-witness during the investigation stage in light of the standards on corroboration described above and with the assistance of a qualified witness support officer.<sup>182</sup> Such an approach ensures that prosecutors assess in light of all relevant circumstances whether it is possible to raise an indictment when the victim is the sole witness, where reasonable grounds exist for suspecting that a sexual violence crime was committed.

Based on the available jurisprudence, the OSCE Mission welcomes the practice of almost all courts in BiH to give credence to a victim's sole testimony when appropriate, and it encourages all courts to adopt this practice to ensure that perpetrators do not enjoy impunity for sexual violence crimes where the victim is the only witness.

#### 4.3.4. *Credibility*

Where the victim of a sexual violence crime is the sole witness the credibility of her or his statement is paramount. While courts in BiH are entitled to a full and free assessment of the evidence available to them, the existing national and international jurisprudence on wartime sexual violence crimes provides ample guidance on the standards applicable for assessing the credibility of a traumatized witness, including an understanding that minor inconsistencies are not fatal to a finding of reliability.<sup>183</sup>

The Court of BiH and many entity courts have, encouragingly, reinforced and expanded their jurisprudence on the credibility of traumatized witnesses in recent years, including in sexual violence cases, taking into account the full context of the witness's situation and how it may affect their memory, consistency, and decision to report the crime only after a long passage of time.<sup>184</sup>

In *Laličić*, for example, the Court of BiH explained in clear terms how trauma associated with sexual violence can affect a victim's testimony:

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<sup>182</sup> See section 6 below on witness support and protection.

<sup>183</sup> See, e.g., *Radić et al*, Court of BiH, First Instance Verdict, 9 March 2011, paras. 546–550.

<sup>184</sup> See, e.g., *Petar Kovačević*, Court of BiH, First Instance Verdict, 2 November 2015, paras. 240–242 (dismissing defence's challenge to victim S-1's credibility due to minor inconsistencies between her testimony and her statement given during the investigation); *Ibro Macić*, Court of BiH, First Instance Verdict, 17 April 2015, para. 290 (noting that minor inconsistencies in the victims' testimonies were not fatal to a finding of their credibility, given that the passage of time and the trauma inflicted by the crimes could explain such discrepancies).

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Based on various legal interpretations of sexual offences, the case law repeatedly demonstrated and accepted that, in a majority of cases raped women start talking about, what is for them a traumatic event, only after a longer period of time. This opinion is held by this Panel also.... Such behaviour is caused by different factors. Namely, it has to be borne in mind that it is widely known that, given the overall attitude of the society and the tradition in this region, it is a common phenomenon that women who were raped do not want the public to find out about it and hide this as well as they can, even from their closest family and not try to get back at somebody with stories that they were raped personally if that really did not happen. . . Therefore, the Panel finds it perfectly logical that some of them talk about rape for the first time only when many years has passed from the event and that they try to avoid talking about that traumatic event or to hide it, reducing it to the act of rape itself (as many of the victims in the case at hand did) and finding that talking about details is entirely irrelevant and irritating.<sup>185</sup>

In *Marković and Marković*, the two co-accused, members of the VRS, were charged along with a third co-accused with forcibly removing a 14-year old child from her home and repeatedly raping her in a van driven by a fourth person. In its convicting verdict, the Court of BiH found the account of the victim-witness credible in spite of some minor inconsistencies between her earlier statements and testimony at trial, holding:

The Panel finds that there are no significant discrepancies between S-4's statement she gave in the hearing and her previous statements. In addition, with regards to minor inconsistencies in the statement of the victim, the Panel, in accordance with the opinion of the ICTY Chamber in the Furundžija case, finds that, from persons who experienced a traumatic event such as rape, 'it is not reasonable to expect that they remember small details such as the date or the time. It is also not reasonable to expect them to remember every single element of the complex and traumatic sequence of events. Indeed, inconsistencies may, in certain circumstances, indicate

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<sup>185</sup> *Zaim Laličić*, Court of BiH, First Instance Verdict, 25 May 2015, paras. 153–155 (citations omitted). The Court went on to find the victim credible according to this standard. *Ibid.*, para. 171 ("Analyzing the testimony of the injured party SM, as the victim of inhumane acts and rape, taking into account a year of imprisonment with her underage child and that she was a victim of traumatic experiences during that time, when she feared for her and the life of her child, the objective circumstances in which the acts of inhumane treatment and rape took place; her statement given at the main trial in conjunction with other presented evidence and testimonies the verdict is based on is congruent with the determining circumstances of her imprisonment in the Hrasnica prison, the conditions and the description of the premises in which the inmates were kept, the knowledge that the men were taken for forced labor, murders, and beatings of the detained persons, the Panel finds it accurate, credible and therefore acceptable.")

truthfulness and the absence of interference with witnesses.<sup>186</sup>

Similarly, in *Batko*, the Court of BiH properly assessed the existence of minor inconsistencies in several victims' testimonies or their previous silence about the sexual violence they endured, finding that such deficiencies in a victim-witness's testimony are not fatal to a finding of credibility. In that case, the panel noted that a victim's reluctance to speak openly about such experiences is "natural" and "understandable" in light of the evidence set forth by an expert-witness psychologist during the trial, who explained the traumatic effects of the sexual violence; the court also accepted as logical why a victim would fail to report a rape to the police in front of her daughter.<sup>187</sup>

In the *Dulić* case, the Court of BiH ultimately acquitted the accused of the rape of a civilian woman. In doing so, it rejected the defence's arguments that the victim's credibility was questionable due to the fact that she had reported the rape 20 years after its occurrence, acknowledging that there can be different reasons for failing to report a sexual violence crime earlier.<sup>188</sup> However, the Court examined in detail the testimony of the victim-witness, as well as the testimonies of a number of other corroborating witnesses, and found that it could not establish beyond reasonable doubt that the accused had committed the rape.<sup>189</sup> It based its finding on a large number of major inconsistencies in the victim's testimony and between her testimony and that of other witnesses.<sup>190</sup> While the OSCE Mission notes that where a court finds such inconsistencies to be so great as to call into question the credibility of the evidence, it is appropriate that principle of *in dubio pro reo* should prevail. However, the case does potentially raise concerns as to the quality of the investigation and evaluation of evidence by the BiH Prosecutor's Office.<sup>191</sup>

At the entity level, the Bihac Cantonal Court provides a positive example in its *Soleša* verdict of a delicate assessment of the victim's credibility. In that case, the defence attempted to discredit the victim of the crime by arguing that she reported the crime only 20 years after its occurrence and that she was receiving social benefits as a victim of war. The Court flatly dismissed this challenge, stating:

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<sup>186</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, para. 179.

<sup>187</sup> *Veselin Vlahović Batko*, Court of BiH, First Instance Verdict, 29 March 2013, paras. 199, 211, 311–312.

<sup>188</sup> *Dževad Dulić*, Court of BiH, First Instance Verdict, 11 September 2015, para. 133 ("The Panel finds ungrounded the objection of the defence counsel given in the closing words twenty years had passed since the event, having in mind that the motives for this can be different and are often logical and justified by the circumstances and social, personal, family or social status of the injured party.").

<sup>189</sup> *Ibid.*, paras. 90–135.

<sup>190</sup> *Ibid.*, paras. 93–94.

<sup>191</sup> This is supported by the fact that in its verdict the Court criticizes the prosecution for failing to have presented the victim with a photo of another suspect with the same name as the accused, who would have been present in the same area where the crimes were committed during the relevant time period, who met the physical description that the victim provided. *Ibid.*, paras. 119–120.

The court rejected such allegations of the defence bearing in mind that the moment a woman chooses to report rape or speak about it is not important for the question whether the crime was committed. This, as is the case with other evidence, must be viewed in the context of war and its consequences in BiH. In their testimony before the court, the expert witnesses said that it is not unusual that a raped woman starts talking about the rape twenty years after the event, that it has been observed that a great number of women do not tell their husbands and children that they had been raped. The fact that they work and that they apparently function normally is also not unusual for victims of rape. Namely, according to the expert witnesses, these women “suffer in silence” and have reduced quality of life...<sup>192</sup>

In a notable exception to the generally nuanced approach by courts in BiH to the question of traumatized victim-witness credibility, in *Milovanović* the Bijeljina District Court departed from the approach of other courts described above in finding the victim’s testimony lacked credibility. In its acquitting verdict, the Court noted that the victim’s account was uncorroborated by other eyewitnesses<sup>193</sup> – not a requirement, as described above – and went on to find that a minor inconsistency between her statements at trial and in the earlier investigation record suggested that she had been guided in giving her testimony.<sup>194</sup> Furthermore, in finding that the prosecution had not proven the crime was committed by the defendant, the Court took note that the victim first reported the crime in 2014 without explaining the significance of that fact to its finding.<sup>195</sup> The Court’s mention of this suggests that it considered it detrimental to the credibility of her statement, despite the extensive jurisprudence dealing with the issue of time gap in reporting traumatic crimes, as described above.

The OSCE Mission notes the extensive progress made by most courts in BiH to undertake a full assessment of the context, including trauma and the passage of time, in assessing the credibility of witnesses. It is hoped that this progress will continue and extend to all courts in

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<sup>192</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, pp. 15–16.

<sup>193</sup> *Radosav Milovanović*, Bijeljina District Court, First Instance Verdict, 22 January 2016, pp. 4–5.

<sup>194</sup> *Ibid.*, pp. 4–5 (“Considering the testimony of the victim that she gave to the Prosecutor’s Office in Sarajevo on 17 December 2014, where she ... confirmed in this statement that she had her period at the time, while in the main trial she claimed that she didn’t have her period but she only said it to the accused so that he would give up on the rape (in the opinion of the court these facts show that the victim was guided in her statements).”).

<sup>195</sup> *Ibid.*, pp. 5 (“The Court finds that none of the prosecution evidence has proven that the accused committed the acts that he is charged with in the adapted indictment during the concrete incident during the armed conflict acting in his official authority directly or acting on the orders of a superior officer, because for the existence of this criminal offence there has to necessarily be a violation of international law which is binding for the active participants in armed conflict, **and also considering the fact that the victim first reported the criminal offence in 2014.**” (emphasis added)).

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the country with regards to sexual violence cases.

#### 4.3.5. *Special investigative measures and emerging practices*

A final issue of interest with regards to evidence used in sexual violence cases is the emerging use of special types of investigative procedures and international legal assistance during the investigative stage, which in many cases can significantly strengthen the evidentiary record as well as the efficiency of proceedings.

One example of the use of such measures is the prosecution's introduction of evidence obtained through "special investigative measures"<sup>196</sup> which would otherwise be unavailable for assessment. While this type of evidence is used more frequently in corruption and organized crime cases, in the *Marković and Marković* case, the prosecution called a State Investigation and Protection Agency (SIPA) investigator who had been responsible for monitoring wire-tapped telephone conversations between one co-accused and a witness who testified at trial – the driver of the van in which the victim was raped by three perpetrators.<sup>197</sup> As presented by the prosecution, the audio recordings suggested that the driver was to receive a sum of money from the co-accused.<sup>198</sup> During direct examination of the driver by the prosecutor at a later hearing, he testified that he had not seen the two co-defendants rape the victim – a departure from his previous statements given to investigators.<sup>199</sup> The prosecutor confronted the witness with his previous statements as well as the audio recordings presented at the earlier hearing, suggesting that the witness had changed his testimony at trial in favour of the accused.<sup>200</sup> The Court ultimately gave credence to the driver's earlier witness statements, which implicated the accused, and discounted his trial testimony, citing the recorded conversations and the implied agreement between the witness and the accused.<sup>201</sup>

Another investigative tool increasingly employed by prosecutors in war crimes cases is the use of international legal assistance to obtain evidence from witnesses – including victims of sexual violence – who reside outside of BiH. This takes two forms: a request sent to the foreign authority to take a statement, or a request to establish a video-link between prosecutorial authorities in the foreign country and BiH in order for the prosecutor to

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<sup>196</sup> BiH CPC, arts. 116–117.

<sup>197</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, Main Trial Hearings, 28 October and 4 November 2014. The third perpetrator is deceased, while the other two were the co-accused in this case.

<sup>198</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, Main Trial Hearing, 4 November 2014; *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, paras. 162–163.

<sup>199</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, para. 161. In response to the discrepancy, the prosecutor confronted the witness with statements he gave in 1992, 2011, 2013, and 2014. *Bosiljko Marković and Ostoja Marković*, Court of BiH, Main Trial Hearing, 2 December 2014.

<sup>200</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, Main Trial Hearing, 2 December 2014.

<sup>201</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, paras. 161–164.

examine the witness directly. The OSCE Mission has observed the use of this procedure in ongoing wartime sexual violence cases, where it spared vulnerable witnesses the trauma of traveling to BiH to give a statement, as well as saving financial resources by prosecutors who would otherwise have to travel to interview the witness in person.

The OSCE Mission notes that such advancements in the use of technology and resources by prosecutors' offices and courts in war crimes cases have the potential to significantly improve the efficiency and speed with which CRSV cases are tried. The OSCE Mission recommends that prosecutors' offices and courts during both the investigation stage and trial stage continuously assess and explore opportunities for the use of measures such as international legal assistance that can improve the efficiency of the proceedings and help improve the criminal justice experience for vulnerable witnesses.

## 5. Sentencing

As in other categories of war crimes cases,<sup>202</sup> sentencing in CRSV cases before courts in BiH presents distinct challenges. Some of the primary issues observed by the OSCE Mission include inconsistent or contradictory application of aggravating and mitigating factors in deciding a sentence, questionable sentencing practices in plea bargaining arrangements, and the setting of sentences that can be converted to a fine.

Courts in BiH prescribe sentences in war crimes cases according to broad statutory guidelines established by the SFRY Criminal Code<sup>203</sup> or the Criminal Code of BiH<sup>204</sup> with wide variation according to the application of mitigating and aggravating factors. The SFRY CC contains a blanket provision for the articles on war crimes against civilians,<sup>205</sup> against the wounded and sick,<sup>206</sup> and against prisoners of war,<sup>207</sup> which includes a range of enumerated offences. The code provided for a sentence of five to 15 years or the death penalty (which could be commuted to 20 years) for each of these crimes. The death penalty is no longer imposed since the Human Rights Chamber's 1997 holding in *Damjanović* that capital punishment violates art. 2 of Protocol 6 to the European Convention on Human Rights.<sup>208</sup> Thus in practice, today the maximum sanction allowed by the SFRY CC for these crimes is 20 years in RS and 15 years in FBiH due to the entities' differing interpretations of the provisions.

However, the criminal codes of BiH, FBiH, RS, and BDBiH provide a margin for sentencing variation in light of aggravating and mitigating factors, including *inter alia* harm suffered by the victim, the offender's "personal situation," and "other circumstances relating to the personality of the offender."<sup>209</sup> The codes do not provide further specificity regarding

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<sup>202</sup> For an overview of historical sentencing trends in war crimes cases in BiH and a discussion of the effect of the ECtHR *Maktouf and Damjanović* decision on sentencing after 2013, see Francesco de Sanctis, *Reconciling Justice and Legality: a Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes*, J. INT. CRIM. JUSTICE (2014). For a discussion of sentencing problems in war crimes cases in Serbia under the SFRY CC, see OSCE Mission to Serbia, *War Crimes Proceedings in Serbia 2003–2014* (2015), pp. 75–81.

<sup>203</sup> Following the European Court of Human Rights *Maktouf and Damjanović* decision, *supra* note 11, courts in BiH apply the SFRY criminal code in war crimes cases (excluding crimes against humanity cases, since these crimes were not covered by the SFRY code), including its sentencing provisions.

<sup>204</sup> Following the *Maktouf* decision, the Court of BiH applies the BiH Criminal Code and related sentencing guidelines only in crimes against humanity cases.

<sup>205</sup> SFRY Criminal Code, art. 142.

<sup>206</sup> *Ibid.*, art. 143.

<sup>207</sup> *Ibid.*, art. 144.

<sup>208</sup> *Sretko Damjanović v. the Federation of BiH*, Human Rights Chamber of Bosnia and Herzegovina, Decision on the Merits (CH/96/30), 5 September 1997.

<sup>209</sup> BiH CC, art. 48(1) ("The court shall impose the punishment within the limits provided by law for that particular offence, having in mind the purpose of punishment and taking into account all the

these factors, nor do they provide guidance as to the amount of reduction or augmentation that can be applied to a sentence in the presence of such factors, within the limits of the law. The criminal procedure codes do require, however, that a convicting verdict must contain the circumstances taken into consideration by the court in deciding on the sentence, including a specific presentation of the reasons for reducing the sentence.<sup>210</sup>

### 5.1.1. *Application of aggravating and mitigating circumstances*

One challenge relates to the inconsistent consideration of mitigating and aggravating factors by courts in determining an appropriate sentence, as well as an absence of reasoning as to why certain circumstances would justify reduction of punishment, particularly where it falls below the mandatory statutory minimum.<sup>211</sup>

A defendant's "good behaviour" during trial, as well as his or her "family status" (i.e., whether s/he is married with children), present illustrative examples as to the challenge presented by mitigating circumstances in sexual violence cases. In a number of cases before courts in BiH, these factors are cited (usually among others) as mitigating factors,<sup>212</sup>

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circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular: the degree of culpability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator."); FBiH CC, art. 49(1); RS CC, art. 37(1); SFRY CC, art. 41(1).

<sup>210</sup> BiH CPC, art. 290(8) ("If the accused has been sentenced to punishment, the opinion shall state the circumstances the Court considered in fashioning the punishment. The Court shall specifically present the reasons which guided the Court when it decided that the punishment should be mitigated or the accused released from the punishment or when the Court has pronounced a suspended sentence or has pronounced a security measures or forfeiture of property gain.").

<sup>211</sup> The BiH Criminal Code allows for the pronouncement of a sentence below the mandatory minimum where a) the law allows for the possibility of a reduced sentence and b) there exist "highly extenuating circumstances" indicating that the reduced sentence can achieve the purpose of criminal punishment. BiH CC, art. 49. The SFRY Criminal Code provided for the reduction of sentence under the same circumstances. SFRY CC, art. 42.

<sup>212</sup> See, e.g., *Zoran Dragičević*, Court of BiH, First Instance Verdict, 22 November 2013, para. 196 (citing "good behavior" during the trial as a mitigating factor); *Zaim Laličić*, Court of BiH, Second Instance Verdict, 23 October 2015, paras. 101–102 (reducing the first instance court's sentence of nine years to six years, finding that the first instance panel failed to properly weigh aggravating and mitigating circumstances, in particular finding that the defendant's family status as a father of three was relevant for the reduction of his sentence); *Marijan Brnjić et al.*, Court of BiH, Second Instance Verdict, 22 April 2016, para. 71 (affirming first instance court's sentence, which was based upon mitigating factors including the accused's family status as a father of three, while noting that the prosecution failed to provide any case law substantiation for his appeal of the sentence); *Radomir Škiljević*, Tuzla Cantonal Court, First Instance Verdict, 26 February 2015, p. 7 (Court included several mitigating factors including the defendant's young age in tempore criminis and the fact that he is a "family man;" court

without explanation as to why they meet the conditions indicated by the applicable criminal code. For example, although a defendant's status as a parent could be viewed as a valid mitigating factor in order to avoid inevitable hardship imposed on his family as a result of his imprisonment, it is unclear whether being a "family man" has any bearing on the defendant's good character or positive contribution to society.

In *Macić*, for example, the Court of BiH found the defendant guilty for war crimes against civilians including the murder of four women, torture, and inhumane treatment which included sexual violence against camp inmates. In setting his sentence at 10 years, the Court found as mitigating the defendant's family status, his good behaviour, and his respect for the court during the trial.<sup>213</sup> The Court does not go into any detail as to why these factors are relevant to the sentencing in his specific case. Similarly, in *Racković*, the defendant was found guilty of crimes against humanity in the form of persecution by imprisonment, rape, and other inhumane acts. In determining the defendant's sentence for these crimes, the court found relevant his "early life," his family status, and his current old age as mitigating factors, without further explanation, to find that a sentence of 12 years achieved the purposes of the punishment.<sup>214</sup>

Yet in other cases, the Court of BiH has rejected these same factors as irrelevant for the purposes of punishment. In the *Marković and Marković* and *Savić* cases, for example, the Court's convicting verdicts expressly indicated that "good behaviour" shall not be considered as a mitigating circumstance, since it is expected of all defendants during trial.<sup>215</sup>

The Court of BiH has also declined to reduce a sentence as a result of the perpetrator's family status in some cases. In *Milislavjević et al*, for example, the Court found that a perpetrator's status as a "family man" with minor children could not be considered a mitigating factor given the gravity of the crimes he committed.<sup>216</sup> In *Tolić*, the Court also rejected the defendant's family situation and certain good deeds towards prisoners in the

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did not include a single aggravating factor although the accused remained at large for ten years following the charges filed against him).

<sup>213</sup> *Ibro Macić*, Court of BiH, First Instance Verdict, 17 April 2015, para. 355 (finding as mitigating factors the accused's family status, good behaviour and respect for the court during the trial).

<sup>214</sup> *Vitomir Racković*, Court of BiH, First Instance Verdict, 11 May 2015, para. 290 (reduced on appeal to 10 years for consistency with existing jurisprudence on crimes against humanity sentences. *Vitomir Racković*, Second Instance Verdict, 8 February 2016, para. 193).

<sup>215</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, para. 228 (rejecting the accused's good behaviour during the trial as a mitigating factor, since this is expected of all defendants; and considering as aggravating factor the accused's attempts to destroy evidence relating to the case); *Slavko Savić*, Court of BiH, First Instance Verdict, 29 June 2015, para. 379 (rejecting "good behaviour" during the trial as a mitigating factor, since good behaviour is expected of all defendants before the court).

<sup>216</sup> *Predrag Milislavjević et al*, Court of BiH, First Instance Verdict, 28 October 2014, para 303.

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detention camp as mitigating circumstances given the seriousness of his offences.<sup>217</sup>

The Court of BiH appeals panel finding in *Vojić and Mešić* provides a useful indicator for the lack of clarity surrounding how such factors are considered in determining a sentence. In sentencing the two co-perpetrators for the repeated rape of a civilian, the first instance panel found as mitigating the fact that one of the co-perpetrators was married with a child and the other was married with two children, one of whom was a minor.<sup>218</sup> After considering a number of aggravating factors, including the “ruthlessness” of the co-perpetrators and the long-term consequences of the attack for the victim, the Court found that a sentence of seven years’ imprisonment would serve the interests of justice.<sup>219</sup> In considering the first instance sentence, the appeals panel found that the trial panel had attached too much significance to the co-perpetrators’ family status in setting the sentence, and that it did not adequately consider the aggravating circumstances.<sup>220</sup> In light of these issues the appeals panel increased the sentence to nine years’ imprisonment for both perpetrators.<sup>221</sup>

In some cases, mitigating factors considered by a court actually appear to be in contradiction to aggravating factors considered in the same verdict. For example, in the *Soleša* case, the Bihać Cantonal Court convicted the defendant for the rape of a minor during the armed conflict and convicted him to six years’ imprisonment. In arriving at this sentence, the Court found as a mitigating factor that, in addition to the fact that the crime was committed over 20 years before, the defendant was married with one child. Yet in the following paragraph of its judgment, the Court finds as an aggravating factor that the defendant, in raping a minor child, “acted ruthless and cold-blooded although he was then the father of a female child.”<sup>222</sup> In this case, the perpetrator’s status as a father appears to work simultaneously in his favour and against him, calling into question the utility of considering his family status in determination of an appropriate sentence.

Finally, in some cases, courts have cited mitigating factors that do not seem to fall within those allowed by the applicable code. In *Zelenika et al.*, for example, the Court found that the accused Ivan Medić, as a member of the Croatian Defence Council (HVO), raped a female camp detainee by abusing his position of authority and in a manner designed to humiliate and degrade her.<sup>223</sup> Yet in determining his sentence, the Court considered as mitigating the

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<sup>217</sup> *Josip Tolić*, Court of BiH, First Instance Verdict, 20 March 2015, para. 357. See also *Dragan Šekarić*, First Instance Verdict, 13 February 2015, para. 557 (considering but ultimately rejecting defendant’s family status as mitigating factors justifying a reduction in sentence “considering the specific circumstances of the crime, the object of which was an attack on the life and dignity of the victims”).

<sup>218</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, para. 328.

<sup>219</sup> *Ibid.*, paras. 329–331.

<sup>220</sup> *Ibid.*, para. 127.

<sup>221</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, Second Instance Verdict, 1 December 2016, paras. 120–127.

<sup>222</sup> *Duško Soleša*, Bihać Cantonal Court, First Instance Verdict, 19 September 2014, p. 17.

<sup>223</sup> *Zelenika et al.*, Court of BiH, First Instance Verdict, 14 April 2015, paras. 698–707.

fact that the accused had offered her shelter in his house and helped her procure medicine while she was detained in the camp.<sup>224</sup> It is not clear how the perpetrator's occasional acts of kindness towards the rape victim can be considered mitigating with regards to the crime committed; namely, these acts do not bear upon his degree of culpability, his motives for perpetrating the offence, the degree of injury to the victim caused by the rape, the circumstances in which the rape was perpetrated, or any other of the factors upon which courts may decide to reduce a perpetrator's sentence. It is thus questionable whether the Court should have considered these factors at all in determining an appropriate punishment for the rape.

The OSCE Mission observes that serious gaps exist in the rationale offered for sentencing practices by courts in BiH, including in the consistent application of aggravating and mitigating factors within a single court. In particular, the standard application of mitigating factors such as "family status" and "good behaviour" by courts in CRSV cases arguably does not take into account the purpose of criminal punishment.<sup>225</sup> A perpetrator's current marital and parental status do not have a bearing on culpability for a serious criminal offence committed 20 years ago, the effect it has had on the victim and the community, or the deterrence effect on future criminal activity that punishments are hoped to achieve. This is doubly true where courts do not concretely link these factors to individual defendants' situations, but apply these factors in a routine, generic fashion.

Furthermore, reducing a perpetrator's sentence according to his or her family status could have a discriminatory impact whereby individuals who are unmarried or do not or cannot have children receive a higher sentence than those who are married with children.<sup>226</sup> The widespread problem of a lack of clear reasoning on the application of these factors, as well as the inclusion of other questionable mitigating factors in setting punishment, raises concern about the potential for arbitrariness in sentencing for CRSV crimes before courts of BiH. The OSCE Mission therefore recommends that courts across BiH undertake more detailed and individualized reasoning when explaining sentencing with regards to aggravating and mitigating factors, in particular by assessing the validity and utility of the application of certain mitigating factors in future cases. In addition, in order to increase transparency and encourage a more standardized application of such factors while ensuring an individualized approach to punishment, the justice sector could consider developing sentencing guidelines elucidating the types of mitigating and aggravating factors that may be relevant in such cases.

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<sup>224</sup> *Ibid.*, para. 937.

<sup>225</sup> The BiH Criminal Code provides that the purposes of criminal punishment are: "a) To express the community's condemnation of a perpetrated criminal offence; b) To deter the perpetrator from perpetrating criminal offences in the future and to encourage his reformation; c) To deter others from perpetrating criminal offences; and d) To increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators." BiH CC, art. 39.

<sup>226</sup> See also OSCE Mission to Serbia, *War Crimes Proceedings in Serbia 2003–2014* (2015), pp. 78–79.

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### 5.1.2. Plea bargain agreements

Sentencing practices pursuant to plea bargain agreements between the prosecution and the perpetrator present another challenge. During the time period under review in this analysis, the OSCE Mission monitored four wartime sexual violence cases that concluded with a plea bargain agreement (PBA),<sup>227</sup> three of which were confirmed before entity level courts and the fourth at the State level. Some elements of these PBAs raise concerns.

The conclusion of a war crimes proceeding with a PBA can carry advantages, including in wartime sexual violence cases. Such agreements can spare prosecutorial and judicial resources by eliminating the need to hold a trial and allowing other cases to proceed more efficiently, if concluded before the proceedings begin or at an early stage;<sup>228</sup> they eviscerate the risk of acquittal when the evidence available to the prosecution is limited; they allow prosecutors to obtain crucial insider evidence, including from co-perpetrators bearing less criminal liability for an offence, by offering a lowered sentence in exchange for testimony; they may spare a victim the traumatization of having to testify about the circumstances of the crime; and in some cases they allow for the negotiation of special agreements between the perpetrator and the victim, such as a public apology by the perpetrator or the payment of an agreed amount of financial restitution (as will be discussed below).

However, plea deals can also carry disadvantages. A plea bargain may deprive a victim of an opportunity to participate in the proceedings by voicing her perception of the criminal acts and the effects that they had for the victim. Such agreements are negotiated between the prosecutor and the perpetrator, and approved by a court;<sup>229</sup> while the prosecutor is obliged to accept a property claim filed by the victim<sup>230</sup> – a requirement that stands when the case goes to trial as well – neither the court nor the prosecutor is required to consult or even inform the

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<sup>227</sup> *Radivoje Soldo*, Court of BiH, First Instance Verdict, 3 November 2015 (Plea bargain agreement concluded sentencing accused to 5 years' imprisonment); *Amir Ćoralčić*, Bihać Cantonal Court, First Instance Verdict, 19 October 2015 (Plea bargain agreement provides that the perpetrator will pay 50,000BAM to the rape victim, who was a minor at the time of the crime, in addition to a one-year sentence, converted to a fine upon application by the defendant by a decision of the Bihać Cantonal Court on 20 January 2016); *Redžep Beganović*, Bihać Cantonal Court, First Instance Verdict, 18 March 2016 (Plea bargain agreement provides that the perpetrator will pay 50,000BAM to the victim of attempted rape, who was a minor at the time of the crime, in addition to a one-year sentence, converted to a fine upon application by the defendant by the Bihać Cantonal Court on 7 July 2016); *Radomir Škiljević*, Tuzla Cantonal Court, First Instance Verdict, 26 February 2015 (Plea bargain agreement provides that accused will serve three years and six months).

<sup>228</sup> This benefit of PBAs is greatly reduced in cases where the deal is concluded at a late stage in the trial. For more commentary on the advantages and disadvantages of PBAs, see OSCE Mission to BiH, *Delivering Justice in Bosnia and Herzegovina* (2011), p. 54.

<sup>229</sup> BiH CPC, art. 231(1)–(6).

<sup>230</sup> *Ibid.*, art. 195(1).



victim (and/or the victim's family) prior to concluding a PBA with a perpetrator.<sup>231</sup> A full trial procedure affords the victim an opportunity to testify which, although it can be traumatic, can also have a cathartic effect by allowing a victim to confront their perpetrator and play an active role in the condemnation of the perpetrator.

For many survivors of traumatic events, the opportunity to give their testimony in court and explain the impact of the crime on their life plays a key role in the healing and closure process. Plea deals have the potential to rob a victim of this empowering role by excluding them completely from the process without explanation. This is particularly true given that PBAs typically end in a lower sentence than would have been achieved through a full trial for the same crime, where the perpetrator is convicted. This concern is particularly acute where a PBA results in no time served. Several plea deal cases monitored by the OSCE Mission have resulted in a sentence that may be converted to a fine under the applicable criminal code, discussed in the next section. Such arrangements can be interpreted as allowing a perpetrator who has confessed to a grave international crime to “buy” his freedom, provided he has the financial means to do so.

The OSCE Mission notes that, particularly within the context of mass atrocity crimes, the potential benefits of plea bargaining should be carefully balanced with the goals of establishing truth and delivering justice to victims. Based on the Mission's monitoring, it appears that there may be over-reliance on PBAs in some prosecutors' offices and courts. For example, between 1 January 2015 and 31 December 2016, 13 war crimes cases concerning a range of offences were closed with a final and binding verdict at the Bihać Cantonal Court. Of these, six cases – almost half – were concluded with a plea deal.<sup>232</sup> In five of these plea deals, involving offences including rape, inhuman treatment, and grave bodily injury to the health of civilians and prisoners of war, the perpetrators received a sentence of 12 months – the absolute legal minimum for war crimes. The OSCE Mission has obtained information regarding each of these cases, and it is worth noting that in each of the five plea bargain deals that ended in a sentence of one year, the sentenced individual had residence and/or employment outside of Bosnia and Herzegovina. This is relevant given that one year is the threshold for converting a prison sentence to a fine (see the following section). This pattern suggests a potential for the use of plea bargaining with a one-year sentence under a specific set of circumstances – i.e., foreign residence or employment – which in turn calls into question

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<sup>231</sup> The court is required to inform the injured party about the results of the plea deal after its conclusion, but not before. BiH CPC, art. 231(9); FBiH CPC, art. 209(1); RS CPC, art. 105(1); BDBiH CPC, art. 195(1).

<sup>232</sup> *Dževad Mahmutović*, Bihać Cantonal Court, First Instance Verdict, 23 February 2015; *Amir Ćoralić*, Bihać Cantonal Court, First Instance Verdict, 29 October 2015; *Sefer Dervišević*, Bihać Cantonal Court, First Instance Verdict, 28 September 2016; *Safet Kovačević*, Bihać Cantonal Court, First Instance Verdict, 28 December 2015; *Redžep Beganović*, Bihać Cantonal Court, First Instance Verdict, 18 March 2016; *Mustafa Omerčehajić*, Bihać Cantonal Court, First Instance Verdict, 28 September 2016.

whether all defendants in war crimes cases before the Bihac Cantonal Court receive equal treatment. The prosecution's frequent use of plea bargaining under such circumstances, without clear and public explanation of the benefit of such a practice, has the potential to undermine the interests of justice and corrode public confidence in the work of both prosecutors and courts.

The OSCE Mission observes that PBAs can serve the interests of justice under certain circumstances, including in sexual violence cases, particularly given the substantial number of war crimes cases that remain to be tried. However, to ensure that such arrangements do not frustrate the purposes of the criminal justice process to deliver justice to victims and establish a truthful record of events – and thereby aggravate the suffering of the survivors of these crimes – prosecutors and courts should carefully evaluate each plea bargain proposal and ensure that those presented to the court adequately serve the interests of justice in each individual case.

Although it is not required by the law, it is known to the OSCE Mission that many prosecutors at both the State and entity levels timely inform all the injured parties in a case about ongoing plea negotiations and explain the potential advantages of striking a plea deal. It is recommended that this practice be adopted by all prosecutors' offices. Victims should be given an opportunity – through a legal representative, where possible – to express specific concerns about a potential deal. Prosecutors should in turn carefully consider these objections to modify or reject the deal or, when determining that the plea arrangement is still in the best interests of justice, to provide a reasoned explanation for proceeding with it when such objections exist. Finally, it is recommended that prosecutors' offices ensure that victims receive institutionalized support from a witness support officer throughout the process.

Taking these steps has the potential to ensure a sensitive and thoughtful approach to victims of serious crimes and also serves a long-term goal in terms of ensuring the fullest possible participation and co-operation of victims as key witnesses in the criminal justice process. Taking such a systemic approach to plea bargain agreements may help ensure the co-operation and testimony of other victims and witnesses from affected communities in future proceedings.

### *5.1.3. Sentencing for conversion to fine*

A related concern noted by the OSCE Mission with regards to sentencing concerns the provision in all four of the applicable criminal codes allowing a prison sentence below a certain number of months to be converted to a fine. Under the criminal codes of BiH and the FBiH, a prison sentence of 12 months or fewer shall *automatically* be converted to a fine (equivalent to 100 convertible marks per day of prison sentence)

upon the petition of the condemned person.<sup>233</sup> In BDBiH, a prison sentence of 12 months or fewer *can* be converted to a fine at the same daily rate, but the law does not state that it *shall* be converted,<sup>234</sup> allowing courts discretion in deciding whether to grant the substitution requested by a petitioner. In RS, the discretionary right of the court is also provided by the wording of the law, but there only a sentence of six months or fewer can be substituted with a fine.<sup>235</sup>

This regime creates two clear inequalities between individuals sentenced by the Court of BiH or courts in FBiH versus those sentenced by courts in BDBiH and in RS. First, the threshold for substitution of a prison sentence to a fine is stricter in the latter, allowing such substitution only for sentences of six months or fewer, meaning that this provision is irrelevant in war crimes cases, where one year is the absolute minimum sentence. Second, the discretionary right on the part of courts in RS and BDBiH to decide whether or not to grant a substitution, in the absence of any standardized criteria upon which to base such a decision, creates a risk for arbitrariness by courts in deciding whether to substitute a prison sentence, as opposed to an automatic right to conversion in BiH and FBiH.

The risks entailed by these discrepancies are not hypothetical. Between 2006 and 2016, the OSCE Mission monitored 17 war crimes cases in which 21 perpetrators received a sentence of 12 months.<sup>236</sup> Only two of these took place in RS,<sup>237</sup> meaning that sentences for war crimes in at least 15 war crimes cases were eligible for conversion to a fine. To the

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<sup>233</sup> BiH CC, art. 42a; FBiH CC, art. 43a.

<sup>234</sup> BDBiH CC, art. 43a.

<sup>235</sup> RS CC, arts. 33(2), 36(2)–(3).

<sup>236</sup> *Dragan Živković*, Brčko District Basic Court, Second Instance Verdict, 30 September 2016; *Sefer Dervišević*, Bihać Cantonal Court, First Instance Verdict, 28 September 2016; *Aleksandar Ostojić and Miladin Tošić*, Brčko District Basic Court, Second Instance Verdict, 30 May 2016; *Redžep Beganović*, Bihać Cantonal Court, First Instance Verdict, 18 March 2016; *Safet Kovačević*, Bihać Cantonal Court, First Instance Verdict, 28 December 2015; *Amir Čoralić*, Bihać Cantonal Court, First Instance Verdict, 19 October 2015; *Galib Hadžić and Nijaz Hodžić*, Brčko District Basic Court, Second Instance Verdict, 9 October 2015; *Dragić Sretko et al*, Banja Luka District Court, Second Instance Verdict, 29 June 2015; *Dževad Mahmutović*, Bihać Cantonal Court, First Instance Verdict, 23 February 2015; *Branko Pudić*, Brčko District Basic Court, Second Instance Verdict, 5 February 2013; *Atif Krkalić*, Zenica Cantonal Court, Second Instance Verdict, 21 November 2012; *Dimče Ivčev and Dražen Urošević*, Brčko District Basic Court, Second Instance Verdict, 24 August 2012; *Sabahudin Operta et al*, Zenica Cantonal Court, Third Instance Verdict, 27 January 2010; *Edin Hakanović*, Zenica Cantonal Court, Second Instance Verdict, 3 September 2009; *Tomo Jurinović*, Banja Luka District Court, First Instance Verdict, 2 September 2009; *Mirsad Čupina et al*, Mostar Cantonal Court, Second Instance Verdict, 27 March 2008; *Drago Palameta*, Mostar Cantonal Court, Second Instance Verdict, 22 June 2006.

<sup>237</sup> The two cases in RS took place before the Banja Luka District Court. Of the remaining cases, five were tried in Brčko District BiH and 10 were tried before courts in FBiH, half of which were before the Bihać Cantonal Court.

Mission's knowledge, four of these sentences have in fact been converted – three of them before the Bihać Cantonal Court and one before the Zenica Cantonal Court.

These four cases merit particular attention, including with regard to their sexual violence elements. Two of these cases – *Beganović* and *Ćoralić* – relate to the same set of criminal acts carried out by the two perpetrators jointly involving inhuman treatment of civilians and the rape and attempted rape of two minor girls during the war. The Prosecutor's Office in Bihać filed an indictment against *Beganović* in December 2012 and following his trial he was found guilty of all charges and sentenced to five years' imprisonment by the Bihać Cantonal Court.<sup>238</sup>

On appeal, however, the Supreme Court of FBiH quashed the verdict for contradictory reasoning and returned the case to the Bihać Cantonal Court for retrial. In December 2014, the Prosecutor's Office in Bihać filed an indictment against the second perpetrator, *Ćoralić*, for inhuman treatment and rape of a minor civilian.<sup>239</sup> However, following the entry of a not guilty plea, the prosecutor and defendant agreed upon a plea bargain that was approved by the Bihać Cantonal Court in October 2015 and thus the case did not proceed to trial. The plea agreement provided that the perpetrator would serve one year in prison for the rape and inhuman treatment and that he would pay 50,000BAM (approximately 25,000EUR) restitution to the rape victim.<sup>240</sup> The *Beganović* retrial never began. In March of 2016 *Beganović* signed a plea bargain very similar to *Ćoralić*'s, providing for one year of imprisonment and the payment of 50,000BAM restitution to the victim.<sup>241</sup>

Both *Beganović* and *Ćoralić* immediately petitioned the Bihać Cantonal Court to convert their one-year prison terms to a fine per the applicable provisions in the FBiH CC. The court granted both requests as required by law.<sup>242</sup> To the OSCE Mission's knowledge, neither of the victims in either case was represented by an attorney at any stage of the proceedings. It is not clear whether the victims were informed that the prison sentence provided in the plea agreement could be converted to a fine.

The OSCE Mission questions whether conversion of a prison sentence to a fine in cases involving commission of international crimes serves the overall interest of justice as it has the potential to create the perception that perpetrators have not been fairly punished for

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<sup>238</sup> *Redžep Beganović*, Bihać Cantonal Court, First Instance Verdict, 18 May 2013 (overturned on appeal), p. 2.

<sup>239</sup> *Amir Ćoralić*, Prosecutor's Office of Una Sana Canton (Bihać), Indictment, 8 December 2014.

<sup>240</sup> *Amir Ćoralić*, Bihać Cantonal Court, First Instance Verdict, 19 October 2015, pp. 4.

<sup>241</sup> *Redžep Beganović*, Bihać Cantonal Court, First Instance Verdict, 18 March 2016, pp. 2–3.

<sup>242</sup> *Amir Ćoralić*, Bihać Cantonal Court, Decision (on substitution of fine), 25 January 2016 (ordering *Ćoralić* to pay 36,500BAM for the full year sentence); *Redžep Beganović*, Bihać Cantonal Court, Decision [on substitution of fine], 7 July 2016 (ordering *Beganović* to pay 22,200BAM for the remainder of time left on his sentence when time served for custody is subtracted).

their deeds. This could undermine public confidence in the criminal justice system by suggesting that those who have been convicted and sentenced for serious criminal offences, but who have the money to pay a fine, are able to purchase their freedom.

The OSCE Mission therefore recommends that the legislatures of BiH, FBiH, and BDBiH consider revising the applicable codes either to make an exception to the provision on conversion to a fine in cases of international law violations, or to reduce the maximum sentence eligible for conversion to six months, as in the RS, which would eliminate the possibility of conversion of war crimes sentences.

## 6. Witness Protection and Support

Adequate witness protection and support mechanisms are crucial not only to the well-being of vulnerable witnesses, but to the integrity of the criminal justice system on the whole.<sup>243</sup> This applies to witnesses in conflict-related sexual violence cases in particular, since victims of such crimes often exhibit enduring trauma that can affect their memory and the appearance of reliability and consistency at trial.<sup>244</sup>

The critical nature of victim-witnesses in the criminal justice process is reflected in the National Strategy for War Crimes Processing, which emphasized the importance of “creat[ing] an atmosphere in which witnesses will give evidence free of fear or threats or pressures that may pose a threat to their lives or lives of people close to them.”<sup>245</sup> The National Strategy therefore included provisions aimed at improving witness protection and support in all courts handling war crimes cases, including the fitting of courts with separate rooms for witnesses testifying under protective measures,<sup>246</sup> the hiring of psychologist-witness support officers in all prosecutors’ offices and courts,<sup>247</sup> and the establishment of coordinating mechanisms at the State and entity levels in order to improve exchange of information and prevent repeated interviewing of vulnerable witnesses.<sup>248</sup>

### 6.1. Institutional measures and mechanisms

The OSCE Mission is encouraged to have observed a series of distinctly positive trends in the rendering of witness protection and support in recent years. These trends relate to the increasingly effective use of witness protection measures by prosecutors and courts, the provision at most institutions of adequate infrastructure and staffing for effective support, and an apparently increasing sensitivity of prosecutors and judges to the needs and interests of witnesses, particularly those who have experienced trauma, including sexual violence victims.

In CRSV cases monitored and analysed for this report, the OSCE Mission observed

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<sup>243</sup> For more on the important role of witnesses in war crimes proceedings and an early assessment of the situation for witness support in BiH, see OSCE Mission to BiH, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a Year After Adoption of the National Strategy for War Crimes Processing* (2010).

<sup>244</sup> See section 4.3.4 above relating to judicial assessment of witness credibility in CRSV cases.

<sup>245</sup> National Strategy for War Crimes Processing (2008), p. 31, [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)

<sup>246</sup> *Ibid.*, p. 34, [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)

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, p. 33–34, [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)

extensive witness protection measures proposed by prosecutors and ordered by courts.<sup>249</sup> These measures included the granting of pseudonyms – including the omission of a victim’s full name from public court documents – exclusion of the public from main trial hearings, and allowing vulnerable witnesses to testify from a separate room with audio-video distortion. While this is particularly true at the Court of BiH, entity courts have also greatly increased their use of such measures in recent years, in large part thanks to budgetary support allowing for the construction of appropriate facilities as envisaged by the National Strategy.<sup>250</sup> The OSCE Mission has observed that many entity courts now have a policy of automatically offering a victim of sexual violence the opportunity to testify from another room via video-audio link. While a victim is always free to refuse this measure, if for example she or he wishes to face the perpetrator in the courtroom or to testify publicly, the practice by courts signals a generally positive shift towards putting the interests of victim-witnesses in a place of higher priority.

Furthermore, the capacity of courts and prosecutors’ offices across the country to render adequate psychological support to vulnerable witnesses has dramatically increased in the last three years, as most of these institutions now employ a full-time, dedicated witness support officer to assist during the investigation and at trial.<sup>251</sup> The typical role of this

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<sup>249</sup> *E.g.*, *Gligor Begović*, Court of BiH, Main Trial (Some victims of sexual violence granted pseudonyms; public excluded from relevant hearings when details of sexual violence were discussed); *Petar Kovačević*, Court of BiH, Main Trial (Victims granted pseudonyms, public excluded from relevant hearings); *Dževad Dulić*, Court of BiH, Main Trial (Victim and relative granted pseudonyms, public excluded from relevant hearings); *Ibro Macić*, Court of BiH, Main Trial (Victims provided with pseudonyms, public excluded from hearings when protected witnesses testified, public banned from revealing identities of victims); *Oliver Krsmanović*, Court of BiH, Main Trial (Victim provided with pseudonym, public excluded from hearing); *Slavko Savić*, Court of BiH, Main Trial (Victim provided with pseudonym, hearings closed to public); *Bosiljko Marković and Ostoja Marković*, Court of BiH, Main Trial (Victim provided with pseudonym, hearings closed to public, victim testified from another room); *Adil Vojić and Bekir Mešić*, Court of BiH, Main Trial (Court excluded public from parts of the main trial to protect private life of victim; court omitted victim’s name from related court decisions read at trial); *Goran Popović*, Court of BiH, Main Trial (Court excluded public from select hearings to protect the interests of protected witnesses and the private life of victims of sexual violence; victims granted pseudonyms); *Duško Soléša*, Bihać Cantonal Court, Main Trial (Public excluded from trial); *Vladimir Šišić*, Doboj District Court (Court excluded public from entire main trial and offered the victim the opportunity to testify from another room); *Branko Milanović*, Doboj District Court (Court offered victim opportunity to testify from a separate room, which she refused because she wanted to testify in open court; public excluded from the main trial with the exception of the individuals providing support to the victim).

<sup>250</sup> For more information on externally-funded witness support projects, see OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), p. 41.

<sup>251</sup> As of the time of writing, to the OSCE Mission’s knowledge, institutions employing a full-time witness support officer with external or central funding were: Court of BiH, Prosecutor’s Office of BiH, Banja Luka District Court, Bihać Cantonal Court, Bihać Cantonal Prosecutor’s Office, Brčko District Basic Court, Istočno Sarajevo District Prosecutor’s Office, Istočno Sarajevo District Court, Mostar Cantonal Prosecutor’s Office, Sarajevo Cantonal Court, Sarajevo Cantonal Prosecutor’s Office, Travnik Cantonal

person is to assess the mental state of the witness during the investigation, to provide an opinion to the prosecutor and the court on the individual's ability to testify and the potential need for protective and support measures; and to provide psychological support to the witness during investigation and during trial.<sup>252</sup>

The OSCE Mission has observed that prosecutors' offices and courts rely increasingly on the services and expert opinions of these witness support specialists to ensure that vulnerable witnesses are prepared to testify and are not unnecessarily subjected to re-traumatization in the course of the proceedings.<sup>253</sup> In some cases, the trial panel took into account the expert assessment of a witness support officer in deciding whether to grant protective measures or other procedural motions relating to a vulnerable witness.<sup>254</sup>

The *Jović* case before the Banja Luka District Court provides an illustrative example of how the expertise of a witness support officer can positively impact a court's approach to a traumatized witness. In that case, Jović was charged with the co-perpetration of war crimes in the form of the murder of several civilians and the rape of one woman, who was related to some of the murder victims. The rape victim had already testified in the proceedings against two of Jović's co-perpetrators in 2007; Jović himself was at large during those proceedings, but he was named as a perpetrator in the indictment against the other two.<sup>255</sup> When Jović became available to the Court, the Banja Luka District Prosecutor's

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Prosecutor's Office, Novi Travnik Cantonal Court, Trebinje District Prosecutor's Office, Tuzla Cantonal Prosecutor's Office, Zenica Cantonal Court, and Zenica Cantonal Prosecutor's Office.

<sup>252</sup> Based on the OSCE Mission's trial monitoring experience, it is not uncommon for traumatized witnesses to become very agitated during testimony, particularly during cross-examination. In some cases witnesses collapse or faint. In these cases a witness support officer, present during the proceedings, is able to request an adjournment and accompany the witness out of the courtroom for a break and counseling.

<sup>253</sup> *E.g.*, *Oliver Kršmanović*, Court of BiH, Main Trial (Victim assisted and accompanied by witness support officer throughout hearing, waited and entered from a separate room); *Branko Milanović*, Doboj District Court (Doboj District Prosecutor's Office witness support officer provided assistance to the victim during the investigation, during the trial, and afterwards. The victim was granted effective protection measures including testimony from a separate room and exclusion of the public from the main trial. Furthermore the court called for a recess when it became evident that the victim was overwhelmed and required a break during her testimony).

<sup>254</sup> *E.g.*, *Asim Kadić*, Zenica Cantonal Court (During the hearing on 7 May 2013, the Court rejected defence attorney objections to special protective measures for the victim, taking into consideration the opinion of expert witness-psychologist who testified as to the re-traumatization suffered by the victim by repeated interviews; court and prosecutor's office cooperated with NGO Medica Zenica to ensure victim received adequate support); *Željko Jović*, Banja Luka District Court (Witness Support Officer cooperated effectively with prosecutor's office to assess psychological state of traumatized victim-witness residing abroad; Court accepted motion by prosecutor, on the basis of the WSO report, to read the victim's statement aloud instead of requiring her to testify).

<sup>255</sup> One of Jović's co-perpetrators was convicted, while another accused was acquitted. *See Saša Lipovac*, Supreme Court of the Republika Srpska, Second Instance Verdict, 25 November 2010 (convicting Lipovac for murders and rape as a war crime); *Dražen Nikić*, Supreme Court of the Republika Srpska,



Office filed an indictment against him for the murders and his facilitating role in the rape; the indictment foresaw the victim's testimony at his trial.<sup>256</sup> At a later stage, however, the prosecutor in the case filed a motion with the court proposing an exception to the CPC requirement of the direct presentation of evidence,<sup>257</sup> in light of the severe trauma suffered by the victim. The prosecutor proposed instead to read at trial two earlier statements of the victim taken during the investigation. The motion was supported by a report compiled by the Banja Luka District Court's witness support officer, who had been in contact with the victim by phone and assessed that the victim's testimony would certainly lead to her re-traumatization and disturbance to her private life.<sup>258</sup> The Court accepted the prosecution's motion, with the approval of the defence, noting in its first instance verdict that the victim "suffered trauma related to the incident and she underwent medical treatment in Denmark in 2006 and 2007 in order to overcome the traumatic experience. Therefore, she is mentally not able to approach the court in order to testify."<sup>259</sup> The victim's previous statements, supplementing the extensive testimony of an insider witness and that of Jović's co-perpetrators, formed part of the basis for the convicting verdict against Jović, who was sentenced to 10 years' imprisonment for his role in the crimes.<sup>260</sup> The case provides a strong example for how the assessment work of a witness support officer can help courts formally consider the interests of the victim during criminal trials for CRSV, while still respecting the fair trial rights of a defendant.

Further indicators that courts are taking an increasingly sensitive approach to vulnerable witnesses can occasionally be found in the reasoning of their verdicts. For example, in *Zelenika et al*, the Court of BiH explains its reasoning for not requiring a male victim of forced fellatio to describe the experience in detail during his testimony:

The Panel came to believe that this witness did not want to testify about the events he had witnessed in the Dretelj detention camp, feeling uncomfortable talking about such details. Taking this into account and, as per the Panel's assessment, that the witness did not want to confirm the allegations in the

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Second Instance Verdict, 8 December 2009 (acquitting the accused of all charges).

<sup>256</sup> The indictment charged that Jović participated in the rape by holding a gun against the victim's head during the assault and pulling the trigger (whereby no shot was fired). *Željko Jović*, Banja Luka District Prosecutor's Office, Indictment, 11 February 2015, pp. 2–3.

<sup>257</sup> Art. 288 of the RS CPC allows for exceptions to the direct presentation of evidence. Sub-paragraph 2 of the article provides that a prior statement given by a witness during the investigation can be used as evidence during trial if that person is "dead, affected by mental illness, cannot be found or their presence in court is impossible or very difficult due to important reasons."

<sup>258</sup> The victim was living abroad and had married since she gave her testimony in the *Lipovac and Nikić* proceedings; in light of these new life circumstances, she strongly opposed the proposal that she return to BiH to give testimony as to the same set of facts she attested to earlier.

<sup>259</sup> *Željko Jović*, Banja Luka District Court, First Instance Verdict, 28 September 2015, p. 17.

<sup>260</sup> *Ibid.*, p. 28.

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indictment in order to protect his private life, the witness was not further asked to confirm the above statements of other witnesses, considering that sufficient evidence has been presented in connection to this event that indisputably suggest that the described sexual abuse that had occurred without the consent of the victims and in an especially degrading manner, where they were made to perform fellatio on each other, in the presence of other inmates...<sup>261</sup>

In other verdicts, the Court's interest in protecting victims from re-traumatization can be seen in reasoning regarding judicial recognition of facts established by the ICTY. The Law on Transfer of Cases from the ICTY allows for courts in BiH to accept as proven facts established by the ICTY.<sup>262</sup> The circumstances under which a court may decide to do so are well developed in the case law of the Court of BiH.<sup>263</sup> This practice is not only positive for judicial efficiency – preventing the re-litigation of issues such as the existence of an armed conflict in a certain area, when its existence has been proven in multiple previous cases – but also for helping protect witnesses from re-traumatization due to multiple testimonies. In deciding on the admission of established facts in *Kovačević*, the court underlined the purpose of such measures during criminal proceedings:

The legislature provided the court with the discretionary right to accept as proven the adjudicated facts bearing in mind the economy of the proceedings, the right of the accused to a trial in a timely manner and the wellbeing of witnesses by reducing the number of courts before which they have to repeat their, often traumatic, testimonies.<sup>264</sup>

The increased use of established facts in war crimes cases represents a positive development. The OSCE Mission notes that entity level courts would also benefit from increased use of established facts in order to spare judicial resources and prevent re-traumatization of witnesses in some cases.

While lauding the significant advances in witness protection and support achieved by the judiciary in recent years, the OSCE Mission notes that some challenges still remain to be addressed. In some cases, for example, courts have failed to take full advantage of the witness

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<sup>261</sup> *Ivan Zelenika et al*, Court of BiH, First Instance Verdict, 14 April 2015, para. 743.

<sup>262</sup> Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in Bosnia and Herzegovina, Art. 4.

<sup>263</sup> See, e.g., *Petar Kovačević*, Court of BiH, First Instance Verdict, 2 November 2015, paras. 41–68 (Court undertakes analysis of the nine factors relevant to a decision on admission of facts established by the ICTY in the *Mitar Vasiljević* case (IT-98-32), finding that the facts proposed by the prosecutor may be admitted per art. 4 of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH).

<sup>264</sup> *Ibid.*, para. 66.

protection measures and facilities available to them.<sup>265</sup> In other cases, protective measures ordered by the court are not fully enforced during the proceedings. The OSCE Mission monitored a number of wartime sexual violence cases where the names of protected witnesses were revealed during the trial, often with members of the public and journalists present.<sup>266</sup>

In a few cases monitored by the Mission, it was not clear whether the prosecution fully understood the witness protection measures issued by a court or was adequately skilled and conscientious in consistently applying them throughout the proceedings. In the *Laličić* case before the Court of BiH, for example, the Court had granted a victim of sexual violence a pseudonym. During the hearing in which the victim-witness testified, however, the prosecutor was unable to answer the presiding judge's inquiry as to whether the victim had requested protective measures other than the pseudonym. The prosecutor ultimately answered that a pseudonym should be sufficient.<sup>267</sup> Unsatisfied with the prosecutor's response, the Court ordered a closed hearing with the victim to ask her directly which protective measures she would like to request. During the same hearing, the prosecutor asked another witness – who testified without protective measures – whether she was related to the sexual violence victim, an impermissible question as it could reveal the victim's identity. The Court was forced to remind the prosecutor that such questions are not allowed.<sup>268</sup>

Protective measures for victims of sexual violence are crucial for ensuring that those who have endured traumatic events are able to participate in the criminal justice process while maintaining their dignity and privacy. In the few cases where the full names of vulnerable witnesses have been revealed despite pseudonyms being granted by the court, these individuals were robbed of the sense of security and privacy that such measures provide.

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<sup>265</sup> *E.g., Asim Kadić*, Zenica Cantonal Court (in spite of finding that the victim was highly traumatized, the court did not offer her the possibility to testify over video-audio link from another room, instead ordering the public and the defendant to leave the courtroom for the duration of the victim's testimony. It is unclear why the Court did not utilize the video-audio equipment on its premises provided in the same year by an EU project. See Cantonal Court Zenica website, "Sastanak predsjednice Kantonalnog suda u Zenici sa šefovima terenskih ureda Misije OSCE u Zenici i Travniku," 3 October 2013, <http://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=45701>).

<sup>266</sup> *Zoran Dragičević*, Court of BiH (name of protected witness – the victim of sexual violence – was revealed by another protected witness. The court issued a warning but no sanction); *Bosiljko Marković and Ostoja Marković*, Court of BiH (identity of protected witness was revealed during the testimony of an investigator from the State Investigation and Protection Agency, who had not been informed by the prosecutor about the protective measures. The Court reminded the parties that the identity of protected witnesses shall not be revealed, but did not issue any sanction. Furthermore, the victim's immediate family members who testified at trial were not granted pseudonyms, effectively negating the victim's own identity protection); *Brnjic Marijan et al*, Court of BiH, Main Trial (in one hearing, the prosecutor read aloud the full name of rape victim who had requested her name not be made public).

<sup>267</sup> *Zaim Laličić*, Court of BiH, Main Trial Hearing, 9 March 2015.

<sup>268</sup> *Ibid.*, It is worth noting that the victim was also unaccompanied by a witness support officer, suggesting that the prosecutor had not informed the witness support section about the need for this service.

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Courts should take such violations seriously, whether they are committed by one of the parties or by a member of the court itself, including by issuing sanctions when appropriate.

In a number of other instances monitored by the OSCE Mission, the full names of sexual violence victims were provided in indictments and/or verdicts, which are available to the public or reported in the media.<sup>269</sup> The OSCE Mission notes that due to the stigma that can be associated with sexual violence crimes, the revelation of a victim's name even once can have seriously detrimental effects for his or her well-being and privacy. It is therefore critical that prosecutors at all levels provide full and accurate information to a victim of sexual violence about all possibilities for protection measures before the indictment is filed, so that the victim has realistic expectations and is able to make an informed decision about how she or he wants to proceed.

Witness support can also be improved despite major progress made in recent years. The OSCE Mission observes occasional exceptions to the generally increased sensitivity of judges and prosecutors to the needs of vulnerable witnesses.<sup>270</sup> In spite of the National Strategy having envisaged this and the availability of funding through international projects,<sup>271</sup> a number of entity prosecutors' offices and courts still do not have a dedicated witness support officer.<sup>272</sup> In some instances, where either a court or a prosecutor's office employs a witness support officer, both institutions benefit from their services. Of particular concern,

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<sup>269</sup> *E.g., Veselin Vlahović Batko*, Court of BiH (name of one protected witness-victim's father and his address revealed in both the indictment and verdict, and the name of another protected witness-victim's husband and address revealed in the verdict; full names of murder victims, who were direct family members of two victims of sexual violence, provided in both the indictment and the verdict); *Josip Tolić*, Court of BiH (victim posthumously named in judgment); *Predrag Milisavljević et al*, Court of BiH; *Ljubić Tihomir*, Mostar Cantonal Court; *Radosav Milovanović*, Bijeljina District Court; *Asim Kadić*, Zenica Cantonal Court.

<sup>270</sup> *E.g., Aleksandar Ostojić and Miladin Tošić*, Brčko District Basic Court (No support was offered to the evidently traumatized victim and court took an insensitive approach to him, forcing him to testify and threatening him with a fine during the course of the main trial when he refused to answer certain questions; in the Brčko District Appeals Court verdict of 30 May 2016 the victim was referred to as "very uncooperative").

<sup>271</sup> It must be noted that, due to funding delays of the EU Instrument for Pre-Accession Budgetary Support in 2015–2016, several witness support officers funded under this mechanism were laid off. Some have been re-hired, while as of the time of writing, some of the affected positions remained vacant. This has unfortunately had an effect on the level of support provided to vulnerable victims. In *Vladimir Šišić* before the Doboj District Court, for example, a traumatized victim of sexual violence was forced to testify without any support measures since the witness support officer in that institution had been laid off during the course of the proceedings.

<sup>272</sup> *E.g.* Banja Luka District Prosecutor's Office; Bijeljina District Court; Bijeljina District Prosecutor's Office; Brčko District Prosecutor's Office (uses services of Brčko District Police); Doboj District Court; Doboj District Prosecutor's Office (previously had a witness support officer who was laid off due to funding challenges); Livno Cantonal Prosecutor's Office; Livno Cantonal Court; Mostar Cantonal Court (uses services of Mostar Cantonal Prosecutor's Office witness support officer); Trebinje District Court.

however, are jurisdictions where neither the court nor prosecutor's office employs any witness support provider, for example in Bijeljina. The OSCE Mission notes with regret the complete lack of protective or support measures offered to sexual violence victims before that court, in contrast to virtually every other court in BiH.<sup>273</sup>

The OSCE Mission recommends that court presidents and chief prosecutors in institutions that lack a dedicated witness support officer take into full consideration the benefits that employing such a specialist can provide, not only for the well-being of witnesses and victims, but for the reliability and integrity of the evidentiary record in their cases, ultimately having a positive effect on the overall administration of justice.

The OSCE Mission lauds the important advancements made by judicial institutions in BiH in terms of respect for, and protection of, the interests of vulnerable witnesses, including victims of sexual violence. The Mission recommends that judges and prosecutors continue to build their capacities to adequately assess and support the needs of witnesses and, whenever possible, to take full advantage of existing infrastructural and human resources available for their protection and support.

## 6.2. Non-governmental mechanisms

As described in the OSCE Mission's last report on CRSV cases before entity-level courts,<sup>274</sup> a broad range of non-governmental organizations provide support to witnesses in wartime sexual violence cases in BiH. These NGOs provide services such as psychological counselling, legal aid, logistical aid such as transport for witnesses to and from court hearings, and moral support during testimony (for example by having a staff member present in the courtroom during the trial when a client witness testifies).

In early 2015, several of the leading organizations providing such support launched a project with EU Instrument for Pre-Accession (IPA) financial support to create a more structured network of witness support service providers and build their capacity. The network established by the project includes among others the institutional providers found in courts and prosecutors' offices as well as law enforcement, civil society, and others involved in witness support.<sup>275</sup>

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<sup>273</sup> In the *Milovanović* case discussed above, for example, the victim of sexual violence was offered no protective or support measures by the prosecutor or court. Consequently, the victim testified in open court under her full name. The lack of appropriate court facilities including a separate entrance and waiting room also resulted in the victim waiting in the same hallway as the accused for the proceedings to begin. *Radosav Milovanović*, Bijeljina District Court, Main Trial.

<sup>274</sup> OSCE Mission, *Combating Impunity for CRSV* (Entity courts, 2004–2014), pp. 40–42.

<sup>275</sup> "Ensuring access to Justice for witness/victims through strengthening existing and establishing new Witness support Networks across BH," <http://www.svjedocipravdapristup.com/index.php/en/o-projektu>

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Among other activities, the project successfully established a series of regional protocols which delineate the responsibilities of various governmental and non-governmental actors in the realm of witness support. For each of the 15 regional sub-networks established by the project, a protocol has been signed or is due to be signed by each of the relevant institutions and organizations involved in witness support for that region, particularly prosecutors' offices, courts, social welfare centres, health care centres, victims' and veterans' associations, NGOs, law enforcement, and municipal administration. In principle, the protocols should create a clearer channel for referrals from one institution to another as a vulnerable witness proceeds through the criminal justice process, from pre-investigation stage support through post-testimony counselling and social services. At the time of writing, protocols had been signed in every region of the country except Sarajevo Canton. The project has comprehensively mapped each of its regional networks and makes this information publicly available in several languages, providing a useful resource for victim-witnesses and service providers alike.<sup>276</sup>

The semi-structured referral system developed by the project seems to be achieving results in at least some regions. For example, project implementer Vive Žene reported that in 2015–2016, it received referrals from a range of judicial and non-governmental actors, including the Cantonal Prosecutor's Office in Tuzla, the District Prosecutor's Office in Istočno Sarajevo, the State Investigation and Protection Agency's Tuzla Regional Office, the Centre for Mental Health of Tuzla, the Centre for Social Work of Tuzla and the Brčko Camp Survivor Association.<sup>277</sup>

The services provided by witness support NGOs inside the formal networks as well as those who do not participate<sup>278</sup> continue to represent an important source of support for survivors of sexual violence. While the progressive development of institutional mechanisms, as described above, is critical for the sustainability of witness support services within the judiciary, given the current financial and human resources available, NGOs continue to play an important role in helping victim-witnesses overcome psychological trauma, allowing for access to social services and legal aid, and in providing a conduit between the prosecution and victims who are ready to report an offence.

For a maximally efficient and effective witness support services web, the OSCE Mission recommends that non-governmental and institutional witness support providers continue to strengthen their co-operation and develop reliable referral mechanisms. Such efforts will

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<sup>276</sup> See "Ensuring access to Justice for witness/victims through strengthening existing and establishing new Witness support Networks across BH," Networks, <http://www.svjedocipravdapristup.com/index.php/en/2015-03-17-15-20-43>

<sup>277</sup> This information was furnished by Vive Žene in a meeting with the OSCE Mission in February 2017.

<sup>278</sup> For example, the Mission has observed numerous war crimes cases in which Prijedor-based NGO Izvor, which does not participate in a formal witness support network, has provided transportation to many victim-witnesses of sexual violence at both the state and entity levels.

ultimately ensure that victims of sexual violence are adequately supported before, during, and after the conclusion of criminal proceedings.

### 6.3. Victim representation and compensation claims

The OSCE Mission is encouraged by the expanding successful enforcement of non-material damage claims during war crimes proceedings. Although a victim's right to claim such damages during criminal proceedings is guaranteed by the CPCs, until recently courts were reluctant to grant such claims, instead referring victims of war crimes to civil proceedings following the conclusion of the main criminal trial.

Allowing those injured by major crimes to claim non-material<sup>279</sup> damages is an important advancement in victims' rights in BiH.<sup>280</sup> This process takes into account the concrete and lasting effects of trauma on individuals and seeks to compensate their permanently reduced quality of life. In addition, it empowers victims during the criminal proceedings to play a role as more than just a passive witness. Victims file their own claim for compensation – although usually with the assistance of a legal representative – and give a statement before the court regarding the claim.

Carrying out this procedure during the criminal proceedings, rather than in a separate civil suit, offers several benefits. First, it spares victims the expense and trauma of re-testifying as to the relevant facts in a separate civil proceeding, when they have already given the relevant testimony during a criminal trial. Second, it allows compensation claims to be decided upon by a court while still guaranteeing the victim's privacy based on protective measures granted during the criminal proceedings – in a civil case, the victim would be forced to reveal her identity in order to file the suit. Finally, streamlining the decision on a non-material damages claim with the criminal proceedings also promotes judicial economy by avoiding a separate procedure before a different court.

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<sup>279</sup> Types of non-material damage recognized by the case law in BiH include “A) Physical pain caused by bodily injury, surgery during medical treatment as well as the pain that occurred after medical treatment. B) Mental anguish which might be caused by decreased vital activities, mutilation (lost of the parts of the body, scars etc), death or disability of close person, rape and sexual harassment. C) Fear suffered due to the commission of a criminal offence and after it, if the fear was especially strong and was of long duration.” See OSCE Mission to BiH, Template for Petition for Property Claim, footnote 6, *available at* <http://www.osce.org/bih/277561>

<sup>280</sup> For more on the rationale, legal mechanism, and practical challenges arising in the enforcement of compensation claims in war crimes proceedings before courts in BiH, see TRIAL International, *Enforcement of Damage Compensation Claims of Victims of War in Criminal Proceedings in Bosnia and Herzegovina: Situation, Challenges and Perspectives (2015)*, *available at* [http://trial.ba/wp-content/uploads/2015/10/ENG\\_Ostvarivanje-zahitjeva-za-naknadu-%C5%A1tete-%C5%Bertava-ratnih-zlo%C4%8Dina-u-okviru-krivi%C4%8Dnih-postupaka-u-Bosni-i-Hercegovini-%E2%80%93-stanje-problemi-i-perspektive-.pdf](http://trial.ba/wp-content/uploads/2015/10/ENG_Ostvarivanje-zahitjeva-za-naknadu-%C5%A1tete-%C5%Bertava-ratnih-zlo%C4%8Dina-u-okviru-krivi%C4%8Dnih-postupaka-u-Bosni-i-Hercegovini-%E2%80%93-stanje-problemi-i-perspektive-.pdf)

In the *Vojić and Mešić* case, the Court of BiH explained clearly the reasoning behind allowing compensation for non-material damages to be awarded to victims of serious crime. After finding the co-defendants guilty of wartime rape, the Court ordered them to pay her 28,000BAM (approximately 14,300EUR) for non-material damages. In doing so, the Court identified the principle behind its decision:

[T]he Panel finds that awarding compensation to the victim of a crime, as was done in the case in hand, complies with the principle of social justice. Sociologically, the principle of compensating the victim should be equally important as the principle of punishment as a form of social reaction to a criminal activity. Namely, the purpose of trial must not be only the repression against the perpetrator of the crime, but rather to strive to fully restore the condition violated by the crime.<sup>281</sup>

At the time of writing, six such claims had been granted during war crimes proceedings,<sup>282</sup> all of them to victims of wartime sexual violence; of these, three had been confirmed by the second instance court while the others are still in the appeal stage.<sup>283</sup> In determining the amount of non-material damages, courts have referred to the orientation criteria established by the FBiH Supreme Court.<sup>284</sup>

Although the rapidly developing case law on property claims by victims is an encouraging

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<sup>281</sup> *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 354–355, 362.

<sup>282</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015, p. 6, para. 244 (victim represented by private attorney filed property claim; court ordered co-defendants to jointly compensate the victim a total of 26,500BAM for mental anguish caused by the violation of liberty or personality rights and by diminished quality of life); *Bosiljko Marković and Ostoja Marković*, Court of BiH, Second Instance Verdict, 29 February 2016, paras. 103–105 (affirming the first instance compensation order and providing reasoning as to the awarding of compensation to victims during criminal proceedings); *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016, paras. 354–355, 362 (ordering co-defendants to pay 28,000BAM in non-pecuniary damages to victim); *Slavko Savić*, Court of BiH, First Instance Verdict, 29 June 2015 (granting award of 30,000BAM to victim, upheld on appeal).

<sup>283</sup> *Bosiljko Marković and Ostoja Marković*, Court of BiH, First Instance Verdict, 24 June 2015 (compensation claim affirmed on appeal, 29 February 2016); *Slavko Savić*, Court of BiH, First Instance Verdict, 29 June 2015 (compensation claim affirmed on appeal, 24 November 2015); *Adil Vojić and Bekir Mešić*, Court of BiH, First Instance Verdict, 16 March 2016 (compensation claim affirmed on appeal, 1 December 2016); *Krsto Dostić*, Court of BiH, First Instance Verdict, 6 October 2016; *Mato Baotić*, Court of BiH, First Instance Verdict, 9 December 2016; *Nenad Vasić*, Doboj District Court, First Instance Verdict, 25 January 2017.

<sup>284</sup> For a detailed analysis of how courts have applied the criteria, see for example Trial International, *Dosuđivanje naknade nematerijalne štete i kriteriji za odmjeravanje iznosa naknada: Prikaz sudske prakse u krivičnim i parničnim postupcima u Bosni i Hercegovini* (2017) pp. 14, 17, 23, 26.



step in the right direction, challenges remain. First, some courts are still reluctant to grant such claims, preferring to refer victims to civil proceedings instead.<sup>285</sup> Notably, the Banja Luka District Court recently rejected a fully substantiated compensation claim during the first instance proceedings. In its verdict, the Court analysed evidence presented in relation to the non-material harm to the victim as follows:

[I]t is logical that, after being raped by multiple perpetrators, [the victim] was frightened, that she suffered a great shock as a young person, that her first intercourse occurred under threat and with use of force, which undoubtedly left far-reaching consequences on her mental health, which was also confirmed in the report of the expert witness Alma Bravo Mehmedbašić, which this court accepts in its entirety.<sup>286</sup>

Yet after acknowledging the non-material damages demonstrated by the expert witness, the Court concluded its verdict with a single sentence stating that the evidence submitted regarding the claim was insufficient and determining, without providing any justification, that deciding on the claim would unreasonably delay the proceedings.<sup>287</sup>

This decision by the Banja Luka District Court represented a complete departure from recent practice, as the type of evidence submitted by the prosecutor regarding the claim – including the psychiatric evaluation by a recognized expert – was almost identical to that submitted in similar claims granted by other courts.<sup>288</sup> The Court’s reasoning for rejecting this evidence as insufficient was unclear from its very brief reasoning.

A second challenge in this regard is ensuring that prosecutors order the collection of evidence that can substantiate a compensation claim during the investigation as required by law. This evidence is related to, but distinct from, the evidence that must be collected in support of a criminal charge. In a CRSV case, for example, the prosecution may order that the victim be examined by a medical expert to assess the physical or mental consequences of the crime, which is used to demonstrate that the crime occurred as well as to show the

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<sup>285</sup> *Dževad Dulić*, Court of BiH, First Instance Verdict, 11 September 2015, para. 11 (in his closing arguments, prosecutor suggested that the victim undertake civil suit to collect damages from the accused, rather than collecting the relevant evidence to be presented during the criminal proceedings as required by the CPC).

<sup>286</sup> *Smiljanić et al*, Banja Luka District Court, First Instance Verdict, 7 July 2016, p. 20.

<sup>287</sup> *Ibid.*, p. 22 (“Based on art. 108 of the RS CPC, the injured party [redacted] is directed to satisfy the compensation claim in civil proceedings because the evidence presented in the proceedings did not provide a reliable basis for complete or partial decision on the claim and any other action on the compensation claim by this court would result in a consequence of significant delay to the criminal proceedings.”)

<sup>288</sup> In fact, the same expert provided the evaluation and the victim was represented by the same lawyer, Nedžla Šehić, who had filed successful claims before other courts.

consequences for the victim as a basis for requesting a particular sentence (or when that is an element of the crime, for example in torture cases). For the compensation claim, however, it is necessary to introduce medical expertise showing the severity and extent of *ongoing* pain and suffering caused by the crime, and/or mental anguish caused by a reduced quality of life.<sup>289</sup> Often these two types of evidence are produced by the same expert; however, unless the prosecution specifically orders an assessment on the factors relating to a compensation claim, the expert will not provide them. This provides a *de facto* bar for a victim to claim compensation for non-material damages.

Finally, a third significant challenge relating to such claims is enforcing them once they have been awarded by a court. To the OSCE Mission's knowledge, as of the time of writing, none of the three non-material damage awards confirmed in a final and binding verdict had actually been paid. In many cases, the defendants simply do not have the assets to pay; in others, the practical challenges to liquidating their assets and using proceeds to pay out to a victim are too great.<sup>290</sup>

While the first two challenges can be addressed through increasing awareness among prosecutors and judges about the technical aspects of investigating and adjudicating compensation claims, the third challenge may require a more systemic solution. Some experts and organizations suggest the creation of a state-level victims' compensation fund that would step in to pay damages when a convicted perpetrator lacks assets to do so.<sup>291</sup> The Mission finds that lacking a pragmatic solution to the non-enforceability of awarded compensations claims, it is certainly crucial to appropriately manage victim's expectations in this regard to avoid further frustrations and harm.

Overall, the OSCE Mission positively assesses the general trend toward granting victims compensation for non-material damages as a result of conflict-related sexual violence. The Mission recommends that prosecutors and courts across the country increasingly adopt the practice of supporting, and deciding on, compensation claims by victims of war

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<sup>289</sup> The summary orientation criteria for determining compensation claims is provided in the OSCE Mission to BiH Template for Petition for Property Claim, footnote 6, *available at* <http://www.osce.org/bih/277561>

<sup>290</sup> One concern is that once a defendant has been charged, he or she is able to transfer ownership of property to a third party, thus blocking enforcement of a claim at a later stage. The OSCE Mission observes that prosecutors are beginning to address this challenge by filing motions for the relevant court to freeze the defendant's assets as soon as the indictment is filed, but to date no final and binding verdict has been reached in a conflict related sexual violence case where this procedure was used.

<sup>291</sup> One advocate for this approach is Nedžla Šehić, a private attorney who has represented victims in hundreds of civil compensation claim proceedings and in all six of the successful claims during criminal proceedings noted above. International organizations such as Amnesty International have also recommended the establishment of such a fund. *See Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119<sup>th</sup> Session, 6–29 March 2017*, p. 9.

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crimes during criminal trials. The Mission further joins a number of other organizations in recommending that the legislatures consider possible options for the establishment of a compensation fund that would ensure that claims granted to victims during proceedings are paid in full regardless of the perpetrator's financial status.

## 7. **Recommendations**

The OSCE Mission set forth recommendations to various actors in its prior two volumes on conflict-related sexual violence cases. In addition, the Mission has developed a number of new recommendations in light of the analysis provided in the present volume.

The newest recommendations are provided first below, followed by the prior recommendations in a table with information on their implementation status.

### 7.1. **Recommendations developed pursuant to the present analysis**

#### 7.1.1. *To prosecutors' offices and courts at the State and entity levels*

- Prosecutors and judges in all jurisdictions across BiH should ensure that the application of substantive criminal law occurs in a gender-neutral fashion, in particular ensuring that sexual violence is recognized and punished in all its forms, regardless of the sex of the victim or the perpetrator, including crimes of sexual violence against males.
- The Court of BiH and entity-level courts should harmonize their practice with regards to the interpretation of the *ne bis in idem* doctrine in sexual violence cases and other war crimes proceedings to ensure legal certainty and avoid the possibility of impunity. In addition, it is recommended that judges undertake particularly careful analysis when determining whether a war crimes indictment is barred by previous proceedings when the initial factual circumstances did not encompass the sexual violence crime.
- All judges in the Court of BiH and in entity level courts should explicitly disavow resistance as an element of the crime of rape in order to bring national jurisprudence fully in line with applicable domestic legislation as well as international law and standards.
- Courts in BiH should continue in the positive trend towards giving credence to a sexual violence victim's sole testimony when that testimony is reliable and credible.
- Prosecutors' offices and courts should continuously assess and explore opportunities during the investigation stage and trial stage for the use of measures such as international legal assistance that can improve the efficiency of the proceedings and help improve the criminal justice experience for vulnerable witnesses.
- Courts across BiH should provide full, clear reasoning with regards to sentencing practices including the application of aggravating and mitigating factors, in particular by assessing the validity and utility of considering certain mitigating factors and by individualizing the application of such factors to a particular accused. In addition, the

justice sector should consider developing practical guidelines on appropriate use of such factors in war crimes sentencing.

- In cases of plea bargaining, prosecutors should timely inform all the injured parties in a case about the ongoing plea negotiations and explain the potential advantages of the agreement to ensure that victims are informed about the ongoing proceedings and their role in them. Victims should be given an opportunity through a legal representative to express specific concerns about a potential deal. Prosecutors' offices should ensure that victims receive institutionalized support from a witness support officer throughout the process.
- Prosecutors should provide full, clear information to victims of sexual violence about all available possibilities for protection measures before indictments are filed, in order to ensure that victims are able to make an informed decision about which measures she or he would like to request and to avoid the possibility that victims' full names could be revealed in a public indictment or verdict when the victims do not want their name to be publicized.
- Judges and prosecutors should continue to build their capacities to adequately assess and support the needs of witnesses and, whenever possible, to take full advantage of existing infrastructural and human resources available for their protection and support. In addition, the Mission recommends that court presidents and chief prosecutors in charge of institutions that currently lack a full-time witness support officer take into full consideration the benefits that employing such an in-house specialist can provide, and to request funding allocations from the appropriate governmental body for the hiring of such a staff member.
- Prosecutors and courts across the country should increasingly adopt the practice of supporting, and deciding on, compensation claims by victims of war crimes during criminal trials, including victims of sexual violence.

#### *7.1.2. To the High Judicial and Prosecutorial Council BiH*

- The HJPC BiH should evaluate the capacity of entity-level courts and prosecutors' offices for utilizing international legal assistance for the collection and presentation of evidence in wartime sexual violence cases, and take appropriate training and support measures for offices that are found to require such measures.
- The HJPC BiH should call attention to best practices by courts and prosecutors' offices in the investigation, prosecution, and adjudication of CRSV cases, and to encourage the promulgation of these practices through publication of relevant information on its website and in public fora and through support to seminars and peer-to-peer discussions among justice sector professionals.

### *7.1.3. To the Legislatures of BiH, FBiH, and Brčko District BiH*

- The legislatures of BiH, FBiH, and Brčko District BiH should consider revising the applicable criminal codes to make an exception to the provision on conversion to a fine in cases of international law violations. Alternatively, the legislatures could consider reducing the maximum sentence eligible for conversion to six months, as in Republika Srpska, which would eliminate the possibility of conversion of war crimes sentences.

### *7.1.4. To the Judicial and Prosecutorial Training Centres*

- The Judicial and Prosecutorial Training Centres (JPTCs) should continue to support specialized training for judges, prosecutors, and legal associates on the processing of CRSV cases, based on observed trends and challenges identified in this report. The JPTCs should consider options for novel approaches to educational events on these topics in order to enhance practical skills, such as intensive workshop-style sessions designed to provide technical knowledge on topics such as compensation claims and vulnerable witness support.

### *7.1.5. To Witness Support Providers, including the NGO Sector*

- NGOs and institutional witness support providers should continue to strengthen their co-operation and develop reliable referral mechanisms. In addition, service providers should develop a uniform approach to supporting compensation claims, including referrals to free legal aid providers where possible.

### *7.1.6. To the International Community*

- The international community should continue engaging on the topic of justice for conflict-related sexual violence crimes, particularly from a survivor-focused perspective. Options for promoting survivors' rights include support for legal aid organizations representing CRSV survivors in compensation claims and initiatives aimed at strengthening psycho-social support structures for survivors.

## 7.2. Compilation of Previous Recommendations (2014–2015)

Recommendation	Recommendation made to	Implementation status	Further information
The BiH Prosecutor's Office should develop a policy for the prioritization, investigation and prosecution of conflict-related sexual violence and ensure there is dedicated capacity for this task. A summary of this policy should be made publicly available, in particular to survivors of sexual violence.	<b>BiH PO</b>	To the Mission's knowledge, no such policy has been developed to date.	
Prosecutors and judges should be vigilant about ensuring that allegations of sexual violence in all its forms are properly assessed and accordingly qualified so that the full nature and extent of the harm suffered by the victims is reflected in indictments and verdicts.	<b>Judges and Prosecutors at all levels in BiH</b>	Mostly	As described in the current report, the OSCE Mission has observed a visible improvement in the recognition and appropriate qualification of sexual violence crimes by prosecutors' offices and courts in BiH, although some cases continue to raise concerns. It is recommended that judges and prosecutors continue to attend trainings and stay up to date on current case law from international and national courts pertaining to wartime sexual violence.
The BiH Court and Prosecutor's Office should ensure that all judges, prosecutors, investigators, and relevant support staff have the opportunity to receive appropriate training and engage in peer exchanges in the best practices of investigation, prosecution and adjudication of conflict-related sexual violence. In particular, the BiH Court President and Head of the Special Department for War Crimes should identify precise training needs and inform training providers of these needs.	<b>BiH PO and BiH Court</b>	Partially	The BiH PO and Court of BiH routinely send staff to specialized OSCE Mission trainings on WTSV. To the OSCE Mission's knowledge there has been no systematic effort by either institution to identify precise training needs.
Parties should refrain from asking questions concerning the prior sexual conduct of a victim of sexual violence or attempting to admit such evidence in line with Article 264(1) of the BiH Criminal Procedure Code. Judges should be vigilant in halting such questioning when it occurs. Judges should consider prohibiting questions concerning subsequent sexual conduct of a victim of sexual violence in line with international best practice.	<b>BiH Court</b>	Mostly	As described in this report, for the most part such questioning does not occur, and when it does, judges immediately order it to stop. However, the Mission has monitored a couple of recent cases in which the prosecutor questioned the victim about prior conduct.

Recommendation	Recommendation made to	Implementation status	Further information
<p>Judges should interpret Article 264 of the BiH Criminal Procedure Code concerning the introduction of evidence of a victim's consent in a manner that balances the absence of any legal requirement to prove lack of consent with the fair trial rights of the accused. In particular, judges should consider requiring an <i>in camera</i> hearing procedure to determine the relevance and credibility of such evidence thus protecting the rights of victims of sexual violence.</p>	<p><b>BiH PO and BiH Court</b></p>	<p>Partially</p>	<p>As discussed in this report, courts in BiH have for the most part fully implemented the CPC prohibition on evidence of consent. Although courts have not required <i>in camera</i> hearings for such evidence to be evaluated, they do take into account the existence of coercive circumstances that negates a victim's ability to consent, and they have generally rejected attempts by the defence to admit evidence of consent.</p>
<p>The OSCE Mission recommends that, in the absence of a relevant provision within the BiH Criminal Procedure Code, the BiH Court standardize its practice recognizing the lack of a requirement for corroboration of witness testimony from victims of sexual violence to ensure that the particular nature of sexual violence crimes is appreciated in all proceedings before the Court</p>	<p><b>BiH PO and BiH Court</b></p>	<p>Mostly</p>	<p>As discussed in this report, courts across BiH generally do not require corroboration to a victim's sole testimony where it is credible and reliable. However, this practice is not uniform throughout BiH.</p>
<p>In order to ensure that all instances of conflict-related rape and other forms of sexual violence are recognized as such and appropriately charged and adjudicated, the OSCE Mission recommends that the BiH Parliament amend Articles 172(1)(g) and 173(1)(e) of the 2003 Criminal Code as a matter of urgency to bring them into line with international standards.</p>	<p><b>BiH Ministry of Justice and BiH Parliament</b></p>	<p>Yes</p>	<p>As described in section 3.1 of this report, the Criminal Code was amended in line with this recommendation and that of the Committee Against Torture to exclude force or threat of force as elements of the crime of rape.</p>
<p>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.</p>	<p><b>Entity level courts</b></p>	<p>Mostly</p>	<p>Courts increasingly recognize that there is no requirement that the prosecution show use of force or threat of force, although troubling exceptions remain.</p> <p>To the Mission's knowledge, no joint sessions have been held between courts pertaining to the harmonization of the application of criminal law in this regard.</p>



Recommendation	Recommendation made to	Implementation status	Further information
<p>Training providers – in particular the Judicial and Prosecutorial Training Centres and the Criminal Defence Section (Odsjek Krivične Odbrane) within the BiH Ministry of Justice – should provide training on conflict-related sexual violence covering the following areas in particular:</p> <p><b>a.</b> identifying evidence of conduct that may fall within the category of rape, sexual slavery, enslavement, torture, gender-based persecution and any other form of sexual violence of comparable gravity;</p> <p><b>b.</b> scope and application of special evidentiary and procedural rules concerning sexual violence cases</p>	<p><b>High Judicial and Prosecutorial Council, Judicial and Prosecutorial Training Centres and Other Training Providers</b></p>	<p>Yes</p>	<p>The OSCE Mission has organized a number of such trainings in co-operation with JPTCs throughout 2015 and 2016; more are planned for 2017. However, further training could be helpful on specific problem areas identified in this report and others.</p>
<p>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 persecution, 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.</p>	<p><b>Judges and Prosecutors in the Entities and Brčko District BiH</b></p>	<p>To the Mission's knowledge, no such policy has been developed to date.</p>	
<p>Law enforcement agencies should pay special attention to the <b>gender balance</b> 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.</p>	<p><b>Law Enforcement Agencies</b></p>	<p>The OSCE Mission is not aware of any particular policy in this regard.</p>	
<p>The High Judicial and Prosecutorial Council BiH <b>should ensure</b> that all judges, prosecutors, investigators, and relevant support staff in the entities and Brčko District BiH <b>have the opportunity to receive appropriate training</b> and to engage in peer-to-peer exchanges on best practices for investigating, prosecuting and adjudicating cases of conflict-related sexual violence.</p>	<p><b>High Judicial and Prosecutorial Council BiH</b></p>	<p>Partially</p>	<p>The OSCE Mission has organized such trainings in co-operation with HJPC BiH and JPTCs. However, further training could be helpful on specific problem areas, and the Mission is not aware of any systemic effort to identify knowledge gaps by the relevant institutions.</p>

Recommendation	Recommendation made to	Implementation status	Further information
<p>The Judicial and Prosecutorial Training Centres should provide additional specialized training on conflict-related sexual violence covering the following areas:</p> <ul style="list-style-type: none"> <li>• Definitions of rape and other forms of sexual violence</li> <li>• International jurisprudence on conflict-related sexual violence</li> <li>• Techniques for questioning witnesses on sexual violence</li> <li>• Impact of trauma on witnesses and preventing the re-traumatization of witnesses</li> <li>• 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</li> <li>• Gender issues, including differences in the motivation to testify</li> </ul>	<p><b>Judicial and Prosecutorial Training Centres of RS and FBiH</b></p>	<p>Yes</p>	<p>The OSCE Mission has organized such trainings in co-operation with HJPC BiH and JPTCs.</p>
<p>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 program, and to strengthen capacity for witness support in co-operation with relevant NGOs.</p>	<p><b>Executive and Legislative Authorities</b></p>	<p>Mostly</p>	<p>Most courts have been equipped with the appropriate facilities, including separate witness support rooms, video-audio equipment for remote testimony, and separate entrances for witnesses.</p> <p>Co-operation between institutional witness support officers and NGOs has been improved through the IPA-funded witness support network project, although referral mechanisms could be strengthened further.</p>

## **Annex A: List of CRSV Cases Completed during Reporting Period**

### **BIHAĆ CANTONAL COURT**

#### **1. BEGANOVIĆ**

- *Prosecutor v. Redžep Beganović*, Case No. 01 0 K006344 16 K 2, First Instance Verdict of 18 March 2016 (Plea bargain agreement)
- *Prosecutor v. Redžep Beganović*, Case No. 01 0 K006344 13 K, First Instance Verdict of 10 May 2013

#### **2. ĆORALIĆ**

- *Prosecutor v. Amir Ćoralić*, Case No. K 009451 15 K, First Instance Verdict of 19 October 2015 (Plea bargain agreement)

#### **3. KUBURIĆ AND BANJAC**

- *Prosecutor v. Bora Kuburić and Radmila Banjac*, Case No. K 01 0 K 008669 15 Kž, Second Instance Verdict of 6 October 2016 (FBiH Supreme Court)
- *Prosecutor v. Bora Kuburić and Radmila Banjac*, Case No. 01 0 K 008669 14 K, First Instance Verdict of 26 February 2015

#### **4. SOLEŠA**

- *Prosecutor v. Duško Soleša*, Case No. 01 0 K 008271 14 Kž, Second Instance Verdict of 22 May 2015 (FBiH Supreme Court)
- *Prosecutor v. Duško Soleša*, Case No. 01 0 K 008271 14 K, First Instance Verdict of 19 September 2014

#### **5. TOMIĆ**

- *Prosecutor v. Ranka Tomić*, Case No. 01 0 K 010221 15 Kps, Decision on transfer of proceedings to other country as of 26 May 2016

### **BIJELJINA DISTRICT COURT**

#### **6. MILOVANOVIĆ**

- *Prosecutor v. Radosav Milovanović*, Case No. 12 0 K 005012 16 Kž, Second Instance Verdict of 24 March 2016 (RS Supreme Court)
- *Prosecutor v. Radosav Milovanović*, Case No. 12 0 K 005012 15 K, First Instance Verdict of 22 January 2016

## **BRČKO BASIC COURT**

### **7. HADŽIĆ AND HODŽIĆ**

- *Prosecutor v. Galib Hadžić and Nijaz Hodžić*, Case No. 96 0 K 020424 15 Kž, Second Instance Verdict of 9 October 2015 (Brčko District Appellate Court)
- *Prosecutor v. Galib Hadžić and Nijaz Hodžić*, Case No. 96 0 K 020424 10 K, First Instance Verdict of 31 October 2014

### **8. OSTOJIĆ AND TOŠIĆ**

- *Prosecutor v. Aleksandar Ostojić and Miladin Tošić*, Case No. 96 0 K 024956 15 Kž 8, Second Instance Verdict of 30 May 2016, (Brčko District Appellate Court)
- *Prosecutor v. Aleksandar Ostojić and Miladin Tošić*, Case No. 96 0 K 024956 11 K, First Instance Verdict of 17 April 2015

### **9. TATAREVIĆ AND OMAZIĆ**

- *Prosecutor v. Asmir Tatarević and Armin Omazić*, Case No. 96 0 K 039065 15 Kž, Second Instance Verdict of 19 November 2015 (Brčko District Appellate Court)
- *Prosecutor v. Asmir Tatarević and Armin Omazić*, Case No. 96 0 K 039065 12 K, First Instance Verdict of 3 February 2015

## **BANJA LUKA DISTRICT COURT**

### **10. JOVIĆ**

- *Prosecutor v. Željko Jović*, Case No. 11 0 K 007515 15 Kž 7, Second Instance Verdict of 28 January 2016 (RS Supreme Court)
- *Prosecutor v. Željko Jović*, Case No. 11 0 K 007515 15 K, First Instance Verdict of 28 September 2015

## **DOBOJ DISTRICT COURT**

### **11. GRBIĆ**

- *Prosecutor v. Stojan Grbić*, Case No. 13 0 K 003304 15 K, Decision on Discontinuation of Proceedings of 15 April 2015

### **12. MILANOVIĆ**

- *Prosecutor v. Branko Milanović*, Case No. 13 0 K 002899 15 Kž, Second Instance Verdict of 16 March 2015 (RS Supreme Court)
- *Prosecutor v. Branko Milanović*, Case No. 13 0 K 002899 14 K, First Instance Verdict of 27 November 2014

### **13. ŠIŠIĆ**

- *Prosecutor v. Vladimir Šišić*, Case No. 13 0 K 003295 15 Kž, Second Instance Verdict of 28 August 2015 (RS Supreme Court)
- *Prosecutor v. Vladimir Šišić*, Case No. 13 0 K 003295 15 K, First Instance Verdict of 28 May 2015

## **MOSTAR CANTONAL COURT**

### **14. LJUBIĆ**

- *Prosecutor v. Tihomir Ljubić*, Case No. 07 0 K 012520 16 Kv, Decision on Rejecting Indictment of 22 April 2016

## **ZENICA CANTONAL COURT**

### **15. KADIĆ**

- *Prosecutor v. Asim Kadić*, Case No. 04 0 K 005141 14 Kz, Second Instance Verdict of 20 November 2014 (FBiH Supreme Court)
- *Prosecutor v. Asim Kadić*, Case No. 04 0 K 005141 13 K, First Instance Verdict of 6 February 2014

## **TUZLA CANTONAL COURT**

### **16. ŠKILJEVIĆ**

- *Prosecutor v. Radomir Škiljević*, Case No. 03 0 K 003575 06 Kps, First Instance Verdict of 26 February 2015 (Plea bargain agreement)

## **COURT OF BIH**

### **17. BEGOVIĆ**

- *Prosecutor v. Gligor Begović*, Case No. S1 1 K 016600 16 Krž 3, Second Instance Verdict of 28 April 2016 (*Begović* Appeal Judgment)
- *Prosecutor v. Gligor Begović*, Case No. S1 1 K 016600 14 Kri, First Instance Verdict of 11 December 2015 (*Begović* Trial Judgment)

### **18. BRNJIĆ ET AL**

- *Prosecutor v. Marijan Brnjić et al*, Case No. S1 1 K 016706 16 Krž, Second Instance Verdict of 22 April 2016 (*Brnjić et al* Appeal Judgment)
- *Prosecutor v. Marijan Brnjić et al*, Case No. S1 1 K 016706 14 Kri, First Instance Verdict of 15 December 2015 (*Brnjić et al* Trial Judgment)

## 19. BAŠIĆ AND ŠIJAK

- *Prosecutor v. Muhidin Bašić and Mirsad Šijak*, Case No. S1 1 K 007209 13 Krž , Second Instance Verdict of 5 November 2013 (*Bašić and Šijak* Appeal Judgment)
- *Prosecutor v. Muhidin Bašić and Mirsad Šijak*, Case No. S1 1 K 007209 12 Kri, First Instance Verdict of 18 January 2013 (*Bašić and Šijak* Trial Judgment)

## 20. ČONDRIĆ

- *Prosecutor v. Mato Čondrić*, Case No. S1 1 K 017569 16 Krž 5, Second Instance Verdict of 12 May 2016 (*Čondrić* Appeal Judgment)
- *Prosecutor v. Mato Čondrić*, Case No. S 1 1 K 017569 15 Kri, First Instance Verdict of 18 September 2015 (*Čondrić* Trial Judgment)

## 21. DRAGIČEVIĆ

- *Prosecutor v. Zoran Dragičević*, Case No. S1 1 K 008024 14 Krž 2, Second Instance Verdict of 28 February 2014 (*Dragičević* Appeal Judgment)
- *Prosecutor v. Zoran Dragičević*, Case No. S1 1 K 008024 12 KrI, First Instance Verdict of 22 November 2013 (*Dragičević* Trial Judgment)

## 22. DULIĆ

- *Prosecutor v. Dževad Dulić*, Case No. S1 1 K 017348 16 Krž, Second Instance Verdict of 7 March 2016 (*Dulić* Appeal Judgment)
- *Prosecutor v. Dževad Dulić*, Case No. S1 1 K 017348 14 Kri, First Instance Verdict of 11 September 2015 (*Dulić* Trial Judgment)

## 23. KAMERIĆ

- *Prosecutor v. Indira Kamerić*, Case No. S1 1 K 010132 15 Krž, Second Instance Verdict of 15 December 2015 (*Kamerić* Appeal Judgment)
- *Prosecutor v. Indira Kamerić*, Case No. S1 1 K 010132 13 KrI, First Instance Verdict of 17 April 2015 (*Kamerić* Trial Judgment)

## 24. KOVAČEVIĆ

- *Prosecutor v. Petar Kovačević*, Case No. S1 1 K 014093 16 Krž 3, Second Instance Verdict of 15 September 2016 (*Kovačević* Appeal Judgment)
- *Prosecutor v. Petar Kovačević*, Case No. S 1 1 K 00 14093 14 Kri, First Instance Verdict of 2 November 2015 (*Kovačević* Trial Judgment)

## 25. KRSMANOVIĆ

- *Prosecutor v. Oliver Krsmanović*, Case No. S1 1 K 006028 16 Krž, Second Instance Verdict of 21 April 2016 (*Krsmanović* Appeal Judgment)
- *Prosecutor v. Oliver Krsmanović*, Case No. S1 1 K 006028 11 Kri, First Instance Verdict of 31 August 2015 (*Krsmanović* Trial Judgment)

## 26. LALIČIĆ

- *Prosecutor v. Zaim Laličić*, Case No. S1 1 K 017982 15 Krž 2, Second Instance Verdict of 23 October 2015 (*Laličić* Appeal Judgment)
- *Prosecutor v. Zaim Laličić*, Case No. S1 1 K 017982 15 Kri, First Instance Verdict of 25 May 2015 (*Laličić* Trial Judgment)

## 27. MACIĆ (case split from *Osman Brkan* case)

- *Prosecutor v. Ibro Macić*, Case No. S1 1 K 011047 15 Krž, Second Instance Verdict of 30 October 2015 (*Macić* Appeal Judgment)
- *Prosecutor v. Ibro Macić*, Case No. S1 1 K 011047 13, First Instance Verdict of 17 April 2015 (*Macić* Trial Judgment)

## 28. MAKSIMOVIĆ

- *Prosecutor v. Dalibor Maksimović*, Case No. S1 1 K 013906 15 Kro, Decision on transfer of proceedings to other country as of 15 April 2016

## 29. MARKOVIĆ AND MARKOVIĆ

- *Prosecutor v. Bosiljko Marković and Ostoja Marković*, Case No. S1 1 K 012024 14 Krž, Second Instance Verdict of 29 February 2016 (*Marković and Marković* Appeal Judgment)
- *Prosecutor v. Bosiljko Marković and Ostoja Marković*, Case No. S1 1 K 012024 14 Kri, First Instance Verdict of 24 June 2015 (*Marković and Marković* Trial Judgment)

## 30. MILISAVLJEVIĆ ET AL

- *Prosecutor v. Predrag Milisavljević et al*, Case No. S1 1 K 011128 15 Krž 16, Second Instance Verdict of 2 June 2016 (*Milisavljević et al* Appeal Judgment)
- *Prosecutor v. Predrag Milisavljević et al*, Case No. 1 K 011128 12 Krl, First Instance Verdict of 28 October 2014 (*Milisavljević et al* Trial Judgment)

## 31. POPOVIĆ

- *Prosecutor v. Goran Popović*, Case No. S1 1 K 013866 15 Krž 5, Second Instance Verdict of 29 February 2016 (*Popović* Appeal Judgment)
- *Prosecutor v. Goran Popović*, Case No. S1 1 K 013866 13 Kri, First Instance Verdict of 30 April 2015 (*Popović* Trial Judgment)

## 32. RACKOVIĆ

- *Prosecutor v. Vitomir Racković*, Case No. S1 1 K 014365 15 Krž 4, Second Instance Verdict of 8 February 2016 (*Racković* Appeal Judgment)
- *Prosecutor v. Vitomir Racković*, Case No. S1 1 K 014365 14 Krl, First Instance Verdict of 11 May 2015 (*Racković* Trial Judgment)

### 33. SAVIĆ

- *Prosecutor v. Slavko Savić*, Case No. S1 1 K 017213 15 Krž, Second Instance Verdict of 24 November 2015 (*Savić* Appeal Judgment)
- *Prosecutor v. Slavko Savić*, Case No. S1 1 K 017213 14 KrI, First Instance Verdict of 29 June 2015 (*Savić* Trial Judgment)

### 34. ŠEKARIĆ

- *Prosecutor v. Dragan Šekarić*, Case No. S1 1 K 014550 15 Krž 8, Second Instance Verdict of 30 September 2015 (*Šekarić* Appeal Judgment)
- *Prosecutor v. Dragan Šekarić*, Case No. S1 1 K 014550 14 Kri, First Instance Verdict of 13 February 2015 (*Šekarić* Trial Judgment)

### 35. SOLDO

- *Prosecutor v. Radivoje Soldo*, Case No. S1 1 K 018201 15 Kri, First Instance Verdict of 3 November 2015 (*Soldo* Trial Judgment)

### 36. TOLIĆ

- *Prosecutor v. Josip Tolić*, Case No. S1 1 K 013929 15 Krž 7, Second Instance Verdict of 27 October 2015 (*Tolić* Appeal Judgment)
- *Prosecutor v. Josip Tolić*, Case No. S1 1 K 013929 13 KrI, First Instance Verdict of 20 March 2015 (*Tolić* Trial Judgment)

### 37. VLAHOVIĆ

- *Prosecutor v. Veselin Vlahović Batko*, Case No. S1 1 K 004659 13 Krž 15, Second Instance Verdict of 5 February 2014 (*Vlahović* Appeal Judgment)
- *Prosecutor v. Veselin Vlahović Batko*, Case No. S1 1 K 004659 11 Kri, First Instance Verdict of 29 March 2013 (*Vlahović* Trial Judgment)

### 38. VLAČO

- *Prosecutor v. Branko Vlačo*, Case No. S1 1 K 007121 14 Krž, Second Instance Verdict of 25 February 2015 (*Vlačo* Appeal Judgment)
- *Prosecutor v. Branko Vlačo*, Case No. S1 1 K 007121 12 Kri, First Instance Verdict of 4 July 2014 (*Vlačo* Trial Judgment)

### 39. VOJIĆ AND MEŠIĆ

- *Prosecutor v. Adil Vojić and Bekir Mešić*, Case No. S1 1 K012506 16 Krž, Second Instance Verdict of 1 December 2016 (*Vojić and Mešić* Appeal Judgment)
- *Prosecutor v. Adil Vojić and Bekir Mešić*, Case No. S1 1 K 012506 15 KrI, First Instance Verdict of 16 March 2016 (*Vojić and Mešić* Trial Judgment)



#### **40. ZELENİKA ET AL**

- *Prosecutor v. Ivan Zelenika et al*, Case No. S1 1 K 009124 16 Krž 8, Second Instance Verdict of 22 September 2016 (*Zelenika et al* Appeal Judgment)
- *Prosecutor v. Ivan Zelenika et al*, Case No. S1 1 K 009124 12 Krl, First Instance Verdict of 14 April 2015 (*Zelenika et al* Trial Judgment)

#### **CRSV cases extraordinarily re-opened pursuant to the ECtHR *Maktouf* Decision**

**MARKOVIĆ** (included in 2014 report; reopened by Constitutional Court decision of 17 March 2015)

- *Prosecutor v. Miodrag Marković*, Case No. S1 1 K 003426 15 Krž 2, Second Instance Verdict, 9 April 2015 (*Zelenika et al* Appeal Judgment)
- *Prosecutor v. Miodrag Marković*, Case No. S1 1 K 003426 11 KrŽ, Second Instance Verdict, 28 December 2011 (*Marković* Appeal Judgment)
- *Prosecutor v. Miodrag Marković*, Case No. S1 1 K 003426 10 Krl, First Instance Verdict, 15 April 2011 (*Marković* Trial Judgment)

**LAZAREVIĆ ET AL** (included in 2014 report; reopened by Constitutional Court decision of 6 November 2014)

- *Prosecutor v. Sreten Lazarević and others*, Case No. S1 1 K 018951 15 Kžk, Second Instance Verdict, 9 June 2015 (*Lazarević et al* Appeal Judgment)
- *Prosecutor v. Sreten Lazarević and others*, Case No. X-KRŽ-06/243, Second Instance Verdict, 22 October 2010 (*Lazarević et al* Appeal Judgment)
- *Prosecutor v. Sreten Lazarević and others*, Case No. X-KR-06/243, First Instance Verdict, 29 September 2008 (*Lazarević et al* Trial Judgment)

**BOGDANOVIĆ** (included in 2014 report; reopened by Constitutional Court decision of 21 July 2015)

- *Prosecutor v. Velibor Bogdanović*, Case No. S1 1K 003336 10 KrŽ, Second Instance Verdict, 18 September 2015 (*Bogdanović* Appeal Judgment)
- *Prosecutor v. Velibor Bogdanović*, Case No. S1 1 K 003336 11 Krž 3, Second Instance Verdict, 21 June 2012 (*Bogdanović* Appeal Judgment)
- *Prosecutor v. Velibor Bogdanović*, Case No. S1 1 K 003336 10 Krl, First Instance Verdict, 29 August 2011 (*Bogdanović* Trial Judgment)

**KOVAČ** (included in 2014 report; reopened by Constitutional Court decision of 6 November 2014)

- *Prosecutor v. Ante Kovač*, Case No. S1 1K 017861 14 KrŽ, Second Instance Verdict, 17 december 2014
- *Prosecutor v. Ante Kovač*, Case No. X-KRŽ-08/489, Second Instance Verdict, 12 November 2010 (*Kovač* Appeal Judgment)

- *Prosecutor v. Ante Kovač*, Case No. X-KR-08/489, First Instance Verdict, 10 July 2009  
(*Kovač* Trial Judgment)

## **Annex B: Ongoing CRSV Cases before Courts in BiH** **(as of 31 December 2016)**

### **BIJELJINA DISTRICT COURT**

#### **1. MARJANOVIĆ**

- *Prosecutor v. Predrag Marjanović*, Case No. 12 0 K 0004969 15 K, **Main trial ongoing**

### **BRČKO BASIC COURT**

#### **2. AHMETBAŠIĆ**

- *Prosecutor v. Mirsad Ahmetbašić*, Case No. K 93473 16 K, **Main trial ongoing**

#### **3. SALAJ**

- *Prosecutor v. Redžep Salaj*, Case No. K 80170 K, **Main trial ongoing**

### **BANJA LUKA DISTRICT COURT**

#### **4. SMILJANIĆ ET AL**

- *Prosecutor v. Goran Smiljanić et al*, Case No. 11 0 K 017578 16 K, First Instance verdict of 31 October 2016, **Appellate procedure**

### **DOBOJ DISTRICT COURT**

#### **5. LEPAN ET AL**

- *Prosecutor v. Tadija Lepan et al*, Case No. 13 0 K 003862 15 Kpp, 4 November 2015, **Indictment confirmed**

#### **6. LEPAN**

- *Prosecutor v. Drago Lepan*, Case No. 13 0 K 003952 15 Kpp, 23 December 2015, **Indictment confirmed**

#### **7. MLIVIĆ**

- *Prosecutor v. Kadrija Mlivić*, Case No. 13 0 K 004291 16 Kps, 11 October 2016, **Indictment confirmed**

#### **8. PIJUNOVIĆ**

- *Prosecutor v. Miroslav Pijunović*, Case No. 13 0 K 002141 12 K, First Instance verdict of 3 July 2015, **Retrial**

## 9. RAŠIĆ

- *Prosecutor v. Pero Rašić*, Case No. T15 0 KTRZ 0005856 10, **Pending confirmation of Indictment confirmed**

## 10. VASIĆ

- *Prosecutor v. Nenad Vasić*, Case No. 13 0 K 03666 16 K, **Main trial ongoing**

## MOSTAR CANTONAL COURT

### 11. PEHAR

- *Prosecutor v. Nikola Pehar*, Case 07 0 K 012876 16 Kps, 1 February 2016, **Indictment confirmed**

### 12. ŽILIĆ AND GAKIĆ

- *Prosecutor v. Ramo Žilić and Esad Gakić*, Case No. 07 0 K 011492 14 K, First Instance verdict of 4 November 2015, **Appellate procedure**

## SARAJEVO CANTONAL COURT

### 13. DABETIĆ

- *Prosecutor v. Duško Dabetić*, Case No. 09 0 K 023862 15 K, First Instance Verdict of 17 June 2016, **Appellate procedure**

### 14. ĐUROVIĆ

- *Prosecutor v. Predrag Đurović*, Case No. 09 0 K 02246 15 K, First Instance Verdict of 30 October 2015, **Appellate procedure**

### 15. GOJKOVIĆ

- *Prosecutor v. Milkan Gojković*, Case No. 09 0 K 023306 15 k, First Instance Verdict of 25 February 2016, **Appellate procedure**

## NOVI TRAVNIK CANTONAL COURT

### 16. JOZIĆ AND MAHALBAŠIĆ

- *Prosecutor v. Anto Jozić and Đemahudin Mahalbašić*, Case No. 06 0 K 009862 16 Kps, **Ongoing Main trial**

## ODŽAK CANTONAL COURT

### 17. JURIĆ

- *Prosecutor v. Mirko Jurić*, Case No. T02 KTRZ 0005968/15, **Pending confirmation of Indictment**

## ZENICA CANTONAL COURT

### 18. NESLANOVIĆ *ET AL*

- *Prosecutor v. Ernad Neslanović et al*, Case No. 04 0 K 007756 16 Kps, **Ongoing Main trial**

## TUZLA CANTONAL COURT

### 19. MATANOVIĆ

- *Prosecutor v. Božo Matanović*, Case No. 03 0 K 0 011847 14 K, First Instance Verdict of 3 July 2015, **Appellate procedure**

## COURT OF BIH

### 20. AKELJIĆ *ET AL*

- *Prosecutor v. Minet Akeljić et al*, Case No. S1 1 K 017182 15 Kri, **Ongoing Main trial**

### 21. BAOTIĆ

- *Prosecutor v. Mato Baotić*, Case No. S1 1 K 020032 15 Kri, First Instance Verdict of 9 December 2016, **Appellate procedure**

### 22. BOJADŽIĆ

- *Prosecutor v. Nihad Bojadžić*, Case No. S1 1 K 008494 12 KrI, First Instance Verdict of 14 April 2016, **Appellate procedure**

### 23. BRNJIĆ

- *Prosecutor v. Marijan Brnjić*, Case No. S1 1 K 019816 15 Kro, First Instance Verdict of 9 December 2016, **Appellate procedure**

### 24. BOŠNJAK *ET AL*

- *Prosecutor v. Boris Bošnjak et al*, Case No. S1 1 K 019908 16 KrI, **Ongoing Main trial**

### 25. ĆURIĆ *ET AL*

- *Prosecutor v. Enes Ćurić et al*, Case No. S1 1 K 017146 14 Kro, **Ongoing Main trial**

## 26. DOSTIĆ

- *Prosecutor v. Krsto Dostić*, Case No. S1 1 K 019771 15 Kri, First Instance Verdict of 6 October 2016, **Appellate procedure**

## 27. ĐOJIĆ

- *Prosecutor v. Jozo Đojić*, Case No. S1 1 K 017362 14 KrI, **Ongoing Main trial**

## 28. GAVRANOVIĆ

- *Prosecutor v. Branislav Gavranović*, Case No. S1 1 K 020074 15 Kro, 26 November 2015, **Indictment confirmed**

## 29. HODŽIĆ

- *Prosecutor v. Nedžad Hodžić*, Case No. S1 11 K 018439 15 Kri, **Ongoing Main trial**

## 30. IKONIĆ ET AL

- *Prosecutor v. Milisav Ikonić et al*, Case No. S1 1 K 018442 15 Kri, **Ongoing Main trial**

## 31. JURIĆ

- *Prosecutor v. Ilija Jurić*, Case No. S1 1 K 018179 15 KrI, First Instance Verdict of 9 November 2015, **Appellate procedure (retrial)**

## 32. KARAGIĆ

- *Prosecutor v. Slobodan Karagić*, Case No. S1 1 K 020380 16 KrI, **Ongoing Main trial**

## 33. MRĐA ET AL

- *Prosecutor v. Goran Mrđa et al*, Case No. S1 1 K 018013 15 KrI, **Ongoing Main trial**

## 34. MILUNIĆ ET AL

- *Prosecutor v. Dušan Milunić et al*, Case No. S1 1 K 017538 15 KrI, **Ongoing Main trial**

## 35. NEZIROVIĆ

- *Prosecutor v. Almaz Nezirović*, Case No. S1 1 K 017570 15 Kri, **Ongoing Main trial**

## 36. NANIĆ ET AL

- *Prosecutor v. Zijad Nanić et al*, Case No. S1 1 K 016629 15 KRO, **Ongoing Main trial**

## 37. SEJDIĆ

- *Prosecutor v. Ahmet Sejdić*, Case No. S1 1 K 020481 15 Kro, **Ongoing Main trial**

### **38. PLANOJEVIĆ**

- *Prosecutor v. Brane Planojević*, Case No. S1 1 K 022705 16 Kro, **Ongoing Main trial**

### **39. PERIŠIĆ AND ZORANOVIĆ**

- *Prosecutor v. Božidar Perišić and Vinko Zoranović*, Case No. S1 1 K 018441 16 KrI, 15 January 2016, **Indictment confirmed**

### **40. SAKOČ**

- *Prosecutor v. Edin Sakoč*, Case No. S1 1 K 020968 16 Kri, **Ongoing Main trial**

### **41. TEPIĆ ET AL**

- *Prosecutor v. Savo Tepić et al*, Case No. S1 K 014788 14 KRI, **Ongoing Main trial**

### **42. ŽILIĆ**

- *Prosecutor v. Edhem Žilić*, Case No. S1 1 K 015591 16 Kri, **Ongoing Main trial**

(Accused at large as of 31 December 2016)

## **BRČKO BASIC COURT**

### **43. SALIJEVIĆ**

- *Prosecutor v. Nermin Salijević*, Case No. 84224/14, 25 November 2014, **Indictment confirmed**

## **DOBOJ DISTRICT COURT**

### **44. BREKALO**

- *Prosecutor v. Goran Brekalo*, Case No. 13 0 K 002271 12 Kps, 11 September 2012, **Indictment confirmed**

### **45. JOZIĆ**

- *Prosecutor v. Luka Jozić*, Case No. 13 0 K 001549 12 Kps2, 17 May 2011, **Indictment confirmed**

### **46. MILOŠ**

- *Prosecutor v. Marko Miloš*, Case No. 13 0 K 001338 11 Kps, 7 February 2011, **Indictment confirmed**

#### 47. SLABIĆ

- *Prosecutor v. Dalibor Slabić*, Case No. 13 0 K 000642 10 Kps, 12 April 2010, **Indictment confirmed**

#### 48. ŠTUC

- *Prosecutor v. Anto Štuc*, Case No. 13 0 K 001491 11 Kps, 13 April 2011, **Indictment confirmed**

### NOVI TRAVNIK CANTONAL COURT

#### 49. STOJANOVIĆ

- *Prosecutor v. Marinko Stojanović*, Case No. 06 0 K 006877 14 Kps, 13 January 2015, **Indictment confirmed**

### COURT OF BIH

#### 50. ALIĆ

- *Prosecutor v. Fahrudin Alić*, Case No. S1 1 K 012524 13 Kro, 5 March 2013, **Indictment confirmed**

#### 51. ANČIĆ

- *Prosecutor v. Ivan Ančić*, Case No. S1 1 K 012408 13 KRO, 8 January 2014, **Indictment confirmed**

#### 52. GOLUBOVIĆ AND BOŽIĆ

- *Prosecutor v. Anto Golubović and Jurica Božić*, Case No. S1 1 K 007874 14 Kro, 29 January 2015, **Indictment confirmed**

#### 53. HRKAĆ

- *Prosecutor v. Ivan Hrkać*, Case No. S1 1 K 002907 07 Kro, 9 January 2008, **Indictment confirmed**

#### 54. KURDIJA

- *Prosecutor v. Mladen Kurdija*, Case No. S1 1 K 017735 14 Kro, 18 December 2014, **Indictment confirmed**

#### 55. KUŠIĆ

- *Prosecutor v. Rajko Kušić*, Case No. S1 1 K 017608 14 Kro, 16 December 2014, **Indictment confirmed**



**56. KOSTJEREVAC**

- *Prosecutor v. Adem Kostjerevac*, Case No. S1 1 K 018560 15 Kro, 14 April 2015,  
**Indictment confirmed**

**57. STJEPANOVIĆ**

- *Prosecutor v. Novak Stjepanović*, Case No. S1 1 K 002928 09 Kro, 11 November 2009,  
**Indictment confirmed**

**58. VIDOVIĆ**

- *Prosecutor v. Marko Vidović*, Case No. S1 1 K 003599 10 KRO, 24 February 2012,  
**Indictment confirmed**

## **Annex C: CRSV Thematic Trainings Carried out by OSCE Mission 2013–2016**

### **War Crimes Capacity Building Project (2014–2017)**

Trainings for judges, prosecutors, legal associates, and (for some events) witness support officers:

1. Training of Trainers, Investigating and prosecuting sexual violence, 20–21 November 2014, Sarajevo;
2. Investigation and Prosecuting Wartime Sexual Violence, 1–2 December 2014, Sarajevo;
3. Training of Trainers: “Wartime Sexual Violence,” 25–26 June 2015, Teslić;
4. Wartime Sexual Violence 17–18 Nov 2015, Sarajevo;
5. Wartime Sexual Violence 31 Mar–1 Apr 2016, Banja Luka;
6. Wartime Sexual Violence 17–18 Nov 2016, Sarajevo;
7. (Planned: Wartime Sexual Violence, autumn 2017, Istočno Sarajevo).

### **War Crimes Processing Project (2013–2014)**

1. Training Wartime Sexual Violence, 11–14 March 2013, Sarajevo;
2. Sexual Violence in Armed Conflicts, 13–14 November 2013, Banja Luka.

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