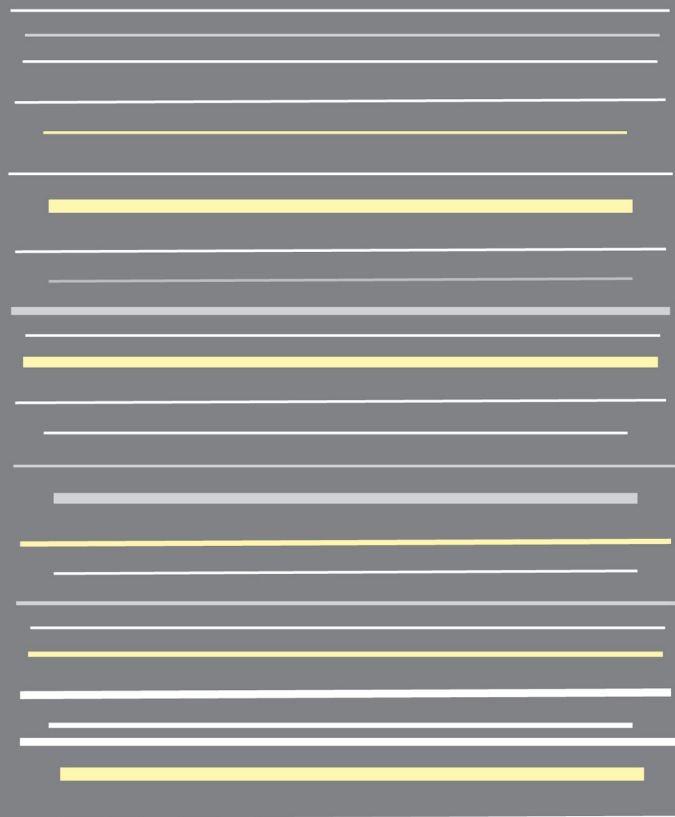




Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina

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

An analysis of criminal proceedings
before the Court of Bosnia and
Herzegovina between 2005 and 2013



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Executive Summary

This report examines the progress and obstacles that exist in investigating, prosecuting and adjudicating cases of conflict-related sexual violence within the State level criminal justice system of Bosnia and Herzegovina (BiH). It considers to what extent the legal framework and proceedings conducted to date before the Court of BiH (BiH Court) are succeeding in tackling impunity for sexual violence crimes. This report finds that overall there is a genuine commitment on the part of BiH authorities – in particular the Special Department for War Crimes within the BiH Prosecutor's Office and Section I for War Crimes of the BiH Court – to delivering justice to survivors of sexual violence.

Over the last decade, 111 cases involving conflict-related sexual violence have been addressed by the criminal justice system in BiH. The BiH Court has concluded 36 such cases, convicting 33 perpetrators and acquitting 12 individuals – representing a conviction rate of 73% for sexual violence charges. At the end of 2013, indictments in a further 18 cases had been confirmed – although in three of those cases the fugitive remained at large. The report notes that many more such cases are under investigation. A significant number of sexual violence cases are being prosecuted at the entity level, and will be analysed in a future report by the OSCE Mission to BiH (OSCE Mission).

The present report finds that while the overall number of indictments for sexual violence raised by the BiH Prosecutor's Office is low in comparison to the prevalence of such crimes in the conflict – during which an estimated 20,000 women and girls and an unknown number of men and boys were victimized – there have been notable achievements. In particular, the BiH Prosecutor's Office has investigated a wide array of types and incidences of conflict-related sexual violence against victims of Bosniac, Serb and Croat identity and members of national minorities, including the systematic rape and sexual slavery of women and girls committed both by commanders and direct perpetrators. Patterns of systemic sexual violence in locations such as Foča, Grbavica (Sarajevo), and Višegrad have been the subject of a number of inter-related cases. Among those cases completed to date, the BiH Prosecutor has also investigated sexual violence against male prisoners in detention camps and prosecuted one woman.

A key finding of this report is that implementation of the National Strategy for War Crimes Processing (National Strategy) is enhancing the resolution of sexual violence cases by ensuring the burden is shared between the State and entity level criminal justice systems. The report examines 44 decisions on the allocation of cases between the State and entity level. The OSCE Mission finds that decisions approving the transfer of cases fit the criteria of being "less complex" and contained reasoning on witness protection requirements.

Despite these positive achievements, the outstanding number of unresolved cases concerning conflict-related sexual violence and their relative complexity is unknown to the public, which in turn frustrates victims' wishes to know what progress is being made in investigating the crimes against them. The report finds that although the main obstacles

to resolving further sexual violence cases relate to legal and practical hurdles beyond the control of criminal justice system actors, such as lack of availability of evidence and suspects, an increased and dedicated capacity to prioritize, investigate and prosecute these crimes could significantly speed up progress.

The report contains an analysis of the compliance of BiH's substantive and procedural legal framework applicable to conflict-related sexual violence cases with international law and standards. The ongoing need to amend the definition of sexual violence crimes in the 2003 Criminal Code of BiH (2003 Criminal Code), some three years after the United Nations (UN) Committee against Torture (CAT) recommended such a step, is highlighted. The OSCE Mission remains concerned that the definition in BiH law is unduly narrow, and the textual requirement to prove perpetration of the crime through force or threat of use of force may be leading prosecutors to raise fewer sexual violence indictments than might otherwise be the case. However, in practice, the BiH Court has interpreted that "coercive circumstances" negate any possibility of consent, which is in line with the highest international standards and in practice overcomes deficiencies in the legislation in those cases that have come to trial. On a positive note, the 2003 Criminal Code contains the relatively new crime of gender-based persecution as a crime against humanity and in three cases to date the BiH Court pronounced what are, to the OSCE Mission's knowledge, the first verdicts worldwide for this offence.

Trial monitoring conducted by the OSCE Justice Sector Monitoring Programme of sexual violence cases at the BiH Court shows that, in practice, judges and prosecutors have demonstrated a sound understanding of the elements of rape, sexual slavery and other forms of sexual violence as a war crime, crime against humanity or genocide. However, concerns regarding the application of evidentiary rules related to issues of consent are highlighted in the report, particularly with respect to possible infringements on the rights of defendants and victim-witnesses.

OSCE trial monitoring findings show that, in a number of cases, indictments were vague concerning the specific charges related to conflict-related sexual violence, or the BiH Prosecutor's Office did not explicitly address the sexual nature of torture and other acts. In past verdicts, the BiH Court failed to remedy these problems or to articulate reasoning for the re-qualification of acts as a different offence. The report notes, however, that recent jurisprudence of the BiH Court is rectifying these issues. It is hoped that this trend will continue and judges and prosecutors will pay close attention to ensuring that indictments and verdicts accurately reflect the nature and extent of the harm suffered by the victims as a result of sexual violence. The current UK-funded development of training curricula on conflict-related sexual violence for judges, prosecutors and investigators should further contribute to these efforts.

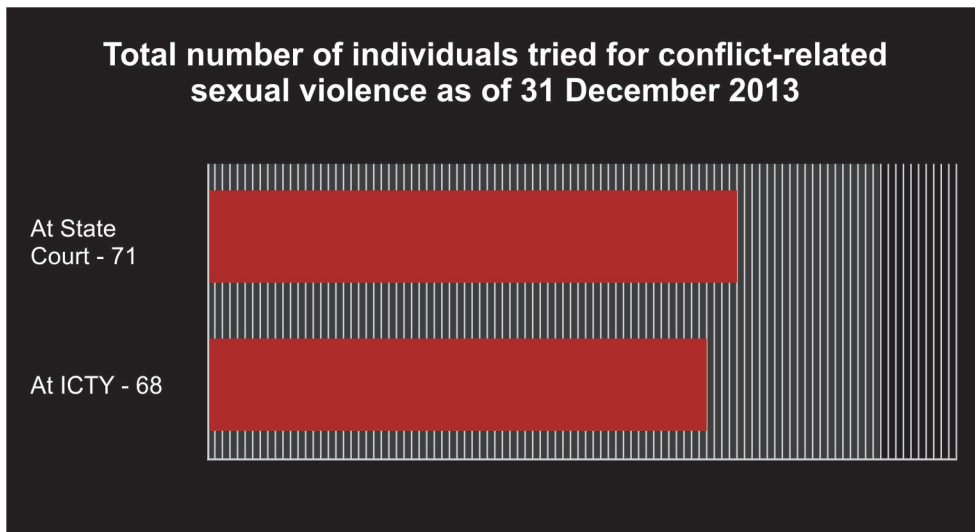
1. Introduction

The BiH criminal justice system is making a significant and growing contribution to efforts to combat impunity for conflict-related sexual violence crimes¹ perpetrated during the 1992-1995 conflict.² Prosecutions for crimes of sexual violence committed during the conflict in BiH have been carried out by both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the BiH judiciary. Notwithstanding the vast scope of victimization and lingering impunity gap for both crimes of sexual violence and other serious violations of human rights and humanitarian law, notable strides have been made in bringing perpetrators of sexual violence to account in trials at the domestic level.

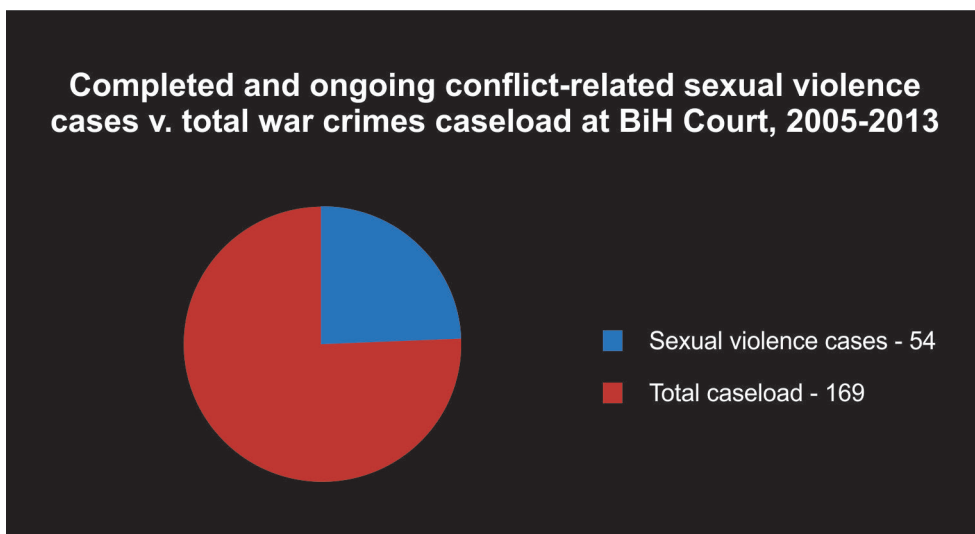
Assumptions are often made that there have been scant indictments and prosecutions for rape and other forms of sexual violence in BiH, that acquittal rates are outrageously high and that survivors are deeply dissatisfied with the efforts of the criminal justice authorities to deliver justice to them so far. These assumptions are contrary to the findings of the OSCE Mission to BiH (OSCE Mission) cited throughout this report which demonstrate that the BiH Prosecutor's Office and Court of Bosnia and Herzegovina (BiH Court) have made sound progress in addressing conflict-related sexual violence; for example, recently overtaking the ICTY in the number of accused brought to trial or subject to a pending indictment (71 in Sarajevo versus 68 in The Hague) for this category of crime. While it is certainly true that many survivors have not received justice and women victims' associations continue to express dissatisfaction with the quality and pace of justice so far, many of them continue to put their faith in domestic investigators, prosecutors and judges to further tackle impunity for sexual violence crimes.³ The OSCE Mission undertook this report because it is time – in 2014, following nearly a decade of war crimes processing at the State level – to acknowledge the progress and achievements of the BiH criminal justice

- 1 The term "conflict-related sexual violence" refers to: "incidents or patterns [...] of sexual violence, that is rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity against women, men or children. Such incidents or patterns occur in conflict or post-conflict settings or other situations of concern (e.g. political strife). They also have a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and/or causal link." See Report of the Secretary-General, *Conflict-related sexual violence* (13 January 2012), UN Doc. A/66/657*-S/2012/33, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/33&referer=http
- 2 This report is limited to sexual violence crimes that took place during the conflict in the territory of BiH, from 1992 until December 1995, when the Dayton Peace Agreement was signed. It does not cover conflict-related sexual violence crimes that occurred in other territories within the former Yugoslavia during the same period.
- 3 See Medica Mondiale, "... and that it does not happen to anyone anywhere in the world: The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia" (December 2009), available at: http://www.medicamondiale.org/fileadmin/content/07_Infotehek/Gerechtigkeit/medica_mondiale_Zeuginnenstudie_englisch_december_2009.pdf
See also Amnesty International, *Old crimes, same suffering: No justice for survivors of wartime rape in North-East Bosnia and Herzegovina*, (29 March 2012), AI Index: EUR 63/002/2012, available at: <http://amnesty.org/en/library/info/EUR63/002/2012/en> ; See Amnesty International, *When everyone is silent: Reparation for survivors of wartime rape in Republika Srpska in Bosnia and Herzegovina*, (31 October 2012), AI Index: EUR 63/012/2012, available at: <http://amnesty.org/en/library/info/EUR63/012/2012/en>

system in resolving cases of sexual violence during the conflict and to seriously examine the obstacles that persist in the pursuit of justice for the victims of these crimes.



Between 2005 and the end of 2013, to the OSCE Mission’s knowledge, courts in BiH have completed 256 war crimes cases.⁴ Of these, **76 involved charges of sexual violence**, including **36** cases before the BiH Court and **30** before those in the Federation of BiH (FBiH), Republika Srpska (RS) and Brčko District. Additionally, of the **148** ongoing cases at the close of 2013, **35** involved sexual violence charges, including **18** ongoing cases before the BiH Court and **17** ongoing cases before the entities and Brčko District. The OSCE Mission is also aware of numerous cases in the investigative stage that include evidence of sexual violence and may thus result in charges for these crimes.



⁴ Completed cases are defined as ones in which a final and binding verdict has been reached.

The **36 cases involving sexual violence** allegations completed before the BiH Court to date involved **45 defendants**. **Thirty-three defendants have been convicted for sexual violence crimes**. Eighteen defendants were acquitted of some sexual violence charges, while **12 of those defendants were ultimately acquitted of all sexual violence charges**. Four defendants were found guilty of sexual violence crimes pursuant to a plea bargaining agreement.⁵

Thus, some 20 years since the beginning of the conflict, BiH is among the domestic jurisdictions that have completed the highest number of cases involving conflict-related sexual violence crimes. The lessons learned in its efforts to address these crimes through the criminal justice system serve as a useful tool not only for BiH institutions at all levels, but also for other domestic jurisdictions struggling to combat impunity for such crimes and deliver justice to the victims.

Nevertheless, considering the magnitude of the sexual violence that occurred during the conflict in the territory of BiH, the fact remains that the majority of perpetrators of sexual violence continue to enjoy impunity. The failure to provide accountability for these crimes will continue to have a debilitating impact on survivors of sexual violence and serves as an impediment to post-conflict reconciliation and the establishment of full respect for human rights and the rule of law in BiH.⁶

Previous reports prepared by the OSCE Mission have examined the efficiency and effectiveness of both the State and entity level criminal justice systems in resolving war crimes cases.⁷ This report explores the efforts of the State level criminal justice institutions – the BiH Prosecutor’s Office and the BiH Court – specifically in relation to tackling cases which included rape and other forms of sexual violence, while a forthcoming companion report will examine the situation at the entity level.

The present report includes an analysis of the domestic legislation applicable to conflict-related sexual violence crimes tried at the BiH Court, as well as the conduct of cases involving conflict-related sexual violence crimes completed at the BiH Court since the OSCE Mission commenced its monitoring of war crimes proceedings in 2005. In particular,

⁵ *Bjelić, Perković, Tripković and Veselinović cases, see Annexes 1 and 2 infra.*

⁶ *See, e.g., UN Security Council Resolution 1820 (2008), Operative Paragraph (OP) 4 (stating that “ending impunity for [conflict-related sexual violence] acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation in post-conflict societies”).*

⁷ OSCE Mission to BiH, *Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010* (May 2011), available at http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf; OSCE Mission to BiH, *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles, March 2005* (available at http://www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf); OSCE Mission to BiH, *The Processing of ICTY Rule 11bis cases in Bosnia & Herzegovina*, January 2010 (released June 2010), (available at: http://www.oscebih.org/documents/osce_bih_doc_2010122314321282eng.pdf) and 60 OSCE Mission to BiH *Reports on 11bis Cases*, (available at: <http://www.oscebih.org/Documents.aspx?id=146&lang=EN>). *See also* OSCE Mission to BiH, *Witness Protection and Support in BiH War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing*, released in May 2010 (available at: http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf); OSCE Mission to BiH *Spot Report on Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*, December 2009 (available at: http://www.oscebih.org/documents/osce_bih_doc_2010122314120729eng.pdf); and OSCE Mission to BiH, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*; August 2008 (available at: http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf).

it focuses on how the BiH Court has allocated cases involving sexual violence crimes from the BiH Court to courts in the entities and Brčko District and its treatment of the crimes of rape, sexual slavery, other acts of sexual violence, rape and sexual violence as torture, and rape and sexual violence as persecution. It also addresses how the BiH Court has applied special evidentiary and procedural rules in sexual violence. Overall, this report serves to inform the ongoing policy discussions about BiH's response to conflict-related sexual violence and the delivery of justice to victims with a comprehensive analysis of the work of the State level criminal justice institutions over the past decade.

1.1 Background

The conflict that engulfed the former Yugoslavia during the 1990s was characterized by widespread and systematic rape and other forms of sexual violence. Although the true figure is not known, a reliable estimate is that some 20,000 women and girls were subjected to sexual violence in BiH alone.⁸ No estimates exist regarding the number of men and boys who were also subjected to such violence. Rape was found to have been used by all parties of the conflict as a weapon of war and as an instrument of ethnic cleansing intended to terrorize the population and force ethnic groups to flee.⁹ The scale of sexual violence and other atrocities committed during the conflict generated international outrage, compelling the United Nations (UN) Security Council to determine the situation a threat to international peace and security and to establish an *ad hoc* international criminal tribunal – the ICTY – as a means of promoting an end to the violence, holding perpetrators accountable and bringing justice to victims.

The ICTY has made significant progress in establishing facts regarding the sexual violence that occurred during the conflict and holding perpetrators accountable for these crimes. The ICTY has to date convicted 33 persons for sexual violence, acquitting 12 individuals for such crimes.¹⁰ Four defendants were still on trial for such crimes (Hadžić, Karadžić, Mladić and Šeselj) as of January 2014 and cases concerning 10 accused were still before the Appeals Chamber.¹¹ The ICTY also substantially elucidated the law governing conflict-related sexual violence crimes – setting the stage for the criminalization of sexual violence in the statutes of other international and hybrid criminal tribunals, including the Rome Statute of the International Criminal Court (ICC). In this manner, the effects of efforts by

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

9 Report of the Secretary-General, *Rape and abuse of women in the areas of armed conflict in the former Yugoslavia*, (4 August 1995), UN. Doc. A/50/29, available at: <http://www.un.org/documents/ga/docs/50/plenary/a50-329.htm>, para. 14; *Report on the situation of human rights in the territory of the former Yugoslavia* submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, (10 February 1993), UN Doc. E/CN.4/1993/50, available at: <http://www.unhcr.ch/huridocda/huridoca.nsf/2f80d5ef4fbd3b49c1256b26003d73ba/coa6cfd5274508fd802567900036daga?OpenDocument>, para. 84.

10 See ICTY, *Crimes of Sexual Violence: In Numbers*, (mid-2013) available at: <http://www.icty.org/sid/10586>. While the ICTY indicted 78 individuals for sexual crimes, five of these defendants were transferred to BiH and a further five had their indictments withdrawn by the ICTY Prosecutor. A further eight defendants charged with sexual violence died before the completion of their case.

11 *Ibid.*

the ICTY to investigate, prosecute and adjudicate conflict-related sexual violence have spread far beyond the borders of the former Yugoslavia.

However, the ICTY was established as a temporary tribunal with a limited mandate. Since 2003, pursuant to its completion strategy, it has focused on the prosecution of the highest-level accused and referred indictments and evidence relating to mid to lower level accused to courts in the former Yugoslavia. It will not be issuing any further war crimes indictments, and it is currently in the process of completing its few remaining cases.

It is now principally the responsibility of courts in the region of the former Yugoslavia to continue the fight against impunity for the crimes that occurred during the conflicts, including those involving sexual violence. Given the scale of atrocities that occurred in BiH territory, the BiH judiciary, in particular, is faced with a formidable task. However, as this report shows, it is a task that BiH justice actors have undertaken with resolve.

1.2 Scope of Report and Methodology

This report is the first of a two-part series that examines the achievements of the BiH criminal justice system in addressing conflict-related sexual violence crimes, as well as the outstanding obstacles to the resolution of these cases in accordance with international and domestic standards. The present report focuses on the work of the State level criminal justice institutions – Section I for War Crimes within the BiH Court and the Special Department for War Crimes within the Prosecutor’s Office of BiH – while a forthcoming report will focus on the work of criminal justice institutions in the entities and Brčko District. Important, but distinct, issues relevant to dealing with the legacy of conflict-related sexual violence in BiH, such as legal recognition of victims as “survivors of sexual violence” and provision of psycho-social support, are beyond the scope of this report.

The analysis and recommendations contained in this report are based on findings from the **OSCE Mission’s Justice Sector Monitoring Programme**. The findings contained in this report encompass the period from 2005, when the OSCE Mission began to monitor war crimes cases in the domestic criminal justice system, to 31 December 2013. During this time, the OSCE Mission monitored an extensive number of hearings in cases before Section I of the BiH Court concerning cases of war crimes, crimes against humanity and genocide involving sexual violence and reviewed indictments, verdicts and other decisions in respect of all such proceedings. Since early 2011, the OSCE Mission has monitored cases concerning sexual violence at the BiH Court as a priority. The findings in this report are mainly drawn from 36 cases completed at first or second instances before the BiH Court between 2005 and 2013, as well as monitored hearings in these and the 18 ongoing cases.

1.3 Structure of Report

This report proceeds as follows. Chapter 2 provides an overview of progress and challenges to date in the investigation, prosecution and adjudication of cases concerning conflict-related sexual violence in BiH, noting issues generally affecting the processing of the backlog of war crimes cases in the country and issues specifically related to cases involving sexual violence. This chapter also examines the practice of the BiH Court in allocating war crimes cases involving sexual violence between the State and entity levels.

Chapter 3 sets forth the substantive and procedural legal framework applicable to sexual violence as war crimes, crimes against humanity and genocide and examines the compliance of the BiH framework with international standards, making several recommendations as to how it may be strengthened.

Chapter 4 contains a detailed analysis of the application of law to cases concerning conflict-related sexual violence by the BiH Court. This analysis illustrates the extent to which the State level institutions are succeeding in delivering justice in conflict-related sexual violence cases and adding to the body of jurisprudence in this area, albeit with some outstanding concerns and challenges. The issues identified in this chapter in turn give rise to a series of recommendations addressed to judges and prosecutors.

Chapter 5 concludes with a series of recommendations to the international community, State level government, members of the judiciary and legal practitioners.

Key findings and concerns are highlighted at the beginning of each chapter. Annexes containing a complete list of all completed and ongoing sexual violence cases at the BiH Court, a list of defendants convicted or acquitted for sexual violence charges, and the criteria for allocation of cases between the State and entity levels are located at the end of the report.

2. Overview of Progress and Challenges in Investigation, Prosecution and Adjudication of Conflict-Related Sexual Violence in BiH

This chapter examines the general trends in relation to the treatment of sexual violence cases, including the number of indictments, convictions and acquittals at the BiH Court by the end of 2013 and the types of crime they address. An overview of issues generally affecting the processing of the backlog of war crimes cases in the country and issues specifically related to bringing forward investigations and prosecutions of cases involving sexual violence is provided, with the aim of assessing overall progress and outstanding obstacles to combating impunity for this category of crimes at the State level. This chapter also explores the practice of the BiH Court in allocating war crimes cases involving sexual violence between the State and entity levels according to their relative complexity and in particular, consideration given to witness protection in the context of cases transferred to entity courts.

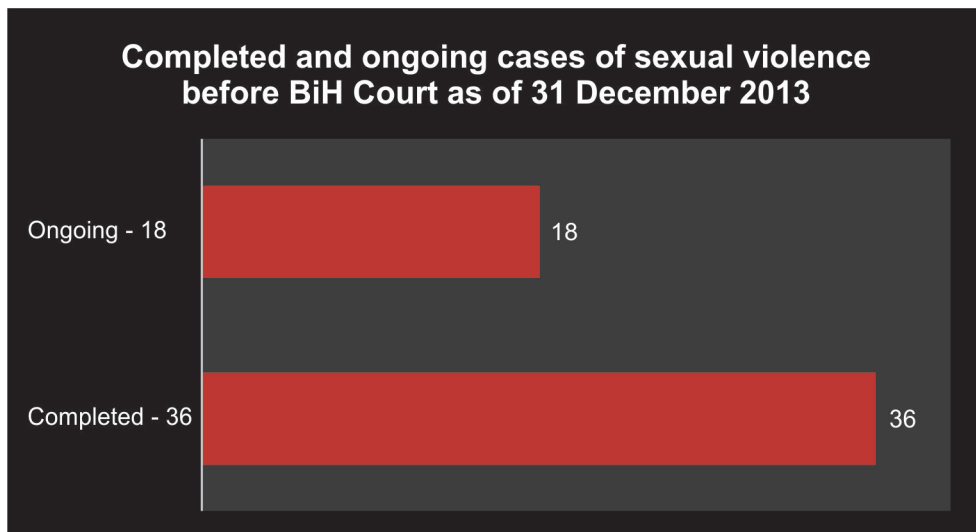
Key findings and concerns:

- A genuine commitment of BiH authorities – in particular the BiH Prosecutor’s Office and BiH Court – to delivering justice to survivors of sexual violence is evident. In particular, the BiH Prosecutor’s Office has investigated a wide array of types and incidences of conflict-related sexual violence.
- Implementation of the National Strategy for War Crimes Processing (National Strategy) is enhancing the resolution of sexual violence cases by ensuring the burden is shared between the State and entity level criminal justice systems.
- While overall the number of indictments for sexual violence raised by the BiH Prosecutor’s Office is low in comparison to the prevalence of such crimes during the conflict, the conviction rate of 73% in the 36 cases completed at the BiH Court to date demonstrates that sound progress is being made.
- Plea bargains were used in a small number of cases tried at the BiH Court, but in none of those cases did the BiH Prosecutor seek to amend the indictment to drop charges relating to sexual violence before entering into the agreement with the defence.
- Despite these positive achievements, the outstanding number of unresolved cases concerning conflict-related sexual violence and their relative complexity is unknown to the public, which negatively impacts the interests of victims.
- Certain problems persist with respect to further closing the impunity gap. While the OSCE Mission is aware of 35 cases at the pre-trial or trial stage throughout the country and many more at the investigative stage, the lack of availability of suspects and evidence hampers the progress of investigations.

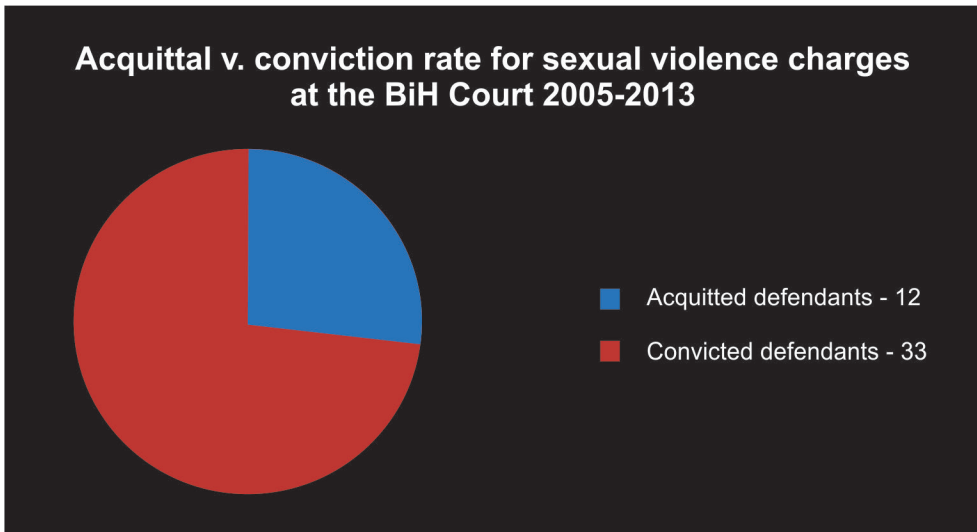
- Although the main obstacles to resolving further sexual violence cases relate to legal and practical hurdles beyond the control of criminal justice system actors, increased dedicated capacity to prioritize, investigate and prosecute these crimes could speed up progress.
- Decisions approving or rejecting transfer of cases to entity courts contained reasoning on witness protection requirements and were overall in line with the National Strategy's criteria for allocating cases.

2.1 Overall Progress and Trends

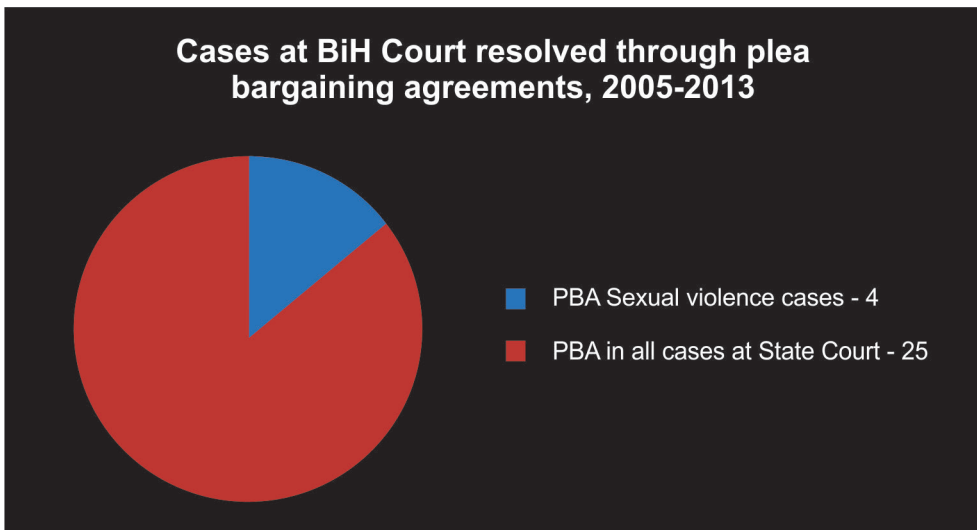
As mentioned above in Chapter 1, the outcome of efforts led by the BiH Prosecutor's Office and the BiH Court to investigate, prosecute and adjudicate cases involving conflict-related sexual violence is that in some 54 cases indictments were raised, out of which 18 cases are still in progress, while 36 cases have been completed with a final and binding decision by December 2013.



Subsequent chapters of this report address how these cases have been handled at trial, but the present section discusses the overall progress and trends in respect of this category of the war crimes caseload. To date, **33 perpetrators have been convicted at the BiH Court and 12 individuals acquitted**. Thus, **the conviction rate from 2005-2013 was 73 per cent and the acquittal rate a corresponding 27 per cent**. This rate can be considered on par with the record of the ICTY, which tried a similar number of individuals for a similar range of crimes – often in relation to the same factual allegations.



Plea bargaining agreements have been used in a small number of cases concerning sexual violence as they have in other war crimes cases before the BiH Court.¹² The OSCE Mission has previously noted its concern regarding the practice of charge bargaining in war crimes cases before the BiH Court, in which the prosecution apparently dropped serious charges in the process of striking such agreements with the defence.¹³ However, in these four cases, **no sexual violence charges were dropped when the plea agreement was entered into.**



¹² For a detailed examination of the practice of plea bargaining at the BiH Court and concerns regarding charge bargaining, plea bargains entered into at a late stage in the trial proceedings, poor mechanisms to safeguard co-operation clauses in plea agreements and missed opportunities to invite expressions of remorse and admissions of facts from defendants, see OSCE Mission to BiH, *Delivering Justice*, pp. 54-56 at 4.4.2.

¹³ *Ibid.*

Moreover, **these cases represent a wide array of types of sexual violence that occurred during the conflict.** The Special Department for War Crimes within the BiH Prosecutor's Office has investigated cases concerning **systemic sexual violence**, including systematic rape and sexual slavery of women and girls held in formal or informal places of detention. Indictments in these cases have addressed both commanders and direct **perpetrators of sexual violence.** There are instances of perpetrators being known to victims as well as unknown perpetrators committing these acts. Perpetrators have been charged with the **use of sexual violence to terrorize individuals and their communities** during the conflict as well as **holding women and girls in captivity for sexual abuse** by the alleged perpetrator. Like the ICTY, the BiH Prosecutor's Office has also investigated **sexual violence against male prisoners** in detention camps, charging alleged perpetrators with conduct such as forced nudity, forced oral sex, and other forms of sexual humiliation.¹⁴ The manner of qualification of these crimes is addressed in section 4.1.2.1 below.

While the majority of persons accused of such crimes have been male, the BiH's Prosecutor's Office has also **charged women with sexual violence crimes.** One case, *Terzić*, concerned a female who was accused of forcing male prisoners to perform oral and penetrative sex on female prisoners.

Examination of the caseload dealing with sexual violence at the State level to date also reveals that the BiH Prosecutor's Office is succeeding in exploring the widespread nature of sexual violence. Indictments contained charges for sexual violence crimes perpetrated against victims of Bosniac, Serb and Croat identity as well as members of national minorities. Indictments raised to date also indicate that the BiH Prosecutor has addressed **patterns of sexual violence connected to situations of serious violations of human rights and humanitarian law**, such as occurred in Foča,¹⁵ Grbavica (Sarajevo),¹⁶ and Višegrad.¹⁷ Sexual violence crimes have most often been investigated by the BiH Prosecutor in conjunction with other alleged war crimes, crimes against humanity and genocide rather than in isolation.

Overall, while the total number of indictments is low in comparison to the prevalence of sexual violence during the conflict, there are many positive signs that investigative resources have been committed to addressing conflict-related sexual violence within the overall commitment to tackling impunity for war crimes and addressing the backlog of unresolved case-files in line with the National Strategy.

2.2 Core Challenges

As noted above, the most reliable estimate of the number of female victims of conflict-related sexual violence in BiH is **20,000.** Next to this figure, the number of perpetrators

¹⁴ See *Kurtović, Lazarević et al., Terzić, and Veselinović* cases, Annexes 1 and 2, *infra*.

¹⁵ See the cases of *Janković, Nikačević, Samardžić, Stanković, Tripković, Vuković, and Vuković et al.*, Annexes 1 and 2, *infra*.

¹⁶ See the cases of *Baričanin* and *Vlahović*, Annexes 1 and 2, *infra*.

¹⁷ See the cases of *Krsmanović, Lelek, Milisavljević et al., Popović et al., Savić, Šimšić and Tanasković*, Annex 1 and 2, *infra*. A number of cases also dealt with the perpetration of sexual violence in the Mostar area, although these cases do not appear to be connected or part of an overall pattern (see the cases of *Bogdanović, Bojadžić, Kurtović, Radić et al. and Zelenika et al.*). Two cases dealt with crimes at 'Miladin Radojević' Primary School in Kalinovik (*Bundalo et al. and Slavko Lalović* cases). See Annexes 1 and 2, *infra*.

prosecuted by the ICTY and the BiH criminal justice system to date – **139** individuals in total – appears disappointingly low. However, there are a number of factors that should be borne in mind in assessing the extent of the success or failure of the authorities in BiH to deliver justice.

First, the numbers of criminal cases naturally do not equal the number of estimated victims. This is for a variety of reasons, including the fact that a single case can address a large number of victims and, equally, may address the alleged wrongdoing of multiple accused. In addition, under-reporting is a possible factor as many survivors of sexual violence may not have reported the sexual crimes they were subjected to for a number of reasons, including possible feelings of shame and stigma attached to being a victim of rape as well as mistrust of criminal justice actors.¹⁸ Progress can, therefore, more realistically be measured against the number of pending case-files rather than estimated numbers of victims. In this regard, it should be noted that the National Strategy foresees the completion of all war crimes cases by 2023.¹⁹ While this is clearly an ambitious goal given the current backlog of approximately 1300 war crimes cases, ongoing efforts to increase the overall efficiency and effectiveness of war crimes prosecution through the implementation of the National Strategy and supplementary support from donors will aid in meeting this deadline. Given this context, it is important to ensure that progress with regard to investigating and prosecuting sexual violence crimes remains apace with overall progress and that sexual violence crimes are properly prioritized.

Second, although some legal hurdles concerning the way BiH law defines sexual violence crimes may prevent prosecutors from filing greater numbers of indictments for war crimes (see section 3.2.1 *infra*), most of the factors impeding the fight against impunity are no different for this category of offence than for other war crimes. As the OSCE Mission noted in 2011, **a number of hurdles exist for investigating and prosecuting sexual violence cases in the BiH criminal justice system**, among them are political opposition from certain quarters to an integrated and cohesive judicial system able to tackle serious crime; a fragmented legal and institutional framework applicable to war crimes cases; and a lack of availability of suspects, physical evidence, and witnesses willing to testify.²⁰

Lack of availability of suspects is a particularly acute issue in war crimes cases in BiH.²¹ Of the 18 sexual violence cases currently in progress at the BiH Court, three of the accused are at large (*Hrkač, Stjepanović, Vidović*) so these cases cannot advance beyond the confirmation of indictment stage.²² Although tremendous progress has been made in enhancing regional co-operation in war crimes processing in recent years with Serbia and Croatia in particular, it is too early to assess the benefits of co-operation agreements on the processing of sexual violence cases. In addition, as time passes, **witnesses may die and other forms of evidence can be lost**. Although additional capacity development for

¹⁸ See Amnesty International, *Old crimes, same suffering*, *supra* note 3, p. 6 (noting that many survivors have given multiple statements to ICTY and BiH investigators without noticeable progress on their cases).

¹⁹ The *National Strategy*, adopted by the BiH Council of Ministers on 29 December 2008, available at: http://www.nuhanovicfoundation.org/user/file/bosnian_national_war_crimes_strategy_18-12-08.pdf; in local language, *Državna Strategija za Rad na Predmetima Ratnih Zločina*.

²⁰ *Ibid.*, p. 14.

²¹ *Ibid.*, pp. 80-83 (sec. 6 discussing regional co-operation).

²² See Annex 2, *infra*.

investigators and prosecutors will improve the processing of outstanding investigations, there is little evidence to suggest a lack of priority being given to war crimes cases of sexual violence in BiH, as the figures cited in section 2.1 illustrate.

Third, while there is significant war crimes investigative capacity within the BiH Prosecutor's Office, there is no specialized unit dealing with sexual violence cases. Such units or co-ordinating working groups have operated at international tribunals and are considered a good practice for ensuring that sexual and gender-based crimes, and their nexus to other crimes, are analysed and investigated, and that the specialized knowledge and skills required to interview, protect and support victims, gather evidence and prepare strong cases are in place.²³ The OSCE Mission recommends that **the Special Department for War Crimes within the BiH Prosecutor's Office ensures that there is dedicated capacity to prioritize, investigate and prosecute these crimes and to develop an overarching strategy in this regard.**

The policy elements of such a strategy should be **communicated publicly and used to inform survivors and other stakeholders about the Prosecutor's Office approach.** Such a step would help to ameliorate the legitimate frustration felt by survivors and victims' associations about the lack of information and consultation concerning the steps taken by authorities to combat impunity for conflict-related sexual violence. The **efforts of human rights organizations, victims' associations and victim-advocates to keep the issue of conflict-related sexual violence high on the public agenda** and demand the delivery of justice, truth and reparation for those who survived – and those who did not survive – sexual violence during the conflict in BiH cannot be overlooked or diminished. Similarly, a cadre of domestic journalists dedicated to covering war crimes issues also continues to play an important role in documenting the country's struggle to deliver justice to survivors and to ensure that BiH society confronts the legacy of sexual violence. However, these efforts are no replacement for criminal justice system actors communicating the legal and policy issues related to the handling of the caseload of sexual violence crimes in BiH.

The challenges in relation to tackling impunity for sexual violence in BiH have been met with a **determination on the part of the international community, civil society and the national authorities themselves to ensure sustained political commitment** to this end. In its Resolution on the situation in BiH of 17 June 2010, the European Parliament noted that "those in positions of political responsibility in BiH have not adequately ensured justice and reparation for thousands of women and girls who were raped during the 1992-1995 war, since the number of cases of sexual war crimes which have resulted in prosecution remains exceptionally low" and that "victims have often not been treated with dignity and respect or given sufficient protection, psychological and material support to rebuild their lives".²⁴ The Resolution "[c]alls upon BiH authorities to include a definition of sexual violence in the Criminal Code in line with international standards, provide the victims directly with adequate reparation, economic, social and psychological support,

²³ See, e.g. ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, (30 January 2014), available at: <http://www.unictr.org/portals/0/English/Legal/Prosecutor/ProsecutionofSexualViolence.pdf>, pp.11-12.

²⁴ European Parliament, *Resolution of 17 June 2010 on the situation in Bosnia and Herzegovina* (P7_TA-PROV(2010)0238), para. J (available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0238&format=XML&language=EN>).

including the highest attainable mental and physical health support services, develop programmes and allocate adequate resources for long-term protection of witnesses”, and to this end, to “speed up prosecution procedures in cases of sexual war crimes committed during the war” and “implement a strategy targeting the victims of war crimes of sexual violence with highest priority”.²⁵ BiH has answered these calls with continued, if at times slow, implementation of the 2008 **National Strategy**, development of a **Programme for Victims of Wartime Rape, Sexual Abuse and Torture and their Families**,²⁶ and most recently, endorsing a **Declaration of Commitment to End Sexual Violence in Conflict** sponsored by the UK through the Preventing Sexual Violence in Conflict Initiative.²⁷ With this commitment, BiH renewed its pledge to tackle the legacy of conflict-related sexual violence at home.

2.3 Allocation of Conflict-Related Sexual Violence Cases between the State and Entity Level

BiH adopted the National Strategy in December 2008 with the aim of providing a systematic approach to resolving the country’s sizeable war crimes backlog in an efficient and effective manner.²⁸ Bearing this goal in mind, one of the key objectives of the National Strategy is the transfer of war crimes cases deemed “less complex” from the BiH Court to courts in the entities and Brčko District.²⁹

²⁵ *Ibid.*

²⁶ In 2010, the BiH Ministry of Human Rights and Refugees began national consultations to develop a *Programme for Victims of Wartime Rape, Sexual Abuse and Torture and their Families*. At this writing, the programme is due to be adopted by the governments of BiH. The aim of the programme is to provide survivors with redress and assistance for the health and psycho-social needs, as many of them continue to experience social isolation and consequences on their physical and mental health stemming from the sexual violence to which they were subjected. Lack of political will combined with the complex and fragmented nature of governance structures in BiH means that the State has largely failed to date to provide adequate rehabilitation and support to women. The programme has been developed with the technical support of United Nations Population Fund (UNFPA), which has undertaken to develop guidelines on Minimum Standards for Service Provision and Referral Mechanisms for Survivors of Conflict-Related Sexual Violence in BiH.

²⁷ *A Declaration of Commitment to End Sexual Violence in Conflict*, 23 September 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244849/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT__TO_PRINT....pdf. 122 countries, including BiH, endorsed the declaration at 68th Session of the General Assembly.

²⁸ A detailed assessment of the implementation of the National Strategy was carried out by the OSCE Mission in 2010 and set out in the 2011 report; OSCE Mission to BiH, *Delivering Justice*, *supra* note 7.

²⁹ Pursuant to the Strategy, the transfer process is either initiated upon a proposal from the BiH Prosecutor’s Office to the BiH Court or by the BiH Court *proprio motu*, which is followed by a BiH Court decision on transfer. At the investigative stage, cases can only be transferred on the motion of the BiH Prosecutor’s Office. Article 27 of the BiH Criminal Procedure Code provides:

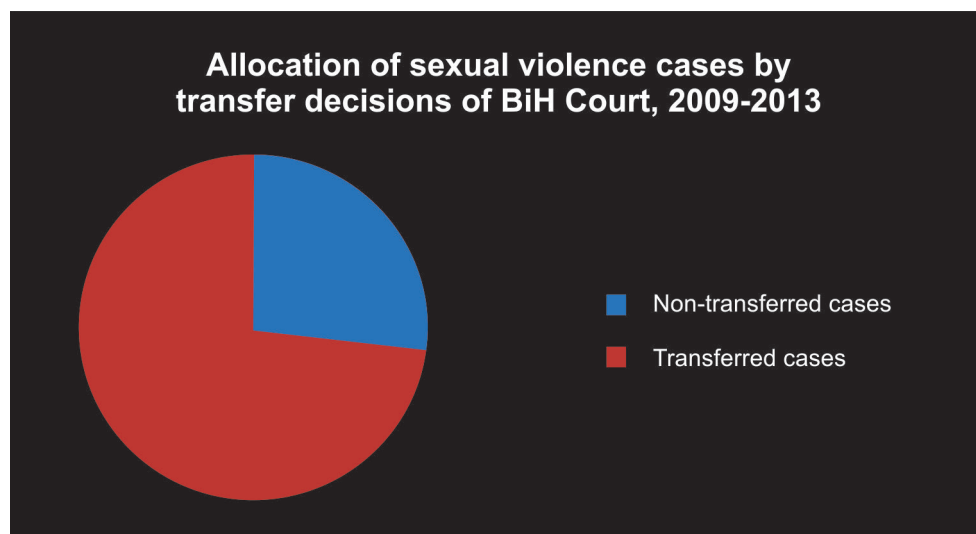
- (1) The Court may transfer conduct of the proceedings for a criminal offence falling within its jurisdiction to the competent Court in whose territory the offence was committed or attempted. The conduct of the proceedings may be transferred not later than the day the main trial is scheduled to begin.
- (2) The decision in terms of Paragraph 1 of this Article may also be rendered on the motion of the parties or the defence attorney for all the offences falling within the jurisdiction of the Court except for the offences against the integrity of Bosnia and Herzegovina.

Article 27(a) of the BiH Criminal Procedure Code, (adopted in 2009 pursuant to the National Strategy) entitled “Transfer of jurisdiction for the criminal offences referred to in Chapter XVII of the Criminal Code of BiH”, provides:

- (1) If the proceedings are pending for the criminal offences referred to in Articles 171 through 183 of the

The BiH Court's transfer decision is based upon criteria for assessing the complexity of each case that are set forth in Annex A of the National Strategy (see Annex 3, *infra*).³⁰ These criteria include the gravity of the criminal offences, the capacity and role of the perpetrator, and other circumstances.³¹ In assessing the gravity of the offence, the National Strategy provides that cases involving "severe forms of rape", including "multiple and systematic rape" and the "establishment of detention centres for the purpose of sexual slavery", will fall into the category of "most complex cases" and thus should be tried at the BiH Court rather than at the entity level. Other types of cases included in this category under the criteria include serious forms of torture and those involving severe consequences suffered by victims – both factors which often apply to cases involving victims of sexual violence.³² Nonetheless, the criteria provide enough flexibility to allow the transfer of sexual violence cases to the entity level if they involve, for example, single instances of rape by a direct perpetrator, and if adequate witness protection capacity is available at the cantonal or district court in question.

Since 2009, the BiH Court has transferred a total of 333 cases to courts in the entities and Brčko District under Article 27 and 27(a) of the BiH Criminal Procedure Code (2003).³³ Of these cases, 39 have included sexual violence allegations, representing over 10 per cent of all transferred cases.



Criminal Code of Bosnia and Herzegovina, under its decision, the Court may transfer the proceedings to another court in whose area the criminal offence was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.

- (2) The Court may render the decision referred to in Paragraph 1 of this Article also upon the motion of the parties or defence counsel, while at the stage of investigation, only upon the prosecution motion.

³⁰ These criteria have been codified in Article 27(a) of the BiH Criminal Procedure Code. *Ibid.*

³¹ See Annex A of the National Strategy, at Annex 3 of this report, *infra*.

³² *Ibid.*

³³ Articles 27 and 27(a) of the BiH Criminal Procedure Code, BiH Official Gazette Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13

Most of the transferred cases involve allegations of the rape of either one or two female victims.³⁴ Two cases involve the rape of minor girls. One case alleges the beating of prisoners of war on their genitals, while another alleges forced oral sex between two persons. An additional three cases include allegations of attempted rape. One case includes allegations that the victim was raped multiple times. Since 2010, the BiH Court has denied the BiH Prosecutor's request for the transfer of a total of 15 cases involving sexual violence allegations. In some of these decisions refusing to approve the transfer of cases to the entity level, the BiH Court has reasoned that the **gravity of the offence** – including evidence of perpetration of multiple and systematic rapes – prohibited such a step.

In its decisions determining that transfer to the entity level was appropriate, the BiH Court has paid particularly close attention to **victim and witness considerations**. Sexual violence victims frequently require the application of protective measures, including closed session hearings and other measures to protect the identity of victim-witnesses such as the use of separate entrances and screens. At the time of the adoption of the National Strategy, most cantonal and district courts were not adequately equipped to provide physical protective measures, or concerns with the handling of procedural protective measures were present.³⁵ Thus, the Annex A criteria also indicate that the interests of victims and witnesses – in particular the capacity of the receiving court to provide appropriate witness protection measures – must be considered in weighing the decision whether or not to transfer a case to the entity level. In the interim, however, the High Judicial and Prosecutorial Council authorized EU, UNDP and USA funded initiatives to re-design at least one courtroom in each cantonal or district courthouse conducting war crimes trials if required. The upgrades also included provision of the technical means to conduct a hearing from a distant location via video-link and to distort the voice and image of the witness; as well as, in some courts, construction of a witness ante-chamber if there was no other suitable location in the building for witnesses to wait or give evidence via video-link.³⁶

Accordingly, decisions approving the transfer of cases to the entity level have reasoned that no witnesses requested protective measures; victims requested protective measures that could be provided by the respective entity court; or, there was no information regarding whether any witnesses requested protective measures. In one such case, the BiH Court reasoned that if the respective entity court was not in a position to provide the necessary protective measures, it could request assistance from other courts. In some of its decisions rejecting requests to transfer sexual violence cases to the entity level, the BiH Court has based its reasoning on grounds such as lack of appropriate witness protection facilities.

34 The OSCE Mission's Justice Sector Monitoring Programme monitors war crimes case transfer decisions by the BiH Court and maintains the confidentiality of these decisions when cases are in the investigation stage. For this reason, this report contains a summary and analysis of those decisions reached in respect of sexual violence cases but does not directly cite or quote from them.

35 See OSCE Mission to BiH, *Delivering Justice*, supra note 7, pp. 28-29 (section 2.2.2) (discussing the "quantum leap" necessary to improve the legislation and infrastructure at the entity level to ensure adequate witness protection measures, including physical upgrades to courts and the ability to provide out-of-court protection); OSCE Mission to BiH, *Witness Protection and Support in BiH War Crimes Trials* supra note 7.

36 A notable exception is Bihac Cantonal Court which still did not have the necessary equipment in December 2013.

Overall, these decisions can be said to be broadly in line with the criteria set out in the National Strategy. The transfer of 39 investigative case-files concerning sexual violence of a less complex nature to the entity level translates into these cases being dealt with by a greater number of prosecutor's offices, allowing the BiH Prosecutor's Office to focus on more complex cases involving large-scale, systemic crimes and/or multiple accused. **Implementation of the National Strategy, therefore, is enhancing the resolution of sexual violence cases by ensuring the burden is shared between State and entity level criminal justice systems.**

The progress of cantonal and district prosecutor's offices and courts in the FBiH, RS and Brčko District will be assessed by the second OSCE Mission report in this two-part series examining the investigation, prosecution and adjudication of conflict-related sexual violence in BiH.

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

This chapter analyses the legal and procedural framework applicable to conflict-related sexual violence cases before the BiH Court and the extent of its compliance with international standards. The manner of application of these provisions in practice is dealt with in Chapter 4. The present chapter sets out how international law currently captures conflict-related sexual violence as distinct war crimes, crimes against humanity and genocide, and examines whether the procedural and substantive law to be applied in BiH Court cases – namely the 2003 Criminal Procedure Code of BiH (BiH Criminal Procedure Code) and 2003 Criminal Code of BiH (2003 Criminal Code) and, on some occasions, the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY Criminal Code) – reflects BiH's obligations and the highest standards of international law.³⁷

Key findings and concerns:

- Sexual violence crimes codified in the 2003 Criminal Code are gender-neutral and the procedural provisions applied in proceedings before the Court BiH include special evidentiary rules for sexual violence cases. Following certain issues that presented themselves in the early sexual violence cases, the BiH Court also adopted the Rules of Procedure on Protection of Witnesses that reinforced the prohibition of questioning concerning prior sexual conduct of the injured party.
- The definition of sexual violence crimes in the 2003 Criminal Code is unduly narrow as it contains the element of force/threat of use of force, which may result in narrow charging decisions and low numbers of indictments raised in relation to sexual violence.
- Over three years have passed since the UN CAT recommended amending the definition of sexual violence in the 2003 Criminal Code and the process has still not been completed by the BiH Parliament.
- The SFRY Criminal Code does not encompass the full range of conflict-related sexual violence crimes, providing explicitly only for rape and forced prostitution as war crimes against civilians, and is unsuited to address other sexual crimes such as sexual slavery, enslavement, forced pregnancy, enforced sterilization, other acts of sexual violence and gender-based persecution.

³⁷ An examination of the broader legal framework in BiH applicable to war crimes cases beyond those provisions specifically related to the prosecution and adjudication of sexual violence is not within the scope of this chapter, as this has been addressed in earlier OSCE Mission reports. See OSCE Mission to BiH, *Delivering Justice*, *supra* note 7; OSCE Mission to BiH, *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles*, (March 2005), *supra* note 7.

- Potential fair trial concerns arise from a reading of the 2003 BiH Criminal Procedure Code as placing an absolute prohibition on the introduction of evidence that a victim consented to sexual contact. At the same time, the practice of trial panels, in a handful of sexual violence cases, of admitting evidence of consent without assessing its credibility and relevance in an *in camera* session is of major concern and risks damaging the psychological wellbeing of sexual violence victims who give testimony.
- The BiH Criminal Procedure Code does not contain a general exception to the requirement for corroboration in relation to testimony of victims of sexual violence, but in practice judges in Section I for War Crimes of the BiH Court have interpreted one to exist in conflict-related cases.

3.1 International Legal Framework

3.1.1 International Humanitarian Law

Rape and other forms of sexual violence have been prohibited under the laws of war since they were first articulated.³⁸ In modern times, explicit and implicit prohibitions against sexual violence have been incorporated into each of the principle international humanitarian law instruments.

The 1863 Lieber Code, which first codified the customary international laws of warfare,³⁹ explicitly prohibited rape by penalty of death. Explicit prohibitions against sexual violence are also codified in Article 27(2) of the Fourth Geneva Convention of 1949, governing the protection of civilians during wartime, which provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution and any form of indecent assault”; Article 76(1) of Additional Protocol I, which applies in situations of international armed conflict, providing that: “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”; and Article 4(2)(e) of Additional Protocol II, which applies in non-international armed conflicts, prohibiting: “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

Sexual violence is implicitly proscribed in Article 46 of the 1907 Hague Convention Concerning the Laws and Customs of War on Land, which applies in situations of military occupation, providing that “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected”; Common Article 3 of the Geneva Conventions, which applies in non-international armed conflict, and prohibits “violence to life and person”, including “mutilation, cruel treatment and torture”, as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”; and Article 14 of the Third Geneva Convention, which provides that “[p]risoners of war are entitled in all circumstances to respect for their persons and their honour” and “[w]omen shall be treated with all the regard due to their sex”.

³⁸ See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 *Duke Journal of Comparative & International Law* 219 (2005), p. 224.

³⁹ Arts. 44, 47, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, (24 April 1863) available at: <http://www.icrc.org/ihl/INTRO/110>

The prohibition against rape and other forms of sexual violence has been recognized as a well-established norm of customary international law applicable in both international and non-international armed conflicts.⁴⁰ BiH is a party to all four Geneva Conventions and their Additional Protocols.⁴¹

3.1.2 International Criminal Law

Despite the widespread sexual violence that took place during World War II, the Charters of the post-World War II International Military Tribunals at Nuremberg and Tokyo did not expressly criminalize sexual violence in any of its manifestations. Sexual violence was not explicitly prosecuted at the Nuremberg Tribunal, and was only addressed to a limited extent at the Tokyo Tribunal.⁴² Control Council Law No. 10, which governed the trial of alleged Nazi war criminals in Germany by the Occupying Powers, contained a provision proscribing rape as a crime against humanity. However, no explicit charges were brought for rape during the trials held under this law.⁴³

The most comprehensive developments in the prosecution of conflict-related sexual violence crimes at the international level have taken place since the early 1990s through the work of the international criminal tribunals, and in particular, the ICTY and the International Criminal Tribunal for Rwanda (ICTR). The statutes of both tribunals list rape as a crime against humanity, while the ICTR goes further to recognize “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” as a war crime. In addition to these provisions, both tribunals have prosecuted alleged perpetrators of sexual violence under statutory provisions that do not expressly reference sexual violence. For example, the ICTR and ICTY have established that sexual violence can constitute torture, persecution, enslavement, and inhumane acts as crimes against humanity, as well as torture, cruel treatment, inhumane treatment, and outrages upon personal dignity as war crimes.⁴⁴ They have also established that sexual violence can be a constitutive act of genocide.⁴⁵ The Special Court for Sierra Leone (SCSL) has also established that forced marriage may constitute an inhumane act as a crime against humanity,⁴⁶ while the Pre-Trial Chamber

⁴⁰ ICRC, *Study on Customary International Humanitarian Law*, Rule 93 (Rape and other forms of sexual violence are prohibited), see: http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule93

⁴¹ BiH became a State Party to the Geneva Conventions and Additional Protocols I and II on 31 December 1992. BiH lodged its instrument of accession to Additional Protocol III on 14 March 2006.

⁴² See Mark S. Ellis, *Breaking the Silence: Rape as an International Crime*, 38 Case Western Reserve Journal of International Law 225 (2006-07), p. 228; Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288 (2003), p. 302.

⁴³ Kelly D. Askin, *ibid.*, pp. 301-302.

⁴⁴ See Chapter 4 *infra* discussing the jurisprudence of the international criminal tribunals on sexual violence.

⁴⁵ See *Furundžija (Lašva Valley)*, Case No. IT-95-17-1, Trial Judgment (10 December 1998), para. 172; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 731.

⁴⁶ *Prosecutor v. Brima, Kamara, and Kanu* (“AFRC Case”), Appeal Judgment (22 February 2008) (Special Court for Sierra Leone), para. 184 (finding that forced marriage is “not predominantly a sexual crime” and overruling the Trial Chamber’s conclusion that forced marriage may constitute the crime against humanity of sexual slavery).

of the ICC has held that it may constitute the crime against humanity of sexual slavery.⁴⁷

Building upon the jurisprudential advancements made at the ICTY and ICTR, the Rome Statute of the ICC (Rome Statute) contains the broadest articulation of conflict-related sexual violence offences to date. The Rome Statute codifies rape as both a crime against humanity and a war crime. It also includes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as both a crime against humanity and a war crime. Furthermore, for the first time in an international legal instrument, the Rome Statute lists the crime against humanity of persecution on the basis of gender.⁴⁸ BiH became a State Party to the Rome Statute on 11 March 2002.

3.1.3 *Special Evidentiary and Procedural Rules for Sexual Violence Cases*

Drawing on national criminal justice systems, the international tribunals have established special rules governing the testimony of victims of sexual violence that address the issues of consent, prior and subsequent sexual conduct, and corroboration. These rules are designed to protect victims of sexual violence from added trauma and take into consideration the particular nature of sexual violence crimes.

Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence provides that in cases of sexual assault, evidence of a victim's prior sexual conduct may not be admitted into evidence, and no corroboration of a sexual violence victim's testimony is required.⁴⁹ In applying this rule, the ICTR Trial Chamber found that a chamber can make findings based on a single testimony provided that testimony is relevant and credible.⁵⁰ Rule 96 also provides that consent is not allowed as a defence under certain circumstances. Furthermore, before evidence of a victim's consent will be admitted, the trial chamber must determine in an *in camera* hearing that the evidence is both relevant and credible.⁵¹

Similar to the ICTY and ICTR Rules, the ICC Rules prescribe an *in camera* procedure to consider the relevance or admissibility of evidence that a victim consented to sexual violence.⁵² The ICC Rules also provide that evidence of prior sexual conduct of a victim or

47 *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-02/12ICC, Decision on the Confirmation of the Charges (26 September 2008), para. 431.

48 Rome Statute, Article 7(1)(h). Note that the Rome Statute defines "gender" as "the two sexes, male and female, within the context of society". See Rome Statute, Article 7(3).

49 Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence, entitled "Evidence in Cases of Sexual Assault", provides:

In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence.

50 *Akayesu* Trial Judgment, paras. 134-135.

51 Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence, *supra* note 49.

52 See Rule 72 of the ICC Rules of Procedure and Evidence, which provides:

(1) Where there is an intention to introduce or elicit, including by means of the questioning of a victim

witness is not admissible and furthermore bars the admission of evidence of subsequent sexual conduct. Additionally, the ICC Rules enumerate specific principles that apply to cases of sexual violence, including that:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; and
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.⁵³

Furthermore, the ICC Rules provide that corroboration is not required to prove any crime within the Court's jurisdiction, and in particular, crimes of sexual violence.⁵⁴

or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

- (2) In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear *in camera* the views of the prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.
- (3) Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

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

54 See Rule 63(4) of the ICC Rules of Procedure and Evidence, which provides: "Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence".

3.2 National Legal Framework

In BiH, war crimes, crimes against humanity and genocide are mainly tried under two criminal codes: the 2003 Criminal Code and the SFRY Criminal Code. At the State level, the 2003 Criminal Code is generally applied in war crimes cases, while courts in the entities and Brčko District generally apply the SFRY Criminal Code.⁵⁵

The substantive law applicable in BiH is gender-neutral, i.e. it does not draw distinctions between crimes that may be committed against males and females that would have the effect of unnecessarily narrowing the scope of crimes that can be prosecuted. However, **the definitions of sexual violence offences in the legislation as both war crimes and crimes against humanity are deficient and unduly narrow in respect of the inclusion of an additional and unnecessary element that they be committed through “force or the threat of use of force”**. The following sub-section analyzes this issue in detail. Thereafter, the national legal framework concerning questioning regarding prior sexual conduct, evidence of consent and the lack of requirement for corroboration of victim testimony concerning sexual violence is examined.

3.2.1 Sexual Violence Offences as War Crimes, Crimes against Humanity and Genocide in BiH Criminal Legislation

Under the 2003 Criminal Code, war crimes, crimes against humanity and genocide are set forth in Chapter XVII, entitled “Crimes against Humanity and Values Protected by International Law”. The 2003 Criminal Code was enacted the year following BiH’s ratification of the Rome Statute and, to a large extent, implements the substantive crimes contained therein in domestic law. Chapter XVII thus expressly proscribes the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity.⁵⁶ The 2003 Criminal Code also proscribes the crime against humanity of persecution on the basis of gender.⁵⁷ Furthermore, the 2003 Criminal Code also proscribes rape and forcible prostitution as war crimes.⁵⁸ The minimum sentence prescribed by the 2003 BiH Criminal Code for genocide, crimes against humanity and war crimes is 10 years’ imprisonment, while the maximum sentence is 45 years’ imprisonment.

However, the 2003 Criminal Code’s provisions governing sexual violence crimes as war crimes and crimes against humanity do not fully align with international standards.

55 In a limited number of cases, courts in the FBiH have also used the interim 1998 FBiH Criminal Code. The reasons for, and consequences of, the application of three different criminal codes in war crimes cases in BiH are explored in detail in previous OSCE Mission reports. See OSCE Mission to BiH, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, (August 2008), available at http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf; OSCE Mission to BiH, *Delivering Justice*, *supra* note 7, pp. 19; 70-72.

56 See Article 172(1)(g) of the 2003 Criminal Code.

57 Article 172(h) of the 2003 Criminal Code.

58 See Article 173(1)(e) of the 2003 Criminal Code.

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

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

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

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

These provisions limit the means by which sexual acts can be rendered non-consensual – and thus criminal – to situations in which coercion through force or threat of force has been employed. To the contrary, the jurisprudence of the international tribunals has established that lack of consent to sexual activity may be demonstrated by other means of coercion, which are particularly relevant during periods of armed conflict, including fear of violence, duress, detention, psychological oppression, or abuse of power.⁵⁹ The provision in BiH law is thus unduly restrictive.

In certain cases before the BiH Court, as elaborated in Chapter 4, **judges have overcome this legislative shortcoming by interpreting the relevant provisions in line with the jurisprudence of the international tribunals.** However, such corrective action is only possible once a case reaches the courtroom. If the prosecution did not charge sexual violence crimes in the first place because they cannot show that the acts took place by means of force or threat of force, it may not be possible to later correct such omissions in the case. As such, the OSCE Mission is concerned **that the 2003 Criminal Code's definitions governing sexual violence crimes may result in an array of criminal conduct not perpetrated through force or threat of force not being investigated, prosecuted and adjudicated in relation to the BiH conflict.** Moreover, the narrowness of the provision could be a factor that has contributed to preventing greater numbers of war crimes indictments involving sexual violence crimes from being raised in BiH to date.

In January 2011, in its concluding observations in relation to BiH, the UN CAT recommended that BiH amend Articles 172 and 173 of the 2003 Criminal Code to bring them in line with international standards and "remove the condition of "force or threat of immediate attack" from the present definition".⁶⁰ BiH was given a year to adequately respond to the CAT's recommendations.

⁵⁹ See *infra*, Chapter 4.

⁶⁰ Numerous NGOs, as well as United Nations bodies, have cited similar concerns regarding the failure of the 2003 Criminal Code to define conflict-related sexual violence crimes in accordance with international standards. See Amnesty International, *'Whose justice?': The women of Bosnia and Herzegovina are still waiting*, (30 September 2009) AI Index: EUR 63/006/2009, available at: <http://amnesty.org/en/library/info/EUR63/006/2009/en> (in English, French, and B/C/S), pp. 21-22; Committee on the Elimination of all forms of Discrimination Against Women (CEDAW), *Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina*, (30 July 2013) UN Doc. CEDAW/C/BIH/CO/4-5, para 9(b); Impunity Watch, *Living in the Shadows: War Victims and Gender-Sensitive Truth, Justice, Reparations and Non-Recurrence in Bosnia and Herzegovina*, (August 2012), p.11; TRIAL, *Written Information for the Adoption of the List of Issues by the Committee on the Elimination of Discrimination of Violence against Women with regard to Bosnia and Herzegovina's Combined Fourth and Fifth Periodic Reports*, (September 2012) available at: http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/BH/Alternative_report_CEDAW_Bosnia_-_September_2012.pdf, paras. 14-19.

On 5 December 2011, the BiH Ministry of Human Rights and Refugees requested that the BiH Ministry of Justice provide information regarding the fulfilment of the CAT's recommendations. The BiH Ministry of Justice referred the matter to the Criminal Codes Implementation Assessment Team,⁶¹ which, on 29 January 2013, 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 Criminal Code.⁶² The changes were incorporated into the BiH Ministry of Justice's proposed set of amendments to the 2003 Criminal Code⁶³, which were submitted to the BiH Council of Ministers. The Council of Ministers adopted the amendments during its session on 3 September 2013, and they were subsequently forwarded for parliamentary consideration. The Constitutional-Legal Committee of the House of Representatives considered and approved the package of amendments at its session on 22 October 2013. However, **the amendments were not adopted when they reached consideration by the BiH House of Representatives** at its 57th session on 20 November 2013 due to a failure to meet the required quota, known as entity majority. To the OSCE Mission's knowledge, the proposed amendments to Articles 172(1)(g) and 173(1)(e) were not the cause of the rejection of the package of 2003 Criminal Code amendments. Nonetheless, adoption of the amendments will now be delayed until further consultation on the package takes place.

Although legislative reform efforts to date have focused on removing the most problematic aspect of the definition of sexual violence— namely, the restrictive element of sexual violence as a war crime and crime against humanity – the OSCE Mission also notes that the enumerated constitutive acts of sexual violence *as a war crime* under the 2003 BiH Criminal Code are considerably narrower than those provided for in international law. Article 173(1)(e) includes only "sexual intercourse or an equivalent sexual act (rape) or forcible prostitution", in marked contrast to the Rome Statute which provides similar underlying acts as those listed in Article 173(1)(g) concerning crimes against humanity.

As noted above, the BiH Court has the power to requalify cases tried under the 2003 Criminal Code according to the relevant provisions of the **SFRY Criminal Code** and has done so in two cases that included sexual violence charges. In contrast to the 2003 Criminal Code, the SFRY Criminal Code contains a provision proscribing war crimes and genocide but does not provide for the prosecution of crimes against humanity.⁶⁴ Nor does it recognize the mode of liability of command responsibility. Furthermore, explicit prohibition of sexual crimes in the SFRY Criminal Code is limited to rape and forcible prostitution as a war crime against civilians.

61 Criminal Codes Implementation Assessment Team (CCIAT) was a State level body composed of legal experts from both entities and Brčko District, which was led by the BiH Ministry of Justice and convened as needed until January 2013.

62 The OSCE Mission supported the recommendation of the CAT in a written submission to CCIAT concerning the package of proposed amendments to the 2003 Criminal Code. *OSCE Mission to BiH, Comments to Proposed Amendments to the Criminal Codes of BiH subject to review by the CCIAT of the BiH Ministry of Justice*, August 2012.

63 This draft also contained proposed amendments to a number of other provisions.

64 See Chapter XVI of the SFRY Criminal Code, entitled "Criminal Acts against Humanity and International Law".

Article 142 of the SFRY Criminal Code, governing war crimes against civilians, provides:

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that the civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; **forcible prostitution or rape**; [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.⁶⁵ [emphasis added]

The elements of these crimes are not defined further. The definitions of genocide (Article 141), war crimes against the wounded and sick (Article 143) and war crimes against prisoners of war (Article 144) do not explicitly criminalize any sexual conduct. However, sexual violence may be implicitly prohibited as torture, inhuman treatment or “causing of great sufferings or serious injury to the bodily integrity or health” under any of the categories of war crimes in the SFRY Criminal Code. Similarly, sexual violence may constitute the underlying acts of genocide of “inflicting of serious bodily injuries or serious disturbance of physical or mental health”.⁶⁶ The crime of forced sterilization is implicitly recognized within the underlying act of genocide of imposing measures “intended to prevent births within the group”.⁶⁷

The SFRY Criminal Code does not reflect the highest standards of international law with respect to the criminalizing and defining of conflict-related sexual violence as war crimes, crimes against humanity and genocide. In particular, a number of forms of sexual violence are not explicitly captured, including the crimes against humanity of sexual slavery, forced pregnancy, forced sterilization, persecution (including on gender grounds) and other acts of sexual violence, such as forced nudity and sexual humiliation. The absence of crimes against humanity from the SFRY Criminal Code means that widespread and systematic sexual violence crimes against a civilian population are not adequately criminalized under the SFRY Criminal Code’s provisions, and thus do not provide compliance with international law with regard to the duty to investigate and prosecute sexual violence of such a nature. Similarly, the limiting of the criminalization of war crimes of sexual nature to rape and forcible prostitution omits other forms of sexual violence that may amount to war crimes, including sexual slavery, forced pregnancy, enforced sterilization and “any other form of sexual violence constituting a serious violation of Article 3 common to the four Geneva Conventions”.⁶⁸

⁶⁵ Article 142, SFRY Criminal Code. Note that with the adoption of the Constitution of BiH in December 1995, the death penalty could no longer be imposed, for it would be in violation of Protocol No. 6 to the European Convention on Human Rights (ECHR).

⁶⁶ Article 141, SFRY Criminal Code, states in full: Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or **the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members**, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or **that measures be imposed intended to prevent births within the group**, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty. [emphasis added]

⁶⁷ *Ibid.*

⁶⁸ See Article 8(vi), Rome Statute.

The 2003 Criminal Code is better suited to address the serious violations of human rights and international humanitarian law that occurred during the conflict,⁶⁹ although its application has resulted in convicted persons challenging the sentences they have received on the basis of Article 7(1) of the European Convention on Human Rights.⁷⁰ As a result, the SFRY Criminal Code has been applied, on appeal, in only two cases involving sexual violence before the BiH Court to date and thus the majority of cases have been decided under the 2003 Criminal Code.⁷¹ Although it is uncertain what future jurisprudence considering the principle of *lex mitior* will bring, the OSCE Mission notes that the BiH Court's practice to date in applying the 2003 Criminal Code to the qualification of sexual violence crimes has been positive and helped to ensure the possibility of capturing the full nature and extent of the harm suffered by victims. Future trial panels should bear this issue in mind should the issue arise.

3.2.2 Special Evidentiary Rules in Sexual Violence Cases in BiH Law

3.2.2.1 Prior sexual conduct

Similar to the Rules of Procedure and Evidence of the international tribunals, the BiH Criminal Procedure Code prohibits questioning a victim of sexual violence about prior sexual history.

Article 86(5) of the BiH Criminal Procedure Code, entitled "Course of the Examination of a Witness", provides, in the relevant part:

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

69 See OSCE Mission to BiH, *Moving Towards a Harmonized Application of the Law*, *supra* note 6; OSCE Mission to BiH, *Delivering Justice*, *supra* note 7, at footnote 114; pp.70-71.

70 Article 7 of the European Convention on Human Rights and Fundamental Freedoms provides:
 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

See *Maktouf & Damjanović v. Bosnia and Herzegovina*, (Applications nos. 2312/08 and 34179/08) Judgment of the Grand Chamber (18 July 2013). See also BIRN, *Bosnia quashes ten war crimes convictions*, (24 October 2013), available at: <http://www.balkaninsight.com/en/article/ten-war-crimes-convictions-quashed>.

71 The two instances in which the Appellate Panel applied the SFRY Criminal Code were *Kurtović* and *Terzić*. The defendant in latter case was acquitted of sexual violence charges. In the *Kurtović* appeal (March 2009), the Appellate Panel held that when considering the minimum statutory sentence in crimes that were foreseen in both the 2003 Criminal Code and the SFRY Criminal Code, the latter should be applied as the more lenient law. In addition to these cases, in the *Pinčić* case, the Appellate Panel entered a second final and binding judgment, reversing the application of the 2003 Criminal Code and applying the SFRY Criminal Code, following the Constitutional Court decision of October 2013 on quashing the second instance verdict in the said case. See *Maktouf & Damjanović v. Bosnia and Herzegovina*, *supra* note 70.

Article 264(1) of the BiH Criminal Procedure Code, entitled “Special Evidentiary Rules When Dealing with Cases of Sexual Misconduct”, provides:

It shall not be allowed to ask an injured party about any sexual experiences prior to the commission of the criminal offence in question. Any evidence offered to show, or tend[ing] to show the injured party’s involvement in any previous sexual experience, behaviour, or sexual orientation, shall not be admissible.

The provision is not quite as broad as the ICC Rules, which also prohibit questioning about subsequent sexual conduct as noted above.⁷² As the OSCE Mission has previously noted, in the *Janković* case, the Prosecution asked three victim-witnesses about their prior sexual history.⁷³ In the *Radmilo Vuković* Appeal Judgment, the Defence attempted to introduce into evidence, during a closed hearing, a gynecological health record of the victim to prove previous sexual experience. The Presiding Judge immediately warned the Defence Counsel that such evidence was not permitted.⁷⁴

While such incidents are concerning, the OSCE Mission notes that judges refused to rely on this inadmissible evidence and that subsequently the Plenum of Judges of the BiH Court adopted, in 2008, Rules of Procedure on Protection of Witnesses that address the matter further. Article 19 of the BiH Court Rules on Witness Protection provides:

The Presiding Judge or the Judge shall restrict the content of questions asked on direct and cross-examination pursuant to Articles 86(5) and 264(1) and (3) of the Criminal Procedure Code when the witness is an injured party to a crime of sexual misconduct.⁷⁵

The OSCE Mission continues to urge parties to refrain from this type of examination and judges to remain vigilant for such questioning, halt it immediately if it occurs and not to subsequently rely on any such information presented. Judges should also consider prohibiting questioning about subsequent sexual conduct in line with international best practice, should such circumstances arise.

⁷² Rule 72 of the ICC Rules of Procedure and Evidence, *supra* note 52 (Ch. 3.1.3).

⁷³ OSCE Mission to BiH, *Third OSCE Report in the Gojko Janković Case Transferred to the State Court pursuant to Rule 11bis*, October 2006, p.7 (discussing “Concerns Regarding Questions Related to Prior Sexual History of Witnesses”). The OSCE Mission noted its concern that:

[...] the Prosecutor in the main trial of *Janković* asked several of his witnesses whether they were virgins before they were raped, while the Trial Panel did not express any disapproval of the inquiry. If any relevance can be attached to this question, it would appear that it has been posed in order for the Court to consider the loss of virginity in such violent circumstances as an aggravating factor against the accused. The Mission finds that this conduct is inconsistent with Article 86(5) BiH CPC, which prohibits questioning injured parties about their previous sexual experience [...]

⁷⁴ *Radmilo Vuković*, Appellate Hearing, 31 August 2007.

⁷⁵ See Article 19, Rules of Procedure on Protection of Witnesses, “Witnesses in Cases of Sexual Criminal Misconduct” adopted on 29 September 2008.

3.2.2.2 *Absence of requirement to prove lack of consent*

Similar to the Rules of Procedure and Evidence of the international tribunals, the BiH Criminal Procedure Code contains a rule governing evidentiary matters in sexual violence cases.

Article 264 of the BiH Criminal Procedure Code, entitled “Special Evidentiary Rules When Dealing with Cases of Sexual Misconduct”, provides in the relevant part:

[...]

(2) Notwithstanding Paragraph 1 of this Article, evidence offered to prove that semen, medical documents on injuries or any other physical evidence may stem from a person other than the Accused, is admissible.

(3) In the case of the criminal offence [*sic*] against humanity and values protected by the international law, the consent of the victim may not be used in a favour [*sic*] of the defence.

(4) Before admitting evidence pursuant to this Article, the Court must conduct an appropriate hearing *in camera*.

(5) The motion, supporting documents and the record of the hearing must be sealed in a separate envelope, unless the Court orders otherwise.

The application of these provisions in practice by the BiH Court is discussed in Chapter 4.

A plain reading of Article 264(3) indicates that evidence of consent in war crimes, crimes against humanity and genocide cases may not be used for the benefit of Defence under any circumstances.⁷⁶ On the one hand, the provision could be taken to show that BiH law implicitly accepts that the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish lack of consent as an element of the crime. On the other hand, the substantive definition of sexual violence crimes in the 2003 Criminal Code does not fully support such a reading (see discussion on the element of force or threat of use of force in Articles 172 and 173 of the 2003 Criminal Code above in section 3.2.1). Moreover, this provision is narrower than equivalent provisions of the rules of the international tribunals, which allow evidence of consent to be admitted under limited circumstances. The OSCE Mission is concerned **that a complete ban on the presentation of evidence that a purported victim consented to sexual intercourse would violate the right of the accused to a fair trial, including, in particular, the rights to introduce evidence and witnesses and cross-examine prosecution evidence.**⁷⁷ The OSCE Mission accordingly recommends that judges interpret Article 264(3) flexibly to allow consideration of the admissibility of evidence tending to show the victim consented in line with the practice of the international tribunals outlined above, in order to ensure fair trial rights are balanced with the absence of any requirement to show lack of consent to prove a crime of sexual violence (see also section 4.2.2.3, discussing the BiH Court’s jurisprudence on the issue of sexual slavery and consent).

⁷⁶ The OSCE Mission notes that “Crimes against Humanity and Values Protected by International Law” is the title of Chapter Seventeen of the 2003 Criminal Code, which covers (among other crimes) genocide, crimes against humanity, and war crimes. Consequently, Article 264 of the 2003 BiH Criminal Procedure Code should be read to cover not only crimes against humanity but all offences included in Chapter XVII of the 2003 Criminal Code.

⁷⁷ See ICCPR, Article 14 (d); ECHR, Article 6(c).

The prohibition on introducing evidence of consent has not, in practice, meant that the defence counsel has abstained from trying to introduce or illicit such evidence in practice. For example, in the *Radmilo Vuković* case, the first instance verdict shows that two defence witnesses gave evidence that the victim and the Accused were in a relationship and that the sexual intercourse that occurred was consensual.⁷⁸ Similarly, in *Pinčić*, the Defence was allowed to admit a statement of the Accused, claiming that he has been dating the victim at the time of the alleged crime.⁷⁹ The Defence also called four witnesses who testified that the Accused and the victim were romantically involved.⁸⁰ In *Janković*, the Defence, in its closing arguments, argued that the Accused did not rape or detain two witnesses but to the contrary “they begged him to stay under his protection”.⁸¹ As noted below, the BiH Court also allowed the Defence to admit evidence of consent in the *Kujundžić* and *Barićanin* cases.⁸²

Thus, while the prohibition of admission of evidence of consent in the BiH Criminal Procedure Code presents a potential fairness issue, the practice of the BiH Court shows that such evidence has been admitted in practice. However, the manner in which this has occurred **gives rise to another concern, namely that in cases where the defence attempted to raise evidence of consent at trial, the BiH Court allowed it to be heard in open instead of closed session and without first hearing arguments concerning its relevance and credibility.** In none of the above-mentioned cases is there mention of this evidence being introduced through an *in camera* procedure.⁸³ The best practice of international tribunals indicates that, before admitting such evidence, its relevance and credibility should be probed in an *in camera* procedure. This practice also serves to lessen the risk of potential trauma to victim-witnesses (see section 3.1.3, *supra*).

The practice of **admitting evidence of consent without resorting to use of an *in camera* procedure has the potential to jeopardize the wellbeing of sexual violence victims testifying in court by exposing them to irrelevant and painful questioning that can result in additional trauma.** The OSCE Mission accordingly recommends that trial panels require evidence of consent to be probed in an *in camera* session for relevance and credibility prior to admitting it.

3.2.2.3 *Absence of requirement for corroboration of evidence of victims of sexual violence*

As noted above, a general exception to the requirement of corroboration of witness testimony is made for victims of sexual violence at the international level. Unlike the rules of the international tribunals, the BiH Criminal Procedure Code does not contain a provision specifying that corroboration is not required to prove crimes of sexual violence

⁷⁸ See *Radmilo Vuković* Trial Judgment, p. 5.

⁷⁹ *Pinčić* Trial Judgment, p. 36.

⁸⁰ *Pinčić* Trial Judgment, pp. 3, 16, 33, 36, 41.

⁸¹ *Gojko Janković* Indictment dated 16 February 2007, p. 17.

⁸² See *infra*, p. 51 [section 4.2.2.3 on sexual slavery and consent].

⁸³ See, e.g. *Radmilo Vuković* Trial Judgment, p. 5. Procedural decisions concerning the conduct of the trial, in particular those related to closing hearings to the public, should be reason in the verdict. Absent such reasoning, it appears an *in camera* hearing did not take place to determine the relevance and credibility of the evidence.

provided that the testimony is credible. Nonetheless, in a number of cases, the BiH Court has explicitly recognized this principle.

For example, in the *Marković* Appeal at the BiH Court, the Defence argued that the Trial Panel erred by convicting the Accused of rape based solely on the statement of the victim. The Appellate Panel dismissed this argument, finding that the Trial Panel “could have convicted the Accused based on the statement of the aggrieved party”, quoting the BiH Court Appeal Chamber’s holding in the *Mejakić et al.* case that “[e]vidence that is lawful, authentic and credible, may be considered sufficient to convict an accused even where its source is a single witness”.⁸⁴ The Appellate Panel further found that in drawing its conclusion, the Trial Panel properly took into account the nature of the crime of rape, which “is often committed in front of a rather small number of people or none at all” and is thus difficult to corroborate.⁸⁵ Similarly, in *Radić et al.*, the Appellate Panel stated that “corroboration is not required in general or in particular” in evaluating the evidence of sexual violence victims “provid[ed] it passes the threshold of reasonableness”.⁸⁶ In an appeal in the *Pinčić* case, the Defence argued that the Trial Panel erred by finding the victim credible because no witness corroborated her testimony that “she was forced into the bedroom with a rifle” and that “the Accused threatened to bring fifteen soldiers to the house if she refused to have sex with him”. Relying on ICTY jurisprudence, the Appellate Panel noted that corroboration is not required to establish witness credibility.⁸⁷

Overall, the most recent cases considered by BiH Court Appellate Panels have affirmed that there is no requirement of corroboration of a victim’s evidence concerning sexual violence.⁸⁸ The jurisprudence which has emerged in the BiH Court exempting witness testimony concerning crimes of sexual violence from corroboration in BiH law is a positive step towards ameliorating the lack of a specific rule in this regard. The OSCE Mission recommends that, in the absence of a relevant provision within the BiH Criminal Procedure Code, the BiH Court standardize this practice to ensure that the particular nature of sexual violence crimes is appreciated in all proceedings before the Court.

84 *Marković* Appeal Judgment, para. 72 (quoting the BiH Court’s *Mejakić et al.* Appeal Judgment, para. 47).

85 *Marković* Appeal Judgment, para. 79.

86 See *Radić et al.* Appeal Judgment, para. 545 (citing the ICTY’s verdict in *Prosecutor v. Delalić, et al.*, (“Čelebići”) Case No. IT-96-21, Trial Judgment (16 November 1998), para. 956, as well as Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence).

87 *Pinčić* Appeal Judgment, para. 68 (citing the ICTY’s *Dragomir Milošević* Appeal Judgment, para. 248). However, the Panel nevertheless considered the issue and dismissed the Accused’s argument on the basis that the Trial Panel could have found the victim’s testimony credible because it was corroborated by the testimony of several other witnesses. *Pinčić* Appeal Judgment, paras. 68-73.

88 *Marković* Appeal Judgment, paras. 72, 79; *Radić et al.* Appeal Judgment, para. 544.

4. Sexual Violence Cases before the BiH Court

This chapter discusses the jurisprudence of the BiH Court in conflict-related sexual violence cases, in particular how such crimes have been qualified in indictments and verdicts and development of the jurisprudence within the BiH Court.

Given that understanding of the scope of definitions of sexual violence as war crimes, crimes against humanity and genocide has been driven largely by the jurisprudence of international tribunals to date – and in light of the fact that the BiH Court may rely on this jurisprudence and facts established in legally-binding ICTY decisions⁸⁹ the discussion of how the BiH Court has treated the definition of each crime is foreshadowed by a summary of the current state of international law on the issue. Following this, the case-law of the BiH Court to date is discussed, having particular regard to its compliance with the domestic legal framework, the highest standards in international law and the rights of defendants and witnesses, particularly victim-witnesses.

Key findings and concerns:

- The BiH Court and Prosecutor's Office have soundly articulated the objective elements of rape as a war crime, crime against humanity, or genocide and in particular, have interpreted that "coercive circumstances" negate any possibility of consent in line with the highest international standards thus overcoming deficiencies in the legislation.
- The BiH Court articulated the crime against humanity of sexual slavery in line with international standards and displayed a sound understanding of the issue of consent in the context of sexual slavery cases, although some early pronouncements on sexual slavery failed to take into account all of the underlying acts that may constitute this offence.
- The BiH Court pronounced the first verdicts worldwide for gender-based persecution as a crime against humanity in three cases to date.

⁸⁹ Article 4 of the *BiH 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 BiH* (2002) provides:

"At the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings."

- Notwithstanding these positive achievements, in a number of cases, problems previously noted by the OSCE Mission with respect to war crimes cases tried before the BiH Court were identified, including failures by the BiH Prosecutor's Office to recognize the sexual nature of torture and other acts of sexual violence in a number of indictments and failures by trial panels to correct such flaws or to articulate reasoning for the qualification of acts in a manner different than that contained in the indictment. Appellate panels also failed to provide reasoning for departing from the qualification of crimes in the trial judgment in some cases.
- While four of the 36 completed cases at the BiH Court dealt with sexual violence against males, the conduct was not qualified as rape although it met the definition of rape under both BiH and international law and jurisprudence.

4.1 Rape

4.1.1 International Jurisprudence on Rape

As rape may be qualified as a war crime, crime against humanity or underlying act of genocide under international and BiH law, there are a number of objective and subjective elements of the respective definitions of these crimes that have been developed by the international tribunals.

In the *Akayesu* case, the ICTR Trial Chamber noted that there was no commonly accepted definition of rape in international law at that time, and that although certain national jurisdictions define rape as "non-consensual intercourse", rape may also include "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."⁹⁰ The Chamber also considered that "the elements of rape cannot be captured in a mechanical description of objects and body parts".⁹¹ It thus defined the *actus reus* of rape as:

[...] a physical invasion of a sexual nature committed on a person under circumstances which are coercive.⁹²

In the *Furundžija* case, the ICTY built upon the *Akayesu* definition, elaborating the nature of the "physical invasion" that may constitute rape as well as the concept of coercive circumstances. The Trial Chamber defined the objective elements of rape as:

- (i) 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;
 - b. of the mouth of the victim by the penis of the perpetrator;
 - c. by coercion or force or threat of force against a victim or third person.⁹³

⁹⁰ *Akayesu* Trial Judgment, *supra* note 45, para. 596, 686.

⁹¹ *Ibid.*, para. 597.

⁹² *Ibid.*, para. 598. Shortly after the *Akayesu* judgment, the ICTY applied the same definition in the *Čelebići* case. *Čelebići* Trial Judgment (ICTY), para. 479.

⁹³ *Furundžija* Trial Judgment, para. 185.

The Trial Chamber in the *Kunarac* case concurred with the *Furundžija* articulation of the *actus reus* of rape but considered that paragraph (ii) of the definition, which describes the circumstances that negate consent to sexual penetration, was more narrowly construed than required under international law. The Chamber found that other factors besides coercion or force or threat of force against a victim or third person could render sexual penetration non-consensual.⁹⁴ It thus articulated the objective elements of rape as follows:

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.⁹⁵

The Rome Statute has also defined rape as a war crime and crime against humanity, drawing from and building upon the ICTY and ICTR definitions. The ICC Elements of Crimes describes the *actus reus* of rape as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.⁹⁶

⁹⁴ *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23&23/1, Trial Judgment (22 February 2001), para. 438.

⁹⁵ *Ibid.*, para. 460.

⁹⁶ Rome Statute Elements of Crimes, Articles 7(1)(g)-1 (crime against humanity of rape), 8(2)(b)(xxii)-1 (war crime of rape – other serious violations of the laws and customs applicable in international armed conflict); and 8(2)(e)(vi)-1 (war crime of rape - other serious violations of the laws and customs applicable in armed conflicts not of an international character), available at: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>. The SCSL has drawn from the ICTY, ICTR and ICC definitions of rape in articulating the elements of the crime. See, e.g., Valerie Oosterfeld, *The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments*, 44 *Cornell Int'l L.J.* 49 (2011), pp. 53-61 (citing the AFRC Trial Judgment, *supra* note 46, which adopted the *Kunarac* elements of rape, as well as the RUF Trial Judgment, which defined the element of rape as:

“(i) The Accused invaded the body of a person by conduct resulting in penetration, however, slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent; (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and (iv) The Accused knew or had reason to know that the victim did not consent.”

See also AFRC Trial Judgment, *supra* note 46, para. 693; RUF Trial Judgment (SCSL), para. 145).

Each of the definitions of rape pronounced by the international tribunals address the issue, either explicitly or implicitly, of whether the requisite sexual penetration was non-consensual. The *Akayesu* and *Furundžija* definitions do not explicitly list lack of consent as an element of rape. The definitions instead focus on the factors which may render sexual penetration non-consensual. *Akayesu* refers to “coercive circumstances”, explaining that not only physical force but a variety of other factors can demonstrate coercive circumstances, including “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation”.⁹⁷ It further explains that coercion may be inherent in certain circumstances, such as armed conflict or those in which the military is present.⁹⁸ In *Furundžija*, the factors found to render sexual penetration non-consensual include “coercion or force or threat of force against a victim or third person”.⁹⁹ The Chamber added that any form of captivity negates the possibility of consent to sexual penetration.¹⁰⁰

Although the *Kunarac* Appeal Chamber added the element of non-consent to the definition of rape, it emphasized that in most cases involving war crimes or crimes against humanity, the circumstances will almost always be coercive, thus precluding the possibility of consent.¹⁰¹ *Kunarac* also clarified that there is no requirement to show that the victim resisted in order to prove the victim’s lack of consent.¹⁰²

In the *Gacumbitsi* case, the Appeals Chamber provided further insight into the *Kunarac* definition, holding that “the Prosecution can prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible” and that in order to do so, the Prosecution need not “introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator” or “of force” but that “the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim”.¹⁰³

The issue of consent is also addressed in the Rules of Procedure and Evidence of the *ad hoc* international tribunals, which apply to all forms of sexual violence, including rape.¹⁰⁴

97 *Akayesu* Trial Judgment, para. 688.

98 *Akayesu* Trial Judgment, para. 688; *Čelebići* Trial Judgment, para. 495.

99 *Furundžija* Trial Judgment, para 185.

100 *Furundžija* Trial Judgment, para. 271.

101 *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23&23/1, Appeal Judgment (12 June 2002), para. 130. See also *Kunarac* Appeal Judgment, para. 129 (clarifying that rather than renouncing the Tribunal’s earlier jurisprudence, the *Kunarac* definition sought to explain the relationship between force and consent; namely, that force or threat of force is not an element of rape but rather evidence of non-consent). See also *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64, Appeal Judgment (7 July 2007), para. 155, which provided further insight into the *Kunarac* definition, holding that “the Prosecution can prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible” and that in order to do so, the Prosecution need not “introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator” or “of force” but that “the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim”.

102 *Kunarac* Appeal Judgment, para. 128 (noting that it is “wrong on the law and absurd on the facts”).

103 *Gacumbitsi* Appeal Judgment, *supra* note 101, para. 155.

104 See Rule 96, ICTY and ICTR Rules of Procedure and Evidence; Rules 63(4), 70 and 72, ICC Rules of Procedure and Evidence. See also section 3.1.3 entitled “Special Evidentiary and Procedural Rules for Sexual Violence Cases”, *supra*, p. 26.

4.1.2 BiH Court Jurisprudence on Rape

Out of the 36 cases completed by the BiH Court that include sexual violence crimes, the vast majority include counts of rape. The four cases in which rape was not charged involve male victims, which is discussed below in section 4.2.1.1.¹⁰⁵ In an additional case, an allegation of rape supported a genocide charge. However, the accused was ultimately acquitted of responsibility for this rape.¹⁰⁶

As noted above in section 3.2.1, the 2003 Criminal Code definition of rape is not in accordance with international standards. However, in several cases, **the BiH Court has overcome this deficiency by relying on established international jurisprudence when defining the elements of rape.**¹⁰⁷

For example, as early as 2006 in *Šimšić*, the first BiH Court case to address the elements of rape, the BiH Court relied upon *Kunarac*, finding that the *actus reus* of rape consisted of:

[...] 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.

As in *Kunarac*, the *mens rea* was found to be “the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.¹⁰⁸

In relation to the non-consent element, in line with international standards, the BiH Court recognized that not only force or threat of force but also coercive circumstances may negate consent. Quoting *Kunarac*, it further found that “[r]esistance is not a requirement”.¹⁰⁹

¹⁰⁵ See *Kurtović, Lazarević, Terzić and Veselinović* indictments. See *Annex 1, infra*.

¹⁰⁶ See *Jević et al.* Indictment dated 15 January 2012 (*charging* the accused with genocide pursuant to article 171(a) and (b), in conjunction with Articles 29 and 180(1) of the 2003 Criminal Code, for participation in a joint criminal enterprise, with the aim of partially exterminating a group of Bosniac people, by inflicting on them severe physical and mental injuries, by forcible transfer of the population, by separating men from their families, and by capturing and executing Bosniac men, through acts including rape. Specifically, Count 2 of the Indictment alleges, *inter alia*, that at least one Bosniac woman was raped in the “White House” by persons under the order and supervision of the accused. Note that the Appellate Panel ultimately acquitted the accused of responsibility for the rape, finding that it could not connect the accused with the actions of those who committed it. See *Jević et al.* Trial Judgment, pp. 86-87. See also *Jević et al.* Appeal Judgment, p.5 (confirming the Trial Chamber’s finding).

¹⁰⁷ The non-binding Council of Europe/European Commission, *Commentary of the BiH Criminal Code* (2005) also supports a broader interpretation of what may constitute force or threat of use of force:

It is considered that the perpetrator assaulted the body of a person with an act which resulted in penetration of sexual organs no matter how slight, of any part of the victim’s body, respectively anal or genital with an object, or some other part of the body. Assault was committed **by force or threat, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of the coercive environment, or the assault was committed on a person who could not give genuine consent.**

See pp. 566-567 (emphasis added).

¹⁰⁸ *Šimšić* Trial Judgment, p. 49.

¹⁰⁹ *Ibid.*

In this case, the BiH Court soundly articulated international standards and the domestic law governing wartime rape. Rape was similarly defined in 15 additional cases involving allegations of rape.¹¹⁰ In 16 other cases, the BiH Court did not enter into an analysis of the elements of rape.¹¹¹

4.1.2.1 Rape and other forms of sexual violence against males

The BiH Court has finalized a total of four cases involving sexual violence against males.¹¹² At least two of these cases involved allegations that male victims were forced to perform oral sex on one another. Although this crime has been recognized as rape in the jurisprudence of the international tribunals,¹¹³ as well as that of the BiH Court in practice,¹¹⁴ these acts were not qualified or assessed as rape either in the indictments of the BiH Prosecutor's Office or the verdicts of the BiH Court.

For example, in the *Kurtović* case, the Accused was charged and convicted of war crimes against civilians for, *inter alia*, forcing two brothers and members of the Croatian Defence Council, who were detained in a church, to strip naked and have oral sex.¹¹⁵ This act was qualified in both the indictment and the Trial Judgment as inhuman treatment and

¹¹⁰ See *Radmilo Vuković* Trial Judgment, p. 11 (citing *Kunarac* Appeal Judgment, paras. 127-132, stating that "[t]he *actus reus* of the crime of rape in international law is constituted by the sexual penetration", and that the *mens rea* consists of:

[...] the intention to effect sexual penetration and the knowledge that it occurs without the consent of the victim. Such state of mind may be inferred from all the circumstances surrounding the events, including the coercive environment in which the act took place. Resistance is not a requirement. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. Force and threat are merely an *indicium*.

Further citing the *Akayesu* Trial Judgment, stating that "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion"; *Mejakić et al.* Trial Judgment, p. 203 (citing *Kunarac* Appeal Judgment, paras. 127-129, stating that the *mens rea* of rape is "[t]he intention to effect the sexual penetration, and the knowledge that it occurs without the consent of the victim". Further referring to the *Akayesu* definition of rape, described as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" and stating that "[s]exual violence is broader than rape and includes such crimes as sexual slavery or molestation"). See also *Baričanić* Trial Judgment, paras. 215-216; *Bastah et al.* Trial Judgment, p. 80; *Bogdanović* Trial Judgment, paras. 124-128; *Gazdić* Trial Judgment, paras. 106-112; *Kovač* Trial Judgment, p. 43; *Kovač* Appeal Judgment, p. 57; *Kujundžić* Trial Judgment, p. 115; *Lalović* Trial Judgment, paras. 147-148; *Marković* Trial Judgment, pp. 34-35; *Nikačević* Trial Judgment, pp. 28-29; *Novalić* Trial Judgment, p. 23; *Pinčić* Trial Judgment, p. 32; *Radić* Trial Judgment, pp. 101-102; *Radić* Appeal Judgment, p. 171; *Momir Savić* Trial Judgment, p. 93.

¹¹¹ See *Bundalo et al.*, *Damjanović*, *Dolić*, *Samardžić*, *Stanković*, *Janković*, *Jević* Trial and Appeal Judgments, *Kličković*, *Lelek*, *Palića*, *Savić*, *Tanasković*, *Ranko & Rajko Vuković*. See also *Bjelčić*, *Perković*, and *Tripković* Trial Judgments.

¹¹² See *Kurtović*, *Lazarević et al.*, *Terzić* and *Veselinović* cases.

¹¹³ See, e.g. *Furundžija* Trial Judgment, paras. 183-185 (holding that "forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity", that "such an extremely serious sexual outrage as forced oral penetration should be classified as rape", and accordingly, that the elements of rape include sexual penetration of the mouth of the victim by the penis of the perpetrator).

¹¹⁴ See e.g. *Pinčić* Trial Judgment, pp. 31-32 (noting that some states treat forced oral penetration as sexual assault while others qualify it as rape and concluding that rape includes "sexual penetration of the mouth of the victim by the penis of the perpetrator").

¹¹⁵ *Kurtović* Indictment, p. 3; *Kurtović* Trial Judgment, pp. 45-46.

violation of bodily integrity as war crimes against prisoners of war pursuant to Article 175 of the 2003 Criminal Code.¹¹⁶ In *Lazarević et al. case*, Lazarević was similarly charged, under the mode of liability of command responsibility, with, *inter alia*, allowing Serb soldiers to enter a civilian detention camp in Zvornik and force male Bosniac prisoners to perform oral sex on one another. This act was qualified as a war crime against civilians under Article 173(1)(c) of the 2003 Criminal Code, which covers both torture and inhuman treatment.¹¹⁷ Lazarević was ultimately acquitted of inhuman treatment for this act.¹¹⁸

In the *Veselinović* case, concluded through a plea agreement, the Accused, a member of the RS Army Military Police, pleaded guilty to, *inter alia*, enabling members of the paramilitary group to mistreat non-Serbs detained in a cultural centre in Hadžići. The mistreatment included forcing men “to perform lewd acts among themselves”.¹¹⁹ It is not clear whether such lewd acts included sexual penetration. For these acts, *Veselinović* was charged and convicted of persecution as a crime against humanity committed through torture.¹²⁰

In a fourth case, *Terzić*, the Accused, a female member of the military police of the Croatian Defence Council, was charged and acquitted of, *inter alia*, forcing a male prisoner to have sexual intercourse with a mentally-challenged female prisoner.¹²¹

While it is overall positive that cases involving sexual violence against males have been investigated and prosecuted, such acts have yet to be qualified as rape despite meeting the definition set out in other cases that involved rape of females. Future indictments and verdicts may offer the possibility to apply a gender-neutral approach to qualifying acts within the definition of rape.

¹¹⁶ *Kurtović* Trial Judgment, pp. 4-5 (under Article 175(1)(a) and (b), together with Articles 180(1) and 29 of the 2003 Criminal Code. Note that the Appellate Panel requalified the acts as War Crimes against Civilians under Article 142(1) of the SFRY Criminal Code (see *supra* note 75). See *Kurtović* Appeal Judgment, p. 3.

¹¹⁷ *Lazarević et al.* Indictment date 12 September 2008, pp. 2-3, 5.

¹¹⁸ *Lazarević et al.* Trial Judgment, pp. 2-3, 64-66 (convicting Lazarević for this act under Article 173(1)(c), in conjunction with Article 29, 31, 180(2) of the 2003 Code); *Lazarević et al.* Appeal Judgment, pp. 4-5 (acquitting Lazarević for this act).

¹¹⁹ *Veselinović* Trial Judgment, p. 11.

¹²⁰ See *Veselinović* Amended Indictment, pp. 1-2; *Veselinović* Trial Judgment, pp. 3, 11.

¹²¹ *Terzić* Trial Judgment, p. 7. See also *Terzić* Appeal Judgment, p. 2 (upholding the Trial Panel’s finding).

4.2 Enslavement and Sexual Slavery

4.2.1 International Jurisprudence on Enslavement and Sexual Slavery

The ICTY and ICTR Statutes enumerate enslavement as a crime against humanity¹²² but do not contain the distinct crime of sexual slavery. In the *Kunarac* case, the ICTY defined enslavement in the context of sexual violence. The Trial Chamber held that the *actus reus* of enslavement is the exercise of any or all of the powers attaching to the right of ownership over a person, while the *mens rea* is the intentional exercise of such power.¹²³ *Kunarac* was convicted of rape and enslavement.¹²⁴

Kunarac identified a list of *indicia* for determining whether a particular circumstance constitutes enslavement, including “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”.¹²⁵ It also established that lack of consent is not an element of enslavement although it may be relevant to the question of whether the accused exercised powers attaching to the right of ownership.¹²⁶ Furthermore, it determined that it is not necessary for the victim to be enslaved indefinitely or for a prolonged period of time in order to establish the crime of enslavement.¹²⁷

The Rome Statute enumerates sexual slavery as both a war crime and a crime against humanity in addition to enslavement as a crime against humanity.¹²⁸ The ICC Elements of Crimes defines the *actus reus* of enslavement as:

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.¹²⁹

The same element comprises the first element of the crime of sexual slavery whether committed as a crime against humanity or a war crime. However, sexual slavery includes the following additional element:

122 See ICTY Statute, Article 5(c); ICTR Statute, Article 3(c).

123 *Kunarac* Trial Judgment, para. 540. See also *Kunarac* Appeal Judgment, para. 118 (in which the Appeals Chamber holds that the law does not know of a “right of ownership over a person” and expresses preference for the language “of a person over whom any or all of the powers attaching to the right of ownership are exercised”).

124 See *Kunarac* Trial Judgment, paras. 728-745 (finding *Kunarac* guilty of rape and enslavement as crimes against humanity for keeping two girls in an abandoned house for five to six months where they were constantly raped by *Kunarac* and another, forced to do household chores and treated as personal property).

125 Trial Judgment, para. 543; Appeal Judgment, para. 119.

126 *Kunarac* Appeal Judgment, para. 120.

127 *Kunarac* Appeal Judgment, para. 121. The Trial Chamber clarified that “The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship.” See *ibid*.

128 Rome Statute, Article 7(1)(c) (enslavement); Article 7(1)(g) (sexual slavery as a crime against humanity); Article 8(e)(vi) (sexual slavery as a war crime)

129 ICC Elements of Crimes, Article 7(1)(c), (crime against humanity of enslavement).

The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹³⁰

The SCSL Statute also lists both the crimes of sexual slavery¹³¹ and enslavement¹³² as crimes against humanity, though it does not define them further. The SCSL rendered the first international criminal conviction for sexual slavery in the *Sesay et al.* case (the “RUF case”), thereby solidifying the international standard governing this crime.¹³³ The RUF case defined sexual slavery in accordance with the ICC Elements of Crimes.¹³⁴

The RUF case clarified that sexual slavery is “a particularized form” of enslavement that includes the exercise of ownership involving sexual acts and adopted the *Kunarac indicia* for determining enslavement.¹³⁵ The Chamber also emphasized that the term “similar deprivation of liberty” in the first element of the definition covers “situations in which the victims may not have been physically confined but were otherwise unable to leave as they would have nowhere else to go and feared for their lives”.¹³⁶

4.2.2 *BiH Court Jurisprudence on Enslavement and Sexual Slavery*

In line with the ICC and the SCSL Statutes, in addition to enumerating enslavement as a crime against humanity,¹³⁷ the 2003 Criminal Code also enumerates the specific crime against humanity of sexual slavery. The 2003 Criminal Code defines enslavement as:

[...] the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children.¹³⁸

The 2003 Criminal Code does not contain a definition of the elements of sexual slavery.

4.2.2.1 *Imprecise and vague indictments for crimes involving enslavement and sexual conduct*

The BiH Court has completed seven cases involving conduct indicative of sexual slavery, resulting in convictions in all but one instance.¹³⁹ However, despite the specific provision

¹³⁰ Article 7(1)(g) – 2, (crime against humanity of sexual slavery); Article 8(2)(b)(xxii) – 2, (war crime of sexual slavery); Article 8(2)(vi) – 2, (war crime of sexual slavery).

¹³¹ See SCSL Statute, Article 2(g).

¹³² See SCSL Statute, Article 2(c).

¹³³ *Prosecutor v. Sesay, Kallon and Gbao*, (“RUF Case”) Case No. SCSL-04-15-T, Trial Judgment (2 March 2009).

¹³⁴ *RUF case*, Trial Judgment, para. 158. *Taylor* defined the elements of sexual slavery in accordance with the *RUF Case* definition. See *Prosecutor v. Taylor*, Case No. SCSL-03-01, Trial Judgment (18 May 2012), para. 418.

¹³⁵ *RUF case*, Trial Judgment, paras. 155, 159-160.

¹³⁶ *Ibid.*, para. 161.

¹³⁷ See Article 172(1)(c), 2003 Criminal Code.

¹³⁸ Article 172(2)(c), 2003 Criminal Code.

¹³⁹ Charges and convictions entered for the crime of sexual slavery apparently recognize the customary nature of underlying constitutive acts of this offence recognized since World War II, namely enslavement and rape/acts of sexual violence amounting to a crime under international law. For a full discussion of the customary nature of this crime see *RUF case*, paras. 155-156, 196 (noting the *Kunarac* precedent).

governing sexual slavery, no indictments charged the relevant conduct as such. Rather, in some cases, the BiH Prosecutor's Office charged the accused with rape and enslavement,¹⁴⁰ in one case with enslavement,¹⁴¹ and in the remaining four cases, due to imprecision in the indictments, it is not possible to ascertain how the accused were charged.¹⁴²

Notwithstanding the lack of corresponding charges in the indictments, the accused were ultimately convicted of sexual slavery in three cases.¹⁴³ In a separate three cases, the accused were convicted of: persecution through imprisonment and rape¹⁴⁴; enslavement, torture, rape and sexual abuse¹⁴⁵; and enslavement and rape.¹⁴⁶ In the remaining case, the accused was acquitted of sexual slavery.¹⁴⁷

4.2.2.2 *Qualification of sexual slavery and enslavement and elaboration of definitions*

The BiH Court first dealt with the issue of sexual slavery in the *Samardžić* case, the first case involving sexual violence allegations to be completed before the BiH Court. *Samardžić* was charged, *inter alia*, with holding several Bosniac women and girls in sexual slavery for some three to four months in the notorious "Karaman's House" in the municipality of Foča, where they were raped by soldiers on a daily basis and forced to do household chores.¹⁴⁸ The indictment also charged the Accused with taking a young girl from "Karaman's House", where she was "imprisoned", in a nearby apartment, where he raped her on a daily basis, and on one occasion forced another young girl who was also "imprisoned" in the apartment to strip naked and watch the rape.¹⁴⁹ The indictment listed these acts as crimes against humanity but is imprecise as to the specific underlying act.¹⁵⁰ For the first act, the Trial Panel ultimately convicted *Samardžić* of rape and aiding and abetting in

¹⁴⁰ See e.g. *Stanković* Indictment, *Baričanin* Indictment.

¹⁴¹ See *Kujundžić* Indictment.

¹⁴² See *Janković* Indictment, *Samardžić* Indictment, *Bundalo et al.* Indictment, *Krsto Savić* Indictment.

¹⁴³ See *Samardžić* Appeal Judgment; *Janković* Trial Judgment and Appeal Judgment; *Kujundžić* Trial Judgment and Appeal Judgment.

¹⁴⁴ See *Bundalo et al.* Appeal Judgment.

¹⁴⁵ See *Stanković* Trial Judgment and Appeal Judgment.

¹⁴⁶ See *Baričanin* Trial Judgment and Appeal Judgment.

¹⁴⁷ In the *Krsto Savić et al.* case (Trial Judgment), the accused was alleged to have participated in a joint criminal enterprise, which included the holding of a woman in sexual slavery by unidentified members of paramilitary groups. *Krsto Savić* Indictment dated 26 February 2009, pp. 2, 5-6. The Trial Panel convicted *Savić* of persecution by means of sexual slavery for this conduct. On appeal, however, although the Appellate Panel found that although the victim had been subjected to sexual slavery, *Savić* could not be held responsible as there was no nexus between his actions and the crime. See *Krsto Savić* Appeal Judgment, paras. 255-259.

¹⁴⁸ See *Samardžić* Indictment dated 9 February 2006, p. 4 (Count 8).

¹⁴⁹ See *Samardžić* Indictment dated 9 February 2006, p. 5 (Count 11) and 6 (Count 16).

¹⁵⁰ See *Samardžić* Indictment dated 9 February 2006, p. 6 (stating that for all of the acts alleged under the 17 counts of the indictment, the accused was charged with crimes against humanity in violation of Article 172 (1) (a), (c), (d), (e), (g), (h), and (k) of the BiH Criminal Code). See also *Samardžić* Trial Judgment, p. 9 (describing the amendment of the *Samardžić* Indictment including the withdrawal from the charges of the crime of enslavement under Article 172(1)(c) and the addition of the crime of enforced disappearance under Article 172(1)(i)).

sexual slavery.¹⁵¹ However, it acquitted Samardžić of imprisonment for the second act, as explained below in section 4.2.2.3.¹⁵² On appeal, Samardžić was convicted for both acts as the crime against humanity of persecution, including on gender grounds, in conjunction with the underlying crimes of rape, sexual slavery, “any other form of sexual violence of comparable gravity”, and imprisonment.¹⁵³

The *Samardžić* Panel did not define the elements of sexual slavery but did articulate the *indicia* upon which it based its finding of sexual slavery, including that victims were: brought to “Karaman’s House” against their will; allocated to soldiers upon arrival; forced to clean and cook for visiting soldiers; subjected to daily rapes; and treated by the Accused and other soldiers as “legitimate war booty or personal property”.¹⁵⁴ These *indicia* are in line with the *indicia* of enslavement enumerated in the *Kunarac* judgment.¹⁵⁵ At the same time, in convicting the accused of rape, other forms of sexual violence and imprisonment in addition to sexual slavery, the BiH Court departed from international practice, which has defined sexual slavery to encompass rape and other acts of a sexual nature in addition to the exercise of powers attaching to the right of ownership over a person.¹⁵⁶

The BiH Court first articulated the elements of sexual slavery in the *11bis* case of *Janković* (2007). *Janković* was accused of holding a sixteen and a seventeen year old girl captive for over a year in a house that he occupied, where he and Dragoljub Kunarac (who was tried by the ICTY) raped them repeatedly and used them “as sexual and general servants, [...] treating them as objects and personal possessions and exercising complete control over their lives”.¹⁵⁷ Although the precise crime for which he was charged for this conduct is unclear,¹⁵⁸ the BiH Court found him guilty of torture and sexual slavery as crimes against humanity.¹⁵⁹

Stanković, another *11bis* defendant transferred from the ICTY for trial before the BiH Court, was accused of setting up a detention centre for women in “Karaman’s House”, where at least nine female persons, most of them minors, were detained and raped. For this conduct, he was charged with enslavement, torture and rape as crimes against humanity.¹⁶⁰ He was also accused of “claim[ing]” one of these detainees “for himself”, raping her numerous times, raping her minor sister, and then taking her to two different

¹⁵¹ *Samardžić* Trial Judgment, p. 2-3 (pursuant to Article 172(1)(g)).

¹⁵² See *infra*, section 4.2.2.3 on Sexual Slavery and Consent, p. 52 (citing *Samardžić* Trial Judgment, p. 27).

¹⁵³ *Samardžić* Appeal Judgment, pp. 2-4, 24 (pursuant to Article 172(1)(h), in conjunction with items (e) and (g) of the 2003 Criminal Code).

¹⁵⁴ *Samardžić* Appeal Judgment, p. 16.

¹⁵⁵ See *Kunarac* Trial Judgment, *supra* note 125.

¹⁵⁶ See *supra*, 134.

¹⁵⁷ *Janković* Indictment, p. 5.

¹⁵⁸ *Janković* Indictment, p. 5-6 (noting that *Janković* was charged for this crime under Article 172(1)(c),(f) and (g), in conjunction with 180(1) – individual responsibility – of the 2003 Criminal Code).

¹⁵⁹ *Janković* Trial Judgment, pp. 3-4 (under Article 172(1)(f) and (g), in conjunction with Article 29 – co-perpetration – of the 2003 Criminal Code). See also *Janković* Appeal Judgment, p. 15, upholding the Trial Chamber’s finding.

¹⁶⁰ *Stanković* Indictment, 28 November 2005, pp. 2-4 (under Article 172(1)(c), (f) and (g) of the BiH Criminal Code).

apartments, where he detained her for about a month. For this conduct, he was charged with imprisonment, torture and rape as crimes against humanity.¹⁶¹ He was further accused of forcing these women to perform labour in and outside of the detention centre, including cleaning, cooking, and bathing soldiers, and painting window frames in apartment blocks, while they were verbally insulted and threatened. For these acts, he was charged solely with enslavement and torture.¹⁶² The Trial Panel convicted Stanković as charged under these counts.¹⁶³

In the *Kujundžić* case, the Accused was charged with holding a 15-year old girl in sexual slavery when “by the use of force and threats he established the exclusive right to dispose of her, the control over her movement, mental control and the control of her sexuality”.¹⁶⁴ Specifically, the indictment alleged that Kujundžić took the victim away from her home and returned her at his whim, changed her Muslim name into a Serb name, repeatedly raped her, and allowed others to rape her, including with objects.¹⁶⁵ The indictment qualified these acts as persecution as a crime against humanity in conjunction with the crime of enslavement.¹⁶⁶ However, the Trial Panel convicted Kujundžić of sexual slavery as a crime against humanity.¹⁶⁷

In defining the elements of sexual slavery, the BiH Court cited the ICC Elements of Crimes, which refers to the perpetrator causing a person to “engage in one or more acts of a sexual nature”.¹⁶⁸ The Trial Panel’s conviction for sexual slavery as a crime against humanity in the *Kujundžić* case provides a positive example of the BiH Court’s treatment of this crime in line with international standards.

In the *Bundalo et al.* case, the indictment alleged that defendants Bundalo and Zeljaja were responsible, *inter alia*, for unknown soldiers taking away seven mostly minor females from a prison camp for Bosniac civilians to Miljevina and Foča.¹⁶⁹ The indictment is imprecise as to the provisions of the 2003 Criminal Code under which the accused were charged for this act;¹⁷⁰ however, in 2009 the Trial Panel convicted the accused of persecution as

161 *Stanković* Indictment, 28 November 2005, pp. 3-4 (under Article 172(1)(e), (f) and (g) of the BiH Criminal Code).

162 *Stanković* Indictment, 28 November 2005, pp. 2-4 (under Article 172(1)(c) and (g)).

163 *Stanković* Trial Judgment, pp. 2-3, 34. See also *Stanković* Appeal Judgment, p. 1 (upholding the convictions).

164 See *Kujundžić* Indictment, p. 3. See also *Kujundžić* Trial Judgment, para. 516.

165 *Kujundžić* Indictment, p. 3.

166 *Kujundžić* Indictment, p. 4 (under Article 172(1)(h), in conjunction with item (c) and Articles 29 – co-perpetration, 30 – incitement, and 180(1) – individual responsibility of the 2003 Criminal Code).

167 *Kujundžić* Trial Judgment, paras. 551, 555, 557 (under Article 172(1)(g), in conjunction with the modes of liability alleged in the indictment); *Kujundžić* Appeal Judgment, p. 5.

168 *Kujundžić* Trial Judgment, paras. 512-514.

169 *Bundalo et al.* Indictment (2009), pp. 2, 5.

170 The accused were charged, as participants in a JCE, for this and other acts, described together as persecution carried out “by killings, extermination, forcible transfer of population, imprisonment, torture, rape, enforced disappearances, arbitrary destruction of property on a large scale, starvation of the population, causing great suffering and injuries to body, by applying measures of intimidation and terror and other inhumane acts of a similar character” with crimes against humanity, in violation of Article 172(1)(h) of the 2003 Criminal Code, in conjunctions with items (a), (b), (d), (e), (f), (g), (i), and (k), and with war crimes under Article 173(1) (a), (c), (e), and (f) of the 2003 Criminal Code, together with Article 180(1). See *Bundalo et al.* Indictment, (2009) pp. 8-9.

a crime against humanity in conjunction with the crime of sexual slavery.¹⁷¹ On appeal in 2011, the Appellate Panel ultimately acquitted Bundalo of this charge¹⁷² and Zeljaja was found guilty on appeal of persecution as a crime against humanity committed through the crimes of imprisonment and rape.¹⁷³ Although the Appellate Panel recognized this conduct as “sexual enslavement”, it does not provide reasoning in relation as to why it considered that the conduct was best captured by the crimes of imprisonment and rape rather than sexual slavery.

Finally, in the *Baričanin* appeal, the most recent case involving a conviction for enslavement of a sexual nature to be completed by the BiH Court, the Accused was alleged, *inter alia*, to have detained a woman in an apartment in Sarajevo’s Grbavica neighbourhood, where he raped her repeatedly and enabled another person to rape her.¹⁷⁴ For these acts, he was charged and convicted of enslavement and rape as crimes against humanity.¹⁷⁵ In convicting *Baričanin* of enslavement, the Trial Panel took into account the *indicia* of enslavement enunciated by the ICTY in the *Kunarac* case.¹⁷⁶

The OSCE Mission notes that although enslavement of a sexual nature similarly resulted in convictions for enslavement and rape at the ICTY, unlike the 2003 Criminal Code, the ICTY Statute did not include the crime of sexual slavery. The jurisprudence of the SCSL, as well as the ICC Elements of Crimes, have clarified that enslavement in conjunction with rape constitutes sexual slavery. Cases such as *Stanković* and *Baričanin* exemplify the challenge with which the BiH Court is faced with regard to crimes that may constitute sexual slavery. Future cases addressing crimes of a similar nature should provide opportunities for the Court to further develop its jurisprudence related to the qualification of conduct as sexual slavery.

4.2.2.3 Sexual slavery and consent

Trial Panels addressed the issue of consent in the context of sexual slavery in three cases, demonstrating a sound understanding of the circumstances that can negate consent to sexual violence, as elaborated in the jurisprudence of the international tribunals.

As noted above, the *Samardžić* Trial Panel acquitted the Accused of imprisonment as a crime against humanity for allegedly holding two minor girls captive in an apartment where he raped one repeatedly and, on one occasion, forced the other to strip naked and watch

¹⁷¹ *Bundalo et al.* Trial Judgment, pp. 2-5, 154-157 (under Article 172(1)(h), in conjunction with item (g) and 180(1)). Note that it is not entirely clear whether the accused was convicted of persecution as a crime against humanity solely in conjunction with the crime of sexual slavery or also in conjunction with the crime of rape. See *Bundalo et al.* Trial Judgment, pp. 154-157. Furthermore, the accused were only convicted of these crimes in relation to “at least two” of the minor girls. See *Bundalo et al.* Trial Judgment, p. 5.

¹⁷² In acquitting Bundalo, the Appellate Panel reasoned that the precise role and nature of his participation in the alleged JCE had not been clearly defined in the trial judgment. *Bundalo et al.* Appeal Judgment, pp. 87-88.

¹⁷³ *Bundalo et al.* Appeal Judgment, pp. 8, 11-12 (under Article 172(1)(h), in conjunction with items (e), (g) and Article 29 – co-perpetration – of the 2003 Criminal Code).

¹⁷⁴ *Baričanin* Indictment, pp. 2-3.

¹⁷⁵ *Baričanin* Indictment, p. 3 (under Article 172(1)(c) and (e), in conjunction with Article 180(1), of the 2003 Criminal Code); *Baričanin* Trial Judgment, p. 5 and paras. 1, 231, 242, 243. See also *Baričanin* Appeal Judgment (upholding the convictions).

¹⁷⁶ *Baričanin* Trial Judgment, para. 234.

the rape. The Trial Panel based the acquittal in part on testimony by the latter victim that the girls had keys to the apartment, and that the accused “lived” with the former victim, which the Trial Panel found “implied a community of two people without duress”.¹⁷⁷

The Appellate Panel overturned this finding and convicted Samardžić of sexual slavery for these acts,¹⁷⁸ holding that “[t]he circumstances under which the injured parties stayed in the above-mentioned apartments and rooms, the fact that they were surrounded by army and police, separated from male members of their families, without any funds and realistic possibility of escape, exclude any possibility of their voluntary residing and stay in such places”.¹⁷⁹ The Panel further stated that “lack of resistance or obvious and constant disagreement throughout the sexual slavery cannot be interpreted as a sign of consent”.¹⁸⁰ This holding is consistent with international jurisprudence, which has established that the first element of the crime of sexual slavery covers “situations in which the victims may not have been physically confined but were otherwise unable to leave as they would have nowhere else to go and feared for their lives”.¹⁸¹

In *Kujundžić*, four defence witnesses testified in court that the sexual intercourse between the victim and the accused was voluntary and that the victim benefitted from her relationship with the Accused.¹⁸² The BiH Court dismissed these assertions on the basis that the victim was an emotionally immature minor and given the coercive circumstances in which she found herself.¹⁸³ Additionally, one defence witness, to whom the Accused had allegedly “given” the victim, testified that during the time of the alleged sexual slavery, the victim had agreed to live with him in a common-law marriage upon meeting her for the second time, after he had been introduced to her by his friend, with whom she was in a relationship. The BiH Court also dismissed this assertion as “unrealistic and unacceptable”.¹⁸⁴

Finally, in *Baričanin*, the Accused argued that he had locked the victim in the apartment for her own protection and that they had engaged in consensual sexual intercourse, which occurred without coercion.¹⁸⁵ The Trial Panel dismissed this assertion, finding that under the circumstances, the victim “had no real possibility of choice”, and that “it would be absurd to conclude that the Accused was protecting the witness” given that he had

¹⁷⁷ *Samardžić* Trial Judgment, pp. 34-35.

¹⁷⁸ *Samardžić* Appeal Judgment, pp. 2-4, 24.

¹⁷⁹ *Samardžić* Appeal Judgment, p. 24.

¹⁸⁰ *Samardžić* Appeal Judgment, p. 18.

¹⁸¹ *See supra*, section 4.2.1 (citing the *RUF* case, Trial Judgment, para. 161).

¹⁸² *Kujundžić* Trial Judgment, paras. 533-535.

¹⁸³ *Kujundžić* Trial Judgment, para. 536 (noting circumstances including “[...] the attack of the Serb Army on the Bosniac population in the place where she lived, and also the fact that the accused was a member of that Serb Army, that he had authority and power, and that he had psychological control over her as well as control over her movements and sexuality” and further *emphasizing* that “[o]ne should not forget the fact that the aggrieved party, together with her mother and younger sister, was completely unprotected in the place in which they lived”).

¹⁸⁴ *Kujundžić* Trial Judgment, paras. 537-538.

¹⁸⁵ *Baričanin* Trial Judgment, paras. 219, 236-238.

allowed an unknown man to enter the apartment and left him with her.¹⁸⁶ In these cases, the BiH Court demonstrates a sound understanding of the circumstances that can negate consent to sexual violence.

Overall, BiH Court judgments in cases involving enslavement of a sexual nature have evolved to **soundly articulate the elements of the crime against humanity of sexual slavery, despite some early failures to recognize all of the underlying acts that may constitute sexual slavery. Notably, judgments dealt with issues of consent in the context of sexual slavery in line with international jurisprudence.** Notwithstanding these positives, the BiH Court took diverging approaches to the treatment of conduct concerning enslavement of a sexual nature in a number of cases, reaching different conclusions as to the correct qualification of the crimes and often failing to provide reasoning to justify one qualification over another. This problem can be traced in part to **variation and lack of precision on the part of the BiH Prosecutor's Office in charging conduct involving enslavement of a sexual nature.** Further discussion among and training for judges and prosecutors on this matter is encouraged. Future indictments for crimes involving enslavement and sexual violence should be cognizant of the recent jurisprudence of the BiH Court concerning the elements of sexual slavery and enslavement.

4.3 Torture and Other Acts of Sexual Violence

4.3.1 International Jurisprudence on Torture and Other Acts of Sexual Violence

The ICTY and ICTR Statutes criminalize torture as both a crime against humanity¹⁸⁷ and a war crime.¹⁸⁸ The ICTY and ICTR have held that rape and other forms of sexual violence can constitute torture if the elements of torture are met.¹⁸⁹

In the *Kunarac* case, the ICTY defined the elements of torture as:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹⁹⁰

¹⁸⁶ *Baričanić* Trial Judgment, paras. 222, 225, 236, 239.

¹⁸⁷ See ICTY Statute Article 5(f); ICTR Statute Article 3(f).

¹⁸⁸ See ICTY Statute Article 2(b); ICTR Statute Article 4(a).

¹⁸⁹ *Akayesu* Trial Judgment, para. 597; *Čelebići* Trial Judgment, paras. 495-496; *Furundžija* Trial Judgment, para. 171; *Kunarac* Trial Judgment, paras. 655-656; *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Trial Judgment (2 November 2001), para. 561; *Prosecutor v. Semanza*, Case No. ICTR-97-20, Trial Judgment (15 May 2003), para. 483.

¹⁹⁰ *Kunarac* Trial Judgment, para. 497.

In defining these elements, the *Kunarac* Trial Chamber clarified that contrary to the holdings of previous trial chambers, the presence of a state official or a person acting in an official capacity in the torture process is not required for an act to qualify as torture under international humanitarian law.¹⁹¹

Furthermore, the ICTY has established that the prohibited purposes of torture enumerated in the third element of the definition are not an exhaustive list,¹⁹² that “humiliating the victim” may also be a prohibited purpose,¹⁹³ and that there is no requirement that the act or omission be perpetrated solely for the prohibited purpose.¹⁹⁴ The ICTY and ICTR have also held that sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental. The first element of torture is thus automatically established once rape has been proved.¹⁹⁵

The prosecution of torture as a crime against humanity¹⁹⁶ and a war crime¹⁹⁷ is also provided for under the Rome Statute. Torture as a crime against humanity is defined as:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.¹⁹⁸

Unlike the ICTY and ICTR elements, the ICC does not require proof that an act was undertaken for a prohibited purpose for it to constitute torture as a crime against humanity. This element is required, however, for torture to constitute a war crime. The ICC Elements of Crimes defines the war crime of torture as:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

¹⁹¹ *Kunarac* Trial Judgment, para. 496; *Kunarac* Appeal Judgment, para. 148. See also *Furundžija* Trial Judgment, para. 162. [Note: both definitions in the context of war crimes while *Kunarac* is crimes against humanity]. The ICTR has adopted the *Kunarac* definition of the elements of torture. See *Semanza* Trial Judgment, paras. 342-343.

¹⁹² *Čelebići* Trial Judgment, para. 470.

¹⁹³ *Furundžija* Trial Judgment, para. 162.

¹⁹⁴ *Čelebići* Trial Judgment, para. 470.

¹⁹⁵ *Kunarac* Appeal Judgment, paras. 150-151. See also *Semanza* Trial Judgment (*finding* that “by encouraging a crowd to rape women because of their ethnicity, the accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes” and that he thus “was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture”), para. 485.

¹⁹⁶ See Rome Statute, Article 7(1)(f).

¹⁹⁷ See Rome Statute, Articles 8(2)(a)(ii) and 8(2)(c)(1).

¹⁹⁸ ICC Elements of Crimes, Article 8(2)(a)(ii) – 1.

The notion that rape can constitute torture has also been recognized by regional human rights bodies, including the Inter-American Commission on Human Rights and the European Court of Human Rights.¹⁹⁹

The Rome Statute also provides for the prosecution of “any other form of sexual violence” as a crime against humanity in Article 7(1)(g) and as a war crime in Articles 8(2)(b)(xxii), and 8(2)(e)(vi). This crime was first set forth in the Rome Statute.

The ICC Elements of Crimes defines sexual violence as follows:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.²⁰⁰

For crimes against humanity, this conduct must be of a comparable gravity to the other offences in Article 7(1)(g) of the Statute.²⁰¹ For war crimes, the conduct must be of comparable gravity to that of a grave breach of the Geneva Conventions²⁰² or to that of a serious violation of Common Article 3 of the Geneva Conventions I-IV.²⁰³

The standalone crime of sexual violence is not codified in the statutes of the ICTY and the ICTR. However, *Akayesu* held that sexual violence can fall within the scope of other inhumane acts as a crime against humanity; outrages upon personal dignity as a war crime; and causing serious bodily or mental harm to members of the group as a form of genocide.²⁰⁴ In *Akayesu*, the ICTR first articulated the elements of sexual violence as:

[...] any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.²⁰⁵

Thus, other acts of sexual violence may include rape but are not limited to it. The ICTY in the *Kvočka* case (2001) endorsed this definition, adding that sexual violence is broader than rape and includes such crimes as sexual slavery or molestation, sexual mutilation, forced marriage, forced abortion, and the gender-related crimes explicitly listed in the Rome Statute.²⁰⁶

¹⁹⁹ See *Fernando and Raquel Mejia v. Peru*, Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996; *Aydin v. Turkey*, European Court of Human Rights, Reports of Judgments and Decisions, No. 50 (1997-VI), para. 86.

²⁰⁰ ICC Elements of Crimes, Article 7(1)(g) – 6.

²⁰¹ *Ibid.*, para 2.

²⁰² Elements of Crimes, Article 8(2)(b)(xxii) – 6, (war crime of sexual violence).

²⁰³ Elements of Crimes, Article 8(2)(e)(vi) – 6, (war crime of sexual violence).

²⁰⁴ See *Akayesu*, para. 688, citing ICTR Statute Articles 2(2)(b) – causing serious bodily or mental harm to members of the group as a form of genocide, 3(i), - other inhumane acts as a crime against humanity, and 4(e) – outrages upon personal dignity as a war crime.

²⁰⁵ *Akayesu* Trial Judgment, para. 598, 688.

²⁰⁶ *Kvočka et al.*, Trial Judgment, para. 180 and fn. 343.

In the *Furundžija* case, the ICTY added that:

[...] international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.²⁰⁷

4.3.2 *BiH Court Jurisprudence on Torture and Other Acts of Sexual Violence*

In the 2003 Criminal Code, the distinct crime of sexual violence is criminalized as a crime against humanity but not as a war crime:

Specifically, Article 172(1)(g) states, *inter alia*:

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 ... any other form of sexual violence of comparable gravity.

Torture is proscribed under the 2003 Criminal Code as both a crime against humanity²⁰⁸ and a war crime²⁰⁹:

Specifically, Article 172(2)(e) defines torture as:

[...] the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the perpetrator except that torture shall not include pain or suffering arising only from, or being inherent in or incidental to, lawful sanctions.²¹²

Articles 173, 174 and 175 criminalize torture as a war crime against protected categories but do not define it further:

Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health.²¹¹

²⁰⁷ *Furundžija* Trial Judgment, para. 186.

²⁰⁸ Article 172(1)(f), 2003 Criminal Code.

²⁰⁹ Articles 173(1)(c) – War Crimes Against Civilians, 174(a) – War Crimes against the Wounded and Sick; 175(a) – War Crimes against Prisoners of War, 2003 Criminal Code.

²¹⁰ Article 172(2)(e), 2003 Criminal Code.

²¹¹ Articles 173(1)(c), 174(a), and 175(a), 2003 Criminal Code.

The BiH Court first defined the crime “any other form of sexual violence of comparable gravity” in the *Lelek* case. The BiH Court relied upon the definition of sexual violence set forth by the ICTY in the *Stakić* case, namely: “any severe abuse of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim’s dignity”.²¹² The BiH Court further explained that, “[u]nlike the act of coercing another to sexual intercourse or an equivalent sexual act, the ICTY defines sexual violence as ‘broader than rape and includ[ing] such crimes as ... molestation’”.²¹³

The *Lelek* indictment alleged, *inter alia*, that Lelek entered the house of an elderly woman, armed with a weapon, and forced her “to touch him on the genitals and stroke his penis, while he slapped and beat her, and cursed her ‘Turkish mother’”.²¹⁴ Lelek was charged for this conduct with the “perpetration of an act equivalent to sexual intercourse (rape)” under Article 172(1)(g) of the 2003 Criminal Code. However, the Trial Panel found that this conduct instead “contain[ed] the elements of ‘coercing another person by force or by threat of immediate attack upon her life or limb ... to [an]other form of grave sexual violence’”. The BiH Court reasoned that “severe sexual violence constitutes a more accurate charge” because “a sexual act equivalent to sexual intercourse implies penetration of a sex organ, an object or some other body part in any part of the victim’s body”. Yet, in the present instance, no penetration occurred.²¹⁵

In the same case, Lelek was charged with participating in the abduction and enforced disappearance of Bosniac civilian men and forcing the wife of one of the men “to strip naked, and to strip her 80 year old mother naked, extorting money from them”.²¹⁶ The Trial Judgment clarified that the wife was also ordered to sit naked on the stomach of her husband, who had been stabbed in the stomach.²¹⁷ Lelek was convicted of torture for this crime. Notably, although the international tribunals have recognized that forced nudity may constitute sexual violence, the Trial Panel did not explicitly consider whether the forced nudity under this count constituted sexual violence constituting torture (or another sexual violence crime).²¹⁸ In failing to do so, the Trial Panel missed a potential opportunity to fully reflect the nature and extent of the crime.

212 *Lelek* Trial Judgment, p. 38 (relying on *Prosecutor v. Stakić, et al.*, (Prijeđor), Case No. IT-97-24, Trial Judgment (31 July 2003), para. 757).

213 *Ibid.*

214 *Lelek* Indictment dated 31 March 2008, p. 3. See also *Lelek* Trial Judgment, p. 38.

215 *Lelek* Trial Judgment, pp. 38-39.

216 *Lelek* Indictment of 31 March 2008, pp. 2, 4. Note that the precise crime for which he was charged for this act is not clear from the indictment.

217 *Lelek* Trial Judgment, p. 27.

218 *Lelek* Trial Judgment, pp. 26-28.

The BiH Court has endorsed the *Lelek* definition of “other forms of sexual violence of comparable gravity” in several cases.²¹⁹ In these cases, accused persons were charged and convicted of this crime for various sexual acts falling short of sexual penetration. For example, in the *Mejakić et al.* Appeal Judgment, three Accused were charged and found guilty, as members of a joint criminal enterprise, for the sexual abuse of two women detained in the Omarska prison camp. Such conduct included grabbing the breasts and buttocks of one woman, kissing her on her face, taking off her underpants, and attempting to have sexual intercourse with her, as well as attempting to force the other woman to have sexual intercourse.²²⁰ In the *Radić et al.* case, Radić was charged²²¹ and convicted of telling a 15-year old girl in the Vojno Camp “to take off her clothes in order to have sexual intercourse”, and then later “ripp[ing] off her clothes, [pull[ing] her by her hair, [telling] her to sit naked between two men and [telling] her that she could choose to have either oral or vaginal sex”.²²² The BiH Court found that “[t]his specific case amounts to ... sexual violence given that penetration was not effected”.²²³ In the same case, all accused were charged and convicted as members of a joint criminal enterprise for the attempted rape of a woman detained in the Vojno Camp.²²⁴

However, in other cases, the BiH Prosecutor’s Office and the BiH Court did not enter into an evaluation of whether certain acts of a sexual nature to which victims were subjected constituted sexual violence. For example, in the *Veselinović* case, the Accused was charged,

²¹⁹ See e.g., *Mejakić et al.* Trial Judgment, p. 203 (noting that “[s]exual violence is broader than rape and includes such crimes as sexual slavery or molestation”); *Pinčić* Trial Judgment, p. 32 (noting that “international criminal regulations punish not only rape but also any serious assault which does not include real penetration. It can be said that the ban includes all serious abuses of a sexual nature carried out against the bodily or moral integrity of a person by using coercion, threat or intimidation in the manner that is degrading and humiliating for the victim’s dignity.”); *Radić et al.* Appeal Judgment, p. 172 (quoting the definition of sexual violence set forth in *Akayesu*, namely: “Sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact, such as public display of nudity”, as well as the definition set forth in the *Lelek* Trial Judgment).

²²⁰ See *Mejakić et al.* Indictment dated 7 July 2006, pp. 3, 5, 6, 9, and 12 (charging *Mejakić*, *Gruban*, and *Knežević* for this conduct with “other forms of sexual violence” pursuant to Article 172(1)(g) of the 2003 Criminal Code. *Mejakić* and *Gruban* were charged in conjunction with Articles 29, 180(1) and 180(2) of the 2003 Criminal Code, while *Knežević* was charged in conjunction with Articles 29 and 180(1)); *Mejakić et al.* Trial Judgment (2008), pp. 2, 5, 7, 8, 10, 13-14, and 128-131 (convicting *Mejakić*, *Gruban*, and *Knežević* as charged for the aforementioned crimes); *Mejakić et al.* Appeal Judgment, pp. 3-4 and paras. 60, 97 (modifying the Trial Judgment by finding *Mejakić* and *Gruban* responsible for the crimes alleged in the indictment solely on the basis of participation in a joint criminal enterprise pursuant to Articles 29 and 180(1) of the 2003 Criminal Code).

²²¹ See *Radić et al.* Indictment dated 14 May 2008, p. 6 (charging *Radić* for this crime of “other forms of sexual violence” under Article 172(1)(g) of the 2003 Criminal Code. The indictment is not clear as to the mode of liability under which he was charged for this particular crime).

²²² *Radić et al.*, Trial Judgment, pp.105-106.

²²³ See *Radić et al.* Appeal Judgment, pp. 10-11, 24, 182-183 (convicting *Radić* for this conduct of persecution in conjunction, *inter alia*, with “other forms of sexual violence” under Article 172(1)(h), together with Articles 172(1)(g), as well as Articles 29 and 180(1) of the 2003 Code). See also *Radić et al.* Trial Judgment, pp. 6, 17, 103-106.

²²⁴ See *Radić et al.* Indictment, pp. 6-7, 10, 13, 17-19. Note that *Radić* and *Sunjić* were also charged for this crime under the mode of liability of command responsibility. *Radić et al.* Indictment, pp. 6-7, 10. See also *Radić et al.* Appeal Judgment, pp. 207-210, 11-12, 15, 18, 23-26 (convicting all accused for this conduct of persecution in conjunction, *inter alia*, with “other forms of sexual violence” under Article 172(1)(h), together with Articles 172(1)(g), as well as Articles 29 and 180(1) of the 2003 Criminal Code). See also *Radić et al.* Trial Judgment, pp. 7, 10, 12, 16-17, 128-130.

inter alia, with mistreating a woman by “stopp[ing] her in the road, grabb[ing] her breasts, push[ing] her to a tree, lean[ing] her against the tree and fir[ing] a number of pistol bullets above her head”.²²⁵ The Accused was convicted of torture for this conduct pursuant to a plea agreement.²²⁶ Neither the indictment nor the verdict addressed the sexual aspect of the crime.

In the *Marković* case, the Accused was charged with both rape and torture for raping a minor girl.²²⁷ The Trial Panel found him guilty of rape but not of torture. The BiH Court noted that under certain circumstances, rape can constitute torture.²²⁸ The BiH Court further found that the rape caused the victim “psychological trauma and pain”, and that it was committed with a discriminatory intent, as demonstrated, *inter alia*, by the fact that the Accused knew that the victim was of Croat ethnicity.²²⁹ However, the BiH Court determined that in the circumstances of the case, the crime could not be qualified as torture “because the factual substratum of the Indictment does not contain elements of torture, neither the objective elements related to the act of perpetration, nor the subjective ones, which would suggest the existence of the Accused’s intention (awareness) and volition to torture the victim”.²³⁰

In *Lazarević*, the Accused was found guilty of allowing Serb soldiers to enter a civilian detention camp and forcing male prisoners to perform oral sex on one another.²³¹ Although forced fellatio constitutes rape, for this and other non-sexual acts, the Accused was charged under Article 173(1)(c), which includes the crimes of torture and inhuman treatment. The Trial Panel found that the Accused committed inhuman treatment and not torture, reasoning that “the acts committed by the accused during the relevant period do not reach the standard required for torture”. More specifically, the Trial Panel reasoned that the acts did not reach the requisite threshold for torture of “severe” pain or suffering. This finding, in relation to the sexual violence charge, contradicts the jurisprudence of the ICTY and ICTR, as well as the BiH Court, which has established that sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental. The Accused was ultimately acquitted of responsibility for these acts during re-trial by the Appellate Panel in 2010, which found that Lazarević did not have effective control over the direct perpetrators and the evidence did not support an inference he enabled the sexual acts.²³²

Consistent establishment of the sexual nature of conflict-era crimes can contribute to the development of the **historical record of the scope of sexual violence during the conflict** and the State’s efforts to deliver accountability for it. Moreover, **bringing to light the nature of the harm suffered by victims may contribute to the de-stigmatization of**

²²⁵ *Veselinović* Indictment dated 29 June 2009, p. 3. Note that it is unclear from the indictment the precise crime for which Veselinović was charged for this act.

²²⁶ See *Veselinović* Trial Judgment, pp. 2, 4, 13

²²⁷ *Marković* Indictment, pp. 1-2.

²²⁸ *Marković* Trial Judgment, pp. 34.

²²⁹ *Marković* Trial Judgment, pp. 32-33.

²³⁰ *Marković* Trial Judgment, p. 33. See also *Marković* Appeal Judgment, p. 3 (*upholding* the Trial Judgment in its entirety).

²³¹ *Lazarević et al.* Trial Judgment, pp. 2-4, 64-66.

²³² *Lazarević et al.* Appeal Judgment, paras. 195-206.

victims and affected communities and assist the **survivors of sexual violence who seek compensation** for material damage suffered as a result of the crime. For these reasons, the OSCE Mission notes that continued efforts by the BiH Prosecutor's Office and Court are needed to ensure that acts constituting "any other form of sexual violence of comparable gravity" and the sexual nature of conduct charged as torture are consistently articulated in indictments and verdicts involving conflict related sexual violence.

4.4 Rape and Sexual Violence as the Crime against Humanity of Persecution

4.4.1 International Jurisprudence on Rape and Sexual Violence as the Crime against Humanity of Persecution

The ICTY and ICTR Statutes have codified persecution as a crime against humanity on political, racial and religious grounds.²³³ The SCSL Statute additionally recognizes persecution on account of ethnicity.²³⁴

In addition to the grounds enumerated in the Statutes of the ICTY, ICTR and SCSL, the Rome Statute recognizes persecution on national, cultural, and gender grounds, as well as "other grounds that are universally recognized as impermissible under international law, in connection with any [crime against humanity] referred to in [Article 7(1) of the Statute] or any crime within the jurisdiction of the Court".²³⁵ This is the first time that gender has been set forth as a basis for persecution in an international legal instrument.

The ICTY has defined persecution as:

An act or omission that:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in customary international or treaty law (the *actus reus*); and
2. was carried out deliberately with the intent to discriminate on political, racial and religious grounds (*mens rea*).²³⁶

²³³ See Rome Statute, Article 5(h); ICTR Statute, Article 3(h).

²³⁴ See SCSL Statute, Article 2(h).

²³⁵ See Rome Statute, Article 7(1)(h).

²³⁶ *Stakić* Trial Judgment, para. 732. See also *Prosecutor v. Kupreskić, et al.*, Case No. IT-95-16, Trial Judgment (14 January 2000), para. 621 *Prosecutor v. Tadić*, Case No. IT-94-1, Opinion and Judgment, Trial Judgment (7 May 1997), paras. 697, 715.

Although the ICTY and ICTR Statutes do not recognize persecution on the grounds of gender, in several cases, rape and other forms of sexual violence were found to constitute forms of persecution on political, racial and religious grounds.²³⁷

The ICC Elements of Crimes defines the elements of persecution as:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. 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.²³⁸

To date, the ICC has not rendered a conviction for persecution based on gender; although charges for gender-based persecution were brought in one case by the Prosecutor, but they were not confirmed by the judges.²³⁹

²³⁷ See, e.g., *Prosecutor v. Todorović*, (Bosanski Šamac), Case No. IT-95-9/1, Sentencing Judgment (31 July 2001), paras. 3, 9, 17, 38-40 (*finding Todorović guilty*, pursuant to a guilty plea, of persecution for acts of sexual violence, including forced oral sex, against men detained in police stations); *Kvočka et al.* Trial Judgment, paras. 546-561 (*finding the accused guilty of persecution for acts including sexual assault and rape of women detained in Omarska camp*); *Prosecutor v. Nahimana et al.* ("The Media Case") Case No. ICTR-99-52, Trial Judgment (3 December 2003), paras. 1069, 1079, 1092-1094 (*finding the accused guilty of persecution for acts including the portrayal by the media of "Tutsi women as femme fatale, and the message that Tutsi women were seductive agents of the enemy", which "made the sexual attack of women a foreseeable consequence"*).

²³⁸ See ICC Elements of Crimes, Article 7(1)(h). See also Rome Statute, Article 7(2)(g) (*defining persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"*).

²³⁹ See Women's Initiatives for Gender Justice, *Gender Report Card of the International Criminal Court 2012*, (2012), available at: <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>, pp. 104-105, 116 (*noting that the accused Callixte Mbarushimana (Democratic Republic of the Congo) was charged, inter alia, with persecution based on gender*).

4.4.2 *BiH Court Jurisprudence on Rape and Sexual Violence as the Crime against Humanity of Persecution*

Persecution as a crime against humanity is codified under Article 172(1)(h) of the 2003 Criminal Code. Similar to the Rome Statute, the 2003 Criminal Code recognizes persecution on “political, racial, national, ethnic, cultural, religious, or sexual [*sic*] gender or other grounds that are universally recognized as impermissible under international law, in connection with any [crime against humanity] listed in [Article 172(1) of the 2003 Criminal Code], any offence listed in the [2003] Code or any offence falling under the competence of the Court of [BiH]”.²⁴⁰

The BiH Court has defined the elements of persecution, based on the definition set forth in Article 172(2)(g) of the 2003 Criminal Code,²⁴¹ as:

1. An intentional and severe deprivation of fundamental rights;
2. Contrary to international law;
3. Against any identifiable group or collectivity;
4. On political, racial, national, ethnic, cultural, religious, or gender or other grounds that are universally recognized as impermissible under international law;
5. In connection with any offence listed in [the 2003 Criminal Code] or any offence falling under the competence of the BiH Court.²⁴²

Accused persons have been charged and convicted of persecution for sexual violence crimes on the basis of political, racial, national, ethnic, and cultural grounds in several cases before the BiH Court.²⁴³ In only three cases, however, the persecution was found to have been committed, *inter alia*, on the basis of gender. To the OSCE Mission’s knowledge, this is

²⁴⁰ The unofficial consolidated version of the 2003 BiH Criminal Code erroneously list “sexual” in addition to “gender” and others grounds for persecution. The word “sexual” does not appear in the official versions in the languages of BiH.

²⁴¹ Article 172(2)(g) of the 2003 Criminal Code defines persecution as a crime against humanity, in line with the definition set forth in the Rome Statute, as “the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity”.

²⁴² See *Mejakić et al.* Trial Judgment, p. 205. See also *Bundalo et al.* Appeal Judgment, p. 93.

²⁴³ For example, in *Šimšić*, the second BiH Court case involving sexual violence charges, the Accused was charged and convicted of persecution on account of political, national, ethnic, cultural and religious grounds committed through conduct including the rape of women and girls imprisoned in an elementary school in Višegrad. See e.g. *Šimšić* Indictment dated 28 June 2005, pp. 1-6; *Šimšić* Appeal Judgment, pp. 1-4. In the *Radić et al.* case, the Accused were charged with persecution for conduct including rape and other acts of sexual violence committed against women and girls in the Vojno camp. The indictment does not specify the grounds of persecution for which the Accused were charged. The Accused were ultimately convicted for these acts of persecution on political, national and religious grounds. See *Radić et al.* Indictment dated 14 May 2008, pp. 1-19; See *Radić et al.* Appeal Judgment, pp. 5-26 and paras. 692-693. In the *Bundalo et al.* case, the Accused Bundalo and Zeljaja were charged with persecution on political, national, ethnic, cultural and religious grounds by way of conduct including the taking away of seven girls detained in an elementary school to Miljevina and Foča, where they were held in sexual slavery, as well as the rape of women detained in the school, by soldiers who were allowed to enter freely. Zeljaja was convicted for these crimes of persecution solely on religious and ethnic grounds, committed by means of imprisonment and rape. Bundalo was acquitted of these particular charges. See *Bundalo et al.* Indictment dated 13 October 2009, pp. 1-8; *Bundalo et al.* Appeal Judgment, pp. 5-16.

the first time in either an international or domestic criminal forum that sexual violence crimes have been found to constitute the crime against humanity of persecution on the basis of gender.

Significantly, the BiH Court found sexual violence crimes to constitute gender-based persecution in *Samardžić*, its first war crimes case involving sexual violence crimes. *Samardžić* was alleged to have contributed to various crimes against the Bosniac population in the municipality of Foča, including the physical maltreatment and murder of captured civilians, as well as the rape and sexual slavery of women and girls in “Karaman’s House” and other locations. For these acts, he was charged with persecution on national, ethnic, religious, and gender grounds; murder, enslavement, deportation, imprisonment, rape, sexual slavery, and other inhumane acts.²⁴⁴ However, due to imprecision in the indictment, it is not possible to link the acts alleged to the particular provision under which the Accused was charged for those acts. On appeal, *Samardžić* was found guilty of persecution on national, ethnic, religious and gender grounds committed by means of deportation, imprisonment, rape, sexual slavery, and other inhumane acts.²⁴⁵ Although all alleged acts were found to constitute persecution, the Appeal Judgment is imprecise as to which acts constituted persecution on the basis of gender.

In the *Kujundžić* case, the Accused was initially charged with persecution based on national, ethnical, religious and gender grounds committed by means of murder, enslavement, deportation, torture, rape, sexual slavery, and other inhumane acts.²⁴⁶ As in *Samardžić*, it is not possible to link the basis of persecution charged to each act alleged due to imprecision in the indictment. In the amended indictment, however, despite charges of rape and sexual slavery, gender was not mentioned as a basis for the alleged persecution.²⁴⁷ Nevertheless, the Trial Panel found that the Accused committed persecution on ethnic, religious, national, cultural, and gender grounds.²⁴⁸ Notably, unlike the *Samardžić* Judgment, the *Kujundžić* Judgment clearly linked the basis of persecution to each underlying crime. Thus, the Trial Panel specifically found that all of the acts perpetrated by the Accused constituted persecution on ethnic, religious, national and cultural grounds, while the sexual violence crimes, including the rape of a woman and a girl, as well as holding the girl in sexual slavery, additionally constituted gender-based persecution.²⁴⁹

²⁴⁴ See *Samardžić* Indictment dated 9 February 2006, pp. 2-6 (pursuant to Article 172(1)(a), (c), (d), (e), (g), (h), and (k) of the 2003 Criminal Code).

²⁴⁵ *Samardžić* Appeal Judgment, pp. 1-4, 20 (pursuant to Article 172(1)(h), in conjunction with items (d), (e), (g), and (k) of the 2003 Code).

²⁴⁶ *Kujundžić* Indictment dated 26 December 2007, pp. 1-4.

²⁴⁷ *Kujundžić* Indictment dated 29 May 2009, pp. 1-4.

²⁴⁸ *Kujundžić* Trial Judgment, pp. 1-4. See also *Kujundžić* Appeal Judgment, pp. 3-5.

²⁴⁹ See *Kujundžić* Trial Judgment, para. 591 (*holding* that “[e]ach act committed by [...] *Kujundžić* was perpetrated with a discriminatory intent, exactly for the reason of a different ethnic, religious national and cultural identity of the victim. The Panel concludes that all of those acts had, as the intention, exactly the discrimination of the victims on the grounds of that identity, as well as on the sexual ground (in the event of rape of Witnesses 2 and 4 and keeping Witness 2 in sexual slavery), which beyond doubt is contrary to the rules of international law. Such conclusion is based on the words and acts by the accused during the perpetration of the referenced crimes [...]”).

Finally, in the *Perković* case, the Accused was charged with, and convicted pursuant to a plea agreement, of persecution on national, ethnic, religious and gender grounds for various acts including murder, imprisonment, torture and rape.²⁵⁰ Despite being decided three months after *Kujundžić*, neither the indictment nor the Trial Judgment links the specific basis of the persecution to each underlying crime.²⁵¹

As the first jurisdiction to enter convictions for gender-based persecution as a crime against humanity, the BiH Prosecutor's Office and the BiH Court deserve recognition for their work to ensure proper qualification and application of the crime of persecution when appropriate. The jurisprudence resulting from the *Kujundžić* judgment should be utilized in future cases before the BiH Court when applicable.

²⁵⁰ See *Perković* Indictment dated 8 April 2009, pp. 1-4 (pursuant to Article 172(h), in conjunction with items(a), (e), (f), (g) and (i) of the 2003 Criminal Code).

²⁵¹ See *Perković* Indictment dated 8 April 2009, pp. 1-4 (pursuant to Article 172(h), in conjunction with items (a), (e), (f), (g) and (i) of the 2003 Criminal Code). See also *Perković* Trial Judgment, pp. 1-3.

5. Summary of Recommendations

5.1 Recommendations to the BiH Prosecutor's Office and BiH Court

- i. Given the scale of sexual violence atrocities, the relatively high number of these cases that remain unresolved, and BiH's obligations to effectively investigate and prosecute such crimes, 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.
- ii. 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.
- iii. 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 (see Recommendation (viii) in section 5.3 *infra* for the OSCE Mission's recommendations in this regard).
- iv. 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.
- v. 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 *in camera* hearing procedure to determine the relevance and credibility of such evidence thus protecting the rights of victims of sexual violence.
- vi. 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.

5.2 Recommendations to the BiH Ministry of Justice and BiH Parliament concerning the Legal Framework

vii. 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.

5.3 Recommendations to the High Judicial and Prosecutorial Council, Judicial and Prosecutorial Training Centres and Other Training Providers

viii. 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:

- a. 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;
- b. scope and application of special evidentiary and procedural rules concerning sexual violence cases.

5.4 Recommendations to the International Community

ix. Ensure continued diplomatic and financial support to domestic efforts to combat impunity for conflict-related sexual violence by the BiH criminal justice institutions through efforts such as the United Kingdom's Prevention of Sexual Violence in Conflict Initiative as well as increased support to non-governmental organizations and victims' associations.

ANNEX 1 – Accused Charged with Sexual Violence and Convicted or Acquitted by BiH Court

* connotes convicted pursuant to a plea bargaining agreement

Case (in alphabetical order)	Accused name	Charged	Convicted	Acquitted
1. <i>Baričanin</i>	Saša Baričanin	✓	✓	-
2. <i>Bastah et al.</i>	Predrag Bastah	✓	-	✓
	Goran Višković	✓	✓	-
3. <i>Bjelić*</i>	Veiz Bjelić	✓	✓	-
4. <i>Bogdanović</i>	Velibor Bogdanović	✓	✓	-
5. <i>Bundalo et al.</i>	Ratko Bundalo	✓	-	✓
	Neđo Zeljaja	✓	✓	-
	Đorđislav Aškraba	-	-	-
6. <i>Damjanović</i>	Dragan Damjanović	✓	✓	-
7. <i>Dolić</i>	Darko Dolić	✓	-	✓
8. <i>Gazdić</i>	Jasko Gazdić	✓	✓	-
9. <i>Janković</i>	Gojko Janković	✓	✓	-
10. <i>Jević</i>	Duško Jević	✓	-	✓
	Mendeljev Đurić	✓	-	✓
	Goran Marković	-	-	-
	Neđo Ikonić	-	-	-
11. <i>Kličković</i>	Gojko Kličković	✓	-	✓
	Mladen Drljača	✓	-	✓
	Jovan Ostojić	-	-	-
12. <i>Kovać</i>	Ante Kovać	✓	✓	-
13. <i>Kujundžić</i>	Predrag Kujundžić	✓	✓	-
14. <i>Kurtović</i>	Zijad Kurtović	✓	✓	-
15. <i>Lalović</i>	Slavko Lalović	✓	✓	-

16. <i>Lazarević et al.</i>	Sreten Lazarević	✓	-	✓
	Dragan Stanojević	-	-	-
	Mile Marković	-	-	-
	Slobodan Ostojić	-	-	-
17. <i>Lelek</i>	Željko Lelek	✓	✓	-
18. <i>Marković</i>	Miodrag Marković	✓	✓	-
19. <i>Mejakić et al.</i>	Željko Mejakić	✓	✓	-
	Momčilo Gruban	✓	✓	-
	Duško Knežević	✓	✓	-
20. <i>Nikačević</i>	Miodrag Nikačević	✓	✓	-
21. <i>Novalić</i>	Ćerim Novalić	✓	✓	-
22. <i>Palija</i>	Jadranko Palija	✓	✓	-
23. <i>Perković*</i>	Stojan Perković	✓	✓	-
24. <i>Pinčić</i>	Zrinko Pinčić	✓	✓	-
25. <i>Radić</i>	Marko Radić	✓	✓	-
	Dragan Šunjić	✓	✓	-
	Damir Brekalo	✓	✓	-
	Mirko Vračević	✓	✓	-
26. <i>Samardžić</i>	Neđo Samardžić	✓	✓	-
27. <i>Savić Momir</i>	Momir Savić	✓	-	✓
28. <i>Savić et al.</i>	Krsto Savić	✓	✓	-
	Milko Mučibabić	-	-	-
29. <i>Stanković</i>	Radovan Stanković	✓	✓	-
30. <i>Šimšić</i>	Boban Šimić	✓	✓	-
31. <i>Tanasković</i>	Nenad Tanasković	✓	✓	-
32. <i>Terzić</i>	Albina Terzić	✓	-	✓
33. <i>Tripković*</i>	Novica Tripković	✓	✓	-
34. <i>Veselinović*</i>	Rade Veselinović	✓	✓	-
35. <i>Vuković</i>	Radmilo Vuković	✓	-	✓
36. <i>Vuković et al.</i>	Ranko Vuković	✓	-	✓
	Rajko Vuković	-	-	-
TOTAL: 36 cases		45	33	12

ANNEX 2 – Alphabetical List of Conflict-Related Sexual Violence Cases at BiH Court

A. Completed Cases at the BiH Court by 31 December 2013

BARIČANIN

Prosecutor v. Saša Baričanin, Case No. S1 1 K 004648 12 KrŽ, Second Instance Verdict, 28 March 2012 (*Baričanin* Appeal Judgment)

Prosecutor v. Saša Baričanin, Case No. S1 1 K 004648 11 KrI, First Instance Verdict, 9 November 2011 (*Baričanin* Trial Judgment)

BASTAH ET AL.

Prosecutor v. Predrag Bastah and other, Case No. X-KRŽ-05/122, Second Instance Verdict, 22 February 2011 (*Bastah et al.* Appeal Judgment)

Prosecutor v. Predrag Bastah and other, Case No. X-KR-05/122, First Instance Verdict, 4 February 2010 (*Bastah et al.* Trial Judgment)

BJELIĆ

Prosecutor v. Veiz Bjelić, Case No. X-KR-07/430-1, First Instance Verdict, 28 March 2008 (*Bjelić* Trial Judgment)

BOGDANOVIĆ

Prosecutor v. Velibor Bogdanović, Case No. S1 1 K 003336 10 KrŽ, Second Instance Verdict, 21 June 2012 (*Bogdanović* Appeal Judgment)

Prosecutor v. Velibor Bogdanović, Case No. S1 1 K 003336 10 KrI, First Instance Verdict, 29 August 2011 (*Bogdanović* Trial Judgment)

BUNDALO ET AL.

Prosecutor v. Ratko Bundalo and other, Case No. S1 1 K 005159 11 KŽŽ, Third Instance Verdict, 18 June 2013 (*Bundalo et al.* Third Instance Judgment)

Prosecutor v. Ratko Bundalo and other, Case No. X-KRŽ-07/419, Second Instance Verdict, 18 March 2011 (*Bundalo et al.* Appeal Judgment)

Prosecutor v. Ratko Bundalo and other, Case No. X-KR-07/419, First Instance Verdict, 21 December 2009 (*Bundalo et al.* Trial Judgment)

DAMJANOVIĆ

Prosecutor v. Dragan Damjanović, Case No. X-KRŽ-05/51, Second Instance Verdict, 13 June 2007 (*Damjanović* Appeal Judgment)

Prosecutor v. Dragan Damjanović, Case No. X-KR-05/51, First Instance Verdict, 13 June 2007 (*Damjanović* Trial Judgment)

DOLIĆ

Prosecutor v. Darko Dolić, Case No. S1 1 K 003433 11 KrŽ, Second Instance Verdict, 1 December 2011 (*Dolić* Appeal Judgment)

Prosecutor v. Darko Dolić, Case No. X-KR-09/783, First Instance Verdict, 26 April 2011 (*Dolić* Trial Judgment)

GAZDIĆ

Prosecutor v. Jasko Gazdić, Case No. S1 1 K 005718 11 KrŽ, Second Instance Verdict, 17 June 2013 (*Gazdić* Appeal Judgment)

Prosecutor v. Jasko Gazdić, Case No. S1 1 K 005718 11 Krl, First Instance Verdict, 9 November 2012 (*Gazdić* Trial Judgment)

JANKOVIĆ

Prosecutor v. Gojko Janković, Case No. X-KRŽ-05/161, Second Instance Verdict, 23 October 2007 (*Janković* Appeal Judgment)

Prosecutor v. Gojko Janković, Case No. X-KR-05/161, First Instance Verdict, 16 February 2007 (*Janković* Trial Judgment)

JEVIĆ ET AL.

Prosecutor v. Duško Jević and other, Case No. S1 1 K 003417 10 KrŽ, Second Instance Verdict, 20 May 2013 (*Jević et al.* Appeal Judgment)

Prosecutor v. Duško Jević and other, Case No. S1 1 K 003417 10 Krl, First Instance Verdict, 25 May 2012 (*Jević et al.* Trial Judgment)

KLIČKOVIĆ ET AL.

Prosecutor v. Gojko Kličković and other, Case No. S1 1 K 005207 KŽK, Second Instance Verdict, 7 May 2013 (*Kličković* Appeal Judgment)

Prosecutor v. Gojko Kličković and other, Case No. X-KR-06/213, First Instance Verdict, 5 November 2010 (*Kličković* Trial Judgment)

KOVAČ

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)

KUJUNDŽIĆ

Prosecutor v. Predrag Kujundžić, Case No. X-KRŽ-07/442, Second Instance Verdict, 4 October 2012 (*Kujundžić* Appeal Judgment)

Prosecutor v. Predrag Kujundžić, Case No. X-KR-07/442, First Instance Verdict, 30 October 2009 (*Kujundžić* Trial Judgment)

KURTOVIĆ

Prosecutor v. Zijad Kurtović, Case No. X-KRŽ-06/299, Second Instance Verdict, 25 March 2009 (*Kurtović* Appeal Judgment)

Prosecutor v. Zijad Kurtović, Case No. X-KR-06/299, First Instance Verdict, 30 April 2008 (*Kurtović* Trial Judgment)

LALOVIĆ

Prosecutor v. Slavko Lalović, Case No. S1 1 K 002590 11 KrŽ, Second Instance Verdict, 1 February 2012 (*Lalović* Appeal Judgment)

Prosecutor v. Slavko Lalović, Case No. S1 1 K 002590 11 Krl, First Instance Verdict, 29 August 2011 (*Lalović* First Instance Judgment)

LAZAREVIĆ ET AL.

Prosecutor v. Sreten Lazarević and others, Case No. X-KRŽ-06/243, Second Instance Verdict, 21 August 2009 (*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)

LELEK

Prosecutor v. Željko Lelek, Case No. X-KRŽ-06/202, Second Instance Verdict, 12 January 2009 (*Lelek* Appeal Judgment)

Prosecutor v. Željko Lelek, Case No. X-KR-06/202, First Instance Verdict, 23 May 2008 (*Lelek* Trial Judgment)

MARKOVIĆ

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)

MEJAKIĆ ET AL.

Prosecutor v. Željko Mejakić and others, Case No. X-KRŽ-06/220, Second Instance Verdict, 16 February 2009 (*Mejakić et al.* Appeal Judgment)

Prosecutor v. Željko Mejakić and others, Case No. X-KR-06/220, First Instance Verdict, 30 May 2008 (*Mejakić et al.* Trial Judgment)

NIKAČEVIĆ

Prosecutor v. Miodrag Nikačević, Case No. X-KRŽ-08/500, Second Instance Verdict, 12 July 2010 (*Nikačević* Appeal Verdict)

Prosecutor v. Miodrag Nikačević, Case No. X-KR-08/500, First Instance Verdict, 19 February 2009 (*Nikačević* Trial Verdict)

NOVALIĆ

Prosecutor v. Ćerim Novalić, Case No. X-KRŽ-09/847, Second Instance Verdict, 14 June 2011 (*Novalić* Appeal Judgment)

Prosecutor v. Ćerim Novalić, Case No. X-KR-09/847, First Instance Verdict, 21 May 2010 (*Novalić* Trial Judgment)

PALIJA

Prosecutor v. Jadranko Palija, Case No. X-KRŽ-06/290, Second Instance Verdict, 24 April 2008 (*Palija* Appeal Judgment)

Prosecutor v. Jadranko Palija, Case No. X-KR-06/290, First Instance Verdict, 28 November 2007 (*Palija* Trial Judgment)

PERKOVIĆ

Prosecutor v. Stojan Perković, Case No. X-KR-09/662, First Instance Verdict, 24 December 2009 (*Perković* Trial Judgment)

PINČIĆ

Prosecutor v. Zrinko Pinčić, Case No. S1 1 K 014434 13 KrŽ, Second Instance Verdict, 17 December 2013 (*Pinčić* Appeal Verdict No.2)

Prosecutor v. Zrinko Pinčić, Case No. X-KRŽ-08/502, Second Instance Verdict, 2 December 2009 (*Pinčić* Appeal Judgment)

Prosecutor v. Zrinko Pinčić, Case No. X-KR-08/502, First Instance Verdict, 28 November 2008 (*Pinčić* Trial Judgment),

RADIĆ ET AL.

Prosecutor v. Marko Radić and others, Case No. X-KRŽ-05/139, Second Instance Verdict, 9 March 2011 (*Radić et al.* Appeal Judgment),

Prosecutor v. Marko Radić and others, Case No. X-KR-05/139, First Instance Verdict, 20 February 2009 (*Radić* Trial Judgment)

SAMARDŽIĆ

Prosecutor v. Neđo Samardžić, Case No. X-KRŽ-05/49, Second Instance Verdict, 13 December 2006 (*Samardžić* Appeal Judgment)

Prosecutor v. Neđo Samardžić, Case No. X-KR-05/49, First Instance Verdict, 7 April 2006 (*Samardžić* Trial Judgment)

SAVIĆ

Prosecutor v. Momir Savić, Case No. X-KRŽ-07/478, Second Instance Verdict, 19 February 2010 (*Savić* Appeal Judgment),

Prosecutor v. Momir Savić, case No. X-KR-07/478, First Instance, 3 July 2009 (*Savić* Trial Judgment)

SAVIĆ ET AL.

Prosecutor v. Krsto Savić, Case No. X-KRŽ-07/400, Second Instance Verdict, 11 April 2011 (*Savić* Appeal Judgment)

Prosecutor v. Krsto Savić and other, Case No. X-KR-07/400, First Instance Verdict, 3 July 2009 (*Savić et al.* Trial Judgment)

STANKOVIĆ

Prosecutor v. Radovan Stanković, Case No. X-KRŽ-05/70, Second Instance Verdict, 28 March 2007 (*Stanković* Appeal Judgment)

Prosecutor v. Radovan Stanković, Case No. X-KR-05/70, First Instance Verdict, 14 November 2006 (*Stanković* Trial Judgment)

ŠIMŠIĆ

Prosecutor v. Boban Šimšić, Case No. X-KRŽ-05/04, Second Instance Verdict, 7 August 2007 (*Šimšić* Appeal Judgment)

Prosecutor v. Boban Šimšić, Case No. X-KR-04/05, First Instance Verdict, 1 July 2006 (*Šimšić* Trial Judgment)

TANASKOVIĆ

Prosecutor v. Nenad Tanasković, Case No. X-KRŽ-05/165, Second Instance Verdict, 26 March 2008 (*Tanasković* Appeal Judgment)

Prosecutor v. Nenad Tanasković, Case No. X-KR-05/165, First Instance Verdict, 24 August 2007 (*Tanasković* Trial Judgment)

TERZIĆ

Prosecutor v. Albina Terzić, Case No. S1 1 K 005665 11 KrŽ, Second Instance Verdict, 5 July 2013 (*Terzić* Appeal Judgment)

Prosecutor v. Albina Terzić, case No. S1 1 K 005665 11 Krl, First Instance Verdict, 19 October 2012 (*Terzić* Trial Judgment)

TRIPKOVIĆ

Prosecutor v. Novica Tripković, Case No. S1 1 K 002418 Krl, First Instance Verdict, 7 June 2011 (*Tripković* Trial Judgment)

VESELINOVIĆ

Prosecutor v. Rade Veselinović, Case No. X-KR-05/48, First Instance Verdict, 30 June 2009 (*Veselinović* Trial Judgment)

VUKOVIĆ

Prosecutor v. Radmilo Vuković, Case No. X-KRŽ-06/217, Second Instance Verdict, 13 August 2008 (*Vuković* Appeal Judgment)

Prosecutor v. Radmilo Vuković, Case No. X-KR-06/217, First Instance Verdict, 16 April 2007 (*Vuković* Trial Judgment)

VUKOVIĆ ET AL.

Prosecutor v. Ranko and Rajko Vuković, Case No. X-KRŽ-07/405, Second Instance Verdict, 2 September 2008 (*Vuković et al.* Appeal Judgment)

Prosecutor v. Ranko and Rajko Vuković, Case No. X-KR-07/405, First Instance Verdict, 4 February 2008 (*Vuković et al.* Trial Judgment)

B. Ongoing Cases at the BiH Court as of 31 December 2013

ALIĆ

Prosecutor v. Fahrudin Alić, Case No. S1 1 K 012524 13 KrO, 7 March 2013, **Indictment confirmed**

BAŠIĆ ET AL.

Prosecutor v. Muhidin Bašić and other, Case No. S1 1 K 007209 11 Krl, First Instance Verdict, 18 January 2013 (*Bašić et al.* Trial Judgment) **Appellate procedure**

BOJADŽIĆ

Prosecutor v. Nihad Bojadžić, Case No. S1 1 K 008494 11 Krl, **Main trial ongoing**

BRKAN

Prosecutor v. Osman Brkan, Case No. S1 1 K 014243 14 Krl, First Instance Verdict, 6 December 2013 (*Brkan* Trial Judgment) **Appellate procedure**

DRAGIČEVIĆ

Prosecutor v. Zoran Dragičević, Case No. S1 1 K 008024 12 Krl, First Instance Verdict, 22 November 2013 (*Dragičević* Trial Judgment) **Appellate procedure**

HODŽIĆ ET AL.

Prosecutor v. Nedžad Hodžić and other, Case No. S1 1 K 008978 13 Krl, **Main trial ongoing**

KAMERIĆ

Prosecutor v. Indira Kamerić, Case No. S1 1 K 010132 13 Krl, **Main trial ongoing**

KRSMANOVIĆ

Prosecutor v. Oliver Krsmanović, Case No. S1 1 K 006028 11 Krl, **Main trial ongoing**

MILISAVLJEVIĆ ET AL.

Prosecutor v. Predrag Milisavljević and other, Case No. S1 1 K 011128 12 Krl, **Main trial ongoing**

POPOVIĆ ET AL.

Prosecutor v. Jovan Popović and other, Case No. S1 1 K 013866 13 KrO, **Main trial ongoing**

ŠEKARIĆ

Prosecutor v. Dragan Šekarić, Case No. S1 1 K 014550 13 KrO, **Main trial ongoing**

TOLIĆ

Prosecutor v. Josip Tolić, Case No. S1 1 K 013929 13 Krl, **Main trial ongoing**

VLAĆO

Prosecutor v. Branko Vlaćo, Case No. S1 1 K 007121 Krl, **Main trial ongoing**

VLAHOVIĆ

Prosecutor v. Veselin Vlahović, Case No. S1 1 K 004659 13 Krl, First Instance Verdict, 29 March 2013 (*Vlahović* Trial Judgment)

ZELENIKA ET AL.

Prosecutor v. Ivan Zelenika and other., Case No. S1 1 K 009124 12 Krl, **Main trial ongoing**

C. Accused at Large as of 31 December 2013

HRKAČ

Prosecutor v. Ivan Hrkač, Case No. S1 1 K 002907 07 KrO, **Indictment confirmed**

STJEPANOVIĆ

Prosecutor v. Novak Stjepanović, Case No. X-KR-07/382-1, **Indictment confirmed**

VIDOVIĆ

Prosecutor v. Marko Vidović, Case No. S1 1 K 003599 10 KrO, **Indictment confirmed**

ANNEX 3 – Case Complexity Criteria, Annex A of the National Strategy for War Crimes Processing

Annex A of the National Strategy (2008) states:

If a case meets the criteria below in terms of the gravity of criminal offence and the capacity and role of the perpetrator, whether separately or in their interconnection, and taking into account other circumstances, the proceedings will be conducted before the BiH Court. Otherwise, the case will be tried before another court in BiH pursuant to legal provisions on jurisdiction, transfer and taking over of cases.

GRAVITY OF CRIMINAL OFFENCES

- a) Legal qualification of criminal offence – genocide, crimes against humanity (proving that there was a widespread and systematic attack), and war crimes against civilian population and prisoners of war, providing that some other criteria have been fulfilled as well;
- b) Mass killings (killing of a large number of persons, systematic killing);
- c) **Severe forms of rape (multiple and systematic rape, establishment of detention centres for the purpose of sexual slavery);**
- d) **Serious forms of torture (taking into account the intensity and the degree of mental and physical injuries, large scale consequences);**
- e) Serious forms of unlawful detention or another severe deprivation of physical liberty (establishment of camps and detention centres, escorting to and detention in the camps and detention centres, taking into account the large scale of or particularly severe conditions during the detention);
- f) **Persecution;**
- g) Forced disappearance (taking into account the consequences, circumstances and the large scale of forceful disappearance);
- h) Serious forms of infliction of sufferings upon civilian population (starvation, shelling of civilian building structures, destruction of religious, cultural and historical monuments);
- i) **Significant number of victims (or severe consequences suffered by the victims – degree of physical and mental suffering);**
- j) Particularly insidious methods and means used in the perpetration of criminal offence;
- k) Existence of particular circumstances.

CAPACITY AND ROLE OF THE PERPETRATOR:

- a) Duty within unit (commander in the military, police or paramilitary establishment);
- b) Managing position in camps and detention centres;
- c) Political function;
- d) Holder of a judicial office (judge, prosecutor, public attorney, attorney at law);
- e) More serious forms and degrees of participation in the perpetration of a criminal offence (taking part in the planning and ordering of a crime; manner of perpetration; intentional and particular commitment to the planning and ordering of a crime; the degree of intent should be taken into account).

OTHER CIRCUMSTANCES:

The following should be taken into account:

- a) Correlation between the case and other cases and possible perpetrators;
- b) **Interests of victims and witnesses (witnesses who have been granted protection measures before the ICTY and the BiH Court – protected witnesses; necessity to provide witness protection; witnesses included in the programme of protection; repentant witnesses);**
- c) Consequences of the crime for the local community (demographic changes, return, possible public and social reactions or anxiety among citizens and the consequences for the public order in relation to the perpetration or prosecution of the crime). [emphasis added]

