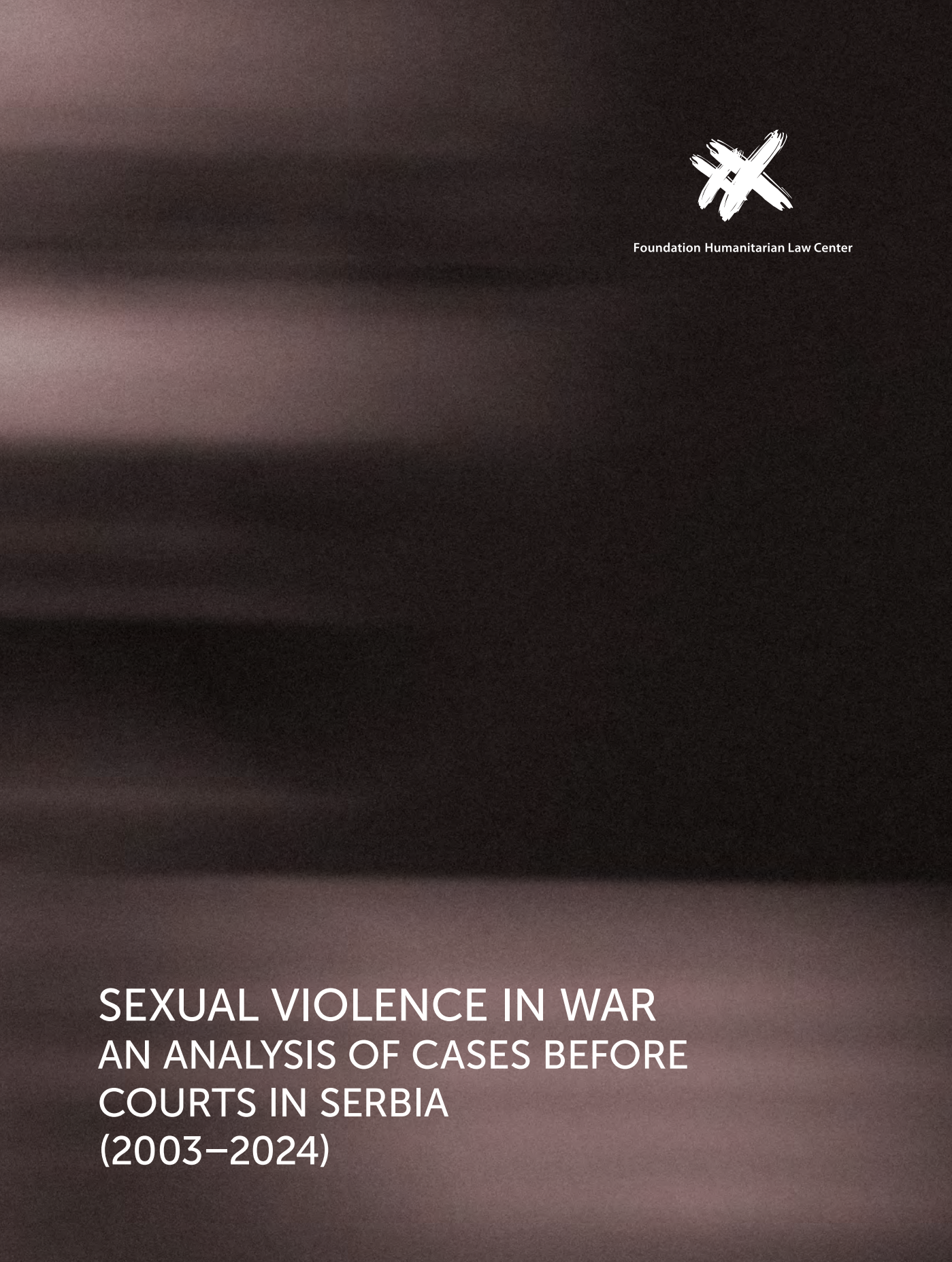

Foundation Humanitarian Law Center

SEXUAL VIOLENCE IN WAR
AN ANALYSIS OF CASES BEFORE COURTS IN SERBIA (2003–2024)

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#ЕУ ЗА ТЕБЕ

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Abbreviations

CPC	Criminal Procedure Code
HLC	Humanitarian Law Center
ECtHR	European Court of Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICJ	International Court of Justice
BiH	Bosnia and Herzegovina
POWCP	Public Office of War Crimes Prosecutor
Prosecutor	War Crimes Prosecutor
UN	United Nations

Introduction

Since its establishment in 2003, the Public Office of the War Crimes Prosecutor (POWCP)[1] of the Republic of Serbia has issued 106 indictments against individuals for crimes committed during the wars in the former Yugoslavia. Only 13 indictments filed include incidents of sexual violence, which indicates that in the previous practice of the domestic judiciary, sexual violence was rarely prosecuted, and when prosecuted it was most often considered as a war crime that occurs alongside murder and other physical violence. Considering the prevalence of rape and other forms of sexual violence in armed conflicts in the former Yugoslavia, it is clear that the domestic judiciary has not paid due attention to these crimes.

The prevalence of sexual violence was one of the reasons for the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), whose practice today represents a standard in prosecuting these crimes. More than a third of all those convicted before the ICTY have also been convicted of crimes of sexual violence. Nevertheless, although the work of the ICTY represents a milestone in the prosecution of sexual and gender-based violence in war, the achievements of that court have not been significantly incorporated into the work of the domestic judiciary.

To date, no one has been prosecuted in Serbia for the sexual violence committed in Foča, although the statements of women raped in Foča, collected by researchers of the Humanitarian Law Center during 1993 in refugee camps in Serbia, Turkey and Macedonia, were the basis for initiating an investigation by the ICTY Prosecutor's Office and prosecuting those responsible for these crimes. Some of the names of the potential perpetrators of these crimes in Foča and in other places in the former Yugoslavia are listed in the judgments of the Tribunal.

The Analysis of the Prosecution of Crimes of Sexual Violence in Armed Conflicts before Courts in Serbia over the Past Two Decades that you are reading is part of the continuous work of the Humanitarian Law Center, the organisation that monitors and analyses all war crimes proceedings in Serbia. The need for an analysis that covers rape trials and other forms of sexual violence exclusively, stems from the belief that additional efforts need to be made to prosecute these crimes. The aim of the Analysis is to formulate recommendations through the study of previous practice that could contribute to more efficient processing of sexual violence, as well as improving the positions of victims and witnesses in these proceedings.

1 With the Law on the Public Prosecutor's Office of February 2023, the former Office of the War Crimes Prosecutor changed its name to the Public Office of the War Crimes Prosecutor. In order to facilitate monitoring, the report will use the name of the Public Office of the War Crimes Prosecutor, or the abbreviation POWCP.

I. Methodology

By the time of writing this analysis, the Public Office of War Crimes Prosecutor (POWCP) in Belgrade had issued 106 indictments against individuals for crimes committed during the wars in the former Yugoslavia. Of these indictments, only 13 involve incidents of sexual violence. Five indictments were filed exclusively for rape (the indictment does not cover murders and other act of war crimes).[2] As the Humanitarian Law Center (HLC) noted back in 2019, "[in] the practice of domestic justice so far, sexual violence has rarely been prosecuted, and even then most often as a war crime that appears alongside murder and other types of physical violence".[3]

Indictments in the cases of *Bijeljina*, *Bijeljina II, Skočić*, *Brčko*, *Brčko II*, *Kalinovik*, *Bratunac*, *Gnjilane group, Ćuška/Qyshk*, *Bratunac II*, *Đakovica*, *Goražde*, and *Vukovar-Proleterska* included 29 persons suspected of sexual violence, perpetrated against 16 victims. All the accused persons were men, while the victims were mostly women.

To date, 9 final judgments have been issued – in the cases of *Bijeljina, Bijeljina II, Skočić, Brčko, Brčko II, Kalinovik, Bratunac, Gnjilane Group* and *Đakovica*. Owing to the death of the defendant, sexual violence had to be omitted from *the amended indictment in the Ćuška/Qyshk* Case. The cases of *Bratunac II* (merged with the *Bratunac-Borkovac* Case), *Goražde* and *Vukovar-Proleterska* are still ongoing.

The subject of this analysis is all the judgments for sexual violence, both first instance and on appeal, issued in the period from 2004 to 2024. The Analysis also includes cases in which sexual violence is qualified differently – as inhumane treatment or bodily harm.[4] Thus, the Analysis also includes those cases related to violence against the genitals of the injured, such as genital mutilation, forced fellatio and forced sexual intercourse between victims. Despite the fact these acts could qualify as sexual

2 Cases: *Brčko* (defendant Nikola Vida Lujić), *Kalinovik* (defendant Dalibor Krstović), *Bratunac II* (defendant Novak Stjepanović) was originally indicted against Stjepanović only for rape, but by merging with the *Bratunac-Borkovac* Case , other crimes were also included: *Goražde* (defendant Lazar Mutlak), *Vukovar-Proleterska* (defendant Jovan Radak);

3 HLC, "Report on War Crimes Trials in Serbia" (Belgrade, 2019). See, https://www.hlc-rdc.org/wp-content/uploads/2019/05/Izvestaj-o-sudjenjima-za-ratne-zlocine-u-Srbiji.pdf.

4 In the *Zvornik III and IV* Cases, one person was convicted of sexual violence, qualified as "inhumane treatment", in the way that imprisoned Bosnian Muslims were forced to have intercourse at the Cultural Centre in Čelopek: but it was also qualified as "bodily harm" – cutting off of a sexual organ. In the *Zvornik II* Case, although one person was convicted of assisting in murder, and it was noted that the injured person was actually raped beforehand, because a stake was inserted into his anus, this was not qualified as rape or as inhumane treatment or bodily harm, but was only given as a description of the actions that preceded the murder. Also, another defendant in the same case was found guilty of assisting and abetting inhumane treatment, where the Cultural Centre in Čelopek was also mentioned, but not the cases of sexual violence, although the same verdict refers to the already final verdicts for the perpetrator of this sexual violence. Here, inhumane treatment is stated only as holding prisoners in inhumane conditions. In the *Brčko II* Case, the defendant was found guilty of inhumane treatment of two detainees at the Luka camp – two brothers whom he forced to practice oral sex on each other.

violence, they were not thus qualified, although they were still prosecuted. In certain cases,[5] some of the acts of commission are described as "unnatural fornication", which is not recognised as a form of war crime, while rape is. Both prosecutors and judges considered act of sexual violence as the most appropriate way of describing the violation of the bodily integrity of the victims, bearing in mind the provisions of the Criminal Code of the Federal Republic of Yugoslavia and the legal definition of the criminal offences of rape and unnatural fornication that existed in domestic legislation at the time of the commission of the offence.[6]

As there is still no specific definition of the war crime of sexual violence, and the interpretation of this crime is constantly evolving through case law, it is important to draw attention to acts that should qualify as sexual violence by their nature and the intensity of the mental and physical pain inflicted. Through the examples in the practice of international courts and tribunals from other countries, this analysis will point to the fact that such acts begin to qualify as acts of sexual violence.

II. The legacy of the International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, during the armed conflicts in Bosnia and Herzegovina (BiH) and Croatia. The establishment of this court is of historical importance for international law because, for the first time, sexual violence committed during an armed conflict was qualified as a war crime. The ICTY Statute contains one of the first concrete qualifications of rape as a crime against humanity[7], in addition to the previous case discussed before the International Criminal Tribunal for Rwanda (ICTR).[8] The ICTY has also been the first international criminal court to issue judgement for rape as a form of torture.[9]

With the establishment of the ICTY, for the first time in history there is an awareness of a crime that has been largely neglected throughout the history of armed conflicts – sexual violence.[10] This court provided a platform for survivors to talk about their suffering, and proved that effective prosecution of sexual violence in war is possible. This way of working also broke the silence about this crime and

5 See judgments in the cases of *Đakovica* (defendant Anton Lekaj – first instance Judgment no. K.V. number 4/05 of 18.09.2006 and second instance Judgment no. Kž. I RZ 3/06 of 26.02.2007), *Bijeljina II* (defendant Miodrag Živković, first instance Judgment no. K-Po2 No. 10/14 of 14.04.2015 (repealed), first instance Judgment no. K-Po2 No. 10/15 of 24.11.2015 and second instance Judgment no. Kž1 Po2 1/16 of 26.09.2016); *Bijeljina* (defendant Jović Dragan et al. – first instance Judgment no. K-Po2 No. 7/2011 of 4.06.2012 and second instance Judgment no. Kž1. Po2. 6/12 of 25.02.2013).

6 See e.g. judgments in the cases of Đakovića, *Bijeljina*, *Bijeljina II*.

7 *Prosecutor vs. Kunarac et al.*, Case No. IT-96-23&23/1, Judgment, 22 February 2001.

8 *Sylvestre Gacymbitisi vs. The Prosecutor*, Case No. ICTR-2001-64_A, & July 2006 Judgement.

9 *Prosecutor vs. Mucić et al.*, Case No. IT-96-21, Judgment, 16 October 1998.

10 See, Serge Brammertz and Michelle Jarvis (editors), *Processing Sexual Violence Crimes under the Jurisdiction of the International Criminal Tribunal for the former Yugoslavia* (ICTY) (CPU Printing company Sarajevo, 2017); HLC, Practical Policy Proposal: Processing Sexual Violence Crimes During Armed Conflict before Courts in the Republic of Serbia.

the culture of systematic impunity.[11] Together with the International Criminal Tribunal for Rwanda (ICTR)[12] and the Special Court for Sierra Leone[13], the ICTY has laid the foundations of case law for the prosecution of sexual and gender-motivated crimes committed in armed conflicts. It has also significantly improved the rules for the treatment of victims of these crimes during court proceedings.[14]

When establishing the ICTY, the Secretary-General of the United Nations stated that "it is not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts in connection with such acts. On the contrary, national courts should be encouraged to exercise their jurisdiction in accordance with relevant national laws and procedures".[15] Thus, already at the very establishment of the tribunal, the need was emphasised for states to envisage in their national legislation an approach to this problem that would be oriented towards victims of sexual violence, in order first to prevent these crimes, and later to prosecute them.

In parallel with the work of the ICTY, the states of Bosnia and Herzegovina, Croatia, Serbia, and later Montenegro, have taken a significant step towards the effective prosecution of war criminals by establishing special prosecution mechanisms. Thus, the Special Department for War Crimes within the Prosecutor's Office of BiH was established in 2005, after the Office of the War Crimes Prosecutor in Serbia in 2003; while in Croatia this competence is exercised by the State Attorney's Office of the Republic of Croatia. The jurisdiction of the Department for Suppression of Organised Crime at the Supreme State Prosecutor's Office of Montenegro was enlarged in 2008 to prosecute war crimes perpetrators.[16]

Until the end of 2004, war crimes trials in Bosnia and Herzegovina were conducted exclusively before cantonal courts in the Federation of BiH, district courts in Republika Srpska and the Brčko District Court, whilst in early January 2005 the War Crimes Department was established within the Court of BiH. In Serbia, before the establishment of the War Crimes Department of the Belgrade Higher Court in 2003, war crimes proceedings were conducted before courts of general jurisdiction and military courts, but with the establishment of this department, exclusive jurisdiction for such cases was transferred to it. In Croatia, all county courts had jurisdiction over war crimes cases until November 2011. By amending the national law, only four specialised county courts in Zagreb, Osijek, Rijeka and Split have retained this jurisdiction.[17]

11 ICTY, "Crimes of Sexual Violence", See: https://www.icty.org/bcs/specijali/zlo%C4%8Dini-sexual-violence.

12 International Criminal Tribunal for Rwanda, See: https://unictr.irmct.org/en/tribunal.

13 See: War Crimes Research Group, "Special Court for Sierra Leone: Outreach, Legacy and Impact", Final Report, February 2008, https://rscsl.org/Documents/slfinalreport.pdf.

14 See: ICTY, "Crimes of Sexual Violence",https://www.icty.org/bcs/specijali/zlo%C4%8Dini-sexual-violence.. https://www.icty.org/bcs/specijali/zlo%C4% 8Dini-sexual-violence; HLC, Policy Paper: Prosecution of Crimes of Sexual Violence during Armed Conflicts before the Courts of the Republic of Serbia.

15 Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) (S/25704), Section II, Article 8D, para. 64, p. 16.

16 The Special State Prosecutor's Office of Montenegro was established in 2015, see: https://sudovi.me/spdt/sadrzaj/Gw1r

17 Croatia is divided into counties, and counties are divided intomunicipalities. All counties and largermunicipalitieshave their own courts. https://www.iusinfo.hr/aktualno/u-sredistu/nadleznost-hrvatske-u-progonu-ratnih-zlocina-9882

The establishment of the specialised chambers and departments of the Prosecutor's office and courts is in accordance with the obligation of all states firstly, to prevent war crimes perpetrators, or else, if they fail to do so, to prosecute them.[18] At the same time, their foundation has been one of the most important, but also most complex conditions for the establishment of the rule of law and lasting peace, which is reflected in the cessation of impunity for war crimes, and particularly sexual violence, which carries special weight due to the specificity and sensitivity of this crime.[19] Finally, the establishment of the specialised chambers, prosecutors' offices and courts was a key component devised by the ICTY to complete the new indictments, and at the same time to terminate its work by 2010 as required by the UN Security Council.[20] The establishment of these institutions enabled the transfer of responsibility for the prosecution of war crimes from the Hague Tribunal to the national judiciaries. This step towards the transfer of responsibility also included the handover of already investigated but still unprocessed cases, as well as collected evidence, to national prosecutors' offices.

The importance of prosecuting war crimes of sexual violence is also demonstrated by the fact that, out of a total of 10 Security Council resolutions on women, peace and security, five have been directly focused on sexual violence in conflict. The first UN Security Council Resolution on Women, Peace and Security (WPS) 1325 was adopted in October 2000. It is also the first resolution that connects women with the peace and security agenda and recognises that armed conflicts affect women and girls differently than men and boys, and emphasises the need for the active and effective participation of women in peace processes, including peace negotiations and peacebuilding. Resolution 1325 reminds all states that they are obliged to prosecute and punish those responsible for genocide, crimes against humanity and war crimes, including crimes of sexual violence against women.[21]

In April 2019, the obligation to combat impunity for sexual violence in war was again recalled by the United Nations Security Council in the adopted Resolution 2467, which stated that crimes that are systematic and widespread and characterised by extreme brutality are still being committed against women during armed conflicts.[22] Also, with this resolution, the UN called on Member States to fight nonliability and ensure that perpetrators of the war crime of sexual violence be held responsible, because disregard of and impunity for these crimes sends a message that such crimes are tolerated in society.[23]

18 All states are expected to investigate war crimes suspected of being committed by their nationals or armed forces, or committed on their territory, and to prosecute suspects. They must also investigate other war crimes over which they have jurisdiction. State practice establishes this rule as a norm of customary international law applicable in international and non-international armed conflicts. See Rule 156 in the International Humanitarian Law Database, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule158.

19 Policy Paper: Prosecution of Crimes of Sexual Violence during Armed Conflicts before the Courts of the Republic of Serbia (HLC, 2019).

20 Security Council Resolution, S/RES/ 1966 (2010), available at: https://digitallibrary.un.org/record/695418?v=pdf.

21 Security Council Resolution S/RES/1325 (2000). https://zeneucrnom.org/images/pdf/rezolucija1325.pdf.

22 Security Council Resolution S/RES/2467 (2019), "Strengthening Justice and Accountability and an Invited Approach to Survivors in the Prevention and Response to Conflict-Related Sexual Violence", available at: https://www.un.org/shestandsforpeace/sites/www.un.org.shestandsforpeace/files/unscr_2467_2019_on_wps_english.pdf. See: Policy Paper: Prosecution of Crimes of Sexual Violence during Armed Conflicts before the Courts of the Republic of Serbia (HLC, 2019).

23 *Ibid.*

The UN Special Representative on Sexual Violence in Conflict points out that prosecution also serves the purpose of prevention by helping to change the culture of impunity for these crimes towards a culture of deterrence. According to the 2021 report, in the 3,293 UN-verified cases of sexual violence committed in 18 countries, the majority of victims of this type of war violence – 97% – were women and girls.[24] According to the latest report by the UN Special Representative on Sexual Violence in Conflict submitted in 2023, women and girls have again been disproportionately affected by sexual violence globally. And it is especially displaced women, refugees and migrants who face increased levels of sexual violence related to armed conflict.[25]

The ICTY ended its work in 2017. Out of a total of 161 defendants, 76 persons faced charges of crimes of sexual violence.[26] However, out of the 76, only 35 persons were convicted, while 22 were acquitted of the charges. Also, nine of the defendants died before their arrest or during the proceedings, while indictments against six persons were transferred to the domestic judiciary. One indictment against four people was withdrawn.[27]

III. National framework

Armed conflicts in Croatia, Bosnia and Herzegovina, and Kosovo were marked by systematic crimes committed against civilian housing in order to enforce ethnic cleansing of the whole territories. A special characteristic of the wars fought in the territories of these countries are the numerous war crimes – murder of civilians, forced disappearances, torture, holding of civilians in detention facilities, and systematic rape and other forms of sexual violence.[28] A number of the highest political, military and police officials of Serbia have been convicted of crimes committed by Serbian forces during the armed conflicts in the former Yugoslavia. Furthermore, members of other military and police forces involved in the conflicts were prosecuted before the ICTY. However, the ICTY, the international community, citizens, and above and before all others, the victims and survivors expected a significant number of war criminals to be held accountable before domestic courts in the region, because only a small number of mostly high-ranking persons were actually convicted before the ICTY.[29] And indeed, countries from the region have assumed their international obligations to prosecute war crimes.

24 UN, "Justice critical to fighting sexual violence in conflict", https://news.un.org/en/story/2022/04/1116192 13 April, 2022.

25 "Conflict-related sexual violence", report of the UN Secretary-General. S/2024/292, April 2024, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/05/SG-2023-annual-reportsmallFINAL.pdf

26 ICTY, "In Numbers" (as of September 2016), https://www.icty.org/bcs/specijali/zlo%C4%8Dini-sexual-violence/in-numbers

27 *Mejakić et al.* (Mirko Babić, Nenad Banović, Predrag Kostić, Momčilo Gruban).

28 See, UN General Assembly, A/RES/50/192, 23 February 1996; Human Rights Watch, "UN Fall of Srebrenica and the Failure of UN Peacekeeping" 15 October 1995, https://www.hrw.org/report/1995/10/15/fall-srebrenica-and-failure-un-peacekeeping/bosnia-and-herzegovina

29 Joseph Rikhof, "Prosecution of International Crimes – a Historical and Empirical Overview", 2(2) *Bergen_ Journal of Criminal Law and Criminal Justice* (2014) 108-140; Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton Company, New York, 2011).

For example, almost 4,000 suspects for crimes committed during armed conflicts are under investigation by BiH state authorities.[30]

Thus, based on the Law on the Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, the Office of the War Crimes Prosecutor (OWCP) of the Republic of Serbia was established in 2003, whose jurisdiction covers the detection, prosecution and trial of criminal offences against humanity and other offences specified by international law (criminal offences under Articles 370 to 384 and 385 and 386 of the Criminal Code).[31] These offences include genocide, crimes against humanity, war crimes against civilians and war crimes against prisoners of war, as well as serious violations of international humanitarian law committed on the territory of the former Yugoslavia from 1 January 1991, which are listed in the ICTY Statute; and also, the criminal offence of aiding and abetting a perpetrator after the commission of a criminal offence (referred to in Article 333 of the Criminal Code), if committed in connection with the aforementioned criminal offences.

In war crimes proceedings, the POWCP indicted and the courts tried under the Criminal Code of the Federal Republic of Yugoslavia (FRY), as being the most favourable for the perpetrator.[32] All cases analysed were qualified as criminal offences of war crime against civilians (Article 142 of the Criminal Code of the FRY), and as far as punishment was concerned, sentences ranged from 5 to 20 years. Some of the long-term prison sentences imposed related to defendants who, in addition to rape, as one of the acts of committing a war crime against civilians, were simultaneously found guilty of other criminal acts such as murder, inhumane treatment, etc.[33] In verdicts issued exclusively for rape, the harshest sentence was 13 years in prison[34], the next in terms of severity was 8 years[35], while the lightest was 5 years.[36]

30 OSCE Mission to BiH, "Race against Time – Progress and Challenges in the Implementation of the State Strategy for the Work on War Crimes Cases of Bosnia and Herzegovina" 24 June 2022.

31 Criminal Code ("Offical Gazette of the Republic of Serbia" nº 85/2005, 88/2005, – corr. 107/2005, 72/2009, 111/2009, 121/2012, 104/20'13, 108/2014, 94/2016 and 35/2019); Law on Organisation and Jurisdiction of State Authorities in War Crimes Proceedings, https://www.paragraf.rs/propisi/zakon_o_organizaciji_i_nadleznosti_drzavnih_organa_u_postupku_za_ratne_zlocine.html

32 *Ibid*, Article 5.

33 Judgment of the Appellate Court in Belgrade of the War Crimes Department Kž1 Po2 6/12 of 25 February 2013, Dragan Jović sentenced to 20 years in prison for the multiple rape of two Bosniaks and the murder of one Bosniak in Bijeljina in 1992; Judgment of the Higher Court in Belgrade K.Po2 8/2017 of 23 September 2019, which was confirmed by the judgment of the Appellate Court in Belgrade – War Crimes Department Kž1 Po2 4/20 of 17 September 2020, which sentenced Dalibor Maksimović to 15 years in prison for the rape of a Bosniak woman and the murder of 4 Bosniaks in Bratunac in 1992.

34 Judgment of the High Court in Belgrade – War Crimes Department K Po2 7/2011 of 4 June 2012, which was confirmed by the judgment of the Appellate Court in Belgrade – War Crimes Department Kž1 Po2 6/12 of 25 February 2013, sentencing Zoran Đurđević to 13 years in prison for the multiple rape of two Bosniak women in Bijeljina in 1992.

35 Judgment of the Higher Court in Belgrade – War Crimes Department K.Po2 5/18 of 19 September 2019, confirmed by the judgment of the Appellate Court in Belgrade – War Crimes Department Kž1 Po2 7/19 of 3 January 2020, which sentenced Nikola Vida Lujić to 8 years in prison for raping a Bosniak woman in Brčko in 1992.

36 Judgment of the Appellate Court in Belgrade – War Crimes Department Kž1 Po2 3/23 of 15 December 2023 sentencing Dalibor Krstović to 5 years in prison for the rape of a Bosniak woman in Kalinovik in 1992.

So far, the analyses of the prosecution of sexual violence have indicated that the practice of special authorities for the prosecution of war crimes in Serbia shows that they do not have a working definition of the criminal offence of rape as a war crime or other crime under international law.[37] It is common knowledge that the objective elements of one and the same crime can differ in peace and wartime conditions, as is the case with murder or torture. Namely, according to the criminal legislation in force at the time of armed conflicts, the objective elements of rape are "adultery by force or serious threat" (without further clarification of the meaning of the term "adultery"), or "an equal act to it [adultery]".[38] Also, it is envisaged that a rape victim can only be a female[39], which is completely at odds with the evolution of the act in case law.[40] However, although there is an absence of a detailed and clear definition of the criminal offence of sexual violence in war, the prosecutor's office and the court have enough space to more precisely determine and define sexual violence through their practice.

i. Crime against humanity

No one has been prosecuted for crimes against humanity in Serbia so far, because the POWCP has taken the position that this criminal offence cannot be prosecuted. Namely, the POWCP believes that this would violate the principle of legality, which stipulates that no one can be convicted of a criminal offence which, at the time it was committed, was not provided for by law and for which no penalty was provided. However, the provisions of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms state that the principle of legality cannot be violated if the criminal offence in question was provided for either by domestic and-or international law. A crime against humanity was first envisaged as a crime in the 1946 Charter of the International Military Tribunal for the Far East. Although at that time the crime against humanity did not include sexual slavery, with the beginning of the work of the ICTR and the ICTY, in the *Kunarac et al.* Case, the acts that were considered to be enslavement as a crime against humanity were expanded to include sexual slavery. Also, the relationship between gender-based crimes and common law was established. This was the first time in history that sexual slavery was treated as a crime against humanity.

37 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017).

38 See: Marijana Ristić, "Criminal Offence of Rape in the Law of the Republic of Serbia", *Law – Theory and Practice no. 30* (2013) Forced intercourse in the classical sense represents the penetration of the male sex organ into the female sex organ, p. 70. Starting from the legal text ("and with it (forced intercourse) the equal act") to the act of committing the criminalact of rape also includes: a) penetration of the male genital organ into the mouth of the victim; b) penetration of the male genital organ into the anus of the victim. See in more detail: Cvetković, V., (2006). Criminal act of rape referred to in Article 178 of the Criminal Code of the Republic of Slovenia in: Dragiša Slijepčević, et al. (editor) Bulletin of Jurisprudence of the Supreme Court of Serbia 2, Belgrade, Intermeks, p. 79; Stojanović, S., Perić, O., (2006). Criminal law: special part, Belgrade, Pravna knjiga, p. 100.

39 See: Article 103, paragraph 1 of the Criminal Code of the Socialist Republic of Serbia, Official Gazette of the SRS,Nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90, Official Gazette of RS, No. 16/90, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02. "Therefore, the existence of the criminal offence of rape requires that the perpetrator force the woman to have sexual intercourse with him against her will."

40 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017), p. 7.

In 1968, the United Nations General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to war crimes and crimes against humanity[41], which was ratified by the then Socialist Federal Republic of Yugoslavia (SFRY) in 1970.[42] Article 1 of the Convention states that a crime against humanity (as defined in the Charter of the International Military Tribunal) shall not become statute-limited, irrespective of the date on which it was committed, even where such acts do not constitute a violation of the domestic law of the country in which they were committed.[43] Thus, Serbia, as a successor country to the SFRY, has an obligation to prosecute a crime against humanity (which is a criminal offence provided for by international law) committed during the wars fought in the territory of the former Yugoslavia during the 1990s, although at that time it was not envisaged in the Criminal Code as a separate criminal offence.

Serbia authorised the crime against humanity as being an offence after 1995, and rape and enslavement as a way of committing that offence. For comparison, it can be mentioned that BiH, for example, had the same legal framework as Serbia in the period 1992-1995 when it came to war crimes, and the crime against humanity was authorised only in 2003. Nevertheless, the correct application of crimes against humanity for the period 1992 – 1995 to cases adjudicated by the Court of BiH was confirmed by the European Court of Human Rights (ECtHR).[44] Namely, the ECtHR noted in this case that the applicant was convicted in 2007 of persecution as a crime against humanity in relation to acts committed in 1992. As these acts did not constitute a crime against humanity under domestic law until the entry into force of the Criminal Code of 2003, it is evident from the aforementioned documents that these acts, at the time they were committed, were accepted as constituting a crime against humanity under international law. It is to be noted that in this case all the constituent elements of crimes against humanity were fulfilled: the contested acts were committed in the context of a wider and systematic attack directed against the civilian population and the applicant was aware of these attacks.[45]

Serbia would correctly adjudicate if it characterised these crimes as crimes against humanity, in those situations when such elements can be proven. Therefore, the practice of the ICTY, the ICTR, but also the ECtHR with reference to BiH should be relevant to Serbia. For instance, in such cases (when these features are proven), the Court of BiH characterises these acts as rape or sexual slavery, and thus as crimes against humanity.

For this reason, the HLC believes that the POWCP does not face any legal obstacle to prosecuting crimes against humanity committed in the territory of the former Yugoslavia. What is more, the POWCP was ready to give up its own position in some other cases. In 2008, the POWCP demanded

41 The Convention on the Inapplicability of the Statute of Limitations to War Crimes and Crimes against Humanity was adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2391 (XXIII) of 26 November 1968, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-non-applicability-statutory-limitations-war-crimes.

42 See: https://treaties.un.org/Pages/showActionDetails.aspx?objid=0800000280034a97&clang=_en.

43 Article 1 (b) of the Convention, see: https://ihl-databases.icrc.org/assets/treaties/435-IHL-65-EN.pdf.

44 Decision of the ECtHR in Case No. 51552/10, under the filed application of the convicted Boban Šimšić against Bosnia and Herzegovina, paras. 21 – 25; available at: https://hudoc.echr.coe.int/eng# {% 22itemid %22:[% 22001-155597% 22]}, last visited on 30/09/2024.

45 *Ibid*, at para. 23.

an investigation against Peter Egner, a member of the Gestapo, for the genocide he committed during World War II, although at that time genocide as a criminal offence was not foreseen by domestic law. The then Brčko District Court upheld the decision of the investigating judge and allowed the investigation to go ahead in this case, in the belief that the principle of legality was not violated if the provisions of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms were taken into account, which state that the principle of legality cannot be violated if the act in question is provided for in international law and constitutes a criminal offence under general legal principles recognised by civilised nations.

Finally, in the *Skočić* Case, charges of crimes against humanity were permitted to be brought against the defendants, thus demonstrating the court's knowledge of international standards. What is relevant to the crime against humanity is that it should be a broad or systematic attack against a certain group of the population, and with the knowledge of the perpetrator that it is so. Recently, a prosecutor in BiH filed an indictment for crimes committed in Zvornik, where he qualified the criminal offence as a crime against humanity, and this crime was committed in June 1992.[46] What, for example, the prosecutors in BiH are also doing in these cases, in addition to providing the evidence proving that there was a

46 See the case of the Court of Bosnia and Herzegovina no. S1 1 K 047172 23 Ko *Vidoje Blagojević et al.* (prosecutorial number: T 20 0 KTRZ 0024892 23). On 5 February 2024, the Court of Bosnia and Herzegovina confirmed the indictment in the Case of *Vidoje Blagojević et al.*, charging the defendants Vidoje Blagojević, Ivan Arapović, Milan Arapović, Kosta Pejić, Božo Radić, Mile Savić, Mile Blagojević, Ljubiša Pejić, Stevo Vasiljević, Branko Pejić and Verica Radović, inter alia, with being in the area of the municipality of Zvornik between 31 May 1992 and 25 June 1992, during the war in Bosnia and Herzegovina and during the armed conflict between the Army of the Republic of Srpska (VRS) and the Army of the Republic of Bosnia and Herzegovina (ARBiH) in the area of the municipality of Zvornik, and during a broad and systematic attack by the military, paramilitary and police forces of the so-called Serbian Republic of BiH, and then of the Republic of Srpska, directed against the civilian Muslim population of the municipality of Zvornik, which lasted from 8 April 1992 until at least the end of August 1992, knowing about the armed conflict, but also about the broad and systematic attack, and that their actions formed part of that attack, participated in the illegal detention and inhumane treatment of about 700 Muslim civilians, detained at the Technical School Center (TSC) in Karakay, and the murder and enforced disappearance of at least 150 Muslim civilians. It is further stated that the defendants Ivan Arapović, Milan Arapović, Kosta Pejić, Božo Radić, Mile Savić, Mile Blagojević, Ljubiša Pejić, Stevo Vasiljević, Branko Pejić, as members of the Karakaj Company in the capacity of guards in the said facility, and contrary to Article 26 of the Law on the Army of the Serbian Republic of Bosnia and Herzegovina, failed to protect the lives and health of about 700 imprisoned Muslim civilians in TSC Karakaj because, although they were guards in TSC Karakaj, they did not prevent Serbian soldiers P. S. (deceased) and M. S. (unavailable), and T. M. (deceased), who was a member of the Military Police, as well as other Serbian soldiers who were members of the TO Zvornik until 2 June 1992, and from 2 June 1992 members of the Zvornik Brigade of the VRS, from entering the part of the TSC where these Muslim civilians were imprisoned on a daily basis, after which other unidentified Serbian soldiers beat imprisoned Muslim civilians,brought out imprisoned Muslim civilians, since when all trace has been lost of most of them, and killed imprisoned Muslim civilians. It is further stated that the aforementioned defendants, in order to inflict great suffering, and serious physical and psychological injury, committed and assisted in the imprisonment or other serious deprivation of physical liberty, and assisted in inhumane acts of a similar nature committed in order to inflict great suffering or serious physical or psychological injury or impairment of health, and the enforced disappearance and murder of civilians of Muslim nationality. The defendant Vidoje Blagojević is charged that, as a person in a superior position among the members of the Karakaj Company of the Zvornik Brigade, he failed to take necessary and reasonable measures with the aim of initiating proceedings to punish the said members of the Karakaj Company and other members of the Zvornik Brigade for their aiding and abetting inhumane acts of a similar nature, committed in order to inflict great suffering or serious physical or psychological injury or damage to health, and the forcible disappearance and murder of about 700 civilians of Muslim nationality, available at: https://www.sudbih.gov.ba/Post/Read/Potvr%C4%91ena%20optu%C5%BEnica%20u%20predmetu%20Vidoje%20Blagojevi%C4%87%20i%20drugi, last visited20.09.2024.

wide and systematic attack, is proposing that the court accept as established facts matters mentioned in the relevant judgments of the ICTY. In this case, these were facts from the decisions in the *Krajišnik*, *Stanišić and Župljanin* cases, among others.[47] The POWCP could follow the same practice.

The ICTY has successfully held several officials responsible[48] for committing rape as a crime against humanity, and established the responsibility of perpetrators of sexual violence on various grounds. Namely, it has established the individual responsibility of some defendants as perpetrators[49], but also in some cases as superiors, on the basis of command responsibility[50], and on the basis of the existence of a joint criminal enterprise.[51] Liability, whatever the basis, was established within the framework of the act of crime against humanity.

In the Case of *Prosecutor v. Tadić*, the first international trial where a defendant faced rape charges as a crime against humanity, the ICTY condemned *Tadić* in a decision that is "an important judicial recognition of the role of sexual violence in the wider campaign of ethnic cleansing by Serbs".[52] The Chamber concluded that the evidence of widespread and systematic rape in Serbian camps was very credible, citing evidence that "both male and female prisoners were subjected to severe abuse, including beatings, sexual assaults, torture and executions". Several additional court proceedings before the ICTY have established the responsibility of individuals for rapes committed during a widespread and systematic attack against civilians.[53]

IV. National practice not aligned with the practice of the ICTR and ICTY or the practice of surrounding countries

Through its twenty years of work, the ICTY has changed its approach to punishing sexual violence as a war crime. It was the first international court to convict rape as a form of torture[54] and sexual enslavement as a crime against humanity.[55] Almost half of all defendants were accused of sexual violence, and a third were judged criminally responsible for these acts.

47 See e.g. *Prosecutor vs. Momčilo Krajišnik* (IT-00-39), available at: https://ucr.irmct.org/scasedocs/case/IT-00-39#appealsChamberJudgement, last visited 20.09.2024; *Prosecutor vs. Stanišić and Župljanin* (IT-08-91), available at: https://ucr.irmct.org/scasedocs/case/IT-08-91#eng, last visited 20.09.2024.

48 Article 7 (1) and 7 (3) of the Statute of the ICTY.

49 Hazim Delić, commander of the infamous Čelebići camp, see *Prosecutor vs. Mucić et al.*, judgment, 16.11.1998.

50 Zdravko Mucić, the commander of the Čelebići camp, was found guilty of crimes committed by his subordinates on the basis of his position as the de facto commander of the camp. See: *Prosecutor vs. Mucić et al*, judgment, 16.11.1998.

51 *Prosecutor vs. Radovan Karadžić*, Case No. IT-95-5/18.

52 *Prosecutor vs. Duško Tadić* Case No. IT-94-1-T.

53 Verdicts that included convictions or pleas to rape and sexual violence as crimes against humanity include *Prosecutor vs. Ranko Češić*, Case No. IT-95-10/1-S, Judgment (Mar. 11, 2004); *Prosecutor vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-A and IT-96-23/1- A, Judgment (12 June 2002); *Prosecutor vs. Dragan Nikolić*, Case No. IT-94-2-A, Judgment (Feb. 4, 2005); *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Judgment (Nov. 2, 2001).

54 *Prosecutor vs. Mucić et al.*, Case No. IT-96-21, Judgment, 16 October 1998.

55 *Prosecutor vs. Kunarac et al.*, Case No. IT-96-23&23/1, Judgment, 22 February 2001.

The Hague Tribunal is the first court in Europe to prosecute sexual violence against men in war[56] and to develop special rules to protect victims who testify before the court. The first version of the Hague Tribunal's Rules of Procedure and Evidence included measures to reduce the trauma of victims when confronting defendants and during their testimony. Unfortunately, this positive practice has not been transferred to the judiciary of the Republic of Serbia.

The definition of rape in international law, primarily developed by the practice of the ICTY, defines the physical elements of the act (penetration with the penis or other object of the victim's vagina, anus or mouth), and does not distinguish between the sex of the victim, because the victim can be a woman or a man. Also, as an integral element of the rape, the definition envisages the absence of consent of the victim, and not just the presence of coercion or threat.[57] Absence of consent is considered as a broader notion of coercion and encompasses it[58], which is revolutionary, because for the first time the circumstances surrounding the crime are considered and those circumstances are linked to consideration of the victim's lack of consent.[59] Despite this, in actual practice in Serbia, the absence of consent and coercion are used interchangeably, although the two terms are completely different and are proven differently.[60]

Finally, in the *Lašva Valley* Case[61], the ICTY found that the crime of rape includes the following elements: "sexual penetration, however limited, of the victim's vagina or anus with the perpetrator's penis, or with any other object used by the perpetrator, or of the victim's mouth with the perpetrator's penis, where such penetration is carried out with the use of coercion, force or threat of force against the victim or a third person".[62]

However, contrary to the definition of rape in international law, in several POWCP indictments (e.g. *Bijeljina*, *Bijeljina II*, *Đakovica*), acts of anal or oral penetration are not factually described as rape, but as "unnatural fornication", and the CC of FRY, which the courts in the Republic of Serbia apply to war crimes committed in the period from 1992 to 1995, does not state unnatural fornication as a possible act of committing a war crime, but as rape. Also, the POWCP does not qualify penetration by "any other object" as rape, or unlawful unnatural fornication, but as torture and inhumane treatment. Such a qualification can sometimes be justified, especially when the consequences of the rape are so severe that they reach the degree of rape as torture of a person.[63]

56 *Prosecutor vs. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999.
57 See judgment of the ICTY Trial Chamber in the *Kunarac et al.*case, para. 460.
58 *Ibid*, at paras. 458, 459.
59 See: Olivera Simić and Jean Collings, "Defining Rape in War: Challenges and Dilemmas", *Griffith Journal of Law and Human Dignity* 6(1) 2018.
60 See: Transcript of the main hearing in the Lekaj Case, 20 December 2005, p. 51 and p. 53 and compare the questions of the Chamber: "Did the defendant threaten you on that occasion?" (p. 51) and "Were you struggling?"(p. 53) http://www.hlc-rdc.org/wp-content/uploads/2014/06/Lekaj_transkript_20.12.2005.pdf.
61 *Prosecutor vs. Ante Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998.
62 *Ibid.*
63 Indictment TRZ KTO no. 05/2016 of 26 May 2016. http://www.hlc-rdc.org/wp-content/uploads/2016/10/Optuznica_Tomic_Ranka_26.05.2016..pdf.

In the *Zvornik III and IV* Cases, one person was convicted of sexual violence, qualified as "inhumane treatment", with regard to a situation when imprisoned Bosnian Muslims were forced to have sexual intercourse at the Cultural Centre in Čelopek; but the crime was also qualified as "bodily harm", since it included the cutting off of a sexual organ. In the ICTY practice, the beating or burning of the genitals qualifies as torture.[64] In the *Zvornik II* Case, the court went a step further in ignoring the crime of rape. Although one person was convicted of aiding and abetting the murder, and it was noted that the injured person had actually been raped previously, because a stake had been inserted into his anus, this action was not qualified as rape or as inhumane treatment or bodily harm, but was only presented as a description of the actions that were taken preceding the murder.

The different positions of prosecutors regarding actions in the execution of the same offence also exist in the indictments of the POWCP, and lead to uneven case law. For example, in the *Brčko* Case (defendant Nikola Vida-Lujić), the Deputy Prosecutor for War Crimes stated that in terms of the elements of the criminal offence of "rape", the act of committing it is represented by "*any sexual penetration, no matter how insignificant, into the victim's vagina or anus, of the perpetrator's penis or any other object used by the perpetrator*..."[65] Uneven case law, when the highest courts take opposite positions on the same legal issue, greatly undermines the principle of legal certainty and the rule of law.

Regarding torture, the ICTY concluded that the prohibition of torture has achieved the status of *jus cogens*, which can be defined as an imperative norm of international law from which no derogation is allowed. In the judgment in the *Mucić et al.* Case[66], the court found the definition of torture as follows*:* "to intentionally inflict, by act or omission, severe pain or suffering, whether physical or mental, in order to obtain information or confession or to punish, intimidate, humiliate or coerce the victim or a third person, or to discriminate on any grounds against the victim or a third person. For such an act to be torture, one of the parties must be a public official or must, at least, be acting in a public capacity, for example, as a *de facto* authority of the state or of any other authority".

The first-instance verdict in the *Skočić* Case mentions the act of cutting off the penis as an act of committing a crime, whereby the court indicates it does not attribute any importance to the particular nature of this act. As this verdict was later revoked, the action was no longer considered in the court proceedings after the annulment of the first-instance verdict, and the opportunity was missed to qualify it as torture committed within the framework of crimes against humanity. In addition, the International Criminal Court (ICC) qualifies the cutting-off of the genitals as forced sterilisation. Widespread or systematic forced sterilisation has been recognised as a crime against humanity under the Rome Statute of the International Criminal Court in its explanatory memorandum. Forced sterilisation is a process or act that renders a person incapable of sexual reproduction without their consent or knowledge. "The perpetrator has deprived one or more persons of their biological

64 *Prosecutor vs. Mucić et al.,* Case No. IT-96-21, Judgment, 16 October 1998.
65 Nikola Vida-Lujić, first instance judgment, 19/09/2019.
66 *Prosecutor vs. Mucić et al.,* Case No. IT-96-21, Judgment, 16 October 1998.

reproductive capacity".[67] The current Criminal Code of the Republic of Serbia also provides for sterilisation as a way of committing crimes against humanity, i.e. forced sterilisation as a war crime;[68] and the judiciary in the Republic of Serbia is not deprived of the possibility of qualifying this act of "cutting-off the penis" as torture, but also, under certain conditions, as "sterilisation".

In case law, sexual violence is often qualified in varying ways, sometimes as rape, sometimes as inhumane treatment, and sometimes as torture. This depends on the action of execution and the consequences of the act. For example, rape would be ordinary penetration; torture would be, for example, penetration by several people at the same time or some other executed act that inflicts great pain, such as cutting off the penis or breast or the like; and inhumane treatment would be, for example, forcing the victim(s) to kiss mouth to mouth with multiple perpetrators. Thus, for example, in Ukraine, as the prosecutor and Head of the Department for the Prosecution of Sexual Violence in Connection with the War, Anna Sosonska, has stated, prosecutors have begun to qualify the exposure of the genitals to electric shocks as sexual violence.[69] Thus, judges and prosecutors have offered their creative contributions to the development of existing definitions of torture and rape in international humanitarian law. In this regard, the latest report of the Special Rapporteur on Torture, and Other Cruel, and Inhuman or Degrading Treatment or Punishment calls for a fundamental review of how these notorious crimes are considered and dealt with. Sexual torture can be a war crime, a crime against humanity, or even genocide.[70]

Certainly, the courts cannot be expected to take into account all the practices of international courts, but it is important to point out the development of theory and practice in law, in order to acquire new knowledge in this field. For example, when it comes to inhumane treatment or torture, the acts of "torture" are not clearly defined in the Criminal Code, although five or ten acts are listed. Rather, it is stated as "torture", and then judicial practice develops the elements of torture, which can be, among other things, a violation of bodily integrity, for which there must be a more severe consequence. Inhumane treatment is the same violation of physical integrity, but again, it is not stated what all the possible acts of inhumane treatment are.

Rights cannot and do not have to be interpreted in an exclusive way in the sense that only what is enumerated in the law is prescribed once and for ever. Of course, criminal offences cannot be extended to something that is not prescribed by law as a criminal offence, but the practice establishes what can be classified as the criminal offence of rape. So, Ukraine, that is, the prosecutors in the indictments, have also established and qualified the use of electricity, i.e. electric shocks applied to the genitals as sexual violence. The Criminal Code of Ukraine does not mention electric shocks as an act

67 Elements of Crimes. Article 7 (1) (g)-5 "Crime against humanity of enforced sterilization" https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

68 See Articles 371 and 372 of the Criminal Code of the Republic of Serbia ("Official Gazette of RS", nos. 85/2005, 88/2005 - amended, 107/2005 - amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016 and 35/2019.

69 Podcast Asymmetrical Haircuts, episode 105, "Prosecuting CRSV in Ukraine with Anna Sosonska and Anastasiia Moiseieva", 28 June 2024.

70 UNGA, A/79/181, "Torture and other cruel, inhumane or degrading treatment or punishment", 18 July 2024.

of sexual violence – moreover, the legislation limits the description of prescribed war crimes. Only the prosecutors have decided to qualify the act as an act of sexual violence, although it is not mentioned as such anywhere in the criminal code of Ukraine. Thus, case law is evolving and needs to follow the flow and practice of other countries in order to improve the domestic legislation.

In the *Brčko II* Case, the defendant was found guilty of inhumane treatment of two detainees at the Luka camp – brothers whom he forced to practice oral sex on each other. From international practice, we can see that this act could qualify as rape. Namely, the Prosecutor of the Special Department for War Crimes of the Prosecutor's Office of BiH, in the indictment against Boško Peulić, qualified this same act – forcing others to have intercourse or fellatio – as rape. As in the *Zvornik III and IV* Case, and in the *Peulić Boško et al.* Case, prisoners were forced to have sexual intercourse with each other.[71] In the ICTY *Stanišić and Župljanin* Case, the Prosecutor's Office charged Mićo Stanišić, among other things, with the actions committed by members of the Serbian forces, who forced fathers and sons to sexually abuse each other in the presence of others detained at the infamous Čelopek Cultural Center near Zvornik.[72]

It is very important to recognise sexual violence and qualify it as such, and to align practice with international standards. Therefore, although unnatural fornication is not envisaged as a form of committing a war crime, the court in Serbia lists it as such in its judgments, while the courts in BiH and the Hague Tribunal list it as rape or other form of sexual violence, sometimes as torture, and sometimes as inhumane treatment, depending on the severity of the consequences. This is not about a new act of war crime in the form of unnatural fornication, but only about the court's interpretation of what rape and other forms of sexual violence are.[73]

One of the problems with the Criminal Code of FRY that Serbia applies to all war crimes is that sexual slavery is not envisaged as a way of committing a war crime. In the *Skočić* Case, for example, sexual slavery was completely ignored, although there were elements of sexual slavery as defined by the ICTY Statute and practice, which provides for enslavement as a form of the criminal offence of rape. The *Kunarac et al.* Case is one of the most important cases in the practice of the ICTY, and represents the first case before an international court that dealt exclusively with allegations of sexual violence. This case is of historical importance in international criminal law because it has expanded the scope of acts that constitute enslavement as a crime against humanity to include sexual enslavement, and establishes the relationship between gender crimes and customary law. Namely, the inclusion of sexual enslavement as a crime under the crime of slavery, which has long been recognised as a "peremptory

71 S1 1 K 020248 16 KRI - Peulić Boško et al.; T20 0 KTRZ 0008572 14; https://radiosarajevo.ba/vijesti/bosna-i-hercegovina/potvrdena-optuznica-protiv-boska-peulica-zbog-ratnih-zlocina-u-srednjoj-bosni-ovo-su-detalji/511982

72 *Stanišić and Župljanin*, Case No. IT-08-91-T, First Instance Judgment of 27.03.2013.

73 In BiH and before the Hague Tribunal, they qualify it as such, usually as part of crimes against humanity: Article 172, paragraph 1, item d) of the Criminal Code of BiH: forcing another person to have sexual intercourse or an equivalent sexual act (rape), sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of serious sexual violence – or, if they can prove the gravity of the act, as torture. If there is no penetration into the body, but there is some form of sexual violence, then it is usually qualified as inhumane treatment.

norm" in customary law[74] is in the *Kunarac et al.* Case a precedent in the history of international criminal law. The ICTY and, later, the Court of BiH tried such cases as crimes of enslavement, i.e. as a crime against humanity.[75]

In the *Kunarac et al.* Case before the ICTY, the accused were found guilty of slavery as a crime against humanity, for imprisoning and raping women in private homes and other facilities, and exploiting them to perform household chores.[76] In this case, the Chamber defined slavery as "the exercise of any or all of the powers arising from the right of ownership over a person".[77] The ICTY further found that the hallmarks of enslavement include not only ownership, but also "the restriction or control of an individual's autonomy, freedom of choice or freedom of movement […] Further indicators of enslavement include exploitation, compulsion to perform forced or compulsory labour or services, often without compensation and, often but not necessarily, with physical suffering, sexual intercourse, prostitution and trafficking in human beings".[78]

Faced with the same factual situation in the *Skočić* Case, the War Crimes Department of the Higher Court in Belgrade deviated from ICTY practice. Namely, in this case, the court treated the facts relating to sexual violence separately from the facts pertaining to captivity and compulsion to do housework.[79]

As previous case analyses have shown, not only did the POWCP and the court not process this case as enslavement, but the court concluded in the first instance judgment in the repeated proceedings that there was no evidence of inhumane treatment in forcing the injured parties to wash things, prepare food and clean for the defendants. As the court stated: "With the circumstances that the injured parties occasionally cooked food, made pancakes and doughnuts, the defendant 'Alpha' stated that no one forbade them to eat while preparing food; if they washed other people's clothes, it is logical that in the given conditions they could certainly wash their own clothes; and they were cleaning the houses in which they were also staying".[80]

Namely, the court found that these actions could not be considered inhumane treatment, because there was no evidence that they represented a serious attack on human dignity or that they led to the severe mental or physical suffering of the injured – in other words, these actions did not "result in severe humiliation, degradation".[81] The court's explanation gives the impression that the victims lived in completely normal conditions and not in sexual slavery during the war. In this way, the court

74 See: *Jean Allain, The Law and Slavery: Prohibiting Human Exploitation* (Brill, Nijhoff, 2013).

75 See cases of the Court of BiH: second-instance judgment in the *Samardžić* Case; first-instance and second-instance judgment in the *Janković* Case; first-instance and second-instance judgment in the *Kujundžić* Case.

76 *Ibid.* at 28. IWPR, "Analysis: Foca's Monumental Jurisprudence", 23 June 2001, available at https://iwpr.net/global-voices/analysis-focas-monumental-jurisprudence.

77 *Ibid*.

78 First instance judgment of the ICTY in the *Kunarac et al*. Case, para. 542.

79 See Milica Kostić, "Gender dimension of war crimes:Sexual violence against women" (BCSP, 2017).

80 Judgment of the War Crimes Department of the Higher Court in the retrial in the *Skočić* Case number K Po2 11/14 of 16 June 2015, p. 55. http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf.

81 Judgment of the War Crimes Department of the Higher Court in the retrial in the *Skočić* Case number K Po2 11/14 of 16 June 2015, p. 42. http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf.

completely ignored the context of the event that was proven during the proceedings, which was that the victims were captured, that they were raped daily and physically abused by members of the same units that had killed their family members. In its reasoning, the court thus showed ignorance of the relevant legal theory and practice related to sexual violence, but also to human rights in general, and complete insensitivity to legal work on such cases.[82]

In its judgment, the court makes a generalized reference to the "positions of the Hague Tribunal", while, for reasons which are unclear, it drastically deviates from the practice of the ICTY, and also from the practice of other bodies regarding the evidence of inhumane treatment. Thus, for example, in cases of inhumane treatment the European Court of Human Rights has emphasised that the "seriousness of the violation" is assessed "on the basis of all the circumstances of the case, such as the nature and context of the treatment, its duration, physical and mental effects, sometimes gender, age and health status of the victim".[83] The ECtHR concluded that, "When it comes to a person deprived of liberty, any use of physical force not strictly caused by his or her actions violates human dignity".[84] The International Committee of the Red Cross also explains the meaning of inhuman treatment as follows: "It does not mean exclusively treatment that constitutes an attack on bodily integrity or health […] Certain measures such as cutting civilians off from the outside world, and especially from their families […] should be considered inhumane treatment".[85]

V. Work of the Prosecutor's Office in the field of sexual violence in war

In the 20 years of the POWCP's existence, only 13 out of the 106 war crimes indictments filed contain charges of war crimes of sexual violence, accounting for just over 10% of the total number of indictments filed. The first indictment for the act of sexual violence the POWCP filed 15 years after its establishment, in 2018.[86] In the last two decades, 9 cases[87] have been finalised. Only two judgments, those in the *Brčko* and *Kalinovik* Cases[88], were pronounced exclusively for the act of sexual violence – rape in war. The remaining seven verdicts were issued for the commission of several other criminal offences, at least one of which was related to sexual violence. Owing to the death of the defendant, sexual violence had to be omitted from the amended indictment in the *Ćuška/Qyshk* Case.

82 See Milica Kostić, "Gender dimension of war crimes:Sexual violence against women" (BCSP, 2017).

83 ECtHR A v. United Kingdom, Judgment 23 September 1998, Eur. Ct. H.R., para. 20 (citing: Costello-Roberts v. United Kingdom, Judgement 25 March 1993, 247-C Eur. Ct. H.R. (Ser.A) 1993).

84 ECtHR. Ribitsch vs. Austria, 21 EHRR 573, 1996, at para. 38.

85 ICRC Commentary on the Third Geneva Convention, at para. 627; ICRC Commentary on the Second Geneva Convention, at para. 268, First instance judgement of the ICTY in the case of Prosecutor vs. Mucić et al., paras. 521–522.

86 Indictment of OWCP against Nikola Vida Lujić dated 12 September 2018, available at www.hlc-rdc.org/wp-content/uploads/2019/01/Optuznica_12.09.2018..pdf, accessed 20 November 2019.

87 The following cases have been finalised: *Bijeljina*, *Bijeljina II, Skočić*, *Brčko, Brčko II, Kalinovik, Bratunac, Gnjilane Group, Đakovica*. Ćuška: The trial in the *Ćuška/Qyshk* Case began in 2010. The extension of the indictment in 2013 included the rape of one person, while the amended indictment from 2024 omitted the rape due to the death of the defendant.

88 *Brčko* and *Kalinovik* Cases.

Proceedings are also ongoing against the defendant Lazar Mutlak (*Goražde* Case) and Jovan Radan (*Vukovar – Proleterska* Case) on indictments related exclusively to rape, as well as against Novak Stjepanović, who, after the joining of the *Bratunac and Bratunac II* Cases, is on trial for rape and murders.

If we take into account the extent of the sexual violence committed during the conflict in the former Yugoslavia, it is evident that the number of nine cases that have been finalised before the domestic judiciary is very small, and that the POWCP has otherwise almost completely ignored these acts. Recognising the problem, the OWCP stated in the Prosecutorial Strategy for the Investigation and Prosecution of War Crimes in the Republic of Serbia 2018-2023 that it would intensify work on cases involving sexual violence in the coming period.[89] However, there are still no significant developments when it comes to these crimes.

The provision for the prioritisation of the processing of sexual violence was strengthened in the Revised Prosecutorial Strategy, where it was emphasised that "cases with elements of sexual violence" would have priority.[90] In practical terms, this means that these cases have priority in the investigation and collection of evidence. But it is possible to see from international practice how prosecutors work to prioritize cases in other post-conflict societies. Thus, in Myanmar, although a huge number of serious war crimes were committed, prosecutors deliberately focused on those cases where it was necessary to collect evidence for a war crime of sexual violence; which they justified by the fact that "it is well known that these crimes were the fewest to be adjudicated and usually the least reported, because people do not want to talk about these cases and what happened, for obvious reasons".[91] They further point out, "if we have the opportunity to gather evidence for these cases, we will certainly prioritise them."[92]

The decision of the OWCP to prioritise these crimes is to be welcomed; but, unfortunately, with the long delay of almost twenty years, during which some of the witnesses and defendants have died, justice in these cases has remained elusive.[93] But even if we exclude the delay and the fact that the decision to prioritise these cases has only been very recent, there are still no significant changes in practice. With the delay in bringing to justice those suspected of crimes of sexual violence committed during armed conflicts, the risk that a large number of victims will not meet the satisfaction of justice increases proportionately. Although war crimes do not become obsolete, human life itself is limited, and victims, as well as perpetrators, die. Thus, for example, in the *Ćuška/Qyshk* Case, the act of rape in war had to be omitted from the indictment because the defendant Milojko Nikolić, who was accused

89 Prosecutorial Strategy for the Investigation and Prosecution of War Criminals 2018-2023, p. 36.
90 Revised Prosecutorial Strategy for the Investigation and Prosecution of War Crimes in the Republic of Serbia (2022-2026), p. 6.
91 This primarily refers to the stigma and shame that accompany the injured parties in these cases.
92 Nicholas Koumjian, Director of the Independent Commission for Myanmar (IIMM), podcast Asymmetrical Haircuts 12 April 2024
93 Thus, in the Ćuška Case currently before the Court of Appeals, the indictment had to be amended due to the death of the defendant Milojko Nikolić, which led to sexual violence being omitted, since only Nikolić was charged with rape.

of rape, among other things, had died. The other defendants are not charged with rape, so the case as far as this part is concerned has been completed.

Given the specificity of the crime of sexual violence in war, victims are often not ready to report the crime, owing to the stigmatisation to which these persons are exposed if speaking publicly about their experience. This war crime is also accompanied by the difficulties experienced in proving it, such as lack of witnesses, and of medical and other documentation.[94] It is for these reasons that their efficient processing requires additional efforts and entrepreneurship, which is why special strategies for the processing of sexual violence have often been developed in international practice.[95] So far, the POWCP has not developed a specific strategy for the prosecution of sexual violence in war.

Recognising the need to remove barriers to access to justice for victims, survivors and their families, in 2021 the UN Special Rapporteur on Sexual Violence in War developed the "Model Legislative Provisions and Guidelines for Investigating and Prosecuting Conflict-Related Sexual Violence" (Model Provisions and Guidelines).[96] These provisions significantly improve the codification of substantive and procedural criminal law in relation to conflict-related sexual violence, putting the spotlight on victims and survivors. The model of provisions and guidelines is intended as a resource to assist state legislators and international organisations providing legal assistance to requesting states, experts such as prosecutors, investigators and lawyers, as well as public agencies and non-governmental, joint and civil society organisations, in the implementation of a strong legal and procedural framework in accordance with international norms and obligations.[97]

In its previous practice, the POWCP filed a minimum number of indictments in which it characterised war rape as a war crime. In the *Lovas* Case, the POWCP failed to extend the existing indictment to include these acts. Despite several witnesses pointing out[98] during the proceedings that there were rapes in that village during the period to which the indictment refers, the POWCP did not amend the indictment to include these acts. Therefore, the POWCP neither amended its lawsuit, nor did the court react after witnesses presented claims of crimes of sexual violence being committed.

Namely, when one of the witnesses in the *Lovas* Case mentioned rape, the Chamber prevented the presentation of evidence by immediately redirecting the conversation to another topic, not allowing the witness to comment. When the witness misunderstood the court's request to provide an additional

94 See, for example: Strategy on Sexual and Gender-Based Violence of the International Criminal Court, https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf; Milica Kostić, "The Gender Dimension of War Crimes: Sexual Violence against Women" (BCSP, 2017), p. 6.

95 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017).

96 See, "Model Legislative Provisions and Guidelines for Investigating and Prosecuting Conflict-Related Sexual Violence," 18 June 2021, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/06/report/auto-draft/OSRSG-SVC-Model-Legislative-Provisions-ENG.pdf.

97 *Ibid*.

98 See, for example: Transcript from the main hearing of 27 March 2009, pp. 4 and 16, http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transcripts/51-27.03.2009.pdf; Transcript from the main hearing of 30 June 2009, p. 19, http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transcripts/61-30.06.2009..pdf; Transcript from the main hearing of 27 November 2009, p. 73–74, http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas/75-27_11_2009.pdf.

description, thinking that they were asking for an additional description related to rape, and said that she would not talk about it, the president of the panel said: "And I will not take you back to talk about the rape, but I am interested in beating, or if you were physically beaten, harassed?"[99] In this Case, the Humanitarian Law Center (HLC) documented that "every time a witness would mention rape, the court would immediately divert the conversation to the question of whether they had been beaten".[100]

The Humanitarian Law Center considers that the court in the *Lovas* Case had to allow testimony regarding a criminal offence or an act of commission of a criminal offence not covered by the indictment. The court controls the taking of evidence and determines what is relevant to the proceedings and what is not. But, if, after taking evidence at the main hearing, the prosecutor finds that the factual situation is different from what is stated in the indictment, the prosecutor has the right to amend the indictment until the conclusion of the main hearing. Depending on what kind of amendments are involved, the court may decide on the indictment so amended in such a way as to reconfirm it, if, for example, a new criminal offence has been added, or if it is a minor amendment, then the defence is allowed enough time to make a statement regarding these amendments, or propose new evidence regarding that amended indictment. Therefore, the court should not defend issues related to a criminal offence that could be charged to the defendants on trial, which are not covered by the original indictment, because the prosecutor may amend the indictment until the end of the main hearing if the evidence indicates that the factual situation is different.[101] This is especially true when it comes to crimes of sexual violence in war, in accordance with the need to prioritise them, which was also recognised by the POWCP in its Strategy.

In the publication Gender Dimension of War Crimes, author Milica Kostić points out that such conduct of the court can be compared with the conduct of the Chamber in the first and one of the most important cases of prosecution of sexual violence before an international court – in the Case of *Akayesu* before the ICTR. In this case also, the original indictment did not cover cases of sexual violence. However, after a series of testimonies from victims of sexual violence who survived or witnessed the crime, one of the judges reacted, after which the prosecution was ordered to investigate cases of sexual violence.[102] Namely, on 17 June 1997, the ICTR prosecutor, Judge Louise Arbour, signed the amended indictment in the case of the defendant Jean-Paul Akayesu. The amended indictment contained new allegations of sexual violence against female civilians allegedly committed by the defendant between April and June 1994 in Rwanda. The First Instance Chamber approved the prosecutor to amend the indictment based on the statements of five witnesses who claimed that the women, who sought refuge in the municipality of Taba, were sexually abused. Judge Arbour's initiative

99 *Lovas* Case, see, Report on War Crimes Trials in Serbia during 2016, HLC, pp. 81 and 82, available at: https://www.hlc-rdc.org/wp-content/uploads/2017/05/Izvestaj_o_sudjenjima_za_2016.pdf.

100 Report on War Crimes Trials in Serbia during 2014 and 2015, HLC, p. 69, available at: https://www.hlc-rdc.org/wp-content/uploads/2016/03/Izvestaj_o_sudjenjima_za_ratne_zlocine_u_Srbija_tokom_2014._i_2015._godine.pdf.

101 See CC of Serbia Article 109 - amendment or filing of a new indictment, Article 110 - extension of the indictment, Article 111 - subsequent amendment of the evidentiary procedure.

102 See: Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017); Haffajee, Rebecca L. "Prosecuting crimes of rape and sexual violence at the ICTR: The application of Joint criminal enterprise theory". Harvard Journal of Law & Gender, Vol. 29: 201–221.

resulted in the extension of the indictment and the first conviction for rape and sexual violence as a crime against humanity, the definition of rape and sexual violence as a crime under international law, and the conclusion that rape may constitute an act of genocide.[103]

On the other hand, in a case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), the International Court of Justice (ICJ)[104] considered rape cases in Lovas. It had investigated crimes throughout Croatia for the entire duration of war, and this had not been done by a domestic court that dealt exclusively with the events in that village. Namely, in the case of Croatia's lawsuit against Serbia before the ICJ regarding the application of the Convention on the Prohibition and Punishment of the Crime of Genocide, Croatia, among other things, proved cases of rape in Lovas. The court, however, did not have sufficient evidence to rule on these cases because it held the position that the existence of an intention to destroy, in whole or in part, a national or ethnic group was not established in the present case.[105]

VI. Convictions for multiple acts of committing a criminal offence, including sexual violence

Seven[106] war crimes cases were finally adjudicated in which individuals were charged with multiple acts of committing a war crime, at least one of which related to sexual violence, while the case against Novak Stjepanović is currently pending.

With the initial indictment, the POWCP charged Novak Stjepanović with[107] the rape of a Bosniak woman (*Bratunac II* Case). On 23 November 2022, a new indictment was filed against Stjepanović[108] (*Bratunac-Borkovac* Case), charging him and four other members of the VRS for participation in the search and arrest, and then the murder, of 14 Bosniak civilians hiding in an abandoned quarry near the village of Borkovac, in the municipality of Bratunac. After the unification of the indictments against Novak Stjepanović, a single procedure for rape and murder has been conducted (*Bratunac II* Case).

Out of seven cases finally adjudicated for multiple acts of committing a war crime, including sexual violence, in two cases acquittals were rendered, while in five cases there were convictions.

103 UN News, "Jean-Paul Akayes faces new allegations of sexual violence", 7 January 1997. https://unictr.irmct.org/en/news/jean-paul-akayesu-faces-new-charges-sexual-violence.

104 Application of the Convention on the Prevention and Punishment of the Crime of Genocide Croatia v. Serbia, see: https://icj-cij.org/case/118.

105 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017); Judgment of the International Court of Justice in the case of Croatia v. Serbia regarding the application of the Convention on the Prohibition and Punishment of the Crime of Genocide, 3 February 2015, paras. 325–330.

106 These are the cases of *Bijeljina* (Dragan Jović et al.), *Bijeljina II* (Miodrag Živković), *Skočić* (Sima Bogdanović et al.), *Brčko II* (Miloš Čajević), *Bratunac* (Dalibor Maksimović), *Gnjilane Group* (Fazli Ajdari et al.), and *Đakovica* (Anton Lekaj).

107 Indictment No. KTO no. 4/20 of 18 September 2020.

108 Indictment No. KTO no. 9/22 of 23.11.2022.

When it comes to acquittals, in the *Gnjilane Group* Case, by the initial first-instance verdict of 21 January 2011[109], nine defendants were convicted of various acts of committing a war crime, and were convicted of sexual violence for cutting off a sexual organ with a machete, while eight defendants raped protected witnesses C1 and C2 on a daily basis for several days. In the explanation, court stated that in addition to the fact that the victims were raped, which is the most serious attack on the physical, sexual and personal integrity, and in itself a severe humiliation for the victim, in this case the victims were also subjected to additional humiliations such as: rape by several soldiers at the same time, rape in front of a group of soldiers watching, oral rape, whereby they were forced to swallow ejaculations, being urinated on following a sexual act, and penetration of the vagina in front of a group of soldiers. The court concluded that the rape that had taken place with such intensity for a long time, with beatings and degrading and humiliating acts, was torture.[110] The court valued these circumstances as aggravating when measuring the sentence of all the defendants.[111] This first-instance verdict was quashed on 7 December 2011[112], and after the reissue of the first-instance conviction of 19 September 2012 in the part related to the sexual violence[113], the second-instance verdict of 13 November 2013 reversed the[114] first-instance verdict and the defendants were acquitted, due to lack of evidence. Subsequently, the Supreme Court of Cassation issued a judgment of 5 December 2014 adopting the Request for Protection of Legality filed by the Republic Public Prosecutor[115], and found that the final judgments of 19 September 2012 and 13 November 2013 violated the criminal

109 Judgment of the Higher Court in Belgrade no. K-Po2 33/2010.

110 See page 141 – 142 of the reasoning of the judgment.

111 *Ibid*, pages 160 - 164.

112 Decision of the Appellate Court in Belgrade no. Kž1 Po2 8/11.

113 Judgment of the Higher Court in Belgrade no. K-Po2-18/11 of 19 September 2012: by operative part I, the defendants Shefket Musliu, Sadik Aliji, Aguš Memiši, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiki and Burim Fazliu were found guilty, as co-perpetrators, of the criminal offence of war crime against civilians referred to in Article 142, paragraph 1, in conjunction with Article 22 of the Criminal Code of the FRY, and were convicted as follows: defendant Šefket Musliu, sentenced to five years, the defendant Sadik Aliji, sentenced to eight years, the defendant Aguš Memiši, sentenced to twelve years, the defendant Faton Hajdari, sentenced to ten years, defendant Ahmet Hasani, sentenced to thirteen years, the defendant Nazif Hasani sentenced to thirteen years, the defendant Samet Hajdari, sentenced to fifteen years, the defendant Ferat Hajdari, sentenced to eight years, and the defendant Kamber Sahiti, sentenced to eight years in prison; the defendant Selimon Sadiki, who was previously sentenced to eleven years in prison for the aforementioned offence and had a prison sentence of one year and eight months, to which he was sentenced by the judgment of the Appellate Court in Belgrade Kž1 Po1.4/10 of 12 May 2010, has been sentenced to a unique sentence of twelve years, and the defendant Burim Fazliu sentenced to twelve years.

114 Judgment of the Court of Appeal in Belgrade no. Kž1 Po2 2/13.

115 The essence of the request for the protection of legality related to the question of whether these acts of violence and inhumane treatment of members of one of the parties to the conflict against the persons of the opposing party in their power are closely related to the internal conflict in Kosovo and Metohija, whether this conflict affected the execution of these acts and whether they serve the purpose for which the conflict arose and which is indicated in the indictment, and whether the conditions are met as regards the provisions of the IV Geneva Convention on the Protection of Civilian Persons during the War and the II Additional Protocol on the Protection of Victims of Non-International Armed Conflicts, on Protection against Violence, Retaliation, Inhumane Treatment and Violation of Human Rights, which have the significance of a war crime.

law in favour of the defendants. But the Supreme Court of Cassation stated that its decision[116] did "not interfere"[117] with the finality of the said judgments.

In the second case in which a final acquittal was rendered, the case concerned the defendant Živković Miodrag (*Bijeljina II* Case), who was charged with the fact that he and other soldiers[118], after searching a house in Bijeljina and robbing the Bosniak civilians there, together with other soldiers, alternately raped and committed unlawful fornication against the mother, her daughter and their daughter-in-law in the house of the victims, and then killed the mother's husband in front of them, and drove the victims out of the house and forced them to walk naked and barefoot around the city, when two of them were again alternately raped and subjected to unlawful fornication at the exit from the town of Bijeljina. The defendant was acquitted due to lack of evidence that he had committed these acts.[119]

In the remaining five cases[120], individuals were convicted of multiple acts of committing a criminal offence, including sexual violence.

In the *Đakovica* Case, the defendant Anton Lekaj was convicted by the first-instance verdict, because, among other actions, (1) he had forced the victim, a minor, into sexual intercourse, by approaching her with another unidentified member of the KLA whilst she was cleaning the hotel room at their

116 See page 5-6. Judgments: "Therefore, this lack of first and second instance judgments is reasonably pointed out in the request for the protection of the legality of the Republic Public Prosecutor, as well as the ambiguity of the reasons for the conclusion of the first and second instance court that in this particular case it cannot be said about the act of war crime because the existence of an armed conflict after 20 June 1999 has not been proven, and in particular, for the conclusion of the second instance court by which the cessation of armed conflict is related to the date of signing the so-called Kumanovo Agreement. This is because the aforementioned agreement does not bind the KLA because it is not a signatory to it and because the phased withdrawal of the FRY armed forces from Kosovo and Metohija is envisaged by the Military-Technical Agreement, a military operation that lasts for a certain period of time, which further means that even after 9 June 1999, direct hostilities between these forces and members of the KLA were possible. Therefore, the duration of the internal conflict cannot be determined by the date of signing the said agreement, but by the rules of international humanitarian law that bind the parties to the conflict and after the cessation of hostilities until the general conclusion of peace or the achievement of a peaceful solution throughout the territory under the control of the party to the conflict."

117 *Ibid*: Finding, for the reasons stated, that the request for the protection of legality reasonably indicates that the first and second instance judgment committed a significant violation of the provisions of the criminal procedure referred to in Article 438, paragraph 2, item 2) of the CPC, the Supreme Court of Cassation accepted the request and as the request was filed to the detriment of the defendants, decided as in the operative part of this judgment, on the basis of Article 492, paragraph 1, item 3) and Article 493 of the CPC, by establishing that the final judgments of the Higher Court in Belgrade, War Crimes Department K-Po2-18/11 of 19 September 2012 and the Court of Appeal in Belgrade, War Crimes Department Kž1.Po2. 2/13 of 13 November 2013 committed the aforementioned violation of the criminal law in favour of the defendants, without prejudice to the finality of the aforementioned judgments.

118 Indictment No. KTO no. 6/14 of 4 June 2014

119 Defendant Živković Miodrag, first instance Judgment no. K-Po2 No. 10/14 of 14.04.2015 (repealed), first instance Judgment no. K-Po2 No. 10/15 of 24.11.2015, and second instance Judgment no. Kž1 Po2 1/16 of 26.09.2016.

120 Convictions: defendant Lekaj Anton – first instance Judgment no. K.V. number 4/05 of 18.09.2006 and second instance Judgment no. Kž. I RZ 3/06 of 26.02.2007; the defendant Čajević Miloš – first instance Judgment no. K-Po2 9/2018 of 26 April 2021 and second instance Judgment no. Kž1-Po2 4/21 of 4 November 2021; the defendant Gavrić Tomislav and others – first instance Judgment no. K-Po2 11/14 of 16 June 2015, second instance Judgment no. Kž1 Po2 5/15 of 28 March 2018 and the third instance judgment no. Kž3 Po2 1/18 of 13 February 2019; defendant Jović Dragan and others – first instance Judgment no. K-Po2 No. 7/2011 of 4.06.2012 and second instance Judgment no. Kž1.Po2. 6/12 of 25 February 2013; defendant Dalibor Maksimović – first instance Judgment no. K-Po2 8/2017 of 23.9.2019 and second instance Judgment Kž1-Po2 4/20 of 17 September 2020.

orders. They closed the door and started pushing her; the defendant, who was armed, threatened to kill her if she did not take off her clothes, which she did. He then committed forced intercourse against her, after which the unidentified member of the KLA, taking advantage of the fact that the resistance of the victim was broken, also committed forced sexual intercourse against her; (2) together with Arben Škupija, aka Zifa, he used force to force the unnatural fornication of the victim, by first beating him, and then one putting his sexual organ in his mouth, and the other in his anus. The defendant was sentenced[121] to 13 years in prison. He presented his defence at the end of the proceedings, claiming that he was not present at all in the area where these acts were committed.

Of the aggravating circumstances, the court appreciated "the gravity of the criminal offence committed and the resulting consequences, and then the special recklessness shown by the defendant during the commission of the offence, which is reflected in the fact that the victims were completely innocent and unprotected persons, who did nothing to provoke the defendant and his comrades, as they sought to humiliate and inflict severe mental and physical suffering on them, and that they knew the fact that this was a wedding procession, and so, specifically in order to make the humiliation still greater, they sexually defiled the bride. The court also appreciated the other serious consequences of this crime: that three persons are missing, that the survivors' mental health was impaired, and that they emigrated from the territory of Kosovo and Metohija". The court did not appreciate the age of the victim against whom the rape was committed as an aggravating circumstance, even though she was a minor, nor the fact that she was raped immediately afterwards by another perpetrator. Also, the court did not consider as an aggravating circumstance the simultaneous rape of one male person by the defendant and another perpetrator. What is again worrying is that the court stated in the operative part of the judgment, as well as in the explanation, the full name of the injured party, a minor.

In the *Bijeljina* Case, Dragan Jović, Zoran Đurđević and Alen Ristić[122] were accused of entering the house of Bosniak civilians in Bijeljina, and then, in addition to other acts of war crimes, raping and committing unlawful fornication against the mother, her daughter and daughter-in-law in the victims' house in front of their adult and underage family members, and then forcing the victims out of the house, and raping another person in front of the house, and then forcing the two victims to walk naked and barefoot around the city; two of them were again raped at the exit from Bijeljina. The defendants were sentenced to prison terms ranging from 12 to 15 years. The court did not appreciate as an aggravating circumstance the fact that the defendants raped the victims in front of their closest family members, including a minor, and that they again together raped the two injured parties shortly thereafter, after forcing them to walk naked and barefoot around the city. If the trial chambers do not give sufficient importance to aggravating circumstances that are specific to sexual violence, this has

121 First instance judgment No. K.V. number 4/05 of 18.09.2006 and second instance Judgment no. Kž. I RZ 3/06 of 26.02.2007.

122 First instance judgment No. K-Po2 9/2018 of 26 April 2021 and second instance Judgment no. Kž1-Po2 4/21 of 4 November 2021.

the consequence that such judgments do not reflect the severity of the sexual violence or the suffering of the victims.[123]

In the *Brcko II*Case, the defendant Miloš Čajević was convicted by a first-instance verdict[124], for, inter alia, forcing two illegally imprisoned Bosniak civilians, who were family relatives, to strip from below the waist and put their penises into one another's mouths. He was sentenced to seven years and six months in prison for all these acts, for committing a war crime. With regard to aggravating circumstances, the court stated that it appreciated the extent to which the act made the victims vulnerable. However, it is not clear whether the court appreciated these facts as characteristics of the act or as aggravating circumstances. The second-instance[125] verdict overturned the first-instance verdict and reduced the prison sentence of seven years and six months to five years, because the first-instance court incorrectly assessed the defendant's previous conviction as an aggravating circumstance when consolidating that earlier conviction, and imposed a single prison sentence for the earlier offence alongside the offence determined in this proceeding.

In the *Skočić* Case, Tomislav Gavrić and others were charged, and then with the first-instance verdict[126] convicted of various acts of committing a war crime, and among these acts were those related to sexual violence, namely: (1) an unidentified member of the unit used a knife to cut off the penis of the injured party Aganović Esad, who was naked; (2) the now deceased Bogdanović Sima took the victim called "Alpha" from Hamdija's house to the yard, grabbing her by the hair, and then, with one end of a belt, tied the hands of the victim and, after tying the other end of the belt to the fence, took off her clothes and raped her; (3) other unidentified members of the unit took the victims, both minors – "Beta", 13 years old, and "Gamma", 15 years old – to the old house of Ribić Hamdija, and raped them there; a member of the unit, known by name of Bogdan, raped the injured "Beta", after which, this victim was raped by several other unidentified members of the unit; an unidentified member of the unit known by the nickname of "Tihi", threatening her with a gun, raped the injured "Gamma"; also, (4) throughout the entire stay in Malešić, victims "Alpha", "Beta" and "Gamma" were sexually humiliated by particularly insulting actions by members of "Sima's Chetniks" and (5) repeatedly raped by them.

The Court of Appeal in Belgrade quashed the first-instance verdict in the *Skočić* Case and returned it for retrial, and suspended the proceedings against the defendant Stojanović Zoran on account of his death.[127] By the first instance verdict in the retrial of 16 July 2015, six defendants were fully acquitted.[128] Upon the appeal filed with the POWCP, the Court of Appeal in Belgrade issued a second-instance

123 See page 18. Kyle Delbyck, Punishing War Sexual Violence: Guidelines for Combating Penalty Inconsistencies, 2018. It was concluded that the lack of individualised analysis in convictions for multiple criminal offences primarily affects the non-identification of aggravating circumstances that are specific to the criminal offence of sexual violence. As there is no description of such circumstances and the share of this crime in the sentence, convictions for multiple crimes do not reflect the severity of sexual violence or the suffering of victims.

124 First instance judgment No. K-Po2 9/2018 of 26 April 2021.

125 Judgment of the Court of Appeal in Belgrade no. Kž1-Po2 4/21 of 4.11.2021.

126 Judgment of the Higher Court in Belgrade no. K-Po2-42/2000 of 22.02.2013, by which seven defendants were found guilty.

127 Judgment of the Court of Appeal in Belgrade no. Kž1 Po2 6/13 of 14.05.2014.

128 Judgment of the Higher Court in Belgrade no. K-Po2 11/14 of 16.06.2015.

verdict[129] by which it accepted the appeal of the prosecution, and reversed the first-instance verdict, and found three defendants guilty, namely, Zoran Đurđević, Zoran Alić and Tomislav Gavrić, while for the remaining defendants it confirmed the first-instance acquittal. In this second-instance verdict, in the part related to sexual violence, these three defendants were convicted because (1) during their entire stay in Malešić, members of the "Sima's Chetniks" unit sexually humiliated victims "Alpha", "Beta" and "Gamma", by particularly offensive acts, stripping them naked and forcing them to dance on the table, and to watch each other being raped by several unidentified members of the unit, as well as the defendant Đurđević Zoran, who forced the victims "Beta" and "Gamma" to walk naked on the tables, and threatened "Alpha" into drinking his sperm from a glass; and (2) the victims were repeatedly raped by several of them – namely, "Alpha" was repeatedly raped by the defendants Zoran Đurđević, Zoran Alić and Tomislav Gavrić; and "Beta" was repeatedly raped by the defendants Zoran Alić and Tomislav Gavrić.

Although the defendants were convicted for repeatedly raping two victims over a long period of time, it cannot be seen from the reasoning of the verdict that the court had these facts in mind when imposing the prison sentence.[130] The third-instance verdict overturned the second-instance verdict by reducing the prison sentence of the defendant Tomislav Gavrić from ten to eight years, of the defendant Zoran Alić from six to five years, and of the defendant Zoran Đurđević from ten to eight years. The reason for reducing the sentence given by the third-instance court was that the second-instance court did not give adequate importance to the mitigating circumstances in relation to the defendants, without stating exactly what the mitigating circumstances were, but only flatly stating that they were not given adequate importance. Although the mitigating and aggravating circumstances that are specific to sexual violence have not been legally defined, the court did not give the aggravating circumstances any real significance.

VII. Convictions exclusively for sexual violence

So far, a total of five indictments have been filed exclusively for the act of sexual violence as a war crime act. Two cases were closed with final convictions – for the defendant Nikola Vida-Lujić in the *Brčko* Case, and the defendant Dalibor Krstović in the *Kalinovik* Case. Proceedings are ongoing against the defendant Lazar Mutlak in the *Goražde* Case and the defendant Jovan Radan in the *Vukovar-Proleterska* Case. In addition to these four cases, an indictment was also filed against the defendant Novak Stjepanović in the *Bratunac II* Case, which refers exclusively to rape; but after that another indictment was filed against the same defendant, which refers to murders, inhumane acts and the like. The proceedings on these two indictments have been merged and have not been completed.

The first indictment, exclusively for the act of sexual violence, was filed by the POWCP 15 years after its establishment, that is to say, as late as 2018, against Nikola Vida Lujić in the *Brčko* Case. The

129 Judgment of the Court of Appeal in Belgrade no. Kž1 Po2 5/15 of 28.03.2018.
130 Judgment of the Court of Appeal in Belgrade no. Kž3 Po2 1/18 of 13.02.2019.

indictment is the result of regional cooperation. Namely, the Prosecutor's Office of the Brčko District has assigned the indictment to the competent authorities of the Republic of Serbia, since Vida Lujić is a citizen of Serbia, where he resides.

In 2018, the Prosecutor's Office of the Brčko District opened proceedings against the defendant Nikola Vida-Lujić together with two other soldiers, for when, armed with a gun as a member of the paramilitary formation "Red Berets", he entered the family house of A.Š. on 20 June 1992, where, using coercion in the form of threats to her life, he repeatedly raped the victim, which left her with permanent consequences regarding her physical integrity and mental health. The rape was committed after the victim had been previously ordered to hand over the gold and money in her possession, with the defendant constantly holding the gun in his hand while, as the indictment states, the other soldiers searched and smashed things around the house.[131]

In the case against Lujić, the court found that the charges in the indictment had been fully proven and sentenced him to eight years in prison. Namely, Lujić asked the victim to give him money and gold, and after she did so, he forcibly took her to the bathroom, locked the door, grabbed her by the head, knocked her down to a kneeling position, and violently performed oral sex on her with his sexual organ. He then took off her sweatpants and raped her, this time vaginally.

In this case, the court correctly found that there were no mitigating circumstances on the part of the perpetrator and correctly assessed all aggravating circumstances, such as the "continuous suffering" of the victim, the "intensity of the psychological injuries" as well as the "psychological trauma for which she is still being treated today".[132] Despite being found guilty by the court, Nikola Vida-Lujić denied his responsibility and therefore expressed no form of repentance for the offence he is charged with. The gravity of the criminal offence should also be observed in the nature of the comportment of the perpetrator towards the victim. There is no evidence that the defendant expressed regret for his actions, nor that he in any way assisted the victim after the commission of the offence, which would have shown his remorse and desire for re-socialisation.

In the second legally concluded case against the defendant Dalibor Krstović (*Kalinovik* Case), the court sentenced the defendant to five years in prison. The court did not take into account as an aggravating circumstance the fact that the defendant took the victim to an empty classroom where he raped her, and then ordered her to remain undressed, only to let enter another soldier immediately after, who then raped the victim again. It is obvious that the defendant was aware that another soldier would also rape the victim, which was why he ordered her not to dress or leave, thus enabling another soldier to rape her. Nevertheless, the court did not consider this circumstance and this rape an aggravating circumstance.

131 *Indictment against Nikola Vida-Lujić* dated 12 September 2018, available at: http://www.hlc-rdc.org/wp-content/uploads/2019/01/Optuznica_12.09.2018.pdf.

132 Judgment of the Appellate Court in the *Brčko* Case of 31 January 2020, available at: http://www.hlc-rdc.org/wp-content/uploads/2020/06/Drugostepena_presuda_-_31.01.2020..pdf.

VIII. Attributing too much importance to mitigating circumstances

The court generally gives too much importance to the defendant's family circumstances. The family circumstances of the defendant deserve no more than minimal attention when assessing the circumstances for the purpose of war crimes sentencing. These crimes are so serious that the defendant's family circumstances cannot justify the imposition of a lighter sentence. The Chambers of International Courts reached the same conclusion.[133] According to the Trial Chamber of the ICTY in the verdict on Miroslav Bralo, although "the family circumstances of the defendant may, in some cases, be taken into account as mitigating circumstances, they have only a limited impact on the sentence to be imposed... when the defendant has been convicted of extremely serious crimes, committed in a particularly brutal manner".[134]

Thus, the family circumstances of perpetrators of crimes such as war crimes, which due to their severity and brutality never become obsolete, should have a very limited impact on sentencing. Family circumstances are valued as extenuating circumstances even to those convicted of rape of the minors. In the *Skočić* Case, the court found that there were mitigating circumstances on the side of the convicted Zoran Đurđević, Tomislav Gavrić and Zoran Alić. Gavrić and Đurđević are married and have children, while it was taken as a mitigating circumstance for Alić that he was a minor at the time of the crime in Skočić and that he lost his leg in the war. Not only did the court incorrectly give importance to such "mitigating circumstances", but the Court of Appeal reduced Đurđević's sentence to 8 years because the second instance court did not give "adequate importance to mitigating circumstances".[135]

The defendant's family circumstances are valued as a mitigating circumstance, although the court does not provide any details about the dynamics of his family. For example, the court does not provide information on whether the defendant is abusing his wife or is a father who is absent and neglects his children. Courts should not assess family circumstances without such information, i.e. without an individualised analysis of the reasons why the defendant's family circumstances may diminish his criminal responsibility.[136] In the *Bijeljina* Case (defendants Dragan Jović et al.), the fact that the defendant was young and "intoxicated" at the time of the commission of the act was taken into account. The court thus suggests that the commission of an offence if the defendant is drunk is a mitigating

133 See*: Prosecutor vs. Pauline Nyiramasuhukoe et al.,* .ICTR, Case ICTR-98-42-T, First Instance Judgment, (24 June 2011), para. 6221; *Prosecutor vs. Radoslav Brdjanin,* ICTY, Case IT-99-36-T, First Instance Judgment, (1 September 2004), para. 1130; Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY,* Oxford University Press, (2016), p. 289. *See also* OSCE*, Achieving Justice,* (June, 2017), p. 67. As stated in the OSCE report, taking into account family opportunities as mitigating circumstances has a discriminatory impact on those persons who cannot or do not decide to marry or have children, which further casts doubt on the valuation of family opportunities as mitigating circumstances.

134 *Prosecutor vs. Miroslav Brala,*ICTY, Case IT-95-17-S, First Instance Judgment, (7 December 2005), para. 48.

135 Judgment of the Court of Appeal in the *Skočić* Case of 13.2.2019 available at http://www.hlc-rdc.org/wp-content/uploads/2019/06/Trećstepena_presuda_13.02.2019..pdf, p. 17.

136 See: Olivera Simić and Mersudin Pružan, "Punishing War Sexual Violence", TRIAL International, 28 December 2023, p. 29.

circumstance, which sends a message that alcohol consumption is something that can reduce the liability for the offence.

Even when the defendant's family circumstances are considered mitigating circumstances after a thorough examination and balancing of the situation and the implications of the crime of sexual violence for the family, this circumstance should, according to international case law, be given little weight when measuring the sentence.[137]

IX. Insufficient application of aggravating circumstances

In addition to the problematic application of mitigating circumstances, the court constantly has difficulties in adequately explaining the obvious aggravating circumstances. The court points out a number of aggravating circumstances that include, among other things, the vulnerable status of the victim, the abuse of the perpetrator's powers, violence, humiliation and cruelty in connection with the criminal offence, enthusiastic participation in the criminal offence, discriminatory or vengeful motives for the offence, the impact of the offence on the victims and the conduct of the perpetrator after the commission of the offence. However, even when the court points out such circumstances, the gravity of the criminal offence is not visible in the explanation of the decision on the punishment, nor in the punishment itself.

In relation to the defendant Zoran Đurđević (*Skočić* Case), who was convicted of raping three Roma women, sexually abusing them, and inflicting bodily injuries on one of the protected witnesses, the court also took as an aggravating circumstance the fact that he had previously been convicted. This was correct, because he had been convicted of burglary and robbery, which indicated his propensity to commit crimes.

However, the court failed to appreciate as an aggravating circumstance the fact that Đurđević was previously convicted of a war crime against civilians, for an absolutely identical criminal offence committed in an identical manner – rape, which he committed about a month before the crime in Skočić. That happened in Bijeljina in mid-June 1992, when he raped and sexually humiliated two Bosniak women, for which he was sentenced to 13 years in prison.[138] The court did not mention or appreciate the previous conviction for this offence, although the verdict for crimes in Bijeljina would have been very relevant if the court had taken it into account, because it was the same criminal offence which Đurđević repeated and with the same method of execution – rape and sexual humiliation. The fact that the court did not consider the case with due diligence when deciding, and that it acted in an

137 *Ibid.*

138 Case *Bijeljina* https://www.hlc-rdc.org/Transkripti/bijeljina.html, judgment of the Higher Court in Belgrade K.Po2 no. 7/2011 of 4 June 2012, confirmed by the judgment of the Court of Appeal in Belgrade Kž1 Po2 6/12 of 25.02.2013.

unprincipled way in its work, is also evidenced by the fact that the same president of the panel acted in the *Skočić* Case as in the *Bijeljina* Case.[139]

Likewise, it remains unclear how only six years earlier Đurđević had been sentenced by the Court of Appeals to 13 years in prison for the rape and sexual humiliation of two Bosniak women in Bijeljina, and now to eight years in prison for several months of rape and sexual humiliation of three Roma women in Skočić.[140]

This court practice leads to an uneven penal policy. In the *Bijeljina* Case, the rape occurred on one day, while in Skočić it was a crime that was repeated several times, and the sexual humiliation occurred when he forced protected witnesses, the victims "Beta" and "Gamma", to walk on the tables naked. The victims at the time were minors – namely, "Gamma" was 15 years old, and "Beta" was only 13. If Đurđević had already been sentenced to 13 years in prison, then he had to be sentenced to a more severe sentence for a repeated similar crime, with the same execution actions, especially if one of the victims was raped several times and both of them were minors at the time of the crime.[141] When all this is taken into account, it seems that the 10-year sentence is unjustifiably mild and should have been significantly more severe.[142]

X. Protection of victims of sexual violence

The serious nature of the crime, the vulnerability of victims of sexual violence, and the lasting character of the impact left by the crime on the lives of the victims require special measures of protection during criminal proceedings. It is common knowledge that victims of sexual violence face a multitude of prejudices, which reinforces the stigma. It is also recognised that this crime affects not only the victim directly, but the consequences affect the victim's family, as well as the entire community.[143] This is a crime that leaves a deep physical and psychological trauma on the victims, which is why special standards and obligations for the institutions dealing with victims of sexual violence during court proceedings have been built into international and national frameworks. Among these measures are the exclusion of the public during testimony, testimony through one-way internal television, special rules regarding the assessment of the testimony of victims (namely, it is not necessary to substantiate the testimony of victims of sexual violence with other evidence; consent by the victim is not a basis for

139 HLC, "Sentences for Rape of Roma Women from Skočić Too Mild" 11.3.2019, available at: http://www.hlc-rdc.org/?p=36418.

140 *Ibid.*

141 Report on war crimes trials in Serbia in 2019, HLC, available at: https://www.hlc-rdc.org/wp-content/uploads/2020/03/Izvestaj_o_sudjenjima_za_ratne_zlocine_u_2019._godini.pdf.

142 Peščanik, "Chetniks Pravda" 12/07/2018, available at: https://pescanik.net/cetnicka-pravda/.

143 See: Enis Omerović et al., "Sexual Violence in Armed Conflict: Between Folk and Bosnian-Herzegovinian Theory and Practice", available at: https://www.prf.unze.ba/wp-content/uploads/2024/04/Anali33god16_01.pdf.

exemption from responsibility if the victim was exposed to violence or intimidation, or if she feared for herself or a close person; the previous sexual behaviour of the victim is not acceptable evidence).[144]

Contrary to international standards, domestic positive law regulations do not provide for special protection measures for victims of sexual violence, but for all victims and witnesses. During a war crimes trial, victims are not provided with psychological support, because the Support and Assistance Service for Witnesses and Injured Parties at the War Crimes Department of the Higher Court has only one employed psychologist, while the employees who work with witnesses have not had special training to work with victims of sexual violence.[145] The Humanitarian Law Center has identified a number of shortcomings in the system of support for victims and witnesses in war crimes proceedings. Some of the shortcomings are: an inadequate normative framework governing the position of victims and witnesses, the insufficient capacities of the institutions in charge of assistance and support to victims and witnesses of war crimes during all stages of criminal proceedings, as well as the insufficient training and sensitivity of employees in institutions responsible for processing war crimes.[146]

Victims of sexual violence deserve special attention in terms of witness support and protection. According to the European Court of Human Rights, these victims have a greater interest in privacy due to the stigma that accompanies their violations.[147] Testifying can be extremely difficult for them, especially when, against their will, they have to face the defendant, thus risking retraumatisation in many cases.[148] The importance of adequate protection and support mechanisms for victims of sexual violence is also confirmed by the fact that more than 50% of all war crimes convictions are revoked owing to the absence of the victims in court. Namely, because of the requirement for victims of sexual violence to testify repeatedly and thus expose themselves to unnecessary retraumatisation, victims often refuse to testify (e.g. in the *Skočić* and *Bijeljina II* Cases).[149]

However, some progress is being made, because at the very beginning of the work of the court and the war crimes trials, only the measure for the exclusion of the public existed in the protection of victims of sexual abuse, and even this measure was not always applied. Namely, in the *Đakovica* Case,

144 See for example Article 75 and Article 96 of the ICTY Rules of Procedure and Evidence, Article 24. of the UN Convention against Transnational Organized *Crime, Official Gazette of FRY* - International Treaties, no. 6/2001 and Council of Europe Resolution 1212 (2000) on rape in armed conflicts, para. 6.

145 On the support provided to victims and witnesses in the War Crimes Department of the Higher Court in Belgrade, see more in: HLC "Ten Years of War Crimes Prosecution in Serbia – Contours of Justice" (analysis of war crimes prosecution 2004–2013), 2014: 54-6 http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf.

146 "Policy Paper: Improving the Status and Rights of Victims and Witnesses in War Crimes Proceedings in Serbia" (HLC, 2019).

147 See *Bocos-Cuesta vs. Kingdom of the Netherlands*, ECtHR, 10 November 2005, para 69 *; Accardi and Others v. Italy,* ECtHR, 20 January 2005, para 1.

148 Several international bodies discuss their participation in criminal proceedings. The relevant documents are, among others, the Resolution of the Parliamentary Assembly of the Council of Europe 1212 (2000) on rape in armed conflict; Council of Europe Recommendation 1325 (1997) on trafficking in women and forced prostitution; the General Assembly, Council of Europe Recommendation Rec. (2002) 5 on the protection of women from violence, and the Declaration of the United Nations General Assembly on the elimination of violence against women.

149 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017) 10.

during the testimony of S.T., who was raped as a 14-year-old girl, the public was not excluded.[150] The state in which she testified was also indicated by the fact that the court noted in the transcript that the witness was crying during her testimony.[151] Nevertheless, today the status of protected witnesses to victims of sexual violence is regularly granted in war crimes cases (see e.g. *Skočić*, *Gnjilane Group*, *Bratunac, Kalinovik* and *other cases*).[152] Thus, for example, in the *Skočić* Case, three victims received this status, testifying from a separate room, with the exclusion of the public.[153] The two defendants in the *Gnjilane Group* Case also testified under a pseudonym and with the exclusion of the public.[154] In the *Kalinovik* Case, against the defendant Dalibor Krstović, the court designated pseudonyms as a protection measure for six witnesses, as well as for the victim.

Measures related to the protection of particularly sensitive witnesses have been introduced into the CPC, which has been applied since January 2012.[155] The purpose of these measures is to prevent the revictimisation of victims witnesses.[156] According to the CPC, a particularly sensitive witness is a witness who is particularly sensitive with regard to age, life experience, gender, state of health, the nature, manner or consequences of the criminal offence committed, or other circumstances.[157] The measures applied in relation to this type of witness are questioning through a chamber, or by an individual judge or a prosecutor (depending on the stage of the procedure), questioning with the help of a social worker, psychologist or other professional, or questioning through technical means of image and sound transmission. A particularly sensitive witness cannot be confronted with the defendant, unless the defendant requests it and the authority of the proceedings allows it, taking into account the degree of sensitivity of the witness and the rights of the defence.[158]

At the very beginning of its work in 1994, the Hague Tribunal adopted special rules for cases involving allegations of sexual violence. Thus, for example, Rule 96 of the ICTY Rules of Procedure and Evidence stipulates that in cases of sexual violence, the victim's previous sexual conduct will not be accepted as evidence. The same rule also provides that the victim's consent cannot be used as a defence argument if the victim has been subjected to violence or intimidation, or if they feared for themselves or a close person. Therefore, this rule provides that it is not necessary to substantiate the victim's testimony with

150 *Ibid.*
151 Case *Lekaj*, District Court in Belgrade, case number K.V. no. 4/05; witness S.T. testified on 20 December 2005.
152 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017) 10.
153 *Skočić* Case, Higher Court in Belgrade, case number K-Po2 42/2010.
154 *Gnjilane Group* Case, Higher Court in Belgrade, case number K-Po2 33/2010.
155 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* nos. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Articles 103 and 104.
156 Goran P. Ilić et al., *Commentary on the Code of* Criminal Procedure (3rd amended edition, Belgrade, 2013), p. 310.
157 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* nos. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 103
158 *Ibid*, Art. 103-104.

other evidence if it is convincing.[159] Also, the principle of free judicial conviction allows the judge to base the decision on "only" one statement, which the courts do in cases of sexual violence.[160]

However, notwithstanding this revolutionary advance in international law, none of these rules has been incorporated into national law. The rule of not accepting the victim's earlier sex life as evidence of defence was not foreseen in Serbia until 2009.[161] The existence of such a rule is necessary, as evidenced by the course of the trial in the *Gnjilane Group* Case. Namely, during the interrogation, one of the defence attorneys insultingly alluded to the previous sex life of protected witnesses, which the president of the panel assessed as inadmissible interrogation, informally admonishing him. In the same case, the defence attorneys insulted the protected witness, telling her that she was a "prepared witness", that she was reading her statement and that someone was helping her, until, after several warnings, the president fined them to the amount of RSD 200,000 – though not for insulting the witness, but for violating the dignity of the court.[162] However, this was not a "violation of the dignity of the court" but a violation of the dignity of the witness. In this case, the court incorrectly applied the CPC, which provides for punishment for insulting witnesses and injured parties, as a special basis for Article 102[163].

The same omission of the court was repeated in the *Skočić* Case, where the examination of protected witnesses was also marked by the indecent behaviour of the defendants, who heckled them in a vulgar manner and asked questions, seeking to disparage and further traumatise them. In this case, too, despite the legal obligation to protect the integrity of witnesses, the president of the chamber did not impose formal sanctions on the defendant, but only informal warnings.[164] In addition to the admonition and fine, as measures imposed by the court after the attack on the integrity of the witness had already occurred, the court also had at its disposal two so-called preventive measures to protect the integrity of the witness – hearing without the presence of the public, and expulsion of the

159 Gender dimension of war crimes, p. 10; See Article 96 of the ICTY Rules of Procedure and Evidence. See also: OSCE. Combatting impunity for sexual violence in armed conflict in Bosnia and Herzegovina: progress made and challenges. Belgrade: 2015: 26-27 http://www.osce.org/bs/bih/117054?download=true. Although this is not regulated by law, the judge in BiH will still ask for more evidence in practice and it will be difficult for the case to pass only on the basis of a statement.

160 First instance judgment in the *Skočić* Case. See http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf.

161 It is forbidden to ask the victim or witness questions related to their sex life and sexual preferences, political and ideological orientation, racial, national and ethnic origin, moral criteria, other exclusively personal and family circumstances, except exceptionally, if the answers to such questions are directly and obviously related to the need to clarify the essential features of the criminal offence that is the subject of the proceedings." OSCE. "Criminal Procedure Code". Official Gazette of RS, 46/06, Article 107.

162 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017) 10 and 11; HLC, Report on War Crimes Trials in Serbia 2010, *Gjilane Group* Case, 2011: 29. http://www.hlc-rdc.org/wp-content/uploads/2014/04/Izvestaj_o-domacim-sudjenjima-za-r-zl_srpski.pdf 23 March 2017.

163 See: Article 102 of the CPC RS, "The procedural authority is obliged to protect the victim or witness from insult, threat and any other attack. A participant in the proceedings or another person who insults the victim or witness before the body of the proceedings, threatens him or threatens his safety, the public prosecutor or the court will warn him, and the court may fine him up to 150,000 dinars."

164 Milica Kostić, "Gender dimension of war crimes: sexual violence against women" (BCSP, 2017) 11; as a representative of the victims, the HLC had access to their testimonies, which are not publicly available.

defendant.[165] The measure of expulsion of the defendant was applied during the hearing of one witness – a victim of sexual violence in the *Bijeljina* Case.[166] In the same case, the court applied maximum protection measures by hearing one of the witnesses in her place of residence.[167] Another rape victim in the same case, H.A., did not want to meet with the defendant or be shown their photos on account of the trauma she experienced during the commission of the offence, so the president of the council interviewed her at the premises of the Embassy of the Republic of Serbia in Vienna, where the victim lives.[168]

Since 2017, the POWCP has also had an Information and Support Service for victims and witnesses. Since January 2021, the Prosecutor's Office has employed a psychologist who provides assistance to victims and witnesses; but it should be emphasised that in the previous period, whenever there was a need for this in specific war crimes cases, an expert was hired for the same purpose.

When it comes to the successor states of the former Yugoslavia, Croatia and BiH, in addition to the usual procedural protection measures, have adopted a rule on the non-acceptance of the victim's earlier sexual life as evidence for defence.[169] In Serbia, such a norm was envisaged by the CPC, which was in force from 2006 to 2009.[170] Unlike the procedural laws in BiH and Croatia, the CPC does not contain specific measures for the protection of victims of sexual violence, so the usual procedural measures of protection can only be applied in relation to them.[171]

From all of the above, it can be concluded that for the most part the practice of domestic courts is not in line with the practice established by the ICTY and other international courts, which prioritise the protection of victims and take into account the specifics of sexual violence. Namely, it is obvious from actual practice that the War Crimes Court in Serbia sometimes cites the practice of the Hague Tribunal when explaining why they have applied certain institutes from the Serbian criminal legislation in a

165 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* no. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 363, item 4 and Article 390, paragraph 5.

166 See the section Protection of Victims of Sexual Violence, p. 65.

167 Case *Bijeljina*, Higher Court in Belgrade, case number K.Po2 7/2011, transcript from the trial of 17 October 2011, p. 26, available at: http://www.hlc-rdc.org/wp-content/uploads/2011/10/04-Bijeljina-transkrpt-sudjenja-17.10.2011.pdf, accessed: 13 May 2014. Criminal Procedure Code, *Official Gazette of the Republic of Serbia* nos. 58/2004, 85/2004, 115/2005, 46/2006 and 79/2009, Article 324

168 HLC, "10 Years of War Crimes Prosecution in Serbia – Contours of Justice", p. 66, available at: http:// www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf. 5 December 2019.

169 See the Criminal Procedure Act of the Republic of Croatia (Editorial Review Text), *Official Gazette No.* 152/08, 76/09, 80/11, 91/12 - Decision and Decision of the Constitutional Court of the Republic of Croatia, 143/12, 56/13 and 145/13, Art. 422, para. 1, and the Law on Criminal Procedure of BiH , *Official Gazette of Bosnia and Herzegovina* 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, Article 264, para. 1.

170 "It is forbidden to ask a victim or witness questions related to their sexual life and sexual preferences, political and ideological orientation, racial, national and ethnic origin, moral criteria, other exclusively personal and family circumstances, except exceptionally, if the answers to such questions are directly and clearly related to the need to clarify the essential features of the criminal offence that is the subject of the proceedings." Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, No. 46/06, Article 107.

171 Procedural Protection section, p.62, see: https://www.hlc-rdc.org/wp-content/uploads/2019/12/Predlog_prakticne_politike_sr.pdf.

certain way.[172] The court is also obliged to align its practice with that of the Hague Tribunal when it comes to the protection of victims of sexual violence.

XI. Recommendations

In order to improve the prosecution and punishment of sexual violence in war, a number of measures need to be taken.

1. Prohibition of interrogations about previous sex life

In Serbia, there never has been, nor is there now, a provision similar to Article 96 of the ICTY Rulebook, that the victim's previous sexual behaviour not be accepted as evidence in the proceedings. Victims of sexual violence, regardless of when it occurred, should be allowed to enjoy the protection provided for by this and other provisions of Article 96 of the Rulebook, i.e. it is necessary to advocate for the introduction of such a provision into the CPC of the Republic of Serbia.

2. Submission of a property claim

The Criminal Procedure Code of Serbia provides for the right of the victim to declare a property claim (compensation for damage) at any time until the completion of criminal proceedings. So far, the courts in Serbia have never awarded a property claim to any war crime victim during criminal proceedings, with the explanation that this decision would significantly delay the criminal proceedings.[173] For example, in BiH, 11 such requests have been accepted, while in Serbia there have been none. It is necessary for judges to start following the Guidelines issued by the Supreme Court of Cassation, which offer concrete solutions, both to public prosecutors and judges, as to how they should act in order to decide on a property claim in the most economical and effective way.

3. Avoiding retraumatisation of victims

The task of the prosecutor is to provide during the investigation those data that help him to make the best decision on the penalty, i.e. its amount, by requesting an expert opinion on the reduction of general life activity, which should later be used to determine the amount of the legal claim submitted by the injured party or their attorney. In this way, the victims of these crimes would be entitled to compensation for damages during criminal proceedings. This would avoid the retraumatisation of victims that occurs when they are referred to the exercise of their right to compensation in civil proceedings.

172 Ex. Second instance in the *Skočić* Case - no. Kž1 Po2 5/15 of 28.03.2018 analyses the *Kunarac* Case, but also the *Furundžija* Case, as well as the *Kvočka* Case.

173 See Articles 252-260.

4. Relying only on the statement of one witness or injured party

In accordance with the practice of the ICTY and other international courts, in cases of sexual violence in war, it must be possible to base a conviction on the testimony of one witness only, or the injured party. In cases of sexual violence where there are usually no witnesses, trust should be placed in one witness only or the injured party.

5. Continuous monitoring of the development of case law

The development of case law brings with it reforms and reinterpretations of the criminal offence sexual violence in war in accordance with the evolution of law. Sexual torture can be a war crime, a crime against humanity, or even genocide. Legislation should cover the spectrum of sexual and other crimes related to torture. Explicit references to sexual forms of torture should be established.

6. Development of a specific strategy

The POWCP should develop **a specific strategy** for the prosecution of sexual violence. Developing special vigilance in this area demonstrates a commitment to bringing all those responsible for war crimes to justice, and to prioritising the prosecution of perpetrators of war crimes of sexual violence before judicial authorities.

7. Minimal attention to mitigating circumstances

The courts attach too much importance to the defendant's family circumstances. The family circumstances of the defendant deserve no more than minimal attention when assessing the circumstances for the purpose of sentencing for war crimes.

8. Sexual violence as a crime against humanity

The courts must try the war crime of rape as **a crime against humanity** and not just as a war crime. Serbia, as a successor country of the SFRY, has an obligation to prosecute any crime against humanity (which is a criminal offence provided for by international law) committed during the wars fought in the territory of the former Yugoslavia during the 1990s.

9. Reparations

Laws providing reparations and rehabilitation for all survivors of sexual violence in war and other similar violations of rights should be adopted.

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