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EXECUTIVE SUMMARY

Conflict-related sexual violence (CR-SV) victims face formidable challenges in accessing the justice system. Many individuals, for example, are afraid to come forward because of prevailing stigma; grapple with severe psychological issues due to untreated trauma: lack information about how to navigate the legal process; do not have the means to pay for legal assistance; still live in the same communities as their perpetrators; and face a backlog of cases and corresponding delays at prosecutors' offices. Unfortunately, even when victims' cases reach the courtroom, the resulting punishment is often disappointing, failing to reflect the depth of victims' suffering.

Sentencing for CRSV in Bosnia and Herzegovina (BiH) is low and inconsistent. As documented by institutions from the Committee against Torture to the Council of Europe to the Organization for Security and Co-operation in Europe (OSCE) to Amnesty International, the need for reform is urgent.^[11] At the entity level, the average punishment for CRSV as a standalone crime is only 4.77 years, *below* the statutory minimum of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC). In two recent cases, perpetrators who committed wartime sexual violence against minors received just one year of jail time; both men promptly converted their sentences to the payment of a fine, meaning that they will never see the inside of a prison.

Meanwhile, disparities between the approach of courts across BiH particularly between that of state and entity level panels—have created a sense of arbitrariness, undercutting public faith in the justice system.

¹ OSCE, Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016 (hereinafter Towards Justice), (June 2017), pgs. 88-89; Amnesty International, Last Chance for Justice for Bosnia's Wartime Rape Survivors, (September 2017), pgs. 11, 26; Council of Europe, Commissioner for Human Rights Report Following Visit to Bosnia and Herzegovina, (November 2017), pg. 6. Available at https://rm.coe.int/report-following-the-visit-to-bosnia-and-herzegovina-from-12-to-16-jun/16807642b1; Committee against Torture, Concluding Observations on the Sixth Periodic Report of Bosnia and Herzegovina, Doc. No. CAT/C/SR.1602, (December 2017), para. 16. Available at http:// tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BIH/CAT_C_BIH_CO_6_29665_E.pdf

Why Are Sentences Low and Inconsistent?

Some courts have been observed to:

 Eschew specific analysis of sexual violence crimes in verdicts involving multiple violations, meaning that judgments omit mention of aggravating factors particular to the sexual violence offence, including the harms suffered by victims.

- Overlook key aggravating circumstances.
- Identify questionable/seemingly irrelevant mitigating and aggravating circumstances.

 Afford substantial weight to—at most negligibly important mitigating circumstances.

- Label ordinary mitigating circumstances as "particularly mitigating", meaning that defendants can be sentenced below the relevant criminal code's statutory minimum.
- Fail to weigh aggravating and mitigating circumstances against each other, with the result that the quality of the analysis is undermined and the risk of arbitrariness heightened.

To remedy the above issues and improve the consistency and fairness of sentencing, ensuring that wartime sexual violence victims obtain the justice they deserve, the report concludes with sentencing guidelines and accompanying practice exercises, which were reviewed by a sitting member of the judiciary.

FOREWORDS

From the Domestic Perspective

Sanctions imposed by courts in Bosnia and Herzegovina on perpetrators of conflict-related sexual violence have been subject to public criticism for some time now. Courts are most often reproached for the fact that punishments are too lenient given the legal sentencing range and inconsistent in terms of the assessment of mitigating and aggravating factors.

Deciding on the appropriate sanction for perpetrators of these criminal offences requires the court to put forth special care and dedication so as to truly serve the purpose of punishment. Sentencing is not an easy task, particularly when we take into account that although punishment constitutes the means of accomplishing the function of criminal law and sentencing policy in every country, it seems that sometimes this part of judges' work does not receive as much attention as it should. Here one should especially keep in mind that the second instance courts have a very limited corrective role in sentencing policy because they are able to act only upon an appeal against a decision imposing punishment and only when such an appeal presents concrete arguments that indicate why the first instance decision was inappropriate. If the appeal fails to indicate specific omissions in the first instance judgment, the second instance court cannot "make up for" these omissions *ex officio*.

It is thus of high importance that the parties to the proceedings not only file an appeal if the judgment contains omissions in the decision imposing the sentence, but also present appellate claims that can truly serve as a basis for review of soundness of the contested judgment. This limited role of the second instance court in the development of the sanctioning policy is the very reason that the responsibility of the first instance courts is even greater in determining the sentences for these criminal offences and in presenting convincing, clear, and specific reasons for their decisions.

However, some criminal convictions of perpetrators of conflict-related sexual violence fail to present appropriate reasons for the imposed sanctions, including those factors (mitigating and aggravating) that the court took into account in deciding on the sentence. It is not unusual to find in such judgments generic formulations that make it impossible to discern why certain factors have been valued by the court as aggravating or mitigating.

Sometimes, in cases in which perpetrators have been found guilty of several offences that constitute war crimes, including conflict-related sexual violence, it is not clear at all what specific factors have been assessed in relation to the different offences.

Judgments imposing sentences below the statutory minimum against perpetrators of conflict-related sexual violence without providing an appropriate explanation are of particular concern. Similarly, there are judgments in which factors were assigned aggravating value although they could not have been attributed to the perpetrator but to the broader wartime context.

This publication provides a detailed analysis of judgements convicting and imposing sentences on perpetrators of conflict-related sexual violence, and highlights the most significant inconsistencies in sentencing. The mere indication of the most common omissions in sentencing perpetrators of these offences can serve as clear guidance to courts to approach this process in a more careful and responsible way.

Namely, although the criminal codes applied in Bosnia and Herzegovina stipulate general sentencing rules and factors which are of relevance for sanctioning (mitigating and aggravating), the courts sometimes just list them without providing any arguments as to how these factors manifest themselves in the individual case, or state some of the specific factors in the judgment without explaining their value – i.e. why did the court assess them as mitigating or aggravating and what weight did it assign to them? Due to such arbitrariness, some judgments completely neglect the circumstances that are specific to conflict-related sexual violence offences and are relevant for sentencing. This approach ultimately results in "incomplete" judgments from which neither the injured party nor the defendant can clearly understand why the given sentence has been pronounced.

Therefore, the analysis of specific judgments presented in this publication is of utmost importance, as are the supporting guidelines, which provide in a clear and specific manner criteria that can govern courts in Bosnia and Herzegovina in sentencing perpetrators of conflict-related sexual violence.

> Judge Božidarka Dodik FBiH Supreme Court

From the International Perspective

It has been 23 years since the brutality of the conflict in Bosnia and Herzegovina came to an end. Some victims have come forward courageously to participate in post-conflict justice processes, and I am pleased to say that in some cases, accountability mechanisms have been effective. I am honored to have been part of the accountability process myself, having carried out war crimes investigations in post-war Bosnia from 1996-1998 with Human Rights Watch, and having worked as a prosecutor at the ICTY from 2005 to 2014.

In its ideal, transitional justice is meant to function precisely the way that post-conflict justice was carried out in relation to the former Yugoslavia. That is, so long as it is not feasible to implement accountability processes within the affected community, the international mechanism fills that gap. Gradually, as national processes are strengthened post-conflict, the international mechanism's mandate recedes and international expertise provides support and skills transfer to national practitioners, until all justice for international crimes is handled by national authorities at home.

From a macro level perspective, this is precisely what has occurred in the transitional justice context in relation to the former Yugoslavia. It is my sincere hope that the positive impact of these processes has been felt far and wide in post-conflict Bosnia, and has contributed to transformative healing and a sense of true justice for survivors and the affected community.

We do know, however, that the process has been far from perfect. It took far too long for victims to feel a sense of ownership over their own justice process; far too long for high level perpetrators to face justice; and far too long for victims to be truly provided effective witness and victim protection and psychosocial support. Many lessons have been learned, sacrifices made, and errors corrected, that can form the basis for transitional justice mechanisms in other regions.

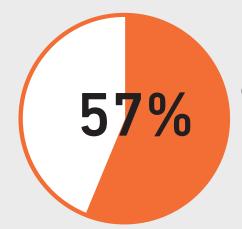
The remarkable work of TRIAL International in Bosnia has immeasurably strengthened the impact of post-conflict justice. One of the disappointments of the survivor community, in particular survivors of conflict related sexual violence, is the inconsistent and perceived inadequate sentences rendered for sexual violence crimes in BiH courts. This report is yet another example of the quality critical analysis carried out by TRIAL International, which elucidates the particular challenges related to sentencing.

Through analysis of jurisprudence and comparative careful evaluation, the report provides a clear and coherent overview of sentencing practices in BiH for conflict-related sexual violence crimes. More importantly, though, TRIAL International presents guidelines on sentencing that draw upon the analysis and respond to the viewpoints of survivors who have participated in the justice process only to be deeply disheartened by the lack of seriousness with which sexual violence crimes appear to be treated. Finally, ever practical and technical in its advocacy work, TRIAL International provides scenarios to be used for capacity building of justice practitioners, exercises that will facilitate thoughtful assessments of aggravating and mitigating factors based upon the misconceptions exposed in the report.

TRIAL International's assessment sheds light on the legal consequences of importing harmful discriminatory viewpoints into judicial reasoning. It is hoped that their recommendations will be treated with seriousness and that the guidelines will assist adjudicators in remedying the pattern of sentences that do not meet the statutory minimum for crimes of this gravity. I applaud TRIAL International for taking yet another step in the direction of ensuring effective and meaningful justice for conflict related sexual violence.

> Maxine Marcus Director, Transitional Justice Clinic

KEY STATISTICS



of entity level first instance verdicts in the

2012-2017

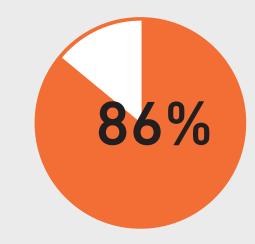
period resulted in sentences **less** than the statutory minimum.

4.77 YEARS

the average sentence for relevant entity level cases between

2012 and 2017,

below the minimum.



of first instance entity judgments involving multiple offences

DO NOT

mention sexual violence for the purposes of sentencing.

3.64 YEARS

the average sentence for entity level cases without judgments from the Sarajevo Cantonal Court.



of entity level trial judgments identify mitigating circumstances

BUT

no aggravating circumstances, overlooking the harms suffered by CRSV victims.

I. METHODOLOGY

This document was prepared utilising 92 state and entity level judgments in cases involving conflict-related sexual violence.

The judgments span the period 2012-2017. In certain cases, although trial judgments predated the period under consideration, appellate judgments were issued in or after 2012 and were therefore incorporated into the analysis. In other cases, relevant judgments have yet to be made available to the public and are not part of the analysis.^[2]

The document secondarily relies on sentencing practices applied at the international level, as derived from reports issued by international organizations such as the OSCE and judgments delivered at international tribunals.

2 The TRIAL International office in BiH sent requests to entity level courts for judgments and also contacted the Court of BiH regarding judgments that were not yet published online.

II. LEGAL BACKGROUND

A. Entity and State Level Sentencing Regimes

The Dayton Peace Accords divided the state of BiH into two entities: the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). Subsequent negotiations led to the establishment of Brcko District, a self-governing administrative unit.^[3] The processing of war crimes trials in BiH is split between the entity and state level judiciaries, which operate in parallel and are subject to different legislation, jurisprudence, and practices.

At the state level court, the Court of BiH, conflict-related sexual violence is prosecuted under two sentencing regimes. Per Article 172 of the BiH Criminal Code (BiH CC), CRSV—including rape or an equivalent sexual act, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity—is prescribed as a crime against humanity. The Court of BiH can sentence perpetrators of such offences to between 10 and 45 years in prison.

Since the European Court of Human Rights' 2013 decision in *Maktouf v. Bosnia* and *Herzegovina*,^[4] the Court of BiH has exclusively applied the SFRY CC to war crimes against civilians and war crimes against prisoners of war. Article 142 of the SFRY CC

³ For the purposes of this report, references to "the entities" include Brcko District.

⁴ For more on the impact of Maktouf v. Bosnia and Herzegovina, see OSCE, Combating Impunity for Conflict Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges (Entity Courts, 2004–2014), (June 2015), pgs. 17–18; Francesco de Sanctis, Reconciling Justice and Legality: a Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes, Journal of International Criminal Justice, (2014); James Sweeney, Non-retroactivity, candour and 'transitional relativism': A response to the ECHR judgment in Maktouf and Damjanovic v. Bosnia and Herzegovina, Diritti Umani e Diritto Internazionale, (2014). Available at http://eprints.lancs.ac.uk/72444/1/Sweeney_Non_retroactivity_candour_and_transitional_relativism_4.pdf; Maja Kapetanovic, The impact of the ECHR judgment in Maktouf and Damjanovic v. BOSNIA AND HERZEGOVINA (July 18, 2013) on the processes of transitional justice in Bosnia and Herzegovina, Regional School for Transitional Justice Journal, (March 2014).

criminalizes forcible prostitution and rape as war crimes against civilians, while Article 144 criminalizes inhuman treatment and serious injury to bodily integrity as war crimes against prisoners of war. These offences can be punished with sentences between 5 and 15/20 years.^[5]

Entity courts solely use the SFRY CC and are—at present—only processing war crimes against civilians and war crimes against prisoners of war, not crimes against humanity. Correspondingly, the punishment of CRSV at the entity level is currently restricted to the SFRY CC's 5 to 15/20 year sentencing range.

B. How Do Courts Decide on Sentences?

Various provisions within the BiH CC and SFRY CC regulate decision-making on sentencing. Article 39 of the BiH CC lays out the punishment objectives that should guide courts; condemning the criminal offence; deterring the perpetrator from committing additional crimes; deterring the general public from committing crimes; rehabilitating the perpetrator; and raising public awareness of the danger of criminal offences and the fairness of punishing perpetrators. Article 33 of the SFRY CC contains similar language.

Article 48 of the BiH CC identifies general categories of mitigating and aggravating circumstances that courts should take into consideration, such as "the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator." This list of mitigating and aggravating factors is not exhaustive and courts are permitted to pinpoint additional circumstances that align with the enumerated objectives of punishment. Again, Article 41 of the SFRY CC employs identical language to Article 48 of the BiH CC.

⁵ The SFRY CC, in force during the 1992-1995 conflict, permitted courts to levy a sentence of 5-15 years for war crimes or, in the most severe cases, the death penalty. As a substitution for death, the Yugoslav code authorized the imposition of a 20 year sentence. With capital punishment now formally abolished in BiH, courts in FBiH apply a 15 year maximum and courts in RS a 20 year maximum.

While the BiH CC fixes the lowest sentence for crimes against humanity at 10 years, and the SFRY CC for war crimes against civilians and prisoners of war at 5 years, both codes allow for the reduction of sentences below these statutory minimums. Article 49(b) of the BiH CC empowers courts to lower the penalty when there are *both* "particularly mitigating circumstances" and the lesser sentence could still fulfill the purpose of punishment. Article 42 of the SFRY CC authorizes a similar possibility.

C. Sparse Guidance: the Need for Sentencing Guidelines

The provisions in the SFRY CC and BiH CC offer little clarity as to the specific factors that qualify as mitigating or aggravating, the weight that different factors merit, and the factors that should constitute "particularly mitigating circumstances". To date, there are no sentencing guidelines in existence at either the state or entity level.

As will be detailed in this report, the unsound application of mitigating and aggravating factors has resulted in inconsistent sentencing, disproportionately low punishments, and, ultimately, diminished justice for victims.

The analysis set forth below is thus accompanied by sentencing guidelines that based on domestic judgments and international sentencing practices—aim to assist courts in determining appropriate punishments for conflict-related sexual violence. These guidelines fall in line with recommendations from the OSCE's most recent report on the prosecution of CRSV in BiH, which asks the justice sector to "consider developing practical guidelines on the appropriate use of [mitigating and aggravating] factors in sentencing."^[6]

III. MULTIPLE OFFENCE JUDGMENTS: BLURRY TERRITORY

The aforementioned confusion surrounding CRSV sentencing partially stems from how domestic courts approach multiple offence judgments.

In the majority of cases in which perpetrators have been convicted of multiple crimes, the presiding panel does not discuss the mitigating and aggravating factors applicable to the sexual violence offence.^[7] As detailed by actors who have confronted the same issue at international tribunals, this practice can obfuscate decision-making on appropriate punishments for CRSV ^[8] and also belies the principle that sentences should result from individualized analysis of the crimes and circumstances at hand.

Furthermore, given that mitigating factors—such as a defendant's personal situation, expression of remorse, and cooperation with the prosecution—often apply to all crimes, the lack of individualized assessment in multiple offence verdicts primarily detracts from the discernment of *aggravating* factors specific to the sexual violence crime. Absent a description of these circumstances, multiple offence judgments fail to reflect the gravity of sexual violence and the suffering of victims.

⁷ It is worth noting that this approach produces a lack of clarity in sentencing for other crimes as well.

⁸ See Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pgs. 262, 266, 268-269; Christine Bishai, *Superior Responsibility, Inferior Sentencing: Sentencing Practices at the International Criminal Tribunals*, Northwestern Journal of International Human Rights, Volume 11: Issue 3, (2013), pg. 107.

A. At the State Level: Overlooking Sexual Violence

At the state level, of the 13 first instance verdicts in which perpetrators were convicted of multiple offences during the period 2012-2017,^[9] only 5 expressly assess the aggravating and/or mitigating factors specific to the sexual violence offence for the purposes of punishment.^[10]

In *Dragan Sekaric*, for example, the Accused was convicted of persecution as a crime against humanity for committing rape and murder. The Court of BiH separated its assessment of the two offences with respect to sentencing, finding that the sexual violence crime encompassed aggravating factors such as the abuse of power and severe physical and psychological consequences for the victim.^[11]

However, the bulk of state level trial verdicts involving multiple offences—8 of the 13 verdicts under consideration—do not analyse the sexual violence crime at all in the sentencing section.^[12]

In *Vitomir Rackovic*, for example, the Court of BiH convicted the Accused of severe deprivation of liberty, other inhumane acts, and rape. In 1992, Rackovic, a member of the Bosnian Serb army, helped abduct a group of women from houses in which they

⁹ As discussed in the methodology section, the TRIAL International office in BiH was unable to access certain verdicts, which have not been included in the report.

¹⁰ These cases are *Mato Baotic*, Court of BiH, First Instance Verdict, 9 December 2016; *Zoran Dragicevic*, Court of BiH, First Instance Verdict, 22 November 2013; *Zaim Lalicic*, Court of BiH, First Instance Verdict, 25 May 2015; *Dragan Sekaric*, Court of BiH, First Instance Verdict, 13 February 2015; *Ivan Zelenika et al*, Court of BiH, First Instance Verdict, 14 April 2015.

¹¹ Dragan Sekaric, First Instance Verdict, 2015, paras. 568-560.

¹² Gligor Begovic, Court of BiH, First Instance Verdict, 11 December 2015; *Petar Kovacevic*, Court of BiH, First Instance Verdict, 2 November 2015; *Josip Tolic*, Court of BiH, First Instance Verdict, 20 March 2015; *Vitomir Rackovic*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Veselin Vlahovic Batko*, Court of BiH, First Instance Verdict, 17 April 2015; *Indira Kameric*, Court of BiH, First Instance Verdict, 17 April 2015; *Itis worth noting that in some verdicts*, the sections on sentencing do mention that the Accused was convicted of the crime of wartime sexual violence; however, references solely to the conviction without further discussion have not been counted as "analysis" of the sexual violence offence.

were taking shelter with their children.^[13] En route to a village near Visegrad, he ordered one of the women to climb into the front seat of the car and subsequently forced her into sexual intercourse, sneering that she would "bear a Serb child."^[14]

In issuing a punishment for Rackovic, the Court of BiH did not reference any particular features of the rape, instead more generally stating of all of the Accused's crimes: "(The Panel) had in mind the degree of guilt of the Accused, since the Chamber found that the Accused with direct intent, independently, or as a co-perpetrator committed the acts ... (and) the extent of the infringement of a protected good - that is, the freedom, dignity and psycho-physical integrity of the injured parties."^[15]

The categories of aggravating factors enumerated by the Court of BiH do not reflect the horrific conditions in which the sexual violence act was perpetrated, such as the fact that Rackovic tore the victim away from her children and raped her publicly. It is thereby unclear whether the Court of BiH accounted for either these circumstances or the specific consequences for the victim when deciding on sentencing.^[16]

The remaining 7 multiple offence verdicts issued during 2012-2017 employ the same type of all-purpose language,^[17] eschewing individualized analysis and providing little guidance to future courts about how to reach sentencing decisions on conflict-related sexual violence.

¹³ Vitomir Rackovic, First Instance Verdict, 2015, para. 211.

¹⁴ Vitomir Rackovic, First Instance Verdict, 2015, para. 202.

¹⁵ Vitomir Rackovic, First Instance Verdict, 2015, para. 290. Again, as mentioned above, the lack of specificity in the sentencing analysis makes it difficult to ascertain the court's decision-making not only with respect to the sexual violence offence, but also with respect to the other crimes of which Rackovic was convicted.

¹⁶ See also Josip Tolic, First Instance Verdict, 2015, para. 356. Tolic was found guilty of committing murder and rape and inflicting severe mental and physical suffering during his stint as a camp guard in Odzak/Bosanski Brod. With respect to the sexual violence offence, Tolic repeatedly raped a female detainee, threatening that he would let ten guards rape her if she did not sleep with him. Levying a 10 year sentence for Tolic's crimes, the Court of BiH simply repeats the general language used in Article 48 of the BiH CC, noting: "the Chamber considered the degree of criminal responsibility of the Accused, the motive for the perpetration of the criminal offense, the degree of violation of the protected property, the circumstances under which the offense was committed ..."

¹⁷ In certain cases, the panel uses words such as "cruel" and "humiliating", seeming to implicitly refer to the sexual violence crime, but never clarifies as much. *See Ibro Macic*, First Instance Verdict, 2015, para. 337.

B. At the Entity Level: the Rarely Referenced Offence

In the realm of entity level sentencing, the absence of specific sexual violence references is even starker. Between 2012 and 2017, of 15 first instance judgments involving multiple offences, only two verdicts, *Predrag Bajic et al* and *Ramo Zilic*,^[18] discuss the sexual violence crime for the purposes of sentencing. The other 13 cases contain no mention of the rape in question.^[19]

In *Ranko Stevanovic*, for example, the Accused was convicted of sexual violence that entailed unique aggravating factors, such as perpetrating the crime in front of the victim's in-laws and subsequently urinating on her. In determining the appropriate punishment, however, the Trebinje District Court did not assess these circumstances or their particular impact on the victim.

In the court's words, Stevanovic's sentence of 14 years was based on "the fact that the accused perpetrated the war crime through two separate criminal actions with grave consequences: the killing of three civilians and the rape of two civilians. Under this circumstance, the court valued the degree of endangerment and violation of protected good."^[20] While the Trebinje panel does cite the fact of the rapes, there is no individualized reasoning as to particular aggravating factors.

20 Ranko Stevanovic, First Instance Verdict, 2012, pg. 2.

¹⁸ Predrag Bajic and Sinisa Babic, Bihac Cantonal Court, First Instance Verdict, 22 May 2014, pg. 10; Ramo Zilic and Esad Gakic, Mostar Cantonal Court, First Instance Verdict, 4 November 2015, pgs. 65- 66. Even in Bajic and Zilic, the discussion of sexual violence is limited, with the Bajic panel mentioning the age of the rape victim and the Zilic panel identifying the brutality of the sexual violence crime as an aggravating factor.

¹⁹ For the purposes of this section, plea agreements have been included when they undertake discussion of specific mitigating and/or aggravating factors. *Nenad Bajic*, Bihac Cantonal Court, First Instance Verdict, 3 June 2014; *Slobodan Dragic*, Bihac Cantonal Court, First Instance Verdict, 26 February 2015; *Asmir Tatarevic and Armin Omazic*, Brcko Basic Court, First Instance Verdict, 3 February 2015; *Galib Hadzic and Nijaz Hodzic*, Brcko Basic Court, First Instance Verdict, 3 February 2015; *Galib Hadzic and Nijaz Hodzic*, Brcko Basic Court, First Instance Verdict, 17 May 2013; *Danilo Spasojevic*, Bijeljina District Court, First Instance Verdict, 28 January 2012; *Ostoja Minic et al.*, Bijeljina District Court, First Instance Verdict, 11 April 2014; *Zeljko Jovic*, Banja Luka District Court, First Instance Verdict, 28 September 2015; *Nan Koler*, Supreme Court of FBiH, Second Instance Verdict, 11 March 2013; *Mladen Milanovic*, Supreme Court of FBiH, Second Instance Verdict, 26 February 2015; *Ranko Stevanovic*, Trebinje District Court, First Instance Verdict, 17 May 2012.

In some cases, courts simply regurgitate the general factors enumerated in Article 41 of the SFRY CC.

In *Ostoja Minic et al*, a case before the Bijeljina District Court, Velimir Popovic was convicted of, *inter alia*, forcing detainees to perform fellatio on each other. With regard to Minic's five year sentence, the court bypassed individualized analysis of the sexual violence crime, stating—per Article 41—that it had "valued all the circumstances of the event and the circumstances on the part of the accused; particularly, the degree of criminal liability (with direct intent), the type, nature and motive of the perpetrated offence, the gravity of its consequences (the number of individual actions and unavoidable continuous consequences of psychological nature for a great number of injured parties)".^[21]

In *Danilo Spasojevic*, a case involving significantly different circumstances—the gang rape of two women—the Bijeljina District Court lists the same Article 41 factors; "the degree of criminal liability of the accused; as well as the manner in which the offence was perpetrated and the motive for its perpetration; the consequences ... the gravity of the perpetrated criminal offence".^[22]

C. Unclear Decision Making and Disregard for Victims

The multiple offence state and entity level judgments discussed above shed little light on how to punish conflict-related sexual violence. The lack of specific reference to sexual violence crimes and, in certain instances, the peremptory recitation of Article 41 factors creates confusion about appropriate mitigating and aggravating circumstances, and, ultimately, about appropriate sentences for CRSV.

²¹ Ostoja Minic et al., First Instance Verdict, 2014, pg. 2.

²² Danilo Spasojevic, First Instance Verdict, 2012, pgs. 18-19.

Additionally, in omitting the aggravating factors specific to the sexual violence offence, verdicts do not evince the severity of the crime. In particular, state and entity multiple offence verdicts should—where possible—identify the unique harms suffered by sexual violence victim/s as an aggravating circumstance for the purposes of sentencing.

D. Examples from the Courtroom: Illuminating the Punishment of Sexual Violence at the ICC

The recent *Jean Pierre Bemba-Gogo* case at the International Criminal Court (ICC) provides a model of how to effectively explain the rationale behind sentencing for conflict-related sexual violence. Bemba was convicted of murder, rape, and pillaging for his role as a military commander during the civil war in the Central African Republic. For the purposes of sentencing, ICC Trial Chamber III divided its discussion of the crimes into discrete sections. In relation to the sexual violence offence, the court conducted an extensive examination of the harms suffered by victims and identified the fact that vic-tims were particularly defenceless and that the rapes were perpetrated with "particular cruelty" as aggravating factors.^[23]

In *Bemba*, it is clear how the Chamber decided on the Accused's punishment and, correspondingly, that the Chamber recognized the gravity of crimes of sexual violence.

²³ Situation in the Central African Republic in the Case of the Prosecutor v. Jean Pierre Bemba-Gombo, International Criminal Court, Case No. ICC-01/05-01/08, Sentencing Judgment, (21 June 2016), paras. 36-47.

IV. CONVICTIONS SOLELY FOR SEXUAL VIOLENCE: SPECIFICITY IN ACTION

In cases in which perpetrators have been convicted solely of sexual violence, courts *do* tend to identify specific aggravating and mitigating factors, eschewing the pro forma language cited in the previous section.

A. Individualized Analysis of Sexual Violence Crimes

In *Markovic and Markovic*, for example, the Court of BiH's sentencing analysis references particular features of the rape, such as the fact that the victim was underage; that she experienced lifelong psychological trauma; that the Accused dragged the victim away in front of her parents; and that the Accused tried to conceal evidence and exert influence on witnesses after the rape.^[24]

Entity level convictions for sexual violence alone are often similarly precise with respect to sentencing. In *Asim Kadic*, the Zenica Cantonal Court identified the rape's impact on the victim as an aggravating circumstance, stating that she not only suffered from posttraumatic stress disorder but also was abandoned by her husband after he found out about the crime.^[25]

In *Dragoljub Kojic*, the Doboj District Court correspondingly took note of the "continuous consequences for the psychological health of the injured party" and pinpointed the number of times that the Accused raped the victim as an additional aggravating factor.^[26]

²⁴ Bosiljko Markovic and Ostoja Markovic, Court of BiH, First Instance Verdict, 24 June 2015, paras. 225-228.

²⁵ Asim Kadic, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, pg. 8.

²⁶ Dragoljub Kojic, Doboj District Court, First Instance Verdict, 30 April 2013, pg. 11.

B. Dependence on the Article 41 List

In certain cases at the entity level, however, courts still utilise non-specific factors, paralleling the problematic multiple offence verdicts assessed in the previous section.

In *Jozic and Mahalbasic*, a recent case before the Novi Travnik Cantonal Court, the verdict reprised the aforementioned Article 41 list, stating that the prescribed punishment was based on the "degree of criminal liability of the defendant, the motives behind the commission of the criminal offence, the violation of the protected value, and the circumstances under which the offence was committed."^[27]

This general language belies the particular aggravating factors evident in the actions of both Accused, with Jozic laughing alongside guards after perpetration of the rape, and Mahalbasic raping the victim multiple times over the course of several days. There is no indication that the court evaluated these circumstances when determining the sentence. Additionally, the Novi Travnik panel neglected discussion of the harms suffered by the sexual violence victim.

In line with the multiple offence judgments detailed above, the lack of individualized analysis masks the severity of sexual violence and creates confusion over appropriate punishments. In particular, as examined in the following sections and as documented by organizations from the OSCE to Amnesty International,^[28] the application of mitigating and aggravating factors is inconsistent throughout BiH and, in some cases, unsound.

²⁷ Anto Jozic and Demahudin Mahalbasic, Novi Travnik Cantonal Court, First Instance Verdict, 22 May 2017, pg. 31.

²⁸ See OSCE, Towards Justice, (June 2017), pgs. 63-64; Amnesty International, Last Chance for Justice for Bosnia's Wartime Rape Survivors, (September 2017), pgs. 11, 26.

V. AFFORDING EXCESSIVE WEIGHT TO NEGLIGIBLE MITIGATING FACTORS

Courts across BiH have generally afforded a defendant's family situation, conduct in court, and assistance to victims too much weight as mitigating factors.

A. Should Defendants Who Are Married/Have Children Receive Lower Sentences?

For a range of reasons, a defendant's family situation should merit—at most—minimal worth in the sentencing determination for wartime offences.

In *Dragan Sekaric*, for example, the Court of BiH Appellate Panel ruled that the crimes under consideration—murder and rape—were so grave that the Accused's family status could not justify the imposition of a more lenient sentence.^[29] Panels at international tribunals have reached the same conclusion.^[30] In the words of an ICTY Trial Chamber, while "the family circumstances of an accused may, in some cases, be taken into account as mitigating factors ... they have only limited bearing on the sentence to be

²⁹ Dragan Sekaric, Court of BiH, Second Instance Verdict, 30 September 2015, para. 175. See also Adil Vojic and Bekir Mesic, Court of BiH, Second Instance Verdict, 1 December 2016, paras. 121-122, 124-125, 127.

³⁰ See Prosecutor v. Pauline Nyiramasuhuko et al, ICTR, Case No. ICTR-98-42-T, Trial Judgment, (24 June 2011), para. 6221; Prosecutor v. Radoslav Brdanin, ICTY, Case No. IT-99-36-T, Trial Judgment, (1 September 2004), para. 1130; Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY, Oxford University Press, (2016), pg. 289. See also OSCE, Towards Justice, (June 2017), pg. 67. As raised by the OSCE in this report, the use of family status as a mitigating factor has a discriminatory impact on those who are unable to or do not choose to wed or have children, raising further doubts about the value of family status as a mitigating factor.

imposed ... (w)here an accused has been convicted of extremely serious crimes, committed in a particularly brutal manner". $^{\rm [31]}$

Some BiH courts, however, appear to deem a defendant's family situation a substantial mitigating factor. In *Mirko Kovacevic*, for example, the Doboj District Court valued the fact that the Accused was a "family man" and father of two children.^[32] For abducting a woman from her family home and raping her twice, Kovacevic received just a three year sentence. Verdicts from Bihac to Brcko to Tuzla to Banja Luka have similarly assigned mitigating credit to defendants with spouses and/or children, without specifying that said family circumstances should merit little weight.^[33]

The ascription of value to a defendant's family status lends itself to contradiction. In *Dusko Solesa*, the Bihac Cantonal Court found the Accused's status as "family man" mitigating but simultaneously labeled it aggravating that Solesa had raped a minor "regardless of the fact that he had a daughter himself at the time."^[34] As documented by the OSCE in a recent report,^[35] the court never disclosed how it reconciled these seemingly conflicting assessments of the Accused's character, simply noting that both were taken into account for the purposes of sentencing.

³¹ Prosecutor v. Miroslav Bralo, ICTY, Case No. IT-95-17-S, Trial Judgment, (7 December 2005), para. 48.

³² Mirko Kovacevic, Doboj District Court, First Instance Verdict, 2 December 2013, pg. 12.

³³ Nenad Bajic, First Instance Verdict, 2014, pg. 6; Predrag Bajic and Sinisa Babic, First Instance Verdict, 2014, pg. 9; Galib Hadzic and Nijaz Hodzic, First Instance Verdict, 2014, pg. 80; Zeljko Jovic, First Instance Verdict, 2015, pg. 26; Radomir Skiljevic, First Instance Verdict, 2015, pg. 6; Danilo Spasojevic, First Instance Verdict, 2012, pg. 2; Ramo Zilic and Esad Gakic, First Instance Verdict, 2015, pgs. 65–66; Mladen Milanovic, Second Instance Verdict, 2013, pg. 19.

³⁴ Dusko Solesa, Bihac Cantonal Court, First Instance Verdict, 19 September 2014, pg. 15.

³⁵ OSCE, Towards Justice, (June 2017), pg. 66.

In Dusko Solesa, the Bihac Cantonal Court found the Accused's status as a "family man" mitigating but simultaneously labeled it aggravating that Solesa had raped a minor "regardless of the fact that he had a daughter himself at the time." Given that both things cannot be true, the judgment creates a sense of arbitrariness. Other cases, albeit less explicitly paradoxical, raise analogous issues. In *Mirko Lukic*, for example, the Bijeljina District Court gave the Accused mitigating credit for being a "family man", even though he was convicted of raping an underage female.^[36] Lukic ultimately received a three year sentence.

In *Danilo Spasojevic*, the Bijeljina panel likewise described the Accused as a "family man"—a mitigating factor in the sentencing calculation—despite the fact that Spasojevic's offences entailed the targeting of a family;^[37] as part of a group of Serb militiamen, Spasojevic abducted a daughter and daughter in-law from their shared family home and perpetrated a gang rape. The reasoning in *Spasojevic* seems counterintuitive, with the court rewarding an individual who caused a family's physical and psychological devastation for having a family himself.^[38]

Meanwhile, most verdicts that characterise an Accused's family situation as mitigating do so superficially, omitting details about the family dynamic. What if the defendant is an abusive spouse, or an absent father? Courts should not make a determination without this type of specific information or—most importantly—without individualized analysis as to how family status mitigates the defendant's criminal responsibility, particularly in the event of contradictory circumstances such as those in *Solesa*, *Spasojevic*, and *Lukic*.

Even if an Accused's family situation is deemed mitigating after thorough interrogation and the balancing of said situation against the family implications of the sexual violence crime, this factor should—as detailed in domestic and international jurisprudence—be afforded little weight in the sentencing calculation.

³⁶ Mirko Lukic, Bijeljina District Court, First Instance Verdict, 4 March 2014, pg. 2. See also Slavko Savic, Court of BiH, First Instance Verdict, 29 June 2015, para. 379.

³⁷ Danilo Spasojevic, First Instance Verdict, 2012, pg. 2.

³⁸ But see Sasa Baricanin, Court of BiH, First Instance Verdict, 9 November 2011, para. 252. "The Panel was also mindful of the facts that the Accused is a father of 3 underage children, and that he had no prior convictions. The Panel has held, however, that in terms of their quality and quantity, the referenced circumstances were not sufficient so as to result in rendering a more lenient sentence than that imposed by the Panel, given the specific circumstances of the crime the subject of which was a whole family."

B. Good Behaviour in Court: Par for the Course or Deserving of Credit?

Certain state level panels have rejected the use of proper conduct in court as a mitigating factor, reasoning that such behaviour is expected of defendants and thereby should not be used to lower sentences sans extraordinary civility.^[39] International tribunals have correspondingly assigned mitigating weight only when the defendant has exhibited particularly respectful behaviour in court, such as foregoing the cross-examination of victims.^[40]

Some state and entity level panels, however, have credited displays of *ordinary* conduct—with no mention of any noteworthy action.^[41] In *Dusko Dabetic*, for example, the Sarajevo Cantonal Court identified the Accused's appropriate "conduct at trial" as a mitigating factor.^[42] This type of precedent is problematic given that defendants are legally obligated to follow the rules of the courtroom and behave with decorum.^[43]

As evidenced by the above jurisprudence, BiH panels have adopted conflicting approaches to the question of whether good conduct in court constitutes a mitigating factor. In a number of cases, panels have bestowed excessive weight on compulsory behaviour.

C. Acts of Assistance: The Necessity of Thorough Interrogation

The use of acts of assistance as a mitigating factor is controversial. International courts, as supported by a handful of domestic panels, have emphasised the importance of *closely*

³⁹ See Slavko Savic, First Instance Verdict, 2015, para. 379; Zaim Lalicic, First Instance Verdict, 2015, para. 209. See also Branko Vlaco, First Instance Verdict, 2014, para. 481, in which the court stated that it considered only "exceptional" conduct during proceedings to be a mitigator. The court provided no further explanation, however, as to the meaning of "exceptional conduct".

⁴⁰ See Prosecutor v. Radoslav Brdanin, ICTY, Case No. IT-99-36-T, Trial Judgment, (1 September 2004), paras. 1136-1137; Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pgs. 288-289.

⁴¹ See Ibro Macic, First Instance Verdict, 2015, para. 355; Zoran Dragicevic, First Instance Verdict, 2013, para. 196; Petar Kovacevic, First Instance Verdict, 2015, para. 267; Indira Kameric, First Instance Verdict, 2015, para. 237; Danilo Spasojevic, First Instance Verdict, 2012, pg. 18; Asim Kadic, First Instance Verdict, 2014, pg. 13; Ranko Stevanovic, First Instance Verdict, 2012, pg. 15; Milkan Gojkovic, Sarajevo Cantonal Court, First Instance Verdict, 25 February 2016, pg. 31; Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

⁴² Dusko Dabetic, Sarajevo Cantonal Court, First Instance Verdict, 17 June 2016, pg. 13.

⁴³ See Articles 141, 242(2)(3) of the BiH CC.

interrogating the motives behind and circumstances surrounding such acts before deeming them mitigating.^[44] In *Branko Vlaco*, for example, the Court of BiH rejected as a mitigating factor the fact that the Accused helped certain individuals, concluding that Vlaco clearly had the power to save other victims and chose not to.^[45] Correspondingly, in *Kvocka et al*, an ICTY Trial Chamber awarded negligible mitigating weight to the Accused for assistance rendered to detainees, reasoning that the victims he aided "were known to (him) or they share(d) similar characteristics with the accused."^[46]

In BiH, however, verdicts such as *Kvocka* and *Vlaco* are the anomaly. In most cases, panels at the state and entity level *automatically* identify acts of assistance as mitigating. In *Danilo Spasojevic*, for example, the Bijeljina District Court assigned mitigating credit to the Accused, who was convicted of murdering and raping several members of a family, for helping one son escape.^[47] The panel failed to examine the reasons behind Spasojevic's selective assistance.

Similarly, in **Zelenika et al**, the Court of BiH deemed it mitigating that Ivan Medic offered his victim shelter and helped her obtain medicine after raping her. While this behaviour could have stemmed from the defendant's benevolence or sense of remorse, it could just as likely have reflected his desire to ingratiate himself with the victim for the purposes of facilitating future acts of sexual violence. It is also questionable whether the panel should have benefited Medic given that his small acts of kindness towards the victim did not affect his decision to rape her.^[AB]

Building on the positive practices displayed in *Kvocka* and *Vlaco*, courts must evaluate the specifics of the situation instead of making generalised conclusions about acts of assistance.

⁴⁴ See Barbara Hola, Sentencing of International Crimes at the ICTY and ICTR, Amsterdam Law Forum, (2012), pgs. 17-18; Prosecutor v. Momcilo Krajisnik, ICTY, Case No. IT-00-39-T, Trial Judgment, (27 September 2006), paras. 1162-1163.

⁴⁵ See Branko Vlaco, Court of BiH, Second Instance Verdict, 27 April 2015, para. 234.

⁴⁶ Prosecutor v. Kvocka et al, ICTY, Case No. IT-98-30/1-A, Appeals Judgment, (28 February 2005), para. 693. See also Prosecutor v. Tharcisse Muvunyi, ICTR, Case No. ICTR-2000-55A-T, Trial Judgment, (12 September 2006), para. 540.

⁴⁷ Danilo Spasojevic, First Instance Verdict, 2012, pg. 19. See also Sasa Baricanin, Court of BiH, Second Instance Verdict, 28 March 2012, para. 56; Ramo Zilic and Esad Gakic, First Instance Verdict, 2015, pg. 65; Zoran Dragicevic, First Instance Verdict, 2013, para. 196; Zaim Lalicic, First Instance Verdict, 2015, para. 208.

⁴⁸ Ivan Zelenika et al, First Instance Verdict, 2015, para. 937.

VI. APPLICATION OF QUESTIONABLE MITIGATING AND AGGRAVATING FACTORS

In certain wartime sexual violence cases, particularly at the entity level, courts have employed questionable mitigating factors and—less commonly— questionable aggravating factors.

A. 20 Years Onward: Assigning Credit for the Passage of Time

Entity level verdicts periodically cite the passage of time since the sexual violence offence as a mitigating factor.^[49]

In *Dragoljub Kojic*, for example, a case in which the Accused raped the injured party multiple times, the Doboj District Court found it mitigating that more than two decades had elapsed following the crime.^[50] Kojic received a three year sentence.

As noted by the Zenica Cantonal Court in *Asim Kadic*^[51] however, the timeframe of the crime is a matter reserved for legislation on statutes of limitations, not sentencing.^[52] The passage of time holds no bearing on the appropriateness of mitigation; it is not probative for example, of the degree of the defendant's responsibility, the circumstances surrounding the crime, or the defendant's potential for rehabilitation.

⁴⁹ See Predrag Bajic and Sinisa Babic, First Instance Verdict, 2014, pg. 9; *Mirko Lukic*, First Instance Verdict, 2014, pg. 7; *Mirko Kovacevic*, First Instance Verdict, 2013, pg. 12; *Ostoja Minic et al.*, First Instance Verdict, 2014, pg. 6; *Ranko Stevanovic*, First Instance Verdict, 2012, pg. 15; *Dusko Solesa*, First Instance Verdict, 2014, pg. 17.

⁵⁰ Dragoljub Kojic, First Instance Verdict, pg. 8.

⁵¹ Asim Kadic, First Instance Verdict, 2014, pg. 13. See also Articles 14-19 of the BiH CC; Articles 95-100 of the SFRY CC.

⁵² In any event, because of the gravity of war crimes, such offences are not subject to statutes of limitation.

In Dragoljub Kojic, a case in which the Accused raped the victim multiple times in her own home, the Doboj District Court found it mitigating that more than two decades had elapsed following the crime. How can the mere passage of time reduce the defendant's responsibility? Kojic received a three year sentence.

B. The Injured Party's Expressed Preferences With Respect to Punishment

In other cases at the entity level, courts have labeled the fact of whether the injured party has requested punishment as an aggravating or mitigating factor.^[53]

In *Mirko Lukic*, for example, the Bijeljina District Court counted the victim's desire for prosecution against the Accused in aggravation.^[54] Conversely, in *Mirko Kovacevic*, the Doboj District Court identified the injured party's disinterest in prosecution or compensation as a mitigating factor.^[55]

It is impermissible to use an injured party's attitude towards the trial in this manner. Such a personal choice could be based on issues unrelated to the defendant; whether or not the injured party has told anyone about the event; whether or not the injured party has the support of loved ones; the extent to which the injured party trusts the justice system; the psychological challenges the injured party is facing; and so on. These matters bear little relation to the question of whether the defendant is worthy of leniency. Correspondingly, the victim's expressed preferences may not reflect her innermost feelings on the issue of punishment, rendering any "request for" or "disinterest in" prosecution all the more irrelevant.

Lastly, in BiH, the responsibility to conduct criminal prosecutions lies with the authorities alone. Defendants cannot be credited for victims' reliance on the police and prosecutors' offices to fulfill their legal obligations.

⁵³ See Danilo Spasojevic, First Instance Verdict, 2012, pg. 2.

⁵⁴ Mirko Lukic, First Instance Verdict, 2014, pg. 7.

⁵⁵ Mirko Kovacevic, First Instance Verdict, 2013, pg. 12

C. Wartime Circumstances as Aggravators and Mitigators

International tribunals have established that wartime circumstances only tenuously connected to the crime itself should not be attributed to the defendant for the purposes of sentencing.^[56] In the words of the ICTY Appeals Chamber in *Miroslav Bralo*, "a finding that a 'chaotic' context might be considered as a mitigating factor in circumstances of combat operations risks mitigating the criminal conduct of all personnel in a war zone."^[57] Meanwhile, as detailed by the ICTY Trial Chamber in *Mucic et al*, "it would be too remote to ascribe every woe of the surrounding neighbourhood to the guilty accused."^[58]

BiH courts, however, periodically assign mitigating or aggravating value based on the broader wartime context.

In *Safet Delic*, for example, the Bihac Cantonal Court identified the mitigating factor that "tensions [were] raised in the territory where the criminal offence was committed."^[59] Given that "tensions" affected everyone living in BiH during the conflict, whether perpetrator or victim, said stressors are not sufficiently connected to the defendant for the purposes of mitigation.

Correspondingly, panels occasionally "ascribe every woe of the surrounding neighborhood" to the defendant.^[60] In *Ramo Zilic*, the Accused was convicted of forcing detainees to have oral and anal sex and burning their genitals when they could not perform.

⁵⁶ See Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY, Oxford University Press, (2016), pg. 278; Barbara Hola, Sentencing of International Crimes at the ICTY and ICTR, Amsterdam Law Forum, (2012), pg. 19; Prosecutor v. Ranko Cesic, ICTY, Case No. IT-95-10/1-S, Sentencing Judgment, (11 March 2004), para. 93.

⁵⁷ Prosecutor v. Miroslav Bralo, ICTY, Case No. IT-95-17-A, Appeals Judgment, (2 April 2007), para. 13.

⁵⁸ Prosecutor v. Mucic et al, ICTY, Case No. IT-96-21-T, Trial Judgment, (16 November 1998), para. 1226.

⁵⁹ Safet Delic, Bihac Cantonal Court, First Instance Verdict, 7 December 2012, pg. 4. See also Galib Hadzic and Nijaz Hodzic, First Instance Verdict, 2014, pg. 77, stating that "during the time of their (the crimes) commission [the Accused] had been under permanent stress due to the nature of his regular duties"; *Ivan Zelenika et al*, First Instance Verdict, 2015, para. 939, stating that Marina Grubisic-Fejzic, one of the Accused, was "the victim of a whirlwind of war and of its own acts"; *Slavko Lalovic*, Court of BiH, Second Instance Judgment, 6 April 2012, para. 85, identifying as a mitigating circumstance that "the Accused found himself in a very stressful situation due to a capture of a close family member."

⁶⁰ Prosecutor v. Mucic et al, ICTY, Case No. IT-96-21-T, Trial Judgment, (16 November 1998), para. 1226.

In imposing a punishment on Zilic, the Mostar Cantonal Court noted that the screams of victims "could have been heard in the entire Musala area", seemingly faulting the Accused for the ensuing "strong discomfort and fear" amongst Musala residents.^[61] The fact that nearby individuals got wind of the crime is too indirect a consequence of Zilic's actions.

Similarly, in *Markovic and Markovic*, the trial panel stated that with respect to the defendant's level of criminal responsibility, it had "borne in mind the fact that ... members of [the victim's] family lived in fear for their lives and safety as they had already been apprehended for questioning by members of the military to which the two Accused also belonged."^[62] Cases like *Zilic* and *Markovic and Markovic* suggest that defendants should be accountable for events tangentially associated with their crimes.

D. Gender Stereotyping

Lastly, it is worth noting that the sentencing analysis employed in *Indira Kameric*, a case before the Court of BiH, relies on archaic gender stereotypes. In *Kameric*, the Accused was convicted of, *inter alia*, ordering a male detainee to grope a female detainee's breasts and genitals. Adding an aggravating circumstance to the trial verdict, the appellate panel stated: "that a woman should be able to commit such ruthless acts against another woman, with no compassion or thoughtfulness whatsoever, points to a greater degree of the Accused's criminal responsibility."^[63]

This assertion implies that women are typically warmhearted, sensitive individuals, a view that—albeit positive— is rooted in societal biases and operates to the detriment of the Accused. Going forward, courts should avoid using a defendant's gender and related stereotypes—in mitigation or aggravation.

⁶¹ Ramo Zilic and Esad Gakic, First Instance Verdict, 2015, pg. 66.

⁶² Bosiljko Markovic and Ostoja Markovic, First Instance Verdict, 2015, para. 226.

⁶³ Indira Kameric, Court of BiH, Second Instance Verdict, 5 December 2015, para. 103.

VII. UNDERUSE OF AGGRAVATING FACTORS AND OVERUSE OF MITIGATING FACTORS

In addition to the problematic application of aggravating and mitigating factors, panels throughout BiH—particularly at the entity level—consistently struggle to discern apparent aggravating factors.

Domestic courts, as supported by international precedent,^[64] have affirmed numerous aggravating circumstances, including the vulnerable status of the victim; the perpetrator's abuse of power; the violence, humiliation, or cruelty of the crime; the protracted nature of the crime; the perpetrator's zealous participation in the crime; the discriminatory or vengeful motives behind the crime; the crime's impact on victims; and the perpetrator's conduct after the crime.

When entity or state level panels overlook such factors, the severity of the crime is not evident in the sentencing analysis or, ultimately, in the sentence itself.

⁶⁴ See Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pgs. 281-285; Barbara Hola, *Sentencing of International Crimes at the ICTY and ICTR*, Amsterdam Law Forum, (2012), pgs. 15-18. Unlike the BiH CC or SFRY CC, the ICTY, ICTR, and ICC statutes require panels imposing punishments to evaluate the gravity of the crime separately from the application of mitigating and aggravating factors. The line between circumstances that establish gravity and circumstances that qualify as aggravating, however, is blurred. Some panels incorporate circumstances such as victim impact and abuse of power into the gravity assessment and others into the aggravating factor assessment.

A. Entity Level: Rarity of Aggravating Circumstances

In 7 out of the 27 entity level trial judgments evaluated for the purposes of the report,^[65] courts found mitigating circumstances but failed to identify manifest aggravating circumstances.^[66]

In *Slobodan Dragic*, for example, the Accused pled guilty to committing inhuman treatment and rape. In the PBA, the Bihac Cantonal Court took note of classic mitigators, such as the Accused's youth at the time of the offence and his expression of remorse.^[67] In contrast, the court listed no aggravating circumstances, despite the fact that the Accused raped a minor in her own home, with family members present in the other room.^[68]

Likewise, in *Mirko Kovacevic*, the Accused was convicted of abducting a woman from her family home and holding her for two days, over the course of which he raped her twice and threatened to kill her. The Doboj District Court enumerated various mitigating factors, including the Accused's status as a family man, his lack of prior convictions, his conduct during the proceedings, his poor financial situation, the passage of 20 years since the crime, and the fact that the injured party had not requested prosecution.^[69] The court, however, identified no aggravating circumstances, omitting mention of the number of rapes, the duration of the victim's detention, and the violent threats.^[70] Kovacevic received a three year punishment.

⁶⁵ This number again includes plea agreements that discuss mitigating and aggravating factors.

⁶⁶ In these cases, the courts either explicitly state that they have found no aggravating circumstances or simply list no aggravating circumstances when undertaking their analysis of aggravating and mitigating factors. *Slobodan Dragic*, First Instance Verdict, 2014; *Bora Kuburic and Radmila Banjac*, First Instance Verdict, 2015; *Asmir Tatarevic and Armin Omazic*, First Instance Verdict (with respect to Tatarevic), 2015; *Galib Hadzic and Nijaz Hodzic*, First Instance Verdict, 2014; *Mladen Milanovic*, Second Instance Verdict, 2013; *Mirko Kovacevic*, First Instance Verdict, 2013; *Radomir Skiljevic*, First Instance Verdict, 2015.

⁶⁷ Slobodan Dragic, First Instance Verdict, 2014, pg. 5.

⁶⁸ Slobodan Dragic, First Instance Verdict, 2014, pg. 4.

⁶⁹ Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

⁷⁰ Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

In still other cases, entity courts list a limited number of aggravating circumstances, skipping key factors probative of the appropriate sentence. In *Ivan Koler*, for example, the Supreme Court of FBiH (in a retrial) convicted Koler of ordering two detainees who were brothers to have sexual intercourse with each other.^[71] When one brother was unable to perform, the Accused berated him for sexual impotence.

In deciding on the punishment, the Supreme Court of FBiH assigned mitigating credit for the Accused's youth at the time of the crime, identifying the "number of injured parties" as the sole aggravating circumstance and overlooking the brutality of forcing family members to engage in sexual acts.^[72] Koler was ultimately sentenced to just one year and six months in prison, more than three years below the SFRY minimum.

Appellate courts at the entity level have rarely compensated for their trial counterparts' omission of aggravating factors, with the result that lower level courts' incomplete sentencing analyses stand.^[73]

⁷¹ Ivan Koler, Second Instance Verdict, 2013, pg. 3.

⁷² Ivan Koler, Second Instance Verdict, 2013, pg. 2.

⁷³ An exception is the *Galib Hadzic* case, in which the Appellate Court of Brcko District stated that the Brcko Basic Court should have identified the number of injured parties and the consequences of the crime as aggravating circumstances. *Galib Hadzic and Nijaz Hodzic*, Appellate Court of Brcko District, Second Instance Verdict, 9 October 2015, pg. 30.

In Mirko Kovacevic, the Accused was convicted of abducting a woman from her family home and holding her for two days, over the course of which he raped her twice and threatened to kill her. The Doboj District Court enumerated six mitigating factors but identified not a single aggravating factor. Kovacevic received a three year sentence.

B. Appellate Panels at the State Level: Compensating for Omissions in Trial Judgments

Although state level trial judgments—in line with the aforementioned entity level judgments— have often discounted important aggravating circumstances, the last several years have seen second instance panels supplement deficient first instance verdicts with new aggravating factors, in some cases leading to increased sentences.^[74]

In 2008, for example, the Court of BiH convicted *Zrinko Pincic*, an HVO member, of raping a female detainee on multiple occasions. The judgment, while identifying mitigating circumstances such as the Accused's family status and proper conduct in court, found no aggravating circumstances.^[75]

In 2013, an appellate panel at the Court of BiH reconsidered Pincic's case on the basis of the ECtHR's judgment in *Maktouf*.^[76] In determining the appropriate sentence, the verdict noted that it had considered the "continuity" of the crimes and the "protracted period of time" over which they were perpetrated, aggravating factors neglected in the original verdict.^[77]

The court subsequently changed Pincic's sentence from nine years—at the time *below* the statutory minimum of the BiH CC sentencing range for war crimes against civilians—to six years—*above* the SFRY CC minimum for war crimes against civilians.

⁷⁴ See Sasa Baricanin, Second Instance Verdict, 2012, para. 56, adding that the victim was subject to repeated rapes; *Muhidin Basic and Mirsad Sijak*, Court of BiH, Second Instance Verdict, 5 November 2013, para. 174, adding that the crimes were perpetrated with the motive of revenge; *Bosiljko Markovic and Ostoja Markovic*, Court of BiH, Second Instance Verdict, 29 February 2016, para. 97, adding that the Accused displayed a lack of remorse; *Miodrag Markovic*, Court of BiH, Third Instance Verdict, 9 April 2015, para. 23, adding that the victim was underage and that her mental health was severely affected. The Court changed Markovic's sentence from seven years—at the time *below* the statutory minimum of the BiH CC sentencing range for war crimes against civilians—to six years—*above* the SFRY CC minimum for war crimes against civilians.

⁷⁵ Zrinko Pincic, Court of BiH, First Instance Verdict, 28 November 2008, pg. 43.

⁷⁶ As the result of the ECtHR's judgment in *Maktouf v. Bosnia and Herzegovina*, the Constitutional Court ruled that only the SFRY CC, not the BiH CC, could be applied to war crimes against civilians. Subsequently, the Court of BiH reopened cases in which defendants convicted of war crimes against civilians had been sentenced under the BiH CC.

⁷⁷ Zrinko Pincic, Court of BiH, Third Instance Verdict, 27 December 2013, para. 106.

Similarly, in the 2016 *Krsto Dostic* trial judgment, the Court of BiH listed various aggravating circumstances but did not include the impact of the crime on the victim's mental health, despite the fact that both the victim and an expert psychologist testified about these harms.^[78] Subsequently, the appellate panel, upholding the first instance sentence, added: "the consequences of the offence are grave and humiliating for the victim and have caused traumas to the victims for a longer period of time."^[79]

Although the court did not increase Dostic's 10 year sentence, its acknowledgment of the victim's suffering was significant itself, with the gravity of the crime reflected not just in the punishment but in the analysis.

C. Positive Trends: Thoroughly Reasoned Trial Verdicts

Of late, the remedial action taken by appellate panels has been paralleled by more thorough trial verdicts.

In *Slavko Savic*, for example, the trial court scrupulously examined all relevant aggravating factors, cataloging the psychological consequences of the offence for both the victim and her underage daughter; the brutality of the manner in which the offence occurred (the victim was abducted in front of her daughter and feared for her daughter's life); the fact that the victim was raped on two occasions, the motives behind the rape; and the Accused's abuse of his position of power.^[80]

⁷⁸ Krsto Dostic, Court of BiH, First Instance Verdict, 6 October 2016, paras. 258-259.

⁷⁹ Krsto Dostic, Court of BiH, Second Instance Verdict, 27 January 2017, para. 70.

⁸⁰ Slavko Savic, First Instance Verdict, 2015 paras. 374-378.

While such verdicts are promising, there is still cause for concern. In the 2016 *Mato Baotic* case, for instance, the Accused was convicted of raping three different victims. His various sexual violence crimes evince clear aggravating factors; *inter alia*, one of the victims was impregnated and had an abortion; one of the rapes was perpetrated in front of a group of soldiers and involved extreme physical violence, rendering the offence especially cruel/humiliating; and the Accused abused his position of power as a military policeman and camp commander.

Although the first instance verdict did cite two aggravating factors, it failed to include the above circumstances in its sentencing analysis.^[81]

To avoid the omission of such factors going forward, state and entity judges across BiH should follow the approach of the *Pincic*, *Dostic*, and *Savic* panels, carefully identifying key aggravators and thereby ensuring that sentences match the gravity of the crimes under consideration.

81 See Mato Baotic, Court of BiH, First Instance Verdict, 9 December 2016, para. 221.

VIII. THE DISPROPORTIONATE USE OF PARTICULARLY MITIGATING CIRCUMSTANCES

In contrast to the disproportionately low number of aggravating circumstances identified in verdicts for conflict-related sexual violence, there are a disproportionately high number of cases—especially at the entity level—in which courts find "particularly mitigating circumstances".

A. Legal Background

As discussed above, Article 49(b) of the BiH CC authorises courts to issue punishments below the statutory minimum when there are both "particularly mitigating circumstances" and the lesser penalty can still satisfy the objectives of punishment. Article 42 of the SFRY CC echoes Article 49(b). Under these provisions, entity courts can levy sentences below 5 years for cases of war crimes against civilians and prisoners of war—the statutory minimum in the SFRY CC—and the Court of BiH, below 5 years for cases of war crimes against civilians and prisoners of war, in which the SFRY CC is applied, and below 10 years for cases of crimes against humanity, in which the BiH CC is applied.

Given the existence of Article 49(b) and Article 42, it is clear that there *are* instances in which particularly mitigating circumstances exist and courts can legitimately reduce an Accused's punishment. The provisions laid out in the state and entity CCs, however, offer no details as to what types of circumstances might qualify as such. International precedent can offer valuable guidance.^[82] While the statutes of international courts do not provide for "particularly mitigating circumstances", tribunals have established that factors such as the expression of remorse, substantial cooperation with the prosecution, contribution to reconciliation, lack of a dominant role in the offence, and guilty pleas can be afforded significant weight in the sentencing determination: a weight analogous to that afforded to "particularly mitigating circumstances".^[83]

Along these lines, in *Bora Kuburic*, a case before the Bihac Cantonal Court, the first instance panel found that Kuburic's offences warranted a four year sentence—below the statutory minimum—because she had confessed to the crime and had also "sincerely repented."^[84] However, cases like *Kuburic*—in which courts correctly apply particularly mitigating circumstances—are the anomaly.

B. Crediting Negligible Mitigating Factors as Particularly Extenuating

The "particularly mitigating" circumstances typically cited in BiH verdicts are those that some domestic panels—as supported by international jurisprudence—have concluded should be afforded little to no weight in the sentencing decision; proper conduct in court, defendants' family situations, and defendants' selective benevolence toward

⁸² It is worth noting that international courts do not have sentencing minimums, but set forth maximum sentences (generally life imprisonment).

⁸³ Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY, Oxford University Press, (2016), pgs. 286-289; Barbara Hola, Sentencing of International Crimes at the ICTY and ICTR, Amsterdam Law Forum, (2012), pg. 19. Issues regarding guilty pleas will be discussed in more depth later in the report.

⁸⁴ Bora Kuburic and Radmila Banjac, First Instance Verdict, 2015, pg. 16. See also Bora Kuburic and Radmila Banjac, Supreme Court of FBiH, Second Instance Verdict, 6 October 2016, pg. 14, reducing Kuburic's sentence to three years, pointing to her relatively unimportant role in the perpetration of the crime; *Ivan Zelenika et al*, First Instance Verdict, 2015, paras. 939-940, identifying as a particularly mitigating circumstance the fact that both Ivan Medic and Marina Grubisic Fejzic expressed remorse and also noting that Marina Grubisic Fejzic "treated the victims with due respect and honesty".

certain victims during the war.^[85] Equally troubling, there appears to be no rationale behind when courts deem such circumstances merely "mitigating", as in the cases discussed in previous sections, or "particularly mitigating", as in the cases that follow.

In *Muhidin Basic* and *Mirsad Sijak*, for example, the first instance panel at the Court of BiH identified the defendants' family status and proper conduct during proceedings as particularly mitigating circumstances.^[86] Sijak and Basic received sentences of seven years each, below the BiH CC's statutory minimum for crimes against humanity. Paradoxically, the Court credited the Accused's family situations despite the fact that they were convicted for gang raping a woman as she visited her brother in a detention camp. Sijak and Basic subsequently threatened to kill the victim's brother if she informed anyone of the attack.

Correspondingly, in *Ramo Zilic*, the Mostar Cantonal Court identified as particularly mitigating circumstances, *inter alia*, that the Accused was married, that he was the father of two adult children, and that he helped certain prisoners in the Musala detention camp.^[87] For forcing detainees to rape one other, Zilic was sentenced to four years in prison. Again, given the uncertainty surrounding whether factors such as family status and acts of assistance should even be considered mitigating, it is clear that they should not be deemed particularly mitigating and used to lower an Accused's punishment below the statutory minimum.

⁸⁵ See Mladen Milanovic, Second Instance Verdict, 2013, pg. 19; Asmir Tatarevic and Armin Omazic, First Instance Verdict, 2015, pgs. 78-79; Asim Kadic, First Instance Verdict, 2014, pg. 13; Indira Kameric, First Instance Verdict, 2015, paras. 237-238.

⁸⁶ Muhidin Basic and Mirsad Sijak, Court of BiH, First Instance Verdict, 18 January 2013, para. 360.

⁸⁷ Ramo Zilic and Esad Gakic, First Instance Verdict, 2015, pg. 66.

C. Inflating Defendants' Personal Circumstances

Apart from imposing reduced penalties on the basis of defendants' spousal and/ or parental status, trial panels have often lowered sentences below the statutory minimum due to the Accused's overarching personal circumstances either at the time of the crime's commission or at the time of legal proceedings; the defendant's age, lack of prior or subsequent convictions, physical condition, employment status, financial woes, and so on.^[88]

As referenced above, however, tribunals from the Court of BiH to the ICTY to the ICTR have established that a defendant's personal situation should merit little weight in the sentencing determination.^[89] With regard to factors such as youth and family/ professional stressors at the time of the crime, international panels adjudicating cases similar to those before BiH courts have found that these considerations apply to so many individuals during conflict so as to render them negligible.^[90]

Meanwhile, relevant jurisprudence concludes that personal circumstances at the time of prosecution, such as ailing health and/or finances, are legitimate mitigating factors but should have minimal bearing on the sentence.^[91]

⁸⁸ See Mladen Milanovic, Second Instance Verdict, 2013, pg. 19; Asmir Tatarevic and Armin Omazic, First Instance Verdict, 2015, pgs. 78-79; Asim Kadic, First Instance Verdict, 2014, pg. 13; Indira Kameric, First Instance Verdict, 2015, paras. 237-238; Monika Ilic-Karan, First Instance Verdict, 2013, pg. 10; Dragoljub Kojic, First Instance Verdict, 2013, pg. 11; Galib Hadzic and Nijaz Hodzic, First Instance Verdict, 2014, pg. 77; Mirko Lukic, First Instance Verdict, 2014, pg. 7; Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

⁸⁹ See Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pg. 289; *Dragan Sekaric*, Second Instance Verdict, 2015, para. 175; *Adil Vojic and Bekir Mesic*, Second Instance Verdict, 2016, paras. 121-122, 124-125, 127.

⁹⁰ See Prosecutor v. Darko Mrda, ICTY, Case No. IT-02-59-S, Trial Judgment, (31 March 2004), paras. 91-94; Prosecutor v. Ramush Haradinaj et al, ICTY, Case No. IT-04-84-T, Trial Judgment, (3 April 2008), para. 494; Prosecutor v. Pauline Nyiramasuhuko et al, ICTR, Case No. ICTR-98-42-T, Trial Judgment, (24 June 2011), para. 6221.

⁹¹ See Barbara Hola, Sentencing of International Crimes at the ICTY and ICTR, Amsterdam Law Forum, (2012), pgs. 21-22.

Such case-law reflects the fact that a defendant's personal situation is only tenuously connected to the sentencing goals laid out in the BiH CC and SFRY CC; community condemnation, deterrence, rehabilitation, and awareness raising.^[92]

Whether a defendant was 21 at the time of the crime, is now suffering from medical problems, or is currently unemployed is less than probative of the extent to which his or her crime merits community condemnation; the extent to which the punishment will have a deterrent effect on the defendant and others; the extent to which the defendant is capable of rehabilitation; and the extent to which the sentence will heighten awareness about violations of the protected value.

Some BiH panels, predominantly at the entity level, have disregarded the aforesaid jurisprudence and sentencing objectives. In *Ivan Koler*, for example, the Tuzla Cantonal Court cited the fact that the Accused was 20 when he perpetrated the offence as the sole "particularly mitigating" factor.^[93] For forcing brothers into sexual intercourse, Koler received a one and a half year sentence.

Correspondingly, in *Asim Kadic*, the Zenica Cantonal Court lowered Kadic's sentence below the statutory minimum on the grounds of, *inter alia*, the Accused's troubles at the time of trial: Kadic's family situation, poor health, and indigence.^[94]

94 Asim Kadic, First Instance Verdict, 2014, pg. 13.

⁹² Article 39 of the BiH CC; Article 33 of the SFRY CC.

⁹³ Ivan Koler, Second Instance Verdict, 2013, pgs. 28-29.

In *Ivan Koler*, the Tuzla Cantonal Court cited the fact that the Accused was 20 when he perpetrated the offence as the sole "particularly mitigating" factor, reducing Koler's punishment on this basis. For forcing brothers into sexual intercourse, Koler received a one and a half year sentence. In contrast to the circumstances identified in *Kadic* and *Koler*, the mitigating factors afforded significant value by international jurisprudence—such as remorse, cooperation with the prosecution, and a defendant's role in the crime—are directly correlated with the punishment objectives detailed in the BiH CC and SFRY CC; a defendant's limited participation in an offence, for example, *is* probative of the extent to which the act warrants community condemnation; an expression of remorse *does* bear upon whether a lower punishment will deter the defendant from future crimes; and cooperation with the prosecution *does* correspond to the extent to which the defendant is capable of rehabilitation.

Strikingly, of the 16 state and entity level trial verdicts that have resulted in CRSV sentences below the statutory minimum during the relevant period, only two mention these key considerations,^[95] with the remainder relating to the defendant's personal situation or, as will be discussed below, mitigating circumstances that are even less worthy of reduced penalties.

D. The Use of Questionable Mitigating Circumstances to Reduce Sentences

Domestic courts have occasionally employed the aforementioned questionable/ irrelevant mitigating circumstances to impose reduced sentences.^[96]

⁹⁵ Bora Kuburic and Radmila Banjac, First Instance Verdict, 2015; Ivan Zelenika et al, First Instance Verdict, 2015.

⁹⁶ See Galib Hadzic and Nijaz Hodzic, First Instance Verdict, 2014, pg. 77, noting as a particularly mitigating circumstance that the Accused was under stress due to his official duties; *Mirko Lukic*, First Instance Verdict, 2014, pg. 7, citing the lapse of time since the commission of the offense as one of several mitigating factors used to lower the sentence below the statutory minimum; *Dragoljub Kojic*, First Instance Verdict, 2013, pg. 11, likewise identifying the lapse of time as a particularly mitigating circumstance.

In *Mirko Kovacevic*, for example, the Doboj District Court found, *inter alia*, that the passage of 20 years since the war and the fact that the victim had not requested prosecution or compensation were particularly mitigating circumstances.^[97] For abducting a woman from her family home and raping her twice over the course of two days, Kovacevic received a sentence of three years. As discussed above, neither the timeframe of a crime nor the injured party's wishes with respect to punishment should be considered mitigating.

Similarly, in *Zelenika et al*, the Court of BiH relied partially on the fact that the Accused Marina Grubisic Fejzic was an "emotionally immature... victim of a whirlwind of war" to justify levying a punishment of five years for crimes against humanity,^[98] a sentence below the BiH CC's statutory minimum. Again, the broader circumstances of war should not be deemed mitigating *at all*, let alone "particularly mitigating".

Lowering defendants' sentences on the basis of the factors identified in *Kovacevic* and *Zelenika* undermines BiH's penal objectives.

E. Rejecting the Sentencing Framework Altogether

Disturbingly, it appears that in certain cases reduced sentences are based on panels' wholesale rejection of the sentencing framework for CRSV.

98 Ivan Zelenika et al, First Instance Verdict, 2015, para. 939.

⁹⁷ Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

In Zelenika et al, for example, the Accused received, respectively, six year and five year sentences: below the BiH CC's statutory minimum.^[99] In accounting for these punishments, the Court of BiH noted that because the crimes against humanity perpetrated by the Accused, including multiple acts of sexual violence, were not "directed at" the deprivation of life, "the weight of their actions and the resulting consequences [did] not reach the ranking of sentencing in the legally prescribed framework for the criminal offense of crimes against humanity" and "the pronouncement of a sentence greater than the one issued by the court would represent an unjustified and disproportionate reprisal of society".^[100]

Per the above explanation, the punishments imposed in *Zelenika et al*—while ostensibly based on the particularly mitigating circumstances enumerated by the court—also represent the panel's refusal to accept that conflict-related sexual violence—if unaccompanied by murder—could merit a sentence above 10 years; the statutory minimum for crimes against humanity.

Similarly, in *Indira Kameric*, the Accused, convicted of torture and inhuman treatment for ordering a male detainee to sexually assault a female detainee, was credited with the particularly mitigating factor that "the consequences of her actions (were) not too grave or of a far-reaching nature as is the case with more severe war crimes offences."^[101]

She received a three year sentence, below the SFRY CC's statutory minimum. Under the SFRY CC, however, the crimes of torture and inhuman treatment—whether in the form of conflict-related sexual violence or other acts—have already been deemed a sufficiently severe violation of protected values, with sufficiently severe consequences, to necessitate

⁹⁹ The third Accused, Ivan Zelenika, was not convicted of a sexual violence offence.

¹⁰⁰ Ivan Zelenika et al, First Instance Verdict, 2015, paras. 941-942.

¹⁰¹ Indira Kameric, First Instance Verdict, 2015, para. 237.

a punishment within the 5 to 20 year range. While the appellate verdict subsequently raised the Accused's sentence to four years, a promising development, the first instance panel's reasoning raises serious concerns.

Judgments such as *Kameric* and *Zelenika et al* contravene reasoned legislative—and, correspondingly, societal—assessments of wartime sexual violence.

F. The Numbers: Startling

Finally, the sheer proportion of cases in which defendants have been sentenced below the statutory minimum undercuts the gravity of conflict-related sexual violence. While state level appellate panels have largely overturned such verdicts, a promising trend,^[102] 12 out of 21 of entity level first instance verdicts involving conflict-related sexual violence—more than half of such verdicts—resulted in sentences less than the prescribed minimum,^[103] with no judgments overturned on this basis at the appellate level.^[104] As noted by organisations such as Amnesty International, the surfeit of reduced punishments for CRSV is a problem that the entity level judiciary must address going forward.^[105]

104 As mentioned in the methodology section, these verdicts are those that span 2012-2017 and were publicly accessible.

105 Amnesty International, Last Chance for Justice for Bosnia's Wartime Rape Survivors, (September 2017), pgs. 11, 26.

¹⁰² See Zrinko Pincic, Third Instance Verdict, 2013; Ante Kovac, Court of BiH, Third Instance Verdict, 17 December 2014; Velibor Bogdanovic, Court of BiH, Third Instance Verdict, 12 October 2015; Slavko Lalovic, Second Instance Verdict, 2012; Miodrag Markovic, Third Instance Verdict, 2015. See also recent first instance judgments rejecting particularly mitigating circumstances; Gligor Begovic, First Instance Verdict, 2015; Ibro Macic, First Instance Verdict, 2015; Veselin Vlahovic Batko, First Instance Verdict, 2013; Josip Tolic, First Instance Verdict, 2015.

¹⁰³ This number excludes plea agreements. See Bora Kuburic and Radmila Banjac, First Instance Verdict, 2015; Asmir Tatarevic and Armin Omazic, First Instance Verdict, 2015; Galib Hadzic and Nijaz Hodzic, First Instance Verdict, 2014; Monika Ilic-Karan, First Instance Verdict, 2013; Mirko Lukic, First Instance Verdict, 2014; Asim Kadic, First Instance Verdict, 2014; Ivan Koler, Second Instance Verdict, 2013; Mladen Milanovic, Second Instance Verdict, 2013; Dragoljub Kojic, First Instance Verdict, 2013; Mirko Kovacevic, First Instance Verdict, 2013; Ramo Zilic and Esad Gakic, First Instance Verdict, 2015; Anto Jozic and Demahudin Mahalbasic, First Instance Verdict, 2017.

IX. WEIGHING OF MITIGATING AND AGGRAVATING FACTORS

Whether imposing sentences above or below statutory minimums, the CRSV verdicts under consideration in this report consistently fail to weigh aggravating and mitigating factors *against* each other. The absence of such analysis undermines the quality of decision-making on sentencing.

Courts generally pronounce the sentence immediately after listing all relevant factors. In *Asim Kadic*, for example, the Zenica Cantonal Court identified the Accused's prior convictions as an aggravating circumstance, enumerated a series of mitigating circumstances, and concluded—bypassing any balancing inquiry—that "that the purpose of punishment of the accused [could] be satisfied with a prison sentence of four years ... mitigated to below the legal minimum."^[106] However, the requirement that courts determine whether a lesser penalty can fulfill the objectives of punishment implies a weighing exercise: the balancing of "particularly mitigating factors" against aggravating factors and the severity of the crime.

In *Mirko Lukic*, the Bijeljina District Court likewise levied a sentence below the statutory minimum absent any weighing calculation. As in *Kadic*, the panel merely catalogued a succession of mitigating and aggravating factors, ruling that "the sentence of 3 years of imprisonment [was] commensurate to the gravity of the crime";^[107] namely, repeatedly raping a minor victim.

Without the weighing of factors, this punishment appears arbitrary, generating confusion about how much value the Bijeljina court placed on different aggravators and mit-

¹⁰⁶ Asim Kadic, First Instance Verdict, 2014, pg. 13

¹⁰⁷ Mirko Lukic, First Instance Verdict, 2014, pg. 7. See also Zeljko Jovic, First Instance Verdict, 2015, pg. 26; Monika Ilic-Karan, First Instance Verdict, 2013, pg. 10; Dragoljub Kojic, First Instance Verdict, 2013, pg. 11; Dusko Dabetic, First Instance Verdict, 2016, pg. 13; Mirko Kovacevic, First Instance Verdict, 2013, pg. 12.

igators—and creating doubts as to whether it assigned said value correctly. At the state level, some panels have similarly neglected the requisite weighing assessment.^[108]

A. Examples from the Courtroom: Explaining the Reasoning Behind a Sentence

A series of recent verdicts have demonstrated how courts can effectively elucidate the reasoning behind a sentence. In *Markovic and Markovic*, for example, the Court of BiH noted that although it had taken the physical disability of Ostoja Markovic into account as a mitigating circumstance, the numerous aggravating circumstances rendered the disability of "no particular significance" in the sentencing determination.^[109]

In *Dragan Sekaric*, the Court of BiH correspondingly stated: "of the mitigating circumstances, the Panel evaluated the fact that the accused is a family man, father of two, and according to the Panel's opinion, these circumstances are not qualitatively or quantitatively adequate to lead to a more lenient sanction than the one Panel has opted for, given the specific circumstances of the criminal offence where the subject of the attack had been the life and dignity of the injured parties."^[110]

In the event of minimal aggravating circumstances and significant mitigating circumstances, such as remorse, contribution to reconciliation, or the defendant's limited participation in the crime, this analysis could be reversed. Weighing, regardless of whether it increases or lowers the sentence, provides transparency as to how courts reach their decisions and facilitates reasoned, thorough decision-making.

¹⁰⁸ See Adil Vojic and Bekir Mesic, Court of BiH, First Instance Verdict, 16 March 2016, paras. 327-329. After both Accused raped the injured party, Bekir Mesic separately ordered a male victim they had brought with them to do the same. Although the Court of BiH identified Mesic's additional action as an aggravating factor due to the humiliating nature of the crime, Vojic and Mesic received identical sentences. The verdict follows the same pattern as that of *Lukic* and *Kadic*; it lists aggravating and mitigating factors and subsequently, without any balancing process, pronounces the sentence. This type of approach engenders uncertainty as to how the punishment was determined. *See also Slavko Savic*, First Instance Verdict, 2015, paras. 375-381; *Jasko Gazdic*, Court of BiH, First Instance Verdict, 9 November 2012, paras. 353-361; *Branko Vlaco*, First Instance Verdict, 2014, paras. 480-484.

¹⁰⁹ Bosiljko Markovic and Ostoja Markovic, First Instance Verdict, 2015, paras. 228-229.

¹¹⁰ Dragan Sekaric, First Instance Verdict, 2015, para. 557. See also Veselin Vlahovic Batko, Court of BiH, Second Instance Verdict, 5 February 2014, paras. 723-724.

X. PLEA BARGAINING AGREEMENTS: STUNTED SENTENCES

The use of plea bargaining agreements poses different, but analogous problems to those raised by trial verdicts.

As with the judgments discussed above, plea bargains have resulted in meager sentences, particularly before entity courts. At the entity level, for cases in which defendants accepted plea bargains for conflict-related sexual violence alone, the average sentence was several years below the SFRY CC's statutory minimum.^[111]

As documented by the OSCE, plea bargains can provide benefits such as conserving judicial resources, negating the risk of acquittal, sparing the victim from possible re-traumatisation, acquiring information on offences committed by more responsible co-perpetrators, expediting the judicial process, and so on.^[112]

On the other hand, plea bargain agreements deny victims the opportunity to participate in court proceedings, prevent the establishment of a truthful record of events through courtroom litigation, and can give rise to sentences so low as to contravene the overarching objectives of justice. The punishment of wartime sexual violence with statutorily meager sentences does not reflect the gravity of the crime and, in so doing, fails to achieve the goals of community condemnation, deterrence, and awareness raising. Moreover, plea agreements, similar to many of the aforementioned judgments, frequently fail to explain how exactly the sentence was determined.

112 OSCE, Towards Justice, (June 2017), pg. 68.

¹¹¹ Amir Coralic, Bihac Cantonal Court, First Instance Verdict, 19 October 2015 (one year); Redzep Beganovic, Bihac Cantonal Court, First Instance Verdict, 18 March 2016 (one year); Safet Delic, First Instance Verdict, 2012 (three years and six months). The average sentence in these cases was just 1.83 years. Additionally, at the state level, the Radivoje Soldo case resulted in a plea agreement sentence of five years; Radivoje Soldo, Court of BiH, First Instance Verdict, 3 November 2015.

In particular, the fact that two recent plea bargain agreements resulted in the lowest possible sentence under the SFRY CC—one year—is problematic. In *Amir Coralic* and *Redzep Beganovic*, the Accused were convicted, respectively, of raping and sexually assaulting female minors, for which they received one year sentences and agreed to pay compensation to their victims. Under Article 42(a) of the BiH CC and Article 43(a) of the FBiH CC, sentences of 12 months and lower are automatically converted to a fine upon the petition of the convicted person.

Consequently, following the conclusion of their plea agreements, Coralic and Beganovic both petitioned the Bihac Cantonal Court to undertake such a conversion, meaning that neither man has served or will ever serve any time in prison. As observed by the OSCE, these types of cases "could undermine public confidence in the justice system by suggesting that those who have been convicted and sentenced for serious criminal offences, but who have the money to pay a fine, are able to purchase their freedom."^[113]

In line with the OSCE's recommendations,^[114] the TRIAL International office in BiH supports the revision of the applicable codes to either exclude cases involving international law violations from the possibility of conversion to a fine, or to lower the maximum sentence eligible for conversion to six months, thereby ensuring that war crimes sentences never qualify. The TRIAL International office in BiH further recommends that, given the lack of guidance in current legislation, relevant institutions and organisations work together to create plea bargaining guidelines, which would ideally encompass subjects ranging from the appropriate sentencing framework to means of incorporating victims into the plea bargaining process.

¹¹³ OSCE, Towards Justice, (June 2017), pg. 72

¹¹⁴ OSCE, Towards Justice, (June 2017), pg. 73.

XI. CONCLUSION: THE FLAWED PUNISHMENT OF WARTIME SEXUAL VIOLENCE

As a result of the issues discussed throughout this document—from the lack of individualized analysis in judgments (predominantly multiple offence verdicts) to the overvaluation of negliglible mitigators to the omission of relevant aggravating factors to the use of questionable/seemingly irrelevant mitigating factors to the infrequency of weighing assessments to over-reliance on "particularly mitigating circumstances" to the failings of plea bargaining agreements domestic sentences for conflict-related sexual violence are frequently low and inconsistent, detracting from the gravity of such crimes

At the entity level, the average sentence for sexual violence alone during the 2012-2017 period under consideration is just 4.77 years, below the SFRY CC's statutory minimum.^[115] Notably, the Sarajevo Cantonal Court has issued three sentences. for wartime sexual violence that surpass the statutory minimum,^[116] amounting to an average of 7.8 years. The Sarajevo court, unlike many entity level panels, has always included aggravating factors in its sentencing analysis (in particular, the consequences of the crime for the injured party), has never relied on the guestionable mitigating factors discussed above, and has steered clear of "particularly mitigating circumstances".

¹¹⁵ Dusko Solesa, Supreme Court of FBiH, Second Instance Verdict, 22 May 2015 (six years); *Mirko Lukic*, Supreme Court of RS, Second Instance Verdict, 10 June 2014 (three years); *Dusko Dabetic*, First Instance Verdict, 2016 (six years); *Milkan Gojkovic*, First Instance Verdict, 2016 (eight years); *Predrag Durovic*, Sarajevo Cantonal Court, First Instance Verdict, 30 October 2015 (nine and a half years); *Asim Kadic*, Supreme Court of FBiH, Second Instance Verdict, 20 November 2014 (four years); *Ivan Koler*, Supreme Court of FBiH, Third Instance Verdict, 22 May 2014 (one year and six months); *Dragoljub Kojic*, Supreme Court of FBiH, Second Instance Verdict, 27 March 2014 (three years); *Vladimir Sisic*, Supreme Court of RS, Second Instance Verdict, 27 March 2014 (three years); *Vladimir Sisic*, Supreme Court of RS, Second Instance Verdict, 28 August 2015 (five years); *Anto Jozic and Demahudin Mahalbasic*, First Instance Verdict, 2017 (Jozic-three years and six months). These cases include appellate judgments and first instance judgments where there has yet to be an appellate ruling.

¹¹⁶ Dusko Dabetic, First Instance Verdict, 2016 (six years); Milkan Gojkovic, First Instance Verdict, 2016 (eight years); Predrag Durovic, First Instance Verdict, 2015 (nine and a half years).

Without the Sarajevo judgments, which appear better-reasoned than the majority of entity level verdicts, the average sentence for conflict-related sexual violence at other entity courts is approximately 3.64 years; almost one and a half years below the statutory minimum. Considering that reduced sentences are intended to be the exception, not the norm, the entity level judiciary must remedy these sentencing patterns.

Meanwhile, at the state court, sentencing practices—especially the corrective action taken by appellate judgments—are encouragingly sound. During the relevant period, the average sentence for sexual violence as a war crime against civilians is 7.3 years^[117] and as a crime against humanity, 13.5 years;^[118] both hovering above the statutory minimum. As discussed above, state panels have been more vigilant in unearthing relevant aggravating factors, affording mitigating factors their proper weight, and avoiding the unwarranted application of particularly mitigating circumstances.

As a comparison, in *Slavko Savic*, a case before the Court of BiH, the defendant twice dragged the victim away from her underage daughter and raped her. The

¹¹⁷ See Miodrag Markovic, Third Instance Verdict, 2015 (six years); Zrinko Pincic, Court of BiH, Third Instance Verdict, 2013 (five years); Muhidin Basic and Mirsad Sijak, Second Instance Verdict, 2013 (Basic-seven years, Sijak, seven years); Bosiljko Markovic and Ostoja Markovic, Second Instance Verdict, 2016 (Bosiljko Markovic-ten years, Ostoja Markovic-ten years); Slavko Savic, Court of BiH, Second Instance Verdict, 24 November 2015 (eight years); Marijan Brnjic et al, Court of BiH, Second Instance Verdict, 22 April 2016 (six years); Adil Vojic and Bekir Mesic, Second Instance Verdict, 2016 (Vojic-seven years, Mesic-seven years).

¹¹⁸ In comparison with the number of cases in which defendants were convicted solely of CRSV as a war crime against civilians, there are many fewer judgments in which defendants were convicted solely of CRSV as a crime against humanity. *See Krsto Dostic*, Second Instance Verdict, 2017 (ten years); *Jasko Gazdic*, Court of BiH, Second Instance Verdict, 5 September 2013 (seventeen years).

Court of BiH found numerous aggravating circumstances, including the impact of the offence on the injured party, the Accused's discriminatory motives, and the fact that the crime occurred on two occasions. With respect to mitigating factors, the panel assigned value to the Accused's lack of prior convictions and family situation but rejected his proper conduct in court as a mitigator, reasoning that such behavior should be expected of defendants. For committing the offence of rape as a war crime against civilians, Savic received a 10 year sentence: above the SFRY CC's statutory minimum.

Meanwhile in *Mirko Kovacevic*, a case before the Doboj District Court, the defendant abducted a woman from her family home and raped her on two occasions over the course of two days. For committing the offence of rape as a war crime against civilians, Kovacevic received a three year sentence: below the SFRY CC's statutory minimum. In Kovacevic, the court discerned no aggravating factors; identified questionable mitigators such as the fact that 20 years had passed since the crime and the victim was not requesting prosecution; and incorrectly identified as particularly mitigating circumstances the Accused's family status, lack of prior convictions, conduct during proceedings, and poor financial situation.

As demonstrated by the above example, as well as by the contrast between the Sarajevo Cantonal Court's approach and that of other entity jurisdictions, inconsistent and low sentencing is borne of the improper application of mitigating and aggravating circumstances. More broadly speaking, sentencing decisions that omit individualized analysis of the sexual violence crime facilitate further confusion over appropriate punishments for CRSV. As the result of such gaps in the quality of judicial reasoning, CRSV sentencing in BiH has often been riddled with arbitrariness, uncertainty, and injustice.

XII. ANNEX A: GUIDELINES



What follows are sentencing guidelines aimed at remedying the issues discussed above. The guidelines were reviewed by a sitting judge and include a list of appropriate mitigating and aggravating factors; a list of questionable mitigating and aggravating factors; a list of mitigating factors that can qualify as particularly mitigating circumstances; and, more generally, recommendations on how to approach sentencing analyses so as to ensure clarity regarding the ultimate punishment. Three training exercises, with example answers, accompany the guidelines.

A. General Recommendations for Sentencing Analyses:

-If the judgment involves multiple violations, undertake an analysis of the aggravating and mitigating factors specific to each crime, including the sexual violence crime.^[119]

-Closely interrogate the specifics of mitigating and/or aggravating factors. Do not automatically credit/fault the defendant based on a cursory review. In other words, if you are considering assigning mitigating value based on the defendant's family situation, examine his/her role in the family and whether the crime has family implications; if you are considering assigning mitigating value based on the defendant's acts of assistance, examine possible incentives for this benevolence; if you are considering assigning aggravating value based on the defendant's discriminatory or revengeful motives, examine the circumstances and alternative explanations.

-If upon first review there appear to only be mitigating factors and no aggravating factors—or vice versa—undertake a second review to ensure that all relevant circumstances have been accounted for.

-Clarify how much weight should be afforded to the enumerated aggravating and mitigating factors. During this process, check to make sure that you have not assigned value to the aforesaid questionable aggravating and/or mitigating factors and that you have not labeled ordinary mitigating circumstances as particularly mitigating.

-Weigh mitigating circumstances against aggravating circumstances/the gravity of the crime, explaining if/why certain factors supersede others.

119 As mentioned above, many mitigating factors—such as a defendant's family situation, expression of remorse, and cooperation with the proceedings—are more general and apply to all crimes, not just the sexual violence offence.

B. Questionable Mitigating Factors

These are factors that some BiH panels, particularly at the entity level, have cited as mitigating in verdicts but that should not receive any weight:

- -Passage of time since the crime
- -Victim's disinterest in prosecution/ compensation
- -Gender of the Accused and/or victim
- -Broader tensions/stressors generated by the conflict
- -That sexual violence does not result in as grave consequences as other crimes

C. Mitigating Factors to Be Given Little to No Weight

The following factors, while legitimately mitigating, merit little to no weight in the sentencing determination. Some BiH courts, however, have mistakenly deemed such factors "particularly mitigating":

Defendant's Personal Circumstances
When the Crime was Perpetrated

-Lack of prior convictions -Young age

- Defendant's Personal Circumstances At the Time of Prosecution
 - -Family situation (i.e. married and/or with kids)
 - -Employment status
 - -Financial situation
 - -Health condition
 - -Advanced age
 - -No subsequent convictions

Defendant's Behaviour Towards Victims During the Conflict

-Acts of assistance (if said assistance is found to be based on ulterior motives and/or selective-i.e. only given to prior acquaintances or individuals of the same nationality)

Defendant's Behaviour During Legal Proceedings

-Proper conduct in court (generally no weight unless exceptional: see next section)

-Proper conduct in detention

D. Ordinary to Particularly Mitigating Factors

It is within the court's discretion to afford the below factors substantial weight or even label them "particularly mitigating":

Defendant's Behaviour Towards Victims During the Conflict

-Acts of assistance (i.e. helping victims when said assistance is not based on nationality/ prior acquaintance and lacks ulterior motives)

Defendant's Role

-Not the dominant perpetrator (i.e. was subject to superior orders, played a lesser role in a group of co-perpetrators)

Defendant's Attitude/Behaviour After the Crime

- -Remorse
- -Contribution to reconciliation

Assisting the Proceedings

- -Voluntary surrender
- -Admission of guilt
- -Cooperation with the prosecution

-Exceptional conduct in court (i.e. asking the defence not to cross examine the victim)

E. Questionable Aggravating Factors

These are factors that some BiH courts, particularly at the entity level, have cited as aggravating in verdicts but that should never be given any weight:

-Gender of the Accused and/or victim

-Victim's desire for prosecution/compensation

-Broader harms of the conflict (i.e. the general suffering of civilians in the area/ harms inflicted on the victim's family that are unrelated to the defendant's conduct)

F. Aggravating Factors

It is within the court's discretion to afford the below factors aggravating weight:

Incidence of Sexual Violence

-Number of instances of rape of one victim -Number of different victims

Type of Victim

-Underage victim

-Other similarly vulnerable victims (i.e. detainees/the elderly/the sick)

Defendant's Role

-Abuse of power (i.e. as a camp guard/soldier/political leader)

-Zealous participation in the crime (i.e. leader of a group of co-perpetrators)

Manner of Perpetration

-Use of extreme violence

-Crime committed in a particularly humiliating/cruel manner (i.e. urination on the victim/sexual violence perpetrated in public/forced sexual acts between family members/threats against the victim's family members/victim held in detention for a prolonged period)

Defendant's Attitude Towards the Crime

-Discriminatory or vengeful motives (unless already an element of the offence, as is the case with discriminatory motives and the crime against humanity of persecution)

-Displays of heartlessness (i.e. joking or laughing about the crime/spitting on the victim) (these can overlap with the preceding aggravating factors regarding the cruel/humiliating manner of perpetration)

Consequences for Victims

-Physical and/or psychological harms suffered

Defendant's Behaviour Following the Crime (to be given little to no weight)

-Subsequent threats against victims or other witnesses

-Attempts to conceal evidence

-Subsequent convictions (depending on whether they are similar to the crime perpetrated)

-Lack of remorse

XIII. ANNEX B: TRAINING EXERCISES

SCENARIO 1

R perpetrated multiple crimes while serving as a guard in a camp near Prijedor, including the murder of two detainees, the torture of five detainees, and the rape of female detainee V. With respect to the sexual violence offence, R took V out of the camp on several occasions to rape her in a nearby apartment. Other camp guards were staying in this apartment and witnessed the crime.



R knew that V's children were also living with her in the camp and told her that if she did not have intercourse with him, he would ensure that her children were killed. He did not otherwise use any force or threat of force. After the rape, R spit on V and joked with his friends that he had "finally slept with a Muslimanka." R was 45 years old when he committed the rape and had no prior convictions.

During the trial, R was respectful in court. He was married, with two children, and in poor health because of his old age. He had never been convicted of another crime and was employed, with a secure source of income. R denied that he committed the rape.

In court, an expert witness testified about the long-term psychological consequences of the rape for V, who was having trouble forming relationships, going out in public, and sleeping through the night.

SCENARIO 1 EXAMPLE ANSWER

Analyse the aggravating and mitigating factors specific to each crime, including the sexual violence offence.

With respect to the sexual violence offence, scan for aggravating factors:

R raped V on multiple occasions; as a detainee, V constitutes a vulnerable victim; R abused his power as a camp guard; R raped V in front of other camp guards, a particularly humiliating act; R threatened the lives of V's children to force her into intercourse, particularly cruel behaviour; R spit on V after the rape and joked about what happened, displaying a heartless attitude toward the crime; the crime had significant consequences for V's psychological health; and R was the direct perpetrator of the rapes and controlled the course of events, demonstrating his zealous participation in the crime.

Then, scan for mitigating factors:

R had no prior convictions; R is married with two children; R is in poor health; R is of advanced age; R had no subsequent convictions; and R behaved respectfully in court.

With regard to R's family status, examine it more closely:

Are his wife and children dependent on him? Does the crime have any family implications that would detract from the mitigating value of R's family situation? The fact that R threatened to kill V's children might qualify as one such family implication.

Scan once more for mitigating and aggravating factors to check if you have missed anything:

R's use of the word "Muslimanka" might imply that he acted based on discriminatory motives. Analyse the circumstances surrounding the rape to see if you can infer as much.

Determine the value of the aggravating factors:

The enumerated aggravating factors are of the variety that should be afforded serious weight; multiple rapes, R's abuse of power as camp guard, the particularly degrading and cruel manner in which R committed the rape, R's discriminatory motives, R's lead role in the rape, and so on.

Determine the value of the mitigating factors and if there are any particularly mitigating circumstances:

First, the enumerated mitigating factors generally relate to R's personal situation and should merit little weight. In particular, given that R dragged V away from her children, threatening their lives, you must seriously question whether his status as a family man should warrant any weight at all. Meanwhile, R's proper conduct in court should receive little to no mitigating value given that such behaviour is expected of all defendants. None of the mitigating factors in this case qualify as particularly mitigating.

Weigh the mitigating and aggravating factors against each other:

As mentioned above, the mitigating factors are insubstantial because they largely revolve around R's personal circumstances. In contrast, the aggravating factors are both numerous and significant.

CONCLUSION:

The aggravating factors outweigh their mitigating counterparts and should influence the sentence; to what extent is within your discretion but you should explain your decision-making process in the verdict.

SCENARIO 2

M served as a guard in the same camp where R was stationed. She was sitting in one of the camp offices when two other guards dragged detainees who were brothers into the room. The two guards ordered the brothers to have oral and anal intercourse. The brothers performed oral sex on each other but were unable to engage in anal intercourse. M, laughing, grabbed a steel rod and gave it to her fellow guard, who screamed at one brother to shove it up the other brother's anus. M was just 20 at the time.

Jumping twenty years ahead, M is unmarried, has no kids, and is unemployed. Her finances are in a poor state. Ten years after the war, she was convicted of stealing food from a grocery store. During the trial, she expresses remorse for her actions, and apologizes for the mistakes she made in her youth. She also claims that the stressors of war drove her to commit the crime.

M cooperates with the prosecution, providing helpful information about crimes perpetrated by other camp guards. The two brothers testify at trial, describing how they have never been able to fully recover from the rape and still experience revolt towards sex. As a result of the crime, their family unit has disintegrated. The brother who was penetrated with the steel rod sustained lasting physical damage.

The prosecution argues that not many women would have been able been able to perpetrate the offence in question, meaning that M must be particularly ruthless, and correspondingly, that the victims were particularly affected because they are men.

SCENARIO 2 EXAMPLE ANSWER

First, scan for aggravating factors:

M abused her power as a camp guard; the victims were vulnerable because of their status as detainees; the victims are brothers and they were forced to rape each other publicly, making the crime particularly humiliating; M laughed during the event, displaying heartlessness; and as a result of the rape, the victims are still suffering today—both physically and psychologically. The fact that M is a woman is not a valid aggravating factor, nor is the gender of the victims.

Second, scan for mitigating factors:

M had a less dominant role in the crime; M was only 20 at the time; M expressed remorse; M cooperated with the prosecution; M is unemployed; and M is struggling financially. The fact that M was affected by wartime tensions is not a valid mitigating factor, as it applies to almost everyone living in Bosnia and Herzegovina at the time.

Scan once more for mitigating and aggravating factors to check if you have missed anything:

M was convicted of another offence after the war. Examine the particular circumstances of the conviction: because stealing bread is a petty offence and very different from the wartime crime perpetrated by M, it does not merit aggravating weight.

Determine the value of the aggravating factors:

There are significant aggravating factors in this case. Namely, the crime is especially depraved given that the victims were brothers and were forced to rape each other publicly. Additionally, the victims have suffered severe physical and psychological consequences. As mentioned above, M's subsequent conviction should not be assigned aggravating weight, nor should the fact that M is a woman and her victims were men.

Determine the value of the mitigating factors and if there are any particularly mitigating circumstances:

The fact that M expressed remorse, cooperated with the prosecution, and had a less dominant role in the crime could all qualify as particularly mitigating circumstances. The other mitigating factors related to M's personal situation should be afforded little value.

Weigh the mitigating and aggravating factors against each other:

There appear to be a fairly equal number of substantial mitigating and aggravating factors in this case. As mentioned above, it would be fair to conclude that there are particularly mitigating factors in existence. Given the gravity of the crime, however, and the aggravating factor of the offence being committed against brothers, it would also be fair to conclude that a sentence below the statutory minimum would not fulfill the purposes of punishment.

CONCLUSION:

Whether you decide that the aggravating and mitigating factors cancel each other out, that the mitigating circumstances justify a sentence below the statutory minimum, or that the aggravating factors call for an increase of the sentence, you must explain your reasoning in the verdict.

SCENARIO 3

F served as a soldier in the Bosnian army during the war. Over the course of an assault on a village, he tortured civilians, burned down a church, assisted in the murder of a family, and raided the home of P, a woman taking shelter with her elderly parents.



F abducted P and took her to his temporary accommodations, where he gave her food and medicine. He then raped P and drove her back to her home. Women in the village heard about what F did and were frightened as a result. Before leaving the village for another operation, F helped drive several villagers who he knew before the war to a safer area.

At the time of trial, F displays no remorse. P is not involved with the case and expressly refuses to testify. The defence points to this fact as a mitigating factor, and also proclaims that 20 years have passed since F's crimes and that people in the village are now living together peacefully.

SCENARIO 3 EXAMPLE ANSWER

Analyze the aggravating and mitigating factors specific to each crime, including the sexual violence offence.

With respect to the sexual violence offence, scan for aggravating factors:

As a civilian hiding with her elderly parents, P constitutes a vulnerable victim; F abused his power as a soldier; the rape was perpetrated in a particularly cruel manner, given that F dragged P away from her family; and F displayed a lack of remorse. With regard to the fact that women in the area became frightened after hearing about the incident, F cannot be held accountable for consequences so tenuously connected to the crime.

Then, scan for mitigating factors:

F assisted civilians on two separate occasions; P, whom he gave food and medicine, and several villagers, whom he helped escape. The fact that 20 years have passed since the war and P is not requesting prosecution are not valid mitigating factors.

Scan once more for mitigating and aggravating factors to check if you have missed anything:

You seem to have picked up on everything.

Determine the value of the aggravating factors:

There are not many aggravating factors, with the most significant being that F abducted P in front of her family and, as a soldier, took advantage of P's vulnerable position. F's lack of remorse is a negligible aggravating factor.

Determine the value of the mitigating factors and if there are any particularly mitigating circumstances:

You must closely interrogate F's acts of assistance so as to assign them appropriate mitigating value. In regard to P, F may have given her food and medicine so as to curry favor with her. Additionally, he still raped P afterwards, so his small "kindnesses" should not count for much. More important is F's decision to transport several civilians to a safer area. This action was selective, however, as F knew the individuals in question prior to the war. Depending on the circumstances surrounding F's benevolence, including the nationality of those F helped and how much risk he took in doing so, F's actions could qualify as particularly mitigating.

Weigh the mitigating and aggravating factors against each other:

There appears to be an even balance of mitigating and aggravating factors, unless you have given considerable weight to F's acts of assistance or, alternatively, to the fact that P was dragged away from her elderly parents.

CONCLUSION:

It would be fair to conclude that the mitigating and aggravating factors cancel each other out. Whatever you decide, you should explain your reasoning in the verdict.

ABOUT TRIAL INTERNATIONAL

TRIAL International is a nongovernmental organisation fighting impunity for international crimes and supporting victims in their quest for justice. The organisation provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

TRIAL International has been present in BiH since 2008 and provides support to war time victims of serious human rights violations and their families in the quest for justice, truth and reparations.

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