



TRIAL
International

PUNISHING
WARTIME

SEXUAL
VIOLENCE

the ratio of the gravity of the crime and the sanction imposed

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Acronyms

BDBiH | Brčko District of Bosnia and Herzegovina

BiH | Bosnia and Herzegovina

CC | Criminal Code

CCBDBiH | Criminal Code of Brčko District of Bosnia and Herzegovina

CCRS | Criminal Code of the Federation of Bosnia and Herzegovina

CCFBiH | Criminal Code of the Republika Srpska

Court of BiH | Court of Bosnia and Herzegovina

FBiH | Federation of Bosnia and Herzegovina

ICTY | International Criminal Tribunal for the former Yugoslavia

OSCE | Organization for Security and Co-operation in Europe

RS | Republika Srpska

SFRY | Socialist Federal Republic of Yugoslavia



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Foreword

Appropriate punishing of perpetrators responsible for grave violations of international law is not only a matter of bringing the victims of these crimes closer to justice, but is also the basis for preserving the principles of justice, accountability and the rule of law in any legal system in the world. Furthermore, appropriate punishing of perpetrators contributes to the broader goals of peace, security, and respect for human rights, and provides a guarantee of non-repetition, as well as satisfaction to victims and their families.

Punishing Wartime Sexual Violence in Bosnia and Herzegovina Analysis continues the practice of reporting on the sentencing policy for crimes of wartime sexual violence committed in Bosnia and Herzegovina from 1992 to 1995, commenced by TRIAL International in 2017. In line with the previous reporting, this analysis shows that sentences for the crime of wartime sexual violence are still lenient, inconsistent and inclining to, in terms of mitigating and aggravating factors, understand the position of the perpetrator, not the victim. Therefore, it is reasonable to doubt whether such imposed sentences meet the purpose

of punishment. It is particularly worrisome that this analysis revealed a growing trend of copy-pasting court decisions, without evaluating the specific circumstances of individual cases, deciding on the sentences based on the existing court practice and within the same sentencing range, often below the statutory minimum. In several analysed cases, criminal sanction determination still valued the perpetrator's family life, lack of previous conviction, the passage of time after the perpetration of the crime, while, although elaborated in the judgment, the manner in which the offence was perpetrated is insufficiently valued, such as particular persistence and recklessness, victim's youth, pronounced degree of brutality and insensitivity. This is precisely how the imposed sentences, by not weighing the mutual impact of mitigating and aggravating factors, fail to demonstrate the nature and severity of the offence or the trauma suffered by the victim.

After the publication of the previous analysis on the sentencing policy for the crime of wartime sexual violence, which covers the period until 2017, and based on its guidelines, TRIAL International contributed



to the organisation of several trainings with representatives of the judiciary in Bosnia and Herzegovina. The presence of judicial representatives was not mandatory but based on individual interest. Given the findings of this analysis, which covers the period until 2023, we can conclude that there has been no significant progress since 2017 in the practice of punishing perpetrators of wartime sexual violence; therefore, there is still room for improvement and acquiring knowledge in this important area. Continuous education is also important in the context of the increasing new generation of judges in the courts in Bosnia and Herzegovina who may not be sufficiently familiar with the topic. Given the aforementioned, the impact that the sentencing policy pertaining to grave violations of international law has on social awareness and narratives, as well as the ticking biological clock of the victims, it is of utmost importance to address sentencing for this crime without delay.

Wartime sexual violence is a crime that not only leaves a deep physical and psychological trauma on the victim, but also threatens the fabric of society, especially when the ratio of the gravity of the crime and the sanction imposed is distorted. Ultimately, we should underline that real people and real lives lie behind the statistics and legal discussions in this analysis, belonging to a deeply vulnerable category and demonstrating exceptional courage by participating in criminal proceedings; however, the punishment imposed on the perpetrator often failed to contribute to their sense of satisfaction for the suffering suffered. To this end, the analysis and its guidelines, presenting clear criteria by which courts in Bosnia and Herzegovina can be guided when sentencing perpetrators of criminal offence of wartime sexual violence, can serve as an additional tool in the hands of the judiciary in Bosnia and Herzegovina.



I. Methodology



The analysis was prepared based on the review of 84 judgments passed at the state and entity level in a total of 48 cases involving wartime sexual violence. The judgments were handed down in the period from 2017 to 2023. Although first instance judgments were passed before this period in some cases, they were included in the analysis because the judgments on appeals were published during or after 2017. The analysis was prepared using the same criteria as the 2012-2017 analysis.¹

The cases including war crime of rape were analysed to the greatest extent, however, the analysis encompassed also a number of cases including violence inflicted on the genitals of the victims, such as burning, hitting, cutting, and the like. Unlike the previous analysis in which the convicted persons were both men and women, there have been no judgments convicting women in the period referenced here.

¹ Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, TRIAL International, 2018.

II. Legal Background

A. STATE, ENTITY AND BRČKO DISTRICT OF BOSNIA AND HERZEGOVINA LEGAL FRAMEWORKS FOR SENTENCING

The Dayton Peace Agreement divided Bosnia and Herzegovina (BiH) into two Entities: the Federation of Bosnia and Herzegovina and (FBiH) and the Republika Srpska (RS). Later negotiations resulted in the establishment of the Brčko District of Bosnia and Herzegovina (BDBiH), a self-government administrative unit.

Jurisdiction for war crimes trials is divided between these levels, first in accordance with the 2008 National War Crimes Strategy,² and then with the 2018 Revised War Crimes Strategy,³ aiming to ensure the appropriate distribution of war crimes cases between the judiciaries at BiH, Entity and BDBiH levels.⁴ Judiciaries on these levels have their own criminal codes⁵ and criminal procedure codes, which are not fully harmonised, and they operate in parallel and apply different legislation, jurisprudence and practices.

² BiH Council of Ministers adopted this strategy on 29.12.2008. Available at: http://www.mpr.gov.ba/web_dokumenti/drzavna%20strategije%20za%20rad%20na%20predmetima%20rz.pdf, last accessed on 28.8.2023

³ The Council of Ministers adopted the Revised Strategy in September 2020. Available at: http://www.mpr.gov.ba/web_dokumenti/default.aspx?id=10809&langTag=bs-BA, last accessed on 28.8.2023

⁴ The revised strategy, Annex A lays down: *If a case meets the below-mentioned criteria in terms of the severity of a criminal offence and the nature and role of a perpetrator, individually or in their mutual connection, the proceedings will be conducted before the Court of BiH; otherwise, the proceedings will be conducted before another competent court in BiH, in accordance with the legislation governing jurisdiction, transfer or takeover of cases. Severity of a criminal offence: a) legal qualification of the criminal offence (genocide and crimes against humanity in all cases, and criminal offences that are legally qualified as a war crime against civilian population, a war crime against prisoners of war or a war crime against the wounded and sick, provided that at least one of the other criteria is fulfilled), b) systematic murders, c) severe forms of rape (systematic rape, establishment of detention centres for sexual slavery), d) severe forms of illegal imprisonment or other severe cases of deprivation of physical freedom (establishment, arrest and detention in camps and detention centres, taking into account the number, duration or particularly difficult conditions of confinement), e) severe forms of inflicting suffering on the civilian population (mass shelling of civilian objects, destruction of religious and cultural-historical monuments), f) connection of the case with other cases. Capacity and role of the perpetrator in the crime perpetration: a) formation duty, b) managerial position in the management of camps and detention centres, c) political/judicial function, d) severe methods and degrees of participation in the crime perpetration (joint criminal enterprise, command responsibility).*

⁵ Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18, 46/21, 31/23 and 47/23); Criminal Code of the Republika Srpska (Official Gazette of RS, 64/2017, 104/2018 – CC’s decision, 15/2021, 89/2021 and 73/23); Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, 36/2003, 21/2004 – correction, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017) and the Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of BDBiH, 19/2020 – consolidated text).

The state-level court – the Court of BiH – adjudicates wartime sexual violence cases within the framework of two criminal codes that are relevant for determining criminal liability and sentencing, namely the Criminal Code of BiH (CCBiH) and the adopted Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY).⁶ If rape or another form of sexual violence (sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or other form of severe sexual violence) constitutes a criminal offence crimes against humanity referred to in Article 172 (1)⁷ CCBiH, or in conjunction with persecution referred to in that Article, the Court of BiH applies CCBiH. In those cases, a minimum imprisonment of ten years is prescribed, and a long-term prison sentence ranging from 21 to 45 years can be imposed.⁸

In all other cases of wartime sexual violence, when they are not qualified as part of a crime against humanity, the Court of BiH,⁹ but also the entity courts and the court of BDBiH apply the provisions of CCSFRY, namely Article 142, which refers to war crimes against civilian population,¹⁰ and Article 144, which refers to war crimes against prisoners of war,¹¹ which prescribes a minimum prison sentence of five years for wartime sexual violence, and it ranges up to fifteen or twenty years in prison.¹²

6 Official Gazette of the Socialist Federal Republic of Yugoslavia (Official Gazette of SFRY), 44/76, 36/77, 56/77, 34/84, 37/84 and 55/2014, 74/87, 57/89, and 3/90).

7 Article 172 (1) of CCBiH – Crimes against humanity: Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack, perpetrates any of the following acts: ...f) Torture; g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity; h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual or other grounds... in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina; ... k) Other inhumane acts of a similar nature intentionally causing great suffering, or serious injury to body or to physical or mental health... shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

8 Long term imprisonment – Article 42b: (1) For the gravest forms of serious criminal offences perpetrated with intent, long-term imprisonment for a term of 21 to 45 years may be prescribed.

9 Since the European Court of Human Rights adopted the decision in the case “Maktouf v. Bosnia and Herzegovina” on 18.7.2013. Decision available at: <http://www.mhrr.gov.ba/PDF/UredPDF/default.aspx?id=3989&langTag=bs-BA>, last accessed on 28.8.2023

10 War crime against the civilian population - Article 142: (1) Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to... torture, inhuman treatment... immense suffering or violation of bodily integrity or health; ...forcible prostitution or rape; ... or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

11 War crime against prisoners of war - Article 144: Whoever in violation of rules of international law, orders that prisoners of war be subject to... torture, inhuman treatment... immense suffering or violation of bodily integrity or health; ...or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

12 Article 38 of CCSFRY: (1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years. (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal offences eligible for the death penalty.

B. ABOUT SENTENCING PRACTICES OF THE COURTS

When deciding on sentences, courts are to apply several provisions of CCBiH or CCSFRY. Primarily, Article 39 of CCBiH lays down the punishing purpose that should guide the courts when deciding on punishment, which is to express the social condemnation of the committed criminal offence, to influence the perpetrator to refrain from committing criminal offences in the future and to encourage his re-education, to influence others not to perpetrate criminal offences, and to contribute to the public awareness of the danger of criminal offences and the fairness of punishing the perpetrators. Article 33 of CCSFRY contains similar wording, which was adapted to the then socialist self-governing system, and the purpose of punishment was also *strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline*.¹³

However, there is an additional purpose that the Court of BiH neglects when imposing appropriate punishments, which is prescribed by CCBiH, namely that the purpose of criminal sanctions is the protection and satisfaction of the victim.¹⁴ Not a single one of the reviewed sentences of the Court of BiH rendered pursuant to CCBiH reflects on this purpose.¹⁵

Apart from the punishment purpose, when courts impose sentences on perpetrators, they are to apply the provision on mitigating and aggravating factors that should be valued in relation to the perpetrated crime and the perpetrator. Article 48(1) CCBiH (identical to Article 41(1) CCSFRY) lays down that the court shall impose a sentence within the limits provided by law for the particular offence, having in mind the purpose of punishment and taking into account all the circumstances affecting the sentence severity (mitigating and aggravating factors), and, in particular: the degree of guilt, motives behind perpetration of the offence, the degree of threat or injury to the protected good, circumstances of perpetration, the

¹³ Article 33 of CCSFRY: The purpose of punishment in the framework of the general purpose of criminal sanctions (art 5, para 2) is: 1) preventing the offender from committing criminal offences and his rehabilitation; 2) rehabilitative influence on others not to commit criminal offences; 3) strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline.

¹⁴ Article 6, point b) CCBiH.

¹⁵ According to CCSFRY, in the socialism era, this purpose was prescribed by Article 5(2): The general purpose of drafting and imposing the criminal sanctions is to suppress the socially dangerous activities which violate or jeopardise the social values protected by the criminal code.



perpetrator's previous life, his personal situation and demeanour after the perpetration of the criminal offence, as well as other circumstances related to the perpetrator's personality. This is not an exhaustive list of mitigating and aggravating factors, and courts are allowed to determine additional factors consistent with the specified sentencing purpose.

Although the minimum prison sentence of ten years is prescribed by CCBiH for crimes against humanity, and CCSFRY lays down the minimum of five years for war crimes against civilian population and prisoners of war, both codes allow reduction of sentences below the statutory minimum. Pursuant to Article 49(b) CCBiH (same as Article 42, point 2) CCSFRY), the court may impose a sentence below the legal minimum when it finds that there are "particularly mitigating factors" and when the punishment purpose can be achieved with a reduced sanction as well. However, when it comes to crimes against humanity, a prison sentence of less than five years cannot be imposed even by way of mitigation,¹⁶ while the prison sentence for war crimes can be reduced to one-year imprisonment.¹⁷ Although the previous analysis provided practical guidelines on the application of mitigating and aggravating factors in sentencing, a review of sentences after the issuance of those guidelines shows that there has been some progress, but that mitigating and aggravating factors are still applied incorrectly in many cases, which results in inconsistent sentencing, disproportionately lenient sentences and, ultimately, diminished justice for the victims.

In particular, it was observed that after defendants get convicted of a war crime under the provisions CCSFRY, which prescribes a minimum prison sentence of five years for such crimes, and later their sentences get reduced to one year in prison pursuant to CCSFRY, when such sentences become final, they apply for conversion of the prison sentence to a fine. However, as this replacement is not provided for by CCSFRY, but it is allowed by the current criminal codes, the Court of BiH, as well as courts of the Entities and the BDBiH, incorrectly apply the existing criminal codes to criminal offences established on the basis

¹⁶ Article 50(1) a) CCBiH: When there are conditions for the reduction of punishment referred to in Article 49 (Reduction of Punishment) of this code, the court shall reduce the punishment within the following limits: If a punishment of imprisonment of ten or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to five years of imprisonment; ...

¹⁷ Article 43 of CCSFRY: (1) When there are conditions for the reduction of punishment referred to in Article 42 of this code, the court shall reduce the punishment within the following limits: 1) if a period of three years' imprisonment is prescribed as the lowest limit for the punishment for a criminal offence, it may be reduced for a period not exceeding one year of imprisonment; ...

of CCSFRY and to prison sentences imposed in accordance with CCSFRY, and replace the imprisonment of one year with a fine according to the rules of CCBiH, CCRS, CCFBiH and CCBDBiH.¹⁸ In this way, two substantive codes are applied to the same war crime, which constitutes a violation of the criminal code because a code which is not applicable has been applied to the criminal offence described in the indictment. Due to such practices of the courts, some convicted war criminals do not spend a single day in prison.

For this reason, this analysis is again accompanied by previous sentencing guidelines¹⁹ based on national sentences and international sentencing practices, seeking to assist courts in determining appropriate sentences for wartime sexual violence. The guidelines are aligned with the recommendations from the published OSCE report on the prosecution of wartime sexual violence in BiH, which calls on the justice sector to *consider developing sentencing guidelines elucidating the types of mitigating and aggravating factors that may be relevant in such cases*.²⁰

¹⁸ Article 42a CCBiH, Article 46a CCRS, Article 43a CCFBiH and Article 43a CCBD.

¹⁹ Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, 2018, p. 62-66.

²⁰ OSCE, *Towards Justice*, (June, 2017), p. 77.

III. Multiple Offence Sentences: Unclear and Inconsistent Practice

The previous analysis covering the period from 2012 to 2017 found that in the majority of analysed sentences convicting perpetrators of multiple criminal offences, the court panels did not value mitigating or aggravating factors applicable to a crime involving sexual violence. This time, a total of 24 cases were analysed, in which defendants were convicted of multiple crimes, involving at least one perpetration method or one criminal offence related to wartime sexual violence. Of these 24 cases, 16 were tried before the Court of BiH, and 8 before entity courts.

This time, it was found that in an equal number of cases in which the perpetrators were convicted of multiple criminal offences (8 out of 16), the state-level panel valued aggravating factors applicable to sexual violence. However, when it comes to entity courts, in none of the eight analysed cases did the court panel value any aggravating factors applicable to sexual violence.

As mentioned above, sentences for multiple criminal offences in which panels do not value mitigating and aggravating factors specific to sexual violence do not reflect the severity of sexual violence or suffering of the victims.²¹

²¹ See p. 18. Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing, 2018*. It was concluded that the lack of individualised analysis in sentences for multiple criminal offences primarily contributes to the failure to establish aggravating factors that are specific to the criminal offence of sexual violence. As there is no description of such circumstances and the share of this criminal offence in the punishment, sentences for multiple criminal offences do not reflect the severity of sexual violence or suffering of the victims.

A. ANALYSIS OF CASES BEFORE THE COURT OF BIH – NEGLECTING THE PURPOSE AND SPECIFIC CIRCUMSTANCES RELATED TO WARTIME SEXUAL VIOLENCE

At the state level, from 2016 to 2023,²² out of 16 war crimes cases²³ in which the perpetrators were convicted of multiple crimes that included sexual violence, none of the judgements took into account the purpose of criminal sanctions, namely the protection and satisfaction of the victim.²⁴

In eight of these sixteen cases, the Court of BiH imposed sentences after an individualised analysis of specific aggravating and mitigating factors related to wartime sexual violence or the specific perpetrator.

For example, in the case against defendant **Ibrahim Demirović and others**²⁵ the defendant was sentenced to ten years in prison because he perpetrated the war crime against civilian population, by means of inhumane treatment, forced labour and rape. As for the aggravating factors pertaining to sexual violence only, the court valued the fact that the defendant

²² This analysis included the cases and judgements that were not included in the previous one due to unavailability at the time, as well as the cases in which a first instance judgement was passed and included in the previous analysis, but the first instance judgement was followed by the second instance judgement or the first instance judgement was reversed and a new one was rendered, followed by the second instance judgement in some cases.

²³ Pertaining to these 15 cases, the following 30 first instance, second instance and third instance judgements were analysed on the state level: Judgement of the Court of BiH no. S1 1 K 038523 22 Kri of 24.5.2022; Judgement of the Court of BiH no. S1 1 K 034278 20 of 27.5.2022 and no. S1 1 K 034278 22 Krž of 25.10.2022; Judgement of the Court of BiH no. S1 1 K 015591 16 Kri of 17.11.2017 and no. S1 1 K 015591 18 Krž 2 of 23.3.2018; Judgement of the Court of BiH no. S1 1 K 017146 15 Kri of 13.10.2017 and no. S1 1 K 017146 18 Krž 2 of 21.9.2018; Judgement of the Court of BiH no. S1 1 K 017182 16 Kri of 2.10.2018 and no. S1 1 K 017182 19 Krž of 6.6.2019; Judgement of the Court of BiH no. S1 1 K 018013 15 Kri of 19.5.2017, and no. S1 1 K 018013 17 Krž 9 of 7.11.2017 and Judgment of the Appellate Division of the Court of BiH no. S1 1 K 018013 17 Kžk of 21.12.2018; Judgement of the Court of BiH no. S1 1 K 008494 17 Kžk of 3.9.2018; Judgement of the Court of BiH no. S1 1 K 016447 14 Kri of 7.3.2018 and no. S1 1 K 016447 17 Krž 2 of 3.11.2017; Judgement of the Court of BiH no. S1 1 K 021173 16 Kri of 17.11.2017 and no. S1 1 K 021173 18 Krž 2 of 8.5.2018; Judgement of the Court of BiH no. S1 1 K 020380 16 Kri of 15.1.2018 and no. S1 1 K 020380 18 Krž 2 of 24.5.2018; Judgement of the Court of BiH no. S1 1 K 020032 15 Kri of 9.12.2016 (this first instance judgement was used in the previous analysis, but a second instance judgement was passed in the meantime upon appeal, quashing some acquitting parts of the first instance judgement), namely the Judgment of the Court of BiH no. S1 1 K 020032 17 Krž 11 of 14.4.2017, and in relation to the quashed part, the Judgement of the Court of BiH no. S1 1 K 020032 17 Kžk of 3.11.2017 was rendered; Judgement of the Court of BiH no. S1 1 K 021351 17 Kri of 11.6.2021 and no. S1 1 K 021351 21 Krž 2 of 9.3.2022; Judgement of the Court of BiH no. S1 1 K 023242 17 Kri of 22.3.2019 and no. S1 1 K 023242 19 Krž 17 of 7.10.2019; Judgement of the Court of BiH no. S1 1 K 024006 17 Kri of 6.9.2018 and no. S1 1 K 024006 18 Krž of 31.1.2019; Judgement of the Court of BiH no. S1 1 K 020821 16 Kri of 30.10.2018 and no. S1 1 K 020821 18 Krž 18 of 15.2.2019; Judgement of the Court of BiH no. S1 1 K 019908 16 Kri of 30.9.2020. and no. S1 1 K 019908 20 Krž 5 of 19.2.2021.

²⁴ Article 6, point b) CCBiH..

²⁵ *Ibrahim Demirović and others*, Judgement of the Court of BiH no. S1 1 K 0 17146 15 Kri of 13.10.2017, para 388.



demonstrated persistence in the crime perpetration by repeatedly raping the injured party over a long period of time, taking advantage of her position, as well as of his affiliation to, and his command function in the armed formation at the time. The second instance court²⁶ overturned this sanction and increased it to thirteen years of imprisonment, noting as an additional aggravating factor that the defendant perpetrated rape himself in order to humiliate, discriminate and degrade the injured party's personality, and that he did so by taking her out of the detention facility where the injured party was detained with her parents and her underage brother.

Specific aggravating factors related to sexual violence were also valued in the following cases: **Momir Tasić and others**²⁷, **Duško Suvara**²⁸, **Nihad Bojadžić**²⁹, **Emir Drakovac and others**³⁰, **Slobodan Karagić**³¹, **Mato Baotić**³² and **Saša Cvetković**³³.

The previous analysis for the period from 2012 to 2017 found that 8 out of 13 judgments at the state level did not contain any reference to sexual violence in the sentencing part.³⁴ The analysis of judgments passed afterwards found that there has been some shift, and that now at the state level there is an equal number of sentences for multiple criminal offences, 8 out of 16 analysed cases, that do not include a review of aggravating and mitigating factors related to the perpetrated sexual violence in the sentencing part.

²⁶ Judgement of the Court of BiH no. S1 1 K 017146 18 Krž 2 of 21.9.2018, paras 181 and 182.

²⁷ *Momir Tasić and others*, Judgement of the Court of BiH no. S1 1 K 024006 17 Kri of 6.9.2018, paras 241, 242 and 244. This part of the judgement was upheld by the second instance judgement of the Court of BiH no. S1 1 K 024006 18 Krž of 31.1.2019, paras 139 and 140.

²⁸ *Duško Suvara*, Judgement of the Court of BiH no. S1 1 K 034278 20 of 27.5.2022, paras 244 and 245, and no. S1 1 K 034278 22 Krž of 25.10.2022, paras 71 and 72.

²⁹ *Nihad Bojadžić*, Judgement of the Court of BiH no. S1 1 K 008494 17 Kžk of 3.9.2018, para 582.

³⁰ *Emir Drakovac and others*, Judgement of the Court of BiH no. S1 1 K 016447 14 Kri of 7.3.2017, paras 229 and 230, and Judgement of the Court of BiH no. S1 1 K 016447 17 Krž 2 of 3.11.2017, paras 123-125.

³¹ *Slobodan Karagić*, Judgement of the Court of BiH no. S1 1 K 020380 16 Kri of 15.1.2018, para 202, and Judgement of the Court of BiH no. S1 1 K 020380 18 Krž 2 of 24.5.2018, paras 190 and 191.

³² *Mato Baotić*, Judgement of the Court of BiH no. S1 1 K 020032 15 Kri of 9.12.2016, para 221 - this first instance judgement was used in the previous analysis, but a second instance judgement was passed in the meantime upon appeal, quashing some acquitting parts of the first instance judgement, namely the Judgment of the Court of BiH no. S1 1 K 020032 17 Krž 11 of 14.4.2017, paras 116 and 118, and in relation to the quashed part, the Judgement of the Court of BiH no. S1 1 K 020032 17 Kžk of 3.11.2017 was rendered, convicting the defendant of three more counts of the indictment that did not refer to sexual violence.

³³ *Saša Cvetković*, Judgement of the Court of BiH no. S1 1 K 023242 17 Kri of 22.3.2019, paras 289 and 290, and Judgement of the Court of BiH no. S1 1 K 023242 19 Krž 17 of 7.10.2019, para 60.

³⁴ See Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, 2018, p. 19.

So, in the case against defendants **Goran Mrđa and others**³⁵ the Court of BiH did not state any aggravating factor in relation to the perpetrated rape, but generally referred to aggravating factors pertaining to all criminal offences and acts of the defendants, even though the defendant Goran Mrđa took the injured party to a room, where he forcibly undressed her, threatening her with a knife, knocked her on her back, and then four of the five people who entered the house urinated on the injured party and took turns raping her.

The Court of BiH followed the same pattern in the remaining seven cases involving multiple war crimes, and when deciding on the sentence, it did not refer to any aggravating (or mitigating) factors specific for the perpetrated sexual violence. These were cases against defendants **Šaban Haskić and others**³⁶, **Senad Džananović and others**³⁷, **Edhem Žilić**³⁸, **Ivan Medić and others**³⁹, **Novica Tripković**⁴⁰, **Jovan Tintor**⁴¹ and **Boris Bošnjak and others**⁴².

B. ANALYSIS OF CASES AT THE ENTITY LEVEL: UTTER NEGLIGENCE OF WARTIME SEXUAL VIOLENCE

The previous analysis of judgments at the entity level between 2012 and 2017 found that out of fifteen first instance judgements involving multiple criminal offences, only two judgments referred to aggravating factors pertaining to sexual violence for the purpose of sentencing.⁴³

³⁵ *Goran Mrđa and others*, Judgement of the Court of BiH no. S1 1 K 018013 17 Kžk of 21.12.2018; para 544.

³⁶ *Šaban Haskić and others*, Judgement of the Court of BiH no. S1 1 K 017182 16 Kri of 2.10.2018, paras 667–672. The first instance judgement was upheld by the second instance judgement of the Court of BiH no. S1 1 K 017182 19 Krž of 6.6.2019.

³⁷ *Senad Džananović and others*, PJudgement of the Court of BiH no. S1 1 K 021351 17 Kri of 11.6.2021, paras 923 and 925. This judgement was upheld by the second instance judgement of the Court of BiH no. S1 1 K 021351 21 Kžk of 9.3.2018, para 325.

³⁸ *Edhem Žilić*, Judgement of the Court of BiH no. S1 1 K 015591 16 Kri of 17.11.2017, paras 317–321, and no. S1 1 K 015591 18 Krž 2 of 23.3.2018, paras 77 and 78.

³⁹ *Ivan Medić and others*, Judgement of the Court of BiH no. S1 1 K 021173 16 Kri of 17.11.2017, para 213, and no. S1 1 K 021173 18 Kžk of 8.5.2018, para 36.

⁴⁰ *Novica Tripković*, Judgement of the Court of BiH no. S1 1 K 038523 22 Kri of 24.5.2022, para 65.

⁴¹ *Jovan Tintor*, Judgement of the Court of BiH no. S1 1 K 020821 16 Kri of 30.10.2018, paras 563–566, and no. S1 1 K 020821 18 Krž 18 of 15.2.2019, para 345.

⁴² *Boris Bošnjak and others*, Judgement of the Court of BiH no. S1 1 K 019908 16 Kri of 30.9.2020, paras 884–888, and no. S1 1 K 019908 20 Krž 5 of 19.2.2021, paras 197 and 198.

⁴³ See Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, 2018, p. 21.



This time, eight cases⁴⁴ that were conducted before entity courts were analysed, in which the perpetrators were convicted of multiple criminal offences from 2016 to 2023.⁴⁵ **In none of these eight cases**, aggravating or mitigating factors specifically related to sexual violence **are valued explicitly** for sentencing purposes.

Thus, in the case against defendants **J. A.** and **M. Đ.**⁴⁶ defendant M. Đ. was convicted of raping the victim – who was detained in a military prison – three times over a period of three to four days, taking advantage of his position and the victim’s helplessness and fear.⁴⁷ However, when deciding on the appropriate punishment, the court did not value any of these factors or refer to their specific impact on the victim, but only repeated the general circumstances listed in Article 41 CCSFRY.

It was also noticed that in different judgements involving different defendants and different facts, the courts provided identical reasoning using the copy-paste method, repeating the same grammatical errors, as in the cases against defendants **D. D.**⁴⁸

⁴⁴ Pertaining to these eight cases, the following 15 first instance, second instance and third instance judgements were analysed on the entity level: Judgment of the Cantonal Court in Novi Travnik no. 06 0 K 009862 19 K 2 of 20.5.2019 and Judgment of the Supreme Court of the Federation of BiH no. 06 0 K 009862 19 Kž 2 of 14.11.2019; Judgment of the Cantonal Court in Sarajevo no. 09 K 023306 17 K 2 of 23.10.2018 (the previous first instance judgement in this case was included in the previous analysis, but that judgement was reversed and remanded for a new trial, and this new first instance judgement was passed) and the Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 023306 19 Kžk of 30.1.2020; Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 000748 16 Kžž 2 of 9.3.2017 (third instance, while the reversed first instance judgement was included in the previous analysis); Judgment of the Cantonal Court in Sarajevo no. 09 K 023862 15 K dated 17.6. 2016 (used in the previous analysis, but now there is also the second instance judgement that was not previously analysed) and Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 023862 16 Kž 9 of 6.4.2017; Judgment of the Supreme Court of the Federation of BiH no. 04 0 K 005715 17 Kžk of 22.3.2019 and Judgment of the Supreme Court of the Federation of BiH no. 04 0 K 005715 19 Kžž from 3.3.2021; Judgment of the District Court in Banja Luka no. 11 0 K 017578 16 K of 31.10.2016 and Judgment of the Supreme Court of the Republika Srpska no. 11 0 K 017578 17 Kž of 21.3.2017; Judgment of the Cantonal Court in Zenica no. 04 0 K 007756 16 K of 4.10.2017 and Judgment of the Supreme Court of the Federation of BiH no. 04 0 K 007756 18 Kž of 8.5.2018; Judgment of the Cantonal Court in Mostar no. 07 0 K 013762 18 K 2 of 25.2.2019 and Judgment of the Supreme Court of the Federation of BiH no. 07 0 K 013762 19 Kž 2 of 5.11.2019.

⁴⁵ This analysis included the cases and judgements that were not included in the previous one due to unavailability at the time, as well as the cases in which a first instance judgement was passed and included in the previous analysis, but the first instance judgement was followed by the second instance judgement or the first instance judgement was reversed and a new one was rendered, followed by the second instance judgement in some cases.

⁴⁶ Unlike the Court of BiH, entity courts sometimes publish full names and surnames of defendants in their judgements, and sometimes only their initials. For this reason, defendants’ initials were also used in this analysis in cases where only they were available.

⁴⁷ *J. A. and M. Đ.*, Judgment of the Cantonal Court in Novi Travnik no. 06 0 K 009862 19 K 2 of 20.5.2019, p. 39-40

⁴⁸ *D. D.*, Judgment of the Cantonal Court in Sarajevo no. 09 K 023862 15 K of 17.6.2016 (used in the previous analysis, but now there is also the second instance judgement which was not previously analysed), p. 19, and Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 023862 16 Kž 9 of 6.4.2017, p. 17.

and **Milkan Gojković**⁴⁹. In both cases, against D.D.⁵⁰ and against Milkan Gojković⁵¹, although the facts of rape, perpetrators and injured parties were completely different, the first instance court provided the same explanation, including the same grammatical errors: ... *as an aggravating factor, the court valued harmful consequences of the criminal offence for the injured party's health, and the court did not find any other aggravating factors.*

Entity courts acted in the same or similar way in the cases against defendants **Mato Martić**⁵², **N. E., M. A. and K. S.**⁵³, **D. V.**⁵⁴, **Goran Smiljanić and others**⁵⁵ and **Mladen Milanović**⁵⁶.

⁴⁹ *Milkan Gojković*, Judgment of the Cantonal Court in Sarajevo no. 09 K 023306 17 K 2 of 23.10.2018 (the previous first instance judgment in this case was included in the previous analysis, but it was reversed and remanded for a new trial, and this new first instance judgement was rendered).

⁵⁰ *D. D.*, p. 19. Judgements of 17.6.2016.

⁵¹ *Milkan Gojković*, p. 66. Judgements of 23.10.2018.

⁵² *Mato Martić*, Judgment of the Supreme Court of the Federation of BiH no. 04 0 K 005715 17 Kžk 9 of 22.3.2019, p. 25, and no. 04 0 K 005715 19 Kžž of 3.3.2021, p. 10.

⁵³ *N. E., M. A. and K. S.*, Judgment of the Cantonal Court in Zenica no. 04 0 K 007756 16 K of 4.10.2017, p. 29, and Judgment of the Supreme Court of the Federation of BiH no. 04 0 K 007756 18 Kž of 8.5.2018, p. 16.

⁵⁴ *D. V.*, Judgment of the Cantonal Court in Mostar no. 07 0 K 013762 18 K 2 of 25.2.2019, p. 34. This judgement was confirmed by the Judgment of the Supreme Court of the Federation of BiH no. 07 0 K 013762 19 Kž 2 of 5.11.2019.

⁵⁵ *Goran Smiljanić and others*, Judgment of the District Court in Banja Luka no. 11 0 K 017578 16 K of 31.10.2016, p. 26. This judgement of the first instance court was confirmed by the judgment of the Supreme Court of RS no. 11 0 K 017578 17 Kž of 21.3.2017, and the relevant part related to the sanction can be found on p. 12.

⁵⁶ *Mladen Milanović*, Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 000748 16 Kžž 2 of 9.3.2017, p. 10 (third instance, while the reversed first instance judgement was included in the previous analysis).



C. UNCLEAR DECISION MAKING AND DISREGARD FOR VICTIMS

The analysed state-level judgements for multiple criminal offences involving wartime sexual violence still do not provide enough insight into the way in which wartime sexual violence should be punished in those cases. When deciding on sentences, the Court of BiH did not take into account the purpose of criminal sanctions related to the protection and satisfaction of the victim in any of the cases. In addition, half of the analysed cases contain only general formulations regarding the aggravating and mitigating factors that were considered at the sentencing stage, and no specific factors relevant for the crime and the perpetrator are mentioned.

The situation is even worse on the entity level. None of the analysed judgements contained specific aggravating or mitigating factors related to wartime sexual violence perpetrated with another war crime.

Due to such behaviour, existing case law is very poor in terms of positive examples that could help future practices of the courts in terms of sentencing of wartime sexual violence.

IV. Convictions Solely for Sexual Violence: Insufficient Regard for Specific Factors

A total of 13 cases with a total of 27 judgements were analysed at the state level involving perpetrators who were convicted for wartime sexual violence only, and two cases with a total of four judgements were analysed at the entity level.⁵⁷ It was found that in a significant number of cases, when imposing sentences, the courts still did not value any specific factors related to sexual violence.

A. VALUING SPECIFIC AGGRAVATING OR MITIGATING FACTORS

Like the previous one, this analysis of conviction cases at the state level⁵⁸ also points to the conclusion⁵⁹ that in a number of **cases, court panels do tend to identify specific aggravating and mitigating factors related to sexual violence**, eschewing the pro forma language.

Thus, in the case against the defendant **Jozo Đojić** the first instance court considered the following specific aggravating factors: *... the particular persistence and recklessness demonstrated by the defendant when raping the injured party, who was a minor at the time; he tore the five-month-old child from her arms and threatened to harm him, threatened to kill her husband who was in the camp, ignored the injured party's pleas and resistance, or cries of*

⁵⁷ In most cases, first instance and second instance judgements are passed, but in some cases, the first instance judgement is reversed one or more times, which is why the judgements outnumber the cases.

⁵⁸ The judgements are as follows: Judgement of the Court of BiH no. S1 1 K 005151 18 Kri of 27.2.2019 and no. S1 1 K 005151 19 Krž of 9.7.2019; Judgement of the Court of BiH no. S1 1 K 017362 14 Krl of 13.11.2017 and no. S1 1 K 017362 17 Krž 2 of 28.2.2018; Judgement of the Court of BiH no. S1 1 K 018442 15 Krl of 14.9.2018 and no. S1 1 K 018442 18 Krž of 14.2.2019; Judgement of the Court of BiH no. S1 1 K 018560 21 Krž 2 of 24.8.2021 and no. S1 1 K 018560 21 Kžk of 21.12.2021; Judgement of the Court of BiH no. S1 1 K 021644 18 Kri of 4.12.2018 and no. S1 1 K 021644 19 Krž of 12.3.2019; Judgement of the Court of BiH no. S1 1 K 023309 17 Kri of 11.10.2017 and no. S1 1 K 023309 17 Krž of 19.1.2018; Judgement of the Court of BiH no. S1 1 K 023906 17 Kri of 5.7.2018, Decision of the Court of BiH no. S1 1 K 023906 18 Krž 3 of 30.11.2018 and Judgment of the Appellate Panel of the Court of BiH no. S1 1 K 023906 18 Kžk of 5.7.2019; Judgement of the Court of BiH no. S1 1 K 024032 18 Kri of 19.9.2018 and no. S1 1 K 024032 18 Krž 3 of 24.12.2018; Judgement of the Court of BiH no. S1 1 K 026633 17 Kri of 12.10.2018 (reversed and a new first instance conviction was passed), no. S1 1 K 026633 19 Krž 5 of 26.3.2019 and no. S1 1 K 026633 19 Kžk of 18.7.2019; Judgement of the Court of BiH no. S1 1 K 028283 19 Kri of 14.9.2020 and no. S1 1 K 028283 20 Krž of 21.12.2020; Judgement of the Court of BiH no. S1 1 K 033539 19 Kri of 3.12.2020 and no. S1 1 K 033539 21 Krž 2 of 8.6.2021; Judgement of the Court of BiH no. S1 1 K 041911 21 Kro of 11.4.2022; Judgement of the Court of BiH no. S1 1 K 041154 21 Kri of 18.11.2022 and no. S1 1 K 041154 22 Krž 2 of 30.3.2023.

⁵⁹ See p. 24: *... do tend to identify specific aggravating and mitigating factors, eschewing the pro forma language.* "Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing."

several children who were in the apartment, he was hitting and slapping her constantly, and pulled the injured party's hair, demonstrating a particular degree of brutality and insensitivity; the consequences for the victim include impaired mental health and the feeling of humiliation and degrading which exists to this day because of the difficult incident that marked her and made her life difficult both in the family environment and in the community where she continued to live, as she testified at the main trial, in a visibly shaken state.⁶⁰

In the case against the defendant **Milisav Ikonić and others** the multiple acts of rape and the defendant's persistence during six nights, almost consecutively, when he raped the injured party, and also during her stay in the school, and the fact that it was her first sexual experience were valued as aggravating factors.⁶¹

Specific aggravating factors related to rape were also valued at the sentencing stage and in cases against defendants **Adem Kostjerevac⁶², Vuk Ratković⁶³, Žarko Vuković⁶⁴, Elvir Muminović and others⁶⁵**, and **Radovan Veljović⁶⁶**.

However, in three cases at the state level, the court partially values certain circumstances of the crime perpetration, but does not consider them aggravating. For example, in the case against defendant **Dragan Janjić⁶⁷** the court does not find any aggravating factors because ... *it was about one victim whom he had raped once, the victim did not belong to the category of the detained/sick/minors or elderly persons, the defendant did not use any form of extreme*

⁶⁰ Jozo Dojić, Judgement of the Court of BiH no. S1 1 K 017362 14 Krl of 13.11.2017, para 119, and no. S1 1 K 017362 17 Krž 2 of 28.2.2018, para 96.

⁶¹ Milisav Ikonić and others, Judgement of the Court of BiH no. S1 1 K 018442 15 Krl of 14.9.2018, paras 167–169, and Judgement of the Court of BiH no. S1 1 K 018442 18 Krž of 14.2.2019, para 51.

⁶² Adem Kostjerevac, Judgement of the Court of BiH no. S1 1 K 018560 21 Krž 2 of 24.8.2021, and Judgement of the Court of BiH no. S1 1 K 018560 21 Kžk of 21.12.2021, paras 230, 232 and 233.

⁶³ Vuk Ratković, Judgement of the Court of BiH no. S1 1 K 024032 18 Kri of 19.9.2018, para 246, which was confirmed by the second instance judgement no. S1 1 K 024032 18 Krž 3 of 24.12.2018, and the part related to the valued aggravating factors, para 83.

⁶⁴ Žarko Vuković, Judgement of the Court of BiH no. S1 1 K 023309 17 Kri of 11.10.2017, para 316, which was confirmed by the second instance judgement no. S1 1 K 023309 17 Krž of 19.1.2018.

⁶⁵ Elvir Muminović and others, Judgement of the Court of BiH no. S1 1 K 023906 17 Kri of 5.7.2018, Decision of the Court of BiH no. S1 1 K 023906 18 Krž 3 of 30.11.2018 and Judgment of the Appellate Panel of the Court of BiH no. S1 1 K 023906 18 Kžk of 5.7.2019, para 182.

⁶⁶ Radovan Veljović, Judgement of the Court of BiH no. S1 1 K 041154 21 Kri of 18.11.2022, para 266.

⁶⁷ Dragan Janjić, Judgement of the Court of BiH no. S1 1 K 026633 17 Kri of 12.10.2018 (reversed, followed by a new first instance conviction), no. S1 1 K 026633 19 Krž 5 of 26.3.2019 and no. S1 1 K 026633 19 Kžk of 18.7.2019, paras 59 and 60.

violence during the crime perpetration apart from the common form that characterises rape in itself, the injured party undoubtedly suffered physical and psychological trauma as a rape victim, which she explicitly stated in her testimony, although these consequences, no matter how severe they were for the victim, did not exceed the level which is common for this type of violence. At the same time, the court does not value the following factors: that the defendant first went to the victim's apartment looking for her; the next day, he came back to the same apartment, and took the victim and her minor son, as well as her mother-in-law with two children out, and took them to the premises of the local police station, where he kept the victim and her minor son in a room, while he told her mother-in-law that she was free to go home with her children, at which point, fearing what would happen to her and her son, the injured party grabbed her son and ran out of the room and of the police station, only to faint out of great fear and fall to the ground; when she regained consciousness, she saw the defendant standing next to her, who then started kicking her, and then took her minor son and handed him over to her mother-in-law, telling them to go home; he took the victim into a small room in the police station, where he threatened her not to try to escape, then ordered her to undress, and then forced the injured party to satisfy him orally, and then raped her.

The court acted in a similar way in cases against the defendant **Saša Ćurčić**⁶⁸, as well as the defendant **Radovan Paprica and others**.⁶⁹

In addition to these state-level cases where specific factors related to sexual violence were valued, two identified cases of conviction for rape only at the entity level were also analysed,⁷⁰ and it was found that **specific aggravating factors related to sexual violence**, were partially valued in one case, but not in the other. In the case against defendant **Predrag Đurović**⁷¹ the Cantonal Court in Sarajevo valued the grave and permanent consequences of the perpetrated crime for the injured party's mental health as aggravating, which were

⁶⁸ *Saša Ćurčić*, Judgement of the Court of BiH no. S1 1 K 028283 19 Kri of 14.9.2020, paras 225 and 227, and no. S1 1 K 028283 20 Krž of 21.12.2020, paras 85-87.

⁶⁹ *Radovan Paprica and others*, Judgement of the Court of BiH no. S1 1 K 033539 19 Kri of 3.12.2020, para 319 and no. S1 1 K 033539 21 Krž 2 of 8.6.2021, paras 97 and 98.

⁷⁰ The judgements are as follows: Judgment of the Cantonal Court in Sarajevo no. 09 0 K 022246 16 K 2 of 30.1.2017 and Judgment of the Supreme Court of the Federation of BiH no. 09 0 K 022246 17 Kž 5 of 20.6.2017; Judgment of the District Court in Doboj no. 13 0 K 003666 16 K 2 of 25.1.2017 and Judgment of the Supreme Court of RS no. 13 0 K 003666 17 Kž 2 of 18.4.2017.

⁷¹ *Predrag Đurović*, Judgement of the Cantonal Court in Mostar no. 09 0 K 022246 16 K 2 of 30.1.2017, p. 44. This judgement was amended by the second instance judgement of the Supreme Court of the Federation of BiH no. 09 0 K 022246 17 Kž 5 of 20.6.2017 reducing the sentence because the first instance court valued defendant's prior criminal record excessively as an aggravating factor.

established in the expert's findings, i.e., that she was severely traumatised by sexual torture in 1992, and developed chronic post-traumatic stress disorder that led to severe dysfunctions in terms of memory, attention, opinion, emotional and volitional spheres.

B. APPLYING GENERAL SENTENCING RULES REFERRED TO IN ARTICLE 48 CCBiH (ARTICLE 41 CCSFRY) WITHOUT DETERMINING SPECIFIC CIRCUMSTANCES

In a number of judgments at the state and entity level, the courts deciding on the sentence generally referred to provisions of Article 39⁷² CCBiH (or Article 33⁷³ when applying CCSFRY) that prescribe the purpose of punishment, or provisions of Article 48⁷⁴ CCBiH (or Article 41⁷⁵ CCSFRY when applying CCSFRY) on the general sentencing rules. At the same time, courts do not determine specific aggravating (nor mitigating) factors pertaining to the criminal offense.

For example, at the state level, in the case against **Milomir Davidović** the court failed to find any aggravating factors on the part of the defendant, even though they brought two girls from the detention centre to the apartment, one of whom was a minor, after which the defendant and other Serb soldiers came to the apartment and the defendant raped one victim, who was then raped by other Serb soldiers, after which they returned both victims to the detention centre together. The court only relies on factors referred to in Articles 39 and 48 CCBiH.⁷⁶

72 The Purpose of Punishment – Article 39: The purpose of punishment is: a) To express the community's condemnation of a perpetrated criminal offence; b) To deter the perpetrator from perpetrating criminal offences in the future and encourage his rehabilitation; c) To deter others from perpetrating criminal offences; and d) To increase the consciousness of citizens of the danger of criminal offences and of the fairness of punishing perpetrators.

73 Purpose of punishment – Article 33: The purpose of punishment in the framework of the general purpose of criminal sanctions (Article 5 (2)) is: 1) preventing the offender from committing criminal acts and his rehabilitation; 2) rehabilitative influence on others not to commit criminal acts; 3) strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline.

74 General Principles of Meting out Punishments – Article 48: (1) The court shall impose the punishment within the limits provided by law for that particular offence, having in mind the purpose of punishment and taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating factors), and, in particular: the degree of guilt, 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.

75 General principles in fixing punishment – Article 41: (1) The court shall fix the punishment for a criminal act within the limits provided by statute for such an act, taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating factors), and, in particular, the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

76 Milomir Davidović, Judgment of 27.2.2019, paras 224–227.

The Court of BiH applies the same approach in the cases against **Milan Todović**⁷⁷, as well as **Damir Miskin**⁷⁸.

As for the entity cases that refer exclusively to sexual violence, apart from the case of the Cantonal Court in Sarajevo (which partially valued the special circumstances of perpetration of rape, as shown in the previous paragraphs), only one other case was identified, but particularly aggravating factors related to rape were not valued in it. Namely, in the case against **V. N.**⁷⁹ the defendant was convicted of raping the victim on several occasions on different days. The court did not find any aggravating factors on the part of the defendant (such as persistence or repetition), as the Court stated: *The Panel applied the provisions of Article 41 (1) CCSFRY, the transposed code, and meted out the punishment within the sentencing range prescribed by the code for the given offence, bearing in mind the purpose of punishment and taking into account all the factors that impact the level of the sentence. Regarding the criminal offense, the Panel considered a punishment necessary to satisfy the legal elements and goals, that must be necessary and proportionate to the severity of the threat or violation of the protected good, the suffering of the victim, for the punishment to deter others not to commit criminal offences and to demonstrate social condemnation of the defendant's behaviour, motives from which the offence was committed, the circumstances under which the offence was committed, and the individualisation of the punishment; therefore, in sentencing the defendant, the court valued all the factors that could affect the type and level of punishment, taking into account: the defendant's personal and individual characteristics, defendant's behaviour after the committed offence as he did not commit any other criminal offences, his personal and family circumstances, as well as mitigating factors on the part of the defendant, as follows: he had not been previously convicted of any offence, he is elderly, father of two children, 23 years have passed since the offence was committed. The Panel did not find any aggravating factors on the part of the defendant.*⁸⁰

Furthermore, it was observed, as stated in the previous chapter in relation to multiple criminal offences, that court panels at the state level completely ignore the purpose of

⁷⁷ *Milan Todović*, Judgment of 4.12.2018. which was upheld by the second instance judgment of 12.3.2019.

⁷⁸ *Damir Miskin*, Judgment of the Court of BiH no. S1 1 K 041911 21 Kro of 11.4.2022, para 47.

⁷⁹ *V. N.*, Judgment of the District Court in Doboj no. 13 0 K 003666 16 K 2 of 25.1.2017.

⁸⁰ *Ibid.*, p. 26. The second instance court, by Judgment of the Supreme Court of the RS no. 13 0 K 003666 17 Kž 2 of 18.4.2017, p. 5, reduced the prison sentence imposed by the first instance court, stating that due to the absence of aggravating factors, the purpose of punishment can be achieved with a more lenient sentence.



criminal sanctions, which refers to *the protection and satisfaction of the victim of a criminal offence*. Only one of the analysed judgments at the state level, which refer exclusively to sexual violence, mentions the victim's satisfaction as an element of the purpose of sentencing the defendant, namely the case against **Milomir Davidović**: *Therefore, this kind of convergence of different details on the part of the defendant in its correlation, in this specific case, undoubtedly reflects the nature of particularly mitigating factors in light of Article 49 CCBiH, which is why the Panel decided to impose a prison sentence of 7 (seven) years, finding that such a sentence will meet the purpose of special and general prevention, and ultimately provide certain satisfaction to the victim of the criminal offence, which also constitutes one of the elements of the purpose of sentencing.*⁸¹

However, even in this judgment, the defendant's prison sentence was reduced, so it is obvious that this reference by the court was purely of a formalistic nature, without really taking into account the purpose of the sanction referred to in Article 6 CCBiH.

As stated earlier in the section on judgments for multiple criminal offenses, the absence of an individualised analysis of aggravating and mitigating factors conceals the severity of sexual violence and creates confusion about the appropriate punishment. The application of mitigating and aggravating factors is inconsistent throughout BiH and, in some cases arbitrary, under the justification of judicial discretion. The result is that the sanctions are often arbitrary, and with such sentencing, not only the victims but also the general public can rightly ask what kind of a sentencing policy the courts in BiH apply in case of perpetrators of criminal offences the victims of which are mostly women.

⁸¹ *Milomir Davidović*, Judgment of the Court of BiH no. S1 1 K 005151 18 Kri of 27.2.2019, para 231.

V. Affording Excessive Weight to Negligible Mitigating Factors

As the previous analysis showed also, the courts throughout BiH generally still afford excessive weight to family circumstances of the defendant, their behaviour in court and assistance they provided to the victims as mitigating factors.

A. SHOULD DEFENDANTS WHO ARE MARRIED OR HAVE CHILDREN RECEIVE LOWER SENTENCES?

For numerous reasons, family circumstances of the defendant do not deserve more than minimal attention when valuing the factors for the purposes of sentencing for war crimes.

For example, in the second instance judgment of the Court of BiH, the Prosecutor's Office claimed in the appeal that the first instance panel, when sentencing the defendant **Ivan Medić** afforded weight to the established mitigating factor (family man and father of three children) which has no significance as a mitigating factor or anything to do with the committed criminal offence.⁸² The Supreme Court of the Federation of BiH, in the case against **Ž. R.** pointed out that the court should not have considered as a mitigating factor on the side of the defendant that he is a father of two sons, one of whom lives with him because he is unemployed, because the proceedings did not establish whether the son of Ž. R. is unemployed and whether he lives with him.⁸³ In the first instance judgment against **D. J.**⁸⁴, in the part referring to the criminal sanction, the Court of BiH took into account the opinion of the Panel, which explained that the behaviour of the defendant during the court proceedings was appropriate, suitable and in accordance with the expectations of the Panel, which in itself does not represent either an aggravating or a mitigating factor.

Furthermore, the second instance judgment against **Mladen Milanović** found the defendant guilty and sentenced him to one year in prison. When imposing the sentence, the second instance court found that the defendant's lack of previous conviction is a mitigating factor, as

⁸² *Ivan Medić and others*, second instance judgment of the Court of BiH no. S1 1 K 021173 18 Krž 2 of 8.5.2018.

⁸³ *Ž. R. and G. E.*, second instance judgment of the Supreme Court of the Federation BiH, no. 07 0 K 011492 16 Kž of 9.2.2017.

⁸⁴ *Dragan Janjić*, first instance judgment of the Court of BiH no. S1 1 K 026633 17 Kri of 12.10.2018.

well as his family circumstances (that he is married and father of two children), and afforded the said mitigating factor the character of particularly mitigating factor.⁸⁵ This Prosecutor's Office filed an appeal against this judgment, pointing out that the second instance court afforded excessive importance to the mitigating factor on the part of the defendant, and that the established mitigating factors are not of such a nature that they should be deemed particularly mitigating factors. The Prosecutor's Office considered that these factors allowed the court to impose a more lenient sentence on the defendant, within the statutory range, but not to reduce his sentence below the statutory minimum. Ruling on the appeal by the Prosecutor's Office, the Supreme Court of the Federation of BiH concluded in the third instance judgment that the appeal is well-founded in indicating that the imposed prison sentence of one year was too lenient. However, the third instance judgment upheld the position of the second instance court that the established mitigating factors (lack of previous conviction and family circumstances, i.e., that he is married and father of two) are properly characterised as particularly mitigating, but that they were afforded excessive importance, and that the second instance court correctly reduced the prison sentence below the statutory minimum (under five years), however, the court could not have reduced it to the lowest statutory measure, i.e., that the court should not have imposed the most minimum prison sentence of one year. For this reason, the third instance court increased the prison sentence by four months and sentenced the defendant to one year and four months in prison.

In addition, in the first instance judgment of the Court of BiH against **Edhem Žilić** the Panel valued his personal and family circumstances as mitigating factors, but pointed out that *these factors do not constitute particularly mitigating factors that would serve as a ground for reducing the sentence below the statutory minimum.*⁸⁶

Some courts take personal and family circumstances into account, such as the Cantonal Court in Zenica, which in the case against **N. E., M. A.** and **K. S.** took into account their personal and family circumstances, such as the fact that the defendants are fathers of two children, and sentenced them to reduced prison sentences of below the statutory minimum.⁸⁷ N. E., M. A. and K. S. were sentenced to only one year in prison each for the physical and psychological

⁸⁵ Mladen Milanović, Judgment of the Supreme Court of the Federation BiH no. 09 0 K 000748 11 Kžk of 15.2.2013.

⁸⁶ Edhem Žilić, first instance judgment of the Court of BiH no. S 1 1 K 015591 16 Kri of 17.11.2017.

⁸⁷ N. E., M. A. and K. S., first instance judgment of the Cantonal Court in Zenica no. 04 0 K 007756 16 K of 4.10.2017.

abuse of several civilians. One civilian succumbed to his injuries after a few days. The court, appreciating the fact that the defendants committed the criminal offense with other unknown persons, and that the consequences for the victims were caused not only by the actions of the defendants but also by other persons, reduced the prison sentences below the statutory minimum, and sentenced the defendants to minimum prison terms. When imposing the sentence, the court did not take into account the fact that the ten-year-old daughter witnessed her father's (one of the captured civilians) abuse and torture, and that she was exposed to inhumane treatment as a minor. Furthermore, in this case the defendants committed the murder of a civilian, so the family circumstances of the defendants should not have influenced the sentencing below the statutory minimum.

In the third instance judgment, the Supreme Court of the Federation of BiH assessed that the Cantonal Court in the case against N.E., M.A. and K.S. afforded excessive importance to the mitigating factors established on the part of the defendants *such as personal and family circumstances, while not sufficiently assessing the degree of guilt of the defendants and the consequences of the perpetration of the criminal offense*,⁸⁸ or the actual activity of the defendants (the number of actions taken), the persistence with which the defendants were guided in the perpetration of the criminal offense and the recklessness that the defendant N.E. showed towards the injured party, who was only nine and a half years old at the time of the events. The court found the cantonal prosecutor's objections to be partially founded. Despite this, the court reduced the sentence again without providing an explanation thereon.

Just like in the previous analysis, in the majority of judgments analysed here, the family circumstances of the defendant are valued as a mitigating factor, although the court does not provide any details about the dynamics of his family. As in the previous analysis, the courts do not provide information on whether the defendant abuses his wife or whether he is an absent father who neglects his children. Courts should not value family circumstances without this kind of information, i.e., without an individualised analysis of the reasons why the defendant's family circumstances may possibly lessen his criminal liability. For example, in the judgment against **Jozo Dojić** the first instance court valued the fact that he is a family man and a father of one as mitigating factors on the part of the defendant, even though he was convicted of raping a minor.⁸⁹

⁸⁸ *N. E., M. A. and K. S.*, second instance Judgment of the Supreme Court of the Federation BiH no. 04 0 K 007756 18 Kž of 8.5.2018.

⁸⁹ *Jozo Dojić*, first instance judgment of the Court of BiH no. S1 1 K 017362 14 Krl of 13.11.2017.



B. GOOD BEHAVIOUR IN COURT: PAR FOR THE COURSE OR DESERVING OF CREDIT?

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.⁹⁰ However, as in the previous analysis, we observed a trend that some panels at the state and entity level favour the defendant by assigning excessive importance to expected behaviour of the defendant in court. Therefore, in many cases, the courts valued good behaviour in court as a mitigating factor, without explaining that such behaviour is expected of the defendant and therefore should not be used to lower the sentence, unless the behaviour is truly exceptional.

The Cantonal Court in Sarajevo, in the case against **D. D.** valued as mitigating factors the fact that, according to the criminal records, the defendant had no prior convictions and that *he demonstrated good behaviour in court during the trial*. D. D. was convicted of multiple rapes, where he assaulted and physically beat the witness several times. D. D. was sentenced to six years in prison for a criminal offense for which a sentence of at least five years is foreseen. The defendant D.D. was certainly expected to behave well in court and this should not have been a mitigating factor that affected the sentence level. This type of precedent is particularly problematic considering that the defendants are legally bound to follow the rules of the courtroom and behave well.⁹¹

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 interrogating the motives behind and circumstances surrounding such acts before deeming them mitigating.⁹² In most cases, panels at both the state and entity levels automatically assess assistance as a mitigating factor.

⁹⁰ 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.

⁹¹ See Articles 141, 242(2)(3) CCBiH.

⁹² See Barbara Hola, *Sentencing of International Crimes at the ICTY*, 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.

For example, in the case against **Enes Ćurić and others**⁹³ in the first instance proceedings, the Court of BiH assessed the act of assistance by the defendant Ćurić as a mitigating factor, taking into account that while performing his duties as the warden of prison facilities in Potoci, he helped and provided protection to the detained civilians at certain moments, to which certain witnesses testified during evidentiary proceedings, who stated in relation to the behaviour of the defendant that he was fair to them, i.e., that he helped them. The Panel, however, failed to examine the reasons for which Ćurić provided this selective assistance. Ćurić was the warden of the prison facility in the Elementary School in Potoci and other prison facilities in Potoci in the area of the municipality of Mostar and he selected a large number of prisoners from the prison facilities as human shields, some of whom were killed by firearms.

In the case against **Milomir Davidović** the Court of BiH similarly valued as a mitigating factor the fact that Davidović helped some Bosniaks during the war, and that he expressed regret in the court for everything that the rape victims survived in Foča.⁹⁴ However, the Panel does not explain who he helped and why. Courts must assess the details of a particular situation rather than make generalised conclusions about acts of assistance.

In the case against **Radovan Paprica and others**⁹⁵ the second instance court reduced the prison sentence after the defence pointed out that the first instance court *failed to render a decision in accordance with the principle of individualisation of punishment, as the court did not take into account all the circumstances on the part of the defendant, more precisely, the mitigating factors on the part of the defendants were not properly assessed*. The Appellate Panel found that the first instance panel did not sufficiently assess particularly mitigating factors on the part of the defendants. The Appellate Panel stated that the defendant Paprica helped a person of Bosniak nationality during the war in the municipality of Foča, as well as that the defendant Ognjenović is a father of three. The Panel decided to reverse the first instance judgement in the decision on the criminal sanction by sentencing the defendant to seven years in prison. Lowering the prison sentence due to family circumstances, which are solely reflected in the fact that Ognjenović has three children, should not serve as reason to lessen his criminal liability. Likewise, the fact that he helped a person of Bosniak nationality without detailing in what way, why or how should not lead to lowering of the prison sentence, as discussed above.

⁹³ *Ibrahim Demirović and others*, first instance judgment of the Court of BiH no. S1 1 K 017146 15 Kri of 13.10.2017.

⁹⁴ *Milomir Davidović*, first instance judgment of the Court of BiH no. S1 1 K 005151 18 Kri of 27.2.2019, p. 59.

⁹⁵ *Radovan Paprica and others*, second instance judgment of the Court of BiH no. S1 1 K 033539 21 Krž 2 of 8. 6. 2021.

VI. Application of Questionable Mitigating and Aggravating Factors

Just like in the previous analysis, we observed here that in some cases of wartime sexual violence, especially at the entity level, the courts applied questionable mitigating and, although less often, questionable aggravating factors.

A. 30 YEARS ONWARD: ASSIGNING CREDIT FOR THE PASSAGE OF TIME

This analysis also observed that entity judgments occasionally state the passage of time since the criminal offence of sexual violence as a mitigating factor, which should not be the case because war crimes do not fall under statute of limitations.

For example, the Cantonal Court in Novi Travnik did not take into account the passage of time as a mitigating factor, because criminal acts of war crimes do not expire with the passage of time, in this case 24 years after the perpetration of the criminal offences.⁹⁶ Nevertheless, the Cantonal Court in Mostar in the case against **D. V.** assessed as a particularly mitigating factor the fact that *more than twenty years had passed since the perpetration of the crime*, having in mind the circumstances related to the personality and behaviour of the defendant in the time that followed the perpetration of the crime. Therefore, the court considers *that with the passage of time it is evident that the goals of special prevention have already been partially achieved, which justifies the application of the mechanism of mitigating the punishment.*⁹⁷ This decision was made despite the fact that D. V. inhumanely treated and tortured several imprisoned civilians, such as one of the victims whom D. V. repeatedly kicked hard in the genital area while the victim stood with his legs spread apart and during which time he suffered unbearable pain.

B. 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.⁹⁸

⁹⁶ *J. A. and M. D.*, first instance judgment of the Cantonal Court in Novi Travnik no. 06 0 K 009862 19 K 2 of 20.5.2019.

⁹⁷ *D. V.*, first instance judgment of the Cantonal Court in Mostar no. 07 0 K 013762 18 K 2 of 25.2.2019.

⁹⁸ See *Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), str. 278; *Barbara Hola, Sentencing of International Crimes at the ICTY and ICTY*, Amsterdam Law Forum, (2012, p. 19; *Prosecutor v. Ranko Cestic, ICTY, Case No. IT-95- 10/1-S, Sentencing Judgment*, (11 March 2004), para. 93.

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.⁹⁹ However, courts in BiH occasionally value the broader context of war as a mitigating or aggravating factor

In the first instance judgment of the Court of BiH against **Edhem Žilić** the defence pointed out that the Court failed to assess as a mitigating factor the fact that members of the Serb nationality burned everything the defendant had in his birthplace in Bjelašnica and killed part of his family, and that the Croats held his family in captivity.¹⁰⁰

In the second instance judgment against **Milan Todović** the defence lawyer claimed that the defendant did not create inhumane conditions with intent to make them unbearable to the injured party, but that *they were equal for the defendant and the injured party*. The defendant did not lock the injured party S1 when he was leaving, which was confirmed by two witnesses; during the cross-examination of the injured party S1, when asked by the defence why she did not leave the defendant, she answered that she had nowhere to go. The defence lawyer noted that the defendant comes from a conservative environment, where girls are bought, so the defendant bought the victim, thinking that he would live with her and, as claimed in the appeal, these are circumstances that indicate that this is not a case of classic rape and that it was the intent of the defendant, when he met the injured party and when he bought her, to marry her, and that the first instance judgment should have assessed these indisputable facts with more attention and respect. The appeal of Milan Todović’s defence was dismissed as ill-founded, but the possibility of using such arguments is inadmissible because they humiliate the injured party and normalise the crime of *buying women*. It also remains unclear what the defence meant by *non-classic rape*. Rape is a criminal offense regardless of the circumstances under which it occurs, the elements of the offense are the same and must be condemned.

⁹⁹ *Prosecutor v. Miroslav Bralo*, ICTY, Case No. IT-95-17-A, Appeals Judgment, (2 April 2007), para. 13.

¹⁰⁰ *Edhem Žilić*, first instance judgment of the Court of BiH no. S1 1 K 015591 16 Kri of 17.11.2017.

VII. Underuse of Aggravating Factors and Overuse of Mitigating Factors

In addition to the problematic application of aggravating and mitigating factors, courts throughout BiH, particularly at the entity level, consistently struggle to discern apparent aggravating factors. Domestic courts, as supported by international precedent,¹⁰¹ have affirmed numerous aggravating factors, including the vulnerable status of the victim, the perpetrator's abuse of power, 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.

A. ENTITY LEVEL: RARITY OF AGGRAVATING FACTORS

In the case against **G. M.**¹⁰² the Cantonal Court in Sarajevo considered as an aggravating factor *the harmful consequences that the perpetration of the criminal offense produced for the injured party's health, while the court did not find any other particularly aggravating factors*. The court concluded this despite the fact that G. M. approached the witness, hitting her on the body with his hands, and raped her in front of her husband, who was then slaughtered by another soldier. The witness then crawled over her husband's body, took her two-year-old daughter in her arms and ran away from her apartment. The court did not take into account as a particularly aggravating factor that the witness was raped in the presence of her husband and minor child, and that she witnessed the murder of her husband immediately after the rape.

In another case, the Cantonal Court in Sarajevo assessed as an aggravating factor against the defendant **D. D.** the harmful consequences that the perpetration of the criminal offense

¹⁰¹ 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.

¹⁰² *Milkan Gojković*, Cantonal Court in Sarajevo no. 09 K 023306 17 K 2 of 23.10.2018.

produced for the health of the victim, and the repetition of the act of perpetration, while *the court did not find any other particularly aggravating factors*. The court concluded this despite the fact that the witness lived alone, suffered beatings and threats from D.D. and M., cursing her *balija* mother and threatening her by saying: *now you'll see, we will slaughter you*. D. D. and M. knocked her down on the concrete, and then they both kicked her and beat her with their hands all over her body, and at one point the witness felt a strong blow from a weapon to the right part of her head above her eye, which later resulted in constant dizziness and severe headaches, and felt blood running down her face; she began to lose consciousness, and the two of them dragged her to her apartment, where they washed her face with cold water for her to regain consciousness, and then M. raped her in the presence of D.D., after which D.D. repeatedly raped the victim in 1992 and 1993 and brutally tortured her all that time. D. D. was sentenced to six years in prison for a criminal offense that is punished by at least five years.¹⁰³

The first instance Court of BiH assessed as a mitigating factor on the part of the defendant **Milomir Davidović**¹⁰⁴ that *the defendant is a family man, father of two whom he is obliged to raise and support, especially because one child is still a minor*, as well as the previous life of the perpetrator, i.e., the fact that he had not been previously convicted and that no other criminal proceedings were or are being conducted against him, and that he behaved well during the trial. The panel found no aggravating factors on the part of the defendant Milomir Davidović. This conclusion of the court came despite the fact that Davidović participated in a group rape. The two victims were forcibly taken to an apartment in a residential building, where the defendant Davidović forced one of the victims to have sexual intercourse and she was then raped by other Serb soldiers.

An example of good practice in appealing a first instance judgment due to insufficient application of aggravating factors and excessive application of mitigating factors can be found in the case against **Ibrahim Demirović**. In the second instance proceedings before the Court of BiH, the appeal of the Prosecutor's Office of BiH was partially upheld, and the court reversed the decision on the sentence of the defendant Ibrahim Demirović, known as "Hećim", to a prison sentence of thirteen years,¹⁰⁵

¹⁰³ *D. D.*, Judgment of the Cantonal Court in Sarajevo no. 09 K 023862 15 K of 17.6.2016, p. 19, and Judgment of the Supreme Court of the Federation BiH no. 09 O K 023862 16 Kž 9 of 6.4.2017, p. 17.

¹⁰⁴ *Milomir Davidović*, first instance judgment of the Court of BiH no. S1 1 K 005151 18 Kri of 27. 2. 2019.

¹⁰⁵ *Ibrahim Demirović and others*, second instance judgment of the Court of BiH no. S1 1 K 017146 18 Krž 2 of 21.9.2018.



the first instance judgment imposed a prison sentence of ten years. Namely, in the second instance proceedings, the court rightly observed that when it comes to the defendant Ibrahim Demirović, the first instance panel, although they properly assessed the facts that the defendant was a family man and in poor financial situation as mitigating factors, the panel afforded excessive weight to these factors. Analysing specific incriminations, it is evident that the defendant acted with particular cruelty and recklessness, in addition to inflicting severe psychological suffering on his victims. The second instance court added that the aforementioned is particularly reflected in the fact that the act of rape was committed for the purpose of humiliating, discriminating and degrading the victim's personality, as deduced from the overall context in which the incriminated actions were protracted and perpetrated on several occasions; he took the injured party out of the detention facility where she was detained with her parents and underage brother, using the position of the injured party, as well as his leadership function in the military unit during the incriminated time in which he forced the injured party to have sexual intercourse.

The gravity of the criminal offense must also be observed through the lens of the specific relationship of the perpetrator of the criminal offense and the victim. Namely, it is precisely in it that one can make conclusions about special, higher gravity of the criminal offence, depending on who the victim of the committed criminal offence is. All of the above points to the special circumstances of the criminal offence, as well as the fact that it was committed out of low motives – humiliation and ruin of human dignity, which, according to the Appellate Panel of the Court of BiH, increases the degree of subjective criminal liability of the defendant. Finally, there is no evidence that the defendant expressed regret for his actions, nor that he helped the victim in any way after the crime, which would show his remorse and desire for resocialisation. In view of the above, the Appellate Panel reversed the sanction imposed on the defendant Demirović and, based on the established mitigating and aggravating factors, imposed a prison sentence of thirteen years.

In the second instance judgment against **Saša Ćurčić**¹⁰⁶ the Appellate Panel of the Court of BiH found that the first instance court correctly assessed that there were no aggravating factors on the side of the defendant, and that the five-year prison sentence imposed on the defendant was adequately meted out. When explaining the adequacy of the imposed sentence, the Panel stated the following: *In cases of criminal offences of wartime sexual*

106 Saša Ćurčić, second instance judgment of the Court of BiH no. S1 1 K 028283 20 Krž of 21.12.2020.

violence, aggravating factors assessed in practice included the frequency of sexual violence (number of rapes of one victim and number of different victims, type of victim: minor and vulnerable victims), role of the defendant (abuse of power, e.g., as a guard in a camp / soldier / political leader, and zealous participation in the criminal offence, e.g., as a leader of a group of co-perpetrators), the manner of perpetration (use of extreme violence, criminal offense committed in a particularly humiliating/cruel manner), attitude of the defendant towards the criminal offence (discriminatory or vindictive motives for the offence, unless already an element of the offence, callousness), and the consequences for the victims (physical and/or psychological trauma). The aforementioned circumstances were absent in this case, given that there was one victim, who was not a minor, nor sick or old, there was one offence – a single action, which was not marked by extreme violence or cruelty, nor by discriminatory or vindictive motives, and in this sense, the first instance court's conclusion on the absence of aggravating factors on the part of the defendant appears to be correct.

It is disappointing that the second instance court found it appropriate to reduce the defendant's prison sentence, using concerning circumstances for such a decision. The fact that he raped "only" one victim, who was not a minor, nor sick or old insults the victim's dignity and increases her mental pain and suffering. Such stated facts are not only discriminatory in nature – they should not play any role in drastically reducing the prison sentence.

B. APPELLATE PANELS AT THE STATE LEVEL: COMPENSATING FOR OMISSIONS IN FIRST INSTANCE JUDGMENTS

Although in the first instance judgment at the state level, similar as in aforementioned entity judgments, we often encounter aggravating factors being overlooked, in the past few years the trend continued in which the second instance panels compensated for the shortcomings of the first instance judgment by adding new aggravating factors that in rare cases led to more severe sentences. However, in many cases, although second instance panels compensated for the shortcomings in first instance judgments by properly pointing out that the first instance court failed to assign due weight to the established aggravating factors, such conclusions did not lead to more severe sentences, but were usually dismissed entirely and the prison sentence either stayed the same or was lowered.



For example, the Prosecutor's Office of BiH pointed out in their appeal that the first instance panel incorrectly applied Article 41 CCSFRY when sentencing the defendant **Ivan Medić**¹⁰⁷ i.e., that the general sentencing rules were incorrectly applied, stating that the first instance court did not consider the aggravating factors on the part of the defendant with due care and only listed them declaratively without affording them any weight. The Prosecutor's Office stated that there are a number of aggravating factors on the part of the defendant Ivan Medić, and that significance was given to the established mitigating factors (family man and father of three) which should not have the weight of a mitigating factor or anything to do with the committed criminal offence. Furthermore, the Prosecutor's Office underlined the sentence for the committed criminal offence which, as stated in the appeal, is closer to the legal minimum prescribed by Article 142 CCSFRY, as well as that the first instance court based its reasons for the sentence on a mere count of aggravating factors that were not assigned real weight, and that the court did not take into account that the defendant Ivan Medić had already been convicted for the same criminal offence. Further explaining the appeal claims, the Prosecutor's Office indicated the factors that the Court should have assessed as aggravating, namely the degree of criminal liability reflected in the intensity and scope of his mental attitude towards the offence, the recklessness reflected in the sadistic treatment of helpless women, the severity of violations of the protected good, the motive (the lowest and most inhumane motive) for perpetration of the crime, as well as the circumstances under which the crimes were committed; special weight should be assigned to the fact that the defendant Ivan Medić had previously been convicted for the same criminal offence – rape. Despite these explanations, the second instance court reduced Medić's prison sentence from fourteen to twelve years.

In the second instance judgment of the Court of BiH against the defendant **Duško Suvara**¹⁰⁸ the prosecutor stated that the first instance panel *did not properly assess the aggravating factors*, and that the imposed sentence is not appropriate to the gravity or consequences of the crime committed. Furthermore, the prosecutor pointed out that *the defendant should have taken into account the consequences and suffering to which the victims were exposed, which are not a matter of the past, but are constant and unchanged*; an expert also testified in

¹⁰⁷ *Ivan Medić and others*, second instance judgment of the Court of BiH no. S1 1 K 021173 18 Krž 2 of 8.5.2018.

¹⁰⁸ *Duško Suvara*, second instance judgment of the Court of BiH no. S1 1 K 034278 22 Krž of 25.10.2022.

relation to these circumstances when presenting their findings and opinions. The prosecutor placed special emphasis in the appeal on the proposal that the panel of the appellate division must in considering this appeal *take into account the mental attitude of the defendant towards his actions, which is reflected in the undoubtedly expressed intention to commit the crime in the imagined way, along with the clearly expressed dehumanisation of the victims*. On the other hand, *the prosecutor disputes the value of the defendant's confession of the actions committed against witness S-2, and finds that the defendant's curtly expression of remorse does not represent an adequate form of expression of sympathy for the injured party S-2, i.e., that he expressed it only in the closing remarks, after the prosecutor pointed this out*. Accordingly, the prosecutor noted that the imposed sentence of six years is not proportionate to the gravity of the crime and the resulting consequences, and that it will not achieve the purpose of punishment, especially due to the fact that the defendant had previously been convicted of a grave crime against life and body. Despite the aforementioned explanations, the second instance court *found that the prison sentence of six years is quite adequate for the severity of the committed acts of perpetration and the degree of guilt of the defendant*.

C. POSITIVE TRENDS: THOROUGHLY REASONED FIRST INSTANCE JUDGMENTS

The trend of an increasing number of thoroughly reasoned first instance judgments that follow the remedial action taken by appellate panels is also observed in this analysis.

For example, the first instance judgment of the Court of BiH in the case against **Edhem Žilić** refers to ICTY case law and explains in detail the decision on the criminal sanction.¹⁰⁹ In deciding on the punishment, the Panel had in mind the general rules on selection of the type and scope of punishment, in light of the purpose of punishment, and in particular the degree of criminal liability of the defendant, the circumstances under which the crime was committed, the severity of threat or violation of the protected good, his earlier life and personal circumstances, demeanour after the committed offence and motive for perpetration. In this regard, in line with the ICTY case law, when assessing mitigating and aggravating factors, the Panel took into account that the Prosecutor's Office must establish aggravating factors beyond a reasonable doubt, while the defence must prove mitigating factors through a probability assessment, i.e., it must be more likely that these factors existed than that they did not.

¹⁰⁹ Edhem Žilić, first instance judgment of the Court of BiH no. S1 1 K 015591 16 Kri of 17.11.2017.



In the first instance judgment of the Court of BiH against the defendant **Jozo Đojić**¹¹⁰ the Panel considered the degree of criminal liability of the defendant, thoroughly explaining the decision; among the aggravating factors, they valued the particular persistence and recklessness demonstrated by the defendant when raping the injured party, who was a minor at the time; he tore the five-month-old child from her arms and threatened to harm him, threatened to kill her husband who was in the camp, ignored the injured party's pleas and resistance, or cries of several children who were in the apartment, he was hitting and slapping her constantly, and pulled the injured party's hair, demanding that she does what he asks her to do. In this way, the court reasons, the defendant Jozo Đojić demonstrated a particular degree of brutality and insensitivity; the consequences for the victim include impaired mental health and the feeling of humiliation and degrading which exists to this day because of the difficult incident that marked her and made her life difficult both in the family environment and in the community where she continued to live, as she testified at the main trial, in a visibly shaken state. Although such a thorough explanation is commendable, the court still assessed and took into account as mitigating factors the fact that the defendant is a family man, his lack of previous conviction, his impaired health, and his behaviour in court, which was good during the proceedings. Đojić was sentenced to six years in prison.

In the first instance judgment of the Court of BiH against **Vuk Ratković**¹¹¹ the Panel assessed all mitigating and aggravating factors on the part of the defendant Vuk Ratković. In this regard, the Panel did not find any mitigating factors. The assessed aggravating factors included the fact that the defendant committed the crime on three occasions against the injured party, taking advantage of her powerlessness, i.e., the fact that the injured party was without protection because her husband and son left Višegrad, while she had no other relatives in Višegrad and was helpless and in fear for her own life and the lives of her minor daughter and niece, that he committed the crime without any kind of empathy, showing persistence and recklessness in its perpetration, *he committed the last rape in the presence of the injured party's minor daughter and niece*, who he harassed and locked in another room of the apartment. In addition, when deciding, the Panel also took into account the long-term consequences of the committed criminal offence, revealed by the testimony of the injured party, as well as of other heard witnesses, and by expert witness testimony.

¹¹⁰ *Jozo Đojić*, first instance judgment of the Court of BiH no. S1 1 K 017362 14 Krl of 13.11.2017.

¹¹¹ *Vuk Ratković*, first instance judgment of the Court of BiH no. S1 1 K 024032 18 Kri of 19.9.2018.

D. POSITIVE TRENDS: REFERENCES TO ICTY CASE LAW

As in the previous analysis, the trend of judicial panels referring to ICTY practice has continued.

In the second instance judgment of the Court of BiH against **Mate Baotić**¹¹² the Appellate Panel quite correctly found that due to the nature of the criminal offence of rape, where there are usually no eyewitnesses who can confirm the testimony of the injured party, the conviction can be based on the testimony of the injured party if it is authentic and credible. This position of the Court of BiH is in accordance with ICTY case law; therefore, the Appellate Panel, deliberating on the aforementioned part of the appeal by the defence lawyer and the defendant, found it ill-founded and concluded that the defendant committed an offence similar to rape against the injured party. The Appellate Panel found that the testimony of the injured party was clear and convincing, and that the first instance panel correctly determined that there was no motive on the part of the injured party to baselessly accuse the defendant of something he did not do, therefore, the conviction can be based on the testimony of the injured party.

The Court of BiH, in the first instance judgment, sentenced to twelve years in prison **Saša Cvetković**¹¹³, who actively participated in the murder and rape of the civilian population of Roma and Bosniak nationality and forced sexual intercourse on the injured party, who had been a virgin until that moment; he kicked her in the back making her fall in front of the door of another room. The injured party was then repeatedly raped on the bed in another room by other Serb soldiers, which resulted in injuries to the physical integrity and mental health of the injured party.

In a second instance judgment, the Court of BiH dismissed as ill-founded the appeal of the defence lawyer of Saša Cvetković.¹¹⁴ When reaching a conclusion on whether the first instance court assessed the presented evidence comprehensively and with sufficient

¹¹² *Mato Baotić*, second instance judgment of the Court of BiH no. S1 1 K 020032 17 Krž 11 of 14.4.2017.

¹¹³ *Saša Cvetković*, first instance judgment of the Court of BiH no. S1 1 K 023242 17 KrI of 22.3.2019.

¹¹⁴ *Saša Cvetković*, second instance judgment of the Court of BiH no. S1 1 K 023242 19 Krž 17 of 7.10.2019.



caution and determined the factual situation, the Appellate Panel took into account the fact that sexual violence is a crime that often takes place without witnesses. Furthermore, exploring the international legal framework for proving this type of crime, the Panel relied on ICTY case law. The trial judgment in the *Delalic et al.* case refers to Rule 96(i), which states that *corroboration of the testimony of a victim of sexual violence is not required*.¹¹⁵ A more recent manifestation of that international standard is found in Rule 63(4) of the ICTY Rules that *prohibits the Chamber from imposing a corroborative requirement in order to prove any crime, and in particular, for crimes of sexual violence*. The purpose of Rule 96(i) is *to accord to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes*.¹¹⁶

Given that it is indisputable that the testimony of the injured party can be the sole and valid evidence in a specific criminal case, the defence tries to invalidate it with alleged differences that indicate the unreliability of such testimony – the circumstance that may affect its probative value. Only a victim of such an offence that primarily violates dignity can describe such an inner feeling, where the Panel did take into account that *rape is an attack on the entire personality of the victim, not only on her body*.

¹¹⁵ *Prosecutor v. Delalic et al.*, ICTY-96-21-T, Trial Judgment (16 November 1998), para 936.

¹¹⁶ *Prosecutor v. Tadic*, ICTY-94-1-T, Trial Judgment (7 May 1997), para 536.

VIII. The Disproportionate Use of Particularly Mitigating Factors

In contrast to the disproportionately small number of aggravating factors in judgments for wartime sexual violence, we come across a disproportionately large number of cases, especially at the entity level, in which the courts value “particularly mitigating factors”.

A. LEGAL BACKGROUND

As mentioned above, Article 49(b) CCBiH allows the courts to impose a more lenient sentences where they find particularly mitigating factors and when the purpose of punishment can be achieved with a lower sentence. Article 42 CCSFRY is similarly worded as Article 49(b). According to these provisions, entity courts can impose sentences of less than five years for war crimes against the civilian population and prisoners of war, which is the statutory minimum in CCSFRY; the Court of BiH can impose a sentence of less than five years in prison for war crimes against the civilian population and prisoners of war because it applies CCSFRY in such case, whereas sentences under ten years can be imposed for crimes against humanity to which CCBiH applies.

Bearing in mind Article 49(b) and Article 42, it is evident that there exist cases with particularly mitigating factors, where the courts can legitimately lower defendants’ sentences. The provisions contained in the state and entity CCs, however, do not elaborate which factors may be assessed in such a way.

International precedent can offer valuable guidance.¹¹⁷ While the statutes of international courts do not provide for “particularly mitigating factors”, 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 factors”.¹¹⁸

¹¹⁷ It is worth noting that international courts do not have sentencing minimums, but set forth maximum sentences (generally life imprisonment).

¹¹⁸ See *Serge Brammertz and Michelle Jarvis, Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), str. 286-289; *Barbara Hola, Sentencing of International Crimes at the ICTY and ICTY*, *Amsterdam Law Forum*, (2012), str. 19. *Issues regarding guilty pleas will be discussed in more depth later in the text.*



B. CREDITING NEGLIGIBLE MITIGATING FACTORS AS PARTICULARLY EXTENUATING

“Particularly mitigating factors”, which are usually cited in national judgments, are those factors for which some national courts, as well as international jurisprudence, have concluded that they should be given little or no consideration in deciding on the sentencing, such as good behaviour in court, family circumstances and selective acts of assistance by the defendant towards the victims during the war.¹¹⁹ As in the previous analysis, this analysis observes that the courts do not present an explanation for the assessment of such factors as “mitigating”, as seen in the aforementioned judgments, or “particularly mitigating”, as in the judgments referred to here.

In the first instance judgment of the Court of BiH against **Radovan Veljović**¹²⁰ the Panel considered, among the mitigating factors on the part of the defendant Veljović, that he had not been previously convicted, that he was a family man, father of one, and his behaviour in Court was good; furthermore, in deciding on his sentence, the Panel also took into account the fact that the defendant is elderly. The Panel assessed the above mitigating factors in their totality as particularly mitigating, finding that even a more lenient sentence will meet the purpose of punishment. The court failed to provide an explanation for concluding that the mitigating factors are particularly mitigating.

The Cantonal Court in Mostar, in the first instance judgment against **D. V.**¹²¹ took into account mitigating factors on the part of the defendant, namely the fact that more than twenty years have passed since the perpetration of the crime, during which time the defendant had no convictions, nor was there any evidence of antisocial behaviour, thus, he turned to socially acceptable behaviour. For that reason and bearing in mind the factors that relate to the personality and behaviour of the defendant in the time that followed the perpetration of the crime, the court assessed the mitigating factors on the part of the defendant as particularly mitigating factors, finding that with the passage of time it became evident that the goals of special prevention have already been partially achieved, which justifies the imposition of more lenient sentence. The court found that the imposed prison sentence of two years was sufficient, considering the purpose of punishment provided for by law.

¹¹⁹ See *Mladen Milanović*, second instance judgment, 2013, p. 19; *Asmir Tatarević and Armin Omazić*, first instance judgment, 2015, p. 78-79; *Asim Kadić*, first instance judgment, 2014, p. 13; *Indira Kamerić*, first instance judgment, 2015, paras 237–238.

¹²⁰ *Radovan Veljović*, first instance judgment of the Court of BiH no. S1 1 K 041154 21 Kri of 18.11.2022.

¹²¹ *D. V.*, first instance judgment of the Cantonal Court in Mostar no. 07 0 K 013762 18 K 2 of 25.2.2019.

In the first instance judgment against **Milomir Davidović**¹²², the Court of BiH took into account as mitigation factors the perpetrator's earlier life, i.e., the fact that he has not been convicted before, and that he was not and is not subject to any other criminal proceedings. The Panel also took into account that the defendant is a family man, father of two whom he is obliged to raise and support, especially since one child was still a minor. Furthermore, the Panel also assessed the fact that the defendant helped some Bosniaks during the war, and that he expressed regret before the court for everything that rape victims survived in Foča. The Panel also assessed the fact that the defence contributed to the efficiency and cost-effectiveness of the proceedings, given that certain facts and circumstances were not contested, as well as that *the defendant behaved well during the trial, which is expected, but which should be emphasised in case of exceptionally appropriate behaviour and respect for court decisions. Therefore, this combination of various details on the side of the defendant, in their correlation in the specific case, undoubtedly reflects the character of particularly mitigating factors.*

Therefore, although there is doubt as to whether factors such as family circumstances and acts of assistance should be regarded as mitigating at all, as shown by the previous analysis, it is clear that they should not be regarded as "particularly mitigating" or used as such to reduce the defendant's sentence below the statutory minimum. Courts should give well-argued explanations about what constitutes "particularly mitigating" factors in a specific case. In addition, the courts should provide an explanation as to why "mitigating factors" are qualified as "particularly mitigating", which are used as an argument in imposing sentences below the statutory minimum.

C. INFLATING DEFENDANTS' PERSONAL CIRCUMSTANCES

The judgment of the Appellate Division of the Court of BiH in the case of **Goran Mrđa and others**¹²³ reduced the prison sentence due to family circumstances. Following the sentencing rules provided for in Article 41 CCSFRY, while also taking into account the statutory punishing range prescribed for this criminal offense, the Appellate Panel assessed all the relevant circumstances of the specific case, and found mitigating factors in relation

¹²² *Milomir Davidović*, first instance judgment of the Court of BiH no. S1 1 K 005151 18 Kri of 27.2.2019.

¹²³ *Goran Mrđa and others*, second instance judgment of the Appellate Division of the Court of BiH no. S1 1 K 018013 17 Kžk of 21.12.2018.



to defendants Goran Mrđa and Milorad Mrđa – that they are family men, married, parents, Goran Mrđa was father of four and Milorad Mrđa father of three children, that the defendants Goran Mrđa and Milorad Mrđa were of younger age at the time of the perpetration of the offence. They were accused of psychological and physical abuse of civilians and rape. Goran Mrđa took the injured party to a room where he, forcibly and threatening her with a knife, undressed her, and then knocked her on her back, after which four of the five people who entered the house urinated on her and raped her alternately – Goran Mrđa, Milorad Mrđa, M.J. and another person known to them; she was first raped by Goran Mrđa, while the others held her arms and legs, scratched and bit her; she tried to defend herself as long as she had the strength to, she cried, called for help, begged not to be touched and to let her go; she occasionally lost consciousness. Among the aggravating factors, the Appellate Panel considered that defendants Goran Mrđa and Milorad Mrđa had already been convicted, and that they demonstrated unnecessary cruelty in committing individual criminal offences of war crimes, cruelty that had no logical reason, except to harm the victims (among whom there were children) and to make their already difficult life even more strenuous, which makes their behaviour not only unlawful but also completely humanly unacceptable. After such a detailed explanation of mitigating and aggravating factors, it remains unclear why the Appellate Panel reduced the prison sentence of Goran Mrđa from fourteen to eleven years, and Milorad Mrđa from eight to seven years in prison.

In the first instance judgment of the Court of BiH in the case of **Boris Bošnjak and others**¹²⁴ Bošnjak was sentenced to ten years in prison. Among the mitigating factors, the Panel valued that the defendants Miodrag Grubačić and Ilija Đajić were family men, married, parents, fathers of two children each, and that the defendant Bošnjak was divorced, but father of two minor children. Among the aggravating factors, the Panel took into account that the defendants demonstrated unnecessary cruelty in committing individual criminal offences of war crimes and that they made the already difficult life of the captured civilians more strenuous, in the conditions of the camp, which were inhumane and extremely unsuitable for accommodation of people, making their behaviour not only unlawful but also completely humanly unacceptable. In other words, the Panel took into account

¹²⁴ *Boris Bošnjak and others*, first instance judgment of the Court of BiH no. S1 1 K 019908 16 Kri of 30.9.2020.

that the defendants used and demonstrated, in an inhumane, inhuman and humiliating manner, their status of supremacy over the imprisoned civilians, whom they physically and psychologically mistreated on a daily basis in order to make their stay in the camp as difficult as possible. The Panel convicted the defendant Boris Bošnjak to a prison sentence of ten years on the ground of the number of actions that the Panel found him responsible for (as many as 21) and the particularly cruel way of treating detainees, as was explained in detail in the sentencing part of the judgment, following a thorough analysis of both aggravating and mitigating factors. The Panel concluded that the sentence would have been significantly higher if the Panel had not accepted mitigating factors on the part of the defendant Bošnjak, reflected in his young age and the fact that he is a father of two children and, according to criminal records, he had no prior convictions. Although the Panel emphasised in the first instance judgment that Bošnjak was sentenced to fewer years due to acceptance of mitigating factors, the Panel, in the second instance judgment in this case, reversed the decision on punishment and lowered Bošnjak's prison sentence from ten to eight years.¹²⁵

¹²⁵ *Boris Bošnjak and others*, second instance judgment of the Court of BiH no. S1 1 K 019908 20 Krž 5 of 19.2.2021.

IX. Weighing of Mitigating and Aggravating Factors

Whether imposing sentences above or below statutory minimums, the wartime sexual violence judgments under consideration consistently fail to weigh aggravating and mitigating factors against each other, as well as their actual impact on the sentence. The absence of such analysis undermines the fairness and lawfulness of decision-making on sentencing.

A. FAILURE TO WEIGH MITIGATING AND AGGRAVATING FACTORS

In cases in which the imposed sentences were not lowered but fell within the statutory range, the courts, as a rule, pronounce the sentence immediately after listing the mitigating and aggravating factors, failing to weight them against each other or assess their impact on the sentence.

In the case against **Saša Cvetković**, the Court of BiH assessed as mitigating factors the fact that the defendant was a younger adult under the age of twenty, that he had no criminal record, that he was a family man, and that he had a good demeanour and behaviour in court. The court considered as aggravating factors that the defendant had committed murder against old and infirm persons who were disabled, then that he had committed the act of rape against a minor victim, who was young and a virgin, and that he had known all the injured parties since he was their neighbour. The Court of BiH then listed additional aggravating factors and imposed the sentence with the explanation that it finds that *the imposed criminal sanction is proportionate to the gravity of the offense, the severity of the threat and violation of the protected good, as well as the circumstances under which the offense was committed, and that within the meaning of the provisions of Article 33 CCSFRY, the purpose of punishment is to be achieved with such an imposed sentence.*¹²⁶

¹²⁶ *Saša Cvetković*, Judgment of the Court of BiH no. S1 1 K 023242 17 Krl of 22.3.2019, paras 289–291, upheld by the second instance judgment no. S1 1 K 023242 19 Krž 17 of 7.10.2019. The imposed sentence was not lowered, it fell under the statutory sentencing range for the offence.

The Court of BiH had the same approach of listing mitigating and aggravating factors without weighing them against each other or assessing their impact on the sentence in the following cases in which the sentence was not reduced: **Goran Mrđa and others**¹²⁷, **Šaban Haskić and others**¹²⁸, **Emir Drakovac and others**¹²⁹, **Jozo Đojić**¹³⁰, **Jovan Tintor**¹³¹, **Milisav Ikončić and others**¹³², **Nihad Bojadžić**¹³³, **Ivan Medić and others**¹³⁴, **Senad Džananović and others**¹³⁵, **Elvir Muminović and others**¹³⁶, **Ibrahim Demirović and others**¹³⁷, **Momir Tasić and others**¹³⁸, **Duško Suvara**¹³⁹ and **Adem Kostjerevac**.¹⁴⁰

We observe the same practice in entity level judgments, which, even when they do not impose a reduced prison sentence, only list the mitigating and aggravating factors without weighing them to against each other or assessing their impact on the sentence.

In the case against **Milkan Gojković**¹⁴¹, as well as in the case against **D. D.**¹⁴², the Cantonal Court in Sarajevo listed the same mitigating factors, namely lack of previous conviction and good behaviour in court, and the same aggravating factors, namely the harmful consequences for the injured party's health, imposing the same prison sentences with the same explanation, although the defendants and the factual circumstances were different: *the court sentenced the defendant to a prison sentence of 6 (six) years, as the court finds*

¹²⁷ *Goran Mrđa and others*, Judgment of 19.5.2017, paras 473–476, and of 21.12.2018, paras 538–545.

¹²⁸ *Šaban Haskić and others*, Judgment of 2.10.2018, paras 667–675, upheld by the second instance judgment of 6.6.2019.

¹²⁹ *Emir Drakovac and others*, Judgment of the Court of BiH no. S1 1 K 016447 14 Kri of 7.3.2017, paras 228–233, upheld in this part by the second instance judgment no. S1 1 K 016447 17 Krž 2 of 3.11.2017.

¹³⁰ *Jozo Đojić*, Judgment of 13.11.2017, paras 119–121, upheld by the second instance judgment of 28.2.2018.

¹³¹ *Jovan Tintor*, Judgment of 30.10.2018, paras 564–570, upheld by the second instance judgment of 15.2.2019; however, the second instance panel found that the first instance panel wrongly assessed certain factors as aggravating as they constituted the elements of the offence, so they partially reduced the prison sentence, but not below the statutory minimum.

¹³² *Milisav Ikončić and others*, Judgment of 14.9.2018, paras 164–171, upheld by the second instance judgment of 14.2.2019.

¹³³ *Nihad Bojadžić*, Judgment of 3.9.2018, paras 582 and 583.

¹³⁴ *Ivan Medić and others*, Judgment of 17.11.2017, paras 211–213, reversed in the decision on punishment by the second instance judgment of 8.5.2018, but not below the statutory minimum.

¹³⁵ *Senad Džananović and others*, Judgment of 11.6.2021, paras 921–926, upheld by the second instance judgment of 9.3.2022.

¹³⁶ *Elvir Muminović and others*, Judgment of 5.7.2018, paras 309–312, and of 5.7.2019, paras 181–183.

¹³⁷ *Ibrahim Demirović and others*, Judgment of 13.10.2017, para 388. This judgment was reversed by the second instance judgment of 21.9.2018 in the sentencing part referring to Ibrahim Demirović, increasing the prison sentence from 10 to 13 years.

¹³⁸ *Momir Tasić and others*, Judgment of 6.9.2018, paras 241–245, upheld by the second instance judgment of 31.1.2019.

¹³⁹ *Duško Suvara*, Judgment of 27. 5. 2022, paras 243–248, upheld by the second instance judgment of 25.10.2022.

¹⁴⁰ *Adem Kostjerevac*, Judgment of 21.12.2021, paras 226–235.

¹⁴¹ *Milkan Gojković*, Judgment of 23.10.2018, p. 66.

¹⁴² *D. D.*, Judgment of 17.6.2016, p. 19.

that the imposed sanction can achieve the purpose of punishment within the meaning of the provision of the Article 33 of the transposed CCSFRY, finding that the sentence imposed is in proportion to the degree of criminal liability of the defendant and that the imposed punishments will achieve the general and special purpose of punishment (Articles 5 and 33) of the transposed CCSFRY, i.e., will prevent the defendants from committing the same offence or other offences in the future, but also that this punishment will affect the awareness of citizens that they respect the rules and norms of the legal order.

In the cases where the imposed sentences are below the statutory minimum, the courts most often list mitigating and aggravating factors and, without any weighing of the factors against each other, impose a reduced sentence, usually with the explanation that *the purpose of punishment can be achieved with...* a reduced sentence below the statutory minimum. The requirement that the courts determine whether a more lenient sentence can meet the purpose of punishment, however, implies a balancing act: weighing of “particularly mitigating factors” against the aggravating factors and the gravity of the offense. However, as the following cases show, courts usually fail to do this.

In the case against **Žark Vuković**¹⁴³ the Court of BiH imposed a reduced prison sentence of seven years, even though the statutory minimum is ten years; the court did not undertake a comparative assessment of the relevant mitigating and aggravating factors. The court stated only one mitigating factor – that the defendant had no previous conviction, and only one aggravating – that he showed persistence in committing the crime – this was enough for the court to conclude that the lack of previous conviction is a particularly mitigating factor that justifies a sentence below the statutory minimum.

The Court of BiH had the same approach in the cases against **Radovan Veljović**¹⁴⁴, and **Novica Tripković**.¹⁴⁵

The position of the Court of BiH, expressed in the judgment against **Dragana Janjića**¹⁴⁶, is particularly worrying, as the defendant’s prison sentence was reduced even though the court did not find any mitigating factors, but invoked the principle of fairness.

¹⁴³ Žarko Vuković, Judgment of 11.10.2017, paras 315–318, upheld by the second instance judgment of 19.1.2018.

¹⁴⁴ Radovan Veljović, Judgment of 18. 11. 2022, paras 266–268, upheld by the second instance judgment of 30.3.2023.

¹⁴⁵ Novica Tripković, Judgment of 24.5.2022, paras 64–66.

¹⁴⁶ Dragana Janjić, Judgment of 18.7.2019, paras 60 and 61.

Entity courts take a similar approach to that of the Court of BiH. In the case against the defendant **D. V.**¹⁴⁷ the Cantonal Court in Mostar imposed a sentence below the statutory minimum without any comparative assessment of mitigating and aggravating factors. The court listed the aggravating factors, namely: *degree of guilt, i.e., that the crime was committed with direct intent, that the defendant tortured and inhumanely treated four civilians, demonstrated persistence in the perpetration of the criminal offence and extreme callousness, and the mitigating factors, namely: that more than twenty years have passed since the perpetration of the crime, during which time the defendant had no other convictions, nor was any evidence presented as to his antisocial behaviour, which means he turned to socially acceptable behaviour.* The Court then concluded: *... given the circumstances related to the personality and behaviour of the defendant in the time after the perpetration of the crime, the court values the mitigating factors on the part of the defendant as particularly mitigating factors, considering that it became evident over time that the goals of special prevention have already been partially achieved, which justifies the imposition of a reduced sentence.* The Court found that the imposed sentence of imprisonment for two years is sufficient, from the perspective of the purpose of punishment provided by law, to express social condemnation of the committed crime, to deter the perpetrator, as well as others, from committing criminal offences.

The Cantonal Court in Zenica decided in the same way in the case against **N. E., M.A. and K. S.**¹⁴⁸, whose first instance judgment was reversed by the Judgment of the Supreme Court of FBiH of 8.5.2018 with respect to the sentence; but even the Supreme Court failed to weigh mitigating and aggravating factors against each other.¹⁴⁹

In all cases in which the courts do not weigh mitigating and aggravating factors against each other or assess their specific impact on the sentence, the sentences imposed are arbitrary, they give rise to doubt regarding the weight that the courts assign to the various aggravating and mitigating factors, and also cast doubt on the correctness of the court's assessment thereon.

¹⁴⁷ *D. V.*, Judgment of 25.2.2019, pgs. 34-35, upheld by the second instance judgment of 5.11.2019.

¹⁴⁸ *N. E., M. A. and K. S.*, Judgment of 4. 10. 2017, p. 29.

¹⁴⁹ Judgment of the Supreme Court of the Federation BiH no. 04 0 K 007756 18 Kž of 8.5.2018, p. 16.



B. RARE ATTEMPTS TO WEIGH MITIGATING AND AGGRAVATING FACTORS

However, there are judgments in which courts attempt try to explain the imposed sentence by weighing aggravating and mitigating factors against each other.

In the case against **Boris Bošnjak and others**¹⁵⁰ the Court of BiH sentenced Boris Bošnjak to prison following the assessment of mitigating and aggravating factors, and the Court stated that it took into account that the defendant committed 21 acts and was particularly cruel to detainees, sentencing him to ten years in prison; however, the court added that *this sentence would have been much higher if the court had not accepted mitigating factors on the part of the defendant, namely, that he was of a really young age and the fact that he is a father of two children and, according to criminal records, he has no previous convictions, and that he was only 19 years old at the time of the perpetration of the crime.*

In the case against **Edhem Žilić**¹⁵¹ the Court of BiH valued the personal and family circumstances of the defendant as mitigating factors, but taking into account a range of established aggravating factors, the court found that these mitigating factors *do not constitute particularly mitigating factors that would serve as a basis for reducing the sentence below the statutory minimum.*

In the case against **Edin Sakoč**¹⁵² the Court of BiH listed as mitigating factors earlier life of the defendant, his personal and family circumstances and behaviour after the crime was committed, while as aggravating factors it considered the circumstances under which the crime was committed and the severity of the consequences. The Court proceeded to explain the significance of these factors and contrast them; although the Court accepted the fact that the defendant felt no hatred towards the other nationality, the fact that the defendant used his position of dominance and power in the specific situation at the time of the perpetration of the crime is taken as an aggravating factor; as for the facts that his grandmother was killed, and members of his immediate family were detained, it should be borne in mind

¹⁵⁰ *Boris Bošnjak and others*, Judgment of the Court of BiH of 30.9.2020, para 886. This judgment was reversed by the second instance judgment of 19.2.2021, in the decision on the sentence for Boris Bošnjak, by lowering it from 10 (ten) to 8 (eight) years.

¹⁵¹ *Edhem Žilić*, Judgment of the Court of BiH of 17.11.2017, para 320. This first instance judgment was reversed by the second instance judgment in the sentencing decision, so that the nine-year prison sentence was reduced to a six-year prison sentence. See Judgment of the Court of BiH no. S1 1 K 015591 18 Krž 2 of 23.3.2018, para 77.

¹⁵² *Edin Sakoč*, Judgment of the Court of BiH no. S1 1 K 020968 17 Kžk of 2.4.2018, paras 129–135.

that these events occurred in 1993, i.e., after the perpetration of the criminal offense the defendant is charged with and in the time when the defendant was no longer a member of the military unit.

In the case against **J. A.** and **M. Đ.**¹⁵³ the Court of BiH listed as mitigating factors earlier life of the defendant, his personal and family circumstances and behaviour after the crime was committed, while as aggravating factors it considered the circumstances under which the crime was committed and the severity of the consequences. The Court proceeded to explain the significance of these factors and contrast them; although the Court accepted the fact that the defendant felt no hatred towards the other nationality, the fact that the defendant used his position of dominance and power in the specific situation at the time of the perpetration of the crime is taken as an aggravating factor; as for the facts that his grandmother was killed, and members of his immediate family were detained, it should be borne in mind that these events occurred in 1993, i.e., after the perpetration of the criminal offense the defendant is charged with and in the time when the defendant was no longer a member of the military unit.

In the case against **Mate Martić**¹⁵⁴ the Supreme Court of FBiH imposed a reduced prison sentence, and at the same time considered as mitigating factor the lack of prior conviction of the defendant, his age, as well as his extremely poor health, while the court stated that it also considered aggravating factors on the part of the defendant, namely, his persistence and recklessness in committing the crime. The court further stated that given the existence of the aforementioned mitigating factors, especially defendant's serious illness, it concluded that they are of such significance that in their totality they have the character of particularly mitigating factors, indicating that even a reduced sentence can achieve the purpose of punishment.

Weighing mitigating and aggravating factors against each other, regardless of whether it increases or lowers the sentence, provides transparency as to how courts reach their decisions and facilitates fairer punishments – such that their lawfulness will not be questionable nor will there be any doubt as to the discretion given to courts.

¹⁵³ *J. A. and M. Đ.*, Judgment of 20.5.2019, pgs. 39-40, upheld in this part by the Judgment of the Supreme Court of the Federation BiH of 14.11.2019.

¹⁵⁴ *Mato Martić*, Judgment of the Supreme Court of the Federation BiH of 22.3.2019, pgs. 24-25, upheld by Judgment of 3.3.2021.

X. Plea Bargaining Agreements: One of the Reasons for Inappropriate Punishing

In three cases at the state level, prison sentences were imposed for wartime sexual violence on the basis of plea agreements, while at the entity level, there have been no judgments on this basis. In each case, based on the rules on reducing the sentence, the sentences imposed were below the statutory minimum.

The plea agreement mechanism was introduced into the BiH criminal justice system twenty years ago; analyses have shown that there are both advantages and disadvantages when pronouncing judgments based on plea agreements that are equally applicable to wartime sexual violence. As stated in the previous analysis: *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.*¹⁵⁵

However, the victims of criminal offences have almost no influence on the conclusion of plea agreements, the terms of the agreement, or the acceptance of the agreement by the court and the sentencing under the agreement. When negotiating an agreement with the defendant, the prosecutor is only obliged to give the injured party an opportunity to state her compensation claim, if such a claim is filed against the defendant.

In the agreement, the prosecutor can agree with the defendant and propose to the court an imposition of a sentence below the statutory minimum for a given criminal offence. Although in practice certain chief prosecutors issue binding general instructions prohibiting the conclusion of an agreement without the express consent of the injured parties, this is not a legal obligation and the court cannot reject the agreement because the injured party does not agree with the sentence; therefore, the prosecutor's offices can independently decide on the significance to be assigned to the injured party when negotiating the sentence with the defendant.

The court can accept or reject the agreement, and there is no possibility of deviating from the agreed conditions, including in terms of the proposed sentence. For this reason, it seems to be a useful practice to propose a punishment range to the court, i.e., minimum

¹⁵⁵ See Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, 2018, pgs. 56-57.

and maximum sentence, for the court to decide on the imposed sentence. When deciding on the agreement, the court checks, *inter alia*, whether the proposed sentence is in accordance with the criminal code and whether the injured party was given an opportunity to present her compensation claim to the prosecutor. The court is obliged to inform the injured party about the results of plea bargaining, but the injured party does not have the right to appeal the imposed prison sentence.¹⁵⁶

Explanations in judgments made on the basis of plea agreements generally do not mention any specific aggravating factors valued in relation to sexual violence or their impact on the sentence.

In the case against **Novica Tripković**¹⁵⁷ the defendant was convicted to eight years in prison for raping two persons who were illegally imprisoned, although this criminal offense is punishable by a prison sentence of at least ten years or a long-term prison sentence. In the explanation of the judgment, the court stated that, with regard to the sentence, it considered as aggravating factors *the manner of perpetration of the offence, the severity of violation of the protected good and, in connection with this, the consequences of the committed offence, which are reflected in the physical and psychological harm that the victims of this crime suffered and are still suffering.*

A prison sentence for wartime sexual violence that is shorter than the statutory minimum and that fails to take into account the victim's opinion on the proposed sentence is contrary to Article 6 CCBiH, prescribing that the purpose of criminal sanctions is, *inter alia*, the protection and satisfaction of the victim of the criminal offence.

In the case against **Damir Miskin**¹⁵⁸ the defendant was sentenced to four years in prison, although at least five years are foreseen for the criminal offence. In explaining the judgment, the court stated that it did not find any aggravating factors, even though the defendant *together with other soldiers, captured a group of 12 civilians on the mountain, including the injured party, who were illegally imprisoned in one of the school rooms, and during the night the defendant came to the school together with two soldiers, took the injured party out of the room where she was imprisoned with other civilians*

¹⁵⁶ Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/2003, 32/2003 – corr. 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009, 93/2009, 72/2013, 65/2018), Article 231.

¹⁵⁷ *Novica Tripković*, Judgment of 24.5.2022, paras 62–65.

¹⁵⁸ *Damir Miskin*, Judgment of 11.4.2022, para 47.



and her three minor children and took her to a room in the attic of the school, where the defendant raped her. Particularly problematic are the judgments which impose, on the basis of plea agreements, the most lenient punishment according to CCSFRY – a prison sentence of one year.

In the case against **Goran Pavković**¹⁵⁹ the defendant was convicted for torturing five imprisoned civilians, and was sentenced to a minimum prison sentence of one year, although this criminal offense carries a prison sentence of at least five years. Explaining the sentence, the court stated that it found no aggravating factors on the side of the defendant, except that he committed a grave criminal offense that does not have a statute of limitations.

In the case against **Miroslav Perić**¹⁶⁰ the defendant was sentenced to a prison sentence of one year, although a prison sentence of at least five years is foreseen for this criminal offence. Explaining the sentence, the court did not refer at all or state that it considered any aggravating factors.

When the court imposes a prison sentence of up to one year, according to the provisions of the criminal codes of BiH,¹⁶¹ RS,¹⁶² FBiH¹⁶³ and BDBiH¹⁶⁴ the court is obliged to convert the imposed prison sentence of up to one year with a fine upon petition of the convicted person. Each day of imprisonment is equal to a fine of BAM 100.00 (BAM 50.00 in the RS).¹⁶⁵ Although CCBiH since 2018¹⁶⁶ and CCRS since this year¹⁶⁷ foresee exceptions from converting a prison sentence into a fine, these exceptions do not include war crimes.

¹⁵⁹ *Goran Pavković*, Judgment of the Court of BiH no. S1 1 K 007448 18 Kro of 11.4.2018, paras 65–73.

¹⁶⁰ *Miroslav Perić*, Judgment of the Court of BiH no. S 1 1 K 026886 17 Kro of 19.12.2017, paras 61–64.

¹⁶¹ Article 42a – CCBiH.

¹⁶² Article 46a – Criminal Code of the Republika Srpska (Official Gazette of RS, 64/2017, 104/2018 – Decision US, 15/2021, 89/2021 and 73/23).

¹⁶³ Article 43a – Criminal Code of FBiH (Official Gazette of the Federation of BiH, 36/2003, 21/2004 – corr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017).

¹⁶⁴ Article 43a – Criminal Code of BDBiH (Official Gazette of Brčko District of BiH, 19/2020 – consolidated text).

¹⁶⁵ or a daily amount of the fine stipulated by CCBiH.

¹⁶⁶ Law on Amendments to the Criminal Code of BiH (Official Gazette of BiH, 35/18, published on 29.5.2018, entered into force on 6.6.2018): “(4) The provisions from paragraphs (1), (2) and (3) of this article do not apply to perpetrators of criminal offenses from CHAPTER XVI (Criminal offenses against the integrity of Bosnia and Herzegovina), Article 201 (Terrorism), Article 202 Funding of Terrorist Activities), Article 202a (Encouraging Terrorist Activities in Public), Article 202b (Recruitment for Terrorist Activities), Article 202c (Training to Perform Terrorist Activities) and Article 202d (Organising a Terrorist Group) of this Code.”

¹⁶⁷ Law on Amendments to the Criminal Code of RS (Official Gazette of RS, 73/23, published on 16.8.2023, entered into force on 24.8.2023): After paragraph (3), a new paragraph (4) shall be added to read as follows: “(4) The provision of paragraph (3) of this Article shall not be applicable to perpetrators of the criminal offenses under Article 146 (Trafficking in Children), Article 147 (Associating for the Purpose of Perpetrating the Criminal Offences of Trafficking in Humans and Children), Chapter XV (Criminal Acts of Sexual Abuse and Sexual Exploitation of Children), Chapter XXII (Criminal Offences against the Constitutional Order and Security of the Republika Srpska), Chapter XXIII (Criminal Offences of Terrorism), as well as to the perpetrators who have previously been convicted of the same kind of criminal offence twice or more times.”

When imposing punishments for wartime sexual violence, the Court of BiH applies CCBiH only when rape or other forms of sexual violence (sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, or any other form of severe sexual violence) were committed as part of a crime against humanity. In that case, a minimum prison sentence of ten years is stipulated, therefore, even when the sentence is reduced it cannot be shorter than five years.

In all other cases of wartime sexual violence, when they are not part of a crime against humanity, the Court of BiH, as well as entity courts, apply the provisions of CCSFRY in sentencing the perpetrator. CCSFRY prescribes a minimum prison sentence of five years for wartime sexual violence, which can be reduced to a prison sentence of one year. In numerous judgments, both the Court of BiH and the entity courts imposed a one-year prison sentence for wartime sexual violence and other war crimes based on CCSFRY.¹⁶⁸ The sentences could not be converted into fines as CCSFRY does not foresee the possibility of replacing the imposed prison sentence with a fine.

However, once these judgments pronounced under CCSFRY became final, some convicted persons asked the courts to convert the one-year prison sentence to a fine, according to the provisions of CCBiH, CCRS, CCFBiH and CCBDBiH. The previous analysis¹⁶⁹ also showed that persons convicted of war crimes used this possibility,¹⁷⁰ and this practice continued and never stopped, as seen in the most recent case under consideration in this analysis.

The final judgment of the Cantonal Court in Odžak sentenced the defendant **Mirko Ćulap** to one year in prison for committing the criminal offense of war crimes against the civilian population under Article 142 (1) as read with Article 22 CCSFRY.¹⁷¹ Mirko Ćulap filed a petition to convert the prison sentence to a fine, and the Cantonal Court in Odžak issued

¹⁶⁸ The OSCE Mission to BiH published in June 2017 the report *PTowards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016*, stating that between 2006 and 2016, of 17 war crimes cases in which a sentence of 12 months was pronounced, at least 15 sentences for war crime were eligible for conversion to a fine, pgs. 63-64.

¹⁶⁹ Kyle Delbyck, *Punishing Conflict-Related Sexual Violence: Guidelines for Combating Inconsistencies in Sentencing*, 2018, pgs. 56-57.

¹⁷⁰ According to OSCE data, four prison sentences have in fact been converted to a fine by 2017, p. 64.

¹⁷¹ *Mirko Ćulap*, Judgment of the Cantonal Court in Odžak no. 02 0 K 001504 21 K 2 of 24.1.2022.

judgment no. 02 0 K 001504 23 Kv of 6.2.2023, accepting his petition and replacing a prison sentence imposed according to CCSFRY with a fine in the amount of BAM 36,500.00, based on the provisions of CCFBiH.

In this way, by converting prison sentences imposed under CCSFRY to fines and in accordance with the provisions of CCBiH, CCRS, CCFBiH and CCBDBiH, the courts violate the prohibition of applying two different criminal codes to the same criminal offense when determining liability and deciding on the sentence. The prohibition to apply two different criminal codes to the same criminal offense in terms of factual description and punishment was considered by the Court of BiH¹⁷², but also indirectly by the Constitutional Court of BiH in numerous decisions on the retroactive application of CCBiH to war crimes.¹⁷³


The first instance judgment of the Court of BiH against **Boro Milojica and others**¹⁷⁴ convicted Boro Milojica for the crime against humanity under Article 172 of CCBiH, and the court, applying Articles 39, 42 and 48 of CCBiH, sentenced him to eight years in prison. Deciding on the sentence, the first instance court stated that it was guided by the principle of fairness, and that it also *had in mind the provision of Article 38 (1) CCSFRY, which prescribes a range of prison sentences that can be imposed on the perpetrator of the criminal offence*. Following the appeal, the second instance court reversed the first instance judgment, explaining that the defendant was declared guilty of crimes against humanity under Article 172 CCBiH and the first instance court, when explaining the sentence, wrongly referred to the provision of Article 38 CCSFRY, considering that a sentencing range stricter than the one in force at the time of the perpetration of the crime may not be applied. The Appellate Panel found this decision of the first instance court to be wrong both from the aspect of the existence of significant violations and of violations of the criminal code. The second instance court *recalls that in terms of general rules and principles of the criminal code, it is inadmissible to combine the provisions of two different criminal codes – as has always been clear in the theory of criminal law. Every law constitutes an organic unity; therefore, no legal provision can be torn out of the whole to which it belongs and incorporated into some other whole, unknown to it.*¹⁷⁵

¹⁷² *Boro Milojica and others*, Judgment of the Court of BiH no. S1 1 K 024092 17 Kri of 27.6.2019, paras 266 and 267, and Decision of the Court of BiH no. S1 1 K 024092 19 Krž of 1.11.2019.

¹⁷³ Constitutional Court of BiH. Case no. AP 1751/11, Appeal by A. K., Decision of 6.11.2014.

¹⁷⁴ *Boro Milojica and others*, Judgment of the Court of BiH no. S1 1 K 024092 17 Kri of 27.6.2019, paras 266 and 267.

¹⁷⁵ Decision of the Court of BiH no. S1 1 K 024092 19 Krž of 1.11.2019, paras 13–19.



It is evident that the courts, with their uncritical approach to accepting plea agreements and disregarding the relevant aggravating factors, impose prison sentences of one year for committed war crimes, even though the prescribed minimum is five years. Furthermore, as a consequence of such decisions, the courts find themselves in a situation where, upon a petition to replace a prison sentence with a fine, they improperly apply two different criminal codes to a single criminal offense – one for factual description, the other for punishment – thereby violating the basic rules and principles of criminal law and violating the criminal code by applying a code that cannot be applied. Criminal codes are to be applied in full, not in part, as is wrongly done by courts at all levels when it comes to converting prison sentences for war crimes to fines.

XI. Recommendations

To enhance punishment of perpetrators of wartime sexual violence, numerous measures should be undertaken.

When imposing an appropriate sentence, the Court of BiH must take into account that the purpose of criminal sanctions is the protection and satisfaction of the victim of the offence, and should, accordingly, impose appropriate sentences.

The practice of converting prison sentences imposed in war crimes cases to fines must stop, because the legislation on the basis of which war crimes are adjudicated does not allow this and two different substantive laws cannot be applied to the criminal offense and the sanction, as is wrongly done by some courts. A step in this direction is for the courts to never impose a prison sentence of one year for wartime sexual violence.

In cases in which multiple criminal offenses are tried, as well as in cases in which the perpetrators were convicted solely for wartime sexual violence, it is not enough to state general formulations regarding the purpose of punishment or list the aggravating and mitigating factors that were taken into account in determining the sentence. Courts should assess and present specific circumstances related to the specific offence and the specific perpetrator of wartime sexual violence for the punishment to be appropriate and not arbitrary, and to reflect the severity of sexual violence and the suffering of the victims. In particular, the courts must stop the practice of writing explanations by copying and pasting explanations from other judgments.

Courts assign extensive importance to the defendant's family circumstances and good behaviour in court, and they uncritically accept allegations of perpetrators helping victims as mitigating factors.

Courts should not consider the passage of time as a mitigating factor. Furthermore, wartime circumstances in which the perpetrator found himself cannot serve as justification for the committed war crimes.



Courts should take into account that aggravating factors are the vulnerable status of the victim, abuse of power by the perpetrator, violence, humiliation and cruelty in connection with the crime, duration of the crime, zealous participation in the crime, vengeful motives for the crime, the impact of the crime on the victims and the behaviour of the perpetrator after committing the crime.

Second instance courts should continue compensating for the shortcomings in first instance judgments upon appeals in terms of appropriate punishment, because this is the basis for first instance courts to start changing their established practice. Furthermore, it is necessary to continue to refer to ICTY case law when assessing mitigating and aggravating factors.

Courts should stop valuing ordinary circumstances, which are sometimes not even mitigating, as particularly mitigating factors, such as family and the like. Particularly mitigating factors would be, for example, sincere remorse, but not remorse declaratively expressed to avoid responsibility or reduce the punishment, exceptional cooperation with the prosecution, contribution to reconciliation, the fact that the defendant did not have a dominant role in the attack, and admission of guilt, however, in the phase of investigation or before the start of the main trial.

When second instance courts establish additional aggravating factors, then it is only logical that the sentence be higher. Contrary to this logic, in some cases, the second instance courts reduced the sentence imposed by first instance courts even though they found additional aggravating factors in second instance proceedings.

Courts should weigh aggravating and mitigating factors against each other, as well as assess their actual impact on the sentence, rather than just listing them and imposing the sentence without a genuine analysis of their impact.

Plea bargaining agreements are useful, but courts should take into account the opinion of the injured parties regarding the proposed prison sentences before accepting the agreement.

It is necessary to organise joint trainings on imposing sanctions for wartime sexual violence, which will include judges and prosecutors, as well as professional associates from all parts of the country and from all levels of the judiciary, as it is obvious that there is an inconsistent practice of imposing sentences both within the courts and among different courts and levels of the judiciary.

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