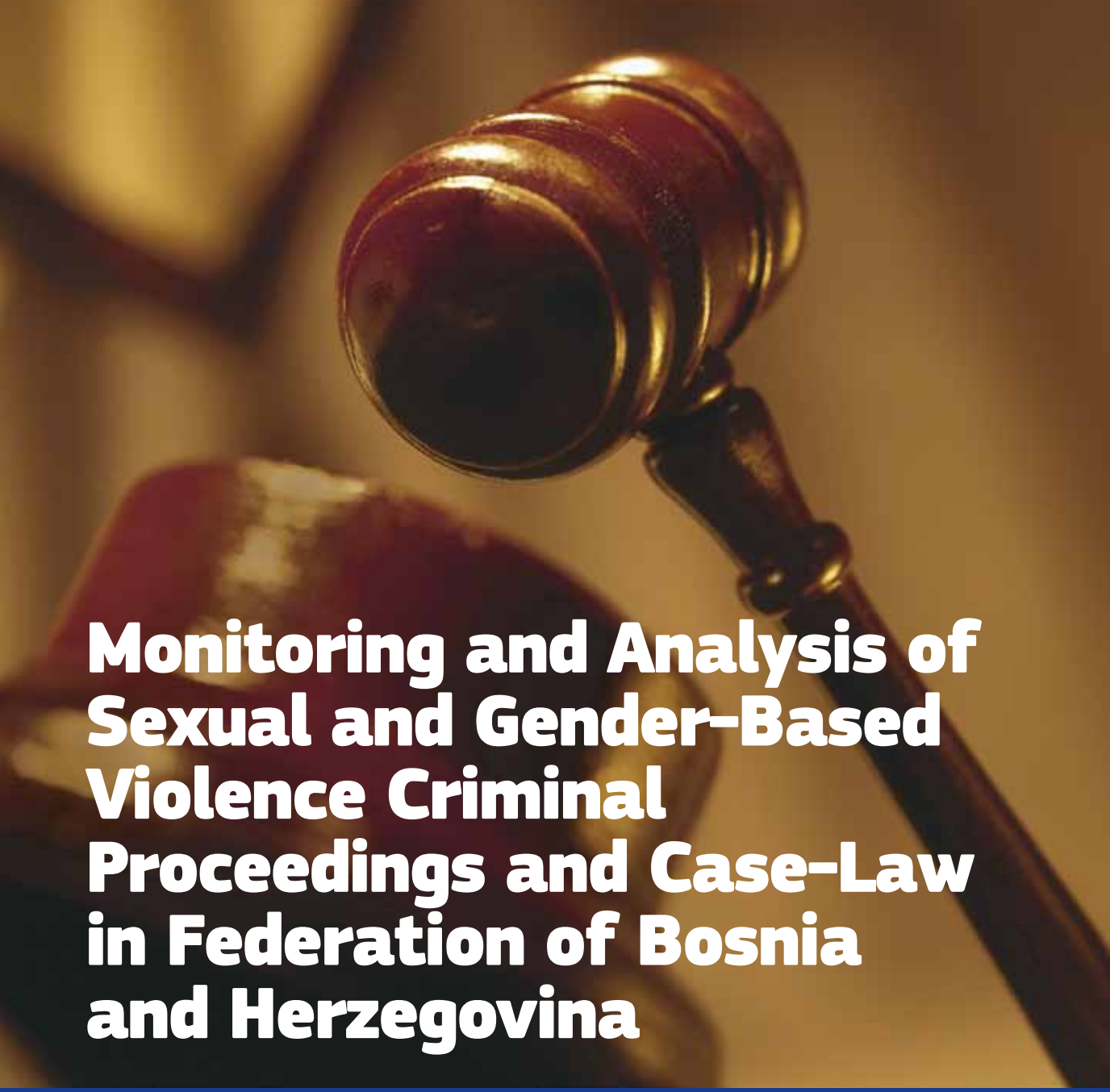

Monitoring and Analysis of Sexual and Gender-Based Violence Criminal Proceedings and Case-Law in Federation of Bosnia and Herzegovina

Centre for Legal Assistance for Women Zenica

Zenica, 2011

United Nations Population Fund

Bosnia and Herzegovina
Federation of Bosnia and Herzegovina
Government
Gender Centre of Federation of Bosnia and Herzegovina

Ministry for Human Rights and Refugees
Agency for Gender Equality of Bosnia and Herzegovina

Republic of Srpska
Government
Gender Center - Center for Gender Equality

United Nations Development Programme

Preventing and Combating Sexual and Gender Based Violence in Bosnia and Herzegovina

Monitoring and Analysis of Sexual and Gender-Based Violence Criminal Proceedings and Case-Law in Federation of Bosnia and Herzegovina

Final Report and Analysis

Prepared by: Centre for Legal Assistance for Women Zenica

Zenica, 2011

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Executive Summary

Violence against women (sexual and gender-based violence) represents a problem for the entire society, and therefore requires an efficient and timely response of all responsible stakeholders. As the efforts of the government and the legislature are focused primarily on developing an appropriate legal framework, in line with international standards, the main purpose of monitoring and analysis is to determine whether the legal regulations in which international standards are incorporated are being implemented consistently.

The existence of appropriate legislation is just a dead letter on a printed page insofar as the victim of a criminal offence is not enjoying the required protection in the criminal proceedings, or insofar as there has been an excessive delay in the proceedings, not justified by the circumstances of the particular criminal case. For a number of years the efforts made by the government have just remained on the attempts to address this problem, which is why the role of the judiciary is vital for the exercise of the proclaimed rights.

The primary objective of the analysis is to identify the shortcomings in the prosecution of crimes related to sexual and gender-based violence, to reach some specific conclusions and make recommendations to all relevant institutions. The project called "Monitoring Justice towards Achieving Sexual and Gender Equality„ carried out the monitoring of selected criminal offences. These criminal offences have not been selected randomly; the cases were monitored because they involved the offences whose victims were in a very delicate situation. The inefficiency of the judiciary and the lack of adequate protection for the victims of the criminal offence have resulted in a number of undesirable consequences. The first and probably most important consequence is the failure to report criminal offences due to the loss of faith in the protection provided by the government as part of its statutory obligation.

In order to highlight the problems encountered in practice and to prevent such situations, the analysis will cover the most important aspects of the criminal proceedings that were the primary focus of this monitoring exercise (the application of substantive law, the treatment of victims in criminal proceedings,

penal policy, the trial within a reasonable time, the terms and conditions under which the trial took place and the difficulties encountered while obtaining and presenting evidence).

1. Introduction

Violence against women (sexual and gender-based violence) is a violation of human rights based on inequality between women and men. This widespread problem is encountered and dealt with not only by Bosnia and Herzegovina, but also by a number of the most developed countries in the world. It is clear that violence against women is associated with discrimination and gender-based prejudices, and as such has become part of Bosnia and Herzegovina's daily life.

The specific situation prevailing in BiH, and *ipso facto* in the Federation of BiH, is that certain laws are enacted in order to regulate a number of issues concerning women, including violence against women, which are, as a matter of fact, inapplicable insofar as their individual provisions are concerned.[1] Statistics show that the capacities of all stakeholders concerned should be expanded in regard to protecting women against sexual violence and violence in general, so as to ensure more efficient promotion of human rights, which therefore fall within the category of rights inherent to women as well. In addition, there is an apparently small number of reported and documented cases of violence against women, which largely affects the quality of life of women and calls into question a fundamental human right guaranteed to all women — the right to security.

The increase in gender inequality goes hand in hand with the increase of gender-based violence and sexual harassment. Surveys conducted in 2004 and 2007 show that between one- fifth and three-quarters of females have experienced violence in the private sphere, whether in family or in their most immediate environment.[2] Despite the efforts made in the Federation, there is still no

1 Law on the Protection against Domestic Violence provides for protective measures, including *inter alia* accommodation in shelters, but does not provide for any financial assistance for them (which were so far established owing to NGO sector), or the use of an alimony fund, which does not exist.

2 The survey that was conducted in the municipality of Zenica on a sample of 600 women, as part of a program titled "*Developing Gender Based Violence* and *Child Abuse* Referral Mechanism in BiH", supported by UNFPA/ UNICEF, 2007 and 2008.

adequate coordinated community response that would be focused on helping the victim, especially when it comes to battered or raped women.

For all these reasons, by providing support to the BiH institutions, this Project sought to identify the current practices of the courts in the prosecution of sexual and gender-based violence in the context of existing legislation and the current implementation of international standards.

Namely, in order to reduce gender-based violence, Bosnia and Herzegovina ratified numerous international documents. By ratifying these international documents, the state has assumed responsibility to comply with the international standards such as the prohibition of sex discrimination,[3] ensuring equality of all persons before the law and the realization of the right to equal and effective protection, with the prohibition of discrimination on any grounds, including sex,[4] elimination of discrimination against women in all its forms using all means available,[5] undertaking all necessary measures to protect women in the family and society,[6] guaranteeing basic civil and political rights (right to life, liberty and security of person, to a fair trial, to an effective remedy, punishment solely on the basis of law, respect for private and family life, prohibition of abuse of rights and other rights and freedoms),[7] as well as ensuring non-discrimination of children and protection of their best interests.[8] In accordance with the commitments it made in the international documents, Bosnia and Herzegovina has adopted or amended a number of laws aimed at preventing gender-based and sexual violence, and punishing offenders.[9]

Due to the legislative and other changes, to the ever more frequent education and promotion of practice for the stakeholders and agents involved in the protection – which have reinforced their capacities for an effective law enforcement, and work on improving the coordination between the institutions and non-governmental organizations – victims of domestic violence are being encouraged increasingly to seek help from and to report violence to the relevant stakeholder institutions involved in the protection, but also to turn to non-governmental organizations

3 Universal Declaration of Human Rights and Freedoms.

4 International Covenant on Civil and Political Rights.

5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), while the establishment of the Committee on the Elimination of Discrimination against Women provided a mechanism of supervision over the same convention.

6 Declaration on the Elimination of Violence against Women (DEVAW).

7 European Convention on the Protection of Human Rights and Fundamental Freedoms (remainder of the text: ECHR) and its Protocols.

8 Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

9 The Criminal Code of the Federation of BiH, the Criminal Procedure Code of the Federation of BiH, the Family Law of the Federation of BiH, the Law on Protection against Domestic Violence of the Federation of BiH, the Gender Equality Law of the Federation of BiH, the Law on Prohibition of Discrimination of the Federation of BiH and the Law on the Protection of Witnesses under Treat and Vulnerable Witnesses of the Federation of BiH.

dealing with the protection of human rights in order to seek help from them in that regard as well. It should be emphasized that the police is becoming a very important player in providing support to the victims and discovering the offenders in order to enforce legal and other provisions relating to the issues of domestic violence and general violence in society more consistently.[10]

Under such circumstances and within the specified legal framework, the Centre for Legal Assistance to Women Zenica (hereinafter: the Centre), being the main implementing authority in the project *"Monitoring Justice towards Sexual and Gender Equality",* by collecting and analyzing the data throughout the Federation, has made an assessment of effectiveness of the judiciary in the prosecution of crimes of sexual and gender-based violence.

The term "gender-based violence" is to be understood as any act of violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.[11]

The issue of effective monitoring of women's rights, which are at the same time human rights, or the outline of the situation with respect to human rights in a certain country, should both be based on a set of verifiable, accessible, centralized and thoroughly elaborated data with the aim of effective protection and promotion of human rights. For this specific reason, the process of monitoring included also the undertaking of active data collection, data verification and putting the data into operation.

The purpose of the project was to collect and disseminate objective information on the administration of justice in individual cases, in order to make a systematic assessment of functioning of the judicial system component parts on the basis of such data. Evaluation of the effectiveness of judicial protection would have effect of increasing the transparency of court proceedings and raising the public awareness of the international standards associated with fair trial. This would provide support to the reform of the judiciary and the strengthening of both the national capacities in implementing applicable laws, policies and strategies and the capacities of non-governmental organizations, all with the aim of improving the status of victims of sexual and gender-based violence at all stages of criminal proceedings.

10 Preliminary Findings on the Implementation of the Laws on Protection from Domestic Violence in Practice by the relevant institutions, the OSCE, 2009.

11 Gender-based and sexual violence include:
- violence occurring in the family or domestic unit, including, inter alia, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, and other traditional practices harmful to women;
- violence occurring within the general community: rape, sexual abuse, pandering, trafficking in women for the purposes of sexual exploitation and economic exploitation.

The Project of the Centre was implemented as part of a joint UNDP/UNFPA project entitled **"Preventing and Combating Sexual and Gender-Based Violence in BiH"**, which is conducted in cooperation with the Gender Equality Agency and the Gender Centres of the Federation of Bosnia and Herzegovina and the Republika Srpska.

2. Trial monitoring methodology

The high degree of administrative fragmentation at all levels of government is seriously undermining the enjoyment of human rights guaranteed by national legislation and international standards alike. In addition, a number of examples from the case-law of Bosnia and Herzegovina's judiciary show the importance of harmonization of the case-law in BiH and unacceptability of arbitrary and unsubstantiated legal standpoints and their application in particular.[12] In any case, women as victims of criminal offences suffer significant damage as a result of such shortcomings, since in this context their legal certainty, the principle of legality and the principle of rule of law are all called into question invariably. Due to the sensitive position of the woman as the victim/injured party[13] in criminal proceedings, this monitoring exercise covered the criminal offences where compliance with the international standards is of extreme importance, not only because of the woman injured by the specific crime but also for the purpose of restoring faith in the justice administration system for all other victims of sexual and gender-based violence, so as to eventually break the vicious circles of violence in this way.

In accordance with the project of court trial monitoring relating to prosecution of perpetrators of criminal offences (CO) of sexual and gender-based violence, the Centre has monitored the trials and collected information on criminal court proceedings for crimes committed and referred to in the Criminal Code of the Federation of BiH (CC FBiH) as follows:

- Criminal offences against life and limb (murder; aggravated bodily injury; slight bodily injury);

12 SECOND PERIODIC REPORT of Bosnia and Herzegovina on International Covenant on Economic, Social and Cultural Rights, Sarajevo, June 2010.

13 The concept of a female injured party in criminal procedural and criminal substantive law terms is different and can lead to certain ambiguities. It seems that the ambiguities in the criminal proceedings arise primarily from the lack of distinction between the terms victim of a criminal offence and injured party affected by a criminal offence, the latter being a broader term altogether. Specifically, the injured party can be a direct or indirect victim of an offence and in fact this term represents a civil law term, while the victim of a criminal offence is the one who is always directly affected by the criminal offence. For purposes of this report, we are referring to the injured party who is also a victim of the crime, therefore the injured party in the strict sense of the word.

- ◊ Criminal offences against sexual freedom and morality (rape; sexual intercourse with a helpless person; sexual intercourse by abuse of position; sexual intercourse with a child; lechery (concupiscence); satisfying lust in the presence of a child or juvenile; pandering; incest);
- ◊ Criminal offences against marriage, family and youth (domestic violence; common-law marriage with a junior juvenile).

Having in mind the preliminary considerations on the necessity for monitoring of certain criminal offences, the following aspects of monitoring imposed themselves as relevant for the analysis of the current situation, the evaluation of progress, and the compliance with the international standards:

- ◊ *application of substantive law* (in terms of proper legal qualification of facts),
- ◊ *treatment of the victim within the proceedings* (depending on whether the victim enjoyed the status of a protected witness, whether she was examined in the presence of psychologist, with prior removal of the accused from the courtroom),
- ◊ *penal policy pursued in criminal offences* (application of legislative provisions on criminal sanctions, provisions on extenuating and aggravating circumstances, possibility of exercising special and general prevention),
- ◊ *trial within a reasonable time* (depending on the type of the CO, the circumstances under which the CO was committed, the conduct of the accused),
- ◊ *analysis of the conditions under which the trial took place* (the size and the special arrangement of the courtroom),
- ◊ *juveniles as victims in criminal proceedings* (sensibilisation of judges with respect to a juvenile victim), and
- ◊ *problems encountered in proving criminal offences*.

Monitoring of the judiciary was conducted during the period between February and October 2011 in the territory of the Federation of Bosnia and Herzegovina, and so in the Cantonal Court and the Municipal Court in Zenica, the Cantonal Court and the Municipal Court in Tuzla, the Cantonal Court and the Municipal Court in Sarajevo, the Cantonal Court in Novi Travnik and the Municipal Court in Travnik. In the preparatory phase of the monitoring implementation, protocols were signed on cooperation with the presidents of all courts that were in the focus of monitoring in the Federation territory. The above protocols were preceded by delivery of letters to all courts, requesting from them to allow access to hearings, access to court documents, files and other required information, but also access to hearings conducted *in camera*.

By signing the Protocol on Mutual Cooperation with the Courts, the Centre as the implementing agent of the project has made a commitment to applying the following principles:

- the principle of non-interference in the court trials,
- the principle of impartiality,
- the principle of professionalism,
- the principle of confidentiality.

Trials were monitored by four monitors/observers, who had the identity accreditations. During the course of the court trial monitoring period the monitors appeared in court for 114 hearings.

Selection of the cases that were in the focus of monitoring was performed by selecting the cases from the docket of trials in the Criminal Division. The monitors were able to monitor a small number of cases throughout the entire court trial (ranging from the guilty plea hearings of the accused before the preliminary hearing judge to the hearings where the first instance verdicts were pronounced), whereas a larger number of cases were monitored directly only at certain stages of the proceedings, depending on the period when the monitors got involved in the monitoring process (attending the main trial, the hearings for deliberation of the guilty pleas, the hearings for pronouncing the criminal sanctions or the announcement of verdicts).

In order to obtain as much information of importance for the project implementation as possible within the direct trial monitoring, a number of court records were reviewed pertaining to the completed court proceedings that were instituted against the perpetrators of criminal offences being in the focus of the monitoring exercise. After returning from the hearing, i.e. after their departure to the court, the monitors produced a trial report, which contained information about the case, a summary of the indictment, a brief outline of the trial, an analysis of the relevant standards and other important issues, including the examples of good practices.

2.1. Statistical survey of the monitored cases

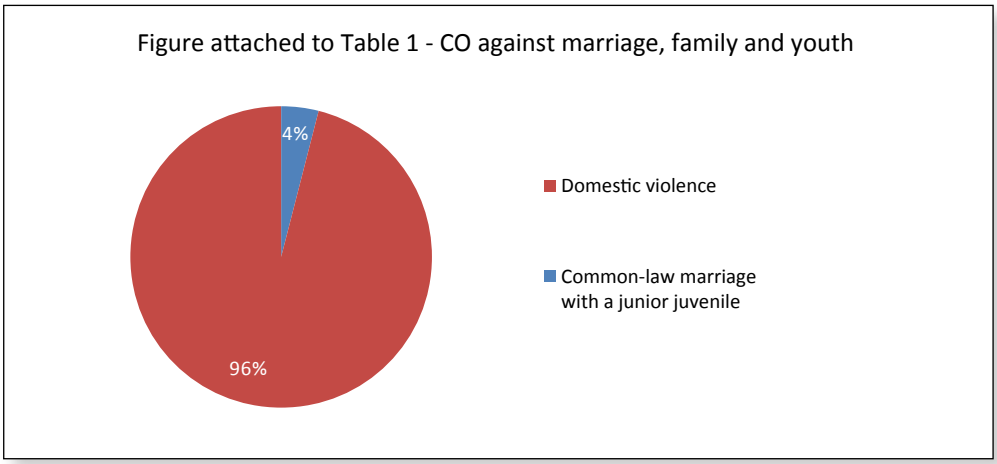
The total number of monitored cases during the monitoring amounts to 145, as follows:

Criminal offences against marriage, family and youth – 81 in total (of which 78 cases of domestic violence; 3 cases of common-law marriage with a junior juvenile) – ***Table 1, Figure attached to Table 1 .***

Table 1

No	Criminal offences against marriage, family and youth	Number of offences
1.	Domestic violence	78
2.	Common-law marriage with a junior juvenile	3
	Total	81

Figure attached to Table 1.

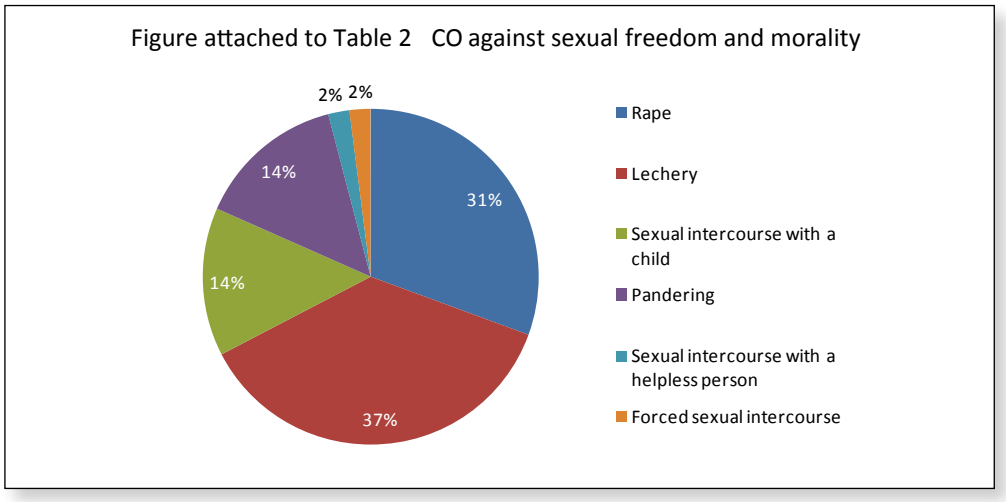


Criminal offences against sexual freedom and morality – 47 in total (of which 14 rapes; 17 cases of lechery (concupiscence); 7 cases of sexual intercourse with a child; 7 cases of pandering; 1 case of sexual intercourse with a helpless person; 1 case of forced sexual intercourse) – ***Table 2, Figure attached to Table 2.***

Table 2.

No.	Criminal offences against sexual freedom and morality	Number of offences
1.	Rape	14
2.	Lechery (concupiscence)	17
3.	Sexual intercourse with a child	7
4.	Pandering	7
5.	Sexual intercourse with a helpless person	1
6.	Forced sexual intercourse	1
	Total	47

Figure attached to Table 2.

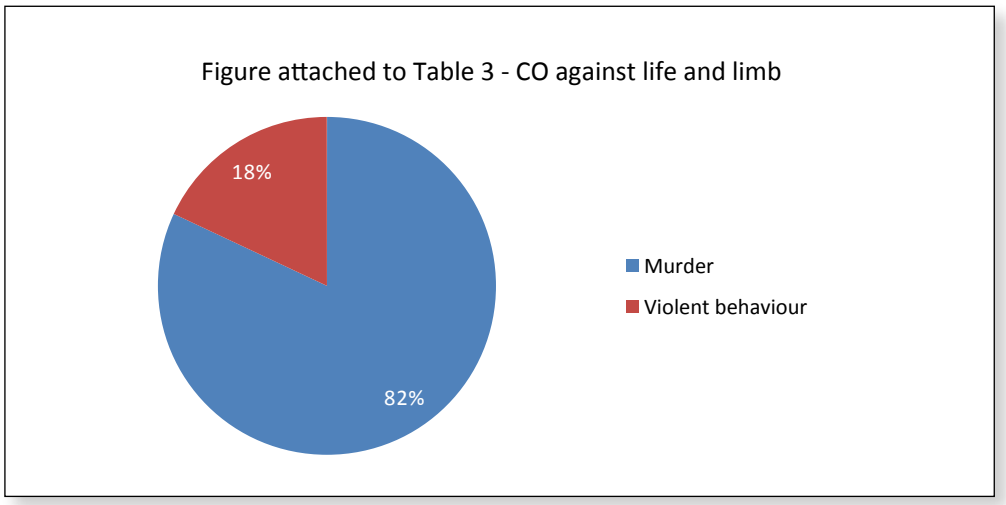


Criminal offences against life and limb – 17 in total (of which 14 cases of murder; 3 cases of violent behaviour) – ***Table 3, Figure attached to Table 3.***

Table 3.

No.	Criminal offences against life and limb	Number of offences
1.	Murder	14
2.	Violent behaviour	3
	Total	17

Figure attached to Table 3.



Out of the total number of cases monitored in the reporting period, the total number of cases completed with the final and binding verdict was 114.

The analysis of the monitored cases was conducted on the basis of data obtained through the direct monitoring of trials in the courts and the review of court files relating to the completed court trials that were instituted against the perpetrators of criminal offences being in the focus of monitoring.

3. Analysis

Major aspects of the analysis that are presented below have not been selected randomly; they include aspects that will enable the review and analysis of case-law of the courts with regard to international standards. This analysis of the case-law within its essential elements will facilitate a systematic evaluation of the effectiveness of parts of the judiciary for the purpose of identifying specific areas that would require reforms and for the purpose of making the concrete conclusions and *ipso facto* specific recommendations.

3.1. Trial within a reasonable time as part of the right to a fair trial

3.1.1. International standards

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) provides the right to a fair trial, and taking into account the systematic classification taken from a series of up-to-date commentaries and doctrinal interpretations of the Convention, a number of elements or aspects of the right to a fair trial may be derived therefrom.[14] The

14 The right to have access to court;
The right to receive legal aid and advice;
The right to equality of arms;
The right to a public hearing;
The right to a fair hearing;
The right to proof;
The right to public pronouncement of judgments;
The right to a tribunal established by law;
The right to impartiality and independence in trial;
The right to be tried within a reasonable time;
The right to effective enforcement of judgments;
The prohibition of arbitrariness in the proceedings.

entire system of procedural rights under Article 6 of the European Convention rests with the idea of effective legal redress; however, the system is viable only if this kind of protection is provided in a timely manner, for the purpose of which Article 6 includes a guarantee regarding the length of the proceedings within a reasonable time frame. Explaining the importance of this guarantee, the European Court has emphasized that too time-consuming trials undermine the effectiveness and credibility of the judiciary.

A reasonable time for court trials represents an open standard. It involves a maximum period of time which, if exceeded, may lead to violation of human rights. This is not an optimal or ideal time limit which, depending on the circumstances, may be much shorter than the reasonable one.[15] Through the standard of reasonable time the Court does not appear to favour the speed of the actions taken by the competent authorities without taking into account the quality of both the proceedings and the decision-making.[16] In considering the length of the proceedings the Court also considers the total integrated length of the proceedings, but also whether in the particular stage of proceedings there were any protracted periods of inactivity which were not caused by the conduct of the applicant (the defendant).[17] Even though the time limits with regard to the length of the proceedings have not been laid down in the Court's case-law, having considered the multiplicity of cases in which the Court decided by using additional criteria, some of the limits have nevertheless become crystallized.[18] However, the reasonableness of the length of proceedings is to be assessed in each case against the particular circumstances and in regard to the following criteria laid down in the Court's case-law:

15 The European Court's case-law does not lay down any absolute limits with regard to the length of proceedings but evaluates the reasonableness of the length of proceedings in each individual case, taking into account the factors such as complexity of the case, conduct of the applicant (in this case it is the defendant), conduct of the competent authorities, the value of the protected goods and the need for urgent action, and the number of procedural stages through which the case had passed.

16 *The Right to Trial within a Reasonable Time*, Collected Papers on Selected Judgments of the European Court of Human Rights in cases against Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and Serbia, the Human Rights Centre of the University of Sarajevo.

17 A. Uzelac, "The Right to a Fair Trial in Civil Cases: New Case-Law of the European Court of Human Rights and its Impact on Croatian Law and Practice", April 2009.

18 Thus according to a more recent analysis, even when it involved some highly complex cases, the Court regularly found a violation where the proceedings took longer than five years for criminal, or 8 years for civil cases. In the cases that required urgent action (or in the so-called priority cases) the Court tended to establish a violation even if the trial took only 2 years. Looking into the different stages of the proceedings, as regards the cases that have undergone several phases of the trial, the indicative limits should be about 2-3 years by an instance or level of decision-making (trial, appeal proceedings, extraordinary legal remedy). However, these limits are not strictly defined and vary from case to case, precisely because the criteria by which the Court guided itself.

a. complexity of the case,[19]

b. conduct of the applicants,[20]

c. conduct of the competent authorities,[21] and

d. the relevance of the decision taken in the case for the applicant.

Although in many instances Contacting States have referred to the objective limitations in the activities of their courts (the lack of funds, overburdened courts, a large number of cases), the European Court did not consider it regularly as a sufficient justification, expressing the view that Contracting States are responsible for organization of their judicial systems in such a way that ensures the full respect for their fundamental rights of their clients.[22]

19 When it comes to the complexity of the case, the Court takes into account the complexity of the legal matters and the matters of facts that the domestic court is supposed to address, and so in particular:
- the number of parties or defendants and witnesses;
- voluminosity of evidence;
- complexity of the expert witness evaluation;
- international elements, especially in regard to obtaining evidence;
- death of a party during the course of the proceedings;
- age of the event, which was the subject of litigation.

However, one should take into account that the presence of any of these factors of complexity does not in itself justify the great length of proceedings, or even provoke the finding of the Court that the case was really complicated.

20 The party is expected to demonstrate promptness in undertaking all procedural actions that are relevant to the party, to refrain from the tactics of delay, and to use all effective means required to accelerate the proceedings, except where such an effective means does not exist. Since the defendant cannot be expected to contribute actively to the acceleration of the proceedings which could lead to his conviction.

21 In assessing whether the length of the proceedings was reasonable, the Court takes into account all the objective circumstances such as the complexity of the case and the number of jurisdictional levels at which the case was deliberated during its entire lifetime. The state is obligated to provide a system that guarantees a fair trial in accordance with the requirements of Article 6 of the Convention and is responsible for actions of all of its authorities (unjustified action of the courts, the inactivity of the courts, etc.).

22 *See* Zimmermann and Steiner v. Switzerland, 8737/79, Judgment of 13 July 1983; Guincho v. Portugal, 8990/80, Judgment of 10 July 1984. The Court reached a dissenting conclusion only in Buchholz v. Germany, 7759/77, Judgment of 6 May 1981, where it concluded that there is no liability on the part of the Contracting States for a temporary backlog of business caused by an abrupt increase in the volume of litigation that it could not reasonably foresee, and which was the result of an economic recession, provided they demonstrated to have taken, with the requisite promptness, remedial action to deal with such backlogs.

3.1.2. Domestic legislation

The Criminal Procedure Code of the FBiH adopts the same principles, determining that the duty of the court is to make efforts to conduct proceedings without delay and to prevent any abuse of the rights that belong to the participants of the proceedings.

According to the Criminal Procedure Code of the FBiH, the accused has the right to trial without delay, with a number of procedural safeguards that should contribute to the expeditious completion of the criminal proceedings.[23] This right is established primarily for the benefit of the accused, because the intent of the legislator is to accelerate the proceedings and to take the decision on the relevant legal matter as soon as possible for the person being tried. It is worth mentioning that the consistent implementation of the foregoing legislative provisions also contributes to the protection of interests of the victims. Specifically, the purpose of the guarantee of trial within a reasonable time, which is not applicable only in criminal proceedings, is to protect all parties in court trial against an excessive delay in the proceedings.

3.1.3. Criminal offence (CO) of domestic violence

The court trial monitoring exercise and the examination of archived case files have performed an analysis on the length of the proceedings. Based on the data collected, it appears that in most of the monitored cases the proceedings have not been found to be too lengthy or time-consuming, which at the same time constitutes the legal obligation.[24] In 4 out of the total 58 completed cases that were within the focus of monitoring, there were deep concerns expressed that the proceedings were not completed without delay, which was not justified by the complexity of the case, the conduct of the accused or other participants in the criminal proceedings.

23 Thus, under the CPCFBiH the accused is entitled to be brought before the court within the shortest reasonable period of time and to be tried without delay, but no later than one year following the confirmation of the indictment (Article 14, paragraph 1), the right to have the length of detention kept to a minimum, through a series of strict regulations on the length and extension of the detention period (Article 145, paragraph 4), the imposing a fine upon the prosecutor, defence attorney, attorney-in-fact, legal representative or an injured party, if their actions are aimed at prolonging the criminal proceedings (čl.226), the statutory setting of a deadline for confirmation of the indictment, and so of 8 days, while for complex cases it amounts to 15 days (Article 243, paragraph 2), the scheduling of the main trial within 30 days following the date when the accused has entered a plea of guilty or not guilty (Article 243, paragraph 4), and the defining of the obligations of judges to eliminate everything that prolongs the proceedings but does not serve to clarify the matter (Article 254).

24 The Federation Law on Protection against Violence itself requires an action on the part of all major stakeholders and agents engaged in providing protection.

Having analyzed the reasons for the length of the proceedings that exceeded the period of two years, we have detected that in one case[25] the indictment was confirmed on 12 December 2007, the guilty or not guilty plea hearing was held on 21 January 2008, and the main trial was held as late as on 23 June 2011, which as a result caused that the testimonies given by the injured parties at the main trial were much less stringent than those given in the investigation, and that they did not match physical evidence. This trend of scheduling the hearings with the inexplicable time intervals between them but without any specific reason justifying such gaps is also characteristic for the remaining three cases.

The conclusion is that there have been no excessively long proceedings in most of the monitored cases of criminal offences of domestic violence. Although the above exceptions appear to have occurred only in a limited number of isolated cases, a significant deviation in this respect seems to be particularly alarming, since in a certain number of cases the injured party (woman) and the accused (man) will continue to live together or cohabitate.[26]

On the basis of available information, it was found that in 6 out of the total 54 monitored cases, the victim/injured party continued to be exposed to violence by the accused male.[27]

> ** A case tried in the Municipal Court of Travnik, for the criminal offence of domestic violence, where the accused did not allow the injured party to return to the house where she lived together with the accused.*

> ** A case tried in the Municipal Court of Travnik, for the criminal offence of domestic violence, where the response of the prosecutor's office to the appeal indicates that „... the accused made no gesture that would show whether he had any regret about the criminal offence he had committed. Quite the contrary, one could get the impression that the accused has resumed the same pattern of behaviour by performing the described offences on a daily basis....".*

The records within a limited number of cases show that the proceedings were suspended due to the lapse of a considerable period of time between the individual hearings, or that the prosecution dropped the criminal charges because the injured party had changed her statement in the testimony (due to

25 Municipal Court of Travnik.

26 Since the data was not recorded in official case documentation, the monitors obtained the same information through informal channels (by observing the events outside the courthouse, in conversation with the prosecutors).

27 One case in Tuzla and one case in Zenica Municipal Courts, and 4 cases in Travnik Municipal Court.

the continued cohabitation with the accused, completed divorce proceedings, etc.) as a result of the loss of interest in further criminal prosecution.

** A case tried in the Municipal Court of Sarajevo, where after 15 months the prosecutor's office dropped all further criminal charges in the prosecution, since in the meanwhile the injured party had completed the divorce proceedings informing the prosecutor's office that there was no further interest on her part in the continued criminal proceedings. Although it is clear that, according to the principle of legality, the prosecutor's office was not bound by the attitude of the injured party about the criminal prosecution, regardless of the reasons, the prosecutor's office dropped the criminal prosecution, since the injured party in the said case was the only witness of the committed criminal offence, whereas no other pieces of evidence were presented whatsoever.*

Regardless of the fact that in most cases involving criminal offences of domestic violence the trial was completed within a reasonable time frame, the above fact does represent a firm guarantee that the interests of the victim/injured party were actually protected, especially if we take into account the fact that the protective measures provided by the Federation Law on the Protection against Domestic Violence are implemented very rarely, which is a phenomenon that will be analyzed at a later point in this report.

3.1.4. Criminal offences against sexual freedom and morality

Being guided by the criteria such as the complexity of the case, the conduct of the accused, the actions undertaken by the court and the prosecutor's office, the need for taking emergency actions, as well as a number of procedural stages through which the cases has passed, the analysis included 18 cases from this group of criminal offences that were being monitored before the cantonal courts. The outcome of this analysis reveals that all cases were completed without delay, and that 10 out of 18 completed cases were completed within 2-3 months after the indictment had been confirmed, 4 (four) within a period of 3-6 months, while in only 4 (four) cases the proceedings took between 6 and 12 months.

As regards the situation at the municipal courts, a slightly larger number of cases has been recorded where the trial took longer than 12 months counting from the moment of confirmation of the indictment to the moment of rendering of a verdict. The length of the proceedings between 6 and 12 months was recorded in three trials, but on the other hand in 6 (six) cases the proceedings were found to have taken longer than 12 months after the indictment was confirmed. In

all of the above cases, except one, the proceedings were not found to be time-consuming; yet, for the sake of comparison, an analysis was performed about the principal cause of the length of the proceedings which exceeded 12 months.

** A case tried in the Municipal Court of Tuzla, for the criminal offence of lechery (concupiscence), where the indictment was issued on 25 October 2004. By the time when the monitoring period ended the proceedings had not yet been completed. The reasons for delaying the hearings were in the fact that the accused persons and the injured parties, summoned in their capacity as witnesses, did not appear at the hearing, but also in the failure on the part of the summoned court expert witness to appear at the witness stand and in the prosecutor's excused absence. During this procedure, the main trial was postponed* **13 times***, and although the apprehension orders were being issued, they did not produce the desired effect, and therefore custody was ordered for the accused due to his evading admittance with the judicial authorities. From the perspective of the victim of the criminal offence against sexual freedom and morality, any undue delay of the proceedings will result in the continuous suffering of violence and in the emergence of new adverse consequences for the victim[28] and her retraumatisation.*

3.2. Penal policy

The main element of criminal proceedings after establishing the criminal liability of the defendant is the sentencing hearing. International documents do not lay out a criminal law framework for criminal offences and therefore the obligations of the State in this area are not specified, other than the basic principle that punishment must be effective and preventive, and that it must comply with the principle *Nullum crimen, nulla poena, sine lege.*[29]

The jurisprudence of the European Court of Human Rights considers that the term "legality" within the meaning of the ECHR includes three main elements: accessibility, predictability and protection from any arbitrary treatment by

28 A case tried in the Municipal Court of Tuzla under no. 32 0 K 044208 07 K (3 indictments were confirmed against the accused during 2007 on account of the criminal offence of domestic violence, one indictment confirmed in 2008, where the indictments were joined into a single case as late as on 15 December 2009, and so only after the fifth indictment was confirmed for the same criminal offence).

29 Thus, the ECHR and the International Covenant on Civil and Political Rights provide that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

government authorities. Article 7 of the ECHR[30] links these principles with the specific context: the application of substantive criminal law.[31]

Although Contracting States tend to enact and amend their substantive criminal law independently and without any imposition, the Council of Europe has repeatedly expressed its view that the sanction imposed must be "effective, proportionate and dissuasive." By becoming Parties to *the Convention* (of the Council of Europe) *on Preventing and Combating Violence against Women and Domestic Violence,*[32] the Contracting States have committed themselves to taking the necessary legislative or other measures to ensure effective, proportionate and dissuasive sanctions. Parties may also adopt other measures in relation to offenders, such as the monitoring and supervision of convicted persons, but also withdrawal of parental rights if the victim appears to be a child whose protection may not be provided otherwise.

The same attitude in regard to the provided sanctions was expressed by the Council in the *Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse,*[33] noting that one should take into account the seriousness of the offences established in accordance with this Convention.

In addition to these conventions, under the Recommendation Rec. (2002) 5 adopted by the Committee of Ministers on the Protection of Women against Violence[34], the Council of Europe established that Member States should ensure that any act of violence against a person – in particular physical or sexual violence – constitutes in its criminal law a violation of that person's physical, psychological and/or sexual freedom and integrity, and not solely a violation of morality, honour or decency, and should also provide for appropriate measures and sanctions in national legislation, making it possible to take swift and effective

30 „1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations."

Paragraph 2 of the above Article excludes from the prohibition of retroactive application of the law any offence which at the time when it was committed, was considered a criminal offence, "according to the general principles of law recognized by civilized nations." This provision clearly recalls the principles of Nuremberg (and Tokyo) and their focus on war crimes. The formulation itself is, however, taken directly from Article 38 of the Statute of the International Court of Justice.

31 The Court also found violations of Article 7 (1) in the cases where the accused were sentenced to prison for terms longer than those permitted by national law (*Jamil v. France* (1995) (The State has extended the sentence of imprisonment by twenty months, whereas the maximum penalty allowed at the time when the offence was committed was four months) and *Gabarri Moreno v. Spain* (2003). (domestic courts have acknowledged a mistake made in sentencing, but failed to correct it).

32 http://www.coe.int/t/dghl/standardsetting/violence/default_en.asp

33 http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm

34 http://www.coe.int/t/dghl/standardsetting/equality/03themes/violence-against-women/Rec%282002%295_ Croatian.pdf

action against perpetrators of violence and redress the wrong done to women who are victims of violence.

According to the Federation Criminal Code, the purpose of punishment is *inter alia*:

- ◊ to express the community's condemnation of a perpetrated criminal offence;
- ◊ to deter the perpetrator from perpetrating criminal offences in the future and to encourage his reformation;
- ◊ to deter others from perpetrating criminal offences.

This means that, when imposing the prescribed criminal sanction, by taking into account all extenuating and aggravating circumstances, the Court should seek to achieve the purpose of the specific and general prevention. The criminal law theory has long abandoned the position of an exclusively repressive character of criminal sanctions, since such sanctions have failed to achieve the desired purpose. An adequate punishment of the accused, who was found in the criminal proceedings to have committed a criminal offence, should deter the same person from perpetrating the same offence in the future, but also act as a warning to all potential perpetrators that their actions will be duly punished.

A criminal sanction must be prescribed by law, but in such a way that allows its individualization. The law sets out the basic framework of punishment for certain crimes, leaving the possibility for the court in this framework to achieve individualization of the sentence and to hand down the sentence that is fully adequate for a particular crime and its perpetrator.

One of the objectives of monitoring the judicial proceedings relating to the prosecution of sexual and gender-based violence is also to look into the penal policy of the judicial authorities through an analysis of the magnitude of pronounced sentences in relation to the prescribed application of the extenuating and aggravating circumstances in sentencing, and to pronounce the sentence that is below the statutory minimum and other relevant aspects.

3.2.1. Criminal offences against marriage, family and youth

Within this category of criminal offences, the subject of monitoring were the criminal offences of domestic violence and the criminal offences of common-law marriage with a junior juvenile.[35]

The information obtained from research shows that the most common causes leading to domestic violence are: inadequate living conditions, unemployment, financial insecurity, alcoholism, stress, mental illnesses, drug addiction, and violence as a behaviour pattern resulting from patriarchal perceptions of the wife-husband relationship.[36] Victims of domestic violence are mostly spouses, former spouses, children, parents and other persons who live in a family household.

Court trial monitoring in the proceedings for the criminal offence of domestic violence reveals primarily the fact that in 69 out of the 78 monitored cases domestic violence was committed against family members with whom the perpetrator cohabitates in the same family household (wife and children). In these cases the Criminal Code of the FBiH provides that the offence shall be punishable by imprisonment for a term between 3 (three) months and 3 years.[37]

An analysis of the pronounced criminal sanctions shows that the courts tend to impose suspended sentences regularly for the criminal offence of domestic violence, and so on the basis of penal orders submitted by the prosecutor's office. This is supported by the fact that a suspended sentence of imprisonment was pronounced in 41 out of the total 57 completed cases that were being monitored in the reporting period. It is further specified that a probation period of one year was determined in most of the cases, which otherwise represents a statutory minimum.[38]

Imprisonment sentences pronounced for this type of criminal offence were recorded in an insignificant number of cases (5 for the reporting period), and so particularly in the cases where the criminal offence of violence resulted in serious bodily injury, or was being perpetrated continuously over a long period

35 Article 222, paragraph 1, of the CCFBiH provides that whoever by violence, insolent or arrogant behaviour violates peace, physical integrity or mental health of a member of his family, he or she thereby commits the criminal offence of domestic violence, for which he or she may be punished by a fine or imprisonment for a term not exceeding one year. The said Article contains the total of 6 paragraphs which regulate those legally qualified forms of this offence (perpetration of the criminal offence against a family member with whom one who perpetrates the violence lives together or cohabitates in the family household, if in the course of the perpetration of criminal offence, a weapon, dangerous object or other instrument suitable to inflict grave bodily injury or impair health has been used, if a serious bodily injury was inflicted on a family member or his health is severely impaired, or if the criminal offence referred to in paragraph 1 through 3 of this Article is perpetrated against a child or juvenile, if the offence has caused death of a family member, or whoever deprives of a life a family member whom he has been previously abusing).

36 SECOND PERIODIC REPORT of Bosnia and Herzegovina on International Covenant on Economic, Social and Cultural Rights, Sarajevo, June 2010.

37 Article 222, paragraph 2, of the CC FBiH.

38 Article 62, paragraph 1, of the CC FBiH.

of time, and where also another criminal offence was committed concurrently with the crime of violence.

In a certain number of cases it is observed that the courts do not take as an aggravating circumstance the fact that an act of violence was committed against several family members at the same time, for example, against wife and daughter at the same time. In 14 out of the total 57 monitored cases, the crime of domestic violence was perpetrated against several family members.

**An example of a case in which the accused perpetrated a continued criminal offence of violence against his wife and a criminal offence of violence against his daughter, where along with threats and insults he also inflicted minor bodily injuries on them, on account of which he was ultimately fined. When deciding on the criminal sanction, out of all aggravating circumstances the court finds relevant only the fact that the accused did not express remorse during the proceedings.*

Personal history or circumstances of the accused also include his family situation, which can be taken as either the extenuating or the aggravating circumstances. The fact that the accused committed a criminal act against several members of his family suggests that the family situation has been heavily disrupted, which should be treated as an aggravating circumstance.

3.2.2. Criminal acts against life and limb

In nearly all monitored cases involving the criminal offence of murder, the accused persons were persons of male gender, whereas the victims were persons of female gender, mostly wives (marital, extramarital or former wives).

An analysis indicates that also the other victims of the criminal offences of murder or attempted murder were mostly family members (grandmother, daughter-in-law, relatives by marriage).

An analysis of the monitored criminal proceedings shows that that in 9 out of 14 monitored cases the victims were wives, and in three out of the above 9 cases the accused was previously convicted for the criminal offences of domestic violence and violent behaviour against women (wife, mother).

As far as criminal sanctions are concerned, in most cases the imposed imprisonment sentence was closer to the statutory maximum.

** In a case before the Cantonal Court of Zenica, the accused (husband of the victim) was sentenced to imprisonment for a term of 22 years; the Supreme Court reversed the verdict in the part of the sentence decision, and imposed a prison sentence for a term of 20 years.*

** In a case before the Cantonal Court of Tuzla, the criminal offence of murder under Article 166, paragraph 2, the defendant was sentenced to imprisonment for a term of 25 years.*

3.2.3. Criminal acts against sexual freedom and morality

An analysis of a category of criminal offences against sexual freedom and morality has covered 47 cases monitored by the monitors (27 in municipal courts, 20 in cantonal courts), which indicates a high incidence of these crimes insofar as the total number of monitored cases is taken into account.

In imposing criminal sanctions for the offences lechery (concupiscence) and pandering, we can see the imposition of sentences that are below the statutory minimum, regardless of the complexity of the case and the circumstances of the case. It has thus been found in 10 out of 47 monitored cases, that the criminal sanctions imposed were far below the statutory minimum.[39] In most cases, the extenuating circumstances were considered to have included the circumstances that had to do with the facts such as the clean criminal record (no previous conviction), older or advanced age, guilty pleas and promises that they would not repeat the crimes, sincere remorse, proper behaviour during the trial, the fact that a long period of time had passed since the perpetration of the criminal offence, the facts that the perpetrator was a family man, father of minor children, that the crime was committed in a state of considerably diminished mental capacity, that the mother committed suicide and father was committed to mandatory psychiatric treatment, etc.

A penal policy analysis concerning the relationship between the prescribed and imposed criminal sanctions in the said cases shows that the criminal offences of

39 The court has an obligation to fashion (mete out) the punishment for a criminally liable perpetrator of a criminal offence within the limits that are prescribed for that criminal offence by law, bearing in mind in this matter the purpose of punishment and taking into account all the circumstances that had a bearing on greater or lesser punishment. So Article 49 of the CPCFBiH provides for the following circumstances, which, depending on the specific case can be taken either as extenuating or aggravating circumstances: the degree of guilt, the degree of vulnerability or injury of a protected witness, the motives for which the crime was committed, the earlier life of the offender, personal circumstances of the offender, the offender's conduct after he committed the criminal offence, the circumstances under which the criminal offence was committed, as well as other circumstances related to the personality of the perpetrator.

lechery were punished by sentences of imprisonment ranging from 2 months to one and a half years.

** Sentences of five months in prison were imposed by the Municipal Court of Sarajevo, in a case relating to the concurrence with the criminal offence of violent behaviour.*

**The lowest sentence of 2 months in prison was imposed by Zenica Cantonal Court, in a case involving the concurrence with the criminal offence of robbery and the criminal offence of sexual intercourse with a child (attempted), where the sentences of imprisonment were imposed on him for each of the three perpetrated offences separately, and thereafter a single imprisonment sentence was imposed on the same perpetrator.*

Having compared the sentences of imprisonment imposed on the perpetrators of the criminal offence of lechery (concupiscence) against juveniles and children in the courts where the trials were monitored, we have come to the conclusion that, in 3 monitored cases, Zenica Municipal Court pronounced the sentence for a term between 11 months (minimum) and 1 year and 6 months (maximum). At the Municipal Court of Travnik, for the same criminal offence committed against children and juveniles, the lowest sentence imposed was 6 months' imprisonment, whereas the maximum sentence was 1 year in prison, while in one case the verdict of acquittal was reached and the accused was acquitted.

Based on the analysis, we can conclude that the imposed sentences are usually very mild, especially in cases where children were the victims of crime.

Protective measures

Pursuant to the entity Laws on the Protection from Domestic Violence, the court may pronounce the following protective measures against a perpetrator in the family:

a. Removal from the apartment, house or other dwelling and prohibition from returning to that apartment, house or other dwelling;
b. A restraining order towards victim of the violence;
c. Securing protection for the victim of domestic violence;
d. Prohibition from harassment and stalking of the victim of violence;
e. Mandatory psycho-social treatment;

f. Mandatory rehabilitation for an addiction;

g. Socially useful work in benefit of humanitarian organization or local community.[40]

Most officers in the competent institutions did not receive appropriate training on the nature and characteristics of domestic violence, and so they are unable to place the implementation of the Law into the proper context. An additional difficulty is in the fact that protective measures are not perceived as a uniform form of victim protection. The arrangement entrusting the protective measures to the responsibility of the Minor Offence Departments of the Municipal Courts has caused considerable confusion because it fails to make any clear distinction between the protection of victims and the punishment of perpetrators to the detriment of the victims.[41]

Since BiH is firmly committed to establishing and developing the new standards for the protection of women and children against all forms of violence[42], in compliance with the international standards, and in order to establish an effective social mechanism for further implementation and improvement of the standards for the protection against domestic violence and upgrading of the system for monitoring of this phenomenon, a considerable progress has been made and certain strategic documents have been adopted to that effect.[43]

It is precisely for this reason that both entities have established the safe houses or shelters designed specifically for the protection of victims of violence, and there are six of such shelters in the Federation of BiH.

40 The said Periodic Report indicates that during the reporting period 391 requests for the imposition of protective measures were submitted, while the courts pronounced 103 protective measures. These measures protected a total of 161 persons. The largest number of imposed protective measures was a measure prohibiting harassment or stalking a person exposed to violence (72.81%), while no protective measure to ensure protection of person exposed to violence, i.e. mandatory psychosocial treatment, was imposed.

41 Preliminary Findings on the Implementation of the Laws on Protection from Domestic Violence in Practice by the relevant institutions, the OSCE, 2009.

42 In its Article 222, the Criminal Code of the Federation of Bosnia and Herzegovina (*FBiH Official Gazette 36/03, 37/03, 21/04, 69/04, 18/05*) provides special incrimination under the title domestic violence. In addition to the basic form of this offence, which is punishable by a fine or imprisonment for a term not exceeding one year, there are also the qualified forms that provide for financial penalties or imprisonment.

43 1.Strategy for Preventing and Combating Domestic Violence in Bosnia and Herzegovina for 2009-2011,

2.Strategic Plan for the Prevention of Domestic Violence in the Federation for 2009-2010,

3.National Strategy for Combating Violence against Children for 2007-2010. while the preparation of the National Strategy for Combating Violence against Children for 2011-2014 is underway.
It should be emphasized that the Council of Ministers adopted a Gender Action Plan for BiH, which, in one of its chapters prescribes actions undertaken to combat and prevent violence. The Resolution on Combating Domestic Violence against Women was adopted at the level of Bosnia and Herzegovina, while the Strategy on Combating Domestic Violence in BiH is still in the process of adoption, which will represent a compilation of the entity strategies. There are, *inter alia*, some important indicators of the efforts made so far in Bosnia and Herzegovina on achieving the long-term objectives in combating domestic violence.

The truth is – which is not typical only for Bosnia and Herzegovina – that it is very difficult to identify the extent and structure of domestic violence. One can confirm with certainty the latent nature of the problem, which is usually reflected in the failure to report the offender, since in most of the local communities this phenomenon happens within the four walls and is traditionally regarded as the "private problem". It contributes significantly to the lack of uniform statistical records on the matter of domestic violence, which must be eliminated in the foreseeable future with support of the policy documents.

In order to take a strategic approach to this problem, on 5 March 2003 the Council of Ministers adopted a Strategy on Preventing and Combating Domestic Violence in BiH for the period 2009-2011.[44]

An analysis of the monitored cases has led to a disturbing conclusion in regard to the number of imposed protective measures. Specifically, even though there were numerous instances in which the court could impose a protective measure since it involved violence perpetrated in intoxicated state, no cases were nevertheless recorded in which the protective measure was imposed to keep the injured party under surveillance with a view to controlling her going out, or to order and conduct surveillance of the multiple recidivist offenders in the criminal offence of domestic violence, etc.

Protective guardianship and safety measures

Together with the imposition of a suspended sentence, the CCFBiH provides the possibility to place the perpetrator under protective guardianship[45]. By taking into account the circumstances of the criminal offence, personality of the perpetrator, his personal history prior to the perpetration and his conduct after perpetrating the criminal offence, the Court may decide to assume that the purpose of suspended sentencing and social rehabilitation of the offender will be

44 In addition to the implementation of activities at the state level, the aim of the Strategy is to coordinate the implementation of the entity of strategic and action plans for combating domestic violence so as to ensure their application as efficiently as possible, especially if one takes into account the fragmentation and inconsistency of legislation in Bosnia and Herzegovina, and the lack of consolidation of statistics relating to domestic violence.

45 Article 69 of the CCFBIH provides that protective guardianship may include the following obligations: treatment in an appropriate health institution, refraining from intake of alcoholic drinks or opiates (intoxicating drugs), attending particular psychiatric, psychological or other counselling centres and acting in accordance with their instructions, training for a certain profession, accepting employment which is appropriate to the skills and abilities of the perpetrator, disposing with the salary or other income and property in an appropriate way and in accordance with marital or family obligations.

achieved more efficiently with the placement of the offender under protective guardianship. [46]

Since the imposition of such a large number of suspended sentences is so evident, not even a single case has been recorded in which the accused was placed under protective guardianship.

As far as security measures are concerned, the situation is almost equally alarming, since the application of security measures is observed only in one out of the total number of monitored cases.

** In one case of the criminal offence of domestic violence referred to in Article 222, paragraph 2, in concurrence with the criminal offence of violent behaviour referred to in Article 362, paragraph 2, the Municipal Court of Zenica imposed the security measure of mandatory medical treatment of alcohol addiction, with a the probation period of 5 years.*

Legal qualification

It is noted that essentially the same factual basis received different legal qualifications in some cases of domestic violence; so, in certain cases it is qualified as a concurrence the criminal offence of domestic violence and slight injuries, while in other cases the same factual description represents a criminal offence of domestic violence only.

** For the sake of illustration we can refer to the judgement of the Municipal Court of Zenica of 13 April 2009, which imposed a single imprisonment sentence on the defendant, while for the identical factual description of the criminal offence in the ruling of 11 October 2010, Sarajevo Municipal Court imposed the sanction for the crime of domestic violence only. There are several such examples, whereas different actions were also found to have taken place in the same courts too.*

46 According to Article 69 of the Federation Criminal Code, protective guardianship may include the following obligations:
a) Treatment in an appropriate health institution;
b) Refraining from intake of alcoholic drinks or opiates (intoxicating drugs);
c) Attending particular psychiatric, psychological or other counselling centres and acting in accordance with their instructions;
d) Training for a certain profession;
e) Accepting employment which is appropriate to the skills and abilities of the perpetrator;;
f) Disposing with the salary or other income and property in an appropriate way and in accordance with marital or family obligations.

* *A case before the Municipal Court in Travnik, the criminal offence of domestic violence (222/2, CCFBiH); according to the factual description, the accused perpetrated the CO over the period from 17 January 2010 to 13 February 2011, which should have been qualified as a continued criminal offence of domestic violence.*

* *A case before the Municipal Court in Travnik, the crime of domestic violence (222/2, CCFBiH); according to the factual description, the accused punched the injured party in the face and as a result he knocked out her tooth and cut her lip, but also broke her cell phone, all of which was not taken into account, because the factual description was qualified as the CO of domestic violence.*

The problem of imposition of inappropriate sanctions for the criminal offences in the group of COs against sexual freedom and morality lies in the fact that no proper legal qualification system is put in place.

* *A case before the Municipal Court of Travnik, the CO of sexual intercourse with a child (207/1, CCFBiH), where the factual description of the CO indicates that during the period from 10 June 2010 to 25 June 2010, the accused had sexual intercourse with a child; therefore, it involved a continued criminal offence. However, the event in question was not qualified as such, which would consequently lead to a more stringent punishment.*

3.3. Procedural matters

3.3.1. Status of the victim of sexual and gender-based violence in the criminal proceedings

3.3.1.1. International standards

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides the basic rights of the victims that include fair treatment regulated by law, namely, the right of access to justice and fair treatment, the right to legal counsel, the right to play an active role in all stages of the proceedings and the protection of the procedure, the right to restitution and compensation, protection of victims as witnesses from intimidation and retaliation by offenders.

The ECHR and the International Covenant on Civil and Political Rights stipulate only minimum required standards. The Council of Europe, the member of which is also BiH, adopted a series of recommendations on the rights of victims and witnesses, which reflect the general principles and mechanisms that Member States must apply in order to enable the exercise of basic human rights to the full extent.[47]

3.3.1.2. Domestic legislation

The concept of victim is not provided either in the CCFBiH or the CPCFBiH, which provides a definition of the injured party in Article 21, paragraph 1, sub-paragraph h), which reads as follows: "the term 'injured party' refers to a person whose personal or property rights have been threatened or violated by a criminal offence." The concept of victim, without any definition of the term provided, is mentioned in the provisions of Article 228, paragraph 2 of the CPC; it defines the obligation of healthcare workers, teachers, tutors, school counsellors, educators and other persons who are authorized to exercise supervision, guardianship, education and upbringing, to report criminal offences once they find out or estimate that there is a suspicion that a minor is the victim of sexual, physical or other form of abuse. Article 100, paragraph 4 of the CPCFBIH provides that when hearing a minor and, in particular if the minor was injured by the criminal offence, the participants in the proceedings shall be obligated to act with circumspection in order not to have an adverse effect on the minor's mental condition, and that the minor shall be heard with the assistance of a psychologist, school counsellor, psychologist or other relevant expert.

A positive step forward in terms of the rights of victims of crime have been made with the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.[48] This law allows the possibility to provide for the protection of personal safety of crime victims in order to secure their testimony. Even though the witnesses have a legal and citizen duty to testify in criminal proceedings, such proceedings must be arranged so as to avoid an unjustified violation of the rights of victims and witnesses, which is a standard procedure provided by the Constitution of BiH and the Entity Constitutions.

With regard to vulnerable witnesses, as opposed to witnesses that are under threat, there is no actual threat coming from the suspect or the accused person or other persons close to that witness. There is a sense of insecurity, inability to act

47 Recommendation Rec. (85) 11 of the Council of Europe on the position of victims within the framework of criminal law and procedure, the Recommendation Rec. (97) 13 of the Council of Europe concerning intimidation of witnesses and the rights of the defence, as well as the Recommendation Rec. (2005) 9 of the Council of Europe to member states on the protection of witnesses and collaborators of justice.

48 The Law was published in the Official Gazette of the Federation of BiH, no. 37/03 of 31 July 2003.

independently in protecting their own rights, but also the difficulties associated with the witness testimony.[49] The major risk for vulnerable witnesses comes specifically from the criminal proceedings themselves. In addition, the sense of vulnerability present in the witness may be the result of a general distrust in the criminal justice system. Sometimes an inadequate and unprofessional conduct and treatment on the part of criminal procedure authorities may lead to the occurrence of additional trauma in witnesses. This is exactly the reason why different institutions within the criminal justice system should be aware that they can also have traumatic effects on the witnesses, and therefore they should try to avoid this kind of effect by all means necessary.

In addition to a terrible traumatic experience they have been through during the perpetration of the criminal offence itself – should they be really willing to report the offence to criminal procedure authorities – victims of sexual abuse offences will also experience repeated attacks against their person through further humiliation by undergoing a detailed examination of all details of the event on at least three occasions (the police investigation, the main trial). If to all this we add the fear of possible retaliation by the perpetrator, which is certainly justified because even during the perpetration of the offence the perpetrator used force or made serious threats of attack against life and limb of the victim or against life and limb of the person close to the victim, the fear of public condemnation, and the risk of secondary victimization, we can rightly conclude that this involves a specific category of witnesses that should be provided with maximum support and protection over the course of criminal proceedings.[50]

It is still true that in many cases the victims of violence express distrust in the authorities in charge of providing such protection, which is deeply rooted in a series of failures on the part of the police, social workers, prosecutors or courts to provide the victims of domestic violence with the required protection. It is therefore necessary to take all measures available to protect the victim and to create favourable conditions in order to enable the victim to give full and credible testimony in her capacity as witness.

The measures of assistance and support to vulnerable witnesses include all measures taken by the police, prosecution, courts, social services and other authorities, which cannot be classified as procedural measures of protection applied to these categories of witnesses, and so in order to diminish or eliminate the feelings of fear or embarrassment, and to overcome certain practical

49 According to Article 3 of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, A witness under threat is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony, while A vulnerable witness is a witness who has been severely physically or mentally traumatized by the events of the offence, or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile.

50 D. Pajić, „Protection of Vulnerable Witnesses in Criminal Proceedings", Annals of the Law School – University of Zenica.

problems (e.g. making travel and accommodation arrangements, accompanying persons with disabilities on their way to the court house, assisting persons who are unfamiliar and can hardly cope with the urban environment of the city or town where the court is situated, etc.) that may arise as a result of their obligation to testify in the criminal proceedings.[51]

The rights of victims and witnesses include the right to life, liberty and security, and respect for private and family life, as guaranteed under the European Convention on Human Rights (ECHR) to all persons, to which Bosnia and Herzegovina's Constitutions (State and Entity level) give primacy over all other laws. Moreover, the ECHR guarantees the right to an effective remedy against any violation of such rights.[52]

**An example of violation of the provisions of Article 100 of the CPCFBIH is the case before the Cantonal Court in Tuzla for the criminal offence of pandering, as a result of which some underage girls also appeared in the capacity as the injured parties, and who in the proceedings received the same treatment as if they were adult victims, i.e. they were not examined in the presence of a specialized expert officer and without being granted the status of protected witness or witnesses under.*

As far as the application of witness protection measures is concerned,[53] the case analysis revealed that out of the total number of monitored cases, regardless of the type of criminal offence, the protective measures were applied to vulnerable witnesses in 7 cases.

51 As the witness protection measures, the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses provides access to psychological and social assistance and professional help, order of presentation of evidence at the main trial (so as to hear the vulnerable witnesses and witnesses under threat as soon as possible), an appropriate control over the manner of the examination of witnesses, removal of the accused from the courtroom during the hearing of witnesses, testimony by using technical means for image and sound transmission, and limitation of the right of the accused and his defence attorney to inspect files and documentation. Additionally, Article 5 provides that the Court may order such witness protection measures provided for by this Law as it considers necessary, including the application of more than one measure at the same time.

52 The European Court of Human Rights interprets the right to an effective remedy so that this right, along with the payment of compensation where appropriate, also includes an in-debt and effective investigation that could lead to identification and punishment of those responsible. (See Aksoy v. Turkey, the European Court of Human Rights, 16. December 1996, paragraph 98).

53 Enforcement of the witness protection measures should be distinguished from the award of the status of protected witness, because the latter implies a higher level of protection (so, the identity of protected witnesses will not be revealed to anyone except the members of the trial chamber and the chamber rapporteur, while the witness will not personally appear before the trial chamber in any hearing other than the hearing of protected witnesses, and then the witness is not under any obligation to answer questions that might disclose his or her identity or the identity of the members of his or her family, as well as other measures with the same purpose).

So, before the Cantonal Court in Zenica, the victims were granted the status of a protected witness in 6 cases (lechery and rape twice, lechery, sexual intercourse with a child, robbery in concurrence with the criminal offence of sexual intercourse with a child and the criminal offence of lechery, and the criminal offence of rape twice), at the Cantonal Court in Novi Travnik the status was granted once, while at the Cantonal Court in Tuzla it was never granted (although it should have been done in cases involving the perpetration of criminal offence of pandering, where the victims (witnesses) were minors, and also in cases of the criminal offence of lechery where the victims were minors who experienced fear as a result of the perpetrated criminal offence, as well as in the case of criminal offence of rape Article 203/2 in conjunction with paragraph 1, in concurrence with the criminal offence of murder Article 166 /1 in conjunction with Article 28 of the CCFBiH).

Damage compensation for the victims of criminal offences seems to be a special problem as well. The entire criminal proceedings, including the investigation proceedings, is carried out in the first place in order to protect the rights and freedoms of citizens, who, in the case of execution of criminal sanctions, acquire the status of injured parties, provided that any of these rights and freedoms were attacked, at risk or violated. Therefore, at any point of time in the investigation, the prosecutor must regard the injured person as a person whose rights and freedoms are violated or put at risk by the criminal offence. As far as the investigation proceedings are concerned, during the course of the investigation proceedings the prosecutor is required to examine and establish all the facts and circumstances relevant to the settlement of the property claim filed by the injured party, in order for the injured party to be able to exercise her right.

According to Art. 86 of the CPCBiH, the injured party being examined as the witness shall be asked about his desires with respect to satisfaction of a property claim in the criminal proceedings. A petition to pursue a claim under property law in criminal proceedings shall be filed with the prosecutor or the court. If the injured party/victim has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is confirmed, he shall be informed that he may file that petition by the end of the main trial or sentencing hearing. Most often the court does not decide the property claim in the criminal proceedings, since in each particular case it finds that the process of resolving such claims will cause unnecessary delays in the criminal proceedings.

** During an analysis of the completed proceedings where the property claims were also filed, we have revealed that in no case whatsoever did the courts decide within the course of criminal proceedings on any of the property claims filed, but instead they instructed the injured party/ victim to pursue such claims in a civil action. Bearing in mind that the launching of a civil action requires financial assets not available to the victims in general, and that litigation usually takes a long period of time, as well as the fact that the new proceedings trigger a renewed cycle of trauma and frustration for the victim, the right that the victims claim will often remain a dead letter on the printed page.*

3.3.1.3. Analysis of conditions under which the trial took place

Victims of sexual violence deserve special attention in terms of witness support and protection. According to the European Court of Human Rights, these victims should have a greater deal of interest in their privacy due to the stigma that accompanies their injuries.[54] Giving testimony can be extremely difficult for them, especially when they are compelled to face the accused against their own will, running a risk of retraumatisation in many cases.[55] For all these reasons it is necessary to provide adequate protection to the victims of criminal offences so that they could feel safe and thus contribute with their testimony to the successful completion of the criminal proceedings.

Considering the obligation of Contracting States to guarantee to all persons the required minimum of basic rights in accordance with the ECHR, but also to prosecute the offenders, the European Court of Human Rights has taken a stand that Contracting States should "organize their criminal proceedings in such a way that those interests are not justifiably imperilled."[56]

The role of witnesses in court is extremely important; therefore, it is important to have a well-designed system of witness support, as this contributes to the realization of a fair trial too. Witnesses are, in a certain way, provided with an active role in the court proceedings, which is why it is highly important to respect their rights. In this process, one should make a clear distinction between the terms *witness protection* and *witnesses support*. Witness protection involves the application of one or more measures at the same time, so that a judge or a

54 See Boco-Cuesta v. Kingdom of the Netherlands, the European Court of Human Rights, 10 November 2005, para 69, Accardi et al. v. Italy, European Court of Human Rights, 20. January 2005, para. 1.

55 Relevant documents include, inter alia, the Council of Europe Recommendation Rec. (2002) 5 on the protection of women against violence, the UN General Assembly Declaration on the Elimination of Violence against Women.

56 See Doorson v. the Kingdom of the Netherlands, 26. March 1996, para 70. the Strasbourg Court further provides that "The principles of fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."

trial chamber would able to control the method of questioning the witnesses, specifically with the aim of protecting the witnesses from harassment and confusion. Witness support implies the establishment of a special unit/office/department that takes care of the witnesses after the indictment is confirmed, it prepares them psychologically before and, where necessary, during the proceedings, but in any case after the testimony and provides them with additional organizational and logistic support.

During the court trial monitoring in the selected courts, we have generally detected and recorded certain problems that make the trial process more difficult.

Our conclusion is that the conditions in which the trials take place are not the same in all courts because their spatial capacities are not identical. There is a specific number of courtrooms in all courts; however, in some municipal courts (in Travnik and Tuzla), the number of courtrooms is not satisfactory. As a result, it often happens that the trials are arranged and take place in the offices of judges, which are usually small and inadequate, where the accused and the injured party are seated and squeezed in close proximity, which in the injured party always creates strong feelings of discomfort and, not rarely, fear. In such a situation, witnesses are also those who often feel uncomfortable, regardless of their relationship with the accused or the injured party.

** The exception in relation to this issue is the Cantonal Court of Sarajevo, within which a Witness Support Office is in operation and in charge of making sure that all witnesses are informed of their rights and obligations before the court, and in charge of providing psychological and other support to witnesses during and after the court proceedings. The Cantonal Court has also arranged a special area designated for protected witnesses, which has a separate entrance and is linked directly to the courtrooms. The room is furnished with furniture designed for sitting and relaxing, it has its own toilet facilities, while some authorized officials are at the service of the witnesses at all times and are in charge of providing them with psychological and all other forms of support. To our knowledge, these rooms that are situated in the Cantonal Court may, if necessary, be made available to Sarajevo Municipal Court too.*

It is evident from the above descriptions that the implementation of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses largely contributes to exercising of the victims' rights, but the full effect of the purpose of this Law is absent due to its incomplete applicability to all problematic situations. In addition, even other conditions under which the trials take place are unsatisfactory in most courts either, primarily the size and layout of the courtroom, where the victims are often found squeezed in close proximity to the accused.

3.3.1.4. Problems in obtaining and presenting evidence

In a limited number of cases of criminal offences against sexual freedom and morality, there is the record of insufficient cooperation between the competent authorities in obtaining evidence for the perpetrated criminal offences, which resulted in rendering a verdict acquitting the accused.

> ** This situation is illustrated in one case before the Cantonal Court of Travnik; in the case of the criminal offence of rape, a verdict was rendered by the Supreme Court of the Federation acquitting the accused, following an appeal filed by the accused, and so due to the lack of physical evidence, which could have been provided immediately after the crime was committed.*[57]

Problems associated with obtaining evidence are also apparent in situations where the prosecution has based the indictment solely on the testimony of the injured party, without any substantive physical evidence, while the injured party has changed her statement during the criminal proceedings. In addition, the problem may occur through no fault of the responsible authorities if the victim of the crime is reluctant to report the crime, while in the meantime, physical evidence is lost, which can be remedied only by restoring faith in the efficiency of the judiciary.

> ** Thus in the case before the Cantonal Court of Tuzla, the problem of evidence emerged because the injured party reported the criminal offence only 9 days after the perpetration of the offence, and her statements in regard of the facts related to the criminal offence in question were highly contradictory. A medical examination performed at the Clinic of Gynaecology and Obstetrics revealed no injuries that would indicate the existence of traces of forced sexual intercourse. No DNA analyses of blood and hair were ever made, and consequently the expert witness was unable to give his opinion with certainty as to whether or not the traces belonged to the injured party.*

57 It is evident from the ruling handed down by the Supreme Court of FBiH that a DNA analysis of foetus and parts of placenta was not made after the injured party suffered miscarriage (induced abortion), since they were lost, which would otherwise safely prove or deny defendant's paternity.

4. Closing considerations and recommendations

4.1. Closing considerations

In the context of this analysis, no simple conclusion can be drawn as to whether the trials of gender-based violence are efficient or not. Evidently, the case-law of the courts reveals that there is a positive trend in the completion of criminal proceedings within a reasonable time.[58] Yet, in order to protect the victims of the crimes of domestic violence, the Law on Protection against Domestic Violence has provided for an obligation of emergency action on the part of all relevant stakeholders (the police, guardianship authorities, the court) so as to prevent any continued perpetration of violence and the incidence of new detrimental consequences for the victims. The right to completion of the criminal proceedings within a reasonable time has not been violated in most monitored cases of the criminal offences of domestic violence, taking into account all the above criteria applied in the evaluation of this right.

An analysis of the cases of criminal offences of domestic violence reveals that a large number of the criminal offences of domestic violence was recorded in all municipal courts, and that a suspended sentence is usually imposed for the same offences, with the identified sentence of imprisonment for a term of 3-6 months and with the minimum probation period of 1 (one) year, whereas the number of imprisonment sentences imposed is negligible. All this suggests that the described criminal policy fails to achieve any of the anticipated general or special prevention purposes. Having in mind all available information, it was found that in 6 out of the 54 monitored cases, the victim/injured party still remained to be exposed to violence by the accused party.

It was noted that essentially the same factual basis receives different legal qualifications in some cases of domestic violence; so, in certain cases it is qualified as a concurrence of criminal offences of domestic violence and slight bodily injuries, while in other cases the same factual description constitutes the criminal offences of domestic violence only.

It has been noted in a certain number of cases that the courts do not take as an aggravating circumstance the fact that the act of violence was committed against several family members at the same time, for example, against wife and daughter at the same time. Until fairly recently, domestic violence was considered a normal, socially acceptable pattern of behaviour, which resulted in the absence of adequate protection provided to the victims of this form of violence, or the injured

58 Although this is a legal standard whose wording is quite vague, its putting it into a specific context is carried out through the case-law of the European Court of Human Rights. See footnotes under 16 and 17.

parties, the most common among them being spouses, children and other family members. What seems to be a common denominator of relationships in every situation of domestic violence are the intimacy and interdependence between the victim and the perpetrator in the private sphere. Domestic violence is difficult to detect because it happens in the privacy of home and marriage, which privacy is also legally protected. Once the violence is detected and criminal proceedings are mounted against the perpetrator, such proceedings usually end with the imposition of a suspended sentence against the perpetrator of the crime.

The records in a limited number of cases show the suspension of the proceedings due to the lapse of a considerable period of time between the individual hearings, or withdrawal from the criminal prosecution by the prosecution since the injured party – i.e. woman violence victim, has changed her statement (due to the continuation of her cohabitation with the accused, completion of divorce proceedings, etc.), due to the lack of interest in any further criminal prosecution. This practice is incompatible with the accusatory principle, under which criminal proceedings may only be initiated and conducted upon the request of the prosecutor.

An analysis of the monitored cases has led to a disturbing conclusion in regard to the number of imposed protective measures. Specifically, even though there were numerous instances in which the court could impose a protective measure since it involved violence perpetrated in intoxicated state, no cases were nevertheless recorded in which the protective measure was imposed to order to keep the injured party under surveillance with a view to controlling her going out, or to order and conduct surveillance of the multiple recidivist offenders in the criminal offence of domestic violence, etc.. Moreover, since the imposition of such a large number of suspended sentences is so evident, not even a single case has been recorded in which the accused was placed under protective guardianship. As far as security measures are concerned, the situation is almost equally alarming, since the application of security measures is observed only in one out of the total number of monitored cases.

Imposition of lenient sentences is observed in the cases of crimes against sexual freedom and morality, and so often even below the legal minimum, which is why it is not surprising that there is a considerable number of committed criminal offences from this group. What seems to be profoundly disturbing is the significant percentage of cases in which children and juveniles turn out to be victims of these crimes.[59]

59 These problems are by no means regarded as harmless; a great deal of statistics show that such minors in many cases become perpetrators of violence themselves, committing the crimes the victims of which they were once themselves. Specifically, the perpetration of these crimes against minors/children has adverse effects on their development, which may end up with isolation, withdrawal in a shell, and depression (as was evident in several cases at the Cantonal Court in Zenica), or with development of different forms of deviant behaviour patterns (case before the Municipal Court in Zenica, where the accused for the criminal offence of rape against an underage girl was a minor who came from a families with extremely unsettled relationships and an alcoholic father).

In a limited number of cases of the criminal offences against sexual freedom and morality, there is the record of insufficient cooperation between the competent authorities in obtaining evidence for the perpetrated criminal offences, which resulted in rendering a verdict acquitting the accused. Problems associated with obtaining evidence are also apparent in situations where the prosecution has based the indictment solely on the testimony of the injured party, without any substantive physical evidence, while the injured party has changed her statement during the criminal proceedings. In addition, the problem may occur through no fault of the responsible authorities insofar as the victim of the crime is reluctant to report the crime, while in the meantime physical evidence is lost, which situation can be remedied only by restoring faith in the efficiency of the judiciary.

During an analysis of the completed proceedings where the property claims were also filed, we have revealed that in no case whatsoever did the courts decide within the course of criminal proceedings on any of the property claims filed, but instead they instructed the injured party/victim to pursue such claims in a civil action. The Court, of course, has the discretionary power to decide whether the property claims will also settled within the criminal proceedings, depending on whether the procedure will be dragged out for too long. However, bearing in mind that the launching of a civil action often requires financial assets that are otherwise not available to the victims in general, and that litigation normally takes lengthy periods of time, as well as the fact that the new proceedings trigger a renewed cycle of trauma and frustration for the victim, we can see that the rights claimed by the victims will often remain a dead letter on the printed page.

One of the main problems remains in the fact that the conditions under which the trials take place are often unfavourable, which is a technical and logistical problem with serious consequences for the conduct of the victims/injured parties, especially if the victim is forced to sit just a couple of metres away from the accused. All this can cause hesitation in giving testimony and even a change in testimony. An adequate application of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses is an imperative in the light of the accepted international standards. As for the act of granting the status of a protected witness to the victim, the case analysis of the monitored cases reveals that the status of protected witness was recognized in 7 out of all monitored cases, regardless of the type of crime.

4.2. Recommendations

4.2.1. Municipal and Cantonal Courts in the Federation of BiH, and Cantonal Prosecutor's Offices:

- To comply with the principle of urgency of action for the crimes of domestic violence in accordance with the Law on the Protection against Domestic Violence.
- To ensure more rigorous application of criminal sanctions available.
- To place under protective guardianship some offenders who have received a suspended sentence.
- To facilitate a timely provision of physical evidence for the crimes of domestic violence and crimes against sexual freedom and morality.
- To ensure the conduct of an in-depth investigation by the prosecutor.
- To establish special witness support departments/units/offices within the courts.
- To improve the technical conditions in the courts, including with satisfactory audio and video equipment for the protection of witnesses.
- To make arrangements to provide a waiting room — a special room in the courts designed for placement and accommodation of witnesses and protected witnesses.
- To establish a framework for cooperation between the prosecutors and mental health centres during the investigation stage in order to provide support for psychological and social problems experienced by the potential vulnerable witnesses.
- To improve coordination between the prosecutor's offices and courts in terms of psychological support for witnesses in order to reduce the risk of their retraumatisation.

4.2.2. The Ministry of Security of Bosnia and Herzegovina, the Ministry of Justice of Bosnia and Herzegovina, the Federation Ministry of Justice of the Federation of Bosnia and Herzegovina:

- To harmonise national legislation governing the area of violence against women with the international standards of sexual and gender-based violence, particularly in terms of the anticipated sanctions and measures designed for the purpose of victim protection.
- To harmonize legislation in order make more severe the penalties for

perpetrators of domestic violence; it would be advisable to pay more attention to the length of investigation and judicial proceedings. Also, in the future it would be very important to work on improving the institutional cooperation of all sectors involved in the relevant subject matter in order to have an adequate exchange of information for effective combating of domestic violence.

- To monitor international legislation and instruments and work on the harmonization of national legislation with the international instruments relating to sexual and gender-based violence.
- To provide optimal conditions for the operation of courts, including a sufficient number of courtrooms and special areas designated for protected witnesses and injured persons.

4.2.3. The Gender Equality Agency of Bosnia and Herzegovina, the Gender Centre of the Federation of Bosnia and Herzegovina:

- To develop a strategy in order to undertake concrete measures with a view to encouraging women to report cases of domestic violence. In consequence of the above statements, Bosnia and Herzegovina must work more than ever on increasing and reinforcing public awareness of the seriousness of domestic violence phenomena, its prevalence and growth, while simultaneously raising awareness among its citizens about the issues of detecting, reporting and fighting against the offender. This means that it is more than ever necessary to educate the general public, particularly children, parents and professionals about the existence of the problem of domestic violence, including on the method of combating violence, and if possible, to work on developing a joint action plan.
- To develop a strategy for the prevention of domestic violence, gender-based violence, sexual harassment and harassment, through the work with the potential abusers/violence perpetrators, or persons prone to violent behaviour, especially with children from the families with an abusive member.

4.2.4. The Centre for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina:

- To train judges, prosecutors, healthcare professionals, educators, teaching staff, school counsellors, social workers, psychologists and the police, on legislation, laws, bylaws and procedures relating to sexual and gender-based violence in order to ensure senzibilisation

of all stakeholders and parties concerned. To provide capacities in the sector of the internal affairs for the development and improvement of multidisciplinary collaboration and coordination with other sectors.

- To organize training sessions in connection with the methodology of sentencing (meting out and fashioning sentences) and establishing the aggravating circumstances and other factors that have influence on sentencing, on the proper implementation of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, on the imposition of protective measures as a means to an end of protecting the victim rather than punishing the accused.

4.2.5. Legislative authorities at all levels, the Federation Ministry of Internal Affairs:

- To prepare all necessary subsidiary legislation, particularly bylaws, rulebooks and regulations in the field of domestic violence, gender-based violence, harassment and sexual harassment, and to establish relevant structures and institutions required for their implementation.

Monitoring and Analysis of Sexual and Gender-Based Violence Criminal Proceedings and Case-Law in Republic of Srpska

Final Report and Analysis

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Executive Summary

Activities within the Project **"Monitoring and Analysis of Criminal Proceedings and Case-Law in the Areas of Sexual and Gender-Based Violence before Banja Luka, Bijeljina and Doboj Basic and District Courts"** have enabled an assessment and an analysis of operations of the judicial institutions in the prosecution of sexual and gender-based violence in the Republic of Srpska. **The special focus of the monitoring process wad placed towards the identification of specific problems and challenges in ensuring the protection of human rights of the injured party (a woman - violence survivor)** from the point of view of application of domestic law and international standards in this area.

This report is focused on the analysis of irregularities in the criminal prosecution of selected offenses in the field of sexual and gender-based violence in the criminal cases in the area of sexual and gender-based violence before the Basic Court and the District Court of Banja Luka, the Basic Court and the District Court of Bijeljina and the Basic Court of Doboj, and on the monitoring of case-law through the analysis of judgments reached by the District Court and the Basic Court of Trebinje and the Basic Court of Sokolac (which covers the region of East Sarajevo). **The focus of the monitoring were the criminal cases in which women appear as victims, and the violence is gender-based or committed against women in the family and the family household, including also close social relationships.** The analysis covers the key aspects of conducting criminal proceedings - the fairness of the trial, the application of substantive and procedural law and the penal policy in this domain.

With regard to ensuring the fairness of the trial, the findings of the monitoring suggest that there is the widespread failure to use the possibilities provided by the Criminal Procedure Code, the Law on the Protection of Witnesses in Criminal Proceedings and the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings, including (where applicable) the possibilities in the form of a technically equipped and adequately staffed unit designed to support the victims with the aim of achieving a balance between the individual rights of the accused to have a designated defence counsel and the right of

the underage victim to enjoy protection against retraumatisation and negative consequences for the victim's future psychological development.

The analysis of monitored cases indicates the necessity of greater attention on the part of the judicial institutions in assessing the characteristics of the elements of crime and its legal qualification in cases where children appear to be direct or indirect victims of sexual and gender-based violence, and the need for recognition of the multiple vulnerability of children witnessing the violence of one parent against the other parent and/or parents' mutual violence, as well as the violence against other family members.

It is noted that prosecutors rely heavily on the testimony of both the injured party (a woman - violence survivor) and the accused but possibly of other witnesses as well, and that during the investigation they make insufficient efforts to collect evidence, as a result of which too much of aburden is placeofon the injured party (a woman violence survivor), which indicates the necessity for special awareness-raising campaigns designed for the courts and prosecutor's offices with regard to the condition of the injured party (a woman violence survivor) and for taking of an active approach on the part of the court in order to ensure the full support towards achieving international standards of providing social, psychological and legal assistance to the injured parties in the course of criminal proceedings.

An analysis of penal policy of the targeted courts in connection with criminal cases in the area of sexual and gender-based violence indicates that these offenses are viewed as less socially threatening than other violent crimes. A criminal offense of domestic violence in the family or in the family household is sanctioned almost exclusively with fines and suspended sentences which do not contain any measures aimed at preventing the recurrence of violence and remedying the causes that led to the commission of the offense in the first place. The absence of enforceable measures of protective guardianship and safety measures suggests that the penal policy of the monitored courts was focused primarily on repressive rather than protective purpose of punishing the perpetrators of violence. It is essential for the courts to place their focus on protecting the safety of the woman violence victim and on supporting her recovery through the prevention and elimination of her fear of threats and retaliation fuelled by the perpetrator of violence, but also on ensuring the safe living environment free from repeated violence and abuse, and on supporting the process of recovering from the trauma caused by the violence she has survived.

1. Introduction

Sexual and gender-based violence, where women and girls appear as predominant victims, both stand as an obstacle in the way of sustainable development and functioning of a society in which the core values are based on respect for basic human rights and fundamental freedoms without any distinction in regard to gender. These values should also guide and channel all activities of judicial institutions in their engagement in preventing and combating these forms of violence, as well as remedying the consequences of violence and providing protection and support to the victims. Efforts to channel the work of judicial institutions towards the problems and challenges encountered by women and girls who have survived some form of sexual and gender-based violence, will open up new opportunities required for improving their access to justice and eliminating their feeling of being helpless and abandoned by "all those" with whom they live in day-to-day cohabitation.

Gender-based violence can be seen as the most widespread and most socially tolerated form of human rights violations.[1] The key international documents in the field of women's human rights' protection define it as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (UN Declaration on the Elimination of Violence against Women[2]), and as "a form of discrimination that seriously inhibits women's ability to enjoy rights

1 Report *State of the World Population 2005*, Chapter 7 „Gender-Based Violence: A Price Too High", United Nations Population Fund (UNFPA), available on the webpage link: http://www.unfpa.org/swp/2005/index.htm (Last time accessed on 28/09/2011)

2 UN Declaration on the Elimination of Violence against Women was adopted at the General Assembly of the United Nations on 20 December 1993. Available on the webpage link: http://www.un.org/documents/ga/res/48/a48r104.htm (Last time accessed on 28/09/2011.)

and freedoms on a basis of equality with men" (General Recommendation no. 19 of the CEDAW Committee[3]). The legal framework of Bosnia and Herzegovina (the Law on Gender Equality in BiH [4]) has achieved a major breakthrough in defining the gender-base violence and in recognizing it as a criminal offense.

World statistics indicate that victims of sexual and gender-based violence are mostly women, and that in their lifetime about 70% of women have experienced some form of violence from men. Husbands, partners or someone whom women violence survivors know have been identified as the most common perpetrators of these violence forms. It is estimated that in 2002 alone about 150 million girls under 18 years of age were exposed to some form of sexual violence.[5] In Bosnia and Herzegovina, there is no uniform database on gender-based violence and there are no uniform statistics on domestic violence, which is reputed as the most common form of gender-based violence. Official figures from received from Republic of Srpska government institutions that represent the direct stakeholders in the activities of protection against gender-based violence (social welfare centres, police, law enforcement agencies, judicial authorities) are far from being uniform and suggest that there is no systemic and systematic response to this problem.[6] One of the key challenges in preventing and combating sexual and gender-based violence is about how to provide a long-lasting and effective protection, assistance and support to victims of these forms of violence.

Therefore, the project for monitoring the trials in criminal cases in the field of sexual and gender-based violence at the targeted Basic and District Courts of the Republic of Srpska was aimed primarily at identifying the practices in prosecution of cases in this area, and the implementation of national legislation and international standards **concerning the protection of the rights and position of the victim, i.e. of the woman violence survivor that appears as the injured party in the criminal proceedings**.

Bosnia and Herzegovina is a member of regional and international organizations that have adopted a number of documents in the field of preventing and combating sexual and gender-based violence. The State and the entities have made a commitment to comply with international standards in this area by

3 General Recommendation no. 19 of the CEDAW Committee – VAW, adopted at the 11th session of the CEDAW Committee held in 1992. Available on the webpage link: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19 (Last time accessed on 28/09/2011.)

4 Law on Gender Equality in Bosnia and Herzegovina (consolidated version), *Official Gazette of BiH* 32/10. Available on the webpage link: http://www.arsbih.gov.ba/images/documents/zors_32_10.pdf (Last time accessed on 29.09.2011.)

5 Global facts and figures on gender-based violence available on UN WOMEN internet presentation at: http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php (Last time accessed on 28.09.2011.)

6 Official statistical data on gender-based violence are available in the 4th and 5 combined CEDAW Country Report from Bosnia and Herzegovina, which is available on the Internet Presentation of the Gender Equality Agency of Bosnia and Herzegovina, link: http://www.arsbih.gov.ba/arsbih.gov.ba/images/documents/cedaw_4_5_e.pdf (Last time accessed on 28/09/2011)

ratifying and incorporating the relevant international conventions into their domestic legal system, and by developing public policy that will make uniform the principles and practices of protection, support and assistance to victims of gender-based violence. The most important international standards require respect for and observance of basic human rights without discrimination on any grounds, protection of civil and political rights (right to life, liberty and security, protection of private and family life, the right to a fair trial and the right to an effective remedy)[7], taking of all necessary measures towards preventing and combating discrimination and violence against women and effective protection of women victims of violence and their access to fair and effective legal remedies, which include reparation, compensation and rehabilitation,[8] and implementation of all measures aimed at protecting children against abuse, adequate protection during criminal proceedings, including their privacy, identity, and the opportunity to testify.[9]

Being a part of Bosnia and Herzegovina, the Republic of Srpska incorporated in its legal framework a number of provisions and adopted specific legislation aimed at establishing a domestic legal framework for prosecution of offenses of sexual and gender-based violence.[10]

The first section of the Report "Monitoring and Analysis of Criminal Proceedings and Case-Law in the Areas of Sexual and Gender-Based Violence in the Republic of Srpska," provides a general framework for the trial monitoring methodology in

7 Universal Declaration of Human Rights and Fundamental Freedoms (1948), the International Covenant on Civil and Political Rights (1966) with the Optional Protocols, the European Convention on Human Rights and Fundamental Freedoms (1950), Protocol no. 12 to the European Convention on Human Rights and Fundamental Freedoms (2005)

8 The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); General Recommendation no. 19 of the Committee for the Elimination of All Forms of Discrimination Against Women (1992); the UN Declaration on the Elimination of Violence against Women (1993); the Beijing Declaration and Platform for Action (1995), the Recommendation of the Committee of Ministers of the Council of Europe no. R (85) 11 on the position of the victim in the framework of criminal law and procedure (1985); the Recommendation of the Committee of Ministers of the Council of Europe no. R (87) 21 on assistance to victims and the prevention of victimization (1987); the Recommendation of the Committee of Ministers of the Council of Europe 1450 (2000) on violence against women in Europe; the Recommendation of the Committee of Ministers of the Council of Europe R (2002) 5 on the protection of women against violence.

9 Recommendations of the Committee of Ministers of the Council of Europe no. R (91) 11 on sexual exploitation, pornography, prostitution of, and trafficking in, children and young adults (1991); the Recommendation of the Committee of Ministers of the Council of Europe no. R (93) 2 on the medico-social aspects of child abuse (1993); the Convention on the Rights of the Child (1989); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000); the Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000); the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); Recommendation of the Committee of Ministers of the Council Europe no. R (91) 11 on sexual exploitation, pornography, prostitution of, and human trafficking in, children and young adults (1991).

10 The Constitution of the Republic of Srpska, the Criminal Code of the Republic of Srpska, the Criminal Procedure Code of the Republic of Srpska, the Law on Protection against Domestic Violence of the Republic of Srpska, the Law on Protection of Witnesses in Criminal Proceedings of the Republic of Srpska and the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska.

criminal cases instituted before the targeted courts which were the subject of an active monitoring exercise. The next section of the Report presents an analysis of the monitored criminal proceedings and case-law, with the focus on adherence to the principles of **fair trial, the application of substantive law (with the special emphasis on imposing protective measures in criminal proceedings), the application of procedural law and on penal policy** in relation to the existing international standards and domestic legal framework in the Republic of Srpska in the field of gender-based violence and sexual violence. **Position and protection of the injured party, i.e. the victim of sexual and gender-based violence is a basic parameter for analysis.** The final section of the report focuses on the closing considerations and recommendations designed for the competent institutions in relation to the improvement of criminal proceedings and judicial practice in the field of sexual and gender-based violence in the Republic of Srpska **in order to provide more effective protection to the violence victim** in criminal proceedings.

The main purpose of the Report is to point out the irregularities and difficulties observed in the prosecution of cases of sexual and gender-based violence, to improve understanding of domestic judicial institutions with regard to the role of the civil public sphere in ensuring the objectivity and gender sensitivity of the court trials in the field of sexual and gender-based violence, and specifically to define the recommendations for changes in the court practice and identify the needs for training of judges and prosecutors in the field of prosecution of sexual and gender-based violence in Bosnia and Herzegovina.

Trial monitoring in criminal proceedings in the field of gender-based violence and sexual violence in the Republic of Srpska was conducted by the NGO "United Women" Banja Luka and the NGO "Lara" Bijeljina as part of the Project **"Monitoring and Analysis of Criminal Proceedings and Case-Law in the Areas of Sexual and Gender-Based Violence before the Basic and District Courts of Banja Luka, Bijeljina and Doboj."** The project was implemented within the period of 10 months (from 15 December 2010 to 14 October 2011) with the support of the Programme "Preventing and Combating Gender-Based Violence in Bosnia and Herzegovina", supported by the United Nations Population Fund (UNFA) and the United Nations Development Programme (UNDP) missions to Bosnia and Herzegovina.

2. An analysis of the main challenges in preventing and combating the offenses of sexual and gender-based violence in the Republic of Srpska and BiH

The prosecution of offenses of gender-based violence and sexual assaults in criminal proceedings is plagued with various problems identified by various non-governmental organizations in BiH. The non-governmental organizations point out that most women who have been exposed to some forms of domestic violence (which is recognized as the most common form of gender-based violence against women) are silent about this violence and do not even think to report it to the competent institutions. Experiences of the NGOs such as "United Women" Banja Luka and "Lara" Bijeljina, both of which have already been providing the direct legal and psycho-social assistance and support to women victims of violence for 15 years, show thae women victims of violence do not have confidence in the government institutions and the major stakeholders and agencies engaged in providing protection against violence (primarily the police, social welfare centres, prosecutor's offices and courts).

The following are the main problems that women victims of gender-based violence encounter in practice:

- **The lack of possibility to exercise any direct physical protection, as well as the lack of police supervision over the conduct of the violence perpetrators.** Women victims of domestic violence who have reported violence to the police testify that after making complaints about violence they are often subjected to repeated violence by the same perpetrators, since the police is unable to impose and enforce any emergency measures to protect the victims, such as restraining orders against the perpetrator prohibiting his access to the victim, etc. Where during the course of an intervention the police apprehends a violence perpetrator and detains him in the police station for a short period of time, it is a general rule that, immediately or within a short period after his release from detention, the perpetrator repeats the incident of violence, which often has much greater intensity than the one before the police intervention.
- **The lack of sensibility in the approach of social workers who come into contact with the victims of gender-based violence.** Violence victims often testify about the lack of understanding on the part of social workers with whom they come into contact in the social welfare centres, who frequently look for the causes of violence in the conduct that precedes the act of violence and is regarded as 'the victims' own responsibility', they fail to recognize and consider in detail the direct and indirect consequences

that exposure to violence leaves on the women and children victims, while emphasizing as a priority the preservation of the family and its intrinsic values. This approach is a cross-cutting phenomenon present in all stages of social workers intervention, ranging from the first contact with the violence victim, through implementation of family conciliation proceedings in the event of divorce, scheduling the timetables of parental visits and contacts with the child, all the way up to the placement and residence of the victims in a safe house or shelter designed for victims of domestic violence, etc.

- **The slow prosecution rate of violence cases by the judicial institutions**. Although the law provides for an emergency procedure, women victims of violence suggest that the proceedings before the courts take too long, sometimes several months, even years, and that during that time they are often exposed to continuous threats and pressures to withdraw their testimony or drop the charges, as they are exposed to intimidation and repeated violence by the violence perpetrators, which has an effect of accumulation of fear among the violence victims. The practice that the non-governmental organizations in BiH use in their work with the victims of violence points at the fact that **the physical violence resulting in visible physical injuries is recognized predominantly by government institutions as the main and single form of violence against women,** while other forms of violence such as sexual, psychological and economic abuse of women are insufficiently recognized in practice. The available official figures suggests that there is a widespread practice in the Republic of Srpska that the police fails to forward reports on all committed acts of domestic violence to the competent prosecutors' offices, but instead it makes independent assessments as to whether the reported cases of domestic violence constitute the elements of a criminal offense or not.[11]

Adoption of **the Law on the Protection against Domestic Violence of the Republic of Srpska,**[12] which introduced the possibility of prosecuting the acts of domestic violence within minor offense proceedings, has resulted, in practice, in a continuing and significant decline in the number of cases of domestic violence prosecuted within criminal proceedings, but also in the lack of uniformity of legal protection against domestic violence across BiH – because the current laws in the Federation recognize domestic violence as a criminal offense only. Another problem is in the fact that both laws dealing with this area (the RS Criminal Code and the RS Law on the Protection against Domestic Violence) do not offer any

11 For more information please see: Alternative Report on Implementation of CEDAW Convention and on Women's Human Rights in BiH, October 2010. Available on the webpage link: http://www.unitedwomenbl.org/docs/CEDAW2010local.pdf (Last time accessed on 28.09.2011.)

12 Law on the Protection against Domestic Violence of the Republic of Srpska, *RS Official Gazette* no. 118/05, as amended, *RS Official Gazette* no. 17/08

clear definition, or a clear division, with regard to qualifying domestic violence either as a minor or criminal offense. Representatives of the agencies that provide protection, particularly judicial institutions, often point out that in practice domestic violence is regarded as a minor offense unless there is a continuity of an act of perpetration of domestic violence, whereas the existence of continuity in the perpetration of acts of domestic violence, but also the very acts of violence that have serious consequences, are regarded and qualified as criminal offenses. The lack of possibility for an effective enforcement of protective measures aimed at protecting the victims of domestic violence, and the prevalent use of the RS Law on the Protection against Domestic Violence for the purpose of punishing "less serious" forms of this type of gender-based violence, suggest that there is a tendency to recognize this form of gender-based violence as an offense entailing a lower degree of social risk. This represents a negative trend in terms of providing effective support and protection for the victims of violence because it minimizes the possibility of protecting their fundamental rights, but equally reduces the possibilities of access to justice.

3. Trial Monitoring Methodology

The purpose of trial monitoring in criminal proceedings in the field of sexual and gender-based violence in the targeted courts of the Republic of Srpska is to improve understanding of the local judicial institutions with regard to the role of the civil public sphere in ensuring the objectivity and gender sensitivity of the court trials in the field of sexual and gender-based violence, and more specifically, to define the recommendations for changes in the case-law and identify the needs for training of judges and prosecutors in the field of prosecution of sexual and gender-based violence in Bosnia and Herzegovina

Bearing in mind that the trial monitoring in criminal proceedings in the field of sexual and gender-based violence in the Republic of Srpska was conducted by two local NGOs, with years of experience in providing assistance and support to women and children victims of gender-based violence, which is a ground-breaking initiative in this area, it is extremely important to note that the purpose of trial monitoring was also to facilitate capacity building of the NGO sector women representatives for monitoring the performance and effectiveness of judicial institutions in the prosecution of sexual and gender-based violence, to develop specific skills and tools required for monitoring and analysis of the operations of courts in the prosecution of criminal offenses in this area, and to improve communication and cooperation between judicial institutions and NGOs in the Republic of Srpska in the fight against sexual and gender-based violence.

In the period from late-January until mid-September 2011, the female monitors (observers) of the NGO "United Women" Banja Luka and the NGO "Lara" Bijeljina monitored the total of 87 trials (guilty or not guilty plea hearings, main trials and sentencing trials) in the criminal cases in the area of sexual and gender-based violence brought before the Basic Court and the District Court of Banja Luka, the Basic Court and the District Court of Bijeljina and the Basic Court of Doboj. **The focus of the trial monitoring exercise was placed on the criminal cases in which women appear as victims, and the violence is gender-based, or has been committed against women in the family and the family household, including also close social relationships.**

The data presented in the tables below shows clearly that **the focus of trial monitoring was placed largely on monitoring the main trials in criminal cases of domestic violence in the family and the family household,** and that **a relatively small number of monitored criminal proceedings were completed with a court ruling during the course of the monitoring period**, revealing a tendency towards time-consuming court proceedings in the field of prosecution of sexual and gender-based violence in the Republic of Srpska.

Table 1. An outline of the trials monitored by criminal offenses in the targeted courts

No.	Criminal offense	Basic Court in Banja Luka	Basic Court in Bijeljina	Basic Court in Doboj	District Court in Banja Luka	District Court in Bijeljina
1.	Domestic Violence in the Family and Family Household (RSCC, Art. 208, para. 1, 3, &6)	17	27	4	-	-
2.	Sexual Abuse of a Child (RSCC, Art. 195, para. 1 & 4)	-	-	-	6	3
3.	Light Bodily Harm (RSCC, Art. 155, para.1)	9	1	2	-	-
4.	Evading the Alimony (RSCC, Art. 210)	3	-	-	-	-
5.	Sexual Abuse of a Child (RSCC, Art. 195, para. 1 & 4) & Illegal Manufacturing and Trade of Weapons or Explosive Substances (RSCC, Art. 399, para. 1)	-	-	-	3	-
6.	First Degree Murder (RSCC, Art. 149, para. 1, in connection with Art. 20) & Illegal Manufacturing and Trade of Weapons or Explosive Substances (RSCC, Art. 399, para. 1)	-	-	-	2	-
7.	First Degree Murder (RSCC, Art. 149, para. 1, sub-paragraph 1)	-	-	-	1	-
8.	Endangering Public Transport (RSCC, Art. 410, para. 3)	-	3	-	-	-
9.	Endangering Safety (RSCC, Art. 169)	-	4	-	-	-
10.	Rape (RSCC, Art. 193, para. 2)	-	-	-	-	1
11.	Robbery (RSCC, Art. 233, para.2), Abduction and Rape (Art. 193, para. 2)	-	1	-	-	-
TOTAL: 87		29	36	6	12	4

Table 2. An outline of the criminal proceedings monitored by type of hearing in the targeted courts

No.	Type of hearing		Basic Court in Banja Luka	Basic Court in Bijeljina	Basic Court in Doboj	District Court in Banja Luka	District Court in Bijeljina
1.	Guilty or not guilty plea	4	2	-	1	-	1
2.	Main trial	70	23	30	5	10	2
3.	Judgment rendering	10	2	6	-	1	1
4.	Plea bargain agreement	2	2	-	-	-	-
5.	Status conference	1	-	-	-	1	-
TOTAL:		87	29	36	6	12	4

An outline of the criminal offenses on account of which judgments were received from the targeted courts for the purpose of passive monitoring of criminal proceedings

The District Court in Trebinje: Domestic Violence in the Family or the Family Household (Art. 208, para. 1 in connection with para. 4 of the RSCC).

The Basic Court in Sokolac (*East Sarajevo): 4 judgments - Domestic Violence in the Family or the Family Household (Art. 208, para.1 of the RSCC), Abandonment of a Helpless Person (Art. 160, st.1 RSCC), Grievous Bodily Injury (Art. 156, para.1 of the RSCC), Damaging Another's Personal Property (Art. 249, para. 1 of the RSCC).

The Basic Court in Trebinje: 8 judgments - Domestic Violence in the Family or the Family Household (Art. 208, para. 1 of the RSCC) seven judgments, and Domestic Violence in the Family or the Family Household (Art. 208, para. 2 of the RSCC) one judgment.

4. Analysis

4.1. Fair trial

4.1.1. International standards

The European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6) has established the basic international principles and standards in relation to the fairness of the trial including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, a public pronouncement of judgment, and exclusion of the public from all or part of the trial only in exceptional situations (in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice), the presumption of innocence and ensuring the right to a fair trial in order to protect the rights of the suspect or the accused.

4.1.2. Legal framework — Republic of Srpska

The Criminal Procedure Code of the Republic of Srpska follows the principles contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and emphasizes that the duty of the court is to conduct the proceedings without delay, to prevent any abuse of the rights which belong to the persons participating in the proceedings and reduce the length of detention to the shortest time possible. Although the provisions of the Code are primarily aimed at ensuring the rights of the suspect or the accused in criminal proceedings, they are of particular importance from the point of view of prosecuting criminal offenses in the area of sexual and gender-based violence as their application in practice contributes to protecting the rights of the woman violence survivor that appear in her capacity as the injured party in the proceedings.

4.1.3. An outline of the main issues with the examples of cases in practice

Findings of the trial monitoring in the criminal cases involving sexual and gender-based violence before the targeted courts in the Republic of Srpska reveal that the

trials were open to the public, except in the events of protecting the interests of children and juveniles (hearings of juvenile witnesses), and other circumstances prescribed by international standards (Art. 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms), as well as by national legislation.

The accused had the opportunity to present their defence, personally or through a defence attorney of their choice, but also the possibility of having a defence counsel appointed *ex officio* within the legal framework. In one criminal case that was subjected to monitoring before the Basic Court in Bijeljina *(Domestic Violence in the Family or the Family Household Art. 208, paragraph 6 of the RSCC in conjunction with paragraph 1 of the RSCC in concurrence with the criminal offense of Light Bodily Harm referred to in Art. 155, paragraph 1 of the RSCC)*, the accused exercised the right to present his own defence, while in two criminal cases before the same court *(Attempted Sexual Abuse of a Child, Art. 195, paragraph 1 in conjunction with Art. 20 of the RSCC and Domestic Violence in the Family or the Family Household, Art. 208, paragraph 3 in conjunction with paragraph 1 of the RSCC)* the accused was assigned a defence attorney *ex officio*.

The courts instructed the accused that they were entitled to exercise the right to propose witnesses in their own favour, the right to examine witnesses, and the right to examine witnesses proposed by the prosecutor, and in an isolated exceptional event, no cases of violation of the rights of the accused were ever detected.

In one criminal case before the Basic Court in Bijeljina *(Domestic Violence in the Family or the Family Household, Art. 208, § 3)*, in the main trial, which was closed for the public, but held in the presence of a representative of Bijeljina Social Welfare Centre and a psychologist, the court examined two injured parties (underage victims of violence) in their capacities as witnesses, which was audio recorded. At the next main trial hearing the judge informed the accused and his defence attorney of the hearing procedure of juvenile female witnesses was undertaken, and also allowed them to have access to the audio recording, but thereafter invited them to ask indirect questions, an opportunity which was used by the accused and his lawyer in the end. The court instructed the accused and other parties present at the main trial hearing, at which the audio recording was heard, that the questions they asked would be posed to the witnesses at the next main trial hearing, which would be held *in camera* (i.e. closed to the public), and that the audio recording containing the witnesses' answers would ultimately be presented to the accused and the defence attorney at the next main trial hearing. This is how, in the opinion of the monitors the rights of the accused were observed on the one hand, while on the other hand, the protection of rights and safety was ensured for the underage victims who appeared as witnesses in the criminal proceedings, which – in the opinion of the monitors – is a practice in full compliance with the international standards and national legislation in this field.

The Law on the Protection of Witnesses did not apply in this case, because since 01 January 2011 the juveniles have been subjected to application of the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings. The public was excluded from the hearings on the account of victims being underage. In the opinion of the monitors, the Court applied the international standards and provisions of the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings (Article 186). Further actions and procedures undertaken by the parties and the court merely followed from implementation of Article 186 of the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings. A female psychologist from Bijeljina Social Welfare Centre was present during the hearing of the underage injured parties, and therefore Article 186 was fully implemented by the court, which has provided full protection for the juveniles.

On the other hand, in one criminal case before the District Court in Banja Luka (Sexual Abuse of a Child, Art. 195 paragraph 4 of the RSCC), the court ruled that the evidence should not be presented directly by examining an injured party (a woman violence survivor), thus taking into account the finding and the opinion of a court female expert witness according to which the appearance of the injured party (an underage woman - violence survivor before the court would have a retraumatising effect and consequences for her future psychological development. In rendering this decision the court took into consideration the right of the accused to defence, and the fact that only under exceptional circumstances evidence is not presented directly at the main trial, and therefore by referring to the provisions of Article 288, paragraph 2 of the RSCPC, and bearing in mind paragraph 3 of Article 3 of the United Nations Convention on the Rights of the Child and the best interest of the child, the Court decided not to hear the injured party (an underage woman - violence survivor) before the Court. At the main oral *in camera* hearing, the accused and his defence counsels were allowed to review directly the audio and video-recordings of the interview with the injured party (a woman violence survivor), which was conducted during the investigating procedure at the police station by a clinical psychologist of the Clinical Centre of Banja Luka, in the presence of an authorized official of the Ministry of Internal Affairs of the Republic of Srpska and a representative of the Social Welfare Centre of Banja Luka. Neither the accused nor his defence attorneys have had an opportunity to ask the injured party any questions. The defence counsels of the accused raised an objection as to the method of taking a deposition, indicating that the female psychologist used the leading questions in the examination of the injured party (a woman - violence survivor). Following the motion of the prosecutor, the court summoned an expert court witness (a clinical female psychologist) to complete the findings about the degree of trauma and stress in the injured party (an underage woman violence survivor). According to the opinion of the monitors, during these criminal proceedings the Court has protected the rights of the underage injured party, and concerning the

nature of the offense and the age of the injured party (11 years), it prevented her further traumatisation (Art. 155 of the RS CPC, in conjunction with Art. 186 and 187 of the Law on Protection of Children and Juveniles in Criminal Proceedings of the Republic of Srpska). However, on the other hand, it is questionable whether the Court has thus violated the rights of the accused, since the defence was not allowed to examine the underage injured party at the main trial and thus exercise the right of the accused to ask questions and give explanations at the main trial regarding the testimony of the underage violence survivor (Art. 274, paragraph 1, of the RS CPC). The judgment in this case was repealed merely on account of the fact that, by rejecting the motion of the defence counsels to hear the underage violence survivor at the main trial, the Court of first instance has violated the defendant's right to defence and has thus made a major violation of the criminal procedure provisions under Article 311, paragraph 1, sub-paragraphs g) and j) of the RS CPC. In the opinion of the monitors, by using the opportunities provided by the Law on the Protection of Witnesses in Criminal Proceedings, the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings, as well as the opportunities that this Court has in the form of a technically equipped and adequately staffed Victim and Witness Support Unit, a balance could be struck between the individual rights of the accused to present his defence and the rights of the minor victims to be protected from retraumatisation and negative consequences for the future psychological development.

4.1.4. Conclusion

Results of the monitoring exercise reveal that, in the criminal cases in the area of sexual and gender-based violence that were being monitored before the targeted courts in the Republic of Srpska, **from the perspective of protection of the rights of underage injured parties who suffered violence,** the trials were conducted in accordance with the principles laid down by international standards and national legislation. In the criminal cases and proceedings that were subjected to this monitoring, where the rights of the accused were limited with regard to questioning of the witnesses, the court has – in the opinion of the monitors – considered the circumstances that were dictated by the severity and nature of the criminal offense, as well as the age and condition of the minors who were harmed by the criminal offense and appeared as witnesses in the proceedings, which suggests that there is a great deal of compliance with the international standards in the protection of minors victims of sexual violence and sexual abuse, as well as the protection of minors in their capacity as witnesses in the criminal proceedings. However, having in mind the number of cases monitored was quite small, it cannot be claimed with certainty that the interests of the juvenile victims or persons harmed by the criminal offense were actually

protected before all or most of the courts, in all or most of the proceedings, and *ipso facto* that the results of the monitoring exercise create a realistic picture of the situation in this field. To be able to make a sustainable conclusion about the extent to which the rights of the victims (including minor victims in particular) have been observed and protected, it would be necessary to collect data within a broader range of areas and from a larger number of cases. Here, in particular, it should be pointed out that only one Court and one Prosecutor's Office in the Republic of Srpska have special witness support units in place. Established under the auspices of the United Nations Development Programme (UNDP) and the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), the Witness Support Units have been up and running since 1 September 2011 within the District Court and the District Prosecutor's Office in Banja Luka, which were judicial institutions selected for the purpose of the pilot project in the field of support and protection of witnesses/victims in criminal cases tried before the courts and prosecutor's offices in Bosnia and Herzegovina. All witnesses summoned to testify before the District Court in Banja Luka have equal access to services of this Unit. The Witness Support Unit is here to make sure that all witnesses are informed of their rights and obligations before the Court, and to provide psychological and other support to witnesses during the trials. There are ongoing activities designed to expand this witness support mechanism so that it will also include the District Court and the District Prosecutor's Office in East Sarajevo. Nevertheless, in the course of the monitoring, it was not noted that services of support have been offered to witnesses/victims in cases of gender-based violence.

4.2. Application of substantive law

4.2.1. International standards

International standards in the field of preventing and combating sexual and gender-based violence on the global (UN)[13] and regional (Council of Europe)[14] levels instruct the Member States to take all legislative and other necessary measures to ensure effective protection of women and children from sexual and gender-based violence (including effective penalties, civil remedies and damages). These standards provide guidance on how to identify and sanction these forms of violence within the criminal justice legislation, and so in a

13 General Recommendation no. 19 of the Committee for Elimination of All Forms of Discrimination against Women (CEDAW) (1992), the Convention on the Rights of the Child (1989).

14 Recommendation of the Committee of Ministers of the Council of Europe R (2002) 5 on protection of women against violence, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007).

broader context (any form of violence, particularly physical or sexual violence against persons who have not consented to it, even if they did not show signs of resistance, and violation of physical, psychological and/or sexual freedom and personal integrity, and not only a violation of morality, honour or sense of morality), and punishment of any abuse of office by the perpetrator of violence, particularly the abuse of office among adults against children, including sexual abuse of a child while the child is under the care of parents, legal guardians or any other person who takes care of the child.

4.2.2. Legal framework — Republic of Srpska

The Criminal Code of the Republic of Srpska prescribes a number of criminal offenses which are closely associated with sexual and gender-based violence.[15] It is important to stress that the Criminal Code of the Republic of Srpska provides no definition of the terms *child* and *juvenile*, apart from the premise that the criminal sanctions against minors imply that the Code makes a clear distinction between junior juveniles (14-16 years of age) and senior juveniles (16-18 years of age).[16] The Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska, in accordance with international standards, defines a child as any person below the age of 18, and sets out some specific rules of treatment for children who are, *inter alia*, also the victims or witnesses in criminal proceedings. The Law on the Protection of Witnesses in Criminal Proceedings provides a definition according to which a vulnerable witness is a witness who has been severely physically or mentally traumatized by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile.[17]

4.2.3. An outline of the main issues with the examples of cases in practice

In the opinion of the monitors, some cases of irregularities were identified during the course of trial monitoring in connection with the legal qualification of the criminal proceedings relating to sexual and gender-based violence.

15 Criminal Offenses against Sexual Integrity (Chapter 19) and Criminal Offenses against Marriage and Family (Chapter 20), or they may be qualified as gender-based violence, such as the Criminal Offenses against Life and Limb (Chapter 16).

16 *See*: „Bosnia and Herzegovina: Amendments to the Criminal Code, Harmonization of National Legislation with International Standards", Hajrija Hadžiomerović-Muftić, direct link: http://www.ring.ba/index.php?option=com_content&view=article&id=88:bosna-i-hercegovina-izmjene-u-krivinom-zakonu&catid=35:tekstovi&Itemid=59 (Last time accessed on 10. 10. 2011.)

17 Witnesses under Treat and Vulnerable Witnesses, Article 3, paragraph 3.

In one of the criminal cases instituted before the Basic Court in Bijeljina, *the prosecutor decided that the criminal offense should qualify as an act of domestic violence in the family or the family household characterized by the existence of a serious consequence (Art. 208, para 3, in conjunction with paragraph 1 of the RS CC)*.

The indictment (which was confirmed in November 2009) contains allegations that over a long period of time (since 2003) the accused has mentally and physically mistreated the members of his family in his home, failed to look after the children, beat his wife, abused her, left home, came back home in intoxicated state and slapped his wife, hit her head hard against the wall tiles and beat his daughter in the head pulling her by the hair. After the death of his wife (in January 2009) he abused two minor daughters, and one day (in April 2009) in the morning he lay down next to one of the daughters, put his arm around her, touching her breasts and her genital area and, after she startled and stood up she began to cry, he told her she had better sleep with him so that he could give his money to her instead to another woman. He also told her that she would not be able to get pregnant when she got married until she slept with him. When the daughter went to school, the accused lay down next to his other daughter, took off his underwear, showing her his genitals, showing her how to do that "thing" with him, he touched her 'butt' with his finger while the girl put a blanket over her head so as not to look, after which she got a high fever as a result.

Judging from the conduct of the accused, as it is described in the indictment, *it appears that this offense could also be qualified as Sexual Abuse of a Child (from Art. 195 of the RSCC)*, whose basic form is punishable by a more severe penalty. The inadequate qualification of this offense as an act of domestic violence in the family and the family household gives rise to the conclusion that the judicial institutions give privilege to perpetrators of these kinds of sexual and gender-based violence and prevent the imposition of stricter sanctions that would otherwise have much stronger preventive character. We should bear this in mind in particular since the international standards require the application of laws and measures to protect children and juveniles against sexual abuse by the persons within the family, where abuse is made of a recognized position of trust, authority or influence over the child,[18] and where the judicial institutions are required to identify and sanction these offenses.

Unofficial information that monitors obtained during the course of monitoring of this case suggests that the underage girls were placed in a foster family since January 2011, continued their education, improved their performance at school and gained more self-confidence. Through an informal interview with the female foster parent of these girls, the observers have found out that the elder sisters

18 Article 18 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007).

tried to use their influence to persuade the younger, underage girls to refrain from testifying, what they resisted. Also, through an informal interview with the psychologist from the Social Welfare Centre of Bijeljina, the observers have realized that the Centre worked with the girls on their empowerment, as well as it did with their foster mother. After the elder sisters attempted to influence the testimony of these two underage girls, they were denied further contact with them.

In the criminal proceedings conducted before the Basic Court in Bijeljina in *the criminal case of Domestic Violence in the Family or the Family Household (Art. 208, paragraph 1, of the RSCC) in concurrence with an offense of Light Bodily Injury (Art. 155, paragraph 1, of the RSCC)*, where the accused committed violence against his former wife and her sister, in the presence of a minor child, the court did not accept the Prosecutors' qualification of an offense of domestic violence in the family or the family household against the former wife as the injured party.

The indictment (which was confirmed in January 2011) contains allegations that one day late in the evening (in late-October 2010), in the apartment of his former wife, after a brief argument on account of their previous troubled relationship, he hit her with an open fist – slapping her in the face, as a result of which his former wife fell on the floor, and then he kept punching her in the hairy part of her head. When the sister of his former wife came closer, holding their son in her arms, the accused hit her too with an open fist – slapping her in the face, and after she gave the child over to his former wife the accused kicked her in the abdomen, and after she picked up the phone to call for help he snatched the receiver from her and threw it away, and pushed her to the couch continuing to strike her with his hands in the face, arms and abdomen, as a result of which he inflicted serious bodily injuries on her in the form of contusions of the body and head and abrasions of the lower lip, as well as a number of light bodily injuries.

The Court reclassified the offense committed against the former wife of the accused to the light bodily injury *(Art. 155, paragraph 1, of the RSCC)*, and specified in the judgment that the elements of this crime are not contained in the conduct of the accused, as well as that the continuity of violence has not been proved. The reasoning of the court ruling also indicated that the accused fulfils his parental duties towards their common minor children, finding it as evidence that the accused is not the perpetrator of the criminal offense of domestic violence in the family or the family household. In doing so, the Court has disregarded the fact that the accused has committed the act of the criminal offense in the immediate presence of their common minor child, who can therefore be seen as a victim of domestic violence in the family or the family household. In addition, the inability to prove the continuity of violence cannot be considered as the absence of elements of the criminal offense considering that the definition of the criminal offense of domestic violence within the family or the family household,

such as it is regulated by the Criminal Code of the Republic of Srpska, does not contain this requirement in terms of existing elements of the crime.

In this case, an erroneous application of provisions of Article 42 of the Criminal Code of the Republic of Srpska has been observed with regard to meting out the sentence for the committed concurrent criminal offenses, according to which the compound punishment must be higher than each of individual punishments, which is what the court failed to apply. The accused received a suspended sentence and, as indicated in the judgment, "for one criminal offense – Slight Bodily Injury – sentence of imprisonment for a term of 1 month, and for the second criminal offense – Slight Bodily Injury – sentence of imprisonment for a term of 1 month, and a compound punishment of imprisonment for a term of 1 month, as a suspended sentence, with a one-year probation period."

4.2.4. Conclusion

The presented cases identified during the course of trial monitoring indicate the necessity to raise awareness and draw attention of the society as a whole, as well as of the criminal justice system *stricto sensu*, to the gravity and consequences of crimes involving sexual and gender-based violence. The international standards require the focus of attention on recognizing and sanctioning these crimes, especially in assessing the elements of the crime and its legal qualification in cases where children appear to be direct or indirect victims. It is also important to point out that the judicial institutions should identify the multiple vulnerability of the children witnessing the violence of one parent against the other parent and/or parents' mutual violence, as well as the violence against other family members, and to take this into account when making the legal qualification of the offense. According to the international standards, this type of violence is regarded as psychological violence and abuse that may have consequences for the smooth future development of the child, and indicate the need to use such qualification of the crime that will provide, to the greatest extent possible, the efficient protective sanctions aimed at preventing the recurrence of such violence.

4.3. Application of procedural law

4.3.1. International standards

With regard to the application of procedural law in connection with the criminal cases in the area of sexual and gender-based violence, the relevant

international standards[19] are focused on the requirements for the establishment and strengthening of institutional mechanisms enabling women and female children to report the acts of violence against them in a safe and confidential environment, without any fear of punishment or retribution, and to file criminal charges against the perpetrator. The Recommendation of the Committee of Ministers of the Council of Europe R (2002) 5 on the protection of women against violence focuses on enabling the victim of violence to institute criminal proceedings, and to request special attention of the prosecutor to be focused on instituting the criminal proceedings on behalf of the victims of violence and ensuring the full and effective protection and support to the victims of violence during the course of their testimony. The Recommendation instructs Member States to ensure that all victims of violence are able to institute proceedings (paragraph 38), and to make provisions to ensure that criminal proceedings on behalf of the victim can be initiated by the public prosecutor (paragraph 39) and to encourage prosecutors to regard violence against women and children as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest (paragraph 40).

Member States are directed that they should take all necessary steps to ensure that at all stages in the proceedings, the victims' physical and psychological state is taken into account and that they may receive medical and psychological care (item 41), and envisage the institution of special conditions for hearing victims or witnesses of violence in order to avoid the repetition of testimony and to lessen the traumatizing effects of proceedings, to ensure that rules of procedure prevent unwarranted and/or humiliating questioning for the victims or witnesses of violence, taking into due consideration the trauma that they have suffered in order to avoid further trauma, and where necessary, ensure that measures are taken to protect victims effectively against threats and possible acts of revenge (paragraphs 42-44). Also, the Recommendation of the Committee of Ministers of the Council of Europe R (85) 11 on the position of the victim in the framework of criminal law and procedure indicates that at all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them (paragraph C8).

Special attention has been focused on protecting the rights of the child victim of violence, and to that end children should be accompanied, at all hearings, by their legal representative or an adult of their choice, as appropriate, unless the court gives a reasoned decision to the contrary in respect of that person.

19 Beijing Declaration and Platform for Action (2005), the Recommendation of the Committee of Ministers of the Council of Europe no. R (2002) 5 on protection of women against violence; the Recommendation of the Committee of Ministers of the Council of Europe no. R (85) 11 on the position of the victim in the framework of criminal law and procedure (1985).

Children should be enabled to institute proceedings through the intermediary of their legal representative, a public or private organization or any adult of their choice approved by the legal authorities and, if necessary, to have access to legal aid free of charge. The Recommendation instructs the Court to provide for the requirement of professional confidentiality to be waived on an exceptional basis in the case of persons who may learn of cases of children subjected to sexual violence in the course of their work, as a result of examinations carried out or of information given in confidence. [20]

With regard to the rights of the victim to compensation, the Recommendation instructs that Member States should ensure that, in cases where the facts of violence have been established, victims should receive appropriate compensation for any pecuniary, physical, psychological, moral and social damage suffered, corresponding to the degree of gravity of the criminal offense, including legal costs incurred. [21] In the course of court proceedings the victim should be informed of the date and place of a hearing concerning an offence which caused him suffering, his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice as to how he can find out the outcome of the case.[22]

4.3.2. Legal framework — Republic of Srpska

The Criminal Procedure Code of the Republic of Srpska contains detailed provisions regarding the protection of the victim in the evidence presentation process and in the conduct of criminal proceedings. During such proceedings the victim of sexual and gender-based violence may be heard as a witness, noting that the law provides expressly that among the persons who cannot be heard as witnesses there is, *inter alia,* a minor who, in view of his age and mental development, is unable to comprehend the importance of his right not to testify (Art. 147, paragraph 1 sub-paragraph d)). Among the persons who are allowed to refuse to testify are the spouse or the extramarital partner of the suspect or accused, a parent or child, an adoptive parent or adopted child of the suspect or accused. The court, or another authority conducting the proceedings, shall caution these persons, prior to their examination or as soon as it learns about their relation to the accused, about their privilege allowing them to refuse to testify. (Art. 148). A lawyer as the advisor may be assigned by the court's decision to the witness during the examination if it is obvious that the witness himself is

20 Paragraphs 46, 47 and 49 of the Recommendation of the Committee of Ministers of the Council of Europe no. R (2002) 5 on protection of women against violence.

21 *Ibid*, paragraph 36

22 Para D9 of the Recommendation of the Committee of Ministers of the Council of Europe no. R (85) 11 on the position of the victim in the framework of criminal law and procedure (1985).

not able to exercise his rights during the examination and if his interests cannot be protected in some other manner. (Art. 149, para 5).

The Code prescribes circumspection when hearing a minor and, in particular, if the minor was victimized by the criminal offense, so that the hearing should not to have an adverse effect on the minor's mental condition and that, if necessary, the minor shall be heard with assistance of a school counsellor or other professional (Art. 151, para 4). The Code protects the victim from being asked about his/her sexual behaviour prior to the commission of the criminal offense, and provides that if such a question has already been asked, the court verdict shall not be based on such statement (Art. 151 para 5 in conjunction with Art. 279 para 1). The examination of witnesses may be recorded by using audio-visual equipment at all stages in the proceedings, and the Code provides that the examination shall be recorded in case of minors under sixteen (16) years of age who were injured parties, and if there are grounds for fearing that the witness cannot be examined at the main trial (Art. 155).

During the examination and the conduct of criminal proceedings, the judge or the presiding judge shall have to protect the witness from insults, threats and attacks (Art. 282 para 1). Protection of the injured or the victim who appears in the proceedings as a witness is further realized through the possibility of imposing prohibitive measures (Art. 185), which the court may impose should the circumstances of the case indicate that such measures are required. Limitations in regard to the imposition of prohibiting measures during the course of criminal proceedings do not apply to family members or close relatives of the suspect or the accused, insofar as they have been harmed by the criminal offense, as well as to his defence attorney (Art. 188).

Before taking the decision to accept a plea bargain agreement the court has an obligation to check whether the injured party was given an opportunity before the Prosecutor to give statement regarding the claim under property law (Art. 246, para 6, sub-paragraph e), and to inform the injured party about the outcome of the plea bargaining (Art. 246, para 9). The injured party shall also be entitled to be informed of the withdrawal of the indictment by the prosecutor (Art. 247).

The injured party shall also be eligible to file property claims that have arisen because of the commission of a criminal offense on which the court shall deliberate in the criminal proceedings, if this would not considerably prolong such proceedings (Art. 103 para 1). The injured party shall be entitled to file a petition to pursue his or her property claim no later than the end of the main trial or sentencing hearing before the court, and the party shall be informed of such entitlement by the court (Art. 105). The Court shall decide the petition filed by the injured party within the court verdict and it may refer the party to pursue his rights in a civil action (Art. 108).

The Law on the Protection of Witnesses in Criminal Proceedings of the Republic of Srpska prescribes the measures aimed at protecting the witnesses under threat and vulnerable witnesses, such as access to psychological and social assistance and professional help (Art. 6), the opportunity to be heard at the earliest time possible (Art. 7), the possibility to give testimony by using technical means for transferring image and sound (Art. 8), the possibility to testify without the presence of the accused, with the protection of his rights (Art. 10), as well as other rights that are regulated by this Law. The definition of witnesses under threat and vulnerable witnesses provided in this law (Art. 3) indicates that the victims of sexual and gender-based violence can be classified in this group of witnesses, and thus exercise additional rights and protection in criminal proceedings.

The Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska provides special rules in the event that the child or juvenile examined as a witness in criminal proceedings is seriously physically or psychologically traumatized due to the circumstances under which the criminal offense was committed or suffers from serious psychological disorders making the child or a juvenile particularly vulnerable. In such situations no confrontation of the child or juvenile witness with the suspect or the accused is allowed (Art. 187). If identification of the suspect or the accused is to be performed by a minor who is injured by the criminal offense or where the minor appears as an eyewitness of the committed criminal offense, such identification shall be made at all stages of the proceedings in the way that makes it completely impossible for the suspect or the accused to see the minor person (Art. 188).

When in the criminal proceedings the child or the juvenile appears at the trial in the capacity as an injured party, the trial is conducted by a juvenile judge, or by a court panel chaired by a juvenile judge or a judge with specialized skills. This provision is specifically applicable to the offenses such as: Murder, First Degree Murder, Infanticide, Incitement to Suicide and Assistance in Suicide, Grievous Bodily Injury, Abduction, Unlawful Deprivation of Liberty, Abuse, Rape, Sexual Intercourse with a Helpless Person, Sexual Abuse of a Child, Sexual Intercourse by Abuse of Position, Satisfying Lust in Front of Others, Trafficking in Human Beings for the Purpose of Prostitution, Abuse of a Child or Juvenile for Pornography, Production and Screening Child Pornography, Incest, Common-Law Marriage with a Juvenile, Abduction of a Child or a Minor, Neglecting and Abusing a Minor, Domestic Violence, Breach of Family Obligations, Evading the Alimony, Enabling Another to Enjoy Narcotics, Robbery, and Aggravated Robbery (Art. 184). The Law provides an emergency treatment for dealing with these offenses (Art. 190).

4.3.3. An outline of the main issues with the examples of cases in practice

Findings of the trial monitoring in the criminal cases relating to sexual and gender-based violence in the targeted courts in the Republic of Srpska reveal that, in most of the proceedings that were covered by the monitoring, the prosecutor based the counts of the indictment primarily on the testimonies of the accused and the injured parties, but to a limited extent also on evidence gathered during investigation and the testimonies of other witnesses, which constitutes a problem in connection with the proceedings relating to the criminal offense of domestic violence in the family or the family household (Art. 208 of the RSCC). Expert evaluations in the course of the monitored proceedings were proposed by the defence counsel, and it was noted that the prosecutors did not require additional expert evaluations, except in a single criminal case *(Sexual Abuse of a Child, Art. 194 para 4 of the RSCC)* before the District Court of Banja Luka, in which the female prosecutor requested additional expert evaluations by a clinical psychologist and a neuropsychiatrist in order to complement the findings on the degree of trauma and stress in cases involving a juvenile violence victim through an analysis of the testimony given by the injured party in her capacity as witness during the course of investigation and opinion-making concerning the findings of the expert court witness which has partly contested the process of taking the testimonies from the injured party, as well as amendments to the expert evaluation regarding the psychological profile of the accused. There were no examples where the presentation of other pieces of evidence was proposed.

These findings reveal that the protection of fundamental rights of the injured party or the violence victim has been considerably reduced, or called into question, particularly in regard to the application of international standards which require the recognition of violence against women and children as priority-based and aggravating circumstances in terms of institution and conduct of the criminal proceedings, which was not evident from the presentation of evidence in the monitored proceedings, and therefore a passive attitude of the prosecutor was noted with regard to the protection of the rights of the injured party.

The injured parties (women violence survivors) were provided with the opportunity to give testimony in their capacity as witnesses, which they took advantage of in most cases, but only in a small number of monitored criminal cases before the targeted courts it was noted that the injured parties exercised the privilege of deciding not to testify. The injured parties were informed by the courts in the criminal cases subjected to monitoring of their right not to testify in criminal proceedings relating to domestic violence, with special attention of the courts focused on how to inform the underage injured parties in respect of their rights they may exercise regarding the testimony.

During the course of trial monitoring in a criminal case relating to domestic violence in the family or the family household before the Basic Court of Bijeljina, there was an incident observed in the court lobby when, before the main trial hearing, in the presence of the defence counsel of the accused, the prosecutor advised the injured party to withdraw from testifying against the accused since she would thus "come to an agreement on custody of the children in the divorce proceedings more easily." Such situations indicate that there is the practice of going beyond the framework of the instruction on rights and the support to the injured party, which constitutes one of the obligations of the prosecutor in relation to his primary role of representing the interests of the injured party in criminal proceedings, and may be regarded as asking the witness leading questions, or influencing the witness.

No considerable inconsistencies were detected in the testimonies given by the injured parties in the investigation and before the court. The defence counsel was entitled to challenge the testimony of the injured parties, whereas the Court provided protection against inadmissible questions in the event that they were asked. In one criminal case (Abuse of a Child, Art. 194, para 4, of the RSCC) before the District Court of Banja Luka, the female defence attorneys of the accused pointed out during the trial that pornographic materials (magazines and DVDs) were found in the house of the injured party (underage women violence survivor), which she was reading and watching, while allusions were also made to the fact that the injured party already had previous sexual experiences. The court overturned these objections made by the female defence lawyers of the accused in accordance with the obligation of preventing the questions on prior sexual behaviour of the victim.

However, it is necessary to point out that the injured parties (women violence survivors), who appeared in criminal proceedings in the capacity as witnesses before the courts that were subjected to trial monitoring, had no support in the form of legal assistance/attorney in the courtroom, nor any special support from psychologists and social workers. In accordance with the law and international standards the Court was providing protection to the victim during the testimony against insults, threats and assaults. Insofar as the cases involved minors in their capacity as injured parties, their testimonies were taken in a manner which was in compliance with the domestic legislation *(the Criminal Procedure Code of the Republic of Srpska, the Law on the Protection of Children and Juveniles in Criminal Proceedings of the Republic of Srpska)* and international standards. Yet, it is observed that the privileged status provided by the Law on the Protection of Witnesses in Criminal Proceedings, which recognizes children and juveniles as vulnerable witnesses (Article 3 paragraph 3), could not be granted by the Court in all monitored cases where such practice was believed to be possible in the opinion of the observers.

Through the trial monitoring process that took place in the targeted courts, the monitors have noticed that the courtrooms were materially and technically equipped to provide protective measures to the injured parties in the process of testifying. In all targeted basic courts where the trial monitoring took place, the required audio and video equipment was in place for the support to the injured parties, or the witnesses in the process of taking testimony, whereas the District Court of Banja Luka had a separate witness support room that was used in two cases that were being monitored before this Court. As it is specified above, bearing in mind the small number of cases and the limited duration of monitoring, we cannot claim with certainty that the situation is identical in all or most of the courts in the Republic of Srpska. On the contrary, in the Republic of Srpska, there is a special Witness Support Unit already in place only in Banja Luka District Court and Banja Luka District Prosecutor's Office, ever since 1 September 2010, but during 2012 this unit is also expected to be opened in East Sarajevo District Court and East Sarajevo District Prosecutor's Office.

No audio and video equipment was used in the monitored cases for the purpose of supporting the process of taking of testimony from the adult female injured parties. Thus, the Court has failed to apply domestic legislation that would enable creation of special conditions required for taking the testimony of the female injured party, and international standards that refer to undertaking of all necessary steps that would allow the physical and psychological state of the victims to be taken into consideration at all stages, in order to avoid repeated testimony and mitigate the traumatic effects of the court proceedings, and prevent unnecessary and/or humiliating questioning of the victims or witnesses of violence. This is particularly important in cases of domestic violence in the family or in the family household (which make an overwhelming majority of criminal cases that were subjected to trial monitoring) in which, according to the opinion of the observers, due to the lack of special protection by the court, the injured parties or victims of violence were exposed to further unnecessary psychological trauma, humiliation and fear of threats and revenge prompted by their very contact with the accused in the courtroom, which calls into question the protection of basic human rights of women violence survivors in their capacity as injured parties.

No irregularities were observed with regard to informing the victim or the injured party about the making of the plea bargain agreements. The victims or the injured parties were informed by the courts during the proceedings on their right to file property claims, insofar as they were not informed in respect of such rights earlier by the prosecutor. However, in the cases where the injured parties filed the property claims during the proceedings, the court referred them to pursue their rights in a civil action and no cases were detected in which any such claims were decided during the course of the criminal proceedings. These monitoring findings suggest that there was a passive attitude on the part of the

Court, but also on the part of the Prosecutor's Office, which, according to the opinion of the observers, obtained sufficient evidence so that the Court could deliberate and decide towards more adequate protection of interests of the injured parties in the cases of sexual and gender-based violence.

4.3.4. Conclusion

Findings of the trial monitoring in connection with the criminal cases in the area of sexual and gender-based violence before the targeted courts in the Republic of Srpska reveal that there is a passive attitude on the part of the judicial institutions in providing effective and full support and assistance to the injured parties during the conduct of criminal proceedings, particularly in regard to the process of taking testimony from witnesses and the possibility of property claims settlement.

Reduced activity on the part of the prosecutors in collecting evidence in the investigation proceedings has an effect of limited support to the counts contained in the indictment with evidence based almost exclusively on the testimony of the accused and the injured, but rarely on the testimony of other witnesses, which is causing great difficulties in terms of proving the existence of a criminal offense but also mild and inadequate sanctions for the perpetrators of such violence.

Such practices reveal that the activities of the prosecutor during the course of criminal proceedings in terms of support to the injured parties were very limited and that, only in exceptional circumstances, which include typically some severe forms of sexual violence against the minors, did the prosecutor propose additional expert evaluations, while the additional options in regard of providing support to proving the existence of an offense are generally not exercised, especially in the case of the crime of domestic violence in the family and the family household where the persons of female gender appear as the injured parties. It should be noted that, considering the nature of the crimes that involve elements of sexual and gender-based violence which leave strong effects on the injured party in terms of impairment and threat to psychological and physical integrity, the monitoring findings point at the necessity of special sensibilisation of courts and prosecutor's offices for the psychological and physical conditions of the injured party appearing at court in her capacity as witness, and the need for an active approach of the Court and the Prosecutor's Office in providing full support towards using the possibilities provided by national legislation and international standards, towards providing social, psychological and legal assistance to the injured parties in the course of criminal proceedings.

The failure to apply special protection measures that are otherwise used for persons considered as vulnerable witnesses and ordinary witnesses, but also the lack of support from psychologists, social workers and legal counsels in cases of

where the injured party comes to the witness stand, are limiting the possibility that the injured parties would be likely to give unsolicited testimony to the Court about all relevant facts relating to the perpetration of the offense, without any pressure or fear of the consequences that would arise from confrontation with the accused during and after their testimony, which reveals the existence of an inherent risk for basic human rights of the injured party. The importance of allowing smooth testimony of the injured parties, or the victims survivors of sexual and gender-based violence, is all the more considerable for it often provides one of the primary pieces of evidence in the proceedings, so it is imperative for the prosecutors and judges who conduct these proceedings to ensure that all available means are used for providing support and protection to the adults acting as injured parties in this the proceedings.

The commitment on the part of the courts to provision of full support to the injured parties in criminal proceedings in the field of sexual and gender-based violence must also be directed at preventing the proceedings from being too time-consuming, in regards to both the prosecution of acts of violence and the exercise of victims' rights to compensation through property claims filed under property law, in order to assist them in rehabilitation and recovery from any trauma caused by violence. In this regard, in the process of prosecuting the crimes in this area it would be necessary for the courts to adopt the practice of solving the property law claims during the criminal proceedings to the greatest extent possible, while minimizing the referral of the injured parties to pursue their rights in a civil action, as a result of which the prosecutors' offices would be able to collect sufficient evidence that will allow the courts to hand down the rulings in regard to these claims.

4.4. Penal policy

4.4.1. Relevant international standards

It is important to mention that various international standards[23] require not only a zero-tolerance policy towards sexual and gender-based violence by all government institutions, and the introduction and use of more rigorous sentencing policies for offenses in this area, but also *the application of measures that will enable protection and rehabilitation of the victims of violence and have an impact on the perpetrators of violence so that they would not repeat the offense.* This clearly indicates the importance and role of the courts in preventing the violence

23 *Inter alios* also the Recommendation 1450 (2000) on Violence against Women in Europe, the Recommendation 2002(5), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007), the Convention on Preventing and Combating Violence against Women and Domestic Violence (2011).

in this area. These standards require of them to ensure the greater protection of women (for example, through measures that prohibit abusive husbands to return to the matrimonial home and the measures that would reinforce the penalties and sentences for spousal violence in an appropriate way). In relation to the crimes involving sexual exploitation and sexual abuse of children, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse makes references to the use of specific aggravating and extenuating factors in determining the penalties for offenses which led to severe damage to physical or mental health of the victim, if the offense was preceded or accompanied by torture or serious violence, if the offense was committed against an extremely vulnerable victim, or the offense was committed by a family member, a person who lives with the child or a person who abused his authority, and if the offense was committed by several persons who acted in concert with one another, or the offense was committed as part of criminal conspiracy, or the offender was previously convicted of the criminal offenses of the same character.

With regards to the penal policy in relation to the offenses involving violence against women and domestic violence, the Convention on Preventing and Combating Violence against Women and Domestic Violence *requires the application of sanctions that are effective, proportionate and dissuasive, taking into account their seriousness.* These sanctions should include sentences involving the deprivation of liberty, as well as other measures against the perpetrators as well as monitoring or supervision of convicted persons, withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way. These standards require that certain circumstances, insofar as the they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences committed against a former or current spouse or partner as recognized by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority, as well as the offence, or related offences, that were committed repeatedly, the offence that was committed against a person made vulnerable by particular circumstances, the offence that was committed against or in the presence of a child, the offence that was committed by two or more people acting together, the offence that was preceded or accompanied by extreme levels of violence, the offence that was committed with the use or threat of a weapon, the offence that resulted in severe physical or psychological harm for the victim, or where the perpetrator had previously been convicted of offences of a similar nature.

4.4.2. Legal framework — Republic of Srpska

The Criminal Code of the Republic of Srpska prescribes the type and the extent of sanctions for offenses that were subjected to monitoring. *The court shall mete out 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 circumstances), and, in particular the degree of culpability, the motives for perpetrating the offence, the degree of danger or damage 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 character of the perpetrator.* When meting out the punishment for the criminal offence in recidivism, the court shall take into special consideration whether the most recent offence is of the same type as the previous one, whether both acts were perpetrated with the same motive, and it will also take into consideration the period of time which has elapsed since the pronunciation of the previous conviction, or since the punishment has been served or pardoned. In fixing a fine, the court shall take into consideration the situation of the perpetrator in terms of property, taking into account the amount of his salary, his other income, his assets and his family obligations (Art. 37).

The court has the ability to pronounce *warning sanctions – suspended sentence and judicial admonition – that are to be pronounced against a guilty perpetrator only in cases where, given the nature and gravity of the criminal offence, circumstances under which the offense was perpetrated and the character of the perpetrator, the execution of punishment is not necessary and the purpose of punishment can be achieved through a warning with a threat of punishment (suspended sentence), or through admonition only (judicial admonition* (Art. 45 RSCC).

The court may order that a perpetrator who has been subject to a suspended sentence is placed under *protective guardianship*, and it may terminate the protective guardianship even before its expiration if the court establishes that the purpose of this measure has been attained. If a convicted person against whom a protective guardianship has been pronounced fails to fulfil the obligations imposed on him by the court, the court may warn him or may replace earlier obligations with other obligations or extend the protective guardianship within the probation period, or may revoke the suspended sentence (Art. 52 of the RSCC). *Protective guardianship may include treatment in an appropriate health institution, refraining from intake of alcohol or opiates (intoxicating drugs), attending particular psychiatric, psychological or other counselling centres and acting in accordance with their instructions, training for a profession, accepting employment which is appropriate to the skills and abilities of the perpetrator,*

disposing with the salary or other income and property in an appropriate way and in accordance with marital and family obligations. (Art. 53, para 1, of the RSCC).

In addition, the court has at its disposal *safety measures that may be pronounced along with the criminal sanction, the purpose of which is to remove situations or conditions that might influence a perpetrator to commit criminal offences in the future* (Art. 55 of the RSCC). These measures include *mandatory psychiatric treatment, mandatory medical addiction treatment, as well as a number of other measures* (Art. 56 of the RSCC).

The measures of protective guardianship and safety measures can be regarded as an important tool for support to preventing and combating of criminal offenses falling within the area of sexual and gender-based violence, ensuring the safety of victims of violence and supporting the process of re-socialization of the violence perpetrators.

4.4.3. Analysis of the cases from practice

Findings of the trial monitoring in the criminal cases relating to sexual and gender-based violence before the selected courts in the Republic of Srpska courts and the judgments pronounced and collected during the implementation of trial monitoring, reveal that in most criminal proceedings instituted for domestic violence the imposed fines were ranging from 500 to 1,500 BAM, and then in turn the suspended sentences were ranging from 1 to 4 months. An exception was a criminal case in which the person accused of perpetrating an act of domestic violence in the family or the family household was sentenced to imprisonment for a term of 3 months, where it is clear from the court ruling that the action of the criminal offense persisted continuously for a period of several months.

Findings of the court ruling analysis suggest that there were also some cases in which the facts that the accused was a family man and father of one or several children were singled out as the extenuating circumstances for an offense of domestic violence in the family or the family household, which can be seen as being contradictory to the established facts of the act of violence that was committed in the particular case. At the same time, the fact that the violence against the injured party was repeated, or the persistence in committing the criminal offense was not used as an aggravating factor in meting out the sentence, which indicates that there is the lack of sensibility on the part of the judges to the nature and consequences of domestic violence in the family or the family household, especially the consequences that this type of violence has for the women violence survivors in their capacity as injured parties.

Low-income status of the accused, admission of guilt, advanced age, and the absence of earlier convictions were most often mentioned as other extenuating

circumstances, whereas previous convictions were most often mentioned as other aggravating factors. The monitors have observed the case where, during the period of 4 months, 3 verdicts were pronounced to the same person for the criminal offense of domestic violence in the family or the family household (Art. 208 para 1, the RS CC), where under the first verdict the accused was fined by the court to the amount of 500 BAM, then under the second verdict the accused was punished with a suspended sentence imposed for a term of 4 months of imprisonment with a probation period of one year, and under the third verdict the accused was fined to the amount of 1,500 BAM, whereby in the first two proceedings the court identified the admission of guilt and advanced age of the accused as extenuating circumstances, failing to identify any aggravating circumstances.

Sanctions in the judgments were not found to have been accompanied with the imposition of safety measures (Art. 55-62 of the RS CC), and suspended sentences were not found to have been accompanied with the measures of protective guardianship (Art. 52-53 RS CC), as measures that may have an important protective purpose to the effect of protecting the rights and safety of the victims of sexual and gender-based violence and preventing the recurrence of violence. The exception was 1 (one) safety measure of mandatory psychiatric treatment administered over the course of 6 months which was imposed against the accused for a crime of domestic violence within the family or the family household (Art. 208, para 4), who was found, by way of expert evaluation during the criminal proceedings, to have committed the offense in the state of mental incompetence due to a mental illness.

4.4.4. Conclusion

An analysis of penal policies in criminal cases relating to sexual and gender-based violence conducted in the targeted courts in the Republic of Srpska that were subjected to trial monitoring indicates that the acts of violence in this area are viewed as less serious offenses.

This is evident from the findings of the analysis of verdicts pronounced for the offense of domestic violence in the family or the family household, which is the most common phenomenon of gender-based violence prosecuted in the criminal proceedings, in which the courts impose almost exclusively the fines and suspended sentences. These sanctions, as well as imprisonment sentences, do not include measures aimed at remedying the causes that led to the perpetration of a criminal offense; on the contrary, in the opinion of the observers, they may have an effect of intensifying the violence of the accused against the injured party, reducing the number of complaints filed by the violence survivors with the relevant institutions, as well as increasing the distrust in the work of judicial

institutions in terms of perception about the lack of an effective mechanism to prevent and combat gender-based violence and protect their fundamental human rights, primarily the right to life free from violence.

The disadvantage of the applied measures of protective guardianship and safety measures by the courts in criminal cases related to sexual and gender-based violence suggests that the *primary focus of the courts is on the repressive purpose of punishing the perpetrators of violence in this domain*. Such practices do not achieve the protective purpose of punishment, which in these forms of criminal offenses, in addition to the punishment of the offender, also requires *protection of safety of the injured party and support for her recovery* (efforts to prevent and eliminate the fear of threats and retaliation by the perpetrator of violence, to ensure safe living environment free from repeated violence and abuse, and to support the process of recovery from the trauma caused by violence that the injured person has survived).

The practice of frequent sanctioning of domestic violence in the family or the family household by pronouncing suspended sentences and fines, without any accompanying use of appropriate protective and safety measures, does not eliminate the causes that have led up to the perpetration of a criminal offense since there is no sanction or measure that would focus on the socialization of perpetrators of violence (enabling the perpetrator to have access to professional support that will enable him to understand the significance and consequences of violence, and reduce or eliminate the possibility of repetition of violence, to implement the process of recovery from drug and alcohol addiction disorders, to assume responsibility for the acts of violence and, where possible, to make steps towards establishing communication and relationships with the victims of violence, which will be based on non-violence).

5. Closing considerations and recommendations

5.1 Closing considerations

With regard to ensuring respect for the principle of fairness of the trial in criminal proceedings that were the subject to monitoring and in which the rights of the accused were limited in regard to questioning the witnesses, the court took into consideration the circumstances dictated by the gravity and nature of the crime, as well as the age and condition of the minors that were harmed by the criminal offense and that gave testimony as witnesses in the proceedings. However, it was observed at the same time that the rights of the accused were disregarded in one case, or specifically that the rights of the accused to examine the underage women violence survivor as the injured party at the trial and thus exercise the right of the accused to raise questions at the trial and give explanations regarding the testimony of the underage women violence survivor (Article 274, paragraph 1, of the RS CPC). The possibilities provided by the Criminal Procedure Code, the Law on the Protection of Witnesses in Criminal Proceedings and the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings were not used, including the possibility that the court had in mind with regard to a technically equipped and adequately staffed Victims Support Unit, towards ensuring the balance between the individual right of the accused to have a defence counsel of his own choice or otherwise and the right of the underage victim to receive protection against retraumatisation and negative consequences for the future psychological development.

The cases observed in the case-law are indicating the necessity of shifting the focus of the judicial institutions to paying a greater deal of attention to assessing the characteristic elements of the crime and its legal qualification in cases where children appear to be direct or indirect victims of sexual and gender-based violence. It is essential that the judicial institutions should recognize the multiple vulnerability of children witnessing the violence of one parent against the other and/or their mutual violence, and violence against other family members, which can be regarded as psychological violence and abuse that may have consequences for the smooth future development of the child, and indicate the need to use such qualification of the crime that will provide, to the greatest extent possible, the efficient protective sanctions aimed at preventing the recurrence of such violence. Monitoring of criminal proceedings has also revealed the limited activities of the judicial institutions in providing effective and full support and assistance during the course of the proceedings for the adult injured parties i.e. female survivors of violence, particularly in regard to the activities undertaken by prosecutors in order to collect evidence in the investigative process, making

it difficult to prove the existence of a criminal offense, but also to take decisions on the property claims filed by the injured party.

It was also observed that, only in exceptional circumstances, which typically involve some more severe forms of sexual violence against the minors, did the prosecutors propose the presentation of other evidence, such as additional court expert evaluations, and as a result this option of proving the existence of the criminal offense was not exercised in the cases of adult female survivors of violence in their capacity as injured parties, especially in cases of criminal acts of domestic violence in the family or the family household that constitute the most common form of violence in this domain. Although the conduct of investigation proceedings was not the subject of monitoring, the body of evidence presented at the main trials was instrumental in noting that the prosecutors relied heavily on the testimony given by the injured party and the accused, and possibly by other witnesses, and that during the course of investigation the prosecutors were insufficiently engaged in collecting evidence such as the medical expert evaluations of injuries sustained as a result of violence, photo-documentation of injuries and, depending on the case, other evidence as well. In this way too much of a burden and responsibility has been placed on the injured party, particularly bearing in mind that the nature of crimes that involve elements of sexual and gender-based violence suggest that there are strong effects in terms of impaired and compromised psychological and physical integrity, which points out the necessity of special sensibilisation of judges and prosecutors to the condition of the violence survivors as injured parties and an active approach by the courts in fullfing the international standards of securing social, psychological and legal assistance to the injured parties during the course of criminal proceedings.

The failure to implement the existing national legislation and international protection standards that are applicable to vulnerable witnesses and witnesses under threat, but also the lack of support from psychologists, social workers and legal counsels in cases where the injured parties who have survived violence are required to come to the witness stand, are limiting their ability to testify in court without any pressure and fear of the consequences that will arise from their confrontation with the accused even after their testimony. The practice of the judicial reliance on the testimony of the injured party suggest that there is a passive attitude on the part of the judicial institutions towards the protection of fundamental human rights of victims of sexual and gender-based violence who appear in their capacity as witnesses in the criminal proceedings.

Penal policy of the targeted courts in connection with criminal cases in the area of sexual and gender-based violence suggests that these offenses are viewed as less serious than other violent crimes. A criminal offense of domestic violence in the family or the family household is sanctioned almost exclusively with fines and suspended sentences, which do not contain any measures aimed at preventing the recurrence of violence and remedying the causes that led to the

commission of the offense; on the contrary, in the opinion of the monitors, they may have an effect of intensifying the violence of the accused against the injured party, reducing the number of complaints filed by the violence survivors with the relevant institutions, as well as increasing the distrust in the work of judicial institutions in terms of perception about the lack of an effective mechanism to prevent and combat gender-based violence and protect their fundamental human rights, primarily the right to life free from violence. This can lead to the creation of a false image that the number of cases of gender-based and sexual violence has been reduced and the public policies in this area are successful, which can actually as a consequence create a counter effect, the actual increase in the number of unreported cases of gender-based and sexual violence and the increase in the number of victims whose rights to life free from violence are not protected.

The disadvantage of the applied measures of protective guardianship and safety measures implies that the penal policy of the courts selected for monitoring was focused primarily on repressive rather than protective purpose of punishing the perpetrators of violence. It is essential for the courts to place their focus on protecting the safety of the woman-violence victim and on supporting her recovery through the prevention and elimination of her fear of threats and retaliation by the perpetrator of violence, on ensuring the safe living environment free from repeated violence and abuse, and on supporting the process of recovering from the trauma caused by the violence she has survived.

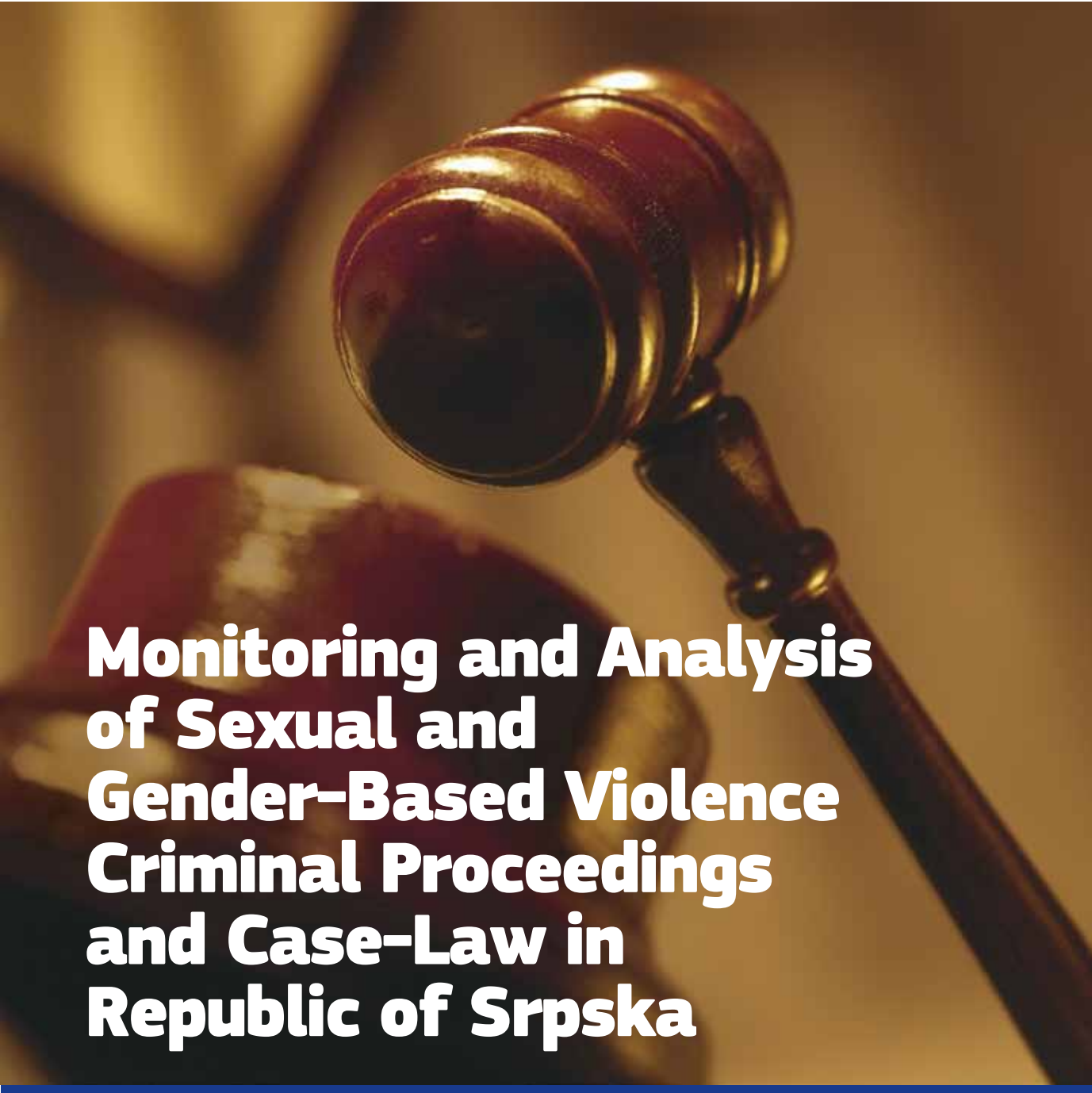
The practice of frequent sanctioning of domestic violence by pronouncing suspended sentences and fines, without the accompanying use of appropriate protective and safety measures, not only fails to remedy its consequences, but it also fails to contribute to eliminating the causes that have led to the perpetration of the crime. The lack of efforts aimed at resocialisation of the perpetrators of violence contributes to the recurrence of such offenses and the reduction in the number of reported violence cases.

5.2. Recommendations

- To improve the legal framework for the protection of human rights of persons who have survived violence and appear in their capacity as injured parties in criminal proceedings, and to ensure the implementation of international standards that indicate the need to strengthen the institutional mechanisms enabling women and female children to report the acts of violence against them in a safe and confidential environment, without fear of punishment or revenge, and to file criminal complaints and initiate legal proceedings.

- In relation to ensuring full and effective support to women survivors of violence appearing in their capacity as injured parties in the criminal proceedings, it is also necessary for the courts that prosecute criminal cases in the area of sexual and gender-based violence — by evaluating the circumstances of each individual case, bearing in mind not only the ability of the injured party to testify in the presence of the accused completely and accurately, but also the need to protect the injured party from further victimization — to apply provisions of national procedural laws that are applicable to vulnerable witnesses and witnesses under threat. We believe that it would be necessary to minimize the contacts of the injured parties with the accused in the proceedings, not only in the case of juvenile victims but also of adult injured parties, survivors of violence, taking into account the rights of the accused and the balance between the individual rights of the accused and the victim. In addition to other measures set forth by law, these measures can be provided by introducing practices of using audio and video equipment for the taking of testimony of the injured party, as well as implementing and providing support to social workers and psychologists in the process of testifying. It is particularly important to ensure the measures in the case of criminal proceedings which are aimed at prosecuting domestic violence in the family or the family household, considering its prevalence and consequences, trauma and fear of retaliation, to which the woman who has survived the violence is exposed. Thus the courts will promote the implementation of international standards that are aimed at ensuring greater protection of victims' rights in the investigation phase, during the course of court proceedings and in meting out the sanctions and in sentencing.
- In this regard, it is essential that the Ministry of Justice of the Republic of Srpska should make possible that all courts in the Republic of Srpska are capable of fulfilling special conditions that are to be met in order to take testimony from vulnerable witnesses and witnesses under threat (separate rooms for witnesses) in accordance with the Law on the Protection of Vulnerable Witnesses and Witnesses Under Threat of the Republic of Srpska, as well as the relevant international standards in this area, which require a stronger involvement of judicial institutions in protecting the rights of the injured parties in criminal proceedings.

- In relation to improving the work of the courts in criminal cases in the area of sexual and gender-based violence, it is essential that the Centre for Judicial and Prosecutorial Training the Republic of Srpska (JPTC RS), as the key government institution responsible for the development and implementation of training programmes for judges and prosecutors in the Republic of Srpska, should provide the possibility for all judges and prosecutors who are involved in the work on the criminal cases of sexual and gender-based violence in the Republic of Srpska to receive readily available on-going training on the application of international standards for the protection of victims of sexual and gender-based violence. These training sessions should be an integral part of the annual program of vocational and professional training for judges and prosecutors in the form of modules which include the processing of specific cases from practice, mock trials and preparation of additional materials in the form of manuals and handbooks with the analysis of the jurisprudence and case-law of the countries in which the provisions that provide protection to the injured parties, or victims of sexual and gender-based violence have a widespread practical application. This training should be based on a multidisciplinary principle, by using experiences of civil society organizations that have a long-time experience in terms of providing legal and psychological assistance and support to the victims of violence, social welfare centres and healthcare institutions, as well as the institutional mechanisms to contribute actively to the adoption and implementation of public policies aimed at preventing and combating sexual and gender-based violence (Gender Centre of the Republic of Srpska Government).



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United Nations Population Fund

Bosnia and Herzegovina
Federation of Bosnia and Herzegovina
Government
Gender Centre of Federation of Bosnia and Herzegovina

Ministry for Human Rights and Refugees
Agency for Gender Equality of Bosnia and Herzegovina

Republic of Srpska
Government
Gender Center - Center for Gender Equality

United Nations Development Programme

Preventing and Combating Sexual and Gender Based Violence in Bosnia and Herzegovina