



Humanitarian Law Center



Kingdom of the Netherlands



#EY
ЗА ТЕБЕ

Policy Paper:
**Prosecution of Crimes of Sexual Violence
during Armed Conflicts
before the Courts of the Republic of Serbia**



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'In my opinion, they wanted to break our spirit as much as possible because a woman who is raped cannot recover from that experience. I will never recover. My life is ruined. My whole family is ruined. My loved ones were killed. Everything I had was taken away from me. They took away my happiness'.

RM070, a witness raped in Foča¹

¹ Testimony of PM070 before the ICTY, 30 September 2013, *Mladić*.

ABBREVIATIONS

ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
OWCP	Office of the War Crime Prosecutor
BiH	Bosnia and Herzegovina
CCSFRY	Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette of the SFRY Nos 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90- 1217, 45/90-1340, 54/90-1773 and Official Gazette of the SFRY Nos 35/92-651, 37/93-816, 24/94-273, 61/01 from 09.11)
CPC	Criminal Procedure Code (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)
HLC	Humanitarian Law Centre

ABSTRACT

The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) marked a turning point in the history of international law dealing with sexual violence committed during armed conflicts. The ICTY Statute contains one of the first definitions of rape as a crime against humanity. It reflects an effort to raise awareness of one of the traditionally least talked-about subjects—sexual violence during armed conflicts. Since its foundation, the ICTY has taken on the responsibility of establishing a practice for dealing with sexual and gender-motivated crimes committed in conflicts and of introducing important changes to the rules governing the treatment of victims of these crimes during court proceedings, along with the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

The cessation of impunity for crimes of sexual violence is one of the most complex and significant conditions for the establishment of the rule of law and lasting peace in conflict areas.

Upon the completion of the ICTY mandate, the obligation to prosecute those crimes was transferred to the national courts of the countries formed by the breakup of Yugoslavia.

In 2003, the Office of the War Crimes Prosecutor (OWCP) was founded, pursuant to the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings. The OWCP is responsible for investigating and prosecuting cases of war crimes. In 16 years of work, the OWCP has pressed only 10 criminal charges for crimes of sexual violence committed during the war. Only five of those cases were finalised. Bearing in mind the scope of sexual violence committed during the conflict in the former Yugoslavia, there is no doubt that the number of cases brought before the Serbian judiciary is tiny. The prosecution of these crimes must therefore be more efficient in the coming years, and the need to this has been identified by the OWCP. In the Prosecutorial Strategy for the Investigation and Prosecution of War Crimes in the Republic of Serbia, the OWCP stated that the efforts to prosecute cases of sexual violence would be increased in the coming period.

Every country is obliged to try to prevent such crimes and to prosecute the perpetrators. In April 2019, the United Nations Security Council reiterated those obligations in Resolution 2467, which states that crimes against women are still widely committed during armed conflicts and are characterised by extreme brutality. The resolution also addresses the need for states to adopt national legislation focused on this issue and on the victims of sexual violence, in order to prevent these crimes in the first place, and then also to prosecute them.

I. INTRODUCTION

In 1991 and 1992, while conflict took place in Bosnia and Herzegovina (BiH), the international community was interested in allegations by the media and non-governmental organizations that sexual violence was frequently committed². As a result, certain international organisations, such as Human Rights Watch and Amnesty International, began investigating those media allegations, and the UN Security Council formed the Panel of Experts, with the aim of determining whether sexual violence was strategically used as a weapon of war³. The report submitted by the Panel of Experts⁴ influenced the establishment of the ICTY in 1993⁵ and the creation of a new legal framework dealing with sexual violence.⁶

The Humanitarian Law Centre (HLC) was among the non-governmental organisations that documented sexual violence over Bosniak women in Foča. In 1993, the HLC visited camps located in Serbia, Turkey and Macedonia and took statements from women raped in Foča. Those statements served as a basis for

2 For Bosnian Teen-Ager, a Rape of Innocence: Soldiers: Muslim girl describes night of terror with abduction and multiple assaults by Serbs, Los Angeles Times, 9 August 1992; Robert Fisk, Bosnia War Crimes: 'The rapes went on day and night', The Independent, 8 February 1993.

3 Grace Harbour, 'International Concern regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment', from Prosecuting Conflict-Related Sexual Violence at the ICTY, p. 23. The UN Human Rights Commission has appointed a Special Rapporteur. Also, the UNPROFOR and the Observation Mission of the European Community have been deployed to BiH.

4 The Final Report and the accompanying annexes were submitted to the ICTY by the Panel of Experts in 1994. The Annex IX deals exclusively with sexual violence crimes and documents sexual violence in the period from 1991 until 1993 in BiH, including the forms of violence and the list of confinement places.

5 On 25 May 1993, the Security Council adopted the Resolution 827, establishing the ICTY and expressing 'extreme concern about the grave crimes of organized and systematic detention and rape of women'.

6 Ibid. p. 21.

the ICTY prosecutorial investigation for the rapes committed in Foča and the prosecution of perpetrators.⁷

According to the ICTY data, more than two-thirds of the individuals brought before the ICTY have been convicted of crimes of sexual violence.⁸ This information supports the claim that those crimes were so widespread in the former Yugoslavia that they should be tried before an international court.

Although the whole world has witnessed the scope of those crimes, the exact number of women raped during the conflict in the former Yugoslavia is still unknown. Until 1993, the estimated number of raped women was between 12,000 and 70,000, in BiH alone.⁹ Only a few years after the end of the BiH conflict, the Kosovo Verification Mission under the Organization for Security and Co-operation in Europe stated that numerous cases of rape and other forms of sexual violence in Kosovo¹⁰ were used to foster ethnic cleansing, which had already been done in Croatia and Bosnia and Herzegovina.¹¹

Although the extent of sexual violence committed in the former Yugoslavia is undoubtedly huge, the OWCP has so far prosecuted only 10 cases of sexual violence committed during the conflict,¹² out of which one case was about sexual violence for which criminal charges were pressed as late as 2018,¹³ whereas the other nine cases were about sexual violence and murder.

7 HLC database.

8 Michelle Jarvis, 'A Review – The Issue of Responsibility in Conflict-Related Sexual Violence', from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, p. 4.

9 Report of the UNHCR Special Rapporteur, footnote 7; Report of Ann Warburton's Team, par. 14, footnote 8.

10 Report of the Women's Rights Division, Human Rights Watch, Kosovo: Rape as a Weapon of 'Ethnic Cleansing', pp. 2-3.

11 OSCE, *As Seen, As Told – An analysis of the human rights findings of the OSCE Kosovo Verification Mission from October 1998 to June 1999*, p. 21.

12 Gnjilanska grupa, Lekaj, Čuška, Skočić, Bijeljina I, Bijeljina II, Bratunac, Zvornik III i IV, Brčko, Brčko II i Kalinovik.

13 OWCP indictment against Nikola Vid Lujčić from 12 September 2018, available at: http://www.hlc-rdc.org/wp-content/uploads/2019/01/Optuznica_12.09.2018..pdf, accessed: 20 November 2019.

The distinction between gender-based violence and sexual violence in the context of armed conflict should also be clarified here. The term *gender* refers to socially constructed roles and identities of women and men within a particular community.¹⁴ Those roles and identities can vary across communities and change over time, and they can also be influenced by various factors, such as culture, ethnicity, age and sexual preferences.¹⁵ But in connection with these crimes there is a particularly relevant gender factor— the inequality of women and men that only deepens and deteriorates during armed conflict.¹⁶ In this regard, the ICTY also concluded that the understanding of the concept of gender can also influence the type of violation.¹⁷ For instance, although both women and men are exposed to sexual violence during armed conflicts, the implications are different: in the case of women, the consequence is a loss of dignity, whereas for men, the implications of homosexuality are present, and there is a perceived loss of power and masculinity.¹⁸

On the other hand, sexual violence during armed conflicts should be viewed in accordance with international instruments, notably the International Criminal Law Statute, according to which sexual violence encompasses rape, sexual slavery, involuntary prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence.¹⁹ Therefore, the notion of gender-based violence is much broader than that of sexual violence during armed conflict.

This policy paper is intended for Serbian institutions responsible for investigating and processing wartime sexual violence. Namely, the HLC has been monitoring all trials before the War Crimes Department of the Higher Court in Belgrade since

14 International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, June 2004, par. 15.

15 Irma Specht, *Gender, Disarmament, Demobilization and Reintegration and Violent Masculinities*, in *Gender Violence in Armed Conflicts*, 2013, p. 61-63.

16 Judith Gardam, Michelle Jarvis, *Women, Armed Conflict and International Law*, 2001, p. 7.

17 Michelle Jarvis, 'A Review – The Issue of Responsibility in Conflict-Related Sexual Violence', from *Prosecuting Conflict-Related Sexual Violence at the ICTY*, p. 12.

18 Fionnaala Ni Aolain, *Criminal Justice for Gendered Violence and Beyond*, 2011, p. 429.

19 *Statute of the International Criminal Tribunal*, Article 7, available at http://www.podaci.net/_z1/8126847/S-mksuda02v0105.html, accessed: 21 November 2019.

2003. During its sixteen years of existence, the HLC has identified certain defects that must be removed to ensure successful prosecution of crimes before the domestic court. In view of this, this policy paper is divided into two parts. The first part contains an analysis of the international framework for the prosecution of these crimes, whereas the second is focused on the domestic legislative framework related to them and contains recommendations for its improvement.

II. INTERNATIONAL LEGAL FRAMEWORK

i. Definition of Sexual Violence

Although conflict-related sexual violence is as old as armed conflict and is prohibited by numerous international documents, it was first defined as a crime against humanity in the statute of the ICTY.²⁰ According to Article 5 of this statute, rape is considered a crime against humanity along with murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political, racial and religious grounds and other inhumane acts. It thus falls under the jurisdiction of the ICTY.²¹

Although the ICTY Statute placed rape in the category of crimes against humanity, the ICTR provided a definition of rape in the judgement in the *Jean-Paul Akayesu* case, which states the following: ‘The Tribunal defines sexual violence, which includes rape, as an act of sexual nature committed on a person under coercive circumstances. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical

²⁰ See *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, on the protection of victims of international armed conflict, Article 76; *Protocol Additional to the Geneva Convention of 12 August 1949*, on the protection of international armed conflict victims, Article 4.

²¹ *ICTY Statute*, Article 5, available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf, accessed: 21 November 2019. The ICTY Statute, which defines rape as a crime against humanity, is based on Control Council Law No 10, enacted after the Second World War, with the aim of prosecuting war crimes in Germany. As opposed to the Nuremberg and Tokyo Charters, this law expressly defines rape as a crime against humanity. However, the Statute of the International Criminal Tribunal for Rwanda has gone a step further, defining rape not only as a crime against humanity but also as a war crime. The reason for this discrepancy is that the ICTR Statute transposed the provisions of the Protocol II Additional to the Geneva Convention of 12 August 1949, related to non-international armed conflict, in which rape is expressly forbidden.

contact'.²² In the same judgement, coercive circumstances are defined as 'threats, intimidation, extortion and other forms of duress, which prey on fear or desperation . . . and coercion may be inherent in certain circumstances, such as armed conflict or military presence among women'.²³

Following the ICTR judgement in the *Jean-Paul Akayesu* case, the ICTY defined rape as an act of torture²⁴ and sexual slavery²⁵ in many of its cases.

22 ICTR Judgement in the *Akayesu* case from 2 September 1998, par. 688.

23 Ibid.

24 The ICTY first-instance judgement in the *Mucic et al.* case, from 16 November 1998, par. 494 stated the following: 'In view of the above discussion, the Trial Chamber, therefore, finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows: (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical, (ii) which is inflicted intentionally, (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity'.

25 The ICTY first-instance judgement in the *Kunarac et al.* case, from 22 February 2001, par. 543 stated the following: 'The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor'.

ii. Evidence in Cases of Sexual Violence

The definition of rape as a crime against humanity is quite significant, but one of the most important ICTY achievements is probably the set of specific standards for the presentation of evidence in cases of sexual violence in the Rules of Procedure and Evidence. Rule 96 was the most important ICTY tool for tackling discriminatory tactical movements of defence attorneys, in their attempts to exploit gender stereotypes.²⁶

Rule 96 thus states that no corroboration of the victim's testimony shall be required in sexual violence cases, the victim's consent shall not be allowed as a defence argument if the victim has been subjected to or threatened with violence, duress, confinement or psychological pressure or if s/he reasonably believed that if s/he did not submit, another person could be subjected to or threatened with violence, duress, confinement or psychological pressure. Before evidence of the victim's consent is admitted, the defendant shall convince the Trial Chamber *in-camera* that the evidence is relevant and credible and that prior sexual conduct of the victim shall not be admissible as evidence.²⁷

With this rule, the ICTY established a practice that the victim's statement is sufficient to convict the sexual violence perpetrator and no corroboration of the victim's testimony is required, the victim's consent cannot be used as a defence argument, and the victim's prior sexual conduct cannot be admissible as evidence in court proceedings, which was probably the most revolutionary practice.

26 Priya Gopalm et al., 'Proving Crimes of Sexual Violence', in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, p. 120.

27 ICTY Rules of Procedure and Evidence, Rule 96, available at: https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_bcs.pdf, accessed: 4 December 2019.

III. NATIONAL LEGAL FRAMEWORK

i. Criminal Law

The Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) from 1976 is the substantive law applied in war crimes proceedings before Serbian courts, because that criminal code was in force at the time the crimes on the territory of the former Yugoslavia were committed. The CCSFRY contains a chapter dealing with crimes against humanity in the context of international law.²⁸

²⁸ *The Criminal Code of the Socialist Federal Republic of Yugoslavia* (Official Gazette of the SFRY Nos 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, 54/90-1773 and Official Gazette of the SFRY Nos 35/92-651, 37/93-816, 24/94-273, 61/01 from 09.11), Chapter 16, Articles 141-155.

For instance, Article 142 of that chapter deals with war crimes against civilians, listing rape as one of those crimes.²⁹

Although rape can also be prosecuted as a crime of genocide (severe bodily injuries or severe damage to the physical or mental health of members of a group) and as a crime against prisoners of war (torture and inhumane treatment), the OWCP has never pressed charges for rape as one of those two criminal offences. To this day, all charges including sexual violence have been pressed as war crimes against civilians.

29 Ibid. Article 142, (1) Any person who violates the rules of international law effective in time of war, armed conflict or occupation, and orders or commits an attack on civilians, neighbourhoods, individual civilians or persons unable to fight, resulting in death, severe bodily injury or serious damage to health; an attack without a set target resulting in the death of civilians; murder, torture and inhumane treatment of civilians; biological, medical and other scientific experiments; harvesting of tissues or organs for transplants; infliction of great pain or injury and violation of health or bodily integrity; forced migration and population transfer or forced renouncement of one's nationality or conversion to another religion; forced prostitution or **rape**; the use of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful detention in concentration camps and other forms of unlawful detention; deprivation of rights to a fair and impartial trial; forced service in enemy armed forces, intelligence or administration service; forced labour, starvation of civilians, confiscation of property or looting; unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs; taking illegal and disproportionate contributions and requisitions, diminishing the value of domestic money or issue of illegal money, shall be punished by no less than five years and up to twenty years of imprisonment. (2) The punishment in paragraph 1 of this Article shall be imposed upon any person who violates the rules of international law effective in time of war, armed conflict or occupation, and orders or commits attacks on objects specially protected by international law or hazardous objects and facilities, such as dams, embankments and nuclear power plants; indiscriminate targeting of civilian objects, unprotected sites and demilitarised zones under the special protection of international law; long-term and large-scale damage to the environment that can be detrimental to a population's health or survival. (3) Any person who violates the rules of international law effective in times of war, armed conflict or occupation and orders or enforces the relocation of their own civilians to an occupied territory shall be punished by no less than five years of imprisonment.

ii. Criminal Procedure Code

The provisions of the Criminal Procedure Code (CPC) are crucial when it comes to the rights and roles of victims (injured parties)³⁰ in criminal proceedings before the courts in Serbia. According to the CPC, a victim (injured party) is a person whose personal or property right has been violated or jeopardised by a criminal offence.³¹

According to the CPC, the victim is entitled to: submit a motion and evidence for realising a compensation claim and to suggest interim measures for providing it; present facts and propose evidence supporting the claim; hire an attorney; examine the files and objects submitted as evidence; be notified in the event of the dismissal of a criminal complaint or abandonment of criminal prosecution by the public prosecutor; submit objections to the public prosecutor's decision not to conduct criminal prosecution or to abandon criminal prosecution; be advised on the possibility of launching criminal prosecution and representing the prosecution; attend the preliminary hearing; attend the trial and participate in examining evidence; file an appeal against the decision on the costs of the criminal proceedings and the adjudicated compensation claim; be notified of the outcome of the proceedings and be served the final judgment; perform other actions as per the CPC.³²

30 A victim is a natural person who has suffered harm, including physical, psychological or emotional damage or economic loss, directly caused by a criminal offence. In criminal proceedings, family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death are also considered victims. See: Draft Document of the National Strategy on the Rights of Victims and Witnesses of Crime, for the period 2019-2025, available at the official internet presentation of the Ministry of Justice of the Republic of Serbia.

31 *The Criminal Procedure Code* (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 2, paragraph 1, point 11.

32 *Ibid.* Article 50, paragraph 1.

Any person who is a victim in criminal proceedings is entitled to these rights (not only victims of sexual violence but also other war crime victims and victims of crime in general). Therefore, victims of sexual violence do not enjoy any special rights.

In most cases, the court will question the victim (the injured party) during criminal proceedings. At that point, the injured party will also become a witness. According to the CPC, a witness is a person who is likely to provide information on the criminal offence, the perpetrator or other facts established during the proceedings.³³

In order to ensure a smooth flow of court proceedings and encourage the victim to testify, the CPC provides for certain court witness protection measures³⁴ applicable both during the investigation and the trial.³⁵

The court witness protection measures include measures to protect the integrity of witnesses, measures to protect highly vulnerable witnesses and measures to protect witnesses exposed to risk as a result of their testimony.

a. Protection of the Integrity of Witnesses

Depending on the stage of the proceedings, the court or the prosecutor is obliged to protect witnesses from insults, threats or any other forms of assault

³³ Ibid. Article 91.

³⁴ Before the adoption of the CPC in 2006, legal provisions on witness protection were formulated in such way as to give a general outline of witness protection, without getting into specific forms of protection. According to the CPC valid until 2006, the President of the Trial Chamber, Court President or Public Prosecutor were supposed to take care of basic witness protection, including the protection of the injured person as a witness. The CPC valid from 2006 introduced special witness protection measures during criminal proceedings (court witness protection measures). The new CPC, which has been applied in war crime cases since 15 January 2012, stipulates multiple measures of court witness protection.

³⁵ *The Criminal Procedure Code* (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Articles 102-111.

on his/her integrity from other participants in the proceedings. Attacks on the integrity of witnesses most frequently come from the defendant or the defendant's attorney. To achieve this, the prosecutor may issue a reprimand, whereas the court may issue a reprimand and impose a fine of up to RSD 150,000.³⁶ In addition to reprimands and fines, the court has two so-called preventive measures at its disposal that can be imposed after the integrity of a witness has already been violated or assaulted: closed sessions and the removal of the defendant from the courtroom.³⁷

Insults directed at victims by defendants and their attorneys are not uncommon in war crime trials in Serbia.³⁸ Besides protected witnesses, victims of sexual violence are often exposed to insults. For instance, during the questioning of protected witnesses in the *Gnjilane Group* case, one of the defence attorneys alluded to the prior sexual conduct of the protected witnesses. The President of the Trial Chamber deemed such conduct inadmissible and issued an informal reprimand to the attorney. In the same case, the defence attorneys also insulted a protected witness, accusing her of false testimony and claiming that she had a pre-prepared statement, written with the help of another person. As a result, the President of the Trial Chamber imposed a fine on them, not for insulting the protected witness but for contempt of court.³⁹ On the other hand, in the *Bijeljina* case, the court removed the defendant from the courtroom after he insulted the victim of sexual violence during the hearing.⁴⁰

36 Ibid. Article 102.

37 *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde*, p. 62, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf, accessed: 5 December 2019.

38 Ibid. p. 63.

39 Humanitarian Law Centre, *Izveštaj o suđenjima za ratne zločine u Srbiji za 2010. godinu*, p. 29.

40 Ibid. p. 63.

If a defendant insults a victim of sexual violence, the court should always take action and issue a reprimand. Should the defendant continue insulting the victim, the court should then remove the defendant from the courtroom. If defence attorneys insult the victims during the hearing, the court should be more consistent in imposing fines on them and informing the Bar Association of such decisions.

b. Protection of Highly Vulnerable Witnesses

Measures for the protection of highly vulnerable witnesses were introduced in the CPC in 2012.⁴¹ The aim of these measures is to prevent the re-victimization of injured parties in the role of witnesses.⁴²

According to the CPC, a highly vulnerable witness is one whose vulnerability is the result of his/her age, life experience, gender, health or the nature, manner or consequences of the criminal offence, or other circumstances.⁴³

Measures taken for this type of witness are: questioning by the Trial Chamber; a single judge or prosecutor (depending on the stage of the proceedings); examination with the help of a social worker, psychologist or other professional; or questioning using video and sound transmission devices. A highly vulnerable witness may not be confronted with the defendant unless the defendant requests otherwise and the authorised body grants the request, taking into account the degree of sensitivity of the witness and the rights of the defendant.⁴⁴ In most cases, victims of sexual violence must have the status of a

41 *The Criminal Procedure Law* (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Articles 103-104.

42 Goran P. Ilić, *Komentar Zakonika o krivičnom postupku* (3. izmenjeno i dopunjeno izdanje, Beograd, 2013), p. 310.

43 *The Criminal Procedure Law* (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 103.

44 *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde*, p. 64, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf, accessed: 5 December 2019.

highly vulnerable witness, considering the nature of crimes of sexual violence and the consequences to the victims.

Since the introduction of the possibility of obtaining the status of a highly vulnerable witness in Serbian procedural law, this status was granted — for the first and only time — to a rape victim the Čuška case in 2013. However, although the expert report of a psychiatrist indicated that the victim was an emotionally unstable person who was raped at the age of 13 and whose testimony could lead to an emotional breakdown, the court did not grant this person the status of a highly vulnerable witness before the trial, i.e. the cross-examination stage. Considering this person's health condition, she could have been granted this status during the investigative procedure. Also, the court could have taken extra measures, such as questioning with the help of a psychologist so as to mitigate the negative reaction of the witness.⁴⁵

Considering that most victims of sexual violence still suffer the consequences of severe emotional trauma resulting from the abuse, the court should **grant the status of a highly vulnerable witness to those victims** whenever possible. The HLC believes that such victims **should be granted this status immediately upon the beginning of the investigative procedure. Such victims should also be questioned by a person of the same sex, with the help of a psychologist and a person familiar to the victim (a family member or a friend)**. This way, an intense emotional reaction of the victim could be avoided and re-victimisation could be minimised.

c. Protection of Witnesses Exposed to Risk

In case there are indications that a witness' testimony could jeopardise their own life or that of a person close to them, their health, freedom or significant property, the court can grant them the status of a protected witness. The primary purpose of witness protection measures is to prevent

⁴⁵ Ibid. p. 64.

public disclosure of their identity.⁴⁶

The measures to which protected witnesses are entitled on the basis of the CPC include closed sessions, the prohibition of public disclosure of their identity and nondisclosure of their identity to the defendant and the defendant's attorneys. The last measure is taken in extraordinary circumstances and can only last up to 15 days before the trial. These measures are carried out by modifying or deleting the witness' personal data in the case file, concealing the witness' appearance or their testimony from a special room, using a voice-altering device or a device that can alter sound and image.⁴⁷

Upon obtaining protected status, the witness is assigned a pseudonym to be used instead of personal data during the court proceedings, as well as in public. Violation of the obligation to use the protected witness' pseudonym constitutes a breach of secrecy, which is a criminal offence.⁴⁸

To this day, victims of sexual violence have been granted the status of protected witnesses in three cases—*Gnjilanska grupa*⁴⁹, *Skočić*⁵⁰ and *Bratunac*.⁵¹ Two women who were victims of rape in the *Gnjilanska grupa* case testified under a pseudonym in a closed session.⁵² In the *Skočić* case, three women who were victims of rape

46 *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde*, p. 64, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf, accessed: 5 December 2019.

47 Ibid.

48 Ibid.

49 The *Gnjilanska grupa* case, available at: http://www.hlc-rdc.org/Transkripti/gnjilanska_grupa.html, accessed: 5 December 2019.

50 The *Skočić* case, available at: <http://www.hlc-rdc.org/Transkripti/skocici.html>, accessed: 5 December 2019.

51 The *Bratunac* case, available at: <http://www.hlc-rdc.org/Transkripti/bratunac.html>, accessed: 5 December 2019.

52 *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde*, p. 65, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf, accessed: 5 December 2019.

testified under a pseudonym, from a separate room and in a closed session.⁵³ In the *Bratunac* case, the rape victim testified under a pseudonym, from a separate room but the session was not closed.⁵⁴

The *Bijeljina* case is a good example of the protection of victims of sexual violence. During the testimony of a victim, the court removed the defendant from the courtroom, whereas another victim was questioned by the President of the Trial Chamber in the premises of the Serbian Embassy in Vienna, where the victim resides. The reason for this was the refusal of the victim to face the defendant in the courtroom or see his photographs.⁵⁵

The Humanitarian Law Centre believes that a victim of sexual violence should always be granted the status of a protected witness in case his/her life or safety are jeopardised. The HLC also believes that, for the benefit of such a victim's emotional stability, s/he should always testify from a separate room and in a closed session.

iii. Proving Crimes of Sexual Violence

Considering the characteristics of crimes of sexual violence and victims' vulnerability, special protective measures should be taken during criminal proceedings. As a result, special standards and procedures have been created on the international level, and institutions dealing with victims of sexual violence during court proceedings are obliged to adhere to them. Those measures include closed sessions, questioning via closed-circuit television and adherence to special rules for the assessment of the victim's testimony. As previously stated, The ICTY Rules of Procedure and Evidence introduced a rule that prior sexual conduct of the victim shall not be admissible as evidence, no corroboration of the victim's testimony shall be required and the victim's

53 Ibid.

54 The *Bratunac* case, available at: <http://www.hlc-rdc.org/Transkripti/bratunac.html>, accessed: 5 December 2019.

55 *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde*, p. 66, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_srp.pdf, accessed: 5 December 2019.

consent shall not be accepted as a defence argument if the victim was subjected to or threatened with violence (see p. 10).

Among countries that are the successors of the former Yugoslavia, Croatia and BiH have also adopted the rule that prior sexual conduct of a victim is not admissible as evidence in addition to standard protective measures.⁵⁶

As opposed to the Criminal Procedure Code of BiH and the Criminal Procedure Code of Croatia, the CPC of Serbia does not contain specific protective measures for victims of sexual violence. Hence, only the standard protective measures apply to those victims (see p. 11).

In this regard, the HLC recommends amending the CPC by adopting the ICTY standard for proving wartime sexual violence, including the following measures: **no corroboration of the victim's testimony should be required; the victim's consent should not be used as a defence argument if the victim was exposed to violence or threats or if the victim feared for their own well-being or the well-being of a close person; prior sexual conduct should not be accepted as evidence.**

iv. Appropriate Psychological Support

The Victim and Witness Assistance and Support Service at the Higher Court in Belgrade (Assistance and Support Service) was established in 2006, in line with the Law on the Organisation and Jurisdiction of Government Authorities in War Crimes Proceedings. It is under the direct control of the President of the Higher Court in Belgrade. The Assistance and Support Service provides logistics support and so-called emotional support (by showing care, encouragement and respect).⁵⁷

⁵⁶ *The Criminal Procedure Code of the Republic of Croatia* (Official Gazette Nos 152/08, 76/09, 80/11, 91/12), Article 422, paragraph 1; *The Criminal Procedure Code of the Republic of Bosnia and Herzegovina* (Official Gazette of BiH Nos 3/03, 32/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13), Article 264, paragraph 1.

⁵⁷ *The Law on the Organisation and Jurisdiction of Government Authorities in War Crime Proceedings* (Official Gazette of the Republic of Serbia Nos 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011-as amended and 6/2015), Article 11.

Since the enactment of the new CPC in 2012, the Assistance and Support Service has not been formally obliged to provide assistance and support to witnesses during the investigation. It is still only obliged to provide assistance and support immediately before, during and after the trial. This is a result of the transfer of jurisdiction over the investigation from the court (examining magistrate) to the prosecution.⁵⁸ As a result, the Victim and Witness Information and Assistance Service (OWCP Service) was founded under the OWCP in April 2007, during the process of establishing a network of services to provide information and support to victims (injured parties) and witnesses under the Public Prosecutor's Office in Serbia. The OWCP Service has two members and a coordinator, all of whom have previously worked at the OWCP.⁵⁹

Although the Assistance and Support Service and the OWCP Service are both responsible for providing support to victims and witnesses, neither of them have hired a psychologist. The staff of these two services have not even had any training to acquire special skills in dealing with victims of sexual violence.⁶⁰

The HLC therefore recommends that **the staff of these two services complete specialised training to be able to accommodate the needs of this type of victim and that a psychologist specialised in this area be hired.** Furthermore, on the basis of extensive experience in working with victims of war crimes, the HLC claims

58 As per the new Criminal Procedure Code (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), applied in war crime cases since January 2012, investigation is carried out by the prosecution. However, the subjects interviewed by the HLC for the creation of *10 godina procesuiranja ratnih zločina u Srbiji – Konture pravde* pointed out that even before the introduction of prosecutorial investigation, the OWCP has had a great role in directing the actions of the police in collecting evidence.

59 More information on the Victim and Witness Information and Assistance Service at the OWCP available at: [http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document sr/2017-08/latinica.pdf](http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document%20sr/2017-08/latinica.pdf), accessed: 10 December 2019.

60 Humanitarian Law Centre, *Policy Paper: Improving the Status and Rights of Victims and Witnesses in War Crimes Proceedings in Serbia*, available at: http://www.hlc-rdc.org/wp-content/uploads/2019/12/Practical_Policy_Proposal_en.pdf, accessed: 10 December 2019, p.21.

that **continuous psychological help**, from the beginning of the investigation until testimony at the main trial, could significantly reduce the intensity of the emotional reaction and the risk of re-victimisation of victims of sexual violence. Also, **the presence of a psychologist and a familiar person (a family member or a friend) during the examination of those victims could help create a sense of security so that they are able to focus on their testimony.**

v. Compensation Claims

The CPC specifies that the victim (the injured party) has the right to file a compensation claim until the termination of the criminal proceedings (in order to compensate for damage caused by the committed crime).⁶¹ However, so far, the courts in Serbia have not dealt with any compensation claims of victims of war crimes during criminal proceedings.⁶² The stated reason for this is that deciding on those matters would significantly delay the criminal proceedings. This has led to the establishment of the practice that compensation claims are not dealt with within the criminal proceedings but exclusively in civil proceedings, which should be an exception, rather than a rule.

Due to such a practice, the victims (injured parties) are additionally victimised because they are forced to deal with another long-lasting and costly trial to enforce their right to compensation for damage to property after lengthy and emotionally exhausting criminal proceedings. As a result, most victims are reluctant to initiate another court procedure, so they rather renounce their right to pursue compensation for damages.

In the case of victims of sexual violence, there is an additional problem. Namely, if such a victim has the status of a protected witness in criminal proceedings and does not obtain the resolution of the compensation claim, the victim would have

61 *The Criminal Procedure Code* (Official Gazette of the Republic of Serbia Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 252.

62 See: *Rape victim referred to civil proceeding for damages*, press release, 25/09/2019, HLC, available at: <http://www.hlc-rdc.org/?p=36916>, accessed: 1 December 2019.

to renounce the protective measures in order to initiate civil proceedings because the Law on Civil Procedure does not allow the use of pseudonyms, so the victim's real name would have to be revealed. Therefore, not being able to obtain the compensation claim resolution, the victims of sexual violence are forced to choose whether to retain the protective measures and lose the right to compensation or renounce the protective measures and initiate civil proceedings to obtain property compensation.

The Supreme Court of Cassation (SCC) has also identified the need to resolve compensation claims during criminal proceedings. In October 2019, the court presented the *Guidelines for the Improvement of Court Practice in Compensation Proceedings for Victims of Serious Crimes in Criminal Proceedings* (Guidelines).⁶³ The SCC Guidelines offer specific solutions (for public prosecutors and judges) on how to act upon compensation claims in the most effective and cost-effective ways.

Judicial practice that exists in this field in Bosnia and Herzegovina represents one of the positive examples that it is possible for victims of sexual violence to be adjudicated a compensation claim in criminal proceeding. Namely, in 2015, The Court of Bosnia and Herzegovina made the first decision that adjudicated a compensation claim to a victim of wartime rape during criminal proceeding, amounting to 30.000 KM (approximately 15.000 EUR). A few more decisions followed where criminal court acted the same.⁶⁴ However, after their compensation claim had been passed in criminal proceeding, victims of sexual violence came across an additional problem. They were not able to obtain compensation payments

63 *Guidelines for the Improvement of Court Practice in Compensation Proceedings for Victims of Serious Crimes in Criminal Proceedings* available at: <https://www.podrskazrtvama.rs/lat/media/domaci/Smernice.pdf>, accessed: 1 December 2019.

64 The Court of Bosnia and Herzegovina made the first decision in the case against Slavko Savić in June 2015. TRIAL International in Bosnia and Herzegovina, *Compensating Survivors in Criminal Proceedings: Perspective from the Field*, p. 10, available at: https://trialinternational.org/wp-content/uploads/2016/11/TRIAL-International_compensation-publication_EN_web.pdf, accessed on 11 December 2019.

from those convicted because the convicted defendants do not own property the damages to victims could be paid from. There is also no special fund for victims at the state level that the adjudicated compensation claim could be paid from.⁶⁵ For this reason, TRIAL International submitted a petition to the UN Committee against Torture in 2017. The Committee made a decision that Bosnia and Herzegovina was obliged to establish an effective system of compensation payments to victims of war crimes, including victims of wartime rape, and to secure appropriate and free medical and psychological help.⁶⁶

The HLC recommends that judges adjudicate on compensation claims by victims of war crimes during criminal proceedings, whenever possible. However, if this is not possible during criminal proceedings, the HLC recommends that the Civil Procedure Code be amended in such way as to enable the victims who enjoyed protective measures during the criminal proceedings to retain those measures during the civil proceedings. Equally, the duty of Serbia is to establish an adequate mechanism to ensure that rape victims, who fulfilled their right to compensation for damages, would also receive the compensation payments.

65 Ibid., p. 44.

66 Aljazeera Balkans, Presuda protiv BiH u korist žrtve silovanja tokom rata, dostupno na <http://balkans.aljazeera.net/vijesti/presuda-protiv-bih-u-korist-zrtve-silovanja-tokom-rata>, accessed on 11 December 2019.

IV. RECOMMENDATIONS

1. In accordance with the Prosecutorial Strategy for the Investigation and Prosecution of War Crimes in the Republic of Serbia 2018-2023, the OWCP should investigate and prosecute crimes of sexual violence during armed conflict more thoroughly;
2. In case the defendant insults a victim of sexual violence, the court should always reprimand him/her and if s/he continues insulting the victim, s/he should be removed from the courtroom.
3. In case the defendant's attorney insults a victim of sexual violence during an examination, the court should reprimand him/her and if s/he continues insulting the victim, the court should impose a fine on him/her and inform the Bar Association of such decision.
4. Depending on the assessment of the particular needs of each victim, the prosecutor or the court (depending on the stage of the proceedings) should issue the status of a highly vulnerable witness to a victim of sexual violence.
5. If a victim has the status of a highly vulnerable witness, s/he should be questioned by a person of the same sex, with the help of a psychologist and a person familiar to the victim (a family member or a friend);
6. If a victim's life or safety could be jeopardised as a result of his/her testimony, the court should always grant him/her the status of a protected witness. Also, the HLC believes that such a victim should always testify from a separate room in a closed session, in order to ensure his/her emotional stability;
7. The CPC should be amended to include the standards established by the International Criminal Tribunal for the former Yugoslavia (ICTY) for proving sexual violence in war: no corroboration of the victim's testimony should be required; consent should not be accepted as a defence argument if the victim was subjected to violence or intimidation, or if s/he feared for his/her life or the life of a close person; prior sexual conduct of the victim should not be admitted as evidence;
8. The staff of the OWCP Service and the Assistance and Support Service should undergo specialised training to be able to work with this type of victim and a psychologist specialised in this area should be hired;

9. Victims of war crimes, and particularly victims of sexual violence should be granted continuous psychological support, from the beginning of the investigation until the main trial;
10. Judges should adjudicate on compensation claims by victims of sexual crimes, particularly those who have the status of a protected witness. If that is not possible during criminal proceedings, the Civil Procedure Code should be amended to enable the victims who enjoyed protective measures during criminal proceedings to retain those measures during civil proceedings.
11. To establish an adequate mechanism to ensure that victims who have been ordered compensation for damages could successfully receive the adjudicated payment amounts.

Policy Paper:

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