



Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina

Ensuring Accountability for Domestic Violence

**An analysis of
sentencing in domestic
violence criminal
proceedings in Bosnia
and Herzegovina, with
recommendations**

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EXECUTIVE SUMMARY

In spite of underreporting, poor data collection and lack of in-depth and comprehensive research into this problem, domestic violence has been recognized as a widespread human rights violation in Bosnia and Herzegovina (BiH).¹

International standards stipulate that states hold a responsibility to prevent, investigate and prosecute all forms of human rights violations. This obligation applies to domestic violence, as it constitutes a violation of fundamental human rights. Domestic violence also has a significant gender-bias component, and therefore overlaps to a large extent with the phenomenon of violence against women.

As part of its Justice Sector Monitoring Programme, and in fulfilling its mandate to monitor the human rights situation in BiH, the OSCE Mission to Bosnia and Herzegovina (OSCE Mission) has monitored responses of the criminal justice system to domestic violence cases.

This paper provides an analysis of **sentencing practices** of BiH courts in domestic violence criminal proceedings, based on the Mission's monitoring findings. After a review of relevant **international standards** and the **national legal framework** on domestic violence, it analyses in detail: the types of sanctions applied, the mitigating and aggravating circumstances considered by the court, the legal mechanisms

1 It has been recognized in the Gender Action Plan of Bosnia and Herzegovina that a "large number of women in Bosnia and Herzegovina face a domestic violence problem", and by the BiH Ministry of Security that "domestic violence (...) is more and more becoming a frequent criminal offence" in the country and therefore has become a "serious security threat". Additionally, a group of BiH NGOs stated that "violence against women, especially domestic violence, continues to be a widespread social problem in BiH, and a serious violation of fundamental human rights and freedom of female violence victims/survivors". See the BiH Gender Action Plan, adopted by the BiH Council of Ministers on 14 September 2006, p. 94; the "Information paper about criminal offences against life and limb, with emphasis on domestic violence for the period of 2006-2007 and trends in the first three months of 2008", prepared by the BiH Ministry of Security, June 2008, p.1; and the "Alternative Report on the Implementation of CEDAW and Women's Human Rights in BiH", drafted under the coordination of 'Rights for All' and Helsinki Citizens' Assembly, October 2010.

of warrant for pronouncement of sentence and plea agreements, and compensation awards to victims.

On the basis of that analysis, this paper identifies the following **three key concerns** regarding sentencing in domestic violence cases:

1. Sentencing at or below minimum penalties prescribed by the law, and over-usage of suspended sentences; often facilitated by the use of abbreviated proceedings;
2. Under-charging and reluctance to combine domestic violence with other charges; and
3. Failure to revoke suspended sentences upon violation of the probationary period.

As a result, this paper formulates a number of **recommendations** for judges and prosecutors dealing with domestic violence cases, including:

- ensuring that sentencing for domestic violence is commensurate to the gravity of the offences, and that sentencing below legally prescribed minimum levels remains exceptional and is clearly justified in the verdict;
- making a careful assessment before proposing and imposing suspended sentences, and ensuring that these will be revoked in cases of re-offending;
- providing a full and clear explanation of the mitigating and aggravating circumstances impacting the final sentence; and
- processing domestic violence in its aggravated forms, or in combination with other charges, whenever warranted by the facts of the case.

The OSCE Mission intends that its analysis and these recommendations assist judicial authorities, as well as law enforcement, social protection authorities, support services and non-governmental organizations – in better understanding sentencing practices and in the overall improvement of their work in the field of preventing and combating domestic violence.

1. Introduction and Scope of Analysis

Domestic violence is not only a **widespread social problem** that damages individuals, families and society as a whole, but it is also a **criminal offence**. As such, it calls for not only vigorous social condemnation and prevention efforts, but also for unyielding societal disapproval and a correspondingly strong response from the judicial system.

According to the Council of Europe's recently adopted Convention on Preventing and Combating Violence Against Women and Domestic Violence, domestic violence refers to "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".²

This paper analyses the **sentencing practices** of BiH courts in domestic violence criminal proceedings. The analysis is limited to cases that have been legally qualified as 'domestic violence' as per Articles 218, 222 and 208 of the Criminal Codes of, respectively, Brčko District of Bosnia and Herzegovina (BDBiH), the Federation of BiH (FBiH) and the Republika Srpska (RS),³ thus excluding:

- cases in which the factual basis would have warranted a legal qualification of 'domestic violence' but where the prosecution opted for other charges; and
- cases where domestic violence has been processed only as a minor offence rather than a criminal offence.

The present analysis was based on findings from the **OSCE Mission's Justice Sector Monitoring Programme**. As part of this programme, the Mission has monitored and analysed domestic violence criminal proceedings since 2004 in municipal, basic, district and cantonal courts throughout the country.

For this paper, **289** domestic violence criminal proceedings in courts in the FBiH, RS and BDBiH, monitored by the Mission between 2004 and 2010 were analysed.⁴ For sections 4.2 and 4.4 below, only **70** out of those 289 cases were analysed in more detail – therefore, the percentages provided in those sections refer to a total of 70 cases. These 70 cases were chosen on the basis of the infor-

2 See article 3, b Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted on 7 April 2011. At the time of writing, the Convention has entered into force but has not been ratified yet by Bosnia and Herzegovina.

3 Hereinafter the Criminal Code of the Federation of Bosnia and Herzegovina will be referred to as FBiH CC, the Criminal Code of the Republika Srpska as RS CC, and the Criminal Code of Brčko District as BDBiH CC. When reference is made to the Criminal Procedure Codes, CC will be replaced by CPC. The definitions of domestic violence included in these articles are provided below.

4 This includes only proceeding where guilty verdicts were pronounced.

mation available for the topics addressed in the above-mentioned sections: aggravating and mitigating circumstances, recidivism, and compensation.

2. International Standards Regarding Domestic Violence

2.1. The Due Diligence Standard for Human Rights Violations

International human rights standards make it clear that states hold a responsibility to prevent, investigate and prosecute all forms of human rights violations.⁵ While obligations under human rights treaties apply explicitly to the signatory states and therefore to acts committed by state agents, it is also the case that under principles of international and human rights law, states may be responsible for private acts if they fail to prevent violations of rights, to investigate and punish acts of violence, and to provide access to justice, including reparations. This is known as the due diligence standard.⁶

The UN General Assembly has provided that due diligence means states must “[t]ake appropriate legislative and administrative and other appropriate measures to prevent violations,” as well as “take action against those allegedly responsible [for human rights violations] in accordance with domestic and international law.”⁷

Although the due diligence standard has been applied to numerous human rights concerns, international treaties and instruments have made it clear that the standard also applies specifically to states’ actions and policies regarding **violence against women**.

5 Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, judgment of 29 July 1988, para. 172.

6 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission, 2001, Article 2. The *Commentaries* on the Draft Articles make it clear that responsibility for acts or omissions includes “want of due diligence;” See Report of the International Law Commission on the work of its fifty-third session, A/56/10, p. 34. For discussion of application of the due diligence principle see Robert P. Barnidge, Jr., “The Due Diligence Principle Under International Law,” *International Community Law Review*, Vol. 8, No. 1, pp. 81-121, 2006.

7 UN General Assembly Resolution 60/147, 21 March 2006, on the “Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” Annex 4.

The two key binding instruments in this regard are the **UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**⁸ and the **CoE Convention on Preventing and Combating Violence against Women and Domestic Violence**. The latter clearly stipulates that states parties are obliged to refrain from, and ensure that state actors refrain from, engaging in any act of violence against women, but also to “take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of th[e] Convention that are perpetrated by non-State actors”.⁹

BiH authorities should also consider non-binding instruments that have developed an international body of standards in relation to gender violence, such as the **UN Declaration on the Elimination of Violence against Women**.¹⁰ The UN General Assembly has condemned “all acts of violence against women and girls, whether these acts are perpetrated by ... private persons or by non-State actors.” It called for “the elimination of all ... violence in the family, within the general community and where perpetrated or condoned by the State, and stresses the need to treat all forms of violence against women and girls as a criminal offence, punishable by law.”¹¹

These principles were reiterated in a 2006 report by the **UN Special Rapporteur on Violence Against Women**, which concluded that “there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.”¹²

These principles have been mirrored on a regional level. Violence against women is defined by the **Council of Europe** as including “violence occurring in the family or domestic unit.”¹³ Member states “have an obligation to exercise due dili-

8 Under CEDAW, ‘discrimination’ has been held to include gender-based violence, and the CEDAW Committee has held that the due diligence standard applies to states’ obligations to take “appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act,” to prevent gender-based violence and to investigate and punish such acts. See: UN Committee on the Elimination of Discrimination Against Women, General Recommendation 19 (11th Session, 1992), at para. 6, 9 and 24 (a).

9 See article 5 of the CoE Convention on preventing and combating violence against women and domestic violence.

10 UN General Assembly resolution “Declaration on the Elimination of Violence Against Women,” A/RES/48/104, 20 December 1993.

11 UN General Assembly resolution “Intensification of Efforts to Eliminate All Forms of Violence Against Women,” A/RES/61/143, 19 December 2006.

12 Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, “The Due Diligence Standard as a Tool for the Elimination of Violence Against Women,” E/CN.4/2006/61, 20 January 2006, para. 29.

13 See Council of Europe, Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002, Appendix, ‘Definition,’ para. 1(a).

gence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims.”¹⁴

EU Guidelines on Violence against Women and Girls specify that “combating the impunity of perpetrators of violence against women, and access to justice for victims” are priorities for member states.¹⁵

These principles and states’ responsibilities towards victims of domestic violence have been upheld in several cases before international courts and UN treaty bodies, such as the **UN Human Rights Committee**,¹⁶ particularly with reference to ending impunity for violence against women.

The **European Court of Human Rights** (ECHR) has held that states have a duty to provide effective access to justice for victims of domestic violence. The Court reasoned “effective respect for private or family life obliges [States] to make this means of protection effectively accessible.”¹⁷ In 2009, the Court ruled for the first time that gender-based violence is a form of discrimination under the ECHR.¹⁸

In an emblematic case from 2001, the **Inter-American Commission** ruled that a complaint by a victim of domestic violence should be viewed as “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting” perpetrators of gender violence. It noted in particular that the State had failed “to fulfil the obligation with respect to prosecute and convict ... these degrading practices.”¹⁹ The Commission emphasized that “the condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”²⁰

2.2. International Standards on Sentencing in Domestic Violence Cases

International guidelines on violence against women pay particular attention to **sentencing** as a key element of state-level action and policy to prevent such acts. This

14 Council of Europe, Recommendation Rec(2002)5, *ibid*, at Article II.

15 EU Guidelines on Violence Against Women and Girls and Combating All Forms of Discrimination Against Them, General Affairs Council, 8 December 2008.

16 UN Human Rights Committee, *Ms. A.T. v. Hungary*, 26 January 2005, Communication No. 2/2003, para. 9.6(II) (ii).

17 European Court of Human Rights, *Airey v Ireland*, 9 October 1979. 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, at para. 13.

18 European Court of Human Rights. *Opuz v Turkey*, 9 June 2009, Application No. 33401/02.

19 Inter-American Commission on Human Rights, *Maria da Penha Maia Fernandes* (Brazil), 16 April 2001. Report No. 54/01, Case 12.051, at para. 56.

20 *Ibid* at para. 55.

is particularly relevant to the need to adopt and integrate a gender perspective into all policies and programmes related to criminal justice, in addition to other social concerns. To this effect, states are encouraged to evaluate and review their criminal legislation, procedures and policies to determine if they are adequate to combat violence against women.²¹

Key recommendations to be taken into consideration include the need for sentences to be commensurate with the gravity of the crime committed.²² This is imperative if criminal legislation and policy are to play a role in encouraging social and institutional recognition of violence against women as a serious crime that requires appropriate sanction.²³ This is particularly relevant with regard to domestic violence; the Council of Europe calls on member states to “revise and/or increase the penalties, where necessary, for deliberate assault and battery committed within the family.”²⁴ In addition, sentencing guidelines should be developed to ensure consistency in the application of the law in this regard.²⁵

Enhanced sanctions should be enforced for repeat offenders or for those who commit multiple violations of protection orders.²⁶ If implemented, this would encourage greater enforcement of the rule of law on both a societal and institutional level. In addition, it would have the effect of encouraging public trust and confidence in the criminal justice system, particularly amongst victims of gender violence, who are often reluctant to try to gain access to justice.

In addition, financial penalties should not be imposed if they would cause hardship to the survivor and/or children, particularly with regard to a potential impact upon child maintenance payments.²⁷ Treatment and rehabilitation of the

21 UN Economic and Social Council, Proposed Draft Resolution, Article 9, as set out in *Report of the Intergovernmental Expert Group Meeting to Review and Update the Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice held in Bangkok from 23 to 25 March 2009*, E/CN.15/2010/2, 26 June 2009.

22 UN Division for the Advancement of Women in the Department for Economic and Social Affairs, *Handbook for Legislation on Violence Against Women*, 2010, at p. 50-1; UN Office on Drugs and Crime, *Proposed Revised Model Strategies and Practical Measures on Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice*, March 2009, Article 9(iii)-(iv) (available at <http://www.unodc.org/documents/justice-and-prison-reform/Expert-group-meeting-Bangkok/Revised-Model-Strategies-DRAFT-2-for-EGM-5-March2009.pdf>); see also General Assembly resolution 52/86, *Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, A/RES/52/86, 2 February 1998.

23 UNODC, *Proposed Revised Model Strategies*, *supra* note 17, Article 9(a)(iv) quin.

24 Council of Europe, Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002, at para. 56.

25 UN DAW/DESA, *Handbook*, *supra* note 17, at p51.

26 See Council of Europe, Rec(2002)5, *supra* note 19, at para. 58(f); also UNODC, *Proposed Revised Model Strategies*, *supra* note 17, Article 9(a) bis; UN DAW/DESA, *Handbook*, *supra* note 17, at p52.

27 UN DAW/DESA, *Handbook*, *ibid*, at p52

offender should be considered in conjunction with penal sanctions.²⁸ This impetus fits with the overarching requirement for states to “make available to the courts through legislation a full range of sentencing dispositions to protect the victim, other affected persons and society from further violence.”²⁹

2.3. State Obligations to Provide Reparation

International and regional documents require states to provide for reparation and redress for victims of crime within their national legislation. For instance, the **UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** states that, “[v]ictims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to *prompt redress*, as provided for by national legislation, *for the harm they have suffered*.”³⁰ These standards additionally prescribe that the judicial and administrative mechanisms need to enable victims to “obtain redress through formal or informal procedures that are *expeditious, fair, inexpensive and accessible*,” or that such mechanisms and procedures should be established to achieve this standard.³¹ The duty of a state to provide reparation to victims is considered to be a “symbol of the State’s concern for the victim.”³²

These standards clearly stipulate that if compensation is not available through other means – including directly from the offender - states should then endeavour to provide financial compensation to the victims when they have sustained serious bodily injury and/or an impairment to health, or to the dependants of persons who have died or become physically or mentally incapacitated as a result of the victimization.³³ State compensation, according to the **European Conven-**

28 UNODC, *Proposed Revised Model Strategies*, *supra* note 17, Article 9(e); UN DAW/DESA, *Handbook*, *supra* note 17, at p53;

29 UNODC, *Proposed Revised Model Strategies*, *supra* note 17, Article 9(d). See also ICCLR, *Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice: Resource Manual*, March 1999, Chapter IV.

30 Article 4 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power – adopted by GA resolution 40/34 of 29 November 1985, emphasis added. See also the European Convention on the Compensation of Victims of Violent Crimes, adopted on 24 November 1983.

31 Article 5 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, emphasis added.

32 UN doc.A / CONF.144/20, annex, Guide for Practitioners, p.21, para 83

33 See Article 12 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and Article 1 of the Council of Europe Committee of Ministers Resolution (77) 27 – On the Compensation of Victims of Crimes, as well as Article 2 European Convention on the Compensation of Victims of Violent crimes.

tion on the Compensation of Victims of Violent Crimes, shall be provided even when the offender cannot be prosecuted or punished.³⁴

Moreover, as stated in the **UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**, states have a duty to inform individuals about their right to redress through judicial and administrative mechanisms.³⁵

3. National Legal Framework

This section outlines the criminal legal framework that is applicable to domestic violence in Bosnia and Herzegovina. The full text of the criminal code provisions on the offence of domestic violence is provided in an Annex to this report.

At the outset, it needs to be highlighted that, as established in all criminal codes, the **purpose of punishment** generally is threefold: a) exerting a preventive influence on individuals not to commit criminal offences (i.e. general prevention), b) preventing the perpetrator from committing additional criminal offences and encouraging his/her rehabilitation (i.e. individual prevention and rehabilitation), and c) expressing the community's condemnation of the criminal offence and reaffirming the value of the law.³⁶ Since 2010, the FBiH and BDBIH CC added one more element to the purpose of criminal sanctions – “protection and satisfaction of victims of criminal offences.”³⁷

The criminal codes stipulate that punishment may constitute: an **imprisonment sentence or a fine**. An imprisonment sentence may be suspended under the conditions provided for in the law.³⁸ Also, imprisonment may be substituted by a fine or community service under certain conditions.³⁹ The criminal codes also provide for the possibility of reduction of punishment, when the law so establishes and when the court determines the existence of “highly extenuating circumstances” as explained further below in section 5.1.

34 See Article 2(2) of the European Convention on the Compensation of Victims of Violent crimes.

35 Article 5 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, “Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair and inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.”

36 Article 42 FBiH CC, Article 28 RS CC, and Article 7 BDBIH CC.

37 Article 7 (b) FBiH CC and Article 7 (b) BDBIH CC.

38 In these cases, the court imposes a punishment on the offender but orders it not to be carried out provided that the offender does not commit another offence during a certain period of time. See Article 62 FBiH CC, Article 46 RS CC, and Article 61 BDBIH CC.

39 Articles 43a and 44 FBiH CC, Article 34 RS CC, and Article 44 BDBIH CC.

In addition to these sanctions, courts may also impose on the offender one or several security measures, such as mandatory psychiatric treatment, mandatory medical treatment for addiction, prohibition to carry out a certain activity, prohibition to drive a vehicle and forfeiture.⁴⁰

Article 222 of the 2003 **FBiH CC** introduced a criminal offence of “domestic violence” for the first time to that jurisdiction. If committed against a member of the “family”⁴¹ offenders shall be subject to a fine or imprisonment for a maximum of one year; if committed against a member of their “household” the offender shall serve up to three years in prison.⁴² Legislation provides several categories of aggravated forms of this offence, including the use of a weapon, causing serious bodily harm or death, and causing death of a family member whom the offender has previously mistreated. These offences carry sentences of between three months and 15 years, or “long-term imprisonment” of between 21 and 45 years.⁴³ The **BDBIH CC** has very similar provisions in its Article 218.

The **RS CC** of 2000 introduced a criminal offence of “domestic violence” for the first time.⁴⁴ In 2003, this provision was amended and the maximum term of imprisonment was increased to two years.⁴⁵ If a domestic violence act caused the death of a previously-mistreated family member, the perpetrator is subject to a minimum sentence of ten years in prison.⁴⁶ Categories of aggravated forms of domestic violence similar to those set out in the FBiH legislation are included.⁴⁷

All the criminal procedure codes provide that victims of crimes, including domestic violence, are entitled to submit compensation claims in connection with “reimbursement of damage, recovery of items, or annulment of a particular legal transaction.”⁴⁸ This should take place during the criminal trial or at the sentencing hearing.

Also, all criminal procedure codes establish clearly an obligation for the court to provide well-reasoned verdicts.⁴⁹ According to these provisions, the opinion of the court included in the verdict must “state the circumstances the court con-

40 Article 71 FBiH CC, Article 56 RS CC, and Article 71 BDBIH CC.

41 Article 222 (1) FBiH CC provides that “[w]hoever, by use of violence, threatening behaviour or mental cruelty violates the peace, life, physical or mental health of any member of his family, shall be punished by a fine or imprisonment for a maximum term of one year.”

42 Article 222 (2) FBiH CC.

43 Article 222 (3)-(6) and 43b FBiH CC.

44 Article 198 (1) RS CC from 2000 provides that: “[w]hoever by use of force, brazen and rude behaviour endangers peace, bodily integrity or mental health of a member of his family or family community shall be punished by a fine or imprisonment for a maximum term of one year.”

45 Article 208 (1) RS CC.

46 Article 208 (5) RS CC.

47 Article 208 (2)-(6) RS CC.

48 Article 207 FBiH CPC, Article 103 RS CPC and Article 193 BDBIH CPC.

49 See Article 305 (8) FBiH CPC, Article 304 (8) RS CPC, and Article 290 (8) BDBIH CPC.

sidered in determining the level of punishment” – this includes presenting the reasons “which guided the court when it decided on a more severe punishment than the one prescribed, or when it decided that the punishment should be more lenient or the accused should be released from the punishment or when the court has pronounced a suspended sentence or has pronounced a security measures or forfeiture of the proceeds of crime.”⁵⁰

In 2005, the RS and FBiH adopted **Laws on Protection from Domestic Violence**, which intersect with the provisions set out in their respective Criminal Codes.⁵¹ Both Laws define the concept of family and the offence of domestic violence, and provide for protection measures for victims of domestic violence. They are notable for providing sanctions for all state officials who fail to report cases of domestic violence.⁵² In 2009, the OSCE Mission published a report with preliminary findings on the implementation of the Laws on Protection in the RS and the FBiH, where it noted a number of concerns regarding the application of these laws and issuance of protection measures for victims of domestic violence.⁵³

4. National Practice and Concerns

This chapter examines in detail the sentences imposed for domestic violence convictions across BiH. Cases have been analysed in terms of the type, frequency and characteristics of the sentences imposed. Court procedures, including plea agreements and warrant for pronouncement of sentence, are examined, in addition to aggravating and mitigating circumstances, in order to analyse and interpret decision-making processes in relation to sentencing.

50 Article 305 (8) FBiH CPC. The above mentioned articles in the RS and BDBiH CPCs have similar wording. This obligation of courts to provide clear and reasoned verdicts in criminal trials can be derived from fair trial standards provided for in Article 6 of the European Convention of Human Rights. See: European Court of Human Rights, *Hadjianastassiou v. Greece*, Judgement of 16 December 1992, para. 33. In this case, the Court established a link between the right to appeal under Article 6 and the need to have a clear and reasoned verdict. Nevertheless, the jurisprudence of the Court on the threshold that the reasoning of the verdict needs to meet in order for there not to be a violation of Article 6 has been somewhat vague.

51 To date, BDBiH has yet to adopt legislation on domestic violence.

52 See Article 20 FBiH Law on Protection from Domestic Violence, and Article 20 RS Law on Protection from Domestic Violence.

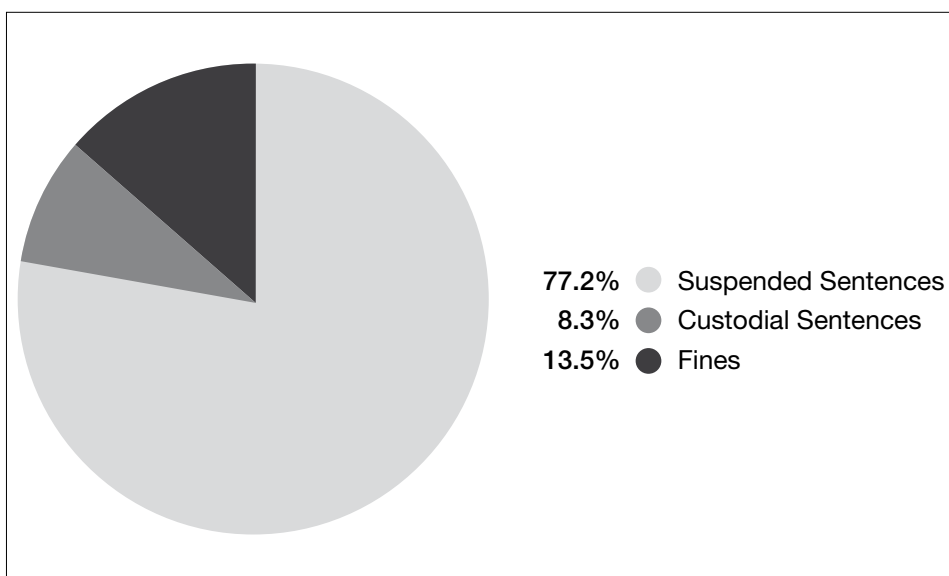
53 See OSCE Mission to BiH, “Response to Domestic Violence and Co-ordinated Victim Protection in the Federation of Bosnia and Herzegovina and the Republika Srpska: Preliminary Findings on the Implementation of the Laws on Protection from Domestic Violence,” July 2009.

4.1. Type of Sanctions Applied

In total, 289 cases involving charges of domestic violence drawn from the OSCE Mission's Justice Sector Monitoring Programme were analyzed for this section. The sentencing decisions in these cases were examined and analysed to survey the frequency and characteristics of sanctions imposed for domestic violence. These cases date from 2004 – 2010 and all feature fully-concluded convictions of the accused. They have been drawn from FBiH, RS and BDBIH.

The breakdown of sanctions in the analysed cases show that:⁵⁴

- The majority of cases carried a **suspended prison sentence**, almost 77.2 per-cent (or 223 cases);
- **Custodial prison sentences** made up only 8.3 per-cent of the total (or 24 cases); and
- Offenders were required to pay **fin**es in 13.5 per-cent of cases (or 39 cases).



Sanctions Issued

⁵⁴ Note that in addition to these cases, which are of a significant number, there was an additional case where both a suspended sentence *and* a fine were imposed, and also two cases recorded in which the offenders received only a court reprimand. These cases make up 1%, which completes the percentages presented above. Also, there was one case in which a fine was converted to an eight-day custodial sentence. According to the law, if a fine is not paid within the timeframe defined by the court, the fine shall be substituted by imprisonment. See Article 48 FBiH CC, Article 36 RS CC, and Article 48 BDBIH CC.

a) Suspended Sentences

The most notable finding regarding sentencing for domestic violence is the **high number of suspended imprisonment sentences**, which accounted for 77.2 per-cent of the total number of cases monitored – or 223 out of a total of 289 cases. This is a notable trend throughout the country.

It is also of note that most of the imprisonment sentences that were suspended, were rather **low**. Data shows that in the majority of cases where imprisonment sentences were suspended (i.e. in 88.8 per-cent of the 223 cases), the court had determined the imprisonment sentence to be between **one and six months**.⁵⁵

This shows that in the majority of the domestic violence cases monitored by the Mission (in 198 cases), the imprisonment sentences handed down were not only rather low, but additionally their execution was suspended by the court - which means that in practice there was no effective sanction imposed on the perpetrator.

The duration of the suspension of the imprisonment sentence (i.e. the probationary period) varies from case to case. Information regarding the length of suspension was not available for all cases. The criminal codes provide that the period during which a sentence may be suspended is of minimum one year, and maximum 5 years.⁵⁶ With regard to the cases for which it was available, in the majority of the above-mentioned cases, sentences were **suspended for one year** – in other words, for the shortest probationary period possible. A minority of cases were suspended for 18 months, two years, or longer; the longest suspension period reported was four years.

Cases which carried a suspended sentence embraced the full spectrum of domestic violence offences. The cases monitored included frequent accounts of beatings, slapping, physical assault causing “severe” or “grievous” injury, or use of weapons such as knives or firearms and explosive devices. Verbal abuse was frequently reported, including death threats: in one case the accused threatened to cause his pregnant wife a miscarriage. The victims of such cases included minors, elderly parents, and extended family members as well as intimate partners.

Alcohol abuse was frequently reported in such cases, which detail offences committed while the accused was “intoxicated” or “under the influence of alcohol.” However, in most of these cases there is no indication that security measures of mandatory medical treatment for addiction were imposed alongside of the sus-

55 In 5.38 per-cent of those cases the imprisonment sentence was of between six months and one year; in 5.83 per-cent of the cases there was an imprisonment sentence of one year, and only in one case (0.45 per-cent), there was an imprisonment sentence of 18 months.

56 Article 62 (1) FBiH CC, Article 46 (1) RS CC, and Article 61 (1) BDBiH CC.

pendent sentences. Security measures of mandatory psychiatric treatment were imposed only in nine cases. All nine cases received suspended sentences of one year or less. Offences in these cases were generally marked by alcohol abuse and/or intoxication of the accused when he committed the acts in question, and all involved physical assault or beating.

b) Custodial Sentences

Only 24 (i.e. 8.3 per-cent) of the total number of cases monitored resulted in a custodial prison sentence. Within this category, most custodial sentences were of short duration: 70.8 per-cent of custodial sentences were of **one to six months** in length, while 25 per-cent were of six to twelve months duration. This corresponds to 17 and 6 cases, respectively.

One notable exception resulted in a sentence of 21 years, the longest sentence imposed under domestic violence charges according to the Mission's records. The accused had first assaulted and later strangled his mother; he was prosecuted under Article 222(6) of the Criminal Code of FBiH for causing the death of a family member whom he had previously mistreated, an offence that carries a minimum sentence of ten years in prison.

Generally, the courts fail to provide an explanation of why they imposed more onerous sanctions in these cases where custodial sentences were applied. However, it seems that the court considered the offences to be more serious or that aggravating factors were present. An examination of the cases shows that many involved death threats, long-term and continuous violence, or other aggravating circumstances.

Less than half (45.83 per-cent) of custodial sentences were imposed for charges of aggravated offences. However, the statistics also show that most of those who are convicted of aggravated offences do not actually receive a custodial sentence, but rather a suspended sentence. As these offences are subject to more severe penalties – between one year and long-term imprisonment - these statistics demonstrate that the courts are consistently applying sentences at or below minimum statutory levels.⁵⁷

As a matter of concern, from the analysis of verdicts, no full explanation can be drawn as to why some of the most serious offences of domestic violence receive rather lenient punishments.

57 See Article 222(4)-(6) FBiH CC; Article 208(2)-(5) RS CC, and Article 218(3) – (6) BDBiH CC.

c) Fines

Fines were imposed in 13.5 per-cent of the total cases monitored. Fines ranged overall from 200 – 4,500 KM, but the majority of fines (just over 68 per-cent, or 27 cases) were of less than 1,000 KM.⁵⁸

Courts tend to provide little or no information as to their reasoning for imposing fines in domestic violence cases. In general there is little to distinguish these cases from others that received suspended sentences in terms of the violence committed or the circumstances of the accused. These cases included physical abuse and assault, verbal insults, threats, intimidation, and destruction of property. The facts of these cases include incidents of violence directed against, or occurring in the presence of, minors.

4.2. Mitigating and Aggravating Circumstances and Recidivism

The seventy cases which involved aggravating or mitigating circumstances were analysed in detail with regard to how these circumstances are considered when pronouncing the sentence. Criminal legislation requires courts to mete out punishment within the limits provided by law for that particular offence, bearing in mind the purpose of punishment and taking into account mitigating and aggravating circumstances, which include “the motives for committing the offence, the degree of danger or injury to person, property or thing, the circumstances in which the offence was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal offence, as well as other circumstances related to the offender.”⁵⁹

a) Mitigating Circumstances

Mitigating circumstances were identified and used as grounds for a reduction of or imposition of a lower sentence in 54 out of the 70 cases – approximately 74 per-cent. A wide variety of such factors were taken into consideration. Frequent reference was made to **lack of prior convictions** on the part of the accused. **Admission of guilt, expressing remorse for the crime** or a combination of both was amongst the circumstances most frequently accepted by the courts as mitigating; it was noted in 64 per-cent of the cases that featured mitigating circumstances. In several cases, courts referred to the accused’s “**proper behaviour before the court.**” Although these are factors that are frequently considered by the courts as mitigating circumstances, it

⁵⁸ In three additional cases the imposition of fines was suspended, which makes up 1.04% of the cases.

⁵⁹ See Article 49 FBiH CC, Article 37 RS CC, and Article 49 BDBiH CC.

would be important to define what “proper behaviour” means in the court’s perspective and its impact on the final sentence imposed. In fact, even if this may be a valid or at least common mitigating circumstance, it would be of concern if the minimum expected of any accused brought before a court would be taken into account to significantly mitigate a sentence in serious cases, such as those of domestic violence.

Another frequently-cited mitigating circumstance was the **accused’s status as a father or “family man.”** This may be a valid consideration in avoiding an unintended impact on the victims when considering how sentencing will impact upon a father’s duty to pay child maintenance, for instance.⁶⁰ However, these circumstances should be construed differently in cases where the accused is the father of adult children or is not responsible for a family’s income. Given the near ubiquity of cases in which an accused is married or has children, the courts should be careful to avoid implying that marital status or paternity in itself somehow evokes greater “respectability” within society or provides a form of character reference.

In other cases, the courts identified mitigating circumstances in accordance with the **wishes of victims**, who did not wish the accused to serve a custodial sentence, withdrew the prosecution, did not take part in proceedings or stated that they had reconciled with the accused. These again are valid considerations, but it is suggested that further inquiry should be made to ascertain whether the victims were questioned about these matters in private, or whether they were required to publicly make statements to the court in the presence of the accused. In some of the cases monitored the victims were publicly encouraged by the court to reconcile with the accused.

Another frequently-cited mitigating circumstance is the **financial status** of the accused; the courts often refer to economic disadvantage, unemployment and poverty. These observations accurately reflect the economic reality for many families in BiH, and it is often a valid consideration, especially when deciding to impose a fine. What must be avoided, however, is that the stress of economic disadvantage is in any way taken by the court as somehow explaining or justifying the commission of the offence. Any such interpretation would be extremely worrying as it is the mandate of the courts to send a strong message to society that there can be no excuse that legitimizes domestic violence or absolves the responsibility of offenders.

Of particular concern, in some cases the court noted as mitigating circumstances that **the victim had incited the accused to commit domestic violence.** In one case the accused’s former wife reportedly prevented him from enjoyment of their joint property; in another, the court made reference to the victim’s verbal abuse of the accused; and in a third case, the court made a general reference to the “beha-

60 *Supra* note 25.

viour” of the victim as a mitigating circumstance, after the accused claimed that she had falsely reported him to the police on previous occasions. What is of utmost importance is that physical assault or abuse are not accepted in any way as a legitimate response to relationship difficulties.

b) Aggravating Circumstances

In contrast to the high frequency with which the courts identify mitigating factors, **fewer cases featured aggravating circumstances** when imposing the sentence: only 29 out of the 70 cases, or approximately 41 per-cent.⁶¹

The most frequently-cited aggravating circumstance relate to **previous convictions**.⁶² However, in most of these cases, the previous convictions did not relate to domestic violence offences – only 7 out of the total 70 cases involved recidivism for domestic violence. This data suggests that in spite of the fact that often criminal offences of domestic violence are associated with a history of violence within the family, this is not being reflected in the domestic violence proceedings before the courts.

Other aggravating factors mentioned by the courts include **the severity of the violence** or the **injuries inflicted upon the victim**, the **long-term or continuous nature of the violence**, the **particular vulnerability of victims** who were elderly or in poor health, and the **accused’s refusal to express remorse** for his behaviour. However, these circumstances were rarely taken into account and usually featured in only one or two cases each.

4.3. Abbreviated Proceedings and Sentencing in Domestic Violence Cases

a) Warrant for Pronouncement of Sentence

In 45.67 per-cent of all 289 cases monitored, the sentence was delivered as a result of the issuance of a **warrant for pronouncement of sentence** (WPS), a statutory provision that provides a mechanism to expedite court proceedings. Under the criminal procedure codes, the WPS mechanism can be used with regard to “criminal offences

61 Note that in 13 cases (out of the 70 analyzed in this section) there were both mitigating and aggravating circumstances.

62 This was the case in 75 per-cent of cases in which aggravating factors were identified – or, in 22 out of the 70 cases analyzed.

for which the law prescribes a prison sentence **up to five (5) years or a fine.**⁶³ This has resulted in frequent application of the WPS mechanism to domestic violence charges.

Under this procedure, if the prosecutor has gathered enough evidence to substantiate allegations that the suspect has committed the criminal offense, the prosecutor may request in the indictment that the court issue a warrant for pronouncement of the sentence. If the accused pleads guilty, and the warrant is granted by the judge, the court will rule that the sentence requested by the prosecutor in the indictment can be enforced without the need for a main trial.⁶⁴

Because WPS is intended for use in less serious cases where the interests of justice as well as those of the accused and victims would not be prejudiced by an expedited process,⁶⁵ legislation provides that this expedited mechanism may only be used to request **sanctions including a fine, suspended prison sentence or application of security measures.**⁶⁶

However, an examination of the facts of cases that were prosecuted using WPS demonstrates that the mechanism is also applied to cases involving **serious instances of violence.** Offensive behaviour included physical assault, stabbings, threats, destruction of property and other forms of intimidation. In one instance, for example, the accused attempted to strangle his wife, while in another the accused smashed his daughter's head against a wall. Victims in such cases include minors, elderly parents and extended family members. The category also included several cases that involved use of weapons including firearms and knives. Various examples include stabbings with kitchen knives, shootings, and threats to cut the throat of the accused's wife with scissors.

b) Plea Agreements

Plea agreements (PA) were concluded in 13.15 per-cent of the total cases monitored. The majority of these agreements resulted in **suspended sentences** (78.95 per-cent). In contrast, only 10.53 per-cent of these cases resulted in custodial sentences, while another 10.53 per-cent of cases were sanctioned with a fine. Legislation specifically provides that plea agreements can be used to impose sentences **below legally prescribed minimums.**⁶⁷

63 See Article 350 FBiH CPC, Article 334 of the BDBiH CPC, and Article 357 RS CPC.

64 See FBiH 353 CPC, Article 360 RS CPC, and 337 BDBiH CPC.

65 See OSCE Mission to BiH, Spot Report on "The Presumption of Innocence: Instances of Violations of Internationally Recognised Human Rights Standards in the Courts of Bosnia and Herzegovina," February 2007 (available at: <http://www.oscebih.org/Download.aspx?id=56&lang=EN>), at p3.

66 See Article 350 FBiH CPC, Article 357 RS CPC, and Article 334 BDBiH CPC.

67 See Article 246 FBiH CPC, Article 246 RS CPC, and Article 231 BDBiH CPC.

4.4. Awarding of Compensation to Victims

As discussed earlier, victims of crimes - including domestic violence - are entitled to apply for **compensation** in connection with damage suffered or recovery of items.⁶⁸

However, the Mission's monitoring shows that compensation claims for domestic violence are very rarely settled in criminal proceedings. In addition, it appears that **frequently compensation claims are not filed** by victims at all, even in civil proceedings. Given the economically disadvantaged status of many domestic violence victims, resulting in injured parties not initiating civil proceedings for compensation, this means that the needs of many victims are not being met.

What is most concerning is that many victims simply do not know about this procedure. Responsibility to fully instruct victims on their rights in this regard lies with both judges and prosecutors, and it can be thanks to their initiative that this procedure becomes a regular process that benefits victims in need.

The responsibility of judges and prosecutors also extends to ensuring that victims file their claim in time so that it can be processed during criminal proceedings. Courts appear to frequently refer victims to process their claims instead through civil proceedings.⁶⁹ This can be prohibitively expensive for victims in terms of legal costs and unnecessarily prolongs the claim process. For instance, referral to civil proceedings was noted in all domestic violence cases heard at certain courts, giving rise to suspicions that certain jurisdictions may have informally adopted this method as an automatic procedure. It is crucial therefore that prosecutors collect the necessary information that can substantiate the compensation claim that the injured party might want to submit. It is therefore important that the injured party is informed about this possibility at an early stage of the proceedings so as to allow him or her to file the claim, and the prosecutor to collect all necessary information on time.⁷⁰

68 *Supra* Section 2.3 and note 47.

69 According to the law, courts may decline deliberating on the compensation claim during the criminal proceedings if this would "considerably prolong such proceedings." Article 207 (I) FBiH CPC, Article 103 (I) RS CPC and Article 193 (I) BDBiH CPC.

70 In view of facilitating this process for the injured parties, the Mission has published a leaflet, "*Know your rights and duties*", providing victims and witnesses in criminal proceedings key information about their rights, as well as a template that injured parties can use to file their compensation claims. Both documents are available here: http://www.oscebih.org/documents/osce_bih_doc_2010122713020999eng.pdf and http://www.oscebih.org/documents/osce_bih_doc_2010122712570728eng.pdf

5. Key Concerns

Three trends have been identified from the analysis outlined above, which raise the concern of the OSCE Mission.

5.1. Sentencing At or Below Minimum Penalties Prescribed

Sentencing for domestic violence remains generally low - **at or below legally prescribed minimum levels**. This is a consistent problem in relation to all domestic violence offences but most worrying are the prosecution of **aggravated incidents**, which involve children and juveniles, the use of weapons, or grievous bodily injuries. These are enumerated in legislation as aggravated offences, which are subject to custodial prison sentences of between three months and 15 years, or “long-term imprisonment” of between 21 and 45 years.⁷¹ The majority of such cases, however, receive sentences that are less than the provided minimums or are suspended altogether. In fact, excluding cases that resulted in the death of the victim, none of the cases examined received a sentence in the upper range of legally prescribed penalties.

Monitoring findings show that both in the FBiH and the RS offenders have been subject to **custodial sentences** receiving terms of three, six or ten months under these provisions. An even larger majority of these offences receive **suspended sentences**, sometimes of six months, four months or two months, which were below the minimum terms provided in the law for those cases. Furthermore, in a few cases, where the prescribed statutory penalty foresees a prison sentence, courts have accepted motions for imposition of a fine *in lieu of imprisonment*.⁷²

Overall it is difficult, if not impossible, to determine how **aggravating and mitigating circumstances** impacted upon the eventual sentence. The courts provide no explanation of how such factors lead them to decide that a suspended sentence is fairer than a custodial sentence, for instance, or how mitigating circumstances relate to sentencing below the minimum sentence prescribed by law. In general, based on an analysis of the written verdicts, it is difficult to discern how the circumstances considered by the court – both mitigating and aggravating – impacted on the determination of the individual sentence imposed by the court.

Sentencing under the legislative minimum is permissible when the court determines the “existence of highly extenuating circumstances, which indicate that the purpo-

71 *Supra* note 42.

72 The conditions under which the court may impose a fine *in lieu of imprisonment*, in cases where the law prescribes a sentence of imprisonment for that particular offence, are listed by each of the CCs: Article 51 (1) (f) FBiH CC and BDBiH CC, and Article 39 (1) (4) RS CC.

se of punishment can be attained by a lesser punishment.”⁷³ The problem resides in that **little or no information** is provided by the courts about the details of such circumstances, how they are identified, or how they relate specifically to the sentence imposed and in that courts do not always make explicit reference to the presence of “highly extenuating circumstances”. A review of judicial practice seems to suggest that courts tend to understand that the presence of cumulative mitigating circumstances counts as “highly extenuating circumstances” in a given case. This, however, is not provided for in the law, and the court must explain what constituted “highly extenuating circumstances” in a particular case. As noted in the Commentary to the Criminal Codes, highly extenuating circumstances are “all the circumstances considered as mitigating in the regular imposing of the sentence (Article 41), provided that they have the characteristics of particularly mitigating circumstances, which means that they are such mitigating circumstances that significantly reduce the threat of the crime and the guilt of the perpetrator.” The Commentary further notes that “this is an exceptional competency that our courts use very often and, according to some, also abuse, as this in fact turns an exception into a rule.” It continues “... courts tend to sometimes not provide or substantiate especially the mitigating circumstances, which is an essential violation of criminal procedure and a reason for the revocation of the verdict.”⁷⁴

It is up to the judge to ensure that all relevant circumstances which affecting the meting out of punishment are fully documented and are taken into consideration when determining the sentence. Monitoring findings show that the court’s reasoning does not demonstrate that certain details - such as the age of victims, psychological intimidation, or long-term patterns of abuse - were taken into account.

Moreover, provisions in the FBiH and in BDBiH distinguish between offences committed against members of the ‘family’ and members of the ‘household,’ whereby the latter are intended to carry a higher sentence of up to three years in prison.⁷⁵ Yet in practice, in cases monitored by the Mission, courts did not take this distinction into account and there is **no apparent trend of distinguishing between victims** when sentencing.

The OSCE Mission is appreciative of the unique and delicate circumstances of each domestic violence case and the necessity of careful evaluation on a case-by-case basis to individualize sentences appropriately. Nevertheless, the **lack of information regarding the courts’ reasoning** when sentencing gives rise to serious concerns regarding inconsistency and unpredictability: imposition of sen-

73 See Article 50, b) FBiH CC and BDBiH CC, and Article 38 (2) RS CC.

74 Miloš Babić, Lijlana Filipović, Ivanka Marković, and Zdravko Rajić, Commentaries on the Criminal Codes in Bosnia and Herzegovina, Book I, page 279-280 (on Article 49 of BiH CC, which applies to the respective articles of the other CCs), Council of Europe/European Commission, Sarajevo, 2005.

75 *Supra* note 41.

tences often appears little more than arbitrary. In particular, the sanctions applied seem to bear little relation to the sliding scale of penalties available for a range of aggravated offences. Overall, the **courts appear to fail in ensuring that sentences are commensurate with the gravity of the crime.**⁷⁶

If criminal sanction represents society's repugnance at the crime committed, **sentencing below minimum levels sends a clear signal that domestic violence is not regarded as a serious crime** worthy of equally serious punishment. Near-automatic imposition of nominal sentencing at or below minimum levels in effect constitutes little more than a warning and makes the minimum sentences prescribed by legislation meaningless. This sends a worrying message of social and institutional complacency, especially to victims who risk personal safety to report abuse and violence.

Sentencing at or below minimum penalties prescribed by the law is also facilitated by the use of abbreviated proceedings. Indeed, the frequent use of warrant for pronouncement of sentence proceedings gives rise to some concern, particularly in domestic violence cases involving a marked level of violence, given that they guarantee the imposition of non-custodial sentences, as noted in Section 4.3 above. In conjunction with discarding the normal trial hearing, this may lessen the full impact of prosecution for the accused, and does not readily deter re-offending. In addition, it is important to note that bypassing the main trial hearing significantly reduces the opportunity for victims to participate in the trial or to see the process of justice being done in court. Plea agreement proceedings, in addition, give the court the possibility of reducing the punishment to below the lower limit established by law, even in the absence of "highly extenuating circumstances".

Both PA and WPS mechanisms are **legitimate and useful tools** to free up valuable time and resources at the courts by more efficiently processing lesser offences. While prosecutors might decide to propose these mechanisms based on the evidence they possess and on their assessment of the expected performance of witnesses in trial, their usage in relation to domestic violence cases may also signal an over-reliance on the part of prosecutors and judges to simplify prosecution of what are serious, complex and socially sensitive offences.

⁷⁶ *Supra* note 20.

5.2. Under-charging and Reluctance to Combine Domestic Violence with Other Charges

A second problem relates to prosecution of offenders under ‘ordinary’ or ‘non-aggravated’ domestic violence charges, although the acts occurring would appear to qualify for **aggravated forms of domestic violence**, involving use of weapons, affecting children, or causing grievous bodily harm.

Particularly disturbing are cases involving **abuse of children**, where perpetrators were not charged with relevant aggravated offences. In one case, for example, the accused sat on his underage daughter’s head; in another, the accused physically abused his children, prevented them from attending school and evicted them from their home. In a third case, the accused subjected his children to a long-term pattern of physical abuse, before eventually coming to his daughter’s schoolyard where he threatened to kill her and the rest of the family. In one particularly strange example, the accused was found guilty of beating his son under non-aggravated charges, but the fact that the abuse was directed against a child was considered to be an aggravating circumstance. The accused in these cases were charged with “ordinary” domestic violence and the prosecutor did not include any child abuse charges in the indictments.

In one case for instance, a child was injured during a fight between the accused and the child’s mother. The prosecutor admitted during the hearing that aggravated charges in relation to the child’s injury were dropped because the accused’s intention to hurt the child could not be proven and the injury had resulted “unintentionally” from the violence which the accused was inflicting on the mother. This case suggests a misconception by the prosecution of the nature of domestic violence and the means by which it inflicts violence and harm upon all family members. From a legal perspective, the prosecution underestimated the foreseeability of children in the home receiving injuries during violent incidents and the recklessness of such attacks. The child was injured because of the violent environment created by the accused, who should have been prosecuted for it accordingly.

In another case, the accused was charged with non-aggravated domestic violence against his wife, despite the fact that he was found to have stabbed her with a fork and to have forced her to have sexual intercourse on the balcony of their house. In spite of these facts, the indictment did not include any charges in relation to the forced sexual intercourse. The lack of inclusion of charges related to sexual violence in domestic violence cases when facts point to the existence of such violence is an area of concern requiring further enquiry. It is important that both the prosecution and the court understand and acknowledge the nature and seriousness of such offences.

All of these examples illustrate cases of under-charging – i.e. when an indictment is raised for the “base” offence instead of for an aggravated form of domestic violence,

and a reluctance of prosecutors to combine charges of domestic violence with other charges. The latter is more evident in cases involving violence against children. None of the cases involving children mentioned above involved child abuse charges, even though the facts included physical violence as well as deprivation of food, prevention from attending school, excessive physical work, and severe verbal and emotional abuse. Failure to include other charges has a serious **impact upon the applicable sentencing regime**: criminal provisions in relation to child abuse, for instance, provide for a sentence of up to three years in prison in FBiH or up to two years in the RS,⁷⁷ which may be higher than the applicable sentences for domestic violence. Further investigation is required into prosecutorial decisions regarding content of the indictment and legal qualification, in particular cases involving **children** as well as **sexual violence**.

While prosecutorial choices as to what the indictment should contain are obviously dependent on the available evidence, and are therefore very difficult to assess, the above-mentioned pattern may also result from a misunderstanding of the legal elements of the various categories of offences.

Under-charging may indicate a profound lack of understanding on an institutional level of the nature and forms which domestic violence may take.

Under-charging demonstrates a lack of sensitization to gender, sexual violence and child welfare issues, which can profoundly impact upon the experiences of victims in domestic violence criminal proceedings. Such sanctions do not seem to adequately serve the purpose of punishment to provide “protection and satisfaction to victims.”⁷⁸ These sentencing practices also undermine the rehabilitative potential of domestic violence prosecutions by failing to impress on offenders the nature, seriousness and consequences of their actions.

5.3. Failure to Revoke Suspended Sentences upon Violation of Probationary Period

The FBiH CC and BDBIH CC⁷⁹ provide that suspended sentences must be revoked if, during the probation period, the convicted person is convicted of another criminal offence *and* receives a punishment of imprisonment for two years or more. This means that in FBiH and BDBIH, judging by current sentencing patterns, repeated domestic violence offences during a probation period will very rarely rise to the threshold at which a suspended sentence **must be** revoked. If

77 See Article 219 FBiH CC, and Article 207 RS CC and Article 216 BDBIH CC.

78 See Article 7, (b) FBiH CC and for BDBIH CC.

79 See Article 64 FBiH CC, and Article 64 BDBIH CC.

the person is sentenced for lesser punishment the court shall assess if the suspended sentence **shall be revoked**.

However, in the RS, since August 2010, the imposition of suspended sentences is more difficult. Under Article 47(4) of the RS CC, a suspended sentence may not be imposed on an offender who has already received a suspended sentence for *any* criminal offence or who has previously served a custodial sentence. In addition, a suspended sentence should be revoked if the offender commits “one or more criminal offences before the probation period expired.” As there is no limitation with regard to the severity of future offences, this means that revocation provisions should apply to **repeat domestic violence convictions**.

By way of general observation, courts throughout the country rarely revoke suspended sentences.⁸⁰ Of the 70 cases examined in detail, there was only a single instance in which a court in the FBiH noted breach of the probation period as an aggravating circumstance. Although the court did impose a custodial sentence in that case, information is unavailable as to whether it enforced the older suspended sentence in doing so.

In addition, in none of the 70 cases examined in detail did the court appear to enquire into the compliance of offenders with obligations imposed on them by the courts. It is provided that the court may revoke a suspended sentence if the convicted person does not fulfil obligations imposed on him by the court within the probation period.⁸¹ In domestic violence cases, these may include security and protection measures, child maintenance payments or mandatory rehabilitation treatment. There were no records of repeat offenders being sanctioned for non-compliance with such obligations.

It is submitted that further enquiry should be made into the enforcement of suspended sentences in cases of re-offending and breach of obligations.

80 This observation applies to the cases analysed in this report that took place between 2007 and 2010, and should be read with the caveat that the mentioned legislative changes in the RS in August 2010 might result in a significant difference in practice.

81 See Article 66 FBiH CC, Article 50 RS CC, and Article 66 BDBiH CC.

6. Conclusions and Recommendations

6.1 Use of dissuasive sentences

Domestic violence convictions frequently receive sentences **below legally prescribed minimum levels**. Although this is permissible when a case contains “highly extenuating circumstances” in almost no cases do the courts make clear what these are or how they affect the sentencing decision.

Minimum or below-minimum sentencing is a particular concern with regard to aggravated offences, including violence against children, use of weapons, or grievous bodily injuries. Despite the fact that by definition these offences involve the most serious and damaging instances of domestic violence, only a small minority of these offenders receive a custodial sentence.

Recommendation: Sentencing for domestic violence should be commensurate to the gravity of the offences. Sentencing below legally prescribed minimum levels for domestic violence should be used in exceptional cases and the court is urged to provide a clear explanation of what constituted ‘highly extenuating circumstances’ in the specific case. In particularly serious or violent cases of domestic violence, sentencing should reflect additional disapproval. The request for and imposition of suspended sentences for aggravated offences, at or below the minimum prescribed by law, require additional scrutiny.

6.2 Appropriate use of and revocation of suspended sentences

The most common sanction imposed for domestic violence in BiH is a **suspended sentence**, which was imposed in over three-quarters of cases. As a matter of concern, courts do not appear to revoke or enforce suspended sentences when offenders breach the probation period by re-offending. Courts also issue suspended sentences for **repeat offenders** contrary to legislative provisions.

Recommendation: Prior to imposition of a suspended sentence, prosecutors and judges (upon proposal or imposition, respectively) should carefully assess whether a suspended sentence meets the purpose of punishment, including individual and general prevention. Suspended sentences should be revoked when the convicted person re-offends. As a general rule, suspended sentences should not be imposed on repeat offenders if the first domestic violence conviction is final.

6.3 Justification of imposed sentence

Lack of information regarding the factors considered when imposing sentence, such as how individual **mitigating and aggravating and factors** affect the sentence, results in a lack of transparency and accountability, with a danger that sentencing decisions appear arbitrary and legislative sentencing guidelines become meaningless.

Few trends or patterns can be identified in sentencing decisions, so that it is unclear why some cases receive higher or lower sentences than others. In particular there seems to be **little relation between the sentence and the gravity of the crime** - particularly when it comes to aggravated offences, which often result in the same sentences as non-aggravated offences.

Recommendation: *In accordance with the obligation to provide well-reasoned verdicts, courts should give a full and clear explanation of which mitigating and aggravating circumstances were taken into account when fashioning the sentence and in which way these circumstances affected the sentence.*

6.4. Under-charging

Prosecutors often appear to charge the accused with offences that are less serious than the facts of the case would appear to warrant. **Under-charging** is particularly concerning in cases where domestic violence against children or use of weapons is not charged under aggravated domestic violence offences.

Recommendation: *Prosecutors are urged to indict domestic violence offenders for aggravated forms of domestic violence whenever the facts of the case include such aggravating circumstances. When such circumstances are present in the indictment but not appropriately reflected in the charges, the burden rests on the court to review the legal qualification of the case.*

6.5 Charging of all offences

There appears to be a **reluctance to combine domestic violence charges with other charges** such as child abuse. The desire to prosecute cases as quickly and efficiently as possible should not lead to situations where the accused escapes prosecution for more serious crimes and avoids a more onerous sentencing regime.

Recommendation: *In complex and serious cases where domestic violence is combined with other charges such as maltreatment or neglect of a child, the indictment should reflect the full extent of offences committed and combine different criminal charges as appropriate.*

6.6. Sexual violence

Charges for **sexual violence** are almost totally absent from domestic violence proceedings, even if they have been alleged during the proceedings. Given the high likelihood of such violence occurring in abusive relationships, further inquiry by the prosecutor and police during the investigation phase is crucial.

Recommendation: *Police and prosecutors should make sure to appropriately inquire into instances of sexual abuse in domestic violence cases, and include such facts and corresponding charges in the indictment.*

Annex

Article 222 FBiH Criminal Code⁸²

Domestic Violence

- (1) Whosoever, by use of violence, threatening behavior or mental cruelty violates the peace, life, physical or mental health of any member of his family, shall be punished by a fine or imprisonment for a maximum term of one year.
- (2) Whosoever commits an offence under paragraph 1 above against a member of his household, shall be punished by a fine or imprisonment for a maximum term of three years.
- (3) If during the commission of any offence under paragraphs 1 and 2 above, any weapons, dangerous implements or other instruments capable of inflicting grave bodily injury or harm are used, the offender shall be punished by imprisonment for a term of between three months and three years.
- (4) If the commission of any offence under paragraphs 1 to 3 above results in grievous bodily harm to, or impairment of health of any member of his family, or if any offence under paragraphs 1 to 3 above is committed against a child or juvenile, the offender shall be punished by imprisonment for a term of between one and five years.
- (5) If the commission of any offence under paragraphs 1 to 4 above results in the death of any member of his family, the offender shall be punished by imprisonment for a term of between two and fifteen years.
- (6) Whosoever causes the death of any member of his family whom he has previously mistreated shall be punished by imprisonment for a minimum term of ten years or to longterm imprisonment.

Article 208 RS Criminal Code⁸³

Domestic Violence

- (1) Whoever, by use of violence, threatening behavior or mental cruelty violates the peace, life, physical or mental health of any member of his family or family household, shall be punished by a fine or imprisonment for a maximum term of two years.
- (2) If during the commission of any criminal offence under paragraph 1 of this article, any weapons, dangerous implements or other instruments capable of inflicting grave bodily injury or harming a person's health are used, the offender shall be punished by imprisonment for a term of between three months and three years.
- (3) If by the commission of any offence under paragraphs 1 and 2 of this article causes grievous bodily harm or impairment of health of any member of his family, or if any criminal offence under paragraphs 1 and 2 of this article is committed against a juvenile, the offender shall be punished by imprisonment for a term of one to five years.
- (4) If the commission of any criminal offence under preceding paragraphs of this article the offender results in the death of any member of his family, the offender shall be punished by imprisonment for a term of between two and twelve years.
- (5) Whoever kills a member of his family whom he has mistreated previously, shall be punished by imprisonment for a minimum term of ten years.
- (6) Family members or members of family household are understood to mean also ex-spouses, their children and their parents.

82 Official Gazette of the Federation of Bosnia and Herzegovina nos. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, and 42/11.

83 Official Gazette of the Republika Srpska nos. 49/03, 108/04, 37/06, 70/06, and 73/10.

Article 218 BDBIH Criminal Code⁸⁴

Domestic Violence

- (1) A person who endangers tranquillity, physical or mental health of a member of his family by applying violence, impudent or remorseless behaviour shall be fined or sentenced to prison to up to one year.
- (2) A person who commits the offence referred to in Paragraph 1 of this Article against a family member with whom he lives in a household shall be fined or sentenced to prison to up to three years.
- (3) If the person who committed the offence referred to in Paragraphs 1 and 2 of this Article used weapons, dangerous tools or other objects that can cause serious bodily injuries or health impairments, shall be sentenced to prison from three months to three years.
- (4) If the family member suffered from serious bodily injuries or serious health impairments as a result of the offence referred to in Paragraphs 1 through 3 of this Article, or if the offence referred to in Paragraphs 1 through 3 of this Article was committed against a child or a juvenile, the perpetrator shall be sentenced to prison from one to five years.
- (5) If the offence referred to in Paragraphs 1 through 4 of this Article caused death of the family member, the perpetrator shall be sentenced to prison from two to fifteen years.
- (6) A person who causes death of the family member whom he had previously abused shall be sentenced to minimum ten years or long-term imprisonment.

84 Official Gazette of Brčko District BiH nos. 10/03, 45/04, 6/05 and 21/10.