

CRIMINALIZATION AND PROSECUTION OF RAPE IN BOSNIA AND HERZEGOVINA

SUBMISSION TO THE UN SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

Amnesty International presents the attached responses to the questionnaire on criminalization and prosecution of rape in Bosnia and Herzegovina. This submission has been prepared in response to the call for contributions issued by the United Nations (UN) Special Rapporteur on violence against women, its causes and consequences ahead of her upcoming report on rape as a grave and systematic human rights violation and a form of gender-based violence against women.

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant Sections of the Criminal Code and the Criminal procedure code.

In Bosnia and Herzegovina (BiH), the criminal offenses of rape and other forms of sexual violence are regulated at the level of the entities, i.e., Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), and the Brcko District of Bosnia and Herzegovina (Brcko District). The Criminal Code of BiH (the state level criminal code) provides for the criminal offense of rape only when it is committed as a crime under international law, i.e., genocide, war crime or crime against humanity. [NB: For more detail, see under War and/or conflict]

Responses to the survey will be broken down by relevant jurisdiction.

Criminal Code of Federation BiH¹

Under the Criminal Code of the FBiH, the criminal offense of rape is covered in Chapter XIX – Criminal offenses against sexual freedom and morality.

Article 203

Rape

(1) Whoever coerces another by force or by threat of immediate attack upon his life or limb, or the life or limb of someone close to that person, to sexual intercourse or an equivalent sexual act, shall be punished by imprisonment for a term between one and ten years.

(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article in a particularly cruel or humiliating manner or if on the same occasion a number of perpetrators perform a number of acts of sexual intercourse or e

¹ Krivični zakon Federacije Bosne i Hercegovine (Službene novine FBiH, br. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 i 76/14, 46/16 i 75/17)

equivalent sexual acts against the same victim, shall be punished by imprisonment for a term between three and fifteen years.

(3) If, by the criminal offence referred to in paragraph 1 of this Article, the death of the raped person is caused, or serious bodily injury is inflicted on the raped person or his health is severely impaired, or the raped female is left pregnant, the perpetrator shall be punished by imprisonment for not less than three years.

(4) The punishment referred to in paragraph 2 of this Article shall be imposed on whoever perpetrates the criminal offence referred to in paragraph 1 of this Article out of hatred on the grounds of national or ethnic origin, race, religion, sex or language.

(5) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against a juvenile, shall be punished by imprisonment for not less than three years.

(6) Whoever perpetrates the criminal offence referred to in paragraphs 2, 3 and 4 of this Article against a juvenile, shall be punished by imprisonment for not less than five years.

(7) If, by the criminal offence referred to in paragraph 2 of this Article, the consequences referred to in paragraph 3 of this Article are caused, the perpetrator shall be punished by imprisonment for not less than five years.

Criminal Code of Republika Srpska²

Under the RS Criminal Code, the criminal offense of rape is covered in Chapter XIV – Criminal offenses against sexual integrity.

Rape

Article 165

Whoever coerces another person into a sexual intercourse or any other equivalent sexual act by force or threat of immediate attack upon life or limb, or life or limb of someone close to that person, shall be punished by imprisonment for a term between three and ten years.

In the event that the criminal offence referred to in paragraph (1) of this Article has been committed against a minor or in a particularly cruel and degrading manner or if on the same occasion the victim was raped by several perpetrators or the rape was perpetuated out of hatred or if the criminal offence has resulted in grievous bodily injury or a serious impairment of health or pregnancy of the female victim, the perpetrator shall be punished by imprisonment for a term between five and fifteen years.

Criminal Code of Brcko District³

Under the Criminal Code of Brcko District, the criminal offense of rape is covered in Chapter XIX – Criminal offenses against sexual freedom and moral.

Rape

Article 200

(1) A person who compels another person to sexual intercourse or an act equal to sexual intercourse by use of force or by threat of direct attack on life and body of that person, or life and body of somebody close to that person, shall be sentenced to prison from one three to ten years.

² Krivični zakonik Republike Srpske (Službeni glasnik Republike Srpske, br. 64/17).

³ Krivični zakon Brčko distrikta Bosne i Hercegovine (Službeni glasnik Brčko distrikta BiH, br. 10/03, 45/04, 06/05, 21/10 i 9/13).

(2) If the offence referred to in Paragraph 1 of this Article was committed in an extremely brutal or humiliating way, or if several sexual intercourses, or sexual acts equal to them, involving the same victim were committed by several persons, the perpetrator shall be sentenced to prison from three to fifteen years.

(3) If the offence referred to in Paragraph 1 of this Article resulted in death of the raped person, or grievous bodily injury, or serious impairment of health, or pregnancy of the raped person, the perpetrator shall be sentenced to at least three years of prison.

(4) A person who commits the criminal offence referred to in Paragraph 1 of this Article out of hatred, shall be imposed the sentence referred to in Paragraph 2 of this Article.

(5) A person who commits the criminal offence referred to in Paragraph 1 of this Article against a juvenile, shall be sentenced to at least three years of prison.

(6) A person who commits the criminal offences referred to in Paragraphs 2, 3 and 4 of this Article against a juvenile, shall be sentenced to at least five years of prison.

(7) If the criminal offence referred to in Paragraph 2 of this Article resulted in consequences referred to in Paragraph 3 of this Article, the perpetrator shall be sentenced to at least five years of prison.

2. Based on the wording of those provisions, is the provided definition of rape:

- a) Gender specific, covering women only FBIH/NO; RS/NO; BD/NO
- b) Gender neutral, covering all persons FBIH/YES; RS/YES; BD/YES
- c) Based on the lack of consent of victim FBIH/NO; FBIH/NO; FBIH/NO
- d) Base
d on the use of force or threat FBIH/YES; RS/YES; BD/YES
- e) Some combination of the above. N/A
- f) Does it cover only vaginal rape? FBIH/NO; RS/NO; BD/NO
- g) Does it cover all forms of penetration? NONE OF THE CCs PROVIDE SPECIFIC FORMS OF PENETRATION.
- h) Is marital rape in this provision explicitly included? FBIH/NO; RS/NO; BD/NO
- i) Is the law silent on marital rape? FBIH/YES; RS/YES; BD/YES
- j) Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?

Amnesty International's research has not covered this issue to date.

- k) Is marital rape excluded in the provisions, or is marital rape not considered as a crime?

Amnesty International's research has not covered this issue to date.

3. Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.

FBIH/NO; RS/NO; BD/NO.

4. What is the legal age for sexual consent?

FBIH:14

RS:15

BD:14

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

RS Criminal Code provides an exception for sexual activity between peers. According to Article 172 (6) of the Criminal Code, sexual intercourse or an equivalent sexual act with a child under fifteen years of age is not a punishable offense if 'there is no significant difference in mental or physical maturity between him [defendant] and a child'.

FBIH Criminal Code and Brcko District Criminal Code do not include similar provisions.

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape

Federation BiH:

Criminal sanctions for the 'basic' form of rape range between one and ten years of imprisonment.

In addition, Criminal Code of FBiH provides for aggravated forms of the offense, including:

- a) rape which was committed in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders, which is punishable by three to 15 years of imprisonment;
- b) rape which resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy, which is punishable by a minimum term of three years;
- c) rape committed out of hatred, which is punishable by three to 15 years of imprisonment;
- d) rape committed against a juvenile⁴, which is punishable by a minimum sentence of three years;
- e) rape, which was committed against a juvenile in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders; which resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy; or out of hatred, which is punishable by a minimum sentence of five years;
- f) rape, which was committed in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders, and resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy, which is punishable by imprisonment for a minimum term of five years.

Criminal Code of FBiH additionally prescribes sanctions for Sexual Intercourse with a Helpless Person (Article 204), Sexual Intercourse by Abuse of Position (Article 205), Forced Sexual Intercourse (Article 206), Sexual Intercourse with a Child (Article 207), Lewd Behaviour (Article 208), etc., however, only aggravated cases of the offence of Sexual Intercourse with a Helpless Person (Article 204) are subject to sentences equivalent to those prescribed for rape.

Republika Srpska:

⁴ Laws across BiH define 'juvenile' as a person under the age of 18. See Article 1 (14) of Criminal Code of BiH, Article 2 (10) of the Criminal Code of the Federation BiH, and Article 2 (3) of the Republika Srpska Law on protection of children and juveniles in the criminal process, RS Official Gazette 13/2010 and 61/2013.

Criminal sanctions for the 'basic' form of rape range between three and ten years of imprisonment.

In addition, RS Criminal Code includes aggravated forms of the offense, including:

- a) If the rape is committed against a child over 15 years of age or in a particularly cruel or degrading manner or by more offenders or out of hatred or if the criminal offence results in grievous bodily harm or serious effect on health or pregnancy of the female victim, the offender shall be punished by prison term of between five and fifteen years.
- b) If the rape results in the death of the victim, the perpetrator shall be punished by imprisonment term of minimum ten years.

NB:

- Minimum criminal sanction for the 'basic' form of rape in the Republika Srpska are higher than in the Federation BiH (three and one year of imprisonment, respectively).
- Minimum criminal sanction for aggravated offenses in the Republika Srpska are also higher than the same in the Federation BiH (five and three years of imprisonment, respectively). The exception to this is in cases of rape of a juvenile and if the rape was committed in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders; which resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy; or out of hatred, for which Federation BiH Criminal Code envisages a minimum sentence of five years of imprisonment without prescribing the maximum term.
- Republika Srpska Criminal Code prescribes a minimum sentence of 10 years of imprisonment for the offense that results in the death of the victim, without providing for the maximum sentence.

Brcko District:

Criminal sanctions for the 'basic' form of rape range between three and ten years of imprisonment.

In addition, Brcko District Criminal Code includes aggravated forms of the offense, including:

- a) If it was committed in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders, which is punishable by three to 15 years of imprisonment;
- b) If it resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy, which is punishable by a minimum term of three years of imprisonment;
- c) If it were committed out of hatred, which is punishable by three to 15 years of imprisonment;
- d) if committed against a juvenile, which is punishable by a minimum sentence of three years;
- e) if committed against a juvenile in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders; which resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy; or out of hatred, which is punishable by a minimum sentence of five years;

if committed in an aggravated, cruel or degrading manner, or if it was performed by multiple offenders, and resulted in grievous bodily injury, a serious effect on health, the death of the victim or pregnancy, which is punishable by imprisonment for a minimum term of five years.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

Victims of rape in criminal proceedings are entitled to pecuniary compensation from convicted offenders, however evidence suggests that many are unfamiliar with their rights and few seek to obtain reparation in criminal proceedings. According to NGOs providing legal and psychological support to women victims of sexual violence,

victims are rarely advised to legally claim compensation in criminal proceedings and do not receive legal aid necessary to undertake the highly technical compensation process, resulting in extremely few, in some jurisdictions zero, registered cases of compensation.⁵ Victims who fail to claim compensation in criminal proceedings have an opportunity to file compensation claims in separate civil proceedings, however, available analyses show that, similarly, very few victims exercise this right, indicating widespread reluctance of prosecutors and judges to pursue this avenue.⁶ In general, survivors of rape, sexual violence (as well as domestic violence) have limited access to information, tend to be poorly acquainted with their rights, and receive inadequate legal and psychological support throughout the legal process.⁷

See 26 C below for challenges in obtaining reparations for rape in conflict, an aspect which Amnesty International has researched in detail, and which are not dissimilar from the problems of reparation for contemporary cases of rape and sexual violence.

Aggravating and mitigating circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

Criminal Codes in BiH (including Criminal Codes of Federation BiH, Republika Srpska and Brcko District) include general principles on the imposition of punishment, including consideration of all relevant circumstances, aggravating and mitigating, under which an offense was committed.⁸ These general principles apply to all criminal offenses, including rape.

Additionally, each criminal code provides for specific aggravating forms of rape. See details below

a) Is rape by more than one perpetrator an aggravating circumstance?

RS/YES; FBIH/YES; BD/YES [NB: All three criminal codes provide for higher sentences in cases where rape was committed by multiple perpetrators]

b) Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference)

All three criminal codes prescribe higher minimal sentences for rape or forced sexual intercourse committed against a juvenile or a child. The codes also distinguish a separate crime of 'sexual intercourse with a helpless person', for which they envisage similar sentences as for rape/aggravated cases of rape (in FBIH); equivalent minimal sentences as for rape/aggravated cases of rape, but without providing for the maximum limit when offense was committed in particularly cruel or degrading manner or resulted in serious injury or death of the victim (in the RS and BD). On the other hand, the criminal offense of 'sexual intercourse through abuse of office', which covers compelled sexual intercourse as a result of imbalance of power, does not meet the definition of rape which requires use of force or threat of use of force for the commission, carries lesser sentences in all three criminal codes.

c) Is rape by spouse or intimate partner an aggravating circumstance?

FBIH/NO; RS/NO; BD/NO

⁵ Coalition of NGOs, "Report of civil society organizations on the implementation of the concluding observations and recommendations of CEDAW for Bosnia and Herzegovina," January 2019.

⁶ European Women's Lobby, "Mapping of policies and legislation on violence against women and Istanbul Convention in Bosnia and Herzegovina," 2014

⁷ Organization for Security and Cooperation in Europe (OSCE), "Criminal responsibility and penalties for perpetrators of domestic violence", December 2011, European Women's Lobby, "Mapping of policies and legislation on violence against women and Istanbul Convention in Bosnia and Herzegovina," 2014; Coalition of NGOs, "Report of civil society organizations on the implementation of the concluding observations and recommendations of CEDAW for Bosnia and Herzegovina," January 2019.

⁸ General principles on the imposition of punishments take into account all circumstances bearing on the level of punishment, and in particular, the degree of culpability, the motives for committing the offense, the degree of danger and injury to person, the circumstances in which the offense was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal offense. See Article 49 (1) of the FBIH Criminal Code, Article 52 (1) of the Republika Srpska Criminal Code and Article 49 (1) of the Brcko District Criminal Code.

9. Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify.

No specific mitigating circumstances relating to the criminal offense of rape exist in criminal codes in BiH. As above, all three criminal codes provide for general principles on the imposition of punishment, including consideration of all relevant circumstances, aggravating and mitigating, under which an offense was committed. These general principles apply also to the criminal offense of rape and include consideration of the degree of criminal responsibility, motivation for committing an offense, the degree of injury or harm inflicted on the victim, circumstances and context in which offense was committed, prior history of the offender, offender's personal circumstances and his behaviour following the commission of offense. Courts are not limited by any formal rules and, to some degree, judges can use their experience and judgement to determine mitigating and aggravating circumstances in each specific case.

10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response?

FBIH/NO; RS/NO; BD/NO

If so, at what stage and what are the consequences?

Amnesty International Research has not to date covered this issue.

11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify.

a. if the perpetrator marries the victim of rape? FBIH/NO; RS/NO; BD/NO

b. if the perpetrator loses his "socially dangerous" character or reconciles with the victim? FBIH/NO; RS/NO; BD/NO.

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)?

FBIH/YES; RS/YES; BD/YES.

13. Is rape reported to the police prosecuted ex parte (private prosecution)?

FBIH/NO; RS/NO; BD/NO

14. Is plea bargain or "friendly settlement" of a case allowed in cases of rape of women?

FBIH/YES; RS/YES; BD/YES.

15. Is plea bargain or "friendly settlement" of a case allowed in cases of rape of children?

Amnesty International Research has not to date covered this issue.

16. Please provide information on the statute of limitations for prosecuting rape.

Federation BiH: Five years for the 'basic' form of rape; 10-15 years for aggravated forms of rape.

Republika Srpska: Five years for the 'basic' form of rape; 10-15 years for aggravated forms of rape.

Brcko District: Ten years for the 'basic' form of rape; Fifteen years for some aggravated forms of rape.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

FBIH/NO; RS/NO; BD/NO.

18. Are there mandatory requirements for proof of rape, such as medical evidence or the need for witnesses? If yes, please specify.

All three criminal codes/criminal procedure codes envisage a standard procedure for collecting evidence which applies to all criminal offenses, including offense of rape.

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?

FBiH/YES⁹; RS/YES¹⁰; BD/YES¹¹

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.

Victims of rape and sexual violence in Federation BiH, Republika Srpska and Brcko District qualify as vulnerable witnesses under applicable Witness Protection laws, however, in practice, analyses have found that they rarely receive psychological, social and legal assistance to which they are entitled in criminal proceedings.¹²

War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity? YES

22. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? NO

23. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES

24. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

In the period 2004-2020, courts registered 219 cases against 346 defendants involving rape or sexual violence committed in conflict. Of those, 161 cases (involving 229 defendants) have been closed.¹³

In 2019, 16 cases, involving 24 defendants, were closed; including 13 cases before Court of BiH and three at entity levels and Brcko District. In total, 17 defendants were sentenced amounting to 125 years in prison; five were acquitted; one defendant died during the trial and the proceedings against one defendant were ceased due to illness of the defendant.

At the time of submission, 58 cases, involving 117 defendants, are pending before various courts in BiH; 38 are pending before Court of BiH and 20 before courts at the entity level and Brcko District.

Other

26. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

⁹ Article 279 (1) of the Federation BiH Criminal Procedure Code.

¹⁰ Article 279 (1) of the Republika Srpska Criminal Procedure Code.

¹¹ Article 264 of the Brcko District Criminal Procedure Code.

¹² European Women's Lobby, "Mapping of policies and legislation on violence against women and Istanbul Convention in Bosnia and Herzegovina," 2014

¹³ All figures cited in this section were provided by the Organization for Security and Cooperation (OSCE) Mission to Bosnia and Herzegovina, 21 May 2020, correspondence available to Amnesty International.

A. Slow rate of prosecution and backlog of cases

Despite considerable progress made until 2016, the prosecution of war crimes cases, including cases of wartime rape and sexual violence, dramatically slowed down over the last several years. As of June 2019, there were still over 250 war crimes cases pending before various courts in BiH.¹⁴ Systemic deficiencies in the Prosecutor's Office, including a persistent backlog of cases, ineffective case management and a remarkable decline in conviction rates, threaten to leave many victims without justice, truth and reparation.¹⁵

At the time of writing, BiH Council of Ministers had not adopted the revised War Crimes Strategy, which is meant to address the prosecution challenges, improve the allocation of cases among different courts and set new deadline for their completion. According to the now expired War Crimes Strategy adopted in 2008, all war crimes cases were to be completed by 2023; an unachievable goal given the current rate of prosecutions. Without significant surge in capacity and prosecutions, it could take another decade to clear the existing backlog of cases. Considering that the crimes of wartime rape and sexual violence date back to 1992-1995 period, every additional year of delay means the likely loss of many suspects, witnesses and victims and an increased chance of impunity.

B. Prosecutions under inadequate criminal code

The courts across BiH continue to rely on the Criminal Code of the former Socialist Federal Republic of Yugoslavia (SFRY Criminal Code) in prosecuting crimes committed during the conflict. Unlike the more progressive BiH Criminal Code, the SFRY Criminal Code has serious gaps when applied to crimes under international law. Most notably, it does not criminalize crimes against humanity and does not recognize the mode of liability of command and other superiors' responsibility, in contradiction with international standards. While rape is defined as a war crime, the full array of crimes of sexual violence recognized in international law (including sexual slavery and forced pregnancy) is not defined in the SFRY Criminal Code.¹⁶ This has serious consequences for the adjudication of cases involving rape and other war crimes of sexual violence, as many such acts have been committed in the context of widespread attacks against the civilian population and could, therefore, constitute crimes against humanity.

This has become of greater concern since the 2013 ruling by the European Court for Human Rights (ECtHR) in the case *Maktouf and Damjanović v. Bosnia and Herzegovina*.¹⁷ The ECtHR ruling found that the application of the sentencing provision of the BiH Criminal Code in *Maktouf and Damjanović* constituted a violation of Article 7 of the European Convention of Human Rights (ECHR), which prohibits the retroactive application of criminal law if it is to the disadvantage of the accused. The ruling stated that the court in BiH ought to have used the more lenient sentencing provisions of the SFRY Criminal Code¹⁸ when sentencing the defendants who were charged with war crimes and received penalties that were within the lower range of punishment foreseen under the BiH Criminal Code.¹⁹

Although the ECtHR ruling did not provide a further view as to whether the sentencing provisions of the BiH Criminal Code, especially those in the higher range, i.e., 15 years or above, are compatible with Article 7, courts in BiH have interpreted it as requiring that the more lenient SFRY Criminal Code be applied to cases of war crimes and

¹⁴ OSCE, War crimes case management at the Prosecutor's Office of Bosnia and Herzegovina, June 2019. See also OSCE, Observations on the National War Crimes Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road "Category A" cases, September 2018.

¹⁵ Ibid.

¹⁶ Under provisions for war crimes provided by SFRY Criminal Code of 1976, sexual violence can be prosecuted as torture, inhumane treatment or the causing of great suffering or serious injury to bodily integrity or health. See chapter XVI of the SFRY Criminal Code, entitled "Criminal Acts against Humanity and International Law." Also, see Organization for Security and Cooperation in EUROPE (OSCE), "Combating Impunity for Conflict-related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges, An Analysis of Criminal Proceedings before the Courts of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District between 2004-2014", Sarajevo, June 2015. In April 2017, UN Human Rights Committee expressed concern about the practice of courts in BiH to prosecute the crimes committed in conflict under the SFRY Criminal Code and instructed BiH to "ensure that judicial authorities in all entities pursue efforts aimed at harmonising jurisprudence on crimes committed during the conflict, and apply the law in a manner consistent with the applicable international legal standards." See UN Human Rights Committee, Concluding observations on the third periodic report of Bosnia and Herzegovina, paras. 15-16, CCPR/C/BIH/CO/3, April 2017.

¹⁷ *Maktouf & Damjanović v. Bosnia & Herzegovina* (2312/08 and 34179/08), European Court Grand Chamber (2013).

¹⁸ Article 142 of the SFRY Criminal Code codifies rape only as a crime against the civilian population and foresees a minimal sentence of five years of imprisonment. As a comparison, Article 173 of the BiH Criminal Code foresees a minimum of ten years of imprisonment for the same crime.

¹⁹ The principle of non-retroactivity under Article 7 of ECHR prohibits the retrospective application of criminal law where it is to an accused's disadvantage. For more discussion on the effects of the *Maktouf & Damjanović v. Bosnia & Herzegovina* decision on the proceedings, see OSCE Mission to BiH, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina (Entity Courts, 2004-2014)*, June 2015, p. 17-18.

genocide.²⁰ While cases of crimes against humanity, including some cases of wartime sexual violence, have continued to be tried under the BiH Criminal Code, the BiH Constitutional Court's interpretation of the ECtHR ruling affected trials and sentencing in all other genocide and war crimes proceedings before the Court of BiH. In at least 23 instances, this has led to the reopening of cases with final and binding decisions and a reduction of the sentences handed down to perpetrators of crimes of sexual violence.²¹

Beyond the impact on sentencing practices, in several cases, the courts have also interpreted the ECtHR ruling as requiring the re-qualification of acts in order to apply the SFRY Criminal Code. Amnesty International considers that the ECtHR ruling addresses only the sentencing practice and, therefore, does not preclude the courts in BiH from using the definitions of crimes under the BiH Criminal Code. Article 7 of the ECHR and Article 15 of the International Covenant on Civil and Political Rights allow for the trial and punishment of any person for any act, which, at the time of its commission, was criminal under international law, even if appropriate domestic legislation was not in force at the time of the commission of the act. The view of the courts in BiH that the criminal code in force at the time of the conflict should typically apply has resulted in a situation where some serious crimes under international law, including crimes of sexual violence, are not adequately classified and tried.

These deficiencies in the SFRY Criminal Code make it an unsuitable normative framework to address sexual violence in armed conflicts.²²

C. Challenges in accessing reparations

Victims of wartime rape and sexual violence continue to face numerous challenges in accessing all forms of reparation, including compensation for the harms suffered and regular assistance by the authorities. The few positive measures related to the provision of special monthly allowances - connected to the status of a victim of war - and support for the victims, remain fragmented and differ vastly from jurisdiction to jurisdiction perpetuating the sense of legal uncertainty. BiH still does not have a state-level Law on Protection of Victims of Wartime Torture. The current situation whereby the rights of victims of wartime torture, including victims of sexual violence, are regulated at the level of entities, Federation of BiH and Republika Srpska (RS), and the Brčko District is inherently discriminatory, with civilian victims of war's status and access to social benefits and support being dependent on their place of residence, rather than universally guaranteed by the state.

Compensation in criminal proceedings

Financial compensation granted to victims in criminal proceedings remains by and large unenforceable. To date, courts in BiH have ruled in 17 criminal proceedings, confirmed at the second instance, to order convicted perpetrators to pay compensation to the victims of conflict-related sexual violence.²³ While this is a positive development, to date, the court decisions have been implemented and compensation paid to the victims in one or two such cases.²⁴ The perpetrators often lack funds, making it impossible for the courts to enforce such decisions. BiH does not have a victim compensation fund or alternative mechanism to compensate survivors of criminal acts in cases when the convicted perpetrators are not able to pay damages, leaving the victims unable to effectively enforce their right to this form of compensation.

Compensation in civil proceedings – application of statute of limitations

²⁰ See OSCE, *Towards Justice for Survivors*, p. 13 and Korner, Joanna, *Processing of War Crimes at the State Level in Bosnia and Herzegovina*, June 2016, p.29, available at: <http://www.osce.org/mission-to-bosnia-and-herzegovina/247436>

²¹ See OSCE Mission, *Towards Justice for Survivors*, p. 13-14. See also Association of NGOs, *Follow up Report of the Implementation by BiH of the Recommendations issued by the UN Committee on Elimination of Discrimination against Women*, July 2015, para. 13.

²² Amnesty International, *Submission to UN Human Rights Committee*, March 2017 (Index: EUR 63/5554/2017). Also, see Amnesty International, *Whose Justice?*, p. 30.

²³ Email correspondence with TRIAL Int., June 2017. Examples of cases confirmed in the second instance are: *BiH v. Marković Bosiljko*, Case no. S1 1 K 012024 15 KRZ, 29 February 2016, and *BiH v. Slavko Savić*, Case no. S1 1 K 017213 15 KRZ, 24 November 2015.

²⁴ Amnesty International correspondence with TRIAL International, 19 May, 2020. See also Detektor.ba, "Bosnian war rape convicts compensate victim for the first time," 17 September, 2019, <https://detektor.ba/2019/09/17/bosnian-war-rape-convicts-compensate-victim-for-first-time/?lang=en>; Trial International, "Perpetrator convicted of wartime rape has paid compensation to the survivor," 14 May, 2020, <https://trialinternational.org/latest-post/perpetrator-convicted-of-wartime-rape-has-paid-compensation-to-the-survivor/>

The vast majority of victims are still required to pursue compensation claims in separate civil proceedings, and do so before local courts that lack adequate witness protection.²⁵ Separate civil proceedings often compromise the privacy of witnesses and expose victims to unnecessary re-traumatization when they have, yet again, to provide their testimonies. While pursuing claims before civil courts, victims bear the burden of proof, have to hire a lawyer and, until recently, have been responsible for the payment of prohibitively high court fees in instances when their claims have been dismissed. Although in March 2018, the BiH Constitutional Court issued a decision²⁶ stating that court fees imposed on unsuccessful claimants posed an excessive burden on the victims of wartime sexual violence, the judicial practice, which has so adversely affected victims, continues.²⁷

What makes the situation of claimants even more precarious is the fact that those who pursue compensation claims in separate civil proceedings routinely face rejection of their cases, owing to the widespread application of the statute of limitations to reparation claims by all courts in BiH. Although in BiH the statute of limitations does not apply for the crimes under international law, the courts across the country issued decisions stating that, if directed at the state or the entities, the claims for pecuniary damages resulting from war crimes were subject to the statute of limitations.²⁸

That view has resulted in widespread dismissal of compensation claims filed by the survivors before courts in all parts of the country in civil proceedings, forcing survivors to pay high court fees or face administrative seizure of their assets.²⁹ Amnesty International considers that the BiH Constitutional Court's position stands in the way of survivors' ability to realise their right to reparation and is contrary to international standards and practice. As the statute of limitations does not apply to crimes under international law, such as genocide, crimes against humanity and war crimes, they should not apply to criminal or civil proceedings in which victims of crimes against humanity seek full reparation. Due to the long-term physical and psychological effects of torture on the victims, statutes of limitations should not apply in these cases, as they deprive the victims of their right to redress, compensation and rehabilitation.³⁰

In August, the UN Committee against Torture issued a landmark ruling in a case concerning compensation for a victim of wartime rape, filed by TRIAL International with support of Amnesty International.³¹ In the ruling, the Committee stated that the victims should not be prevented from receiving integral redress, including compensation, on the basis of the statute of limitations, because the perpetrators were unknown or unable to pay compensation awarded by courts. Insisting that the state had subsidiary responsibility in these cases, the Committee requested BiH to provide adequate compensation to the victims, ensure their immediate access to medical and psychological care, and establish an effective reparation scheme at the national level to provide redress to all victims of torture, including sexual violence.

The absence of state-wide legislation on administrative reparation, the inability of the authorities to enforce court decisions on compensation and BiH Constitutional Court's position on statutory limitations leave many victims without an enforceable right to a remedy, contrary to international law.³²

²⁵ For discussion of challenges of seeking compensation in civil proceedings, see TRIAL, "Enforcement of damage compensation claims of victims of war in criminal proceedings in Bosnia and Herzegovina, Situation, Challenges and Perspectives", Sarajevo 2016, and, TRIAL, "Compensating survivors in criminal proceedings: Perspectives from the field, December 2016", available at: https://trialinternational.org/wp-content/uploads/2016/11/TRIAL-International_compensation-publication_EN_web.pdf.

²⁶ Klix, "Ustavni sud BiH: Zrtva silovanja ne mora platiti sudske troskove," 3 April 2018. <https://www.klix.ba/vijesti/bih/ustavni-sud-bih-zrtva-silovanja-ne-mora-platiti-sudske-troskove/180403049>.

²⁷ TRIAL International, *Strategic judgment of the Constitutional Court of BiH*, April 2018, <https://bit.ly/2PLfJov>

²⁸ See for example BiH Constitutional Court Decision of 10 November 2015, referenced at: <http://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=58140>, and Decision of 21 September 2016, available at: <http://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=63824>, as well as *Mustafa Karahasanović & Others v. Republika Srpska*, (AP-4128), BiH Constitutional Court, 28 March 2014.

²⁹ Also, interview with Jasmin Mešković, president of the BiH Association of Camp Inmates, 11 November 2016 and 28 March 2017, Sarajevo.

³⁰ The UN Human Rights Committee also expressed concern about the opinions of the BiH Constitutional Court, which "limit the ability of victims to effectively claim compensation". In 2017, the Committee urged BiH to "urgently adopt legislative and practical measures to ensure that survivors of torture and sexual violence have access to effective remedies". See UN Human Rights Committee, *Concluding observations on the third periodic report of Bosnia and Herzegovina*, CCPR/C/BIH/CO/3, para. 17-18.

³¹ UN Convention against Torture, *Decision adopted by the Committee under article 22 of the Convention*, CAT/C/67/D/854/2017, 11 September 2019.

³² Art. 14 of the UN Convention against Torture states that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". Also, see UN Committee against Torture, *General Comment no. 3 on the implementation of Art. 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/GC/3, November 2012, paras. 38-39: The states have to ensure that the that the victims have not only de

jure, but also de facto access to timely and efficient mechanisms to exercise their right to compensation and remedy of violation and address formal and informal barriers that could prevent access. The failure of any State Party to implement a ruling that ordered reparation to victims of torture represents a “significant impediment to the right to redress”.