

# JUDICIAL BENCHBOOK

## Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina



**Sarajevo, 2014**

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# Letter from the High Judicial Prosecutorial Council and the Association of Women Judges of Bosnia and Herzegovina

The purpose of the DV Benchbook is to improve the judicial response to domestic violence and increase the consistency of judicial practice in cases of domestic violence in BiH. While this resource represents the first of its kind in BiH, there are numerous similar resources throughout North America, Western and Northern Europe and other locations across the globe.<sup>1</sup> This fact is a testament to the challenge that domestic violence presents to courts and the broader criminal justice system. Indeed, domestic violence constitutes one of the most complicated and difficult socio-criminal issues confronted by judiciaries and criminal justice communities the world over. As such, a resource that can aid courts in evaluating and understanding cases of domestic violence – including deepening critical understanding of social factors identified as mitigating or aggravating – can improve judicial practice and increase judicial consistency. Moreover, in line with the purpose of punishment as listed in the respective criminal codes, the information provided in the DV Benchbook can support the judiciary's ability to achieve its stated goals:

- expressing community condemnation for this criminal offence
- preventing the perpetrator from committing the same criminal offence in the future
- preventing others from perpetrating this criminal offence
- increasing the awareness of citizens of the danger of this criminal offence and the fairness of punishing perpetrators.<sup>2</sup>

The DV Benchbook represents the best professional judgement of the members of the DV Judge Panel and those collaborating on the development of the resource. It is important to note that this resource constitutes the first of its kind – as a resource on the subject of domestic violence as well as the methodology used to develop the content. The topic of domestic violence was proposed by judges who recognized that judicial practice in BiH had

<sup>1</sup> See for example from the United Kingdom: Sentencing Guidelines Council, 'Overarching Principles: Domestic Violence – Definitive Guideline' (2006). From the Netherlands: Ministerie van Volksgezondheid, Welzijn en Sport, 'Checklist Rechterlijke Macht', in *Uitvoeringsadvies wet Tijdelijk Huisverbod: Lessen uit de Pilots & Handvatten voor Implementatie* (Den Haag: Ministerie van Volksgezondheid, Welzijn en Sport, 2008), 70. And from the United States: Administrative Office of the Courts Department of Family Administration, 'Maryland Judge's Domestic Violence Resource Manual' (Annapolis: Maryland Judicial Center, 2009); Florida Office of the State Courts Administrator, 'Florida Domestic Violence Benchbook' (Tallahassee, Florida: Office of Court Improvement, 2012); North Carolina Administrative Office of the Courts, 'North Carolina Domestic Violence Best Practices Guide for District Court Judges' (Raleigh, NC: North Carolina Administrative Office of the Courts, 2012).

<sup>2</sup> FBiH Criminal Code, Article 41; RS Criminal Code, Article 28; Brčko District Criminal Code, Article 7.

room for improvement. The content was entirely and completely developed **by judges – for judges**. And while the methodology included support from DCAF/AI and a consultant, that support was limited to identifying and preparing materials and resources for the DV Judge Panel to review. The DV Judge Panel was responsible for outlining and developing the details of each recommendation made within the DV Benchbook.

The unfortunate reality is that domestic violence impacts our communities and our courts – and that impact is likely to continue to grow. Our best intention is to work together to improve understanding of this problem in order to improve our methods and our mechanisms for addressing it within the judiciary. Thus it is our hope that the DV Benchbook will serve as a cornerstone in improving our understanding and developing innovative solutions to this profound problem.

**Ružica Jukić**

Vice-President

High Judicial and Prosecutorial Council of Bosnia and Herzegovina

**Adisa Zahiragić**

President

Association of Women Judges in Bosnia and Herzegovina

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# Contents

<b>Project Activity Background and Acknowledgements</b> .....	3
Atlantic Initiative .....	4
DCAF .....	5
Gender and Justice Reform Project in Bosnia and Herzegovina .....	5
<b>Reviews</b> .....	6
Professor, Dr. Ivanka Marković .....	6
Judge Malik Hadžiomeragić .....	6
Prosecutor Hajrija Hadžiomerović-Muftić .....	6
Professor, Dr. Haris Halilović .....	7
<b>Introduction</b> .....	8
The Judiciary: Role, Scope and Leadership .....	8
Introduction to Domestic Violence: An Overview and Definitions .....	10
Causes of violence .....	10
Types of violence and abuse .....	11
<b>Recommendations</b> .....	16
<b>1. Aggravating factors</b> .....	17
1.1. Recidivism .....	17
1.2. Duration of domestic violence over a long period of time (factual recidivism) .....	17
1.3. Scope and type of violence .....	18
1.4. Vulnerability of victims .....	20
1.5. Degrading (additionally humiliating) the victim .....	21
1.6. Prior record of a domestic violence victim's requests for assistance from public and other institutions (police, prosecutor's office, social work centres) and non-governmental organizations that provide specialized assistance to victims of domestic violence .....	21
1.7. Placing the victim in a safe house .....	25
1.8. Child witnesses of domestic violence .....	22
1.9. Abuse of alcohol or drugs .....	22
1.10. Defendant's criminal history .....	23
1.11. Deliberate delay of criminal proceedings by the defendant .....	24
1.12. Defendant's position of social power or authority .....	24
1.13. Psychological violence – part of abuse in a case of physical domestic violence .....	24

<b>2. Mitigating factors: Unjustified qualifications and possible exceptions</b> .....	25
2.1. Defendant’s position of social power or authority .....	25
2.2. Defendant’s family status .....	25
2.3. Significantly decreased mental capacity .....	26
2.4. Family’s economic social status/perpetrator as breadwinner .....	26
2.5. Defendant’s “good behaviour” before the court .....	26
<b>3. Other circumstances of relevance for sentencing</b> .....	28
3.1. Remorse .....	28
3.2. Victim’s attitude .....	28
<b>4. Court actions pertaining to the victim of domestic violence</b> .....	30
4.1. Protection of the rights and interests of domestic violence victims during court proceedings .....	30
4.2. Victim’s risk assessment by the court pertaining to domestic violence .....	31
4.3. Taking measures to protect the victim as a witness of domestic violence .....	32
4.4. Victim gives up the idea of testifying .....	32
4.5. Property claim/damage compensation .....	32
<b>5. Court ruling in a criminal proceeding</b> .....	34
5.1. “More lenient” qualification of domestic violence – indictment confirmation stage .....	34
5.2. Court actions following a request for issuing a sentencing warrant .....	34
5.3. Guilty plea agreement .....	35
5.4. Conditional/suspended sentence .....	36
5.5. Revocation of suspended sentence .....	36
5.6. Imposing protective supervision with a suspended sentence .....	37
5.7. Contents of explanation of a court judgment .....	38
5.8. Verbal warning and information by the court .....	38
5.9. Contents of a court decision imposing a security measure in a domestic violence case .....	38
5.10. Standard of proof for imposing a security measure of mandatory psychiatric treatment (i.e. protective supervision, visiting certain psychological services and following their advice) .....	39
5.11. Implementation of proceedings in domestic violence cases without unjustified delays .....	39
<b>6. Psychological violence – establishment</b> .....	40
6.1. Psychological violence as a method of perpetrating domestic violence – standard of proof .....	40
<b>7. Recommendations for the prosecutor’s office</b> .....	41
7.1. Preparing a case file on domestic violence .....	41
7.2. Special recommendations for the prosecutor’s office in domestic violence cases .....	42
<b>8. Training and leadership</b> .....	45
<b>9. Sentencing policy of higher-instance courts</b> .....	46

## Project Activity Background and Acknowledgements

In autumn 2012 DCAF and the Atlantic Initiative (AI) initiated a domestic violence resource development project under the auspices of the ongoing Gender and Justice Reform project funded by the Norwegian Ministry of Foreign Affairs. **The Association of Women Judges of Bosnia and Herzegovina (AWJ)** originally proposed an activity to address domestic violence in early 2012. After reviewing existing research and resource materials on domestic violence in Bosnia and Herzegovina (BiH) and holding a series of brainstorming and consultation meetings with AWJ members, a clear project activity began to emerge. It is therefore with a great debt of gratitude that DCAF/AI wish to extend a heartfelt thank you to the AWJ, and in particular **Adisa Zahiragić, Rada Bjeljic** and **Amela Mahić-Samardžić** for their ideas, inspiration and direction.

The project activity was consistently focused on developing a resource **for judges, by judges**; a resource that could be used to improve judicial response to domestic violence and increase consistency of judicial practice in BiH. We were fortunate enough to be able to identify nine judges with the necessary dedication and interest. We refer to them as the *Domestic Violence Judge Panel* (DV Judge Panel), and it is their wisdom, vision and leadership that ultimately led to this unique and groundbreaking publication. While the *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH (DV Benchbook)* was not drafted by the panel members themselves, it was entirely developed at their direction, with their input, and finally validated by them with a consensus vote. It is our pleasure to acknowledge and give credit to the DV Judge Panel for making this project a successful reality.

- **Rada Bjeljic**, Municipal Court, Sarajevo and member of the AWJ Coordinating Board
- **Jasmina Ćosić**, Municipal Court, Sarajevo and member of the AWJ
- **Sanela Kovač-Grabonjić**, Cantonal Court, Sarajevo and member of the AWJ
- **Amela Mahić-Samardžić**, Municipal Court, Sarajevo and member of the AWJ Coordinating Board
- **Branimir Maletić**, Basic Court, Gradiška
- **Darko Samardžić**, Court of Bosnia and Herzegovina
- **Dragan Uletilović**, Basic Court, Banja Luka
- **Biljana Vučetić**, Basic Court, Banja Luka and member of the AWJ
- **Adisa Zahiragić**, Cantonal Court, Sarajevo and president of the AWJ

We were able to identify judges to participate on the panel with the help of the **High Judicial and Prosecutorial Council** (HJPC), and specifically **Amra Jašarević**, deputy director of the Secretariat. Moreover, the HJPC provided us with de-identified domestic violence criminal cases to use as a point of departure to discuss good practices and common trends in case evaluation and sentencing. Finally, with the support and leadership of the HJPC the DV Benchbook will become institutionalized as a key resource for judges and prosecutors in BiH.

The DV Benchbook was especially enriched by individuals and organizations participating in a series of stakeholder meetings. Local civil society organizations working on domestic violence, social protection services, entity-level gender centres, law enforcement and prosecutors were invited to share their input and insights on the issues they believed most critical to improving the judicial response to domestic violence. The subsequent stakeholder report was used by the DV Judge Panel to identify key areas of practice for review and critical analysis.

The **Judicial and Prosecutorial Training Centre of the Federation of Bosnia and Herzegovina** and the **Judicial and Prosecutorial Training Centre of Republika Srpska** also provided significant support for the project. Moreover, these training centres will continue to play a critically important role in the process of institutionalizing the DV Benchbook in the Bosnia and Herzegovina judiciary by incorporating it as a standard resource in their domestic and gender-based violence training programmes. We would like to give special thanks to the Director of the Training Centre of the Federation of BiH, **Ismet Trumić**, and the Director of the Training Centre of Republika Srpska, **Drago Ševa**. We would also like to thank **Aida Trozić** and **Vanja Pavlović** for their support and guidance throughout the process.

We would also like to express our gratitude and appreciation to the Office of Overseas Prosecutorial Development, Assistance and Training, US Department of Justice, operating out of the US Embassy in Sarajevo (OPDAT programs are funded by the U.S. Department of State). In particular, **Robert Thomson** and **Ruth Plagenhoef** extended a number of significant and important resources in support of the project – including technical assistance, sponsoring training and funding for a study trip on the judicial response to domestic violence.

Finally, DCAF and AI wish to thank **Nenad Galić**, the consultant who supported the project from beginning to end – including preparing the stakeholder report and contributing to drafting and editing the DV Benchbook.

### Atlantic Initiative

The Atlantic Initiative (AI) is a non-governmental organization based in Bosnia and Herzegovina (BiH), which was established in 2009 by a group of university professors, journalists, and analysts. The Atlantic Initiative researches security risks in BiH, issues of NATO integration, the security of women and the implementation of UN resolution 1325, gender and judiciary, and the security of Roma people and returnees in BiH. The AI produces an academic journal on democracy and security in Southeastern Europe, and promotes open and informed debate on BiH's Euro-Atlantic integrations processes. The Atlantic Initiative is well recognized in BiH and regionally as an organization that informs the opinions of the international community and BiH government and policy representatives in the security field.<sup>3</sup>

<sup>3</sup> [www.atlantskainicijativa.org](http://www.atlantskainicijativa.org)

## **DCAF**

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is one of the world's leading institutions in the areas of security sector reform and security sector governance. DCAF provides in-country advisory support and practical assistance programs, develops and promotes appropriate democratic norms at the international and national levels, advocates good practices and conducts policy-related research to ensure effective democratic governance of the security sector. DCAF's gender and security programme works through research, policy and technical advice, and regional projects to support the development of security sectors that meet the security needs of men, women, boys and girls, and the full participation of men and women in security sector institutions and security sector reform processes.<sup>4</sup>

## **Gender and Justice Reform Project in Bosnia and Herzegovina**

The Gender and Justice Reform Project in Bosnia and Herzegovina is a multi-year project implemented by DCAF and the Atlantic Initiative, and funded by the Norwegian Ministry of Foreign Affairs. The project aims to increase the capacities of judges and prosecutors to more effectively integrate gender into their procedures and practices and deliver non-discriminatory justice services. The project also seeks to strengthen the role of women in the justice sector, particularly on the decision-making level. Project activities are intended to result in concrete outputs such as resources and research, as well as developmental outcomes like the creation of change agents in BiH, whether individual or organizational. To that end, the project seeks to provide support, technical assistance and capacity building opportunities to interlocutors, while simultaneously seeking their leadership, direction and expertise throughout the design and implementation of activities.

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<sup>4</sup> [www.dcaf.ch](http://www.dcaf.ch)

# Reviews

## Review excerpts

### **Professor, Dr. Ivanka Marković, Faculty of Law, University of Banja Luka and President of the Council for the Elimination of Domestic Violence in Republika Srpska**

Even after a decade from passing the law which criminalized domestic violence as a separate criminal offense, this form of the criminality is still not treated in the same way as other criminal offenses. This constitutes a violation of basic human rights and freedoms and it should be said that the publication 'Judicial Considerations for Domestic Violence Case Evaluation in BiH' is a significant step towards the establishment of an adequate judicial response to this form of criminality. The recommendations provided in some parts of the publication can eliminate prejudices and correct the understanding of domestic violence as a less serious form of criminality. Judges should send a clear public message with their sentencing policy that domestic violence is not a less serious form of criminality, but a serious violation of basic human rights, such as the right to freedom, physical integrity and the right to life. In order to achieve this, recommendations from this publication should be adopted and incorporated in every specific case. We further recommend the Benchbook to be used in the process of judicial and prosecutorial training.

### **Judge Malik Hadžiomerađić, Supreme Court of the Federation of Bosnia and Herzegovina**

As pointed out in the publication itself – which is its greatest value – it was prepared by judges themselves. This is refreshing news given that papers written by judges and other participants in the BiH judicial system are unfortunately relatively rare. In this case, as many as nine long-standing judges from different courts at all levels of BiH took part in the development of the publication, which guarantees that the publication incorporates various perspectives. The variety of perspectives, as stated in the publication, still led to a consensus and defining of a joint position and recommendations for treatment of both socially and legally important issues in relation to domestic violence.

### **Hajrija Hadžiomerović-Muftić, Prosecutor, Office of the Prosecutor of the Federation of Bosnia and Herzegovina**

It is important to emphasize that the issue of domestic violence in this publication is presented professionally, providing facts about domestic violence, it is methodologically clear and written in an understandable and simple style. This motivates careful reading and provides a wealth of information and a solid basis to all professionals to develop a more efficient and effective strategy to address domestic violence. One could rightfully say that this publication also has social importance, reflected in its ability to raise awareness among professionals,

primarily judges and prosecutors, about this issue. And this publication can also encourage certain state institutions to be more actively involved in the implementation of measures and proposals that forward the practical recommendations of this paper.

**Professor, Dr. Haris Halilović, Faculty of Criminalistics, Criminology and Security,  
University of Sarajevo**

In my opinion, the publication, 'Considerations for Domestic Violence Case Evaluation in BiH,' published by DCAF/AI, is a significant step forward in researching the criminal justice response to domestic violence in Bosnia and Herzegovina. The publication provides concrete recommendations to improve the response to domestic violence supported by proper arguments. I believe that this publication will be very important, not only for judges as its primary target group, but to other professionals in the criminal justice system as well, on which the outcome of criminal proceedings for domestic violence often depends. Here, I am primarily referring to prosecutors, but also to specific categories of professionals from police agencies at all levels in Bosnia and Herzegovina who cooperate with the prosecutor and conduct investigations under the supervision and leadership of the prosecutor. Of course, given the issues it tackles, the publication should not be left unseen by a wider scientific, professional, legal and criminological audience. It is my pleasure to recommend it for publication.

# Introduction

## The Judiciary: Role, Scope and Leadership

The judiciary plays an important role in social development by establishing and enforcing social and behavioural norms in line with the principles of the rule of law. In practical terms, there is no higher authority to which the judiciary can pass along responsibility. If judges are either unable or unwilling to follow through on the establishment and enforcement of social and behavioural norms by application of the law, there is little or no possibility for other authorized bodies, state institutions or non-governmental organizations to respond effectively. Indeed, the police response and even the prosecutorial response are virtually ineffective if the judicial response is not fully present. Moreover, judges are uniquely positioned as leaders within the criminal justice system and the community at large. Judges therefore have the opportunity to encourage – if not require – other criminal justice system actors like police and prosecution, as well as civil actors, to take a professional and consistent approach to domestic violence.

Judges can and must use their authority to show that courts take domestic violence seriously. A domestic violence judge can educate within the court system and outside the court in the community at large; can focus community concerns on the safety of citizens; and can establish an anti-violence atmosphere in the community. In this process, courts must maintain their impartiality and professionalism; must ensure equality of all parties included in the process, including the defence bar; and must ensure due process for all parties. Judges should fully adhere to the principle of impartiality while speaking out publicly against the crime of domestic violence.<sup>5</sup>

Victim safety and perpetrator accountability, as well as prevention of future cases of violence, are foundational elements of the judicial response to domestic violence. Indeed, in a society that seeks to implement and adhere to the rule of law, the overall goals of judicial response are to punish, to deter future criminal and misdemeanour violations and to increase community safety. Thus prioritizing victim safety and perpetrator accountability in domestic violence cases is consistent with the broader goals of judicial response and the rule of law.

What is meant by the term “victim safety” and how does that relate to the professional responsibilities of judges? Courts in North America have found that looking beyond the single incident reflected in the case is an important strategy to increasing victim safety.<sup>6</sup> In terms of practice, victim safety means:

<sup>5</sup> Emily Sack, ‘Creating a Domestic Violence Court: Guidelines and Best Practices’ (San Francisco, CA: Family Violence Prevention Fund, 2002), 7.

<sup>6</sup> Andrew Klein, ‘Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges’, National Institute of Justice Special Report (US Department of Justice, Office of Justice Programs, 2009) 16–17, 55–58.

- conducting a thorough investigation
- obtaining a complete picture of the criminal incident and the context in which it occurred
- engaging in systematic and thorough case evaluation
- applying an appropriate sanction based on the facts and context of the case.

Indeed, victim safety requires more than a snapshot of the criminal incident itself. Ensuring victim safety necessitates situating the criminal incident in a larger socio-cultural and behavioural context in order to determine the extent of the abuse and violence taking place in the relationship. Using this method, the courts are better positioned to assess fully the risk presented by the perpetrator to both the victim and the community.

Judges have a critical role in sanctioning of perpetrators, and evidence has shown that a clear and consistent criminal justice system response does have a preventive effect.<sup>7</sup> That is, perpetrators must face swift and certain consequences for their actions. Predominant delivering of suspended sentences, jail verdicts under any legal minimum for domestic violence cases and lenient criminal sanctions may not reflect a clear message that domestic violence is a socially unacceptable behaviour. In fact, this kind of judicial response can send the opposite message and thereby increase the sense of impunity and confidence with which perpetrators commit domestic violence. Judges can protect victim safety and determine perpetrator accountability by enforcing existing laws. Judges can enforce the existing laws by treating assaults committed by partners as serious crimes.

Judges have wide discretion to interpret and enforce laws. Sometimes judges exercise their discretion in ways that question a perpetrator's accountability<sup>8</sup>. A suspended sentence may reinforce the offender's belief in his right to use violence to establish power and control over his partner, as well as his perception that such violence will not be punished. Multiple suspended sentences for consecutive incidents of domestic violence arguably send a clear message to the perpetrator – domestic violence is not viewed as a serious crime by the judiciary and will most likely go unpunished.

Additionally, judges in BiH exercise tremendous discretion in the realm of sentencing. This presents an opportunity for the judiciary to send a clear message that has the possibility of deterring future criminal acts of domestic violence. BiH laws prescribe a wide variety of sanctions and protective mechanisms that can be used in various combinations to address fully the safety needs of the victim (and family) and adequately sanction a perpetrator.

Judges are leaders in terms of both establishing and enforcing social order and holding an important and respected position in the community. Moreover, judges are in a position to establish standards of professional conduct within the courts – standards to which all parties should adhere. This unique leadership role enables judges to be at the forefront of improving the response to and reducing the incidence of domestic violence in BiH.

<sup>7</sup> Klein, 'Practical Implications of Current Domestic Violence Research', 52-53.

<sup>8</sup> For more information on court practice in BiH see OSCE, *Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in Bosnia and Herzegovina, with Recommendations* (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2011).

## Introduction to Domestic Violence: An Overview and Definitions

**Domestic violence** implies different forms of violence and abuse between family members.<sup>9</sup> **Battering** is a specific type of domestic violence and denotes a *pattern of abusive, violent or threatening actions aimed at intentionally controlling or dominating* another person.<sup>10</sup> Domestic violence, in the legal context, is a reference to an incident of physical, sexual or other violence – it can therefore be a single isolated event or include a series of incidents (that include battering).

Domestic violence is also a form of gender-based violence. **Gender-based violence** is an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females.<sup>11</sup> While gender based violence has a greater impact on women and girls as a result of the subordinate status of females in relation to males, gender based violence can also be directed at men and boys. **Gender** refers to the social characteristics, roles, behaviours and activities assigned to women and men within a particular socio-cultural context. Gender, like society and culture, is changeable over time and varies within and across socio-cultural contexts, while sex denotes biological features that are unchangeable.<sup>12</sup> Gender refers not simply to women or men but also to the relationship between them.<sup>13</sup> Thus the term gender is purposefully used to underscore that gender itself is not a natural fact, but rather takes shape in a changing socio-cultural context.

Within the context of this document male nouns are used in relation to perpetrators while female nouns are often used in relation to victims. This choice reflects the reality of domestic violence – the majority of perpetrators are men and the majority of victims are women.<sup>14</sup> However, it is important to recognize that men can also be victims of domestic violence and women can also be perpetrators of such violence. In particular, we see women perpetrating crimes against older family members such as elderly parents, in-laws or extended family, as well as younger family members such as children and stepchildren. Women can also commit domestic violence and engage in battering against their husbands or partners, and men can be the victims of female violence and abuse. Nonetheless, in recognition of the demographic reality of this crime, nouns and pronouns are used accordingly.

## Causes of violence

International human rights standards recognize that women and girls are exposed to greater risk of domestic violence, but men can also be its victims. Given that domestic violence

<sup>9</sup> In this Benchbook, family members are all persons defined by entity laws on protection against domestic violence.

<sup>10</sup> Domestic Abuse Intervention Programs, 'Home of the Duluth Model'.

<sup>11</sup> Inter-Agency Standing Committee, *Guidelines for Gender-based Violence Interventions in Humanitarian Settings, Focusing on Prevention of and Responses to Sexual Violence in Emergencies*, Geneva: September 2005.

<sup>12</sup> Sex refers to the biological or physical presence of sexual and reproductive organs like the penis and vagina and the testes and ovaries as well as male and female hormones and chromosomal differences (i.e. XY/XX) that differentiate between male and female. While not common, it is also possible to be born with biological or physiological characteristics from both sexes. In addition, sex, except for the presence of genetic identification, can be changed with surgical intervention and/or hormone therapy.

<sup>13</sup> Kristin Valasek, 'Security Sector Reform and Gender', in *Gender and Security Sector Reform Toolkit*, eds. Megan Bastick and Kristin Valasek, 3-4 (Geneva: DCAF, OSCE/ODIHR, UN-INSTRAW, 2008).

<sup>14</sup> Claudia García-Moreno and others, *Summary Report Multi-country Study on Women's Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (Geneva: World Health Organization, 2005), 20, [www.who.int/gender/violence/who\\_multicountry\\_study/summary\\_report/summary\\_report\\_English2.pdf](http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf).

disproportionately affects women, it is deemed a form of gender-based violence.<sup>15</sup> For this reason, gender-based violence in the context of domestic violence can also be defined as violence against women only because they are women or violence that affects women disproportionately.<sup>16</sup> Generally, gender-based violence and battering constitute a set of behaviours aimed at controlling family members by using force, threats and other forms of violence.

Domestic violence against women is a complex, universally present phenomenon<sup>17</sup> which cannot be explained with simple and individual theories that were used in the past.<sup>18</sup> Today's paradigm, which is completely accepted by international human rights standards, recognizes the structural nature of violence against women as gender-based violence, and describes this form of violence as one of the key social mechanisms used to force women into a subordinated position to men. It is also recognized that violence against women is a manifestation of an unequal power balance between women and men through history, which has led to men's discrimination against women.<sup>19</sup> A UN study on all forms of violence against women finds the main structural causes of this violence are patriarchy and other relations involving dominance and subordination, social-cultural norms of behaviour, customs and tradition, and economic inequality.<sup>20</sup> Actually, the main cause of violence against women is gender inequality, and domestic violence and other forms of gender-based violence (e.g. rape, sexual harassment) represent one of the main obstacles to achieving equality between women and men.

## Types of violence and abuse

Domestic violence, family violence and battering can include a wide array of violent and abusive acts. While not all acts of domestic violence may constitute a criminal or misdemeanour violation as defined by the laws governing BiH, it is still important for overall *case evaluation and the application of criminal sanctions* to have a clear understanding of the variety and/or pattern of abuse and violence taking place. The following examples are intended to provide an overview and do not serve as a comprehensive list of every type of violence or abuse that can take place.

Although we often give more attention to the different forms of physical and sexual violence that take place, **emotional abuse**, particularly if repeated and regular, creates a context in which physical and sexual violence are far more debilitating to the victim. In addition, a pattern of emotional abuse may make actual physical violence unnecessary as a means of control, as a result of the fearful and emotionally incapacitated position of the victim. Emotionally abusive behaviours are not limited to but can include the following.

- *Insults*: Constant or extreme criticisms that injure the personal, emotional, sexual and professional image. Insults can greatly undermine a person's self-confidence and eventually render the victim emotionally incapacitated.

<sup>15</sup> Council of Europe, 'Convention on Preventing and Combating Violence against Women and Domestic Violence', (Council of Europe, 2011), Preamble.

<sup>16</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992), paragraph 6.

<sup>17</sup> Claudia García-Moreno and others, *Summary Report Multi-Country Study on Women's Health and Domestic Violence against Women*, VII.

<sup>18</sup> Causes of violence against women, i.e. domestic violence, are studied from different perspectives, including feminist, criminal, psychological, sociological, public health and the perspective of human rights. An approach based on human rights implies interconnection between women's human rights and preconditions that are caused by disrespect of those rights.

<sup>19</sup> Council of Europe, 'Convention on Preventing and Combating Violence against Women and Domestic Violence', Preamble.

<sup>20</sup> UN General Assembly, *In-Depth Study on All Forms of Violence against Women*, Report of the Secretary-General, Document No. A/61/122/Add.1, 6 July 2006, 28-30.

- *Rejection*: Direct or indirect statements that create feelings of unworthiness. Constant rejection teaches a victim that he or she is unworthy of receiving loving behaviour. Rejection can be used as punishment for not cooperating with an abusive partner. Abusers may also employ rejection in an attempt to justify their anger towards the victim.
- *Emotional threats and accusations*: Direct or indirect statements made in an attempt to cause emotional or physical harm to the victim. These include lying about the victim's behaviour, attitude or emotional state.
- *Emotional blackmail/extortion*: A statement or behaviour that uses fear, guilt, insecurity or confusion to trap a victim into giving the abuser power over him or her.
- *Possessive and punitive behaviour*: Perceiving another person as physical property or an emotional extension of himself or herself. Behaviour includes jealousy, limiting freedom, creating isolation and denying a person's capabilities or opportunities to develop.
- *Basing relationships on unrealistic expectations*: This includes an assumption by the abuser that he or she knows what is best for the victim, and can also include expecting the victim always to look or perform in a certain way, maintain the home or care for children in a certain way and so on.
- *Threats to harm or take away children*: One of the most common reasons given for resuming an abusive relationship is fear that the abuser will act on threats of taking the children from the victim.
- *Financial blackmail/extortion*: Controlling the victim's finances, denying access to money. Financial abuse may range from not allowing the victim to earn money to preventing education or access to work.<sup>21</sup>

**Physical violence** is most often associated with hitting, kicking, pushing and other obvious forms of physical abuse. However, physical violence can also include demonstrations of force. For example, punching walls or doors, destroying property or driving in a reckless and dangerous manner can all be demonstrations of physical violence. These demonstrations can send a clear and frightening message to victims – “this is what I am capable of, and you are next”. In addition, different forms of abuse which have a physical consequence can be included within the category of physical violence – for example, putting locks on food cupboards and the refrigerator or locking victims inside or outside the home. Finally, physical violence can include actual or threatened violence against others – children, other family members or even pets. Physical violence and abuse can include but are not limited to:

- damaging property when angry (thrown objects, punched walls, kicked doors, etc.)
- pushing, slapping, biting, kicking
- strangulation

<sup>21</sup> This list is adapted from American Judges Association/American Judges Foundation, ‘Domestic Violence and the Courtroom, Understanding the Problem... Knowing the Victim’, [http://aja.ncsc.dni.us/domviol/publications\\_domviobooklet.htm](http://aja.ncsc.dni.us/domviol/publications_domviobooklet.htm).

- abandoning partner in a dangerous or unfamiliar place
- scaring by driving recklessly
- use of weapon to threaten or hurt
- forcing to leave home
- trapping partner in the home or keeping from leaving
- preventing the victim from calling police or seeking medical attention
- hurting children
- withholding or limiting food and water
- using physical force in sexual situations.<sup>22</sup>

**Sexual violence** is not always directly associated with domestic violence or battering, but studies have consistently found that the majority of victims who experience physical abuse also experience sexual violence and abuse.<sup>23</sup> In many legal settings sexual violence has a higher criminal penalty than physical violence. While this may not always be the case, it is still critically important to identify *all* of the criminal violations that have occurred in a domestic violence case – including sexual violence and abuse. Similar to physical violence, sexual violence can include direct violence of a sexual nature like rape and other forms of assault, but may also include abusive or controlling acts that have a sexual nature or element. Sexual violence and abuse can include but are not limited to:

- demeaning comments about a person's sexual performance
- accusations of cheating
- being overly jealous of outside relationships with friends, family, etc.
- coercion or forcing to dress in a sexual way
- sexual insults or using unwanted sexual names
- forced or pressured sex or performance of sexual acts
- threats to cheat or get sex elsewhere (prostitutes, affairs)

<sup>22</sup> This list is adapted from The Hotline, 'What Is Domestic Violence', [www.thehotline.org/is-this-abuse/abuse-defined/](http://www.thehotline.org/is-this-abuse/abuse-defined/).

<sup>23</sup> The OSCE's report *Ensuring Accountability for Domestic Violence*, see note 8, states that while sexual violence is alleged within domestic violence cases in BiH, offenders are rarely if ever charged. Moreover, a variety of local and national studies in the United States suggest that when there is physical violence there is probably sexual abuse as well. For example, a Texas study, based on a sample of 148 women seeking a protective order found that 68 percent of physically abused women also reported sexual assault. 79 per cent of sexually assaulted women reported repeated forced sex. See Judith M. McFarlane and Ann Malecha, 'Sexual Assault among Intimates: Frequency, Consequences, and Treatments: Final Report Submitted to the National Institute of Justice', grant number 2002-WG-BX-0003 (Washington DC: US Department of Justice, National Institute of Justice, 2005), Abstract, 9.

- guilt or coercion to get sex (I can't help myself, I need sex to relieve stress, it is your duty, etc.)
- holding down during sex
- demanding sex when partner is sick, tired or after physical violence
- hurting with weapons or objects during sex
- visible presence of a weapon (e.g. gun) during sex
- involving other people in sexual activities without consent.<sup>24</sup>

**Stalking** is generally understood (not legally defined) as a pattern of actions that would cause a reasonable person to feel fear. In other words, the aim of stalking is to eliminate another person's privacy or safety, or feelings of privacy or safety. Most stalking occurs between current or former intimate partners and thus stalking can be a relevant component of domestic violence, and particularly of battering.<sup>25</sup> Moreover, studies have shown that stalking behaviour has a correlation to increased risk of homicide, making the identification of stalking activities a critical element of case evaluation and risk assessment.<sup>26</sup> Stalking can include but is not limited to:

- unwanted phone calls, voicemail messages, letters, notes, e-mails and text messages
- surveillance activities, including following someone on foot or by car, sitting outside their home, work or other location (e.g. gym, school, etc.), use of GPS, cameras or audio-recorders and computer programs that track computer use
- trespassing and/or breaking into someone's home, car or office
- unwanted gifts (flowers, jewellery, chocolates, lingerie, etc.)
- visiting, contacting and/or threatening friends, family or colleagues.

A number of other abusive or violent acts have been identified, from a socio-legal perspective, which can also constitute domestic violence and/or battering. In some cases these may be a single criminal or misdemeanour act of domestic violence, but more often they can shed light on a larger pattern of abuse that ultimately results in the loss of liberty and freedom of the victim.

Additional forms of abuse and violence can include but are not limited to the following.

<sup>24</sup> This list is adapted from The Hotline, 'What Is Domestic Violence', <http://www.thehotline.org/is-this-abuse/abuse-defined/#tab-id-3>.

<sup>25</sup> A study in the US found that 59 per cent of women, who have been stalked, were by a current or former intimate partner or dating partner. Patricia Tjaden and Nancy Thoennes, 'Stalking in America: Findings from the National Violence against Women Survey', (Washington, DC: US Department of Justice, National Institute of Justice, April 1998), 6.

<sup>26</sup> One study found more than half (54 per cent) of female intimate partner murder victims had reported stalking to police prior to their murders by the stalkers. Judith M. McFarlane and others, 'Stalking and Intimate Partner Femicide', *Homicide Studies* 3, no.4 (November 1999): 310.

- *Economic abuse:* This can include preventing the victim from getting or keeping a job, eliminating or limiting access to money or other resources, forcing or coercing the victim into signing over wealth or property, taking or confiscating the victim's property or money and threatening the victim about his/her financial dependence or shaming the victim about this financial dependence in front of friends, family or colleagues.
- *Isolation:* This can include eliminating or limiting contact between the victim and everyone else (friends, family, colleagues, etc.), eliminating or limiting access to reading materials, music, TV, movies and other sources of information and entertainment, eliminating or limiting access to the outside world including extra-curricular activities (gym, sports, dance, etc.) as well as routine household responsibilities that involve going to the bank, the grocery store, the post office, etc.
- *Using children:* This can include threatening to harm children or take them from the victim, eliminating or limiting access to children by the victim or his/her family/friends and turning children against the victim (parent) by telling them lies or stories about the victim.
- *Coercion, threats and intimidation:* This can include coercing victims to do things or agree to things they do not want, using threats of harm against the victim, others or oneself (suicide, self-injury, etc.), using intimidating looks or gestures, displaying weapons and destroying or defacing property.

While this is not an exhaustive list of all the ways in which a spouse, intimate partner or family member can commit abuse, it does provide a broader framework for evaluating the complete context in which one incident of violence occurs. A comprehensive contextual framework allows the courts to identify more effectively the risk the perpetrator presents to the victim and community, and thus to impose a more appropriate and specific sanction.

# Recommendations

## Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina

*In accordance with international human rights protection standards, courts are to ensure that criminal offences of domestic violence, given their gravity, are punishable with efficient and proportional sanctions that deter further perpetration of criminal offences.*

As described in greater details in the introduction, the following recommendations from the DV Judge Panel represent their best professional contribution to improving the judicial response to domestic violence criminal cases. The recommendations are divided into eight chapters addressing a variety of relevant topics, including case evaluation, sentencing and considerations for an overall improved criminal justice system response to domestic violence.

The first three chapters deal with what may constitute aggravating or mitigating circumstances, and accordingly affect the severity of the applied criminal sanction in domestic violence cases<sup>27</sup>. The fourth and fifth chapters deal with procedural legal issues and actions relevant for criminal proceedings in relation to general matters identified during the research as particularly problematic from the perspective of case law on domestic violence in Bosnia and Herzegovina; and the position of the victim during court proceedings. The sixth chapter constitutes a special recommendation concerning procedures for determining psychological violence as a form of domestic violence. This is largely a result of the lack of criminal prosecutions and established case law on this topic. The seventh chapter provides recommendations to the office of the prosecutor to improve both the quality of indictments and submitted case files and the response of the judiciary. The final two chapters contain general recommendations regarding the importance of and need for training and leadership from judges and prosecutors in order to combat domestic violence in BiH more effectively, including the sentencing practices of higher-instance courts.

While the DV Benchbook makes recommendations related to specific factors that may exist within domestic violence criminal cases, the DV Judge Panel recognizes that each criminal case is distinct and nuanced, and therefore individual presiding judges are ultimately in the best position to evaluate a case appropriately and apply a criminal sanction. Thus the DV Benchbook is a resource judges can use when evaluating domestic violence criminal cases, but it is not intended to serve as a fixed guideline for how to handle each individual case of criminal domestic violence appearing before the BiH judiciary.

<sup>27</sup> Aggravating or mitigating factors include factors that do not constitute elements of the body of the crime in the specific case of domestic violence in a criminal proceeding. Otherwise, according to the existing legislation, some of the factors that were covered in the first chapter would be valued as qualifying factors for the criminal offense of domestic violence.

# 1. Aggravating factors

## 1.1. Recidivism

*Recommendation:* Recidivism in cases of domestic violence is considered an aggravating factor.

*Explanation:* In cases of recidivism (repeated offence) the victim of domestic violence, as a rule, has taken an active role in seeking the assistance of the criminal justice system and allied institutions. Thus recidivism is indicative of consecutive failures by the institutions legally obligated to offer protection (and justice) to the victim. In cases of recidivism, prevention as one of the intended purposes of the sanction was obviously not achieved. Moreover, recidivism may denote a pattern of domestic violence or battering, particularly in combination with other forms of abusive behaviour (extreme domination, obsessive jealousy, etc.).

## 1.2. Duration of domestic violence over a long period of time (factual recidivism)

*Recommendation:* Duration of domestic violence over a long period of time,<sup>28</sup> if not included within the criminal offence, is considered an aggravating factor.

*Explanation:* In cases involving domestic violence over a long period of time, it is justified – in accordance with the established facts of the case – to establish ongoing violence and abuse.

Analysis of court judgments in domestic violence cases in BiH illustrates the common defence counsel practice of claiming an incident of domestic violence to be an isolated instance that does not constitute *ongoing violence and abuse* – regardless of whether a criminal proceeding is conducted for a single incident or an extended offence. In this regard, the existence of ongoing violence and abuse can be proved by, among other things, establishing the existence of consequence(s) suffered by the victim as a result of the ongoing violence and abuse. This provides the possibility of identifying several combinations of jeopardizing “the protected good”, as stipulated by the criminal codes in relation to the criminal offence of domestic violence. In cases when the defence claims there is no ongoing violence and abuse, the court is encouraged to not lose sight of the possible existence of psychological consequences for the victim during the entire duration of domestic violence. Additionally, the court may benefit from paying special attention to the need and justification for the presentation of evidence aimed at establishing the victim’s possible psychological injuries, among others.

<sup>28</sup> This is a reference to a real court case from BiH where, over a period of one year, three separate incidents of physical violence in a family occurred while the court action was exclusively focused on each individual incident of violence. Further, expert evidence during court proceedings established the presence of continual psychological violence by the defendant against the victim during the aforementioned period of time.

In cases where ongoing violence and abuse are established, it is recommended that the court commission a professional expert assessment of the perpetrator's psychological condition and, if necessary, impose secure and mandatory psychiatric treatment as a preventive measure.

## 1.3. Scope and type of violence

### 1.3.1. Strangulation

*Recommendation:* Strangulation is considered an aggravating factor.

*Explanation:* Evidence of strangulation constitutes an aggravating factor given its imminent threat to the physical health and safety of the victim as well as the possibility of causing psychological trauma. Strangulation constitutes one of the most lethal forms of violence and poses a significant threat of physical injury and even death (including death that may occur up to several days later as a result of blood clots from the interruption of oxygen to the brain).<sup>29</sup> Additionally, strangulation may denote an escalation in violence and thus the potential for extreme physical injury or lethality to the victim.

### 1.3.2. Threats with/use of weapons or dangerous tools

*Recommendation:* Use or threatened use of weapons or dangerous tools is considered an aggravating factor except in cases when it constitutes an element of the body of the crime.

*Explanation:* The use of weapons or dangerous tools or threats of use is best considered an aggravating factor given the life-threatening violence they pose. Moreover, the use of or threats with weapons is decisive in maintaining a sense of constant jeopardy and fear in the victim, and thus a critical component of the abuser's effort to maintain power and control over the victim. The use of or threat with weapons or tools may also denote an escalation in violence and abuse and be indicative of increased risk of extreme violence or lethality to the victim.

Research shows that the use of weapons or dangerous tools or threats to use these in the context of domestic violence represents a decisive indicator in fatal outcomes.<sup>30</sup>

### 1.3.3. Sexual assault, rape or attempted rape

*Recommendation:* Sexual assault or rape within the context of a domestic violence is charged as a separate criminal incident.

*Recommendation:* Sexual assault, rape or attempted rape not specifically included within the criminal offence of the domestic violence case is considered an aggravating factor.

*Explanation:* The presence of sexual violence and rape within a domestic violence relationship may

<sup>29</sup> Gael B. Strack and Casey Gwinn, 'On the Edge of Homicide: Strangulation as Prelude', *Criminal Justice* 26, no.3 (Autumn 2011): 3–4; Cheryl A. Thomas, *Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union*, Expert paper, Document No. EGM/GPLVAW/20 08/EP.01, (UN Office Vienna, 12 May 2008, revised 17 June 2008), 11. One study showed that the odds of becoming an attempted homicide victim increased by 700 per cent and those of becoming a homicide victim increased by 800 per cent for women who had been strangled by their partner: Nancy Glass and others 'Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women', *Journal of Emergency Medicine* 35, no.3 (October 2008): 329.

<sup>30</sup> See, for example, Klein, 'Practical Implications of Current Domestic Violence Research', 26; Jacquelyn C. Campbell and others, 'Assessing Risk Factors for Intimate Partner Homicide', *NIJ Journal* 250, (November 2003): 16; Jacquelyn C. Campbell and others, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study', *American Journal of Public Health* 93, no. 7 (July 2003), 1094; Linda E. Saltzman and others, 'Weapon Involvement and Injury Outcomes in Family and Intimate Assaults', *Journal of the American Medical Association* 267, no. 22 (1992), 3043–3047.

denote a high level of violence and control by the perpetrator. Moreover, the use of sexual violence and rape indicates the likelihood of ongoing and continuous violence and thus a battering relationship rather than a one-time incident. Sexual violence (i.e. sexual assault, rape or attempted rape) can be established through the identification of physical and/or psychological injuries (or endangerment) to the victim. Since sexual assault can involve a broad spectrum of actions, the court will need to establish which actions may constitute actual or attempted sexual assault.

Current leading research<sup>31</sup> shows a high presence of various forms of sexual violence in cases of domestic violence. In contrast, results of research conducted in BiH<sup>32</sup> indicate that sexual violence is not regularly recorded in cases of domestic violence before the courts.

### 1.3.4. Stalking

*Recommendation:* Stalking is considered an aggravating factor except in cases in which the action is found to be an isolated instance and included in the criminal offence.

*Explanation:* Stalking jeopardizes an individual's sense of safety, and can cause fear and/or trauma (i.e. pose a threat to a person's psychological integrity); thus, depending on the circumstances of a case, stalking can qualify as an aggravating factor. It is necessary to establish the existence of a high degree of threat/violation of the protected good as a consequence of stalking. Stalking may also indicate extreme jealousy and/or an attempt to prevent the victim from leaving the perpetrator. It is therefore important to identify this behaviour as indicative of an increased effort by the perpetrator to maintain control over the victim.

Although individual cases of stalking (i.e. stalking that does not take place continually or over a period of time) are rare in practice, if the concrete case in a court proceeding involves an "isolated incident of stalking" which is not included in the criminal offence, it is possible to view it as an exception, without qualifying it as an aggravating factor.

### 1.3.5. Extreme domination

*Recommendation:* Extreme domination is considered an aggravating factor, except in isolated cases of the behaviour which are included in the criminal offence.

<sup>31</sup> In the USA and Great Britain, the leading countries when it comes to this type of research, most research supports the claim that sexual assault is common in physically abusive relationships. McFarlane and Malecha, 'Sexual Assault among Intimates', Abstract, 9 found in a study based on a sample of 148 women who sought assistance from the judiciary after being physically assaulted by an intimate partner that almost 70 per cent of the abused women reported having also been sexually assaulted by their partners. One study on marital rape gathers data from several studies using clinical samples, all of which indicate that 20–70 per cent of battered women have been sexually assaulted by their partners at least once: Raquel Kennedy Bergen, *Wife Rape: Understanding the Response of Survivors and Service Providers* (Thousand Oaks, CA: Sage, 1996). See also Angela Browne, *Report of the Council on Scientific Affairs: Alcohol, Drugs and Family Violence*; (American Medical Association, The Council: 1993); Patricia Mahoney and Linda M. Williams, 'Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife Rape', in *Partner Violence: A Comprehensive Review of 20 Years of Research*, eds. Jana Jasinski, Linda M. Williams and David Finkelhor, 113–162 (Thousand Oaks, CA: Sage, 1998); Ellen Pence and Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (New York: Springer, 1993). Research also indicates that compared to batterers, men who batter and rape are particularly dangerous and more likely to injure their wives severely and potentially even escalate the violence to murder. See Angela Browne, *When Battered Women Kill* (New York: Free Press, 1987); Jacquelyn C. Campbell, 'Women's Responses to Sexual Abuse in Intimate Relationships', *Health Care for Women International* 10 (1989): 335–346. All referenced in Raquel Kennedy Bergen, 'Marital Rape: New Research and Directions' National Online Resource Center on Violence against Women (Harrisburg, PA: National Resource Center on Domestic Violence, 2011), [www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=248](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=248).

<sup>32</sup> OSCE, *Ensuring Accountability for Domestic Violence*, 63 and 68; Udružene žene Banja Luka and Lara Bijeljina, 'Monitoring and Analysis of Criminal Proceedings and Case Law in Sexual and Gender-based Violence in Republika Srpska' (Bjeljina: Lara Ženski Arhivni Centar, 2011), 13.

*Explanation:* Behaviour that falls into the category of extreme domination includes the perpetrator's constant control over the victim's behaviour with an exclusive goal to dominate the victim, who is always in a subordinated position towards the perpetrator. Such behaviour jeopardizes the victim's psychological integrity and may result in extreme fear and anxiety. Moreover, it indicates the likelihood that the domestic violence relationship is ongoing and continuous, and therefore constitutes battering.

Although the court will evaluate the existence of such behaviour on a case-by-case basis, it is important to note that extreme domination can encompass various types of violence by the perpetrator, such as economic abuse (e.g. preventing the victim from getting or keeping a job, taking the victim's money), male privilege (e.g. treating the victim like a servant, defining the way the victim should behave in private and public), emotional abuse (e.g. humiliating the victim), intimidation (e.g. smashing things, destroying the victim's property) and so on.

Extreme domination can be established with a combination of specific examples of the behaviour in addition to showing evidence of the ongoing nature of the violence and abuse.

### **1.3.6. Obsessive behaviour or obsessive jealousy**

*Recommendation:* Obsessive behaviour or obsessive jealousy is considered an aggravating factor.

*Explanation:* Obsessive behaviour or obsessive jealousy can jeopardize or violate the victim's serenity and mental health (i.e. the protected good) and is therefore an aggravating factor. However, whether obsessive behaviour or jealousy results in psychological trauma or other injuries should not necessarily be required to qualify such behaviours or circumstances as aggravating (accordingly, it would not be necessary to present evidence in this direction). Obsessive behaviour and obsessive jealousy are also indicative of a battering relationship, and thus denote the existence of ongoing and continuous abuse and control by the perpetrator.

### **1.3.7. Isolating the victim from family and friends**

*Recommendation:* Isolating the victim from family and friends is considered an aggravating factor.

*Explanation:* Behaviours that isolate the victim from friends and family include, among other things, not allowing the victim to use a cell phone, home telephone or internet, checking the victim's cell phone and e-mail, censoring and checking the victim's mail, setting the time when the victim must be home from work, prohibiting the victim from contacting family, humiliating the victim at family events, etc. All these behaviours can be taken as evidence of possessiveness and domination by the perpetrator, aimed at isolating the victim, decreasing outside support and increasing dependency. Moreover, isolating the victim denotes a battering relationship, and thus ongoing and continuous abuse and control by the perpetrator.

## **1.4. Vulnerability of victims**

*Recommendation:* Abuse of victims with particular vulnerabilities is considered an aggravating factor.

*Explanation:* It is recommended that the court pay special attention to factors that may indicate the victim is in a context or circumstance that results in particular vulnerability. For example, *age*

(very old, very young), *disability* (psychological, mental, physical), *immigration or residence status* (undocumented, no papers), association with a *minority ethnic or religious community* (Roma) or *sexual orientation* (gay or lesbian) are all factors that may increase the victim's risk of dependency on the perpetrator. These factors may make it difficult or impossible for victims to seek help, report the violence or leave the abusive relationship. If perpetrators abuse the victim's circumstance of vulnerability, it should constitute an aggravating factor.

### **1.5. Degrading (additionally humiliating) the victim**

*Recommendation:* Publicly degrading or humiliating the victim is considered an aggravating factor.

*Explanation:* If there is indication that the perpetrator humiliated, shamed or degraded the victim by taking photographs, making video or audio recordings, posting comments on social networks (on the internet) or threatening to reveal private or personal information about the victim, these actions may be considered aggravating factors because they were performed to degrade the victim further.

The court is encouraged to pay special attention if a specific case of degrading involves a juvenile victim, which would additionally increase the gravity of the perpetrated offence and its consequences, given that the victim's personality is not fully developed and he/she is dependent on others.

### **1.6. Prior record of a domestic violence victim's requests for assistance from public and other institutions (police, prosecutor's office, social work centres) and non-governmental organizations that provide specialized assistance to victims of domestic violence**

*Recommendation:* The victim's record of requests for assistance is taken into consideration as potential evidence of abuse and considered an aggravating factor.

*Explanation:* The fact that the victim sought help in the past from local institutions and organizations that are obliged or specialized to provide protection to victims indicates the possibility of ongoing violence and abuse. Moreover, the active role of the victim in seeking assistance and protection should serve as an indication of the existence of a domestic violence relationship and the victim's desire for assistance. The court is encouraged to consider this circumstance when reviewing criminal domestic violence cases. Representatives of the institutions and organizations from which the victim sought help may be able to offer official data and professional findings, including evidence that sheds additional light on the history of violence and the relationship between the perpetrator and the victim.

### **1.7. Placing the victim in a safe house**

*Recommendation:* Placement of a victim in a safe house is taken into consideration as potential evidence of abuse and signifies the possible need for a more severe criminal sanction.

*Explanation:* According to the entity laws on protection from domestic violence, a safe house is a form of protection for victims of such violence. For a victim to be temporarily placed in a safe house, a decision by relevant professionals (i.e. a social work centre or the police in the Federation

of Bosnia and Herzegovina, or a social work centre in Republika Srpska), including reasons and justification for the victim's accommodation in the safe house, is required. The fact that the victim was forced to leave her home for the sake of her own safety and/or the safety of her children and was placed in a safe house by relevant authorities is evidence of domestic violence and abuse. Moreover, the very act of placing the victim in a safe house may indicate a high level of threat to the victim's safety and psycho-physical integrity, and therefore indicate the gravity of a domestic violence criminal case.

If the court manages to establish a causal link between the fact of *placing the victim in a safe house* and other aggravating factors found in the specific case of domestic violence, it is recommended that this fact increase the severity of the imposed criminal sanction.

## 1.8. Child witnesses of domestic violence<sup>33</sup>

*Recommendation:* Child witnesses of domestic violence are considered an aggravating factor.

*Explanation:* The court is encouraged to pay special attention to the potential consequences for children who have witnessed or been exposed to domestic violence.<sup>34</sup> It is recommended that child witnesses of domestic violence are considered an aggravating factor in the following cases:

- child witnesses physically present when the violence was taking place
- child witnesses not physically present, but able to hear the violence/abuse and see its consequences later
- child witnesses not physically present and cannot hear the violence/abuse, but can see its consequences afterwards.

## 1.9. Abuse of alcohol or drugs

*Recommendation:* Perpetration of domestic violence under the influence of alcohol or drugs is considered an aggravating factor.

*Explanation:* The court is encouraged to recognize that in many cases of domestic violence the perpetrator will consciously and/or intentionally place himself under the influence of alcohol or drugs in order to eliminate inhibitions, and in doing so is more easily able to perpetrate domestic violence against a family member. According to relevant criminal codes, the legal qualification of *self-induced mental incapacity* does not constitute grounds for a more lenient sanction.

When evaluating this circumstance as aggravating, it is recommended that the court establish – in cases involving ongoing violence and abuse as well as recidivism – whether the perpetrator also commits violence when sober. Courts are encouraged to identify whether the

<sup>33</sup> According to the Criminal Code of Republika Srpska, domestic violence committed in the presence of a person younger than 18 years constitutes the qualified form of a criminal offence in cases of domestic or family violence. See article 208 Criminal Code of RS (Official Gazette of Republika Srpska, No. 49/03 and 67/13).

<sup>34</sup> For example, the Republika Srpska Law on Protection from Domestic Violence (*Official Gazette of Republika Srpska*, No. 102/12) in Article 8 provides that children are victims of domestic violence even if they were only witnesses of violence. For more information on the impact of domestic violence on children witnessing it, see for example Joy D. Osofsky, 'Children Who Witness Domestic Violence: The Invisible Victims', Social Policy Report IX: 3 (Ann Arbor MI: Society for Research in Child Development, 1995).

individual, when under the influence of alcohol or drugs, also perpetrates violence in different circumstances and in other places (e.g. at work, at social events) than the family context. If the perpetrator only commits violence in a family environment, a conclusion can be drawn that he is able to control his behaviour in public places and on public occasions. In this case it is particularly important for the court not to define acts of violence under the influence of alcohol as a loss of control on the side of the perpetrator, but as the intentional elimination of inhibitions for the purpose of perpetrating domestic violence against a family member. In any case, courts are encouraged to avoid identifying alcohol and drug use as a *mitigating factor* in cases of domestic violence, as also noted by entity criminal codes.

### 1.10. Defendant's criminal history

*Recommendation:* Previous convictions or legal violations by the defendant<sup>35</sup> are considered an aggravating factor.

With regard to previous court decisions and the previous criminal record of the perpetrator in domestic violence cases, it is recommended that the following factors are considered aggravating.

- Previous criminal record pertaining to the criminal offence of domestic violence, which would define the perpetrator as a special recidivist.
- Previous criminal record pertaining to another criminal offence should be interpreted on a case-by-case basis to be treated as an aggravating factor. Special attention should be paid to the fact that in a large number of cases, criminal offences from the same group (i.e. offences against marriage and family) or offences similar by the type of protected good (e.g. offences against sexual integrity, civil rights and freedoms, body and life) can justify the qualification of an aggravating factor.
- Previously imposed protective measures by the court in a minor offence procedure due to domestic violence (in accordance with entity laws on protection from domestic violence).
- When it comes to courts in Republika Srpska, in accordance with legislation regulating domestic violence as a minor offence (in addition to its direct liability), previous minor offence sanctions for domestic violence are considered aggravating factors.

*Explanation:* During proceedings courts are encouraged to access information regarding the defendant's previous criminal record, and acknowledge that if the defendant has a criminal history he falls into the category of a high-risk perpetrator of domestic violence. In this regard, the court is encouraged to insist on having access to the defendant's most up-to-date criminal record. This information can contribute to providing full insight into the circumstances of the case, and is relevant for applying criminal sanctions or other measures.

<sup>35</sup> In Republika Srpska misdemeanour punishment is foreseen for cases of domestic violence, according to the Law on Domestic Violence of Republika Srpska.

### 1.11. Deliberate delay of criminal proceedings by the defendant

*Recommendation:* If the court identifies that the defendant has deliberately attempted to delay procedures by claiming procedural<sup>36</sup> incapacity to attend the trial, and it determines that the defendant is capable of attending the trial, such behaviour is considered a special aggravating factor.

*Explanation:* Although this action refers to court proceedings conducted for all criminal acts, it is particularly important that the court recognizes the relevance of this factor in cases of domestic violence. Courts, alongside other criminal justice institutions and allied organizations, are obliged to provide protection to the victim (from the perpetrator) during the judicial proceedings in addition to ensuring the swift deliberation of justice.

### 1.12. Defendant’s position of social power or authority

*Recommendation:* A defendant’s use of his/her position of social power or authority is considered an aggravating factor.

*Explanation:* The court is encouraged to identify when perpetrators use their position of social power or authority to establish power and control over the victim, commit violence against the victim or otherwise coerce, abuse or threaten the victim. The abuse of one’s position of social power and authority is strictly prohibited and in and of itself constitutes a violation of the ‘public good’. Moreover, using such a position in order to more successfully commit a criminal offence is grounds for a more severe penalty.

### 1.13. Psychological violence – part of abuse in a case of physical domestic violence

*Recommendation:* Psychological violence and abuse are considered an aggravating factor except in cases where they constitute a component of the criminal offence.

*Explanation:* In cases of domestic violence where physical abuse makes up the criminal offence but evidence of psychological violence and abuse is identified in the course of proceedings, the court is encouraged to use that evidence to justify psychological violence as an aggravating factor. For standard of proof in establishing psychological violence, see recommendation 6.1.

Psychological violence and abuse may denote ongoing and continuous abuse and an overall pattern of battering. Considered in combination with an act of physical violence, they are indicative that the incident before the court was not a one-time or isolated case of domestic violence. However, the court is encouraged to pay attention to and differentiate between the existence of psychological violence and *consequences for the victim’s psychological identity in domestic violence cases*, which may constitute the criminal offence and therefore may not be considered an aggravating factor.

<sup>36</sup> Referring to physical and/or psychological ability to attend trial.

## 2. Mitigating factors: Unjustified qualifications and possible exceptions

### 2.1. Defendant's position of social power or authority

*Recommendation:* A defendant's position of social power or authority is not considered a mitigating factor.

*Explanation:* The fact that a defendant occupies a position of social power or authority and performs a public duty or function (e.g. policeman, civil servant, parliament delegate or board member) should not be viewed as a condition for imposing a more lenient sanction (i.e. seen as a confirmation of the defendant's *positive character*). Moreover, persons performing public functions are not entitled to special treatment by the court.

### 2.2. Defendant's family status

*Recommendation:* A defendant's family status is not considered a mitigating factor, with one exception.

As an exception, the defendant's family status may be considered a mitigating factor in cases when the defendant is a parent of a juvenile child or children and the only person responsible for supporting the family, provided that the following conditions are met:

- the intensity of domestic violence is weaker, or it was an isolated incident of violence
- the violence is exclusively focused on the partner, and children did not witness the violence.

*Explanation:* The court is encouraged not to lose sight of the fact that the existence of domestic violence negates the possibility of harmony within the family and directly undermines the foundation of a "healthy and functional family" as the basic cell of society. It is encouraged to avoid presumptions that marital status or parenting deserves higher social respect or is indicative of the defendant's moral character.

Thus it would not be justified to value the fact that a defendant is a "family man" or "parent" as a mitigating factor automatically in a domestic violence case. The court is encouraged to value the *defendant's family status* as an independent mitigating factor with extreme caution. If family status is identified as a mitigating factor, the court is encouraged to establish a link

with the other facts and circumstances of the case (e.g. the children's basic needs are not jeopardized in the family, the defendant is not a recidivist, etc.) that can, in a complementary way, justify qualification of family status as a mitigating factor.

## 2.3. Significantly decreased mental capacity

*Recommendation:* Significantly decreased mental capacity is considered a mitigating factor only in exceptional cases as outlined by the criminal code.

*Explanation:* The court is encouraged to exercise special caution when potentially qualifying *significantly decreased mental capacity* in domestic violence cases as a mitigating factor. It is encouraged to avoid exclusively valuing this factor from a formal aspect, but to analyse in detail the motive and causes of the defendant's state of decreased mental capacity.

If domestic violence was perpetrated with significantly decreased mental capacity due to temporary or permanent mental illness, temporary insanity or mental retardation, such states constitute legal grounds for a more lenient sanction.

However, a significant number of domestic violence cases may involve a different qualification of *decreased mental capacity*: the perpetrator, in many cases, is violent while intentionally under the influence of alcohol, which is why the offence includes premeditation or negligence (for example, self-induced mental incapacity). In such cases the state of significantly reduced mental capacity does not constitute grounds for a more lenient sanction (*for more details, see recommendation 1.9*).

When the court finds that a defendant perpetrated a criminal offence with significantly decreased mental capacity, it is recommended that the court, *ex officio*, takes necessary actions to determine the need for imposing a security measure of mandatory psychiatric or addiction treatment.

## 2.4. Family's economic social status/perpetrator as breadwinner

*Recommendation:* The family's economic status and/or the perpetrator's role as breadwinner is not considered a mitigating factor.

*Explanation:* Courts are discouraged from automatically valuing a family's poor economic and social status or the perpetrator's role as the primary breadwinner as a mitigating factor. In general, BiH courts do not automatically value such circumstances as mitigating factors when imposing sanctions for other types of criminal offence. The court is therefore encouraged to consider that the perpetrator's role as breadwinner may stimulate him to continue the domestic violence, because in that way he exercises power over the victim, given the fact that the victim is economically dependent on him. The court is only legally bound to value the perpetrator's financial status (and, accordingly, his family obligations) when determining a fine.

## 2.5. Defendant's "good behaviour" before the court

*Recommendation:* A defendant's good behaviour before the court is expected and therefore is not considered a mitigating factor.

*Explanation:* To avoid potential appeals because the court did not sufficiently value *good*

*behaviour or correct attitude before the court*, it is advisable for the court to state explicitly in the judgment that “good behaviour” is expected from all defendants and other persons appearing before it, and therefore the court did not value this as a mitigating factor when deciding on the type and severity of the criminal sanction. BiH has recorded appeals against sentencing by first-instance courts in domestic violence cases filed with the argument that the *good behaviour or correct attitude of the defendant before the court*<sup>37</sup> was not sufficiently considered as a mitigating factor.

Conversely, if the defendant is in contempt<sup>38</sup> of court and/or does not respect the other parties in a court proceeding, it is advisable that the court records this fact and mentions it in the explanation of the court decision (regardless of whether the defendant was sanctioned for contempt of court or not), although the court is not encouraged to value this behaviour explicitly as a separate aggravating factor.

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<sup>37</sup> Examples of such behaviour include when the defendant treats the court and the damaged party with respect, shows care and attentiveness towards the victim, etc.

<sup>38</sup> Examples of such behavior include insulting of the parties, disturbing order in the courtroom, etc.

## 3. Other circumstances of relevance for sentencing

### 3.1. Remorse

*Recommendation:* Defendant remorse is not automatically considered a mitigating factor.

*Explanation:* Remorse represents the defendant's attitude towards the perpetrated offence. Depending on the facts in the criminal offence of domestic violence, the court may value it as an aggravating or a mitigating factor.

Courts are encouraged to take into consideration the history of violence (i.e. previous domestic violence/abuse that occurred before the subject case and court proceeding) when determining whether remorse constitutes a mitigating or aggravating factor. This includes whether the domestic violence is ongoing, the perpetrator's attitude towards the act of violence after the incident and his psychological attitude towards the consequences of the offence.

For example, if violence and abuse were ongoing then it is recommended that the expressed remorse should not be considered a mitigating factor. Rather, in these cases there is a possibility for the court to view the act of remorse as a dishonest gesture by the defendant and, accordingly, to consider *remorse* an aggravating factor.

Conversely, *remorse* may potentially be relevant as a mitigating factor when the defendant appears before the court for domestic violence for the first time and there is no other indication of ongoing or continuous abuse (e.g. social protection services, witnesses, etc.).

In any case, when determining the sanction the court is encouraged to place emphasis on the act of perpetration and all the circumstances of the case, rather than the fact that the defendant expressed remorse. Courts are encouraged to exercise increased caution and critical analysis when valuing the perpetrator's *remorse*, given the possibility that the defendant is intentionally deceiving the court and the difficulty of establishing whether the expressed remorse for the domestic violence is honest.

### 3.2. Victim's attitude

*Recommendation:* The attitude of the victim is not considered when determining an appropriate sanction.

*Explanation:* Courts are discouraged from considering the victim's attitude when determining a sanction for a perpetrated offence of domestic violence. Given that courts are obliged to follow a general principle to impose a sanction proportional to the gravity of the offence and in accordance with general sentencing rules, the wishes of the victim may interfere with the application of a criminal sanction.

Moreover, it is important for victims *not to feel responsible* for the imposed sanction. As there may be a risk that the victim has been or will be threatened by the perpetrator to request a more lenient sanction or plead for the case to be dismissed, the attitude of the victim may not reflect the reality of the circumstances. In addition, it is the judiciary that is responsible for establishing domestic violence as an unacceptable social behaviour, and not the victim of the crime; thus the burden of enforcement should fall entirely upon responsible institutions and not individual members of society.

## 4. Court actions pertaining to the victim of domestic violence

### 4.1. Protection of the rights and interests of domestic violence victims during court proceedings

*Recommendation:* At all stages of court proceedings and in accordance with established standards of victim human rights protection, it is recommended that the court makes every effort to take the required actions to protect the rights and interests of a domestic violence victim, including:

- the right to be treated with respect and dignity
- the right to be protected from revictimization due to further violence
- the right to receive all information about her rights (delivery of the judgment and damage compensation, i.e. filing a property claim)
- the right to have her identity protected from the media, in accordance with relevant legislation
- the right of non-exposure to prejudices based on gender, race, ethnicity, age, appearance, physical and intellectual abilities or other personal features
- the right to be asked only those questions relevant for the court proceeding
- the right to have all required steps taken to eliminate fear of future assaults
- the right to protection and safety
- the right to be informed, at least in cases when victims and their families may be in danger, about the perpetrator's escape from prison/custody, or temporary or permanent release
- the right of having special protective measures provided as a vulnerable witness in court proceedings, including video-link hearings so the victim may avoid being questioned in the same room with the perpetrator, and the use of a psychologist or other expert to assist the victim during testimony
- the right to adequate support services – depending on the court's organizational capacities – so that the victim's rights and interests are properly presented and taken into consideration.

## 4.2. Victim's risk assessment by the court pertaining to domestic violence

*Recommendation:* During proceedings, the court is encouraged to pay special attention to the following circumstances that may be helpful in making an assessment of potential danger to the victim:

- access to/ownership of a gun(s) by the defendant
- use of a weapon by the defendant in a prior abusive incident
- threats with weapons by the defendant
- serious injury resulting from prior abusive incidents
- forced sex with the victim
- obsessive/extreme jealousy/dominance by the defendant
- prior history of domestic violence by the defendant
- separation, attempted separation or planned separation by the victim
- display of obsessive possessiveness by the defendant
- threats or attempts of suicide by the defendant
- stalking by the defendant
- prior police contact, particularly in cases where there is no actual police or justice system intervention, by the defendant
- threats to kill the victim
- prior criminal history of the defendant
- abuse of drugs/alcohol by the defendant, particularly preceding incidents of abuse and violence
- victim has a protection order.

*Explanation:* The court is one of the legally defined entities responsible for providing protection from domestic violence. It is thus imperative for it to engage in a risk assessment (risk of death, seriousness of the situation and risk of repeated violence) during proceedings to enforce laws and apply criminal sanctions more effectively.

## 4.3. Taking measures to protect the victim as a witness of domestic violence

*Recommendation:* Courts actively pursue efforts to afford victims protection during court proceedings.

*Explanation:* In accordance with laws on witness protection in criminal proceedings, the court can provide protection measures for a victim of domestic violence who appears as a witness, particularly a vulnerable or threatened witness, depending on the circumstances of the case.

It is advisable that the court considers the possibility of using video-link equipment to support questioning the victim as a witness at the main trial. This is necessary so that the victim is not forced to testify in the same room with the perpetrator, for the sake of her psycho-physical well-being, to prevent unnecessary and/or humiliating questioning of the victim as a witness of violence, to avoid repeating the victim's testimony and to mitigate traumatic consequences of the court proceeding for the victim.

*It is additionally advisable* to provide the victim with psychological assistance and support during testimony.

## 4.4. Victim gives up the idea of testifying

*Recommendation:* Courts are encouraged to avoid dropping cases solely on the basis of the victim not wanting to testify or participate in the trial.

*Explanation:* If the victim refuses to participate in the court procedures or to testify and there is *grounded suspicion* that the defendant perpetrated the offence of domestic violence, the court is encouraged to advise the prosecutor's office not to drop the charges automatically. The court and the prosecutor's office are encouraged to use all available means (e.g. order an expert witness) that may be helpful in presenting new evidence. The court is encouraged to keep in mind that the perpetrator of domestic violence may be, and often is, in a position to put additional pressure or use emotional or psychological violence on the victim during court proceedings, directly jeopardizing her autonomy in making the decision to testify.

## 4.5. Property claim/damage compensation

*Recommendation:* Courts are encouraged to notify and actively pursue opportunities for victims to submit property or damage compensation claims.

*Explanation:* The court is encouraged to inform the victim in the criminal proceeding about the possibility of filing a property claim for compensation for damage incurred as a result of the domestic violence. It is advisable that the court takes an active attitude towards the submitted property claim and treats it with due diligence, so as to make a decision on the claim within the existing criminal proceeding.

The court now plays active role at an early stage of the criminal proceeding, when an indictment is decided upon and evidence supporting it and other evidence pertaining to compensation to the damaged party are evaluated. The court can return the indictment to the

prosecutor for amendment if it does not include evidence pertaining to compensation.

If the property claim was not decided on within the criminal proceeding, it is recommended that the court judgment includes clear communication to the damaged party about the possibility of initiating civil action to claim damage compensation, i.e. executing the property claim through a civil proceeding.

## 5. Court ruling in a criminal proceeding

### 5.1. “More lenient” qualification of domestic violence – indictment confirmation stage

*Recommendation:* Courts are discouraged from conducting procedures for the basic form of domestic violence when evidence in the file points to a qualified form of the criminal offence.

*Explanation:* Research<sup>39</sup> in BiH on domestic violence shows that in a significant number of cases procedures are conducted for the basic form of domestic violence (i.e. with “more lenient” qualification of the offence), while the facts of specific cases point to the existence of “qualified” elements that require prosecution of the perpetrator for a qualified form of the criminal offence.

If the factual description of a case of domestic violence or evidence in the file indicates that the specific case involves a qualified form of the offence, i.e. the existence of qualified elements (e.g. child victims, use of weapons or dangerous tools, serious bodily injury or severely impaired health; As well as the perpetration of the offense in presence of a juvenile person under 18, in accordance with the RS Criminal Code.), and the prosecutor’s office issued an indictment for the “basic form”, the preliminary procedure judge is encouraged to return the indictment to the prosecutor’s office for modification in accordance with the factual description of the crime, and to request the prosecutor’s office to change the legal qualification.

### 5.2. Court actions following a request for issuing a sentencing warrant

*Recommendation:* Courts are discouraged from issuing a sentencing warrant when the facts in a case point to another criminal sanction or measure than that proposed by the prosecutor’s office.

In the following cases of domestic violence, *it is not recommended to use the procedure of issuing a sentencing warrant*, although the legal requirement for such a procedure may have been nominally met.

- When a case involves a qualified form of domestic violence, which includes situations where in perpetrating the offence a weapon, dangerous tool or other object suitable for inflicting serious bodily injuries or impairing health was used; when domestic violence resulted in a serious bodily injury or severely impaired health; or when the victim is juvenile.
- When a special recidivist is involved (i.e. in a case of repeated criminal prosecution of the defendant for the offence of domestic violence).

<sup>39</sup> For more information see OSCE, *Ensuring Accountability for Domestic Violence*, 63–64 and 67.

- When there is evidence that the perpetrator failed to abide by a previously imposed protective measure by the court, in accordance with the provisions of the Law on Protection from Domestic Violence (i.e. when there is a history of the defendant's failures to respect court decisions).
- When there are indications that the offence of domestic violence was perpetrated in a state of significantly decreased mental capacity due to abuse of alcohol or drugs (i.e. self-induced mental incapacity of the defendant). This is relevant in establishing the need for imposition of adequate security measures or protective supervision on the defendant at the main trial.

*Explanation:* According to criminal procedure codes, the procedure for issuing a sentencing warrant (as a form of summary criminal proceedings) can be used for criminal offences incurring a prison sentence of up to five years or a fine as the main punishment – but only in cases when the prosecutor requests a fine, suspended sentence or prescribed security measures (note: security measures for mandatory psychiatric or addiction treatment cannot be imposed with a sentencing warrant).

The court is encouraged to exercise special caution when deciding on requests for issuing a sentencing warrant in domestic violence cases, and pay special attention to the risk factors present in the specific case. These are relevant not only in relation to the sanctioning purpose of the sentence, but also as an auxiliary determinant in making a decision on (non-)acceptance of the prosecutor's request for issuing a sentencing warrant.

### 5.3. Guilty plea agreement

*Recommendation:* Courts are encouraged to reject a guilty plea agreement proposing a sanction more lenient than the legally defined minimum prison sentence for domestic violence. This applies to basic cases as well as qualified form of the offence involving aggravating factors related to the method of perpetration or the offender's personality.

*Explanation:* In addition to the standard facts verified by the court when deliberating on a guilty plea agreement, the court is encouraged to pay attention to the proposed criminal sanction and reasoning behind its pronouncement, reciprocal to the severity of the criminal offence, in view of the general and special sanctioning purposes. If the proposed prison sentence is more lenient than the minimum defined by the law for basic or qualified forms of the offence, and the offence involves aggravating factors, the court would have no justification for accepting the sanction proposed in the agreement. Although the court has freedom to evaluate all circumstances, rejection of a guilty plea agreement proposing a prison sentence more lenient than the minimum defined by law is recommended in all cases where:

- the defendant is a recidivist in domestic violence
- there is evidence indicating that domestic violence was taking place over a long period of time
- the defendant used strangulation during the offence

- there is extreme dominance by the defendant over the victim
- the victim was placed in a safe house
- the victim is particularly vulnerable or children witnessed the violence.

### 5.4. Conditional/suspended sentence

*Recommendation:* Courts are discouraged from using suspended sentences in the following cases.

- Recidivism – a case of a special recidivist in perpetration of domestic violence.
- Existence of qualified forms of the criminal offence of domestic violence.
- When the perpetrator is accused of domestic violence for the first time and the court has established the existence of aggravating factor(s) with regard to jeopardizing or violating the protected good or in relation to special circumstances of the offence.

*Recommendation:* Courts are encouraged to impose as long a probation period as possible when applying a suspended sentence.

When it comes to the *probationary period* – if the court imposes a suspended sentence – it is advisable to impose a longer period of probation for three reasons:

- to send an adequate message of special prevention to the defendant, who should carry the burden of the imposed sanction for a long period of time/probation
- to send an adequate message of general prevention to the wider community
- to ensure there are adequate measures available to intervene in a case of recidivism

When it comes to assessing compliance with the terms of a suspended sentence or probationary period, there are generally inadequate checks on the perpetrator unless he commits another criminal offence or does not fulfil the court's specifically imposed obligations. To make conditional sentences more effective in cases of domestic violence, it is recommended that courts (judges and prosecutors) monitor the status of defendants, including their compliance with the orders of the court.

### 5.5. Revocation of suspended sentence

*Recommendation:* Courts are encouraged to revoke suspended sentences for failure to abide by court orders within the probationary period (including alcohol and drug treatment, psychosocial treatment, etc.) in addition to criminal violations.

*Explanation:* When imposing a suspended sentence in domestic violence cases, the court is encouraged to consider a longer period of probation for the purpose of preventing future perpetration of violence.

When a domestic violence defendant, sanctioned with a suspended sentence, repeats the violence during the probationary period, the court is encouraged to revoke the suspended sentence. Guided by the intention of criminal sanctions, particularly in cases of recidivism, and taking into consideration the effects of ongoing violence and abuse on the victim and the courts' obligation to protect victims, courts are encouraged to avoid imposing a second suspended sentence.

When a defendant sanctioned with a suspended sentence that includes a security measure of mandatory psychiatric or addiction treatment fails to fulfil this obligation during the probationary period, the court is also encouraged to revoke the suspended sentence. Moreover, courts are encouraged to check officially on the status of suspended sentences every four to six months to determine whether the individual has complied with the conditions.

It is recommended that the court obtains, *ex officio*, an updated criminal record of the defendant, if the prosecutor's office has not provided this evidence already, to establish if there are any existing suspended sentences against the defendant. If the court finds that a suspended sentence already exists, with an ongoing probationary period, it is encouraged to determine whether legal requirements for revocation of the suspended sentence have been met.

### **5.6. Imposing protective supervision with a suspended sentence**

*Recommendation:* Courts are encouraged to impose protective supervision when it is necessary to prevent domestic violence in the family and the community at large.

*Explanation:* According to the criminal codes of FBiH, RS and BDBiH, a perpetrator who has been given a suspended sentence may be put under protective supervision<sup>40</sup> for a certain length of time during the probationary period. The protective supervision can include treatment at a medical institution, alcohol or drug treatment (and abstinence), and visiting certain psychiatric, psychological or other counselling services and following their advice.

When a defendant in a domestic violence case is given a suspended sentence, it is advisable for the court to identify whether requirements have been met for imposing a suspended sentence with protective supervision. The court's assessment of the existence of a need for protective supervision, in combination with logistical and professional capacities in the community for efficient implementation of supervision, can jointly be used to determine whether such supervision is an effective sanction.

When a suspended sentence with protective supervision is imposed in a domestic violence case, it is recommended that the probationary period be longer than the period of protective supervision so the court decision can be efficiently controlled.

If a convict fails to fulfil protective supervision obligations determined by the court, it is recommended – based on the court's evaluation – that the court either extends the period of supervision during the probationary period or revokes the suspended sentence altogether.

<sup>40</sup> The OSCE report, *Ensuring Accountability for Domestic Violence* (see note 8) revealed that courts in Bosnia and Herzegovina rarely impose suspended sentences with protective supervision, and presently there is no developed case law in this domain. When it comes to understanding the reasons behind this phenomenon, the prevailing opinion among members of the DV Judge Panel is that there is a tacit consensus within the judiciary that it is extremely difficult to control the implementation of protective supervision in practice, which is why imposing such supervision would not be efficient.

## 5.7. Contents of explanation of a court judgment

*Recommendation:* Courts are encouraged to provide a clear explanation of their reasoning, including factors that are considered aggravating or mitigating and an explanation thereof.

*Explanation:* Given the importance (in not only legal practice but social practice) of a court decision, it is particularly crucial that the court offers comprehensive reasoning behind specific decisions, including a complete explanation (i.e. presentation of reasons and arguments) of why it valued certain facts or evidence as aggravating or mitigating. It is especially important for the court to clarify, among other things, potential dilemmas between the parties in the proceedings, and to diminish the significance of arguments by the parties that when determining the sanction the court did not sufficiently value certain circumstances as aggravating or mitigating factors.

When valuing certain facts in a domestic violence case as aggravating or mitigating, it is advisable for the court to differentiate relevant circumstances that – although not constituting the criminal offence – present the context and provide a wider factual basis for the specific case. Examples are child witnesses to the violence, or secondary circumstances like whether the perpetrator is a parent or the primary breadwinner.

## 5.8. Verbal warning and information by the court

*Recommendation:* During the verdict the court is encouraged to issue a clear and strong verbal warning to the defendant on non-tolerance of domestic violence by the court.

*Explanation:* To achieve additional preventive effect against domestic violence, when imposing an appropriate sanction or measure it is advisable for judges to inform the defendant that any violation will be sanctioned by the court. For educational purposes, it is advisable that judges use their position of state authority and their leadership role in the community to send a clear moral message to the perpetrator regarding the unacceptable nature of abusive behaviour and the consequences of such behaviour for the victim, the family and the larger society.

Results of relevant research<sup>41</sup> show that combining a suspended sentence or protective measure with a verbal warning increases the probability that the abuser will adhere to the sentence. Moreover, the warning further sends a message to the victim (and everyone else in the courtroom) that she is entitled to a life without violence, and that the community must not and shall not tolerate domestic violence.

## 5.9. Contents of a court decision imposing a security measure in a domestic violence case

It is recommended that a court decision which includes security measures should specify all relevant factors and details<sup>42</sup> of importance for the efficient implementation of the imposed

<sup>41</sup> Research conducted in the United States includes James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston: Northeastern University Press, 1999), 106–112; Gail A. Goolkasian, 'Confronting Domestic Violence: The Role of Criminal Court Judges', Research in Brief 4, (Washington, DC: US Department of Justice, National Institute of Justice, 1986), 4; Barbara E. Smith, *Non-Stranger Violence: The Criminal Court's Response* (Michigan: University of Michigan Library, 1983), 96.

<sup>42</sup> For example, a court decision imposing a measure of mandatory psychiatric or addiction treatment should specify concrete institutions/organizations/persons in charge of implementing the treatment, duration of the treatment, methodology and dynamics of reporting to the court about implementation of the measure, information about the defendant's health insurance, etc.

measure, to enable adequate enforcement.

Given that security measures of mandatory psychiatric and addiction treatment address factors that increase the risk of perpetration of violence, and therefore indirectly contribute to protecting the victim, it is important for the court to address within the contents of the decision all potential factors that may impede their efficient implementation.

### **5.10. Standard of proof for imposing a security measure of mandatory psychiatric treatment (i.e. protective supervision, visiting certain psychological services and following their advice)**

*Recommendation:* According to the circumstances of a case, courts are encouraged to make all required efforts to impose adequate security measures, including protective supervision, and to use a specific standard of proof for this purpose.

For the purposes of imposing a security measure of mandatory psychiatric treatment or visiting certain service providers for psychosocial treatment and following their advice, the court is encouraged to use expert findings and opinions as a *standard of proof*.

When the facts in a domestic violence case indicate the need for imposing a security measure and/or protective supervision, and *the prosecutor's office did not propose* such a measure, it is recommended that the *court, ex officio, proposes* presentation of the required evidence and, based on the established need, imposes the necessary security measure. In these cases the court is encouraged to keep in mind the possibility of requesting expert testimony for this purpose. However, the court is encouraged to ensure that taking these steps does not unnecessarily delay court proceedings (e.g. because of unavailability of adequate experts).

Additionally, courts are encouraged to inform victims about the effectiveness of such programmes or measures, and thereby avoid any possible assumption on the part of the victim that the perpetrator is now "safe" and will no longer commit acts of violence and abuse.

### **5.11. Implementation of proceedings in domestic violence cases without unjustified delays**

*Recommendation:* Courts are encouraged to make every effort to avoid delays in domestic violence cases, and to that end to identify mechanisms to expedite cases.

*Explanation:* International legal standards stipulate implementation of court proceedings in domestic violence cases without unjustified delays. Also, the laws on protection from domestic violence stipulate urgent action by the court in resolving minor offence proceedings involving domestic violence (relevant law in Republika Srpska) or imposing protective measures in domestic violence cases (relevant law in the Federation of Bosnia and Herzegovina).

Although courts as a rule process criminal cases by order of receipt, when a domestic violence case is received it is advisable that the court takes urgent action to the extent realistically possible. It is recommended that courts conduct proceedings in these cases without unjustified delays in order to establish, in the most efficient way possible, the potential responsibility of the perpetrator for violence and minimize the negative consequences of the court proceeding on the victim.

## 6. Psychological violence – establishment

### 6.1. Psychological violence as a method of perpetrating domestic violence – standard of proof

In most cases, psychological violence is concealed, invisible and takes place over a long period. It is based on various forms of verbal abuse, aggression, humiliation, intimidation, manipulation, trickery and threats. Such behaviour has far-reaching consequences for victims and children, and identification of this form of violence, which is often neglected, requires particular attention.

For the purpose of establishing the existence of psychological violence, the court has the following proofs available.

- Statement of the damaged person.
- Witness's statement.
- Psychiatric expertise – expert findings.
- Findings can be presented as evidence or through expert testimony.

## 7. Recommendations for the prosecutor's office

### 7.1. Preparing a case file on domestic violence

To prepare a thorough case file on domestic violence for the court's evaluation, it is recommended that prosecutors include the following information (in addition to mandatory information taken during the initial questioning of a suspect and in accordance with the Criminal Procedure Code).

- Duration of the relationship between the perpetrator and the victim, and the existence of a history of abuse/violence.
- Isolation. Does the victim have family or friends? Does she live with the perpetrator's family or alone? Does she have access to public transport?
- Location where the violence takes place. Is it an urban or a rural area? Does the victim have any possibility – given the area where the violence takes place – to report it to the police, a social work centre, a doctor or friends?
- Does the victim have access to money (e.g. does she have her own source of income)?
- Does the suspect have access to or possess weapons?
- Use of alcohol/drugs by the suspect.
- In case of injuries inflicted on the victim, did she see a doctor and does she have any photographs and/or medical documents? If she has medical documents, the prosecutor is encouraged to include them in the case file and conduct an assessment of bodily and/or mental injuries detailed in the documents if domestic violence took place in the past; if the offence is "recent", an expert examination of the victim is recommended.
- Written statements of questioned witnesses who may have evidence about the specific offence of domestic violence.
- Official records from a social work centre. These centres may be in a position to offer detailed information about the potential history of domestic violence, repeated violence, placing the victim in a safe house, etc., given their possible involvement in the case.
- Victim's previous visits to a family doctor. Family doctors may be in a position to know the history of a victim's injuries, which may point to ongoing violence and abuse.

## 7.2. Special recommendations for the prosecutor's office in domestic violence cases

### 7.2.1. Urgent action

Prosecutors are encouraged to act urgently in domestic violence cases, since in a large number of cases the suspect and the victim share the same household, and failure to take timely action may lead to continued or repeated violence.

### 7.2.2. Evidence

Prosecutors are discouraged from basing an indictment for domestic violence exclusively on the victim's statement. It is advisable to obtain additional evidence (e.g. statement of another witness), given that victims often withdraw their statements and give up testifying. During the investigation it is important to collect evidence related to the crime and needed for compensation of the victim, as this is required for the court decision on financial compensation for the victim.

Also, at the time of issuing the indictment prosecutors are encouraged to have an *updated copy of the defendant's criminal record*.<sup>43</sup>

### 7.2.3. Preparing the witness to give a statement before the court

Prosecutors are encouraged to prepare witnesses for giving a statement before the court. A victim/ witness statement can have a direct impact on the credibility of the case and therefore the outcome of the court decision. Prosecutors are encouraged to warn victims that the defence counsel is likely to ask confrontational and personal questions, and to help victims/ witnesses prepare for cross-examination.

### 7.2.4. Actions when a victim declines to testify

When a victim declines or refuses to testify during a proceeding and there is a grounded suspicion that the defendant perpetrated the offence of domestic violence, the prosecutor is discouraged from automatically dropping the charges. The prosecutor is encouraged to use all available means (e.g. an expert witness or other witness) that may be helpful in presenting new evidence.

<sup>43</sup> As a rule, the prosecutor's office obtains a copy of the defendant's criminal record during the investigation of the defendant. This circumstance may be a drawback in the truthful establishment of the (non-)existence of the defendant's previous criminal history, given the time that passes between the moment of completing the investigation and issuing the indictment.

### **7.2.5. Checking for existence of previous report(s) on domestic violence or record of interventions by the police and social work centres – inclusion in the case file**

Prosecutors are encouraged to check with the police to identify whether they have information about previous reports of domestic violence against the same perpetrator, or they have responded to that home. This information is valuable for the case file as evidence of the history of violence. Based on the conclusions of focus groups, a large number of cases of domestic violence reported to the police were not followed up with further official actions by the police and/or the prosecutor's office. As the police are required to make an official note of a field intervention, this documentation can serve as evidence of the history of domestic violence by the defendant. Likewise, local centres for social work can potentially provide prosecutors with detailed information about previous reported incidents of domestic violence between the same parties and/or their reciprocal family or partner relationship history.

### **7.2.6. Verification of prior protective measures against the perpetrator in accordance with the Law on Protection from Domestic Violence of the Federation of Bosnia and Herzegovina (i.e. verification of prior minor offence sanctioning, and the imposition of protective measures against the perpetrator in accordance with the Law on Protection from Domestic Violence of Republika Srpska)**

Prosecutors are encouraged to determine whether any previous protective measures (FBiH and RS) have been imposed on the defendant, including other forms of minor offence sanctioning (RS). Prosecutors are encouraged to include this information in the case file as evidence of a history of violence.

### **7.2.7. Psychological violence – standard actions in Republika Srpska**

Legislation in Republika Srpska provides for criminal and minor offence qualifications of domestic violence.<sup>44</sup> According to existing legislation, for an act of domestic violence to constitute a criminal offense, it must involve injuries to the victim's physical or psychological integrity. On the other hand, any act of domestic violence not constituting a criminal offense is a minor offense.

In accordance with international legal standards in the area of domestic violence and relevant entity laws, evidence of continuity and long standing psychological violence may constitute the body of the criminal offense of domestic violence. Thus, prosecutors in Republika Srpska are recommended – if circumstances of the specific domestic violence case allow it – to qualify the offense as a criminal offense in order to conduct criminal proceedings.

### **7.2.8. Indictment for a qualified form of offence**

If the facts in the case or evidence point to the existence of qualified elements of a criminal offence of domestic violence, prosecutors are encouraged to issue an indictment for the qualified form of violence.

<sup>44</sup> Unlike legislation from the Federation of Bosnia and Herzegovina which qualifies domestic violence as exclusively a criminal offence.

### **7.2.9. Prosecution of domestic violence in concurrence with other criminal offences**

If the facts in a domestic violence case indicate the existence of several criminal offences (i.e. in cases when domestic violence is combined with other offences and can be prosecuted in concurrence with these), the indictment is recommended to include all concurrent criminal offences perpetrated by the defendant.

### **7.2.10. Proposing adequate prohibitive measures against the defendant**

In justified cases involving danger of repeated domestic violence or influencing the criminal proceeding, prosecutors are encouraged to propose that the court imposes measures prohibiting the defendant from visiting certain places or areas or meeting certain persons. Given that the procedure is conducted for the criminal offence of domestic violence and therefore includes harming a family member, prohibiting the defendant from further access is justified.

### **7.2.11. Proposing revocation of a suspended sentence**

Prosecutors are encouraged to check whether a defendant fulfils his obligations during the probationary period defined in a suspended sentence, and propose revocation of the suspended sentence when there are adequate legal reasons.

### **7.2.12. Filing an appeal against a judgment**

Prosecutors are encouraged to file an appeal with a request for pronouncement of more stringent sanctions in the second-instance procedure if they find that the first-instance court decision does not meet the requirements of special and general prevention.

## 8. Training and leadership

Regular and ongoing training for judges and prosecutors on the topic of domestic violence and other forms of gender-based violence is critically important to improving the efficient and effective work of judges and prosecutors. Moreover, developing a uniform and consistent approach to prosecution and establishing clear, consistent and evidence-based case law are important components of judicial excellence.

It is recommended that judges use their position of leadership and authority in the criminal justice system, and the community in general, to act proactively as advocates for positive social change in the interest of preventing and combating domestic violence.

## 9. Sentencing policy of higher-instance courts

Consistent with a zero-tolerance policy for gender-based violence, including domestic violence against women, legislation in BiH<sup>45</sup> and international legal standards for protection of women's human rights, it is recommended that:

- appellate/second-instance courts, when imposing a sentence, take into consideration the potential impact of a more lenient<sup>46</sup> criminal sanction than the sanction of the first-instance court on the future behaviour of the perpetrator, and belief among victims of domestic violence that they have guaranteed access to justice and protection from violence
- higher-instance courts support more stringent sentencing policy by lower-instance courts.

<sup>45</sup> See Article 6 of the Gender Equality Law in Bosnia and Herzegovina – consolidated text (*Official Gazette of Bosnia and Herzegovina*, No. 32/10); Article 3, para. 1 of the Law on Protection from Domestic Violence of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 20/13); Article 2 of the Republika Srpska Law on Protection from Domestic Violence (*Official Gazette of Republika Srpska*, No. 102/12 and 108/13).

<sup>46</sup> Suspended sentences with short probation periods and imposed warnings of short-term imprisonment (up to six months) and small fines are defined as 'more lenient' sanctions in domestic violence cases. The existence of a 'lenient sanctioning policy' in courts in BiH in domestic violence cases and the prevailing practice of reducing sanctions by second-instance courts are mentioned in the reports of the OSCE and civil society organizations that monitored court actions in domestic violence cases. For more information see OSCE, *Ensuring Accountability for Domestic Violence* and Udružene žene Banja Luka and Lara Bijeljina, *Monitoring and Analysis of Criminal Proceedings*.