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Prosecutors' Domestic Violence Handbook for Bosnia and Herzegovina

Sarajevo, 2017



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**Atlantic
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Center for Security and Justice Research



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BACKGROUND AND ACKNOWLEDGEMENTS

In the first half of 2017, under the auspices of the project “Gender and Justice in Bosnia and Herzegovina,”¹ supported by Sweden and the Embassy of the Kingdom of Norway in Bosnia and Herzegovina, in partnership with the Office of Overseas Prosecutorial Development Assistance and Training Program (OPDAT) of the United States Department of Justice, the Geneva Centre for Democratic Control of Armed Forces (DCAF) and the Atlantic Initiative established a prosecutorial working group to address the prosecution of domestic violence (DV) cases and provided support for its activities.

The working group was tasked with identifying critical elements and existing good practices in the prosecution of DV cases in Bosnia and Herzegovina (BiH). Over a period of six months, they met regularly and critically analysed the practices of prosecutors in BiH related to DV cases, in order to develop effective and efficient approaches to DV prosecution. The efforts of the working group led to the development of this resource – *Prosecutors’ Domestic Violence Handbook* – designed *for prosecutors, by prosecutors* to provide information deemed particularly important in prosecuting these cases and to recommend improvements in practice.

Eleven prosecutors from prosecutor’s offices in both the Federation of BiH and the Republika Srpska, each with extensive professional experience in DV cases, made up the working group. They translated their knowledge and experiences into this *Handbook*, with expert and technical support from DCAF, the Atlantic Initiative, and OPDAT.

1 This project has engaged through various activities, and in cooperation with members of the judiciary across Bosnia and Herzegovina, to improve the judicial response to domestic violence in BiH. Among other efforts, judges in BiH have been engaged to develop two resources for the evaluation of domestic violence cases: “*Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*” and “*Practice Guide: Domestic Violence – Addendum to the Judicial Benchbook for Considerations of Domestic Violence Cases in Bosnia and Herzegovina*”.

We would like to acknowledge the prosecutors of the working group and thank them for developing the *Prosecutors' Domestic Violence Handbook*:

- Vedran Alidžanović, Cantonal Prosecutor's Office of Tuzla Canton
- Damir Čačković, Cantonal Prosecutor's Office of Tuzla Canton
- Hajrija Hadžiomerović-Muftić, Federal Prosecutor's Office of the Federation of BiH
- Advija Hajdo Balta, Cantonal Prosecutor's Office of Sarajevo Canton
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- Suada Salkić, Federal Prosecutor's Office of the Federation of BiH
- Edin Šačirović, Cantonal Prosecutor's Office of Sarajevo Canton

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We would also like to thank Mel Flanagan, a retired judge and former prosecutor from the US, who is now a guest lecturer in the Faculty of Law at the University of Sarajevo and a legal expert on domestic violence. She participated in some working group meetings, where she presented on specific topics related to the prosecution of DV cases and prepared materials that were adapted for inclusion in this *Handbook*.

Finally, we thank the Association of Prosecutors in the Federation of Bosnia and Herzegovina and the Association of Prosecutors in Republika Srpska, as well as their presidents – Federal Prosecutor Hajrija Hadžiomerović-Muftić and RS Prosecutor Živana Bajić – for their assistance in establishing the prosecutorial working group.

INTRODUCTION

Since the criminalization of domestic violence (DV) in BiH criminal codes² in 2003, actors in the criminal legal system, especially in the judiciary, have worked to develop a quality, harmonized approach by which to respond to domestic violence; an approach that should result in the effective sanctioning of perpetrators and protection of victims. The police, prosecutor's offices, and courts are responsible for investigating, charging, and sentencing DV crimes, but face many challenges in doing so. With respect to prosecutorial practice, one concern among others is the testimony of practitioners that no standard specializations in practice exist for DV cases. This results in a lack of priority for these cases; a lack of understanding of the unique elements of domestic violence and a corresponding dearth of indictments for all forms of family violence; frequent suspensions of investigations or dropped charges when victims refuse to testify; and insufficient coordination between prosecutor's offices and the police. The need to improve judicial responses to domestic violence is recognized by legal professionals, but the willingness of institutions and various levels of government in BiH to adapt to and adopt more efficient approaches to DV cases will depend on many factors.

Prosecutors play a decisive role in this effort, given that they are the main link between the activities of police to identify and build a case against perpetrators of domestic violence and any final court decision about a perpetrator's guilt. Yet, the response of judicial professionals in DV cases can be inhibited by an inadequate understanding of the specific nature of domestic violence; a lack of knowledge about binding international legal standards in practice; and stereotyped or biased interpretation of the facts of a case that impact the evaluation of evidence. These issues are not exclusive to the criminal legal system and judicial practices of BiH, but are more or less a challenge to legal professionals in all such systems around the world.

2 Criminal Codes of the Federation of BiH, of Republika Srpska and Brčko District of BiH.

Domestic violence is the subject of *regulae* on the global level through the legislative activities of UN special bodies, and at the European (regional) level through the activities of the Council of Europe. The Council's "Convention on preventing and combating violence against women and domestic violence," the so-called Istanbul Convention, is the most significant of these international legal instruments. BiH ratified the Convention, thereby assuming the obligation to comply with binding legal standards. Improving the criminal legal response to DV thus requires that professionals in the justice system are aware of relevant international standards, can apply critical and comparative legal analysis, and can identify the strengths and weaknesses of prosecutorial approaches to DV cases. This *Handbook* supports prosecutors by bringing awareness to the issues most relevant in the prosecution of DV cases, offering explanations of the advantages and disadvantages to existing procedures, providing examples of good prosecutorial practices in DV cases in BiH, and recommending improvements to prosecutorial practice.

The Prosecutors' Domestic Violence Handbook comprises theoretical and practical portions. The first chapter provides a theoretical framework for domestic violence, adapted to the needs of prosecutors, to establish a basis for informed decision making in DV cases. The chapter presents the mutually related topics of: domestic violence typology, dynamics of power and control, domestic violence cycles, and the effects of gender bias and stereotyping on the prosecution of domestic violence cases. Chapter two elaborates on specific acts of violence that may occur in DV perpetration but which are not sufficiently recognized in indictments for the offence: strangulation, stalking, and sexual assault.

Considering the obligation of prosecutors to represent the interests of the injured party, the third chapter focuses on ways that prosecutors can improve the experience of DV victims in criminal proceedings. For example, the chapter highlights reasons victims may refuse to testify against their family members; presents a methodology for interviewing injured parties that aligns with international standards of good practices; and discusses the importance of procedural protection measures for victims as well as ensuring they are provided assistance and information.

The fourth chapter outlines general prosecutorial practices relevant to the successful prosecution of DV cases, including: prompt response to DV cases; internal work models for prosecutor's offices in DV prosecutions; the filing of property claims for damages; the consideration of previous prosecutorial decisions and the use of evidence; and the adequate collection of information about a suspect from records and through data verification.

In chapter five, standards of prosecutorial practice for DV cases in different stages of criminal proceedings are presented. Starting at the investigation, through indictment, trial, and appellate proceedings, this chapter breaks down the best international and national practices, to support the efficient work of prosecutors on these cases.

The final chapter of this *Handbook* tackles the importance of education on the topic of domestic violence – for the purposes of ensuring the effective prosecution of DV cases, fostering a gender-responsive approach to these cases, and preventing DV – as a general framework for prosecutorial work on cases involving domestic violence.

Finally, research and official statistics on domestic violence, both globally³ and domestically,⁴ indicate that men are by and large the perpetrators of domestic violence, whereas women are victims. For this reason, most of the examples in this *Handbook* involve female victims and male perpetrators. This is not meant to deny or dismiss in any way that men can also be victims of DV, and that women can be perpetrators.

3 Claudia García-Moreno, et al., *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); UN General Assembly, "In-depth study on all forms of violence against women: Report of the Secretary-General," No. A/61/122/Add.1, 6 July 2006.

4 Marija Babović, et al., *Prevalence and Characteristics of Violence Against Women in BiH* (Sarajevo: Gender Equality Agency of BiH, 2013).

I A THEORETICAL FRAMEWORK FOR DOMESTIC VIOLENCE: INFORMING PROSECUTORIAL ACTION

1.1. Domestic violence typology

The domestic violence typology discussed in this chapter applies only to violence occurring between spouses or common-law spouses – which is recognized in all relevant research as the most frequent form of domestic violence. Therefore, other forms of violence, such as violence against children, against parents, and against elderly relatives, are not explained by this typology.

Research has determined that abusive relationships between spouses or common-law partners fall into the three general types shown in Table 1, below – battering, violent resistance, and situational couple violence. To clarify the differences between these types, the main characteristics of each are described in Table 1 as a function of: the perpetrator's aim or motive; the most important characteristic of violence; the identity of the perpetrator; the frequency of violence; and the severity of the violence.

When people picture domestic violence, they often imagine the first type, **battering**, characterized by one partner exercising power and control over another (*See section 1.2.*). Battering is extremely serious, but it is important to understand that in many cases it is not marked by high levels of *physical* violence. Rather, a perpetrator may use threats and coercion to control a victim and restrict their freedom; which is why sociologist Michael Johnson refers to this type of DV as “coercive controlling violence” or “intimate terrorism.”⁵

5 See: Michael P. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Boston, MA: Northeastern University Press, 2008); and Joan B. Kelly and Michael P. Johnson, “Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions,” *Family Court Review* 46, no. 3 (2008): 479.

NB: For prosecutors, the term “coercive controlling violence” is perhaps most instructive, because it describes the dynamics of violence that characterize battering.

Sometimes, victims of battering commit isolated but violent acts in order to escape from their batterers, or to protect themselves or other relatives in life-threatening situations. This defines **violent resistance**, the second type of violence. In such cases, the fact that a victim-turned-perpetrator was battered regularly or faced a life threatening situation should be considered a significant mitigating factor. It is also critical that prosecutors recognize that perpetrators of violent resistance, and their dependants, often remain threatened by further violence themselves.

The third type of violence that occurs between spouses or common-law partners is **situational couple violence**, in which an argument escalates into violence but neither partner dominates the relationship. Serious injuries can result, but the couple exhibits no pattern of power and control. There is a general tendency for defence counsel to mischaracterize battering as situational couple violence.

Table 1: Johnson's control typology of intimate partner violence⁶

Type of violence	Battering (Coercive Controlling Violence)	Violent Resistance	Situational Couple Violence
Aim	To control the relationship	To escape battering	To "win", get attention, or "get even"
Defining characteristic(s)	Repeated violence; or a single incident used as a lasting threat to control	Victim reacts in defence or in response (retaliation) to battering	A conflict escalates to violence, which ends when resolved
Perpetrator(s)	The dominant partner in the relationship	The victim of battering	Potentially, both parties
Frequency of violence	Often frequent	Very rare, usually a single incident	Usually infrequent or isolated to short periods of time
Severity of violence	Victims often fear for their life, but actual physical violence may be limited	May be very violent	Life-threatening violence is rare; but may occur

6 Denise A. Hines and Emily M. Douglas, "Intimate terrorism by women towards men: Does it exist?" *Journal of Aggression, Conflict and Peace Research* 2, no. 3 (2010): 36-56; Johnson, *A Typology of Domestic Violence*; and Michael P. Johnson, "Types of domestic violence: Research evidence" (presented at the Third Nordic Barnett & Rusen Conference, Sandefjord, Norway, September 2012).

It must be noted that all three of these types of domestic violence between spouses and common-law partners are subject to prosecution. Though, in cases involving violent resistance by a victim against a perpetrator, the prosecutor should establish if any circumstances exclude the unlawfulness of such an act and thus the victim's guilt (for instance, necessary self-defence).

This typology is especially useful to prosecutors because it provides a framework by which to assess domestic violence. An isolated event of violence may appear relatively minor when taken alone; but if prosecutors routinely examine whether singular incidents fit within larger patterns of power and control, they are better able to demonstrate the full scope of ways a defendant may have violated the “peace, physical integrity or mental health of a member of his family.”⁷ In other words, the prosecutor can challenge and contextualize claims by the defence that a defendant ‘merely slapped’ their partner, and furthermore, can strengthen any request for protection of the victim. The typology may also be helpful to prosecutors during proceedings, in order to explain and clarify the dynamics of domestic violence.

1.2. The Power and Control Wheel

The Power and Control Wheel is a useful visual tool that illustrates the constellation of abuse tactics used in battering, or coercive controlling violence.⁸ Initially developed as a model of gender-based violence against women, the Wheel can also pertain to DV perpetrated against men. Though, notably, data from various countries indicates that men who are victims of domestic violence are mostly abused by other men; meaning that, regardless of the gender of the victim, it is largely men who perpetrate this type of violence.⁹

The typology described above in Table 1 categorizes violence between spouses or co-habiting partners, but it is important to remember that domestic violence also occurs among and between other family members. In any domestic violence case, police reports and witness testimonies are likely to focus on instances of physical violence, which are most easily understood as a crime. The Power and Control

7 Criminal Code of the Republika Srpska, “Domestic Violence,” Article 208 (1), Official Gazette of the Republika Srpska 49/03, 108/04, 37/06, 70/06; Criminal Code of the Federation of Bosnia and Herzegovina, “Domestic Violence,” Article 222 (1), Official Gazette of Federation of BiH 36/03; and Criminal Code of Brčko District of Bosnia and Herzegovina, “Domestic Violence,” Article 218 (1), Official Gazette of Brčko District of BiH 9/13. *Note:* as of the writing of this text, a new Criminal Code (“Domestic Violence”, Article 190) has been adopted by the National Assembly of Republika Srpska, but has not entered into force.

8 Different forms of the Power and Control Wheel are available at: Domestic Abuse Intervention Programs, “Wheels,” www.theduluthmodel.org/training/wheels.html (accessed June 2017). As the Power and Control Wheel illustrates, physical violence is only one form of control among many – including threats, intimidation, and emotional and economic abuse.

9 See: Callum Watson, “Preventing and Responding to Sexual and Domestic Violence against Men: a Guidance Note for Security Sector Institutions,” Geneva, DCAF, 2014, 22.

Wheel can help prosecutors and other judicial professionals establish whether a wider pattern of abuse exists, and hence constitutes battering. In such cases, the psychological effects of physical violence on the victim are often greater or longer lasting than any physical injury.

Figure 1: Power and Control Wheel¹⁰



10 Developed by Domestic Abuse Intervention Programs (DAIP), Duluth, MN.

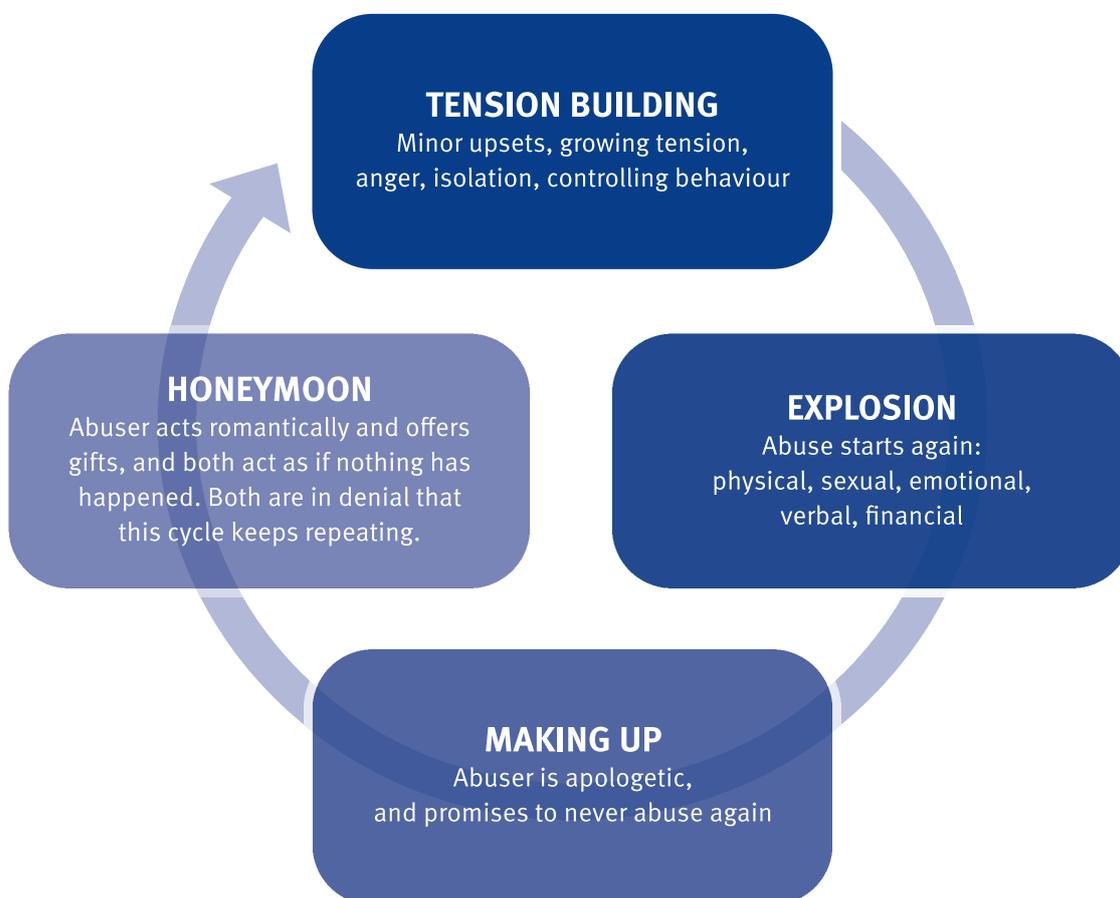
1.3. The cycle of domestic violence

Perpetrators of domestic violence are not necessarily persistently violent; and in some cases, violence is cyclical – tension in a relationship builds slowly, resulting in a brief period of severe violence, followed by a “honeymoon phase” during which the abuser is apologetic. Yet, the tension builds again and the cycle repeats.¹¹ It is important for prosecutors to be aware of this cycle, for victims who are in the honeymoon phase at the time their case reaches trial may be convinced that their abuser’s bad behaviour is confined to the past and may therefore choose not to testify. Nonetheless, these victims are still at risk. Some perpetrators may even use court cases as justification for resuming their controlling behaviour.

Fundamentally, interventions of the criminal justice system and protective measures for victims, issued in accordance with the Law on Protection from Domestic Violence, interrupt the cycle of violence in BiH. For this reason, it is in the interest of victims for prosecutors to pursue DV cases and put maximum effort into the collection of evidence even when those victims are uncooperative or request that charges be dropped. Figure 2, below, shows the cycle of violence that characterizes some abusive relationships, and clarifies why a period of good behaviour on the part of an accused perpetrator of DV should not be considered a mitigating factor and does not indicate that the cycle of violence has been broken.

¹¹ Oakland County Coordinating Council Against Domestic Violence, *Oakland County Domestic Violence Handbook: You're Not Alone* (2003), 11. Available at: <https://www.beaumont.edu/PageFiles/80599/YouAreNotAloneEnglish.pdf> (accessed July 2017).

Figure 2: The Cycle of Domestic Abuse



1.4. Gender bias and the prosecution of domestic violence cases

Gender bias can be defined as “stereotyped thinking about the nature and roles of women and men... and myths and misconceptions about the economic and social realities of women’s and men’s lives.”¹² Even when judicial professionals strive to treat women and men equally and fairly, it is inevitable that their implicit biases, including about gender, play some role in their practice.¹³ Otherwise, judicial decisions would follow one simple, universal pattern: **Facts + Law = Decision**. And

12 Lynn Hecht Schafran, “Planning for Evaluation: Guidelines for Task Forces on Gender Bias in the Courts,” *Women Judges’ Fund For Justice*, 1989, 1.

13 “Implicit bias refers to the unconsciously held assumptions or stereotypes about specific social groups (gender, race, ethnicity, religion, etc.) that develop at a young age and become more ingrained over time. They result in subconscious attitudes, assumptions, and stereotypes that affect decision-making in all areas of our lives.” From: Majda Halilović, et al., *Gender Bias and the Law: Legal Frameworks and Practice from Bosnia and Herzegovina & Beyond* (Sarajevo: Atlantic Initiative/DCAF, 2017), 34-35.

yet, we know this is not how it works; firstly because no two prosecutors put forth identical indictments, and secondly because judges don't make identical decisions. (If they did, there would be little need for courts of appeal.) Subjective decision making is thus a factor, to some degree, throughout the chain of justice.

It may be useful to think of biases and stereotypes as a kind of naturally occurring “shorthand” our brains use to allow us to make quick decisions based on past experiences, including exposures to culture and media. This is rather valuable if, when we see a pot on a stove, we assume that it is hot and take care not to burn ourselves. However, it can be problematic when we turn assumptions based on past experiences into negative generalized judgements. For example, believing women cannot (and therefore should not) pilot planes simply because one has never before seen a female pilot.

The important question prosecutors need to ask themselves is not *whether* they have gender biases but *what* gender biases they have. Indeed, the same goes for the witnesses, experts, judges, and attorneys they work with as well. It is only by starting from the assumption that everyone harbours biases that we can begin to actively identify, challenge, and mitigate these biases in order to ensure that the law is applied in a fair and objective manner, to the greatest extent possible.

How gender bias and gender stereotypes impact domestic violence cases

Many people have strong opinions about the roles women and men ought to play in families, based on varying combinations of culture and personal beliefs. It is therefore unsurprising that gender bias often influences cases of domestic violence in a number of ways. Moreover, most countries only criminalized domestic violence in the mid-to-late twentieth century and, in many cases, DV is still not treated as seriously as other crimes that carry similar penalties; facts that are in themselves reflections of gender bias.¹⁴

Gender stereotypes can impact the provision of justice in domestic violence cases when, for instance, spurious mitigating factors, based on gender stereotypes, are presented by defence counsel. These may rest on the notion that men are naturally aggressive and hence excuse the violence that occurred as due to temporary insanity. Defence counsel may also make note of the fact that a defendant adheres to widely-admired male stereotypes related to his position of social power, status as a father, socio-economic success as a breadwinner, or “good behaviour” before the court.¹⁵ Yet, some of these should actually be treated as aggravating factors

14 Kristin A. Kelly, *Domestic Violence and the Politics of Privacy* (Ithaca, NY: Cornell University Press, 2003).

15 Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo, DCAF, 2014), 25-26.

given that the perpetrator has abused his position of power by committing violence, especially against his family.

Gender bias can also undermine the testimony of female witnesses, who are disadvantaged from the outset by prevailing stereotypes that women are manipulative and thus likely to fabricate accusations. This calls into question the credibility of female witnesses generally and can be particularly challenging when layered upon the trauma of domestic violence, which can prevent people from recalling events in a linear fashion and may lead to the repression of certain memories – sometimes wrongly leading judicial professional to believe that the testimony of victims is untrue.

In addition, many people hold an image of a stereotypical victim of domestic violence, and injured parties who do not fit this image can be subject to greater scrutiny when testifying.¹⁶ This can make it particularly difficult for male victims of domestic violence to be taken seriously, especially if they appear to be physically stronger than their alleged abuser.¹⁷

For these reasons, it is critical that prosecutors and other criminal justice professionals recognize that they harbour implicit biases, just as everybody does. At each stage of the criminal justice process, they must take active steps to ensure that their perspective on a case is rooted in objective analysis of the facts and not implicit biases. Further, prosecutors must question whether and how the evidence presented to them by witnesses, experts, attorneys, and the police has been influenced by biased assumptions and gender stereotypes. Below, Table 2 offers examples of how gender bias can hinder the provision of justice in DV cases, at different stages in the criminal justice process.¹⁸

16 Lynn Hecht Schafran, "Barriers to Credibility: Understanding and Countering Rape Myths," n.d. Available at: http://www.nationalguard.mil/Portals/31/Documents/J1/SAPR/SARCVATraining/Barriers_to_Credibility.pdf (accessed July 2017).

17 Watson, 27.

18 Adapted from: Eileen Skinnider, "Handbook on effective prosecution responses to violence against women and girls," Criminal Justice Handbook Series (Vienna: United Nations Office on Drugs and Crime, 2014), 29-30.

Table 2: Examples of the potential effects of gender bias on criminal proceedings

<i>Stage</i>	<i>Example of Impact</i>
Reporting	Victims do not report DV because they do not know it is a crime or they fear no one will believe them
Response	Police do not record acts of DV as criminal (for example, processing them as minor offences), because they do not consider DV a serious crime
Investigation	Witness testimony is questioned or investigators do not prioritize DV cases, and police fail to fully implement investigative action
Prosecution	Prosecutors do not exercise due diligence during prosecution due to frustrating previous experiences with injured parties in DV cases who refused to testify
Trial	Expert witnesses present analysis influenced by gender bias, which puts the credibility of the victim into question
Sentencing	Inadequate criminal sanction are imposed (for example, due to an inadequate evaluation of the aggravating and mitigating factors that affect sentencing)

II SPECIFIC ACTS OF DOMESTIC VIOLENCE

2.1. Strangulation

In the context of DV, strangulation is an extreme physical form of violence as well as the ultimate exertion of a perpetrator's power and control over a victim. By choosing strangulation, perpetrators literally control their victims' breath – and life or death – in their hands. Strangulation can thus have a devastating psychological effect on victims, and a potentially fatal outcome.¹⁹

The approach of criminal justice actors to DV is inadequate when police and prosecutors fail to recognize that strangulation occurred; and this may be additionally complicated by the tendency of victims to downplay the violence they have experienced. Therefore, it is particularly important that police and prosecutors' offices understand how to recognize the presence of strangulation in a DV case, in order to enable proper documentation, investigation, and prosecution of these cases. What's more, strangulation cases must be appropriately qualified and a distinction made between criminal sanctions in practice, for example, between cases where strangulation constitutes one of the elements of a domestic violence crime and those in which strangulation constitutes an attempted homicide.

To make the investigation of cases involving strangulation more efficient (whether prosecuted as DV or under a different legal qualification), the incident should be documented during investigative actions and the following steps should be taken:²⁰

19 For more information about strangulation as an extreme form of domestic violence, see: Nenad Galić, ed., *Practice Guide: Domestic Violence* (Sarajevo, AI/DCAF, 2016), 21-23.

20 Content modified and adapted from: Alberta Justice and Solicitor General/Alberta Crown Prosecution Service, "Domestic Violence Handbook for Police and Crown Prosecutors in Alberta," Alberta Justice Communications, 2014, 111; and National District Attorneys Association, Women Prosecutors Section, "National Domestic Violence Prosecution Best Practices Guide: White Paper," 2017, 21-22.

- Take a statement from the injured party:
 - Ask them to describe all details of the case, to the extent they can remember them: What is the perceived duration of strangulation? What was the method of strangulation? Ask for a description of the mechanism and intensity of force or pressure applied, whether they lost consciousness, what they did to defend themselves, and document all external injuries.
- Look for witnesses;
- Give instructions for a detailed medical examination (including an external and internal examination of the neck and throat²¹) of the injured party:
 - Check for any breathing and swallowing difficulties; changes in voice, hoarseness, or complete loss of voice; visible injuries on the neck (bruises may appear the next day and change colour); or injuries in the mouth.
- Collect physical evidence (seize objects that may have been used for strangulation);
- Collect good-quality photo documentation:
 - Take full-body photographs of the injured party, and close-ups of the face and neck, including the front, back, and sides of the neck and chest;
 - If possible, take follow-up photographs 24-48 hours later (or as long as visible injuries are present).

In addition to these actions, in criminal situations involving strangulation, it is useful in the investigation stage for the prosecutor's office to submit a proposal to the court to order a physical examination of the *suspect*. As a rule, strangulation victims will attempt to resist, often leaving injuries on the perpetrator. Also, an examination of the suspect would include analysis of any trace DNA from the victim's skin or blood that can be found under the suspect's nails.

Taking these actions will enable quality expert analysis of the victim's injuries later, and establish the consequences of the strangulation.

It is important to note that all of these actions should be taken to the extent possible, in accordance with the circumstances of each case. In situations involving strangulation, the provision of urgent medical assistance to the victim should always be the priority.

²¹ Internal throat examination is preferred, and useful because it can reveal the severity of injuries and intensity of strangulation.

2.2. Stalking

It is very important that investigators and prosecutors recognize the act of stalking as an element of DV, for the purposes of carrying out comprehensive and high-quality prosecutions of DV cases. The Laws on Protection from Domestic Violence in the Federation of BiH and the Republika Srpska define stalking of a family member as an act of domestic violence. However, the RS law stipulates that stalking as an individual act of domestic violence constitutes a misdemeanour, prosecuted in misdemeanour proceedings; whereas in the FBiH it constitutes an act of domestic violence for which protective measures can be imposed by the court. And, according to the Criminal Code of the FBiH (Article 183(3)) and the Brčko District (Article 180(3)), stalking may constitute an element of the body of the qualified form of the offence of 'endangering security,' which can be perpetrated only against a current or former intimate partner (as a passive subject).²²

It is also possible that actions involving stalking appear as an element of DV cases processed through criminal proceedings, for example:

- stalking as one of several acts of DV perpetration that is repeated over a long period of time and constitutes a part of the factual description of the offence (an operative part of the indictment); or
- stalking that does not constitute an act of perpetration of domestic violence that is subject to criminal proceedings, but constitutes a part of the defined broader DV context (as an aggravating factor).

Prosecutors must clearly discern between all the criminal and misdemeanour forms that stalking may take and consider those differences when prosecuting offences with elements of stalking, especially DV cases involving the stalking of a family member.

For the purposes of informed and efficient prosecution of DV and other cases involving stalking, the following list gives examples of actions and behaviours that indicate or define stalking:

- Following the victim and/or showing up where the victim is;
- Sending unwanted gifts, letters, cards, or e-mails;

²² The offence of 'endangering security' applies to a perpetrator who: "by sneaking, frequent following or otherwise harassing endangers the safety of the spouse, common-law partner, or parent of his child, or other person with whom he has or has had a close relationship..." See: Criminal Code of the Federation of BiH, Article 183(3), Official Gazette of the Federation of BiH, No 36/03; and Criminal Code of Brčko District of BiH, Article 180(3), Official Gazette of Brčko District of BiH, no. 33/13.

- Monitoring the victim's phone calls, computer use, or use of other forms of communication;
- Using technology, such as hidden cameras or GPS, to track the victim;
- Driving by or loitering near the victim's home, school, or workplace;
- Gathering information about the victim from public records or online search services, by going through the victim's garbage, or by contacting friends, family, neighbours, or co-workers;
- Other actions meant to control, track, or frighten the victim.²³

2.3. Sexual assault: recognizing the act in the context of DV

The criminal offence of marital rape is very rarely prosecuted in practice, and sexual assault charges are often excluded from domestic violence cases.²⁴ One reason for this may be the fact that collecting conclusive evidence of marital rape is incredibly difficult because it requires proving a lack of consent. This brings various challenges to prosecution, which can be divided into four broad themes – credibility, consent, evidence, and stigma.

The challenge of credibility

Legal professionals and others who provide expert testimony in the courtroom (expert witnesses) may have preconceived and gender-biased notions of how a “real” victim of sexual assault should behave. As a result, victims often find their own behaviour under intense scrutiny (for example, facing questions about whether they were drinking alcohol or why they didn't physically resist more forcefully) as defence counsel aims to destroy their credibility.²⁵ This is particularly problematic in cases of battering in which violence was perpetrated systematically, where there is often a lack of evidence to demonstrate lack of consent. That being said, especially in cases where the prosecution has demonstrated controlling and coercive behaviours on the part of the accused, a defence of consent should not be accepted on its own when it is inconsistent with other facts of the case, and “should require evidence that there is at least some form of affirmative speech or action on the part of the victim, rather than from an inference of passivity or acquiescence.”²⁶

23 “What is Stalking,” Stalking Resource Centre, National Centre for Victims of Crime, <https://victimsofcrime.org/our-programs/stalking-resource-center/stalking-information#what> (accessed May 2017).

24 OSCE Mission to BiH, *Ensuring Accountability for Domestic Violence: An analysis of Sentencing in Domestic Violence Criminal Proceedings in Bosnia and Herzegovina, with Recommendations* (Sarajevo: OSCE, 2011), 63-64.

25 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: AI/DCAF, 2014), 80.

26 Eileen Skinnider, “Handbook on effective prosecution responses to violence against women and girls,” Criminal Justice Handbook Series (Vienna: United Nations Office on Drugs and Crime, 2014), 81.

It is also sometimes the case that a victim does not report sexual assault when reporting domestic violence, or does not understand it as a crime; for example, if they believe that having consented in the past, their consent cannot be withdrawn. With this in mind, it can be helpful if the prosecutor uses these four steps:

1. **ASK:** Has your partner ever forced you to have sex when you didn't want to?
2. **NAME:** What you are describing to me is rape/sexual assault, and it is a crime.
3. **RESPOND:** Offer contact details for an organization that provides support to victims of domestic violence and sexual assault.
4. **FOLLOW UP:** Check in about the victim's safety and assess their security.²⁷

Establishing the absence of consent

Sexual assault is characterized by a lack of mutual consent and a lack of concern for the victim. It can be less obvious in the context of a spousal or common-law relationship, though, when a couple has previously engaged in consensual sexual behaviours.²⁸ While the investigation and forensic work in cases where the accused is unknown to the victim seek to establish the identity of the perpetrator and whether the assault took place, sexual assault in the context of domestic violence involves establishing whether sexual relations were *consensual* at a specific moment in time.

It can be difficult for prosecutors to prove lack of consent beyond a doubt, even in the rare cases where there is forensic or medical evidence. Still, there are several other kinds of evidence that can be used to support the credibility of an injured party and help contextualize any existing medical evidence that suggests non-consensual sexual contact was perpetrated. For example, there may be evidence that the defendant threatened the victim if she did not comply to certain acts or if she did not terminate or continue a pregnancy.

Forensic and medical evidence

The collection of forensic evidence of sexual assault has traditionally focused on establishing whether sexual contact took place and, if so, identifying the perpetrator. As noted above, this approach is not usually suitable in cases involving spouses or common-law partners, in which a lack of evidence does not

27 Adapted from: Women's Health Goulburn North East, *Raped by a Partner* (Victoria (Australia), 2008); and Jennifer Gentile Long, "Prosecuting Intimate Partner Sexual Assault," *The Voice* II, no. 2, American Prosecutors Research Institute (2008).

28 Huhtanen, Heather, "Sexual assault dynamics," in Attorney General's Sexual Assault Task Force, *Advocacy Manual* (Salem, OR: Oregon Department of Justice, 2007), 4-5.

imply a lack of sexual contact; to the contrary, it is often true that sexual abuse leaves no visible traces.²⁹

Ideally, evidence collection in sexual assault cases is undertaken during the provision of medical treatment to the victim, in order to avoid the need for both a medical examination and a separate forensic examination, both of which can be highly intrusive and unpleasant. Evidence that can be used to indicate violent sexual contact includes:³⁰

Type of evidence	Purpose
Blood (for drug and alcohol analysis)	May indicate inability to consent
Urine (for drug and alcohol analysis)	May indicate inability to consent
Extra-genital injury (bruising, lacerations, abrasions, swelling, bites, or scratches)	May indicate use of force
Fingernail scrapings	May indicate resistance, identify perpetrator
Ano-genital injuries (swelling, redness, tenderness, lacerations, contusions, abrasions, tearing, bruising, or bleeding of the vulva, introitus, hymen, vagina, cervix, or anus)	May indicate use of force, penetration

It is also important that medical and forensic records contain information about the psychological state of victims, as well as the examiner's opinion regarding the likely cause of injury (e.g., a sharp object, cloth, or rope).³¹

Psychological expertise

Given how difficult it is to prove abusive sexual intercourse in a marriage or common-law relationship, it is useful to order a psychological evaluation of a DV victim, which may uncover more about the traumatic experience. An expert's findings may also include their opinion as to the genesis of unhealthy relations between spouses

²⁹ Skinnider, 105 and 107.

³⁰ Ibid, 105.

³¹ Ibid.

or common-law partners over time and how the intimate relationship escalated to sexual abuse.

Overcoming stigma and safeguarding the injured party

Prosecuting sexual assault in domestic violence cases without witness testimony from the injured party is very difficult. But victims often refuse to testify (*See section 3.1.*). Many are too embarrassed to discuss sexual experiences in court and many have valid concerns about the social stigma attached to things like certain sexual acts, the loss of virginity outside of marriage, or pregnancy/abortion.³² It is also common for victims in DV cases to fear that their abuser will harm them if they testify – a fear that may be founded in past experience. Thus, it is important that prosecutors view the presence of sexual abuse in the context of DV as a potential indicator that detention or special prohibitive measures, or security measures for the victim, may be necessary; especially considering that sexual assault has been linked with a higher risk of mortality in domestic violence cases.³³

32 The Crown Prosecution Services (UK), “Domestic Abuse Prosecution Guidelines for Prosecutors,” 2014, 9.

33 For more information about sexual violence in the context of DV, see: Galić, *Practice Guide*, 16-18.

III IMPROVING THE POSITION OF THE INJURED PARTY IN CRIMINAL PROCEEDINGS

3.1. Understanding the injured party: why do victims in domestic violence cases refuse to testify?

As a privileged witness, a victim has the legal right to refuse to testify in a DV case, and injured parties exercise this right rather extensively in the context of trials, even when they have previously given statements in the investigation stage and have supported prosecution of the defendant. This can prevent or significantly impair the ability of the prosecutor to prove the defendant's guilt, particularly because there is frequently a lack of other direct evidence.

Importantly, though, the refusal of a victim to testify should not be viewed as a sign of their lesser credibility or any indication that the violence they experienced was not severe. What's more, following the principle of legality, the prosecutor still has a duty to continue the case if there is any other evidence that a criminal offence has been perpetrated. In fact, this may be the only way to end a cycle of violence and free the injured party from repeated abuse.

The question is to what extent prosecutors are acquainted with the reasons victims refuse to testify in DV cases; and it seems many prosecutors do not have the time or awareness to understand why victims pass up this chance to give evidence. And, in situations when a judge changes during a trial, requiring the presentation of evidence more than once, an injured party is even more likely to refuse to testify.

With the aim of more informed prosecutorial practice, below are some of the reasons injured parties in DV cases refuse to testify, and the common effects of DV on victims (in cases involving spouses or common-law partners).³⁴

34 From Jerry J. Bowles, "Victim treatment: why do victims recant and withdraw?" (presented at the conference "New Practices in Court Considerations of Domestic Violence Cases," Sarajevo, December 2015), supplemented with recommendations by Mel Flanagan.

Why do victims refuse to testify/recant/withdraw?

- Out of fear that testifying will spur further violence;
- Because they or their family members have received specific threats that they should not testify;
- Out of sympathy and traumatic bonding with their abuser;
- Because they feel an intense sense of loyalty to their abuser;
- Due to shame over their abuse;
- Because they feel responsible for their abuse;
- Out of a sense that they can control their abuser's use of violence;
- Because they believe they can help their abuser heal;
- Because they have done a cost-benefit analysis and think the benefits outweigh the risks;
- Due to conditioning by their abuser that they will never be believed.

Common effects of DV on victims:

- Fear of the offender's violence;
- Denial, detachment, lack of affect;
- Rage;
- Self-blame;
- Isolation from family and friends;
- Substance abuse issues;
- Depression, anxiety, suicidal thoughts;
- Post-traumatic stress disorder (PTSD);
- Use of defensive/responsive violence;
- Difficulty managing daily tasks.

Note: To understand more fully why DV victims refuse to testify, the *cycle of domestic violence* should be considered, as it indicates that violence is not omnipresent in many violent relationships, instead emerging in violent stages that alternate with stages of calm. *For more information, see section 1.3.*

3.2. Interviewing the injured party in domestic violence cases

In order to establish confidence with the victim in a DV case and ensure a good-quality statement is taken, prosecutors should meet the injured party or her lawyer at the earliest stage possible. Victims, especially those who have experienced battering, may be suffering from trauma and should be treated with particular sensitivity during interviews.

Pointers for preparing to interview the victim:

- Be prepared to provide information or referrals to support services by making a directory of local resources; for example, local CSOs providing specialized services to women and children who are victims of domestic violence.
- Organize an interview with the psychologist prior to interviewing the victim, to acquaint the psychologist with the case file. If at all possible, the psychologist should be present during the victim interview, to provide support as the victim recounts the violation.
- Prepare the victim for the interview by explaining their role in the legal process; they are unlikely to be familiar with the legal system and, by the time they meet with a prosecutor, may already be frustrated by how many different people have asked them very personal questions. It is therefore important to patiently explain why the interview has been requested, and never blame or judge the victim.
- Explain the criminal justice process and inform the victim that a considerable period of time may pass before a court appearance. Explain how the statement you take will be used in court and that the defendant can get a copy of it.
- Explain the role of the defence counsel to prepare the victim for cross examination. Take time with the victim in advance to explain that the legal process allows the defendant to present a defence and that, often, this process can be uncomfortable for a victim. Explain that the victim can help the prosecution prepare for the defence by sharing details of the crime in this interview.

- Choose an appropriate place for the interview; ideally, a neutral environment where the victim feels safe and comfortable, and which affords privacy. The interview location should not be in an interrogation room at the police station or anywhere the perpetrator has access to the victim.
- When interviewing the victim, listen. Give her time to tell you what happened. Victims may need to be reminded that the violence they experienced was not their fault. Always ask the victim about safety concerns.

Adapted from: Eileen Skinnider, “Handbook on effective prosecution responses to violence against women and girls”, Criminal Justice Handbook Series, (Vienna: United Nations Office on Drugs and Crime, 2014), 50-51.

3.3. Utilizing the services of psychologists and the Witness Support Department when hearing domestic violence victims as witnesses

Explanation:

In the majority of DV cases, the testimony of the injured party as a witness is the decisive factor in successfully processing an indictment and proving the defendant’s guilt. The prosecutor’s office must, from the first possible moment, provide the injured party with all relevant information about criminal proceedings so that they fully understand the role they play as well as the potential course and outcomes of those proceedings. A substantial number of prosecutor’s offices in BiH have a Witness Support Department, with psychologists who provide support to witnesses. If such a department has not been established in a prosecutor’s office, prosecutors may request the services of psychologists from other institutions, such as courts or social work centres, who are willing to provide expert support to witnesses as needed. Victims of domestic violence especially benefit from this kind of psychological support.

Recommendations:

When the injured party in a DV case is questioned as a witness on the premises of the prosecutor’s office, the presence of a psychologist should be ensured (i.e., the resources of the Witness Support Section should be engaged), to provide psychological support to the victim and also to obtain a better-quality witness statement and prepare the witness to testify at trial.

In cases of battering, the prosecutor should engage a psychologist if they assess that the injured party is insecure, intimidated, or confused. The psychologist should be adequately prepared before any questioning of the injured party takes place by reviewing the prosecutor's file, and through a preliminary psychological interview to establish the witness's psychological condition.

Prosecutor's offices that do not have a Witness Support Department should take steps to use the services of psychologists from the courts or social work centres, depending on their capacities and any established institutional cooperation between these institutions and the prosecutor's office.

Good practice: When you invite an injured party for questioning at the prosecutor's office, inform them of their right to the services of a psychologist. Provide them with the psychologist's contact information and explain that they can speak with the psychologist to prepare for the interview at the prosecutor's office, as needed.

3.4. Awarding endangered witness or threatened witness status to the injured party: issuing a decision on procedural witness protection measures

Explanation:

Awarding the endangered witness or threatened witness status to a victim of domestic violence and issuing a decision on procedural witness protection measures strengthens the chances that they will testify at the trial. And, by taking all required and available actions to provide protection and assistance to the injured party, the prosecutor's office acts in accordance with the due diligence standard in the prevention of domestic violence and provision of protection to the victim (a binding international legal standard).³⁵

Recommendations:

Investigation stage: Prosecutor's offices that have staff psychologists should utilize their services in working with injured parties who have been traumatized by the perpetration of a criminal offence and now need to prepare for the main trial; in particular, it should be carefully explained that they have the right to refuse to

³⁵ Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, 12 April 2011 (the Istanbul Convention); and Official Gazette of Bosnia and Herzegovina, International Treaties, No. 19/2013, *State obligations and due diligence*, Article 5(2): "Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors."

testify, but that their testimony is in the interest of justice. The testimony provided by victims will likely be of better quality if they are prepared by speaking with the psychologist as early as possible. When the psychologist interviews an injured party in the investigation stage, they should assess the victim's testimony and make an official note. This will provide the prosecutor with an expert assessment as the basis for further steps, i.e. whether the injured party should be awarded the status of an endangered or threatened witness.

Indictment stage: When justified, the indictment should propose that the injured party be awarded endangered witness or threatened witness status. Assessment by an expert team is required – such as expert witnesses like a neuropsychiatrist and psychologist – in order to determine the victim's mental state and whether they have been traumatized by the domestic violence that was perpetrated.

Good practice: In justified cases, the indictment should also propose that the psychologist from the Witness Support Department be present at the trial.

Main trial stage: In cases involving severe criminal offences (e.g., battering as domestic violence), the prosecutor should submit a request to the court that the injured party be awarded the endangered witness or threatened witness status.

Here are some examples of *procedural witness protection measures* that are appropriate in different stages of proceedings for domestic violence, depending on the circumstances of a specific case:

- Measures that reduce the victim's fear by preventing contact with the defendant:
 - Main trial: Remove the defendant from the courtroom while the victim is testifying or allow the victim to testify via video or audio transmission devices.
- Measures limiting the witness's exposure to psychological stress:
 - Investigation: Provide psychological support for victims as they give statements and to prepare them beforehand to undergo questioning by the prosecutor;
 - Main trial: Engage psychologists to support victims;
 - After the testimony: Provide a follow-up conversation with the psychologist for the victim, and offer ongoing psychological support.

3.5. Informing the injured party about specialized support services

Explanation:

In order to provide useful information to DV victims about specialized support services available in the local community, the prosecutor should maintain a directory of this information – including DV support services provided by civil society organizations (CSOs) or public social protection institutions such as social work centres. These services may comprise: accommodation in a safe house, psychosocial support, free legal aid, and legal counselling.

Recommendation:

In DV cases where the injured party is a woman, prosecutors should inform her, as appropriate, about CSOs or public institutions in the local community that provide specialized support services to women victims of DV.

CSOs in BiH that provide specialized support services to women (and children) victims of DV:

1. ***Banja Luka: Udružene žene (United Women) Banja Luka – safe house, legal counselling, psychosocial counselling;*** tel: 051 462 146, e-mail: office@unitedwomenbl.org
2. ***Bihać: Žene sa Une – safe house, legal counselling, psychosocial counselling;*** tel: 037 220 855, e-mail: zena-una@bih.net.ba
3. ***Bijeljina: Lara – safe house, legal counselling, psychosocial counselling;*** tel: 055 290 570, e-mail: ngo.lara@teol.net
4. ***Modriča: Budućnost – safe house, legal counselling, psychosocial counselling;*** tel: 053 820 700, e-mail: gocalg@gmail.com
5. ***Mostar: Žena BiH – safe house, legal counselling, psychosocial counselling;*** tel: 036 550 339, e-mail: zenabih@bih.net.ba
6. ***Sarajevo: Foundation of Local Democracy – safe house, free legal aid, psychosocial counselling;*** tel: 033 237 240 (safe house), 033 570 560 (legal aid), e-mail: shelters.1@bih.net.ba
7. ***Tuzla: Vive žene – safe house, legal counselling, psychosocial counselling;*** tel: 035 224 310, e-mail: vivezene@bih.net.ba
8. ***Zenica: Centre for Legal Assistance to Women – free legal aid;*** tel: 032 402 049, e-mail: czppzz@gmail.com
9. ***Zenica: Medica – safe house, legal counselling, psychosocial counselling;*** tel: 032 463 920, e-mail: medica1@bih.net.ba

Social Work Centre providing safe accommodation to women and children victims of DV:

1. ***Jajce: Social Work Centre Jajce*** – tel: 030 654 105, e-mail: czsrjajce@yahoo.com

Note: As mentioned, it is not only women who can be victims of the offence of DV; and other victims may also need to use the services available in their local community – for example, psychologists who specialize in treating traumatized men or organizations providing support to children or older juveniles exposed to violence. There may also be organizations that provide services to victims who identify with a specific minority group. While NGOs that focus on supporting women do not typically provide support to men, or even children, they usually have information about other organizations or individuals that do.

Although prosecutors are not obligated to take the actions highlighted here, such an approach can dramatically improve the experience injured parties have with the criminal justice system and increase the chance that DV victims will cooperate with police and prosecutors in the future.

IV PROSECUTORIAL PRACTICE IN DV CASES: GENERAL ACTIONS

4.1. Standard of practice: no undue delay

Explanation:

The Council of Europe's Istanbul Convention, a binding instrument in Bosnia and Herzegovina, requires action without undue delay as a mandatory standard of prosecutorial practice in DV cases.³⁶ Implementation of this standard leads to the faster progression of cases through the criminal justice system, bringing proceedings to an outcome more quickly and thus contributing to improving the injured party's position by enabling expedited protection and resolution for the victim (the purpose of sanctioning). On the other hand, failure by criminal justice entities to exercise due diligence in DV cases, which can cause numerous delays of proceedings, may result in further victimization of the injured party as a result of their consecutive exposures to complex criminal proceedings and increased uncertainty about attaining the protection and satisfaction they seek.

Recommendations:

In the work of prosecutor's offices, the general level of due diligence practiced should be heightened for DV cases. Accordingly, prosecutors should be careful to avoid undue delays in these cases; particularly in the indictment stage, after the investigation has been completed, and when the indictment is represented in court.

Good practice: Courts in BiH apply different practices to main trial proceedings – with some courts designating the initial date of the trial for the opening statement, and only then scheduling a hearing for the presentation of evidence, and others

³⁶ Article 49 stipulates that: "Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay."

opening the evidentiary proceedings on the first scheduled day of the trial. In DV cases, victim protection and comfort should be of special interest and the main trial should thus be conducted in the most efficient way possible.

Therefore, to ensure greater due diligence in DV cases, within the scope of the prosecutor's mandate, draw the court's attention to the necessity to group evidence and to concentrate the presentation of evidence at the main trial.

Systemic recommendations:

In order to enable its practical application, prosecutors' offices must support the emergency processing of DV cases. It would be useful if mandatory instructions for emergency processing (i.e. processing without undue delay) in DV cases were adopted by chief prosecutors in both the FBiH and the RS for implementation at all levels, including cantonal and district prosecutors' offices.

Also valuable would be the introduction of an adequate legal solution (e.g., a legislative amendment or a proposal of the High Judicial and Prosecutorial Council to competent ministries) to shorten the timeframe in which prosecutors are notified about the perpetration of DV offences by authorized officers. The duty of urgent notification (i.e., 'notify immediately') should be introduced for all DV cases, not just for offences punishable with imprisonment of longer than five years.

4.2. Organizing the representation of DV indictments in prosecutors' offices

Explanation:

In prosecutor's offices in BiH – especially larger ones – it is rare that the same prosecutor represents the injured party in a DV case from the time of perpetration through the sentencing stage; in other words, so-called 'vertical' representation of a DV indictment is uncommon. This brings with it the possibility that the prosecutors who conduct different stages of the proceedings (e.g., one who supervises the investigative actions, one who writes the indictment and represents it at the main trial, one who participates in the hearing when evidentiary actions are implemented, and one who takes actions in appellate procedures) make different decisions regarding what actions to take, and how to interpret the facts and evaluate the evidence. And, because most prosecutors do not specialize in DV cases, different prosecutors who work on the same case may understand the nature of domestic and gender-based violence differently and may generally have different levels of knowledge about legal standards regarding the protection of victims from domestic violence and of women's human rights. In practice, this is problematic when the law

is applied unequally or is not applied where it could be to sanction perpetrators of domestic violence.

Recommendations:

In smaller prosecutor's offices: to the extent possible, vertical prosecutorial representation should be ensured in DV cases to provide continuity throughout all stages of criminal proceedings.

In larger prosecutor's offices: when vertical representation is not feasible, to the extent possible, prosecutor's offices should ensure efficient internal coordination and exchange of information about DV cases between the prosecutor who originally conducted the case and those who participate in the case in later stages of criminal proceedings. This would require the original prosecutor to follow a DV case when another prosecutor steps in.

4.3. Providing compensation for damages to the injured party

Explanation:

As a rule, DV victims are advised to file property claims for damages as the injured party in civil proceedings.³⁷ This should be made easier in criminal proceedings, especially considering the professional assistance of the prosecutor, who should collect evidence of any damages inflicted by the perpetrator. Indeed, a victim's challenge is much greater in civil proceedings because they are usually on their own, without any professional aid, and can be exposed to additional trauma, victimization, and expenses. It is not known how many DV victims initiate civil proceedings for compensation of damages upon completion of criminal proceedings, but it is thought to be rare; meaning that many DV victims end up without any compensation at all for the harm they have suffered.

Strictly speaking, prosecutors are duty bound to look after an injured party's property claim and collect relevant evidence in that respect. When questioning the injured party as a witness, the prosecutor is in fact obligated to ask about any property claim and its direction.³⁸ However, the question is whether prosecutors fulfil this obligation by collecting evidence of the damage inflicted to a sufficiently

³⁷ Based on findings from the monitoring of court trials in DV cases (See: OSCE Mission to BiH, *Ensuring Accountability for Domestic Violence*) and conversations with numerous judges and prosecutors on this topic, it is clear there is no caselaw in the BiH judiciary concerning property claims by injured parties in DV cases in criminal proceedings.

³⁸ The majority of DV cases involve compensation for non-pecuniary damage.

specific extent to corroborate the injured party's claim.³⁹

Recommendations:

In the investigation stage, before the injured party files a property claim, prosecutors should be involved in assessing whether any damage is pecuniary or non-pecuniary in nature.

Also in the investigation stage, prosecutors can request expertise in order to prove the infliction of damages and define the amount thereof:

- In the case of pecuniary damage, a financial expert can be engaged to determine the amount of damage;
- Depending on the circumstances of a case and the prosecutor's assessment, it is possible to determine non-pecuniary damage in the investigation stage; in this case, the infliction of damage can be proved and the amount of non-pecuniary damage can be determined by engaging an expert neuropsychiatrist.⁴⁰

Once the damage has been established and the injured party has filed a property claim, prosecutors should issue the indictment alongside that property claim.

4.4. Reviewing previous prosecutorial decisions and using previously obtained evidence

Recommendations:

Where possible, the prosecutor in charge of a DV case should review previous prosecutorial decisions concerning the suspect. It is recommended, for instance, that any previous order not to investigate or order suspending the investigation relating to domestic violence should be linked with the newly-opened DV case.

39 In practice, prosecutors cite the following reasons as the most common cause of non-issuance of indictments for defined property claims in DV cases: the establishment of non-pecuniary damages causes significant delays in criminal proceedings; the rules of civil proceedings are applied in the establishment of non-pecuniary damages, and prosecutors are critical about such rules; and compensation for non-pecuniary damage is rarely obtained in practice, considering the assumed insolvency of the defendant.

40 Criminal procedural codes in BiH (in the FBiH, RS, and Brčko District) stipulate that the prosecutor must collect evidence for any property claim related to the criminal offence. Still, there is no current practice of determining the non-pecuniary damages related to the criminal offence of domestic violence.

Also, prosecutors should consider the possibility of using evidence obtained during a previously suspended investigation against the same suspect for domestic violence. When the prosecutor orders the suspension of an investigation, it is possible to reopen that investigation if the prosecutor obtains new information and evidence of the perpetrated crime. Further, useful information or potential evidence obtained in a DV case that results in an *order not to investigate* can be freely used in a new case or investigation against the same suspect for domestic violence.

4.5. Submitting criminal, misdemeanour, and operational records of the defendant

Explanation:

Prosecutors' offices across BiH apply different approaches in order to link cases, and employ different practices in order to receive all relevant records concerning a suspect. For example, some always link processed cases, and have binding instructions from chief prosecutors in that respect, whereas others do not; and some obligate the police to submit misdemeanour and operational records along with criminal records, while such an obligation does not exist in other offices. It is important that prosecutors have all relevant information about a suspect from available records, to comprehensively review the context of a DV case and collect evidentiary material.

Recommendations for good practice:

- The prosecutor should request that police submit *copies of misdemeanour records for the suspect*. This is particularly important because existing legislation in the Republika Srpska allows DV to be processed as a misdemeanour, and in the FBiH, DV can be processed as an offence against public peace and order.
- The prosecutor should request that the police submit *copies of operational records for the suspect*; i.e., information about *potential other reports* by the relevant police station (or public security centre) submitted to the prosecutor's office against the same suspect.
- To the extent possible, the prosecutor should request information from the police about any *previous reports* against the suspect for the same or similar criminal offences.
- The prosecutor should request that the registry of the prosecutor's office provide a list of all proceedings conducted against the suspect (including suspended investigations); unless there is already a practice of regular linking of cases.

- The prosecutor should view the injured party as a main source of information about any history of domestic violence, and where applicable, the prosecutor should obtain details from the injured party about institutions/bodies to which they reported the violence and should contact those institutions to request reports from them (this is particularly important if the police do not keep updated records or do not provide copies of operational records).

4.6.a. Checking whether protective measures have been imposed for DV in accordance with FBiH law: inclusion in the case file as evidence

4.6.b. Checking whether misdemeanour sanctions have been imposed in accordance with RS law: inclusion in the case file as evidence

Explanation:

Some prosecutor's offices in BiH have established the practice of acquiring certain items from police offices along with any report on DV perpetrated as a criminal offence, such as court decisions (from misdemeanour proceedings) and orders imposing protective measures (FBiH) or misdemeanour sanctions (RS) against the suspect, in accordance with the Laws on Protection from Domestic Violence.

If a prosecutor's office has not established this practice, prosecutors who develop DV case files should check with the competent court in the defendant's place of residence to see whether that court has imposed any *protective measures* (still in force or expired) or *misdemeanour sanctions* for domestic violence against the defendant.

Court decisions such as these can be used as evidence to corroborate allegations from an indictment. Namely, they are significant for the purposes of informing the court about a history of violence by the defendant – especially when the violence was perpetrated against the same injured party. This information can also be useful to the court when deciding on adequate sanctions for the defendant.

Recommendations:

Prosecutors who work on DV cases in the *FBiH* should make a habit of establishing whether any prior court decisions have imposed protective measures for domestic violence against a defendant.

Prosecutors who work on domestic violence cases in the *RS* should make a habit of establishing whether any prior court decisions have imposed misdemeanour sanctions for domestic violence against the defendant.

Prosecutors across BiH should make an effort to include these court decisions in DV case files as evidence corroborating allegations from the indictment.

Good practice: Ask for the official note on implementation of protective measure from the police station that supervises the implementation of these measures against the defendant in a DV case, and use it as corroborating evidence as needed.

4.7. Updating the criminal and misdemeanour records of a defendant when lengthy intervals pass between individual stages of criminal proceedings

Explanation:

As a rule, prosecutors obtain copies of criminal records for a defendant in the investigation stage of a case. But these records may change from the time the investigation is completed until the issuance of an indictment, and again from then until the main trial; and in such cases, the records submitted initially may no longer fully illustrate the defendant's criminal history.

On the other hand, prosecutors rarely obtain copies of misdemeanour records for defendants in DV cases. Yet, these are extremely important because they may reveal prior misdemeanour sanctions against the defendant (*RS*) or protective measures imposed against the defendant (*FBiH*) for domestic violence. This information is vital in DV cases, when it is particularly necessary to determine whether a case involves a recidivist who has previously faced criminal sanction or a warning, or against whom misdemeanour sanctions/protective measures have been imposed but not registered in official records during the investigation stage of a DV case. This constitutes important evidence pointing to the defendant's character and their tendency to perpetrate domestic violence, which is relevant to court sentencing.

Recommendations:

For cases in which a lengthy interval has passed since completion of the investigation stage, prosecutors should be conscientious of acquiring updated criminal and misdemeanour records related to DV for the defendant as evidentiary material, and include it when issuing the indictment.

If the interval between the indictment confirmation and trial is also lengthy, prosecutors should check the defendant's criminal and misdemeanour records once again and, as needed, enclose updated records in the evidentiary material of the case.

V PROSECUTORIAL PRACTICE IN CRIMINAL PROCEDURE STAGES OF DV CASES

5.1. INVESTIGATION

5.1.1. Preparing for indictment

It is common in DV cases for the injured party to refuse to testify or to contradict their original statement at the main trial. Usually, the injured party's statement is of primary importance in proving the offence of DV and constitutes key evidence; but prosecutors should be ready to present other evidence when an injured party, as a privileged witness, refuses to testify. To do this, prosecutors must take steps to collect all relevant evidence.

Good-quality evidentiary procedure in DV cases (especially those involving physical violence) requires that police and prosecutors apply efficient collection methods of material (objective and subjective) evidence. Accordingly, investigators should be proactive and collect *all* material evidence found at the scene. To the extent possible, crime scene investigation should be conducted and all suspicious trace evidence seized for expert examination. In cases involving physical violence, the victim should be sent for a physical examination, in order to obtain medical documentation of any injuries. These injuries should also be photographed (because, in addition to written medical documentation, photographs can help experts determine the mechanism of injury). It is critical that a high-quality record is developed from the crime scene investigation and photo documentation, with the entire scene recorded, objects related to the perpetration of the crime identified (e.g., gun, knife, etc.), and biological traces secured (e.g., blood, hair, etc.).⁴¹

41 Edin Šaćirović, "Krivičnopravni i kriminološki aspekti nasilja u porodici" [Criminal-legal and criminological aspects of domestic violence], Master's thesis, Faculty of Law, University of Sarajevo, 2012, 100.

Details of the preparatory actions and procedures that should be taken prior to issuance of the indictment for a criminal offence of DV, relating to evidence collection and risk assessment for the victim, are described below.

Preliminary preparation

Example of good international practice: Prosecutors' offices should work cooperatively with law enforcement agencies to develop protocols on what evidence is necessary in DV cases. Investigators will be more effective and prosecutions more successful if there is clear agreement related to evidence collection. The most efficient way to achieve this is through a standardized form used in every DV case that addresses all relevant evidentiary and risk assessment issues.

Pre-charge procedures⁴²

A. DOCUMENTING THE EVIDENCE

Actions taken by police with prosecutorial supervision:

1. Document every person at the location of the alleged crime.
2. Record their name, relationship, age, size (of victim and alleged perpetrator), demeanour, injuries (with consent), complaints of pain or physical distress, and presentation (pregnant, torn clothes, alcohol on breath). Note the location of each child present at the time of the incident.
3. Take photos of all offensive or defensive injuries on each victim/witness/suspect: note injuries obscured by clothing or hair as well as symptoms of choking or strangulation. Also photograph all disarray at the scene, and broken or damaged property.
4. Take a full statement from the victim in a private, safe location. Be respectful, attentive, calm and patient. Do not rush the victim or blame them for the incident.
5. Ask about all past incidents of violence, threats, intimidation, isolation, or non-consensual sexual contact generally, and involving the suspect. Be prepared to provide information on the criminal justice process, protective measures and/or orders of protection, and available support services (social work centres or CSOs providing support to women and children victims of DV). Provide contact information in case the victim has questions or concerns; and advise the victim to contact the police or prosecutor if there is any further contact, violence, threats, or intimidation by the suspect.

⁴² This material was developed by Mel Flanagan, then was revised by the prosecutorial working group and adjusted to the BiH context for this text.

6. Obtain relevant medical data or medical documentation for the victim.
7. Take a statement from the suspect, if s/he offers or consents. Record all spontaneous comments, admissions, allegations, defences, or alibis fully.
Note: although such statements by the suspect cannot be used as evidence in court (unless signed by the suspect in the presence of a defence attorney), they nonetheless constitute communications of important information that can help the prosecutor plan further evidentiary actions, can shed additional light on the overall context of the case, and can be helpful in conducting a risk assessment for the victim.
8. Take statements from any other witnesses present or in close proximity during the incident, as well as neighbours. Be sure to inquire about past incidents and any relevant history.
9. Collect material evidence at the scene and the means used for perpetration of the crime, as well as biological traces for expert examination. Take custody of all damaged or blood-stained clothing and objects relevant to the incident and all objects used as a weapon or to threaten.
10. Whenever possible, prosecutors should personally conduct crime scene investigations in order to observe the facts⁴³ directly and to improve the intervention and prosecution of DV cases.

Actions taken by the prosecutor's office:

11. Consider the outcomes of all previous reports.
12. Inform the victim about dates of court hearings and their purpose.
13. Process the case as soon as possible, without undue delays.

B. RISK ASSESSMENT (conducted by the police and prosecutor's office):

1. Determine if there are guns or dangerous tools in the house, if the suspect has access to weapons or tools elsewhere, and whether the suspect has threatened the use of weapons or tools. Recover any weapons or tools used to injure or threaten during the incident.
2. Ask if the parties involved in the DV incident recently separated or intended to separate, and carefully consider the injured party's level of fear of future assaults or incidents.

43 E.g. presence of children, scattered objects, broken objects, injuries on the victim, suspect's behaviour.

3. Determine if the suspect has:
 - a. a history of violence and/or threats to the victim or others.
 - b. ever threatened to kill the victim, themselves, or any others.
 - c. ever strangled or choked the victim or others, or threatened to do so.
 - d. ever forced sexual contact with the victim or others.
 - e. mental health or emotional problems.
 - f. prior convictions, or any criminal or misdemeanour proceedings being conducted against him/her.
 - g. abused drugs or alcohol.
4. Consider proposing custody (until the trial) or extension of imposed measures, taking into account all the risk factors listed above, the nature of the offence, and the danger to the victim and community.
5. When risk is significant, request that the suspect be held in custody, when legal requirements are met.
6. When the suspect is released, consider proposing an adequate prohibitive measure.

C. GATHER FURTHER EVIDENCE:

1. Obtain all relevant communication between the suspect and the victim, and any third parties (e.g., from text messages, e-mail, and social networks).
2. Establish whether there are any protective measures, prior records on the victim, witnesses, or offender, or suspended sentences in effect.

5.1.2. Taking statements from witnesses

Interviewing the injured party

The prosecutor should conduct a detailed interview with the injured party, including questions about the circumstances of any previous abuse, in order to determine the scope of violence perpetrated by the suspect and verify the injured party's claims through material evidence. Keep in mind that many victims of physical violence may also be exposed to sexual abuse but do not report it unless specifically asked about it; often because they are not aware that marital rape is in fact a crime (*See chapter 2.3.*).

Note: for more about interviewing the injured party, see chapter 3.2.

Interviewing the suspect

In view of the suspect's right to defence, the prosecutor should give them the opportunity to present their version of the incident. The prosecutor should attempt to verify this version through collected evidence.

Interviewing a child witness

Procedures for interviewing children are clearly defined in the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings. Because a child may be interviewed only up to two times, the prosecutor should be well prepared for an interview with a child witness and should clearly define the aim of the interview.

Interviewing neighbours as so-called 'hearsay witnesses'

"During criminal-operational work, the police should analyze all potential locations and positions from which anything can be heard, because screaming, yelling and beating often can be heard in large residential buildings with poor sound isolation."⁴⁴ The police should identify all neighbours at the scene who heard yelling or other sounds of violence that relate to the DV case, whom the prosecutor's office can use as hearsay witnesses.

Interviewing police officers who intervened in the domestic violence

Police officers who first arrived at the scene should be interviewed and asked to share all their relevant observations, including the condition of the injured party, the behaviour of the suspect, if the suspect threatened the injured party, the reaction of any children present, etc.

5.1.3. Analyzing all available evidence and supporting materials

When analyzing evidence, it is extremely important to consider the *overall context* (or broader picture) of a DV case in order to best assess the evidence and prepare the most effective indictment possible. By focusing on the bigger picture and not individual facts, prosecutors can avoid potentially misleading interpretations of the evidence. This is particularly important in differentiating acts of violence that constitute violent resistance in cases of battering (*See section 1.1.*); in other words, to recognize and adequately qualify the act of necessary defence.

44 Šaćirović, 101.

Theoretical constructions concerning DV (for example, the Power and Control Wheel, the intimate partner DV typology, and the cycle of DV between spouses or common-law partners) that were discussed earlier in this text can be helpful to prosecutors as they consider and assess evidence in DV cases. For instance, it is important that the prosecutor establish the scope of violence, whether there is a continuity of perpetration by the suspect, and whether the injured party has been exposed to domestic violence in the past in order to determine whether the dynamics of domestic violence in a given case constitute battering or situational couple violence. The *domestic violence typology* can be helpful in that respect. Similarly, the *Power and Control Wheel* can be useful in naming, explaining, and contextualizing all the acts that constitute DV in a case by establishing a correlation between them based on the evidence.

5.1.4. Consulting legislation and international legal standards

Apart from consulting all relevant provisions of the applicable criminal code, prosecutors should consult binding international legal standards as a part of their preparations; primarily, relevant provisions of the Istanbul Convention, which was ratified by BiH and came into force in 2013.

Nothing prevents prosecutors from invoking the Istanbul Convention in their work on DV cases, as a source of additional arguments to corroborate their allegations when writing indictments, giving closing remarks, or preparing an appeal; or from referring to relevant legal principles and standards from the Convention. Some of those standards are quoted in this text as they relate to certain topics and are instructive in informing prosecutorial practice in DV cases.⁴⁵

5.1.5. Justifying detention and prohibitive measures

In cases where legal requirements for detention have been met and can be proved by the prosecutor's office, a proposal should be submitted to the court to impose detention against the suspect in a DV case. Proposing detention is justified when the suspect is a special recidivist in the perpetration of domestic violence, meaning they exhibit recidivism in perpetrating acts of an abusive nature.

45 NB: This text does not advocate for the direct application of the Istanbul Convention in the work of prosecutors.

Given that detention is a measure with subsidiary application, which is only applied when more lenient measures cannot be used to ensure the presence of a defendant, it would be reasonable to propose detention to the court as an alternative to the imposition of prohibitive measures.

Good practice: Submit a proposal for detention as an alternative to the imposition of adequate prohibitive measures against the defendant. Specify in the proposal that, should the court reject the detention proposal, it should impose a restraining measure: a ban on visiting certain places or areas, or meeting with certain persons.

5.2. INDICTMENT

5.2.1. Legal qualification: issuing indictments for a qualified form of DV

Explanation:

Trial monitoring results⁴⁶ and analyses of judgments from DV cases in BiH⁴⁷ reveal the widespread practice of issuing indictments primarily for the basic form of domestic violence, even in cases involving DV elements that would enable indictments for a qualified form. In many DV cases, where a graver qualification was justified based on the established facts or the evidence collected, indictments for the basic form of the offence were nonetheless issued and confirmed.

Recommendations:

The indictment should describe all the facts that may serve as grounds for bringing charges for a qualified form of domestic violence (e.g., the use of weapons or dangerous tools, or the presence of children).

If a prosecutor feels unsure about the existence of qualifying factors, the indictment should be written for the graver form of domestic violence since the court is able to change the qualification if it believes the graver qualification is unjustified.

⁴⁶ See: OSCE Mission to BiH, *Ensuring Accountability for Domestic Violence*.

⁴⁷ See: Galić, *Practice Guide*, 49-52.

5.2.2. Prosecuting DV in concurrence with other criminal offences

In cases when domestic violence is combined with other criminal offences, and can be processed in concurrence with these other offences, the indictment should include all concurrent criminal offences perpetrated by the same defendant.

5.2.2.a. Prosecuting DV in concurrence with sexual abuse charges⁴⁸

Explanation:

Domestic violence trial monitoring in BiH has revealed that perpetrators are often not indicted for forced sexual intercourse with victims, even when sexual abuse was perpetrated.⁴⁹ In criminal law, situations in which one family member is a DV victim and another family member is the victim of rape present a possibility for concurrence that is not disputable. Yet, analysis shows that adequate factual and legal identification, qualification, and indictment are disputable in practice when the *same* injured party is exposed to domestic violence along with rape or another offence against sexual freedom and morale (CC FBiH and CC BD BiH) or against sexual integrity (CC RS). In such instances, a distinction should be made between rape and domestic violence, as criminal offences defined to protect different legally protected values. Therefore, one act of perpetration would not constitute elements of both criminal offences; in other words, it would not be an ideal concurrence of these offences, but the potential exists for real concurrence.

Recommendation:

The indictment should bring charges for DV in (real) concurrence with rape in situations when several premeditated acts of perpetration by the defendant against the same injured party constitute elements of both criminal offences.⁵⁰

If a DV case involves acts of sexual abuse by the perpetrator (such as sexual harassment⁵¹) that do not constitute elements of rape or another offence from the

48 For example, criminal offences against sexual freedom and morale, and sexual integrity (such as rape, forced sexual intercourse, and lechery).

49 OSCE Mission to BiH, *Ensuring Accountability for Domestic Violence*, 63-68.

50 For example, a perpetrator begins by perpetrating domestic violence, or perpetrates domestic violence for a long period of time, before a point at which it becomes possible to identify elements of premeditated rape.

51 For example, when in the broader context of DV, one spouse forces the other to watch pornography films and then pressures her/him to do things featured in the film, despite the other spouse's opposition.

group of criminal offences against sexual freedom, such acts should be evaluated as acts of domestic violence and described in the disposition of the indictment.

Good practice: It is important to keep in mind that injured parties in DV cases may not be well-versed in the functioning of the criminal justice system. Thus, unless asked about certain details, they may not recognize the importance of explaining all the circumstances of their abuse. When interviewing an injured party (taking their statement) in a DV case, ask whether their partner has ever forced them to have sexual intercourse against their will. Treat the injured party with respect and care, and ask sensitive questions as delicately as possible.

When DV and sexual abuse co-occur, a victim faces a high risk of further violence and even homicide. In cases where there is evidence of both DV and sexual abuse: carefully assess the risk to the injured party and any family members, take any available actions to enhance their safety, and consider proposing detention for the defendant or adequate prohibitive measures.

Note: for more about sexual assault in the context of DV, see section 2.3.

5.2.3. Indictment with request for the issuance of a sentencing warrant

Explanation:

A request for the issuance of a sentencing warrant is a summary criminal proceeding and its use in DV cases is justified because it is viewed as a tool of efficiency. Since there is no trial, a sentencing warrant can avoid potential issues such as the refusal of the injured party to testify; in that respect, it ensures the imposition of a criminal sanction or measure against the defendant. This procedure is special, among other reasons because of the type of criminal sanction that can be imposed through a sentencing warrant – a fine or suspended sentence for an offence punishable by imprisonment up to five years, or a fine as the main sanction.

When it comes to the use of sentencing warrants in DV cases, trial monitoring of DV cases in BiH revealed that one half of cases resulted in suspended sentences due to the use of a sentencing warrant.⁵² Concerningly, sentencing warrants were used to prosecute offences involving grave physical violence against a spouse, severe child abuse, the use of weapons, and even threats of murder and attempted murder by strangulation.⁵³

52 ^{OSCE} Mission to BiH, *Ensuring Accountability for Domestic Violence*, 57.

53 *Ibid*, 58.

Given the types of criminal sanctions that can be imposed through a sentencing warrant and the requirement of special prevention, it is particularly important that prosecutors exercise due diligence when proposing sentencing warrants in DV cases, taking into account the interests and protection of the injured party. What's more, the injured party does not formally participate in the sentencing warrant procedure, and so their interests must be considered in the context of initiating such a procedure; if possible, prior to finalizing an indictment with a request for the issuance of a sentencing warrant, prosecutors are advised to ask the injured party about their position with respect to the offence and their expectations from criminal proceedings, including any property claim, and thereby determine whether a sentencing warrant request is justified.

Good practice: In DV cases, consider the following *circumstances* as supporting criteria in your determination whether or not to issue an indictment with a sentencing warrant request:

a) *A lack of prior convictions:*

Reasons for a sentencing warrant request should be examined in any case of domestic violence, even when the suspect has no prior convictions. When the suspect does have prior convictions, the binding approaches taken by prosecutors' offices differ in practice – some will not request sentencing warrants when suspects have prior convictions for any criminal offence, and some will not request them when suspects have prior convictions for the same or related criminal offences.

b) *A confession by the suspect:*

A suspect's confession, when not in the context of a particularly grave circumstance of DV perpetration, constitutes a valid reason for a sentencing warrant request with appropriate deterring criminal sanctions. On the other hand, when the suspect denies guilt, regular procedure should be followed.

c) *The position of the Injured party:*

Although prosecutors are not obligated to ask a victim whether they support the issuance of a sentencing warrant request, it would be useful to consult the injured party and consider their position, their interest in prosecuting the defendant, damage compensation, and any other elements that may influence prosecutorial decision making.

5.2.3.a. Requesting a sentencing warrant with a suspended sentence and security measures

Explanation:

A sentencing warrant enables prosecutors to propose the criminal sanction for a DV case, without trial. In justified cases, apart from a suspended sentence, a sentencing warrant can also impose appropriate *security measures*. Proposals of such measures should be guided primarily by the purposes of sentencing and the interests of the injured party.⁵⁴

Recommendation:

In a DV case that results in a suspended sentence with adequate security measures, it would be useful for prosecutors to take a proactive approach and, to the extent possible, verify whether defendants comply with those security measures and any related obligations; and to propose the obligatory revocation of suspended sentences in the case of non-compliance.

5.2.4. The perpetration of DV as legitimate self-defence

Explanation:

In practice, there are cases in which both parties are indicted for domestic violence between spouses or common-law partners. In cases of battering (as a form of DV), the victim may perpetrate a singular act of sometimes extreme violence in reaction to: 1) a concurrent or imminent attack, or 2) prior battering.⁵⁵ In order to ensure the proper prosecution of DV cases, the entire context of relations between two people should be reviewed by prosecutors, and a distinction made between the primary perpetrator of violence – the batterer – and the partner who employs violence in response to the batterer.⁵⁶ To that end, prosecutors should establish during the investigation stage whether a specific act was perpetrated in legitimate self-defence,

54 According to current legislation, prosecutors in the RS have the option to propose certain security measures that are particularly relevant in DV cases: compulsory psychiatric treatment, compulsory addiction treatment, a restraining order relating to a specific person, compulsory psychosocial treatment, and removal from a joint household.

55 For more information, see section 1.1.

56 There have been DV cases in BiH in which both parties were indicted and convicted of domestic violence (see: Galić, *Practice Guide: Domestic Violence*, 53). However, the factual descriptions of the offences in these cases indicates that such mutual charges for domestic violence may be due to an insufficient or incohesive understanding by police and prosecutors of the nature of intimate partner violence and the specificities of various forms of violence between spouses and common-law partners (see section 1.1.).

in order to clarify the existence of circumstances that exclude the unlawfulness of such an act and the very existence of a criminal offence.

Factors that may be helpful in identifying the primary perpetrator of violence between spouses and common-law partners, as opposed to the party who perpetrated violence in response to imminent or previous violence (but does not use violence to exert power and control in the relationship):

- The primary perpetrator has prior convictions for domestic violence
- A protective measure for domestic violence has been issued against the primary perpetrator in the past
- The acts perpetrated by the primary perpetrator reveal a pattern indicating that violence is used to exert power and control over the victim (this may include emotional abuse, economic violence, isolation, etc.).⁵⁷

A distinction between a primary abuser and a victim acting in self-defence can also be made through expert examination of physical injuries; for example, determining whether injuries were inflicted by engaging in an assault (such as fists covered in bruises or hematomas) or by engaging in self-defence (such as scratches or bites on hands).

Recommendations:

In cases where two family members (i.e. both spouses or common-law partners) are suspected of DV perpetration, prosecutors should establish whether the actions that initiated a DV investigation constitute the sufficient legal elements required to apply the institution of legitimate self-defence.

When the prosecutor is unable to establish with confidence that a case included legitimate self-defence, an indictment for domestic violence should be issued and it should be left to the court to determine whether the specific criminal law of the case involves legitimate self-defence or if the scope of legitimate self-defence was exceeded.

⁵⁷ See the Power and Control Wheel for an overview of actions that point to a pattern of battering.

5.3. MAIN TRIAL

5.3.1. Opening statement

According to common practice, an opening statement outlines only basic details of the criminal event that is the subject of criminal proceedings. The details of the case are not tackled in this stage, and it is therefore unnecessary to explain the nature and form of the DV that was perpetrated to the court at this time. While the theoretical constructions of DV introduced in the beginning of this text could be used for that purpose, a presentation citing those constructions and explaining the details of the crime would be more appropriate in closing remarks.

5.3.2. Evidentiary procedures

As a rule, evidentiary procedures in cases involving domestic violence include the hearing of persons who were exposed to violence, as witnesses (the injured party as witness).

5.3.2.a. The hearing of witnesses and experts

Direct and cross examination of witnesses

The prosecutor plays a very active role in this evidentiary procedure given their obligation to instantly react to questions and allegations of the defence. Yet, due to the work restrictions and caseloads that many prosecutors face, it is unknown to what extent they can adequately prepare for this part of DV proceedings if cases are not given priority, as well as whether they can sufficiently prepare witnesses for trial. These limitations are particularly emphasized during the cross examination of witnesses, where it is especially important for prosecutors to deftly handle and fully understand all facts of the case.

For the cross examination of prosecution witnesses (primarily the injured party) by the defence, the prosecutor should prepare beforehand by identifying potential questions the defence will pose to the injured party concerning the domestic violence, in order to offer an adequate counter-thesis or response. A well-prepared strategy alongside a well-prepared witness allows the prosecutor to react swiftly and efficiently to the questioning of the defence during the trial, and thus to effectively contest some of their arguments and allegations.

In DV cases, defence counsel often attempt to reframe the theses presented in the indictment and blame the injured party for the incident(s) in question. Commonly, the defence presents allegations or statements that are irrelevant to the end goal of truth-seeking, against which the prosecutor has a duty to offer adequate counterarguments.

Common allegations made by defence counsel in DV cases include:

- the defendant's violence against the injured party is justified by the injured party's previous "inappropriate" behaviour or provocations (in other words, the injured party is to blame for the violence);
- the physical violence perpetrated by the defendant was no different than the physical violence used by the injured party in self-defence;
- domestic violence is a private issue;
- the violence suffered by the injured party is being exaggerated and DV is not a threat to the community;
- the defendant's violence is justified by external factors such as unemployment, stress, alcohol addiction, etc.

Sometimes, defence counsel in DV cases also try to discredit the injured party by bringing up details of their sexual history during questioning; but such questions are legally prohibited. Prosecutors should refer to provisions of the criminal procedure code governing prohibited questions in order to pose objections to this line of questioning and thereby stop the efforts of defence counsel to discredit the injured party in this way.

When privileged witnesses who gave statements in the investigation stage exercise their legal right not to testify in the main trial

In cases when prosecutors know that an injured party or other members of the defendant's family who enjoy privileged witness status are refusing to testify because they or their loved ones have been exposed to threats, or because they fear for their lives due to the influence or status of the defendant or other illegal actions perpetrated by the defendant, prosecutors should verify and shed light on these allegations or any circumstantial evidence, and then collect all available evidence in accordance with the prosecutorial principle of officiality. At the trial stage, the prosecutor can introduce new evidence, and it is up to the court to assess whether that evidence is relevant to the case.

When a DV case does not rest entirely on the statement of the injured party because there is other circumstantial or direct evidence (e.g., police officers who witnessed violence during their intervention, neighbours who heard verbal threats and sounds of physical violence, etc.), and the injured party has refused to testify because of threats, the prosecution should take steps to prove that the defendant threatened the injured party, in order to introduce this information to the court so that it can be taken into account in the court's deliberations. If the threats made by a defendant against an injured party to inhibit the injured party from testifying can be proved without undue delays, *the prosecutor can present this circumstance as evidence that the defendant is aware of their guilt, which is why they tried to influence the injured party to refuse to testify and thus avoid any sanctions associated with the offence for which they have been indicted.* Proving such threats does not necessarily require a complicated procedure or new investigation, given that they may be made in the presence of other people who can testify, or via text message or other forms of traceable electronic communication (such as e-mail or social media). Prosecutors can introduce an allegation of threats or new evidence at the stage of the proceedings when the defence concludes their presentation of evidence.

In practice, there is some question about both the usefulness of these approaches to proving the offence of DV in the trial stage and the capacities of prosecutors' offices to undertake new evidence collection at that stage. Given the objective limitations faced by prosecutors and the short duration of DV trials in general, these elements should be valued in accordance with the circumstances and severity of each case.

Examining expert witnesses

In DV cases involving physical violence, medical expert analysis is conducted as a rule, with the expert issuing an opinion about the method of injury infliction, the location of injuries and their gravity, the positions of the assailant and the victim, etc. Also common in DV cases are expert analyses by a neuropsychiatrist, or a neuropsychiatrist in collaboration with a psychologist; which is important to proving various circumstances, such as the psychological consequences suffered by the injured party or the consequences of DV for children. In DV cases, standard procedures are applied when it comes to the use of expert witnesses as evidentiary means and the general examination of expert witnesses at the trial.

5.3.2.b. Presenting material evidence

The presentation of material evidence in a DV case is exercised in compliance with standard practices; meaning, there are no specificities to evidentiary procedures in DV cases compared to other criminal cases.

Still, with respect to *viewing photographs of the injured party's injuries*, it is useful to note that an injured party will sometimes offer her own photograph(s) of her injuries to the prosecutor while giving a statement. Any such photograph(s) would not constitute part of the official photo documentation collected by authorized persons, which raises the question of whether they can be used as evidence in court.

Good practice: If an injured party offers a photograph of her injuries while giving a statement, if possible, request additional expert analysis to verify the authenticity of the photograph and compare it to medical findings regarding the injured party's injuries, in order to confirm that the injuries shown match those described in medical documentation.

5.3.2.c. Evidence regarding prior criminal sanctions

Presenting verdicts for prior domestic violence by defendants who are special recidivists

A defendant's criminal records constitute an integral part of the evidence in any criminal matter, not only in DV cases. Still, previous criminal records relating to DV can reveal if a defendant is a special recidivist in perpetrating the same criminal offence. It is important to emphasize, though, that these records do not show who the victim of DV was and thus if it was the same injured party.

Recommendation:

When criminal records indicate that a defendant is a special recidivist in DV perpetration, it is useful to present any prior final verdicts for DV as evidence before the court, in order to establish if the previous offence was perpetrated against the injured party in the current case. If it is found that the offence was indeed repeated against the same injured party, this circumstance should be presented as evidence indicating that the prior conviction did not achieve the sanctioning purpose. Also, the prosecutor should refer to this circumstance as an aggravating factor in their closing remarks and in an appeal, if necessary.

Social history

The social history of the defendant, which the prosecutor's office can request from the competent social work centre during the investigation stage, may be useful as evidence with respect to the determination of adequate criminal sanctions. Although a defendant's social history is not required as evidence, it testifies to the intention of the prosecutor to conduct an objective investigation and establish all relevant

facts and circumstances relating to the defendant's personality. A social history may comprise elements that can be valued as both aggravating and mitigating factors, in accordance with the prosecutorial obligation to consider both of these.

5.4. CLOSING STATEMENT

5.4.1. Arguments: the context of the case

Explanation:

When making the closing statement in a DV case, prosecutors have an opportunity to summarize all disputed points or open issues from the trial, in order to give the court a comprehensive picture of the defendant and the offence(s) perpetrated.

By using additional arguments in a closing statement, prosecutors can emphasize the legal obligation to hold the defendant criminally liable for having perpetrated domestic violence and to provide the victim with protection and satisfaction. Additional arguments can also draw the court's attention to the broader context of domestic violence cases, which may influence the decision of the court, especially as far as sentencing.

Recommendations:

In addition to standard elements of a closing statement (e.g., the legal provisions that should be applied, the elements of the criminal offence, etc.), prosecutors should consider using the following arguments in accordance with the context of each case:

- Offer *your own observations* of the defendant's behaviour during the trial process, if such behaviour can be directly linked to the case on which the court is deciding. Special attention should be paid to whether a defendant displays the following behaviours:
 - aggression against the injured party,
 - threatening language used against or looks made toward the injured party,
 - insults or an arrogant attitude displayed toward the injured party,
 - an unpleasant attitude toward other family members who are present,
 - unjustifiable absence from a hearing, resulting in postponement of the trial.

- In a case involving violence between spouses or common-law partners, the theoretical constructions (e.g., the Power and Control Wheel, the typology of domestic violence, and the cycle of domestic violence) presented in the introductory part of this text can be used to explain the nature of the violence perpetrated. For example, where facts and evidence indicate that a defendant has perpetrated DV *in order to exert power and control over the injured party*, this aspect of the case should be particularly emphasized and explained.
- When a DV case involves gender-based violence, it would be useful for the prosecutor to stress the importance of applying binding international legal standards relevant to the specifics of the case (including the Istanbul Convention and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)). For example, Article 45 of the Istanbul Convention stipulates that imposed criminal sanctions in cases of violence against women and domestic violence should be efficient, should deter from further perpetration of domestic violence, and should be commensurate with the perpetrated criminal offence and its gravity.

5.4.2. Proposing aggravating and mitigating factors

The prosecutor should take into account all aggravating and mitigating factors present in a DV case and emphasize them in a detailed proposal, so that the court can value them at the sentencing stage.

Presenting mitigating factors in a DV case

In BiH, it is notable that defence counsel commonly propose that certain circumstances or factors be valued as mitigating by the court and yet, as a rule, these factors should not be valued as mitigating in the context of DV. Accordingly, in every DV case, prosecutors should conduct a critical analysis of all the mitigating factors that may be proposed by defence counsel in court which the prosecutor believes should not be valued as mitigating factors. This puts the prosecution in a position to offer strong counterarguments and refutations of the value of certain factors proposed by the defence as mitigating, depending on the circumstances of each case.

Defence counsel are likely to propose the following factors as *mitigating* in DV cases:⁵⁸

- The defendant enjoys the status of “family man”
 - *Counterargument:* Domestic violence is a criminal offence perpetrated at the detriment of the family itself, which constitutes a protected value. It is wrong to qualify a DV perpetrator as a family man, considering that, by definition, he has perpetrated violence against a family member(s);
- The defendant is the breadwinner for their family, or their family faces an impoverished economic status
 - *Counterargument:* Except in cases when a fine is imposed, this should not be a relevant argument before the court. As the primary breadwinner, the defendant may continue abusing the injured party’s economic dependence on him/her, and may continue a pattern of controlling behaviour.
- The defendant has a pleasant personality or a good reputation in the community
 - *Counterargument:* The defendant perpetrated violence against another family member. This points to an abusive, not a pleasant, personality. The court should not allow the public impression made by the defendant to outweigh their actions in the private sphere of their life;
- The defendant has expressed remorse
 - *Counterargument:* An emphasis should be put on the offence perpetrated and the circumstances of the case. For example, questioning the sincerity of remorse expressed by a defendant in the context of continued severe violence.
- The defendant has displayed “good behaviour” before the court
 - *Counterargument:* This standard of behaviour is expected from all defendants before court, and not something that should be valued as a mitigating factor.

Presenting aggravating factors in a DV case

If criminal or misdemeanour records include information about *prior convictions of the defendant* for domestic violence or the *imposition of a protective measure* for domestic violence, this should be proposed as an aggravating factor against the defendant (e.g., the defendant’s tendency to perpetrate DV, the defendant’s pattern of battering) to be valued by the court at the sentencing stage.

58 Galić and Huhtanen, 26-29.

When the act of perpetration in a DV case includes elements of two qualified forms of domestic violence but only one DV offence is incriminated,⁵⁹ prosecutors should mention the *second qualifying circumstance* as an aggravating factor (e.g., the use of weapons in the perpetration of domestic violence against a child) before presenting arguments for sentencing purposes.

With respect to the consequences of an offence on the injured party, the closing statement in a DV case should include a proposal on the *occurrence of future damage* as an aggravating factor – especially if a child is the injured party – while presenting arguments to the court for sentencing purposes when applicable (e.g., when expert analysis shows that the specific injury will result in life-long consequences or grave mental suffering in the future).

If the defendant has been reported for domestic violence in the past, and *investigative actions were* conducted at the time (even if they did not result in an indictment), this should be used in the trial to create *a full picture of the context of the DV case* and to reinforce certain claims made by the injured party, such as those about the defendant's abusive nature or that the injured party made earlier attempts to report the defendant's behaviour (and, if applicable, to explain her refusal to testify). These circumstances can be valued as an aggravating factor by the court.

Note: For more examples of aggravating and mitigating factors in the context of DV, and of the treatment in court of these factors, see: Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo: DCAF, 2013), 17-29.

5.4.3. Proposing sanctions

Explanation:

Prosecutors make proposals of adequate criminal sanctions to the court, based on their analysis of all the aggravating and mitigating factors in a DV case; and depending on the context and circumstances of each case, they can propose more stringent or more lenient sanctions.

Recommendations:

In cases of severe DV, prosecutors should propose stringent sanctions in their closing statement, in order to introduce and normalize more stringent sentencing policy for the criminal offence of domestic violence.

59 A form of apparent ideal concurrence.

In cases of extremely severe DV, prosecutors should propose *the most stringent* sanction possible in their closing statement, in order to meet the requirements of special and general prevention.

5.5. APPELLATE PROCEDURE: FILING AN APPEAL

Recommendations:

In DV cases where the court has imposed inadequate and overly lenient criminal sanctions given the severity and consequences of the perpetrated offence,⁶⁰ and the prosecutor does not believe these fulfil the sentencing purposes of special and general prevention and the protection and satisfaction of the victim, prosecutors should consider filing a justified appeal against the first-instance sentence and propose more stringent sanctions, as needed. In this way, prosecutors contribute to the establishment of adequate sentencing policy for domestic violence.

In addition to the obligation of special prevention, every appeal filed against a criminal sanction should emphasize the obligation of general prevention as well, which is only achieved by imposing adequate criminal sanctions. Domestic violence is a widespread criminal offence in BiH despite significant systemic efforts by institutional actors to prevent and protect citizens from domestic violence (through the adoption and implementation of special laws, national and entity-level strategies for the prevention of domestic violence, local protocols on cooperation between entities to ensure protection from domestic violence, and specialized service providers and support services for women and children victims.)

Prosecutors should know the facts of any DV case well, especially of all mitigating and aggravating factors, for the purposes of writing an appeal.

In the explanation of appellate claims relating to a criminal sanction, to the extent applicable and depending on the circumstances of a case, the following facts should be emphasized (so that the court can value them as potential aggravating factors):

- All quantitative and qualitative acts of perpetration by the defendant;
- Facts indicating whether these acts of perpetration were long-term and their intensity;
- Facts pointing to the persistence and arrogance of the defendant in perpetrating the acts that constitute the criminal offence;

60 Caselaw illustrates that minimum or below-minimum legal sanctions are imposed for qualified forms of domestic violence, including violence against children, violence that results in grave bodily injuries, and the use of weapons. See: OSCE Mission in BiH, *Ensuring Accountability for Domestic Violence*, 66.

- A description as to what extent these acts were abusive and consequential for the injured party;
- The form and level of the defendant's guilt, which are relevant for sentencing (e.g., many DV cases involve direct premeditation);
- Actions by the defendant that point to premeditation (e.g., locking the door, pulling curtains or blinds down just before perpetration, etc.);
- Aggravating factors that are present, but were not valued by the first-instance court; especially the fact that a defendant is a special recidivist who has repeatedly perpetrated domestic violence against the same injured party;
- Requests made by an injured party in earlier proceedings for prosecution and sanctioning of the defendant.

Good practice: When lodging an appeal against a criminal sanction, prosecutors can refer to the international legal standard from the Istanbul Convention, which is binding for BiH, that DV offences be punished by “effective, proportionate, and dissuasive sanctions” that reflect their grave nature.

Istanbul Convention, Article 45, “Sanctions and measures”:
“[ensure] that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.”

VI PROSECUTORIAL PRACTICE IN DV CASES: EDUCATION, SPECIALIZATION, AND PREVENTION

6.1. Training for prosecutors

Specialized trainings for police, prosecutors, and judges in the handling of DV cases would increase their knowledge and understanding of the complex nature of domestic violence, creating the preconditions for a gender-responsive approach to the prosecution of these cases and better-quality practice among law enforcement and judicial professionals that is more accountable and more efficient.

6.2. Prosecutorial specialization in DV cases

The specialization of judges and prosecutors in DV cases would enable judicial professionals with specific and current knowledge of DV to handle these cases. One can reasonably assume that such specialization would contribute to better coordination, quality, and efficiency in the work of prosecutors and the entire criminal justice system.

Specialized prosecutors would be well-equipped to understand the position of the injured party and the nature of violence occurring between spouses and common law partners as a form of gender-based violence. Further, they would be trained to implement uniform and harmonized practice in criminal law situations involving domestic violence, which would result in more efficient proceedings and would eventually improve the overall response of the criminal justice system to DV.

Considering the significant number of recidivists involved in DV cases, specialized DV prosecutors would also have cases returning to them, which would ensure a better informed and more efficient approach to protecting the injured party and achieving the aims of special and general prevention.

A possible systemic solution: Against this backdrop, there is the obvious need to introduce a legislative solution to prescribe that prosecutors possessing special knowledge and skills are assigned to cases involving domestic violence crimes. This could be based on the model defined in the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings concerning the specialization of judicial professionals who work on these cases. A legally defined system of organization of prosecutorial work on DV cases would enable prosecutors to apply a harmonized approach through all stages of criminal proceedings.

6.3. Domestic violence prevention

The prosecutor serves a primarily repressive function in prosecuting criminal perpetrators, responding only once the unlawful act has occurred. Still, prosecutors have leeway to take significant actions to prevent domestic violence, including by:

- influencing the sentencing policy of courts by filing appeals against inadequate criminal sanctions imposed by the court (keeping in mind that, apart from special prevention, i.e. preventing the perpetrator from perpetrating another crime, sanctions have a general prevention purpose, i.e. conveying a message to other people in the community to refrain from perpetrating criminal offences); and
- engaging in educational activities in the community, such as awareness raising of the harmfulness of DV and its detrimental effects on victims, children, and families in general.

CONCLUSION

The contents of the *Prosecutors' Domestic Violence Handbook* have been adapted to the existing criminal justice context in BiH – in the Federation of Bosnia and Herzegovina, the Republika Srpska, and the Brčko District. It relies on the best domestic and international practices in DV cases and offers concrete recommendations for improved prosecutorial practice. Along with an introductory review of theoretical constructions of domestic violence, which has practical implications for the work of prosecutors, this text offers a broad overview of topics that relate to prosecutorial practice in DV cases; both as far as general actions that have the specific meaning in DV cases and special actions in different stages of criminal proceedings.

The authors of this *Handbook* hope that it will find its place in terms of practical application in the BiH judiciary and that it will be helpful to prosecutors in their work on DV cases. The text may also have comparative significance in the international legal context, as a starting point for examining prosecutorial practices on domestic violence and for continuing discussions about judicial responses to domestic violence.

Finally, all the people who worked on this resource would like to see an improved response by the judicial system to domestic violence, and hope that this *Handbook* helps pave the path to the informed, responsible, and efficient prosecution of DV perpetrators, and to securing protection for victims.

