

# **A RACE AGAINST TIME**

**Successes and Challenges  
in the Implementation of the  
National War Crimes  
Processing Strategy of  
Bosnia and Herzegovina**



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



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## 1. Executive Summary

More than 25 years since the end of the 1992-1995 war in Bosnia and Herzegovina (BiH), nearly 500 war crimes cases, involving over 4,000 known suspects, remain before the country's prosecutors' offices. At the current rate of processing, the deadline of the Revised National War Crimes Processing Strategy (Strategy) to process all remaining cases by the end of 2023 will be missed. It is also no longer an exaggeration to state that, with each passing day, the likelihood of achieving justice for the remaining victims of the atrocities committed during the war diminishes – a result of the death and illness of suspects, defendants, witnesses, and victims, coupled with a decreasing quality in the evidence to support prosecutions. Justice is now in a race against time.

A number of equally pressing challenges stand in the road ahead. Political factions in BiH continue to impede the full implementation of the Revised National War Crimes Processing Strategy, most clearly evidenced by the failure by the BiH Council of Ministers to appoint the Supervisory Body for monitoring the Strategy's implementation. Scores of suspects and accused reside abroad and are unavailable to the BiH authorities – necessitating significant improvements in regional co-operation to prevent this issue alone frustrating a considerable number of the remaining cases. Lingering limitations in institutional capacities, especially with respect to witness and victim support and protection, continue to derail progress. Institutional failures throughout the lifetime of the Strategy, especially at the State-level, have undermined its core purpose, namely, to prioritise the most complex and highest priority cases and the prosecution of the most responsible perpetrators before the Court of BiH. Finally, the award of compensation within criminal proceedings to victims of atrocities remains the exception, not the rule.

On the other hand, the progress that has been made must be recognized. More than 600 war crimes cases have been adjudicated by the courts in BiH, and the capacities of the domestic institutions have undoubtedly been strengthened over the lifetime of the Strategy – an important legacy that the Mission hopes will endure. This is evidenced not only by the number of cases processed, but also by the improving adherence to international standards. While the international community has made crucial contributions to this process, the fortitude, determination and expertise of domestic actors to assume national ownership of a highly politicized and often fractured process must also be acknowledged and commended.

Justice is not only an imperative from the perspective of victims and witnesses. The fair trial rights of the accused demand, among other things, that their proceedings are dealt with in reasonable time. So too does society at large have an interest in the efficient and fair administration of justice in war crimes cases. Ensuring judicial accountability for the atrocities committed during the war is necessary in establishing a comprehensive historical record of that period, which in itself will enable truth-sharing, the dispelling of competing narratives, and the fostering of further reconciliation.

At this critical juncture, the Mission calls on all stakeholders, national and international, to take every necessary step within their power and respective mandates to ensure that the remaining war crimes cases are processed efficiently and fairly, before the path to justice is blocked forever. More can be done. More must be done.

## 2. Introduction

### 2.1 Background

Strong justice mechanisms form an integral part of the rule of law and human rights mosaic required for states to effectively transition from conflict to peace and long-term stability. The adjudication of war crimes trials,<sup>1</sup> in adherence with international standards, crystallize the nebulous and often disputed facts of war and establish beyond a reasonable doubt the crimes that were committed, and by whom. This essential process lays the groundwork for closure, acceptance, and – ultimately – reconciliation.

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) documented many of the atrocities that took place during the 1992-1995 war in BiH. Yet this narrative is incomplete. Scores of other horrifying acts committed during the conflict were not adjudicated by the ICTY and the victims of these atrocities also deserve justice, with the responsibility for this resting with the BiH judiciary.

Domestic judicial stakeholders, with the support of the international community, have strived to establish a strong domestic judicial system that is adequately-equipped and resourced to process the remaining war crimes cases. A number of important steps have been achieved towards the expansion and, ultimately, full national ownership of the processing of war crimes cases in BiH. From 2005, the war crimes departments within the Court of BiH and the Prosecutor's Office of BiH (PO BiH) operated in a hybrid 'internationalized' model, in which international staff worked alongside national colleagues. By the end of 2012, all prosecutor and judicial posts were filled by BiH nationals.

Since the Mission started monitoring war crimes cases in 2004, 644 cases have been completed by the BiH courts, as of the end of 2021. Yet the objective of war crimes trials is not only to hold perpetrators to account and achieve justice for victims. The country's strategic approach to ensuring accountability for the atrocities committed during the war is also key to establishing a comprehensive historical record of the 1992-1995 war in BiH.

Today, this objective is more important than ever. The denial and relativization of genocide, crimes against humanity, and war crimes remains pervasive in BiH. Political factions continue to present competing narratives as to factual events and legal findings that have been clearly established by domestic and international courts, such as the genocide committed in and around Srebrenica in July 1995. Acceptance of facts is a cornerstone for peace and reconciliation, and their denial and attempts at revisionism impede reconciliation processes. It follows that transparency and the publicity of criminal trials is of paramount importance, and the domestic judiciary must ensure that information on ongoing and completed proceedings is accessible to the public, while still respecting the rights of the accused, victims, and witnesses. As the Mission previously recommended in the context of the judiciary's anti-corruption efforts,<sup>2</sup> the relevant authorities, particularly the High Judicial and Prosecutorial Council (HJPC, Council), the prosecution authorities, and the courts, should make available to the public meaningful and more detailed information on the investigation, prosecution,

1 For the purposes of this report, the term “war crimes trials” or “war crime cases” encapsulates trials and cases involving allegations of genocide, crimes against humanity, and war crimes (under its legal definition).

2 OSCE, *Third Annual Report on Judicial Response to Corruption: The Impunity Syndrome* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2020), available at <https://www.osce.org/files/e/documents/4/e/471003.pdf> [Accessed 9 March 2022], p. 7.



and adjudication of cases. The same principle should apply to war crimes cases, considering their particular importance to the public.

The criminal justice sector cannot, however, be solely responsible for healing a country after the end of conflict. Courtroom justice plays an important role, but one that should fit into a larger picture of truth-telling, acceptance, restoration, and healing. While BiH has never agreed upon a concrete transitional justice strategy to address these other critical aspects of post-conflict transition,<sup>3</sup> the need for a holistic transitional justice approach remains as important today as it ever has been. Although the criminal justice process has gone a long way towards casting light on the atrocities committed during the conflict in BiH, much remains to be done as part of a wider transitional justice process, including in terms of creating a public, accessible, and non-biased record of the history of the conflict, in which the criminal justice process will continue to play a critical role.

While this report focuses on the criminal justice sector, this is just one facet of the work that remains to be done to ensure that all citizens of BiH are able to move forward towards a peaceful and prosperous future.

## 2.2 Purpose

In September 2020, BiH reached another important milestone in its efforts to ensure accountability for atrocities committed during the 1992–1995 conflict, with the adoption, by the BiH Council of Ministers, of the Revised National War Crimes Processing Strategy (Revised Strategy). Today, a further critical juncture lies around the corner given that the Revised Strategy itself expires at the end of 2023. The purpose of this report is, therefore, to identify, with specific reference to the (now Revised) National War Crimes Processing Strategy, successes and challenges in the processing of war crimes cases under the umbrella of the Strategy, with a view to informing the steps to be taken in the run-up to and beyond 2023.

The commitment of domestic authorities, together with substantial support from the international community in the form of material and human resources and capacity building programmes, have yielded considerable results in the process of holding to account those responsible for war crimes committed in BiH.<sup>4</sup> Progress has, however, been inconsistent, with declining case completion rates a particular concern, especially at the State-level between 2016 and 2019.<sup>5</sup> In this context, the Mission has recently issued reports that provide concrete and actionable recommendations to help strengthen the institutional response, especially at the State-level, to processing war crimes cases.<sup>6</sup>

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3 In 2010, the BiH Council of Ministers established a working group of experts to develop a Transitional Justice Strategy. With technical support from the United Nations Development Programme, the working group prepared a draft strategy, however it was never adopted.

4 See, for example, OSCE, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2011), available at <https://www.osce.org/bih/108103> [Accessed 28 February 2022]; OSCE, *Towards Justice for Survivors of Conflict Related Sexual Violence in Bosnia and Herzegovina: Progress Before Courts in BiH 2014–2016* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2017), available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true> [Accessed 28 February 2022]; OSCE, *Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its Relation to the Rules of the Road “Category A” Cases* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2018), available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/397541?download=true> [Accessed 28 February 2022].

5 See Table A below.

6 See, for example, Judge Joanna Korner CMG QC, *Improving War Crimes Processing at the State Level in Bosnia and Herzegovina – A Follow-up Report by Her Honour Judge Joanna Korner CMG QC* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2020), available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/463728> [Accessed 28 February 2022];

As those reports detail, many of the challenges in the processing of war crimes cases are technical and may be addressed with a renewed commitment and focused effort of the relevant institutions and their leadership.<sup>7</sup> Other challenges, however, exist at the strategic, policy, and political levels. Addressing these challenges will require, in addition to improved institutional leadership, sustained commitment from and co-operation between high-level authorities in BiH and the region, as well as the international community.

It is neither hyperbolic nor trite to state that, quite simply, time is running out. At the end of 2021, 495 cases involving 4,284 known suspects remained to be processed. This is in addition to cases where a suspect has not yet been identified, or where it has not yet been established if a crime was committed.<sup>8</sup> Only a few years remain before key witnesses or defendants (as well as, of course, surviving victims) in these cases will age and pass away, forever barring the path to justice. If, therefore, the BiH judiciary is to fulfil its critical role in the country's transition from a post-conflict society into a stable and peaceful democracy, not only must the judiciary focus fully on tackling the challenges that remain and finalizing the outstanding cases (and receive the necessary support to do so), but the strategic and policy considerations that inform the judicial response must be approached with a renewed vigor and commitment.

More than 25 years after the end of the conflict, national stakeholders must all, therefore, once again refocus and redouble their efforts towards the common goal of addressing impunity and achieving justice for victims, especially in light of the Revised Strategy's 2023 deadline.

What follows is an overview of the key developments in the criminal justice system response to war crimes in BiH, a statistical assessment of the progress that has been made, a qualitative analysis of the successes and challenges in implementing the Revised Strategy and, finally, recommendations as to how the latter should be addressed.

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OSCE, *War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2019), available at <https://www.osce.org/files/f/documents/6/9/423209.pdf> [Accessed 28 February 2022]; Judge Joanna Korner CMG QC, *Processing of War Crimes at the State Level in Bosnia and Herzegovina* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2016), available at <https://www.osce.org/bih/247221> [Accessed 28 February 2022]; *Towards Justice*, *supra* n. 4.

<sup>7</sup> See *Judge Korner 2020 Report*, *supra* n. 6, Appendix A: Recommendations; *Case Management*, *supra* n. 6, pp. 27-28.

<sup>8</sup> "Cases" in this context include reports and investigations, i.e. pre-indictment. Cases before the prosecutors' offices across BiH are categorised into (i) cases where the suspect is known (KTRZ cases), (ii) cases where the suspect is unknown (KTNRZ cases), and (iii) cases where it is not been established that a crime has been committed (KTARZ cases). As at the end of 2021, 495 KTRZ cases, 1,249 KTNRZ and 2,079 KTARZ cases remained to be processed.

### 3. Key Developments in the Criminal Justice System Response to War Crimes

#### Among the main issues explored in this section:

- The **historic development** in war crimes case processing in BiH: the shift from a hybrid internationalized justice system to a domestic justice system with full responsibility for handling war crimes cases.
- Responsibility for **ensuring justice** for victims lies now with the domestic judiciary. The **governing authorities in BiH** remain responsible for establishing and maintaining an effective **legal framework** and ensuring that the judiciary has the **capacity and resources** to independently and impartially process cases.
- Competing narratives, political interference, lingering limitations in institutional capacity, and, with hindsight, overly ambitious deadlines, presented **formidable challenges** to the Strategy's effective implementation, necessitating its revision.
- The **Supervisory Body** for monitoring implementation of the Revised Strategy has still not been appointed. The Mission **commends the High Judicial and Prosecutorial Council** for assuming additional responsibilities to ensure oversight of the Revised Strategy.

#### The Mission recommends that:

- the BiH Council of Ministers appoint the Supervisory Body without further delay; and
- the High Judicial and Prosecutorial Council and all prosecutorial and judicial institutions in BiH make available to the public meaningful and more detailed information on the investigation, prosecution and adjudication of war crimes cases.

#### 3.1 The transition to national ownership of war crimes case processing

The past decade plus witnessed a historic development in war crimes case processing in BiH: the shift from a hybrid internationalized justice system to a domestic justice system with full responsibility for handling war crimes cases. In line with the ICTY completion strategy,<sup>9</sup> the first steps took place with the establishment of the State-level Court of BiH and the PO BiH in 2003, with the war crimes departments of each institution becoming fully operational in 2005. The High Representative<sup>10</sup> appointed a number of international prosecutors and judges

9 United Nations International Criminal Tribunal for the Former Yugoslavia (no date), *Completion Strategy*, available at <https://www.icty.org/en/about/tribunal/completion-strategy> [Accessed 26 April 2022].

10 “The Office of the High Representative (OHR) is an ad hoc international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement, that was negotiated in Dayton, Ohio, and signed in Paris on 14 December 1995”, see Office of the High Representative (no date) *General Information*, available at [www.ohr.int/about-ohr/general-information/](http://www.ohr.int/about-ohr/general-information/) [Accessed 28 February 2022].

to work alongside BiH practitioners in order to build national capacities and ensure fair and impartial proceedings, particularly in war crimes trials. From 2006, responsibility for such appointments was conferred on the HJPC, itself then comprised of a mix of domestic and international members. During this period, the BiH judiciary processed dozens of war crimes cases, including the Rule 11 *bis* cases transferred from the ICTY to the domestic judiciary, starting in 2005.<sup>11</sup>

While the mandates of international judges and prosecutors were due to expire in December 2009, the High Representative ultimately extended them after a joint request by the then Chief Prosecutor of BiH, President of the Court of BiH, and President of the HJPC, who argued that the BiH legislature had not allocated sufficient resources to fill the vacancies with national practitioners. Following this extension, the mandates of the last international appointees terminated in 2012. At this point, the State-level institutions responsible for processing war crimes cases transitioned from a hybrid to a fully domestic model, signaling a definitive shift towards national ownership over holding war criminals on all sides accountable.<sup>12</sup>

Although responsibility for ensuring justice for victims lies now with the domestic judiciary, the governing authorities in BiH remain responsible for establishing and maintaining an effective legal framework and ensuring that the judiciary has the capacity and resources to independently and impartially process cases. It also remains imperative that the international community continues to provide sufficient and sustainable support and assistance to ensure continued progress in the fight against impunity.

### 3.2 The adoption of the National War Crimes Processing Strategy

In the face of an indeterminate backlog of war crimes cases, and a plethora of issues affecting their efficient and effective resolution, domestic and international actors recognized the need to develop a strategic approach to domestic war crimes processing. In October 2007, at the request of the Office of the High Representative, a Working Group, chaired by the then Chief Prosecutor of BiH, was formed by the BiH Ministry of Justice to draft a strategy to deal with these issues. The National War Crimes Processing Strategy,<sup>13</sup> adopted by the BiH Council of Ministers in December 2008, was envisaged to guide the processing of war crimes cases until the end of 2023.<sup>14</sup> Adoption of the Strategy was one of the five objectives set by the Peace Implementation Council that BiH had to meet in order to “transition from the OHR to

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11 Rule 11 *bis* cases are those involving middle and lower-level perpetrators of war crimes in BiH who were indicted by the ICTY but whose cases were subsequently transferred to the domestic judiciary for prosecution as part of the ICTY's completion strategy (Rule 11 *bis* of the ICTY Rules of Procedure and Evidence provided the conditions for transfers). For more information about the history and monitoring of Rule 11 *bis* cases in BiH, see OSCE, *The Processing of ICTY Rule 11 bis cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2010), available at <https://www.osce.org/bih/118964?download=true> [Accessed 28 February 2022]. See also section 4.1 below for a more detailed statistical overview.

12 For more on the historical hybrid structure of the Court of BiH, including its War Crimes Chamber, see International Center for Transitional Justice, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, (International Center for Transitional Justice, 2008), available at <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> [Accessed 28 February 2022], pp. 5-8.

13 National Strategy for War Crimes Case Processing (Državna strategija za rad na predmetima ratnih zločina) (2008), available at [http://www.mpr.gov.ba/web\\_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf](http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf) (local language only) [Accessed 28 February 2022].

14 For more information on the history of the Strategy's drafting and its detailed provisions, see *Delivering Justice*, *supra* n. 4, at pp. 17-31.

the EUSR”,<sup>15</sup> thereby heralding increased European Union (EU) engagement in war crimes processing.

At the time of the Strategy's development, the country faced the daunting task of bringing proceedings against thousands of potential war crimes suspects within a judicial system that lacked essential resources and capacities to ensure fair and efficient trials. The Strategy provided a roadmap for tackling this enormous burden, including:

- a) the establishment of clear (albeit demanding) deadlines for completing the entirety of the caseload;
- b) a procedure by which cases were to be distributed between the State-level and entity/Brčko District of BiH (Brčko District) jurisdictions according to their relative level of complexity; and
- c) guidelines pertaining to the application of substantive law, witness support, and capacity development.<sup>16</sup>

It also incorporated into the overall backlog cases in respect of approximately 800 individuals that had been reviewed by the ICTY as part of the transition to a domestic-led judicial process for war crimes cases – also known as Category “A” cases.<sup>17</sup>

The Strategy's adoption therefore signaled the commitment and determination of a wide range of domestic stakeholders – albeit with substantial international support – to establishing processes to ensure accountability for atrocities committed by all sides during the 1992-1995 conflict.

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15 *Declaration by the Steering Board of the Peace Implementation Council*, 27 February 2008, available at [www.ohr.int/ohr\\_archive/declaration-by-the-steering-board-of-the-peace-implementation-council/](http://www.ohr.int/ohr_archive/declaration-by-the-steering-board-of-the-peace-implementation-council/) [Accessed 28 February 2020].

16 The Strategy set forth a plan for the realization of seven primary objectives, namely: I. To prosecute the most complex and top priority war crimes cases within seven years and other war crimes cases within 15 years from the time of adoption of the Strategy (that is, from January 2009); II. To centralize and update at the level of the Court of BiH and the PO BiH the record of all war crimes cases pending before the BiH judiciary; III. To ensure a functional mechanism for the management of war crimes cases, that is, their distribution between the State-level judiciary and judiciaries of the entities and of Brčko District that would facilitate efficient prosecution within the set timeframe; IV. To prosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria; V. To harmonize court practice in war crimes cases in order to ensure legal certainty and equality of citizens before the law; VI. To strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases; and VII. To establish more efficient co-operation with countries in the region concerning war crimes cases for the sake of prosperity in the whole region. *National Strategy*, *supra* n.13, at pp. 4-5.

17 These cases were reviewed as part of the “Rules of the Road” procedure, a process by which the ICTY provided oversight to the domestic prosecution of war crimes cases in BiH. Under this procedure, domestic prosecutors sent their case files to the ICTY for review before proceeding with an indictment or arresting a suspect. A Category “A” classification following review indicated that the case file contained sufficient evidence to provide reasonable grounds for belief that the suspect had committed a serious violation of international law. For more detail on the history of this process and the classification system, see *Observations on the Strategy*, *supra* n.4, pp. 2-4.

### 3.3 Revision of the National War Crimes Processing Strategy

In the years following the Strategy's adoption, significant investments were made to strengthen the State-level institutions' ability to process the more complex war crimes cases. At the same time, so too were the capacities of the entity and Brčko District institutions considerably strengthened, equipping them to handle less complex war crimes cases fairly and efficiently.

Nevertheless, competing narratives on all sides, political interference, lingering limitations in institutional capacity, and, with hindsight, overly ambitious deadlines, all presented formidable challenges to the Strategy's effective implementation. The original Strategy's first and perhaps clearest goal – to ensure the prosecution of the most responsible perpetrators of war crimes within seven years, i.e., by the end of 2015 – was evidently not achieved. Therefore, in April 2017, nearly a decade after the Strategy's adoption, the BiH Council of Ministers appointed a Working Group to prepare amendments to the Strategy.<sup>18</sup>

In January 2018, the Working Group submitted its draft of the Revised Strategy to the BiH Council of Ministers. The process of drafting and the adoption of the Revised Strategy faced severe opposition from a number of victims' associations and representatives of political parties. Opposition was based, in part, on the misunderstanding that cases involving suspects under the ICTY's Category "A" categorization pursuant to the Rules of the Road procedure had been excluded from the overall backlog of cases. Despite this not being the case, political opposition delayed the adoption of the Revised Strategy, by more than two years, until 24 September 2020.<sup>19</sup> It was ultimately adopted following significant advocacy efforts by the Mission, the EU, and other stakeholders.

In addition to revising the Strategy's overarching objective by targeting the completion of all war crimes cases by the end of 2023, the Revised Strategy aimed to strengthen the oversight mechanisms of the Strategy, primarily in relation to the role and remit of the Supervisory Body. Since the adoption of the Revised Strategy in September 2020, however, the Supervisory Body has not been reappointed by the BiH Council of Ministers, with political factions once again frustrating the process.

The third significant amendment to the Strategy was to redefine the criteria to be applied when determining whether a case should be processed at the State or entity/Brčko District level. The Revised Strategy's complexity criteria, based on a two-fold gravity assessment with respect to the crime and the role of the perpetrator, were designed to ensure that the most complex cases (including those involving allegations of genocide, crimes against humanity, command responsibility or joint criminal enterprise) are processed at the State-level, with the less complex cases processed at the entity/Brčko District level.

18 BiH Council of Ministers, *Decision on the Appointment of the Working Group for Preparation of Amendments to the National War Crimes Processing Strategy*, Official Gazette of BiH, No. 44/17. According to Art. 2 of the Decision, the Working Group consisted of nine members representing the Ministry of Security of BiH, State- and entity-level Ministries of Justice, the Judicial Commission of the Brčko District, the HJPC, and the Supervisory Body. In addition, the Court of BiH, the PO BiH, and associations of judges and prosecutors at all levels in BiH were invited to provide expert support to the Working Group. The Mission was invited to attend the meetings of the Working Group, along with the International Residual Mechanism for Criminal Tribunals (BiH Office) and other international organizations working on war crimes processing issues.

19 *Revidirana državna strategija za rad na predmetima ratnih zločina (Revised National War Crimes Processing Strategy)* (2020), available at [http://www.mpr.gov.ba/web\\_dokumenti/default.aspx?id=10809&langTag=bs-BA](http://www.mpr.gov.ba/web_dokumenti/default.aspx?id=10809&langTag=bs-BA) (local language only) [accessed 16 March 2022].

20 *Observations on the Strategy*, *supra* n.4, p. 7.

Although significant amendments were made to the Strategy during the revision process,<sup>21</sup> the substance of the main strategic objectives remained largely unaltered, thereby ensuring continuity and consistency in the implementation of the Strategy following its revision. As a result, when referring in this report to strategic objectives, references can be read, unless indicated otherwise, as being to both the original and the Revised Strategy.

Considering the magnitude of the task facing the judiciary, the absence of the Supervisory Body is likely to be of continued detriment to efficient war crimes case processing. This is the case notwithstanding that the HJPC, *in lieu* of the Supervisory Body, has assumed a number of additional responsibilities and carried out functions beyond the scope of what is required of it under the Revised Strategy,<sup>22</sup> for which it should be commended. The Supervisory Body was specifically designed to monitor implementation of the Revised Strategy, including the financial, human, and technical resourcing of the institutions engaged in war crimes case processing. Its members should include representatives of the BiH Ministry of Justice and of Finance and Treasury, with quarterly reports submitted to the BiH Council of Ministers. The Supervisory Body should therefore act as an important link to ensure that the BiH Council of Ministers is regularly informed of the status of the Revised Strategy's implementation, including, in particular, in relation to issues pertaining to financial resourcing of the institutions.

As will be discussed in greater detail below, achieving the Revised Strategy's goals within the 2023 deadline looks increasingly out of reach. This was noted by Judge Joanna Korner in her September 2020 Report,<sup>23</sup> and was recognized by several panelists at the Mission's October 2021 War Crimes Conference.<sup>24</sup> So too must it be at the forefront of policymakers' considerations when considering the strategic steps to be taken beyond 2023.

### 3.4 Investment of resources in relation to war crimes processing

The Strategy recognizes the need to strengthen the capacity of the judiciary and the police in BiH in relation to work on war crimes cases,<sup>25</sup> and its adoption heralded the investment of significant material, financial, and human resources to improve the efficiency and effectiveness of war crimes prosecutions. For example, over 140 national war crimes investigators, prosecutors, legal associates, and support staff have been employed with the support of the international community, and most notably the EU. Further, since 2014, the Mission's *War Crimes Capacity Building Project* and *War Crimes Monitoring Project*, both funded by the EU, have delivered more than 90 trainings, peer-to-peer workshops, and other events to over 2,500 participants (judges, prosecutors, legal support staff, witness support officers, defence attorneys, and police investigators). These efforts complement activities delivered by

21 In addition to considerable expansion of the sub-objectives of the Revised Strategy's strategic objectives.

22 The HJPC has, via the adoption of *Guidelines for Chief Prosecutors of PO BiH, PO FBiH, PO RS and PO BD BiH in Order to Adopt General Binding Instruction on Obligatory Compliance with Revised NWCS and Decisions, Conclusions and Recommendations of the Supervisory Body* at the Council's November 2020 session, not only confirmed the obligatory nature of the measures incumbent upon institutions under the Revised Strategy, but also established a regime of disciplinary accountability for prosecutors who fail to adhere to those measures. The HJPC further adopted a number of Instructions related to war crimes processing, including in October and December 2020, ensuring that key measures were progressed, including in relation to the status of Category "A" cases and the work-plans of prosecutors' offices. HJPC, *Comprehensive Report on Implementation of the Revised National War Crimes Strategy (October 2020–October 2021)*, on file with the Mission.

23 *Judge Korner 2020 Report*, *supra* n.6, para. 197.

24 OSCE Mission to Bosnia and Herzegovina Conference: Current Challenges to Domestic War Crimes Processing in BiH, 7 October 2021 (held online).

25 *Revised Strategy*, *supra* n. 19, Strategic Objective VI/f; *National Strategy*, *supra* n. 13, Strategic Objective VI/f.

other members of the international community, including the United Nations Development Programme (UNDP) (particularly via its *Regional War Crimes Project*), the ICTY, and its successor, the International Residual Mechanism for Criminal Tribunals (IRMCT).

Such investment has undeniably contributed to the significant strengthening of the institutional capacities across the country. This is indicated not only by a significant increase in case completion rate in 2014,<sup>26</sup> but also by improving adherence to fair trial standards that the Mission has observed over the course of the Strategy's lifetime. Although this is true of both the State and the entity/Brčko District level institutions, the latter have, in particular, achieved a relatively greater degree of success in resolving cases than the State-level over the same period.<sup>27</sup>

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26 See Table A below.

27 *Case Management*, *supra* n. 6, p. 15.



## 4. Implementation of the (Revised)<sup>28</sup> National War Crimes Processing Strategy to date

### Among the main issues explored in this section:

- An **objective statistical review** of the progress in war crimes case processing over the course of the Strategy's lifetime. Under the Strategy's framework, from the beginning of 2009 until the end of 2021, **555 cases** (concerning 842 defendants) **were finalized** across the country. By the end of 2021, the **backlog** of cases (with a known suspect) at POs in BiH was **495 (involving 4,284 suspects)**: a reduction of 59 per cent from the backlog of 1,210 cases in 2014.
- A **qualitative critical analysis of successes and challenges** in the context of certain of the Strategy's key objectives: case management and distribution; harmonization of court practice; institutional capacity; regional co-operation; and victim and witness protection and support.

As set out in greater detail below, the sheer number of cases that have been processed within the Strategy's framework is indicative of the domestic judiciary's improved ability to process war crimes. The policy guidance offered by the Strategy, coupled with the investment of resources, undoubtedly led to tangible and clear improvements in institutional capacity.

There are, however, many other areas where attainment of the Strategy's goals has been more modest. For example, while the Strategy sets out a model of case distribution across the country's courts, with the most complex cases to be completed at the State-level and less complex cases to be handled by cantonal and district prosecutors' offices and courts, this mechanism has been utilized neither systematically nor consistently. Furthermore, in mid-2019, the Mission reported the persistent failure by the State-level institutions, and in particular the PO BiH, to focus solely on investigating and prosecuting the most complex war crimes cases.<sup>29</sup> In spite of modest progress over the last decade, regional co-operation has generally been inconsistent and persistently politicized, substantially obstructing progress in a large number of cases. Meanwhile, victim and witness support and protection – one of the key components of effective criminal justice – while generally improved over the life of the Strategy, similarly exhibit inconsistencies and flaws, which continue to impede the realization of the Strategy's other goals.

What follows is firstly an objective statistical review of the progress in war crimes case processing over the course of the Strategy's lifetime, followed by a qualitative critical analysis of successes and failures in the context of certain of the Strategy's key objectives. As explained at the outset, the purpose of such review and analysis is not only to focus much-needed attention on the areas in respect of which improvement is needed today, but also to inform, now with the benefit not only of hindsight but also of history, the strategic decisions that must be taken in the coming years.

<sup>28</sup> As explained above, references in this report to strategic objectives are used to refer interchangeably to the original and now Revised Strategy, unless the context indicates otherwise.

<sup>29</sup> *Case Management*, *supra* n. 6, pp. 10-16.

As is evident from the analysis in the pages that follow, several critical considerations must now be recognized. Firstly, it must be acknowledged that the deadlines of the original and now Revised Strategy were and are, while well intentioned, overly ambitious. While much has been written (including in the present report) on the failures of the institutions, particularly at the State-level, to process cases in accordance with the Strategy, the sheer scale of the task with which they were (and are still) faced must also be recognized. The institutions must do more, including, in particular, focusing their resources on processing the most complex cases in accordance with the Strategy.<sup>30</sup> However the Strategy's deadlines and the likelihood of their achievement are intrinsically connected, of course, to the resources invested in their pursuit. Consideration should therefore also be given to whether the material, financial, and human resources invested in connection with war crimes case processing, within the context of the Strategy's ambitious timeframe, have been sufficient. Similarly, consideration must be given as to whether the oversight mechanisms designed to ensure accountability for failures with respect to the Strategy have been sufficiently effective. The final factors that must be considered within this matrix are that recent years have seen declining case completion rates, while the continued passage of time renders it increasingly unlikely that all cases will be finalized, as suspects, defendants, witnesses, and victims age and die.

Drawing these factors together, policymakers must consider how to considerably expedite, fairly, the rate of case processing. Failing to do so can only be seen as giving recognition to the previously unpalatable – that not all cases will be adjudicated.

While the successes that have been achieved over the course of the Strategy are shared, similarly, the failures that are outlined in this report do not lie entirely at the feet of any one institution or stakeholder: the enormous complexity of establishing, in a post-conflict environment, a criminal justice system fit to fairly try the perpetrators of atrocity crimes cannot be overstated. It is therefore incumbent upon all stakeholders, from the individual prosecutor through to the domestic or international community policymaker, to use this juncture as an opportunity for renewed commitment and constructive self-reflection.

#### 4.1 Processing of cases during the Strategy's lifetime – statistical overview<sup>31</sup>

##### 4.1.1 Cases completed

Trends in war crimes case processing since the Strategy took effect indicate undeniable progress for which the domestic institutions should receive credit. Between 2004 and the end of 2008, around the time of the Strategy's adoption, the BiH judiciary – State and entity/Brčko District courts – finalized 89 war crimes cases (concerning 136 defendants).<sup>32</sup> While the specific context<sup>33</sup> in which processing took place prior to the Strategy's adoption render any direct and conclusive comparison with the progress made under the Strategy inappropriate, it is nevertheless notable that this amounts to an average of about 18 cases finalized per year across the country in the five years prior to the Strategy's adoption.

30 See Section 4.2.1 below.

31 The statistics presented and analysed in this report are based on the findings of the Mission's trial monitoring programme, and the information available to the Mission as at 31 December 2021.

32 Completed with a final and binding verdict or closed for procedural reasons, including following the death of a defendant.

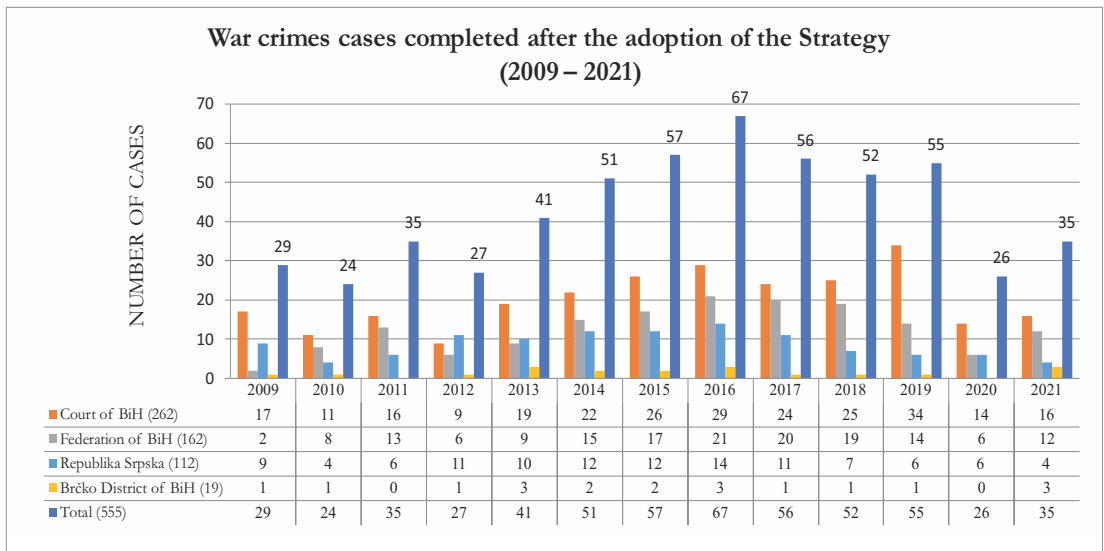
33 Prior to the Strategy's adoption, particular challenges were presented with respect to locating suspects and securing assistance between entity authorities, and formal processes for exchanging case files were only established in 2010. Further, the establishment of the State Court War Crimes Chamber initially had some detrimental effects in terms of the rate of case processing, see *Delivering Justice*, *supra* n. 4, pp. 32-43.

Over the decade-plus that followed, from the beginning of 2009 until the end of 2021, under the Strategy's framework for processing cases, an additional 555 cases (concerning 842 defendants) were finalized across the country.<sup>34</sup> This amounts to an average of approximately 42 cases per year. Of these 555 cases, 262 (437 defendants) took place before the Court of BiH, and 293 (405 defendants) were adjudicated by the entity and Brčko District courts. Furthermore, as at the end of 2021, trials in some 245 cases were ongoing before courts in BiH. Viewed in this light, significant progress has been achieved by the courts and prosecutors' offices (PO) in BiH in establishing accountability for war crimes since the Strategy's adoption.

However, the completion of all cases by the end of 2023 appears out of reach: assuming the average completion rate of 42 cases per year stays true, it will be a further six years before the 245 cases currently pending before the courts *alone* are completed – i.e. not even taking into account the backlog of cases before the POs (as discussed below).

Furthermore, the number of cases completed by courts provides only a partial picture of the overall progress in war crimes case processing, as the fight against impunity should not be perceived only in the context of this criteria. Other factors, such as the prosecutorial backlog of cases and an assessment of indictments filed, as well as conviction rates, also shed light on the pace and quality of war crimes case processing. Considerations pertaining to the complexity of cases processed and the extent to which those most responsible for the commission of atrocities have been held to account are also crucial in determining whether the quantitative achievements hold up to greater scrutiny.

Table A – Case completion



34 It should also be noted that the COVID-19 pandemic had an immediate and significant impact on the rate of case processing in BiH. Although it is impossible to determine with any certainty the exact impact, it should be noted that the case completion rate dropped from 55 in 2019, to 26 in 2020.

#### 4.1.2 Prosecutorial backlog of cases and indictments filed

Not all cases that are investigated by prosecutors end in trial. Many are closed during the investigation phase for legitimate reasons, such as lack of evidence or the death of a suspect or a key witness. Therefore, to understand the overall progress achieved by prosecutors across BiH in concluding war crimes investigations, since 2014 the Mission has also monitored the relative reduction of case backlog at the State and entity/Brčko District POs. This metric captures the progress made in the pre-indictment (i.e., investigation) phase, and not just in relation to cases that end in a trial (i.e., the judicial phase). This also allows progress to be viewed in terms of the proportion of cases resolved compared to the overall number of cases remaining in the backlog.

By the end of 2021, POs in BiH had resolved 59 per cent of the total backlog of cases (with a known suspect) existing in 2014,<sup>35</sup> with the backlog reduced from 1,210 in 2014 to 495 at the end of 2021. This leaves 495 cases (involving some 4,284 potential suspects) to be investigated and resolved as at the end of 2021, a significant number considering, again, the Revised Strategy's final deadline of 2023. This also does not, however, account for the fact that cases may also be *added* to the backlog, either from new criminal reports, or from KTNRZ and/or KTARZ cases being requalified as KTRZ cases. Further, this does not take into consideration the disproportionate rate of reduction at the entity/Brčko District level compared to the State-level, with Federation of BiH (FBiH), Republika Srpska (RS), and Brčko District prosecutors resolving 67 per cent of their case backlog, and the PO BiH resolving 54 per cent of its own backlog.

Table B – Indictments filed<sup>36</sup>

| Jurisdiction           | 2014             | 2015            | 2016            | 2017            | 2018            | 2019            | 2020            | 2021            |
|------------------------|------------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
|                        | Cases (Accused)  | Cases (Accused) | Cases (Accused) | Cases (Accused) | Cases (Accused) | Cases (Accused) | Cases (Accused) | Cases (Accused) |
| Court of BiH           | 57 (112)         | 53 (138)        | 37 (106)        | 30 (52)         | 31 (92)         | 18 (42)         | 16 (45)         | 21 (62)         |
| Federation of BiH      | 23 (31)          | 17 (19)         | 19 (31)         | 10 (12)         | 14 (21)         | 11 (11)         | 4 (4)           | 12 (14)         |
| Republika Srpska       | 18 (27)          | 14 (21)         | 10 (11)         | 5 (13)          | 8 (11)          | 5 (5)           | 3 (4)           | 4 (4)           |
| Brčko District of BiH  | 3 (4)            | 2 (4)           | 0               | 0               | 2 (2)           | 3 (4)           | 0               | 0               |
| <b>Total 450 (902)</b> | <b>101 (174)</b> | <b>86 (182)</b> | <b>66 (148)</b> | <b>45 (77)</b>  | <b>55 (126)</b> | <b>37 (62)</b>  | <b>23 (53)</b>  | <b>37 (80)</b>  |

35 As noted above, cases before the POs across BiH are categorised into (i) cases where the suspect is known (KTRZ cases), (ii) cases where the suspect is unknown (KTNRZ cases), and (iii) cases where it is not been established that a crime has been committed (KTARZ cases).

36 In some cases transferred from the State-level, indictments were filed and confirmed at both the State-level and subsequently, following transfer, at the entity-level. In other cases, entity proceedings continued on the basis of the State-level indictment. In cases concerning the former practice, the table reflects that the indictment was filed at the respective entity-level, rather than the State-level.

The situation is further compounded by the fact that the number of indictments filed on an annual basis has also slowed significantly since 2014 in all jurisdictions of BiH. In both 2018 and 2019, the PO BiH filed slightly over half as many indictments in war crimes cases as it did in 2014.<sup>37</sup> In 2021, the figure was 21 indictments. This reduction in the number of indictments filed is also visible in the entity level POs, which also saw approximately the same proportional drop in indictments filed.

A reduced number of indictments does not necessarily signal a drop in productivity. One of the Strategy's primary goals is to ensure that those most responsible for atrocities committed during the war are brought to justice. If this goal is to be realized, one may expect that *fewer indictments* that concern *more complex* cases would be filed annually. Such cases may involve a higher number of perpetrators, or require establishing the existence of joint criminal enterprises or complex chains of command, and may therefore or otherwise involve the collection and analysis of more material evidence. These cases take more time and resources to investigate and indict. Therefore, although concerning from the perspective of the overall number of cases that remain to be completed, a smaller number of indictments is not necessarily an indicator of inefficiency in case processing. Unfortunately, as discussed below, the Mission's analysis indicates that the decreasing rate of indictments being filed is unlikely to be a result of the prioritization of the most complex cases.<sup>38</sup>

#### 4.1.3 Conviction rates

The second reason that completed cases provide only a limited insight into the judiciary's success under the Strategy is that the quality of investigations and prosecutions are inconsistent. This manifests most visibly in the frequency of acquittals in final instance verdicts, especially at the State-level. Average final instance conviction rates in war crimes cases dropped steadily from 75 per cent in 2014, to an all-time low of 51 per cent in 2018. The situation has, however, generally improved since 2019 (74 per cent), dropping again to 55 per cent in 2020, before improving once more to 88 per cent in 2021.<sup>39</sup>

The responsibility for low conviction rates does not, however, rest equally with all institutions. As seen in the chart below, convictions at the State-level, starting from a high of 86 per cent in 2014, plummeted to 39 per cent in 2018, before improving again to 50 per cent in 2020 and to 86 per cent in 2021. In other words, just four out of ten individuals indicted by the PO BiH were found guilty of at least one charge in 2018, while all others were acquitted of all charges. While acquittals necessarily form part of a functioning judicial system, as previously reported, there is reason for significant concern in this period of sharp decline in conviction rates at the Court of BiH, which could be indicative, among other things, of a deteriorating quality of investigations, indictments, and trial advocacy skills among State-level prosecutors.<sup>40</sup>

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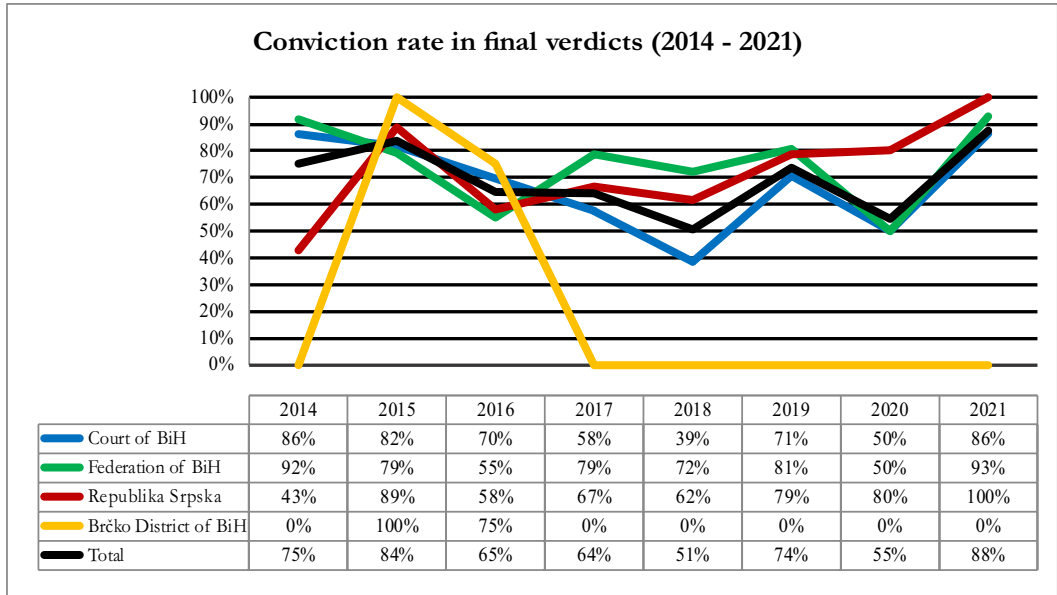
37 2020 is not provided as a comparison due to the difficulty in determining the exact impact of the COVID-19 pandemic on war crimes processing.

38 See Section 4.2.1 below.

39 Although it should also be noted that 2020 and 2021 saw considerably lower case *completion* rates (in large part due to the COVID-19 pandemic) and therefore have a smaller sample size for determining the average case *conviction* rate.

40 For analysis of the possible reasons underlying this decline in conviction rates and other systemic issues that the Mission has identified in the handling of war crimes cases by the PO BiH in recent years, see *Case Management*, *supra* n.6, pp. 24-26.

Table C – Conviction rates



## 4.2 Assessment of key Revised Strategy Strategic Objectives

### 4.2.1 Strategic Objectives I & III: case management and distribution

#### Among the main issues explored in this section:

- The **most complex cases do not appear to have been prioritized** as a matter of institutional policy.
- There has **not been consistent and efficient management of cases**, nor a systematic approach to the **distribution of cases** among the jurisdictions in BiH.

#### The Mission recommends that:

- all necessary steps are taken to ensure the prioritization of the investigation and prosecution of cases concerning those persons most responsible for the atrocities committed during the 1992-1995 BiH war;
- the Court of BiH and the Prosecutor's Office of BiH ensure co-ordination (including with entity/Brčko District judicial institutions) in relation to war crimes case processing, particularly in relation to the transfer of cases.

Considering the data set out in the preceding section, it appears unlikely that the BiH judiciary will complete all war crimes cases by the Revised Strategy's deadline of the end of 2023. The success of the BiH judiciary in implementing the Strategy's overarching objective has been frustrated by challenges relating to two of the Strategy's other main stated goals: to ensure efficient management of war crimes cases and distribution between the State-level judiciary and the entity/Brčko District judiciaries and to prioritize the prosecution of the most complex cases before the Court of BiH.<sup>41</sup>

The Strategy expressly requires that the State-level institutions devote themselves as a priority to the investigation and adjudication of the cases involving the most responsible perpetrators and the cases exhibiting the greatest complexity. Such prioritization should ensure that the largest number of victims will see justice, and that those most responsible for ordering or leading others in committing the most heinous atrocities are held accountable. Effective case management, prioritization, and distribution should relieve the State-level institutions of some of the burden associated with the extensive backlog of cases and allow them to focus resources on the investigation and prosecution of the most complex and highest priority cases.

The Strategy therefore established 'complexity criteria' as a means of categorizing the complexity of cases. A central part of the revision of the Strategy was to amend the criteria, with the aim of increasing flexibility and harmonizing their interpretation by the Court of BiH and the PO BiH, in order to facilitate the transfer of cases to the entity/Brčko District judiciaries.<sup>42</sup>

The complexity of cases is to be determined by the application of the criteria provided in Annex A of the Revised Strategy. Accordingly, if a case meets certain criteria in terms of gravity of the offence and the capacity and role of the perpetrator (whether separately or combined), and taking into account other circumstances, the proceedings should be conducted before the Court of BiH.<sup>43</sup> Otherwise, the case should be tried before another court in BiH pursuant to legal provisions on jurisdiction and case transfer/take-over.

Efficient case management and distribution necessarily depend, therefore, on the willingness of the State-level institutions to perform case selection on the basis of the criteria provided. It is, however, apparent that the State-level has not focused exclusively on the most complex cases throughout the life of the Strategy. In the period from June 2012 until the end of April

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41 *Revised Strategy*, *supra* n. 19, Strategic Objectives I/a & III/c; *National Strategy*, *supra* n. 13, Strategic Objectives I/a & III/c.

42 *Revised Strategy*, *supra* n. 19, Annex A.

43 *Revised Strategy*, *supra* n. 19, Annex A, provides that "If a case meets the criteria below in terms of the gravity of criminal offence and the capacity and role of the perpetrator, whether separately or combined, and taking into account other circumstances, the proceedings will be conducted before the Court of BiH. Otherwise, the case will be tried before another court in BiH pursuant to legal provisions on jurisdiction, transfer and taking over of cases. Gravity of Criminal Offences: a) Legal categorization of crimes (genocide and crimes against humanity in all forms, crimes that are legally categorized as war crimes against the civilian population, prisoners of war or wounded and sick, provided that at least one of the other criteria has also been fulfilled); b) systematic killings; c) severe forms of rape (systematic rape, establishment of detention centres for the purpose of sexual slavery); d) serious forms of unlawful detention or another severe deprivation of physical liberty (establishment of camps and detention centres, escorting to and detention in the camps and detention centres, taking into account the large scale of or particularly severe conditions during the detention); e) serious forms of infliction of sufferings upon civilian population (mass shelling of civilian buildings, destruction of religious, cultural and historical monuments); f) correlation between the case and other cases. Capacity and Role of the Perpetrator in the Execution of Criminal Offence: a) duty within unit; b) management position in camps and detention centres; c) political/judicial function; d) more serious forms and degrees of participation in the perpetration of a criminal offence (joint criminal enterprise, command responsibility.)"

2016, the Supervisory Body issued three separate recommendations to the PO BiH to focus its resources to investigate and prosecute the most complex cases in order to fulfill Strategic Goal I.<sup>44</sup> Similarly, the Mission has addressed this problem in separate reports issued in 2016, 2019, and 2020.<sup>45</sup> The Mission's analysis also indicates that in 2021, approximately 15 per cent of indictments could have been assessed as less complex under the complexity criteria.

These issues are further exacerbated by the fact that the case distribution mechanism envisaged by the Strategy has not been fully or consistently employed. Amendments to the Criminal Procedure Code of BiH, adopted in 2009 as part of the Strategy's Action Plan, were intended to facilitate the transfer of proceedings in accordance with the Strategy's case complexity criteria.<sup>46</sup> Article 27a of the Criminal Procedure Code of BiH provides for the substantive and procedural conditions under which proceedings in war crimes cases may be transferred from the Court of BiH to the respective entity/Brčko District court.

From the outset, however, and as the Mission previously observed, the complexity criteria were subject to inconsistent interpretation.<sup>47</sup> Further, the ambiguity of some of the indicators, paired with the evaluation process for prosecutors, has led to many cases remaining at the State-level that should have been transferred to the entity/Brčko District level under the Strategy's case distribution mechanism. The requirement for all prosecutors in BiH to issue a required number of prosecutorial decisions per year (i.e., a 'quota') may have led some State-level prosecutors to investigate and file indictments in cases that are simpler and easier to solve, and not complex enough to warrant processing before the Court of BiH. This is evident in the number of less-complex cases transferred by the court per its legal authority to entity/Brčko District courts upon the filing of the indictment by the PO BiH.<sup>48</sup>

While the Court of BiH is the ultimate authority in such an assessment, its assessment in turn depends upon the information tendered by the PO BiH, either through the motion for transfer of proceedings or, often, on the basis of the factual description in the indictment. In relation to the former, the Court of BiH does not assess complexity on the basis of the case file (including evidence) itself, but rather on the basis of the information provided in the motion for transfer, filed by the PO BiH.

An example, which is illustrative of the need for all aspects relevant to the complexity criteria to be properly investigated and assessed by the PO BiH, is the determination of a motion for transfer by the Court of BiH in July 2018. In its motion for transfer, the PO BiH outlined that the suspects did not enjoy a position of superior responsibility at the material time, and the Court of BiH accordingly transferred the proceedings to the entity level.<sup>49</sup> More detailed analysis reveals, though, that at the material time, one of the suspects was allegedly a high-ranking police commander, indicative therefore of a case of greater complexity. This information was not, however, reflected in the motion for transfer.<sup>50</sup>

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44 Recommendations adopted at meetings held on 19 June 2012, 1 October 2014, and 19 April 2016, see Supervisory Body for Monitoring Implementation of the Strategy, *Analiza implementacije Državne strategije za rad na predmetima ratnih zločina zaključno sa 2016. godinom* (Sarajevo, Supervisory Body, 2018), pp. 3-4.

45 *Judge Korner 2016 Report*, *supra* n. 6, paras. 61-71, 104, 118-124; *Case Management*, *supra* n. 6, pp. 10-16 (in which the Mission observed that one-third of the indictments filed by the PO BiH in 2017 and 2018 involved fact patterns that could be considered less complex); *Judge Korner 2020 Report*, paras. 95-97, 119-139.

46 Article 27 of the Criminal Procedure Code of BiH provided, since 2003, for the possibility of transfer, however the article was rarely utilized, see *Delivering Justice*, *supra* n. 4, pp. 40-43.

47 *Observations on the Strategy*, *supra* n. 4, p. 10.

48 This issue and others pertaining to the interpretation of case complexity criteria are discussed in the Mission's June 2019 report, *Case Management*, *supra* n. 6, pp. 12-16, 24-25.

49 Decision of the Court of BiH on transfer of proceedings of 4 July 2018.

50 For further discussion of this issue, see *Case Management*, *supra* n. 6, pp. 12-13.



Table D provides a breakdown of the total of 1,141 cases in which proceedings have been transferred from the Court of BiH to entity/Brčko District courts since 2011. Once again it is necessary to more holistically assess whether the quantitative analysis necessarily paints a positive or complete picture. Here, two primary concerns exist: firstly, the erratic nature of transfers over time and, secondly, the trend of transferring cases involving unknown suspects without adequate analysis.

The year-to-year oscillation in transfer activity indicates the absence of a systematic approach at the State-level, primarily at the PO BiH, to identify cases suitable for transfer at the earliest stage of proceedings. Related to this issue is the repeated transfer and takeover<sup>51</sup> of cases. According to the information available to the Mission, in the 2010-2021 period, 35 cases (25 KTRZ and 10 KTNRZ) were transferred and subsequently taken over, or vice-versa, often with a significant period of time elapsing – in one case a period of nine years elapsed between takeover and transfer, with the case remaining in the investigation phase during that time.<sup>52</sup>

*Table D – Transfer of cases from the State to the entity/ Brčko District judiciaries*

| Jurisdiction transferred to | Category of case | 2011      | 2012       | 2013      | 2014      | 2015      | 2016      | 2017      | 2018       | 2019      | 2020       | 2021       | Total        |
|-----------------------------|------------------|-----------|------------|-----------|-----------|-----------|-----------|-----------|------------|-----------|------------|------------|--------------|
| Republika Srpska            | KTARZ            |           | 1          | 2         |           |           |           | 2         | 6          | 1         |            |            | 12           |
|                             | KTNRZ            |           |            |           |           |           |           |           | 9          | 13        | 69         | 71         | 162          |
|                             | KTRZ             | 8         | 70         | 13        | 9         | 11        | 4         | 5         | 24         | 10        | 24         | 8          | 186          |
| Federation of BiH           | KTARZ            | 1         | 11         | 6         | 2         | 1         | 2         | 2         | 5          |           |            | 2          | 32           |
|                             | KTNRZ            |           |            |           |           |           |           | 1         | 83         | 34        | 118        | 93         | 329          |
|                             | KTRZ             | 15        | 134        | 37        | 32        | 20        | 25        | 13        | 38         | 16        | 38         | 16         | 384          |
| Brčko District of BiH       | KTARZ            |           |            |           |           |           |           |           |            |           |            |            | 0            |
|                             | KTNRZ            |           |            |           |           |           |           |           | 1          | 1         | 11         | 18         | 30           |
|                             | KTRZ             | 1         | 1          |           |           |           |           | 1         | 1          |           |            | 1          | 6            |
| <b>Total</b>                |                  | <b>25</b> | <b>217</b> | <b>58</b> | <b>43</b> | <b>32</b> | <b>31</b> | <b>24</b> | <b>167</b> | <b>75</b> | <b>260</b> | <b>209</b> | <b>1,141</b> |

Further, as the Mission has previously reported, significant concerns also exist in relation to the large number of cases with unknown suspects (known as KTNRZ cases) transferred without prior analysis of how they may be related to other cases under investigation or being prosecuted. Without such analysis, important evidence (and context) may be missed, along with the opportunity to identify the suspect(s) through evidence in related cases. The PO BiH, enjoying an absolute overview of all war crimes cases involving complex events, is best placed to analyze such potential connections.<sup>53</sup>

51 Pursuant to Article 449 of the BiH Criminal Procedure Code, the Court of BiH can take cases over from the other BiH jurisdictions (either ex officio or on the application of the parties), taking into consideration the gravity of the criminal offence, the capacity of the perpetrator, and other circumstances of importance in assessing the complexity of the case.

52 Decision of the Court of BiH on takeover of proceedings of 13 October 2011; Decision of the Court of BiH on transfer of proceedings of 30 November 2020.

53 *Case Management, supra* n. 6, p. 16.

With a view to establishing a much-needed systematic approach to case distribution, in April 2018, the Mission accepted an invitation from the then-functioning Supervisory Body to provide a forum for the State-level judicial institutions to plan the distribution of less complex cases.<sup>54</sup> On 28 May 2018, the Mission convened a meeting between representatives of the Court of BiH and the PO BiH at which it was agreed that the PO BiH would identify and thereafter file motions for transfer in relation to 150 KTRZ cases (cases in which the suspect is known) in the June-September 2018 period. It was further agreed that the identification of those cases would not result from case fragmentation<sup>55</sup> in order to ensure actual reduction of the then backlog of KTRZ cases, and that the PO BiH would also conduct an analysis of complexity of all pending KTRZ cases.<sup>56</sup> The Supervisory Body not only endorsed this plan, but also assumed responsibility for overseeing its implementation.<sup>57</sup> Pursuant to these discussions, in 2020, motions for transfer were filed in respect of 66 KTRZ cases, out of which 56 were granted. The Mission is unaware if the analysis of KTRZ cases was conducted as agreed.

Representatives from the PO BiH and Court of BiH met again on 17 September 2020 and agreed that motions for transfer would be filed in respect of 295 KTRZ cases by 31 December 2020.<sup>58</sup> Such cases were to be identified by the PO BiH from the then-backlog of 520 KTRZ cases on the basis of criteria limited to the status of the case, verification of victims, and any correlation with other war crimes cases then pending before the PO BiH.<sup>59</sup> The scope of these criteria, however, provided neither for an assessment of complexity or nature of the events, nor for an analysis of correlation with cases already completed at the State-level. In October 2020, the Mission shared these concerns with the then Chief Prosecutor of the PO BiH, however the Mission's analysis indicates that several cases transferred in 2021 were not fully analyzed in accordance with the complexity criteria.

In principle, war crimes cases involving unknown perpetrators should be considered for transfer provided that a proper assessment *vis-à-vis* the complexity criteria has been conducted. Such an approach is in line with the Strategy.<sup>60</sup> Nevertheless, the Mission reiterates that any transfer of such cases must be based on thorough prior analysis to determine that there is no link with other cases that may therefore render such a case as falling within the complexity criteria.<sup>61</sup>

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54 Supervisory Body for Monitoring Implementation of the Strategy, *Nadzorno tijelo za praćenje provođenja Državne strategije za rad na predmetima ratnih zločina*, 77. sastanak, zapisnik (Minutes of the 77<sup>th</sup> Meeting of the Supervisory Body), on file with the Mission (in local language only), pp. 11-12.

55 The Mission has previously reported on the 'fragmentation' of cases, especially by the PO BiH, whereby new cases are separated from those already existing. While such practices can be justified for efficiency or for practical purposes (e.g., the inaccessibility of an accused), it can also lead to the wasteful repetition of efforts, while also negatively impacting victims and witnesses who will often be required to testify in respect of the same (or related) events in multiple cases. See *Case Management*, *supra* n. 6 for additional discussion.

56 *Conclusions of the meeting between management of the Court of BiH - Permanent Panel for Review and Assessment of Complexity of War Crimes Cases and acting Chief prosecutor of the Prosecutor's Office of BiH and Special Department for War Crimes held on 28 May 2018 at the OSCE Mission to BiH Head Office*, on file with the Mission, p. 1 (Conclusions 1 and 2).

57 Supervisory Body for Monitoring Implementation of the Strategy, *Nadzorno tijelo za praćenje provođenja Državne strategije za rad na predmetima ratnih zločina*, 79. sastanak, zapisnik (Minutes of the 79<sup>th</sup> Meeting of the Supervisory Body), on file with the Mission (in local language only), p. 6.

58 HJPC, *Conclusions of the Meeting held on 17 September 2020*, on file with the Mission (in local language only), p. 2 (E).

59 Prosecutor's Office of BiH, *Informacija o izvršenoj analizi KTRZ predmeta u Posebnom odjelu za ratne zločine Tužilaštva Bosne i Hercegovine (Information on the analysis of KTRZ cases)*, No. A-238/20, 18 September 2020, on file with the Mission (in local language only), p. 1.

60 *Revised Strategy*, *supra* n. 19, Section 2.2 (Case Management).

61 *Judge Korner 2020 Report*, *supra* n. 6, pp. 37-38; *Case Management*, *supra* n. 6, pp. 16, 28.

A further concern of the Mission in relation to the recent trend of transferring cases with unknown suspects is the capacity of entity and Brčko District prosecutors' offices to investigate those cases. As set out above, the capacity of these institutions to investigate and prosecute war crimes cases has proven, generally, to be sufficient.<sup>62</sup> Nevertheless, these institutions have more limited human resources at their disposal and, unlike the PO BiH, they are not generally able to utilize the support of the State Investigation and Protection Agency. Cases should still be transferred in appropriate instances, however, transfers must be accompanied by co-ordination and planning to ensure that the receiving institutions can adequately plan and make best use of their resources. The convening of regular co-ordination and planning meetings between institutions in relation to this (and other) issue(s) should accordingly be established as a matter of good practice.

Given the foregoing, the inescapable conclusion is that, despite notable progress in processing war crimes cases over the course of the Strategy's lifetime, Strategic Objectives I & III have not been fully implemented. The most complex cases have not been prioritized as a matter of institutional policy, and neither has there been consistent and efficient management of cases, nor a systematic approach to their distribution among the BiH jurisdictions via the transfer procedures.

#### *4.2.2 Strategic Objective V: harmonization of court practice*

##### **Among the main issues explored in this section:**

- A lack of harmonization in war crimes cases is a **natural consequence** of a complex judicial system. **Inconsistent adjudication** in relation to key legal questions remains a **common trend** in BiH.
- Although limited, the Mission **welcomes the progress** that the Panels for Harmonization of Case Law have made.

##### **The Mission recommends that:**

- all national and international stakeholders consider how to further improve the harmonization of case law and judicial practice, including by (A) revising the rules of the Panels for Harmonization of Case Law in order to enable the Panels to enjoy a stronger role; and (B) exploring novel approaches to knowledge sharing and the harmonization of judicial practice; and
- the High Judicial and Prosecutorial Council consider how the Court Documentation and Education Department's role can be strengthened, including whether, as a unit within the Secretariat, it can properly fulfil its mandate to serve and support the professional community.

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<sup>62</sup> See sections 4.1.2 & 4.1.3 above.

Inconsistent adjudication in war crimes cases, as well as in other types of cases, is a natural consequence of a complex judicial system consisting of four mutually independent judicial hierarchies. Opposing judicial stances regarding which substantive criminal code should be applied – the 2003 Criminal Code of BiH or the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (1976 CC SFRY) – is the most illustrative consequence of this from the past decade.<sup>63</sup> The Mission notes with concern that inconsistent adjudication in relation to key legal questions remains a common trend in BiH. Such inconsistencies include contradictory holdings relating to the applicability of command responsibility or the range of maximum sentences under the 1976 CC SFRY, the rules and criteria for meting out sentences, the conversion of imprisonment sentences into fines, and interpretation of the *ne bis in idem* rule.<sup>64</sup> While the root causes of some of these questions are related to the different applicable legislative frameworks, the majority of those questions can be resolved within the interpretative domain of the country's four appellate courts.

While the harmonization of court practice and case law is an end in itself – by providing greater legal security and certainty to BiH citizens – it is also a means to an end with respect to the efficiency of proceedings, which will be further streamlined as certain legal uncertainties will no longer require adjudication.

The establishment, in 2014, of Panels for Harmonization of Case Law (HCL Panels), consisting of representatives of each of the four senior appellate courts of BiH and intended to provide harmonized interpretation of legal issues, was an important milestone aimed at filling the gap of the absence of a supreme court at the State-level.<sup>65</sup> The unfortunately limited results achieved by the HCL Panels are largely a result of their nature and complex rules of procedure. For that reason, while the conclusions of the HCL Panel for criminal law reached in December 2018 regarding interpretation of the *ne bis in idem* rule<sup>66</sup> and the application of mitigating circumstances in sentencing in war crimes cases<sup>67</sup> are welcomed, the Mission nevertheless recommends that the rules of the HCL Panels are revised in order to enable the Panels to enjoy a stronger role and therefore more meaningfully contribute to ensuring legal certainty.

The Court Documentation and Education Department (CDED) (formerly the Judicial Documentation Center (JDC)) was established in 2007 as a unit within the HJPC Secretariat, tasked with collecting and cataloguing case law and providing for the professional education of holders of judicial functions.<sup>68</sup> The Mission commends the Council's recommendation from 16 September 2020 and the Council of Ministers decision of 28 January 2021 to make

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63 See *Maktouf and Damjanović v. Bosnia and Herzegovina* (GC), App. Nos. 2312/08 & 34179/08, Judgment of 13 July 2013.

64 The Mission identified such issues through its trial monitoring programme. See *Towards Justice*, *supra* n. 4, pp. 32-39, 63-67.

65 *Delivering Justice*, *supra* n. 4, p. 94.

66 *Tumačenje i primjena zabrane ne bis in idem u predmetima ratnih zločina pred sudovima u Bosni i Hercegovini (Interpretation and application of the ne bis in idem rule in war crimes cases before courts in Bosnia and Herzegovina)*, available at <https://csd.pravosudje.ba/vstvfo/B/142/article/81096> [Accessed 18 March 2022].

67 *Odmjeravanje kazne u predmetima ratnih zločina (Meting out sentences in war crimes cases)*, available at <https://csd.pravosudje.ba/vstvfo/B/142/article/81094> [Accessed 18 March 2022].

68 HJPC, *Pravilnik Centra za sudska dokumentaciju (Judicial Documentation Centre Rulebook)*, No. VSTV-08-2330-051-05122007, 5 December 2007, available at: <https://portalfo1.pravosudje.ba/vstvfo-api/vijest/download/28469> [Accessed 18 March 2022].

the (then) JDC's Case Law Database open access.<sup>69</sup> However, the CDED should play a central role in further improving the dissemination of case law in all fields of substantive and procedural law, including on substantive issues related to crimes against humanity and international law, which will contribute significantly to achieving greater harmonization of court practice. Consideration should therefore be given to how the CDED's role can be strengthened, including whether, as a unit within the Secretariat, it can properly fulfil its mandate to serve and support the professional community, or if the Secretariat's statutorily defined role in providing support to the *Council*<sup>70</sup> precludes the CDED from doing so.

#### 4.2.3 Strategic Objective VI: institutional capacity

##### Among the main issues explored in this section:

- The Mission is concerned at the **appointment of candidates** to (often senior) positions in the judiciary who, according to merit-based criteria, were **neither top-ranked candidates nor had relevant prior experience** in the processing of war crimes or complex criminal cases in general.
- Appointments made without regard to merit-based criteria will likely be **detrimental to the quality** of the investigation, prosecution and adjudication of cases and, consequently, **undermine the delivery of justice**.
- While **some positive steps** have been taken to implement a number of the Mission's recommendations in relation to **managerial practices at the State-level**, a significant amount of **work remains to be done** to ensure that good managerial and working practices are not only established but entrenched.

##### The Mission recommends that:

- the High Judicial and Prosecutorial Council ensure that all appointments are based on relevant experience and merit and that decisions on appointment are well-reasoned; and
- the Court of BiH and the Prosecutor's Office of BiH implement all outstanding recommendations from the Mission's 2019 Spot Report (*Case Management*) and the Judge Korner 2020 Report (set out in Annex A).

69 Council of Ministers, *Odluka o stavljanju van snage Odluke o visini naknade za pristup Bazi sudskih odluka Centra za sudsku dokumentaciju Visokog sudskog i tužilačkog vijeća Bosne i Hercegovine (Decision on repealing the Decision on the amount of the fee for access to the Database of Judicial Decisions)*, Official Gazette of BiH, No. 13/21, p. 6, available at <http://sluzbenilist.ba/page/akt/qX9sOtbBwEc=> [Accessed 18 March 2022].

70 Article 15(1) of The Law on the High Judicial and Prosecutorial Council of BiH, Official Gazette of BiH, Nos. 25/04, 93/05, 48/07, 15/08.

As detailed at section 3.4 above, a significant investment of resources has been made to strengthen the capacities of the BiH institutions to process war crimes cases, including through trainings and other capacity building activities. Once again, however, statistical data only tells part of the story, and it is necessary to also consider other prevailing circumstances. Of particular note in this regard is the role of the HJPC, the independent and autonomous body established to ensure an independent, impartial and professional judiciary,<sup>71</sup> which plays a vital role in relation to the processing of war crimes cases.

### *Judicial and prosecutorial appointments*

The Mission monitors the work of the HJPC, including in relation to judicial and prosecutorial appointments, with the Mission's most recent general observations with respect to appointments detailed in the Mission's *2016-2020 Monitoring Findings*.<sup>72</sup> Particularly relevant with respect to war crimes processing is the prioritization of ethnicity considerations over objective merit-based criteria. Apparently to meet 'ethnicity quotas', the Council has resorted to the appointment of candidates to (often senior) positions in the judiciary who, according to merit-based criteria, were neither top-ranked candidates nor had relevant prior experience in the processing of war crimes or complex criminal cases in general.<sup>73</sup> It is apparent that appointments made without regard to merit-based criteria will likely be detrimental to the quality of the investigation, prosecution and adjudication of cases and, consequently, undermine the delivery of justice.

Perhaps the most striking instance was the appointment of 13 prosecutors to the PO BiH in November 2013.<sup>74</sup> Of those 13, eight candidates on the ranking list proposed by the Nomination Sub-Council were ranked not on the basis of merits, but rather on the basis of ethnic and/or other criteria, with ethnicity matrixes developed for the purpose of filling each vacancy.<sup>75</sup> As a result, appointments were awarded to candidates ranked as low as the twenties, thirties, and even forties of the list. Neither the Nomination Sub-Council nor the Council itself gave specific reasons why exactly these candidates were appointed despite the fact that the Sub-Council, after interviewing the candidates, made conclusions which suggest that the candidates lacked the required experience and expertise in complex criminal cases<sup>76</sup> or had shown limited understanding of criminal law and the issues pertaining to the processing of war crimes cases.<sup>77</sup> Following their appointment, all prosecutors were assigned to the PO BiH Special Department for War Crimes.

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71 Article 3(1) of The Law on the HJPC, *supra* n. 70.

72 OSCE, *Judicial and Prosecutorial Appointments: Monitoring Findings 2016-2020* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2021), available at <https://www.osce.org/files/f/documents/6/2/502855.pdf> [Accessed 7 March 2022].

73 As per Article 43(2) of The Law on the HJPC, the HJPC BiH shall "implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others." As the Mission has previously explained, the HJPC struggles to uphold this legal obligation when balancing the principles of merit and ethnic representation during the appointment process. See for further detail *Judicial and Prosecutorial Appointments, supra* n. 72.

74 The analysis in this section is based on HJPC Candidate Ranking Lists, HJPC Decisions on Appointment, HJPC Session Minutes and HJPC Nomination Sub-Council minutes, on file with the Mission (in local language only).

75 On the basis of documentation on file with the Mission, it appears that an 'ethnicity matrix' is developed for each appointment by setting out the ethnic balance of incumbents and the desired ethnic balance for the appointment in question, suggesting how many candidates of each ethnicity (including 'Others') should be appointed.

76 One appointed candidate had no prior experience as a judge or prosecutor. The Nomination Sub-Panel did note that whilst the candidate was well versed in legal theory, the absence of practical experience was evident.

77 According to the assessment of the Nomination Sub-Council, two of the appointed candidates demonstrated average knowledge of criminal procedure and the organization of the PO BiH, with general and inconsistent answers during their interviews. Of further concern, one had no prior experience, either as a prosecutor or on war crimes cases. In 2019, the Council appointed the same candidate to the bench of the Court of BiH.

Of additional concern, it appears that the Council did not apply merit-based criteria even in relation to the appointment of candidates of the same ethnicity. In the same set of appointments to the PO BiH, one candidate of a certain ethnicity was appointed despite the fact that there were five other candidates of the same ethnicity who were higher ranked. Neither the Nomination Sub-Council nor the Council provided reasons explaining the appointment.<sup>78</sup>

This, unfortunately, was not a one-off occurrence, and a subsequent recruitment procedure in 2014, in which the HJPC appointed five prosecutors to the PO BiH to work exclusively on war crimes cases (with funds for these positions provided by the EU in the context of the country's potential accession to the EU) exhibited similar issues. The Nomination Sub-Council's recommendations again included candidates with insufficient prior experience in prosecuting war crimes or other complex criminal cases, while Council members expressed their concerns in respect of some candidates who were lacking in experience, while not in respect of others.

According to the Council of Europe, of which BiH is a member, judicial appointments should rest on a candidate's merit and professionalism. Other considerations, such as ethnicity, should only apply as complementary criteria to distinguish between candidates who otherwise achieve similar ranks based on objective criteria.<sup>79</sup> By contrast, the approach to appointments outlined above not only impedes the implementation of Strategic Objective V, but also undermines the ability of the institutions themselves, most notably the PO BiH, to implement the other substantive goals of the Revised Strategy.

#### *Leadership and managerial practices at the State-level*

The strength of an institution is not, however, only a product of working-level appointments. Institutional leadership and managerial practices play an equally important role in determining not only the strategic direction of an institution but also its effectiveness. Unfortunately, for significant periods during the Strategy's implementation the Mission has observed (and in 2016, 2019, and 2020 reported on) deficits in leadership and management at the PO BiH.<sup>80</sup> These issues include inefficient managerial practices and internal structures of the Special Department for War Crimes that have not been conducive to the efficient investigation and prosecution of war crimes cases. Such issues not only impeded the previous work of the institution, but have also left an unfortunate legacy in terms of detrimental precedents and established working practices.

While some positive steps have been taken to implement a number of the Mission's recommendations from recent reports, a significant amount of work remains to be done to ensure that good managerial and working practices are not only established but entrenched.

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78 The higher ranked candidates of the same ethnicity were not recommended by the respective Nomination Sub-Council and ultimately were not appointed by the Council. According to the minutes of the Nomination Sub-Council, the appointed candidate attended an interview for the fifth time, had the minimum prior relevant experience in the judiciary (five years as an entity prosecutor), without experience in war crimes cases, and was graded with the same grade by the Nomination Sub-Council as a higher ranked candidate with 20 years of relevant professional experience, including that of a prosecutor on complex criminal cases (grade 1.5). The minutes of the relevant HJPC session are silent on this specific issue.

79 *Judicial and Prosecutorial Appointments*, *supra* n. 72, citing to Recommendation CM/Rec(2010)12 adopted by the Council of Europe on 1 November 2010, available at <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d> [Accessed 26 April 2022], para. 44.

80 *Judge Korner 2020 Report*, *supra* n. 6; *Case Management*, *supra*, n. 6; *Judge Korner 2016 Report*, *supra*, n. 6.

The Mission therefore once again calls upon the leadership of the PO BiH to implement all outstanding recommendations from Judge Korner's 2020 Report and the Mission's 2019 Spot Report (*Case Management*) that are relevant to the institution.

#### 4.2.4 Strategic Objective VII: regional co-operation

##### Among the main issues explored in this section:

- Despite a surge of optimism symbolized by the signing of prosecutorial co-operation agreements between the judicial authorities of countries in the region, and related successes in some high-profile cases, **regional co-operation** can at best be characterized as **inconsistent**. Regional co-operation in relation to war crimes issues remains **sensitive and politicized**.
- The lack of consistent and genuine regional co-operation has had a significantly **detrimental impact** on holding alleged perpetrators to account: approximately **35 per cent of the backlog of cases** awaiting processing by the PO BiH pertains to suspects who are unavailable to the BiH authorities.

##### The Mission recommends that:

- all national and international stakeholders take all necessary steps to improve regional co-operation with respect to war crimes case processing, including convening a high-level summit on regional co-operation.

Strategic Objective VII provides for the improvement of regional co-operation in respect of war crimes cases. Unfortunately, throughout the Strategy's lifetime, genuine and consistent co-operation has been lacking. Despite a surge of optimism symbolized by the signing of prosecutorial co-operation agreements between the judicial authorities of countries in the region, and related successes in some high-profile cases, regional co-operation can at best be characterized as inconsistent.

During a period of concerted effort to improve regional co-operation, in 2013 and 2014 BiH and several of its neighbours – Serbia, Croatia, and Montenegro<sup>81</sup> – signed Protocols defining the scope and type of support that the respective POs would provide to each other in war crimes, crimes against humanity, and genocide cases. Each of the Protocols emphasizes the need for prosecutorial co-operation and information-sharing in investigating and prosecuting these cases, particularly in light of the fact that the extradition agreements between the

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81 The agreements between prosecutorial authorities in BiH and Serbia, Croatia, and Montenegro are almost identical to one another. *The Protocol of the Prosecutor's Office of Bosnia and Herzegovina and the Prosecutor's Office for War Crimes of the Republic of Serbia on Cooperation in Prosecuting Perpetrators of War Crimes, Crimes against Humanity and Genocide* was signed on 31 January 2013; *The Protocol between the State Attorney's Office of the Republic of Croatia and the Prosecutor's Office of Bosnia and Herzegovina on Cooperation in Prosecuting Perpetrators of War Crimes, Crimes against Humanity and Genocide* was signed on 3 June 2013; *The Protocol between the Supreme State Prosecutor's Office of Montenegro and the Prosecutor's Office of Bosnia and Herzegovina on Cooperation in Prosecuting Perpetrators of War Crimes, Crimes against Humanity and Genocide* was signed on 29 April 2014. All available (in local language only) at <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=5&id=9&jezik=b> [Accessed 8 March 2022].



respective countries do not allow for extradition of a country's own citizens in relation to these categories of crimes.<sup>82</sup>

The Protocols provide for the sharing of “all information and evidence on procedures” relating to cases of war crimes, crimes against humanity, and genocide committed in the territory of either state, where the suspect resides in the requested state and holds citizenship of that state (or dual citizenship).<sup>83</sup> They set out in broad terms the types of information that shall be shared, including available evidence, information on the location and identity of suspects, and updates on the status of ongoing proceedings, and the procedures by which such requests are to be executed (including their form), and the mandatory time frames for responding to a request.<sup>84</sup>

Even prior to the signing of the Protocols, the Mission observed some instances of the successful transfer and prosecution of cases when suspects were unavailable to the relevant court in BiH. For example, in 2009, the Bijeljina District PO transferred to the Serbian Office of the War Crimes Prosecutor a case pertaining to four Serbian paramilitaries, which led to the filing of an indictment in 2011.<sup>85</sup> Ultimately, three were convicted by the Belgrade court.<sup>86</sup>

Following their signature, the Protocols appeared to have an initial positive impact. In a 2014 joint operation, BiH and Serbian authorities cooperated in the arrest and indictment of 15 suspects in relation to the killing of 20 civilians in the Štrpci massacre, with 10 suspects indicted at the Court of BiH, and five in Serbia.<sup>87</sup> The arrests followed the establishment of a joint investigative team and were cited by the PO BiH as an example of “good and efficient cooperation”.<sup>88</sup>

In March 2015, Serbian authorities arrested, on their territory, eight former members of a special police brigade accused of participating in the Srebrenica genocide in BiH.<sup>89</sup> The arrest

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82 Preamble of the Protocols, *supra* n. 81.

83 Article 1 of the Protocols, *supra* n. 81.

84 Articles 2-23 of the Protocols, *supra* n. 81.

85 *Bijeljina I (AA et al.)*, KTRZ 7/10 – case information on the official website of the Republic of Serbia Office of the War Crimes Prosecutor, available at <https://www.tuzilastvorz.org.rs/en/cases/bijeljina-ia-et-al> [Accessed 8 March 2022].

86 *Bijeljina I (AA et al.)*, KTRZ 7/10, *supra* n. 85; Balkan Transitional Justice, *Serbia Gives Ex-Fighter Maximum War Crimes Sentence*, 12 March 2013, available at <https://balkaninsight.com/2013/03/12/belgrade-increase-sentence-for-war-crimes-in-bosnia> [Accessed 8 March 2022].

87 *Štrpci*, KTO-1/15 – case information on the official website of the Republic of Serbia Office of the War Crimes Prosecutor, available at <https://www.tuzilastvorz.org.rs/en/cases/%C5%A1trpci> [Accessed 8 March 2022]; Balkan Transitional Justice, *Serb Fighters' Indictment Details Štrpci Train Massacre Plot*, 1 March 2019, available at <https://balkaninsight.com/2019/03/01/serb-fighters-indictment-details-strpci-train-massacre-plot/> [Accessed 8 March 2022]. Proceedings against *Luka Dragičević et al. (S11 K 018711 15 Kr)* are ongoing before the Court of BiH.

88 Prosecutor's Office of BiH, *News: Suspects of War Crimes in Štrpci and Višegrad Arrested*, 5 December 2014, available at <http://www.tuzilastvobih.gov.ba/?id=2747&jezik=e> [Accessed 8 March 2022].

89 Republic of Serbia Office of the War Crimes Prosecutor, *News: Serbia Makes First Arrests of Suspected Srebrenica Gunmen*, 18 March 2015, available at <https://www.tuzilastvorz.org.rs/en/news/web-clipping/serbia-makes-first-arrests-suspected-srebrenica-gunmen> [Accessed 8 March 2022]; The New York Times, *Serbia Arrests Eight Suspected in 1995 Srebrenica Massacre*, 18 March 2015, available at <https://www.nytimes.com/2015/03/19/world/europe/srebrenica-massacre.html> (paywall) [Accessed 8 March 2022].

and 2016 indictment against all eight accused were praised as the result of strong BiH-Serbia co-operation.<sup>90</sup>

The sensitivities and politicization surrounding co-operation in relation to war crimes issues were illuminated by a 2021 request by the BiH judicial authorities to the Croatian authorities that the latter take over proceedings in relation to 14 Croatian former-Generals in the context of allegations of breaches of international humanitarian law in the context of 'Operation Flash'.<sup>91</sup> The request, which sparked strong reactions, was ultimately rejected.<sup>92</sup>

Co-operation with Serbian authorities has also come under strain in recent years, following a series of arrests of Bosnian citizens for war crimes as they crossed the border into Serbia.<sup>93</sup> The most recent of these incidents, occurring in 2021, elicited angry reactions in BiH, before the Serbian authorities ultimately sought to transfer the case to BiH.<sup>94</sup>

In light of these challenges, UNDP is implementing its *Regional War Crimes Project*, intended to, among other things, improve cross-border judicial co-operation,<sup>95</sup> while the Office of the Prosecutor at the IRMCT has also attempted to play a more active role in fostering regional co-operation. At a conference in Belgrade in May 2019, the Mechanism's Chief Prosecutor issued a joint statement together with POs from BiH, Serbia, Croatia, and Montenegro,

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90 *Srebrenica/Kravnice*, KTO-2/15 – case information on the official website of the Republic of Serbia Office of the War Crimes Prosecutor, available at <https://www.tuzilastvorz.org.rs/en/cases/case-name-srebrenica-kravnice> [Accessed 8 March 2022]; indictment available at [https://www.tuzilastvorz.org.rs/public/indictments/kto\\_2\\_15.pdf](https://www.tuzilastvorz.org.rs/public/indictments/kto_2_15.pdf) [Accessed 8 March 2022]; Balkan Transitional Justice, *Serbia Arrests Eight for Srebrenica Massacre*, 18 March 2015, available at <https://balkaninsight.com/2015/03/18/serbia-arrests-seven-for-srebrenica-massacre/> [Accessed 12 May 2022].

91 On 1 May 1995, the Croatian Army launched a military offensive known as 'Operation Flash', on Western Slavonia in the Republic of Serbian Krajina (RSK). The operation ended around 4 May 1995, with RSK losing control of Western Slavonia, as a result of which a large part of the Serb population fled. See *Prosecutor v. Milan Martić*, IT-95-11-T, Trial Judgement, 12 June 2007, available at <https://www.icty.org/x/cases/martic/tjug/en/070612.pdf> [Accessed 8 March 2022], para. 302.

92 Balkan Transitional Justice, *Bosnia's Proposal to Prosecute Croatian Generals Sparks Controversy*, 9 August 2021, available at <https://balkaninsight.com/2021/08/09/bosnias-proposal-to-prosecute-croatian-generals-sparks-controversy/> [Accessed 8 March 2022]; Government of the Republic of Croatia, *News: Croatia Turns Down Bosnia's Request for Legal Aid Concerning Generals*, 23 September 2021, available at <https://vlada.gov.hr/news/croatia-turns-down-bosnia-s-request-for-legal-aid-concerning-generals/33011> [Accessed 8 March 2022].

93 Prosecutor's Office of BiH, *Vijesti: Tužilaštvo BiH Nije Službeno Informisano O Hapšenju Edina Vranja Na Osnovu Zabtjeva Pravosuđa Srbije (News: News: Prosecutor's Office of BiH Not Officially Informed About the Arrest of Edin Vranje Based on the Request of the Serbian Judiciary)*, 13 September 2021, available at <https://www.tuzilastvobih.gov.ba/index.php?id=5026&jezik=b> [Accessed 8 March 2022]; Balkan Transitional Justice, *Serbia Arrests Bosnian Ex-Soldier for Alleged War Crimes*, 31 July 2018, available at <https://balkaninsight.com/2018/07/31/serbia-arrests-bosnian-ex-fighter-for-alleged-war-crimes-07-31-2018/> [Accessed 8 March 2022]; Balkan Transitional Justice, *Serbia Holds Bosniak Ex-Fighter for Alleged Prisoner Torture*, 25 November 2019, available at <https://balkaninsight.com/2019/11/25/serbia-holds-bosniak-ex-fighter-for-alleged-prisoner-torture/> [Accessed 8 March 2022]; Balkan Transitional Justice, *BIRN Fact-Check: Is Serbia Unjustly Targeting Bosnians for War Crime Arrests?*, 17 September 2021, available at <https://balkaninsight.com/2021/09/17/birn-fact-check-is-serbia-unjustly-targeting-bosnians-for-war-crime-arrests/> [Accessed 8 March 2022].

94 Balkan Transitional Justice, *Serbia to Transfer Ex-Policeman's Controversial War Crimes Case to Bosnia*, 14 October 2021, available at <https://balkaninsight.com/2021/10/14/serbia-to-transfer-ex-policemans-controversial-war-crimes-case-to-bosnia/> [Accessed 8 March 2022]; Prosecutor's Office of BiH, *News: Meeting of the Highest Ranking Officials of the BiH Prosecutor's Office, Republic Public Prosecutor's Office and War Crimes Prosecutor's Office of the Republic of Serbia held in Belgrade*, 15 October 2021, available at <http://www.tuzilastvobih.gov.ba/?id=5068&jezik=e> [Accessed 8 March 2022].

95 United Nations Development Programme, *Governance and Peacebuilding: Supporting Transitional Justice*, available at <https://www.eurasia.undp.org/content/rbec/en/home/governance-and-peacebuilding/Rule-of-law-justice-security-human-rights/Supporting-transitional-justice.html> [Accessed 20 April 2022].

stressing the need for improved communication and co-operation.<sup>96</sup> A further similar endeavour took place in September 2021, after which it was reported in the press that cases in respect of 26 individuals were ready for transfer by the Serbian authorities to BiH.<sup>97</sup>

The lack of consistent and genuine regional co-operation has had a significantly detrimental impact on holding alleged perpetrators to account, given the prevalence of indicted defendants unavailable to the relevant court, usually as a result of being located in a foreign country from which they cannot, by law, be extradited. The impact of this situation on war crimes processing in BiH is enormous. Approximately 35 per cent of the backlog of cases awaiting processing by the PO BiH pertains to suspects who are unavailable to the BiH authorities – with this figure likely to only increase as the backlog otherwise reduces. The issue similarly affects approximately 38 per cent of trials across BiH. Specifically, out of 245 cases in the post-indictment phase of proceedings pending across courts in BiH as at the end of 2021, in a total of 94 proceedings, 100 defendants were inaccessible to the relevant court. In some jurisdictions of BiH, these issues have had an especially dramatic effect on the pursuit of justice. For example, as at the end of 2021, there were 20 cases pending trial in Dobož District Court alone as a result of the unavailability of the accused, out of a total of 23 war crimes cases before that court.

To date, no adequate solution has been proposed to remedy this problem given the legal barriers to extradition and the extensive politicization of regional co-operation. As it will only become a more critical issue as the backlog of cases reduces, it is imperative that high level authorities from the region, as well as international community actors, give additional consideration to how the issue can be unblocked.

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96 International Residual Mechanism for Criminal Tribunals (Office of the Prosecutor), *Joint Statement by National War Crimes Prosecutor's Offices and UN Mechanism Chief Prosecutor Following Regional Conference*, 23 May 2019, available at <https://www.irmct.org/en/news/19-06-07-joint-statement-national-war-crimes-prosecutor%E2%80%99s-offices-and-un-mechanism-chief> [Accessed 8 March 2022].

97 *Meeting of the Highest Ranking Officials*, *supra* n. 94; N1, *Serbia Willing to Hand Over War Crimes Cases against 26 BiH Citizens to BiH*, 14 October 2021, available at <https://ba.n1info.com/english/news/serbia-willing-to-hand-over-war-crimes-cases-against-26-bih-citizens-to-bih/> [Accessed 8 March 2022].

**Among the main issues explored in this section:**

- While **significant progress** has been made, **not all** institutions have the necessary **facilities and resources** to balance the protection and support of witnesses providing evidence in court and the right of the accused to a fair trial. The Mission has also observed the worryingly frequent **breach of protective measures**.
- With respect to **victim compensation**, the Mission has concerns regarding the failure of (a) judicial actors to inform victims of their right to file property claims within criminal proceedings, (b) prosecutors to gather evidence in relation to the claims, and (c) courts to adjudicate the claims within the criminal proceedings, when appropriate.
- The Mission, however, also notes and **welcomes the progress made**, in particular at the Court of BiH and by the PO BiH, towards adjudicating property claims for non-material damage in war crimes cases.

**The Mission recommends that:**

- the BiH Executive and Legislative Authorities ensure that all prosecutorial and judicial institutions in BiH are equipped with the necessary personnel, equipment, and facilities to adequately and fairly process war crimes cases, including in relation to witness support and protection; and
- the Court of BiH and the Prosecutor's Office of BiH ensure that all legally required steps are taken in war crimes cases in relation to property law claims in criminal proceedings, including to inform injured parties of their rights, to gather evidence relevant to claims, to investigate the financial situation of suspects/defendants, and to adjudicate the claims in appropriate cases.

*Background*

Witnesses form the core of the evidentiary base of any criminal trial. Witness testimony is often the most important evidence in war crime trials, and in some cases, the only evidence. The willingness and ability of witnesses to give evidence in a war crime case has a direct impact on the prospects of prosecution and, ultimately, conviction. On the other hand, the approach of prosecutorial and judicial authorities towards victims and witnesses greatly influences whether they will, in fact, participate in criminal proceedings.

There are, however, a number of factors that can affect witness testimony in war crime trials. More than 25 years after the end of armed conflict in BiH, witnesses are struggling to maintain the mental fortitude needed to provide credible accounts as part of the criminal process. They are often at risk of re-traumatisation from this effort, particularly in the case of victims or witnesses of sexual violence. Furthermore, many witnesses do not want to testify for fear of having to face in court the person who committed the crime, or for fear of retribution. Witnesses can also be vulnerable to intimidation and may, as a result, change their testimony. Others simply no longer trust the judicial system.

Lack of witness support, including appropriate facilities and technical equipment, can also affect a court's ability to strike a balance between the rights of the defendant and the interests of a witness. Accordingly, witness protection and support is one of the pillars of the Strategy, which prescribes the key objective to ensure that protection, support, and equal treatment is given to all victims and witnesses in war crimes proceedings before courts in BiH.<sup>98</sup>

In a 2010 report, the Mission documented issues identified in war crimes proceedings, including the need for the application of comprehensive witness protection measures in judicial institutions in BiH, the lack of available witness support at entity level prosecutors' offices and courts, and the negative effects of witnesses having to repeat testimony.<sup>99</sup>

In the past decade, the Mission has noted a considerable increase in the capacity of the (particularly entity) institutions to effectively apply witness protection measures. Such increased capacity is largely a result of donor assistance, including by the EU funded Instrument for Pre-Accession projects and the UNDP *Witness Support Project*.<sup>100</sup>

#### *Witness protection and support capabilities*

At the time of writing and to the Mission's knowledge, all courts which ordinarily process war crime cases, with the exception of Odžak Cantonal Court, have the appropriate capabilities and equipment for the application of technological witness protection measures. These conditions include mechanisms to transfer and distort images and sound for the protection of a witness' identity.

There still remain, however, some deficiencies. For example, Zenica Cantonal Court still lacks a separate entrance for witnesses to enter the premises to ensure their identity remains protected and to avoid encounters with the accused. Goražde Cantonal Court, meanwhile, does not have a courtroom that can accommodate hearings that require a large number of persons to be present and, therefore, trials involving several accused are instead heard at Goražde Municipal Court, which itself does not have the technical equipment necessary for witness protection.

In terms of witness support, over the past decade, witness support officers (WSOs) have been made available at an increasing number of prosecutors' offices and courts, with the institutions of Bijeljina, Goražde, and Livno the notable outliers.<sup>101</sup> In Bijeljina, in an attempt to bridge this gap, the District Court and the District Prosecutor's Office signed a protocol on co-operation with the Bijeljina Witness Support Network, which was established in 2016 to provide support to victims and witnesses in war crimes cases. Regrettably, the establishment

98 *Revised Strategy*, *supra* n. 19, Strategic Objective VIII/h; *National Strategy*, *supra* n. 13, Strategic Objective VIII/h.

99 OSCE, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a Year After the Adoption of the National Strategy for War Crimes Processing* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2010), available at <https://www.osce.org/files/f/documents/3/b/118893.pdf> [Accessed 8 March 2022], pp. 11-22.

100 This assistance created technical conditions for the application of witness protection measures, including the reconstruction of courtrooms, the provision of technical equipment, the construction of witness antechambers, and the recruitment of witness support officers in a number of courts and prosecutors' offices.

101 At the time of writing, the institutions employing a full-time witness support officer were: Court of BiH, Prosecutor's Office of BiH, District Court in Banja Luka, Cantonal Court in Bihać, Cantonal Prosecutor's Office of the Una-Sana Canton, Basic Court of Brčko District BiH, District Prosecutor's Office in Istočno Sarajevo, District Court in Istočno Sarajevo, Prosecutor's Office of Herzegovina-Neretva Canton, District Prosecutor's Office of Prijedor, Cantonal Court in Sarajevo, Cantonal Prosecutor's Office of Sarajevo Canton, Cantonal Prosecutor's Office of Central Bosnia Canton, Cantonal Court in Novi Travnik, District Prosecutor's Office in Trebinje, Cantonal Prosecutor's Office of Tuzla Canton, Cantonal Court in Zenica, and Cantonal Prosecutor's Office of Zenica-Doboj Canton.

of the network yielded limited impact and, in several cases, victims and witnesses testified with insufficient psychological support or without any such support at all.<sup>102</sup>

Recognizing that there is no structural network in BiH to perpetuate best practices among WSOs in BiH, the Mission's EU-funded *War Crimes Monitoring Project* (WCMP), in partnership with the Witness Support Department of the Court of BiH, has, since early 2021, provided ongoing support to the formation of a WSO network, including by organising quarterly co-ordination meetings involving WSOs from courts and POs throughout BiH. The meetings are implemented by a Coordination Committee that includes representatives from the witness supports departments at the State and entity/Brčko District institutions, with the goal of enhancing co-operation among, and to harmonize the practice of, WSOs in accordance with the objectives of the Revised Strategy. They also provide a forum for WSOs to address specific needs and concerns arising in practice, as well as to improve co-operation with civil society organizations and non-governmental organisations working in the field of witness support. The Coordination Committee has also worked to address specific needs of WSOs through implementation of trainings on targeted issues.

All courts in BiH should have the necessary facilities and resources to balance the protection and support of witnesses providing evidence in court and the right of the accused to a fair trial. Equalising resources across institutions will provide certainty for witnesses no matter where they are in the country and will prevent witnesses having to travel far beyond their place of residence to testify, which can add to the already stressful nature of the experience. It also remains imperative that additional efforts are undertaken to ensure that victims and witnesses are adequately informed of their rights and are provided with sufficient information to ensure that they understand the processes and what will be expected of them.<sup>103</sup>

#### *Lack of a comprehensive mechanism for tracking protective measures in cases*

Many of the war crimes cases that have been prosecuted throughout the courts in BiH involve overlapping fact patterns and evidence, resulting in some witnesses providing evidence in more than one case. This situation has, not infrequently, led to a systemic breakdown in the protection of witnesses, particularly when protective measures that are implemented in one case are not honoured in subsequent cases involving the same witness.

For example, in one particularly problematic case<sup>104</sup> the identity of a victim was disclosed in the indictment. Although a witness testified under a pseudonym before the Court of BiH in a different case, the protection was not extended upon the transfer of the case to another court. In the same case, investigative statements disclosing the identities of two victims of sexual abuse were read as defence evidence at a trial hearing open to the public, while the identity and details of testimony given by one of the witnesses subsequently appeared in the media.

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102 *Prosecutor v. Mirko Lukić*, Bijeljina District Court, Case No. 12 0 K 003572 13 K; *Prosecutor v. Radosav Milovanović*, Bijeljina District Court, Case No. 12 0 K 0005012 15 K; *Prosecutor v. Ostojia Minić et al.*, Bijeljina District Court, Case No. 12 0 K 000929 10 K.

103 One particular issue the Mission has observed relates to protected witnesses being seemingly unaware that it is necessary to disclose their identity to the defence, pursuant to Article 12(8) of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, Official Gazette, Nos. 3/03, 21/03, 61/04, 55/05 (*Law on Protection of Witnesses*), which provides that “sufficient details shall be released for the defence to prepare for examination of a witness. The information must be released at the latest when the witness testifies at the main trial.”

104 The Mission has omitted the case name to protect the identity of the victim/witness.

In addition to the failure of the prosecutor in charge of the investigation to consider and protect the interests of the victims, this case is also illustrative of the systemic gap in the BiH witness protection system: namely, there is no central mechanism or system for recording protected witnesses in BiH and enabling prosecutors to ensure the continuation of past protections for vulnerable witnesses.

The expansive and overlapping nature of many war crimes cases requires that immediate action be taken to improve the co-ordination and consistent application of and adherence to protective measures across the BiH jurisdictions. This is all the more important in light of the recent increase in the number of transferred cases where, as demonstrated by the example above, the risk of error is further heightened.

### *The application of witness protection measures*

The criminal procedure codes (CPC) provide general measures for the protection of witnesses during court proceedings,<sup>105</sup> while the special laws on witness protection (LWP) in BiH set out more specific measures that can be applied to protect witnesses, along with the conditions for their application.<sup>106</sup> In its 2010 report, the Mission documented serious breaches of witness protection measures and advocated for an overall increase in witness protection, as well as for further application of witness protection measures pursuant to LWP.<sup>107</sup> Since then, judicial institutions have made significant progress towards improved witness protection, especially at the entity/Brčko District level.<sup>108</sup>

The Mission has observed generally consistent and positive practice before the courts in BiH with regard to the necessary exclusion of the public during trials,<sup>109</sup> with courts generally ensuring respect for the balance between the protection of witnesses and, via the public nature of the trial, the rights of the accused. Pursuant to the CPCs, the public can only be excluded from proceedings in certain circumstances, including to protect the interest of a minor or a witness, on the basis of a reasoned and publicly announced decision.<sup>110</sup> As positive examples, firstly, in *Bundalo, et al.*, the Court of BiH ensured that all hearings were public except when the discussion turned to the identity of rape victims, while protected witnesses testified from a separate room using image and voice distortion and with their identity also protected by the court banning the publication of personal data.<sup>111</sup> A similar approach was applied in *Vlabović*, one of the most complex cases processed at the State-level.<sup>112</sup>

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105 See for example Articles 235 (Exclusion of the Public), 264 (Special Evidentiary Rules When Dealing With Cases Involving Sexual Offenses), 267 (Protection of Witnesses from Insults, Threats and Attacks), 273 (Exceptions from the Direct Presentation of Evidence), BiH CPC and corresponding provisions in the CPCs of FBiH, RS and BD.

106 Articles 3, 5(a)-13, *Law on Protection of Witnesses*.

107 *Witness Protection and Support*, *supra* n.99, pp. 11-17, 23.

108 See for example *Prosecutor v. Nedžad Kabrimanović*, Tuzla Cantonal Court, Case No. 03 0 K 012639 14 K; *Prosecutor v. Fikret Mrkonjić*, Tuzla Cantonal Court, Case No. 03 0 K 014257 16 K; *Prosecutor v. Josip Relota*, Novi Travnik Cantonal Court, Case No. 06 0 K 007724 14 K; *Prosecutor v. Mirsad Tabirović*, Mostar Cantonal Court, Case No. 011 751 15 K; *Prosecutor v. Marinko Petrović*, Mostar Cantonal Court, Case No. 07 0 K 011525 15; *Prosecutor v. Branislav Ninković*, Doboj District Court, Case No. 13 0 K 002084 13 K; *Prosecutor v. Milorad Tadić*, Banja Luka District Court, Case No. 009343 12 K; *Prosecutor v. Duško Dabetić*, Sarajevo Cantonal Court, Case No. 09 K 023862 15 K (although granted protective measures, the witness testified without support).

109 See for example *Prosecutor v. Predrag Đurović*, Sarajevo Cantonal Court, Case No. 09 0 K 02246 15 K; *Prosecutor v. Asim Kadić*, Zenica Cantonal Court, Case No. 04 0 K 005141 12 K; *Prosecutor v. Živković Dragan*, Brčko District Basic Court, Case No. 96 0 K083428 14; *Prosecutor v. Milan Komad*, Istočno Sarajevo District Court, Case No. 14 0 K 002880 15 K; *Prosecutor v. Duško Dabetić*, Sarajevo Cantonal Court, Case No. 09 K 023862 15 K.

110 Articles 235, 237, BiH CPC; Articles 250, 252, FBiH CPC; Article 251, RS CPC; Articles 235, 237, BD CPC.

111 *Prosecutor v. Ratko Bundalo et al.*, Court of BiH, Case No. X-KR-07/419, 1<sup>st</sup> Instance Verdict, 21 December 2009, pp. 13, 36-38.

112 *Prosecutor v. Veselin Vlabović*, Court of BiH, Case No. S1 1 K 004659 11 Kri, 1<sup>st</sup> Instance Verdict, 29 March 2013, pp. 336-342.

An unfortunate notable exception arises from the District Court of Bijeljina. In one case,<sup>113</sup> the prosecutor and the court did not move to exclude the public during the testimony of a rape victim, while another witness in the same case, who was a minor when the alleged crime was committed and herself a victim of sexual violence, testified in open court in front of the media about rape. Similarly, in another case before this court,<sup>114</sup> the public was not excluded when the prosecutor read the indictment, which included the identity of two rape victims. Of perhaps even more concern, the identity of the victims and details about the rape charges were subsequently published on the District Prosecutor's Office's web page, and then re-published by several print and electronic media sources.

### *The breach of protective measures*<sup>115</sup>

Disclosing the identity of a protected witness can attract criminal sanctions.<sup>116</sup> Nevertheless, the Mission has also observed the worryingly frequent breach of protective measures that have led to the disclosure of information about a protected witness, including judgements themselves disclosing a protected witness' residence, and details of other cases in which a protected witness had testified, at both the national level and the ICTY. In September 2020, the PO BiH launched an investigation against several media organisations in Republika Srpska who had revealed the identity of a protected witness who testified in 2017 before the Court of BiH.

Protective measures have also unfortunately been breached in the courtroom by other witnesses, parties to the proceedings (including due to inadequate judicial instructions), and even, in one case, the presiding judge. In another case, the prosecutor raised an indictment identifying the witnesses prior to the Court of BiH deciding on a motion to revoke protective measures (although the two witnesses assigned pseudonyms had no objection to testifying without protection).

### *Lack of consistency in dealing with threats, intimidation, and bribes*

The Mission is also aware of instances in which it was alleged before the court that witnesses had been threatened,<sup>117</sup> blackmailed,<sup>118</sup> or offered bribes.<sup>119</sup> To the Mission's knowledge, investigations have, however, only been launched in a limited number of instances.<sup>120</sup> The failure to investigate or respond to threats or acts of intimidation, and, more generally, the lack of a consistent and systemic approach to such instances, intrinsically undermines the protection of witnesses.<sup>121</sup>

113 The Mission has omitted the case name to protect the identity of the victim/witness.

114 The Mission has omitted the case name to protect the identity of the victim/witness.

115 In this section the Mission has omitted the case names to protect the identity of the relevant victims and witnesses.

116 Article 240, BiH CC; Article 352, FBiH CC; Article 338, RS CC; Article 346, BD BiH CC.

117 See for example *Prosecutor v. Vahid Hadrović*, Zenica Cantonal Court, Case No. 04 0 K 004934 13 K 2; *Prosecutor v. Redžo Balić*, Mostar Cantonal Court, Case No. 070 K 012253 15 K; *Prosecutor v. Branko Pudić*, Brčko District Basic Court, Case No. 96 0 K 039051 12K.

118 *Prosecutor v. Miroslav Pijunović*, Doboj District Court, Case No. 13 0 K 002141 12 K.

119 *Prosecutor v. Asmir Tatarević & Armin Omerović*, Brčko District Basic Court, Case No. 96 0 K 039065 12 K..

120 *Prosecutor v. Milenko Krsmanović*, Istočno Sarajevo District Court, Case No. 14 0 K 002707 16 K 2 (although it is also notable that in this case, the threat to the victim was discovered by happenstance in the context of other ongoing proceedings); *Prosecutor v. Dragan Šekarić*, Court of BiH, Case No. S1 1 K 014550 14 Kri.

121 According to the Council of Europe, acts of intimidation towards witnesses should be made punishable by either a separate criminal offence or as part of the offence of using illegal threats, see Council of Europe, *Recommendation 2005 (9) of the Committee of Ministers to member states on the protection for witnesses and collaborators of justice*, 20 April 2005, available at [https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec%20\\_2005\\_9.pdf](https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec%20_2005_9.pdf) [Accessed 19 March 2022], para. 3.



Ensuring adequate protective measures is of paramount importance in securing the testimony of vulnerable witnesses and instilling their faith in the judiciary. The institutions in BiH must adopt a zero-tolerance approach to the undermining of protective measures and ensure that they adhere to the highest standards of confidentiality in proceedings and in publicly available documents. Similarly, they must take seriously any breach (or potential breach) of protective measures and take proactive steps to guard against them and to ensure that those responsible for such breaches are held accountable.<sup>122</sup> The BiH authorities must also respond appropriately to threats against and attempts to bribe witnesses, in order to increase their sense of security and to deter efforts to influence them. Criminal investigations and prosecutions, where appropriate, must be initiated, and those in management positions of judicial institutions must communicate the importance of these matters internally, to ensure appropriate responses.

#### *Property claims in criminal proceedings before the courts in BiH*

Numerous international instruments provide for the right to a remedy for individuals whose rights or freedoms have been infringed.<sup>123</sup> Domestically, meanwhile, the right of an injured party to seek compensation in the course of criminal proceedings (a process known as pursuing a 'property claim') is enshrined in all CPCs in force in BiH. The CPCs prescribe a detailed procedure for the treatment of such claims, which may cover both material and non-material damage (such as emotional harm) suffered as a result of a crime.<sup>124</sup> The prosecutor must inform victims of their right to file a property claim,<sup>125</sup> and the Court, while considering a plea bargain agreement, must ensure that any injured party is given the opportunity to provide a statement before the prosecutor regarding any property claim.<sup>126</sup> The prosecutor has a duty to gather evidence in relation to the claim, and the court must decide on the claim if doing so “would not considerably prolong such proceedings”.<sup>127</sup> Should the court determine that adjudicating the claim would considerably prolong the proceedings or that the evidence does not provide a reliable basis for determining (partially or completely) the claim, the court must inform the injured party that they may pursue a civil action.<sup>128</sup>

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122 Article 236(3), BiH CPC; Article 252, FBiH CPC; Article 252(3), RS CPC; Article 236(3), BD CPC; Article 24(2), *Law on Protection of Witnesses*.

123 For example, Article 2 (3) of the *International Covenant on Civil and Political Rights* provides expressly for an individual right to a remedy in case of breaches of the Covenant. Article 14(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* establishes the obligation for each state party to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. Article 13 of the *European Convention of Human Rights and Fundamental Freedoms* stipulates that everyone whose rights and freedoms are violated must have an effective remedy.

124 Chapter XVII, BiH CPC; Chapter XVII, FBiH CPC; Chapter XII, RS CPC; Chapter XVII, BD CPC.

125 Articles 35(2)(g), 86(10), BiH CPC; Articles 45(2)(g), 100(10), FBiH CPC; Articles 43(2)(e), 151(10), RS CPC; Articles 35(2)(g), 86(10), BD CPC.

126 Article 231(6)(e), BiH CPC; Article 246(6)(e), FBiH CPC; Article 246(6)(e), RS CPC; Article 231(6)(e), BD CPC.

127 Articles 193, 195, 197, 198, BiH CPC; Articles 207, 209, 211, 212, FBiH CPC; Articles 103, 105, 107, 108, RS CPC; Articles 193, 195, 197, 198, BD CPC.

128 Articles 193, 198, BiH CPC; Articles 207, 212, FBiH CPC; Articles 103, 108, RS CPC; Articles 193, 198, BD CPC.

Despite these obligations, the Mission has repeatedly observed and expressed concerns regarding the failure of (a) judicial actors to inform victims of their right to file property claims within criminal proceedings, (b) prosecutors to gather evidence in relation to the claims, and (c) courts to adjudicate the claims within the criminal proceedings, when appropriate.<sup>129</sup>

The Mission has observed that in the majority of war crime cases before the courts in BiH in which an injured party filed a property claim, the compensation of non-material damage was not adjudicated. Instead, the courts referred the injured party to civil proceedings. The most common justification by the court for doing so was that considering the claim and/or establishing the facts with regard to the amount of the claim would considerably prolong the criminal proceedings.<sup>130</sup> Additionally, the courts reasoned in some cases that the claim was undetermined or imprecise,<sup>131</sup> or that the records provided insufficient grounds for a complete or partial adjudication of the matter.<sup>132</sup> In one instance, the court stated that the prosecution failed to carry out its duty to collect evidence on the property claim.<sup>133</sup> In another, the Court of BiH did not provide any reasoning.<sup>134</sup>

The Mission, however, also notes and welcomes the progress made, in particular at the Court of BiH and by the PO BiH, towards adjudicating property claims for non-material damage in war crimes cases.<sup>135</sup> In recent years, in a number of cases involving conflict-related sexual violence, the PO BiH met its legal obligation to gather evidence in support of property

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129 OSCE, *Tackling Hate Crimes: An Analysis of Bias-Motivated Incidents in Bosnia and Herzegovina with Recommendations* (Sarajevo, OSCE Mission to BiH, 2012), available at <https://www.osce.org/bih/107255> [Accessed 21 March 2022], pp. 39-40; OSCE, *Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in Bosnia and Herzegovina, with Recommendations* (Sarajevo, OSCE Mission to BiH, 2011), available at <https://www.osce.org/bih/106970> [Accessed 21 March 2022], p. 25; *The Processing of ICTY Rule 11 bis cases*, *supra* n. 11, pp. 20-22; *Towards Justice*, *supra* n. 4, pp. 83-87; OSCE, *Ensuring Justice for Victims of Trafficking in Human Beings: Response of the Criminal Justice System in Bosnia and Herzegovina, with Recommendations* (Sarajevo, OSCE Mission to BiH, 2021), available at [https://www.osce.org/files/f/documents/6/f/509345\\_0.pdf](https://www.osce.org/files/f/documents/6/f/509345_0.pdf) [Accessed 24 March 2022], pp. 45-49.

130 See for example *Bundalo et al.*, *supra* n. 111, p. 239; *Prosecutor v. Simo Stupar*, Court of BiH, Case No. S1 1 K 030715 18 Kri, 15 May 2021, paras. 382-383 (in the first instance verdict, confirmed at second instance, the 10 injured parties that submitted property law claims were referred to civil proceedings).

131 *Prosecutor v. Hajrudin Dedić*, Zenica Cantonal Court, Case No. 04 0 K 002917 12 K, 1<sup>st</sup> Instance Verdict, 10 December 2015, p. 26; *Prosecutor v. Asim Kadić*, Zenica Cantonal Court, Case No. 04 0 K 005141 12 K, 1<sup>st</sup> Instance Verdict, 6 February 2014, p. 13; *Prosecutor v. Kuburrić Bora & Banjac Radmila*, Bihać Cantonal Court, Case No. K 008669 14, 1<sup>st</sup> Instance Verdict, 26 February 2015, p. 17; *Prosecutor v. Milovan Karakaš*, Bihać Cantonal Court, Case No. 01 0 K 011777 16 K, 1<sup>st</sup> Instance Verdict 2017, 19 May 2017, p. 13; *Prosecutor v. Miladin Tošić et al.*, Brčko District Basic Court, Case No. 96 0 K 024956 11 K, 1<sup>st</sup> Instance Verdict, 17 April 2015, para. 153; *Prosecutor v. Marinko Petrović*, Mostar Cantonal Court, Case No. 07 0 K 011525 15, 1<sup>st</sup> Instance Verdict, 5 October 2015, p. 37.

132 *Prosecutor v. Ivan Zelenika et al.*, Court of BiH, Case No. S1 1 K 009124 12 Kri, 1<sup>st</sup> Instance Verdict, 14 April 2015, paras. 955-956; *Prosecutor v. Sasa Baričanić*, Court of BiH, Case No. S1 1 K003472 12 Kžk, 1<sup>st</sup> Instance Verdict, 9 November 2011, para. 261; *Prosecutor v. Bilbija Slavko*, Bihać Cantonal Court, Case No. 01 0 K 008473 14 K, 1<sup>st</sup> Instance Verdict, 3 July 2014, p. 13; *Prosecutor v. Ilija Pavić*, FBiH Supreme Court, Case No. 10 0 K 002018 15 Kžk, 2<sup>nd</sup> Instance Verdict, 26 November 2015, p. 10; *Prosecutor v. Ramiz Avdović et al.*, Court of BiH, Case No. S1 1 K 008241 11 Kri, 1<sup>st</sup> Instance Verdict, 26 February 2016, paras. 454, 558, 563; *Prosecutor v. Muhidin Bašić & Mirsad Šijak*, Court of BiH, Case No. S1 1 K 007209 12 Kri, 1<sup>st</sup> Instance Verdict, 18 January 2013, para. 364.

133 *Prosecutor v. Ivan Zelenika et al.*, Court of BiH, Case No. S1 1 K 009124 12 Krž, 2<sup>nd</sup> Instance Verdict, 22 September 2016, paras. 241-242.

134 *Prosecutor v. Dragoja Zmijanac*, Court of BiH, Case No. S1 1 K 020448 15 Kri, 1<sup>st</sup> Instance Verdict, 28 November 2016, p. 5.

135 For additional discussion of the issue, see TRIAL International, Vive Žene & Global Survivors Fund, *Bosnia and Herzegovina Study on Opportunities for Reparations for Survivors of Conflict-Related Sexual Violence: We Raise Our Voices* (Sarajevo, Trial International, Vive Žene, Global Survivors Fund, 2022), available at <https://trial.ba/wp-content/uploads/2022/03/Bosnia-and-Herzegovina-study-on-opportunities-for-reparations-for-survivors-of-conflict-related-sexual-violence-%E2%80%94-We-raise-our-voices.pdf> [Accessed 10 March 2022], pp. 62-64.

claims, and the Court of BiH subsequently awarded compensation to the injured parties.<sup>136</sup> Furthermore, in several cases, the Prosecutor's Office of BiH made additional efforts to gather information relating to the accused's property, enabling the injured party to file a motion for a temporary freezing of the assets, which the Court of BiH granted.<sup>137</sup> This latter practice helps protect against the disposal of assets, which often frustrates property claims. Unfortunately, such developments are still not the norm, and there are still instances in which prosecutors fail to inform injured parties of their rights or fail to gather evidence related to the claim or in relation to the financial situation of the suspect or accused.

Further, in several cases the Court of BiH was guided, when adjudicating property claims, by the Orientation Criteria of the Civil Law Department of the FBiH Supreme Court.<sup>138</sup> These verdicts indicate that there is inconsistent practice with respect to levels of compensation awarded and warrants consideration by the Court of BiH of the need to adopt its own orientation criteria, which should be harmonised with the Supreme Courts in RS and FBiH. It is evident, when comparing cases, that different compensation has been awarded for the same percentage of a victim's reduced quality of life and/or higher compensation awarded in relation to a lower percentage of damage suffered, as if different criteria were applied.<sup>139</sup>

The Mission, however, also notes and cautiously welcomes certain emerging practices before courts in the RS and FBiH. The Cantonal PO in Travnik and the District PO in Doboj gathered evidence in relation to property claims, resulting in compensation being awarded to the injured parties by the respective courts (albeit only partially in two cases, with the injured parties referred to civil proceedings for the remainder of the claims).<sup>140</sup> Similarly, in one case, the Banja Luka District PO gathered evidence in support of a property claim, however both the first<sup>141</sup> and second instance courts failed to award compensation.<sup>142</sup> It is unclear why the first instance court concluded that the evidence presented (including expert witness evidence in relation to the property claim) did not provide sufficient grounds for a complete or partial adjudication of the matter. The first instance court held that establishing the facts of the claim would considerably prolong the criminal proceedings and referred the injured party to civil proceedings.<sup>143</sup> On appeal, the second instance court upheld the decision, reasoning that,

136 *Prosecutor v. Saša Cvetković*, Court of BiH, Case No. S1 1 K 023242 17 K, 1<sup>st</sup> Instance Verdict, 22 March 2019, paras. 292-329; *Prosecutor v. Krsto Dostić*, Court of BiH, Case No. S1 1 K 019771 15 Kri, 1<sup>st</sup> Instance Verdict, 6 October 2016, paras. 263-300; *Prosecutor v. Miroslav Perić*, Court of BiH, Case No. S1 1 K 026886 17 Kro, 1<sup>st</sup> Instance Verdict, 19 December 2017, paras. 67; *Prosecutor v. Slavko Savić*, Court of BiH, Case No. S1 1 K 017213 14 Kri, 1<sup>st</sup> Instance Verdict, 29 June 2015, paras. 382-424; *Prosecutor v. Bosiljko Marković & Ostoja Marković*, Court of BiH, Case No. S1 1 K 012024 14 Kri, paras. 232-245; *Prosecutor v. Milomir Davidović*, Court of BiH, Case No. S1 1 K 005151 18 Kri, 1<sup>st</sup> Instance Verdict, 27 February 2019, paras. 235-265; *Prosecutor v. Vuk Ratković*, Court of BiH, Case No. S1 1 K 024032 18 Kri, 1<sup>st</sup> Instance Verdict, 24 June 2015, paras. 248-275; *Prosecutor v. Mato Baotić*, Court of BiH, Case No. S1 1 K 020032 15 Kri, 1<sup>st</sup> Instance Verdict, 9 December 2016, paras. 228-261; *Prosecutor v. Adil Vojić & Bekir Mešić*, Court of BiH, Case No. S1 1 K 012506 14 Kri, 1<sup>st</sup> Instance Verdict, 16 March 2016, paras. 332-362; *Prosecutor v. Radovan Paprica & Slavko Ognjenović*, Court of BiH, Case No. S1 1 K 033539 19 Kri, 1<sup>st</sup> Instance Verdict, 3 December 2020, paras. 337, 351, 2<sup>nd</sup> Instance Verdict, 8 June 2021, paras. 98-107.

137 See for example *Baotić, supra n. 136*, paras. 48-53.

138 Adopted on 27 January 2016.

139 *Savić, supra n. 136*, para. 418-422; *Ratković, supra n. 136*, paras. 269-272; *Marković et al., supra n. 136*, paras. 236-245; *Dostić, supra n. 136*, paras. 295-300.

140 *Prosecutor v. Anto Jozjić & Demabudin Mahalbašić*, Novi Travnik Cantonal Court, Case No. 06 0 K 009862 19 K 2, 1<sup>st</sup> Instance Verdict, 20 May 2019, p. 33; *Prosecutor v. Drago Vukadinović*, Novi Travnik Cantonal Court, Case No. 06 0 K 007374 14 K, 1<sup>st</sup> Instance Verdict, 23 January 2015, p. 7; *Prosecutor v. Nenad Vasić*, Doboj District Court, Case No. 13 0 K 03666 16 K 2, 1<sup>st</sup> Instance Verdict, 25 January 2017, pp. 21-22.

141 *Prosecutor v. Goran Smiljanić et al.*, Banja Luka District Court, Case No. 11 0 K 017578 16 K, 1<sup>st</sup> Instance Verdict, 31 October 2016, p. 22.

142 *Prosecutor v. Goran Smiljanić et al.*, RS Supreme Court, Case No. 11 0 K 017578 17 Kž, 2<sup>nd</sup> Instance Verdict, 21 March 2017, pp. 11-12.

143 *Smiljanić et al., supra n. 142*, p. 17.

while giving evidence in court, the injured party did not testify on the circumstances relevant to the property claim, in particular to her reduced quality of life.<sup>144</sup> However, it is evident from the first instance verdict that the expert witness gave detailed evidence relevant to the property claim, including clearly stating that the quality of life of the injured party was reduced by 25 per cent.<sup>145</sup>

#### *Protective measures in civil proceedings*

Another particularly problematic issue observed by the Mission concerns victims of conflict-related sexual violence who have pursued compensation claims in civil proceedings. The majority of sexual violence victims testifying before the Court of BiH in criminal cases have been granted protective measures, including measures to protect the identity of the victim, such as employing pseudonyms.<sup>146</sup> Such measures are, however, applicable only in criminal proceedings.<sup>147</sup> In civil proceedings, the only protective measure available is the exclusion of the public from proceedings, which does not apply to the parties or their legal representatives. As a result, victims who testify in criminal proceedings under protective measures can only pursue their property claims in civil proceedings by foregoing their right to protective measures.

Further, because some witnesses testify with protective measures and a pseudonym, there also exists the added difficulty in proving that the relevant criminal verdict refers to the claimant. In the absence of a systemic solution, the Court of BiH has assisted injured parties by issuing decisions and verifying the victim's identity only to the judge and record keeper assigned to the civil case. However, according to the information available to the Mission, this practice is not applied consistently, and in some instances, the identity of the claimant has been disclosed in the civil verdict.

The Revised Strategy does, however, recognize this obstacle. It includes a measure to improve the normative framework enabling witnesses enjoying protective measures to pursue property claims in civil proceedings – in other words, to allow victims who have testified under protective measures in a criminal procedure to retain the same protection in civil proceedings.<sup>148</sup> In this respect, the Mission welcomed the establishment of a Working Group on the Amendments to Civil Procedure Code under the auspices of BiH Ministry of Justice and the subsequent adoption of amendments to the BiH Civil Procedure Code by both the House of Representatives and House of Peoples of the BiH Parliament.<sup>149</sup>

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144 *Smiljanić et al., supra n.143*, p.12.

145 *Smiljanić et al., supra n.142*, p. 17..

146 Article 20, *Law on the Protection of Witnesses*.

147 Article 1, *Law on the Protection of Witnesses*.

148 *Revised Strategy, supra n. 19*, Strategic Objective VIII/h (7).

149 Amendments published in BiH Official Gazette, No. 34/21, available at <http://www.mpr.gov.ba/biblioteka/zakoni/bs/default.aspx?id=11413&clangTag=bs-BA> [Accessed 24 March 2022].

Although these amendments allow victims to participate in civil proceedings with protective measures, they will not assist victims in war crimes cases to exercise their right to compensation in respect of criminal damage, because the Court of BiH does not have competence to decide on such criminal damage in civil cases.<sup>150</sup> Criminal damage compensation is, in civil cases, instead regulated at the entity/Brčko District level. Such cases are decided by the municipal and basic courts in the territory in which the criminal offence was committed, the consequence of a criminal offence occurred, and/or the injured party is resident.<sup>151</sup> Accordingly, equivalent amendments to the Republika Srpska, Federation of BiH, and Brčko District Civil Procedure Codes are necessary to ensure victims can participate, with protective measures, in civil proceedings.

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150 Under the BiH Law on Civil Procedure (Article 1), the Court of BiH is competent to decide property disputes between the State of Bosnia and Herzegovina and the Entities, between the State and the Brčko District of Bosnia and Herzegovina, between the Entities, between the Entities and the Brčko District and between the institutions of Bosnia and Herzegovina executing public authorities. The provisions of the BiH Law on Civil Procedure also apply to property disputes arising from the damage caused in the course of performance of the administrative bodies of Bosnia and Herzegovina, other institutions of Bosnia and Herzegovina and official persons of these bodies and institutions, and to litigations concerning violations of the rights under labor relations. BiH Law on Civil Procedure, Official Gazette Nos 36/04, 84/07, 58/13, 94/16, 34/21.

151 Article 32, RS Law on Civil Procedure, Official Gazette Nos. 58/03, 85/03, 74/2005, 63/07, 105/08, Constitutional Court Decision 45/09, Constitutional Court Decision 49/09, 61/13; Article 32, FBiH Law on Civil Procedure, Official Gazette No. 53/03, 73/05, 19/06, 98/15; Article 24, BD Law on Civil Procedure, Official Gazette No. 28/18.

## 5. Conclusions and recommendations

The assessment of processing war crimes cases in BiH is not black and white. On the one hand, the BiH judiciary has achieved undeniable success in terms of the number of war crimes cases that have been processed and, as a result, the number of perpetrators who have been held accountable – this is especially the case in the years since the adoption of the Strategy. Those years have similarly seen continued improvements in the capacity of the BiH institutions to handle war crimes cases, and to do so fairly and in adherence with international standards.

On the other hand, the efficient processing of war crimes cases remains frustrated by a persisting and complex myriad of factors. In particular, the politicization of war crimes processing remains, more than 25 years since the end of the war, deeply entrenched. This is apparent at the regional level, perhaps most starkly manifested in the troubling statistic that more than one third of war crimes cases in BiH are frustrated by the suspect being unavailable to the authorities. It is apparent at the national institutional level in relation to the impact of ethnic (and, by association, political) considerations that attach to judicial appointments. And, it is apparent at the national political level, evidenced by the delays in adopting the Revised Strategy, and now in relation to one of its most fundamental aspects, oversight by the Supervisory Body, whose appointment continues to be blocked. Institutionally, despite the successes achieved and improvements in practices observed, challenges remain, notably concerning technical capacities, but also managerial practices and policies that have not always aligned with the Strategy's Strategic Objectives, especially with respect to case management and distribution – fundamental aspects that go to the heart of the Strategy.

The final factor that must be considered is the inescapable passage of time. Not only does the passing away of witnesses, victims, and defendants bar the path to justice, but so too do the fading memories and health of witnesses and defendants give rise to the increasing likelihood of delayed or discontinued proceedings. Time is, undeniably, of the essence.

It is against this backdrop that the following recommendations are made.

### **To all National and International Stakeholders:**

- 1) Take all necessary steps to further improve efficiency in the fair processing of war crimes cases, including to improve the effectiveness of the institutions in their utilization of available resources and to consider the provision of additional resources.
- 2) Take all necessary steps to ensure the prioritization of the investigation and prosecution of cases concerning those persons most responsible for the atrocities committed during the 1992-1995 BiH war.
- 3) Take all necessary steps to improve regional co-operation with respect to war crimes case processing, including convening a high-level summit on regional co-operation.
- 4) In the continued absence of the Supervisory Body, consider how to ensure adequate oversight of the Revised Strategy, and of any successor strategic framework. This must especially be concerned with the oversight of case management, prioritization and distribution and with ensuring accountability.

5) Consider how to further improve the harmonization of case law and judicial practice, including by (A) revising the rules of the Panels for Harmonization of Case Law in order to enable the Panels to enjoy a stronger role; and (B) exploring novel approaches to knowledge sharing and the harmonization of judicial practice.

#### **To the BiH Council of Ministers**

- 6) Appoint the Supervisory Body without further delay.
- 7) Prioritise the development of a strategic approach to transitional justice in BiH.

#### **To the BiH Executive and Legislative Authorities:**

8) Ensure that all prosecutorial and judicial institutions in BiH are equipped with the necessary personnel, equipment, and facilities to adequately and fairly process war crimes cases, including in relation to witness support and protection.

#### **To the High Judicial and Prosecutorial Council:**

- 9) Ensure that all appointments are based on relevant experience and merit and that decisions on appointment are well-reasoned.
- 10) Consider how to (A) improve the co-ordination and systematic implementation of and adherence to witness protective measures to ensure consistency across all BiH jurisdictions; and (B) improve the judicial and prosecutorial response to cases of witness intimidation, threats, bribery, and other problematic conduct to ensure such issues are dealt with effectively and consistently across BiH.
- 11) Consider how the Court Documentation and Education Department's role can be strengthened, including whether, as a unit within the Secretariat, it can properly fulfil its mandate to serve and support the professional community.

#### **To the Court of BiH and the Prosecutor's Office of BiH:**

- 12) Implement all outstanding recommendations from the Mission's 2019 Spot Report (*Case Management*) and the Judge Korner 2020 Report (set out in Annex A).
- 13) Ensure that all legally required steps are taken in war crimes cases in relation to property law claims in criminal proceedings, including to inform injured parties of their rights, to gather evidence relevant to claims, to investigate the financial situation of suspects/defendants, and to adjudicate the claims in appropriate cases.
- 14) Ensure co-ordination (including with entity/Brčko District judicial institutions) in relation to war crimes case processing, particularly in relation to the transfer of cases.

**To the High Judicial and Prosecutorial Council and all prosecutorial and judicial institutions in BiH:**

15) Make available to the public meaningful and more detailed information on the investigation, prosecution and adjudication of war crimes cases.

**To the International Community:**

16) Continue to provide sustainable support and assistance to the national institutions in relation to war crimes case processing, ensuring co-ordination and coherence with other strategic priorities.



## Annex A – Status of Implementation of Previous Recommendations<sup>152</sup>

Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road “Category A” cases (September 2018)

|   | Institution / Recommendation  | Status                       |
|---|---|------------------------------|
|   | <b>Council of Ministers of BiH</b>  |                              |
| 1 | To adopt, without any further delay, the Revised National War Crimes Processing Strategy  | <i>Implemented</i>           |
| 2 | To appoint, without delay, the new Supervisory Body for Implementation of the Strategy, in line with the Revised Strategy   | <i>Not implemented</i>       |
|   | <b>Supervisory Body for Implementation of the Strategy</b>  |                              |
| 3 | To ensure that the activities contained in the Action Plan of the Revised Strategy are implemented in line with the aim and purpose of the Strategy   | <i>Not implemented</i>       |
| 4 | To issue clear policy directions in problematic areas, including assigning responsibilities to accountable parties with deadlines for their execution   | <i>Not implemented</i>       |
| 5 | To report to the High Judicial and Prosecutorial Council situations in which the judicial authorities fail to fulfil requirements stemming from the Strategy  | <i>Not implemented</i>       |
| 6 | To periodically provide updates to the public on the status of war crimes processing, including challenges in the implementation of the Strategy and measures taken to address them                                       | <i>Not implemented</i>       |
|   | <b>High Judicial and Prosecutorial Council of BiH</b>   |                              |
| 7 | To define a system of liability of judicial actors in case of failure to fulfil requirements stemming from the Strategy   | <i>Partially implemented</i> |
| 8 | To prioritize work in relation to the most complex cases, in line with the goals and guidelines of the Revised Strategy, and to allocate sufficient resources to ensure all complex cases are processed by 2023           | <i>Partially implemented</i> |
| 9 | To regularly provide data to the Supervisory Body relating to the number of “Category A” cases processed and transferred to date, in order to demonstrate progress achieved in these cases as part of the overall backlog | <i>Not implemented</i>       |

152 Assessment is based on information available to the Mission as of 31 May 2022.

|    | <b>All state level actors, including the Court of BiH</b>                     |                              |
|----|---|------------------------------|
| 10 | To consistently apply the complexity criteria to all pending war crimes cases | <i>Partially implemented</i> |

*War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina (June 2019)*

|   | <b>Institution / Recommendation</b>  | <b>Status</b>                |
|---|--|------------------------------|
|   | <b>High Judicial and Prosecutorial Council of BiH</b>  |                              |
| 1 | To pass a conclusion on the obligatory nature of measures prescribed in the Strategy for holders of judicial functions, thereby ensuring accountability in terms of disciplinary measures in cases of failure to comply  | <i>Partially implemented</i> |
| 2 | To ensure that all appointments to the state level judiciary are based on relevant experience and merit. In particular, the recruitment process should at the outset accurately reflect the expertise required for the vacancy in question   | <i>Not implemented</i>       |
|   | <b>Prosecutor's Office of BiH</b>  |                              |
| 3 | When assigning newly appointed prosecutors to specialized departments, including the SDWC, the Chief Prosecutor should take into account whether they possess the expertise required for processing the cases to which they will be assigned   | <i>Partially implemented</i> |
| 4 | Without any further delay, to reintroduce a geographical team-based internal structure within the SDWC, with each team to be led by the most senior prosecutor as a mentor   | <i>Partially implemented</i> |
| 5 | To ensure consistency of practice between all prosecutors processing war crimes cases at the PO BiH in their application of the complexity criteria, set out in Annex A of the Strategy. In this regard, the PO BiH should consult with the Court of BiH regarding any questions on the interpretation or application of the complexity criteria | <i>Partially implemented</i> |

|                     |  |                              |
|---------------------|--|------------------------------|
| 6                   | Without any further delay, to focus its resources on the investigation and prosecution of the most complex cases involving allegations of genocide, crimes against humanity, war crimes, or the most complex forms of responsibility and participation in the commission of such crimes  | <i>Partially implemented</i> |
| 7                   | Without any further delay, to conduct a thorough analysis of the complexity and importance of events contained in all pending KTRZ cases to determine which of these events must be processed by the PO BiH and adjudicated by the Court of BiH, in line with the Strategy, and to report its progress to the HJPC Standing Committee for Efficiency of Prosecutor's Offices | <i>Not implemented</i>       |
| 8                   | To introduce a policy mandating the joinder of all cases that pertain to identical sets of facts and to prohibit the practice of unnecessarily fragmenting cases   | <i>Implemented</i>           |
| 9                   | To utilize the quota exception option under the present regulatory framework which relates to exceptionally complex cases, thereby allowing individual prosecutors to file for a greater number of quota points for processing particularly complex cases  | <i>Implemented</i>           |
| 10                  | Without any further delay, to develop an actionable plan for the imminent transfer of all KTRZ cases which are considered to be less complex pursuant to the Strategy's Annex A criteria to the entity/Brčko District court level  | <i>Partially implemented</i> |
| 11                  | To analyze all acquitting verdicts in the last three years in order to understand and address the underlying causes of the low conviction rate   | <i>Not implemented</i>       |
| <b>Court of BiH</b> |  |                              |
| 12                  | To continue with the established practice of ex officio review of the complexity of all indictments in war crimes cases filed by the PO BiH  | <i>Implemented</i>           |

|    |  |                              |
|----|--|------------------------------|
| 13 | To put on hold the decision making process upon the motions for transfer of KTNRZ cases to the entity/Brčko District level until the PO BiH conducts a thorough analysis of events contained in all pending KTNRZ cases and indicates which of the events contained in such cases must be investigated, prosecuted, and adjudicated at the state level | <i>Not implemented</i>       |
| 14 | To reinstate regular meetings with the PO BiH on legal issues arising from the interpretation or application of the Strategy's complexity criteria   | <i>Partially implemented</i> |

*Improving War Crimes Processing At The State Level In Bosnia and Herzegovina - A Follow-Up Report By Her Honour Judge Joanna Korner CMG QC (September 2020)*<sup>153</sup>

|          | Institution / Recommendation   | Status                       |
|----------|--|------------------------------|
| <b>2</b> | <b>Revised NWCPS</b>   |                              |
| 2.1      | Further consideration should be given to the interpretation of the proposed revised criteria to ensure that only cases which are complex in terms of the level of the perpetrator, and/or the complexity of the nature of events charged, and/or the applicable law, are tried at the CBiH | <i>Not implemented</i>       |
| 2.2      | The obvious first step which needs to be taken is that, after two years, it is imperative that the revised NWCPS be adopted by the Council of Ministers without further delay.   | <i>Implemented</i>           |
| <b>3</b> | <b>Leadership of the SDWC</b>  |                              |
| 3.1      | There is an urgent necessity for the CP to delegate authority to ensure the smooth day-to-day running of the SDWC and to ensure that decisions relating to the operation of the department are taken promptly  | <i>Partially implemented</i> |
| 3.2      | A Head of the SDWC should be appointed without delay   | <i>Implemented</i>           |

<sup>153</sup> The Mission, and not the author of the report, Judge Joanna Korner, did the assessment of the state of implementation of recommendations.

|          |   |                              |
|----------|---|------------------------------|
| 3.3      | It is strongly recommended that, in the light of the heavy workload of the SDWC; the ever-approaching deadline for the completion of WC cases; the need for efficient court prosecution of cases and for the reasons set out in the body of the report that, for a finite period of time (not less than 12 months), the SDWC should be provided with an International Legal Advisor. That person should be a prosecutor with experience in dealing with WC cases and also management.   | <i>N/A</i>                   |
| 3.4      | The heads of teams should be given authority to manage their teams  | <i>Partially implemented</i> |
| 3.5      | The areas of responsibility (and tasks which devolve from such responsibilities) for each level of management should be set out in writing. In order to ensure that the allocated tasks are being carried out as envisaged, a system of reporting must be instituted and adhered to.  | <i>Partially implemented</i> |
| <b>4</b> | <b>Organizational Structures &amp; Working Practices within the SDWC</b>  |                              |
| 4.1      | It has been accepted by the CP that there be a return to the team structure. In order to make them effective working units (as set out in the body of this report), prosecutors and investigators assigned to each team must only work on cases covering the assigned geographical areas. Retaining the section structure has the potential to “muddy the waters” by prosecutors being assigned cases from geographical areas which, whilst not within the team, are within the section | <i>Partially implemented</i> |
| 4.2      | Accordingly, it is recommended that with minimum delay “sections,” as units, be abolished and heads be appointed for each of the six teams  | <i>Not implemented</i>       |

|     |  |                              |
|-----|--|------------------------------|
| 4.3 | <p>In light of the complete geographical mishmash of cases presently assigned to prosecutors and investigators, further consideration must be given to the assignment of individual prosecutors and investigators to the teams. Such assignment must take into account:</p> <ul style="list-style-type: none"> <li>• The cases they are presently working on, in particular those designated as KTRZ;</li> <li>• How much work has been done on any one case; The stage reached in a case, particularly whether a case is in trial;</li> <li>• The area(s) with which they are most familiar.</li> </ul> | <i>Implemented</i>           |
| 4.4 | <p>Such a review should enable the prosecutors and investigators to be assigned to the team most appropriate to the case(s) on which they have expended the most effort and are therefore areas of the conflict with which they are the most familiar. Cases earlier assigned to them on which they have expended less time and which do not come within the geographical area of that team should be reassigned to the appropriate team.</p>  | <i>Implemented</i>           |
| 4.5 | <p>Unless a trial has already commenced, no prosecutor assigned an organized crime case should continue to work on that case</p>   | <i>Implemented</i>           |
| 4.6 | <p>Only prosecutors with some experience of dealing with WC cases should be appointed to the SDWC.</p>   | <i>Not implemented</i>       |
| 4.7 | <p>The number of prosecutors assigned to the SDWC must be increased.</p>   | <i>Not implemented</i>       |
| 4.8 | <p>Complex WC trials should have the benefit of not less than two lawyers to conduct courtroom advocacy.</p>   | <i>Not implemented</i>       |
| 4.9 | <p>Article 37 of the POBiH handbook setting out the duties of section heads contains insufficient detail. Written guidelines on the duties of heads of teams (and the operation of the teams) should be issued without delay</p>   | <i>Partially implemented</i> |

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| 4.10 | Team/section and intersectional meetings of the SDWC should be held on a regular basis. It is suggested the team meetings should be once a week and that heads of teams/sections meet once a fortnight  | <i>Partially implemented</i>              |
| 4.11 | In order to prevent parallel investigations taking place and to ensure indictments of persons charged crimes arising from the same set of events are joined, full and thorough checks need to be carried out of relevant databases to ensure there is no duplication. For the same reasons, any prosecutor receiving a new case must provide the head of their team with the relevant details.                | <i>Insufficient information available</i> |
| 4.12 | In-depth analyses of the reasons for acquittals must be carried out at the first instance by the team responsible for the case. That analysis should be circulated to the heads of all teams/sections. If any head concludes that there are lessons to be learned for all prosecutors then the analysis should be circulated to all and if thought appropriate should be discussed at a collegium of the SDWC | <i>Not implemented</i>                    |
| 4.13 | A 'checklist' of steps required to prepare for a trial should be compiled by an experienced prosecutor and become standard throughout the SDWC. Such a checklist must include ascertaining whether another prosecutor within the team – or indeed in another team – is conducting a case which has a factual overlap  | <i>Implemented</i>                        |
| 4.14 | More analysts should be employed to allow for one to be allocated to each of the teams. They should attend the team meetings.   | <i>Not implemented</i>                    |
| 4.15 | A military analyst should be employed   | <i>Not implemented</i>                    |
| 4.16 | The prosecutors should decide the tasks to be carried out by the analysts and issue written instructions  | <i>Not implemented</i>                    |
| 4.17 | All databases must be regularly updated. Where updating requires information to be provided by entity and district POs and/or courts, such information should be supplied electronically on a monthly basis. A standardized form should be produced listing the nature of the information needed  | <i>Insufficient information available</i> |

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| 4.18     | POBiH investigators should be assigned to teams. Investigation plans, drafted by 'in-house' investigators and those from SIPA, should be prepared in conjunction with the prosecutor assigned to a case   | <i>Partially implemented</i>              |
| 4.19     | Sufficient investigators should be assigned to the SDWC to enable each prosecutor to have the assistance of a dedicated investigator. Each investigator should be provided with a mobile telephone for official use   | <i>Not implemented</i>                    |
| 4.20     | Operations conducted by the 'Terra' team should be relinquished to another agency with the appropriate competence and SIPA officers reassigned to work on KTARZ cases until expiration of the NWCPS deadline  | <i>Not implemented</i>                    |
| <b>5</b> | <b>Mentoring</b>  |   |
| 5.1      | The Rulebook on Mentorship must be fully implemented  | <i>Insufficient information available</i> |
| <b>6</b> | <b>Indictments</b>  |   |
| 6.1      | Overall guidelines need to be produced which set out the factors to be taken into account when deciding whether to issue an indictment against an accused which will include matters such as:<br>Prioritisation factors e.g. grave nature of crime alleged; whether events in municipality already heavily prosecuted; whether case is categorised as KTRZ;<br><ul style="list-style-type: none"> <li>• The role of the suspect;</li> <li>• The level of perpetrator</li> <li>• Availability of the accused/ prospect of arrest;</li> <li>• Whether the accused has previously been convicted;</li> <li>• Nature of the evidence, e.g. reliant on witness testimony alone.</li> </ul> | <i>Not implemented</i>                    |
| 6.2      | In order to achieve the goal of trying those allegedly most responsible for the most serious crimes, the only cases which should be retained by the POBiH for investigation and potential indictments are those which fulfil the criteria in the draft revised strategy.  | <i>Partially implemented</i>              |



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| 6.3 | “Fragmentation” of indictments, without proper justification, must cease  | <i>Implemented</i>                        |
| 6.4 | In order to improve the quality of the indictments, refresher training on substantive law and drafting skills should be provided and continuing assistance be made available through the adoption of a handbook containing instructions on drafting.  | <i>Partially implemented</i>              |
| 6.5 | An increase in the transfer of cases requires, as a matter of urgency, that The Panel for the Harmonization of Case Law further examines the issue of disparities between the BiH CC and the SFRY CC.   | <i>Not implemented</i>                    |
| 6.6 | Indictments should not be issued against accused that are outside the jurisdiction of the CBiH unless there is a <b>realistic</b> prospect that they will be returned to BiH for trial. Case files should be remitted for investigation and prosecution to the relevant PO of the country concerned.  | <i>Implemented</i>                        |
| 6.7 | Indictments should not be issued against accused who have already been convicted of WC in a previous trial unless the indictment alleges that the accused had command responsibility for a crime of such magnitude that public policy demands he be brought to account <b>and</b> that the likely sentence, in event of conviction, will increase any sentence he has previously received | <i>Not implemented</i>                    |
| 7   | <b>Backlog and Transfer of Cases</b>  |   |
| 7.1 | As already stated above, guidelines on the prioritisation of cases must be issued.  | <i>Insufficient information available</i> |
| 7.2 | A once-and-for-all analysis should be carried out immediately on the KTNRZ cases which are presently in the POBiH to establish whether there are any linked with serious KTARZ cases. Those without such links should be transferred to the entity or district POs.   | <i>Not implemented</i>                    |
| 7.3 | Transfer by the POBiH/CBiH of all cases which do not fulfil the criteria of the draft revised strategy must take place without further delay  | <i>Partially implemented</i>              |

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| 7.4       | A list of the cases which will be transferred, together with the names of the POs and courts to which transfer will take place, must be supplied to the Supervisory Body.   | <i>Not implemented</i>                    |
| 7.5       | Once these lists have been received, the chief prosecutors and presidents of courts affected by the transfer must notify the Supervisory Body if such transfer will cause logistical problems                         | <i>Not implemented</i>                    |
| <b>8</b>  | <b>Cases of Sexual Violence</b>   |   |
| 8.1       | Funding should be made available, until the expiration of the deadline, for the VWS and WSN to continue their support of alleged victims of sexual violence.  | <i>Partially implemented</i>              |
| 8.2       | Greater use should be made of the option for witnesses of sexual violence to give remote testimony.   | <i>Implemented</i>                        |
| 8.3       | Guidelines should be issued by the POBiH on the drafting of indictments and preparation for trial, which should include matters pertinent to alleged crimes of sexual violence.                                       | <i>Insufficient information available</i> |
| <b>9</b>  | <b>The “Category A” Cases</b>   |   |
| 9.3       | The task should be completed and the information made public by the CP as a priority task   | <i>Not implemented</i>                    |
| 9.4       | The POBiH should keep the public informed of the progress of WC cases through regular press releases and press conferences.   | <i>Partially implemented</i>              |
| <b>10</b> | <b>Length of Trials</b>   |   |
| 10.1      | In order to complete the maximum number of WC trials before the deadline, the present length of trials must be reduced. Both prosecutors and judges must be proactive in taking proper measures to achieve this goal. | <i>Not implemented</i>                    |

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| 10.2      | As far as prosecutors are concerned, such measures commence with the decision in respect of whom to indict and for which crimes. Thereafter in preparations for trial they should ensure that the only evidence presented is that which is strictly necessary for proof of the crime and the accused's involvement therein. | <i>Not implemented</i>                    |
| 10.3      | The application for admission of adjudicated facts, i.e. not argument, should be made sufficiently in advance of trial for rulings to be made which will allow for the adjustment of evidence to be called before trial. There should be greater use of adjudicated facts.  | <i>Not implemented</i>                    |
| 10.4      | Judges must use their powers of case management as set out in Article 239 CPC to reduce the length of trials.   | <i>Not implemented</i>                    |
| 10.5      | In order for trials to be completed within a reasonable timeframe, more courtrooms should be made available (even if outside the court building); witnesses should be heard in a continuous session even if that requires them to stay more than one day.   | <i>Not implemented</i>                    |
| <b>11</b> | <b>HJPC Performance Evaluation Process (“Quota”)</b>  |   |
| 11.1      | Once the evaluations for 2019 have been completed, feedback should be obtained from those administering and affected by the system.   | <i>Insufficient information available</i> |
| 11.2      | If the feedback demonstrates that the new criteria is still “over-reliant on quantitative criteria and statistics” then further amendments should be made before the assessment of 2020 performance.  | <i>Insufficient information available</i> |

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| <b>12</b> | <b>Amendment of the CPC</b>   |                              |
| 12.1      | <p>It is recommended again that an amendment be sought to Article 227 of the CPC to the effect that the only evidential matters which need to be pleaded in an indictment are such as to make it clear to an accused:</p> <ul style="list-style-type: none"> <li>• The date or period in which he committed the alleged crime;</li> <li>• The place in which the crime was committed;</li> <li>• The general nature of the eventual basis which gives rise to the allegations.</li> </ul> | <i>Not implemented</i>       |
| 12.2      | <p>It is also recommended again that the CPC be amended to mandate a continuing duty of disclosure by the prosecutor of material which may undermine the case for the prosecution or assist the accused in his/her defence</p>  | <i>Not implemented</i>       |
| <b>13</b> | <b>Training</b>   |                              |
| 13.1      | Mandatory advocacy training should take place on a regular basis for all prosecutors and defence lawyers wishing to conduct cases before the CBIH   | <i>Partially implemented</i> |
| 13.2      | Judges, in all courts if possible but pre-eminently those trying WC cases at the CBIH, should be provided with training in case management  | <i>Partially implemented</i> |
| 13.3      | Courses should be designed to incorporate not only lectures but practical exercises reflecting typical situations arising in proceedings on which judges are required to rule   | <i>Partially implemented</i> |
| 13.4      | The management of the POBiH and CBIH should take all necessary measures to ensure the attendance of relevant staff at such trainings and to monitor their progress following the training   | <i>Partially implemented</i> |
| 13.5      | The impact of such training should be assessed by monitoring of trials after training courses have been held  | <i>Partially implemented</i> |