

**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**



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

- The OSCE Mission to Bosnia and Herzegovina (the Mission and BiH, respectively) urges the BiH Council of Ministers to adopt the revised National War Crimes Strategy (Revised Strategy) without further delay.
- As of December 2017, the BiH judicial authorities have processed 473 war crimes cases, including a majority of the “Rules of the Road - Category A” cases, generally in line with international law and standards. The National War Crimes Processing Strategy (the Strategy) adopted in 2008 has been key to this success.
- Although largely successful, several obstacles to effective war crimes processing hindered the implementation of the Strategy. The Revised Strategy addresses these challenges to ensure the continued fight against impunity, and the delivery of justice to war crimes victims.

Introduction

As will be explained below, the BiH judiciary has made major progress in delivering justice to victims of war crimes, including through processing a majority of the Rules of the Road “Category A” cases and many more cases that are not part of the Rules of the Road procedure. Recently, public attention has focused on the “Category A” cases, including allegations that these cases have been ignored or hidden by the BiH judiciary.

Against this backdrop, the Mission observes that there is a lack of clear public information on four major topics:

- the progress that has been achieved by the BiH judiciary since the introduction of the National War Crimes Processing Strategy;
- the current status of the processing of war crimes cases;
- what “Category A” cases are and how they relate to other pending cases in terms of complexity;
- the reasons why the Strategy needs to be revised.

In light of this lack of public information, it is understandable that some public and civil society organizations are concerned about how these cases are being handled. In

order to address the lack of information, this report will briefly describe the progress achieved by the BiH judiciary in effectively processing war crimes, including “Category A” cases, since the introduction of the National War Crimes Processing Strategy in 2008. To this end, the report will first identify both past and existing mechanisms for assessing and processing war crimes cases in BiH.¹ In this context, the nature of the ICTY-BiH “Rules of the Road” (RoR) process and its relationship to the current system of categorizing war crimes cases in BiH will be explained. The report will then provide an overview of the Strategy, including the reasons for its adoption, a brief assessment of its achievements and challenges to date, and the means by which the Revised Strategy would address those challenges. In the conclusion, the Mission recommends actions to overcome obstacles and challenges.

ICTY Case Review and “Category A” Cases

More than 800 individuals were identified as falling under “Category A” by the end of the RoR procedure. As of early 2018, the BiH judiciary had brought proceedings in relation to more than 560, or 70%, of these individuals. The judiciary is continuously moving forward to complete proceedings in relation to the remaining individuals. The current Strategy prioritizes cases according to complexity. It is therefore important to understand how “Category A” cases are categorized and the complexity of the “Category A” cases in comparison with other pending cases.

Background of the Rules of the Road Procedure

During and immediately following the 1992-1995 conflict, the BiH domestic legal system processed war crimes cases concurrently with the International Criminal Tribunal for the former Yugoslavia (ICTY). A lack of coordination in the handling of war crimes case files and concerns over the fairness of domestic trials tried at the entity level led to the so-called “Rome Agreement” in 1996.² This Agreement created an “independent oversight mechanism” which came to be known as the RoR.³ In this oversight capacity, the ICTY Office of the Prosecutor (OTP) performed a review function in relation to investigations and prosecutions undertaken by the BiH authorities.⁴

¹ The term war crimes for purposes of this report refers to crime of genocide, crimes against humanity and war crimes.

² *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005-2010* (Sarajevo: OSCE Mission to BiH, 2011), p. 12. There were also real concerns as to the impact of arbitrary arrests on the freedom of movement, and thus on the ability to hold free and fair elections in September 1996. See further, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles* (Sarajevo: OSCE Mission to BiH, 2005), p. 5.

³ The Rome Statement reflecting the work of the Joint Civilian Commission Sarajevo Compliance Conference (1996), available at <https://www.nato.int/ifor/general/d960218b.htm>. In the Agreed Measures the following provision was included: "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action".

⁴ *Delivering Justice Report*, *supra* note 2, p. 12.

In accordance with the RoR procedure, the relevant BiH authority had to submit each case to the OTP for review before arresting a suspect or issuing an indictment.⁵ Regardless of the OTP's mandate to review these cases, they always remained within the jurisdiction of the BiH authorities. The mandate of the OTP was solely to assess the investigations and prosecutions in order to prevent arbitrary arrests and unfair trials.⁶ By August 2004, in the context of its closing strategy, the ICTY transferred the mandate in relation to RoR cases to the BiH Prosecutor's Office (PO BiH), which continued to review the war crimes cases and categorize them according to the RoR procedure.⁷

“Category A” cases

In essence, the RoR assessed whether the evidence was “sufficient by international standards to provide reasonable grounds for the belief that [the person] may have committed the (specified) ... serious violation of international humanitarian law”.⁸ If this standard was met, the case was categorized as “Category A”. Any other categorization meant that a case was not viable for indictment at the time of review.⁹ The RoR procedure did not assess a case by the relative seriousness of the charges involved, for example, whether the case included genocide or crimes against humanity. This means that “Category A” includes cases of varying seriousness and complexity, but all with sufficient evidence to proceed with prosecution. “Category A” cases are also cases that the ICTY OTP itself did not intend to try. The Mission thus recognises the significant public interest in “Category A” cases, given that there was deemed (by the ICTY OTP) to be sufficient evidence to merit an indictment.

War crimes case processing prior to the adoption of the Strategy

The RoR faced some challenges in its implementation, as reported by the OSCE in 2005,¹⁰ including inefficient co-ordination between prosecutions at State and entity levels in terms of distribution of cases.¹¹ In 2007 it was concluded that, despite of the establishment of the war crimes departments of the Court of BiH and the BiH Prosecutor's Office in 2005, a significant backlog of cases of an unknown size and scope remained.¹² In 2007, this led to recognition of a need for a strategic approach to domestic war crimes processing.

⁵ Progress and Obstacles Report, *supra note 2*, p. 5.

⁶ Delivering Justice Report, *supra note 2*, p. 12.

⁷ *Ibid.*, p. 14. Progress and Obstacles Report, *supra note 2*, p. 5.

⁸ Progress and Obstacles Report, *supra note 2*, p. 5.

⁹ Of the other categories, which ranged from B to H, categories B and C were most significant in terms of number and nature. Category B indicated that the evidence was insufficient, and Category C indicated that the OTP could not determine the sufficiency of the evidence in a case, whereby the BiH authorities were instructed to gather specific evidence and then re-submit the case for re-categorisation. *Ibid.*

¹⁰ *Ibid.*, pp. 47-50.

¹¹ Delivering Justice Report, *supra note 2*, p. 14.

¹² *Ibid.*, p. 17.

The National Strategy for War Crimes Processing and its revision

During the development of the first National Strategy for War Crimes Processing in 2007, it was widely acknowledged¹³ that the large number of cases to be processed by the domestic authorities meant that some system of case prioritization had to be introduced. Moreover, with thousands of cases pending, it would have been impossible to try all cases before the Court of BiH alone. Those responsible for drafting the Strategy, including representatives of BiH's judiciary, therefore recognized that the less complex cases should be distributed among the entity/Brčko District courts. The Strategy established a set of "complexity criteria"¹⁴ which allowed the Court of BiH to assess the complexity and the need for transfer to a court at the entity/Brčko district level.

The Strategy's priority categories did not include "Category A" since this label did not imply a specific level of complexity or seriousness, as explained above. Under the Strategy, all "Category A" cases fell within the backlog to be processed by domestic authorities, along with many other cases which had not been assessed by the ICTY OTP pursuant to the RoR procedure. Therefore, the fact that the current Strategy does not explicitly provide a timeline for processing "Category A" cases does not mean that these cases are not being processed. On the contrary, as also noted above, out of the more than 800 individuals identified as implicated in "Category A" cases at the introduction of the Strategy, to date the PO BiH has brought proceedings in relation to more than 560 of them.

It also relevant that under the Strategy, in addition to the authority to transfer less complex cases to the entity/Brčko District judiciary, the Court of BiH can "take over" more complex cases from the entity/Brčko District level to ensure that they are tried at the state level.

The Strategy's Goals and Achievements

The adoption of the Strategy in December 2008¹⁵ was an important milestone in securing accountability for war crimes in BiH. Its implementation ensured that hundreds of cases have been tried in accordance with fair trial standards and with respect for victims' rights.

The Strategy set a number of ambitious goals. First and perhaps most ambitiously, the Strategy sought to ensure prosecution of the most complex war crimes cases within seven years (or by the end of 2015), and other war crimes cases within fifteen years

¹³ Delivering Justice Report, *supra note 2*, p. 14. In 2007, the Ministry of Justice of BiH established a working group to draft the Strategy pursuant to a request by the Office of the High Representative.

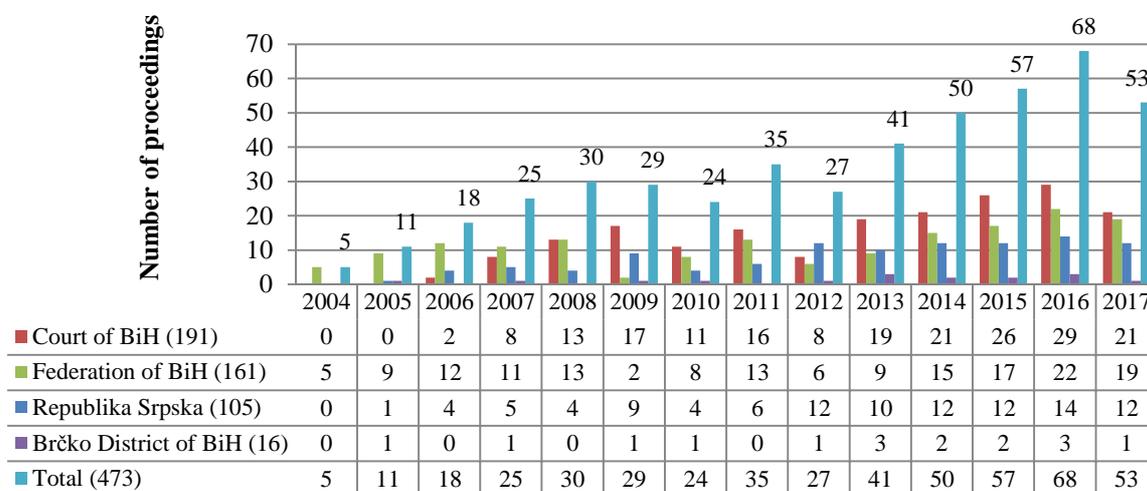
¹⁴ These criteria are found in Annex A of the Strategy and are grouped into three overarching categories: role of the perpetrator; gravity of the offence; and other circumstances including impact on the victim and/or the community. The Court of BiH is required to apply these criteria when deciding whether or not a case is suitable for transfer to the entity/Brčko District level or takeover therefrom.

¹⁵ Delivering Justice Report, *supra note 2*, p. 14.

(or by the end of 2023). Second, the Strategy offered the only feasible solution for handling the very large number of pending war crimes cases; distributing them between the state and entity/Brčko District levels. The Strategy also formalized the leading role of the Court of BiH and the PO BiH in assessing, distributing and processing cases.¹⁶ Finally, the Strategy sought “to resolve issues related to the application of substantive law, prosecution capacity around the country, and many other issues related to bolstering the effective and efficient processing of war crimes cases”.¹⁷ To oversee the Strategy’s implementation, in 2009 the Council of Ministers of BiH established the *Supervisory Body for Implementation of the Strategy* (Supervisory Body).¹⁸

As previously observed by the Mission, ten years into the Strategy’s implementation, its goals have been largely achieved.¹⁹ In part, this is thanks to significant European Union (EU) material support for the judicial institutions and funding of capacity building initiatives by a number of international organizations, including the Mission. As a result, in recent years the entity and Brčko District courts have demonstrated that they are fully equipped to handle less complex war crimes cases fairly, efficiently, and with respect for the rights of victims. Furthermore, the pace of case processing and the number of completed cases²⁰ has increased since the Strategy’s adoption, as seen in the chart below.

War Crimes Proceedings Completed (2004–2017)



¹⁶ Delivering Justice Report, *supra* note 2, pp. 18-19, 24-25.

¹⁷ *Ibid.* Državna strategija za rad na predmetima ratnih zločina (2008), pp. 4-5. Available at: http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf.

¹⁸ Council of Ministers of BiH, *Decision on Establishment of the Supervisory Body for Implementation of the National War Crimes Processing Strategy*, Official Gazette BiH no. 92/09.

¹⁹ *Submission of the OSCE Mission to Bosnia and Herzegovina to the Working Group for Amendments to the National War Crimes Processing Strategy in Bosnia and Herzegovina*, (Sarajevo, OSCE Mission to BiH 2017).

²⁰ The 23 cases (involving 40 defendants) that were extraordinarily reopened after a final and binding verdict are counted only once.

Challenges in the Strategy's Implementation and Related Revisions

In spite of the Strategy's achievements, its implementation has also faced many challenges.²¹ The most obvious shortcoming has been the failure of the PO BiH and Court of BiH to try all of the most complex cases by the end of 2015. Others are explained in more detail below.

In April 2017, the BiH Council of Ministers (CoM) established a Working Group to address the Strategy's implementation issues and to prepare revisions to the Strategy.²² In May 2018, the Working Group submitted its proposal for revisions to the CoM, which planned to discuss the proposal on 3 July 2018. However, during the session, the item was removed from the agenda and it has yet to be re-scheduled for CoM consideration.

Since 2004, the Mission has been monitoring and analyzing war crimes proceedings in BiH. On the basis of its analyses, the Mission had concluded that the proposed revision of the Strategy (the Revised Strategy) will advance war crimes processing and thus also contribute to advancing justice for war crimes victims. Amongst others, the Revised Strategy addresses:

- new timelines for the completion of all war crimes cases;
- complexity criteria and the distribution of cases;
- harmonization of case law;
- assessment of human and material resource needs;
- regional co-operation;
- enhanced supervision over the implementation of the Strategy by the Supervisory Body.²³

A number of the existing challenges and how they would be addressed by the Revised Strategy are described below.²⁴

²¹ *Processing of War Crimes at the State Level in Bosnia and Herzegovina*, J. Korner CMG QC, OSCE Mission to BiH, June 2017. Retrieved from: <https://www.osce.org/bih/247221?download=true> (Accessed on 23 August 2018).

²² Council of Ministers of BiH, *Decision on the Appointment of the Working Group for Preparation of Amendments to the National War Crimes Processing Strategy*, 12 April 2017, Official Gazette of BiH 44/17. Members of the Working Group included representatives from the Ministry of Justice of BiH, entity Ministries of Justice, Judicial Commission of Brčko District, Ministry of Security of BiH, HJPC, and the Supervisory Body. Representatives from the Court of BiH, PO BiH, Associations of Judges and Prosecutors were invited to provide expert support, while the Mission and ICTY also provided advisory support to the work of the Working Group.

²³ *Prijedlog revidirane Državne strategije za rad na predmetima ratnih zločina*, May 2018 (Sarajevo, Ministry of Justice BiH 2018), pp. 4-5.

²⁴ Other factors include, but are not limited to: withholding by the European Union of Instrument for Pre-Accession funding subsequent to the Council of Ministers not adopting the 2014-2018 Justice Sector Reform Strategy; and the establishment of the District Court and District Prosecutor's Office in Prijedor in 2016.

Defining timelines

As the Mission has previously observed, the timelines set out in the Strategy's Action Plan did not adequately take into account the magnitude and scope of activities that needed to be implemented for such deadlines to be achieved.²⁵ The original goal to prosecute the most complex and top priority war crimes cases by the end of 2015 proved to be unattainable. The Revised Strategy provides for the prosecution of the most complex and top priority war crimes cases before the Court of BiH and PO BiH, and other cases before entity/Brčko District courts by the end of 2023. Objectively the revised deadline is more realistic, given that all relevant judicial institutions are now sufficiently effective in case processing and will continue to benefit from specifically targeted material support and capacity building.

Complexity criteria and distribution of cases

Distribution of cases between the state level and entity/Brčko District level was a key component of the Strategy, recognizing that the State level judiciary could not bear the burden of processing of all war crimes cases. According to information available to the Mission, between 2009 and 2017, pursuant to the Strategy's mechanism for transferring cases, 480 less complex cases were transferred from the state level to entity/Brčko District level, with a peak in 2012.

However, the reduction in the overall backlog of complex cases through transfers and completion of proceedings was offset by the Court of BiH taking over 262 cases from the entity/Brčko District level during the same period.

Part of the difficulty with the transfer and takeover mechanisms has been inconsistent interpretation of the Strategy's "complexity criteria". This was also identified in the 2016 Mission Report *Processing War Crimes at the State Level in Bosnia and Herzegovina* ("the Korner Report").²⁶ For this reason, the Revised Strategy includes redefined complexity criteria based on a two-fold gravity assessment with respect to the crime and role of the perpetrator. This will minimize the chance of having less complex cases being processed at the State level while ensuring that the most complex cases – in particular those involving allegations of genocide, crimes against humanity, command responsibility or joint criminal enterprise – *will* be processed at the State level.

²⁵ Delivering Justice Report, *supra* note 2, p. 30. For example, according to the original Action Plan, the PO BiH was tasked to prepare a comprehensive report of the caseload within 30 days after the adoption of the Strategy. Given the enormity of this task, which required close co-operation between PO BiH and entity/Brčko District Prosecutor's Offices, it took over 15 months to finalize this activity, resulting in first comprehensive overview being available only in April 2010.

²⁶ Processing of War Crimes at the State Level in Bosnia and Herzegovina, *supra* note 21.

Application of the law

The Mission recently observed that international and domestic laws are increasingly applied consistently and fairly in war crimes cases across all jurisdictions of BiH.²⁷ However, judicial practice on a few important points remains inconsistent. These issues include, among others, the questionable interpretation of the double jeopardy principle, the differing application of certain modes of responsibility under the Criminal Code of SFRY, and significant variation in sentencing practices. Through the setting up of a plan for improved utilization of existing mechanisms for harmonization of judicial practice, the Revised Strategy reaffirms the Strategy's goal of ensuring legal certainty and equality of all citizens before the law.

Accountability of judges and prosecutors

Before the 2015 deadline, instead of working on the most complex war crimes cases, the PO BiH focused at least some of its resources on investigating and charging less complex cases and actually added to the backlog by unnecessarily splitting some cases. As described in the Korner Report, this problem was largely due to the management style and work of the former Chief Prosecutor (2013-2016) and a focus on quantitative, rather than qualitative result indicators.²⁸ This approach significantly contributed to the failure to meet the 7-year deadline, as the PO BiH focused on cases which, due to their level of complexity, should have been processed at the entity/Brčko District level. By strengthening the role of the Supervisory Body, the Revised Strategy introduces a safeguard against similar problems in the future. Under the Revised Strategy, the Supervisory Body would:

- request regular periodic reports from all actors;
- give necessary instructions on implementation of the Strategy;
- introduce accountability for judges and prosecutors in case of failure to implement strategic goals and measures;
- issue binding instructions for prosecutors regarding the Strategy's implementation.

The Revised Strategy also provides for strengthening the legislative framework for victims who have testified under protective measures in criminal proceedings but were instructed to pursue compensation claims in civil proceedings. Specifically, the changes will allow such individuals to pursue this compensation claim in civil proceedings while retaining their protective measures.²⁹ This would allow vulnerable witnesses to seek compensation from perpetrators of war crimes in cases where

²⁷ *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Obstacles in BiH 2014-2016* (Sarajevo, OSCE Mission to BiH 2017), p. 18 *et seq.*; Delivering Justice Report, *supra* note 2, p. 26.

²⁸ Processing of War Crimes at the State Level in Bosnia and Herzegovina, *supra* note 21, pp. 15-22.

²⁹ The Action Plan of the proposed Revised Strategy envisages requisite amendment of the civil proceedings legislation.

compensation claims are not decided by the criminal court, without increasing their risk of endangerment.

Conclusions and Recommendations

In spite of the significant inherent challenges in processing many hundreds of remaining war crimes cases in BiH, the Mission concludes that the Strategy has generally been successful in the fight against impunity. It has provided a solid foundation for the drafting of a Revised Strategy to close the chapter of war crimes processing by 2023. Furthermore, the factors that have negatively impacted on the Strategy's implementation over the past ten years have been recognized and addressed in the Revised Strategy.

There is no doubt that the BiH judiciary is internationally recognized for its achievements in the domestic case processing of mass atrocity crimes. Having a vast number of war crimes cases thrust upon it during and immediately after the 1992-1995 conflict, the BiH judiciary has succeeded in completing almost 500 of these cases to date, generally in line with international law and standards and with respect for the rights of all parties. The majority of the encountered challenges have been overcome and the adoption of the Revised Strategy will help to meet the remaining challenges. Adoption of the Revised Strategy will also reaffirm the commitment of all relevant stakeholders to fairly and efficiently complete all remaining case and close the impunity gap.

The Mission underlines that:

- The Revised Strategy, just like the original Strategy, applies to all war crimes cases yet to be processed. This includes cases classified pursuant to the RoR procedure as "Category A" cases as well as cases identified after the adoption of the Strategy.
- The improved case distribution mechanism in the revised Strategy will ensure that the PO BiH will focus on complex cases and that other cases can be tried without delay at the entity/Brčko district level in order to meet the 2023 deadline.
- By strengthening the oversight function of the Supervisory Body, the Revised Strategy will ensure that further delays in delivering justice to war crimes victims can be addressed more quickly and effectively.

Based on the foregoing, the Mission recommends the following:

To the Council of Ministers of BiH:

1. To adopt, without any further delay, the Revised National War Crimes Processing Strategy.
2. To appoint, without delay, the new Supervisory Body for Implementation of the Strategy, in line with the Revised Strategy.

To the Supervisory Body for Implementation of the Strategy:

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.
4. To issue clear policy directions in problematic areas, including assigning responsibilities to accountable parties with deadlines for their execution.
5. To report to the High Judicial and Prosecutorial Council situations in which the judicial authorities fail to fulfil requirements stemming from the Strategy.
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.

To the BiH High Judicial and Prosecutorial Council:

7. To define a system of liability of judicial actors in case of failure to fulfil requirements stemming from the Strategy.

To BiH Prosecutor's Office:

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.
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.

To all state level actors, including the Court of BiH:

10. To consistently apply the complexity criteria to all pending war crimes cases.