



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



Delivering

**JUSTICE**

in Bosnia and Herzegovina

An Overview of War Crimes Processing  
from 2005 to 2010



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Co-operation in Europe  
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# **Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010**

May 2011

Published by OSCE Mission to Bosnia and Herzegovina  
Fra Anđela Zvizdovića 1  
71 000 Sarajevo  
Bosnia and Herzegovina  
[www.oscebih.org](http://www.oscebih.org)

Design & Layout:  
PoetaPista | [www.poetapista.com](http://www.poetapista.com)

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ISBN 978-92-9234-010-0

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# Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010

## Executive Summary

This report documents findings from trials of individuals for genocide, crimes against humanity, and war crimes monitored by the OSCE Mission to Bosnia and Herzegovina at both the state and entity level between 2005 and 2010. It considers to what extent the framework for war crimes processing has served to bolster the delivery of justice in war crimes cases and the overall efficiency of the criminal justice system in Bosnia and Herzegovina (BiH). The report examines the progress of implementation of the National Strategy for War Crimes Processing, some two years after its adoption.

During the past five years, the domestic criminal justice system of BiH has completed over 200 cases related to serious violations of international humanitarian law during the 1992-1995 conflict. This demonstrates that the authorities of BiH have not only made a significant contribution to delivering justice for those crimes, but are seriously committed to doing so.

The establishment of both the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina at the state level, which became fully operational in 2005, was an important milestone for the country's battle against impunity. Overall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings. The development and adoption of the National Strategy for War Crimes Processing is a notable effort to address systemic problems hampering effective and efficient processing of war crimes cases.

Courts and prosecutor's offices in the Federation of BiH, the Republika Srpska, and Brčko District have also contributed significantly to the investigation, prosecution, and adjudication of less sensitive and complex war crimes cases. The findings contained in this report confirm that certain courts and prosecutor's offices in both of the entities (Banja Luka, Bihać, Mostar, Novi Travnik, Sarajevo, Tuzla, Trebinje, and Zenica) and Brčko District demonstrated ample capacity, willingness, and professionalism to fairly and efficiently process war crimes cases, free of any indication of ethnic bias, although problems remain with some courts and prosecutor's offices.

Notwithstanding these positive steps towards delivering justice, the report identifies numerous problems preventing the effective and efficient resolution of the outstanding backlog of war crimes cases in the BiH criminal justice system. Chief among these problems are the challenges presented by the complex and fragmented legal framework applicable to war crimes proceedings in BiH. In this regard, the

OSCE Mission to Bosnia and Herzegovina is seriously concerned that the progress regarding implementation of the National Strategy for War Crimes Processing is insufficient to meet the goal of resolving the top priority war crimes cases in the next five years. Implementation of the National Strategy was among the key objectives set by the Peace Implementation Council for the closure of the Office of the High Representative. Therefore, this report closely examines the core tasks connected to the National Strategy, namely the process of assessing the war crimes caseload and allocating cases to the Court and Prosecutor's Office of BiH or cantonal/district institutions according to their level of gravity and complexity. A number of problematic issues with regard to the caseload mapping process, the mechanisms for case allocation, and the application of the criteria to determine allocation are analysed and discussed in depth.

Research conducted by the OSCE Mission shows that one of the main consequences of the problems with the allocation of the war crimes caseload is that the BiH Prosecutor's Office and the Court of BiH have not effectively realized the objective indicated in the National Strategy that requires them to focus on the trial of the "most responsible perpetrators" as a priority. A key element for the successful implementation of the National Strategy is therefore the transfer of less complex cases to the entity level, which will allow the BiH Prosecutor's Office and the Court of BiH to concentrate their resources on more complex cases.

Another core problem addressed in the report is the lack of political support for war crimes processing from certain quarters, evidenced by campaigns of political attack on judicial institutions, interference in proceedings, attempts to undermine existing judicial and legal reforms, and denial of war crimes established to have occurred through binding legal decisions. While the Court of BiH and BiH Prosecutor's Office weathered and resisted these attacks and interference, their occurrence raises a broader concern about the long-term sustainability and support for the vital rule of law reforms BiH has achieved in the past several years.

In light of the report's findings, the OSCE Mission reiterates previous calls for discussion about endowing the state level institutions with constitutional status, as well as considering the creation of a supreme court that could address the problem of non-harmonized application of law in criminal cases. Discussion about these reforms should be framed in light of the need to ensure effective processing of war crimes cases, as well as ensuring the sustainability of the judicial reforms achieved in BiH to date.

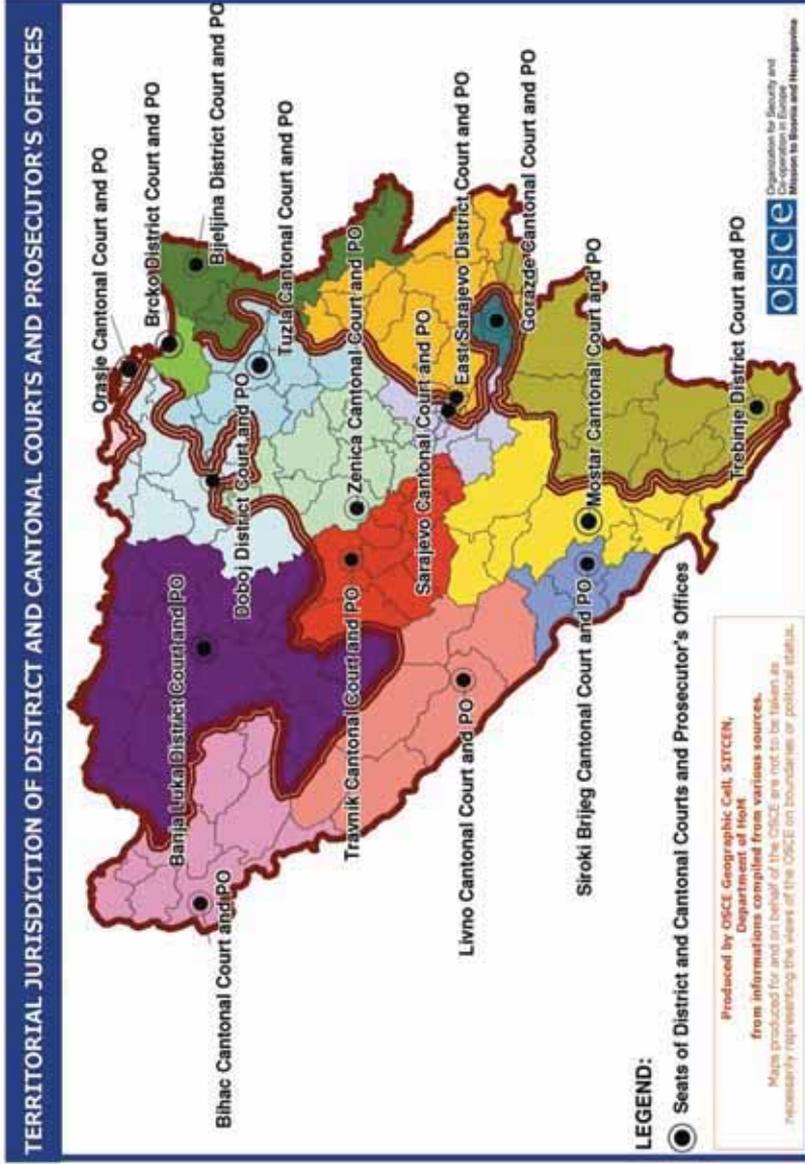
Public confidence in war crimes processing is fragile and widespread distrust in the institutions is still a feature in BiH society, according to public surveys carried out on behalf of the OSCE Mission to Bosnia and Herzegovina and detailed in the present report. This is despite the important judicial reforms and absence of evidence of bias in the conduct of proceedings, giving rise to concern that negative conditions in the

public domain make it difficult for the judiciary to fend off deliberate attempts to misinform the public and to conduct adequate outreach.

The report also details how politicization and stalemate concerning core aspects of regional co-operation in war crimes cases among BiH, Serbia, Croatia, and Montenegro also hampered progress in resolving these cases. Norms prohibiting the extradition of citizens in BiH and the neighbouring states represent a serious challenge not only in relation to war crimes, but for the overall performance and credibility of the judicial systems in the region. Certain cases with regional implications that gained notoriety, namely the cases of *Ilija Jurišić* and *Ejup Ganić*, were seen to significantly damage inter-State relations and co-operation in war crimes matters.

Although, after years of ongoing reforms, the BiH judicial system possesses sufficient guarantees and checks to prevent or correct serious miscarriages of justice in most foreseeable instances, the OSCE Mission to Bosnia and Herzegovina has also identified concerns with regard to the application of domestic criminal law and adherence to fair trial standards at both the state and entity level. The report gives insights into many important issues in these proceedings, including the use of plea bargaining in war crimes cases, interpretation of complex legal concepts such as genocide and command responsibility, and respect for fair trial rights of the accused. Unreasonable length of proceedings and a high rate of revocation of verdicts on appeal indicate particular problems in the management and adjudication of trials.

However, the report notes that the causes of violations of fair trials rights or criminal procedure today can rarely be traced back to factors related to the post-war environment, as was previously the case (i.e. ethnic bias). Rather, the violations encountered today are often indistinguishable from those encountered in other functioning legal systems. Exceptions to this general situation tend to be traceable to the complex and fragmented nature of BiH's judicial system. Thus, this report sets forth a series of recommendations, mainly addressed to the governmental and judicial authorities of BiH, to address some of these core problems and advance robust implementation of the National Strategy for War Crimes Processing. This will ensure that BiH continues to rise to the challenge of finishing the process begun by the International Criminal Tribunal for the former Yugoslavia to deliver justice, as well as to meeting the goal of bolstering the rule of law in BiH.



# 1 Introduction

Bosnia and Herzegovina (BiH) has perhaps the most layered and complex arrangement for prosecuting perpetrators of grave violations of international humanitarian law in history. The *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) created by the United Nations in 1993 exercises primacy over genocide, crimes against humanity, and war crimes cases<sup>1</sup> and has dealt with many of the leaders and planners of atrocities committed during the 1992-1995 conflict. However, since 2005, conscious of the need to conclude its work, the ICTY has referred cases regarding middle and lower-level perpetrators to the countries of the region for completion. Bosnia and Herzegovina has taken up this task with diligence; trying ten indictees referred by the ICTY and taking over the investigation of dozens more case files from the Office of the Prosecutor.<sup>2</sup> Yet these cases represent only a fraction of the caseload concerning war-time criminality that the BiH criminal justice system is confronted with. Given the scope of victimization during the conflict, this fact is unsurprising. As the ICTY prepares to wind up its final cases, closing the impunity gap is a task that falls chiefly to national jurisdictions in the region of the former Yugoslavia. Owing to the fact that many of the crimes were committed on the territory of BiH, it is its domestic legal system that now shoulders the main responsibility for dealing with the legacy of war crimes.

Five years have passed since the Mission to Bosnia and Herzegovina of the Organization for Security and Co-operation in Europe (OSCE Mission) first published a report drawing attention to the number, nature, and importance of war crimes proceedings before the domestic courts of BiH.<sup>3</sup> In the intervening period, numerous OSCE Mission reports have documented particular concerns related to war crimes processing, or findings from the monitoring of specific cases.<sup>4</sup> However, important changes have also taken place in the institutional, legal, and policy framework applicable to war crimes proceedings. Most notably, the National

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1 Hereinafter, this Report will use the term “war crimes” to refer to all international crimes committed during the 1992-1995 conflict in BiH, namely genocide, crimes against humanity, and violations of the laws and customs of war.

2 At the request of the ICTY Prosecutor and in line with its mandate, the OSCE Mission agreed to monitor and report on the so-called Rule 11bis cases. To date, the OSCE Mission has submitted to the ICTY Prosecutor’s Office approximately 60 regular reports on these cases, which are compiled on a quarterly basis (available at [http://www.oscebih.org/human\\_rights/monitoring.asp?d=1](http://www.oscebih.org/human_rights/monitoring.asp?d=1)); also OSCE Mission Report on *The Processing of ICTY Rule 11bis cases in Bosnia & Herzegovina*, January 2010 (released June 2010), (available at <http://www.oscebih.org/documents/16877-eng.pdf>).

3 OSCE Mission Report on *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles*, March 2005 (available at <http://www.oscebih.org/documents/1407-eng.pdf>).

4 See OSCE Mission Reports on 11bis Cases, *supra* note 2. See also *Witness Protection and Support in BiH War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing*, released in May 2010 (available at <http://www.oscebih.org/documents/16563-eng.pdf>); OSCE Mission Spot Report on *Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*, December 2009 (available at <http://www.oscebih.org/documents/15868-eng.pdf>); *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, August 2008 (available at <http://www.oscebih.org/documents/12615-eng.pdf>).

Strategy for War Crimes Processing was developed and its implementation has been ongoing since its adoption in December 2008. It is therefore time to once again take stock of BiH's efforts to provide accountability for war crimes under its jurisdiction. The present report provides a detailed analysis of the structural issues affecting war crimes processing and the performance of the domestic criminal justice system in the past five years, as well as efforts to implement the National Strategy for War Crimes Processing in its first two years. The objective of this report is to provide an appraisal of the overall progress encountered to date and the remaining obstacles to the delivery of effective and efficient justice for war crimes.

## 1.1 Background

Although the ICTY has primacy over war crimes, its jurisdiction is *concurrent* rather than *exclusive*. This means that war crimes trials took place in BiH both during the war and in its aftermath. This gave rise to certain problems. First, there was scant coordination concerning the handling of war crimes case files, both among local courts and with the ICTY. Second, local trials were widely perceived as, at best, not meeting minimum fair trial standards and, at worst, being mere tools of political and ethnic revenge. Both of these factors prompted the 1996 Rome Agreement, which created the *Rules of the Road* procedure, i.e. a mechanism for the ICTY to review prosecutions undertaken by the authorities in BiH. The process was aimed at preventing arbitrary arrests and unfair trials by allowing the ICTY to have oversight of case files opened by prosecutors in the two entities and in Brčko District. At that time, jurisdiction over war crimes was divided on the basis of the principle of territorial jurisdiction among the ten cantonal courts in the Federation of BiH (FBiH) and the five district courts in the Republika Srpska (RS), as well as the Basic Court of Brčko District. Each entity and Brčko District adopted their own criminal code and criminal procedure code.

War crimes trials conducted at the entity level under the *Rules of the Road* procedure produced mixed results. In the FBiH, efforts to deliver justice in a fair and effective way increased noticeably after 2002. However, there was little corresponding activity in the RS. The above-mentioned 2005 OSCE Mission Report gives a full account and assessment of the proceedings conducted before 2005, concluding that, despite some progress, steps taken by the BiH institutions to process war crimes cases were overall insufficient.

In the meantime, in 2002 the ICTY suggested that transfer of some of its caseload to national jurisdictions could present one way in which to complete its work.<sup>5</sup> At the same time, it expressed doubt about the ability of the countries of the former Yugoslavia to fairly and efficiently tackle such cases, given the existence of

5 Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, UN Security Council S/2002/678, June 2002 (available at <http://www.undemocracy.com/S-2002-678.pdf>).

widespread concerns about the safety of witnesses, judges, and prosecutors as well as continued allegations of ethnic bias and overall weak capacity in the legal system.<sup>6</sup> Meanwhile, an ambitious rule of law reform process was underway in BiH.<sup>7</sup> In 2000, the Court of Bosnia and Herzegovina (Court of BiH) and Prosecutor's Office of Bosnia and Herzegovina (BiH Prosecutor's Office) were established as the first institutions at the state level with competence throughout the whole territory of BiH over certain types of criminal offence. In 2003, their competence in criminal matters extended to organized crime, economic crimes, and corruption.<sup>8</sup> That same year, the ICTY and the Office of the High Representative (OHR) agreed on a plan to establish a "war crimes chamber" within the Court of BiH as an "essential part of the establishment of the rule of law and fundamental to the reconciliation process, creating necessary conditions to secure a lasting peace in BiH."<sup>9</sup> 2003 also saw the adoption of the Criminal Code and the Criminal Procedure Code of BiH. These laws define the crimes under the competence of the Court of BiH and the procedure to be applied by the Court of BiH. Among other crimes, the BiH Criminal Code includes genocide, crimes against humanity, and war crimes.<sup>10</sup> These categories of offence were accordingly removed from the entity codes, thereby transferring jurisdiction over these crimes from the entity level to the state level.

In order to process these crimes, Section I for War Crimes within the Court of BiH and the Special Department for War Crimes within the BiH Prosecutor's Office were eventually established as integral parts of those respective institutions, becoming fully operational in 2005.<sup>11</sup> They are among the strongest institutions in the region with jurisdiction and capacity to deal with war crimes cases. Moreover, the Court of BiH and BiH Prosecutor's Office are perhaps the most sophisticated model of hybrid criminal justice to emerge to date, with an emphasis on their permanent role in the domestic criminal justice and including a plan to phase out international elements over time. Thus, the Court and Prosecutor's Office apply domestic criminal law and procedure. International judges and prosecutors will serve in these institutions only for an initial period followed by a transition to a fully domestic complement of staff. By the end of 2009, international judiciary serving in leadership roles had already given way to national counterparts as presiding judges, head of the Special

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6 *Ibid.*

7 The sweeping judicial and legal reforms included the creation of a unified body for oversight of the judiciary (the High Judicial and Prosecutorial Council of BiH), the vetting and reappointment process of judges and prosecutors, and the adoption of new criminal codes and criminal procedure codes.

8 Organized crime, economic crime and corruption are dealt with by Section II of the Court of BiH and the Special Department of the BiH Prosecutor's Office dedicated to those crimes. See <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=5&jezik=e>.

9 ICTY, *OHR-ICTY Working Group on development of BiH capacity for war crimes trial successfully completed*, press release, OHR/P.I.S./731e, 21 February 2003.

10 See Articles 171-173, Criminal Code of BiH 2003.

11 Although the term "War Crimes Chamber" is often used to describe the institution(s) handling war crimes cases at the state level in BiH, the correct terms are, in fact, the Court of BiH and BiH Prosecutor's Office. This report therefore uses the latter terms.

Department for War Crimes, and registrars of the respective institutions. As this report will show, the creation of these two institutions also resulted in a complex framework for allocating cases between the state and the entity level jurisdictions.

By August 2004, the ICTY had turned over responsibility for the *Rules of the Road* process to the BiH Prosecutor's Office. In December 2004, the *Book of Rules on the Review of War Crimes Cases* was introduced, which provided a mechanism for the BiH Prosecutor's Office to review war crimes cases initiated at the entity level with a view to retaining the very sensitive ones. However, co-ordination between prosecutions at the state and entity level under this arrangement proved to be inefficient.<sup>12</sup> Therefore, a need to devise a more effective way of dealing with the huge war crimes caseload and to ensure that the Court of BiH and BiH Prosecutor's Office play a central co-ordinating role in how war crimes cases are processed in the country was identified. This brought, at the end of 2008, the adoption of a National Strategy for War Crimes Processing (hereinafter: National Strategy).<sup>13</sup> The National Strategy also seeks 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.

The present report considers to what extent the evolution of the framework for war crimes processing has served to bolster the delivery of justice in war crimes cases and the overall efficiency of the criminal justice system in BiH, and identifies what issues remain to be addressed. Overall, this report documents how war crimes processing in BiH continues to face the following hurdles:

- low public confidence in the judiciary;
- political opposition from certain quarters to an integrated and cohesive judicial system able to tackle serious crime;
- a fragmented legal and institutional framework applicable to war crimes cases;
- poor investment in human and technical resources;
- lack of availability of suspects, physical evidence, and witnesses willing to testify;
- a caseload of unknown size and scope, scattered between prosecutor's offices around the country.

The OSCE Mission is deeply concerned that these challenges result in continued denial of justice to victims, which, in turn, hampers post-Dayton state-building efforts. However, this report discusses not only the effects these obstacles have on the quality of justice delivered to citizens of BiH, but also highlights the

12 This problem also generally speaking applies to co-ordination between the state level and Brčko District.

13 National Strategy for War Crimes Processing, adopted by the BiH Council of Ministers on 29 December 2008; in local language, *Državna Strategija za Rad na Predmetima Ratnih Zlocina* (available at <http://www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf>).

considerable achievements of the BiH judiciary – most notably the Court of BiH and BiH Prosecutor’s Office and certain noteworthy cantonal and district courts and prosecutor’s offices – in resolving over 200 cases to date.

## 1.2 Scope of report and methodology

This report deals solely with issues related to the **processing of war crimes cases in the criminal justice system of BiH**. Other important but distinct matters connected to dealing with the legacy of war crimes, such as the search for missing persons or reparation to victims and their families, are not within the scope of this report.<sup>14</sup> The report encompasses the period from March 2005, when the Court of BiH and BiH Prosecutor’s Office actively began to exercise jurisdiction over war crimes cases, until September 2010.

The findings contained in this report are based on observation of an extensive number of criminal hearings in the context of the war crimes accountability pillar of the **OSCE Mission justice sector monitoring programme**. All war crimes proceedings taking place before cantonal or districts courts are monitored from the time that the indictment is raised until the sentencing or appeal, while a majority, but not all, war crimes cases before the Court of BiH are also monitored (100 cases at the Court of BiH and 116 cases before entity level courts). Between 2005 and 2010, OSCE Mission has monitored or obtained information about 211 war crime cases (62 group cases involving 210 accused and 149 individual cases) that have been tried before the courts of BiH.<sup>15</sup> In addition, interviews and exchanges with members of the judiciary, legal practitioners, and other concerned actors conducted for the purpose of this report and during the regular course of OSCE Mission activities have been taken into consideration in the formulation of the findings and recommendations contained herein. In particular, a survey concerning the investigative stage of war crimes proceedings was conducted with prosecutors in selected locations between May and July 2010.<sup>16</sup>

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14 OSCE Mission Report on *Processing of ICTY Rule 11bis cases in Bosnia & Herzegovina* deals with the issue of injured party compensation claims in the context of criminal proceedings, at p. 20-22. *Supra* note 2.

15 As of 15 September 2010. See Fig. 1: *War crimes cases started (Indictments raised from January 2005 till September 2010*, and Fig. 2: *Accused brought to trial from January 2005 till September 2010* in Annex 1.

16 The survey was conducted with prosecutors from Dobož, Banja Luka, Bijeljina, and Trebinje in the RS, and from Bihać, Livno, Mostar, Sarajevo, Tuzla, and Zenica in the FBiH, as well as Brčko District. These locations were selected in light of the existence of open proceedings concerning war crimes and/or backlogs of open case files in war crimes matters in these jurisdictions. The survey contained comprehensive questions designed to explore issues related to the investigative stage. Similar surveys were conducted previously by the OSCE Mission, including for the OSCE Mission War Crimes Report 2005, *supra* note 3.

### 1.3 Structure of this report

This report proceeds as follows. Section 2 describes the development of BiH's first National Strategy for War Crimes Processing in 2008 in response to some of the core challenges encountered in administering fair and effective justice for the country's large caseload of war crimes. This section also assesses implementation of the National Strategy to date. Section 3 provides a detailed analysis of the jurisdictional set-up in BiH and critiques its inherent problems, particularly with regard to the allocation of war crimes cases between the state and entity level. This analysis illustrates the complexity of handling the large backlog of war crimes case files in a fragmented criminal justice system such as that of BiH. Section 4 gives an overview of the achievements and challenges experienced in cases before the Court of BiH since it became operational in March 2005. Section 5 provides a detailed analysis of findings concerning war crimes investigations and trials at the entity level during the same period. Sections 6 and 7 respectively discuss problematic aspects of regional co-operation in war crimes processing and political and public support for domestic efforts to combat impunity. Section 8 concludes by setting forth a series of recommendations addressed to both the state and entity level government authorities, members of the judiciary, and legal practitioners, aimed at ameliorating problems identified throughout the report.

## 2 Development and Implementation of the National Strategy for War Crimes Processing

This section describes the development and drafting of the National Strategy for War Crimes Processing, its main features, and examines progress and obstacles related to its implementation to date.

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

- The difficulties related to obtaining a thorough overview of the number and nature of war crimes case files located at courts and prosecutor's offices throughout BiH, including problems such as internal parallel investigations;
- Open questions about the application of criteria to determine which cases are the "most complex" and which are "less complex", indicating whether they should be processed at the state or entity level of the BiH criminal justice system;
- The status of implementation of other important pillars of the National Strategy, including assessing the capacities for investigation, prosecution, and adjudication of war crimes cases at the entity level, and ensuring the existence of an appropriate institutional framework for witness protection and support throughout BiH.

### 2.1 Background

Even following the establishment of the Court of BiH and BiH Prosecutor's Office in 2005, there continued to be a backlog of war crimes cases of both unknown size and scope, and an additional multitude of problems affecting the efficient and effective resolution of such cases. Thus, the need to develop a strategic approach to domestic war crimes processing in BiH was recognized in 2007. At the request of the Office of the High Representative (OHR), a Working Group was formed by the BiH Ministry of Justice in October 2007 to draft a strategy to deal with these issues.<sup>17</sup> The Working Group was chaired by the Chief Prosecutor of BiH.<sup>18</sup> The chief aim of the process was to bring together the leadership of the country's main justice institutions in the hope that they could agree upon solutions to some of the most urgent matters. Such matters included the allocation and prioritization of cases, application of substantive criminal law, protection and support of witnesses, and overall weak co-operation and co-ordination in war crimes processing both internally between jurisdictions in BiH and among the countries of the Former Socialist Federal Republic of Yugoslavia (SFRY) (see Section 6, *Regional Cooperation*).

17 The OHR is an *ad hoc* international institution responsible for overseeing implementation of civilian aspects of the accord ending the war in Bosnia and Herzegovina, and aims to facilitate the resolution of issues falling within that domain. See [www.ohr.int](http://www.ohr.int).

18 The Working Group on the National Strategy for War Crimes Processing was chaired by successive Chief Prosecutors of BiH; a new Chief Prosecutor was appointed shortly after the process began.

After an initial period of minimal progress, in February 2008 the Peace Implementation Council included the adoption of a strategy on war crimes among the five objectives that BiH must meet in order to allow “the transition from the OHR to the EUSR”, thus stepping up the EU’s involvement in BiH.<sup>19</sup> This had the effect of spurring the process forward, and by April 2008, regular drafting sessions were taking place. Deep discussion of the complex legal and institutional framework for war crimes processing in BiH was necessary for the identification of the myriad problems and negotiation of possible solutions. The Court of BiH and BiH Prosecutor’s Office were central to this process, as were the High Judicial and Prosecutorial Council of BiH (HJPC BiH), the Prosecutor’s Offices of the Republika Srpska, Federation of Bosnia and Herzegovina, Brčko District, and the BiH Ministry of Justice. During the drafting process, comprehensive drafts for discussion were contributed by both the President of the Court of BiH and the then Head of the Special Department for War Crimes/Deputy Chief Prosecutor of BiH. While it is certainly true that the process was continually assisted and monitored by the international community (including the OSCE Mission, OHR, European Union Special Representative, and United Nations Development Programme in BiH), the solutions proposed and agreed upon were very much the product of sustained efforts by the national institutions.

From the outset, it was agreed that **the strategy would tackle issues related to the criminal investigation, prosecution, and adjudication of war crimes cases**. Related important issues, such as the search for missing persons and the need for complimentary transitional justice mechanisms, were necessarily separated in order to focus on the considerable challenges concerning the legal and institutional framework for dealing with war crimes within the criminal justice system.<sup>20</sup> Therefore, one of the core issues to be decided upon in the strategy process was the question of whether to henceforth “centralize” all war crimes processing at the state level or, alternatively, whether to maintain the *status quo* which involved both the state and entity level processing war crimes cases under a co-ordinated regime.<sup>21</sup> The former solution would have ended the jurisdiction to process war crimes cases at the entity level. Such a step would have resulted in removing all possibility for review and return of some less sensitive or complex cases from the state level to BiH’s ten cantonal and five district jurisdictions (as well as Brčko District Basic Court) thus eliminating the many inefficiencies and pitfalls of the fragmented approach. The latter solution, on the other hand, foresaw **addressing the problems inherent in sharing the burden of war crimes processing between the state and entity level by imposing a regime of greater co-ordination** (led by the state level) and a number of changes designed to streamline the functioning

19 Communiqué of the Steering Board of the Peace Implementation Council, 20 February 2008 (available at [http://www.ohr.int/pic/default.asp?content\\_id=42667](http://www.ohr.int/pic/default.asp?content_id=42667)).

20 Drafting of a Transitional Justice Strategy for BiH is taking place from 2010 and 2012, under the leadership of an Expert Working Group mandated by the BiH Council of Ministers. See Council of Ministers, *Decision on Establishment of the Expert Working Group for Development of the Transitional Justice Strategy in BiH and the Action Plan for its Implementation* (21 January 2009).

21 See Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, *infra*.

of the system. Although contentious, in the final reckoning, the drafters unanimously opted for the latter approach, dubbed a “co-ordinated and centralized” one.<sup>22</sup> This was deemed to be the best solution towards achieving the overall stated **goal of dealing with the top priority cases within 7 years and all other cases within 15 years**. It must be noted that, while some of the debates concerning decisions about important aspects of the future of war crimes processing in BiH were heated, at no time were there indications of any underlying political motives at play.

Another difficult, and related, issue during the drafting phase was the **lack of harmonized application of substantive criminal law in war crimes cases**, which results in a situation of manifest **inequality before the law in war crimes cases tried before different courts in BiH**. In practice, this means that persons convicted of war crimes before different courts might receive widely divergent sentences. This problem, which is discussed in greater detail in Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, resulted from the legal interpretation preferred by entity level judges to the effect that, considering the clash between the 2003 Criminal Code with the SFRY Criminal Code in force at the time of the conflict, the most lenient law should be applied<sup>23</sup> – i.e. the SFRY Criminal Code, which prescribes lower mandatory maximum and minimum sanctions in war crimes cases than the new Criminal Code.<sup>24</sup> The drafters of the strategy considered a proposal to amend the Criminal Procedure Code to require that cases transferred from the state to the entity level be conducted according to the Criminal Code of BiH. However, there was no agreement concerning whether this solution constituted interference with the discretion of judges to interpret the law. It was thought that there was a considerable risk that imposing mandatory application of the Criminal Code of BiH in war crimes cases through legislation would not be accepted by members of the judiciary as a legitimate approach. As a compromise, the text of an amendment detailing this solution (together with other draft amendments concerning the transfer and allocation of cases) was transmitted, together with the finalized strategic document, to the BiH Ministry of Justice, which was tasked as the responsible institution for establishing a working group to propose the legal amendments recommended by the strategy process. Ultimately, the proposal was

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22 See National Strategy, Objectives and Anticipated Results, *supra* note 13.

23 The principle that the most lenient law (i.e. the law that is most favourable to the defendant) should be applied is considered to be an inherent component of the rule of law. See *Scoppola v. Italy No.2*, ECtHR No. 10249/03, (17 September 2009) para.105-108; 108 *et seq.* This principle is entrenched in Article 4(2) of the BiH Criminal Code.

24 The 2003 BiH Criminal Code is applied by the Court of BiH; an approach which has been affirmed by the BiH Constitutional Court in the case of *Maktouf* (BiH Constitutional Court, verdict no. AP- 1785/06 in the case of Abduladhim Maktouf, 30 March 2007). The minimum sentences prescribed by the 2003 BiH Criminal Code for genocide, crimes against humanity, and war crimes is 10 years' imprisonment, while the maximum sentence is 45 years' imprisonment. The SFRY Criminal Code prescribes a minimum sentence of 5 years' imprisonment and a maximum sentence of 15 years' imprisonment or death, which could be commuted to 20 years' imprisonment. With the adoption of the Constitution of BiH in December 1995, the death penalty could no longer be imposed, for it would be in violation of Protocol No. 6 to the European Convention on Human Rights (ECHR); as a result, the highest sentence applicable under that code is 20 years.

rejected.<sup>25</sup> Two other partial solutions to this problem were identified and included in the strategy: First, amendments to the Law on the Court of BiH and laws on courts at the entity level would allow appellate level judges from all jurisdictions in BiH to convene jointly and agree on uniform interpretations of law. Second, the Court of BiH could issue a “binding” instruction on the applicable law, although it was not made clear how this instruction would become binding on entity courts given the non-hierarchical relationship of the Court of BiH to other courts in the country. These solutions do not wholly resolve the problem of non-harmonized application of law because the issue remains at the discretion of judges. To date, neither of these solutions have been fully implemented.

With the two central issues of the strategy process somewhat resolved, a series of strategic measures concerning other matters were, by contrast, easily and quickly agreed upon and adopted by the deadline imposed by the OHR. The resulting document – the National Strategy<sup>26</sup> – was adopted by the BiH Council of Ministers on 29 December 2008 and sets forth a comprehensive approach to achieving this set-up and to tackling a number of other critical issues. Respective chapters of the National Strategy deal with effective case management, enhancing capacities in courts and prosecutor’s offices for processing war crimes cases (particularly at the entity level), strengthening regional co-operation, providing adequate witness protection and support services, and implementing a programme-based system of fiscal planning for war crimes processing.<sup>27</sup> Each of these topics are dealt with in detail below.

## 2.2 Overview and general assessment of implementation

Adoption of the National Strategy was an important milestone for BiH and for the ongoing efforts to bring about accountability for war crimes. **Implementation of its provisions, however, is an even more important task and one that has proved, in the nearly two years since its adoption, to be complex, fraught with difficulty, and slow.** This situation, combined with the uncertainty described above during the drafting phase about the future involvement of the entity level in resolving war crimes cases, resulted in an observable downward trend in the rate of prosecutions at the entity level since 2008.<sup>28</sup> An important proviso contained in the National Strategy states that courts and prosecutor’s offices around the country are mandated to “continue their work on war crimes cases without any delay and in

25 This was decided at a meeting of the body tasked by the BiH Ministry of Justice – the Criminal Code Implementation Assessment Team (CCIAT) – on 21 January 2009.

26 National Strategy, *supra* note 13.

27 This will ensure that there is separate budgeting and accounting for resources needed for war crimes cases. In turn, this should allow for planning for the future and investment in capacities for war crimes processing over time.

28 See Section 5, *War Crimes Cases at the Entity Level, infra*.

accordance with the existing laws.”<sup>29</sup> Owing to the fact that the law clearly requires courts and prosecutor’s offices to continue processing war crimes cases, along with prudent reminders from the HJPC BiH to the judiciary about the National Strategy’s provision, the caseload has not entirely ground to a halt despite less than robust implementation of the National Strategy. This matter is dealt with further in Section 5, *War Crimes Cases at the Entity Level*.

## 2.2.1 Caseload mapping and management

At the outset, it must be noted that the Working Group charged with drafting the National Strategy did not manage to achieve their goal of gaining a complete overview of all war crimes cases (including the status of cases, procedural history, legal qualification, degree of complexity, etc.). This task was simply too large to complete during the drafting phase. Yet, completion of **the caseload mapping exercise remains an essential step to understanding the caseload both in quantitative and qualitative terms**, and is thus a prerequisite to making decisions about policies concerning the allocation, prioritization, and selection of cases for prosecution.<sup>30</sup> While annexes to the National Strategy contain a large amount of statistical data gathered during the drafting process concerning the types of case files held at all levels, it soon became evident that the data was incomplete and insufficiently clear to provide a basis for immediately distributing the caseload. Thus, the first task of the Supervisory Body appointed by the BiH Council of Ministers to oversee implementation of the National Strategy was to request **regular reporting from courts and prosecutor’s offices regarding their caseloads**. This was to be co-ordinated in large part by the BiH Prosecutor’s Office, as the majority of reporting concerns case files at the investigative stage.<sup>31</sup> Throughout 2009 and 2010, this reporting process was ongoing. By April 2010, the BiH Prosecutor’s Office was able to report the existence of an **approximate 1381 war crimes case files pertaining to some 8249 suspects distributed among the 17 jurisdictions dealing with war**

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29 National Strategy (English Version), at p. 5 *supra* note 13, (English version available at [http://www.adh-geneva.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf)).

30 ‘Allocation’ is understood as the process of deciding whether to process the case at the state or entity level, and, if at the entity level, under which jurisdiction. ‘Prioritization’ is understood as the process of deciding to investigate and potentially prosecute a particular case at the opportunity cost of choosing to prioritize another case. ‘Selection’ is understood as the process of deciding to formally initiate proceedings against a perpetrator or perpetrators.

31 Report on the Activities of the Supervisory Body for Monitoring the Implementation of the National Strategy for War Crimes Processing, July 2010 (stating “With the aim of establishing the exact number of cases and the names or reported persons, the Chief Prosecutor of the Prosecutor’s Office BiH is tasked with determining the correct information, individually for each prosecutors office and the total for all the prosecutor’s offices (the number of cases, the categorization of cases and the names of the reported persons) and to communicate this information to the Supervisory Body by 1 September [2009], at the latest.”)

**crimes cases**<sup>32</sup> – far lower than 2007 estimates of 13,000 to 17,000 perpetrators.<sup>33</sup> Moreover, these figures are within the realm of possibility for actually resolving the caseload within the deadlines set in the National Strategy, keeping in mind the time and resources at the disposal of the domestic judicial institutions. Considering that, since the advent of the new criminal procedure in 2003, the courts of BiH dealt with a total of 216 war crimes cases (62 “group cases” involving 210 accused and 154 individual cases), it seems reasonable to expect that the system could cope with a volume of 1300 cases in the next 13 years (i.e. the remaining timeframe envisioned by the National Strategy). It can also be hoped that two additional factors will assist in speeding up resolution and reduction of the caseload. First, full implementation of the pillar of the National Strategy that deals with effective prosecution capacity should allow more cases to be completed per annum. Second, issuance of orders to close a portion of the open case files due to insufficient evidence should also reduce the number of pending cases.

A key element in the effort to map the caseload was ensuring co-ordination between the Chief Prosecutors of BiH, the RS, the Federation of BiH, and Brčko District of BiH. Thus, these actors are regularly invited to attend sessions of the Supervisory Body, although they are not part of its formal membership.<sup>34</sup> Notwithstanding this, it was evident that part of the delay in completing the caseload mapping exercise was due to non-uniform reporting from prosecutor’s offices at the entity level, although some institutions – notably the Federation BiH Prosecutor’s Office – endeavoured to follow a single methodology in preparing the caseload reports. In addition, the Supervisory Body took steps to ensure consultation among all war crimes prosecutors in the country regarding their responsibilities vis-à-vis the National Strategy.<sup>35</sup> In September 2009, the BiH Prosecutor’s Office indicated that finalization of the mapping exercise necessitated field visits by state level prosecutors to entity prosecutor’s offices to clarify questions about the caseload. This so-called manual review process yielded a disturbing finding; potentially there were **a number of cases “overlapping” between the state and entity**

32 Report of the Prosecutor’s Office of BiH to the Supervisory Body at its tenth session on 13 April 2010. Case inventory completed on 22 March 2010. In addition to those 1381 KT RZ (cases classified as war crimes), the inventory concluded that there are a total of 1859 KTA RZ cases (case files in which the occurrence of a war crime has not been established with certainty or cases related to war crimes) and 310 KTN RZ cases (case files classified as war crimes but the identity of the perpetrators are unknown). The number of potential suspects related to KTA and KTN cases is not known.

33 See, for example, figures provided by the BiH Prosecutor’s Office cited in the *Draft National Strategy for War Crimes Prosecution* of August 2008.

34 The membership of the Supervisory Body is comprised of representatives of the HJPC BiH, BiH Ministry of Justice, BiH Ministry of Security, Federation BiH Ministry of Justice, RS Ministry of Justice, Brčko District Judicial Commission, BiH Ministry of Finance, RS Ministry of Finance, and Federation BiH Ministry of Finance. The Body is personally chaired by the President of the HJPC BiH, while the Secretary of the BiH Ministry of Justice serves as the Vice-Chair.

35 Meetings of entity level chief prosecutors and war crimes prosecutors were organized by the HJPC BiH in Teslić on 23-24 November 2009 and in Bijeljina on 7-8 June 2010. Chief prosecutors of cantonal and district prosecutor’s offices were also individually invited to attend Supervisory Body session and present the work of their respective institutions in relation to implementation of the Strategy.

**level.**<sup>36</sup> In particular, evidence of duplicated (parallel) investigation of cases at the state and entity level sparked concern from the BiH Prosecutor's Office. Consequently, direct discussions between the state and entity level prosecution authorities were necessary to immediately clarify which institution was exercising jurisdiction over a case. Such discussions reportedly took place in the spring of 2010.<sup>37</sup> The issue of overlapping cases remains a potential issue of serious concern, although it is expected that the regular process of updating the inventory of case files and deciding upon their allocation will allow such errors to be identified and corrected.

**Reporting to the Court of BiH regarding the complexity of entity level cases and verdicts rendered in war crimes cases also met with delays and frustrations.**

This led the President of the Court of BiH to alert the Supervisory Body at sessions in September 2009, and again in June 2010, that a majority of entity level courts and prosecutor's offices were not submitting regular and complete reports.<sup>38</sup> These reports are necessary for the Court of BiH to carry out its function of determining which cases it might take over at the state level pursuant to its power to transfer such cases *ex officio* under Article 449(2).<sup>39</sup> By September 2010, the Court of BiH had still not received full reports that would allow it to carry out this function, with little adequate explanation as to why this was the case.

Despite these delays in finalizing the mapping exercise, the BiH Prosecutor's Office repeatedly indicated that from January 2010 onward it would speed up the transfer of cases under Article 27(a) of the BiH Criminal Procedure Code.<sup>40</sup> However, as discussed below in Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, few transfers had actually taken place by October 2010. This would appear to be a direct consequence of a major deficit in the mapping

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36 The Head of the Special Department for War Crimes of the BiH Prosecutor's Office reported to the Supervisory Body at its sixth session (6 November 2009) that there could be as many as 365 such case files involving 910 suspects.

37 E.g., the case of *Radić et al*, which was at that time complete at first instance at the state level (Verdict of the Court of BiH, 20 February 2009, no. X-KR-05/139; case pending re-trial at the time this Report was prepared) was identified as one such case that was also the subject of continuing investigations at the entity level (by the Mostar Cantonal Prosecutor's Office).

38 See, e.g., Letter of the Cabinet of the President of the Court of BiH re "National War Crime Strategy" of 2 June 2010.

39 See Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, *infra*.

40 Article 27(a) of the BiH Criminal Procedure Code deals with transfer of jurisdiction for criminal offences referred to in Chapter XVII of the BiH Criminal Code and provides as follows (unofficial translation):

(1) If the proceedings are pending for the criminal offences referred to in Articles 171 through 183 of the Criminal Code Bosnia and Herzegovina, under its decision, the Court may transfer the proceedings to another court in whose area the criminal offence was attempted or committed, no later than by the time of scheduling the main trial, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.

(2) The Court may render the decision referred to in Paragraph 1 of this Article also upon the motion of the parties or defence counsel, while at the stage of investigation, only upon the prosecution motion.

(3) The decision referred to in Paragraph 1 of this Article shall be rendered by the Panel referred to in Article 24(7) of the Code, composed of three Judges. No appeal from the decision of the Panel shall be allowed.

exercise – the failure to gather qualitative data to accompany statistical data. This problem, combined with a multitude of open questions with respect to the transfer mechanisms (this is discussed in further detail below in Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*) impedes their use. Second, the manner in which the caseload mapping exercise has been conducted to date has not yielded all of the information necessary to make decisions about allocation of the caseload between the state and entity level on the basis of relative complexity of cases. These problems combined are seriously hindering implementation of a central component of the National Strategy.

This situation is a result of the way in which the caseload mapping exercise has been conducted to date, which emphasized gathering information about the total numbers of each technical category of case,<sup>41</sup> rather than distilling essential information from the case files themselves. This means that, despite now having fairly accurate accounting of the *number* of cases and suspects, and where those cases reside, there is still a lack of understanding about the *nature* of cases. **Mapping of the level of gravity of cases, level of responsibility of accused, quality of case investigation, potential availability of suspects, nexus to prosecution priorities** etc. has not taken place.<sup>42</sup> A qualitative caseload mapping exercise would have conformed to the template provided in Annex B of the National Strategy, which allows case information to be recorded in a manner useful for assessing the relative sensitivity and/or complexity of case.<sup>43</sup> To the knowledge of the OSCE Mission, no clear instruction has ever been sent to entity courts and prosecutor’s offices since the National Strategy has been in force to report according to the Annex B structure, aside from a request of the President of the Court of BiH in June 2010.<sup>44</sup> This deficit – the failure to gather qualitative data to accompany statistical data – impedes the ability of the authorities to proceed with case allocation. Therefore, caseload mapping remains a priority task for both the Supervisory Body and the domestic judicial institutions at this writing.

A looming issue with respect to the mapping and allocation of the caseload, in line with the goals of the National Strategy, is the application of criteria to assess the complexity of cases and thus determine whether they should be allocated to the state or entity level. According to the National Strategy, **the “most complex” cases should be tried at the state level, while the “less complex” cases should be tried**

41 E.g. case categorizations as KT RZ, KTA RZ, or KTN RZ. See *supra* note 32.

42 However, a software tool suitable for this task – the *Database of Open Case Files* – is functional in the BiH Prosecutor’s Office and is operated by a team of analysts. Unfortunately, this tool does not appear to have been sufficiently linked to the caseload mapping exercise overseen by the Supervisory Body.

43 Annex B structures case file information in the following way: *Case marking and case status; Suspect/s full name; Suspect/s place of residence; Suspect/s status at the time of commission (for ex. military or police rank, political function, civilian, etc.) and their role in the commission of the offence; Brief offence description (at the end, note also the qualification); Time and place of commission (municipality); Number of victims; Are there any witness protection measures granted (list them) and/or which measures need to be ordered?; Observations (about the case, witnesses, suspect, offence consequences, etc.).*

44 Letter of the Cabinet of the President of the Court of BiH re “National War Crime Strategy” of 2 June 2010, *supra* note 38.

**at the entity level**, replacing the criterion previously in force of “highly sensitive” or “sensitive.”<sup>45</sup> The National Strategy’s *Criteria for the Review of War Crimes Cases* (case complexity criteria), found in Annex A, are based on consideration of the gravity of the criminal offence, the capacity and role of the perpetrator, and other relevant miscellaneous considerations. Whereas the Book of Rules *Orientation Criteria* (case sensitivity criteria) drew clear distinctions between what might be considered highly sensitive<sup>46</sup> or sensitive,<sup>47</sup> the case complexity criteria are a laundry list of factors to be taken into consideration in determining if “the proceedings will be conducted before the BiH Court.”<sup>48</sup> Under the complexity criteria, legal qualification of the offence as genocide, crimes against humanity, or war crimes against a civilian population or prisoners of war, serves as a preliminary basis for classifying a case as more complex, although “some other criteria [must] be fulfilled as well.” For example, “[m]ass killings (killing of a large number of persons, systematic killing)” are an indicator of sufficient gravity and having a “managing position in camps and detention centres” is an indicator of the perpetrator’s capacity and role. Correlation with other cases and possible perpetrators, the interests of victims and witnesses (especially those previously given protection measures), and the “consequences of the crime for the local community” are other circumstances which may be taken into account in deciding upon allocation. In short, the criteria are extremely broad and do not provide clear guidance as to what thresholds must be met to justify a marking as “most complex” or “less complex.” At the same time, a major caveat to the criteria, explained in Annex A, is that classification of a case as “less complex” does not preclude the possibility that it might be tried at the state level owing to the fact that an extenuating circumstance exists – such as the need to provide protection services for witnesses that may not be available at the entity level.<sup>49</sup>

Arguably, the case complexity criteria provide little in the way of new guidance to prosecutors. On the whole, the new criteria rely largely on the same kind of two-fold gravity assessment used in the Book of Rules. The new criteria contains little reference to factors that obviously relate to the *complexity* of prosecuting or adjudicating a war crimes case, such as the case involving multiple accused persons or tricky theories

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45 National Strategy, *supra* note 13, (stating “There is a clear resolve on the part of the State of BiH that the most complex war crimes cases from both of these groups be prosecuted before the Court and the Prosecutor’s Office of BiH and that the cases deemed to be less complex be prosecuted before the cantonal or district courts and prosecutor’s offices of the entities and the Basic Court and Prosecutor’s Office of Brčko District of BiH”). The problems relating to the status of the two sets of criteria are discussed in Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH, infra*.

46 Crimes qualified as genocide, perpetrators at the level of political leaders or military commanders, and circumstances such as the existence of insider witnesses in the case, earned a case file a marking of “highly sensitive.” See Book of Rules on the Review of War Crimes Cases – Orientation Criteria for Sensitive Rules of the Road Cases (BiH Prosecutor’s Office, 28 December 2004).

47 For instance, crimes qualified as rape, perpetrators at the level of regular politicians or soldiers, and circumstances such as the need for protection of witnesses, could result in a case marking of “sensitive.” See Book of Rules Orientation Criteria, *ibid*.

48 Annex A, National Strategy, *supra* note 13.

49 *Ibid*.

of liability and modes of perpetration (e.g. joint criminal enterprise). Nonetheless, an assessment based on gravity appears to be accepted by judicial authorities as the most suitable method of determining the allocation of case files.<sup>50</sup> Disconcertingly, however, the criteria afford judges and prosecutors a large degree of discretion in applying them. They can, in theory, be argued in any way so as to justify a case being marked for processing at the state level, thus posing a risk that the entire premise for shared case allocation outlined in the National Strategy could be undermined in practice. It may also leave the BiH Prosecutor's Office open to accusations of picking the cases with the strongest evidence for processing at the state level, and returning weaker cases to the entity level; a complaint heard from prosecutors in the past.<sup>51</sup> Although the main problems affecting the distribution of cases derive from the procedure (see Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*), it is evident that **the Court of BiH and BiH Prosecutor's Office should adopt a coherent approach to applying the criteria.** Therefore, the "regular meetings aimed at ensuring consistent application of the agreed upon criteria (Annex A)" between the Court of BiH and BiH Prosecutor's Office envisioned in the National Strategy should begin in advance of an expected flood of case transfer motions.<sup>52</sup> Moreover, it would be helpful if the Prosecutor's Office of BiH developed internal guidelines that emphasize the consistent application of the criteria in a manner in line with the goals of the National Strategy. Such guidelines could enumerate specific indicators of what makes a case suitable for trial at the entity level. The Court of BiH should vigilantly oversee the application of the criteria in transfer decisions and apply an appropriate standard of reasonableness to the BiH Prosecutor's Office recommendations.

Finally, it should also be noted that the complexity criteria for the review and allocation of case files do not necessarily serve as criteria for the prioritization and selection of cases for processing, although they do provide an indicator of the kinds of cases the BiH Prosecutor's Office should prioritize (e.g. mass killing as opposed to single murder, systematic rape and sexual slavery as opposed to individual sexual assault).<sup>53</sup> Apart from public presentations around the country in the summer of 2008 by the Special Department for War Crimes,<sup>54</sup> there has been scant public articulation of the prosecution policy regarding war crimes cases. In the absence of clear enunciations of the policy, it is difficult for entity prosecutors to take cues about case prioritization from the state level and for concerned segments of civil society to evaluate the performance of the prosecution authorities. As the institution moves into its seventh year of active investigation and prosecution of cases, **emphasis**

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50 The case complexity criteria were drafted by a joint team of representatives of the Court of BiH and BiH Prosecutor's Office in 2008.

51 See also Section 5, *War Crimes Cases at the Entity Level*, *infra*.

52 See Annex of Strategic Measures and Deadlines, National Strategy (strategic measure no.12), *supra* note 13.

53 See Section 4, *War Crimes Cases before the Court of BiH*, *infra*.

54 See Section 7, *Political and Public Support for War Crimes Processing in BiH*, *infra*.

should be placed on articulating the internal strategy of the BiH Prosecutor's Office; not least because this will be helpful to entity prosecutors and demonstrate transparency to the wider constituencies of victims, affected communities, and the public at large.

## 2.2.2 Other elements of the National Strategy – prosecution capacities, witness protection and support, and fiscal planning

Resolution of the issues plaguing efficient and effective management of the caseload takes centre stage in the National Strategy implementation process. Yet the National Strategy also sets out a comprehensive plan to address the **broader challenges intrinsic to creating a more co-ordinated war crimes processing system – improving capacity, strengthening key areas such as training and witness protection, and tackling the difficult questions of regional co-operation.** Unfortunately, considering the status of these components at the end of September 2010 in relation to the emphasis placed on caseload issues, it is clear that **implementation has tended to be piecemeal rather than holistic.** Nonetheless, certain progress is evident. For instance, leaving aside the question of incomplete caseload mapping, an important adjustment to the legal framework that paves the way for case transfers was accomplished on 13 November 2009, when the BiH Parliament adopted amendments to the BiH Criminal Procedure Code, which facilitated the transfer of war crimes proceedings from the state level to the entity level.<sup>55</sup> The intricacies of this mechanism are discussed further in Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH.*

To date, progress, albeit limited in certain cases, has also been made in several other key areas. With respect to creating mechanisms to solve the problem of non-harmonized application of criminal law in war crimes cases, the BiH Ministry of Justice proposed an amendment to Article 13 of the Law on the Court of BiH in the BiH Parliamentary Assembly on 26 March 2009. The proposed amendment provides a legal basis to hold appellate-level joint sessions. To date, this provision has not been adopted; since March 2010, the BiH Ministry of Justice, at the request of the BiH Council of Ministers, has sought comments, and some degree of consensus, from its RS and FBiH counterparts before putting forward the proposal again. Fortunately, appellate judicial bodies have nevertheless held two such meetings on an *ad hoc* basis.<sup>56</sup>

**Some success in bolstering prosecution capacities at the entity level was achieved.** Several larger prosecutor's offices report creating special departments for war crimes as envisaged by the National Strategy. There appears to be an

55 See further discussion regarding the new Art. 27(a) and Art.449(2) of the BiH Criminal Procedure Code in Section 3.3, *Cases initiated after March 2003 (Category I Cases)*, *infra*.

56 The first such meeting took place on 26 October 2009 and the second on 23 December 2009.

understanding that quota systems<sup>57</sup> – in place at some prosecutor’s offices as a means of tracking work performance – will not apply to prosecutors assigned to the new special departments in light of the clear message from the HJPC BiH that war crimes cases are to be given top priority. These work quotas are often cited as an obstacle preventing progress on the war crimes caseload, given that they do not typically accommodate work on complex and lengthy investigations and trials, and therefore the National Strategy identified changing this manner of assessment as a priority.<sup>58</sup> On the other hand, adjusting the internal quota rules used by a handful of prosecutor’s offices seems to be a more straightforward matter than the more desirable long-term solution of **appointing an adequate number of prosecutors to handle war crimes cases**, which is made difficult by lack of resources.<sup>59</sup> However, the HJPC BiH has not yet formally adjusted the quota system that requires judges to complete a certain number of matters per month to take into consideration the complex nature of war crimes cases as required in the National Strategy.<sup>60</sup>

Conversely, the HJPC BiH approved an international donor project to inject eight support personnel into prosecutor’s offices, and judicial training academies at the entity level, to work on war crimes cases and improve the provision of training on investigating, prosecuting, and adjudicating war crimes cases.<sup>61</sup> Another positive step towards improving resources at the entity level came in early 2010 when the HJPC BiH requested the entity chief prosecutors submit plans for tackling the war crimes caseload that include an assessment of the necessary resource commitments. **Extending the availability of witness protection and support services to the entity level** is a major challenge as it necessarily involves a quantum leap in terms of the resources applied to this area. Progress with implementing the multi-pronged solution outlined in the National Strategy is uneven. In 2009, the BiH Parliament rejected a proposal to amend the *Law on the Witness Protection Programme of BiH*. Parliamentary monitoring conducted by the OSCE Mission indicates that the proposal therein to extend the powers of the State Investigation and Protection Agency (SIPA) to include implementing the out-of-court witness protection programme at the entity level for war crimes cases, and certain other categories of

57 The OSCE Mission is aware of 6 of 16 cantonal and district prosecutor’s offices in the RS, the FBiH, including Brčko District of BiH that employ an internal quota system to monitor the quantity of work done by prosecutors (usually 10 decisions per month in common criminal cases). No formal quota system is applied to prosecutors by the HJPC BiH.

58 See Annex of Strategic Measures and Deadlines, National Strategy (strategic measure no. 20), *supra* note 13. However, between April and October 2010, the HJPC BiH piloted a new quota system in seven courts based on a “time measurement” approach, which is designed to take into account the relative complexity of cases.

59 See Section 5.2 *Human and material resources for investigation, prosecution, and adjudication of war crimes cases at the entity level*, *infra*.

60 See *supra*, footnote 58.

61 Memorandum of Understanding between the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation and the HJPC BiH, with regard to “The War Crimes Justice Project” by ICTY-ODIHR-UNICRI, funded by the European Union, See <http://www.osce.org/odihr/43617.html>. An additional (ninth) support staff position will be created in the Office of Criminal Defence (OKO) in the BiH Ministry of Justice as a resource for defence counsel representing accused in war crimes cases at the entity level.

cases, was objected to by the Serb caucus on the basis that such a function is within the competencies of the entity police agencies rather than state authorities. It is not yet clear whether the law will be re-tabled in parliament or whether another solution will be sought. In October 2010, official witness support services (i.e. psycho-social and logistical support) were still only available at the Court of BiH. However, the HJPC BiH approved two international donor projects that will, respectively, place witness support officers in Banja Luka District Court and Sarajevo Cantonal Court and provide training of trainers to appropriate authorities regarding how to conduct witness support services targeted at the entity level.<sup>62</sup> In relation to protection of witnesses during hearings, the National Strategy also reminds all courts and prosecutor's offices to prevent the disclosure of protected data about the identity of witnesses in line with the law. Notwithstanding this, monitoring findings continue to indicate **failures to investigate threats against witnesses diligently and to order suitable protective measures** (see further OSCE Mission Report on *Witness Protection and Support in BiH War Crimes Trials*).<sup>63</sup> Many courthouses require physical upgrades and technical equipment to facilitate witness protection measures. In this regard, it is noteworthy that the HJPC BiH has also approved donations from the EC aimed at carrying out some of these upgrades.<sup>64</sup>

**Regional co-operation in war crimes matters** – another major pillar in the National Strategy – has been a problematic and politicized issue in recent years. This issue is dealt with further below in Section 6, *Regional Co-operation*. As a consequence of the fact that the implementation of many pillars of the National Strategy remain in the initial stages the goal of carrying out **programme-based fiscal planning for war crimes processing** has not yet even begun.

In April 2010, the OSCE Mission warned that work on implementation of the National Strategy measures falling outside the scope of caseload issues should not be delayed or neglected due to the undeniable urgency of questions about mapping and allocation of cases.<sup>65</sup> Since that time, the Supervisory Body has reported more

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62 The former is a UNDP in BiH project and the latter is the "War Crimes Justice Project," *ibid*.

63 OSCE Report, *Witness Protection and Support in BiH War Crimes Trials*, *supra* note 4.

64 Under this European Union-funded initiative, all cantonal and district courthouses (save those that currently have no war crimes cases or have insufficient human resource capacities to conduct war crimes trials, namely Odžak, Goražde and Siroki Brijeg), will have at least one courtroom redesigned for the purposes of conducting war crimes trials. This will be accompanied by construction of a witness ante-chamber and/or provision of the technical means to conduct a hearing from a distant location (another court) using a protected video-link. At the time of writing, the works are due to be carried out in the latter half of 2011.

65 *Observations of the OSCE Mission to Bosnia and Herzegovina concerning the implementation of the BiH National Strategy on War Crimes Processing during the period January 2009-April 2010* (7 April 2010). This was partly in response to the view expressed by the Supervisory Body that "without the unified database on the number of cases and the names of reported persons for all the prosecutor's offices, the Supervisory Body is not able to consider and carry out further measures towards the implementation of the Strategy and supervision, especially in the field of case management, harmonization of jurisprudence, regional co-operation, victim-witness protection and support." See *Report on the Activities of the Supervisory Body for Monitoring the Implementation of the National Strategy for War Crimes Processing*, July 2010.

extensively about progress on these other components of the National Strategy.<sup>66</sup> All responsible authorities – ministries of justice, courts and prosecutor’s offices, legislatures and ministries of finance, relevant police and social welfare authorities, as well as the HJPC BiH and Supervisory Body – should continue to pursue robust and holistic implementation of all components of the National Strategy without delay.

### 2.2.3 Deadlines

The National Strategy sets out an **ambitious timeline** in its *Annex of Strategic Measures and Deadlines* – which proved to be entirely unfeasible. **Many of the specific deadlines passed without realization of the envisaged measure** (a notable exception was the prompt referral of the task of drafting amendments to the Criminal Procedure Code related to case transfer to a suitable expert drafting body by the Ministry of Justice on 12 January 2009; one day before the deadline set in the National Strategy).<sup>67</sup> Within a short period of time it became clear that the Supervisory Body would have to be the watchdog with respect to setting deadlines and holding institutions accountable to them. The initial deadline set by the National Strategy for finalizing the report on the caseload was 15 days after adoption (i.e. 13 January 2009). Successive extended deadlines mutually agreed upon by the Supervisory Body and the BiH Prosecutor’s Office for completion of the caseload mapping have also demonstrated that the original short deadlines were unrealistic. In actual fact, it took over 15 months to gain a reasonably accurate assessment of the size of the caseload<sup>68</sup>, and, as noted above, insight into the substantive nature of the caseload remains elusive.

Perhaps a larger problem in relation to adherence to deadlines is that many matters were designated as requiring “continued implementation” – particularly those which relate to more nebulous goals such as ensuring necessary “material-technical resources for war crimes processing.”<sup>69</sup> Monitoring of progress on these goals has presented a challenge, since no particular timetable for realization exists. **The Supervisory Body should set clear but flexible timelines for realization of each of the National Strategy’s forty-three strategic measures and consider adopting a benchmarking approach to measuring progress.**

66 See Report on the Activities of the Supervisory Body for Monitoring the Implementation of the National Strategy for War Crimes Processing, 1 January to 30 June 2010.

67 The BiH Ministry of Justice tasked the CCIAT to consider the BiH Criminal Procedure Code amendments related to the Strategy by a decision of 12 January 2009. On the same day, the BiH Ministry of Justice circulated the National Strategy to all judicial authorities in BiH and informed them of their obligation in respect thereto. See Letter of Minister Čolak re “National War Crimes Prosecution Strategy” of 12 January 2009.

68 See Section 2.2.1, *Caseload mapping and management, infra*.

69 See Annex of Strategic Measures and Deadlines, National Strategy (strategic measure no.18), *supra* note 13.

## 2.3 Future outlook for implementation of the National Strategy

As the National Strategy itself acknowledged, the passage of time is marked by an ever-reducing pool of witnesses willing and available to testify at trial, deterioration of physical evidence, and dwindling chances of obtaining other forms of material evidence. A large number of suspects are beyond the reach of the BiH authorities and are likely to remain so, absent significant progress on regional co-operation (see Section 6, *Regional Co-operation*). The outlook for achieving the National Strategy's goal of dispatching top priority war crimes cases by the end of 2015, and all other cases by 2023, will therefore be determined not only by the implementation of the measures prescribed by the National Strategy, but also by circumstances undeniably beyond the control of judicial actors.

Nonetheless, achieving some aspects of the National Strategy simply requires more tangible efforts. For example, removing duplicative cases to avoid the risk of parallel investigations, and formally closing investigations in cases where, due to lack of evidence, an indictment cannot be filed, is and will be one of the main challenges in the implementation of the National Strategy. With regard to the latter, an OSCE Mission survey conducted with selected entity prosecutors regarding investigation of war crimes cases found that many prosecutors are reluctant to cease investigations when evidence is insufficient, despite the fact that the criminal procedure allows the re-opening of an investigation if new evidence subsequently becomes available. This practice seems often to be motivated by the fear of negative reactions by the victims or criticism from the mass-media or the political sphere. **Creating realistic expectations for the resolution of the war crimes caseload among victims and the broader public** is therefore also an important pre-condition for ensuring judicial actors can implement goals unfettered by such pressures.

The National Strategy lays out a roadmap to resolving some of the most notorious problems hampering effective and efficient handling of the large backlog of unresolved war crimes cases in BiH. As the following sections will describe, chief among these are complex problems of jurisdiction, confusion regarding the allocation of cases, challenges of overcoming problems created by the evolution of the legal framework, and ongoing weak technical capacity of courts and prosecutor's offices – particularly at the entity level. It is of the utmost importance that efforts to implement the National Strategy remain sincere and diligent. While progress on many components of the National Strategy is, as yet, incomplete or stalled owing to a variety of factors described above, it is clear that considerable consensus still exists among judicial authorities regarding the legitimacy and soundness of the roadmap. It is, therefore, time for the Supervisory Body, in consultation with practitioners, to assess what has and has not worked during the first two years of the National Strategy and, if necessary, to develop alternative routes to the end goals and to identify and address gaps in the original set of strategic measures. To achieve this, the Supervisory Body may need increased administrative and technical support.

### 3 Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH

This section provides a detailed analysis of the jurisdictional set-up in BiH and analyses its inherent problems, particularly with regard to the allocation of war crimes cases between the state and entity level.

**Among the main issues addressed in this section are:**

- The manner in which the fragmentation of the BiH criminal justice system impacts the effective and efficient processing of war crimes cases, including issues of clashes of jurisdiction between different courts and prosecutor's offices;
- A detailed assessment of the mechanisms that regulate the allocation of the so-called Category I and Category II war crimes cases and the main issues that need to be resolved with respect to these mechanisms;
- Examination of the inconsistent and inefficient application of criteria for case allocation and the resulting lack of foreseeability and certainty regarding which jurisdiction within BiH will prosecute cases;
- Poor communication and co-operation between organs at the state and entity level concerning caseload management;
- Lack of respect of the provisions defining territorial competence of entity prosecutors to investigate and prosecute war crimes cases.

#### 3.1 Overview and general assessment

A major problem affecting war crimes processing in BiH since the first war crimes trials took place at the end of the conflict, is allocating war crimes cases among the different prosecutor's offices and courts in BiH in a manner that is both efficient and in compliance with the law. Resolution of this problem remains one of the larger challenges identified in the National Strategy and is central to its successful implementation. The map of jurisdictions responsible for war crimes cases in BiH is rather complex as it comprises the following: the Court of BiH and the BiH Prosecutor's Office at the state level; ten cantonal courts and an equivalent number of prosecutor's offices in the FBiH; five district courts and an equivalent number of prosecutor's offices in the RS; and the Basic Court and Prosecutor's Office in Brčko District. This complex judicial system is **remarkably fragmented**. No hierarchy exists between the jurisdictions at the state and entity level, which is a reflection of the post-Dayton arrangements of the internal structure of BiH. One of the results is that appeals are dealt with by four different courts: the Appellate Division of



the Court of BiH, the Supreme Court of FBiH, the Supreme Court of RS and the Appellate Court of Brčko District.

**Issues of conflict or overlap among the different jurisdictions** in such a system represent a serious problem for the overall functioning of the BiH judicial system. When it comes to war crimes processing, the matter becomes even more intricate because, in addition to the traditional criteria to determine jurisdiction in a domestic system (territory and subject-matter), more elaborate and flexible criteria have been included for the purpose of efficiently handling the huge war crimes caseload. The definition of the criteria to determine whether a case should be tried by the Court of BiH, or at the entity level, has changed from the Book of Rules, which referred to the *sensitivity* of the case, to the National Strategy which refers to the *complexity* of the case. However, the character of these criteria has remained substantially the same and is linked to features of the case, such as the gravity of the crime, the level of responsibility of the accused, and other circumstances like the correlation between the case and other cases, the interests of victims and witnesses and the consequences of the crime for the local community.<sup>70</sup>

Monitoring of war crimes cases by the OSCE Mission in the last five years clearly shows that the judicial system in **BiH has not succeeded in ensuring that case allocation criteria are applied in a way that is efficient**, both from the point of view of functionality and the need to be fully in accordance with the domestic legal framework. The main problems relate to the cumbersome character of the mechanisms designed to review the cases and decide on their allocation, inconsistent application of those criteria, poor communication and co-operation between organs at the state and entity level, and lack of respect for the provisions defining the territorial competence of entity prosecutors to investigate and prosecute war crimes. These problems have been undermining and slowing down the processing of war crimes in BiH for many years. The root causes of these problems are multifaceted. To a large extent, they reflect systematic deficiencies of the BiH judicial system such as fragmentation and complexity of the legal framework and organizational structure. Another problem, which is more specifically related to war crimes processing, is the transplanting of legal concepts devised to ensure co-operation and co-ordination between the ICTY and national courts within and throughout the BiH judicial system. Transplant of such concepts often proved to be problematic due to the different nature of the legal relations between, on the one hand, international and domestic courts, and, on the other, different domestic courts within one state. A key example in this regard is the attempt to create a procedure similar to the ICTY *Rules of the Road* review mechanism applicable to distribution of war crimes cases within BiH.

Against this background, it must be said that in the latter half of 2010, judicial actors have visibly intensified their attempts to solve the above-mentioned shortcomings

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70 See Annex A, "Criteria for the Review of War Crimes Cases", National Strategy, *supra* note 13.

and ensure that the relevant procedures are harmonized and legally applicable throughout the BiH justice system. An agreement reached in August 2010 between the prosecutor's offices at the state and entity levels regarding the delicate **issue of competence to supervise exhumations** of persons killed during the conflict shows that, through co-operation and dialogue, it is possible to find efficient and legally compliant solutions to problems stemming from the fragmented nature of the BiH judicial system.<sup>71</sup> Similarly, in June 2010, entity prosecutors agreed to transfer war crimes case files to the territorially competent prosecutor's office.<sup>72</sup>

The following analysis elaborates on the points made above and suggests possible measures to improve the functioning of the mechanisms that regulate the allocation of war crimes cases in BiH. The analysis follows the distinction made in the National Strategy between cases for which an investigation was opened before and after March 2003, when state level jurisdiction came into existence. These two groups of cases are referred to respectively as Category II cases and Category I cases in the National Strategy. With the entry into force of the new BiH Criminal Code and Criminal Procedure Code, these two categories of cases were henceforth regulated differently in terms of their allocation, thus requiring separate analyses.

### 3.2 Cases initiated before 1 March 2003 (Category II cases)

Category II cases are **cases in which an investigation was initiated by an entity prosecutor's office before the jurisdiction for war crimes matters was transferred to the Court of BiH and the BiH Prosecutor's Office**. Pursuant to the transitional provisions of the 2003 BiH Criminal Procedure Code, these cases can still be investigated at the entity level and tried by the territorially competent entity court.<sup>73</sup> This general rule has, however, two major caveats. First, cases initiated by entity prosecutors before that date were to be sent to the BiH Prosecutor's Office for review during the investigation stage according to the procedure established under the Book of Rules.<sup>74</sup> Under this procedure the BiH Prosecutor's Office could take over cases deemed to be "**highly sensitive**" or, alternatively, send back cases which are deemed to be just "**sensitive**" for further action by the entity prosecutor.<sup>75</sup> Second,

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71 In August 2010, it was decided that as of 1 January 2011, the BiH Prosecutor's Office shall take over the supervision of all exhumations carried out in BiH. Before this decision, the practice was that exhumations would be supervised by the entity prosecutors not on the basis of their territorial competence – but rather on the basis of the ethnicity of the victims. Thus, prosecutors from the RS would carry out exhumations of missing persons of Serb ethnicity and prosecutors of FBiH would carry out exhumations of missing persons of Bosniak or Croat ethnicity, regardless of whether the site was located in the RS or in the FBiH. In June 2010, however, the *Collegium* of Prosecutors of the FBiH denounced this practice as illegal, which presented a sincere risk that the performance of exhumations would come to a standstill, until the above-mentioned agreement was reached.

72 12th Meeting of the National Strategy for War Crimes Processing Supervisory Body, Bijeljina, 7-8 June 2010.

73 Art. 449(2) BiH Criminal Procedure Code.

74 Book of Rules, *supra* note 46.

75 For further discussion of the case review criteria, see Section 2, *Development and Implementation of the National Strategy for War Crimes Processing, infra*.

under the BiH Criminal Procedure Code, the Court of BiH can decide to take over cases in which the indictment is not yet legally effective or confirmed, taking into account “the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.”<sup>76</sup> This two-step filtering process was created in order to ensure that more complex or highly sensitive cases are processed before the Court of BiH. Its functioning has, however, proved to be flawed and inconsistent for a number of reasons.

First, the scope of the legal effect of the Book of Rules remains unclear. The review procedure envisaged therein was aimed at replacing the review of war crimes cases previously carried out by the ICTY Office of the Prosecutor under the *Rules of the Road*.<sup>77</sup> While, the *Rules of the Road* draw their legal power from an international agreement,<sup>78</sup> the Book of Rules is an internal instruction issued by the *Collegium* of Prosecutors of BiH defining “the duties and responsibilities of all prosecutor’s offices in BiH.”<sup>79</sup> However, since the review procedure under the Book of Rules was not entrenched in the BiH Criminal Procedure Code, its legal effect with respect to the powers and duties of entity courts and prosecutor’s offices remains vague. In practical terms this meant that, in a limited number of cases, some entity courts proceeded with Category II war crimes cases notwithstanding the absence of a decision following review by the BiH Prosecutor’s Office or without verifying whether the case had been reviewed.<sup>80</sup>

While such cases, although concerning, have remained rather exceptional, a wider and more serious problem has been **lack of respect for territorial jurisdiction at the entity level**, particularly by prosecutors concluding investigations. This problem pre-existed the adoption of the Book of Rules as, in the years following the conflict, it was common practice for entity prosecutors to open investigations concerning crimes allegedly committed outside the area of their territorial competence, especially when alleged perpetrators belonged to a different ethnic group. As explained in the 2005 OSCE Mission Report on *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina*,<sup>81</sup> this was understandable at that time considering there was very little or no chance that war crimes charges would be pressed against members of the majority ethnic group in the area of territorial competence of a given prosecutor’s office. This situation was compounded by ethnic tensions and divides inherent to the aftermath of the conflict, as well as the tendency for criminal complaints to be filed in locations distant from the site of the crime due to mass displacement during the

76 Art. 449(2) BiH Criminal Procedure Code.

77 On the *Rules of the Road*, see OSCE Mission War Crimes Report 2005, *supra* note 3, p. 5 and 47-50.

78 The Rome Agreement, signed on 18 February 1996, was supported by the Presidencies of BiH, Croatia, and Serbia (English version available at: <http://www.nato.int/ifor/general/d960218a.htm>).

79 Book of Rules, *supra* note 46. Note, however, that the Collegium of Prosecutors of Bosnia and Herzegovina includes only prosecutors of the BiH Prosecutor’s Office.

80 See for example East Sarajevo District Court case of *Ahmetović*, Bijeljina District Court case of *Spasojević*, and Mostar Criminal Court case of *Previšić*.

81 See OSCE Mission War Crimes Report 2005, *supra* note 3.

conflict. This problem remained present even in recent years; specific examples of this are discussed further below.

The review of cases under the ICTY *Rules of the Road* process, while preventing arbitrary arrests and prosecution on ethnic grounds, did not ensure respect of territorial competence, since cases were returned to the prosecutor who initiated the investigation and not to the one with territorial competence. When, at the end of 2004, the Book of Rules was adopted, respect of territorial competence was a sensible and expectable goal notwithstanding the continued existence of ethnic distrust in BiH. With the creation of the Court of BiH, the implementation of other judicial reforms such as the creation of the HJPC BiH<sup>82</sup> and the completion of the reappointment procedure of judges and prosecutors, the judicial system was palpably less affected by ethnic bias. The Book of Rules also did not solve this thorny issue as it did not expressly foresee that, after review, cases should be sent back to the territorially competent prosecutor's office.<sup>83</sup> As a result, entity prosecutor's offices that had sent case files for review often received back cases which they were not territorially competent to investigate and prosecute. For example, this happened in the cases of *Spasojević et al.* and *Vasiljević et al.* which were sent back to Tuzla Cantonal Court despite the fact that the crimes in question occurred in Zvornik and Bratunac respectively, which is under the jurisdiction of Bijeljina District Court. Such occurrences, in turn, had a chilling effect on the finalization of proceedings, since in many of these cases entity prosecutors decided not to transfer them to the territorially competent prosecutor but rather to allow the case to remain idle. Arguably, this occurred because of mutual lack of trust among prosecutors concerning impartiality in war crimes investigations.

In some cases, instead, the entity prosecutor decided not to remain inactive and filed indictments despite being territorially incompetent. This happened with the **Tuzla Cantonal Prosecutor's Office** in FBiH, which filed at least thirteen indictments for war crimes under the territorial competence of other prosecutor's offices between 2006 and September 2010. In the majority of these instances, the cases should have been under the competence of the **Bijeljina District Prosecutor's Office** in the RS as they concerned crimes in the Drina Valley. In all but one of these cases, the Tuzla Cantonal Court rejected the indictments due to lack of jurisdiction.<sup>84</sup> This procedural quagmire, however, produced two serious drawbacks. First, it increased **political tension at the local level**. Associations of veterans of the same ethnicity as the defendants indicted by the Tuzla Cantonal Prosecutor's Office accused that office of

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82 The High Judicial and Prosecutorial Council of BiH is the self-regulatory body of judges and prosecutors having the general task of ensuring the maintenance of an independent, impartial, and professional judiciary.

83 Art. 7(5)c of the Book of Rules only foresees that the BiH Prosecutor's Office, while returning the case to the prosecutor's office which submitted the case, would notify the office about whether it is territorially competent or not. See Book of Rules, *supra* note 46.

84 In the mentioned period, the Tuzla Cantonal Court rejected indictments in the following cases: *Lazarević Sreten et al.*, *Janković Zoran*, *Milaković Jovo et al.*, *Tomić Ljubo et al.*, *Grujić Slobodan*, *Mihajlović Vojo et al.*, *Ostojić Radomir et al.*, *Simo Stupar et al.*, *Kerović Dragomir et al.*, *Ostojić Zarija*, *Minić Ostoja et al.*, *Vasiljević et al.*, and *Ignjatović Milar et al.*; to the best of the Mission's knowledge the Court tried and completed only one case, *Spasojević et al.*, in which it did not have territorial jurisdiction.

being ethnically biased. Second, it noticeably **slowed down the processing of those cases**, which, notwithstanding the fact they were ready for trial, were referred back to the Court of BiH, which in turn had to decide whether to keep the cases in question under its competence or transfer it to the territorially competent entity court.<sup>85</sup>

According to information obtained during a survey of entity prosecutor's offices carried out by the OSCE Mission, it is clear that, as of mid 2010, many prosecutor's offices in both entities still retain a large number of cases that have no prospect of entering the trial phase due to the lack of territorial competence. It was only in July 2010 that the Supervisory Body of the National Strategy eventually decided to tackle this issue, and facilitated an agreement between all prosecutor's offices to transfer those cases to the competent entity prosecutor immediately. Such transfers took place during the summer months of 2010.

A further shortcoming of the Book of Rules is that it did not require the BiH Prosecutor's Office to give reasons for the basis of a decision to retain a case marked as "highly sensitive" or return it to the entity prosecutor with a marking of [merely] "sensitive." The **lack of reasoning in the review process** had severe negative effects on the quality of co-operation between prosecutors at the state and entity level. As affirmed by many entity prosecutors during the OSCE Mission's survey, the situation made it very difficult to predict whether a case would be sent back to the entity level or not, and left room for speculation about the reasons behind the decision.<sup>86</sup> Finally, entity prosecutors have generally complained about the long period of time that the BiH Prosecutor's Office took to review the cases, which in many instances lasted for two to three years. There is seemingly little explanation for the delay other than lack of resources and commitment to completing the review process. Considering the Book of Rules requires entity prosecutors to submit the entire case file for review, this meant that **during the review process no procedural or investigative action could be taken in relation to the case in question**, which in turn had dire consequences for making progress with the war crimes caseload. Arguably, more resources should have been granted to the BiH Prosecutor's Office to carry out the review process with greater efficiency and speed; especially considering that the **lack of resources** was a problem that also seriously affected the ICTY *Rules of the Road* review process. Lately there have been positive developments, as the Supervisory Body of the National Strategy requested that the process of review of the remaining

85 One example is particularly illustrative of this cumbersome procedure. The *Minić et al.* case was reviewed by the BiH Prosecutor's Office in November 2005 and sent back to the Tuzla Cantonal Prosecutor's Office, despite its territorial incompetence. In June 2009 the Tuzla Prosecutor's Office filed the indictment; the Cantonal Court rejected it due to lack of jurisdiction and referred the case to the Court of BiH, which in October 2009 transferred the case to the territorially competent Bijeljina District Court. The trial started there in January 2010, more than four years after having being reviewed by the BiH Prosecutor's Office.

86 A number of surveyed prosecutors affirmed that the BiH Prosecutor's Office often decides to retain cases not because of their sensitivity but rather because the case is supported by strong evidence. On the other hand, cases with weak evidence are sent back to the entity prosecutor.

cases be completed by August 2010 – although it is not clear at this writing if this deadline was sufficient to genuinely complete the process.

A problem of a different nature has been the **lack of harmonization and synchronization** between the two steps of the filtering process, i.e. the review under the Book of Rules and the power of the Court of BiH to take over entity cases under the BiH Criminal Procedure Code. The problem was mainly caused by the fact that the Court of BiH had not received any notification about which cases had been sent back by the BiH Prosecutor's Office to the entity level after the review. Indeed, neither the Book or Rules nor the Criminal Procedure Code require that the Court of BiH is informed in that regard. As a result, for most of those cases, the Court of BiH has not had an actual possibility of evaluating whether it should exercise its power to take over a case on grounds of its complexity. According to monitoring findings, when the Court exercised this power it was mainly upon a motion of the parties to the proceedings or due to public attention brought on the case by the mass media or civil society. This happened for example in the cases of *Orić* before Bijeljina District Court and *Samardžić* before Trebinje District Court, where the BiH Prosecutor's Office had initially decided to return them to the entity prosecutor as sensitive and were later taken back by the Court of BiH. Such procedure, although entirely legitimate, caused further inefficiency and delays in the processing of the cases as entity prosecutors were first allowed to proceed with a case by the BiH Prosecutor's Office and later stripped of it by the Court of BiH.<sup>87</sup>

The impediments faced by the Court of BiH in the exercise of its power of control over the allocation of cases were recognized as a major problem in the National Strategy. As a response, the National Strategy foresees an obligation for the entity prosecutors, and (in relation to Category I cases) for the BiH Prosecutor's Office, to submit to the Court of BiH the information necessary in order to carry out an assessment of the complexity of cases and deciding on taking over the more complex cases *ex officio*. This information regards the name of the suspect, a short description of the alleged crime, the number of victims, the capacity or ranking of the suspect in relation to the commission of the crime and measures needed for the protection of the witnesses.<sup>88</sup> However, as noted above in Section 2, *Development and Implementation of the National Strategy for War Crimes Processing*, gathering this information has been problematic.

This is regrettable in light of the fact that the sending, gathering, and assessment of this information in a timely and consistent manner have become all the more important since the time of the adoption of the National Strategy, as the National Strategy does not foresee continued review of cases in accordance with the Book of Rules. The National Strategy instead introduces a new set of criteria in its Annex A (described above in Section 2, *Development and Implementation of the National Strategy for War Crimes Reporting*) and a **new mechanism for the case allocation**,

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87 As stated in the National Strategy, up until October 2008, the Court of BiH took over 136 cases under Art. 449(2).

88 Annex B to the National Strategy, *supra* note 13.

which is centred upon the Court of BiH's power to take over a case. This means that, after the adoption of the National Strategy, entity prosecutors, although still obliged to inform the BiH Prosecutor's Office about ongoing cases,<sup>89</sup> are not obliged to send their case files to the BiH Prosecutor's Office, and wait for a decision on their sensitivity, in order to proceed with them. This may have quite explicit effects on war crimes cases currently under investigation at the entity level since, according to the information gathered during the OSCE Mission's survey, there are still a large number of cases which, albeit initiated before March 2003, were not sent by the entity prosecutors to the BiH Prosecutor's Office for review. This happened because the practice of the majority of prosecutors at the entity level has been to send a case for review at the end of the investigation, that is, when it is deemed that sufficient evidence for an indictment has been gathered.

Therefore, the power of the Court of BiH to take over a case has become the only legal safeguard available to ensure that more complex cases are tried at the state level. Despite the importance of this matter, both the BiH Prosecutor's Office and the entity prosecutors have largely neglected their obligation under the National Strategy to send the designated information to the Court of BiH, thus contributing to the overall slow implementation of the National Strategy. In June 2010, the Supervisory Body, upon the initiative of the President of the Court of BiH, decided to address this problem.<sup>90</sup> This will hopefully bring about an efficient solution of this matter. It would be preferable to find a solution that ensures that take-over of cases pursuant to an Art. 449(2) decision occur at an early stage of the investigation, thus limiting the number of instances in which a case is taken over at the end of the investigation or at the moment of the indictment. The solution must also ensure that the principle of prosecutorial discretion in case prioritization of the BiH Prosecutor's Office, as well as the critical role of the Court of BiH acting as a safeguard to ensure that the most complex cases are tried at the state level, are guaranteed in practice.

### 3.3 Cases initiated after 1 March 2003 (Category I cases)

Category I cases are **cases in which an investigation was initiated after the transfer of jurisdiction on war crimes to the state level**. Therefore, they fall under the exclusive jurisdiction of the Court of BiH and the BiH Prosecutor's Office. According to the official data submitted to the Supervisory Body, as of March 2010, the number of cases currently under investigation before the BiH Prosecutor's Office amounted to 657. This caseload clearly exceeds the capacity of the BiH Prosecutor's Office, since, during the five year period considered in this report, this institution has brought to trial approximately 100 cases. However, Category I cases, which

<sup>89</sup> Art. 18 Law on the BiH Prosecutor's Office.

<sup>90</sup> Meeting of the National Strategy Supervisory Body, Bijeljina, 7-8 June 2010, *supra* note 72. See further section 2.2.1, *Caseload Mapping and Management, supra*.

are considered to be less complex, can be transferred to the territorially competent court at the entity level by a decision of the Court of BiH, according to the specific procedure prescribed in the BiH Criminal Procedure Code.<sup>91</sup>

Until September 2010, this mechanism has been used very rarely, with very few cases transferred to the entity level, which appears again to be a result of insufficient information about the cases in question and the open questions about the nature of the mechanism.<sup>92</sup> Conversely, the Court of BiH has tried many cases, which, considering the gravity of the crime and the level of responsibility of the accused, arguably fall within the criteria under the National Strategy identifying less complex cases.<sup>93</sup> As a result, the BiH Prosecutor's Office and the Court of BiH have not effectively realized the objective indicated in the National Strategy that requires them to focus on the trial of the "most responsible perpetrators" as a priority.<sup>94</sup> A key element for the successful implementation of the National Strategy will therefore be transfer of less complex cases to the entity level, which will allow the BiH Prosecutor's Office and the Court of BiH to concentrate their resources on more complex cases.

While the option of transferring cases to the entity judiciary was prescribed in the criminal procedure since 2003, the National Strategy recognized the previous **unsatisfactory application of the transfer mechanism** as a significant problem. In the National Strategy, it is argued that the main cause of the problem was that the provision applicable at that time (Art. 27 BiH Criminal Procedure Code) was unsuitable to ensure the transfer of less complex cases, since it prescribed the existence of "important reasons" as a condition for transfer.<sup>95</sup> Indeed, in some cases, panels of the Court of BiH interpreted this requirement in a restrictive manner by excluding transfer of cases on the basis of their complexity from the realm of "important reasons."<sup>96</sup> The National Strategy therefore correctly underlined the need to modify the legal requirements for case transfers. Thus, the BiH Criminal Procedure Code was amended to incorporate a new provision – Art. 27(a) – applicable only in relation to war crimes cases – which clearly identifies "the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case" as criteria for transfer. Regrettably, these amendments were passed only in November 2009, almost a year after the adoption of the National Strategy. However, even after the adoption of this provision, use of the transfer mechanism remained negligible considering that, as of September 2010, only one case was transferred, while in another case the Court of BiH refused the

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91 See Art. 27a BiH Criminal Procedure Code.

92 As of September 2010, the OSCE Mission was able to identify only seven war crimes cases which have been transferred either under Art. 27 or 27a.

93 See below, Section 4: *War Crimes Cases before the Court of BiH*, *infra*.

94 National Strategy, *supra* note 13.

95 See Art. 27 BiH Criminal Procedure Code.

96 See for example the cases of *Bjelić* and *Lazarević*, in both of which the Court of BiH rejected the motion of the BiH Prosecutor's Office to transfer the case to the entity court.

motion for transfer submitted by the BiH Prosecutor's Office.<sup>97</sup> Therefore, as of that date, it is still impossible to estimate the number of cases which will be transferred in the coming period and to which entity prosecutor's office and court. Apart from representing a serious obstacle to the implementation of the National Strategy, this situation renders it difficult to assess the real needs, in terms of human and material resources, of the judiciary at the entity level to adequately carry out their role.

The dearth of transferred cases also indicates that the Court of BiH has still not developed coherent and elaborate case-law on the **application of the criteria for transfer** prescribed under the National Strategy and the BiH Criminal Procedure Code. In this regard, the Court of BiH will have to pay particular attention to developing a consistent approach in relation to the identification of and importance attached to the "other circumstances" that have to be taken into account in addition to the two main criteria, constituted by the gravity of the crime and the capacity of the perpetrator. Although the Criminal Procedure Code does not specify those circumstances, the judges, for that purpose, will have to refer to the factors identified in the National Strategy, i.e. the correlation between the case and other cases, the interest of victims and witnesses, and the consequences of the crime for the local community.<sup>98</sup>

Another important matter to be addressed relates to the **stage of proceedings when a case can or should be transferred**. It has to be noted in this regard that, in all transferred cases, either under Art. 27 or 27(a), the decision of the Court of BiH was taken *after* the confirmation of the indictment. Arguably, transfer of the case at that stage does not represent the most efficient application of this mechanism since it entails the BiH Prosecutor's Office dedicating a considerable amount of resources to finalizing the investigation of a case that is then going to be tried elsewhere. This is also inefficient from the point of view of the entity prosecutors who receive the indicted case but nonetheless need to familiarize themselves with the evidence adduced in order to adequately prepare for the trial phase. For example, this preparation is very likely to require the prosecutor to interview all of the witnesses again with a view to appropriately questioning them during the trial. A more efficient approach requires that the assessment of the complexity of the case and the decision on its transfer is carried out at an early stage of the investigation, possibly as soon as the main suspects, the alleged crime, and the number of victims have been sufficiently identified.

Pursuant to Art. 27(a), the Court of BiH cannot transfer a case *ex officio* in the investigation phase, but may do so only upon the motion of the BiH Prosecutor's Office. The successful implementation of the National Strategy will therefore also depend on the ability of the BiH Prosecutor's Office to carry out a comprehensive review of the Category I cases which are currently open and to request the Court

97 The Court of BiH allowed the transfer of the *Hakalović* case to Mostar Cantonal Court in April 2010 and rejected a transfer in the *Novalić* case in February 2010.

98 See Annex A to the National Strategy, *supra* note 13.

of BiH to transfer the less complex ones on the basis of the case complexity criteria outlined in the National Strategy.

A further key issue in need of clarification relates to the **use by the Court of BiH of its *ex officio* power to transfer a case**, which can be exercised no later than the scheduling of the main trial.<sup>99</sup> This, in practice, means that a case could be transferred *ex officio* at the stage of the confirmation of the indictment or after the plea hearing. The effective use of this power by the Court of BiH will constitute an important guarantee that the criteria on selection of cases to be tried before the Court of BiH and the entity courts are respected and applied consistently. Indeed, the risk of having a less complex case transferred *ex officio* after the filing of the indictment is an important incentive to ensure that the BiH Prosecutor's Office focuses its efforts on the prosecution of the "most responsible perpetrators" as envisioned in the National Strategy (of which the BiH Prosecutor's Office was a principal architect).<sup>100</sup>

A further problem in this regard is that Art. 27(a) does not define how the *ex officio* power should be exercised from the procedural point of view. Namely, the decision on transfer can be taken only by an *ad hoc* Panel.<sup>101</sup> However, the BiH Criminal Procedure Code does not foresee that the preliminary hearing judge (competent for the confirmation of the indictment and receiving defendants' pleas to the charges) or the Panel assigned to try the case can refer that to the *ad hoc* Panel to consider its transfer *ex officio*. Therefore it is not clear how a case could be brought to the attention of the *ad hoc* Panel in the absence of a motion by the parties. The Court of BiH should find a solution to this matter, which would allow the Court to exercise its power of transfer in an effective and transparent manner. **A possible solution could be to establish a permanent Panel which would be in charge of deciding both on the transfer of cases upon motion by the parties and to review and decide upon all cases which could be transferred *ex officio*.**

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99 See Art. 27a (1) BiH Criminal Procedure Code.

100 On the importance of the judges' role in ensuring the respect of the criteria for the selection of cases, see Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze, Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, (Oslo: PRIO, 2006), pp 126-127 (available at: <http://www.prio.no/sptrans/390890946/Backlog%20of%20Core%20International%20Crimes%20Case%20Files%20in%20BiH.pdf>).

101 Namely the three-judge Panel under Art. 24(7) of the BiH Criminal Procedure Code, in charge of decisions subsidiary to the main trial.

## 4 War Crimes Cases before the Court of BiH

The present section considers some of the main achievements and challenges faced by the Court of BiH and BiH Prosecutor's Office in tackling the war crimes caseload during the first years of operation. This section proceeds as follows. Section 4.1 provides a brief overview of the creation of these institutions and a general assessment of their work to date. Section 4.2 considers several aspects of the caseload at the state level, considering achievements related to the handling of cases of a complex, high-profile, or sensitive nature, as well as certain shortcomings in the consistency of selection and prioritization of cases. The remaining parts of this section (4.3 and 4.4) express some observations, both positive and critical, concerning the application of substantive law and international humanitarian law (IHL) and the application of domestic criminal procedure and adherence to fair trial standards. On the whole, this section presents new findings and does not reiterate certain problems identified in previous OSCE Mission reports, except to note where relevant that these concerns remain present.<sup>102</sup>

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

- How the Court of BiH and BiH Prosecutor's Office have handled factually and legally complex cases, as well as resisted pressures concerning high-profile and sensitive cases;
- Shortcomings in case prioritization and selection, particularly in relation to prosecution of "less complex" cases that are, according to the National Strategy, intended to be prosecuted before the courts of the RS, FBIH, or Brčko District;
- Issues related to the application of substantive criminal law in cases tried before the Court, including complex interpretation of the elements of the crime of genocide and the application of the doctrines of command responsibility and joint criminal enterprise;
- Problems and uncertainty with application of criminal procedure and fair trial standards, particularly concerning provisions related to trial *in absentia*, plea bargaining, trial management, and the quality of defence, witness protection, and witness support;
- An analysis of the reasons for the high rate of revocation of verdicts on appeal and problems with the appellate mechanism.

102 See *Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina*, supra note 2; *Witness Protection and Support in BiH Domestic War Crimes Trials*, supra note 4; and *Reasoning in War Crimes in Bosnia and Herzegovina: Challenges and Good Practices*, June 2010 (available at: <http://oscebih.org/documents/16879-eng.pdf>).

## 4.1 Overview and general assessment

Over five and a half years have passed since Section I for War Crimes within the Court of BiH and the Special Department for War Crimes within the BiH Prosecutor's Office became operational. An objective assessment of the work carried out in that period indicates that the Court of BiH and the BiH Prosecutor's Office, despite a number of challenges, have by and large **succeeded in ensuring that serious war crimes are prosecuted in an efficient manner compliant with human rights standards**. Thus, both institutions can be said to be meeting the objectives linked to their creation. Chief among those objectives was ensuring the existence of trustworthy institutions in the region to which cases against comparatively mid and low-level perpetrators could be transferred as part of the plan to ensure the implementation of the ICTY Completion Strategy.<sup>103</sup> Another, equally important, objective was to bolster the role of the newly-born state criminal justice institutions as an integral component of the domestic judicial system. The combination of these two goals resulted in the vesting of jurisdiction over war crimes cases in the Court of BiH and BiH Prosecutor's Office. Although these institutions are characterized by the presence of, presently, five international judges and three international prosecutors alongside national members of the judiciary, they are permanent and wholly domestic institutions that apply domestic criminal and procedural law.

## 4.2 Caseload of the Court of BiH and BiH Prosecutor's Office

Since its creation, **the Court of BiH has tried a total of 166 individuals for war crimes**.<sup>104</sup> Out of this number, final verdicts have been delivered for 68 of them: 52 were convicted and sentenced to imprisonment for an average of 16 years, while 14 were acquitted. All but one of the cases transferred from the ICTY under Rule 11bis have been completed.<sup>105</sup> (See: Fig. 3: *War crimes cases completed from January 2005 till September 2010*, and Fig. 4: *Accused processed before courts in BiH – Final verdicts rendered to individual accused from January 2005 till September 2010*, in Annex 1). In the majority of cases, the accused persons were charged with crimes against humanity or war crimes against civilians, or both. Twenty-five individuals were charged with genocide.<sup>106</sup> The overwhelming majority of the victims in the trials that have taken place to date were civilians. Fourteen accused have concluded plea bargaining agreements with the Prosecution. Finally, first instance verdicts are still

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103 See ICTY Completion Strategy (available at: <http://www.icty.org/sid/10016>); also Security Council Resolution 1534 (2004) (available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_1534\\_2004\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_1534_2004_en.pdf))

104 As of the end of September 2010.

105 See cases of *Gojko Janković, Mejakić et al., Rašević et al., Paško Ljubičić, Radovan Stanković, and Milorad Trbić*. As of September 2010, the case of Milorad Trbić is pending appeal.

106 See cases of *Petar Mitrović et al., Milorad Trbić, Milisav Gavrić, Vaso Todorović, Pelemiš et al., Radomir Vuković et al., Željko Ivanković, Jević et al., and Kos et al.*

pending in 27 cases, while second instance verdicts are awaited in 18 cases. These figures represent solid evidence of the positive record of the Court of BiH. This is particularly true when compared with the performances of other courts which have been dealing with crimes committed during the conflicts in the former Yugoslavia. For example, the ICTY, with much larger resources and over the course of many more years, completed trials against 125 accused in 89 cases by the end of June 2010. Of course this comparison must take into account that the cases processed by the ICTY were, in general, far more complex than the ones tried by the Court of BiH.

#### 4.2.1 Legally and factually complex cases

The quality of justice delivered by the Court of BiH is, in general, more than satisfactory. It must be noted that, **since it became fully operational in 2005, the Court of BiH has dealt with a number of complex and sensitive war crimes cases.** These cases were difficult due to the broad crime-base underlying the charges,<sup>107</sup> the large number of victims involved,<sup>108</sup> or because of the nature of responsibility of the accused as a superior rather than as a direct perpetrator.<sup>109</sup> For example, the case against Novak Đukić, a commander of the VRS (Army of Republika Srpska) found guilty of ordering a shelling attack on the centre of Tuzla which caused the deaths of 71 civilians, required the assessment of complex ballistics expertise. Other cases, such as *Mandić*, which resulted in the acquittal of the war-time Assistant Minister of the Interior of the Republic of BiH for crimes against humanity and war crimes against civilians, called for a deep understanding of the civil structure of authority during the conflict. In these cases, and others, the Court took a diligent approach toward the assessment of evidence necessary to reach a well-grounded conviction or acquittal.

#### 4.2.2 Impartiality in verdicts and charging decisions

In addition to dealing with legally and factually complex cases, the Court of BiH has grappled with a number of high-profile and sensitive cases that attracted enormous public interest – and pressure. The Court has displayed resistance to external pressures to convict or acquit in instances where cases were in the public eye. For example, the Court adhered to stringent requirements for sufficient evidence in such cases involving high ranking perpetrators (e.g. *Mandić*) or persons accused of genocide in Srebrenica (e.g. *Stupar*), acquitting these defendants when it found there was insufficient evidence to result in conviction. Leaving aside the complex legal aspects of these and other verdicts, the Court has clearly demonstrated on several

107 *Trifunović et al., Stupar et al., Bastah et al., Kličković et al., Adamović et al., etc.*

108 See, for example, *Trifunović et al., Milorad Trbić, Radomir Vuković et al., Mitrović et al., and Radovan Stanković.*

109 See, for example, *Rašević et al., Miloš Stupar, and Novak Đukić.*

vital occasions that it can and will adjudicate cases impartially and independently from public and political pressure. Likewise, **the BiH Prosecutor's Office has demonstrably resisted severe political pressure aimed at influencing the outcome of certain investigations.**<sup>110</sup> Moreover, as the recent case against BiH Army commander Zulfikar Ališpago demonstrates, the BiH Prosecutor's Office courageously proceeds with indicting individuals even in the face of threats against the life and security of prosecutors and witnesses involved in the case.<sup>111</sup> Finally, the overall charging record of the Prosecutor's Office of BiH shows an absence of any kind of ethnic bias: to date, individuals from all sides of the conflict have been brought to trial and the avowed policy of the Prosecution is to pursue cases against the most responsible perpetrators for the gravest crimes, without recourse to achieving any kind of ethnic balance. See Section 7, *Political and Public Support for War Crimes Processing in BiH*, for further discussion of resistance to political interference and attack.

#### 4.2.3 Shortcomings in case prioritization and selection

Notwithstanding these positive findings, there are still problematic issues which need to be addressed and areas in which improvement is needed. For example, some aspects of case selection by the BiH Prosecutor's Office give rise to serious concerns. In contrast to the complex and sensitive cases mentioned above, a large number of cases tried at the state level involve direct perpetrators charged with crimes against a limited number of victims.<sup>112</sup> Generally, the cases falling into this category do not pose any particular challenge for the Court of BiH and BiH Prosecutor's Office. These **less complex cases** should, as a general rule, be dealt with by the entity courts with a view to allowing the state level institutions to focus their resources and energies on the most complex cases, as indicated in the National Strategy. The cases brought forward by the BiH Prosecutor's Office to date raise a serious question as to whether this policy is really observed in practice. Shortcomings in the application of the criteria for prioritization of the most serious cases and distribution of cases between the state and entity level have become apparent. Consequently, current case prioritization and selection practices at the state level represent a serious concern both with regard to the inefficient utilization of the available resources and to the lack of transparency in prosecution policy.<sup>113</sup>

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110 In the course of 2009 and 2010, RS Prime Minister Milorad Dodik repeatedly demanded the indictment of Atif Dudaković, a commander of the Bosnian Army during the conflict.

111 See the Indictment against Zulfikar Ališpago, confirmed on 21 June 2010, p. 107.

112 See, for example, *Mensur Memić et al.*, *Ćerim Novalić*, *Elvir Jakupović*, *Miodrag Marković*, *Stipo Žulj*, *Darko Dolić*, *Ljubo Tomić et al.*, *Izet Smajić*, *Tomo Jurinović*, and *Jakov Duvnjak*.

113 For further discussion of the lack of transparency in case transfer decisions, see Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, *supra*.

## 4.3 Application of international humanitarian law and domestic criminal law

### 4.3.1 Application of substantive criminal law

The Court of BiH has confronted complex issues of IHL in a number of cases. It generally addressed those issues with a good degree of accuracy, regularly following the guidance of ICTY case-law. Arguably, reference by the Court of BiH to ICTY case-law has been facilitated by the fact that the Court, in contrast to the majority of courts at the entity level, applies the 2003 BiH Criminal Code rather than the SFRY Criminal Code that was in force at the time of the conflict.<sup>114</sup> The Court of BiH has generally taken the stance that the retroactive application of the 2003 BiH Criminal Code is not in violation of the principle of legality, an interpretation consistent with rulings of the Constitutional Court of BiH.<sup>115</sup> In March 2009, however, it partially departed from this stance in the appeal judgment in the *Kurtović* case as it held that when considering the minimum statutory sentence in crimes that were foreseen in both the 2003 BiH Criminal Code and the SFRY Criminal Code, the latter should be applied as the more lenient law.<sup>116</sup> This precedent did not have a major impact on the Court's practice since it seems to be applicable only to cases in which a panel might sentence a defendant to the minimum term of imprisonment prescribed under the BiH Criminal Code, which is ten years. However, it should be noted that, by September 2010, *Kurtović* was the only decision of the Court of BiH in which the SFRY Criminal Code was held to be the applicable law rather than the BiH Criminal Code.

### 4.3.2 Reasoning on genocide perpetration and modes of liability

Some of the most complex issues addressed by the Court of BiH to date relate to proving elements of genocide perpetration, command responsibility, and joint criminal enterprise (JCE). As of September 2010, 25 individuals have been charged with genocide; it must be noted that all of these cases are linked to the take over of Srebrenica by the VRS<sup>117</sup> in July 1995. While in most of these cases the first instance

114 As the OSCE Mission stated in a previous report, the 2003 BiH Criminal Code is better able to address the serious violations of humanitarian law and human rights that took place during the conflict in Bosnia and Herzegovina, as well as to define the precise nature of criminal responsibility of individuals involved in committing those violations. The new code incorporates crimes against humanity and offers a comprehensive definition of command responsibility, thus mirroring the provisions contained in the ICTY Statute. Such provisions are absent from the SFRY Criminal Code. See *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, *supra* note 4.

115 See *Maktouf*, Decision on Admissibility and Merits, BiH Constitutional Court, 30 and 31 March 2007.

116 *Zijad Kurtović*, Appellate Judgment, 25 March 2009, paras. 127-134.

117 Army of Republika Srpska.

verdict has not yet been reached, nine individuals have been convicted at first or second instance. Overall, the Court has taken a very cautious and strict approach in the interpretation of the **elements of the crime of genocide**. It is important to note that all but one of the accused who have been convicted of genocide to date<sup>118</sup> have been found guilty as accessories to genocide and not as direct participants in the crime.<sup>119</sup> In the *Trifunović et al.* case, the Appellate Panel revised the first instance verdict with respect to six accused, finding that they were guilty only as accessories to genocide and reducing their sentences by ten years.<sup>120</sup> Although the Appellate Panel found the acts committed by the accused – involving the killing of over one thousand people – formed part of the genocide committed in Srebrenica in July 1995, it concluded that the accused themselves did not share the *mens rea* (the specific intent to commit genocide) with those who planned the attack. The Panel's conclusion seemed to be influenced by the fact that the accused were low-level soldiers who carried out the orders of their superiors, rather than planners of the genocide. Moreover, the Court of BiH recently rejected a guilty plea of genocide entered by the accused Vlastimir Golijan on grounds that while he pleaded guilty to the facts in the Indictment, he stated that he did not understand the legal notion of genocide.<sup>121</sup> Therefore, the Court of BiH deemed that the legal requirements for the acceptance of a guilty plea had not been satisfied.

Another legally controversial issue which emerged in the *Stupar et al.* case concerned the theory of **command responsibility**. The question arose as to what responsibility is incurred by a defendant who assumed the role of commander over the perpetrators only *after* the commission of the crime. The Appellate Panel quashed the verdict of conviction issued by the first instance panel and acquitted the defendant, Stupar, on the grounds that a commander cannot be held criminally responsible for a failure to punish his subordinates if he was not in a position of authority at the time when the subordinates committed the crime.<sup>122</sup>

Indeed command responsibility, together with **JCE**, has been another extremely complex issue addressed by the Court of BiH in many decisions. Defendants have

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118 See *Milorad Trbić*, Trial Judgment, 16 October 2009, convicting Trbić of genocide committed as part of a JCE, and sentencing him to 30 years' imprisonment. The appellate verdict in this case is still pending as of the end of September 2010.

119 *Radomir Vuković et al.*, Trial Judgment, 22 April 2010, *Petar Mitrović*, Appellate Judgment, 7 September 2009, and *Stupar et al.*, Appellate Judgment, 9 September 2009.

120 *Stupar et al.*, Appellate Judgment, 9 September 2009. In the *Petar Mitrović* case, the Appellate Panel also requalified the accused's role as that of an accessory to genocide, and reduced his sentence from 38 to 28 years. See Appellate Judgment, 7 September 2009.

121 Decision on the Acceptance of a Guilty Plea, rendered orally at the 23 September 2010 hearing.

122 The Appellate Panel found that Stupar was the commander of the Šekovići Special Police Detachment from February 1994 until mid June 1995 when he was replaced by Rade Čuturić. Between mid June 1995 and 21 August 1995 when he became Head of the Zvornik Department of the Anti-Sabotage Administration, Stupar remained a member of the 2nd Šekovići Special Police Detachment without having any specific assignment, with the exception of the period between 15 and 18 July when he substituted for Čuturić who had been injured. Therefore, the Appellate Panel concluded that Stupar was not the commander in the period covered by the Indictment (10-14 July 1995). See Appellate Judgment, 28 April 2010, paras. 44, 51, and 56.

been charged under these two forms of responsibility in a considerable number of cases before the Court of BiH. In many instances, command responsibility and JCE are either used alternatively or charged in conjunction with some form of direct perpetration. Since the first instance verdicts in most of these cases are still pending,<sup>123</sup> it is not possible at this point to assess which theory the Prosecution will have more success proving. However, the Court has clearly ruled that a defendant cannot be convicted under both command responsibility and JCE.<sup>124</sup>

The Court's reasoning with regard to the applicability of these two modes of liability is by no means consistent from case to case and reveals a certain degree of confusion. It is clear from the cases reviewed that many first instance judges at the Court of BiH are still not fully comfortable with the use of command responsibility as a mode of liability. Consequently, reasoning concerning the applicability of command responsibility is often incomplete and contradictory,<sup>125</sup> as was pointed out by the Appellate Panel in several of the cases. In the *Šefik Alić* case,<sup>126</sup> for example, the Appellate Panel found that the Trial Panel erred when it concluded that the defendant was relieved of command responsibility due to the fact that his superior was present when the acts in question occurred. Moreover, the Trial Panel should have considered whether the accused had *de facto* authority over his subordinate, rather than merely finding that he lacked *de jure* authority. Similarly, in the *Lazarević et al.* case,<sup>127</sup> the Appellate Panel found that the Trial Panel had erroneously established that the defendant was in a position of authority (as deputy warden) and ordered a retrial.

By contrast, Court of BiH panels seem to have a much firmer grasp of the theory of joint criminal enterprise. With few exceptions,<sup>128</sup> the decisions reviewed for the purpose of this analysis show an increased understanding of the concept of JCE and an overall sound ability to tackle some of the most sophisticated questions relating to this mode of liability.<sup>129</sup> However, the same cannot be said of the Prosecution which,

123 *Gasal et al., Bastah et al., Adamović et al., Kličković et al., Ivanković et al., Petar Čivčić, and Dronjak et al.*

124 See *Radić et al.*, Trial Judgment, p. 174, and *Rašević et al.*, Appellate Judgment, pp. 29-30. The Appellate Panel in the latter case found that the Trial Panel had erred when it convicted the accused on both grounds but only sentenced him on the basis of command responsibility. See also *Mejakić et al.*, Appellate Judgment, 16 February 2009, para. 67. Nonetheless, it appears that the defendants in the recently decided *Lalović et al.* case have been convicted on the basis of both JCE and command responsibility. However, the written verdict was not available at the time of the writing of this report.

125 It should be noted that the Trial Panel's analyses in the *Ferid Hodžić* and *Predrag Kujundžić* cases represent positive examples, for they are well thought out and clear.

126 Decision on the Revocation of the First Instance Verdict, 23 March 2009, paras. 13-14.

127 Decision on the Revocation of the First Instance Verdict, 21 August 2009, p. 3-4. On 23 September 2010, the Appellate Panel issued its verdict, finding Sreten Lazarević, Dragan Stanojević and Slobodan Ostojić guilty of war crimes against civilians as co-perpetrators (Article 29, BiH Criminal Code). Sreten Lazarević was acquitted of command responsibility due to the Prosecution's failure to prove that he had effective control over the perpetrators.

128 For examples of these exceptions, see *Ranko Vuković et al.*, Decision on the Revocation of the First Instance Verdict, 2 September 2008, and the *Appellate Judgment*, 3 June 2009.

129 There are a number of cases involving JCE in which the first instance verdict has not yet been issued. Moreover, four accused who were charged with participation in a JCE have signed plea bargaining agreements. See *Damir Ivanković, Gordan Đurić, Ljubiša Četić, and Vaso Todorović.*

in a number of cases, failed to properly plead and prove all of the elements of JCE. The Prosecution's lack of adequate understanding of JCE is evident in a number of indictments and was duly noted by the Court of BiH. In the *Mandić* case, for instance, the Trial Panel acquitted the defendant of ordering an attack,<sup>130</sup> but suggested that the Prosecution should have considered charging the accused under the theory of JCE.<sup>131</sup> In several cases, the Court stressed the importance of pleading all of the elements of JCE specifically and with sufficient precision in the indictment.<sup>132</sup> For example, the Appellate Panel in the *Božić et al.* case also found that the scope of the JCE pleaded in the indictment must not be overly broad.<sup>133</sup> Yet, in the *Gasal et al.* indictment, the pleading of the JCE is only inferred from the mere reference to the relevant provision of the criminal code. This indictment was filed in 2007 and has not been amended despite the first and second instance judgements in other cases that indicate JCE should be pleaded specifically and clearly.<sup>134</sup>

In the decisions analysed for the purposes of this section, the Court also advanced some important reservations with regard to the applicability of JCE to low-level perpetrators. Discussing the accused's liability under JCE, the Trial Panel in the *Božić et al.* case<sup>135</sup> stated that this form of liability should be reserved only for those who conceived and executed the plan, while the common soldiers should only be held responsible for the crimes they perpetrated.<sup>136</sup> The Trial Panel in the *Radomir Vuković et al.* case reached a similar conclusion.<sup>137</sup> These findings place important limitations on the applicability of JCE in the cases before the Court of BiH, and should be taken into account by the Prosecution when preparing indictments.

Moreover, a number of panels have clarified the difference between participation in a JCE, covered by Article 180(1), and **co-perpetration** under Article 29 of the BiH Criminal Code. In the *Radić et al.* case the Court found that while Article 29 requires that the defendant make a "decisive contribution" to the commission of the crime, a participant in JCE is not required to have made a substantial or significant contribution to the crime. This indicates that the degree of participation in the JCE does not need to meet the standard of a "decisive contribution." According to the

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130 The defendant was also acquitted of command responsibility.

131 Trial Judgment, 18 July 2007, p. 162.

132 See *Bundalo et al.*, Trial Judgment, 21 December 2009, and *Božić et al.*, Trial Judgment, 6 November 2008, and Appellate Judgment, 5 October 2009.

133 Appellate Judgment, para. 122. See also *Milorad Trbić*, Trial Judgment, 16 October 2010, where the Trial Panel narrowed the scope of the JCE to encompass only the events perpetrated in the area of responsibility of the Zvornik Brigade.

134 The indictment against Nisvet Gasal and Musajb Kukavica was filed on 18 September 2007. The indictment merely refers to Articles 180(1), (2), and 29, indicating that the defendants are charged with JCE and command responsibility. The indictment against the other two accused (Handžić and Dautović), on the other hand, makes specific reference to JCE.

135 Trial Judgment, 6 November 2008, p. 62-66, rejecting the Prosecution's theory of JCE for, *inter alia*, failure to sufficiently plead the elements of JCE and to prove its existence. The Trial Panels findings regarding the existence of JCE were upheld in their entirety in the Appellate Judgment, 5 October 2009, paras. 117-170.

136 *Božić et al.*, Trial Judgment, 6 November 2008, p. 63.

137 *Radomir Vuković et al.*, Trial Judgment, 22 April 2010, para. 591.

Trial Panel, this distinction is only relevant in cases where the defendant did not participate in the *actus reus* of the criminal offence, but has committed “some other act” which led to the perpetration of the crime.<sup>138</sup> Similarly, the Trial Panel in the *Krsto Savić et al.* case distinguished participation in a JCE from co-perpetration under Article 29 and aiding and abetting. The Panel found that the degree of participation required for JCE is lesser than the decisive contribution mandated by Article 29, but that participation in JCE carried more weight than the acts of an accessory since the participant in a JCE shares the intent of the other members of the criminal enterprise.<sup>139</sup>

From this brief review of the case-law of the Court of BiH it can be concluded that both trial and appellate panels have generally developed a sound understanding of international criminal law. Some problems seem to remain – particularly with regard to the Prosecution – in relation to the correct application of modes of liability such as command responsibility and JCE. These modes are used, in the majority of cases, against individuals who held some level of authority and did not materially perpetrate the crime. As such, these types of cases are, by definition, more complex and challenging for judges and prosecutors. It is important, therefore, that opportunities for **continuing legal education** of judges and prosecutors, particularly newly appointed ones, as well as occasions and methods for them to share legal opinions and best practices on these matters, are provided.

#### 4.4 Adherence to criminal procedure and fair trial standards

Trials at the Court of BiH are conducted exclusively under the new adversarial-oriented criminal procedure introduced in 2003. In December 2004, the OSCE Mission issued a report presenting findings and conclusions on the implementation of the new procedure code documenting the main challenges faced by judicial actors in the switch from the inquisitorial system to the new predominantly adversarial one.<sup>140</sup> Six years after that report, it can be fairly said that the new procedure has taken deep root in the BiH criminal justice system. However, a number of challenges and problems remain. The cause of these problems often stems from the shortcomings associated with an inadequate understanding by judicial actors of their role and prerogatives under the procedure or gaps in the wording of some provisions of the Criminal Procedure Codes. War crimes trials at the Court of BiH, due to their

138 *Radić et al.*, Trial Judgment, 20 February 2009, pp. 239-241 (revoked on appeal on the basis of essential violations of criminal procedure), citing to *Prosecutor v. Kvočka et al.*, Appellate Judgment, Case No. IT-98-30-1, 28 February 2005.

139 Trial Judgment, 24 March 2009, paras. 429-430. The same view had been expressed by the Appellate Panel in *Rašević et al.*, although the Panel’s reasoning was somewhat confusing, as it appeared to use co-perpetration in JCE and participation in JCE interchangeably. See Appellate Judgment, 6 November 2008, p. 27.

140 *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina*, December 2004 (available at <http://www.oscebih.org/documents/1079-eng.pdf>).

complexity, represent a significant method of assessing the quality of justice delivered in BiH from the point of view of the application of the criminal procedure and trial management. Many of the issues and remarks illustrated below are therefore also applicable to “ordinary criminal cases” processed at both the state and the entity level.

#### 4.4.1 Absence of the accused at trial

One of the most serious procedural challenges faced by the Court of BiH in the first years of its operation related to the **refusal of a number of accused to attend the hearings scheduled in their cases**. In January 2007, at least 29 defendants started a hunger strike while in detention. As part of their protest, they refused to respond to the Court’s summonses to attend hearings, claiming that, due to the hunger strike, they were too exhausted to attend the proceedings. The judges assigned to these cases had to determine whether the trials could continue without their presence in the courtroom in light of the prohibition to hold trials *in absentia* in the BiH Criminal Procedure Code.<sup>141</sup> In the vast majority of these instances, trial panels took the view that proceedings should continue since the defendants had been duly informed about the ongoing proceedings and they had deliberately decided not to attend them.<sup>142</sup> Accordingly, it was held that continuation of the trial in those cases was in accordance with fair trial standards, taking into consideration that the right to defence was ensured by the mandatory presence of their attorneys. While the judges correctly interpreted the criminal procedure in the light of the international provisions on the rights of the accused,<sup>143</sup> it must be recognized that, as the judges in the *Vuković* case underlined, the issue at stake was difficult due to the failure of the BiH Criminal Procedure Code to regulate this situation and its relationship to the trial *in absentia* prohibition.<sup>144</sup>

Indeed the provision on trials *in absentia* included in the BiH Criminal Procedure Code is remarkably short and leaves room for other grey areas.<sup>145</sup> In sum, the efficiency and fairness of the procedure would greatly benefit from a more detailed explication of the trials *in absentia* prohibition which, taking into account fair trial standards, would clearly identify the circumstances in which it applies.

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141 Article 247 BiH Criminal Procedure Code states, “an accused shall not be tried *in absentia*.”

142 See, for example, *Božić et al., Rašević et al., Momčilo Mandić, Stupar et al., and Radmilo Vuković*.

143 See in this regard *Sejdović v. Italy*, ECHR, No. 56581/00, (1 March 2006).

144 See *Radmilo Vuković*, Decision, 19 January 2007.

145 For example, the Court of BiH has finalized cases in which the accused absconded while the second instance verdict was pending but after the appeals had been submitted. See cases against Momir Savić and Mirko Todorović.

#### 4.4.2 Plea bargaining agreements

Another procedural matter which needs to be regulated more clearly is the use of plea agreements, particularly when they are the result of a bargaining process between the parties. While this tool was not used in the first years of the work of the Court of BiH, in the last three years 14 plea agreements have been concluded before Section I for War Crimes. Thus, **plea agreements have become an important aspect of war crimes prosecutions at the Court of BiH.** According to the Prosecution, the use of plea bargains is intended to deliver some positive results in the form of shortened criminal proceedings and reduction of the caseload.<sup>146</sup> However, the manner in which plea bargaining agreements are conducted by the BiH Prosecutor's Office casts doubt over whether these supposed benefits are actually delivered. Moreover, the practice which has emerged to date gives rise to some concerns with regard to compliance with the criminal procedure and, perhaps more troublingly, as to whether the fundamental purposes of war crimes trials is undermined by the manner in which plea bargains are presently employed.

First, it has to be underlined that all but two plea agreements before the Court of BiH<sup>147</sup> were reached after the beginning of the main trial – some even at the very end of the evidentiary proceedings.<sup>148</sup> While this is allowed under the BiH Criminal Procedure Code,<sup>149</sup> concluding plea agreements after the presentation of the evidence significantly diminishes the benefits of the plea bargaining process. In such cases, the costs of a full trial have already been incurred and the witnesses have been exposed to the possible anguish of having to testify and face the accused. Therefore, the Prosecution should carefully consider whether or not to enter into plea agreements with defendants at such a **late stage in the proceedings**. Alternatively, an amendment to the criminal procedure could prescribe a time barrier after which the Prosecution and Defence may not negotiate a plea agreement.

Moreover, it is by no means clear that bargaining benefits in exchange for guilty pleas is always appropriate in cases concerning crimes as serious as genocide, crimes against humanity, and war crimes against civilians. Use of this legal tool in such cases should go hand in hand with an assessment of whether other possible benefits of the criminal process can be linked to the guilty plea – such as admission of facts by the accused in open session, statements locating whereabouts of missing persons, providing opportunities for expressions of remorse, and, as considered in further

146 See BiH Prosecutor's Office, Special Department for War Crimes, Practice Direction No. 2 (Pleas and Plea Agreements), 3 March 2008. However, this document is an internal guideline of the Special Department and has not been adopted by the Collegium of Prosecutors.

147 See the *Marko Boškić* case. The indictment was confirmed on 9 July 2010, charging the defendant with crimes against humanity. The plea agreement was accepted by the Court, and Boškić was sentenced to 10 years' imprisonment. See also the *Elvir Jakupović* case. The indictment was confirmed on 21 June 2010. On 8 July 2010, the defendant pleaded not guilty, and a plea agreement was accepted by the Court on 23 August 2010. The accused was sentenced to five years' imprisonment.

148 *Ljubiša Četić, Rade Veselinović, Paško Ljubičić, and Dušan Fuštar*.

149 Article 231 of the BiH Criminal Procedure Code.

detail below, co-operation of the accused in other investigations. In this regard, enforcement/amendment of the practice direction on pleas and plea agreements at the BiH's Prosecutor Office and **adoption of similar such guidelines specific to war crimes cases at the entity level would be beneficial.**<sup>150</sup>

Another concern is related to the use of a form of plea bargaining by the Prosecution which essentially amounts to **charge bargaining**. In a previous report, the OSCE Mission expressed concern in relation to a number of cases in which, before reaching a plea agreement, the Prosecution submitted an amended indictment, dropping certain charges.<sup>151</sup> Although the Prosecution is allowed to amend the indictment during the trial, this does not seem to be strictly within the letter and spirit of the law if the amendments effectively drop charges in order to negotiate a plea agreement with the defendant. Although the criminal procedure does not expressly forbid charge bargaining, this practice is seemingly incompatible with Article 17 of the BiH Criminal Procedure Code, which mandates the Prosecution to file charges when there is evidence that a crime has been committed. An interpretation of the plea bargaining provisions in light of the principle of legality of prosecution suggests that charge bargaining is not permissible under BiH law. Against this backdrop, it can be said that **the current practice in plea agreements would certainly benefit, in terms of transparency and clarity of the law, from an amendment to the current provisions which would clarify that the parties can negotiate only on the type and length of the sentence to be imposed on the defendant.**

A further shortcoming of the plea agreement provisions is related to its lack of mechanisms to ensure the fulfilment by the defendant of **co-operation clauses** that may be included in the agreement. Indeed, once the Court accepts the agreement with the proposed sentence, there is no possibility under the procedure to withdraw that decision, or modify the sanction, in the event that the defendant does not subsequently comply with the co-operation clause. Therefore, the prosecutor, after the acceptance of the agreement is in reality left with no effective means to obtain the co-operation agreed in the plea agreement. In order to circumvent this problem, some judges at the Court of BiH have developed the practice of receiving the plea agreement but postponing the deliberation on it until the defendant complied with the co-operation clause, namely by testifying for the prosecution in another case that was ongoing at the same time.<sup>152</sup> This practice has the legitimate and valuable goal of ensuring that an accused complies with the duty to co-operate with justice that

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150 *Supra* note 146.

151 See OSCE Mission, *Ninth Report in the Paško Ljubičić Case*, December 2008 (available at <http://www.oscebih.org/documents/14044-eng.pdf>). Instances of charge bargaining have been observed in the following cases: *Rade Veselinović, Paško Ljubičić, Dušan Fuštar, Vaso Todorović* and *Milivoje Ćirković*.

152 On 26 June 2009, in the case of *Koričanske Stijene No.1*, the Panel initially rejected the plea agreement on the grounds that the testimony given by the defendant (Gordan Đurić) in a related case as part of his duty to co-operate was not consistent with the facts admitted in the plea agreement. A subsequent plea agreement was accepted in this case by the Court two months later after the defendant testified again in the related case. On that occasion, the judges held that the defendant had duly complied with the co-operation clause.

he undertook as a condition for a plea bargaining agreement. It has, however, some problematic aspects and limitations. A plea agreement is not effective, or binding on any party, until approved by the judge. Therefore, even if a defendant complies with his duty to co-operate, a judge may well eventually reject the agreement on other legitimate grounds, with an outcome that is seemingly unfair to the defendant. Additionally, the practice of delaying deliberation on plea agreements is only feasible when the intended co-operation should take place in a short time, as delaying the conclusion of the case pending the performance of the requested co-operation would otherwise be inconsistent with the right to trial within a reasonable time. Taking this into account, **a comprehensive and more efficient solution to ensure the fulfilment of co-operation clauses seems to be possible only through adequate amendments to the procedure.**

#### 4.4.3 Length and efficiency of proceedings

Despite these above-mentioned challenges, *inter alia*, judges of the Court of BiH have been generally diligent in ensuring fair trial standards and the overall efficiency of proceedings. With regard to the respect of the right to trial within a reasonable time, it can be said that, as a rule, trials have been conducted in due time. The first instance verdict in many of the less complex cases, involving low-ranking accused and a small number of victims, was reached in less than a year from the beginning of the trial. For example, this was the case in the cases of *Marko Škrobić* (5 months), *Krešo Lučić* (7 months), *Ivica Vrdoljak* (2 months), and *Nenad Tanasković* (6 months). On the other hand, complex cases, involving higher ranking accused, a large number of victims, and/or several accused, have taken much longer to complete in the first instance. For example, the first instance verdict in the *Bastah et al.* case was reached one and a half years after the beginning of the trial. Similarly, the trial against Milorad Trbić, charged with genocide, lasted over two years in the first instance.

In this regard, it must be noted that the length and efficiency of the proceedings before the Court of BiH is dependent on many factors, such as the number of accused, their behaviour in court, the availability of witnesses, and the performance of the Prosecution and the Defence. However, it is ultimately the role of the presiding judge to ensure that the proceedings are conducted in the most efficient manner possible, in accordance with the Criminal Procedure Code and fair trial standards. Although the work of the Court in this respect has significantly improved over the past several years, a number of problems concerning the conduct of the proceedings still remain. Poor **time management** often represents an obstacle to efficient proceedings in war crimes cases before the Court of BiH. Due to prosecutors and defence counsel regularly overestimating the time needed for the examination of witnesses and the presentation of material evidence, hearings are often finished earlier than planned, leaving the courtrooms empty for several hours each day. Although a number of presiding judges have issued warnings to the parties, few have taken concrete steps

towards resolving this problem. As an example of good practice, it can be mentioned that the Presiding Judge in the *Babić et al.* case warned the defence counsel that if they continued to schedule only one or two witnesses a day, the Court would start calling the witnesses from the Defence's list in order to speed up the proceedings. This had the effect of prompting the Defence to propose a more efficient use of the trial time. Another way to increase the efficiency of the proceedings is to ensure that the parties adhere to the estimated length of examination for each witness. While most panels require each party to submit a plan of action at the beginning of the presentation of the prosecution/defence case, detailing the time and scope of direct examination, few panels actually enforce these plans. The Mission has noted, however, that some trial panels have regularly used **status conferences**, which represents a positive development and should contribute to the overall efficiency of the trials.

#### 4.4.4 Defence

The practice of the Court of BiH regarding the **right of the accused to adversarial proceedings** is notable. When deciding about the use of statements taken from a witness or accused during the investigation as evidence, trial panels have made constant reference to the case-law of the European Court of Human Rights (ECtHR). Such departures from the principle of direct presentation of evidence are allowed under the BiH Criminal Procedure Code. In particular, pursuant to a recent amendment to the BiH Criminal Procedure Code,<sup>153</sup> prior statements of the accused given during the investigation can be used against him, even if he has decided to remain silent during the main trial, but only if he was duly informed about the charges and his procedural rights at the time of questioning. In this regard, it must be noted that the Court's decisions to admit prior statements of an accused were reached only after a careful assessment of the satisfaction of fair trial requirements imposed by the ECtHR.<sup>154</sup>

Strictly connected to the issue of compliance with fair trial standards is the quality of defence counsel at the Court of BiH. At the outset it must be said that the work of OKO (the Criminal Defence Section) in providing both training and legal and administrative support to defence counsel at the Court of BiH is generally of a very high standard. OKO has greatly assisted in ensuring that equality of arms between the Prosecution and Defence exists in practice. Nonetheless, the OSCE Mission has noted that the performances of defence counsel vary greatly from case to case and there are some recurring problems in this area. In most war crimes cases at the Court of BiH, an additional *ex officio* defence attorney is appointed for every accused,<sup>155</sup>

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153 Article 273(3). See Law on the Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette No. 58/08.

154 *Milorad Trbić*, Trial Judgment, 16 October 2009, paras. 84-164.

155 *Pelemiš et al., Gasal et al., Kličković et al., Željko Ivanović, Adamović et al., Babić et al.*, etc.

and most trial panels have required that both attorneys be present at each hearing in cases where they are appointed. Not all attorneys have followed this rule, however, prompting criticism from the judges.<sup>156</sup> Some additional attorneys have also ignored the Trial Panel's repeated instructions to be prepared to replace the lead counsel at any point in the proceedings.<sup>157</sup> Moreover, the Mission is concerned by the Court's decision in some cases to allow an accused with one attorney to be represented by another defendant's counsel when his attorney is justifiably absent from the proceedings.<sup>158</sup> Such representation, which raises concerns regarding a possible conflict of interests, is ineffective, as the replacing attorney often acts merely as a formal representative of the accused and rarely takes an active role in the proceedings. In a previous report, the OSCE Mission has also expressed concern regarding the failure to investigate the financial status of defendants in the context of awarding an *ex officio* defence to accused, which appears to be an ongoing problem.<sup>159</sup>

#### 4.4.5 Witness protection and support

Another key issue in war crimes trials has been the protection of and support to witnesses and victims. This issue has already been addressed in detail by the OSCE Mission in the report on *Witness Protection and Support in BiH Domestic War Crimes Trials*, released in May 2010.<sup>160</sup> The OSCE Mission underlines that the Court of BiH has demonstrated a serious commitment to the protection and support of witnesses. This is evident from the work of the Witness Support Office, the availability of sophisticated technical resources for the implementation of protective measures (such as video-link and voice/image distortion) and the commitment of trial panels to adhering to the provisions of the Law on the Protection of Vulnerable and Threatened Witnesses. Nonetheless, the Mission reiterates its previous concerns regarding the **inadvertent disclosure of the identities of protected witnesses** by both parties, as well as by some of the judges. Disturbingly, this has occurred in a number of cases.<sup>161</sup>

156 *Gasal et al.*, hearing held on 20 May 2009, and *Kličković et al.*, hearings held on 25 August, 1 July, 22 September, and 13 October 2009.

157 *Gasal et al.*, hearing held on 19 May 2010. As a positive example, see *Selimović et al.*

158 See, for example, *Babić et al.* and *Damjanović et al.*

159 OSCE Mission Report on *Processing of ICTY Rule 11bis cases*, *supra* note 2, at p. 33-4.

160 OSCE Mission Report, *Witness Protection and Support in BiH Domestic War Crimes Trials*, *supra* note 4.

161 See *Milorad Trbić*, *Kličković et al.*, *Bastah et al.*, *Vuković et al.*, *Momir Savić*, and *Željko Lelek*. The presiding judges' response in most such cases, consisting of a mere warning to the parties to be more careful, is highly inadequate given the seriousness of the situation. In the case of *Milorad Trbić*, the Panel even wilfully put protected information in the hands of the media and public by allowing a protected witness to be heard in open session and simply requesting those present to keep the information secret. See OSCE Mission, *Eighth Report in the Milorad Trbić Case*, July 2009 (available at <http://www.oscebih.org/documents/16491-eng.pdf>).

#### 4.4.6 Revocation on appeal

The appeal procedure before the Court of BiH raises some complex issues. The OSCE Mission, in a June 2010 report, expressed concern regarding the **high rate of first instance verdicts revoked or revised on appeal** and its impact on the overall quality of justice delivered by the Court of BiH.<sup>162</sup> To analyse this problem more deeply, this section assesses a sample of 29 appellate decisions issued by the Court of BiH in 2008, 2009, and 2010. According to this analysis, the first instance verdict was confirmed in its entirety in only five of the 29 cases examined. In 14 cases,<sup>163</sup> the Appellate Panel revoked the first instance verdict and retried the case, while it revised the verdict in a further ten cases.<sup>164</sup>

It is important to note that nine out of those 14 verdicts were revoked, entirely or partially, on grounds that the wording of the verdict was incomprehensible, contradictory, or unreasoned. The scope of this ground of appeal, prescribed under Article 297(1)(k) BiH Criminal Procedure Code as one of the essential violations of criminal procedure requiring revocation of the verdict, was treated in detail in the appellate decision concerning *Todorović and Radić*.<sup>165</sup> In particular, the Appellate Panel clarified that Article 297(1)(k) is not a valid ground of appeal to contest the accuracy of the facts established by the Trial Panel.<sup>166</sup> Instead, the Appellate Panel will examine only whether, on its face, the verdict is incomprehensible, internally contradictory, contradicts the grounds of the findings, has no grounds at all, or did not cite reasons concerning decisive facts. Further, in the *Krešo Lučić* case, the Appellate Panel revoked the first instance verdict on the grounds that the *operative* and *reasoning* parts of the verdict, which respectively detail the court's decisions and the reasons justifying them, were contradictory. It did so because it found that the Trial Panel completely failed to outline the facts and circumstances constituting the elements of the criminal offence in the operative part of the judgement, despite having mentioned relevant facts in the reasoning part. The Appellate Panel further found that the operative part of the verdict was self-contradictory, in that it defined

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162 See *Reasoning in War Crimes Judgments in Bosnia and Herzegovina*, p. 12, *supra* note 102. International Criminal Law Services, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of BiH and Prosecutor's Office of BiH in 2009*, 25 December 2008 p. 32 (available at <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>).

163 In the *Stupar et al.* case, the first instance verdict was only revoked with regard to the accused Stupar.

164 This includes the *Trifunović et al.* case which was separated from *Stupar et al.* in the appeal phase.

165 *Todorović et al.*, Appellate Judgment, 17 February 2009, paras. 15-17. See also *Marko Škrobić*, Appellate Judgment, 22 April 2009, paras. 8-13.

166 *Todorović et al.*, Appellate Judgment, 17 February 2009, paras. 18, 20.

the same act as both unlawful deprivation of liberty and as [an] other inhumane act of a similar character.<sup>167</sup>

Five of the analysed verdicts were revoked, and two revised, as the Appellate Panel found that the Trial Panel's factual findings were erroneously and incompletely established. This was the case in the proceedings against Marko Samardžija who had been sentenced by the Trial Panel to 26 years of imprisonment for crimes against humanity. After reconsidering the evidence, the Appellate Panel found the accused guilty of imprisonment or other severe deprivation of liberty, but acquitted him of being an accomplice in instigation, incitement, and of aiding and abetting murder. He was eventually sentenced to seven years' imprisonment.<sup>168</sup> Similarly, the verdicts in the *Zdravko Mihaljević*,<sup>169</sup> *Suad Kapić*,<sup>170</sup> and *Lazarević et al.*<sup>171</sup> cases were revoked on the basis of erroneous and incomplete factual findings. Moreover, five of the verdicts selected for the sample were revised due to violations of the criminal code with regard to, for example, the Trial Panels' findings on the elements of genocide or command responsibility. An analysis of the decisions of the Appellate Division on these issues has been presented under the previous sub-section (Section 4.3.2 *Reasoning on genocide perpetration and modes of liability*).

Against this background it is possible to draw some tentative conclusions. A review of the recent appellate decisions at the Court of BiH reveals a **very high rate of revocations or revisions of the first instance verdicts**. Objective analysis of the grounds of appeal upheld by the Appellate Division seems to suggest that the number of cases revoked or revised on grounds of erroneous facts or violations of the criminal code is not unreasonable or at least not exceptional. What is seemingly exceptional is the rate of revocation due to mistakes in the wording of the verdict. This fact is indicative of a more complex issue. On one level, it should be a warning to first instance panels to take greater care when writing the verdicts in order to avoid having them overturned on appeal. On the other hand, it possibly exposes a shortcoming in the appellate proceedings as regulated under the 2003 Criminal Procedure Codes. Under the current provisions, following the revocation of a verdict, the Appellate Panel proceeds to "retry" the case instead of remanding it to the Trial Panel, as was

167 Decision Revoking the First Instance Verdict, 3 April 2008. See also *Mirko Pekez et al.*, Appellate Judgment, 29 September 2008, finding that the verdict was contradictory because it stated in the operative part that all three of the accused had committed all of the acts in question, while the reasoning part provided that the first and third accused's participation in the action of gathering civilians and marching them to the execution site were the only incontestable facts.

168 Appellate Judgment, 15 October 2008.

169 Decision Revoking the First Instance Verdict, 26 March 2009. The Appellate Panel revoked the first instance verdict on the basis of Article 290 (l) of BiH Criminal Procedure Code (The Contents of the Verdict), rather than under Article 299 (Incorrectly and Incompletely Established Facts). The final decision of the Appellate Panel in this case is still pending. It is worth noting that the accused had been acquitted by the Trial Panel.

170 Decision on the Revocation of First Instance Verdict, 2 October 2008, granting the prosecution appeal. Kapić, who had been acquitted by the Trial Panel, was subsequently found guilty of war crimes and sentenced to 17 years' imprisonment.

171 Decision on the Revocation of the First Instance Verdict, 21 August 2009. Another ground for the revocation of the first instance verdict in this case was Article 297(l)(k).

the standard practice in the majority of cases processed under the previous Criminal Procedure Codes. The present system of appeals may have the unintended effect of relieving the Trial Panel of the pressure to get it right the first time, as they can expect the Appellate Panel to “fix” any problems. A trial panel’s involvement in a case ceases after the issuance of the first instance verdict. Thus, the panel is not forced to correct its mistakes upon retrial, and it is therefore not required to consider the Appellate Panel’s reasons for revocation or revision of the verdict. Moreover, the fact that the Appellate Panel is obliged under the Criminal Procedure Code to give only a short explanation for its decision to revoke a first instance verdict, does not contribute to ensuring transparency of appellate proceedings.<sup>172</sup> Considering these problems, it is worth recalling that the old Criminal Procedure Code usually required that second instance courts, when quashing a first instance verdict, send the case back to the first instance court for retrial. However this procedure has proved to be highly inefficient, since it has been the main cause of the long delays and inefficiencies which affected most of the war crimes cases tried at the entity level (see Fig. 5: *Average duration of war crimes proceedings processed under the new CPCs from confirmation of indictment to final verdict from January 2005 till September 2010*, and Fig. 6: *Average duration of proceedings from confirmation of Indictment to final verdict including cases conducted under old CPC from January 2005 till September 2010*).<sup>173</sup>

The manner in which appeals are handled is a key issue for the quality of justice delivered by the Court of BiH and its credibility. Tackling problems concerning the rate and reasons for revocation of first instance verdicts may require amendments to the appeal procedure foreseen in the Criminal Procedure Code. Devising an appeal system which is both efficient and fair is arguably one of the most complex issues related to BiH’s criminal procedure and therefore requires analysis deeper than that which is in the scope of this report. In this regard, the OSCE Mission simply stresses that any change to the current system of appeals will have to take into account both the need to enhance the overall quality and efficiency of justice in the courts and the defendant’s right to trial within a reasonable time.

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172 Article 316 of BiH Criminal Procedure Code.

173 Annex I, *infra*. This issue is analysed below in Section 5, *War Crimes Cases at the Entity Level, infra*.

## 5 War Crimes Cases at the Entity Level

This section provides a detailed analysis of findings concerning war crimes investigations and trials at the entity level in the period March 2005 to September 2010. This section proceeds as follows. Section 5.1 provides a brief overview of the number of war crimes cases processed before the courts of the RS, FBiH, and Brčko District and discusses the causes of the general trends identified. The following sections (5.2 to 5.5) analyse the extent to which some of the essential pre-conditions for effective processing of war crimes cases are present at the entity level, noting problems with the availability of human and material resources and evidence, as well as co-operation with the police and victims. Section 5.6 turns to the matter of the application of substantive and procedural criminal law and adherence to fair trial standards in entity level trials.

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

- The general trend towards inconsistent progress in commencing and completing war crimes cases at the entity level, marked by notable progress in some jurisdictions (Banja Luka, Bihać, Mostar, Novi Travnik, Sarajevo, Tuzla, Trebinje, and Zenica) and a concerning lack of progress in others (Bijeljina, Doboј, East Sarajevo, Goražde, Orašje, and Livno);
- Lack of material evidence and problems with witnesses recanting prior statements at trial;
- Assessment of co-operation with the State Investigation and Protection Agency (SIPA) and the entity police and identification of the need for increased training to promote expertise in war crimes investigation among entity police;
- Sparse co-operation with victims and their representatives;
- Problems related to the application of the SFRY Criminal Code, in force at the time of the commission of the crimes during the 1992-1995 conflict, particularly the ability of entity courts to process acts qualified as crimes against humanity and apply the doctrine of command responsibility;
- Poor application of international humanitarian law at first instance entity war crimes trials;
- New trends in relation to the length of proceedings following enforcement of the 2003 Criminal Procedure Codes and remaining problems concerning cases processed according to the old Criminal Procedure Codes, leading to breach of defendants' rights to be tried in a reasonable time;
- Issues related to the equality of arms between the Prosecution and Defence, particularly the rights to cross-examination and disclosure;
- How the problems affecting investigation, prosecution, and adjudication of war crimes trials are related to the complex and fragmented framework of the BiH judicial system, rather than to any appearance of ethnic bias.

## 5.1 Overview and general assessment

In the period between March 2005 and September 2010, monitoring findings indicated the presence of irregular trends in the number of cases processed at the entity level. As the charts below in Annex 1 show, **the number of cases processed has varied widely from court to court** as well as, from year to year, within individual courts. This phenomenon was particularly evident and complex in the FBiH. During the period from the end of the conflict until the end of 2006, Sarajevo and Mostar Cantonal Courts were by far the most active, but in 2007 there was a sudden fall in the number of new cases. Similarly, although on a smaller scale, other courts in FBiH experience brief periods in which a number of cases were brought to trial, but these were preceded or followed by periods of inactivity.

For example, this occurred in Bihać where, between May and November 2007, the Cantonal Court confirmed indictments in six war crimes cases against a total of six accused which were then tried between 2007 and 2008. Since then, however, only four more cases have been initiated.<sup>174</sup> Between 2005 and 2008, Zenica Cantonal Court tried six cases involving a total of 11 defendants; however, since December 2007, no new indictments were filed by the Cantonal Prosecutor's Office.<sup>175</sup> In Novi Travnik seven cases involving nine accused were tried between 2005 and 2007, but no new indictments were raised since 2006. Other courts, such as Brčko and Tuzla, produced more steady results, but raised only one indictment per year on average between 2005 and 2010.<sup>176</sup> Furthermore, in Goražde and Orašje Cantonal Courts no trials have taken place despite the existence of a number of cases in the investigative phase which fall under the territorial competence of those courts. Despite evidence of a trend in the FBiH of significant ebb and flow of cases coming to trial, overall there is a concerning aspect to this trend; i.e. a steady decline in the total number of cases initiated since 2008. (See: Fig. 1: *War crimes cases started (Indictments raised) from January 2005 till September 2010*, in Annex 1). This is in stark contrast to the emerging figures about the remaining backlog of over 1300 cases, many of which are believed to be of a very serious nature.<sup>177</sup>

In the RS, the picture is clearer and trends are more defined. In contrast to the FBiH, war crimes cases began being processed only in 2005. The bulk of this activity is

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174 The indictments were confirmed by Bihać Cantonal Court in the following order: *Željko Kecman* (May 2007), *Marko Pauković* (June 2007), *Mile Knežević* (July 2007), *Slavko Ris* (July 2007), *Sead Huskić* (August 2007), *Lazar Stupar* (November 2007), *Karajić et al.* (January 2009), *Željko Despot* (April 2010), *Ristić et al.* (May 2010), *Ahmetašević* (July 2010).

175 The indictments were confirmed by Zenica Cantonal Court in the following order: *Tomo Mihajlović* (May 2000), *Dominik Ilijašević* (February 2001), *Edin Hakanović* (March 2003), *Operta et al.* (May 2006), *Edin Semić* (June 2006) and *Milanko Božić* (December 2007).

176 The indictments were confirmed by Brčko Basic Court in the following order: *Konstantin Simonović* (June 2005), *Kostić et al.* (April 2006), *Pero Kovačević* (March 2007), *Hasanović et al.* (March 2008), *Pero Rikanović* (December 2009) and *Gušo et al.* (March 2010); and by Tuzla Cantonal Court: *Spasojević et al.* (March 2006), *Sifer Krekić* (June 2007), *Trifković et al.* (March 2009), and *Izet Smajić* (May 2009).

177 See Section 2.2.1, *Caseload mapping and management, supra*.

still mainly concentrated at Banja Luka District Court, which tried 22 cases between 2005 and 2010, delivering first instance verdicts in 18 of them. **Thus, Banja Luka – together with Sarajevo and Mostar in the FBiH – has processed the highest number of cases at the entity level.** On the other hand, the fact that very few cases have been processed in other RS courts is a cause of concern. Trebinje District Court has concluded six war crimes cases involving seven defendants since 2005. However, in 2009 and 2010 no new indictments were filed. In East Sarajevo, only two cases were initiated in the five-year period considered in this report (in November 2008 and July 2009 respectively). The district prosecutor in Doboj filed eleven indictments between January 2008 and September 2010. However ten out of eleven of those indictments were rejected by the District Court for lack of jurisdiction.<sup>178</sup> Finally, in Bijeljina – which has territorial jurisdiction over Zvornik and Srebrenica – the first four indictments for war crimes were filed only in 2009.<sup>179</sup>

Identifying the reasons behind these different trends and the variegated picture of war crimes processing at the entity level is a complex task. This section considers some of the main factors influencing this situation. As explained above, jurisdiction over war crimes cases was transferred to the state level in 2003. Since then, the main problem affecting war crimes processing at the entity level lies in the overall low number of cases brought to trial compared with the high number of cases under investigation. (See: *Fig. 2: Accused brought to trial from January 2005 till September 2010*, in Annex 1). This concerning trend originates from two main factors: **the cumbersome and inconsistent process regulating the allocation of war crimes cases** throughout BiH and the **quality of investigations carried out by entity prosecutors.** The first issue is dealt with in detail in the above section on jurisdiction. However, it should be recalled here that the level of activity of entity prosecutors depends not only on their capacity and dedication, but also on the number and nature of cases which they receive from the state level.<sup>180</sup> With regard to the quality of investigations at the entity level, this section discusses the problem of a fundamental lack of professional capacity and resources to carry them out effectively – also detailing notable exceptions to this shortcoming.

As a preliminary matter, it must also be noted that the mere fact that a case has been reviewed and sent back to an entity prosecutor by the BiH Prosecutor's Office does not necessarily mean that the case is ready for trial.<sup>181</sup> Many cases are based almost entirely on witness statements taken shortly after or during the conflict, but the **witness may have become unavailable** in the meantime. Many other cases,

178 For more details on these cases see Section 5.4, *Application of international humanitarian law and domestic criminal law*, *infra*.

179 The indictments were confirmed by Bijeljina District Court in the following order: *Danilo Spasojević* (November 2009), *Salihović et al.* (November 2009), *Minić et al.* (December 2009) and *Ramadan Dervišević* (February 2010).

180 See Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, *infra*.

181 See Diane F. Orentlicher, *That Someone Guilty Be Punished - The Impact of the ICTY in Bosnia* (New York: Open Society Justice Initiative and International Center for Transitional Justice, 2010), p. 112.

instead, cannot be brought to trial due to the **unavailability of the suspect**. In the survey undertaken by the OSCE Mission, a majority of the prosecutors interviewed cited problems with locating and availability of war crimes suspects as one of the main reasons for the bulk of unresolved investigations.<sup>182</sup> This problem is closely connected with the fact that many suspects obtained citizenship of both BiH and one of its neighbouring countries after the conflict, enabling perpetrators to flee across borders to where they cannot be extradited due to the **prohibition on extradition of citizens**.<sup>183</sup>

In general, the efficiency of proceedings at the entity level substantially increased after the adoption of the new Criminal Procedure Codes at the state and entity level in 2003, a development which was key in ensuring that trials would be carried out within a reasonable time.<sup>184</sup> As far as respect of other fair trial standards is concerned, although these are generally respected, concerning practices have been noticed particularly with regard to the **right to an adversarial trial** and to **equality of arms between the Prosecution and the Defence**.<sup>185</sup> Considering the nature of these concerns, progress in that field seems to necessarily require an improvement in the ability of defence counsel to argue on the basis of fair trial standards and elements of crimes under IHL. More serious concerns remain in relation to the lack of harmonized jurisprudence in war crimes cases at the entity level and Brčko District. This matter however, reflects a structural problem concerning the overall functioning of justice in BiH. **Indeed, there is a growing agreement on the fact that uniform interpretation of the law and legal certainty cannot be achieved in a satisfactory manner in the absence of a supreme court of BiH.**<sup>186</sup>

## 5.2 Human and material resources for investigation, prosecution, and adjudication of war crimes cases at the entity level

It is clear that, after the establishment of the Court of BiH and BiH Prosecutor's Office, and before the adoption of the National Strategy, some prosecutors at the entity

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182 For example, in 2008 one entity prosecutor informed the OSCE Mission that he was not in a position to conclude investigations in 56 war crimes cases due to the fact that a great number of suspects - 595 - were not available to the prosecution.

183 See for example the case of *Čazim Behrić*, whose extradition from Croatia has been requested by BiH for war crimes. In January 2010 Croatia refused to extradite him on grounds that he had Croatian citizenship in addition to that of BiH. On this issue, see Section 6, *Regional Co-operation*, *infra*. The OSCE Mission is not aware of any complete statistics concerning the number of cases affected by the unavailability of the suspect or the total number of unavailable suspects.

184 This issue is discussed further below in Section 4.4.3., *Length and Efficiency of Proceedings*, *infra*.

185 D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 254.

186 The lack of a Supreme Court of BiH has been identified by the European Commission as a major problem in the consolidation of the judicial system and its establishment has been recommended by the Council of Europe. See European Commission, *2008 BiH Progress Report*, p. 13 and Parliamentary Assembly of the Council of Europe, *Resolution 1564 (2007)*, para 21.2.1.

level felt that war crimes ceased to be a priority for their offices since jurisdiction had been transferred to the Court of BiH.<sup>187</sup> On the other hand, it must be noted that some entity prosecutor's offices have established internal war crimes departments or assigned war crime cases to specific prosecutors. However, in the vast majority of the offices, those prosecutors also deal with other types of crimes under the competence of the cantonal and district authorities. Moreover, due to the rules regarding work evaluation, many prosecutors are required to fulfil a **case quota** during a certain fixed period.<sup>188</sup> As a result, prosecutors assigned to war crimes are often expected to work on less complex non-war crimes cases in order to fulfil the quota. The National Strategy recognizes that selected prosecutors at the entity level should be able to focus exclusively on war crimes and should be relieved from the quota system due to the higher complexity of war crimes cases. In this regard, the HJPC BiH is expected to develop more refined standards to measure the performance of the prosecutors assigned to war crime cases that take the level of complexity of a case into account in place of the quota used internally in some prosecutor's offices.

Having said this, it is also necessary to underline that efficient allocation of resources in the different prosecutor's offices is made difficult by the fact that the overall dimension of the war crimes caseload in BiH is still not precisely quantified and the allocation of cases among the different jurisdictions is not defined.<sup>189</sup>

The varying degree of **competence and dedication of individual judges and prosecutors** comes into play in any assessment of the overall ability of entity institutions to properly handle war crimes cases. However, such an assessment must be cautious, due to the complexity of the picture. Nevertheless, it is possible to draw some general conclusions in this regard. Prosecutors and judges working in the majority of FBiH jurisdictions (Sarajevo, Mostar, Zenica, Tuzla, Bihać, Novi Travnik), in Brčko and in parts of the RS (Banja Luka and Trebinje) have proved – although to different extents and not in all the cases which they processed – to be able to fairly and effectively try war crimes cases. Good or satisfactory performances were evident particularly when the case in question was not too complex, i.e. when it involved a direct perpetrator accused of crimes against a limited number of victims. Indeed, less complex cases have constituted the majority of those tried at the entity level.

On the other hand, a limited number of more complex cases, either involving accused persons who exercised some degree of command or involving a larger number of

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187 A number of prosecutors included in the OSCE Mission's survey expressed this view.

188 See *supra* note 58.

189 See Section 2, *Development and Implementation of a National Strategy for War Crimes Processing, infra.*, and Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH, infra.*

victims were processed as well.<sup>190</sup> These trials proved to be more problematic and often were not efficiently handled. Most of the identified shortcomings were caused at least in part by incorrectly identifying the responsibility of superiors or other indirect perpetrators, indicating a **lack of clear understanding of key aspects of IHL** on the part of some judges and prosecutors.<sup>191</sup> As a matter of concern, in a limited number of cases the prosecutor based the indictment on evidence that did not clearly point to the criminal responsibility of the defendants.<sup>192</sup> This problem may be linked, at least in part, to the aforementioned difficulty in obtaining sufficient material evidence in war crimes trials, as well as the lack of specialization of entity judges and prosecutors in IHL.

### 5.3 Availability of and access to material evidence

Another main problem with processing relatively complex cases at the entity level seems to be **limited access to documents and other material evidence**. Clearly, the higher the status of the perpetrator, the stronger the importance of material evidence with a view to establishing the chain of command and all other issues related to this form of liability. Material evidence is seldom used in most of the war crime cases before the entity courts. In the OSCE Mission's survey regarding war crimes cases in the investigative phase, many prosecutors admitted facing problems and obstacles in obtaining documents stored in the archives of local institutions, especially those in the possession of military organs. Other prosecutors underlined the problem of lack of direct access to ICTY evidence, which means that prosecutors do not even look for ICTY evidence because they do not know what kind of evidence the tribunal may possess.<sup>193</sup>

Instances where incriminating statements given by witnesses during investigation are totally denied by the same witnesses during the trial are also deeply concerning. This problem was analysed in depth in previous OSCE Mission reports.<sup>194</sup> Therefore, it will not be analysed further in this report. Here it suffices to reiterate here the importance of implementing an efficient system of witness protection and assistance in order

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190 For examples of cases brought against commanders see: *Borislav Berjan, Željko Mitrović, Milan Šešelj* (Sarajevo Cantonal Court); *Džidić et al., Salihović et al.* (Mostar Cantonal Court); *Operta et al.* (Zenica Cantonal Court). For examples of cases involving large number of victims see: *Kostić et al.* (Brčko Basic Court), *Lazar Stupar, Ristić et al.* (Bihać Cantonal Court).

191 On this, see Section 5.6, *Application of international humanitarian law and domestic criminal law, infra*.

192 This happened for example in the case of *Knežević Mile* (Bihać Cantonal Court), where four out of five witnesses called by the prosecutor did not point or completely excluded that the accused had committed the crime. Very weak evidence was also presented by the prosecution in the *Edin Semić* case and the *Milanko Božić* case before Zenica Cantonal Court. All of these cases ended in acquittals.

193 However, the "War Crimes Justice Project" aims to ameliorate this problem in part by transcribing ICTY transcripts in the official languages of the region and conducting system-wide trainings for judiciary on access to ICTY databases, *inter alia*. See *supra* note 61.

194 See OSCE Mission Report *War Crimes Trials Before the Courts of Bosnia and Herzegovina*, *supra* note 3; also *Witness Protection and Support in BiH War Crimes Trials*, *supra* note 4.

to reduce the risk that witnesses (particularly victim-witnesses) are susceptible to threats, bribes, intimidation, and emotional trauma during the testifying process. This is essential for ensuring not only that the rights of individuals who testify are respected, but also that war crimes cases are effectively prosecuted.

## 5.4 Co-operation with police

Many prosecutors who participated in the OSCE Mission's survey praised co-operation with and assistance of the State Investigation and Protection Agency (SIPA).<sup>195</sup> However, the support of SIPA is only occasional and arranged on an *ad hoc* basis since SIPA deals with war crimes cases at the state level. While the majority of prosecutors assessed the co-operation with the entity police as satisfactory, they also pointed to the **lack of specific training on war crimes investigations for police officers**.<sup>196</sup> The majority of prosecutors also lamented the **absence of assistant prosecutors and expert advisers** working directly with them as is the practice in the BiH Prosecutor's Office (where they are called legal officers and analysts). The reason for this limitation is mainly financial, although the legal framework is also not yet fully in place to allow the engagement of these necessary staff. As a matter of fact, a draft law regulating the work of the prosecutor's offices in the FBiH prepared almost two years ago would ameliorate this problem. The draft aims at increasing the efficiency of the prosecution services in the FBiH by regulating all cantonal institutions in a single law that would replace the eleven laws presently in force.<sup>197</sup> The draft also foresees the employment of expert advisers and assistant prosecutors, thereby reinforcing the capacity of the prosecutors. As a matter of concern, the draft, albeit prepared almost two years ago has never been presented by the FBiH Minister of Justice to the Government for approval, due to opposition from the cantons to certain parts of the draft dealing with the budget allocation system.

## 5.5 Co-operation with victims and their representatives

Another factor which influences the work of entity prosecutors is their level of co-operation with victims' associations. The majority of prosecutors do not have well-established contacts with these organizations. In some instances there appears to be **mistrust between prosecutor's offices and victims' associations** – many of which are reluctant to co-operate with prosecutors of a different ethnicity. Victims'

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195 The State Investigation and Protection Agency is the first police agency with competence across the entire territory of BiH. SIPA is an independently operated administrative organization within the Ministry of Security of BiH whose competencies include prevention, detection, and investigation of criminal offences falling within the jurisdiction of the Court of BiH.

196 Note, however, the OSCE Mission conducted trainings for police investigators assigned to war crimes cases from Banja Luka, Bihać, and Dobojo and the Prosecutor's Office BiH on 19 and 20 October 2010. A programme of further trainings is planned for 2011.

197 Ten of the laws regulate the cantonal prosecutor's offices and an eleventh regulates the entity prosecutor's office.

associations in BiH are usually organized along ethnic and territorial lines and often harbour considerable biases towards other groups.<sup>198</sup> On the other hand, in jurisdictions like Banja Luka, Bihać, and Tuzla, prosecutors have found their work to be greatly facilitated by co-operation with associations representing or assisting victims of the conflict. Such co-operation was seen to build trust and confidence in the judiciary among the public and even helped prosecutors in contacting and obtaining the presence of witnesses in court.<sup>199</sup> On a similar note, the start of the first war crimes trials in Bijeljina in 2009 seemed to be at least partly related to the continuous advocacy of a number of local associations and NGOs who lobbied the district prosecutor's office to address the crimes committed in that area.<sup>200</sup>

## 5.6 Application of international humanitarian law and domestic criminal law

The following analysis identifies the main challenges in trials at the entity level concerning the application of the relevant substantial law (i.e. provisions of domestic law criminalizing violations of IHL) and procedural law. Cases in which concerns were identified, as well as those in which positive performances were observed are highlighted. First, the level of professional ability shown by judges and prosecutors in applying the law is assessed. Second, the “quality” of the trials and the performances of judges and parties during war crimes trials is assessed, particularly from the point of view of efficiency in the preparation and management of the trial, respect of fair trial standards and of the criminal procedure in general.

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198 In some municipalities in BiH, there are multiple associations of victims or families of missing persons in the same place because they serve different ethnic communities.

199 The prosecutors in Banja Luka, Tuzla and Bihać succeeded in developing co-operation with local NGOs in a professional and effective manner.

200 For example, the OSCE Mission observed a number of outreach events organized by Bijeljina-based NGOs on the issue of war crimes in Bijeljina between October 2007 and the writing of this report. Although participation by prosecutors was minimal, these events seemed to create increased public awareness and momentum towards community support for local war crimes prosecution. Such events have included the screening of a television documentary about life in Bijeljina following the events of the war in a town-hall style meeting, organized by the Helsinki Committee for Human Rights in Republika Srpska and XY Films, as well as a roundtable on child victims of the war organized by the Children's Embassy of BiH.

## 5.6.1 Application of domestic criminal law and IHL

During the period considered in this report, the OSCE Mission identified only four cases in which an apparent **war crimes case was qualified as an ordinary crime**.<sup>201</sup> This concerning practice, usually aimed at denying or trivializing the gravity of the crime, was widespread in cases initiated by military courts against soldiers of the same army during the conflict. Many such cases were inherited by entity prosecutors after the conflict. It should be the duty of the prosecutor to re-qualify the alleged crime as a war crime. This actually happened in at least three cases before the Banja Luka District Court against members of the VRS, in which initial charges of murder and rape were changed to war crimes during the trial by the prosecutor.<sup>202</sup> This demonstrated the willingness of the prosecutor to recognize the real nature of the alleged criminal conduct.

The **vast majority of cases at the entity level are still processed under the SFRY Criminal Code**, in force at the time of the conflict. This is in marked contrast with cases at the Court of BiH in which the 2003 BiH Criminal Code is normally applied.<sup>203</sup> As the OSCE Mission reported in 2008,<sup>204</sup> this situation undermines the principles of equality before the law and certainty of the law and was one of the main issues addressed in the National Strategy. Despite these efforts, the lack of consistent practice between the state and entity level and absence of consolidated case-law with regard to which code should be applied and when, currently remains a major concern. Since the OSCE Mission 2008 Report, however, some encouraging, although limited, developments have emerged.

In March 2009, an indictment for crimes against humanity under the BiH Criminal Code was confirmed by an entity court for the first time in the case of *Trifković et al.*<sup>205</sup> This is a positive step in view of the fact that the SFRY Criminal Code does not foresee crimes against humanity, its application would actually impede the prosecution of these crimes at the entity level. During a roundtable convened by the OSCE Mission in October 2008,<sup>206</sup> judges from the Appellate Division of the Court of BiH, Supreme Court of FBiH and RS, as well as the Appellate Court of

201 In *Jarić et al.* (Brčko District BiH Court), three of the four accused have been sentenced to light prison terms (respectively three years and ten months, two years, and six months) for the rape of two female civilians, although the fact that the perpetrators took the victims from a detention camp and were wearing uniforms seems to strongly indicate that the rapes in question constituted a war crime. In *Sretko Đurić* (Bihać Cantonal Court), the accused was convicted for “ordinary” murder although it was committed during the war by a member of the military who was of a different ethnicity to the victim. See also cases of *Samir Grahovac* and *Gojko Pilić* (Bihać Cantonal Court)

202 The cases are: *Milanko Vujanović, Gagić et. al.* and *Trivić et. al.* This also happened in *Ris* case (Bihać Cantonal Court)

203 See Section 4, *War Crimes Cases before the Court of BiH, supra*, noting a single exception to the practice of applying the BiH Criminal Code in war crimes cases.

204 See OSCE Mission Report, *Moving towards a Harmonized Application of the Law, supra* note 4.

205 *Trifković et al.* (Tuzla Cantonal Court)

206 See conclusions from the OSCE Mission Roundtable on “War Crimes Proceedings in the Entities and in Brčko District: Problems and Achievements”, held on 29 October 2008.

the Brčko District agreed that the application of the 2003 Criminal Code would not violate the principle of legality when it comes to crimes against humanity. The views expressed by those judges, together with the *Trifković et al.* precedent, seem to open the door for entity prosecutors to file indictments for crimes against humanity and for the Court of BiH to transfer less complex cases of crimes against humanity to entity courts. Considering the pervasiveness of acts that could be qualified as crimes against humanity in the conflict on the territory of BiH it is foreseeable that charges for this category of crime could involve low ranking individuals. Pursuit of such cases at the entity level would fit with the overall approach endorsed in the National Strategy.

Thereafter, in 2009, in two cases transferred by the Court of BiH to Mostar Cantonal Court and Banja Luka District Court respectively (*Bukvić* and *Jurinović*), the trial was carried out on the basis of charges under the 2003 BiH Criminal Code. Judges in both courts eventually decided to re-qualify the offences under the SFRY Criminal Code on the grounds that, considering the sentences prescribed for those crimes, the SFRY Criminal Code would be more lenient than the BiH Criminal Code. Leaving aside the legal aspects related to the re-qualification of the crime, one positive aspect in these cases was that the courts agreed that, in principle, they possess jurisdiction to apply the BiH Criminal Code. On the other hand, the Doboj District Court took the opposite view by rejecting indictments in ten cases filed by the Doboj District Prosecutor's Office under the BiH Criminal Code.<sup>207</sup> Rather curt reasoning in those cases stated that only the Court of BiH is competent to apply the BiH Criminal Code. These divergent stances give rise to concerns as they represent further evidence of the **lack of harmonized practice and case-law in BiH and of the overall dysfunctionality** created by this situation.

To date, **the entity Supreme Courts have not been able to remedy this situation by delivering clear, comprehensive, and consolidated jurisprudence.** One reason for this shortcoming certainly lies in the fact that the respective entity Supreme Courts are restricted in their review of first instance decisions to the matters raised in the appeals filed by the parties. Admittedly, the issue of the legality of the application of the BiH Criminal Code at the entity level has hardly ever been raised in war crimes appeals. To the knowledge of the OSCE Mission, this has happened only in the case of *Vlahovljak et al.*, tried in the first instance at Mostar Cantonal Court. In this case, the Supreme Court of the FBiH changed the qualification of the offence from war crimes under the SFRY Criminal Code to war crimes under the BiH Criminal Code, seemingly adopting the practice of the Court of BiH. This precedent, however, has not been followed in other cases.<sup>208</sup>

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<sup>207</sup> See, for example, indictments in the cases of *Miroslav Kopljar*, *Mladen Kurdića*, *Nihad Hamzić*. According to the Doboj Prosecutor's Office, seven more cases have been rejected by the District Court on the same grounds.

<sup>208</sup> *Vlahovljak et al.*, Appeal decision of September 2008.

Certainly, it is acceptable that the issue of which criminal code should be applied to war crime cases is assessed on a case-by-case basis. In many cases before entity courts, the application of the SFRY Criminal Code does not represent a serious problem in practice. In general, the cases in which the application of different codes undermines the principle of equality before the law are those in which the court, by applying the BiH Criminal Code, could sentence the accused to a sentence higher than the 15 or 20 years maximum sentence prescribed under the SFRY Criminal Code.<sup>209</sup> In these cases, the application of the SFRY Criminal Code arguably does not allow the court to deliver a sentence which is proportional to the gravity of the crimes. Nor are the sentences in those cases harmonized with practice at the state level.<sup>210</sup> Another category of cases in which the application of the SFRY Criminal Code is problematic are those in which the accused's conduct is arguably best captured under the concept of crimes against humanity or under the theory of command responsibility, which are expressly prescribed only under the BiH Criminal Code.

**The question of whether command responsibility is foreseen under the SFRY Criminal Code** is particularly controversial. As the SFRY Criminal Code does not include the internationally accepted definition of this form of responsibility,<sup>211</sup> very few cases based on command responsibility have been tried and, as a result, there is still no well-established and settled case-law at the entity level on this matter.<sup>212</sup> On the one hand, Sarajevo and Zenica Cantonal Courts, in the *Berjan* and *Operta* cases respectively, clearly took the stance that command responsibility is punishable under the SFRY Criminal Code.<sup>213</sup> On the other hand, in at least three cases Mostar Cantonal Court took a different stance, affirming that the only forms of responsibility under the SFRY Criminal Code are “ordering and executing.”<sup>214</sup>

The Supreme Court of FBiH quashed the verdicts in two cases (*Džidić et al.* and *Krešić and Matić*) tried before Mostar Cantonal Court on the grounds that the judges erred in ruling that the SFRY Criminal Code does not foresee command responsibility. The Court failed to take the same stance, however, in the case of *Ćupina et al.*, confirming the first instance verdict. This was arguably due to the fact that the prosecutor did not challenge the first instance verdict on that ground. It must

209 With the adoption of the Constitution of BiH in December 1995, the death penalty could no longer be imposed and as a result death sentences were automatically converted to 20 years' imprisonment, see *supra* note 24.

210 A good example of this problem is illustrated in the *Kostić et al.* case concluded before Brčko Basic Court, where one of the defendants was sentenced in the first instance to 15 years in prison for one incident of rape and the murder of 14 civilians. In the second instance however, he was found guilty “only” for the rape and the murder of eight civilians. Despite the partial acquittal, the sentence, due to the gravity of the crime, remained the same, i.e. 15 years.

211 However, in one case, *Ćupina et al.*, a cantonal court accepted that command responsibility could be considered as a particular form of perpetration by omission. This was later departed from on appeal.

212 See cases at Mostar Cantonal Court: *Džidić et al.*, *Krešić and Matić*, *Ćupina et al.* and *Boško Previšić*.

213 Cases of *Borislav Berjan* (Sarajevo Cantonal Court) and *Operta et al.* (Zenica Cantonal Court).

214 The cases are: *Džidić et al.*, *Krešić and Matić et al.*, and *Ćupina et al.* In the *Ćupina et al.* case, however, the Court recognized that command responsibility could be based on provisions of the Geneva Conventions or its Additional Protocols by invoking Art. 15 ICCPR and Art. 7(2) ECHR.

be said, indeed, that the courts have not been helped by the Prosecution in clarifying this complex issue. Prosecutors in the cases mentioned above failed to specify which acts committed by the accused would be punishable under the theory of command responsibility, often mixing this form of accountability with others like ordering or even direct perpetration.

Command responsibility has not been the only problematic matter in the application of substantive law. In a number of cases involving physical or psychological violence<sup>215</sup> prosecutors failed to clearly define the alleged incriminating facts and match them with the most appropriate legal qualification in the indictment. It appears that prosecutors were often uncertain about whether the perpetrator's alleged conduct should be qualified as **torture or inhumane and degrading treatment** according to the gravity and nature of the conduct and its consequences for the victims. This shortcoming is concerning as it brings with it the risk of unequal treatment of defendants who perpetrated similar criminal conduct, but who may be charged with crimes of varying degrees of gravity. In some of these cases, the courts were able, on the basis of the facts, to determine *ex officio* the proper legal definition for the conduct of the perpetrator, thus correcting the prosecutor's erroneous qualification.<sup>216</sup>

Similarly, in some other cases, the courts of **second instance corrected mistakes in the interpretation of IHL**, thus fulfilling their role as guarantors of the just application of the law. This happened, for example, in the *Edin Hakanović* case when the FBiH Supreme Court quashed the first instance verdict, finding that the court erred in its definition of using civilians as a human shield. Similarly, in the *Predrag Misković* case the same court quashed the first instance verdict on the basis that the crime of "application of measures of intimidation and terror" was incorrectly applied.

To conclude, it is possible to affirm that **the overall quality of interpretation of humanitarian law progressed considerably in recent years**. Nevertheless, as illustrated above, problems remain with proving elements of certain specific crimes either due to prosecutors not clearly describing the facts which should constitute the elements of the alleged crime in the indictment or due to unclear or inconsistent case-law of the courts and the supreme courts. On the other hand, it must be noted that, in the majority of cases, gross violations or misinterpretations of IHL have been avoided or remedied on appeal. Still, the level of uncertainty surrounding a number of legal issues is much higher at the entity level than at the state level, where many of these issues do not present serious interpretational problems. This difference is due to several factors: the emergence and consolidation of settled practice and case-law is much simpler within one court and prosecutor's office than across the multiplicity of courts and prosecutor's offices at in FBiH or RS. The exposure of judges and

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215 See for example cases of *Krešić and Matić, Džidic et al, Ćupina et al, Marijanović and Buhovac*, and *Niko Obradović* before Mostar Cantonal Court, *Operta et al.* before Zenica Cantonal Court, and *Živko Miletić* before Trebnje District Court.

216 See for example cases of *Operta et al.* (Zenica Cantonal Court) and *Niko Obradović* (Mostar Cantonal Court).

prosecutors to ICTY case-law and training in IHL has been much higher at the state level than for those at the entity level. Finally, the structure of the Court of BiH and BiH Prosecutor's Office permits a level of specialization on IHL issues which is difficult to replicate at the entity level.

On the other hand, an evaluation of the problems encountered by entity judiciary in the interpretation of IHL seems to suggest that **many of the problems outlined could be solved simply through a better flow of legal information.** A **digest of the war crimes related case-law** from the BiH judiciary could be a very important tool towards more harmonized practices between the state and entity level, although its usefulness could be partially limited by the fact that different codes are applied. At the moment there is very little sharing of practice and case-law between prosecutors and judges at the state and entity level.<sup>217</sup>

## 5.6.2 Adherence to criminal procedure and fair trial standards

One of the key challenges to ensuring the proper and efficient application of the new procedure lies in striking a fair balance between the adversarial nature of the procedure (which demands that the Prosecution and the Defence are the main actors in the presentation of evidence) and the duty of the presiding judge to ensure the overall efficiency and fairness of the trial. Therefore, observation of the issues that cause the most tension in this regard is an important element in relation to war crimes trials conducted in BiH. With this in mind, the following section discusses problems with the delay in criminal proceedings at the entity level and respect for other fair trial rights.

### 5.6.2.1 Length of proceedings

A core means of assessing the overall fairness and "quality" of criminal justice is monitoring the extent to which proceedings are concluded without undue delay.<sup>218</sup> A striking feature of war crimes trials taking place before entity courts after the adoption of the new criminal procedure codes in 2003 is a **marked shortening of the length of proceedings and overall increase in the efficiency of trial management.** Adjusting to the entirely new procedure has been far from painless

217 However, it should be noted that the ICTY-OSCE ODIHR-UNICRI "War Crimes Justice Project" includes a series of regional and internal peer-to-peer meetings between judges or prosecutors and ICTY counterparts, as well as the development of a best practices manual for defence counsel, and a range of continuing education opportunities related to working on war crimes cases. *See supra* note 61.

218 *See* Opinion No 6 (2004) of the Consultative Council of European Judges (CCJE) on *Fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement* at para 42: "... 'quality' of justice should not be understood as a synonym for mere 'productivity' of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element."

for legal practitioners and is still, to a certain extent, not accomplished. This said, the monitoring of cases clearly shows that the greatest delays occurred almost exclusively in cases that started before the entry into force of the new Criminal Procedure Codes and are therefore conducted under the old Criminal Procedure Codes. Arguably, these delays amounted to a **breach of the defendants' right to a trial within a reasonable time in many cases**. The main, although not exclusive, cause of these delays is the appellate procedure, which usually requires that second instance courts send the case back to the first instance court for retrial when quashing a first instance verdict.<sup>219</sup> Under this system, cases can be sent back to the first instance an unlimited number of times – in theory until the second instance court eventually confirms the first instance verdict. This system has proved to be highly inefficient, since in many cases the back and forth between the first and second instance has been ongoing for years. In a number of cases, a long period of time passed between the case being remanded to the first instance and the scheduling of the retrial.

This has happened in the *Džidić et al.* case before Mostar Cantonal Court, which started in 2000 and since then has been retried twice, and is currently awaiting a third retrial. The Supreme Court of FBiH quashed verdicts acquitting the four defendants on three occasions in this case (in April 2001, January 2004, and June 2008).<sup>220</sup> In the *Slavko Ris* case before Bihać Cantonal Court, which started in August 2007, the defendant was initially convicted and sentenced to 13 years' imprisonment. After the FBiH Supreme Court quashed the verdict and sent the case back to Bihać for retrial, the Cantonal Court acquitted him in October 2008.<sup>221</sup> Thereafter, the acquitting verdict was also annulled by the Supreme Court. The second retrial ended in April 2010 with a guilty verdict and a sentence of 3 years and 6 months. These cases are concerning not only from the point of view of the length of proceedings, but also from the point of view of the quality of justice; the prolonged conflict of judicial opinions between the first and second instance leaves the **impression that the law is applied unequally or arbitrarily as it apparently allows widely divergent outcomes**.

Undue delays were also noticed in several other cases conducted under the old procedure. The *Samir Bejić* case before Sarajevo Cantonal Court began in March 2003 and was still ongoing at the time of the writing of this report in October 2010.<sup>222</sup> The *Krešić and Matić* and *Ćupina et al.* cases before Mostar Cantonal Court

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219 The court of second instance was allowed to hold a retrial only in exceptional circumstances; for example, when it was necessary for the presentation of new evidence or of evidence already presented when the facts had been erroneously established, if there were justified reasons not to return the case to the first instance panel for a new trial.

220 *Džidić et al.* (Mostar Cantonal Court).

221 *Slavko Ris*, (Bihać Cantonal Court).

222 *Samir Bejić*, (Sarajevo Cantonal Court).

and the cases of *Ilijašević*, *Mihajlović* and *Hakanović* before Zenica Cantonal Court each lasted around six years.<sup>223</sup>

In striking contrast to these cases, trials conducted under the 2003 Criminal Procedure Codes lasted an average period of one and a half years. It is interesting to note that the average length is almost the same throughout BiH, irrespective of whether the case is tried at the state or entity level (see Fig. 5: *2004-2010 average duration of war crimes proceedings processed under the new CPCs from confirmation of indictment to final verdict*, in Annex 1). Proceedings were carried out speedily and efficiently in almost all cases processed before Banja Luka District Court, which mainly conducted trials under the new Criminal Procedure Code.<sup>224</sup> However, judges agreed to adjourn hearings for a longer period (but not exceeding the one month procedural limit) in order to obtain the presence of witnesses, especially those living outside BiH. Mostar and Bihać Cantonal Courts were also particularly diligent and prompt in dealing with cases under the new Criminal Procedure Codes, in which trials at the first instance lasted an average of 1-2 months and the appeal phase was carried without delays.<sup>225</sup>

The case of *Kostić et al.* before Brčko District Basic Court is a good example of how a complex case involving a large amount of witnesses can still be processed promptly at the entity level, provided that principles of efficient trial management and professional conduct are respected. In this case, over 100 witnesses were heard in the course of 37 hearings that took place between July 2006 and April 2007.<sup>226</sup> Similarly, in the *Lazar Stupar* case before Bihać Cantonal Court, seven hearings were held in the course of one month in which 36 witnesses and three experts were heard.<sup>227</sup>

However, not all cases conducted under the new procedure were dealt with efficiently. In a number of cases, serious delays were caused by the manner in which the review procedure under the Book of Rules was applied.<sup>228</sup> Other delays were caused simply by poor management practices, such as failure to obtain the attendance of witnesses, frequent absence of defence counsel, changes in the composition of the panels, and

223 Cases of *Krešić and Matić* and *Ćupina et al.* (Mostar Cantonal Court); *Dominik Ilijašević*, *Tomo Mihajlović*, and *Edin Hakanović* (Zenica Cantonal Court). In the case of *Ćupina et al.* the delay was not attributable to the conduct of the proceedings by the Court.

224 See for example the cases of *Bulatović et al.*, *Petić et al.*, *Zgonjanin et al.* and *Berbić et al.* each of which took around eleven months from the confirmation of the indictment to the final verdict.

225 See for example the cases of *Miralem Omanović*, *Niko Obradović*, *Safet Bukvić* and *Vlahovljak et al.* before Mostar Cantonal Court and the cases of *Željko Kecman*, *Mile Knežević*, *Sead Huskić* and *Karajić et al.* before Bihać Cantonal Court.

226 *Kostić et al.* (Brčko District Basic Court). On appeal no issue was detected with regard to initial conduct of trial proceedings at first instance.

227 Case of *Lazar Stupar* (Bihać Cantonal Court). On appeal no issue was detected in regard to initial conduct of trial proceedings at first instance.

228 See Section 3, *Jurisdiction and Allocation of War Crimes Cases among the Courts of BiH*, *infra*.

adjournments exceeding the legal limit of one month (resulting in the trial re-starting from the beginning).<sup>229</sup>

These findings indicate that progress in ensuring the right to trial within a reasonable time was not simply or automatically the result of the change of the criminal procedure. In the positive examples mentioned above, the parties to the proceedings acted diligently in the presentation of their case, while judges ensured that undue delays were avoided by exercising efficient trial management tactics.

### 5.6.2.2 Other fair trial rights of the accused

With regard to the level of respect for other fair trial standards, monitoring indicated that courts at both the first instance and second instance give due consideration to the rights of the accused under the applicable domestic and international provisions. Prior to 2002, the Human Rights Chamber found serious violations of the right to a fair trial in the majority of war crimes cases brought to trial at the entity level, ordering a re-trial and stressing the need therein to protect the fair trials of the accused.<sup>230</sup> Since that time, there has been clear progress in this regard: to the best of the OSCE Mission's knowledge, the Constitutional Court of BiH (which should complete all unresolved cases of the Human Rights Chamber)<sup>231</sup> did not order any court to re-examine a case on grounds of violation of the right to a fair trial during the five-year period covered in this report.

Having said this, **concerning practices with regard to the respect of fair trial standards have nevertheless been observed in a number of cases.** Problems or potential breaches have arisen in relation to different aspects of the equality of arms principle. In the case of *Željko Kecman*, for example, before Bihać Cantonal Court, the judges rejected a request of the Defence to obtain a forensic evaluation of the bullet found in the body of one of the victims without proper justification.<sup>232</sup> In this case, however, the Supreme Court of FBiH annulled the first instance verdict and ordered a retrial on grounds that the decision of the court represented an essential violation of the fair trial rights of the accused.<sup>233</sup>

Other concerning practices were observed in relation to observance by the Prosecution of its duty to disclose evidentiary material to the Defence – particularly

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229 Instances of poor trial management practices were noticed in the *Željko Mitrović* and in the *Novo Rajak* case before Sarajevo Cantonal Court, in the case of *Marijanović and Buhovac* before Mostar Cantonal Court and in the *Dragoje Radanović* and *Fikret Boškailo* cases before Trebinje District Court.

230 See U. Garms and K. Peschke, "War Crimes Prosecution in Bosnia and Herzegovina (1992-2002): an analysis through the jurisprudence of the Human Rights Chamber," *Journal of International Criminal Justice* (2006) 4 (2), at p. 264.

231 See Agreement in accordance with Article XIV of Annex 6 of the General Framework Agreement for Peace in BiH, January 2008 (unofficial English translation on file with OSCE Mission).

232 *Željko Kecman* (Bihać Cantonal Court).

233 *Željko Kecman* (Supreme Court of FBiH).

any evidence which could be exculpatory. In the cases of *Operta et al.* before Zenica Cantonal Court, *Đorđe Kostić* before Brčko Basic Court, and *Salihović et al.* before Bijeljina District Court, the Defence complained that the Prosecution did not disclose some statements given by witnesses during investigation which could be exculpatory for their clients.<sup>234</sup> The case before Bijeljina District Court is particularly concerning since the statement in question was given by the only eye-witness of the alleged crime; the Prosecution replied to the Defence's request stating that the statement inexplicably went missing.

It can be fairly said that the character of potential violations of the rights of the accused has changed over the course of the last decade. **The causes of violations today can rarely be traced back to factors related to the post-conflict environment, as was previously the case (i.e. ethnic bias).** Rather, the violations encountered today are often indistinguishable from those encountered in other functioning legal systems. Exceptions to this general situation tend to be traceable to the complex and fragmented nature of BiH's justice institutions. In such a context, the full and optimal implementation of fair trial standards depends not only on the conduct of the judiciary, but also on the skill of defence counsel in raising fair trial issues during the proceedings and in challenging decisions or verdicts in their appeals. In this regard, it must be said that the performance of many defence counsel representing individuals accused of war crimes is still rather poor both in terms of **knowledge of IHL and of procedural matters.** The number of defence counsel using case-law of the European Court of Human Rights (ECtHR) and the ICTY in order to defend their clients in the best possible manner is still regrettably few. Exceptions to this picture are mainly, although not exclusively, represented by counsel with previous experience before the ICTY.<sup>235</sup>

## 5.7 Future outlook for war crimes prosecution at the entity level

Against this background, the goal indicated in the National Strategy with regard to entity jurisdictions processing less complex cases is feasible and constitutes one of the key factors which will determine the successful implementation of the National Strategy.<sup>236</sup> Due to the widespread nature of the conflict in BiH, virtually all entity courts in the FBiH and the RS have war crimes cases under their territorial competence. However, it is difficult to make a prediction concerning the contribution that certain jurisdictions will make. Owing to the very few cases tried before some courts in the FBiH to date (Livno, Goražde, Orašje) and in the RS

234 *Operta et al.* (Zenica Cantonal Court), *Đorđe Kostić* (Brčko District Basic Court), and *Salihović et al.* (Bijeljina District Court).

235 Very effective defence was noted, for example, in the cases of *Operta et al.* (Zenica Cantonal Court), *Vlahovljak et al.* (Mostar Cantonal Court) and *Jusup Ahmetović* (East Sarajevo District Court).

236 On the importance of trying direct perpetrators cfr. J. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," *Yale Journal of International Law* (1999) 24 (2).

(Doboj, East Sarajevo, Bijeljina), it is impossible to assess their level of impartiality and efficiency. Although the processing of cases in those jurisdictions may prove to be problematic, it must be said that after years of ongoing reforms **the BiH judicial system seems to have sufficient guarantees and checks to prevent or correct serious miscarriages of justice in most foreseeable instances;** in large part due to the appellate mechanisms. Moreover, **certain courts and prosecutor's offices in both of the entities and Brčko District have demonstrated ample capacity, willingness, and professionalism to process war crimes cases.** On the other hand, **urgent attention must be paid to the problems outlined above if the overall pace and quality of war crimes proceedings at the entity level is to improve** in line with the requirements of the National Strategy.

## 6 Regional Co-operation

This section provides an overview of the legal framework and current situation with regard to regional co-operation in the investigation, prosecution, and adjudication of war crimes cases.

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

- Incremental improvements in the legal framework for working and technical level co-operation among the States of the SFRY region concerning war crimes cases;
- The continuing challenge to combating impunity linked to the provisions prohibiting extradition of nationals of the States of the SFRY region;
- The problem of parallel investigations by BiH and other States into war crimes committed on the territory of BiH;
- Assessment of the notable cases that have illustrated both systemic problems in regional co-operation regarding war crimes cases and the presence of political agendas, i.e. the cases of *Branimir Glavaš*, *Ilija Jurišić*, and *Ejup Ganić*.

As underlined in the European Commission's 2005 *Functional Review of the BiH Justice Sector*, "BiH is required to deal with many more requests for mutual legal assistance than most EU countries because of its particular situation and this is likely to continue for the foreseeable future."<sup>237</sup> The vast majority of those requests are sent to, or come from, countries of the former Yugoslavia. There have been concerted efforts and attempts in the last five years to increase the effectiveness of legal co-operation among BiH, Serbia, Montenegro and Croatia, particularly in connection to the prosecution of war crimes and other serious crimes, such as organized crime and corruption.

Among other initiatives, the **Palić Process** (2004-2007) was created under the *aegis* of the OSCE with the purpose of organizing expert-level meetings for judges, prosecutors, and representatives of the ministries of justice of the above-mentioned States, ultimately working towards enhancing co-operation in regards to the processing of war crimes. These efforts have produced some concrete results, among which was the signing of a number of **bilateral agreements between the State Prosecutors of BiH, Croatia, Serbia and Montenegro** which pertain to war crimes

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<sup>237</sup> European Commission, *Functional Review of the BiH Justice Sector*, March 2005 at p. 131 (available at: <http://www.delbih.ec.europa.eu/files/docs/publications/en/FunctRew/Justicereview.pdf>).

as well as other types of cases.<sup>238</sup> As noted by the OSCE Mission in the course of its monitoring activities, these forms of co-operation have substantially **improved the promptness and efficiency with which requests for the exchange of information and the taking of statements from witnesses abroad** have been carried out. Such progress owes its success to the fact that, under these agreements, the State Prosecutors can send and reply to requests for assistance without going through diplomatic channels. In general, it can be concluded that regional co-operation in the field of sharing information and securing evidence, both during investigations and in court, has considerably improved.

On the other hand, little or no progress is observed with regards to the more problematic and politically sensitive goal of removing the **legal prohibitions against the extradition of a country's own citizens** for any kind of crime, which is currently in force throughout the region. With specific regard to war crimes prosecution in BiH, this prohibition prevents the finalization of a number of investigations. Resolution of a significant number of cases is thus hampered because a large number of suspects have fled BiH and are presently residing in one of BiH's neighbouring countries, where they have obtained citizenship and cannot, therefore, be extradited.

A recent measure was taken by BiH and Croatia to shrink the impunity gap. In February 2010, the two Governments amended their previous *Agreement on the Mutual Execution of Court Decisions in Criminal Matters*. This amendment removed the consent of the convicted person from the list of conditions that had to be satisfied for the **execution of a sentence in a second country** – in the event that the convicted person escapes from the former to the latter. The change in the agreement allowed Croatia to initiate legal process to ensure that the convicted war criminal **Branimir Glavaš** serves his sentence in BiH. In August 2010, Glavaš was convicted to eight years for war crimes by the Supreme Court of Croatia; the sentence could not be executed because in May 2009, immediately after the first instance verdict, he escaped to BiH, where he holds citizenship. In September, the Court of BiH granted the request for execution of the sentence in BiH on the basis of the above-mentioned Agreement.<sup>239</sup> While this is certainly a positive step towards addressing impunity at the regional level, it must be noted that this agreement represents only a partial solution as it applies solely to individuals convicted with a final and binding sentence. It is apparent that, as a result, such a step has no effect on persons who are under investigation but are out of the reach of the prosecuting country. Considering that trials *in absentia* are banned in BiH by the criminal procedure,<sup>240</sup> this agreement seems to be of limited use for BiH since cases cannot be initiated in the absence

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238 *Protocol on Agreement in Establishing Mutual Co-operation in Combating All Forms of Serious Crime* signed with State Attorney's Office of Republic of Croatia on 21/01/2005; *Memorandum on Agreement to Achieve and Advance Mutual Co-operation in Fighting All Forms of Severe Crime* signed with Prosecutor's Office of Republic of Serbia on 01/07/2005 and *Protocol on Agreement to Achieve Mutual Co-operation in Fighting All Forms of Severe Crime* signed with Supreme State Prosecutor of Republic of Montenegro on 26/05/2005.

239 At the time of preparation of this Report, appeals were still pending on this decision.

240 On the issue of trials in absentia see Section 4.4.1, *Absence of the Accused at Trial*, *supra*.

of the accused. In particular, a suspect has to be personally questioned before an indictment can be filed against him. The need to address the issue of extradition therefore remains. This need has been underscored by BiH authorities on several occasions, and was recently reaffirmed in the National Strategy, which includes a section addressing regional co-operation.<sup>241</sup> Due to the high number of BiH citizens who have dual citizenship of either Serbia or Croatia, **norms prohibiting the extradition of the country's own citizens represent a serious challenge not only in relation to war crimes, but for the overall performance and credibility of the judicial systems in the region.**

Another important issue mentioned in the National Strategy is the existence of **parallel war crimes investigations** taking place in BiH and in neighbouring countries concerning incidents that occurred in the territory of BiH. In this regard, the exercise of jurisdiction by Serbia's authorities over war crimes cases relating to the BiH conflict, although legitimate under international law, have been an increasing source of tension between BiH and Serbia. This has been particularly so since May 2007, when a BiH citizen, **Ilija Jurišić**, was arrested in Serbia on charges of war crimes allegedly committed against troops of the Yugoslav Army in Tuzla in 1992. More recently, the extradition case involving wartime member of the BiH Presidency, **Ejup Ganić**, resulted in a serious setback for regional co-operation in criminal matters and strained relations between BiH and Serbia.<sup>242</sup> Mr. Ganić was arrested in March 2010 in London, pursuant to an arrest warrant issued by Serbia. Serbia requested the United Kingdom to extradite him for war crimes allegedly committed against troops of the Yugoslav Army in Sarajevo in May 1992. Eventually, the UK Court refused to extradite Mr. Ganić to Serbia as the judge determined that the charges against him were unfounded and politically motivated.<sup>243</sup> Regardless of the outcome in this specific case, the Ganić case is concerning in terms of repercussions on the level of regional co-operation. It must be noted that just a few days before his arrest, BiH and Serbia had signed an agreement on amendments and

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241 In terms of the measures contained in the National Strategy, the *Law on International Legal Assistance in Criminal Matters*, after initially faltering in parliamentary procedure, was finally adopted on 15 June 2009. Problems with the implementation of this law were immediately identified by the Court of BiH and BiH Prosecutor's Office, thus necessitating the establishment of a working group to propose amendments. This work reportedly proceeds steadily, but until the amendments are finalized and sent to Parliament, the publication of the *Handbook on International Legal Assistance in Criminal Matters* identified in the Strategy and a commentary on the law are postponed.

242 Mr. Ganić was arrested on 1 March 2010 in London based on an arrest warrant issued by Serbia, and Serbia requested to the UK his extradition to Serbia for war crimes allegedly committed against JNA troops in Sarajevo in May 1992. The BiH Prosecutor's Office has been investigating the same incident since October 2006.

243 Westminster Magistrates' Court, *The Government of the Republic of Serbia vs. Ejup Ganić*, 27 July 2010 (available at: <http://www.judiciary.gov.uk/NR/rdonlyres/63FBA6BB-59F4-4BAF-BA78-95FED04AAEC2/0/serbiavganic27072010.pdf>).

addendums to a 2005 *Agreement on Legal Assistance in Civil and Criminal Matters*<sup>244</sup>, which aimed, among other things, at solving the issue of parallel investigations. The Agreement provides that when proceedings for the same war crimes criminal offence are conducted in both countries, the decision to relinquish the criminal prosecution to BiH or Serbia shall be made by giving special consideration to the nationality and residence of the accused. The criteria set out in the Agreement, albeit rather clear, did not prevent the dispute between Serbia and BiH over the extradition of Mr. Ganić. Currently, it cannot be excluded that new “Ganić cases” will occur, and spur further political tension in the region. Arguably, such tensions also pose a risk that the above-mentioned improvements in working-level co-operation concerning, for example, sharing of evidence and taking of witness statements, will regress.

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244 Amended Agreement between Bosnia and Herzegovina and Republic of Serbia on amendments and addendums to the Agreement between Bosnia and Herzegovina and Serbia and Montenegro on legal assistance in criminal and civil matters, 26 February 2010 (in local language available at <http://www.mpr.gov.ba/bs/str.asp?id=424>); see also Agreement between Bosnia and Herzegovina and Serbia and Montenegro on Legal Assistance in Civil and Criminal Matters, 24 February 2005 (in local language, available at: <http://www.mpr.gov.ba/en/str.asp?id=43>).

## 7 Political and Public Support for War Crimes Processing in BiH

This section discusses the general trends with regard to political and public support for the efforts of the BiH criminal justice system to combat impunity for war crimes. This section proceeds as follows. Section 7.1 remarks on the general climate prevailing in BiH, in which war crimes trials are often fodder for political manipulation. Section 7.2 documents and analyses the effect of politically motivated attacks on the Court of BiH and BiH Prosecutor's Office, recalling the earlier findings of the OSCE Mission's report of January 2010.<sup>245</sup> Section 7.3 considers the attitude of the public and affected communities, particularly victims, towards domestic war crimes processing and briefly assesses outreach initiatives by justice institutions to date.

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

- Serious concerns regarding continuous statements labelling the Court of BiH and BiH Prosecutor's Office as anti-Serb institutions, pressing the judiciary to indict certain individuals on the basis of ethnic considerations, or denying that war crimes have been committed despite final verdicts establishing the facts of those atrocities;
- The need to ensure the long-term sustainability and support for state level criminal justice institutions, by affording them constitutional status, (particularly in light of the campaign to delegitimize these institutions and prevent the extension of the mandate of international judges and prosecution in 2009);
- The positive record of transparency at the Court of BiH and BiH Prosecutor's Office and ongoing concerns about the need to balance the protection of private data that may be published in official court documents with the strong public interest in accessing information regarding serious crimes;
- Concerns, based on successive public opinion surveys carried out for the OSCE Mission, that public confidence in the ability of the courts to deliver fair and efficient justice for war crimes is low and is not improving;
- Factors contributing to the difficulty experienced in implementing robust outreach strategies at both state and entity level.

### 7.1 General assessment and overview

The chief challenge faced by the ICTY in mustering support for its work is not an issue for the domestic judicial institutions in BiH dealing with war crimes cases, i.e. the physical distance of the seat of the trials from their main audiences. Indeed,

<sup>245</sup> OSCE Mission Spot Report on *Independence of the Judiciary*, *supra* note 4.

many of the trials take place in the larger towns around BiH, and the Court of BiH, situated in Sarajevo, encourages visits from the public and arranges these upon request. However, in the several years of the existence of the Court of BiH and BiH Prosecutor's Office, it has become clear that they face some equally daunting hurdles. The **politicization of all matters related to war crimes processing**, as well as rising opposition in some quarters toward anything perceived as a project of the international community, has proved a powerful force against the comparably mild efforts to trumpet the work of the domestic judiciary toward resolving the backlog of war crimes cases. Thus, public support for war crimes processing appears to be somewhat lacklustre. Unfortunately, at times the situation even tends to result in outright hostility towards war crimes processing. As the OSCE Mission has previously reported, **the Court of BiH, in particular, is frequently the target of negative propaganda.**<sup>246</sup> This situation compounds the **need for robust efforts to strengthen the reputation of the domestic criminal justice institutions, as well as the local courts, in the eyes of the public** and create a sense of ownership over domestic war crimes processing. This section examines the extent to which this has been accomplished and outlines the continuing need to work on bolstering support for war crimes processing among both the public and particularly affected communities, such as victims.

## 7.2 Political interference and attacks on the Court of BiH and BiH Prosecutor's Office

It is important to note that the concerns related to efficient and human rights compliant war crimes processing expressed in this and previous reports, although significant, do not justify the harsh criticism and denigration which some political forces, especially from the RS, have expressed against the Court of BiH and BiH Prosecutor's Office with increasing frequency over the last two years. As stated in the previous OSCE Mission Report on *Independence of the Judiciary – Undue Pressure on BiH Judicial Institutions*, on many occasions, politicians, through the mass media, attacked the integrity and legitimacy of the state level institutions and have exerted **undue pressure and interference regarding the processing of specific cases.**<sup>247</sup>

With specific regard to war crimes cases, continuous statements labelling the Court of BiH and BiH Prosecutor's Office anti-Serb institutions, pressing the judiciary to indict certain individuals on the basis of ethnic considerations, or denying that war crimes have been committed despite final verdicts establishing the facts of those

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<sup>246</sup> *Ibid.* The Report describes clear political interference with the judicial process through statements, which, due to their harsh content, unsubstantiated nature, and frequency overstep the limits of acceptable criticism and constitute undue pressure on these independent institutions.

<sup>247</sup> *Ibid.*

atrocities, represent a serious concern.<sup>248</sup> In this regard, the OSCE Mission fully supports the stated strategy of the BiH Prosecutor's Office, which is to focus on the prosecution of the most serious crimes and most responsible perpetrators without attempting to ensure "any artificial ethnic balance of suspects"<sup>249</sup> and encourages the Court of BiH and BiH Prosecutor's Office to rigorously adhere to this policy.

Regardless of the fact that these institutions are capable of resisting political pressure,<sup>250</sup> a prolonged **campaign of de-legitimization of the judiciary** – particularly in 2009 – succeeded in undermining the trust of citizens in and public support for the processing of war crimes trials in BiH to some extent.<sup>251</sup> The clashes between certain political forces and the Court of BiH and BiH Prosecutor's Office also raise the **problematic issue of long-term domestic support for and sustainability of those institutions**. The dispute over the extension of the mandate of international judges and prosecutors working in Sections I and II of the Court of BiH and both of the special departments in the BiH Prosecutor's Office (i.e. on war crimes cases and organized crime cases respectively) brought this issue into the public domain. Although the mandate of international judges and prosecutors was due to expire in December 2009, the President of the Court of BiH, the BiH Chief Prosecutor and the President of the HJPC BiH jointly requested an extension.<sup>252</sup> The main justification behind this request was the failure of the legislative and executive powers to ensure sufficient funding for the timely recruitment of national judges and prosecutors to replace the departing international ones.<sup>253</sup> Another argument expressed by several officials working in those two institutions was that considering the climate of political pressure against the Court of BiH and BiH Prosecutor's Office, a complete departure of the international presence at the end of 2009 would have been premature.<sup>254</sup> Despite these sound arguments, political forces from the RS harshly opposed the adoption of the legislation for the extension of the mandate. Eventually, the OHR, with the approval of the Peace Implementation Council, imposed laws extending the mandate of international judges and prosecutors working on war crimes cases

248 See joint OHR/EUSR, OSCE Mission and Council of Europe Mission to BiH press release, *Denial of War Crimes is Inexcusable*, 15 September 2009.

249 See Pamphlet of the BiH Prosecutor's Office, Special Department for War Crimes, *A New Way - A New Beginning*.

250 See Section 4, *War Crimes Cases before the Court of BiH*, at section 4.2.3, *supra*.

251 Prism Survey carried out for the OSCE Mission in April 2007 found that approximately 37 per cent of those surveyed thought the Court was 'fully under political influence' and another 26.7 per cent believed it is under 'some political influence;' additional Prism Survey for the OSCE Mission from January 2010 found that 63.7 per cent of those surveyed have total distrust in the BiH Court to bring just verdicts in war crimes cases contrary to the similar survey done by the Prism in July 2008 for the OSCE Mission showing that 35.4 per cent of those surveyed did not believe at all that the BiH Court would bring just verdicts in war crimes cases.

252 Joint letter of Kreso Meddžida, President of the Court of BiH and Barašin Milorad, the BiH Chief Prosecutor, sent on 2 October 2009.

253 See Registry of the Court of BiH, Annual Report 2009, p. 57 (available at: [http://www.registrarbih.gov.ba/files/docs/ANNUAL\\_REPORT\\_2009.pdf](http://www.registrarbih.gov.ba/files/docs/ANNUAL_REPORT_2009.pdf)).

254 *Report of the International Criminal Law Services Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, 15 December 2008, para. 72 (available at: <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>).

until the end of 2012.<sup>255</sup> The mandate extension did not include those judges and prosecutors working on the arguably even more high-profile and sensitive organized crimes cases. Nevertheless, sufficient continued capacity to investigate, prosecute, and adjudicate war crimes cases at the state level in the immediate period was ensured by mandating the international extension.<sup>256</sup>

The OSCE Mission supported the extension of the mandate of international judges and prosecutors; it also fully supports the transition strategy aimed at achieving a completely domestic membership in the Court of BiH and BiH Prosecutor's Office at the end of 2012. Against this backdrop, the OSCE Mission underlines that **the key factor for the sustainability of these two institutions lies in the commitment of all political forces to respect the independence of these institutions and to support their role.** Unfortunately, this commitment is still lacking. As the Mission already stated in the above-mentioned report on judicial independence, the **lack of constitutional protection of the state level judicial institutions** arguably leaves their members constantly at risk of interference from the executive and legislative branches of government. Giving constitutional status to the Court of BiH and BiH Prosecutor's Office, as well as to the HJPC BiH, would constitute the best legal guarantee of their independence and would better define their relation *vis-à-vis* the executive and legislative branches, in accordance with the principle of separation of powers. It would also be a fundamental step for ensuring the sustainability of these key judicial institutions.

### 7.3 Public confidence in domestic war crimes processing and outreach efforts

When the Court of BiH was established, the need for transparency and outreach to cater for public interest in the work of the institutions was recognized from the outset. A Public Information and Outreach Section (PIOS) in the Registry was established as the responsible office for developing initiatives in that regard, in conjunction with the judges. Similarly, the BiH Prosecutor's Office has a Spokesperson who heads a small Public Relations Department. In addition to their outreach functions, these offices are also the focal points for media relations for the respective institutions.

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255 See OHR, Decision Enacting the Law on Amendments to the Law on Prosecutor's Office of Bosnia and Herzegovina and Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina, 14 December 2009 (available at [http://www.ohr.int/decisions/judicialrdec/default.asp?content\\_id=44287](http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=44287) and [http://www.ohr.int/decisions/judicialrdec/default.asp?content\\_id=44283](http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=44283), respectively).

256 This is not to say that the Court of BiH and BiH Prosecutor's Office do not face certain capacity and resource challenges. In 2010, these institutions faced strain on workspace necessitating a request to relocate the BiH Prosecutor's Office to more spacious premises, thus also freeing space in the building shared with the Court of BiH for the expansion of courtrooms and offices. Another key challenge in 2011 will be ensuring that the BiH Prosecutor's Office has sufficient funds at its disposal to enable it to assume responsibility for all exhumations of mass graves on the territory of BiH, as agreed on 26 August 2010. Keeping domestic funding of both institutions growing at a rate sufficient to match reductions in donations from international sources is an ever present concern.

At the entity level, however, dedicated spokespersons and outreach officers are the exception rather than the rule, and public relations tasks are thus usually delegated to court presidents, chief prosecutors, offices clerks or other staff who have other main functions.<sup>257</sup>

The **record of the Court of BiH and BiH Prosecutor's Office concerning transparency is laudable**, particularly by comparison with other judicial institutions of the region. The majority of the information released concerning cases at the state level is published on the websites of the Court and Prosecutor's Office. Although the rules of criminal procedure preclude film and television recording by media or members of the public of court-room proceedings, in 2009 the Court agreed to provide archived video material from trials to journalists upon request and subject to approval.<sup>258</sup> This was a positive step towards increasing public access to information about the work of the Court. In 2010, an issue arose over the **publication of the names and identifying information of persons convicted of crimes** by the Court of BiH when an objection was raised by one convicted person through the BiH Agency for the Protection of Private Data.<sup>259</sup> This presented a serious challenge to the Court's efforts to keep the public informed of its work. An uncomfortable balance between the right to free access to information (and in addition, the right of victims to truth concerning past crimes perpetrated during the conflict) and the right of individuals to protection of private data resulted in all verdicts and indictments being temporarily removed from the website in mid 2010. Although at the time of the writing of this report the documents were again available to the public on the website, a plan was in development to redact the identifying information, which arguably does not wholly resolve the issue of the public interest in findings concerning genocide, crimes against humanity, and war crimes.

Aside from establishing a firm policy in favour of maximum transparency in line with legal prescriptions, both the Court of BiH and BiH Prosecutor's Office have faced **the challenge of building public trust and support in war crimes processing in the midst of a negative political environment and prevailing social attitudes related to "dealing with the past"** that often emphasize one-sided narratives of victimhood. Lack of accurate and objective media reporting on war crimes matters and inflammatory political rhetoric against criminal justice institutions (outlined in the above section 7.2, *Political interference and attack on the Court of BiH and BiH Prosecutor's Office*) have also made this a daunting task. Nonetheless, both the

257 OSCE Trial Monitoring Programme, *Findings concerning spokespersons in courts and prosecutor's offices* (December 2009). However, note that in September 2010, the Banja Luka District Court opened a position for a dedicated permanent Spokesperson.

258 Such material was requested by the specialized war crimes trial reporting agency, BIRN (Balkan Investigative Reporting Network), and is used in the monthly TV production "TV Justice." See <http://birn.eu.com>. See also Letter for the Association of Court Reporters to PIOS of 28 October 2009, available at <http://www.bim.ba/en/206/40/> (concerning access to audio visual material from the courtroom).

259 See BIRN, "NGOs say privacy law jeopardizes struggle for justice," 16 July 2010 (available at: <http://www.bim.ba/en/227/10/29515/>).

Court of BiH and BiH Prosecutor's Office have endeavoured to carry out outreach initiatives aimed at engaging the public in two-way communication about the work of the respective institutions.

The first major outreach activity carried out by the Court of BiH's Public Information and Outreach Section (PIOS) was the establishment of a **Court Support Network**, which formally came into existence on 31 October 2006. The network was conceived as a way of enlisting the help of local NGOs to distribute information about the work of the Court around the country, taking advantage of their foothold in small communities. It was hoped that community organizations of various types could be used to disseminate information about the Court of BiH and BiH Prosecutor's Office, and to thus promote acceptance of and build solidarity behind individuals that co-operated with prosecutions. The Network functioned through strategic partnerships with five regional NGOs working on human rights and war crimes accountability issues.<sup>260</sup> Unfortunately, however, these early **efforts towards creating partnerships with civil society and reaching out to target groups, such as victims and perpetrator communities, by the Court of BiH were not sustained**. After 2007, the Court Support Network no longer functioned and today, in 2010, it is clear that many victims' associations openly state that they do not trust and support the Court of BiH and BiH Prosecutor's Office.<sup>261</sup>

The BiH Prosecutor's Office has also undertaken outreach efforts, with only partial success. In the summer of 2008, a new strategy for prioritizing and selecting cases for prosecution was publicized in a series of public events. In part, this was also an effort to respond to public curiosity concerning the development of the National Strategy, which was happening behind closed doors.<sup>262</sup> Unfortunately, a pamphlet distributed at these events sparked controversy as it noted the numbers of victims falling into different ethnic categories – and neglected to mention Bosnian Muslims as a category at all.<sup>263</sup> This (accidental) omission alone was enough to spark rage, but the overall message that “ethnicity was not a criterion in choosing suspects” was lost amid confusion about what the new approach favouring the prosecution of the gravest incidents with the largest number of victims actually meant. The manner of execution of this outreach initiative not only dented public confidence in the BiH

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260 These included the Mostar-based office of the Center for Civic Initiatives, an organization with a mandate to ensure transparency and democratic participation in BiH institutions; Žene Ženama, one of the leading women's NGOs in BiH, based in Sarajevo; the RS Helsinki Committee for Human Rights, one of the foremost human rights NGOs in the country and based in the Republika Srpska town of Bijeljina, and; *Izvor*, the Association of Women from Prijedor, one of the most active victims' advocacy groups, which operates in the north-western region of BiH.

261 See, for example, BIRN, *Victims' protest turns into boycott* (available at <http://www.bim.ba/en/147/10/15729/>), 22 December 2008; BIRN, *Victims Associations Left in the Dark over War Crimes Investigations* (available at <http://www.bim.ba/en/103/10/8008/>), 19 February 2008.

262 See Section 2, *Development and Implementation of the National Strategy for War Crimes Processing*, *supra*.

263 Prosecutor's Office of BiH, “New Way, A New Beginning” brochure (2008).

Prosecutor's Office among its core constituency, but also served to highlight the **need for increased expert assistance and planning** with regard to such events.<sup>264</sup>

On a positive note, the state level criminal justice institutions have, on occasion, responded to hostile comments against their work. In November 2009, the BiH Prosecutor's Office **published an open letter to the citizens of BiH by the BiH Chief Prosecutor**, refuting several spurious allegations and efforts to misrepresent an investigation into financial wrongdoing by the then Prime Minister of the RS. The open letter was significant because it also asserted an important message about the integrity of the institution, namely that the:

BiH Prosecutor's Office has no personal feelings about any of the institutions or entities in BiH. We work on behalf of disempowered citizens, for their protection and protection of the entire state and social community from criminal offense perpetrators in the aim of fairness, protection of justice and compliance with laws passed by the Parliament and Assemblies of Bosnia and Herzegovina and its Entities.<sup>265</sup>

Such initiatives are encouraging, but unfortunately seem to be largely limited to reactions to extremely hostile and negative situations.

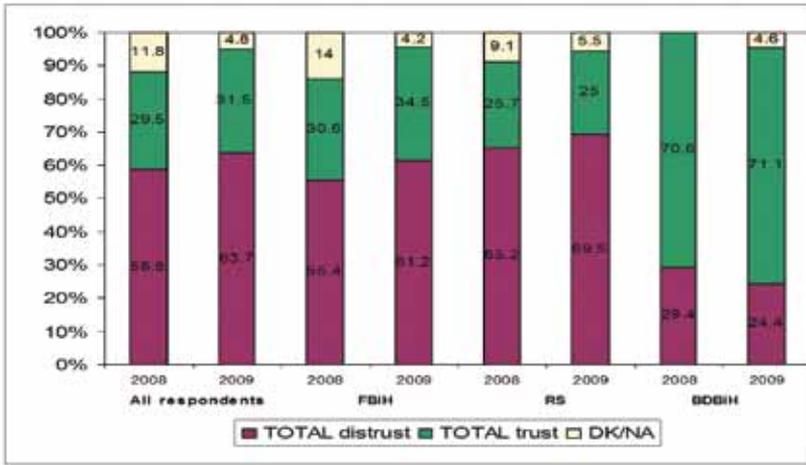
Evidently, the results of outreach initiatives conducted by the Court of BiH and BiH Prosecutor's Office have been somewhat mixed, which may stem from a combination of factors, including the difficult societal context in which they take place, the continued prevalence of politically motivated attacks, biased negative media reporting, misinformation, and an evident need for a greater degree of expert assistance and planning of outreach activities. This situation translates into an **overall lack of public trust in domestic war crimes processing**. This trend can be observed through the results of public opinion surveys carried out for the OSCE Mission in 2007, 2008, and 2009. When a representative sample of BiH citizens was asked whether they would trust in the ability of the state and entity institutions respectively to fairly prosecute war crimes cases, the response was overwhelmingly negative. On average, nearly **60% of all respondents did not have any faith in the Court of BiH to try the war crimes and produce a fair and just result**. The Serb respondents expressed particularly low confidence in the Court of BiH, with only 25% of respondents indicating they had "some trust" in its impartiality. Respondents across all ethnic groups had slightly higher confidence in the entity courts, but the trends were still disappointingly low.<sup>266</sup>

264 As the new outreach strategy developed soon after noted, "[t]he fierce reactions from some victim groups to the new approach by the War Crimes Section have demonstrated the need for public information professionals' involvement in the planning and implementation of similar outreach exercises." *Public Information and Outreach Strategy (Prosecutor's Office BiH)*, at p. 3.

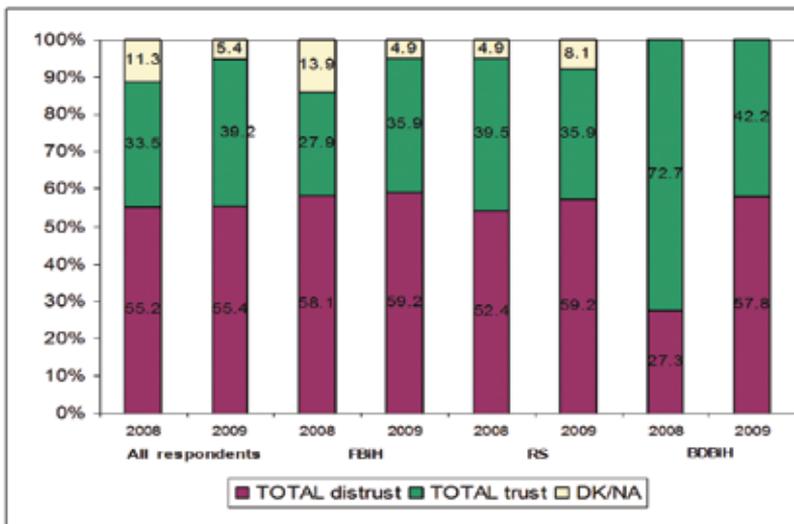
265 Chief Prosecutor Milorad Barašin, *An Open Letter Concerning "Information published by the Republika Srpska Government in the document entitled "False representation of social and economic environment in the RS" and in order to provide better and a more comprehensive information for the public aiming to protect the dignity of the professional community and institution headed by me,"* 11 November 2009 (available at [http://www.tuzilastvobih.gov.ba/files/docs/Otvoreno\\_pismoENG.pdf](http://www.tuzilastvobih.gov.ba/files/docs/Otvoreno_pismoENG.pdf)).

266 Prism Survey carried out for the OSCE Mission in July 2008.

Graph 1: Respondents were asked: If you were a war victim, how much confidence would you have in the work of the Court of BiH (Department for War Crimes) to try suspected persons for war crimes and to bring just verdicts?



Graph 2: Respondents were asked: If you were a war victim, how much confidence would you have in the court of your entity to try suspected persons for war crimes and to bring impartial and just verdicts?



Overall, these successive public opinion polls reveal a distinct distrust in the criminal justice institutions. The danger in this is that not only are the retributive, deterrent, and hopefully restorative elements of war crimes trials being lost, but that this lack of confidence may lead to a consequent reluctance among potential witnesses to cooperate with war crimes prosecutions. On the other hand, the majority of respondents felt “strongly” that the only appropriate way to deal with war crimes is to prosecute persons suspected of those crimes, even when presented with non-judicial options to deal with the past. Given the indication that there remains a strong appetite for justice in BiH, the challenges inherent in efforts to cultivate confidence and engagement of the public in war crimes processing is particularly problematic for moving towards the full restoration of the rule of law in BiH.<sup>267</sup> Unfortunately, the citizens of BiH appear to feel increasingly alienated from the work of the Court of BiH and BiH Prosecutor’s Office. Similarly, in light of the climate of political attacks described above in section 7.2, the current situation is not conducive to building support for war crimes processing among political and leadership elites in the country. The same is largely true at the entity level, where even minimal resources and understanding for the need for outreach and public information activities are sorely lacking.

It is plainly not within the power of the criminal justice institutions to address many of the root causes of the lack of public confidence and engagement in domestic war crimes processing. However, there are also indications that better planned and more sustained outreach initiatives could significantly impact and improve public perceptions, particularly among groups that are simply dissatisfied with the amount and nature of information they receive. Although both the Court of BiH and BiH Prosecutor’s Office have public information staff and active heads of institutions willing to engage with the media, **no comprehensive strategy has been implemented with regard to engaging victims, the public, or the media** with a view to enlisting support and promoting their work absent the need to fend off attacks. Indeed, twin Public Information and Outreach Strategies were developed in 2008 for the respective institutions, emphasizing the need for careful planning in view of the difficult environment in which the Court of BiH and BiH Prosecutor’s Office conduct their public relations, but these plans have yet to be implemented. This is in part due to lack of resources but also seems to be a result of poor appreciation for the benefits of conducting outreach. Therefore, **renewed and comprehensive, strategic efforts to conduct outreach and engage the public should be considered as one tool for combating negative perceptions** of the Court of BiH and BiH Prosecutor’s Office. In addition, both institutions should continue to embrace the above-mentioned strong culture of transparency they have exhibited to date.

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<sup>267</sup> Surveys indicated that the Court of BiH enjoyed greatest public support in 2006. A fall of trust in the Court began in the first half of 2007, continuing through the second half of 2007 before slowly beginning to increase in the first half of 2008, according to results of the BiH Political Monitor 2006-2008 made by Mareco index Bosnia (available at: [http://www.mib.ba/down/prez/bhpm2006-2008\\_en.pdf](http://www.mib.ba/down/prez/bhpm2006-2008_en.pdf)).

## 8 Conclusion and Recommendations

It is clear that the country has taken a major leap forward in ensuring accountability for crimes committed during the conflict in BiH, particularly when compared with the situation documented in the OSCE Mission's Report on war crimes in 2005. This is due in large part to the work of the Court of BiH and BiH Prosecutor's Office over the course of the past five and a half years. What is more, this leap has occurred both in terms of the number of cases tried and the quality of justice delivered. In just a few years, these two institutions have proven to be a trustworthy and effective partner of the ICTY. A productive synergy between these international and national justice mechanisms is evident.

The creation of Section I for War Crimes within the Court of BiH and the Special Department for War Crimes within the BiH Prosecutor's Office and progressive development of their capacities required the efforts, dedication, and commitment of resources of both domestic institutions and the international community. Notwithstanding the ongoing challenges identified in this report, it is fair to say that these efforts have been repaid. The Court of BiH and BiH Prosecutor's Office are the key institutions in BiH not only when it comes to addressing the crimes of the past conflict but also for ensuring accountability for organized crime, corruption, and terrorism. **The future success or failure of BiH in combating those crimes will also depend on the continued support by domestic institutions to the Court of BiH and BiH Prosecutor's Office.**

In stark contrast to the intense concentration of resources and capacity-building efforts at the state level, investment in the institutional framework and resources available for war crimes processing at the entity level during the past five years was largely forsaken. Resources to increase the capacity of courts and prosecutor's offices at the entity level were not allocated. The most visible example of this is the long delay in upgrading courtroom facilities to ensure adequate protection for witnesses – an improvement that is essential for dealing with many kinds of sensitive cases in an appropriate fashion.<sup>268</sup> The OSCE Mission pointed out, in its 2005 Report, that the importance of war crimes trials before the cantonal and district courts would in no way be diminished by the creation of jurisdiction over war crimes cases at the state level. The key role of the entity judiciary in processing less complex war crimes cases, notably those involving direct perpetrators, (under the co-ordination efforts of the Court of BiH and Prosecutor's Office of BiH) was confirmed by the National Strategy. The significance of trying war crimes perpetrators before courts located in the same area where the crimes actually occurred cannot be underestimated. This is vital not only to closing the impunity gap by ensuring a sufficient volume of trials, but also for strengthening of the rule of law in BiH.

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<sup>268</sup> However, as noted in Section 2, the European Union is providing IPA funding for physical upgrades to courthouses aimed at ameliorating this situation. *See supra* note 64.

In terms of resolving the war crimes caseload, the statistics clearly show that the highest number of accused brought to trial throughout BiH in a single year was 2006. This was the result of combined good performances, in numerical terms, at both the state and the entity level. Annual figures for the number of indictments raised and cases completed peaked that year and have not been matched since. The number of accused brought to trial at the Court of BiH remained stable but there was a marked drop in the number of cases initiated at the entity level (see Fig. 2: *Accused brought to trial from January 2005 till September 2010*, in Annex 1). Overall, this statistical data confirms that BiH will only be able to meet the goals set out in the National Strategy through the joint efforts of the state and entity judiciary and institutions. This will require a **more efficient and harmonized functioning of the justice system as a whole**. As highlighted throughout this report, however, lack of co-ordination and co-operation among the different courts and prosecutor's offices is perhaps the biggest obstacle to effective implementation of the National Strategy.

Many of the hurdles highlighted in this report can be solved through a **more robust, consistent, and sustained approach toward the implementation of the National Strategy**. By the same token, **comprehensive solutions to some structural problems will require further progress in the implementation of judicial reforms necessary to strengthen the rule of law in BiH**.<sup>269</sup> Strengthening the independence of the judiciary in order to better resist political pressure and politicization of war crimes issues would entail giving constitutional status to the HJPC BiH, the Court of BiH and the BiH Prosecutor's Office. Ensuring that the principle of equality before the law is not constantly undermined by the lack of harmonized jurisprudence among the courts in BiH will eventually require the establishment of a supreme court of BiH. Such a court is also necessary in order to efficiently solve the frequent conflicts of competence among the courts in BiH, which arise not only in connection with war crimes cases but in currently more serious and urgent cases, such as corruption and organized crime. Against this background, future endeavours to strengthen war crimes processing in BiH will have to be devised in a way that is consistent with and supportive of broader efforts aimed at the establishment of an independent and fully functional judiciary, capable of upholding the rule of law, ensuring equality for all BiH citizens, and preparing it for integration into the Euro-Atlantic family of institutions.

## 8.1 Recommendations

**The OSCE Mission recalls the numerous recommendations** delivered to both the state and entity level government authorities, members of the judiciary, and legal practitioners in the past by both the OSCE Mission and others, aimed at suggesting improvements to

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<sup>269</sup> With regard to the OSCE Mission's stance on judicial reform in BiH, see Gary D. Robbins, Head of OSCE Mission, "Bosnia and Herzegovina's Unfinished Judicial Reform", in *New Europe*, 25 April 2010 (available at <http://www.neurope.eu/articles/100381.php>).

training, capacity-building, resource provision, and the correct application of substantive and procedural law in practice, as well as respect for fair trial standards.<sup>270</sup> Despite strong efforts in several of these areas, **many of these recommendations remain partially or completely unimplemented.** As such, they remain priorities. However, in light of the findings presented throughout this Report, the OSCE Mission recommends the following specific actions be implemented without delay in order to resolve some of the core and urgent problems affecting war crimes processing in BiH:

**The OSCE Mission calls on BiH governmental and political representatives to:**

- i. Define the status, independence, and impartiality of the judiciary, as well as the institutional role of the HJPC BiH, the Court of BiH and BiH Prosecutor's Office in the Constitution of BiH;
- ii. Seriously consider the establishment of a Supreme Court of BiH as the court of final instance, to ensure harmonized interpretation and application of the law and equality before the law;
- iii. Strengthen the capacity and efficiency of prosecutor's offices at the entity level, particularly through the employment of expert advisors and assistant prosecutors. In this regard, the adoption of the long awaited Law on Prosecutor's Offices of FBiH should be a key priority;
- iv. Consider amendments to the criminal procedure codes applicable at the state and entity level to clarify matters highlighted in this report regarding plea bargaining, the prohibition of trials *in absentia* to situations in which detained accused refuse to attend their trial, and the need to bolster the efficiency and fairness of the appellate procedure;<sup>271</sup>
- v. Engage in negotiations with other countries in the region in order to agree on the removal of legal provisions prohibiting the extradition of citizens for war crimes and other serious crimes;

**The OSCE Mission recommends to judicial authorities at the state and entity level that:**

- vi. The BiH Prosecutor's Office should continue the inventory of open war crimes case files at the state and entity level and the inclusion of all relevant

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<sup>270</sup> See OSCE Mission reports (available at [www.oscebih.org/public/documents](http://www.oscebih.org/public/documents)); ICTY Report, *Assessing the Legacy of the ICTY*, 27 April 2010 (available at: [http://www.icty.org/x/file/Press/Events/100427\\_legacyconference\\_pdt\\_report.pdf](http://www.icty.org/x/file/Press/Events/100427_legacyconference_pdt_report.pdf)); UNDP Report, *Needs Assessment in the Field of Support to Witnesses/Victims in BiH*, 31 May 2010 (available at: <http://www.undp.ba/download.aspx?id=2169>); Human Rights Watch Report, *Narrowing the Impunity Gap*, 11 February 2007 (available at <http://www.hrw.org/en/reports/2007/02/11/narrowing-impunity-gap-0>); Human Rights Watch Report, *Still Waiting*, 10 July 2008 (available at <http://www.hrw.org/en/reports/2008/07/09/still-waiting-0>); International Centre for Transitional Justice Report, "War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (2008)," 2008, (available at [http://www.adh-geneva.ch/RULAC/pdf\\_state/ICTJ.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/ICTJ.pdf)).

<sup>271</sup> See Sections 4.4.1, 4.4.2, and 4.4.6.

qualitative information on the cases in a single database. Such a database should be made accessible to prosecutors working on war crimes cases at both the state and entity level;

- vii. A means of sharing the information required under Annex B of the National Strategy regarding co-called Category II cases with the Court of BiH that allows the Court to ensure that the most complex cases are processed at the state level and at the same time guarantees prosecutorial discretion and confidentiality requirements should be urgently sought. The BiH Prosecutor's Office, the Chief Prosecutors of the FBiH, RS and Brčko District, and the Court of BiH should coordinate in order to agree on the most efficient way of providing the Court of BiH with the information required. In particular, consideration should be given to nominating the BiH Prosecutor's Office as the appropriate institution to organize the gathering and flow of this information from the entity prosecutor's offices to the Court of BiH;
- viii. Agreement among state level judicial and prosecutorial authorities should be urgently sought concerning a means of ensuring that the mechanism for takeover of Category II cases by decision of the Court of BiH pursuant to Art. 449(2) BiH Criminal Procedure Code is transparent, functional, and fully legally compliant. In addition, whenever possible, proceedings should be taken over pursuant to Art. 449 at an early stage of the investigation in order to maximize efficiency;
- ix. Regular meetings between the Court of BiH and BiH Prosecutor's Office to ensure consistent interpretation of the complexity criteria for the allocation of war crimes cases between the state and entity level, as foreseen in strategic measure no. 12 of the National Strategy, should begin to take place;
- x. The BiH Prosecutor's Office should develop internal guidelines that emphasize the consistent application of the case complexity criteria in line with the goals of the National Strategy. Such guidelines could enumerate specific indicators of what makes a case suitable for transfer at the entity level and should be shared with the entity prosecutors;
- xi. The BiH Prosecutor's Office should carry out a comprehensive review of the currently open Category I cases with a view to providing the Court of BiH with the information required under Annex B of the National Strategy and submitting motions to the Court of BiH for the transfer of less complex cases to the territorially competent entity court. Whenever possible, the motion for transfer should be submitted at an early stage of the investigation;
- xii. The Court of BiH should develop consistent case-law on the application of the criteria for transferring of Category I cases or taking over Category II cases. The Court of BiH should apply a strict interpretation of the complexity criteria that relies fully on the two-fold gravity assessment of cases envisioned in the criteria relating to the nature of the crime and the role of the accused. "Other circumstances" should be a secondary consideration, as intended in the criteria, and these circumstances should be clearly identified and narrowly interpreted with a view to avoiding an excessive margin of discretion in

decisions on transferring or taking over of cases;

- xiii. To ensure the developing of consistent case-law on the application of the criteria, the Court of BiH should consider establishing a permanent Panel in charge of deciding upon both the transfer and taking over of cases upon motion of the parties or *ex officio*;
- xiv. The Supervisory Body of the National Strategy should consider requesting increased administrative and technical support aimed at strengthening its oversight of implementation. Further, the members of the Supervisory Body, in consultation with heads of judicial institutions should assess whether alternative means of accomplishing the goals of the National Strategy are necessary in some instances and identify and address gaps in the original set of strategic measures;

**The OSCE Mission calls on the HJPC BiH to:**

- xv. Develop more refined standards to measure the performance of judges and prosecutors assigned to war crime cases at both state and entity level in place of the current formal and informal quota systems. These standards should take into account the level of complexity of the cases prosecutors are assigned to;
- xvi. Make provision for the appointment of the necessary numbers of additional judges and especially prosecutors, who shall be assigned to war crimes cases;
- xvii. In its role as a key member of the Supervisory Body of the National Strategy, the HJPC BiH should drive forward implementation of all components in an expeditious manner;

**The OSCE Mission calls on the ICTY to:**

- xviii. Ensure that direct access to ICTY evidence is granted to entity prosecutors working on war crimes. Entity prosecutors should be guaranteed a level of co-operation and access similar to that already established between the ICTY and the BiH Prosecutor's Office;

**The OSCE Mission calls on the international community to:**

- xix. Ensure the availability of the necessary diplomatic and other support requested by the judicial institutions responsible for processing war crimes cases.
- xx. Consider targeted efforts to promote renewed and enhanced high-level political engagement aimed at securing regional co-operation in war crimes matters.

# Annex 1 – Charts

Fig. 1: War crimes cases started (Indictments raised) from January 2005 till September 2010

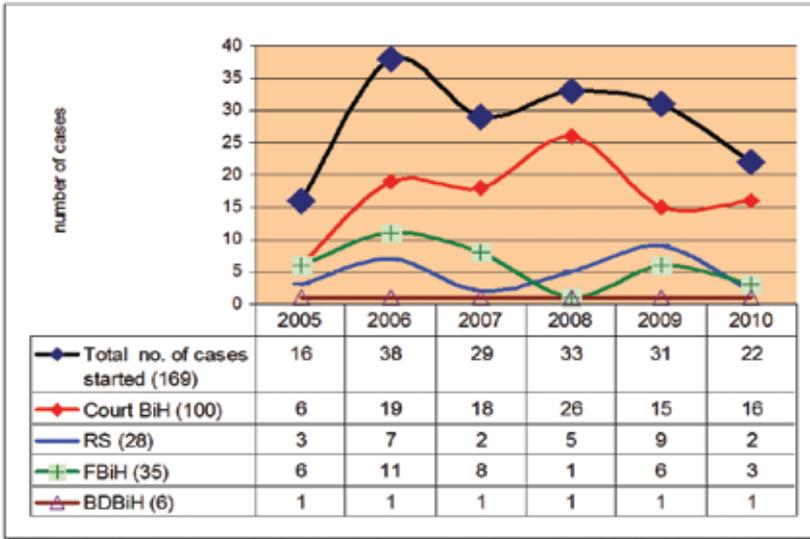


Fig. 2: Accused brought to trial from January 2005 till September 2010

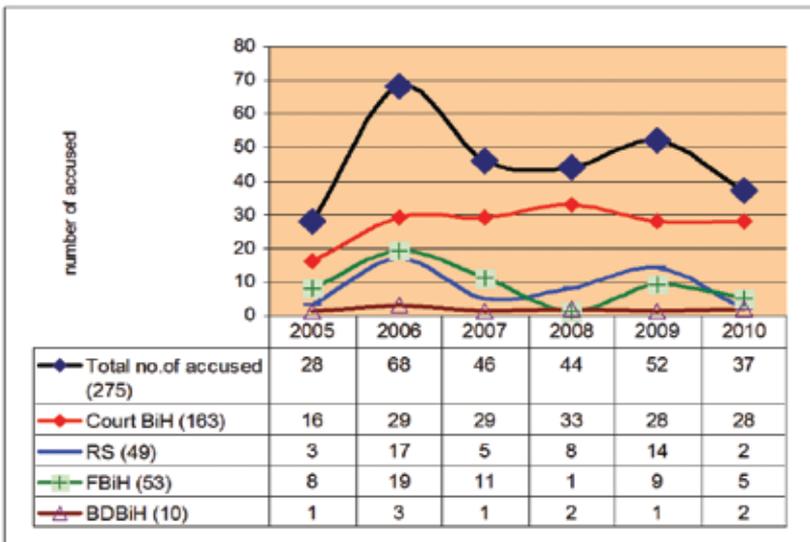


Fig. 3: War crimes cases completed from January 2005 till September 2010

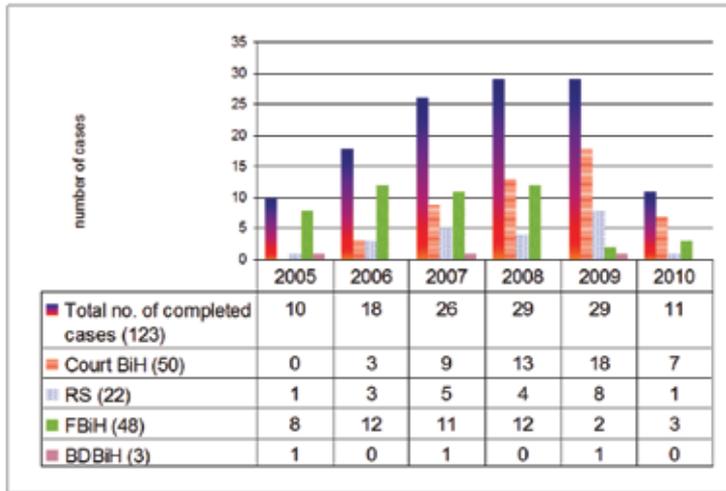


Fig. 4: Accused processed before courts in BiH – Final verdicts rendered to individual accused from January 2005 till September 2010

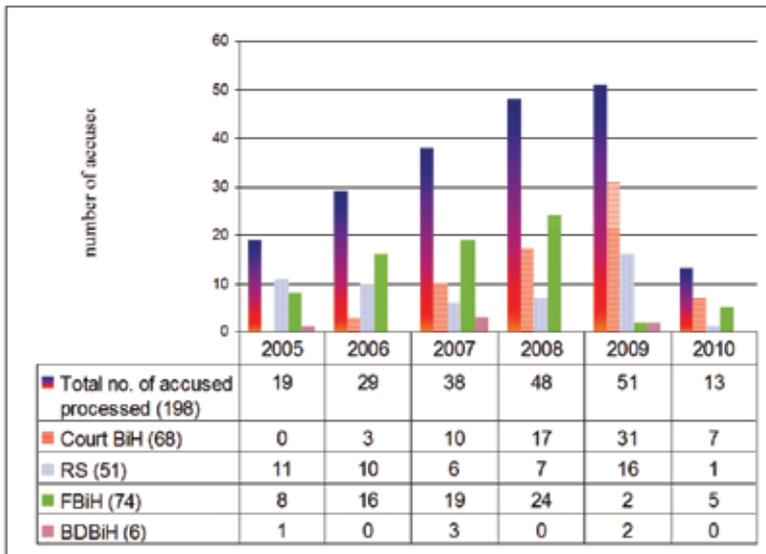


Fig. 5: Average duration of war crimes proceedings processed under the new CPCs from confirmation of indictment to final verdict from January 2005 till September 2010

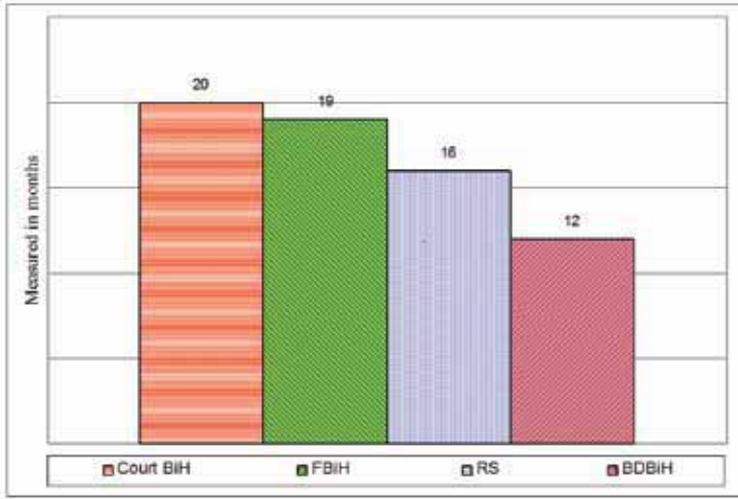


Fig. 6: Average duration of war crimes proceedings from confirmation of Indictment to final verdict including cases conducted under old CPCs from January 2005 till September 2010

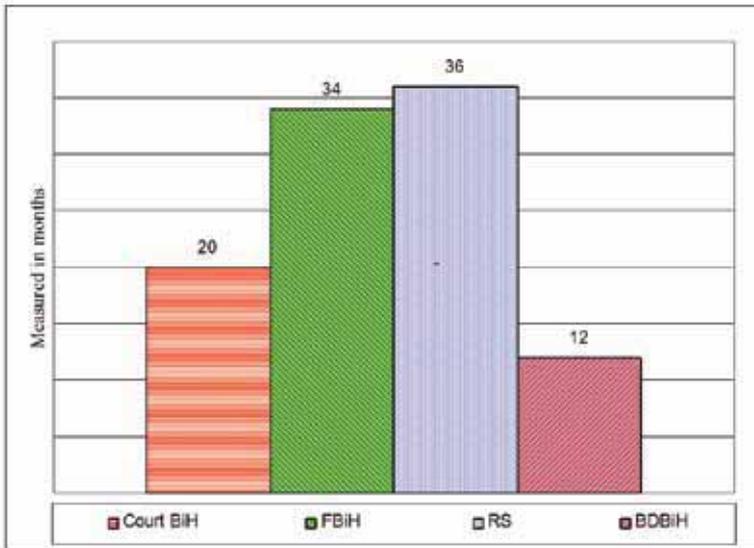
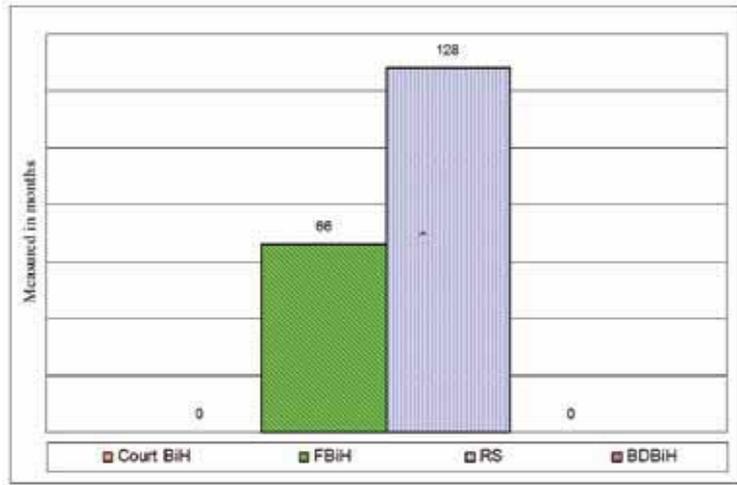


Fig. 7: Average duration of war crime proceedings processed under the old CPCs from confirmation of indictment to final verdict from January 2005 till September 2010



Average for this chart includes 19 cases monitored before FBiH Courts and 4 cases before RS courts.

Fig. 8: War crimes cases started before Sarajevo, Mostar and Banja Luka Court from January 2005 till September 2010

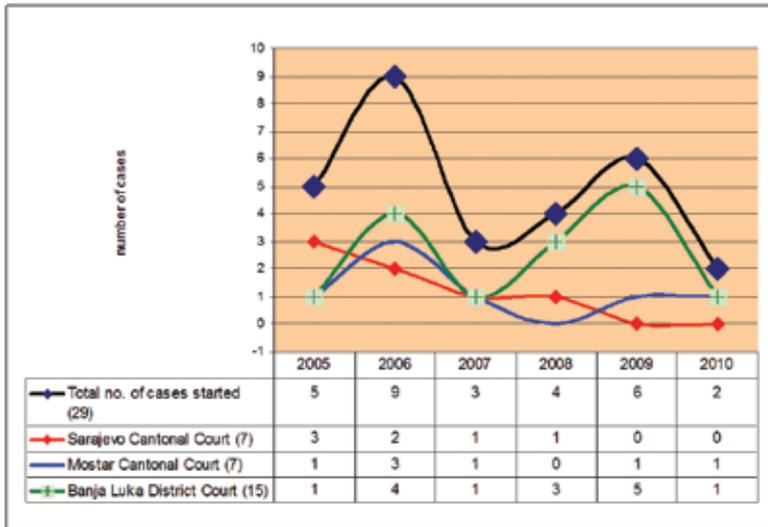
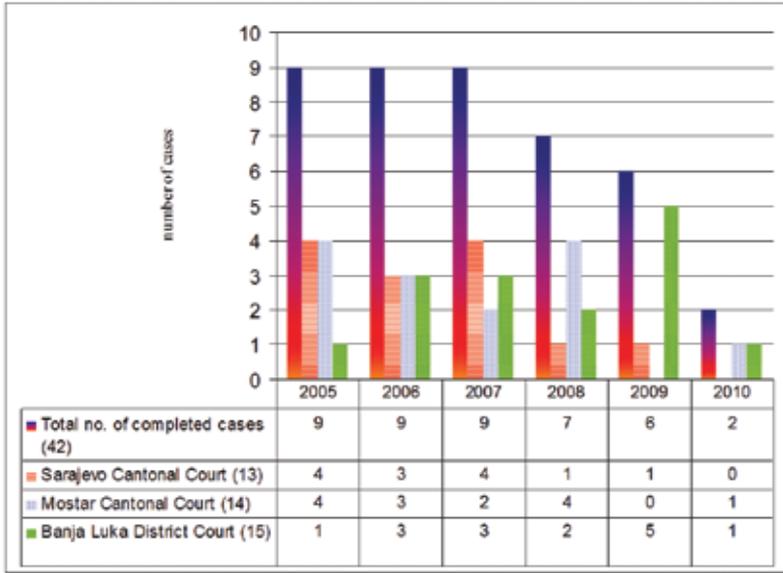


Fig. 9: War crimes cases completed before Sarajevo, Mostar and Banja Luka Court from January 2005 till September 2010



## Annex 2 – List of Acronyms and Abbreviations

BiH	Bosnia and Herzegovina
BiH Prosecutor’s Office	Prosecutor’s Office of Bosnia and Herzegovina
Book of Rules	Book of Rules on the Review of War Crimes Cases of the BiH Prosecutor’s Office
CCIAT	Criminal Code Implementation Assessment Team
Court of BiH	Court of Bosnia and Herzegovina
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FBiH	Federation of Bosnia and Herzegovina
HJPC BiH	High Judicial and Prosecutorial Council of Bosnia and Herzegovina
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
National Strategy	National Strategy for War Crimes Processing of Bosnia and Herzegovina
RS	Republika Srpska
Rules of the Road	Rules of the Road for the Review of War Crimes Cases pursuant to the Rome Agreement
SIPA	State Investigation and Protection Agency
VRS	Vojska Republike Srpske (Army of Republika Srpska)

## Annex 3 – List of Terms and Explanations

Appellate procedure	Pertaining to the appeal hearing stage of a criminal case or legal proceeding
Case	In the context of this report, this refers to a criminal case in which an individual(s) has allegedly committed a crime and the State seeks to investigate with a view to prosecution, should sufficient evidence exist
Caseload	The quantity of cases at any particular time which are allocated to, or are being processed by, the criminal justice system
Command responsibility	Mode of liability through which a superior or commander can be found criminally responsible for the actions of his or her subordinates, if he or she exercised effective control over his or her subordinates and failed to discharge a duty to prevent or punish violations of international humanitarian law. In order to be held liable, commanders must have had a requisite level of knowledge about the illegal acts which were taking place, or as a person in a position of command <i>ought</i> to have known about what was taking place.
Crimes against humanity	Unlawful acts committed as part of a widespread or systematic attack directed against any civilian population, which need not necessarily take place during armed conflict. May include killing, persecution, deportation, torture, rape, enslavement or imprisonment, <i>inter alia</i>
<i>Ex officio</i>	Latin term meaning “by virtue of one’s office”, (in this report usually referring to the power of the Court to take over or transfer cases under the Criminal Procedure Code)

Genocide	Acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. May include killing, causing serious bodily or mental harm, forcibly removing children or preventing births within the group, and deliberately inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part
<i>In absentia</i>	Latin term meaning “in the absence”. Refers to the prosecution of an accused person that takes place when the accused is not physically present, having failed to answer or acknowledge a summons to appear at the proceedings
JCE	Joint Criminal Enterprise: a mode of liability relating to group perpetration of an offence wherein each member of an organized group can be held individually responsible for crimes committed by the group if he or she shared or contributed to the group’s common plan or purpose
Quota	The allocation to prosecutors or judiciary of a minimum number of cases to be investigated or completed within a given amount of time, with the aim of increasing the output or productivity of the court or Prosecutor’s Office of BiH
War crimes	Violation of the laws and customs of armed conflict, in particular but not limited to offences identified in the Geneva Conventions I-IV and the First and Second Additional Protocols to the Geneva Conventions I-IV



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