IMPROVING WAR CRIMES PROCESSING AT THE STATE LEVEL IN BOSNIA AND HERZEGOVINA

A FOLLOW-UP REPORT BY

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Mission to Bosnia and Herzegovina

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LIST OF ACRONYMS

BiH:	Bosnia and Herzegovina
CaH:	Crimes against Humanity
CBiH:	Court of BiH
CC:	Criminal Code of BiH 2003
CPC:	Criminal Procedure Code of BiH 2003
CP:	Chief Prosecutor
FBiH:	Federation of Bosnia and Herzegovina
IPA:	Instrument for Pre-Accession [to EU]
HJPC:	High Judicial and Prosecutorial Council of BiH
ICC:	International Criminal Court
ICTY:	International Criminal Tribunal for the former Yugoslavia
IRMCT:	International Residual Mechanism for Criminal Tribunals
KT(RZ):	Designation of cases where name of perpetrator known
KTN(RZ):	Designation of cases where name of perpetrator unknown
KTA(RZ):	Designation of cases where not established a crime committed
MOU:	Memorandum of Understanding
NWCPS:	National War Crimes Processing Strategy

NWCPS Observations:	OSCE Mission to BiH Report 'Observations on the National War Crimes Processing Strategy'
OTP:	ICTY Office of the Prosecutor
POBiH:	Prosecutor's Office of Bosnia and Herzegovina
RS:	Republika Srpska
SDWC:	POBiH Special Department for War Crimes
SFRY:	Socialist Federal Republic of Yugoslavia
ToR:	Terms of Reference
VWS:	Victim and Witnesses Section
WC:	War Crimes
WCCM:	OSCE Mission to BiH Report 'War Crimes Case Management at the POBiH'
WSN:	Witness Support Network

EXECUTIVE SUMMARY

In 2016, a report prepared by the author of this report identified the main challenges concerning the completion of the National War Crimes Processing Strategy (NWCPS) in Bosnia and Herzegovina. This included a number of specific recommendations to, among others, the Prosecutor's Office of Bosnia and Herzegovina (POBiH) and the Court of BiH (CBiH).

In 2020, the OSCE Mission to BiH, with support from the UK government, commissioned the author to conduct a similar analysis to comprehensively review the implementation of recommendations from the 2016 Report and, if necessary, provide further recommendations. This report is the result of that analysis and should be read in conjunction with the 2016 Report.

The present report is based on more than 30 interviews with judges, prosecutors, investigators, defence counsel, representatives of the High Judicial and Prosecutorial Council (HJPC), Supervisory Body for the Implementation of the NWCPS, the State Investigation and Protection Agency (SIPA), a victims' organization, and others, conducted in January 2020. In addition, a large number of documents and other reports received prior to and during the interviews have also been reviewed, analyzed, and relied upon.

The report finds that while some of the recommendations from the 2016 Report have been implemented, many have not. The most urgent issues which need to be addressed include:

- inefficient managerial practices at the POBiH; and
- a failure at the Special Department for War Crimes (SDWC) to prioritize the most complex cases, thereby not holding accountable those most responsible for the gravest crimes.

Furthermore, the structure of the SDWC does not promote efficiency and accuracy in investigations and charging, which in turn leads to low-quality indictments. Trials are extensive in length thereby delaying justice and presenting challenges for all parties to the proceedings. The revised NWCPS, which provides more detailed guidance on case processing, has still not been adopted by the authorities. These issues, taken individually and as a whole, seriously hinder the chances that the deadline of 2023 for the completion of war crimes cases may be achieved.

To address the most urgent challenges, the report recommends the immediate introduction of managerial changes at the POBiH to allow for more efficient handling of cases, and the introduction of guidelines and controls to ensure that the most complex cases receive priority.

The report further recommends:

- Proper restructuring of investigation teams at the POBiH to ensure clearer understanding of complex events in investigations and the most efficient use of human and material resources;
- Improvements in the process of conducting investigations and drafting indictments;
- Strengthened management of trials for reduced length; and
- The adoption of the revised NWCPS.

More detail on these and other recommendations is provided throughout the report, along with a comprehensive list of all current recommendations in Appendix A.

Unless measures to resolve these and other issues are undertaken expeditiously, as already noted, the 2023 deadline for processing all cases will not be met. Given the ageing of suspects and witnesses as well as the increasing difficulty in obtaining evidence, it will soon not be possible to conduct war crimes trials at all. The responsible national authorities of BiH are called upon to most seriously consider the report's recommendations and to take the necessary measures to ensure that justice is delivered.

Note:

Printing of this publication has been supported by the UK Government. The views expressed in this publication do not necessarily represent the views of the UK Government.

Photo on the cover of the publication is a photo from Judge Korner's private archive, taken in northern BiH in 1999.

I. INTRODUCTION AND METHODOLOGY

1. In August 2019, the author of this report received a request from the OSCE Mission to Bosnia and Herzegovina (hereinafter "the OSCE Mission to BiH"), to conduct a further analysis of the progress of war crimes (hereinafter "WC") trials.[1] The project, entitled "Strengthening Rule of Law by Improving War Crimes Processing in Bosnia and Herzegovina" ("IWCP"), was to be a follow up to the findings and recommendations contained in the author's 2016 Report, entitled "*Processing of War Crimes at the State Level in Bosnia and Herzegovina*" (hereinafter "the 2016 Report").[2]

2. In essence, the analysis sought was:

   - A comprehensive review of the implementation of recommendations provided in the 2016 Report;
   - An assessment of the progress achieved concerning the prosecution of war crimes cases at the state level in BiH since its publication, with a particular focus on the Prosecutor's Office of BiH (hereinafter "POBiH"); and
   - The provision, if needed, of further recommendations.

3. The full parameters of the analysis are set out in the terms of reference ("TOR").[3]

4. Upon further consideration, it was decided that, as with the previous report, the research for the analysis would be carried out by the author being supplied with relevant documents in advance of a visit to conduct interviews with those persons most closely concerned with the processing of the said trials.

5. The project received the full co-operation of the Chief Prosecutor ("CP") of BiH, Gordana Tadić, as well as the judges of the Court of BiH (hereinafter "CBiH") and other interested parties.

6. Interviews were conducted in Sarajevo (on two occasions via video link from Sarajevo) between 20 and 29 January 2020. Some short, subsequent interviews were conducted by members of OSCE Mission to BiH staff after the conclusion of the visit,

[1] The term "war crimes" is used in its generic sense to denote all prosecutions for serious violations of international humanitarian law, rather than the specific crime (enshrined in Articles 173-175 of the BiH Criminal Code, and Articles 142-145 of the old Socialist Federal Republic of Yugoslavia Criminal Code).
[2] J. Korner, *Processing of War Crimes at the State Level in Bosnia and Herzegovina* (Sarajevo, OSCE Mission to BiH 2016). Available at: <https://www.osce.org/bih/247221?download=true> (accessed 26 May 2020).
[3] *See* Appendix B.

to deal with specific issues which arose during the preparation of the report. Further documents were received during and after the visit.[4]

7. Accordingly, this analysis is based upon:

   (i) A review of relevant reports and documents provided by the OSCE Mission to BiH, the POBiH, and other interested parties[5];
   (ii) Interviews with prosecutors and other members of the POBiH[6];
   (iii) Interviews with prosecutors outside the POBiH[7];
   (iv) Interviews with defence counsel[8];
   (v) Interviews with judges[9];
   (vi) Interviews with representatives of other interested organizations;
   (vii) Interview with a representative of a victims' association[10].

8. Additionally the 2016 Report was reviewed in order to remind the author of the state of affairs which had led to the recommendations made and to establish the rate of implementation thereof.[11] Where appropriate, references to the previous report have been footnoted.[12]

9. Direct quotes from those interviewed are shown in quotation marks.[13] For the most part, the speaker has not been identified, as it is the content of what was said which is relevant to an assessment of the overall state of affairs and to make recommendations

[4] The author wishes to express her gratitude to members of the OSCE Mission to BiH for the invaluable assistance rendered in the preparation of this analysis. She would also wish to record her thanks to Aleksandra Golijanin, from the POBiH, who assisted an OSCE Mission to BiH interpreter with interpretation during interviews and provided all further documents requested. The author also regrets the delay in the completion of the report which was the result of competing professional commitments and contracting Covid-19.
[5] *See* Appendix C. It should be noted that a few of the documents which were considered by the author are not referenced herein, as they are not publicly available. However, such documents were all earlier OSCE Mission to BiH analyses, which, whilst providing useful background information and statistics, did not form the basis for the recommendations contained in this report. Most, but not all, of the documents contained in the Appendix, were read in translation.
[6] Not all prosecutors working in the SDWC were interviewed. A selection was made, based on specific factors, relevant to this analysis e.g. organization of the department, working practices, mentoring.
[7] Prosecutors selected for interview were a sample of those who would be affected by the transfer of war crimes cases from the CBiH.
[8] Those selected for interview were a sample of counsel who regularly appeared in WC cases.
[9] Those selected for interview were a selection of judges who dealt with WC cases.
[10] *See* Appendix D for a full list of individuals interviewed. It should be noted that nearly all interviews were conducted via interpretation. Interviews with EU personnel, defence counsel and the President of the HJPC were the exception.
[11] *See* Appendix G for a short analysis of the implementation of those recommendations.
[12] It is suggested that this report be read in conjunction with the 2016 Report.
[13] It should be noted that direct quotes are an English translation. However, at each interview with the prosecutors, bilingual employee of the POBiH, Aleksandra Golijanin, was present. The author retains her notes.

based thereon. The exceptions to this rule are the utterances of those in charge of policy.

II. BACKGROUND

10. The NWCPS, promulgated in December 2008, emphasized the need to process the most complex and highest priority war crimes cases within seven years, i.e. 2015, and other war crimes cases within 15 years, i.e. 2023. The 2015 deadline was not met and it appears was simply merged with the 2023 date for all other cases.

11. In September 2018, the OSCE Mission to BiH published a "spot report" entitled "Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road 'Category A' cases" (hereinafter 'NWCPS Observations').[14]

12. The report contained a table[15] showing that between 2004 and 2017 a total of 473 war crimes proceedings had been completed in the courts of BiH.[16] Whilst acknowledging an increase in trials, the report also noted that an "*obvious shortcoming has been the failure of the POBiH and Court of BiH to try all of the most complex cases by the end of 2015*".[17]

13. Moreover, the statistics which are of relevance are those which relate to:

    (i) The outstanding cases[18] designated as KTRZ, i.e. those where the names of perpetrators are known;

    (ii) The outstanding cases designated as KTNRZ, i.e. those where the perpetrators are unknown;

    (iii) The outstanding cases designated as KTARZ, i.e. those where it has not been established whether a crime has been committed (usually cases arising from exhumations).

[14] *Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road 'Category A' cases* (Sarajevo, OSCE Mission to BiH 27 September 2018). Available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/397541?download=true> (accessed 26 May 2020).
[15] NWCPS Observations, p. 5.
[16] The designation 'BiH' here includes Federation of Bosnia and Herzegovina ("FBiH"), Republika Srpska ("RS"), and Brčko District.
[17] NWCPS Observations, p. 6.
[18] "Cases" in this context include reports and investigations.

14. Figures contained in the December 2019 report "Enhancing War Crimes Case Processing in BiH", produced by the High Judicial and Prosecutorial Council, ("HJPC") showed that, in respect of the POBiH, there were 449 unresolved KTRZ cases involving a total of 4223 suspects. When compared with the December 2018 report, those figures show a decrease of 40 cases.[19]

15. According to the same statistics, the percentage of unresolved KTRZ cases in the POBiH amounts to 72% of all cases. Given that during the reporting period 80 new reports were received, it follows that the bulk of the unresolved KTRZ cases have been in the POBiH for far longer.

16. In respect of the KTNRZ cases, in the POBiH in December 2019 there were 526 such unresolved cases; in respect of the KTARZ cases, 1622 remained unresolved.

17. Nor do the figures relating to numbers of indictments filed or cases completed[20] at the CBiH provide grounds for optimism that the deadline can be achieved. In 2018, 27 indictments were filed; in 2019 that figure fell to 24 (of which 11 were submitted in December 2019). In respect of completed trials, in 2018 the figure was 26, in 2019 it was 30. Whilst such figures might be acceptable had these indictments and completed trials reflected the most complex cases, i.e. involving command responsibility or the most serious crimes as defined in the NWCPS, this was not in fact the situation as many related to single accused persons charged as direct perpetrators.

18. Finally, in respect of statistical information, there has been an increase in the acquittal rate. A spot report, produced by OSCE Mission to BiH in June 2019,[21] entitled "*War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina*" (hereinafter 'WCCM Report'), showed that in 2018 only 17 out of 44 defendants (in war crimes cases tried by the CBiH) were convicted[22], although there was a 75% conviction rate if calculated according to cases in which at least one defendant was convicted of at least one charge. Whilst, as a statistic *simpliciter*, it could be said that it reflects well on the fairness of the proceedings, this is not the case if, as has been

[19] The backlog in other POs is not so large, but overall i.e. POBiH and other POs, the total number of KTRZ unresolved cases (according to HJPC figures) amounts to 619 involving 4677 suspects.
[20] "Completed" in this context comprises final verdicts being reached or cases being discontinued. A full table of relevant statistics was produced by OSCE Mission to BiH in a document entitled "War Crimes Case Processing in BiH (2004-2019)" which is reproduced as Appendix F.
[21] *War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina* (Sarajevo, OSCE Mission to BiH 17 June 2019). Available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/423209?download=true> (accessed 26 May 2020).
[22] However, the statistics for 2019 show a conviction rate of 66% of defendants tried.

suggested, the reason(s) for the acquittals derive from incompetent prosecutorial investigations, indictment drafting, and advocacy at trial.[23]

19. In May 2018, at the instigation of the BiH Council of Ministers, a draft revision of the NWCPS was produced. In the drafting process, the document received input from interested parties, including but not limited to the CBiH, the POBiH, Associations of Judges and Prosecutors, and the OSCE Mission to BiH.

20. Before proposing amendments, the Working Group for Amendments to the NWCPS arranged for an analysis to be made of the reasons for:

- the failure to meet the key objectives set out in the NWCPS; and
- the capacity of the entity and district courts to handle cases transferred by the CBiH under Article 27a of the Criminal Procedure Code (hereinafter "CPC").

21. The analysis and the draft revised NWCPS make it clear that the dynamics of case transfer are not adequate and that a proper mechanism of oversight and control needs to be put in place. It foresees strengthening the role and status of the Supervisory Body for Implementation of the Strategy (hereinafter "Supervisory Body") through the establishment of regular reporting by the relevant organizations on the implementation of "*conclusions, instructions, and recommendations*". The draft revised NWCPS states that the Supervisory Body will strengthen "*the mechanism of their accountability for non-compliance*". According to the President of the Supervisory Body, the sanction for non-compliance will be disciplinary proceedings.

22. The draft revised NWCPS sets out the "*Objectives and Expected Results*" under nine different heads (numbered *a-i*). Annex "A" sets out revised "*Criteria for the Review of War Crimes Cases.*" It is stated that these criteria, together with the "*harmonised*[24] *amended interpretations*" thereof, "*will allow for the transfer of a greater number of less complex cases to entity and Brčko District of BiH judiciaries.*"

23. A comparison between the old and new transfer criteria reveals that in some respects the change does no more than scratch the surface of the problem that the present criteria do not encourage the transfer of cases from the CBiH. As examples:

[23] *See* para.107 *infra*.
[24] Defined as "*a uniform interpretation of the criteria by all stakeholders – primarily the CBiH and the POBiH and judicial institutions of all entities and the Brčko District*".

- "*severe forms of rape*," defined as "systematic" or "detention centres for the purpose of sexual slavery" remain at the CBIH.
- "*serious forms of unlawful detention*" etc. remain at the CBIH if over 20 persons were detained or incarceration lasted over 3 days.

24. It is submitted that the factors which make a case "complex" are not the place of the alleged crime nor the numbers of alleged victims or perpetrators, but matters such as:

- The level of the perpetrator, and/or
- The complexity of the nature of events charged, and/or
- The applicable law, e.g. command responsibility.

25. For example, if the accused is alleged to have been the actual rapist, then however "systematic" the rape(s), there is no reason why the accused could not be tried at entity or district level. If the accused's role in a detention facility was that of a guard, then the number of persons detained or the length of time the facility was in existence do not raise the level of complexity requiring a trial to take place at the CBiH.

26. It is right that the public and victims must have confidence that prosecutions for **all** serious crimes, not just those classed as WC or CaH, are being tried by a competent court. Fortunately, the systematic monitoring of the WC trials, taking place at entity and district level courts, reveals an adequate level of proficiency in the conduct of these cases.

27. The NWCPS Observations report, in its conclusions stated:

> *Adoption of the Revised Strategy will also reaffirm the commitment of all relevant stakeholders to fairly and efficiently complete all remaining cases and close the impunity gap.*
>
> *The Mission underlines that:*
>
> *• The Revised Strategy, just like the original Strategy, applies to all war crimes cases yet to be processed. This includes cases classified pursuant to the RoR procedure as "Category A" cases, as well as cases identified after the adoption of the Strategy.*
>
> *• The improved case distribution mechanism in the revised Strategy will ensure that the PO BiH will focus on complex cases and that other cases*

can be tried without delay at the entity/Brčko District level in order to meet the 2023 deadline.

• By strengthening the oversight function of the Supervisory Body, the Revised Strategy will ensure that further delays in delivering justice to war crimes victims can be addressed more quickly and effectively.[25]

28. The Standing Panel for Assessment of Complexity of Cases (hereinafter "Standing Panel") of the CBiH reached an agreement with the POBiH that the transfer of cases would take place according to the revised criteria – notwithstanding that the document has not yet been formally adopted by the Council of Ministers. Accordingly, four cases were transferred by the court of its own motion. However according to a judge interviewed for the purposes of this report, the POBiH only filed one motion to transfer in 2019, which applied the old criteria.[26]

29. What follows in this report is an examination of some of the main causes of the continuing failure to achieve the NWCPS key objectives with regard to the completion of the most complex WC cases, along with more detailed recommendations (than those contained in the draft Revised Strategy) for steps which need to be taken if there is to be any prospect of the 2023 deadline being achieved.

III. MAIN AREAS OF CONCERN

30. It should be pointed out first that, although most of the areas dealt with in this section are identical to those in the author's 2016 Report, there have been improvements.[27] The most noticeable one has been what appears to be a change of atmosphere and attitude in the Special Department for War Crimes (hereinafter "SDWC"). This, in the author's judgment, is attributable to the departure of the previous CP. Some of the continuing problems in the processing of WC by the POBiH are the direct result of his autocratic, idiosyncratic, and arbitrary style of management. The overall impression gained from the interviews conducted with staff is of an office with an appreciable desire to make things work and to achieve the objectives set out in the NWCPS. Moreover, the SDWC is fortunate to have a number of individual prosecutors who appear to approach the daunting task with determination and indeed enthusiasm.

[25] NWCPS Observations, p. 9. For more details on RoR Category A cases, see section IX *infra*.
[26] *See* para. 129 *infra*.
[27] These will be noted under the relevant heads.

31. Further, although the judges still made complaints, in particular about the inadequate provision of information by the POBiH regarding pending cases, the situation whereby there was "*little if any co-operation over the issues between judges and the CP*" noted in the 2016 Report,[28] has been ameliorated to a certain extent, in that discussions between them do now take place.

32. That having been said (and notwithstanding the reports provided to the Supervisory Body in 2019 which specifically dealt with the implementation of the recommendations of the 2016 Report)[29] there are still issues which persist since the last report. Resolution of some of these issues will require a sea-change in approach.

33. These issues are grouped into ten overarching heads:

(i) Management and operation of the POBiH;
(ii) Mentoring in the POBiH;
(iii) Nature of indictments;
(iv) Backlog & transfer of cases;
(v) Cases of sexual violence;
(vi) The category 'A' cases;
(vii) Length of trials;
(viii) HJPC evaluation process ("Quota");
(ix) CPC amendment; and
(x) Training.

34. Whilst there is overlap between some of the categories identified above, e.g. mentoring could be said to be a subcategory of the section management and operation of the POBiH and the training section covers issues arising from findings in earlier sections, it is considered that each is sufficiently important to merit individual discussion.

[28] *See* 2016 Report, para. 34.
[29] The CBIH provided one in July 2019, the POBiH in November 2019.

IV. THE MANAGEMENT AND OPERATION OF THE POBiH

35. In the 2016 Report, it was said "*It is a truism to state that the tone and effectiveness of any institution is derived from its head and senior management.*"[30] As already noted, the replacement of the previous CP has brought about an improvement.[31]

36. However, it is also clear that the continuing management structure is not conducive to maximising efficiency in working practices. As yet, the CP has not appointed anyone as Head of the SDWC, despite the fact that the POBiH Rulebook authorizes her to do so and that three out of four deputy prosecutors have been appointed by the HJPC.[32] From the interviews conducted with the CP, the heads of sections, and prosecutors, it is evident that the CP involves herself in the minutiae of the day-to-day running of the SDWC, including e.g. the allocation of work to individual prosecutors[33] and the initial consideration of all indictments.

37. Other aspects of the management of the SDWC will be discussed below but the situation is reminiscent of that described in the 2016 Report, i.e. "*that the POBiH was micro-managed with approval required for any decision whether it related to indictments or more mundane administrative activities*".[34]

38. The responsibility of a CP is, *inter alia*, to make policy decisions which affect the office as a whole and issue written guidance on how that policy is to be effected;[35] to ensure that there is a proper dissemination of her decisions to those whom they affect; and to interact with other organizations e.g. other prosecutor's offices, the judiciary, and the media. In particular, this CP is responsible for the management of the whole of the POBIH and cannot be expected to, nor should, deal with matters which may be dealt with by subordinates. Failure to delegate simply creates delay in the taking of decisions.

39. Given the diverse and onerous duties undertaken by both the CP and acting SDWC Deputy Prosecutor, as well as the continuing difficulties with investigations, indictment drafting and the conduct of trials, it is strongly recommended that further

[30] 2016 Report, Recommendation 2.1.
[31] *See* para. 30 *supra*.
[32] According to the CP, Izet Odobašić, one of the section heads, is acting as Head of the SDWC.
[33] Art. 37 of The Rulebook on Internal Organization of the POBiH ("POBiH Rulebook") assigns this task to the Head of Section.
[34] 2016 Report, para. 40.
[35] The importance of written guidelines covering the most important aspects of work by the POBiH, e.g. structures of working, prioritisation of cases, content and form of indictment, cannot be too strongly emphasized.

assistance be provided to management by the employment (for a finite period) of an experienced international prosecutor to provide advice and guidance to the SDWC in the aforementioned areas.

40. It is acknowledged that there may be both political and practical difficulties (the latter includes lack of knowledge of the native languages of BiH) which arise from this recommendation. However, 'desperate times require desperate measures'; an experienced international prosecutor would have the empirical knowledge which would enable him/her to:

- Assist with the drafting of guidelines/checklists;
- Check that the role of an alleged perpetrator meets the requirements for trial at the CBiH;
- Check whether the lines of investigation ordered are the correct ones;
- Check that the indictment particulars fulfil the requirements of the law of CaH and WC as well as the modes of liability e.g. command responsibility, joint criminal enterprise; and
- Advise on trial strategy e.g. adjudicated facts from ICTY trials, the witnesses required.

41. It follows that if such an appointment is to produce the desired outcome of an increase in the efficiency of the SDWC, then the terms of engagement must provide for the international prosecutor to have the authority to inspect and advise upon all documents relative to his/her role.

42. SECTION/TEAM STRUCTURE: The first aspect of the operation of the SDWC, about which a recommendation was made in 2016, was that the geographical team structure, which in 2013 had been replaced by three sections, should be reinstated.[36] No action was taken to implement this recommendation even after the removal of the previous CP in September 2016. In 2018, the OSCE Mission to BiH urged the then acting CP, Gordana Tadić, to reinstate the team structure and did so again in their 2019 WCCM Report. By that stage, she had been formally appointed as the CP (January 2019).

43. The reasons for this advice, as set out in the WCCM Report and fully endorsed by this author, are worth setting out in full:

[36] 2016 Report, Recommendation 3.1.

"*In order to effectively investigate complex war crimes cases, the PO BiH must have teams with the requisite expertise and experience on specific regions and the crimes that took place in those areas. The most obvious way to ensure such a concentration of expertise in the SDWC is to organize the office's prosecutors and investigators into geographical teams, that is, teams of individuals working together who share expertise in particular geographical regions, military formations, and events which are oftentimes linked to each other. This practice allows a team to work efficiently on all cases involving different perpetrators by enabling prosecutors and investigators to maximize their institutional knowledge of specific regions and events, joining cases when possible and ensuring that the full set of circumstances is captured in a particular case. This is particularly important in crimes against humanity cases, where the prosecution must show the link between the crimes and an ongoing widespread or systematic attack. Ultimately, the geographical team-based approach saves critical time and resources since it does not require practitioners to repeatedly learn new circumstances and background information about a new region when undertaking an investigation from a completely different region than the last one they worked on. This approach also greatly reduces the risk of parallel investigations involving the same events and perpetrators. Further, this approach better facilitates an effective relationship between investigators and prosecutors and witnesses, and greatly reduces the risk of re-traumatization by unnecessarily re-interviewing witnesses.*"[37]

44. In July 2019, a proposal was submitted to the HJPC to amend the Rulebook for the SDWC to return to the team structure. This was approved by the HJPC and published in the Official Gazette of BiH on 1 October 2019.

45. However it was not until 3 January 2020 that the CP issued a decision delineating the geographical areas applicable to each team. Moreover the sections have been retained with two teams assigned to each section but with prosecutors being assigned to sections rather than teams.[38] The explanation for that retention, provided by both the CP and the acting head of the SDWC, was that the heads of sections received extra remuneration and were assessed on the basis of being in that position. Accordingly, it was not possible without further amendments to replace them with heads of teams.

[37] WCCM Report, para. 3.1.
[38] *See* Appendix E for the full text of the decision which shows the number of teams and geographical area covered by each team.

This explanation does not appear to have much merit. The original change in 2013 from teams to sections did not apparently cause this problem and if amendments are needed then they should be made without delay.

46. It hardly needs saying that the team structure can only be an effective working one once the areas for each team have been delineated. Accordingly, even if, as the author was told by some prosecutors, they had been "assigned" to teams, they could not have been working on areas specific to those teams before 3 January.

47. It should be noted that inconsistent responses were received to the question (asked of each prosecutor) whether the teams existed as a unit of work. When those who replied that they did so exist were asked about the areas of cases on which they were working, their answers made it clear that teams existed in name only. It was the view of one prosecutor that, not only had the teams not been reinstated, but that instructions had been issued that the author should be given misleading information. If that is correct, it is not only unfortunate, but extremely short-sighted, as any recommendations for improvement need to be based on the actual state of affairs.

48. This aspect of work in the POBiH has been further complicated by the facts that:

- The previous CP assigned cases to individual prosecutors on a basis which took no heed of the areas assigned to the section in which the prosecutor worked;
- Some of the prosecutors were also assigned cases of organized crime;[39]
- A prosecutor working in Section III was moved in May 2019 to become head of Section II. Most of the cases on which he is presently working relate to his previous section.

49. The practical effect of this organizational mess is that individual prosecutors have been working on cases which are outside the geographical area to which they are now assigned and indeed, outside the SDWC. Were the cases to be assigned to new prosecutors within the relevant team/section/department, then whomsoever receives the case will have to spend time becoming familiar with the facts.[40] It will require an in-depth assessment of the cases assigned to each prosecutor and the stage reached in those cases to decide the most efficient method of ensuring that cases arising from the same geographical area are dealt with by prosecutors working as a team.

[39] The author was assured by the CP that this practice has now ended.
[40] As an example, Prosecutor Milanko Kajganić is largely working on Section III cases and additionally was assigned the Dobrovoljačka Street case which now falls within Team 4, Section I.

50. APPOINTMENT OF PROSECUTORS: At present there are 27 prosecutors assigned to the SDWC.[41] Three were appointed in June/July 2019. Two had previous experience in the prosecution of WC cases (one as a prosecutor at the entity level and the other in his capacity as a former legal officer at the War Crimes Chamber of the Court of BiH), the third did not. It is self-evident that WC cases require familiarity with legal concepts and factual knowledge (of the areas of the conflict and the ICTY/CBIH cases which dealt with these areas) which do not arise in other domestic cases. However competent a prosecutor may be, to gain the knowledge required for the proper investigation and prosecution of a WC case requires time to be spent, not only by the prosecutor, but by others who will need to assist with the acquisition of the requisite knowledge. For the future it is strongly recommended[42] that only prosecutors who have previous WC experience are appointed to the SDWC.[43]

51. WORKLOAD OF PROSECUTORS: The responsibilities of a prosecutor are exceedingly wide-ranging and, to say the least, onerous. They include conducting investigations, drafting indictments, preparing for, and conducting, cases at trial, and doing the appeal.

52. Although such a workload may be acceptable in "normal" circumstances, given the exigencies of the present state of WC cases, i.e.:

- The complexity of all such investigations and trials;
- The need to become familiar with the backgrounds to such investigations and trials;
- The large numbers of KTRZ, KTNRZ and KTARZ cases awaiting attention;
- The deadline for completion of WC cases,

that workload in itself, (leaving other factors aside), makes it exceedingly unlikely that the deadline can be achieved.

53. Prosecutors have the benefit of having a legal associate assigned to assist with the workload, however the latter are not authorized to call or cross-examine witnesses

[41] In 2015 there were 35. It is unclear why there has been this reduction in numbers but it is recommended that, at the very least, there should be a return to those numbers.
[42] This recommendation was also made in the WCCM Report. See Recommendation 3, p. 27.
[43] It should also be noted that under the regime of the previous CP, SIPA officers found themselves working with prosecutors assigned from the General Crime Department to the SDWC. The view of SIPA was that the lack of experience in WC cases resulted in "superficial" instructions being given.

during trial.[44] The leadership trials at ICTY were conducted by two senior trial attorneys ('P5' grade). It is appreciated that resources are far more limited in the POBiH, nonetheless, in order for the complex trials to be conducted with efficiency, more than one lawyer from the POBiH needs to be in a position to carry out advocacy. This will mean that more of the preparatory work must be delegated to the legal associates.

54. However, visits to the POBiH also demonstrated that there has been no real change to the system of working hours in the office concluding at 4pm.[45] As with any officials tasked with investigating and prosecuting serious and complex crimes, those who accept positions in the SDWC must, at this stage, be prepared to work outside official hours in order to ensure efficient processing of investigations and trials.

55. OPERATION OF SECTIONS/TEAMS: No written document has been issued as yet providing instructions on the operation of the teams. Interviews revealed that notwithstanding the recommendation contained in the 2016 Report[46] that weekly team/section meetings should be held, the heads of sections have not instituted such a procedure,[47] nor has there been any instruction to that effect by the CP. Indeed, other than the instructions contained in the POBiH Rulebook, no further detailed protocols for the operation of the sections/teams have been issued.

56. The reasons given by section heads for the lack of regular meetings within the sections, or intersectional meetings, were as follows (some almost identical to those provided in 2016):

- "We communicate by email. Meetings are occasional, on case by case basis";
- "I hold meetings on the basis of need rather than regular ones";
- "I personally feel there is no need for meetings if there are no issues";
- "Each prosecutor is absolutely independent in their work";
- "All prosecutors working on war crimes know each other".

57. It should be clearly understood that "the independence of the prosecutor" is not compromised by a discussion of his/her cases, or by an obligation to submit a

[44] Article 49(d) of the POBiH Rulebook sets out their duties (in far more detail than Article 40 which applies to prosecutors). It mandates that a legal associate conduct preparations for the main trial and attend court.
[45] *See* 2016 Report, para. 135.
[46] *See* 2016 Report, Recommendation 3.5.
[47] The POBiH Rulebook, Article 37 sets out the duties of section heads. It blandly requires them to "organize and supervise the work of the department" and to regularly inform "the head of the department and the CP… on the work of the section he/she manages."

proposed indictment for peer review. A prosecutor's office must be seen to act in a coherent and consistent manner and this can only happen if there is a sharing of information and, if required, a policy decision taken to decide on the most appropriate approach.

58. The reasons for holding regular meetings – not only within sections/teams, but also between heads of sections and collegiums of the whole SDWC[48] – was set out in the 2016 Report[49] but because of their importance, bear repeating:

- Ensuring a consistent approach to the legal characterisation and factual basis ("case theory") for an indictment;
- Ensuring that parallel investigations and interviews with witnesses are not taking place and that potential joinder of cases is not being overlooked;[50]
- Discussions about which cases should take priority and be allocated further resources;
- General discussion of, and collective learning from, ongoing cases/problems;
- Allowing new/less experienced prosecutors to benefit from the opinions/advice of more experienced prosecutors;
- Analysing the reasons for a successful prosecution and more importantly, an unsuccessful one.

59. The matters identified in the foregoing paragraph are designed to prevent problems which continue to arise (according to reports), in particular those set out above as points one, three and five.

60. In respect of parallel investigations/prosecutions, much reliance is placed on analysts and investigators. One prosecutor said that if assigned a case he would request an analyst's report which would reveal whether there were parallel investigations taking place and whether witnesses had testified or were about to testify. He believed that parallel investigations were preventable, as the investigating police officers were the same. If this is correct then the only explanation for recent overlapping cases between

[48] Again, inconsistent responses were received about the number of collegiums held with the SDWC as a whole. One prosecutor believed the only one held in 2019 was in September/October to confirm the reinstatement of the team structure. The CP believed that in 2019 one collegium for the whole office had been held and two for the SDWC instead of the four mandated for the latter.
[49] *See* 2016 Report, para. 44.
[50] According to one prosecutor, he only became aware of another colleague working on a case if he made a check on any potential "connections" with other cases.

the CBiH and other courts is a deliberate decision by a prosecutor not to join/transfer such cases.[51]

61. It appears that no analysis of the reasons for acquittals was carried out until the publication of the OSCE Mission to BiH's WCCM Report. According to the CP, that report prompted them to conduct such an analysis. The conclusion reached was that, in each case, the CBiH had acquitted because the chamber could not be sure "beyond a reasonable doubt" of the guilt of the accused.

62. Such an analysis is superficial and does no more than repeat the decision. A proper analysis asks the question: "Why was the trial chamber left in doubt"? Proper analysis should include such matters as:

- Did one or more of the witnesses fail to give the anticipated evidence? If so why? Is this failure a matter which could have been anticipated if appropriate pre-trial questions had been asked?[52]
- Was too much reliance placed on witness testimony, with insufficient search for contemporaneous documentary evidence?
- Were adjudicated facts from other cases employed?
- Was cross-examination of the accused person and/or his witnesses fully researched and effectively carried out.

63. The need to carry out this kind of detailed analysis is underlined by the findings of the WCCM Report that the conviction rate in trials before the CBiH "has experienced a continuous downward trend."[53]

64. PREPARATION & COURT PERFORMANCE BY PROSECUTORS: Two of the possible explanations for an acquittal, suggested above, are, in the broadest terms, insufficient preparation and inadequate advocacy. Inadequate advocacy may be assisted by regular advocacy training sessions.[54]

[51] *See* NWCPS Observations Report, para. 2.3.1.
[52] The public perception of the reason for acquittals was expressed by one interviewee in this way: "The majority of acquittals are due to the unprofessionalism and lack of knowledge of prosecutors. Sometimes they bring witnesses to trial without first speaking to them".
[53] *See* para. 2.1. The response from the POBiH that "the percentage of convictions in relation to the **cases** (emphasis added) was 75%" may be technically accurate but refers to the fact that in a case involving multiple accused, at least one was convicted. From the perspective of victims and overall justice, it is the conviction of individual perpetrators for these crimes which is paramount.
[54] *See* Section XIII *infra*.

65. Whilst there is always a tendency for defence counsel to criticize prosecutors and vice-versa, separate interviews with three defence counsel produced a number of consistent complaints, which may be summarized as follows:

- The length of time taken to conduct investigations;
- The large number of witnesses which prosecutors call;[55]
- A failure by the prosecutor to disclose to defence counsel material in one case which is linked to a second case, even if that material may be relevant to accused in the second case and may be of assistance to the defence.[56] This failure was aggravated when defence counsel raised the matter with the court, by a prosecutor arguing that to disclose might prejudice the other case;
- If witnesses are spoken to before trial and provide new or inconsistent information, notes of what was said ("proofing notes") are not disclosed to defence counsel. This means that either defence counsel are unaware of matters which may be relevant to credibility, or learn about them for the first time when the witness gives the new fact(s) in evidence. The result is that time is wasted whilst counsel take instructions from the accused and possibly the witness having to return. The fact that the CPC does not oblige such disclosure is irrelevant; fairness to an accused and the interests of proper trial management mandate such disclosure and the judges should use their powers of management to insist on such disclosure;
- Prosecutors speaking to witnesses under oath, sometimes over a number of days.

66. Whilst the same caution as with complaints by the defence needs to be applied to complaints by judges about prosecutors, nonetheless there was a level of overlap between the judicial and defence complaints, e.g.:

- Factual and legal errors being made in indictments;
- Insufficient regard being paid to calling evidence strictly relevant to the crimes charged;
- Untimely applications being made for protective measures for witnesses as a result of insufficient advance contact with witnesses;

[55] This aspect is discussed in more detail in Section X *infra*.
[56] The same complaint is referred to in the 2016 Report (paras. 81 & 133) with a suggested amendment to the CPC (Recommendation: 10.2). However, it was the view of a judge that this happened on some occasions because the two cases were given to different prosecutors who were unaware of the evidence in the linked file. This problem could be avoided were a proper team-based system in place. *See* para. 42 *supra*.

- Unfocused questioning of witnesses during trial.

67. A successful trial is obviously the purpose of filing an indictment. The matters relating to indictments will be discussed further below.[57] Some of the issues listed above are the result of inadequate preparation. A standardized 'checklist' of steps to be taken when preparing for trial (which would include checking linked cases and the content of witness interviews) would avoid much of the criticism.

68. ANALYSTS: There are four analysts (three of whom were interviewed) employed in the SDWC. All have worked there for a number of years and those interviewed showed impressive dedication to their work.[58] It is clear that prosecutors are heavily dependent on that dedication and skill. The tasks assigned to them by prosecutors, which range from requests for general information to "very complex reconstructions" (of events) which can take months as well as doing "fieldwork", i.e. going to archives to search for documents, makes it clear that more analysts are needed. Given that many of the complex cases concern military events and suspects, an experienced military analyst should be employed.

69. However, analysts are not legally qualified persons. It is evident that prosecutors are abrogating to the analysts tasks which do not, and should not, come within their area of responsibility. One analyst stated that, having searched databases for documents and witnesses, she "proposed further steps for investigation". Another stressed the importance of attending trainings given to prosecutors so that "we know what prosecutors need". Their ability to engage meaningfully in an investigation is limited by the lack of section/team meetings which as one said wistfully "we used to have on a regular basis".

70. According to the analysts, there are also limitations on the amount of information which they are able to obtain from those databases to which they have access. The Electronic Disclosure Suite ('EDS') set up by ICTY[59] requires a licence, has to be accessed via the internet (which is slow), and very often witness statements and documents are not available on EDS – in the case of the former because protective measures had been granted and in that of the latter because they had been tendered under seal.

[57] *See* Section VI *infra*.
[58] The decision to speak to them was only taken late on the day of interview (as a result of information obtained during earlier interviews of prosecutors). All who were working that day agreed to stay on after working hours.
[59] Now transformed into the International Residual Mechanism for Criminal Tribunals ("IRMCT").

71. Their ability to check whether there are parallel investigations taking place in other POs or whether witnesses have testified in trials at other courts is constrained by the fact that such information was only obtained, and subsequently entered into the relevant database, by physical visits to the POs. The last such visit apparently took place in 2016. This information is clearly important and should not be dependent on physical visits. It should routinely be provided by the entity and district courts via electronic reports.

72. There is a database (which is apparently updated 2/3 times a year) collating material from trials which relate to a particular municipality. It contains information which includes: a description of a particular event, the offence(s) charged, names of witnesses, the prosecutor assigned, the role of the suspect, etc. However it would be useful, in particular for new prosecutors assigned to a team, if this kind of information could be translated into an overall analysis of the events.[60] Such an analysis would also throw up the connections between events in different municipalities.[61]

73. DATABASES: As already indicated, a number of databases exist which are designed to enable the sharing of information which should, in theory:

- Prevent parallel investigations from taking place;
- Allow prosecutors to gauge when cases should be joined and/or transferred to another court;
- Indicate whether potential witnesses have made statements/testified previously/been recently interviewed;
- Contain copies of documents relevant to cases;
- Facilitate the use of adjudicated facts from ICTY cases;
- Contain a compendium of judgements in WC cases.

74. However, the usefulness of such databases is inevitably dependent on their being updated (on a regular basis) with all relevant information, by inputters who have the required knowledge and skills to identify the appropriate database and the area(s) therein which relate to the information provided. Such regular updates and checking of databases by prosecutors, or their staff, should be axiomatic.

[60] The author believes that such an overall analysis was produced for the POBiH in 2005 (based largely on the ICTY trials). It could be used as a basis for an analysis which incorporates information garnered from later cases both in ICTY and domestic courts.
[61] *See* para. 119 *infra*.

75. In March 2018, as part of the UK-funded IWCP Project, the OSCE Mission to BiH carried out a needs assessment for the POBiH. This identified a need for a searchable, electronic evidence database that would enable all prosecutors, investigators, and legal advisors to organize, share, and find evidence more efficiently. As a result, a company was engaged that scanned over 1,300,000 pages of evidence and developed a database that is currently being finalized.

76. Once fully operational, this tool should significantly reduce duplication of investigative actions, incidental overlooking of evidence, re-interviewing of witnesses, and overall contribute to more efficient processing of war crimes. The database will further provide a systematic approach to managing and sharing existing data and evidence within POBiH, similar to existing systems at international criminal tribunals. Once this database is operational, training in its use (and the need for regular updating) must be provided to **all**[62] potential users.

77. INVESTIGATORS: Given the large number of cases assigned to each prosecutor[63] and the fact that they not only have to investigate but also conduct the trial (and any appeal arising therefrom) on their own, support staff are absolutely vital, particularly investigators.

78. The POBiH employs at present a total of 18 investigators, ten of whom work in the SDWC. It is self-evident, therefore, that prosecutors have to share investigators. As the Chief of Investigations pointed out, under the pre-2013 team system the sharing was between prosecutors working on the same team/area. This enabled an investigator to become familiar with events and witnesses, and assisted in the division of labour. The change from teams to sections and the haphazard allocation of cases to prosecutors described above[64] had the inevitable results of increasing the time having to be spent by investigators (and indeed prosecutors) learning about events and witnesses, decreasing the overall efficiency of investigations. It is evident that there should be a return to the pre-2013 system whereby investigators are assigned to a specific team.

79. Prosecutors are authorized by law to conceptualize an investigation. However, it seems that investigation plans are prepared by the investigator. The prosecutor tasks the

[62] Users will include prosecutors, legal associates, investigators, and analysts.
[63] One of the heads of a section has a total of 76 cases assigned, 33 of which are those designated "KTRZ" which involve 250 suspects or more. A new prosecutor has a total of 87 cases assigned to him, of which 26 are designated "KTRZ".
[64] *See* para. 45 *supra*.

investigator to "look at the file and decide what needs to be done…to analyse the case and prepare a plan which the prosecutor signs." As with analysts, such a method places too much responsibility upon the investigator, who cannot be expected to know the overall case theory, nor, not being legally qualified, be expected to know the nature of the evidence required to establish the elements of the crime. There should be input from either a prosecutor or legal associate in the drafting of the plan, which means one or both must be familiar with the case file.[65]

80. Whilst there were problems with the number of vehicles allocated to POBiH investigators, apparently these have been resolved. Mobile phones for use in the field are still not provided. The explanation provided was that "if investigators have mobiles phones then prosecutors will ask for them." This seems a short-sighted view as investigators must have the ability to contact witnesses – and indeed prosecutors for instructions – without being obliged to use their personal phones which, aside from any other issues, may cause problems with security of information relating both to a case and an investigator personally.

81. Although a swift transfer of the less complex cases by the SDWC[66] will alleviate some of the pressure placed on investigators, and despite assistance from SIPA, the SDWC needs to have more investigators dedicated to WC cases who have experience in such cases. It is anticipated that a further nine investigators will be employed under the latest tranche of IPA funds. That anticipation should be translated into actuality as soon as possible with such investigators being employed until the expiration of the deadline.

82. The POBiH has an MOU with SIPA. SIPA provides 80 officers as support in investigations conducted by POBiH prosecutors. However according to the head of SIPA's WC section they are presently working on 250 cases for the POBiH. About 20% of those cases have been under investigation for between 5 and 7 years.[67] Such a rate of progress does not augur well for completion of the most complex WC cases by 2023.

[65] A report by the Supervisory Body (dated 1 June 2019), recording responses from the POBiH to the 2016 Report, stated under the heading 'Responses to Chapter V': "[P]rosecutors create investigation plans with their associates".
[66] *See* Section VII *infra*.
[67] If cases are transferred out of the POBiH, SIPA no longer works on them. Not unreasonably it was said that SIPA cannot satisfy the needs of all POs.

83. Before 2013, in the same way as the investigators directly employed by the POBiH, SIPA organized its officers to work in teams, which aligned with those of the SDWC. That organizational division facilitated meetings with the relevant prosecutors and, more importantly, contact with insider witnesses and their ability to locate persons sought for a case.[68] SIPA has already taken action to reconstitute their team structures (with the appropriate operational procedures), to align with those announced by the SDWC.

84. SIPA's experience with prosecutors mirrors that of the analysts, i.e. that some give detailed instructions (and insist that only these are acted upon), whereas others prepare only a "framework" order. SIPA's preferred method of operation is, not surprisingly, that orders are prepared after discussion with the prosecutor. The amount of information provided by prosecutors is also variable. Some send the full case file without analysis so that SIPA can take up to three months to analyse the information; others merely send part of a file and ask for a meeting; the most helpful ones prepare a document which contains the circumstances of the case and names of witnesses and matters which require investigation. SIPA officers then prepare their own plan. This is an unnecessary duplication of effort which could be avoided if investigation plans were drawn up after consultation between SIPA and the prosecutor and set out in the prosecutor's order to conduct an investigation.

85. In 2016, a team known as "Terra" was set up to focus on the investigation of missing persons and to collect information on mass graves. The official head is Izet Odobašić.[69] There can be no doubt that this is a laudable enterprise and one of importance to the general public. However, as with the KTA cases, it absorbs SIPA resources which, in the light of the deadlines, need to be employed in completing the WC trials. For the period required this enterprise could be delegated to an NGO such as ICMP.

86. One other duplication of investigation resources came to light. When interviewing witnesses in the premises of police stations in the RS, SIPA is obliged to have a local officer present. If it is thought by a prosecutor that the presence of an RS officer is likely to intimidate the witness then the SIPA officer is ordered to conduct the

[68] The SIPA Chief of the War Crimes Section, Žarko Kalem, made the point that he had worked with the prosecutor employed on the Srebrenica '95 cases and therefore knew how to "connect the dots".
[69] It is suggested that the number of managerial roles carried out by Izet Odobašić, in addition to his work on cases assigned to him, are too many for one person to carry out with the thoroughness required.

interview at a SIPA Regional Centre. This wastes time and causes unnecessary expenditure.

V. MENTORING

87. This aspect of the management and operation of the POBiH was the subject of a recommendation in the 2016 Report.[70] Its importance is such that in 2017 the "Rulebook on Consultative Prosecutors" was adopted.[71]

88. At the time of conducting interviews with the three prosecutors appointed to the SDWC, one said he had been told by Prosecutor Muratbegović that he "would" be appointed as a Consultative Prosecutor and he understood the formal process would take place this year; a second said that "there were indications" he would receive mentoring; the third said he had been told that Prosecutor Ibro Bulić was appointed his mentor on 3 January this year.[72]

89. In the June 1 POBiH report to the Supervisory Body it was stated that the 2016 Report recommendation had been complied with "because HJPC, upon proposal by the POBiH, (sic) **assigned** three prosecutors who will conduct mentoring – **training** of newly appointed prosecutors" (emphasis added).

90. On 3 January 2020 the CP issued a "Rulebook on Mentorship in the POBiH". Attached as an Annex is a "Draft Mentoring Plan" (which incorporates recommendations made by OSCE Mission to BiH).[73]

91. It is evident that there has not been any attempt until now to institute, in the POBiH, a properly structured plan of mentoring. In the author's view this is palpably a result of the – still prevalent – perception that prosecutors would not have been appointed if

[70] *See* Recommendation 3.8.
[71] It was adopted by the HJPC on 15 November 2017. It sets out the qualifications required to become a Consultative Prosecutor (Art. 2) and the duties thereof (Arts. 7 & 8).
[72] Ibro Bulić said he had been told in 2018 he had been appointed one of the two consultative prosecutors and indeed provided advice to two prosecutors with whom he worked.
[73] As part of the UK funded IWCP project, the OSCE Mission to BiH engaged two expert consultants to conduct an in-depth analysis of the mentoring system at POBiH and provide specific recommendations for improvement and a model mentoring plan. One such recommendation was that POBiH adopt an internal rulebook on mentoring which would also include mentoring to legal associates and investigators. The findings and recommendations of the experts were presented to the Chief Prosecutor and her team in February 2019.

they were not capable of doing the job without assistance and that a mentoring scheme interferes with the independence of each prosecutor.[74]

92. It should be stressed that becoming a mentor is a position of such importance that it is reflected in a consultative prosecutor's annual evaluation. Mentorship requires certain skills as well as time. Moreover, it is not limited to basic training, but requires ongoing commitment to providing advice and encouragement. Ideally, each of the six SDWC regional teams should have one consultative prosecutor available either to newly appointed or assigned prosecutors to the team.

VI. INDICTMENTS

93. The 2016 Report identified four major issues[75]:

- The level of perpetrators being indicted at the Court of BiH;
- The fragmentation of cases/accused;
- Inconsistency in legal characterisation of the crimes and legal issues of command responsibility; and
- The number of indictments being returned.

94. In general terms the documents examined do reveal an improvement in some areas, but regrettably all of those problems still persist, together with two additional factors:

- Indictments being issued against persons known to be residing outside the jurisdiction of the CBiH; and
- Indicting perpetrators already serving lengthy sentences for WC.

95. LEVEL OF PERPETRATORS: It would seem that whilst the POBiH has indicted a number of high-level perpetrators e.g. Dudaković *et al* and Ninković *et al*, prosecutors are still submitting indictments for confirmation by the CBiH which do not fall within the criteria of the NWCPS (neither the present nor proposed revisions) as suitable for trial at the CBiH.

96. In 2018, there were 34 **confirmed** indictments at the CBiH, involving 94[76] accused persons. Analysis of the indictments shows that:

[74] *See* para. 57 *supra*.
[75] *See* 2016 Report, para. 60.

- 17 of the accused were higher ranked commanders, e.g. Tomislav Kovač (RS MUP), charged with genocide, but at large; Dudaković (Commander of the ABiH), charged with CaH;
- 6 of the accused sit somewhere between higher ranked commanders and direct perpetrators, e.g. Mane Đurić (Vlasenica SJB Chief), charged with CaH; Miodrag Vujičić (Commander of company operating in Prijedor);
- 71 of the accused are alleged to be direct perpetrators. Some are part of cases with commanders as the main accused, others however are not and appear to have been retained by the CBiH because they are charged with CaH or rape, e.g. Slađan Pajić (soldier in VRS and at large), Simo Stupar (SJB Vlasenica Reservist).

97. In 2019 only 17 indictments (one was joined to a pre-existing case) involving 38 accused persons were confirmed. 31 of the 38 are again alleged to be direct perpetrators and again the reason for the CBiH retaining the cases seems to be that CaH and/or rape has been charged e.g. Željko Novaković (soldier in the VRS); Duško Suvara (soldier in VRS). Neither reason is sufficient for encumbering the CBiH with trials which do not properly rank as the "most complex".[77]

98. FRAGMENTATION: As explained in the 2016 Report: "This term was used to describe the practice of filing different indictments which relate to the same event and/or filing several indictments against the same individual."[78] The reasons why this practice should cease have not changed[79]; indeed they become ever more powerful, given the passage of time since the events and the approaching deadline of 2023.

99. Although there has been a diminution in the numbers of cases which could be described as resulting from fragmentation, according to the judges, the practice still persists. The WCCM Report highlights a number of recent cases in which the practice seems to have occurred.[80]

100. This problem was identified by the HJPC in respect of KTRZ cases. After a meeting of the Standing Committee was held in July 2018, all chief prosecutors i.e. POBiH,

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[76] There were originally 95 accused, but one died.
[77] *See* paras. 23–25 *supra* and para. 104 *infra*.
[78] 2016 Report, paras. 72–73.
[79] *See* para. 72 *supra*.
[80] WCCM Report, pp. 18–23.

FBiH, RS and Brčko were asked to submit explanations for the fragmentation of cases. The Standing Committee noted that "*the issue of fragmentation ... adversely affects the overall efficiency of processing these types of cases*".

101. It may be that fragmentation occurs as a result of insufficient communication between individual prosecutors[81] but the overall impression was that the filing of separate indictments was connected to the need for prosecutors to complete their "quota".[82] It should not need stating that if this is the case, then it is an unacceptable device.

102. QUALITY OF INDICTMENTS: It was suggested both by the judges and defence counsel that descriptions in indictments, both legal and factual, were too often defective. Examples provided were:

- Muddled legal characterisations of the crime alleged, e.g. allegations of war crimes containing elements of crimes against humanity;
- Vagueness in description of the crime i.e. facts not related to elements of the offence;
- Pleading joint criminal enterprise ('JCE') and command responsibility as alternative modes of participation;
- Alleging command responsibility and direct perpetration against accused in respect of a single incident.

103. These are all basic legal errors, which result from inadequate understanding of the law relating to these crimes and the drafting of indictments. The remedies for such errors include:

- Refresher training on substantive law and drafting skills[83];
- The introduction of a handbook containing instructions on drafting[84];
- 'Quality control' being exercised by team leaders and/or senior management.[85]

[81] *See* para. 57 *supra*.
[82] The quota system will be discussed further in section XI *infra*.
[83] Through the IWCP project, the OSCE Mission to BiH has provided direct and interactive trainings on complex legal concepts in international criminal law to POBiH. The suggested refresher trainings could assume a similar format.
[84] The OSCE Mission to BiH (again via the UK funded IWCP project) engaged local and international experts with relevant prosecutorial experience in processing war crimes to develop guidelines on investigation management and indictment preparation. These could serve as a basis for POBiH's own guidelines. Their provision to the POBiH has been delayed by the Covid-19 pandemic.
[85] *See* para. 39 *supra*.

104. INCONSISTENCY IN LEGAL CHARACTERISATION OF CRIMES: This was a major problem as identified in the 2016 Report.[86] No such glaring examples of this practice appeared in the indictments filed in the last two years. Unlike her predecessor the CP accepts, as do her senior staff, that consistency of approach is important.

105. The discrepancies occur where events in one municipality have been found by one trial chamber to constitute CaH, whilst similar events occurring in a different, sometimes neighbouring, municipality have been categorized as WC. To take one example: a prosecutor charging rapes arising from an event in Foča will indict the perpetrator(s) under CaH, whereas in Glamoč the perpetrator will be indicted under WC. This discrepancy is the result of a combination of factors, not the least of which is a lack of general acceptance, both legally and factually, of the ICTY findings that there was a common plan engaged in by the Bosnian Serbs, which involved the commission of CaH.

106. A further complicating factor is the applicable law in WC cases. As a result of the decision of the ECtHR in *Maktouf & Damjanović v. BiH*, the 2003 BiH Criminal Code (CC) is applied in cases involving allegations of crimes against humanity and joint criminal enterprise, while the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY) is applied in other cases.[87] This creates a disparity in the available sentence. If, as is anticipated, as a result of the revised NWCPS, more cases are transferred at the investigation stage, this disparity is likely to become more widespread. It is recommended that the Panel for Harmonization of Case Law should further examine the issue of disparities and move towards more consistent application of law.

107. RETURNED INDICTMENTS: As with the problems of fragmentation of indictments and inconsistent legal characterisations, in the 2016 Report this was identified as a major issue.[88] Statistics provided by the CBiH for 2018 and 2019 indicate a diminution of this problem.[89]

[86] *See* 2016 Report, paras 83–92.
[87] *See* 2016 Report, para. 85, for observations on the impact of the decision. There are arguments to be made that if a case is transferred by the CBiH at the indictment stage, then it is permissible for the entity or district court to try an accused for CaH.
[88] 2016 Report, paras. 93–97.
[89] In 2018 nine indictments were returned on one occasion; in 2019 the figure was five indictments returned on one occasion. However, it should be noted that apparently the judges have taken a policy decision that only one opportunity will be given to prosecutors to correct perceived failings in pleading.

108. The reasons given by the CBiH for the returns are linked not only to the problems identified in paragraph 66 *supra*, but also, for example:

- A failure to indicate the relevant provision of the CC;
- A failure to describe the existence of an international armed conflict;
- A failure to allege a discriminatory intent when charging persecution as a CaH;
- A description of the events which does not correspond to evidence of witnesses;
- A "vague and incomprehensible" factual description;
- A failure to comply with the provisions of Article 227 of the CPC.[90] One indictment charging destruction of property was returned on the basis it lacked a precise description of "the scope of the destruction".

109. It remains the view of the author that the provisions of Article 227 of the CPC should be amended for the reasons given in the 2016 Report.[91]

110. INDICTMENTS BEING ISSUED AGAINST UNAVAILABLE ACCUSED: Owing to a number of obstacles to the successful prosecution of an alleged perpetrator who does not reside in BiH (particularly one who resides in jurisdictions that will not extradite), any benefit to indicting such perpetrators is outweighed generally by the costs in time and resources.

111. In the indictment filed in January 2018 against Kosorić *et al*, two of the accused are at large; other indictments issued in 2018 against single accused who are at large include, but are not limited to: Zoran Adamović, Slađan Tasić, Novak Stjepanović, Goran Mojović, Dušan Cimeša. One of the indictments in 2018, i.e. that against Dalibor Maksimović, was transferred to Serbia. According to Judge Kreho, six cases had to be transferred to other jurisdictions in 2018 and ten in 2019.

112. Whilst it is appreciated that the agreements between the countries of the former Yugoslavia leave something to be desired as regards their terms and effectiveness, nonetheless if, after the opening of an investigation, it is appreciated that a suspect is elsewhere then the case should be transferred before an indictment is raised, or, if for some reason that is not an available option, then it should be "shelved" until such time as there is a realistic prospect of a trial taking place in BiH. To persist with an

[90] Article 227(1)(c) states that an indictment shall contain "*a description of the act pointing out the legal elements which make it a criminal offence, the time and place the criminal offence was committed, the object on which and the means with which the criminal offence was committed, and other circumstances necessary for the criminal offence to be defined as precisely as possible*".
[91] *See* 2016 Report, paras. 125–133 and Recommendation 10.1.

investigation and indictment when there is no realistic prospect of a trial in the near future wastes the time and resources of both the POBiH and the CBiH.[92] Whilst such a course may not be popular with the public (on the basis that it may encourage suspects to flee BiH), the remedy is the improvement of regional co-operation, either through the arrest and return of suspects to BiH (which is less likely option for suspects with dual citizenship due to limitations of extradition laws in force), or greater willingness of courts in other jurisdictions to conduct trials using the principles of universal jurisdiction.

113. RE-INDICTING CONVICTED PERSONS: The CPC, Article 216 states that "*The prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offence has been committed exist*". Article 226 mandates that if there is enough evidence for a "grounded suspicion" the prosecutor must prepare and refer an indictment to the preliminary hearing judge.

114. However, as was noted in the 2016 Report: "*The conflict in BiH lasted for over three years. Innumerable crimes were committed by innumerable people. Available resources render it impossible to prosecute all those who committed crimes*."[93] Footnoted to that observation was a reference to the fact that Darko Mrđa, who had been sentenced by ICTY to 17 years for his part in the 1992 Korićanske stijene killings, had been charged with the 1992 Manjača suffocation incident. It was pointed out that "[T]o prosecute him a second time diverts resources which should be devoted to the investigation and prosecution of perpetrators not yet stigmatized as war criminals."

115. Regrettably insufficient heed has been paid to this observation. In December 2018[94] Dragoljub Kunarac, serving 28 years as a result of his conviction by ICTY in 2001 of CaH (torture, rape, and enslavement) in Foča, was indicted for the other crimes committed in the same area in the same timeframe. On 24 December 2019, Milan Lukić, presently serving a life sentence (having been convicted by ICTY in 2009 of murder, torture, assault, looting, destruction of property, and the killing of at least 132

[92] It is also one of the concerns of the victims' associations about the progress of WC cases and was raised by Murat Tahirović during his interview.
[93] 2016 Report, para. 30.
[94] The month is not without significance. A large number of indictments are filed in December (11 of the 24 in 2019). This is an undesirable practice as it coincides with a lengthy court break. It is believed that the impetus for these filings is not unconnected to the "quota" provisions.

identified men, women and children in Višegrad), was indicted for a further incident in that municipality during the same time period.

116. The prosecutor[95] who indicted Lukić was interviewed. His explanation for re-indicting Lukić was that he had received co-operation from Serbia in regard to the evidence, that he had been given access to Lukić in prison, and considered "*the work I had done would be incomplete without indicting Lukić. It is a simple one event case*". He also pointed out that the law required him to act on any criminal report and ultimately to decide whether or not to indict. He did not seek approval before settling the indictment but correctly observed that it had been reviewed by the CP and Izet Odobašić. There were, he averred, no discussions about the desirability of launching this prosecution.

117. This explanation underscores the need for senior management in the SDWC to make policy decisions[96] and to issue clear guidelines on prioritisation of cases.[97] The fact that the prosecutor returned to the case when no longer working in the SDWC demonstrates that there is still an overlap between the sections. More pertinent is the fact that no-one in senior management seems to have, at the very least, queried the decision by the prosecutor to indict a person serving life imprisonment (thereby not only already stigmatized as a notorious war criminal, but ensuring that even if convicted of the new charge the sentence is not going to be increased) in circumstances where there is limited time and limited resources to indict those who have never been tried. Whilst it is noted that the right of victims to obtain compensation may be affected by a decision not to prosecute in such circumstances, as with every such decision a balancing act is required; resources expended on prosecuting already convicted persons has the inevitable effect that crimes (with victims) committed by other – un-convicted – persons may never be prosecuted. In this context, the fact that convictions by ICTY do not apparently rank as such in BiH is also to be deplored.

118. In general terms what is required is the compilation of a checklist of matters to be taken into account before a full investigation is launched and an indictment is submitted for confirmation.

[95] In 2016 he was re-assigned to the Organized Crime Department, having until then worked on Višegrad cases.
[96] *See* para. 38 *supra*.
[97] *See* para. 126 *infra*.

VII. BACKLOG AND TRANSFER OF CASES UNDER ARTICLE 27(a) CPC

119. The continuing backlog of cases in the POBiH is a constant theme in reports dealing with war crime processing.[98] Despite the fact that a quarter-century has now passed since the end of the conflict in BiH, in 2019 118 new KTRZ cases were registered across the various POs, of which 80 were in the POBiH.[99] The present rate of progress, in completion of the KTRZ cases alone,[100] makes it clear that there is no hope of meeting the NWCPS deadline.

120. In respect of KTNRZ cases, 86 new cases were received in 2019, 87 were resolved bringing the total of unresolved cases to 526, one less than in 2018. For the KTARZ cases the figures are: 217 new cases and 246 resolved cases, bringing the total of unresolved cases to 1622, 29 less than in 2018.

121. The fall in the number of indictments filed and confirmed as suitable for trial at the CBiH,[101] according to the President of the CBiH, has made it more difficult for judges to fulfill their individual quota requirements. This could hardly be described as a satisfactory state of affairs.

122. In order to bring some prospect of achievement of the NWCPS goals, urgent measures need to be taken. The KTNRZ and KTARZ cases are an added burden to an already overstretched PO and indeed would be an added burden to the entity and district POs if transferred.[102] Additionally there are some cases still being transferred upwards, i.e. from the entity courts to the CBiH.

123. Although it may initially appear that some KTNRZ cases (that already have been transferred to the entity POs) involve isolated incidents, in a number of instances it is possible to establish the existence of a geographical and temporal link to incidents which taken together constitute part of a larger legally and factually complex event. Transfer of these cases without proper analysis of connections to potentially related

[98] *See* e.g. reports from: HJPC, (quarterly and annual), Supervisory Body, OSCE Mission to BiH (NWCPS Observations & WCCM Report).
[99] HJPC report 2019 "Enhancing WC Case Processing in BiH", p. 22.
[100] *See* para. 14 *supra*. The 2019 HJPC Report pointed out on p. 41 that in its Plan for 2019, the POBiH had anticipated "resolving" 126 KTRZ cases. In fact, it resolved 73, i.e. 58%.
[101] *See* para. 17 *supra*.
[102] Interviews conducted with the chief prosecutors of the RS and Brčko District suggest there would be resistance to a transfer of large numbers of KTNRZ cases as they require a great deal of work which their offices are not, on present staffing levels, equipped to handle.

larger cases investigated by the POBIH entails the risk of important evidence being overlooked.

124. In order to focus its efforts exclusively on the gravest and most complex cases and avoid possible fragmentation of such cases, the POBiH should conduct a thorough analysis of the legal and factual complexity of pending KTNRZ cases and, where they exist, establish links between these cases to determine which of these events must be processed and adjudicated by the Court of BiH.[103]

125. Such analysis is imperative for a number of reasons:

- To hold accountable those most responsible for the crimes;
- To avoid fragmentation of cases;
- To conserve prosecutorial resources; and
- To avoid the creation of contradictory factual and legal findings in respect of the same events.

126. Whilst the aforementioned analysis is important, as was recommended in the 2016 Report[104] the CP must decide, without delay, on an internal POBiH policy for prioritisation of cases and issue guidelines to that effect. Such guidelines must go beyond the criteria set out in the NWCPS and the interpretation provisions. They must include, but not be limited to, such matters as:

- The category of the case, i.e. KTRZ, KTNRZ, KTATZ;
- The nature of the events;
- The role of the suspect(s);
- The prospect of an arrest;
- The number of cases already prosecuted relating to events in a particular municipality or area;
- Whether the case is reliant on witness testimony alone.

127. The indictment issued by the POBiH against Tadija Mitrović in December 2019 encapsulates many of the problems covered by this report. The accused was a low level perpetrator charged with participating in the persecution of civilians and the murder of one in the Prijedor Municipality. The indictment was rejected in April 2020 on the basis of insufficient grounds to suspect he committed the crime.

[103] *See* para. 71 *supra*.
[104] 2016 Report, para. 51 and Recommendation 3.6. *See* also para. 118 *supra*.

128. The transfer of cases from the CBiH to the entity and district courts is obviously closely allied to the problem of the backlog and has equally been the subject of reports and subsequent initiatives, attempting to ensure that only the most complex cases are tried at the CBiH.

129. One such initiative was instigated by the Supervisory Body, which invited the OSCE Mission to BiH to convene a meeting on prioritisation of cases and on setting a plan for distribution of less complex cases. On 28 May 2018, a meeting took place attended by the then-acting CP and members of CBiH permanent panel for the transfer and takeover of WC cases.

130. At the meeting, the judges pointed out that having reviewed the Category I and Category II cases there were 192 cases available for transfer and were it not for case "fragmentation" there would be more. They also referred to the difficulties of proper categorisation caused by the sometimes vague factual descriptions.

131. The CP agreed that between June and September 2018 150 KTRZ cases would be transferred and that an analysis of the KTNRZ cases would be made to see which might be suitable for trial at the CBiH. The Supervisory Body approved the agreement in July.

132. By April 2019 only 39 KTRZ cases had been transferred and no analysis of the KTNRZ cases had taken place.

133. In the May 2018 meeting, agreement was reached between the POBiH that the revised criteria (proposed by the draft strategy) would be applied for the purpose of transfer. On October 23 2018, at the CBiH, a meeting of the Standing Panel for the Assessment of Complexity of Cases took place. The CP was present. It was arranged that there would be a meeting in November to agree on the interpretation of the new criteria. Prosecutors were to review all KTRZ cases (in the reporting and investigation stage) to give a preliminary assessment of their complexity and an inventory would be made of existing cases at entity and district level in order to join those related to larger scale events. Finally, it was agreed that the POBiH would also analyse the KTNRZ cases to see which were suitable for processing at the CBiH.

134. However, none of these arrangements were carried out by the POBiH as envisaged. In respect of the revised criteria, in the response to the OSCE Mission to BiH's Spot Report of June 2019, the CP stated *"[t]he proposal for a revised NWCPS has not yet*

been adopted and we have not been able to continue with the criteria we have agreed in this regard with the CBiH ***due to the reactions of victims and injured parties*** (emphasis added) *which have publicly requested that the new criteria not be applied until the adoption of the amended strategy*."[105]

135. A prosecutor's office is a body mandated to act in the interests of justice, without fear or favour. Whilst victims' groups may "request" (and obviously their concerns must be taken into consideration), the deciding factor must be the overarching interests of justice. There must, of course, be public confidence in the progress of these trials. However, as was pointed out by the OSCE Mission to BiH (which has been monitoring WC trials), in a communication to the Supervisory Body, "*[T]he Mission has not observed in the vast majority of entity/Brčko District courts and prosecutor's offices, any obstacles to the processing of less complex war crimes cases*." The "reaction" described is, to some extent, the result of a failure to sufficiently publicize the progress and results of trials. Moreover, it may well be the case that these groups do not fully appreciate that, without transfer, fewer trials will take place.

136. On 14 November 2019, the POBiH sent a report to the Supervisory Body stating that in 2018, 67 KTRZ, 100 KTNRZ and 11 KTARZ cases had been transferred. Meanwhile, from January to September 2019 only 23 KTRZ, 46 KTNRZ and 3 KTARZ cases had been similarly transferred.

137. Although, according to the HJPC December 2019 Report, the number of transferred KTRZ cases had risen from 23 to 26 (five of them after filing of the indictment), it was pointed out that "certain entity level POs are facing a lack of war crimes cases to process, despite the adequate human resources and EU support received through IPA 2017".[106] If this observation is an accurate one, then the failure to transfer cases to POs with spare capacity, whilst SDWC is struggling to cope with its caseload, is deplorable.

138. The chief prosecutors of the RS and Brčko District did not foresee a problem with the transfer of KTRZ cases. However, it should be noted that there may be a problem with some of the smaller POs and courts, which will require additional resources. In Istočno Sarajevo, for example, there is one prosecutor assigned to deal with WC cases. At the time of interview, he was dealing with 27 KTRZ cases involving 136 suspects, 160

[105] Response 2, September 2019, p. 5.
[106] HJPC Report pp. 5–6.

KTNRZ & KTARZ cases with 6 ongoing trials. Moreover, the court has only one panel of judges (only one member of which has experience in criminal law). As more cases are transferred to such POs and courts, in order to ensure that they may be dealt with expediently, appropriate planning of budgetary and human resources will need to take place.

139. Nonetheless, it is abundantly clear that without further delay cases must be transferred from the CBiH to the entity and district courts.

VIII. CASES OF SEXUAL VIOLENCE ("SV")

140. A comprehensive analysis of trials between 2014 and 2016 involving allegations of SV was produced by the OSCE Mission to BiH in 2017.[107] It drew specific attention to the issues of witness protection and support. The 2016 Report concentrated to a large extent on witness protection problems.[108] As far as is possible these problems have been covered by laws which apply to all courts. According to the Head of the Victims and Witnesses Section ("VWS") at the CBiH, 21 people are now employed to provide support to alleged victims of sexual violence. Technical equipment is available and most, if not all courts have separate entrances for witnesses.

141. However, staff are still employed on specific projects rather than full-time and there is no harmonized practice across the courts for the rendering of support to witnesses. It is suggested that a standardized practice manual be produced. Moreover, the support ends with the trial unless a witness support network ("WSN") is available. This organization existed until 2018 as an EU funded project, but is now wholly voluntary. The importance of both the VWS and the WSN will increase if more cases of SV are transferred. Given that the BiH judiciary is unable to finance the necessary measures, it is recommended that the donor organizations make sufficient funding available for both bodies, at the very least, until 2023.

142. Trials of cases involving allegations of SV have taken place before entity and district courts, apparently without difficulty. There is, unsurprisingly, a reluctance by complainants to give evidence in a court in the area where the alleged crime took

[107] *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016* (Sarajevo, OSCE Mission to BiH, 2017). Available at: <https://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true> (accessed 26 May 2020).
[108] See 2016 Report Section X.

place, which is one of the reasons why the victims' groups express resistance to cases being transferred from the CBiH. One of the prosecutors at the POBiH described a case in which the complainant was strongly resisting any transfer.

143. In the absence of any legal provision allowing for transfer of cases to another area on the basis that a witness is in fear, the problem must be addressed through the existing legal framework at all levels in BiH. Witness protection measures must be strictly enforced. Practical measures such as testimony via video link from another court in BiH or abroad should be utilized whenever deemed necessary.

144. According to one of the judges at the CBiH, insufficient care is still being given to check whether a complainant requires protective measures so that they are not named in the indictment or in public proceedings.

145. The problems of dealing with cases of SV are not confined to, but magnified by, the fact that they occurred within the context of a conflict. As already indicated above,[109] a checklist should be issued of the steps which need to be taken before indictments are filed.

IX. THE 'CATEGORY A' CASES

146. The resistance expressed by victims' groups and some political parties to any amendments being made to the NWCPS appears (as far as the former are concerned) to be largely based on the lack of information provided by the POBiH as to the progress made in dealing with those cases and the status of those which remain unresolved.

147. Murat Tahirović, President of the Association of Victims and Witnesses of Genocide when interviewed stated that in December 2017 a meeting had been held with the CP (present at which was the IRMCT prosecutor, Serge Brammertz). The Association had asked for information about the 'Category A' cases. The CP said that the required information would be provided by the end of March 2018. As of the time of writing, it is understood that such information has still not been supplied.

148. The reason for the request was concern that the level of cases being tried at the CBiH appeared to be less complex than those the Association believed had been designated

[109] *See* para. 67 *supra*.

as 'Category A.' Murat Tahirović produced a document, dated 28 January 2020, in which his association stated: "*In drafting the revised Strategy, it is necessary to focus on over 850 Category A cases. This is to find out how many cases have been adjudicated, how many persons are accused, what are the cases at the stage of investigation, how many cases have seen cessation of investigation, and in how many cases actions have not been taken yet. This may be a starting point for adopting a revised Strategy where priority should be given to taking action in these cases*".

149. The NWCPS Observations Report set out the background to these cases as follows: "*During and immediately following the 1992-1995 conflict, the BiH domestic legal system processed war crimes cases concurrently with the International Criminal Tribunal for the former Yugoslavia (ICTY). A lack of co-ordination in the handling of war crimes case files and concerns over the fairness of domestic trials tried at the entity level led to the so-called "Rome Agreement" in 1996. This Agreement created an "independent oversight mechanism" which came to be known as the RoR. In this oversight capacity, the ICTY Office of the Prosecutor (OTP) performed a review function in relation to investigations and prosecutions undertaken by the BiH authorities… By August 2004, in the context of its closing strategy, the ICTY transferred the mandate in relation to RoR cases to the BiH Prosecutor's Office (PO BiH), which continued to review the war crimes cases and categorize them according to the RoR procedure*".[110]

150. The so-called 'Category A' cases are those assessed as being ones where the evidence was "*sufficient by international standards to provide reasonable grounds for the belief that [the person] may have committed the (specified) … serious violation of international humanitarian law*."[111] There is, in fact, no reason to believe that these are more complex than those which have been assembled by POs since the procedure ended in 2004. They have, nonetheless, acquired what may be described as a "mythical" status in the eyes of the public, most particularly the various victims' associations.

151. In the NWCPS Observations Report, the OSCE Mission to BiH noted that of the 800 individuals named in the cases designated as 'Category A', proceedings had been brought against more than 560 (70%).

[110] NWCPS Observations Report. p. 2.
[111] 'Category B' cases were those where it was assessed there was insufficient evidence and 'Category C' those where the OTP was unable to determine whether or not there was sufficient evidence.

152. Given the concerns voiced, and the adverse impact they may have had on the implementation of the revised NWCPS, the CP and Izet Odobašić were asked why the information had not been provided. The explanation provided by both was that the task of checking the relevant databases had been assigned to a legal advisor, but before the task could be completed she had gone on maternity leave. This explanation, as an excuse, leaves something to be desired if for no other reason than that it highlights a deficiency in management practices.

153. This issue was specifically addressed with the CP, on the basis that it is one which, given that its resolution is simple, unnecessarily causes adverse comment in respect of the POBiH. Accordingly, the task should now be completed without any further delay and the information made public.

X. LENGTH OF TRIALS

154. In seeking solutions on how best to ensure that the deadline for the completion of all WC cases is met, it is impossible to ignore the length of the trials. This feature of trials held before international criminal tribunals was, and still is, the subject of heavy criticism. Regrettably, it is also a feature of the trials held at the CBiH.

155. There are no available statistics on the average length of the trials. However, as already noted, there is a table available showing the proceedings which were completed at the CBiH in 2018 and 2019.[112] To take but a few examples:

- The trial of Mile Pažin involves two accused charged on three counts. Trial began in 2016 and is still ongoing;
- The trial of Sakib Mahmuljin involves one accused charged on two counts. Trial began in 2016 and is still ongoing;
- The trial of Goran Sarić involved one accused charged on three counts. Trial began in 2013 and was completed in 2018.

156. Without knowing the background to these trials, it is difficult to assess the reasons for the length. Nonetheless, the examples demonstrate the impossibility of compliance with the NWCPS deadline if this trend continues.[113]

[112] *See* Appendix F.

157. There are some statistics available for the two most complex cases presently in trial at the CBiH. In the case of *Dudaković et al* (17 accused):

- The indictment was confirmed on 24 October 2018;
- The first hearing was on 19 December 2018;
- The trial proper began on 15 April 2019;
- The first prosecution witness gave evidence on 13 May 2019;
- The prosecution intends to call 447 witnesses (of which less than 20 have been called so far).

158. In the case of *Paravac et al* (4 accused):

- The indictment was confirmed on 12 January 2016;
- The first hearing was on 22 February 2016;
- The trial proper began on 5 April 2016;
- The first prosecution witness gave evidence on 26 April 2016;
- The prosecution named 214 witnesses they intended to call.

159. This case has been further complicated by the fact that on 23 June 2019 the Chamber ordered that Ninković be severed from the trial as a result of delays caused by his ill health. However, instead of simply adjourning his case to be heard as a whole once he was fit, it appears that the two trials will continue in tandem with witnesses being called in to both separately, with the inevitable effect that witnesses will have to testify twice (if not more often should discrepancies arise in their evidence so that they are recalled in the main trial). Moreover, time has to be found in the court calendar to accommodate both trials which will cause delay to the main trial.

160. Judges and prosecutors from each of the above trials were interviewed by OSCE Mission to BiH staff after the author's departure to establish some of the main reasons for the slow progress of these trials.

161. Reasons given by the judges common to both trials were:

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[113] A further factor which will affect the ability to complete the cases by the deadline are the restrictions imposed in response to the Covid-19 pandemic.

- Lack of courtroom availability: there is only one courtroom which can accommodate the number of accused in the *Dudaković* case and other courtrooms are used for trials, e.g. of organized crime or civil cases;
- Health of accused;
- Travel of accused: no funding is made available for accused to stay overnight in Sarajevo and therefore court hearings have to start and end to allow the accused to arrive and leave – in the *Dudaković* case many have to travel from Bihać;
- The number of witnesses called by the prosecution: judges are reluctant to order the prosecution to reduce the number of witnesses as they are only provided with witness summaries (therefore it is difficult to assess their importance) and do not wish to give the appearance of bias;
- The right of victims to give evidence in order to ensure that they can apply for reparations has to be accommodated;
- The length of some of the legal submissions.

162. The prosecutors maintained that they were prepared and able to call witnesses on consecutive days (instead of one witness per week, or fortnight, or month). The prosecutor in the *Paravac* case was reluctant to accept the severance of Ninković, on the basis that it would cause problems with his "case concept".

163. He also stated that adjudicated facts from other trials had been accepted by the Chamber but, as yet, it was too early in the proceedings to make a decision in respect of the reduction of witnesses.[114] This explanation serves to illustrate the somewhat muddled approach to streamlining trials. Motions for adjudicated facts should be made and ruled upon before commencement of trial so that the witness(es) who speak to those facts can be removed from the witness list. Before the case starts, the prosecutor should have developed their case theory and ensured that the only witnesses to be called were those who were strictly necessary to prove the case.

164. It should be noted that OSCE Mission to BiH conducted an analysis of trials at the CBiH. The analysis examined 28 trials completed between 2015 and 2017. Only in 13 were motions for the admission of adjudicated facts actually filed.[115]

[114] The case covers events in Doboj and Teslić in 1992 which were covered in at least two, if not more, ICTY trials and appeals i.e. *Prosecutor v. Brđanin* and *Prosecutor* v. *Stanišić & Župljanin*. The events should therefore be capable of being dealt with in full by adjudicated facts with witnesses only being required in respect of the role of the accused.
[115] The author of the analysis observed that some of the motions filed rather than listing "facts", submitted witness statements, judgments, facts that were legal in nature or related to the culpability of the accused.

165. The length of trials must be reduced. Judges of the CBiH must be prepared to exercise (with more rigour and with less anxiety about any appearance of bias) the case management powers which already exist under the provisions of the CPC.[116]

166. Article 239 states "*(1) the judge or the presiding judge shall direct the main trial. (2) It is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined and that* ***everything is eliminated that prolongs the proceedings but does not serve to clarify the matter***." (emphasis added). Article 262 (3) states "*The judge or the presiding judge shall exercise an appropriate control over the manner and order of the examination of witnesses and the presentation of evidence so that the examination of and presentation of evidence is effective to ascertain the truth,* ***to avoid loss of time*** *and to protect the witnesses from harassment and confusion*" (emphasis added).

167. In practice this entails, at the very least:

- Provision of witness statements to the judges in advance of the trial. If the CPC does not allow such action to be taken then the judges should insist that pre-trial briefs, both from the prosecution and defence, contain a proper summary of the evidence to be given by all witnesses;
- Holding proper pre-trial management hearings (which must include clear announcements being made by prosecution and defence counsel of the matters at issue between the parties);
- Reducing the number of witnesses to be called by the prosecutor to those who are directly relevant to the issues;
- Ensuring proper disclosure of unused material to the defence;
- Admission of adjudicated facts;
- Restriction of examination and cross-examination to the real issues and not allowing repetitive cross-examination. If necessary, time limits should be imposed on the parties.

168. However more drastic measures also need to be taken which include:

- The provision of more courtrooms – even on a temporary basis;
- Provision of funds allowing accused to stay in Sarajevo for more than one day.

[116] This aspect of matters was foreshadowed in the 2016 Report, para. 135.

XI. HJPC PERFORMANCE EVALUATION PROCESS ('QUOTA')

169. As with the interviews conducted for the 2016 Report, this was an issue raised by both prosecutors and judges. It was said that fulfilment of the "quota" is a significant element of the yearly evaluations and affects the prospects of promotion.

170. The prosecutors are obliged to have "completed" 4 KTRZ cases per year. One prosecutor asserted that it was impossible to complete, i.e. from filing an indictment to verdict, a complex case in less than 3-4 years. Another prosecutor suggested this obligation was a reason for the fragmentation of cases and a third prosecutor that the reason so many indictments were filed in December was to enable prosecutors to complete their quota requirements within the year.

171. One of the judges interviewed was scathing about, what he described as, the "reduction" of the prosecutor's quota to 4 cases a year. He stated that, as this took into account not only indictments filed, but also declining to conduct an investigation or cessation of an investigation, this had resulted in an overall reduction of the numbers of indictments filed. This reduction in turn meant that there were fewer cases in trial and therefore judges were not able to complete the quota imposed upon them, i.e. the delivery by each of 5 judgments per year.

172. The presidents of the HJPC and Supervisory Body are all too aware of the criticisms expressed by judges and prosecutors. Their view is that a quota system is a "necessary evil".

173. A 2019 EU Expert Report stated "*All judges and prosecutors in the four systems need to be subject to performance appraisal. Objections to it have been settled by the Constitutional Court. There are evident difficulties with the transition towards a more quality-based system of evaluation of judges and prosecutors. The previous system was over-reliant on quantitative criteria and statistics, which has shown to lead to distorted incentives for both judges and prosecutors. A reform has been adopted introducing new criteria for performance evaluation in line with Commission recommendations. The reform puts much more emphasis on genuine quality, which is balanced against quantity. Taking into consideration the enormous backlogs of cases, any demand to further reduce quotas should be examined with extreme caution.* ***The "obsession" over quota reduction does not appear justified as in practice the vast***

majority of judges and prosecutors fulfil or even exceed their 100% quota."[117] (emphasis added)

174. This last sentence, it is respectfully submitted, is somewhat unfortunate as it could be seen as undermining the previous, well-made point that the quota system "was over-reliant on quantitative criteria and statistics". There needs to be some kind of performance evaluation, but it should not be an arbitrary one, specified as a number of completed cases or judgements delivered, but one which contains sufficient flexibility to accommodate the particular exigencies, in particular the complexity, of WC cases. The new criteria will be applied for the first time to evaluation of work performed in 2019. Accordingly, at present it is not possible to make any meaningful assessment of its effectiveness in, at the most basic level, mitigating, if not entirely removing, the above-mentioned effects of the previous criteria.

XII. AMENDMENT OF THE CPC

175. As discussed earlier,[118] indictments are still being returned by the judges because it is said insufficient factual detail has been provided by the prosecutor. Despite the recommendation made in the 2016 Report[119], no attempt has been made to amend the CPC. Accordingly, to underline the pressing need for action in the light of the deadline, the reasons for amendment are reiterated below.

176. "*The amount of detail required comes about as a result of the wording of Article 227 of the current[120] CPC, in particular Article 227(1)(c):*

> *"a description of the act pointing out the legal elements which make it a criminal offence, the time and place the criminal offence was committed, the object on which and the means with which the criminal offence was committed, and other circumstances necessary for the criminal offence to be defined as precisely as possible".*

[117] *See* EU Expert Report on Rule of Law Issues in Bosnia and Herzegovina (Brussels, European Union, 5 December 2019). Available at http://europa.ba/wpcontent/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf (accessed 26 May 2020), para. 72.
[118] *See* para. 107 *supra*.
[119] *See* 2016 Report, para. 10.
[120] It is in identical terms to Article 262(1)(2) of the SFRY CPC.

177. *Article 6 of the ECHR requires that the accused should be "informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". However to interpret this right as one which means that every word of the evidence which is to be led in the case must be pleaded is to confuse legal and evidential requirements. The requirement is that an accused should know the case he is required to meet, e.g. that he is charged with the crime of rape which took place at a certain time, in a certain place. The surrounding circumstances which led to the rape are matters of evidence and whether the threat was committed with a bayonet or knife cannot effect the commission of the crime, (although it may be an evidential matter which affects the credibility of the complainant).*

178. *Moreover Article 227 (1) (g) requires the evidence supporting the charges to be provided with the indictment. This in turn requires the judges and their staff, as part of the confirmation procedure, to "examine each count in the indictment and evidence submitted by the prosecutor in order to establish grounded suspicion".*[121]

179. *The problem of contradictory witness statements relating to the events, or witnesses giving a different account when testifying (which is common to all trials but particularly those where the events being described are not only traumatic but took place many years before the trial), which should go only to the credibility of a witness, may become a major issue if it has to lead to an amendment to a factual element of the indictment.*

180. *Furthermore Article 280 of the CPC states:*

> *"The verdict shall refer only to the accused person and only to the criminal offence specified in the indictment that has been confirmed, or amended at the main trial or supplemented".*

181. *This is interpreted by the judges as meaning that the verdict can only be based on the criminal offence as* ***factually*** *described in the indictment. The court retains the power to change the legal characterisation of the crime*[122] *and is mandated to "reach a verdict solely based on the facts and evidence presented at the main trial."*[123] *However if several evidential details need to be amended, (either as a result of unexpected testimony or insufficient attention having been paid to the evidence prior to trial), so*

[121] Article 228(3) CPC.
[122] Article 280(2) CPC.
[123] Article 281(1) CPC.

that the description of the circumstances surrounding the crime are 'significantly' altered, then the perception is that it provides grounds for an appeal.

182. *Accordingly it seems to the author that, without causing any unfairness to an accused, an amendment may be made to Article 227 of the CPC, restricting the amount of evidential material which at present must be pleaded. This would have the effects, at the very least, of reducing the workload placed on both prosecutors and judges by these provisions and consequently speed the progress of these trials.*"

183. In essence Article 227(1)(c) should be rewritten so that it is only required that the date, place, nature of the act, and mode of liability be specified.

184. The 2016 Report also suggested a further amendment to the CPC to deal with the problem of disclosure of evidence to the defence. This problem persists.[124] The reasons why a failure to disclose causes delay to a trial are:

- The trial chamber must give time for the application to be argued;
- If, on a defence application, the court orders disclosure of documents (including witness statements) to the defence and it contains potentially useful material, then adjournments are applied for so that appropriate investigations may be made;
- If a witness says something new (which is germane to an issue) when seen by the prosecutor before trial commences and the prosecutor fails to inform the defence, then delay is again caused whilst the witness is testifying because defence counsel will need to investigate the new information, which also may require the witness to return.

185. It is therefore strongly urged again that an amendment be made to the CPC to mandate disclosure by prosecutors of material in their possession which, although not used in the case under consideration, may have a bearing upon it; in particular **any material which might reasonably be considered capable of undermining the case for the prosecution against the accused or assisting the case for the accused**. This obligation is one which should continue until all legal processes have been completed.[125]

[124] *See* para. 65 *supra*.
[125] This obligation is enshrined in the ICC Rome Statute Art. 67(2) and is fundamental to a fair trial.

XIII. TRAINING

186. A theme which runs through this report is the need for those involved in the processing of WC cases to do so on a basis which is knowledgeable, consistent, and efficient. The standards must be uniform.

187. Many of the recommendations, in particular for the POBiH, involve the preparation and implementation of guidelines or "checklists". Implementation does not simply involve distribution, but includes at least one meeting being held to ensure that all whom the guidelines affect understand them, regular checks being made to see that the guidelines are being adhered to and further meetings being held if they are not.

188. Training in respect of indictments has been referred to earlier in this report.[126] The author has been informed that the OSCE Mission to BiH has offered, and is continuing to offer, extensive training programmes on various aspects of war crimes processing, including concepts related to international criminal law, humanitarian law, human rights, and criminal procedure to the prosecutors and support staff of the POBiH. One concerning note, in light of the observed deficits in knowledge, is the low participation rate of POBiH prosecutors at such training opportunities. OSCE Mission to BiH records from the War Crimes Capacity Building Project (2015–2018) indicate that, while POBiH prosecutors applied for participation in great number, many often failed to appear at those trainings.[127]

189. There are two forms of training relating to the efficiency of trials which require more substantial input. First there must be regular advocacy training for **all** advocates, whether acting for the prosecution (in all courts) or the defence.[128] This training must become mandatory. In respect of prosecutors such a provision may be added to the internal rulebook and must be enforced by the CP. In respect of defence lawyers, a condition of being allowed to appear before the CBiH should be that they must attend an advocacy training course at least twice a year. The OSCE Mission to BiH already runs such courses.[129] Trainers for such courses should be sought from those BiH

[126] *See* para. 103 *supra*.
[127] For example, five POBiH prosecutors registered for a training on plea bargaining procedures held on 11 and 12 May 2017. None of the five actually attended the training and did not provide any explanation for failing to appear.
[128] There is no point in training prosecutors to become more efficient advocates if the defence lawyers are not given the same training.
[129] Through a number of its projects, the OSCE Mission to BiH has delivered trainings led by international (primarily former ICTY prosecutors) and national experts to state and entity level courts and prosecutors' offices. Since 2017 and as part of the WCMP project, for example, trainings have been provided on the subjects of trial advocacy, witness support, legal drafting, sentencing, wartime sexual violence, effective investigations of atrocity crimes, sentencing,and

counsel who regularly appeared in trials at ICTY, but also from international lawyers with experience in trying WC cases.[130]

190. Second, the judges, in particular those from the CBiH (but also if feasible from the entity and district courts) should receive training in the management of cases. As already indicated[131] the CPC does allow for much more control of trial matters than is presently being exercised by the judges. It is important that those who conduct the training should have experience of WC trials. Some of the former ICTY judges have great experience in this area and should be employed to conduct an initial training programme on this specific topic.

191. The initial programme should be followed by monitoring of trials to assess the impact of the training and if necessary a follow-up course(s) should be held. The course should be designed to incorporate not only lectures but practical exercises reflecting typical situations arising in proceedings on which judges are required to rule.

192. This report is not the forum to provide suggested detailed programmes for judicial training[132], but such may be supplied if thought to be of assistance.

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case management. Under the WCCB project, the OSCE Mission to BiH delivered 75 trainings for judges, prosecutors, legal support staff, and defence lawyers. In total, more than 2,150 participants took part in these events. On in-house intensive trainings delivered to prosecutors and legal support staff at the POBiH as part of IWCP project, *see* footnote 81 *supra*.

[130] In 2013, the author produced a report entitled "Assessment of Training Needs for the Investigation and Trial of WC in BiH". This contains more detailed recommendations in respect of advocacy training for prosecutors and defence counsel.

[131] *See* para. 166 *supra*.

[132] Such programmes for the training of advocates were set out in the author's 2013 report on training needs used as a basis for the OSCE Mission to BiH's training.

XIV. CONCLUSION

193. It is with much regret that the overall conclusion of this report is that the state of affairs with regard to the processing of WC cases has not shown the level of improvement which was hoped for after the 2016 Report and which is necessary to meet the envisaged deadlines.

194. It is noteworthy that few of the recommendations made in that report were implemented by the POBiH, and some only after the POBiH was informed that another report had been commissioned.

195. Whilst it is important that the public understands that not every alleged perpetrator of a WC can be prosecuted, it cannot be too strongly emphasized that the public expects – rightly – that those allegedly responsible for the most egregious crimes committed during the conflict will be investigated and prosecuted before the deadline of 2023 expires.

196. The additional factor mandating that immediate steps be taken to accelerate the progress of investigation and trial is the additional delay which has been occasioned by the Covid-19 pandemic.

197. It is the opinion of the author that meeting the deadline for the completion of **all** WC cases has become a goal which is impossible to achieve. Unless the recommended changes are made expeditiously, there is little hope that the deadline will be achieved for anything more than a minority of the pending cases.

Joanna Korner

9 July 2020

APPENDIX A: RECOMMENDATIONS

1. INTRODUCTION

1.1 Whilst the majority of the recommendations are related to the operation and work of the SDWC, it is also suggested that some have a more general application within the POBiH. Some recommendations apply to other institutions which impact the processing of war crimes cases.

1.2 This report and in particular the recommendations which follow (many of which repeat those made in the 2016 Report) should not be read in isolation, but should be taken in conjunction with reports and recommendations, issued since 2016, from other organizations.

1.3 It is understood that the IRMCT OTP presently co-operates with the POBIH in providing evidence and expert assistance for specific cases. Officials from that organisation have confirmed to the author that it is ready and willing to extend such support to include assistance in resolving some of the issues identified by the report.

1.4 The relevant paragraph of this report which provides the rationale for the recommendation is shown in bold after each recommendation.

2. REVISED NWCPS

2.1 Further consideration should be given to the interpretation of the proposed revised criteria to ensure that only cases which are complex in terms of the level of the perpetrator, and/or the complexity of the nature of events charged, and/or the applicable law, are tried at the CBiH.

2.2 The obvious first step which needs to be taken is that, after two years, it is imperative that the revised NWCPS be adopted by the Council of Ministers without further delay.

[See: paras. 23–29]

3. LEADERSHIP OF THE SDWC

3.1 There is an urgent necessity for the CP to delegate authority to ensure the smooth day-to-day running of the SDWC and to ensure that decisions relating to the operation of the department are taken promptly.

3.2 A Head of the SDWC should be appointed without delay.

3.3 It is strongly recommended that, in the light of the heavy workload of the SDWC; the ever-approaching deadline for the completion of WC cases; the need for efficient court prosecution of cases and for the reasons set out in the body of the report that, for a finite period of time (not less than 12 months), the SDWC should be provided with an International Legal Advisor. That person should be a prosecutor with experience in dealing with WC cases and also management.

3.4 The heads of teams should be given authority to manage their teams.

3.5 The areas of responsibility (and tasks which devolve from such responsibilities) for each level of management should be set out in writing. In order to ensure that the allocated tasks are being carried out as envisaged, a system of reporting must be instituted and adhered to.

[See: paras. 35–41]

4. ORGANIZATIONAL STRUCTURES & WORKING PRACTICES WITHIN THE SDWC

4.1 It has been accepted by the CP that there be a return to the team structure. In order to make them effective working units (as set out in the body of this report), prosecutors and investigators assigned to each team must only work on cases covering the assigned geographical areas. Retaining the section structure has the potential to "muddy the waters" by prosecutors being assigned cases from geographical areas which, whilst not within the team, are within the section.

4.2 Accordingly, it is recommended that with minimum delay "sections," as units, be abolished and heads be appointed for each of the six teams.

4.3 In light of the complete geographical mishmash of cases presently assigned to prosecutors and investigators, further consideration must be given to the assignment of individual prosecutors and investigators to the teams. Such assignment must take into account:

- The cases they are presently working on, in particular those designated as KTRZ;
- How much work has been done on any one case;
- The stage reached in a case, particularly whether a case is in trial;
- The area(s) with which they are most familiar.

4.4 Such a review should enable the prosecutors and investigators to be assigned to the team most appropriate to the case(s) on which they have expended the most effort and are therefore areas of the conflict with which they are the most familiar. Cases earlier assigned to them on which they have expended less time and which do not come within the geographical area of that team should be reassigned to the appropriate team.

[See: paras. 42–49]

4.5 Unless a trial has already commenced, no prosecutor assigned an organized crime case should continue to work on that case.

4.6 Only prosecutors with some experience of dealing with WC cases should be appointed to the SDWC.

4.7 The number of prosecutors assigned to the SDWC must be increased.

[See: para. 50]

4.8 Complex WC trials should have the benefit of not less than two lawyers to conduct courtroom advocacy.

[See: para. 53]

4.9 Article 37 of the POBiH handbook setting out the duties of section heads contains insufficient detail. Written guidelines on the duties of heads of teams (and the operation of the teams) should be issued without delay.

4.10 Team/section and intersectional meetings of the SDWC should be held on a regular basis. It is suggested the team meetings should be once a week and that heads of teams/sections meet once a fortnight.

4.11 In order to prevent parallel investigations taking place and to ensure indictments of persons charged crimes arising from the same set of events are joined, full and thorough checks need to be carried out of relevant databases to ensure there is no duplication. For the same reasons, any prosecutor receiving a new case must provide the head of their team with the relevant details.

4.12 In-depth analyses of the reasons for acquittals must be carried out at the first instance by the team responsible for the case. That analysis should be circulated to the heads of all teams/sections. If any head concludes that there are lessons to be learned for all prosecutors then the analysis should be circulated to all and if thought appropriate should be discussed at a collegium of the SDWC.

[See: paras. 55–63]

4.13 A 'checklist' of steps required to prepare for a trial should be compiled by an experienced prosecutor and become standard throughout the SDWC. Such a checklist must include ascertaining whether another prosecutor within the team – or indeed in another team – is conducting a case which has a factual overlap.

[See: paras. 64–67]

4.14 More analysts should be employed to allow for one to be allocated to each of the teams. They should attend the team meetings.

4.15 A military analyst should be employed.

4.16 The prosecutors should decide the tasks to be carried out by the analysts and issue written instructions.

[See: paras. 68–72]

4.17 All databases must be regularly updated. Where updating requires information to be provided by entity and district POs and/or courts, such information should be supplied electronically on a monthly basis. A standardized form should be produced listing the nature of the information needed.

[See: paras. 73–76]

4.18 POBiH investigators should be assigned to teams. Investigation plans, drafted by 'in-house' investigators and those from SIPA, should be prepared **in conjunction with** the prosecutor assigned to a case.

4.19 Sufficient investigators should be assigned to the SDWC to enable each prosecutor to have the assistance of a dedicated investigator. Each investigator should be provided with a mobile telephone for official use.

4.20 Operations conducted by the 'Terra' team should be relinquished to another agency with the appropriate competence and SIPA officers reassigned to work on KTARZ cases until expiration of the NWCPS deadline.

[See: paras. 77–86]

5. MENTORING

5.1 The Rulebook on Mentorship must be fully implemented.

[See: paras. 87–90]

6. INDICTMENTS

6.1 Overall guidelines need to be produced which set out the factors to be taken into account when deciding whether to issue an indictment against an accused which will include matters such as:

- Prioritisation factors e.g. grave nature of crime alleged; whether events in municipality already heavily prosecuted; whether case is categorised as KTRZ;
- The role of the suspect;
- The level of perpetrator;

- Availability of the accused/ prospect of arrest;
- Whether the accused has previously been convicted;
- Nature of the evidence, e.g. reliant on witness testimony alone.

6.2 In order to achieve the goal of trying those allegedly most responsible for the most serious crimes, the only cases which should be retained by the POBiH for investigation and potential indictments are those which fulfil the criteria in the draft revised strategy.

[See: paras. 95–97]

6.3 "Fragmentation" of indictments, without proper justification, must cease.

[See: paras. 98–101]

6.4 In order to improve the quality of the indictments, refresher training on substantive law and drafting skills should be provided and continuing assistance be made available through the adoption of a handbook containing instructions on drafting.

6.5 An increase in the transfer of cases requires, as a matter of urgency, that The Panel for the Harmonization of Case Law further examines the issue of disparities between the BiH CC and the SFRY CC.

[See: paras. 102–106]

6.6 Indictments should not be issued against accused that are outside the jurisdiction of the CBiH unless there is a **realistic** prospect that they will be returned to BiH for trial. Case files should be remitted for investigation and prosecution to the relevant PO of the country concerned.

[See: paras. 110–112]

6.7 Indictments should not be issued against accused who have already been convicted of WC in a previous trial unless the indictment alleges that the accused had command responsibility for a crime of such magnitude that public policy demands he be brought to account **and** that the likely sentence, in event of conviction, will increase any sentence he has previously received.

[See: paras. 113–118]

7. BACKLOG AND TRANSFER OF CASES

7.1 As already stated above, guidelines on the prioritisation of cases must be issued.

7.2 A once-and-for-all analysis should be carried out immediately on the KTNRZ cases which are presently in the POBiH to establish whether there are any linked with serious KTARZ cases. Those without such links should be transferred to the entity or district POs.

7.3 Transfer by the POBiH/CBiH of all cases which do not fulfil the criteria of the draft revised strategy must take place without further delay.

7.4 A list of the cases which will be transferred, together with the names of the POs and courts to which transfer will take place, must be supplied to the Supervisory Body.

7.5 Once these lists have been received, the chief prosecutors and presidents of courts affected by the transfer must notify the Supervisory Body if such transfer will cause logistical problems.

[See: paras. 119–139]

8. CASES OF SEXUAL VIOLENCE

8.1 Funding should be made available, until the expiration of the deadline, for the VWS and WSN to continue their support of alleged victims of sexual violence.

8.2 Greater use should be made of the option for witnesses of sexual violence to give remote testimony.

8.3 Guidelines should be issued by the POBiH on the drafting of indictments and preparation for trial, which should include matters pertinent to alleged crimes of sexual violence.

[See: paras. 140–145]

9. THE 'CATEGORY A' CASES

9.1 As noted in the body of this report, the status of the so-called 'Category A' cases is a pressing concern for victims' associations in particular and the public in general.

9.2 The compiling of the information is a relatively straightforward record-checking exercise and the delay in providing the information is inexcusable.

9.3 The task should be completed and the information made public by the CP as a priority task.

9.4 The POBiH should keep the public informed of the progress of WC cases through regular press releases and press conferences.

[See: paras. 146–153]

10. LENGTH OF TRIALS

10.1 In order to complete the maximum number of WC trials before the deadline, the present length of trials must be reduced. Both prosecutors and judges must be proactive in taking proper measures to achieve this goal.

10.2 As far as prosecutors are concerned, such measures commence with the decision in respect of whom to indict and for which crimes. Thereafter in preparations for trial they should ensure that the only evidence presented is that which is strictly necessary for proof of the crime and the accused's involvement therein.

10.3 The application for admission of adjudicated **facts**, i.e. not argument, should be made sufficiently in advance of trial for rulings to be made which will allow for the adjustment of evidence to be called before trial. There should be greater use of adjudicated facts.

10.4 Judges must use their powers of case management as set out in Article 239 CPC to reduce the length of trials.

10.5 In order for trials to be completed within a reasonable timeframe, more courtrooms should be made available (even if outside the court building); witnesses should be heard in a continuous session even if that requires them to stay more than one day.

[See: paras. 154–168]

11. HJPC PERFORMANCE EVALUATION PROCESS ('QUOTA')

11.1 Once the evaluations for 2019 have been completed, feedback should be obtained from those administering and affected by the system.

11.2 If the feedback demonstrates that the new criteria is still "over-reliant on quantitative criteria and statistics" then further amendments should be made before the assessment of 2020 performance.

[See: paras. 169–174]

12. AMENDMENT OF THE CPC

12.1 It is recommended again that an amendment be sought to Article 227 of the CPC to the effect that the only evidential matters which need to be pleaded in an indictment are such as to make it clear to an accused:

- The date or period in which he committed the alleged crime;
- The place in which the crime was committed;
- The general nature of the eventual basis which gives rise to the allegations.

12.2 It is also recommended again that the CPC be amended to mandate a continuing duty of disclosure by the prosecutor of material which may undermine the case for the prosecution or assist the accused in his/her defence.

[See: paras. 109, 175–185]

13. TRAINING

13.1 Mandatory advocacy training should take place on a regular basis for all prosecutors and defence lawyers wishing to conduct cases before the CBiH.

13.2 Judges, in all courts if possible but pre-eminently those trying WC cases at the CBiH, should be provided with training in case management.

13.3 Courses should be designed to incorporate not only lectures but practical exercises reflecting typical situations arising in proceedings on which judges are required to rule.

13.4 The management of the POBiH and CBiH should take all necessary measures to ensure the attendance of relevant staff at such trainings and to monitor their progress following the training.

13.5 The impact of such training should be assessed by monitoring of trials after training courses have been held.

[See: paras. 186–192]

APPENDIX B: TERMS OF REFERENCE

The Mission is implementing the *Strengthening Rule of Law by Improving War Crimes Processing in Bosnia and Herzegovina* Project (Project), funded by the Government of the United Kingdom. The Project represents a follow-up on the findings and recommendations contained in the Mission's 2016 report *Processing of War Crimes Cases at the State Level in Bosnia and Herzegovina*, prepared by Judge Joanna Korner, CMG QC (Korner Report), which identified in broad terms systemic challenges and concerns regarding the processing of war crimes at the state level in Bosnia and Herzegovina (BiH). The Project is being implemented in three phases, consisting of a needs assessment phase (conducted in early 2018), delivering of targeted technical assistance (2018-2019), and a final review of achieved results (2020).

The third and final phase of the Project entails a thorough review of implementation of recommendations provided in the Korner Report and the Needs Assessment Report (produced during the first phase of the Project), as well as the progress achieved with regard to prosecution of war crimes cases at the state level in BiH since the publication of the Korner Report. The review will assess to what extent the activities undertaken by the Prosecutor's Office of BiH (POBiH) have succeeded in addressing the challenges obstructing the achievement of goals set forth in the National War Crimes Processing Strategy (NWCPS). Given that the deadlines set out in the NWCPS were not met despite substantial investment by the international community in terms of the resources available for war crimes processing, it is important at this time to ensure that the activities of the POBiH and Court of BiH are properly directed to achieving those goals as expeditiously as possible and successfully addressing challenges and barriers that have prevented them from meeting the established deadlines. In particular, the review will also assess which of the recommendations from the Korner Report have not been implemented, or have only been partially met.

Among other aspects, the review will focus on assessing whether: (1) case prioritization and organization is effectively standardized, ensuring that only most complex cases are adjudicated at the state level in line with the NWCPS; (2) existing and future resources are maximised through dissemination of best practices and knowledge sharing, contributing to the overall efficiency of investigation procedures and quality of indictments; and (3) overall capacity and expertise of the POBIH are utilized in the most effective and efficient manner, and what measures can be undertaken to increase the quality of investigations, indictments, and judicial proceedings at the state level; and (4) more efficient data management and internal communication mechanisms are substantially enhanced, resulting in improved material evidence management and efficiency of criminal investigations.

To ensure that this complex task reaches the high standard of quality required, and in order to secure a fully independent and objective final evaluation, an external international expert with proven experience and expertise in the prosecution or adjudication of complex war crimes cases will be engaged for this activity (Expert Consultant).

Objective

The Expert Consultant will review the progress made by BiH judiciary since the publication of the Korner Report (2016), identify achievements, shortcomings, and challenges (operational and strategic), and develop recommendations to improve the work of judicial institutions (POBiH in particular), so that they can fully achieve the goals of the NWCPS. The consultant may, as she/he deems appropriate, further review judgments in war crimes cases to accurately and fully assess performance in the investigation and commencement of such cases. In reviewing the performance of the POBiH and Court of BiH, the consultant will focus on areas and issues which she/he deems relevant. The consultant will have discretion to further engage with officials from the High Judicial and Prosecutorial Council (HJPC) and the Supervisory Body for Monitoring of the NWCPS Implementation, and with any other relevant institutions.

Tasks and Deliverables

- Familiarize herself/himself with the objective, specific activities, and results of the Project, main working documents of Phase I (the Needs Assessment Report and Plan of Technical Assistance) as well as with the Mission's most recent reports concerning war crimes processing in BiH;
- Provide a comprehensive and thorough review of implementation of recommendations provided in the Korner Report and the Needs Assessment Report, as well as the progress achieved with regard to prosecution of war crimes cases at the state level in BiH since the publication of the Korner Report, with a particular focus on POBiH, and develop a methodology to achieve this goal;
- Conduct working meetings/interviews with all relevant counterparts at the relevant institutions, including the High Judicial and Prosecutorial Council, the POBiH, the Court of BiH, and the Supervisory Body for Monitoring of the NWCPS Implementation, as well as other relevant institutions and organizations if necessary;
- Review the following and any other issues the Expert Consultant deems appropriate to achieve the objective of this ToR:
    (i) Functioning of the recently re-introduced team structure within POBiH Special War Crimes Department;
    (ii) Functioning of the overall management structures within POBiH and providing specific recommendations as to how to improve the organizational and managerial system within POBiH;
    (iii) Extent to which the processing of most complex war crimes cases is prioritised at the state level in BiH, in accordance with the NWCPS, including the transfer of less complex cases to the entity/Brčko District level;
    (iv) Any other issues identified in the Korner Report, in subsequent OSCE Mission to BiH reports, or during the review.
- Provide a written report on the above by 28 February 2020 with recommendations on how to improve identified problems, if any.

Minimum qualifications required:

- Proven experience of over 15 years as a criminal court judge, prosecutor, or defence counsel;
- Minimum 8 years of experience working on war crime cases as a judge, prosecutor, or defence counsel;
- Familiarity with the functioning of the BiH judicial system;
- Extensive knowledge of the BiH legal and institutional framework for the prosecution of war crimes;
- Extensive knowledge and understanding of the recent armed conflicts in the Balkans;
- Proficient legal writing, analysis, and reporting skills;
- Basic knowledge of Mission activities in relation to war crimes processing in BiH;
- Excellent drafting skills in English;
- Ability to present contentious topics in a clear and understandable manner.

Recommended Consultant:

Judge Joanna Korner

Justification:

The proposed Expert Consultant is on the Mission's roster list.

Reporting and teamwork:

The candidate will report to the HDD Director, through the National Project Manager and Head of the Rule of Law Section.

APPENDIX C: LIST OF KEY DOCUMENTS REVIEWED

- CBiH Report to Supervisory Body June 1 2019
- EU Expert Report on Rule of Law Issues in BiH (5 December 2019)
- HJPC 2018 Annual Report
- HJPC Report '*Project Enhancing War Crime Processing in BiH*' (01.01.2018 – 31.12.18)
- HJPC Report '*Project Enhancing War Crime Processing in BiH*' (01.01.2019 – 30.09.19)
- HJPC Report '*Project Enhancing War Crime Processing in BiH*' (01.01.2019 – 31.12.19)
- Law on Transfer of Cases from The ICTY to the POBiH
- OSCE Mission to BiH Report '*Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road "Category A" cases*' (September 2018)
- OSCE Mission to BiH Report '*Mentoring and initial training at the BiH Prosecutor's Office: Findings and Recommendations*' (January 2019)
- OSCE Mission to BiH Report '*War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina'* (Spot Report June 2019)
- POBiH Report to Supervisory Body June 1 2019
- POBiH Report to HJPC September 2 2019
- Revised National War Crimes Strategy (May 2018)
- Rulebook on the Procedure of Appointment and Methods of Work of Consultative Prosecutors (November 2017)
- Rulebook on Mentorship in the POBiH (3 January 2020)

APPENDIX D: LIST OF PERSONS INTERVIEWED

20 January 2020:	Izet Odobašić	POBiH (Prosecutor)
	Milanko Kajganić	POBiH (Prosecutor)
	Sanja Jukić	POBiH (Prosecutor)
	Mirza Junuzović	POBiH (Analyst)
	Aida Čadar	POBiH (Analyst)
	Melisa Čevra	POBiH (Analyst)
	Tanja Savić	Defence Lawyer
21 January 2020:	Ahmed Mešić	POBiH (Prosecutor)
	Igor Dubak	POBiH (Prosecutor)
	Behaija Krnjić	POBiH (Prosecutor)
	Aleksandar Faladžić	POBiH (Investigations Chief)
22 January 2020:	Gordana Tadić	POBiH (Chief Prosecutor)
	Minka Kreho	CBiH (Judge)
	Ranko Debevec	CBiH (President)
	Željka Marenić	CBiH (Judge)
23 January 2020:	Žarko Kalem	SIPA (Head of WC Department)
	Mevludin Mujezinović	SIPA (investigator)
	Novak Mijović	SIPA (investigator)
	Tarik Crnkić	Istočno Sarajevo Prosecutor
	Senad Osmić	POBiH (Prosecutor)
	Irisa Čevra	Defence Lawyer
	Lejla Čović	Defence Lawyer
24 January 2020:	Munib Halilović	Federal Prosecutor
	Branko Mitrović	RS Prosecutor
27 January 2020:	EU Delegation to BiH	Rule of Law Personnel
	Đermin Pašić	POBiH (Prosecutor)
	Alma Taso	CBiH (Witness Support)
	Jadranka Lokmić-Misirača	President Supervisory Body
28 January 2020:	Edin Muratbegović	POBiH (Prosecutor)
	Izet Odobašić	POBiH (Prosecutor)
	Milan Tegeltija	President HJPC
	Gordana Tadić	POBiH (Chief Prosecutor)

29 January 2020:	Murat Tahirović	President, Association of Victims and Witnesses of Genocide
	Zekerija Mujkanović	Brčko Chief Prosecutor

APPENDIX E: POBiH DECISION: DETERMINATION OF GEOGRAPHICAL AREAS TO TEAMS

[Seal of the Prosecutor's Office of BiH]

Number: A 28/20

Sarajevo, 3 January 2020

Based on Article 5 paragraph 1 of the Law on the POBiH ("Official Gazette of Bosnia and Herzegovina", no. 49/09 – consolidated text, 97/09) and Article 8 and 30 paragraph 3 Rulebook on the Internal Organization of the POBiH ("Official Gazette of Bosnia and Herzegovina", no. 29/14 – consolidated text, 56/15, 66/19), the Chief Prosecutor of the POBiH issues:

DECISION

determining geographic areas for prosecutorial teams and sections of the Special War Crimes Department of the POBiH

I

The Special War Crimes Department has 6 teams, divided into 3 sections with 2 regional teams each:

a) Team IV and Team V – Section I
b) Team I and Team II – Section II
c) Team III and Team VI – Section III

II

The Special War Crimes Department, with the teams, is regionally divided as follows:

a) Team I – North-western Bosnia and part of Posavina
b) Team II – Central Bosnia
c) Team III – Eastern Bosnia (Drina river valley) and part of Posavina
d) Team IV – Sarajevo and Eastern Bosnia including Foča
e) Team V – Western Herzegovina and Neretva river valley
f) Team VI – Srebrenica

III

a) **Section I –** Team IV and V *(Sarajevo and Eastern Bosnia including Foča and Western Hercegovina and Neretva river valley)*

Team IV:

Sarajevo (city municipalities), Istočno Sarajevo, Ilijaš, Trnovo, Gacko, Goražde, Kalinovik, Nevesinje, Bileća, Foča.

Team V:

Prozor/Rama, Jablanica, Konjic, Mostar, Duvno/Tomislavgrad, Kupres, Čapljina, Stolac, Ljubuški, Livno, Ljubinje, Ravno, Široki Brijeg, Grude, Čitluk, Neum, Posušje, Berkovići, Trebinje, East Mostar.

b) **Section II –** Team I and II *(Northwestern Bosnia and part of Posavina and Central Bosnia)*

Team I:

Sanski Most, Ključ, Drvar, Novi Grad/Bosanski Novi, Mrkonjić Grad, Glamoč, Banja Luka, Bosanski Petrovac, Bosanska Kostajnica, Kozarska Dubica, Gradiška, Prijedor, Bosanska Krupa, Velika Kladuša, Kotor Varoš, Bosansko Grahovo, Laktaši, Bihać, Šipovo, Oštra Luka, Prnjavor, Srbac, Ribnik, Skender Vakuf/Kneževo, Bužim, Cazin, Čelinac, Krupa na Uni, Drinići, East Drvar.

Team II:

Jajce, Dobretići, Jezero, Bugojno, Žepče, Vitez, Visoko, Donji Vakuf, Kiseljak, Kreševo, Fojnica, Travnik, Gornji Vakuf, Maglaj, Busovača, Vareš, Novi Travnik, Zavidovići, Kakanj, Zenica, Tešanj, Olovo, Breza, Usora.

c) **Section III –** Team III and VI *(Eastern Bosnia (Drina river valley) and part of Posavina and Srebrenica)*

Team III: Srebrenica, Milići, Bratunac, Zvornik, Vlasenica, Višegrad, Bosanski Brod/Brod, Teslić, Gradačac, Domaljevac, Šamac, Odžak, Modriča, Doboj, Derventa, Rogatica, Kalesija, Han Pijesak, Čajniče, Sokolac, Brčko, Čelić, Teočak, Banovići, Šekovići, Bijeljina, Lopare, Tuzla, Lukavac, Ugljevik, Srebrenik, Sapna, Živinice, Pale, Prača, Orašje, Vukosavlje, Rudo, Kladanj, Novo Goražde, Doboj East, Doboj South, Gračanica, Osmaci, Pelagićevo, Petrovo, Donji Žabar.

Team VI:

Srebrenica, July 1995.

IV

The Map of Bosnia and Herzegovina with the areas on which the prosecutorial teams of the SDWC of the POBiH work constitutes part of this decision.

V

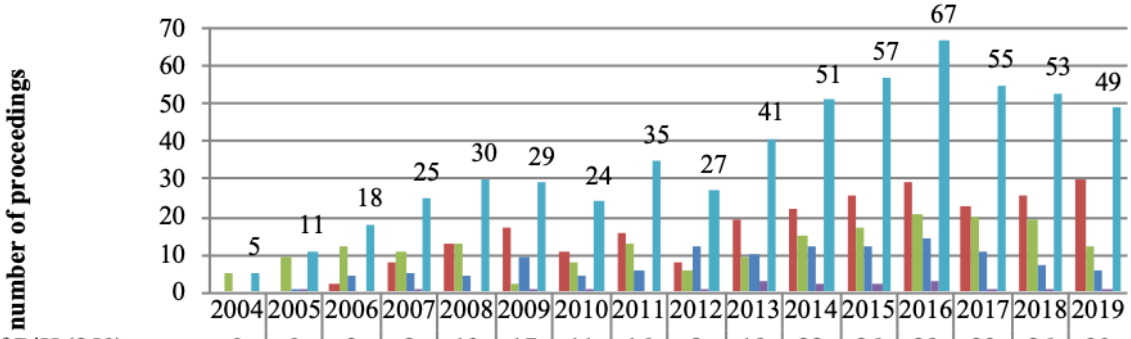
The decision enters into force on the day of its issuing.

APPENDIX F: OVERVIEW OF COMPLETED TRIALS

War Crimes Case Processing in BiH (2004 – 2019)
According to information available as of 2 March 2020

In 2019, the OSCE Mission to Bosnia and Herzegovina observed a **further year-on-year decline in the number of completed war crimes[133] cases.** In 2019, only 49 proceedings against 88 defendants charged with war crimes were completed by the BiH judiciary. Since the Mission began to monitor war crimes processing in BiH in 2004, **a total of 577 proceedings involving 873 defendants have been completed.**[134] However, according to the information available to the Mission at the end of 2019, there remains a backlog of 621 unresolved cases involving 4,736 suspects.

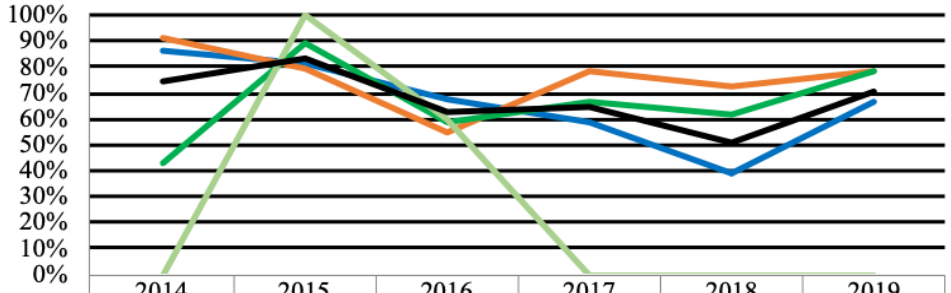
War Crimes Proceedings Completed (2004 – 2019)



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Court of BiH (250)	0	0	2	8	13	17	11	16	8	19	22	26	29	23	26	30
Federation of BiH (192)	5	9	12	11	13	2	8	13	6	9	15	17	21	20	19	12
Republika Srpska (117)	0	1	4	5	4	9	4	6	12	10	12	12	14	11	7	6
Brčko District of BiH (18)	0	1	0	1	0	1	1	0	1	3	2	2	3	1	1	1
Total (577)	5	11	18	25	30	29	24	35	27	41	51	57	67	55	53	49

The Mission observed that **the average final instance conviction rate in 2019 has increased to 71%,** following the concerning low record of 2018 (51%). Contributing to the above, the conviction rate at the Court of BiH has risen from 39% (2018) to 67% but it is still within a trend of decline of the conviction rate in war crimes judgments at state level visible from 2016.

Conviction Rate in Final Verdicts (2014 - 2019)



	2014	2015	2016	2017	2018	2019
Court of BiH	86%	82%	68%	59%	39%	67%
Federation of BiH	92%	79%	55%	79%	72%	79%
Republika Srpska	43%	89%	58%	67%	62%	79%
Brčko District of BiH	0%	100%	60%	0%	0%	0%
All	75%	84%	63%	65%	51%	71%

[133] For the purposes of this factsheet, the term "war crimes" comprises crimes against humanity, genocide and war crimes (under its legal definition). The term "proceedings" refers to proceedings with a confirmed indictment, while "cases" includes investigations. The data presented herein was gathered independently by the OSCE Mission to Bosnia and Herzegovina and represents the situation as of 2 March 2020. The information obtained is not official data provided by BiH judicial institutions.
[134] For the purposes of this factsheet, "completed" refers to those proceedings closed with a final instance verdict or proceedings discontinued for procedural reasons, such as the death of the defendant.

Pending War Crimes Proceedings

In 2019, the Mission observed a **considerable decrease in the number of first instance verdicts rendered**, with 35 first instance verdicts delivered, compared with 53 in 2018. The number of ongoing proceedings at the end of 2019 (244) is slightly lower compared to the end of 2018 (249). Of these 244 proceedings, 6 were awaiting confirmation of indictment, 95 were at the pre-plea stage, 22 were awaiting the start of the main trial, and 121 were on trial, retrial or appeal. **A major obstacle to processing these cases is the unavailability of defendants to the courts**, usually because they are located in a foreign country and cannot be extradited by law. **This problem affects approximately 30% of ongoing cases**: in a total of 74 pending proceedings, 76 defendants are inaccessible to the relevant court in BiH. The number of indictments confirmed at the end of 2019 shows that the overall trend of a reduced influx of new indictments before courts continues.

Jurisdiction	Proceedings (Defendant inaccessible)	Defendants (Inaccessible)
Court of BiH	126 (43)	338 (45)
Federation of BiH	72 (10)	92 (10)
Republika Srpska	40 (21)	44 (21)
Brčko District of BiH	6 (0)	7 (0)
Total	**244 (74)**	**481 (76)**

Indictments Confirmed, 2014–2019

Jurisdiction	2014	2015	2016	2017	2018	2019
	Cases (defendants)	Cases (defendants)	Cases (defendants)	Cases (defendants)	Cases (defendants)	Cases (defendants)
Court of BiH	57 (116)	49 (132)	33 (85)	29 (65)	34 (97)	17 (39)
FBiH	20 (25)	20 (22)	21 (34)	13 (21)	11 (17)	13 (14)
RS	16 (25)	15 (18)	12 (17)	7 (15)	10 (13)	6 (6)
BDBiH	3 (4)	1 (1)	0	0	2 (2)	2 (3)
Total	96 (170)	85 (173)	66 (136)	49 (101)	57 (129)	38 (62)

Transferred Cases,[135] 2009–2019

Jurisdiction	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Federation of BiH	3	34	16	145	43	34	21	27	16	127	50
Republika Srpska	3	10	8	71	15	9	11	4	7	38	25
BDBiH	0	1	1	1	0	0	0	0	1	2	1
Total (724)	6	45	25	217	58	43	32	31	24	167	76

Taken Over Cases,[136] 2009–2019

Jurisdiction	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Federation of BiH	2	5	19	42	29	11	4	22	7	5	1
Republika Srpska	1	1	6	16	37	23	7	7	13	3	3
BDBiH	0	0	0	1	1	6	1	1	0	0	0
Total (274)	3	6	25	59	67	40	12	30	20	8	4

[135] "Transferred cases" refers to those transferred from the Court of BiH to be processed by entity-level and Brčko District courts. Out of a total number of 724 cases transferred since 2009, 534 were KTRZ cases (a case category in which the criminal offence and perpetrator are known). In 2019, out of 76 cases transferred, only 27 were KTRZ cases.

[136] "Taken over cases" refers to cases taken from entity-level and Brčko District courts to be processed by the Court of BiH.

APPENDIX G: ANALYSIS OF IMPLEMENTATION OF 2016 RECOMMENDATIONS

The TOR for this report mandated "a thorough review of implementation of recommendations in the Korner [2016] report". Whilst the text deals with those recommendations (in some instances reproducing them), for ease of reference this appendix lists each of the recommendations made in the previous report and the implementation thereof.[137]

1. LEADERSHIP OF THE POBiH

- Delegation by CP of responsibility for management of SDWC: Not implemented
- Appointment of Chief of Prosecutions: Not implemented

2. MANAGEMENT STRUCTURES

- Return to Geographic Region-Based Team Structure: Implemented (in part) January 2020
- Weekly meetings of teams[138]: Not implemented
- Regular meetings of team (section) heads: Not implemented
- Overall analysis of crimes in each municipality: Not implemented
- Guidelines for Prioritisation of Cases: Not implemented
- Mentoring: Implemented (in part) 2019/2020
- SDWC prosecutors only working on WC cases: Implemented (in part) 2019

3. INVESTIGATIONS

- Avoidance of parallel investigations: Implemented erratically
- Appointment of investigators to SDWC with previous WC experience: Implemented

[137] Where the words "in part" appear in the table, unless otherwise specified, it indicates that not all aspects of the recommendation have been carried out.
[138] Whilst teams only came into existence in January 2020, there were no weekly meetings of the sections which were the units of work between 2016 and 2020.

- Sufficient investigators assigned to each of teams (sections): Not implemented
- Investigators to be supplied with official transport: Implemented
- Investigators to be supplied with official mobile telephones: Not implemented

4. CO-OPERATION BETWEEN POBiH AND JUDGES

- Revision of criteria for complexity of WC cases heard before CBiH: Implemented (in part)[139]
- Monthly meetings between working groups of CBiH and POBiH: Implemented (in part)

5. FORM OF INDICTMENTS & LEVEL OF PERPETRATORS

- Mandatory training (including practical elements) for prosecutors and investigators on the legal elements of WC: Implemented (in part)
- POBiH Guidelines on the form and content of indictments: Not implemented[140]
- Review of indictments for legal and factual accuracy before filing: Implemented allegedly, but if so with insufficient rigour
- Transfer of all cases not fulfilling criteria for trial at CBiH: Not Implemented
- Cessation of filing indictments in order to meet "quota" requirements: Practice allegedly persists
- Cessation of filing indictments against low level perpetrators and those not within the jurisdiction of the CBiH: Not implemented
- Cessation of practice of "fragmenting" cases: Improved but persists
- Policy of consistent legal qualification in respect of accused charged with crimes arising from same events: Implemented

[139] "In part" here refers to the **draft** revised NWCPS.
[140] The said guidelines were developed as part of the IWCP and are pending adoption by the POBiH.

6. BACKLOG AND TRANSFER OF CASES

- Review of cases before CBiH for possible transfer: Implemented (in part)
- Transfer of cases not suitable for trial at CBiH: Implemented (in part)

7. CASES OF SEXUAL VIOLENCE

- Extension of protective measures for victims to all courts: Implemented
- Guidelines issued by POBiH on form and content of indictment to contain specific provision that complainants are not named: Not implemented

8. QUOTA SYTSTEM

- Revision of criteria: Implemented

9. THE CPC

- Amendment to Article 227: Not implemented
- Amendment to mandate duty of continuing disclosure to defence by prosecutor: Not implemented