

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

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EXECUTIVE SUMMARY

The purpose of this analysis is to identify the areas which are hindering the completion of the National War Crimes Strategy in Bosnia and Herzegovina and to make recommendations which it is suggested may improve the work of both the Prosecutor's Office of BiH and the Court of BiH.¹ The Supervisory Body charged with oversight of the NWCS published a report in January 2016 which should be read in conjunction with this analysis.

Before turning to the specific areas of concern, the analysis contains an overview of problems which are generally present in prosecutions for war crimes taking place more than 20 years after the events under consideration.²

The research carried out involved consideration of documents and interviews with persons most closely involved in the processing of war crimes cases³ and raised numerous issues. The analysis concentrates on those which are fundamental and in need of urgent attention.

The first issues considered are: the management and operation of the POBiH⁴ and the nature of the indictments⁵. This section encompasses:

- the level of perpetrators
- “fragmentation” of cases and/or accused
- inconsistency in legal characterisation of the crimes and legal issues of command responsibility; and
- the number of indictments being returned.

Further issues of importance are: the backlog and transfer of cases from the Court of BiH;⁶ witness protection and cases of sexual violence;⁷ the effect of the ‘quota’ system of assessment;⁸ and the interpretation of Article 227 of the CPC 2003⁹.

It is pointed out in the conclusion¹⁰ although the recommendations address the issues concerning the POBiH in the context of war crimes; some have a wider application within that office. Moreover, the ToR¹¹ did not include a requirement to analyse the trials, but this aspect should not be overlooked when considering whether the processing of war crimes cases could be improved.

¹ See Section III & Appendix I

² See Section VI

³ See Appendices F & G

⁴ See Section VIII

⁵ See Section IX

⁶ See Section X

⁷ See Section XI

⁸ See Section XII

⁹ See Section XIII

¹⁰ See Section XIV

¹¹ See Appendix B

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I. LIST OF ACRONYMS

BiH:	Bosnia and Herzegovina
CaH:	Crimes against Humanity
CPC:	Criminal Procedure Code of BiH 2003
CP:	Chief Prosecutor (Goran Salihović)
DCP:	Deputy Chief Prosecutor, SDWC (Gordana Tadić)
ICTY:	International Criminal Tribunal for the former Yugoslavia
IPA:	Instrument for Pre-Accession [to EU]
HJPC:	High Judicial and Prosecutorial Council of BiH
JPTC:	Judicial and Prosecutorial Training Center
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 crime committed
NWCS:	National War Crimes Strategy
POBiH:	Prosecutor's Office of Bosnia and Herzegovina
RPE:	Rules of Procedure and Evidence
SDWC:	POBiH Special Department for War Crimes
ToR:	Terms of Reference

II. INTRODUCTION AND METHODOLOGY

1. In May 2015, the author of this paper was asked by the ICTY Prosecutor, Mr. Serge Brammertz and the OSCE Ambassador to Bosnia and Herzegovina (“BiH”), Jonathan Moore, to undertake an analysis of the processing of war crimes by the Prosecutor’s Office of BiH and the Court of BiH.
2. The purpose of this analysis is to make recommendations to assist in the improvement of the work of both the Court of BiH and the POBiH “so that they can achieve the goals of the National War Crimes Strategy [“NWCS”] as expeditiously as possible.”¹² The aim of the research carried out was to identify the areas which are hindering the process and to consider what steps can be taken to rectify matters.
3. The parameters of this analysis are set out in the terms of reference (“ToR”).¹³
4. It was understood that both the Chief Prosecutor (“CP”) of the POBiH, Goran Salihović and the President of the Court of BiH, Meddžida Kreso, had agreed to co-operate with this analysis. Both were sent letters dated 5 August 2015¹⁴ by OSCE outlining the nature of the analysis and the co-operation which was required to make the analysis as complete as possible. In advance of the proposed meetings, the Court of BiH and POBiH were sent questionnaires.¹⁵ Regrettably as far as the latter was concerned, notwithstanding his verbal agreement given to both the ICTY Prosecutor and the OSCE Ambassador, co-operation was limited.¹⁶
5. Accordingly, this analysis is based upon:
 - (a) A review of indictments confirmed between January 2014 and July 2015;
 - (b) Reports and assessments of the OSCE Mission to BiH covering the same period;¹⁷

¹² See Appendix B *infra*, p.2, Objective, para.1.

¹³ See Appendix B *infra*.

¹⁴ See Appendix C *infra*.

¹⁵ See Appendices D&E. Some of the information provided in the POBiH response, (received after interviews had been conducted with staff in October 2015), is inconsistent with that given orally to the author.

¹⁶ See Section IV *infra*.

¹⁷ The author of this report wishes to record her gratitude to the OSCE Mission to BiH for its invaluable assistance in the preparation of this analysis. Much of the relevant information, which provided the basis for the interviews conducted, was already contained in the reports of the OSCE Mission to BiH.

- (c) Documents relating to the indictments provided by the judges and their legal officers;
- (d) Interviews with judges and their staff¹⁸;
- (e) Interviews with a selection of current prosecutors¹⁹ and former employees of the POBiH²⁰;
- (f) Interviews with other interested parties²¹;
- (g) The 2016 report of the Supervisory Body for Monitoring the Implementation of the National Strategy for War Crimes Processing, (hereinafter “Supervisory Body”)

¹⁸ Given the number of judges now sitting as part of the War Crimes Chamber (“WCC”) and their trial commitments, not all could be personally interviewed. However many were present at the introductory meeting held on 18 August 2015 and the author is satisfied that a representative sample made themselves available for more in-depth discussion. In respect of their staff, the author is particularly grateful to Jasenka Ferović for the time she took to explain the reasons for some of the returned indictments and relevant aspects of the Code of Criminal Procedure. *See* Appendix F for a list of those interviewed.

¹⁹ As with the judges, the number of prosecutors now working on war crimes cases meant not all could be interviewed. A representative sample was selected to include those who had worked in the war crimes department from its inception, (who were personally known to the author), and those who were responsible for indictments about which concerns had been raised by either OSCE Mission’s to BiH monitors or judges.

²⁰ This included former investigators. Some of these former employees asked that their identities be kept confidential. Accordingly their names do not appear in the list of interviews conducted at Appendix F.

²¹ The vast majority of interviews were conducted via interpretation. Accordingly direct quotes referenced in this report are as interpreted. For the most part, such quotes are referenced as “a prosecutor” or “a judge.” The exceptions to this rule are persons in positions of responsibility. The author retains her notes of each interview. In respect of interviews conducted with members of the POBiH, present at all interviews were staff from the POBiH who took notes and one of whom spoke both the Bosnian language and fluent English.

6. Whilst time and translation constraints meant that not all indictments, which gave rise to concern, could be considered in-depth nor, as a result of the refusal by the CP to allow access to investigation files,²² was it possible to examine the evidence which led to the indictments, nonetheless themes emerged from interviews and the available documents which satisfied the author that a proper analysis could be made.²³
7. The recommendations which arise from this analysis appear, for ease of reference, as a separate annex to this report (Appendix I). Each recommendation refers back to the relevant paragraphs of the analysis.

III. BACKGROUND

8. On 29 December 2008, the BiH Ministry of Justice put out the following press release:

*“Council of Ministers of BiH has adopted today the National Strategy for Processing of War Crimes Cases. The Strategy provides systematic approach to solving the problem of the large number of war crimes cases in the courts and prosecutor's offices of Bosnia and Herzegovina. The document defines the timeframes, capacities, criteria and mechanisms of managing war crimes cases, standardization of court practices, issues of regional cooperation, protection and support to victims and witnesses, as well as financial aspects, and supervision over the implementation of the Strategy. **The Strategy emphasizes the need to process the most complex and highest priority war crimes cases within seven years, and other war crimes cases within 15 years.** A Central register of all war crimes cases in Bosnia and Herzegovina will be established at the level of the Court and Prosecutor's Office of Bosnia and Herzegovina. At the same time, the functional mechanisms of managing cases will be provided, i.e. of their*

²² See para. 21 *infra*.

²³ In reaching this conclusion, the author was assisted by the fact that she had participated in the establishment of the war crimes department of the POBiH in 2004-2005 and in 2013 had produced a report concerned with the training needs for judges and prosecutors working on war crimes cases. That report was based on research conducted with nearly all chief prosecutors and court presidents of both entity courts and the Court of BiH.

allocation between the state judiciary and judiciary of the entities. The most responsible perpetrators of war crimes, who are the priority, will be prosecuted before the Court of Bosnia and Herzegovina, with the help of harmonized criteria for the case selection”. (emphasis added)

9. In the actual strategy paper, the time period set out in the press release for completion of war crimes trials was as set out above.²⁴
10. The Prosecutor’s Office of Bosnia and Herzegovina (“POBiH”) had announced that it would be unable to meet the deadline set in the NWCS for completion of the most complex war crimes cases.²⁵
11. On 15 May 2015, a conference was held in Sarajevo at which representatives of the prosecution authorities spoke. The press report thereof is quoted in full as what was said bears directly on some of the issues dealt with in this assessment:

“The head of the Bosnian prosecution war crimes department, Gordana Tadić, told a conference in Sarajevo on Thursday that the deadline will be missed and asked for another three years to complete the task. “We should have finished the most complex investigations within seven years of the adoption of the strategy [in 2008], which will be in December. We will obviously not achieve this and we are already asking for a new deadline which should be at least three years [in the future]” Tadić said.

She said however that the eight cases sent to the country by the prosecutors at the Hague Tribunal were almost finished. “These cases were the priority last year and the prosecutors who worked on them had all the assistance they needed” she said.

Tadić said the Bosnian prosecution had a productive year in 2014 and raised a lot of indictments related to rape and sexual violence offences during the war.

According to estimates, there are still around 500 uncompleted war crimes investigations at the state level and at least as many on the entity level. Prosecutors Branko Mitrović and Munib Halilović, who presented the work of entity level prosecutions at the conference, criticised the way in which cases are sent from the state level to the Republika Srpska and Federation prosecutions. They said that their workrate was hampered by the fact that indictments were already raised at the state level. “We have nothing against the transfer of cases, but send them down in the investigation phase. It is easier to

²⁴ NWCS, para.1.2(a).

²⁵ See Section IV *infra*.

raise indictments then work on someone else's indictments," said Mitrović.

Milan Tegeltija, the head of the Bosnian High Judicial and Prosecutorial Council, HJPC, which oversees much of the country's judiciary, said that in 2014, 20 new prosecutors were hired, which speeded up the entire process. "Prosecutions finished 25 per cent more criminal complaints by, solved 63 per cent more investigations and raised 91 per cent more indictments compared to the year before" said Tegeltija.

Jadranka Lokmić Misiraca from the HJPC, who presented the work of the prosecutions at the conference, said that slow investigations were the biggest problem. "I cannot find an explanation for investigations which go on for eight years, unless the suspect is on the run," said Lokmić Misiraca.²⁶

12. Additionally, the President of the Court of BiH had made the ICTY Prosecutor aware of her concerns regarding the quality of indictments being filed.
13. Further problems were caused by a delay in payment of the second tranche of IPA funds designed to assist in the processing of war crimes trials.²⁷ The funds had been used to hire extra staff for judicial institutions. In the POBiH, some staff who had been hired e.g. legal officers ("expert associates"), investigators, interpreters and other administrative staff, were summarily dismissed.²⁸ The prosecutors who had been hired continued to work, but without being remunerated.
14. It should also be noted that at the same time that the 'field-work' for this assessment was being undertaken, the POBiH was receiving assistance from a British Embassy funded management consultancy, *Agencia*. This had come about shortly after the appointment of Salihović, when he had asked the Embassy for help in formulating a strategic plan in relation to the organisational and operational capacity of the POBiH.

²⁶ Balkan Transitional Justice 21 May 2015 (www.balkaninsight.com).

²⁷ The EU had suspended IPA resources because the judicial sector reform strategy for 2014-2018 had not been adopted.

²⁸ Figures provided to OSCE were two expert associates, four investigators, two other expert staff and five other administration/support staff. It is not clear whether the statistics included interpreters. One of the interpreters assigned to work with the author had had his contract with the POBiH terminated. It is of note that although the Court was similarly affected by the budget reduction it did not dismiss staff.

15. *Agencia's* terms of reference were more general, (if there was any emphasis, it was on the organised crime and corruption department), but as will be seen their conclusions are of relevance to this assessment.²⁹

IV. EVENTS CONCERNING THE CHIEF PROSECUTOR IN RESPECT OF ANALYSIS

16. The response from the CP to the OSCE Mission's letter of 5 August 2015 stated:

“With reference to your letter of 5 August 2015 relating to an independent analysis of the work of the Prosecutor's Office of Bosnia and Herzegovina, and to a proposal to hold a meeting with the Chief Prosecutor of Bosnia and Herzegovina on 17 or 18 August, please be informed that we are unfortunately unable to grant your request, because by doing so we would violate the fundamental principles of confidentiality and impartiality of [our] proceedings, i.e. the right to a fair trial which would influence the integrity of [our] cases, as well as the fact that this would constitute a breach of the rights of victims and suspects. In addition to these important principles, it would be necessary to convene a collegium of prosecutors of the Prosecutors Office of Bosnia and Herzegovina and obtain their consent in regard to this highly sensitive issue, as well as it would be necessary to obtain an opinion of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.” (trans.)

17. The letter further stated that a meeting with the CP could not be held as planned as he would be on holiday. By that stage it was too late to alter the arrangements which, acting on the basis of the verbal agreement, had been made for the author to conduct the required fact-finding in BiH. Accordingly, interviews of personnel out-with the POBiH were conducted between 18 August and 3 September 2015 and relevant documents examined.
18. During this period various attempts were made to persuade the CP, to reverse the position expressed in his letter. These efforts were unsuccessful. On 3 September, (the last day of the author's visit), the High Judicial and Prosecutorial Council (HJPC) approved access for the OSCE Mission to documents related to war crimes cases in the Prosecutor's Office of BiH.

²⁹ See paras 56-58 *infra*.

As stated in their letter: “*Members of the HJPC unanimously adopted the abovementioned decision, so that the OSCE can draft an independent analysis. Thus, the HJPC approves the OSCE to analyze war crime cases and deliver it to the Prosecutor’s Office of BiH for implementation, or else they will face with disciplinary sanctions.*” President of the HJPC Milan Tegeltija stressed that all judicial institutions in BiH are obliged to act in line with decisions of the HJPC, or they may face disciplinary sanctions” (trans.)³⁰

19. It was eventually agreed that the OSCE Mission to BiH could have access to files in cases where indictments had been lodged³¹ and that the author could conduct interviews with prosecutors. However a condition was imposed, that present at any such interviews would be Deputy Chief Prosecutor (“DCP”), Special Department for War Crimes, (“SDWC”), Gordana Tadić as well as a note-taker. Whilst this condition may have inhibited some of those being interviewed from providing completely frank responses to the questions asked, on the whole the author is satisfied that sufficiently honest answers were given to provide a basis for the conclusions reached.
20. Interviews were conducted with both the DCP and the CP. The CP eventually agreed to see the author on the day before she was scheduled to leave. The first part of the meeting, (which took place in his office in the presence of, *inter alia*, the DCP and *Chef de Cabinet* Hasan Pleh), emphasised the statistical successes of confirmed indictments and the failings of the judges. Later, the CP agreed to respond to questions which related to the issues under consideration.
21. Subsequent to this meeting, at the behest of the author, staff at the OSCE Mission to BIH made numerous requests³² to examine some of the relevant files. No permission has been forthcoming.

³⁰ The letter is attached.

³¹ See however para. 21 *infra*.

³² 16.10.15: email to Pleh requesting access to files. 21.10.15: follow up email. Response same day by Pleh: “CP has been notified about your email and as soon as he decides you will be notified”. 21.10.15: phone call to Pleh. Response “CP will consider your request”. 28 October: further phone call to Pleh. Inconclusive conversation to the effect that files should have been sought by the author at the meeting. 9.11.15 further email sent. No response. In late November in a telephone conversation, Pleh stated that case files could not be handed to OSCE staff as they were not prosecutors.

V. OVERVIEW OF WAR CRIMES³³ PROSECUTIONS

22. Before turning to the specific problems which affect the progress of war crimes cases at the Court of BiH, in the opinion of the author it is worth setting out some of the requirements for efficient processing of such cases which, if not all are unique to war crimes trials in BiH, are particularly germane to the process.
23. Consistency of approach by a prosecutor's office both evidentially and in the legal characterisation of the crimes is a *sine qua non* in order to ensure equality before the law and maintain public confidence in the process.
24. In order to achieve consistency of approach an office-wide case theory of the conflict must have been developed.³⁴ That case theory should not only encompass evidential matters, but also the legal characterisation of the crimes committed. It should not need stating that this dual consistency of approach is doubly important when applied to persons who are alleged, in separate proceedings, to have committed crimes in the same area at the same period of time.
25. Prosecutions are still being initiated over 20 years since the beginning of the conflict in 1992. Witnesses and potential accused have died, emigrated³⁵ and, if available, may have memory loss or memories which are "false" (in the sense of no longer being able to distinguish between what they actually heard or saw, as opposed to what they were told by others).
26. Available witnesses may well have made a number of different statements to different authorities and testified in a number of cases before ICTY and domestic proceedings. This increases the risk of inconsistencies which can be used by the

³³ The term "War Crimes" in this section is used in its generic and populist 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).

³⁴ One of the criticisms made of the ICTY OTP was its failure to develop a proper case theory of the various conflicts in the former Yugoslavia until many years – and trials - had passed. There is some excuse for this failure in that circumstances obliged trials to take place in the absence of co-operation from governments of the countries concerned and therefore the completion of full investigations. No such excuse can now be advanced.

³⁵ The term 'emigrated' when used in respect of witnesses encompasses voluntary and involuntary departure from BiH. In respect of potential accused, it includes those in other countries of the former Yugoslavia with which no extradition treaty exists.

defence to suggest unreliability. The more frequently a witness is asked to testify, the more the risk increases.

27. Once an order to conduct an investigation has been issued³⁶ it is vital that a proper investigative plan is drawn up by the prosecutor together with investigators and analysts. Such a plan should contain, *inter alia*, the type of evidence required, (both witness and documentary); suggest places where that evidence is likely to be found (including databases); arrange for checks to be made to ascertain whether there are connected investigations or cases; and set out the legal research required. Regular reports should be submitted on the progress of the investigation. No indictment should be filed until the investigation is complete.
28. A substantial number of the areas in which serious crimes were committed have been the subject of trials at ICTY. Accordingly it is important that prosecutors (or their assistants/analysts) interrogate the relevant ICTY databases before interviewing witnesses or suspects and certainly before settling indictments.
29. The pleading of war crimes in indictments requires the prosecutor to have a proper understanding of the elements which constitute such crimes and the modes of liability for their commission. This understanding must encompass knowledge of international and domestic jurisprudence.
30. There is one last point which needs to be made. 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.³⁷
31. Accordingly, however unattractive a proposition it may be, it must be made clear to the public that, in order to make best use of the resources not all perpetrators can be prosecuted and that the concentration of all prosecutors' offices, but

³⁶ CPC, Article 216.

³⁷ In this context the recent well-publicised arrest of Darko Mrđa on suspicion of taking part in the torture and killing of prisoners being transported from Omarska to Manjača, could be said to be misguided. He has already served a prison sentence, (he was sentenced to 17 years imprisonment and served two-thirds of his sentence prior to being granted early release), for his part in the Korićanske stijene massacre. To prosecute him a second time diverts resources which should be devoted to the investigation and prosecution of perpetrators not yet stigmatised as war criminals. As one of the judges observed "after 20 years a key issue is to try as many people as possible."

particularly of the POBiH, will be on those who played leading roles in the most egregious crimes.³⁸ Prosecutors must be honest with victim groups to investigate/indict when the criteria for prosecuting a particular suspect are not fulfilled. Criticism from the media for a decision to prosecute or not to prosecute is common to all jurisdictions, but may be mitigated if full and reasoned explanations are provided for the decision.

VI. MAIN AREAS OF CONCERN

32. The issues raised in interviews conducted, examination of court documents relevant to the indictments, together with consideration of reports by the OSCE Mission's staff, were substantial. This analysis concentrates on those which appear to the author to be the most fundamental and which are in need of urgent attention.
33. In effect these issues may be grouped under six over-arching heads, set out below in sequential order:
- (a) Management and operation of the POBiH;
 - (b) Nature of the indictments;
 - (c) Backlog of cases (including transfer);
 - (d) Witness protection and crimes of sexual violence;
 - (e) HJPC evaluation system ("Quota"); and
 - (f) The Criminal Procedure Code ("CPC")
34. The problems identified within each of the above are set out in the discussion sections which follow. It is regrettable that matters have reached the stage whereby there is little if any co-operation over the issues between judges and the CP. The view expressed by the judges was that the CP was simply obsessed by making statistics look good and was therefore concentrating on the simpler cases at the expense of the higher level perpetrators. The view expressed by the CP, (and some of the prosecutors), was that the judges were complaining because "we

³⁸ See para. 61ff *infra*.

are burying them in work” and were misapplying the law. Both sides have stated their views to the media.

VII. THE MANAGEMENT AND OPERATION OF THE POBiH

35. The POBiH was referenced in the author’s written assessment of training needs in 2013. The relevant parts are re-produced here as, regrettably, many of the observations made therein were still applicable in 2015:

“The situation which pertains to this office, indeed the court as a whole, merits a separate analysis [emphasis added]. The author had official meetings with the acting Prosecutor (and members of her staff)³⁹, the President of the Court, the International Registrar and unofficial meetings with present and ex-members of staff, both national and international.⁴⁰

Both the PO and court have suffered from being political ‘punch-bags’. The PO has been be-devilled both by internal dissension and by leadership which has been, to say the least, inadequate.

It was also noteworthy that, in the official meetings, blame for perceived failings in the process - such as length of trials and inconsistent verdicts - was placed by the PO on the judges and vice-versa.⁴¹ It was suggested by both sides that the other was in need of education on how to conduct war crimes trials.

The major problems of the PO were more clearly delineated in the unofficial meetings held by the author. Leaving aside the overriding dysfunctional aspects set out above and the backlog of cases, those problems, (which are largely similar to ones of entity POs but which in the POBiH impact on the most serious cases), may be summed up as follows:

- (i) a lack of any strategic planning;*
- (ii) inadequate numbers of prosecutors and legal assistants, interpreters and administrative staff;*
- (iii) poorly trained investigators;*

³⁹ The head of the War Crimes section was not present.

⁴⁰ The author worked at the POBiH in 2005 and has maintained contact with some of the staff through her work at ICTY between 2009 and 2012.

⁴¹ The judicial perspective was that prosecuting offices needed to (i) investigate more efficiently, (ii) be brave in their decisions to close cases, (iii) concentrate on the important evidence to produce good quality indictments, (iv) look for good quality physical evidence. By contrast, the prosecutorial perspective was that the judges made rulings contrary to the jurisprudence of the ICTY and refused to recognise the existence of JCE III.

(iv) *poorly drafted indictments, in particular with regard to the legal characterisation of the crimes.*

Whilst it is appreciated that the purpose of the bulk of proposed EU funding is to assist the entities in their processing of war crimes cases, the role of the POBiH and the Court of BiH are pivotal to the process. Accordingly, appropriate measures need to be taken to rectify these problems.”

36. A significant number of the present problems, which beset the indictments being submitted for confirmation, arise from the style of management which is currently being operated in the POBiH.
37. At present 35 prosecutors work in the war crimes department⁴². In the time available, the author was only able to interview ten prosecutors for the purpose of this analysis,⁴³ as well as a former prosecutor. Five of those interviewed had been working on war crimes cases for many years.⁴⁴ The remainder, whilst some had considerable experience as prosecutors in other areas of criminal activity, had little or no experience of war crimes prosecutions.
38. The lack of experience in war crimes cases by the majority of prosecutors has been identified by the judges as one of the root causes of the number of indictments being returned as a result of defective pleading.⁴⁵ This inexperience is also manifested by a failure to recognise that available evidence should lead to a more serious crime being charged, e.g. torture rather than ill-treatment. At the other end of the spectrum, it means they do not properly plead the elements when charging a war crime.
39. However, as pertinently, according to a former prosecutor, this inexperience renders the prosecutors reluctant to express an opinion when instructed by management to indict a particular person and/or indict for a particular charge, “they do as they are told.”
40. Notwithstanding the assertions by the CP that “there are no new and old prosecutors, they are all completely equal” and “I do not have the right to tell the

⁴² See Appendix E (POBiH Response to Questionnaire).

⁴³ More would have been interviewed had it not been for the CP’s refusal to co-operate in August 2015.

⁴⁴ Prosecutors Barašin, Begović, Bulić, Krnić and Munib Halilović (now working as a federal prosecutor).

prosecutors what to do,” the over-riding impression received, from the vast majority of interviewees, was that the POBiH was micro-managed with approval required for any decision whether it related to indictments or more mundane administrative activities. No decisions, other than those of the most basic administration, appear to be delegated to the DCP.⁴⁶

41. The original organisational structure of the SDWC consisted of six teams, each dealing with a different geographical area of the conflict.⁴⁷ Whilst the web-site still shows this as this structure, in fact the teams were abolished as units of administration in May 2013 and replaced with three sections. The original heads of the sections, namely Vesna Budimir, Dragan Čorlija and Ibro Bulić, were all experienced prosecutors. Vesna Budimir left the POBiH and was replaced by Gordana Tadić.⁴⁸ In August 2014, the CP replaced Čorlija and Bulić with two prosecutors who had had no experience in war crimes prosecutions. The reasons for their removal were not given to those affected.⁴⁹
42. This action means that the present heads of sections are in no position to give advice on investigative, evidential or legal matters concerning war crimes prosecutions, to prosecutors whom they are supposed to lead; nor do they have the requisite knowledge to resist pressures either from senior management or from outside pressure groups to indict low level perpetrators.
43. It might be thought to be self-evident that, given the unique challenges of prosecuting war crimes, a mentoring scheme would be put in place to enable the new prosecutors to benefit from the knowledge of the experienced prosecutors; at the very least to ensure - as lack of accommodation means office sharing is common - the new prosecutors appointed were placed in offices with those more experienced. As is pointed out in the written response to the questionnaire,⁵⁰ “[the]

⁴⁵ See para. 97 *infra*.

⁴⁶ This was particularly evident to the author during the period when unsuccessful attempts were being made in August to get a decision in respect of conducting the previously agreed research with the POBiH.

⁴⁷ One team was devoted to the Srebrenica 1995 cases.

⁴⁸ Gordana Tadić in addition became the DCP.

⁴⁹ The DCP, when asked by the author for the reasons stated that it was the decision of the CP and she had not discussed the reasons with him.

⁵⁰ See Annex F – Response to Q.2.

concept of mentoring the newly appointed prosecutors is not foreseen.” Although it is asserted that there is “monitoring by heads of sections”, according to one experienced prosecutor “I have never been told to mentor younger prosecutors, although they occasionally come to me” and the view of the CP is “there are no new and old prosecutors, all are completely equal, having been appointed by the HJPC” and “I don’t have the right to allocate who prosecutors work with; if they need help they have to ask for it.”

44. For a variety of reasons, e.g. discussion of cases which overlap evidentially and/or legally, promoting consistency of approach in such cases, meetings of sections and heads of sections should take place on a regular basis. The concept that each individual prosecutor is responsible for his/her own cases, (which, it appears, is ingrained in the general prosecutorial culture in BiH), should, in the view of the author, be subject to the over-riding need to avoid inconsistency in the aforesaid matters.
45. Enquiries about the existence of, and frequency of such meetings⁵¹ produced inconsistent responses. All of the experienced prosecutors stated that no meetings were held to discuss on-going cases. One of the new prosecutors stated although he discussed cases with colleagues informally there were no formal meetings. However others stated that “we have regular collegium meetings of the section, once a month, sometimes more frequently...working meetings on indictments and exchanging experiences”⁵² and there “are meetings of the section twice a month. Depends on the need”.
46. The DCP (who, as already stated, was present for all interviews), noted these inconsistencies and pointed out that the divide seemed to be largely between experienced and new prosecutors and there was less need for the former to attend. Not only does the author not agree with this view (for the reasons expressed in paragraphs 41 and 42 *supra*), but also is of the view that the failure of proper management is reflected by the fact that the DCP appeared to be unaware of some

⁵¹ The word “Collegium” (translation) was used to describe both the formal meetings convened by the CP of all prosecutors and the smaller meetings convened by heads of sections.

⁵² This particular prosecutor worked in the same section as one of the more experienced ones, who said there were no meetings.

of the significant information provided by the prosecutors interviewed. In the second interview conducted with her she stated that it had been “useful for her to hear what the prosecutors had to say” and that changes would be made.

47. The agreed quota of cases *per annum* which prosecutors must complete i.e. file indictments is five⁵³. That might be a feasible figure if each prosecutor had assigned to him/her sufficient dedicated support staff, particularly an investigator.
48. However this does not appear to be the case. Each of the prosecutors interviewed said they had to share investigators, (the average ratio seemed to be one investigator for every three prosecutors). Moreover compliance with the expected quota of completed cases is equally dependent on the volume of cases assigned. In fact each prosecutor has a staggering number of allocated cases. The smallest number was 30 cases and one new prosecutor had circa 130 cases, one of which involved 20-30 suspects.
49. Moreover, notwithstanding the existence of a database which should reveal whether parallel investigations into a crime or perpetrator are being conducted by the district or cantonal offices, (and notwithstanding that each prosecutor, when asked, said that s/he or an analyst consulted the database), it seems that such investigations are still taking place. One of the judges described a situation in which she only discovered, (as a result of a telephone call from a judge in Banja Luka), that an accused in a case which was before the Court of BiH, was also the subject of proceedings in Banja Luka and Livno.⁵⁴
50. Aside from the paucity of investigators (aggravated by the IPA funding problem)⁵⁵ the same problems as with new prosecutors in respect of mentoring apply to new investigators. Those appointed in 2014 had only basic knowledge of how to investigate war crimes and received no training from the more experienced investigators. They were assigned to work with new prosecutors so creating the classic scenario of “the blind leading the blind.” Further problems identified by two former investigators with the POBiH were: a lack of proper investigation plans, insufficient vehicles available to interview witnesses who were unable to

⁵³ See Section XI *infra*.

⁵⁴ The case was that of *Prosecutor v. Vrakela et al.*

travel to Sarajevo, no official mobile telephones, and insufficient laptops. One investigator also took the view that “cases were being separated to make the statistics look good”.

51. There is apparently no office policy on prioritisation of cases or for closing cases. It is left to individual prosecutors to decide how to prioritise cases, (within the overall guidelines)⁵⁶ and decide on the criteria for closing cases as “each prosecutor has their own professional opinion.” Again this lack of policy promotes inconsistency in decision making and allows prosecutors to file indictments in the simpler cases without being in breach of prosecutorial policy.⁵⁷ It is also right to say that this problem has been further aggravated by the recent disciplinary proceedings instituted against a former prosecutor in the SDWC for alleged delay in finalising a case which came into the category of “less complex”.
52. Question 1 in the Questionnaire asked how many prosecutors were “solely” working on war crimes.⁵⁸ The answer was 35 but at least one of the 35 stated that he was also working on a number of corruption cases. If this is a more widespread practice then it is one which is inimical to clearing the back-log of war crimes cases and ensuring that proper consideration is given to the assigned cases of alleged war crimes.
53. Consistency is not only necessary in prioritisation and closure of cases, but as already stated,⁵⁹ in the evidential and legal characterisation of cases. This is not the view of the CP – nor, in fairness it needs to be said, that of his predecessor. The view of the CP as expressed to the author was “I do not want to get involved in legal qualifications – that is left to individual prosecutors... I do not think there needs to be an office policy.”

⁵⁵ See para.11 *supra*.

⁵⁶ One – otherwise very impressive – prosecutor frankly admitted liking working on “unknown perpetrator” cases as it was “intriguing”.

⁵⁷ The CP made the valid point that all the cases were “complex” in the true sense of the word. However the agreed categories of cases for trial in the Court of BiH are those which are “complex” i.e. come within Annex A of the NWCS.

⁵⁸ The question was deliberately phrased thus, as a result of information being provided for the author’s previous report that prosecutors at the entity level assigned to investigate war crimes, were also dealing with other criminal matters.

⁵⁹ See para. 23 *supra*.

54. It was said by the CP that all indictments were reviewed by him before being filed. If this is indeed the case then this can only be for errors of drafting as consistency is not a concern. It should not be the role of the CP to carry out such a task. The DCP stated that “all indictments are sent to the CP’s office where they are reviewed by him or his closest associates”. She did not elaborate on who were his closest associates and later stated that “I do not know for sure who reviews the indictments. I get an approval from the CP.” Whilst all indictments may be sent for review, it will be seen that the reviews, if undertaken, are not particularly effective.⁶⁰
55. Whilst, in principle it is right and proper that a CP should insist on proper output from his staff, that principle must encompass quality as a major factor. As already stated, the judges are of the view that the CP’s only interest was in statistics i.e. numbers of indictments filed within his tenure of office. One prosecutor said “The CP and DCP insist on filing indictments as the main thing.” Another prosecutor stated “[T]he main feature for any sort of evaluation by the CP and others, is the number of indictments issued.” The same prosecutor identified the resulting outcome “Instead of dealing with the most complex cases [we] are dealing with the simple ones”. The CP confirmed this view of his overriding aim stating “I just want to see results, as long as there are results everything is OK”.
56. It is worth noting that in August 2015, the CP launched a Strategic Plan “to develop the POBiH into a modern, effective and efficient organisation, providing value for money and able to contribute towards increasing the confidence of the public in the justice system”. This plan had been designed by *Agencia*.⁶¹
57. Between August and November 2015, *Agencia* made strenuous efforts to persuade the CP to engage actively with the proposed programme. This programme included training for staff in basic supervisory and management practices as well as training for prosecutors and investigators in dealing with financial crime, anti-corruption measures and counter-terrorism. These efforts were unsuccessful.

⁶⁰ See para. 95ff *infra*.

⁶¹ See paras 14 & 15 *supra*

58. It is understood that the findings of *Agencia* mirror almost exactly the findings of the author as set out in the preceding paragraphs, i.e. concerns regarding leadership by the top management echelon, limited access to the CP, a failure within the POBiH to set, or work towards collective goals, no proper team structures being in place, and no guidance or assistance being offered by senior prosecutors to their juniors.
59. The strategy devised by *Agencia* is a holistic one, designed to deal with management problems which affect all sections of the POBiH. In the view of the author, it would be sensible for any specific recommendations made in this report in respect of the SDWC to be considered in the context of the recommendations made by *Agencia* (and those of the Supervisory Body⁶²).

VIII. THE NATURE OF THE INDICTMENTS

60. The four issues which give rise to the greatest cause for concern are:
- 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.
61. LEVEL OF PERPETRATORS: The original “Orientation Criteria”⁶³ for deciding which cases would be heard before the Court of BiH listed examples of the level of perpetrator which would come within the parameters of the court. These included *inter alia*, military, police and political leaders, camp commanders, notorious persons and those alleged to have committed multiple rapes. Other criteria related to the nature of the alleged crime(s) e.g. murder committed as part of an attack and special considerations e.g. witness protection issues or difficult issues of law.
62. The original criteria were subsequently amended by the NWCS, Annex A, and in 2011 a formal written agreement came into existence between the Court of BiH

⁶² See para. 67 *infra*

and the POBiH which, it was stated “ shall be used for the purposes of orientation in all future proposals of the Prosecutor’s Office and decisions of the court for transfers of procedure from the jurisdiction of the BiH court as per the Article 27a, as well as all future proposals of the Prosecutor’s Office of BiH and decisions of the court on takeover of procedure from the jurisdiction of the Entity or Brčko District Courts”⁶⁴

63. Whilst in principle this document was a sensible one providing guidance to judges and prosecutors, the criteria set out therein are being too rigidly applied, without due consideration being given to the surrounding circumstances. To take but one example, under the heading “Mass Killings” the agreement reached was that “the cases that resulted in the death of...up to 5 victims” can be transferred, i.e. if more than five victims the case remains with the Court of BiH. However it may be that deaths of many more than five are caused by one legally and factually straightforward criminal act, such as setting a house on fire. In such circumstances there is no good reason why the case should not be transferred.
64. Conversely the same document makes it clear under the heading “Capacity and Role of the Perpetrator” that “ordinary soldiers and police officers fall into the jurisdiction of District and Cantonal Prosecutors’ Offices”. Notwithstanding that criterion, such perpetrators are being tried in the Court of BiH. An egregious example of this practice is demonstrated by the two cases of *Prosecutor v. Pajić, Dmitrović, Krstić, and Misić* and *Prosecutor v. Begović*. Both cases concerned the events in Batković camp during 1992. The first case is ongoing in Bijeljina. The four accused are all alleged to have held positions of command responsibility at the camp. Begović was arrested after the Bijeljina trial had begun. In his case, the allegation was that he was no more than a guard who was responsible for beatings. Nonetheless, he was indicted by the POBiH and tried at the Court of BiH.
65. The prosecutor who indicted Begović explained that he had done so because he had had a meeting with victim representatives. He said “they had confidence in

⁶³ “Orientation Criteria for Sensitive Rules of the Road Cases” 2004.

me and asked me to do this as they remembered him as the worst perpetrator”. The explanation that a particular investigation/indictment has come about because of pressure from a victims’ group is unfortunately not unusual, but it is insufficient reason for overriding the agreed criteria for a prosecution to be mounted at the Court of BiH, or indeed at the other courts.⁶⁵

66. In an analysis of the 39 war crimes indictments raised between 1 January and 9 December 2015, the Permanent Panel for Review and Assessment of the Complexity of Cases, concluded that 12 fell into the category of less complex cases **as presently defined** and should therefore have been dealt with by territorially competent courts.
67. In January 2016, the Supervisory Body published a report in which it assessed the progress of the NWCS between January 2009 and June 2015. The report recommended that “it is particularly necessary to efficiently and transparently review the criteria for the selection and prioritisation of cases as set out in the strategy” .(trans.)⁶⁶ Discussion on this matter is currently ongoing. The report also stated “The Supervisory Body believes that it is primarily the POBiH that has to make a clear distinction between less complex cases and the top priority cases”⁶⁷.
68. As already discussed,⁶⁸ the CP made the point in his meeting with the author, that during the course of his tenure,⁶⁹ the number of indictments filed and confirmed has dramatically increased.⁷⁰
69. However if one examines the general level of perpetrator indicted relatively few fall into the category of those who were leaders or held command responsibility. The majority appear to be low level direct perpetrators of the crimes, camp guards and members of the military or paramilitary formations.

⁶⁴ See “Principled Interpretation and Specification of Criteria for the Assessment of Complexity of Cases as per Annex A of the National Strategy for War Crimes Processing between the Court and Prosecutor’s Office of Bosnia and Herzegovina”.

⁶⁵ See para. 31 *supra*.

⁶⁶ See para. III (4).

⁶⁷ See Recommendation 3 of the Supervisory Body Report.

⁶⁸ See para. 55 *supra*.

⁶⁹ He took up office in February 2013.

⁷⁰ The figures quoted were: 2012: 24 indictments, involving 42 accused; 2013: 26 indictments, involving 50 accused; 2014: 57 indictments, involving 119 accused.

70. In the judgment of the author, the reasons for this pattern are to be found in the failures of management identified above, namely:

- (a) The heavy emphasis placed on statistics; and
- (b) The fact that newly appointed prosecutors do not feel comfortable with the legal concepts of command responsibility and joint criminal enterprise and are insufficiently guided.

71. Having said that, the judges have the power to order the transfer of the cases which do not properly fulfil the criteria for trial at the Court of BiH and in the judgment of the author could take a more pro-active stance in this respect.⁷¹

72. “FRAGMENTATION”: 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.

73. The major problems which flow from this practice are:

- The waste of resources;
- Witnesses having to testify about traumatic events on more than one occasion;
- Prosecuting an accused for a single incident has the potential for allowing him to escape prosecution for involvement in other more serious crimes committed together with others;⁷² and
- Preventing the judges from seeing the overall picture of events and therefore the context of the crime(s) alleged and, in the event of a conviction, making it difficult to gauge the level of culpability of the accused for the purposes of sentence.

⁷¹ See Section IX *infra*

⁷² This problem is a significant one in the RS in the light of the judgment (22.11.2012) by the RS Supreme Court in *Prosecutor v. Dmičić & Brkić*. Applying the *ne bis in idem* principle the court ruled that as the accused *Dmičić* had been convicted on an earlier occasion of the offence of War Crimes against Civilians, he could not be found guilty on a second separate trial of the same offence even though the factual basis was different.

74. The judges provided detailed information about cases, in both indictment and investigative⁷³ stages, in which it was asserted that fragmentation had occurred. Examples of this may be found in the series of indictments issued against individual perpetrators in respect of the events at the “Viktor Bubanj” barracks and the indictments issued against Ibrahim Demirović. The first was filed in September 2014 against Demirović together with Enes Čuric and three others.⁷⁴ The charges related to the events in Potoci, Mostar in July 1993. One month later on 16 October 2014, the same prosecutor filed an indictment against Demirović alone.⁷⁵ The charge related to the same events as those in the earlier indictment.
75. However it also needs to be recognised that there may be a good reason why this fragmentation has occurred. Two indictments were filed in respect of crimes committed in the area of Kalinovik. In November 2007, the prosecutor filed an indictment against three people, (*Prosecutor v. Bundalo, Zeljaja and Askraba*). In February 2008, he filed an indictment against Krsto Savić and Milko Mucibabić, which also related to crimes in that area. The second case was undoubtedly one which fulfilled all criteria for trial at the Court of BiH as Savić was the Centre for State Security (CSB) chief for Trebinje in 1992. The author sought an explanation from the prosecutor. The reason provided for separating the cases was that Kalinovik was merely one part of the case against Savić and to have joined the *Bundalo* case would have substantially increased both the length and complexity of the trial.⁷⁶ This explanation has validity.
76. On 30 September 2010, the same prosecutor filed an indictment against Slavko Lalović. Lalović was a member of the reserve police force with the Public Security Station (SJB) in Kalinovik. He worked as a guard in the Miladin Radojević school building and was charged with having enabled soldiers to go inside the school building and commit violence against civilians who were unlawfully detained therein.

⁷³ The fragmentation element of cases at the investigative stage related to parallel investigations being carried out by the POBiH and a cantonal PO.

⁷⁴ *Prosecutor v. Curic et al.* KTRZ 0009529 14.

⁷⁵ *Prosecutor v. Demirović* KTRZ 0009567 14.

⁷⁶ It should be noted that one of the judges on the *Bundalo* trial described it as “good work” in that it dealt with command and control issues.

77. A week later, on 7 October 2010, the prosecutor filed an indictment against Milan Perić and three others arising from the same set of events. According to the indictment, the four accused were policemen at the Kalinovik SJB, who illegally arrested civilians and took them to the Miladin Radojević primary school and Barutni Magacin camp in Kalinovik, where most of the prisoners were killed.
78. The Prosecutor’s explanation for this separation is, that although both cases had stemmed from the *Bundalo* case, Lalović was inside the camp and the others were outside and there was insufficient nexus between the two sets of allegations. There were only four or five witnesses common to both cases and in the prosecutor’s opinion the trial of Lalović would have been prolonged while evidence was led relating to the other accused. Whilst there are factors which militated in favour of joining the cases, this is not, in the judgment of the author, a clear example of a case being “fragmented” simply to increase the prosecutors quota of indictments.
79. A further example of this practice raised by the judges was that concerning the cases of *Prosecutor v. Tepić et al.* and *Prosecutor v. Dukić*⁷⁷ (both cases concerned the events in Kotor Varoš prison during 1992). The first indictment was filed in December 2013, the second in September 2014. The prosecutor’s explanation for this separation was that at the time of the filing of the Tepić case, Dukić was an unknown perpetrator whose identity only became known at a later stage. It was therefore too late to join him to the case of Tepić. The indictment was confirmed by the Court of BiH and then transferred to the Banja Luka District Court
80. This again is, in one sense, a valid explanation. However, in the opinion of the author, it was not the best use of the limited resources of the POBiH and the Court for the Prosecutor to have pursued this individual, who was a low level reserve policeman and prison guard.
81. Fragmentation of cases in this manner has a further consequence, (which was raised by both a judge⁷⁸ and a defence lawyer), namely that prosecutors resist

⁷⁷ KTRZ 0008858 14.

⁷⁸ The case cited was that of *Prosecutor v. Darko Dolić* [SI 1K003433], in which the accused was charged with rapes. He was acquitted. The judge stated that the panel in that case had been obliged, at the insistence of defence counsel, to examine the files in a connected case.

providing material to defence counsel which was available or given in evidence in one case but does not form part of the evidence at the trial⁷⁹ of a separate but geographically and time linked case and is evidence which may assist the defence in the second case.

82. Whilst the remedy available to the judges, to alleviate this problem, is joinder proceedings⁸⁰, (as happened in some of the cases), it becomes more difficult when the time gap between two – or more – indictments is a relatively lengthy one.

83. INCONSISTENCY IN LEGAL CHARACTERISATION OF CRIMES. This issue concerns the lack of any apparent rationale for indictments which relate to crimes committed in the same area and time-frame, being charged in one case as Crimes against Humanity (“CaH”) and in a second as a War Crime. It is particularly lacking in logic when the area and crimes concerned have already been the subject of numerous judgments in ICTY or the Court of BiH and have been characterised as CaH. It was highlighted by the judges, rightly in the judgment of the author, as a major matter of concern since it results in unequal treatment of accused.⁸¹ It is regrettable that the view expressed by the CP was “qualification [of crimes] is not relevant – what is important is [the fact of] the indictment”

84. This problem has manifested itself in too many cases to do more than quote a few examples. The case of *Prosecutor v. Goran Mrđa et al.* concerns the events in Sanski Most in 1992. The accused, (all of whom are alleged to have been low-ranking soldiers in the VRS⁸²), have been charged with War Crimes. Not only have these crimes been found to constitute CaH in numerous trials at ICTY e.g. *Prosecutor v. Brđanin*, *Prosecutor v. Krajišnik*, *Prosecutor v. Stanišić (Mičo) & Župljanin*, but also in the cases of *Prosecutor v. Vručinić* and *Prosecutor v.*

⁷⁹ The right of defence counsel to inspect files during the course of the investigation, (Article 47 CPC), and after confirmation of an indictment, (Article 226 CPC), does not apparently apply at the trial stage.

⁸⁰ Article 25 CPC

⁸¹ The problem was raised by the judges in the meeting (9 July 2014) of the Permanent Panel for Transferring Cases and the working group of the POBiH headed by Gordana Tadić. The minutes show that Judge Kreho “informed the Working Group...that several indictments... contain inadequate legal qualifications of crimes i.e. the acts of the accused persons are qualified as a war crime although the factual description indicates the acts have the elements of crimes against humanity” (trans.).

Basara & Aničić,⁸³ the POBiH charged CaH. In the case of *Prosecutor v. Nedeljko Dukic*⁸⁴, the accused (who was a reserve police officer of the SJB in Kotor Varoš and from September 1992 a guard in the prison in Kotor Varoš), was charged with killing and beating prisoners as a war crime. Again, in numerous cases before the ICTY, the events in Kotor Varoš have been found to constitute CaH and in the case of *Prosecutor v. Tepić et al.*⁸⁵ the POBiH has charged CaH.

85. Whilst there can be no doubt that the decision of the ECtHR in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*⁸⁶ has caused controversy and resulted in litigation before the Constitutional Court, this has largely been confined to the issue of sentence. Indeed the ECtHR reiterated that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code in war crimes cases was, *per se*, incompatible with Article 7. That matter had to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts had applied the law whose provisions were most favourable to the defendant concerned.

86. All prosecutors interviewed were asked what criteria they used when deciding whether to charge CaH or War Crimes. It became apparent that there was:

- (a) A lack of understanding in respect of the legal elements required for proof of CaH. One prosecutor stated “I decide on the charge based on the intent of the perpetrator”. Another said “unless it is a case of command responsibility I would indict under the old code – it is more favourable to the accused.” A third (experienced) prosecutor said in respect of a particular case “I did not charge CaH because it was an isolated incident”;

⁸² Although charged with serious crimes of murder, rape and beatings, on the facts and level of perpetrator, the case appears to be one which could have been dealt with by the relevant entity-level court, rather than the Court of BiH.

⁸³ The accused in these cases were, respectively, the Chief of the SJB Sanski Most and Commander of the 6th Sana Brigade and Commander of Municipal Staff of the Territorial Defence of Sanski Most.

⁸⁴ KTRZ 000 8858 14 Indictment dated 30.9.2014.

⁸⁵ KTRZ 000 4543 06 Indictment filed 17.1.2014. Tepić was the chief of the Kotor Varoš SJB.

⁸⁶ 2312/08 and 34179/08. Judgment 18.7.2013.

(b) A perception that CaH was more difficult to prove as a charge. The same prosecutor who thought it should be reserved for cases of command responsibility stated “It is easier to charge war crimes – less expensive, shorter and faster [trials]”; and

(c) Consideration was being given to factors which should play no part in the decision. One prosecutor stated that “prosecutors may be doing someone a favour or are afraid that someone [in the area] in which they live will find out”.

87. Two cases in particular illustrate a number of the issues discussed above. On 15 July 2015, an indictment charging war crimes was filed with the Court of BiH against Nikola Savić, a soldier in the VRS, whom it was alleged went to Dusce in the Višegrad area in May 1992. He stole jewellery and money from a Bosniak woman, and then raped and sexually abused her. On 16 July 2015, a different prosecutor filed an indictment for war crimes with the Court of BiH against Nenad Komad, a soldier in the VRS, whom it was alleged had murdered a Bosniak civilian in the village of Kosovo Polje in Višegrad.

88. Both indictments were returned by the confirming judge. Reasons for the returns were:

- A failure to provide proper evidence to satisfy the legal elements of the crimes alleged;
- Seeking an explanation of the charge being one of War Crimes, when the events and crimes in Višegrad in 1992 had been classified in numerous judgments by ICTY and by the Court of BiH in the case of *Prosecutor v. Momir Savić*, as CaH; and
- In respect of the *Komad* indictment it was pointed out that the same prosecutor had also indicted the case of *Prosecutor v. Dragan Šekarić*⁸⁷ for the same events in Kosovo Polje, but had charged CaH.⁸⁸

⁸⁷ He was found guilty in February 2015 of murder and rape committed in Kosovo Polje in June 1992 and sentenced to 14 years imprisonment (increased on appeal to 17 years).

89. In the view of the author, given the status of the accused and the nature of the crimes alleged, neither case qualified for trial at the Court of BiH. Both should have been transferred before the indictment was lodged. The charge(s) clearly should have been those of CaH. It would have made sense for the same prosecutor to have dealt with both cases.
90. When asked about the *Komad* case, the prosecutor concerned stated “I came across this incident when I was investigating something else. I formed a file and got the permission of the CP [to file an indictment]. It is easier to charge WC, less expensive shorter and faster. I do not agree that there has to be consistency in charging. The quota did play a role in my decision, we have to meet a quota – it’s like a cancer.” In respect of the *Nikola Savić* case, the prosecutor concerned gave an almost identical reply “I did not charge CaH because it was an isolated incident. There does not have to be consistency in charging. By working on a low-level case, I am not taking time from more complex cases. This was part of an investigation into another bigger matter.”
91. The CP’s view of inconsistency in charging has already been noted⁸⁹ but he further stated that “legal qualification [by prosecutors] does not bind the court; they can re-qualify [the charge].” There does not appear to a realistic basis for this assertion. Under the Criminal Procedure Code (CPC) 2003 the powers of the judges in respect of indictments are limited to those given under Article 228. The power to amend the indictment at trial is given to the prosecution by Article 275. In practice, it is understood, whilst amendments are made, they are rarely of a substantial nature.
92. Whilst the judges are allowed under Article 285 of the CPC to re-qualify the crime(s) in their judgment, in practice it is virtually impossible to change a war crimes offence to one of CaH, as the elements of the latter crime are significantly different. It is unlikely that evidence will have been led to establish that the

⁸⁸ The Prosecutors’ appeals both failed. A new indictment was submitted in the *Komad* case which was confirmed. The case was transferred to the District Court of East Sarajevo and the trial began in February 2016. No further information is available with regard to the *Savić* case.

⁸⁹ See para. 53 *supra*

criminal act(s) formed part of a widespread or systematic attack and that the accused knew that his act(s) constituted a part thereof.

93. THE QUANTITY OF INDICTMENTS FILED WHICH ARE RETURNED BY THE JUDGES: In one sense it may be said that the statistics speak for themselves. 60 war crimes indictments against 135 persons were filed in 2015.⁹⁰ Out of those: 51 were confirmed, 2 were rejected, and 7 were transferred before indictment confirmation. Of the total number of confirmed indictments 29 were confirmed without being returned, 22 were returned for correction (“consolidation”), 5 of them twice and 17 once.⁹¹ Some examples of indictments returned in 2014 and 2015 are: *Prosecutor v. Begović*⁹² (returned four times before confirmation), *Prosecutor v. Radisić*⁹³ (returned three times before confirmation), *Prosecutor v. Maksimović*⁹⁴ (returned twice before confirmation), and *Prosecutor v. Andabak et al*⁹⁵ (returned twice before confirmation).

94. As already stated⁹⁶ the numbers of indictments filed becomes less relevant if many of the cases do not come within the category of the most complex ones, due to have been completed by December 2015. The level of returns is concerning as it requires both prosecutors and judges to utilise limited resources in dealing with revisions and causes further delay in the processing of WC cases.

95. The reasons for the returns can be summarised as follows:

- Failure by the prosecutor to describe the legal elements which made the act committed a criminal offence;
- Evidence submitted did not support the charges;
- Failure to submit/specify/list relevant evidence to support the charges;

⁹⁰ 21 indictments were filed between 9 and 31 December 2015.

⁹¹ For 2014, the relevant figures are: 60 indictments filed, 24 were confirmed without being returned, 33 were confirmed after being returned, 22 were returned once, 8 were returned twice, 2 were returned 3 times and one 4 times. Statistics provided by Court of BiH.

⁹² KTRZ 0004278 05 (2014).

⁹³ KTRZ 0002701 07 (2014).

⁹⁴ KTRZ 0000683 08 (2015).

⁹⁵ KTRZ 0000366 06 (2015).

⁹⁶ See para. 71 *supra*.

- Failure to specify the role of the participants in the alleged joint criminal enterprise;
- Lack of clarity and precision in factual descriptions of the criminal acts;
- Errors in names; and
- Listing name of protected witness.

96. The view taken by the judges is that the underlying causes of the problems listed in the preceding paragraph are:

- the filing of indictments before investigations have been completed as a result of pressure from the CP to file indictments, and
- a lack of understanding of the legal elements of the crimes and how evidentially they should be pleaded.

The judges' view is shared by some former employees of the POBiH. One said in terms that some of the new prosecutors had so little knowledge that, to take but one example, they did not realise that the evidence relating to a particular crime, as described in the indictment qualified, it to be charged as torture rather than ill-treatment.

97. The view expressed by the CP and some of the prosecutors is that the problem lies with the judges. The CP expressed the view that the judges themselves did not know the law and were complaining because "we are burying them in work." A further perception was that the judges were being captious in their review of indictments. One prosecutor stated that an indictment had been returned because an original document had not been attached and because the recital of the evidence did not specify the implement used to beat the victim.⁹⁷

98. In the view of the author many of the identified problems, to some extent, could have been avoided had the meetings of the working groups of the Court and POBiH been held on a regular basis. According to the judges, until the

⁹⁷ The level of detail in the factual description of the crime apparently required by the judges will be discussed in Section XII *infra*.

appointment of Salihović there were regular meetings held between the judges of Permanent Panel and a working group from the POBiH to discuss general problems of the processing of war crimes prosecutions. After his appointment only two such meetings were held, the last being in July 2014.⁹⁸ No further formal meetings took place until very recently.

99. The judges stated all requests for meetings were ignored. The CP stated that he was unaware of such requests, but that in any event it was improper for there to be a discussion of indictments between the judges and POBiH - "President Kreso cannot discuss indictments in that manner. She can either return or reject them." Whilst it may be improper to discuss specific cases in such meetings, it appears to the author that there are real advantages, in the interests of establishing good practice, for such meetings to be held regularly to discuss general principles.
100. It is understood that after this hiatus, in December 2015 a meeting of the two working groups was held. No minutes have been made available.

IX. BACKLOG AND TRANSFER OF CASES UNDER ARTICLE 27A CPC

101. According to reports prepared by OSCE, in July 2013, the backlog of cases at the POBiH amounted to 682 KTRZ cases. By the end of June 2015, the backlog had risen to 725 KTRZ pre-trial cases, involving 5205 suspects. 375 of those cases were in the investigation stage and 350 in the pre-investigation stage. By 31 December 2015, that backlog had been reduced to 672, i.e. a reduction of 1.5% from the original figure in 2013⁹⁹.
102. This pattern demonstrates that if the present working practices of both the Court and PO of BiH continue, it is highly improbable that there will ever be any real reduction in the war crimes cases, let alone their completion as envisaged by the NWCS.

⁹⁸ The minutes of the meeting held on 9 July 2014 show a discussion ranging from the practice of lower courts charging persons with general crimes when the facts reveal a war crime, the strategic priorities in processing cases, the practice by the POBiH of charging War Crimes rather than Crimes against Humanity ("CaH"), to witness protection issues.

⁹⁹ See Statistical Table at Appendix H.

103. This failure to significantly reduce the backlog of cases is the result of a combination of factors, not the least of which is the obligation under Article 216 (1) of the CPC that a prosecutor “*shall order the conduct of an investigation, if grounds for suspicion that a criminal offence has been committed, exist.*” However a prosecutor has discretion, under Article 216 (4) not to conduct an investigation “*if any other circumstances exist that preclude criminal prosecution.*” It could be argued that this discretion is not exercised sufficiently by prosecutors **at all levels** when receiving complaints of war crimes committed by unknown perpetrators (‘KTN-RZ’) or where, if the perpetrator is known (‘KT-RZ’), it is also known that he is out-with the jurisdiction of the court and unlikely to be extradited.
104. The problems relating to indictments, referenced in Section VIII *supra*, transparently affect the issue of the backlog. Unnecessary time and resources spent on investigations, indictment confirmations (including multiple indictments against the same perpetrator or involving the same crimes with different perpetrators), and trials of low-level perpetrators, involve time and resources of the POBiH and Court which should be utilised for the most complex cases.
105. The transfer to, and take-over¹⁰⁰ of cases from, the entity-level courts is intimately connected with this issue. As already noted¹⁰¹ the criteria for cases which should be dealt with by the PO and Court of BiH are too simplistic and are in urgent need of overhaul so that only the most complex cases remain. However the transfer procedure needs similar attention.
106. The judges’ complaint is that the POBiH only applies for transfer of a case after, or congruous with, an application for confirmation of an indictment. This has the double disadvantage that:
- (a) time has been, and will be, spent on dealing with the indictment and

¹⁰⁰ In 2015 12 cases were taken over by the Court of BiH

¹⁰¹ See para. 67 *supra*.

(b) if transferred the receiving prosecutor's office is presented with the *fait accompli* of an investigation and indictment not conducted by its staff¹⁰².

107. The POBiH made the converse point that if they apply to transfer a case before completion of an investigation, such application is refused by the judges, on the basis that it is only on completion of an investigation that it is possible to assess whether the case is one which needs to be dealt with at the Court of BiH.

108. As already stated¹⁰³ there is a move initiated by the judges to amend the criteria that qualifies a case for trial at the Court of BiH. There are recent encouraging signs that the process of transfer will be similarly improved. As noted by OSCE¹⁰⁴ in late 2015 the judges began to transfer cases after an indictment had been filed by the POBiH but **before** confirmation. The advantages of this practice are obvious in that there are less Court and POBiH resources expended on matters relating to the indictment and it provides the PO in the jurisdiction to which the case is transferred, the opportunity to consider whether any further investigation needs to be carried out and the form of the indictment.

109. It is understood that this practice was endorsed at a meeting held on 12 February 2016 and attended by representatives of, *inter alia*, the Court of BiH, the POBiH, district and cantonal courts and POs and the HJPC.

X. WITNESS PROTECTION AND CASES OF SEXUAL VIOLENCE

110. The problems with witness protection are so wide-ranging and complex (and have already been the subject of a considerable number of in-depth analyses¹⁰⁵),

¹⁰² A further bone of contention is that the prosecutor who has settled the indictment gains the relevant credits for the purpose of the quota, whereas the prosecutor who actually conducts the trial gets no such credit.

¹⁰³ See para.67 *supra*

¹⁰⁴ "Working Paper on the Transfer of Cases before Indictment Confirmation" 2 February 2016. The statistics quoted in the paper show that in 2015 the Court of BiH issued 39 decisions in respect of transfer of cases. Of the 39 applications made, 7 were rejected. The POBiH made the request in respect of 24, the defence in respect of 4 and in 11 cases the Court acted of its motion.

¹⁰⁵ See e.g. "Follow-up report of the Implementation by BiH of the Recommendations issued by the Committee on Elimination of Discrimination against Women" July 2015 (cedaw/c/bih/co/4-5) and House of Lords Select Committee on Sexual Violence in Conflict; "*Sexual Violence in Conflict: A War Crime*" Report, published 12 April 2016 -HL Paper 123.

that it is not possible to do more than refer to some of the more obvious effects upon the trials and backlog of war crimes cases.

111. Article 1 of the 2014 Law on Witness Protection Programme¹⁰⁶ states “*The purpose of this law is to provide for efficient protection of a witness during and after criminal proceedings in order to enable the witness to testify freely and openly in criminal proceedings before the Court of Bosnia and Herzegovina* (emphasis added).

112. It follows therefore that it is not applicable to cases before the cantonal or district courts. Accordingly any case involving a witness who has testified with protective measures in a trial at ICTY, or one for whom it is clear that protective measures will need to be ordered, will have to be tried at the Court of BiH regardless of the nature of the case or the level of the perpetrator.

113. The difficulties with protecting the identity of a witness have not changed since the author’s report in 2013:

“It should be acknowledged that witness protection, (in the sense of the avoidance of public knowledge of the identity of a protected witness), is difficult, if not impossible, to achieve in trials which take place in any of the BiH courts, owing to the self-contained nature of the more rural communities. Even in the more populous towns such as Sarajevo or Banja Luka, the ethnically homogenous areas make them subject to the same problems.”

114. In October 2015 BIRN reported:

“Several dozen protected witnesses in complex war-crimes and organised crime cases were left without protection and support from January to June this year because a commission to ensure the continued implementation of Bosnia and Herzegovina’s witness protection programme was not set up in time. The problem had its origins in 2014, when after a proposal by Bosnia and Herzegovina’s Council of Ministers, the law governing the witness protection programme was revised with the aim of harmonising it with European standards. According to the revisions, all decisions related to people covered by the programme could be only made by the commission, which should have been formed no later than 30 days after the revisions came into effect. But after the revisions of the law were made and before the commission was established,

¹⁰⁶ BiH Official Gazette No.29/04.

some protection programmes had already expired. The six-month delay began after the state prosecution and court failed to propose a list of members who would represent them at the commission. On top of that, the commission's ethnic representation requirement, ensuring that Bosniaks, Croats and Serbs were all involved, was not fulfilled."¹⁰⁷

115. Protective measures should apply to all complainants in cases involving allegations of sexual assault save for the rare occasions that a complainant makes it clear that she/he wishes to give evidence publicly. Accordingly all efforts should be made to extend the provisions of the 2014 Law to all courts and ensure (if not already the case), that all courts are equipped with facilities which enable a complainant to give evidence by remote link.

116. In respect of trials involving crimes of sexual assault, the judges raised three main issues:

(a) A repetitive reason for the return of indictments was that witnesses who had when interviewed requested protective measures, or who would clearly be asking for same, were being named in indictments. In the case of *Prosecutor v. Jurić*,¹⁰⁸ the indictment, which included a charge of rape, was returned as the personal details of the complainant were included. The explanation of the prosecutor for so doing was as follows: "the victim did not request protective measures...I have the largest number of cases of sexual violence. I know if she gives a statement in front of her husband she will want to testify publicly."¹⁰⁹

(b) Too often prosecutors fail to explain to a witness in advance of the trial that an application could be made not only for protective measures but that their name could be withheld from the public.

(c) That the majority of accused charged with sexual assault were alleged to be direct perpetrators. Rarely was the superior charged with these offences as an aider and abettor or failing to prevent or punish the crime.

¹⁰⁷ www.balkaninsight.com.

¹⁰⁸ KTRZ 0009795 14.

¹⁰⁹ See also as examples: *Prosecutor v. Slavko Savić* (KTRZ 0009378 14) and *Prosecutor v. Dragičević et al* (KTRZ 0008767 14).

117. Whilst none of the judges identified any particular problems arising during the trial of cases involving allegations of sexual assault, it should be noted that there has been criticism of the level of sentences passed in the event of conviction.

XI. THE EFFECT OF THE ‘QUOTA’ SYSTEM

118. Virtually the only issue on which judges and prosecutors were in complete agreement, was the requirement set by the HJPC of the number of cases (‘quota’) which had to be ‘completed’¹¹⁰ by judges and prosecutors on an annual basis¹¹¹. Without exception, it was felt that this was a rigid system which took no account of the complexities of war crimes prosecutions. These complexities mean that a greater length of time has to be expended on cases, both in the investigative and trial phase. As one prosecutor said “it is impossible to complete five complex cases within one year”.

119. The Law on the HJPC makes that body the sole one responsible for the evaluation of the work done by judges and prosecutors.¹¹² Under the law the HJPC issues Books of Rules (“BoR”) which set out the relevant criteria applicable to judges and prosecutors.¹¹³ These BoRs set out a complex system of points under three heads of evaluation i.e. achieved annual quota, quality of decisions and job attitude.¹¹⁴

120. The criteria for evaluation of judges’ and prosecutors’ work say that the purpose is to determine the effectiveness and quality of their work and that **the assessment ofresults shall be used in the process of appointment to other**

¹¹⁰ ‘Completed’ cases for prosecutors means indictments filed or completed investigation or closing an investigation; for judges it means issuing judgment. In respect of prosecutors it was said that the number of completed cases required of prosecutors had been 4 *per annum*, until, at the request of the CP, it had been raised to 5.

¹¹¹ This issue also formed part of the authors report on training requirements when she noted “*this.. ..was a constant theme which emerged from the discussions. The effect of such “quotas” is two-fold. First, the temptation is to go for the easy option in indicting single low-level perpetrators on relatively minor crimes... ”*”.

¹¹² See Article 17 (22) “Setting criteria for the performance evaluations of judges and prosecutors”

¹¹³ Chief Prosecutors and Presidents of Courts have separate BoRs from those of ‘ordinary’ prosecutors and judges.

¹¹⁴ It is not felt necessary for the purposes of this assessment to set out the detail of this system. OSCE, in March 2015, produced an excellent analysis of the plethora of documents which set out the requirements mandated by the HJPC.

functions in the judicial institutions, specifically in the assessment of their skills, expertise and suitability to advance within the judicial system¹¹⁵.

121. Whilst Article 8 of the BoR on Orientation Criteria allows a prosecutor to file a motion for increased valuation this has to be done to the CP. If the CP agrees and increases the valuation of a given case, then it is the CP's responsibility to present the case to the Collegium of Prosecutors and to the HJPC.¹¹⁶ Those prosecutors who were aware of this Article, (some said they were not so aware), took the view that the CP would not be receptive to such a motion. As one said *"the main feature for any sort of evaluation by the CP and others is the number of indictments issued....there is no instruction as such in writing but at each collegium and meeting it is made clear that evaluation [depends] on the number of indictments issued"*. The result, added the same prosecutor, is *"Instead of dealing with the most complex cases [we] deal with the simple ones"*.

122. The President of the HJPC, Milan Tegeltija¹¹⁷ takes the view that "most of the quotas are appropriate" and that the solution is to *"form teams for the most complicated cases and keep the quotas in effect."* However Milorad Novković, (immediate past president of the Supervisory Body and before that president of the HJPC), acknowledged the difficulty in applying this system to those engaged in dealing with war crimes cases and was aware that "easy" cases were being undertaken in order to meet the quota. In his opinion complex cases should be exempted from the quota provisions. Instead "there should be supervision or an audit be carried out to check that the work was being done, but I believe that prosecutors are sufficiently conscientious".

123. The effects of this point system with its emphasis on 'completed' cases is:

- In respect of the prosecutors, an incentive to deal with simple cases, (if necessary by the process of "fragmentation"); a reluctance to transfer the simpler cases before an indictment has been lodged, (no points are

¹¹⁵ Article 2.

¹¹⁶ Article 9 is to the same effect in the judges' BoR.

¹¹⁷ Tegeltija was President at the time of interview in August 2015. In September 2015 he replaced Novković as President of the Supervisory Body.

awarded in such a case), large numbers of indictments being filed in December in order to meet the quota

- In respect of the judges, potentially limiting relevant evidence in order to complete trials; rushed judgments which may lead to appeals; an overload of work by prosecutors filing indictments in December to meet their 'quota' requirements, at a time when productivity is not at its highest.

124. It is not suggested that all evaluation procedures should be abandoned for judges and prosecutors who are engaged in the processing of war crimes cases. However a more flexible model should be introduced, which takes into account the work load and the particular complexities of a war crimes case e.g. how many cases allocated to a prosecutor/judge, how many suspects, what level, what stages has an investigation/court proceedings gone through, what work has been done to reach those stages, what percentage of the case is complete. For such an assessment to be valid there must be a properly structured management and reporting system, composed of persons who have the requisite understanding of the processing of war crimes cases.

XII. THE CPC 2003

125. As discussed earlier,¹¹⁸ many of the indictments are returned by the judges because it is said insufficient factual detail has been provided by the prosecutor. The level of detail required by the judges is extremely high. Reasons for return on this basis have included:

- Descriptions of the crimes not being as detailed as set out in the attached witness statements and not including descriptions of events taken from all attached witness statements;
- Details requested of what was meant by the sentence "then they *forced* her to go with them" (sic) and for the same indictment pointing out that the witness said in her statement that the suspect threatened her with a bayonet not a knife; and

¹¹⁸ See para. 95ff *supra*.

- Ordering the prosecution to provide the names of unidentified victims of a killing, where the witness statements stated that 20 people had been killed, only four of whom were known by name and whose bodies had been exhumed.

126. The amount of detail required comes about as a result of the wording of Article 227 of the current¹¹⁹ CPC, in particular Article 27(1)(c):

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

127. 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).

128. 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”*.¹²⁰

129. 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

¹¹⁹ It is in identical terms to Article 262(2) of the Social Federal Republic of Yugoslavia CPC.

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.

130. 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”.

131. 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 crime¹²¹ and is mandated to *“reach a verdict solely based on the facts and evidence presented at the main trial.”*¹²² 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 that the description of the circumstances surrounding the crime are ‘significantly’ altered, then the perception is that it provides grounds for an appeal.

132. 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.

133. The perceived unfairness caused by the fragmentation of cases¹²³ to the process of disclosure of evidence to the defence, may be cured by amending Article 226 of the CPC to mandate disclosure by prosecutors, of material in their possession which although not used in the case under consideration, may have a

¹²⁰ Article 228(3) CPC.

¹²¹ Article 280(2) CPC.

¹²² Article 281(1) CPC.

¹²³ See para. 81 *supra*.

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.¹²⁴

XIII. CONCLUSION

134. As may be seen the findings of this assessment present a depressing picture of the current state of affairs, with regard to the completion of war crimes trials at the Court of BiH within the period contemplated by the NWCS – even with the grant of an extension.

135. The ToR did not include, for understandable reasons, a requirement to assess the nature of the trials themselves. However anecdotal evidence suggests this is a contributory factor to the delay in completion of the NWCS which would benefit from a separate analysis. It is submitted that areas in need of attention to make trials more efficient and shorten the length are:

- Greater use of adjudicated facts from other trials, particularly those at ICTY
- Greater use by the judges of their case management powers
- More regular and intensive advocacy training for prosecutors and defence lawyers
- A change to the ingrained practice that work starts at 8am and finishes at 4pm. An efficient system of criminal justice requires work to be performed outside official working hours

136. The recommendations made in Annex I address issues in the context of the war crimes cases but, as is self-evident, these cases form only a part of the work undertaken by the POBiH and the Court of BiH. It is suggested that these recommendations should not be considered in isolation, but rather in the context

¹²⁴ This obligation is enshrined in the Rules of Procedure and Evidence (“RPE”) of all international criminal tribunals. See e.g. Rule 68 ICTY RPE.

of an overall assessment of the organisational and working practices of the two institutions.

Joanna Korner

June 2016

XIV. APPENDICES

Appendix A: Her Honour Joanna Korner CMG QC Curriculum Vitae

Professional Address: Southwark Crown Court, 1 English Grounds, London SE1 2HU

Email: HHJ.Joanna.Korner@ejudiciary.net

Career Summary:

November 2012: Appointed Judge of the Crown Court of England & Wales

January 2009–2012: employed by The Office of the Prosecutor (OTP), International Criminal Tribunal for the former Yugoslavia (ICTY) as a Senior Prosecuting Trial Attorney, leading in trial of *Prosecutor v. Mičo Stanišić & Stojan Župljanin*.

April 2004–2008: in practice at Bar of England & Wales.

September 1999 - April 2004: employed by the OTP ICTY as a Senior Prosecuting Trial Attorney. In the course of this employment, lead prosecutor in two trials of political and military leaders – *Prosecutor v. Radoslav Brđanin & Momir Talić*, *Prosecutor v. Milomir Stakić* -charged, *inter alia*, with Genocide and CaH and over the period engaged in the investigation and conduct of four other cases. Had charge of a large multi-disciplinary and multi-national, team of lawyers, investigators, analysts, administrative staff and language staff.

April 1993 – September 1999: in practice at Bar of England & Wales. As Queen’s Counsel, prosecuted and defended cases of Murder, Serious Frauds, Kidnapping and Serious Sexual Offences.

April 1993: Appointed Queen’s Counsel.

November 1974 – April 1993: practising Barrister (Criminal work).

November 1974: Called to the Bar of England & Wales.

Education:

1970–1973: Inns of Court School of Law. Degree of Barrister-at-law.

1963–1968: Queensgate School, London.

Other Relevant Experience:

2006: Instructed as one of team of Counsel acting for Bosnia & Herzegovina, in the ICJ case of *Bosnia & Herzegovina v. Serbia & Montenegro*.

September 2004-November 2005: Senior Legal Advisor to Chief Prosecutor of Bosnia & Herzegovina, during establishment of War Crimes section. Responsibilities included drafting the original criteria for whom should be prosecuted, selection of international prosecutors, the integration of national and international prosecutors, and liaising with other criminal justice agencies.

Contributor to “Transitional Justice and Displacement” (2012) Social Science Research Council.

2012: Instructed by EU Delegation in Bosnia and ICTY to conduct an assessment of training needs for judges and lawyers in Bosnia, in respect of the investigation and trial of war crimes. Report delivered in May 2013.

Have participated as a lecturer in training courses, *inter alia*, for: Russian judges on jury trial; Iraqi Judges, Rwandan Judges, and Cambodian lawyers on International Humanitarian and Criminal Law; Bulgarian judges and prosecutors on EU law.

2014 - International Course Director of the Judicial College for England and Wales.

Grade “A” advocacy trainer. Head of International Faculty of Advocacy Training Council (ATC) 2005-2011. Organised and taught on numerous advocacy training courses in the UK and internationally.

Awards:

Appointed Companion of the Order of St. Michael & St. George (CMG) for services to international law, in June 2004

Appendix B: Terms of Reference

Title: Expert Consultant – War Crimes Prosecution

Contract duration: 16 August 2015 – 4 September 2015

Proposed Consultants: Joanna Korner

Task: To review the performance of the Prosecutor's Office of BiH (POBH) and Court of BiH in the investigation and commencement of war crimes cases in 2014 and develop recommendations to further improve the performance of these institutions.

Task Complexity: Complex

Background:

The National Strategy for War Crimes Processing of BiH, adopted in December 2008, provides that the most complex and highest-priority war crimes cases should have been prosecuted within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy. It is clear that these deadlines will not be met.

In 2014, POBH substantially increased the number of war crimes indictments filed compared to the previous year. This marked an increase in its rate of reducing the backlog of identified war crimes cases.

However, the Court of BiH reported that an increasing number of indictments were returned for amendment, and stated its concerns that the quality of war crimes cases filed by the POBH may be decreasing even as the quantity increases.

The POBH has indicated that it does not agree with this assessment and noted its concern that delays in the confirmation of indictments and commencement of cases may arise from issues internal to the Court of BiH.

More generally, given that the deadlines set out in the National War Crimes Strategy will not be met even though substantial investments have been made in the resources available for war crimes processing, it is important at this time to ensure that the activities of the POBH 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.

Both the POBH and Court of BiH have agreed that they would benefit from an objective and critical review of their work in 2014 and related recommendations on operational and strategic issues to improve their performance. The High Judicial and Prosecutorial Council (HJPC) has also agreed that a review and recommendations would assist it to appropriately and constructively implement its supervisory responsibilities over the work of the POBH and Court of BiH. The POBH, Court of

BiH and HJPC have further agreed to assist and support such review, including by providing performance statistics, case-related information and decisions, operational and managerial policies and access to prosecutors and judges.

In light of its long-standing support to national war crimes processing in BiH, the OSCE Mission to BiH has undertaken to engage an experienced, knowledgeable and independent war crimes practitioner (Expert Consultant) to conduct this review and develop appropriate recommendations.

Objective:

The Expert Consultant will review the performance of the POBH and Court of BiH in the investigation and commencement (filing and confirmation of indictments) of war crimes cases in 2014, identify achievements, shortcomings and challenges (operational and strategic), and develop recommendations to improve the work of these institutions so that they can achieve the goals of the National War Crimes Strategy as expeditiously as possible. The Expert Consultant may, as he/she deems appropriate, further review judgments in war crimes cases during 2014, and previous years, to accurately and fully assess performance in the investigation and commencement of such cases.

In reviewing the performance of the POBH and Court of BiH in 2014, the Expert Consultant will select specific cases to examine as the Expert Consultant deems appropriate, except that the Expert Consultant will not review investigations and cases arising out of dossiers transferred by the ICTY to the POBH (Category II cases).

The Expert Consultant will be located in the premises of the POBH and will be in daily contact with relevant actors in the POBH and Court of BiH, including the Chief Prosecutor of POBH, the Head of the Special Department for War Crimes of POBH, prosecutors of the Special Department for War Crimes, the President of the Court of BiH and judges from the War Crimes Chamber of the Court of BiH. The Expert Consultant will further engage with officials from the High Judicial and Prosecutorial Council and the National War Crimes Strategy Steering Board.

The Expert Consultant will review the following issues and such other issues as the Expert Consultant deems appropriate to achieve the objective of this ToR:

- The extent and comprehensiveness (accuracy) of the identified backlog of war crimes cases that remain to be prosecuted and revised forecasts for completing the processing of such cases.
- The filing of indictments in accordance with the complexity criteria and priorities of the National War Crimes Strategy, including in particular the filing of indictments against senior- and mid-level suspects, as well as in accordance with the need for judicial economy.
- The practice regarding sexual violence charges in the indictments issued, including the frequency of such charges and whether they are framed using the most appropriate crime categories (including crimes against humanity) and modes of liability, including those that enable the crimes to be linked to senior or mid-level officials.

- The frequency of and rationales for returning indictments to the POBH for amendment, consistency in standards applied by the Court of BiH in reviewing indictments and quality-control and oversight procedures in place at the POBH.
- The appropriateness of the legal qualifications in indictments of the acts charged and related issues in the indictment confirmation process, particularly in light of the judgments of the ICTY and applicable sentencing regime in BiH.
- Investigative practices and strategies employed by the POBH, including the implementation of an office prosecutorial strategy, intelligence-driven investigations, cooperation between investigators and prosecutors, and coordination of related investigations.
- The referral of less complex cases to entity-level courts in accordance with the National War Crimes Strategy.
- Efficiency measures proposed and/or adopted by the POBH and Court of BiH to expedite war crimes processing in a manner consistent with the fair trial rights of the accused.
- Skills and legal capacities/deficiencies of the POBH and Court of BiH in light of the specific requirements of war crimes cases.

Tasks and Deliverables:

- Written Report on the identified issues and recommendations.

Minimum Qualifications for the International Expert:

- 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 wars in the Balkans;
- Proficient legal writing;
- 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 International Consultant: Joanna Korner

Justification: The selected candidate is ideally placed to carry out the proposed assessment. Having served for more than eight years as ICTY Senior Prosecuting Trial Attorney in high profile cases, Judge Korner has outstanding experience in the prosecution of war crimes in the former Yugoslavia. She also has excellent experience working with the BiH judiciary to enhance efficiency in dealing with war crimes cases. She has already been working as an expert for the Mission in 2013, when she

drafted a key report on the training needs of judges and prosecutors dealing with war crimes in BiH. Considering her unique professional background and previous successful engagement for the Mission, as well as the sensitivity of the task at issue, other candidates have not been contacted nor interviewed.

Reporting: The consultant will report to the Head of the OSCE Mission to BiH.

**Appendix C: Letters from OSCE to President of the Court of BiH and Chief
Prosecutor of BiH**

(i) Text only of letter from OSCE to President of the Court of BiH

5 August 2015

Ms. Meddžida Kreso
President

Court of Bosnia and Herzegovina

Dear Ms. Kreso,

To continue providing the institutions of Bosnia and Herzegovina with the highest level of support in addressing war crimes cases, the OSCE Mission in agreement with ICTY Chief Prosecutor Serge Brammertz has engaged a highly experienced practitioner to carry out an independent review of the work of the Court and Prosecutor's Office of Bosnia and Herzegovina (POBH).

Ms. Joanna Korner, Judge of the Crown Court of England & Wales and former Senior Prosecutor at the ICTY, has been selected for this task. She is available to conduct the review from 17 August to 4 September 2015. Due to her previous experience, which includes drafting a report in 2013 on the training needs of judges and prosecutors dealing with war crimes in BiH, Ms. Korner is ideally placed to carry out the proposed assessment.

The Mission requests your full co-operation and support in enabling Ms. Korner to perform her tasks efficiently and effectively. In order to properly carry out her assessment, the expert and her interpreter will need unhindered access to war crimes case-files and to be able to contact relevant actors in the Court of BiH, including you as the President of the Court of BiH and judges [from] the War Crimes Chamber of the Court of BiH.

Finally, I would like to propose a meeting on 17 or 18 August, when Head of the OSCE Mission to BiH Ambassador Jonathan Moore, along with Head of the ICTY Mission to BiH Margriet Prins, could introduce you to Ms. Korner and further discuss her assignment.

Thank you in advance for your kind attention to this matter. Our Acting Head of Rule of Law, Mr. Francesco de Sanctis, will be in touch with your office to [arrange] details.

Yours sincerely,

[signature]

Alexander Chuplygin

Deputy Head of Mission

OSCE Mission to Bosnia and Herzegovina

Cc: ICTY Mission to BiH - Margriet Prins, Head

(ii) Text only of letter to Chief Prosecutor of BiH

5 August 2015

Mr. Goran Salihović
Chief Prosecutor
Prosecutor's Office of Bosnia and Herzegovina

Dear Mr. Salihović,

To continue providing the institutions of Bosnia and Herzegovina with the highest level of support in addressing war crimes cases, the OSCE Mission in agreement with ICTY Chief Prosecutor Serge Brammertz has engaged a highly experienced practitioner to carry out an independent review of the work of the Court and Prosecutor's Office of Bosnia and Herzegovina (POBH).

Ms. Joanna Korner, Judge of the Crown Court of England & Wales and former Senior Prosecutor at the ICTY, has been selected for this task. She is available to conduct the review from 17 August to 4 September 2015. Due to her previous experience, which includes drafting a report in 2013 on the training needs of judges and prosecutors dealing with war crimes in BiH, Ms. Korner is ideally placed to carry out the proposed assessment.

The Mission requests your full co-operation and support in enabling Ms. Korner to perform her tasks efficiently and effectively. In order to properly conduct her assessment, the expert and her interpreter will need unhindered access to war crimes case-files, as well as the possibility to engage with relevant staff in the POBH, [including] you as the Chief Prosecutor, the Head of the Special Department for War Crimes, and prosecutors of the Special Department for War Crimes. Considering the complexity of the task and the relatively short period of her availability, it would also be important that Ms. Korner be located in the premises of the POBH [during] her engagement on this task.

Finally, I would like to propose a meeting on 17 or 18 August, when Head of the OSCE Mission to BiH Ambassador Jonathan Moore, along with Head of the ICTY Mission to BiH Margriet Prins, could introduce you to Ms. Korner and further discuss her assignment.

Thank you in advance for your kind attention to this matter. Our Acting Head of Rule of Law, Mr. Francesco de Sanctis, [will] be in touch with your office to arrange details.

Yours sincerely,
[signature]
Alexander Chuplygin
Deputy Head of Mission
OSCE Mission to Bosnia and Herzegovina

Cc: ICTY Mission to BiH - Margriet Prins, Head

Appendix D: Court of BiH Response to Questionnaire

Response received on 17 August 2015 (emphasis in original response)

1. **How many judges are assigned to war crimes cases?**
2. **What is their level of experience?**
3. **What kind of training do the judges undergo with regard to statutory and factual requirements before they are assigned to war crimes cases? Is there any training with regard to the job done?**
4. **How are the criteria for the allocation of cases between the Court of BiH and entity-level courts applied?**

The procedure and criteria for the allocation of war crimes cases between the Court of BiH and the entity courts and the Basic Court of the Brčko District of BiH are primarily regulated by the BiH Criminal Procedure Code (Article 27a. and Article 449). The CPC BiH provides that the Court, if all the statutory prerequisites have been met, makes a decision on taking over or transferring cases, **while taking into account the gravity of the criminal offense, the capacity of the perpetrator and other circumstances important the case complexity evaluation.** These criteria defined by the Code are worked out in greater detail in Annex A to the National War Crimes Prosecution Strategy, which is why the Court, or rather the Fixed Panel of Section I for War Crimes of the Criminal Division of the Court of BiH, which is in charge of the implementation of strategic obligations pertaining to decisions on taking over or transferring war crimes cases from within the Court's jurisdiction, in assessing the complexity of cases, uses the Strategy as an orientation point for their interpretation. In that regard, it should also be noted that the Fixed Panel and a team of the BiH Prosecutor's Office, which has also been formed with the aim to improve Strategy implementation, at joint meetings held during 2011 identified practical problems related to the process of taking over or transferring war crimes cases, which, *inter alia*, were caused by an uneven and unbalanced interpretation of the case complexity evaluation criteria, so that a general interpretation of the case complexity evaluation criteria was agreed in November 2011, which additionally improved the efficiency of the case complexity evaluation criteria.

5. **Which criteria are applied to evaluate case complexity, apart from those set forth in the National War Crimes Prosecution Strategy?**

Decisions on taking over or transferring cases are made exclusively by applying the criteria prescribed by the CPC, or Annex A to the Strategy.

6. **If a decision is made to return the indictment to the Prosecutor's Office, who makes such a decision?**

In accordance with the CPC BiH, decisions on the confirmation/refusal of indictments or their return for consolidation to the BiH Prosecutor's Office are made by the preliminary hearing judge seized of the indictment.

7. What are the main problems concerning:

- (i) investigations**
- (ii) indictments**

(i) Over the past year and a half, several serious problems have been noticed with regard to the indictments issued by the BiH Prosecutor's Office during the given period of time.

The first problem concerns a drastic decline in the quality of indictments. It has been noticed that the majority of indictments submitted to the Court for confirmation abounded in flaws with regard to form and/or substance, which is why they could not have been confirmed without their previous return for consolidation to the BiH Prosecutor's Office. Some of the indictments were returned for consolidation several times, and some of them were even ultimately refused. Specifically, between 1 January 2014 and 31 July 2015, the BiH Prosecutor's Office issued a total of 75 indictments in war crimes cases.¹²⁵ In the procedure launched by the issued indictments, during the preliminary hearing and indictment control phase, the Court confirmed no more than **29** indictments without previously returning them for consolidation, which means that the Court was able to confirm a mere 39% of the total number of indictments issued without previously returning them to the Prosecutor's Office for consolidation. Further, the Court completely refused four indictments, one of them for formal reasons, and the remaining three for the lack of grounded suspicion that the suspect committed the acts he was charged with in the indictment, with an instruction that additional investigative actions should be conducted. In two of the four mentioned cases, the Prosecutor's Office subsequently issued new indictments that were then confirmed, one without any consolidation, and the other only after it was again returned for consolidation. Besides, in two cases indictments were refused in relation to one of the counts of indictment, while in one case the indictment was refused in relation to four counts of indictment (it should be noted here that three of those counts were refused in their entirety and one of them only partially, in relation to some of the accused persons, while in relation to the others it was confirmed). The remaining 42 indictments were returned for consolidation to the BiH Prosecutor's Office. Of that figure, 41 indictments were eventually confirmed, while in one case the charges were dropped. Of the 41 confirmed indictments, 27 were confirmed after being returned for consolidation once, 11 after being returned for consolidation twice, two after being returned three times, while one of the indictments, before it was eventually confirmed, was returned for consolidation no less than four times!

The other problem concerning the indictments is related to the fact that indictments were issued in less complex cases, which means there was inadequate prioritization of cases at the BiH Prosecutor's Office. In that context, it has been observed that, in the process of selecting cases for priority prosecution, the Prosecutor's Office was not guided by the criteria set forth in Annex A of the National War Crimes Prosecution Strategy, which is why the Court has faced a

¹²⁵ **Note:** In two cases in which the initially submitted indictments were refused, the new indictments that were issued subsequently were, for the purpose of this analysis, treated as separate indictments and were included as such in the total number of indictments.

number of less complex cases that meet the requirements to be prosecuted before entity courts – which is a practice that has seriously undermined the attainment of Strategy objectives. Specifically, **between 1 January 2014 and 31 July 2015**, out of the total number of 73 issued indictments,¹²⁶ **23 (32%)** were issued in cases which, in the opinion of the fixed panel, fall into the category of **less complex cases** that meet the requirements to be prosecuted before the courts with territorial jurisdiction. Out of this figure, after confirming the indictments, the Court transferred the total of 17 cases to courts with territorial jurisdiction. In three of the six remaining less complex cases, the decision on transfer was not made because those were cases in which the accused were not available to the BiH judiciary, one of the cases was not transferred because the charges were meanwhile dropped, while the remaining two cases were not transferred because the indictments in those cases were ultimately refused. The other cases fall into the category of complex cases. Of those, **26 (36%)** were Category II cases (cases that need to be prosecuted within 15 years), while **24 (33%) were Category I cases (cases that need to be prosecuted within 7 years), which means the most complex and top priority cases.** In six out of the mentioned 24 most complex cases, indictments were issued against persons who are not available to the BiH prosecution authorities.¹²⁷

In addition to the referenced problems relative to the quality, that is, complexity of the filed indictments, another problematic practice of the Prosecutor's Office of B-H has been observed in the past few years – the so called “fragmentation” of cases, that is, the filing of multiple indictments against multiple persons regarding one and the same event, or the filing of multiple indictments against one and the same person. We will mention just a few latest examples of such practice. The first one concerns the indictments for the criminal offense of Genocide filed in the second half of 2014 over the interval of only two months. In related cases in which the Accused are charged with the criminal offense of Genocide committed in the municipalities of Bratunac, Zvornik and Srebrenica in July 1995, the Prosecutor's Office filed two indictments, namely, an indictment against two persons in the case of *Josipović et al.* on 18 September 2014, and an indictment against three persons in the case of *Vasić et al.* on 20 November 2014. In February 2015, a decision was rendered to merge proceedings in these two cases, so that joint proceedings have been conducted against all five accused before this Court as of then. Also, on 21 January 2015, the Prosecutor's Office of B-H filed an indictment against Ilija Jurić charging him with the same criminal event that the Accused in the *Brnjić et al.* case were charged with under the indictment filed

¹²⁶ For the purposes of case complexity analysis, in two cases in which indictments were issued on two occasions (after the initially issued indictment was refused), the issued indictments were not treated as separate ones, as was done in the above analysis of quality of the issued indictments, which means that the total number of cases includes only one, not both of the indictments. This is a reason why in the case complexity analysis we are referring to 73, not 75 indictments. The different approach to counting indictments is justified by the type of analysis – in the indictment quality analysis the subject of analysis is the quality of each individual indictment, while in the complexity analysis the subject of analysis is the factual substratum of the indictment, which is the same in the initially submitted indictment as in the one submitted subsequently.

¹²⁷ In five out of the mentioned six cases, all persons against whom indictments were issued are not available to the BiH prosecution authorities, while in one of the cases, one of the two accused is available to the BiH judiciary, and the other is not.

six months previously. Also, during this period, the Prosecutor's Office filed two indictments against one and the same person (Zdenko Andabak) in an interval of only four months. The "fragmentation" tendency has also been observed in the cases that are still in the investigation stage, hence it happened that on the same day the Court received from the Prosecutor's Office two almost identical motions pursuant to Rule 75(H) of the ICTY Rules of Procedure and Evidence requesting a modification of the protection measures relative to the same witnesses, but for the purposes of two different cases. It also follows from the description of facts of the criminal events in the referenced motions that in both these cases investigation is conducted against the same persons concerning identical events! A similar situation was observed in another two cases of the Prosecutor's Office of B-H in which there is an ongoing investigation against the total of five suspects charged with murders, rapes and other inhumane acts committed in the Rogatica Municipality during the period from May 1992 until the end of 1993. Although the criminal acts that these suspects are charged with were committed in the same period, in the same area and within the same context of events, the Prosecutor's Office has not conducted a joint investigation against them, but has processed them in two different cases. Another thing that should also be stressed here is that different prosecutors are seised of these cases and, on top of it all, they have given different legal qualifications to the acts as charged; thus in one case the suspects are charged with the criminal offense of War Crimes against Civilians, while the suspects in the other case are charged with the criminal offense of Crimes against Humanity.

(ii) With respect to the problems that we encounter in the course of war crime cases trials, we want to emphasize that the most important ones concern the implementation of the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses. It has been observed that the Prosecutors of the Prosecutor's Office of B-H do not apply the provisions of this Law appropriately. Specifically, it has been observed that the Prosecutor's Office did not establish contacts with witnesses with a view to informing them in a timely manner of the right to request to testify under protection measures, and that the witnesses to whom protection measures were granted in the course of the investigation or upon the confirmation of the indictment were not informed of the significance and the scope of the measures ordered. Thus it is not uncommon that a witness learns of the possibility of testifying under protection measures only at the main trial, that is, after his personal information has already been published in an indictment, and often even after the presiding judge of the panel took the witness' personal information at a hearing open to the public. It also happens that a witness to whom a measure of protection of personal information is granted often mistakenly believes that the measure implies that his identity will stay undisclosed not only to the public, but also to the Accused and his Defense Counsel (which is the case only when a witness is granted the status of a protected witness pursuant to Articles 15-23 of the Law on the Protection of Witnesses, a measure applied very rarely). Finally, a particular problem is the inadequate attitude of the Prosecutor's Office of B-H toward witnesses who testified under protection measures in ICTY cases. The Prosecutor's Office regularly fails to make necessary checks in that respect, so it happens that it is established only in the course of the trial that a witness whose personal information has already been presented in an indictment and even at the main trial

had previously testified before the ICTY as a protected witness. In addition to the referenced problems, it has also been observed that, in general, the Prosecutor's Office's communication with witnesses in pre-trial proceedings is insufficient. Given that the task of taking statements from witnesses is very often delegated to SIPA (State Investigation and Protection Agency) officers or officers of the Entities' police bodies, it is often the case that a Prosecutor's first contact with a Prosecution witness happens only at the main trial. Due to such practice, that is, the lack of adequate communication with witnesses, the Prosecution would propose in an indictment or even during the main trial the summoning of witnesses who had meanwhile died or become unfit to testify. All referenced problems have had a negative effect on both the duration and the quality of trials in war crimes cases.

Appendix E: POBiH Response to Questionnaire

(i) Text of letter from POBiH dated 13 August 2015

Reference number: A-22/15

Sarajevo, 13 August 2015

Organisation for Security and Cooperation in Europe

Mission to Bosnia and Herzegovina

To: Mr. Jonathan Moore, Chief of Mission

Fra Andjela Zvizdovica 1 t.A

71000 Sarajevo

Bosnia and Herzegovina

Dear Mr Moore,

Re: Independent Review of the Work of the Court of BiH and the Prosecutor's Office
BiH, response

Concerning your letter dated 5 August 2015 with regards to the independent review of the work of the Prosecutor's Office of Bosnia and Herzegovina and the proposed meeting with the Chief Prosecutor or the Prosecutor's Office of Bosnia and Herzegovina on 17 or 18 August I wish to inform you that, unfortunately, we are not in the position to approve your request since this would result in violating the basic principles of confidentiality and impartiality of proceedings and the rights to a fair trial which would affect the integrity of cases, and, in addition, this would represent the violation of the rights of witnesses and suspects.

In addition to these important principles being violated, it would be necessary to call the Collegium of Prosecutors of the Prosecutor's Office of Bosnia and Herzegovina to obtain the consent of the Collegium on a very sensitive issue such as this. We would also have to obtain the opinion of the High Judiciary and Prosecutorial Council of Bosnia and Herzegovina.

With regards to your request for a meeting on 17 or 18 August 2015, I propose that the meeting be postponed for the first half of September because I am away on prearranged vacation abroad.

Yours sincerely,

Goran Salihović

Chief Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina

(ii) Text of letter from POBiH dated 1 October 2015

**Reference no. A-225/15
Sarajevo, October 1, 2015**

**OSCE-BiH
Fra Anđela Zvizdovića 1 t.A
71000 Sarajevo**

Dear Sir/Madam,

We hereby deliver the summary of responses to questionnaire for the Chief Prosecutor of the Prosecutor's Office of BiH - Mr. Goran Salihović

Questions/Answers:

1. How many Prosecutors are assigned *solely* to deal with the investigation and trial of war crimes?

A total of 35 Prosecutors work on investigations and trials in the Special Department for War Crimes. The Head of the Department is Deputy Chief Prosecutor Gordana Tadić.

2. A number of new Prosecutors have been engaged to deal with war crimes cases. What kind of training and/or mentoring system is in place to assist them?

Thirteen new Prosecutors commenced work on December 1, 2013 and five Prosecutors (IPA project) commenced work on March 15, 2014; [all] new Prosecutors have been assigned to the Special Department for War Crimes. High Judicial and Prosecutorial Council of Bosnia and Herzegovina appointed these Prosecutors in the regular appointment procedure following a vacancy notice. They [all] met the required legal requirements for appointment to these positions. Prosecutors of the Prosecutor's Office of BiH are independent in their work. In accordance with the Rulebook on [internal] organization of the BiH Prosecutor's Office the Special Department for War Crimes has its Head of Department and is divided into three Sections that are managed by three Prosecutors. Although the concept of mentoring the newly appointed Prosecutors is not foreseen, the work of [all] Prosecutors in the Special Department for War Crimes is monitored by the Heads of Sections, Head of the Department and the Chief Prosecutor thus there are permanent mutual consultations on certain issues. Prosecutors of the Prosecutor's Office of BiH are active participants in various trainings including regular training organized by the Centers for Judicial and Prosecutorial Training of the Federation BiH and Republika Srpska as [well] as some other seminars on prosecution of war crimes (Training for newly appointed Prosecutors in the field of war crimes, organized by the OSCE Mission BiH on May 5-14, 2014; (Training for newly appointed Prosecutors in the field of war crimes, organized by the CJPT "War Crimes Prosecution" May 26 - June 4, .2014 ; Prosecution of War Crimes Cases organized in Neum on May 28-29, 2014; Training the Trainers - Sexual Violence in War, organized by CJPT in cooperation with OSCE in Sarajevo on

November 20-21, 2014; Seminar on sexual violence "Sexual violence in war" organized by the CJPT in cooperation with OSCE in Sarajevo on February 1-12, 2014; Training for Judges, Prosecutors, legal officers/ advisors and senior legal officers on [war] crimes; Training of newly appointed Judges, Prosecutors and legal officers on [war] crimes organized by CJPT in Sarajevo on December 3 and December 15, 2014; The procedures in war crimes cases CJPT Banja Luka , February 2-03, 2015; The procedures in [war] crimes cases – investigating skills CJPT, Sarajevo, February 5-06, 2015; "Witness protection system in BiH – current challenges and future development" NI-CO / WINPRO 11 project / UNDP, Sarajevo, March 19-20, 2015; Conference "The silence of the surviving victims of sexual abuse – [patterns] and consequences" organized by the Citizen Association "Woman - War Victim" and the organization UHD "Prijateljice" /Friends/, Sarajevo, April 7-8, 2015).

3. Is such an Assigned Prosecutor obliged to issue a certain number of indictments *per annum*?

Rulebook on orientation criteria for the [work] of Prosecutors in the prosecutor's offices in Bosnia and Herzegovina issued by the HJPC provides that every year a Prosecutor needs to complete five *KTRZ* cases. The number of completed cases directly influences the evaluation of Prosecutors in accordance with the Rulebook and the Criteria for evaluating the [work] of Prosecutors in BiH.

4. Does each of the assigned prosecutors have a designated area e.g. Sarajevo, Srebrenica, Central Bosnia, ARK?

Each of the Prosecutors in the Special Department for War Crimes [within] the Prosecutor's Office of BiH is assigned in one of the three Sections, and is allocated an area i.e. Section I - Head of Section Gordana Tadić, covers the area of Sarajevo, part of [Eastern] Bosnia including Foča, Herzegovina and Neretva valley; Section II - Head of Section Stanko Blagić, covers the area of North-West Bosnia and part of Posavina and Central Bosnia; Section III - Head of Section Izet Odošević, covers the area of [Eastern] Bosnia, a part of Posavina and Srebrenica 1995.

5. Do the prosecutors work in teams?

Prosecutors work in teams composed of a Legal Officer and an Investigating Officer but Senior Officers - Analysts and Senior Officers - Analysts for the data base on pending war crimes cases, Witness Support Unit, Volunteers, Case Coordinators, the ICT and Electronic Evidence Processing Department are also at their disposal.

6. How many and what level of staff support each prosecutor?

Support staff of the Prosecutor's Office of BiH which is available to Prosecutors of the Prosecutor's Office of BiH are: Clerk - Specialists - Administrative and Technical Assistants to the Prosecutors; Drivers; Clerk - Specialist in charge of the Depository of Seized [items] ; Clerk - Specialist -

Register Officer; Clerk - Specialist for Delivery of Writs; Clerk - Specialist for Receipt of Writs; Senior Advisors - Interpreters; Senior Advisor – Librarian Senior Officer - Proof-Reader, employees of the Department of Public Relations, the employees in the Department for Material and Financial Affairs as well as staff of the Department for Legal, Administrative, Technical and General Affairs.

7. Does each prosecutor have a permanent investigator(s) assigned to his team?

The Special Department for War Crimes of the Prosecutor's Office of BiH has a total of 13 Investigating Officers who are assigned to work in three Sections. In accordance with the Section to which the Prosecutor is assigned and according to the needs in the case assigned, Investigating Officers act in a way that each investigator of the same Section [works] pursuant to the orders of three Prosecutors. If the need arises the Prosecutors can temporarily be assigned several Investigating Officers to work with them.

8. How are the criteria for the division of cases [between] the Court of BiH and those at entity level being applied?

The criteria for division of cases [between] the Court of BiH and Entity Courts are applied in terms of the National War Crimes Strategy where periodic reports that include newly received KTRZ cases in the Prosecutor's Office are submitted to the Court of BiH after which the Permanent Panel of the Court of BiH deciding on takeover or transfer of the proceedings within/out of the jurisdiction of the Court of BiH, executes a preliminary [review] and assessment of the complexity of the war crimes cases submitted in the report and informs the Prosecutors. Once the Prosecutors of the Special Department for War Crimes inspect the file of Court proposed transfers the Assigned Prosecutors perform a detailed analysis of case files proposing transfer for individual cases. The Prosecutor's Office of BiH submitted its ninth additional report in mid-September 2015 to the Court of BiH.

9. Have applications been made for the transfer of cases to the entity/cantonal courts before the indictment stage in 2014/2015? If not what is the reason for [waiting] until the indictment stage?

In 2014, the Court of BiH has, upon the proposal of the BiH Prosecutor's Office, transferred proceedings to Entity Prosecutor's Offices for a total of 42 cases initiated against 81 persons, out of which a total of 28 cases were in the reporting /investigation stage. Up to September 2015 the Court of BiH has, upon the proposal of the Prosecutor's Office of BiH transferred proceedings to the Entity Prosecutor's Office for a total of 19 cases initiated against 32 persons out of which 15 were in the reporting/investigating stage.

10. Have any meetings been held with the judges since July 2014 to reach a consensus on the relevant criteria and/or other matters of administration?

Meetings between representatives of the Special Department for War Crimes [within] the Prosecutor's Office of BiH and the Court of BiH have been held regularly in 2014. The last meeting was held on November 3, 2014 at which an agreement was reached to overcome the common problems in war crimes cases. Head of the Special Department for War Crimes [within] the Prosecutor's Office of BiH is in constant contact with the Head of the Criminal Division - Section I for War Crimes, aiming to resolve any pending operational issues.

11. What criteria is used to determine the complexity of cases?

In determining the complexity of the case the criteria used are provided in the National War Crimes Strategy and jointly agreed interpretation of the Court of BiH and the Prosecutor's Office of BiH pertaining to the concretization of the criteria for assessing the complexity of the case referred to in Annex A of the National War Crimes Strategy.

12. Is there a system in place [which] deals with the prioritization of cases?

Every Prosecutor in the Special Department for War Crimes [within] the Prosecutor's Office of BiH is required, in accordance [with] the General Instruction of the Chief Prosecutor and pursuant to the National War Crimes Strategy, to set five priority cases he/she [will] be [working] on in the course of the year.

13. How many war crimes investigations are presently being undertaken by the BiH Prosecutor's office?

There are 317 cases in the investigation stage (35 prosecutors) in the Special Department for War Crimes as of September 2015.

14. Is there a computerized system [which] enables the BiH Prosecutor's office to check whether any of the entity prosecutors' are conducting an investigation into the same crimes as those referred to the Court of BiH?

The Prosecutor's Office of BiH possesses updated centralized records with data pertaining to the number and structure of unresolved war crimes cases in accordance with Strategic measure No. 2 of the National War Crimes Strategy in Bosnia and Herzegovina.

15. Are checks made [with] the ICTY OTP to see what evidence i.e. [witnesses] or documents, is available?

The Prosecutor's Office of Bosnia and Herzegovina has access to the EDS database (reduced base), and after the database search it sends a request for assistance to Liaison Officer of the Prosecutor's Office of Bosnia and Herzegovina to obtain certified electronic evidence. The Prosecutor's Office of Bosnia and Herzegovina has, at its disposal, the Liaison Officer [with] the ICTY Prosecutor's Office and the Mechanism for International Criminal Tribunals, through [which] it is easier to execute requests for assistance in war

crimes cases. In that way databases available to the Mechanism for International Criminal Tribunals are being searched and if there are no obstacles for delivery of evidence (testimony of protected [witnesses], etc.), electronically certified evidence is used in proceedings before the Court of BiH. Liaison Officer of the Prosecutor's Office of BiH is responsible for the continuous cooperation and actively participates in execution of requests for assistance of both the Prosecutor's Office of BiH and the ICTY Office of the Prosecutor.

16. What type of analysis is conducted of the available evidence and by [whom]?

At the beginning of the [work] on War Crimes cases the Assigned Prosecutor requests for analytical checks of suspects and the events of a particular case through [all] available sources of information and evidence available to the Analysts in the Registry (performing verifications of evidence and information in the cases of the Prosecutor's Office of BiH, accessing open war crimes cases in the BiH Prosecutor's Office and entity prosecutor's offices, accessing the available ICTY databases (reduced databases), accessing data pertaining to cases that are in the course of the trial or where verdicts have been rendered by the Court of BiH as well as the first instance and final judgments of the ICTY, reviewing technical and scientific publications, etc., which are publicly available and are related to the suspects and the events in the case). Once that information is obtained the Prosecutor will, together [with] his team: Legal Officer, Investigating Officer and other members of the team conduct a thorough analysis (review of the situation in case) [which] will then be the basis for issuance of an order to conduct an investigation and for the investigation plan.

17. What criteria determine who will be indicted and whether they will be jointly or individually charged?

Criteria for determining who should be charged and whether he/she will be charged individually or as a part of a joint criminal enterprise are primarily based on the previous final judgments of the ICTY and the Court of BiH for specific events and areas being investigated, the criteria of the National War Crimes Strategy, substantive criminal law in Bosnia and Herzegovina, [international] humanitarian law practice and other documents that BiH has taken over in the area. At the final assessment of the charges and the type of criminal responsibility the determining factor for the Prosecutor is what is objectively possible and how much evidence has been collected for grounded suspicion.

18. What criteria are used to decide when an investigation should be closed? How many have been closed in the last year?

Given that the investigation can be closed [with] the issuance of an indictment or suspension of an investigation the regulations used are those established by the Criminal Procedure Code. In 2014 indictments were issued thus closing investigations in 59 cases, and investigations [were] suspended in 48 cases.

19. What criteria determines the nature of the charges?

“Vaguely formulated question regarding the notion of the nature of the charges as to what it concerns - types of offenses or types of criminal responsibility, but in any case the level and the number of collected evidence on these grounds and in accordance [with] the Criminal Code of Bosnia and Herzegovina is a decisive factor”

20. What systems are in place to ensure consistency in charging?

Given that it is not clear [what] is meant by a broad set term consistency in charging, it is difficult to give a concrete [answer], but if that concerns the application of substantive criminal [law] in the area of war crimes for similar events or a proportional prosecution of suspects [from] different ethnic groups and areas of Bosnia and Herzegovina or the application of the type and degree of criminal responsibility, the rank of suspects at the time of the crime or his/her function in Bosnia and Herzegovina today, the Prosecutor's Office of BiH applies criteria that are consistent with those of the National War Crimes Strategy, rules of substantive criminal law of Bosnia and Herzegovina, the jurisprudence of [international] humanitarian criminal law and judgments [of the] Court of BiH and ICTY.

21. What are the major problems which [arise] in:

- (i) investigations**
- (ii) indictments**
- (iii) trials**

The problems that [arise] during the investigation of [war] crimes: the unreliability of [witness] testimony as evidence, the unavailability of [witnesses] who live outside BiH, the unavailability of a number of documentary evidence relating to the war time civil and military authorities which are in possession of the authorities of Republic of Serbia and Republic of Croatia, a complex process of use of evidence from the ICTY database - especially when it [concerns] direct access to that evidence, the lack of staff and competency in police agencies acting under orders from the Prosecutor's Office of BiH, lack of sufficiently effective system of support to protected witnesses, biological reasons for the inability to use [witnesses], prejudice against [witnesses] in cases of sexual and other violence as [war] crimes, a large number of missing war crimes victims [whose] bodies have not been found, hence it is not possible to prove their murder and a number of other professional and technical reasons. Furthermore, the problems that [arise] at the stage of indictment are: unavailability of suspects that have fled usually to the Republic of Serbia and the Republic of Croatia, or in other cases the quality of evidence for charges, inconsistency of practice of the Court of BiH and the Constitutional Court, uneven quality and reliability of available evidence, uneven standards of the Court of BiH [with] respect to the indictment confirmation because at that stage the Court engages itself into the discretionary right of the Prosecutor concerning the description of State of facts in the case and the analysis of [all] evidence can be conducted only at the

main hearing before the Court of BiH once the evidence is presented before the Court. Apart [from] that and pursuant to Article 148 (3) of the BiH Criminal Procedure Code the Court of BiH returns indictments to the Prosecutor's Office of BiH for editing, even though this regulation does not [concern] the matters of confirmation - decision making on indictments, because in terms of Article 228 of the CPC BiH the Preliminary Hearing Judge is obliged to review [whether] the Court does have the jurisdiction in the matter, [whether] the indictment was properly drafted (Article 227 of the same Code) but only in terms of formal content of the indictment: the name of the Court; the first and the last name of the suspect and his personal data; a description of the act pointing out the legal elements [which] make it a criminal offense, the time and place the criminal offense was committed, the object on [which] and the means [with] [which] the criminal offense was committed, and other circumstances necessary for the criminal offense to be defined as precisely as possible; the legal name of the criminal offense accompanied by the relevant provisions of the Criminal Code; proposal of evidence to be presented. Article 228 (2) of the CPC BiH States that the preliminary hearing judge may confirm or discharge [all] or some of the counts in the indictment within 8 days from the day of the reception of the indictment and in complex cases within 15 days from the day of the reception of the indictment; if the preliminary hearing judge discharges [all] or some of the counts in the indictment he/she will submit the decision to the Prosecutor who then has 24 hours to appeal the decision. A panel of judges will decide on the appeal within a 72 hour period. By returning the indictments for editing sometimes even on several occasions the Court has made it impossible for Prosecutors to file an appeal to the Panel in case of rejection of the indictment, or non-confirmation, and thus prevented the second instance decision making with respect to the quality of indictments submitted to the Court; but [all] 58 indictments submitted to the Court of Bosnia and Herzegovina in 2014 were ultimately confirmed as well as those filed in 2015, except for those that are in the confirmation stage. Thus the fact is that the Prosecutors [waste] time in correcting factual descriptions of the indictment at the stage of confirmation of the indictment instead of presenting their views at the main hearing before the Court of BiH and the Court has repeatedly returned the same indictments for confirmation.

The problem in the indictment stage are also [witnesses] who were granted protective measures during testimony before the ICTY, due to lengthy procedures for variation of protective measures of [witnesses] i.e. the information about protective measures of [witnesses] as to ensure that the same measures be used before the Court of BiH during the questioning of such [witnesses], and a number of other problems in collecting evidence and conducting evidentiary actions.

Problems occurring in the trial stage are similar to those relating to the subjective and objective evidence during an investigation, particularly in terms of consistency of [witness] testimony, uneven standards of the court regarding the evaluation of the quality of evidence as [well] as evidence obtained from ICTY, particularly the adjudicated facts that the Prosecutors again have to prove before the Court of BiH, ensuring the presence of [witnesses] who are

outside of BiH at the trial, [frequent] application of the *in dubio pro reo* principle. The Prosecutors of the Prosecutor's Office of BiH often complain that they do not have an equal status of a party in proceedings unlike the accused and their defense [attorneys]. Permanent Panel of the Court for war crimes have a different approach to presentation of certain evidence, particularly with regard to the presentation of statements given by [witnesses] in the investigation, as [well] as the evaluation of the evidence if it was contradicted by evidence given at trial, and a number of other differences regarding the procedure of evaluation of evidence in certain cases; particularly [with] regard to different standards than those [which] applied previously in the matters [concerning] the lifting of [witness] protection measures that have been granted before the ICTY when the [witnesses] do not [wish] such measures before the Court of Bosnia and Herzegovina.

As for assessing the legal qualification of the Prosecutor if it does not agree with it the Court of BiH is not bound to accept the proposals regarding the legal evaluation of the act as listed in Article 280 (2) of the BiH CPC

22. Are there any other factors, not covered in the fore-going questions which are of relevance to the indictments being issued by the POBiH?

What is relevant for the efficient function of the Prosecutor's Office of Bosnia and Herzegovina and is of great importance is the [work] on exhumations, locating mass grave sites /missing persons, regional cooperation, work on Category II cases, and investing more efforts into solving problems relating to the lack of possibilities of monitoring the entity prosecutor's offices to [which] the criminal proceedings were transferred. The need to amend the deadlines prescribed in the National War Crimes Strategy considering the number of category I cases (up to 7 years) that are assigned to Prosecutors of the Prosecutor's Office of BiH.

Apart from that the Prosecutors of the Prosecutor's Office of BiH are sometimes unable to obtain a positive decision on variation of protective measures granted to the [witnesses] during their testimony at the ICTY, even though the [witnesses] are considered to be [witnesses] of key importance in the cases thus forcing the Prosecutor to obtain other evidence to establish the facts from the statements of the protected [witness] given during the testimony at the ICTY.

CHIEF PROSECUTOR
OF THE PROSECUTOR'S OFFICE OF
BIH
Goran Salihović
[signature]

Appendix F: List of Persons Interviewed

- 18 August 2015: Meeting with President Meddžida Kreso and other judges
- 18 August 2015: Meeting with HJPC BiH President Milan Tegeltija and the Deputy Chief of the Secretariat of the HJPC
- 21 August 2015: Meeting with Judges Minka Kreho, Davorin Jukić, Halil Lagumdžija and Samardžić
- 24 August 2015: Meeting with Judges Mira Smajlović, Mediha Pasić and Zoran Božić
- 25 August &
- 31 August 2015: Munib Halilović
- 26 August 2015: Tanja Savić (Defence Lawyer)
- 28 August 2015: Judge Minka Kreho
- 1 September 2015: Milorad Novković
- 1 September 2015: Judge Jasmina Kosović
- 1 September 2015: Jasenka Ferović
- 3 September 2015: President Milan Tegeltija
- 5 October 2015: Ibro Bulić
- 5 October 2015: Džemila Begović
- 5 October 2015: Edin Muratbegović
- 5 October 2015: Miroslav Janjić
- 6 October 2015: Seid Marusić
- 6 October &
- 8 October 2015: Gordana Tadić
- 6 October 2015: Arben Murtezić
- 7 October 2015: Behaija Krnić
- 7 October 2015: Milorad Barašin
- 7 October 2015: Branko Mitrović
- 8 October 2015: Ozrenka Nešković
- 8 October 2015: Goran Salihović
- 9 October 2015: Ćazim Hasansphanić

Appendix G: List of Key Documents Considered

CPC of BiH 2003

Commentaries upon CPC 2003

HJPC Book of Rules (Prosecutors)

HJPC Book of Rules (Judges)

Indictments:

- *Prosecutor v. Andabak*
- *Prosecutor v. Bojić et al.*
- *Prosecutor v. Čondrić*
- *Prosecutor v. Curić et al.*
- *Prosecutor v. Đukić*
- *Prosecutor v. Ikonić*
- *Prosecutor v. Jurić*
- *Prosecutor v. Komad*
- *Prosecutor v. Kuljić*
- *Prosecutor v. Radišić*
- *Prosecutor v. Nikola Savić*
- *Prosecutor v. Vručinić*

Minutes of Meeting of Working Party July 2014

National War Crimes Strategy

NWCS Supervisory Body Report 2016

Orientation Criteria for allocation of cases

OSCE Analyses of Indictments at the Court of BiH and the Backlog of Cases

Overview of War Crimes Indictments filed January – December 2015

POBiH Book of Rules

Appendix H: Overview of Backlog Statistics¹²⁸

General Overview									
Backlog Reduction: GENERAL OVERVIEW			Current situation						
Initial Backlog (Jul 2013)	Prosecutor's Office	KTRZ Caseload	Ongoing KTRZ (on the last day of Q.)	Change in KTRZ caseload	Genuinely solved cases since 1 Jan 2014 (units)	Genuinely solved cases since 1 Jan 2014 (% over	Solved cases by Indictment since 1 Jan 2014 (units)	Solved cases by Indictment since 1 Jan 2014 (% over IB	Solved cases by Indictment since 1 Jan 2014 (% over all
1,210	GRAND TOTAL	Adjusted	NA	NA	NA	NA	NA	NA	NA
		Adjusted (relative to 31 Dec 2013)	1,003	-17.1%	572	47.3%	189	15.6%	33.0%
682	PO BiH (full)	Overall	672	-1.5%	291	42.7%	110	16.1%	37.8%
NA	BD PO	BD	6		13		6		46.2%
286	FBiH	Adjusted (relative to Initial Backlog)	140	-51.0%					
		Caseload & Activities (All)	178	-37.8%	159	55.6%	41	14.3%	25.8%
242	RS	Adjusted (relative to Initial Backlog)	130	-46.3%					
		Caseload & Activities (All)	147	-39.3%	109	45.0%	32	13.2%	29.4%
528	RS+FBiH	Adjusted (relative to Initial Backlog)	270	-48.9%					
		Overall	325	-38.4%	268	50.8%	73	13.8%	27.2%
75	Bihac CPO	Relative to 'Initial Backlog'	43	-42.7%					
		Overall	56	-25.3%	35	46.7%	13	17.3%	37.1%
NA	Goražde CPO	Relative to 'Initial Backlog'	1						
		Overall	1		1		0		0.0%
11	Livno CPO	Relative to 'Initial Backlog'	0	-100.0%					
		Overall	1	-90.9%	4	36.4%	1	9.1%	
71	Mostar CPO	Relative to 'Initial Backlog'	45	-36.6%					
		Overall	56	-21.1%	29	40.8%	5	7.0%	17.2%
35	Orašje CPO	Relative to 'Initial Backlog'	19	-45.7%					
		Overall	19	-45.7%	14	40.0%	3	8.6%	21.4%
23	Sarajevo CPO	Relative to 'Initial Backlog'	8	-65.2%					
		Overall	13	-43.5%	20	87.0%	4	17.4%	20.0%
NA	Široki Brijeg CPO	Relative to 'Initial Backlog'	0						
		Overall	0		0		0		
36	Travnik CPO	Relative to 'Initial Backlog'	18	-50.0%					
		Overall	21	-41.7%	18	50.0%	8	22.2%	44.4%
19	Tuzla CPO	Relative to 'Initial Backlog'	1	-94.7%					
		Overall	4	-78.9%	20	105.3%	2	10.5%	10.0%
16	Zenica CPO	Relative to 'Initial Backlog'	5	-68.8%					
		Overall	7	-56.3%	18	112.5%	5	31.3%	27.8%
29	Banja Luka DPO	Relative to 'Initial Backlog'	10	-65.5%					
		Overall	17	-41.4%	38	131.0%	10	34.5%	26.3%
17	Bijeljina DPO	Relative to 'Initial Backlog'	9	-47.1%					
		Overall	10	-41.2%	6	35.3%	5	29.4%	83.3%
86	Doboj DPO	Relative to 'Initial Backlog'	42	-51.2%					
		Overall	44	-48.8%	39	45.3%	14	16.3%	35.9%
58	East Sarajevo DPO	Relative to 'Initial Backlog'	42	-27.6%					
		Overall	45	-22.4%	15	25.9%	2	3.4%	13.3%
52	Trebinje DPO	Relative to 'Initial Backlog'	27	-48.1%					
		Overall	31	-40.4%	11	21.2%	1	1.9%	9.1%

¹²⁸ This data was gathered by the OSCE Mission to BiH War Crimes Monitoring Project, financed by the European Union to monitor the work of the State and entity-level institutions in their expenditure of IPA budgetary support to reduce the war crimes backlog. This data is collected based on inputs from the relevant courts and prosecutors' offices on a quarterly basis.

Appendix I: Recommendations

1. INTRODUCTION

- 1.1 As will be seen the majority of recommendations made relate to problems identified in the POBiH. The ToR limited this report to issues relating to the processing of war crimes cases and therefore the author's analysis concentrates on the SDWC.
- 1.2 However it is suggested that the recommendations which follow should not be read in isolation, but should be examined in the context of the reports and recommendations delivered by the Supervisory Body and *Agencia*.
- 1.3 The relevant paragraph of this report is indicated following each of the recommendations.

2. LEADERSHIP OF THE POBiH

[See paras. 16-21, 53-55]

- 2.1 It is a truism to state that the tone and effectiveness of any institution is derived from its head and senior management. In order to achieve an efficient, cohesive POBiH which will be able to meet the challenges of the NWCS, changes must take place in the management and working practices of the institution.
- 2.2 Recommendations address specific issues of management and working practices, but these issues are merely symptomatic of the over-riding problem. This is, in the judgment of the author, a failure to establish proper standards of management and set proper goals for their staff, not only those within the SDWC, but all sections of the POBiH.
- 2.3 The CP should make the structural changes which are necessary to achieve efficient working practices.
- 2.4 The CP is responsible for the management of the POBiH as a whole. It should not be the responsibility of the CP to carry out day-to-day management of the war crimes cases. Such responsibility should be devolved to the DCP/head of

the SDWC who should be a prosecutor with experience in dealing with war crimes cases and management generally.

2.5 In light of the heavy workload of the department, it is suggested that for a period (not less than 12 months) a “Chief of Prosecutions” could be put in place to assist the DCP with the day-to-day management of the SDWC.

3. MANAGEMENT STRUCTURES & WORKING PRACTICES OF POBiH (GENERAL)

3.1 Instead of the three sections within the SDWC, there should be a return to the original concept of a smaller team structure based on a particular area of the conflict. The reasons for this proposal are:

- to counter-act the culture of each prosecutor working on a case in relative isolation
- to promote the establishment of an evidential and legal consistency of approach to indictments relating to a particular area of the conflict

3.2 The leaders of the teams should be those with proven ability in the prosecution of war crimes and if possible in the particular area covered by the team.

[See paras. 41-42]

3.3 The leaders should hold weekly meetings of their teams to discuss relevant issues.

3.4 The leaders of the teams should hold regular meetings between themselves to discuss cross-over issues and on a monthly basis the head of the SDWC should meet with the leaders for progress reports.

[See paras. 44-46]

3.5 An overall analysis of the crimes relating to each of the areas should be produced. The analysis should be sourced not only from cases conducted at ICTY and the Court of BiH but also from those conducted at the lower courts. The analysis should reference both witness and documentary evidence

[See paras. 23-24]

3.6 Written guidelines need to be produced for the whole of the SDWC, setting out criteria for the prioritisation of cases to be worked on by prosecutors.

[See para. 51]

3.7 Written guidelines need to be produced for the whole of the SDWC, setting out the criteria for closing investigations.

[See para. 51]

3.8 A structured system of mentoring new prosecutors should be put in place.

That system should include:

- An induction course for the work of the SDWC, which will cover:
 - the preparation of an investigative plan;
 - oversight of the progress of an investigation;
 - how and where to find evidence;
 - how to use databases, (both extracting and inputting material);
 - the criteria for prioritisation of cases allocated;
 - the criteria for closing an investigation;
 - legal and evidential requirements for indictments.

This information should be available in a written document (manual), but should be augmented by oral explanation from the leader of the team to which the new prosecutor /investigator has been assigned.

- New prosecutors should become familiar with analyses of, and previous decisions on, the events in the area of the conflict on which he/she will be working.
- New prosecutors should be placed in an office with an experienced prosecutor who should be prepared to give advice and assistance as and when required.
- For a period of time there should be regular oversight, by the team leader and/or the DCP, of the work being done by each new prosecutor.

[See para. 43]

3.9 Prosecutors assigned to the SDWC should only work on war crimes cases.

[See para 52]

4. INVESTIGATIONS

4.1 Valuable time and resources should not be expended on identifying ‘unknown’ perpetrators at a low level who happen to be connected with an investigation into a high ranking suspect.

4.2 Before any new investigation is commenced a check must be made of the relevant database **and** directly with the PO in the area concerned, to ensure that a parallel investigation is not being carried out by that PO.

[See para. 49]

4.3 Investigators employed by the SDWC should be those who have at least some experience of working on war crimes cases at the entity level.

4.4 The recommendations in paragraph 3.8 *supra* apply *nem con* to new investigators.

4.5 There need to be sufficient investigators assigned to each of the teams.

[See para. 48]

4.6 Funds should be allocated within the budget to ensure that an investigator who is required to carry out 'field' investigations is equipped with a laptop, mobile telephone and transport.

[See para. 50]

4.7 Each investigator must up-date, (on a weekly basis), the investigation plan with details of the progress of the investigation.

4.8 The results of any investigation must be entered on the relevant database which is available to prosecutors and investigators from entity POs.

5. CO-OPERATION BETWEEN POBiH AND JUDGES

5.1 The criteria, defining the level of complexity which requires cases to be heard at the Court of BiH, should be revised.

[See paras. 62-63, 67]

5.2 In order to improve efficiency, meetings between working groups of the POBiH and Court of BiH should be held on a monthly basis. The discussions should relate to general problems and suggestions for their resolution, rather than the detail of specific cases.

[See paras. 98-100]

5.3 It is strongly suggested that neither party make statements to the media criticising the performance or behaviour of the other. The effect is normally to bring both parties into disrepute and is inimical to the proper administration of justice.

6. FORM OF INDICTMENTS & LEVEL OF PERPETRATORS

6.1 It is apparent from the review of actual indictments, (in translation), the interviews with prosecutors, judges and the judges' legal officers, that there is insufficient grasp by prosecutors of the legal and evidential requirements which need to be pleaded in a war crimes indictment and the modes of liability such as command responsibility and joint criminal enterprise.

[See paras. 86 & 95]

6.2 Whilst training programmes, in the elements of the crimes, were provided by OSCE to all new prosecutors and investigators pre-employment with the SDWC, one course, without real assessment or follow-up, is not sufficient. Although, it is understood such courses form part of the training offered by both OSCE and the JPTC in their curriculum, they are not compulsory ones.

6.3 It is therefore recommended that it become compulsory for prosecutors and investigators to attend a "refresher" training course on the elements of crimes and modes of liability not less than once a year for the first 2 years of their employment with the SDWC (and indeed if working in the war crimes department of any prosecutor's office).

6.4 The training programme should be designed to include not only a reminder of principles but practical exercises in which participants are presented with a factual scenario and asked to draft the appropriate indictment.

6.5 Written 'in-house' guidelines on the form and content of war crimes indictments should be drafted, (by persons with the requisite skills), which are made available to all prosecutors. The guidelines should include specimen indictments for allegations of War Crimes and those of CaH.

6.6 Indictments drafted by prosecutors **must** be reviewed for legal and evidential accuracy before filing. The review should be carried out at first instance by the team leader. In highly complex or "high-profile" cases, that review should be conducted by a panel composed of the team leader and the DCPand, if thought necessary, the CP.

6.7 Once an investigation reveals that a suspect does not come within the criteria for trial at the Court of BiH, (unless closely connected to a suspect(s) who do fulfil the criteria), the POBiH should no longer retain the investigation but release it to the relevant cantonal/entity PO.

[See paras. 61-67]

6.8 The practice of indicting suspects to meet a ‘quota’, or for any other statistical reason alone, or because pressure has been brought by the media or a victims’ group, should cease. Equally, valuable time and resources should not be expended on identifying ‘unknown’ perpetrators at a low level who happen to be connected with an investigation into a high ranking suspect. The emphasis should now be firmly placed on quality rather than quantity.

[See para. 90]

6.9 It is strongly recommended that the concentration of the POBiH, in the time which remains, be upon suspects who held command responsibility i.e. either ordered or instigated a crime, or failed to prevent the crime or punish those responsible for its commission. Moreover such suspects should be known and come within the jurisdiction of the Court, either directly i.e. residing within BiH, or indirectly i.e. if residing abroad the suspect may be extradited.

6.10 In order to prevent unnecessary fragmentation of indictments involving the same accused, or the same events, indictments should only be lodged once an investigation into a suspect or a particular crime(s) has been completed. The decision by a prosecutor to indict a suspect(s) must be reviewed for this purpose, first by a team leader and if the case comes within the category of highly complex or “high-profile”, then a further review by the DCP or CP.

[See paras. 72-82]

6.11 A policy must be established within the POBiH of consistency in charging suspects. The same legal qualification must be applied to crimes arising from the events of a particular area, at a particular time, unless there are good evidential reasons, (applicable to the particular circumstances of the suspect), why the policy should not apply. This is particularly so where the events in question have already been adjudicated upon in an earlier case.

[See paras. 83-86]

6.12 It is therefore recommended that a prosecutor who wishes to qualify the crime differently in a particular case, must seek authorisation from the team leader so to do. If authorised, it will be the responsibility of the team leader to record in writing the reasons therefore.

6.13 Whilst it is incumbent upon both prosecutors and judges to ensure that the provisions of Article 227 of the CPC are complied with, nonetheless it is recommended that the latter restrict returns of indictments for amendment to

those which contain real and substantial errors and omissions of fact or law, such as would undermine any verdict reached.

[See paras. 95-97]

7. BACKLOG & TRANSFER OF CASES

7.1 In order to reduce the backlog it is recommended that a full review be undertaken by the POBiH and judges of cases not yet in trial to ascertain whether any may be transferred to cantonal/entity courts.

[See paras.101-102]

7.2 It is hoped that the revisions to the criteria are brought into effect. If the recommendations relating to indictments, (set out in the preceding section), are followed, then there should be less need to use the transfer powers conferred by Article 27a CPC.

7.3 If, however, the POBiH, declines to follow the recommendations, then it is incumbent upon the judges to take the initiative in transferring cases, (which do not meet the requisite criteria for trial at the Court of BiH), at the earliest possible opportunity.

8. CASES OF SEXUAL VIOLENCE

8.1 The major recommendation in this section will require a change to the law. As with the recommendations relating to the CPC which follow, it is appreciated that this is a matter of policy for the BiH government.

8.2 The provisions of the 2014 Law on Witness Protection Programme should be extended to all courts trying cases of sexual violence.

[See paras. 111-114]

8.3 Guidelines to be issued by the POBiH on the form and content of indictments, (see para. 6.4 *supra*), should contain a provision that no complainant making an allegation of sexual violence should be named in an indictment.

Prosecutors/Investigators **must** explain the right to seek protective measures to all such complainants.

[See para. 116]

9. QUOTA SYSTEM

9.1 Whilst there must be a system of evaluation of the work done by judges and prosecutors, it is apparent that unless the present HJPC system of evaluation undergoes a change, the practice of indicting and trying low-level perpetrators and fragmenting cases will continue.

[See Section XI]

9.2 An evaluation process must be established, without delay, which recognises that working on war crimes cases inevitably means that an arbitrary quota of cases to be completed per annum is neither fair, nor conducive to completion of the NWCS.

9.3 It is suggested that one method of dealing with the problem is that the President of the Court and the CP, (rather than individual judges or prosecutors), provide an assessment to the HJPC of the cases which are being worked upon by judges and prosecutors (and their legal officers), which, because of their complexity, will require a greater length of time to be spent in their resolution. The HJPC will have the right to make its own enquiries, but if the assessments are confirmed, then any targets for productivity will be amended.

10. THE CPC

10.1 It is recommended 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 evidential basis which gives rise to the allegation

[See paras. 125-132]

10.2 It is also recommended 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 assisting the accused in his defence.

[See paras. 81 & 133]