

Spot Report

June 2019

# War Crimes Case Management at the Prosecutor's Office of Bosnia and Herzegovina



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## KEY FINDINGS

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- ❑ Between 2004 and the end of 2018, the state level judiciary of Bosnia and Herzegovina (BiH) completed 217 war crimes trials, including a number of high level and complex cases indicted by the Prosecutor's Office of BiH (PO BiH).
  - ❑ The PO BiH is not delivering justice to all victims of war crimes due to persistent deficiencies it has failed to address in recent years.
  - ❑ The conviction rate in war crimes cases at the state level has significantly decreased (to 39%), due in large part to systemic deficiencies in the investigation and prosecution practices of the PO BiH.
  - ❑ The PO BiH is failing to focus its efforts exclusively on the gravest and most complex cases, as required by the National War Crimes Processing Strategy (Strategy), thereby wasting resources and time with less complex cases that should be tried at the entity/Brčko District level.
  - ❑ By continuing to fragment cases for separate indictment or transfer - breaking up larger events into apparently isolated cases - the PO BiH risks re-traumatizing repeat victim-witnesses and distorting the historical record of facts.
  - ❑ With its current inefficiencies, managerial policies, and unnecessarily large war crimes case backlog, the PO BiH will not be able to complete its work on war crimes cases by 2023 (as envisaged by the Strategy), substantially increasing the risk of de facto impunity for many perpetrators of war crimes.
  - ❑ The Mission believes that these systemic issues can be overcome with the implementation of key measures by the High Judicial and Prosecutorial Council, the PO BiH, and the Court of BiH (See detailed conclusions and recommendations on pages 27-28).
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## 1. INTRODUCTION

The Mission has observed, over the last three years, a concerning deterioration in the quality of investigation and prosecution of war crimes cases by the Prosecutor's Office of Bosnia and Herzegovina.<sup>1</sup> This deterioration directly impacts the rate at which war crimes cases are being processed as well as the outcomes of processed cases, resulting in delayed or even denied justice for victims of these atrocities. For instance, as time passes, suspects, witnesses, and victims die or become unavailable. Evidence is forgotten or lost. These delays thus risk *de facto* impunity for perpetrators of atrocity crimes. Transitional justice and reconciliation processes are also negatively affected. And, more than 20 years after the end of the conflict, delays in completing war crimes cases risks further undermining of public confidence in the judiciary as a whole, in turn negatively affecting BiH's security and stability.

The Mission notes three key areas of concern when it comes to the investigation and prosecution of war crimes cases by the PO BiH. These concerns have been identified through the Mission's comprehensive trial monitoring program, its implementation of European Union (EU) funded Instrument for Pre-Accession (IPA) projects, and through its support to institutions overseeing implementation of the National War Crimes Processing Strategy.<sup>2</sup>

- 1) Conviction rates at the Court of BiH have declined precipitously since 2016, raising questions as to the quality of investigations and indictments raised by the PO BiH.
- 2) The PO BiH does not focus its time and resources solely on investigating and prosecuting the most complex war crimes cases, thereby misusing resources and failing to act in accordance with the Strategy.
- 3) The PO BiH is processing war crimes cases at a very slow rate given its available resources. If the current trend continues, it will take almost 10 years for the PO BiH to complete all of the war crimes cases it now holds, which comprise the majority of remaining cases in the country.<sup>3</sup> Again, as noted above and according to the Strategy, these cases should be completed by 2023.

In this report, the Mission will convey its observations underlying these three key concerns and provide concrete examples of the same. Based on these observations the Mission will share its views on why these concerning practices are occurring and conclude with recommendations on how the PO BiH and other relevant stakeholders can adopt measures to rectify the situation for improved delivery of justice.

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1 The term "war crimes", for the purposes of this report, refers to the crime of genocide, crimes against humanity, and war crimes. All analysis contained in this report is based on information available to the Mission at the time of publication.

2 National War Crimes Processing Strategy (2008). Available in BCS only at: [http://www.mpr.gov.ba/web\\_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf](http://www.mpr.gov.ba/web_dokumenti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf).

3 At the end of 2018, 70% of the war crimes cases with known suspects were at the PO BiH.

## 2. SYSTEMIC ISSUES IDENTIFIED WITHIN THE WORK OF THE PO BIH, BASED ON THE MISSION'S OBSERVATIONS

### 2.1 The conviction rate at the Court of BiH has dropped significantly since 2016

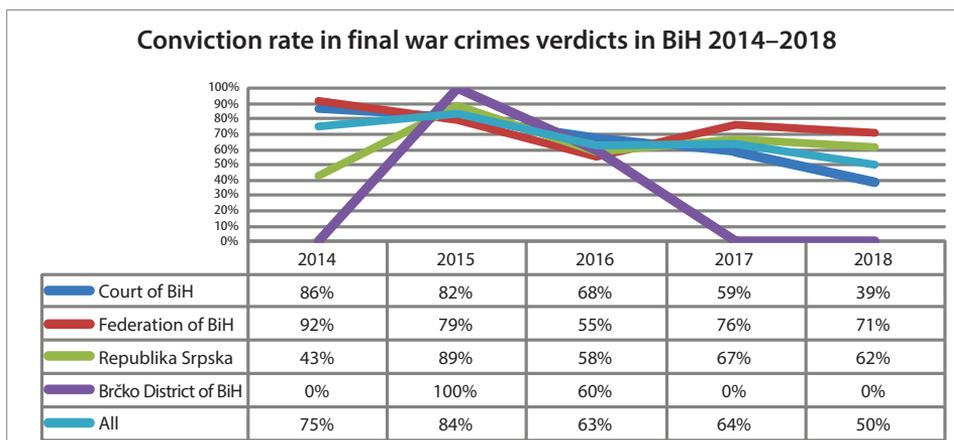
The Mission has observed that since 2014, the conviction rate at the Court of BiH has experienced a continuous downward trend. This trend has accelerated since 2016, resulting in the acquittal of significantly more than half of all defendants at the state level in 2018. This raises questions as to whether the PO BiH is managing its war crimes cases effectively. Clearly, an acquitting verdict does not necessarily denote a breakdown in the processing of a single case. To the contrary, the key legal principles of any fair and robust judicial system include the presumption of innocence, as reflected and enshrined in BiH legislation.<sup>4</sup> A court may only convict a defendant when the crime the individual allegedly committed is proven beyond a reasonable doubt, and that naturally does not occur in all cases.

However, the dramatic and consistent decline in the conviction rate at the Court of BiH cannot, in the Mission's view, reflect solely a respect for, and application of, these principles. In 2018, the PO BiH reached an all-time low in the number of convictions attained in completed cases, with only 17 of 44 defendants in war crimes cases convicted. This equates to a 39% conviction rate. The remaining suspects were acquitted of all charges.<sup>5</sup>

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<sup>4</sup> Article 3, Code of Criminal Procedure of BiH (CPC BiH), Official Gazette of BiH no. 3/03, with most recent amendments published in the Official Gazette of BiH no. 65/18.

<sup>5</sup> Safet Mujčinović, Selman Busnov, Nusret Muhić, Zijad Hamzić, Ramiz Halilović, Nedžad Hodžić, and Osman Gogić (*Prosecutor v. Safet Mujčinović et al.*, S1 1 K 012159 18 Krž 4, Second Instance Verdict of 1 June 2018); Goran Sarić (*Prosecutor v. Goran Sarić*, S1 1 K 007949 18 Krž 3, Second Instance Verdict of 26 October 2018); Ostoja Stanišić and Marko Milošević (*Prosecutor v. Ostoja Stanišić and Marko Milošević*, S1 1K 010315 17 Krž 11, Second Instance Verdict of 11 October 2018); Ekrem Ibračević, Faruk Smajlović and Sejdalija Čović (*Prosecutor v. Ekrem Ibračević et al.*, S1 1 K 016488 17 Kžk, Second Instance Verdict of 11 May 2018); Enes Ćurić, Ibrahim Demirović, Samir Kreso, Habib Čopelja, and Mehmed Kaminić (*Prosecutor v. Enes Ćurić et al.*, S1 1 K 017146 18 Krž 2, Second Instance Verdict of 21 September 2018); Goran Mrđa, Milorad Mrđa, Ranko Mrđa, and Mile Kokot (*Prosecutor v. Goran Mrđa et al.*, S1 1 K 018013 15 KrI, Second Instance Verdict of 21 December 2018); Milorad Radaković and Goran Pejić (*Prosecutor v. Milorad Radaković and Goran Pejić*, S1 1 K 019060 18 Krž, Second Instance Verdict of 24 October 2018); Nikola Zovko, Petar Krdelj, Krešo Rajić, and Ivica Ćutura (*Prosecutor v. Nikola Zovko et al.*, S1 1 K 019135 15 KrI Second Instance Verdict of 24 October 2018); Naser Orić and Sabahudin Muhić (*Prosecutor v. Naser Orić and Sabahudin Muhić*, S1 1 K 014977 18 Kžk, Second Instance Verdict of 24 October 2018); Brane Planojević (*Prosecutor v. Brane Planojević*, S1 1 K 022705 18 Krž, Second Instance Verdict of 22 May 2018); Rade Vlasenko, Drago Končar, and Milan Krupljanin (*Prosecutor v. Rade Vlasenko et al.*, S1 1 K 023656 18 Krž 2, Second Instance Verdict of 21 December 2018); Milan Gavrilović (*Prosecutor v. Milan Gavrilović*, S1 1 K 025339 17 Krž, Second Instance Verdict of 22 February 2018).



Such a high number of acquittals before the Court of BiH raises questions as to whether there are systemic shortcomings in the processing of war crimes cases at the PO BiH. The Mission observes, based on its monitoring, that these issues can be attributed to, among other factors, a failure by the prosecutor to submit sufficient evidence proving beyond a reasonable doubt *chapeau* (i.e. general) elements of the crime, elements of underlying acts alleged, or the mode of perpetration charged. Other factors leading to this high acquittal rate include poor trial strategy, inadequate case management, or ineffective presentation of evidence.

The Mission observed that many acquittals before the Court of BiH in 2017 and 2018 resulted from inconsistent testimony provided by witnesses in the investigative and/or trial phase, and in the absence of any corroborative evidence.

A clear example of this trend can be seen in the case of *Mujčinović et al.* This case involved eight defendants and concerned allegations of unlawful deprivation of liberty and inhuman treatment as war crimes against civilians during events in Stupari (Kladanj Municipality) from May 1992 until the second half of July 1993. The PO BiH alleged that Safet Mujčinović and Selman Busnov, as the commander of the Police Station in Stupari and the chief of the Public Security Center in Kladanj, respectively, failed to take measures necessary to prevent or punish their subordinates. The other six accused were charged as direct perpetrators.<sup>6</sup> Following the main trial, which lasted more than three years, the trial panel acquitted all of the defendants, finding that it could not rely on contradictory witness statements in the absence of any corroborative evidence. The acquittal was confirmed by the Appellate Panel on the same grounds.<sup>7</sup>

<sup>6</sup> *Prosecutor v. Safet Mujčinović et al.* Indictment, T20 0 KTRZ 0003525 07 (filed by prosecutor Dragan Ćorlija on 4 February 2013, confirmed on 15 February 2013).

<sup>7</sup> *Prosecutor v. Safet Mujčinović et al.*, First Instance Verdict, S1 1 K 012159 13 Kr, 8 September 2017 *inter alia* paras. 123, 133-135, 140, 157-159, 174, 179, 193-194, 305, 310, 321; Second Instance Verdict, S1 1 K 012159 18 Krž 4, 1 June 2018 para. 36.

Another example of the PO BiH failing to present key evidence during this period is the case of *Sarić*, which involved the commander of the Republika Srpska (RS) Ministry of Interior Police Brigade who was charged with genocide as part of a joint criminal enterprise (JCE) to eliminate the Bosniak civilian population from the United Nations Safe Area of Srebrenica in July 1995.<sup>8</sup> In this case, the PO BiH failed to tender evidence regarding the defendant's alleged membership in the JCE or any evidence demonstrating a key element of the crime – his specific intent, or *mens rea* – for any of the underlying acts of genocide, such as killings. The Trial Panel rendered an acquitting verdict on this basis, which was fully confirmed by the Appellate Panel.<sup>9</sup>

A final, very illustrative, example of poor presentation of evidence can be found in the case of *Zovko et al.* in which three out of the four accused were senior officials at the Čapljina Police Station.<sup>10</sup> These three accused were charged with command responsibility, that is, failure to prevent and punish their subordinates in relation to war crimes committed against civilians in the village of Čeljevo during August 1993. The Trial Panel acquitted these three defendants of all charges due to the PO BiH's failure to prove that they were superior to, or exercised any effective control over, the civilian police and the HVO military police units at the critical time, which are required elements in establishing command responsibility.<sup>11</sup> The Appellate Panel fully upheld the findings of the Trial Panel in relation to these three defendants.<sup>12</sup>

Based on the foregoing, the Mission concludes that while acquittals necessarily form part of a well-functioning judicial system, the prosecution's failure to present any evidence to support the very core elements of the crimes alleged and modes of liability upon which the indictments were based goes far beyond the norm, surpassing what can be expected from an institution prosecuting complex and serious crimes.

These examples demonstrate that a declining conviction rate in war crimes cases may be due, in large part, to preventable errors on the part of the PO BiH. Objectively, such a low conviction rate signals a waste of financial, human, and other resources at this institution. At this point in time the PO BiH has received more financial support from the international community, most notably the EU, than any other prosecutor's office (PO) in BiH.<sup>13</sup> It is

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8 *Prosecutor v. Goran Sarić*, Indictment, KTRZ 0002194 11 (filed by prosecutor Ibro Bulić on 28 August 2014, confirmed on 9 September 2013).

9 *Prosecutor v. Goran Sarić*, First Instance Verdict, S 1 1 K 007949 13 Kri, 16 February 2018 paras. 179, 190-192, 212-215, 251-252, 318-320; Second Instance Verdict, S1 1 K 007949 18 Krž 3, 16 October 2018, para. 44.

10 *Prosecutor v. Nikola Zovko et al.*, Indictment, T20 0 KTRZ 0010660 15 (filed by prosecutor Stanko Blagić on 16 May 2015, consolidated on 13 July 2015 and confirmed on 16 July 2015).

11 *Prosecutor v. Nikola Zovko et al.*, First Instance Verdict, 19 July 2017, S1 1 K 019135 15 Kri, paras. 75-77, 83, 127-132.

12 *Prosecutor v. Nikola Zovko et al.*, Second Instance Verdict, 16 January 2018, S1 1 K 019135 17 Krž, para. 162. The fourth accused in this case was acquitted of charges alleging his role in events as a direct perpetrator.

13 Through IPA the EU agreed to provide a "Budgetary Support/Grant" of EUR 14.86 million to the justice sector of BiH over the period 2014–2018/9 in order to reduce the national backlog of war crimes cases by 50%. This includes the payment of salaries for judges, prosecutors and support staff (e.g. investigators), as well as material costs throughout the country. These figures have been provided by the EUD BiH.

counterintuitive that, with its years of institutional experience prosecuting war crimes cases and the amount of financial support it has received, the PO BiH should see such a drastic and continuous decline in the number of convictions. The sharp contrast in resources invested by the international community versus the results observed by the Mission in terms of effective case processing by the PO BiH will be dealt with in further detail in section 2.3.

Additionally, from a social perspective, the impact that a low number of convictions has on victims and BiH society as a whole cannot be overstated. It is often the victims, as witnesses, that testify against the accused in court. In many cases, witnesses are subjected to repeated questioning, risking re-traumatization. It is, therefore, very sobering to consider that witnesses in a majority of the cases finalized in the last year may see their efforts as futile due to apparent systemic issues within the PO BiH.

## **2.2 The PO BiH is not focusing its time and resources solely on investigating and prosecuting the most complex war crimes cases**

The Mission observes that, while the PO BiH has indicted some highly complex cases over the last two years, many of the cases it tackled were of insufficient complexity to warrant processing at the state level, demonstrating the institution's failure to focus solely on the gravest cases, as required by the Strategy. This observation is supported by the Mission's analysis of factual allegations contained in indictments in light of the complexity criteria contained in Annex A of the Strategy. The Mission's findings show that one third of indictments filed by the PO BiH in 2017 and 2018 could have been assessed as less complex in accordance with the complexity criteria contained in Annex A of the Strategy.<sup>14</sup>

In relation to indictments containing charges of war crimes, almost half of these could have, in the Mission's view, been transferred to the entity/Brčko District level POs due to the crimes and modes of liability charged.<sup>15</sup> In relation to indictments containing charges of crimes against humanity, of those filed during the period of observation, the Mission concluded that one in three indictments could, *prima facie*, be assessed as factually less

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<sup>14</sup> See Annex A of the Strategy, *supra* note 2.

<sup>15</sup> In total, 10 of the 21 indictments charging war crimes that were filed during the period of observation involved suspect/s who did not hold a superior position and/or the gravity of the crime was not severe enough to be determined as complex. Clear examples of this trend can be seen in the cases of *Cvetković* and *Panković*. In the case of *Cvetković* the PO BiH filed two separate indictments related to the same accused and the same crime base - for the murder of two civilians and the rape of two victims in the area of Srebrenica in May 1992, qualified as war crimes against civilians (*Prosecutor v. Saša Cvetković*, Indictment, T20 0 KTRZ 0009790 14, filed by prosecutor Ivan Matešić on 20 April 2017 and confirmed on 13 April 2017; *Prosecutor v. Saša Cvetković*, Indictment, T20 0 KTRZ 0014609 17, filed by prosecutor Ivan Matešić on 21 September 2019 and confirmed on 26 September 2017). On 14 November 2017, the Court of BiH issued a decision on the joinder of proceedings, based on the ground that the two indictments involved the same accused and the same crime base. In the case of *Panković*, which was finalized by a plea bargain agreement, the PO BiH filed an indictment for allegations of the unlawful detention of five Bosniak civilians in *Vatrogasni dom* in Prozor in late November 1993. Given that the crimes alleged are not considered complex, combined with the fact that the accused was charged with direct perpetration, in the Mission's view this case should not have reached the indictment stage at the PO BiH (*Prosecutor v. Goran Panković*, Indictment, T20 0 KTRZ 0002665 12 filed by prosecutor Sanja Jukić on 3 April 2018 and confirmed on 4 April 2018).

complex, due to the underlying crimes and modes of liability charged (for example, direct perpetration).<sup>16</sup>

By the end of March 2019, six indictments had been filed by the PO BiH in the 2019 calendar year. These indictments included two with allegations of crimes against humanity and four with allegations of war crimes. Two of the indictments alleging war crimes were transferred *ex officio* by the Court of BiH to entity/Brčko District POs due to their less complex nature.<sup>17</sup>

Annex A of the Strategy provides that a war crimes case will be processed at the state level if it meets the complexity criteria in relation to the gravity of the crime (if it is qualified as a crime of genocide, crime against humanity or, exceptionally, as a war crime), the capacity and role of the perpetrator (allegations involving command responsibility, or high ranking political or military formation positions), and taking into account other important circumstances such as the impact on the community. The aim of these complexity criteria was to ensure that “the selection and assessment of complexity of cases [...] be done in a uniform and objective manner”.<sup>18</sup>

According to the Strategy, under these criteria less complex cases would be tried before courts at the entity/Brčko District level pursuant to the CPC BiH rules on territorial jurisdiction, meaning according to where the alleged crime took place.<sup>19</sup> In order to decide which cases should be tried before the entity/Brčko District courts, the Strategy charged the PO BiH and the Court of BiH with the responsibility for assessing the complexity of cases and for determining their potential transfer to the entity/Brčko District level, respectively.<sup>20</sup> Specifically, the PO BiH should review all of its cases and file motions for the transfer of less complex cases to the Court of BiH, which issues decisions confirming or denying transfer motions based on its assessment.

Given the framework established by the Strategy, and its monitoring findings in recent years, the Mission observes that the PO BiH is not effectively executing its duties under the Strategy in order to ensure that the highest level and gravest war crimes cases are prosecuted before the Court of BiH. Specifically, the Mission has observed that the PO BiH inconsistently interprets and applies the Strategy’s complexity criteria in its motions for transfer; files motions for the transfer of less complex cases which have already reached the indictment

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16 In total 9 out of the 32 indictments charging crimes against humanity that were filed could, in the Mission’s view, be assessed as factually less complex and therefore requalified as war crimes. In all nine cases, the accused did not hold superior positions in military or civilian structures, and/or the alleged crimes were committed against fewer than ten victims. A clear example can be seen in the *Perović* case which involves allegations against a direct perpetrator as an accessory to rape of one victim and for participation in another form of serious sexual violence against another victim in Rogatica on 2 and 3 August 1993 (*Prosecutor v. Nenad Perović*, Indictment, T20 0 KTRZ 0000785 06, filed by prosecutor Dževad Muratbegović on 2 February 2018 and partially confirmed on 19 February 2018).

17 *Prosecutor v. Lazar Mutlak*, Indictment, T20 0 KTRZ 0017014 19 (filed by prosecutor Vladimir Simović on 8 March 2019), *Prosecutor v. Milenko Gogolović*, Indictment, T20 0 KTRZ 0016626 18 (filed by prosecutor Edin Muratbegović on 27 March 2019).

18 Strategy, *supra* note 2, p. 14.

19 Article 27 and 27(a) CPC BiH, *supra* note 4.

20 Strategy, *supra* note 2, p. 41.

stage, indicating clear knowledge of the less complex nature of the case; and fails to transfer less complex cases to the entity/Brčko District level POs in the early investigation phase.

### *2.2.1 Inconsistent interpretation and application of the Strategy's complexity criteria*

The Mission has analysed all Court of BiH decisions on transfer of proceedings issued between 1 January 2016 and the end of March 2019, and concludes that within the PO BiH there is a lack of consistent interpretation and/or application of the Strategy's complexity criteria. This, as mentioned above, seriously undermines the effective utilisation of the available resources in the state level judicial institutions.

The interpretation of the complexity criteria contained in Annex A of the Strategy has not been without its difficulties.<sup>21</sup> In order to rectify this situation, the 2018 draft Revised Strategy redefined complexity criteria based on a two-fold gravity assessment: the gravity of the crime, and the capacity and role of the perpetrator.<sup>22</sup> At the time of writing, the Revised Strategy has not yet been adopted, for unclear reasons.<sup>23</sup> However, as the Strategy is a policy document, the non-adoption of the revisions does not bar the PO BiH from assessing the existing backlog of cases in accordance with the amended criteria. Indeed, the Mission has observed that the Court of BiH has already adopted this exact approach.

The following examples illustrate the PO BiH's inconsistent interpretation and application of the complexity criteria. They demonstrate first that the PO BiH applies the complexity criteria incorrectly, determining cases to be complex when in fact they are not and should be transferred to the entity/Brčko District level (see section 2.2 above). And they also demonstrate instances in which the opposite occurs, whereby the PO BiH files motions for transfer of proceedings in cases which it deems to be less complex, which in fact are complex cases that should be adjudicated at the state level.

With regard to the complexity criterion concerning gravity of the alleged crime, in at least four cases in 2018 the Standing Panel of the Court of BiH (Standing Panel),<sup>24</sup> responsible for assessing PO BiH motions for transfer of cases, denied the PO BiH's motion for transfer due to the seriousness of the allegations. One case involved allegations of mass killings

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21 *Processing of War Crimes Cases at the State Level in Bosnia and Herzegovina*, J. Korner CMG QC (Sarajevo, OSCE Mission to BiH, June 2016). Available at: <https://www.osce.org/bih/247221?download=true>. In May 2015, Judge Korner was asked by the International Criminal Tribunal for the former Yugoslavia and Mission to undertake an analysis of the processing of war crimes by the PO BIH and Court of BiH. As the Mission already stated this report, one of the difficulties identified with the transfer and takeover mechanisms was the inconsistent interpretation of the complexity criteria.

22 *Observations on the National War Crimes Processing Strategy and its 2018 Draft Revisions, including its relation to the Rules of the Road "Category A" cases* (Sarajevo, OSCE Mission to BiH 2018), p. 10.

23 *Ibid.*, p. 9. The Council of Ministers planned to discuss the proposed revisions to the Strategy on 3 July 2018, but this item was removed from the agenda and has not been rescheduled for consideration.

24 The Standing Panel is made up of three judges of the Court of BiH who make decisions on motions to transfer cases based upon the criteria set out in Annex A of the Strategy.

(killing of 31 individuals)<sup>25</sup> and the remaining three cases concerned severe forms of rape, e.g. multiple and systematic rapes.<sup>26</sup>

With regard to the complexity criterion concerning the capacity and role of the perpetrator, in June 2018, the PO BiH filed motions for transfer of four cases in which suspects held high-ranking positions within a military structure, including one brigade commander.<sup>27</sup> For this reason, the Court of BiH denied these motions, and further observed possible fragmentation of related cases by the PO BiH as two of the motions (in separate cases) pertained to the same high-ranking suspect.<sup>28</sup> During 2018, in a further six cases involving high-ranking suspects, the Standing Panel denied the PO BiH's motions for transfer.<sup>29</sup> However, in the same period, the Court granted the transfer of proceedings in a different case of a similarly high-ranking police official.<sup>30</sup> In this case, the Court based its assessment on evidence contained in the prosecution motion for transfer, which did not contain information related to the suspect's high ranking role during the conflict.

### *2.2.2 The transfer by the PO BiH of less complex cases which have already reached the indictment stage*

The transfer of less complex cases at the indictment stage is one of the clearest indications that the PO BiH is not focusing its resources solely on investigating and prosecuting the most complex war crimes cases. While this problematic practice has existed for a number of years,<sup>31</sup> the PO BiH has not substantively addressed it.

From a practical perspective, the PO BiH misdirects its financial and human resources when it conducts a full investigation and raises an indictment in a case which is subsequently transferred to an entity/Brčko District level PO. Moreover, the process of drafting an indictment is an important part of a prosecutor's case preparation. It is logically far more beneficial, from a case knowledge perspective and thus also in terms of judicial economy, that the indictment is drafted by the prosecution team that will ultimately present the case at trial.

Since 1 January 2016, the Mission observed that the PO BiH has filed 25 indictments which were subsequently transferred to entity/Brčko District level POs. In a handful of these

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25 Decision of the Court of BiH denying the motion for transfer of proceedings of 27 August 2018.

26 Two decisions of the Court of BiH denying the motion for transfer of proceedings of 12 July 2018.

27 Four decisions of the Court of BiH denying the transfer of proceedings of 4 July 2018.

28 Decision of the Court of BiH denying the motion for transfer of proceedings of 4 July 2018.

29 Decisions of the Court of BiH denying the motion for transfer of proceedings of 8 June 2018, 4 July 2018, 27 August 2018 and 12 September 2018.

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

31 See *Delivering Justice in Bosnia and Herzegovina. An Overview of War Crimes Processing from 2005 to 2010* (Sarajevo, OSCE Mission to Bosnia and Herzegovina, 2011), p. 47. Additionally, the Korner Report noted that the PO BiH unnecessarily spends valuable resources and time on the prosecution of less complex crimes and low-level perpetrators, contrary to the Strategy. See Korner Report, *supra* note 21, p. 35.

cases, the PO BiH filed motions for transfer simultaneously with the indictment.<sup>32</sup> In the Mission's view, this indicates that the prosecutors were fully aware that the cases were less complex at the time of filing the indictments.

Further, as seen in section 2.2 above, when deciding on the confirmation of indictments where no motion to transfer was filed alongside the indictment, the Court of BiH has repeatedly found cases which do not meet the requisite complexity criteria to be processed at the state level. For the most part, the cases dealt with direct perpetrators that did not hold a high-ranking position in any military structure.

Based on the foregoing, it is clear that there is a systemic problem in the management and oversight at the PO BiH in terms of assessing cases against the complexity criteria and in turn their filing of indictments. Raising an indictment requires a vast amount of resources, and this focus on investigating less complex cases directs those resources away from the cases that the PO BiH should be concentrating on. Only by focusing on the most complex cases can the PO BiH effectively contribute to delivering justice to the victims of atrocity crimes.

### *2.2.3 The PO BiH is not transferring all less complex cases to the entity/Brčko District level POs*

Based on the Mission's observations that the PO BiH is investigating and prosecuting less complex war crimes cases, it is apparent that the PO BiH is not transferring such cases to the entity/Brčko District POs. As noted at the outset of this section, according to the Strategy, less complex war crimes cases should be processed at the entity/Brčko District level POs in order to ensure the timely completion of all war crimes cases. This transfer mechanism is the best way to regulate efficiency in the processing of war crimes cases and to facilitate the state level judiciary's ability to focus on the most complex war crimes cases. And it is the function of the PO BiH to make the initial distinction between the most complex cases and those that are suitable for transfer.<sup>33</sup>

#### *Cases with a known suspect*

The table below shows the trend in the number of war crimes cases with a known suspect (known as KTRZ cases) transferred from the PO BiH to the entity/Brčko District level POs since 2010.

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32 *Prosecutor v. Bosiljko Kraljević*, Indictment, T20 0 KTRZ 0013320 16 (filed on 29 December 2016), Motion for transfer filed by PO BiH on 29 December 2016; *Prosecutor v. Branko Koprivica*, Indictment, T20 0 KTRZ 0012306 16 (filed together with motion for transfer by prosecutor Vesna Ilić on 22 December 2017, transferred on 4 January 2018); *Prosecutor v. Predrag Lazetić*, Indictment, T20 0 KTRZ 0012310 16 (filed together with motion for transfer by prosecutor Vesna Ilić on 22 November 2018, transferred on 3 December 2018).

33 Korner Report, *supra* note 21, p. 24, quoting recommendation 3 of the Supervisory Body Report of January 2016.

<b>Jurisdiction</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
<b>Federation of BiH (344)</b>	31	15	134	37	32	20	25	13	37
<b>Republika Srpska (153)</b>	9	8	70	13	9	11	4	5	24
<b>Brčko District of BiH (4)</b>	0	1	1	0	0	0	0	1	1
<b>Total (501)</b>	40	24	205	50	41	31	29	19	62

While there has been a welcome increase in 2018, the 62 KTRZ cases transferred are insufficient to allow the PO BiH to complete its work by 2023, the deadline envisaged by the Strategy, as discussed more in section 2.3 below. In order to provide timely justice to victims, all less complex cases must be transferred to the entity/Brčko District POs.

One reason for this failure to transfer less complex cases may be the existence of a perception, whether among the public or in the PO BiH itself, that the entity/Brčko District level institutions are not well placed to process war crimes cases fairly. However, the Mission's monitoring of all war crimes trials at the entity/Brčko District has demonstrated the contrary.<sup>34</sup>

As seen in Section 2.1 above, over the past two years the conviction rate at the entity level far surpasses that at the state level. Furthermore, the Mission has observed great improvements in the quality of proceedings at the entity/Brčko District level, including in investigations, application of the law, and in witness/victim support. These are clear indicators that these institutions are currently well equipped to deal with less complex war crimes cases.

Improvements at the entity level have largely been due to the injection of tremendous resources aimed at strengthening their approach to war crimes cases, including EU IPA budgetary/grant support, which has enabled over 100 additional staff, including appointed prosecutors and judges and support staff, to work exclusively on war crimes cases.<sup>35</sup> Additionally, the support has facilitated beneficiary institutions to increase capacities within institutions for dealing with war crimes cases. For example, institutions were equipped with audio/visual capabilities that can be used for witness testimony and other purposes.

Given the readiness and capability of the entity/Brčko District POs and courts to handle less complex KTRZ cases, there is no reason for the PO BiH to further delay the transfer of all such cases.

<sup>34</sup> *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016* (Sarajevo, OSCE Mission to BiH 2017), p. 9.

<sup>35</sup> See *supra* note 13.

### *Cases with an unknown suspect*

The Mission observes, in contrast to the practice of the PO BiH regarding KTRZ cases, that the PO BiH has recently transferred many cases with an unknown suspect to the entity/Brčko District level without conducting an analysis of how such cases may be related to other cases that they are investigating and prosecuting, or to larger events that took place during the conflict. During 2018 the PO BiH transferred a relatively large number of cases (94) where the suspect is unknown (known as KTNRZ cases) to the entity/Brčko District POs.

The Mission is concerned by the transfer of these cases because, without proper analysis of connections to potentially related cases, important evidence and context may be lost. Furthermore, the opportunity to identify a suspect through evidence in related cases may also be sacrificed through this practice. The PO BiH – in its unique position of having an absolute overview of all war crimes cases involving complex events such as large scale military operations and planned, systematized attacks – is best placed to analyse events in a holistic way.

Some KTNRZ cases relating to larger events being investigated by the PO BiH may already have been transferred. Through its analysis of transferred cases, the Mission has observed that while a number of KTNRZ cases transferred by the PO BiH *prima facie* appear to involve isolated incidents, in a number of instances it is possible to establish the existence of a geographical and temporal link between these allegations that might constitute part of a larger event. For example, the Mission has observed that some cases involve closely connected events but have been qualified by the PO BiH as isolated events.<sup>36</sup> It is apparent that in these cases the PO BiH did not assess whether these events were connected, and these cases were transferred by the Court of BiH to the respective entity POs. Only through such an assessment can BiH judicial authorities meet their obligation to establish both responsibility of superiors (command responsibility) and the responsibility of their subordinates.

The analysis of events in KTNRZ cases would allow the PO BiH to focus its resources on individuals with the greatest responsibility as well as to clearly identify any subordinates. Aside from helping to avoid inefficiencies, such an analysis is also imperative to avoid the creation of different fact patterns, legal qualifications, and historical narratives of the same events.

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<sup>36</sup> These include events in Sarajevo reflected in seven decisions of the Court of BiH on transfer of proceedings of 26 October 2018, 8 November 2018, 25 January 2019, and 31 January 2019; events in Mostar in 1992 reflected in two decisions of the Court of BiH on transfer of proceedings of 4 July 2018; and events in Mostar in 1993 reflected in nine decisions of the Court of BiH on transfer of proceedings of 4 July 2018, 26 October 2018, and 8 November 2018.

### 2.3 Inefficient reduction of the backlog of cases at the PO BiH

According to the Strategy, adopted in 2008, all war crimes cases were to be completed by 2023, irrespective of their complexity. At the start of 2014, there were 1223 cases with known perpetrators awaiting prosecution before the courts. At the end of 2018, there were 694 such cases. Almost 500 of these remaining cases are held by the PO BiH. At the current rate of processing, it will be impossible for the PO BiH to meet the 2023 deadline for finalizing all war crimes cases.

Processing a vast number of war crimes cases is a daunting task. However, as noted above, the BiH judiciary has received substantial financial and material support from the international community in order to help the judiciary tackle all existing war crimes cases in line with the Strategy.<sup>37</sup> The PO BiH, as the institution charged with processing the most complex crimes, has received more than 2 million euro since 2014, allowing for additional prosecutors and support staff to work exclusively on war crimes cases, along with significant material resources to help in carrying out investigative activities.<sup>38</sup>

Concurrent to receiving financial support, since 2014, all relevant prosecutorial and judicial institutions including the PO BiH received extensive training in a variety of procedural and substantive aspects of international criminal law to provide them with the skills and expertise needed to effectively process war crimes cases.<sup>39</sup> One could reasonably expect that such support would lead to a clear increase in the efficiency and quality of war crimes prosecutions at all levels.

However, analyzing the rate of case processing at the PO BiH over this period, it is clear that its current work pace is insufficient to meet the goals of the Strategy. In absolute numbers, as of the end of 2018 the PO BiH had processed 28% of the war crimes cases it had at the beginning of 2014 (including new cases created through fragmentation or new criminal reports).<sup>40</sup> Based on the Mission's data, and illustrated in the graph below, that leaves the PO BiH with just under 500 war crimes cases with known suspects awaiting completion, to be split between 25 prosecutors currently assigned in the Special Department for War Crimes (SDWC). Even assuming that each prosecutor manages to complete three cases per year moving forward – a considerable achievement taking into account that the most complex

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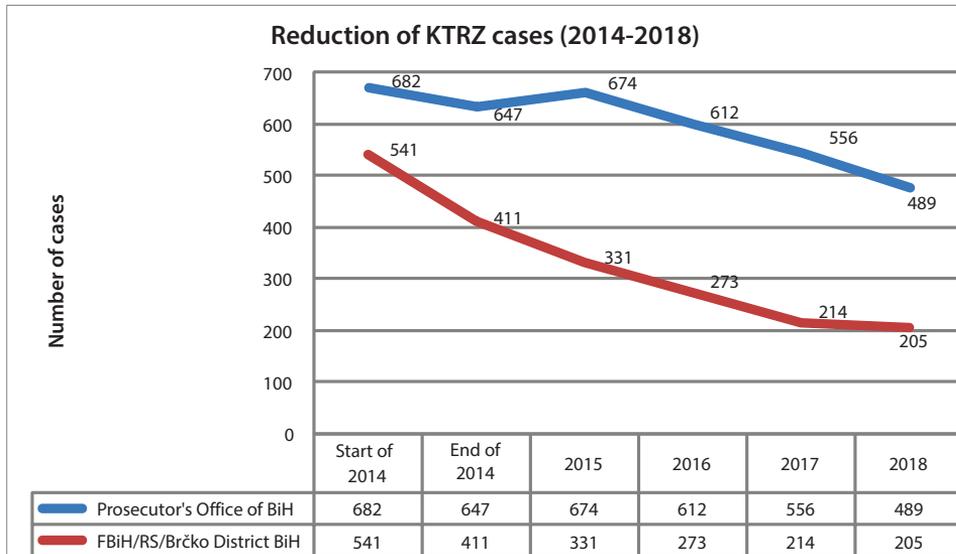
37 As part of the IPA budgetary support, direct financial support to POs and courts was provided for the explicit purpose of ensuring that the capacities of the POs and courts were sufficiently increased to better deal with the high number of outstanding war crimes cases. The Mission's War Crimes Monitoring Project (WCMP), funded by the EU, monitors and advises on the implementation of budgetary support.

38 See *supra* note 13.

39 The OSCE extra-budgetary War Crimes Capacity Building Project (WCCP) was implemented from November 2014 to October 2017 to provide training and technical support to POs and courts in BiH. The WCCP carried out 75 trainings and peer-to-peer events to over 2,100 participants, including judges, prosecutors, defence attorneys, investigators, and support staff on thematic procedural and substantive legal concepts in war crimes cases processing. After the WCCP closed, the WCMP has continued to provide targeted training to judicial practitioners based upon the observed issues and needs assessed through case monitoring.

40 Project on Improving War Crimes Processing in Bosnia and Herzegovina, Report for the period 1 January – 31 December 2018, (Sarajevo, High Judicial and Prosecutorial Council of BiH, 2019 – Available in BCS only), p. 18.

war crimes cases take longer to process – it would take about six and a half years to complete all of the cases, somewhere around late 2025 or early 2026. Aside from missing the deadline by a number of years, this long interval will certainly also entail the death of many, perhaps even hundreds, of suspects, witnesses, and victims. At the entity/Brčko District level POs, by contrast, there are just over 200 war crimes cases with known suspects awaiting completion. At the current rate of completion in these jurisdictions, even once all less complex cases are transferred to the entity/Brčko District level POs in accordance with the Strategy, these cases could still be completed by the 2023 deadline.



Besides these quantitative issues, however, the Mission has also observed a number of concerning practices at the PO BiH that may be directly bearing on its inefficiencies in case processing. These include the creation of new cases through the fragmentation of existing cases and raising multiple indictments in connected cases.

*2.3.1 Case fragmentation: The PO BiH systematically creates “new” cases by separating existing cases*

In recent years, the PO BiH has created over 350 new cases by separating already existing cases.<sup>41</sup> While the occasional separation of cases may be justified for efficiency or practical reasons, such as the inaccessibility of one defendant in a case with numerous accused, such a large number of separations raises concerns about their primary purpose and increases the risk of waste. The primary problem with this practice, when left unchecked, is that creating multiple cases based on the same events can lead to repetition of efforts and a waste of resources within the judicial system, particularly when the PO BiH is already failing to focus exclusively on the most complex cases. Equally, this case fragmentation negatively impacts

<sup>41</sup> The Mission has been tracking the separation of cases at the PO BiH since 2014.

victims and witnesses. By creating multiple cases based upon the same events, victims and witnesses are inevitably summoned to testify about the same or related traumatic events in multiple cases, thus significantly increasing the risk of their re-traumatization.<sup>42</sup>

The CPC BiH provides conditions for joinder<sup>43</sup> and separation<sup>44</sup> of proceedings. A joint proceeding will be conducted in situations when several persons participated in the commission of the same crime, or when the same or several persons committed one or several crimes that are connected. On the other hand, there can be legitimate reasons to separate a case. It may be more efficient, for example, to separate a case where one suspect is unavailable but the evidence against other suspects is sufficient to proceed with the processing of the case. However, the Mission observes instances in which related cases are tried separately with no clear justification. For example, the Mission has observed several recent cases that the PO BiH indicted separately (and in some instances transferred) in spite of their connection to each other and/or other cases.

Four such recent cases concerned the killing and illegal imprisonment of Bosniak civilians in Hotel TE Gacko in June and July 1992, with a significant overlap in witnesses.<sup>45</sup> The indictments in the *Lažetić*<sup>46</sup> and *Koprivica*<sup>47</sup> cases raised by the PO BiH by the same prosecutor (and immediately transferred to the Trebinje District Court) concerned the same event as indicted by the Trebinje PO in the *Svorcan et al.*<sup>48</sup> case, which is currently at the main trial stage before the District Court of Trebinje. Further, the *Govedarica*<sup>49</sup> case, which has already been adjudicated before the District Court of Trebinje, also concerned the same event. In *Svorcan et al.*, currently before the Trebinje District Court, one of the accused, Govedarica, is charged together with Svorcan with killing a Bosniak civilian on 29 June 1992 in front of Hotel TE Gacko. The victim had been detained in a truck in the hotel parking lot and Svorcan is alleged to have stabbed him at least twice with a knife. The injured victim fled and the second accused, Govedarica, ran after him and shot at him with a rifle several times. The victim fell to the ground and died. His mortal remains have not yet been discovered. In the case of *Govedarica*, the accused Govedarica was convicted by the Trebinje District Court for killing another Bosniak civilian as the result of an incident that took place on 29 June 1992 in front of Hotel TE Gacko. According to the verdict, while the victim was trying to get onto one of the trucks, the accused fired his automatic rifle at the victim, who was injured as a result, and subsequently died on the way to Bileća.

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42 Korner Report, *supra* note 21, p. 25.

43 Article 26 (Joinder of Proceedings) CPC BiH, *supra* note 4.

44 Article 27 (Separation of proceedings) CPC BiH, *supra* note 4.

45 Three of four witnesses are shared between the cases and one witness in the *Lažetić and Koprivica* cases already testified in the adjudicated *Govedarica* case.

46 *Prosecutor v. Predrag Lažetić*, T200KTRZ.001231016 (filed by prosecutor Vesna Ilić on 22 November 2018, transferred on 3 December 2018).

47 *Prosecutor v. Branko Koprivica*, T200KTRZ001230616 (filed by prosecutor Vesna Ilić on 22 December 2017, transferred on 4 January 2018).

48 *Prosecutor v. Svorcan et al.*, T160KTRZ000087205 (filed on 31 October 2017).

49 The case involved the same perpetrator as in the *Svorcan and Govedarica* case. See *Govedarica*, Trebinje District Court Verdict of 10 July 2008.

The *Lažetić* case, currently before the Trebinje District Court at the pre-plea stage, concerns the same larger event, as the accused is charged with inhuman treatment and violation of bodily integrity of 11 Bosniak civilians who were illegally imprisoned in Hotel TE Gacko in June 1992. In the *Koprivica* case, also currently before the Trebinje District Court, the prosecution alleges that on 4 July 1992 the accused separated a non-Serb civilian from the group of civilians brought to Hotel TE Gacko and subsequently killed the victim in front of his house. In both the *Koprivica* and *Lažetić* cases, the same prosecutor at the PO BiH submitted the motion for transferring these cases to the Trebinje District Court together with the respective indictments, as the prosecutor deemed that both cases were related to isolated events.

It is clear from the foregoing examples that all four cases related to the same events, and in the Mission's view, should have been processed jointly. This case fragmentation resulted in these cases being processed as less complex cases before an entity court. In light of the apparent connection between these cases, the PO BiH should have conducted a more thorough assessment of their complexity in light of the criteria contained in the Strategy.

Similarly, in August 2017, the PO BiH filed an indictment in the case of *Ratković* which was immediately transferred *ex officio* by the Court of BiH<sup>50</sup> to the District Court of East Sarajevo.<sup>51</sup> The charges related to the multiple rapes of a woman of Serb ethnicity in Višegrad in the period from June 1992 to January 1993. The woman was allegedly targeted because she was married to a Bosniak. However, on 11 November 2017 the case was taken back over by the Court of BiH given that it was currently conducting a trial involving *Ratković (Dragičević et al.* case) concerning the same timeframe and location.<sup>52</sup> In the latter case, *Ratković* was charged with unlawful deprivation of liberty and detention, inhuman treatment, immense suffering and violation of bodily integrity, and the killing of non-Serb civilians in the area of Višegrad Municipality at the beginning of 1993. Based on the foregoing, it is apparent that the two cases in relation to the accused *Ratković* and the charges brought against him should have been investigated and indicted in a single proceeding by the PO BiH.

An even more striking example of case fragmentation can be seen in the cases of *Tešić*<sup>53</sup> and *Lošić*,<sup>54</sup> for which the PO BiH filed indictments in March 2016 and November 2018, respectively. The Court of BiH transferred proceedings in both cases to the District Court of East Sarajevo.<sup>55</sup> These indictments, filed by the same prosecutor, concern an identical event which took place in the building adjacent to the Vlasenica Municipal Court, where

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50 Decision of the Court BiH of 25 August 2017.

51 *Prosecutor v. Vuk Ratković*, Indictment, T20 0 KTRZ 0011699 16 (Filed on 16 August 2017, transferred *ex officio* on 25 August 2017)

52 *Prosecutor v. Luka Dragičević et al.*, Court of BiH, S1 1 K 018711 15 Kri.

53 *Prosecutor v. Dragiša Tešić*, Indictment, T20 0 KTRZ 0011844 16 (filed on 21 March 2016 by prosecutor Seid Marušić, transferred *ex officio* by the Court of BiH on 4 April 2016).

54 *Prosecutor v. Rajko Lošić*, Indictment, T20 0 KTRZ 0014996 17 (filed on 21 November 2018 by prosecutor Seid Marušić, transferred by Court of BiH on 3 December 2018 upon the motion of the PO BiH).

55 Decisions of the Court of BiH on transfer of proceedings of 4 April 2016, and 3 December 2018, respectively.

both accused, in December 1994, are alleged to have subjected the same civilian victims and prisoners of war to inhuman treatment, torture, immense suffering and violation of bodily integrity. Again, given the identical nature of the underlying event, it would have been more appropriate to conduct judicial proceedings against these two accused together.

The Mission has observed the impact of the yearly quota for prosecutors as a key consideration in understanding why so many cases are being unnecessarily fragmented. This will be dealt with in more detail in section 3.2 below.

War crimes cases should not be separated unless absolutely necessary. Due to the high number of cases that have been added to the already large number of cases yet to be processed, the PO BiH should evaluate the motivating factors that have perpetuated the separation of cases thus far, and take measures to ensure that separation of cases takes place only where necessary and in line with the CPC.

*2.3.2 The PO BiH raises multiple indictments where it is clear from the pattern of events that the indictments in fact should be joined together*

In recent years, the Mission has documented the practice of prosecutors at the PO BiH filing numerous indictments based on allegations arising from the same or a similar pattern of facts, when it is clear that it is more efficient and less of a strain on witnesses and victims to raise just one indictment covering all known crimes and perpetrators involved in a given incident.

In 2018, in at least four cases, the PO BiH filed indictments in which the Court of BiH, due to the factual and temporal connection of the events and allegations, issued decisions on the joinder of proceedings following the confirmation of indictments. One example is that between late December 2017 and early June 2018, one prosecutor of the PO BiH filed three separate indictments containing allegations based on related facts and events in Konjic and surrounding villages which took place during 1992 and 1993.<sup>56</sup> The first indictment, confirmed in February 2018, charges 14 suspects, including Esad Ramić, as Commander of the Konjic Municipal Staff of the Territorial Defence, with planning, ordering, instigating, and aiding and abetting, in addition to 13 other members of the Konjic Municipal Territorial Defence, Army of BiH, Croatian Defence Council (HVO), Croatian Armed Forces (HOS), “Akrepi”, i.e. the Sabotage and Reconnaissance Detachment of the Municipal Territorial Defence, and the Public Security Station Konjic with aiding and abetting.<sup>57</sup> The PO BiH filed two more indictments (*Grabovac et al.* and *Borić*), confirmed in April and June 2018, respectively, containing identical patterns of events as those found in the *Ramić et al.*

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<sup>56</sup> *Prosecutor v. Esad Ramić et al.*, Indictment, T20 0 KTRZ 0001679 11 11 (filed by prosecutor Stanko Blagić on 28 December 2017, partially confirmed on 13 February 2018); *Prosecutor v. Zdenko Grabovac et al.*, Indictment, T20 0 KTRZ 0015266 18 (filed by prosecutor Stanko Blagić on 5 April 2018, confirmed on 13 April 2018); *Prosecutor v. Omer Borić*, Indictment, T20 0 KTRZ 0015774 18 (filed by prosecutor Stanko Blagić on 4 June 2018, confirmed on 12 June 2018).

<sup>57</sup> *Ramić et al.*, *supra* note 56.

indictment.<sup>58</sup> Furthermore, whereas the Territorial Staff is generally recognized as having had only one commander at a time, both Esad Ramić (*Ramić et al.* case) and Omer Borić (*Borić* case) were charged as both being commanders of the Territorial Defence Municipal Staff at the same time and their respective indictments contain six identical counts naming them as commanders.<sup>59</sup>

In a very similar indictment filing pattern, three prosecutors at the PO BiH have filed five separate indictments over the past two years relating to the same battalion's actions in one geographical area during the same time period.<sup>60</sup> Focusing on three indictments filed by the same prosecutor, this pattern becomes self-evident. In *Taranjac et al.*, confirmed in January 2017, the PO BiH charged members of the Miska Glava Unit, as well as the president of the Ljubija Crisis Staff and civilian and police leaders, for unlawful deprivation of liberty of approximately 110 Bosniak civilians from Rizvanovići, Rakovčani, Zecovi, Čarakovo, Hambarine, Biščani, Briševo, Kozarac, and other villages who were interned in the Miska Glava Community House.<sup>61</sup> The same prosecutor at the PO BiH filed two more indictments, confirmed by the Court of BiH in July 2018 (*Obradović* case) and May 2018 (*Knežević* case), involving identical patterns of events.<sup>62</sup> In June and September 2018, recognizing the obvious link between these three cases, the Court of BiH issued decisions on the joinder of these three proceedings.<sup>63</sup> It is evident from the foregoing that filing three separate indictments relating to the same events within a seven month period did not serve the purposes of judicial economy. The fact that these three indictments were all filed by the same prosecutor also demonstrates that the PO BiH was aware that they were closely connected.

A similar pattern of case fragmentation can be seen with regard to events in Čemerno, Ilijaš Municipality, which took place in the first half of June 1992 and related to an alleged joint criminal enterprise of the Breza Municipal Territorial Defence Staff aimed at killing the Serb civilian population in that area. The same PO BiH prosecutor filed two separate indictments relating to these crimes in January 2018 (*Hadžić et al.* case) and April 2018 (*Ganić* case), within less than three months of each other. The indictment in the *Ganić* case charges the accused with command responsibility for failing to prevent or punish his subordinates from committing war crimes in the form of murdering Serb civilians in the village of Čemerno

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58 *Grabovac et al.* and *Borić*, *supra* note 56.

59 *Ramić et al.* indictment, counts 1-A, 1-B, 1-C, 1-D, 1-E and 1-K, and *Borić* indictment, counts 1-A, 1-B, 1-C, 1-D, 1-E, and 1-F are identical.

60 These cases concern actions of various units of the 6<sup>th</sup> Battalion of the 43<sup>rd</sup> Brigade of the VRS in the area of Prijedor municipality during summer 1992.

61 *Prosecutor v. Slobodan Taranjac et al.*, Indictment, T20 0 KTRZ 0009690 14 (filed by prosecutor Izet Odobašić on 30 December 2016, confirmed on 10 January 2017).

62 *Prosecutor v. Milorad Obradović*, Indictment, T20 0 KTRZ 0009690 14 (filed by prosecutor Izet Odobašić on 11 July 2018, confirmed on 12 July 2018); *Prosecutor v. Slobodan Knežević*, Indictment, T20 0 KTRZ 0013284 16 (filed by prosecutor Izet Odobašić on 26 April 2018, confirmed on 7 May 2018).

63 *Decision on joinder of proceedings*, Court of BiH, S1 1 K 024175 17 Kri of 6 June 2018; *Decision on joinder of proceedings*, Court of BiH, S1 1 K 024175 17 Kri of 19 September 2018.

in late May and early June 1992.<sup>64</sup> The indictment in the *Hadžić et al.* case<sup>65</sup> charges Ganić's subordinates with the direct commission of these murders as war crimes. The link between these two cases could not have been clearer, particularly given the very short time span within which the indictments were filed. The Court of BiH remedied the problem by issuing a decision on joinder of proceedings in July 2018.<sup>66</sup> These cases plainly demonstrate the persistent practice of case fragmentation at the PO BiH.<sup>67</sup>

The foregoing examples demonstrate a flagrant abuse of the case fragmentation provisions contained in the CPC BiH, which negatively impacts the efficiency of the PO BiH. By continuing to perpetuate this practice, the PO BiH is wasting valuable resources in duplicative investigative actions, lengthening the course of proceedings by forcing multiple trials to take place where only one is needed. This in turn inconveniences or even re-traumatizes witnesses and victims who must continuously take the stand to testify about the exact same events.

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64 *Prosecutor v. Nebra Ganić*, T20 0 KTRZ.0015217 17 (filed by prosecutor Vladimir Simović on 16 April 2018, confirmed on 23 April 2018).

65 *Prosecutor v. Džemal Hadžić et al.*, T20 0 KTRZ.000 0414 07 (filed by prosecutor Vladimir Simović on 19 January 2018, confirmed on 30 January 2018).

66 *Decision on joinder of proceedings*, Court of BiH, S1 1 K 028275 18 Kri and S1 1 K 027423 18 Kri (5 July 2018).

67 Korner Report, *supra* note 21, para. 72 *et seq.*

### **3. ROOT CAUSES OF THE OBSERVED SYSTEMIC PROBLEMS WITHIN THE PO BiH**

#### **3.1 The internal structure of the PO BiH Special Department for War Crimes**

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

The PO BiH abolished the practice of processing cases within geographical teams in 2013 for reasons unknown to the Mission. Since then, the Mission and others have urged the PO BiH to reinstate them.<sup>68</sup> As of May 2019, the PO BiH maintained a structure of three sections of eight to twelve prosecutors, with each section covering a variety of geographic regions.<sup>69</sup> There is no clear benefit to this setup, which does not benefit from the efficiency offered by the geographical team-based approach.

#### **3.2 Problems stemming from individual prosecutors' obligations to meet the annual quota requirement of relevant prosecutorial decisions**

As noted above in section 2.3.1, the Mission has observed the impact of the yearly quota for prosecutors as a possible underlying factor in the unnecessary fragmentation of cases.

The annual quota requirement is commonly regarded as a discouraging factor in focusing on the most complex war crimes cases at the PO BiH. The Book of Rules of the Prosecutor's

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<sup>68</sup> See, for example, Korner Report, *supra* note 21, p. 73.

<sup>69</sup> See *The Prosecutor's Office of Bosnia and Herzegovina* website for description of Department I (Special Department for War Crimes) at <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e>.

Office stipulates that PO BiH prosecutors must issue prosecutorial decisions in four war crimes cases each year.<sup>70</sup> It follows that, as complex war crimes cases may take years to complete the requisite investigative activities in order to file an indictment, it is less desirable for prosecutors to work on those cases and risk not meeting their yearly quota. However, it is possible under the Book of Rules for prosecutors to file a motion to the Chief Prosecutor to have an indictment in a complex war crimes case be assessed at a higher value, allowing for the prosecutors to meet the quota despite not issuing four prosecutorial decisions in a year.<sup>71</sup>

Given the number of cases still left to process at the PO BiH, the Chief Prosecutor should encourage all prosecutors to focus on the most complex cases without concern that it will negatively impact their yearly quota.

### 3.3 Sub-optimal co-operation between PO BiH and the Court of BiH

Efficient and fair processing of war crimes cases requires excellent co-operation between the PO BiH and the Court of BiH. For example, the determination of whether a case should be processed at the PO BiH or one of the entity/Brčko District POs requires a thorough mutual understanding between the PO BiH and Court of BiH on how a prosecutor identifies cases for transfer in line with the complexity criteria contained in the Strategy. The Strategy requires that the PO BiH and the Court of BiH hold regular meetings aimed at ensuring this.<sup>72</sup>

Currently, the Mission observes a lack of understanding and effective co-operation between the PO BiH and the Court of BiH on this issue. This poor coordination results in the PO BiH wasting crucial resources by working on cases that should be processed at the entity/Brčko District POs, as detailed above. The Mission has previously recommended that the PO BiH and the Court of BiH return to their previous practice of holding regular meetings between the judges of the Standing Panel and a working group from the PO BiH on general problems in the processing of war crimes cases.<sup>73</sup> To date, these recommendations have not been implemented.

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70 Article 17 (22) of The Law of HJPC confers to the HJPC the competency for “setting criteria for the performance evaluations of judges and prosecutors”. The Book of Rules set out a system of points to evaluate, amongst other things, the achievement of the yearly quota. See also Korner Report, *supra* note 21, pp. 39-41.

71 Article 8 of the Book of Rules. The Chief Prosecutor has the responsibility to take the case to the Collegium of Prosecutors and HJPC for higher valuation.

72 The Strategy, *supra* note 2, p. 15.

73 Korner Report, *supra* note 21, p. 34. According to Judge Korner, the PO BiH and Court of BiH held regular meetings to discuss issues until 2014, when the practice was suspended.

### 3.4 Insufficient quality and form of indictments

The strength of an indictment is vital to the successful prosecution of a war crimes case. An indictment lays the foundation for any case. It is essential that prosecutors clearly and cogently present the facts of the case in the indictment, with their assessment and evaluation of those facts constituting the elements of the particular criminal offence charged.<sup>74</sup>

The Mission has observed that, in recent years, the Court of BiH returns a significant number of indictments per year to the PO BiH, suggesting that some level of improvement is required in order for indictments to comply with the requirements of the CPC and to merit confirmation. In 2016, seven out of 42 indictments were returned to the PO BiH at least once. In 2017, 17 of 38 indictments filed were returned by the Court of BiH at least once. In 2018, the Court of BiH returned nine out of 27 filed indictments. The Mission has observed that the grounds for return of indictments across these three years relate particularly to the omission of key parts of the indictment related to legal qualification of the alleged crimes or the submission of evidence. For example, the Court of BiH frequently indicates as its reason for returning an indictment a failure by the PO BiH to specify the mode of liability and the manner in which the crime took place, the role of the suspect in committing the crime, the factual description of the crime, and/or the relevant international law basis to support the charges.<sup>75</sup>

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<sup>74</sup> Korner Report, *supra* note 21, p. 77. The Korner Report clearly identified that improvements were needed in this regard. The Korner Report also observed that the PO BiH should have raised indictments concerning a higher level of perpetrators.

<sup>75</sup> For example, according to the information available to the Mission, the indictment in the *Ramić et al.* case was returned twice by the preliminary hearing judge because of the prosecutor's failure to provide information on the alleged mode of liability (PO BiH Indictment of 28 December 2017, *supra* note 56). In the *Perović* case, the preliminary hearing judge returned the indictment once as the prosecutor failed to provide an adequate description of the crime, including when and how the crime was committed (PO BiH Indictment of 24 January 2018, *supra* note 15).

## 4. CONCLUSIONS AND RECOMMENDATIONS

In spite of the tremendous amount of support received from the international community, the PO BiH is impeding the delivery of justice for victims by failing to process war crimes cases with the quality and efficiency appropriate for an institution with such significant responsibility. Each of the issues highlighted above, on their own, impedes the efficient and effective processing of cases. Taken together, these issues indicate that there are systemic shortcomings that begin with the managerial approach to the coordination and work of the PO BiH prosecutors working on war crimes cases, and end with issues concerning oversight over the quality and performance of individual prosecutors on their cases.

The BiH judiciary is unique in that it is one of the only national jurisdictions to engage in large-scale prosecution of atrocity crimes pursuant to the principles of international law. The PO BiH and Court of BiH have been at the core of this effort since 2003 and their crucial role in ensuring justice for victims of atrocity crimes cannot be understated. Further, through the processing of complex war crimes cases, lessons learned and institutional knowledge provide a sound foundation for the PO BiH to tackle the investigation and prosecution of other complex crimes, such as those related to corruption or terrorism. It is imperative that the PO BiH immediately addresses any obstacle impeding the efficient and effective processing of war crimes cases, not only for the sake of the victims, but also for the legacy of the BiH judiciary.

On the basis of the foregoing, and in order to ensure that those most responsible for atrocity crimes are brought to justice before courts in BiH while time remains, the Mission recommends the following:

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

1. To pass a conclusion on the obligatory nature of measures prescribed in the Strategy for holders of judicial functions, thereby ensuring accountability in terms of disciplinary measures in cases of failure to comply;
2. To ensure that all appointments to the state level judiciary are based on relevant experience and merit. In particular, the recruitment process should at the outset accurately reflect the expertise required for the vacancy in question.

### **To the PO BiH:**

3. When assigning newly appointed prosecutors to specialized departments, including the SDWC, the Chief Prosecutor should take into account whether they possess the expertise required for processing the cases to which they will be assigned;
4. Without any further delay, to reintroduce a geographical team-based internal structure within the SDWC, with each team to be led by the most senior prosecutor as a mentor;

5. To ensure consistency of practice between all prosecutors processing war crimes cases at the PO BiH in their application of the complexity criteria, set out in Annex A of the Strategy. In this regard, the PO BiH should consult with the Court of BiH regarding any questions on the interpretation or application of the complexity criteria;
6. Without any further delay, to focus its resources on the investigation and prosecution of the most complex cases involving allegations of genocide, crimes against humanity, war crimes, or the most complex forms of responsibility and participation in the commission of such crimes;
7. Without any further delay, to conduct a thorough analysis of the complexity and importance of events contained in all pending KTNZR cases to determine which of these events must be processed by the PO BiH and adjudicated by the Court of BiH, in line with the Strategy, and to report its progress to the HJPC Standing Committee for Efficiency of Prosecutor's Offices;
8. To introduce a policy mandating the joinder of all cases that pertain to identical sets of facts and to prohibit the practice of unnecessarily fragmenting cases;
9. To utilize the quota exception option under the present regulatory framework which relates to exceptionally complex cases, thereby allowing individual prosecutors to file for a greater number of quota points for processing particularly complex cases;
10. Without any further delay, to develop an actionable plan for the imminent transfer of all KTRZ cases which are considered to be less complex pursuant to the Strategy's Annex A criteria to the entity/Brčko District court level;
11. To analyze all acquitting verdicts in the last three years in order to understand and address the underlying causes of the low conviction rate.

#### **To the Court of BiH:**

12. To continue with the established practice of *ex officio* review of the complexity of all indictments in war crimes cases filed by the PO BiH;
13. To put on hold the decision making process upon the motions for transfer of KTNZR cases to the entity/Brčko District level until the PO BiH conducts a thorough analysis of events contained in all pending KTNZR cases and indicates which of the events contained in such cases must be investigated, prosecuted, and adjudicated at the state level;
14. To reinstate regular meetings with the PO BiH on legal issues arising from the interpretation or application of the Strategy's complexity criteria.