FICHL : Forum for International Criminal and Humanitarian Law

Publication Series

The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina

Morten Bergsmo, Kjetil Helvig, Ilia Utlemidze and Gorana Žagovec



PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina

Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec

2010
Second Edition
Torkel Opsahl Academic EPublisher
Oslo

PURL: https://www.legal-tools.org/doc/688146/

This and other books in the FICHL Publication Series may be openly accessed and downloaded through the Forum website (www.fichl.org). Printed copies may be ordered at www.amazon.co.uk. The book was first published on 17 September 2009. This Second Edition was published on 23 July 2010.

© Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo (PRIO), 2010

All rights are reserved. You may read, print or download this book or any part of it from www.fichl.org for personal use, but you may not in any way charge for its use by others, directly or by reproducing it, storing it in a retrieval system, transmitting it, or utilizing it in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, in whole or in part, without the prior permission in writing of the copyright holder. Enquiries concerning reproduction outside the scope of the above should be sent to the copyright holder. You must not circulate this book in any other cover and you must impose the same condition on any acquirer.

ISBN 978-82-93081-04-3

PURL: https://www.legal-tools.org/doc/688146/

PREFACE TO THE SECOND EDITION

Only minor editorial changes have been made to this Second Edition, such as the inclusion of an Index prepared by Kjetil Helvig and Aleksandra Sidorenko. The book has been reformatted, so the page numbering differs from that of the First Edition.

Identical versions of this Second Edition are available online and as a printed book. Although the Torkel Opsahl Academic EPublisher does not itself charge for either version, the printed version is modestly priced to cover the costs of printer and distributor. The online version is freely accessible through the website of the Forum for International Criminal and Humanitarian Law (www.fichl.org). By publishing both online and in print, the Forum seeks to reinforce its open access programme.

Morten Bergsmo
Publication Series Co-Editor

Alf Butenschøn Skre
Senior Editorial Assistant

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

PREFACE BY THE SERIES CO-EDITOR

The Forum for International Criminal and Humanitarian Law seeks to contribute to scholarship and practice. To this end, we not only organize or co-organize seminars and other activities, but we also promote seminar findings and other publications through this Publication Series. We aspire to place high quality products on an Internet-based platform that is open and freely accessible to all. We are committed to releasing eBooks even if that is still not common in international criminal and humanitarian law. There have been many expressions of appreciation for the Forum's open access approach, especially from students and younger lawyers in this field of law and practise, but also from colleagues in materially less resourceful countries. We are grateful for the strong support from members of the expanded Advisory and Editorial Boards of the Publication Series.

The present volume on the backlog of core international crimes case files in Bosnia and Herzegovina is released in the Series in response to several individual requests. It is based on a paper written and widely circulated in Bosnia and Herzegovina in 2008. Its ideas contributed significantly to the National War Crimes Strategy adopted by the Council of Ministers of Bosnia and Herzegovina in December 2008. The paper has been updated to take into account the Strategy document as well as other key developments. The main sections of this volume are relevant not only to Bosnia and Herzegovina, but also to war crimes jurisdictions elsewhere: the model created for the mapping open case files involving core international crimes (section 4) and the comparative analysis of instruments containing criteria for the prioritization of such cases (section 5). The chapters of the book can be read separately. For these reasons the paper is published in the Forum Series.

Nobuo Hayashi

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

PREFACE BY THE AUTHORS

This book was written late 2007 and early 2008, with amendments and updates in September 2009. It was prepared as a contribution to the ongoing discussions on how to deal with the backlog of core international crimes case files in Bosnia and Herzegovina. More has been invested in criminal justice for atrocities committed there between 1992 and 1995 – through international and national jurisdictions – than in any other country. The way the backlog of case files is dealt with in Bosnia and Herzegovina will set an important precedent. How far can criminal justice be a response to mass atrocity? At the end of the day, will inherent institutional limitations in criminal justice systems be a greater obstacle to justice than lack of will? How can the discourse on what to do with large case file backlogs be professionalized as much as possible? These questions are of fundamental importance for the future of criminal justice for atrocities. That is why we have taken the time to write this book. By analyzing the nuts and bolts of the war crimes prosecution programme in Bosnia and Herzegovina, we have sought to identify some of the dilemmas facing us even when there is both considerable institutional ability and strong will to prosecute core international crimes.

We thank Dr. Jan Braathu, Norwegian Ambassador to Bosnia and Herzegovina, for lending strength to discussions in Sarajevo in 2007 with representatives of the Government of Bosnia and Herzegovina as well as the international community, and for advancing the proposal in section 4 of this book to establish a central knowledge-base of all open war crimes case files in the country.

We also thank Ambassador Douglas Davidson, former Head of the OSCE Mission to Bosnia and Herzegovina, and Mr. James E. Rodehaver, Director of the Human Rights Department of the same OSCE Mission, for their facilitation of work on an earlier version of this book and for interesting exchanges of views in 2007 and 2008. Finally, we express our appreciation to Mr. David Schwendiman, In-

PURL: https://www.legal-tools.org/doc/688146/

ternational Prosecutor, Prosecutor's Office of Bosnia and Herzegovina, for his comments on the book.

Morten Bergsmo, Kjetil Helvig,
Ilia Utmelidze and Gorana Žagovec

PURL: https://www.legal-tools.org/doc/688146/

TABLE OF CONTENTS

Preface to the Second Edition i

Preface by the Series Co-Editor iii

Preface by the Authors v

Introduction 1

Background 6

1. *Overview of the Machinery for the Investigation, Prosecution, Defence and Adjudication of Core International Crimes in Bosnia and Herzegovina* 9

1.1. Introduction 9
1.2. Structure of the Courts in Bosnia and Herzegovina 10
1.2.1. Court of Bosnia and Herzegovina 10
1.2.2. Courts in the entities and Brčko District 11
1.3. Structure of the Prosecutor's Offices in Bosnia and Herzegovina 14
1.3.1. The Prosecutor's Office of Bosnia and Herzegovina 14
1.3.2. Prosecutor's offices in the entities and Brčko District 16
1.4. The Registry 18
1.5. Defence 19
1.5.1. State level 19
1.5.1.1. Criminal Defence Section 19
1.5.2. Entities and Brčko District 20
1.6. Investigation and Police Forces in Bosnia and Herzegovina 20
1.6.1. State level 20
1.6.1.1. State Investigation and Protection Agency 21
1.6.2. Entities and Brčko District 22
1.7. Prison Facilities 24
1.7.1. State level 24
1.7.2. Entities and Brčko District 24

PURL: https://www.legal-tools.org/doc/688146/

2. *Graphical Overview of Core International Crimes Cases in Bosnia and Herzegovina* 27

3. *The Economy of the Overall War Crimes Process in Bosnia and Herzegovina* 33

3.1. Introduction 33
3.2. State Level 35
3.2.1. The Court of Bosnia and Herzegovina 35
3.2.2. Prosecutor's Office of BiH 38
3.2.3. Registry funding 39
3.2.4. Public defence 41
3.2.5. State Investigation and Protection Agency 41
3.2.6. Prison facilities 42
3.2.6.1. State Prison Project (SPP) 43
3.2.7. The High Judicial and Prosecutorial Council 43
3.3. Entities and Brčko District 44
3.3.1. Courts 44
3.3.2. Prosecutor's Offices 46
3.3.3. Public defence 48
3.3.4. Police forces 48
3.3.5. Prison facilities 50
Appendix 51

4. *Map of Existing Open Case Files in Bosnia and Herzegovina Involving Core International Crimes* 53

4.1. Knowing the Backlog of Core International Crimes Cases 54
4.2. Value of Mapping Open Case Files Involving Core International Crimes 64
4.3. Database for Open Case Files Involving Core International Crimes 68
4.4. DOCF Information Categories and Sub-Categories 73

5. *Case Selection and Proritization Criteria* 79

5.1. The Need for Criteria 79
5.2. Criteria in the Relevant BiH Legal Framework 81
5.3. Criteria in the Prosecutor's Office of Bosnia and Herzegovina ... 89
5.4. Criteria in the International Criminal Tribunal for the former Yugoslavia 98

PURL: https://www.legal-tools.org/doc/688146/

5.5. Criteria in the International Criminal Court 111
5.6. Some Concluding Remarks 115

Annex 1:
The DOCF Information Structure 129

Annex 2:
National War Crimes Strategy Adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008 165

1. Introduction 165
    1.1. Rationale for drafting the strategy 166
    1.2. Objectives and anticipated results 167
2. Efficiency in the Prosecution of War Crimes Cases 168
    2.1. Case data 169
    2.2. Management of cases 174
    2.3. Prosecution capacities 181
3. Regional Cooperation 194
4. Victims and Witnesses Protection and Support 197
    4.1. Witness protection 197
    4.2. Victim and witness support 199
5. Financial Aspects 201
6. Strategy Implementation and Supervision 203
[Annex A:] Criteria for the review of war crimes cases: 206

Index 211

FICHL Publication Series 215

Other volumes in the FICHL Publication Series 217

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

Introduction

This book seeks to make a contribution to the debate on what should be done with the large backlog of core international crimes[1] cases in Bosnia and Herzegovina.[2] This complex discourse involves numerous actors from criminal justice, the judiciary, the justice administration, civil society, the international community and foreign donors, amounting to an ambitious political process. It is easy to lose perspective in the broad range of issues that has been placed under the umbrella of 'prosecution strategy' for core international crimes in BiH. Nevertheless, the Council of Ministers of BiH adopted a National War Crimes Strategy[3] on 28 December 2008. It is reproduced as Annex 2 to this book. The document is quite an achievement. It incorporates several ideas put forward in this book when it was first circulated as a paper in BiH in the spring and summer of 2008.[4] Interestingly, it sets as a principal objective that "the most complex and top priority cases" shall be prosecuted within seven years – and other war crimes cases within 15 years – from the time of adoption of the Strategy in December 2008.[5] That does not leave many years to complete the war crimes process in BiH.

---

1 The expression 'core international crimes' in this book is intended to mean genocide, crimes against humanity, and war crimes. Sometimes the shorter form 'war crimes' is used instead of 'core international crimes', for example the 'war crimes process' in BiH or 'war crimes case files'.

2 Hereinafter referred to as 'BiH'.

3 Hereinafter referred to as the 'National War Crimes Strategy', the 'National Strategy', the 'Strategy document', or as 'Annex 2'.

4 The work on the original version of this book ceased on 24 January 2008. Later amendments and updates were done in September 2009. The figures and statistics cited refer to the situation in January 2008 unless otherwise indicated.

5 'National War Crimes Strategy', *op. cit.*, Annex 2, page 165 below.

PURL: https://www.legal-tools.org/doc/688146/

This book makes four basic contributions which the authors consider important elements for the discussion on the backlog of core international crimes cases in BiH and its responsible management over the years to come: (a) information on the nature of the BiH war crimes machinery (sections 1 and 2); (b) its economy (section 3); (c) an analysis of the need for a proper inventory of open war crimes case files in BiH (section 4); and (d) an analysis of criteria for selection and prioritization of war crimes cases (section 5). Contributions (a) and (b) are descriptive and informative in nature, whereas (c) and (d) are analytical and put forward arguments and positions. The sections can to a large extent be read in isolation. The sections are presented in the following order:

1. Section 1 of the book provides a descriptive overview of the institutional machinery for the investigation, prosecution, defence and adjudication of core international crimes cases in BiH. Without a detailed understanding of the mechanisms and institutions already established for such cases, it may be difficult to be an informed participant in discussions on the war crimes case backlog and the requirements of the BiH war crimes process during the next few years. Participants in and experts on the BiH war crimes process will be familiar with most of the information presented in section 1.
2. Section 2 gives a brief statistical and graphical overview of the number of criminal reports, reported persons, filed indictments, persons in filed indictments and final verdicts, as well as the length of proceedings in core international crimes cases in BiH by early 2008, according to available public information and trial monitoring information in the possession of the OSCE Mission to Bosnia and Herzegovina referring to matters in the public domain.
3. Section 3 offers a description of what the activities of the BiH war crimes machinery actually cost, to the extent the fragmented and limited information available allows. The purpose of the section is both to visualize the costs of the process and to show clearly what we do not know about its costs. Knowing the limits of the available information should interest both BiH authorities

PURL: https://www.legal-tools.org/doc/688146/

and external donors. The cost analysis would seem to be important for those who finance the war crimes process currently and in the future. It may also be relevant for practical considerations of which reforms, if any, should be made in the BiH war crimes machinery in order to enable it to reach its objectives and reasonable public expectations, in accordance with the applicable legal framework. Moreover, section 3 shows how dependant the BiH war crimes process is on external financial assistance, but also how much of the external assistance goes to funding international staff.

For these and other reasons, the National Strategy document decided that the "courts and prosecutor's offices in BiH and the relevant ministries of finance, in cooperation with the ministries of justice and the Judicial Commission of Brčko District, shall in 2009, in all judicial institutions that work on resolving war crimes cases, identify in the bookkeeping records the budgetary items that concern war crimes cases".[6]

Section 3 is quite detailed, in part to enable informed readers to compare unit costs of local war crimes justice with that of international criminal justice. The most detailed information refers largely to the figures at the end of 2007. This should better enable interested actors to make comparisons when 2009 figures are made available.

4. Section 4 contains an analysis of the need for a proper inventory of open case files involving core international crimes in the BiH criminal justice system. It argues that a proper inventory is necessary to know and manage the existing case load in a responsible manner. The section assesses how an inventory will fit into existing work on databases in BiH. It then presents the 'database of open case files on core international crimes' (referred to as the 'DOCF'), which is a new knowledge-base concept developed by the authors of this book as an integral part of the work on the paper. The section describes some of the efforts undertaken to have the DOCF implemented, including raising the requisite funds

[6] 'National War Crimes Strategy', *op. cit.*, Annex 2, page 202 below.

PURL: https://www.legal-tools.org/doc/688146/

from the Norwegian Ministry of Foreign Affairs for this purpose. Attached to this book as Annex 1 is the detailed taxonomy or information structure of the DOCF. The DOCF will be available through the Case Matrix, an ICC tool customised for work on core international crimes cases.[7]

The BiH Council of Ministers has recognized the need for a proper inventory of open case files. The National Strategy is in part justified by the "[l]ack of centralized, precise and qualitative statistical data on the number and nature of war crimes cases currently being prosecuted, which serve as indicators of the efficiency of prosecution and which are necessary for the purpose of planning investments in the human and material resources. It is extremely important that the Strategy sets up and updates a centralized record of all war crimes cases in the BiH judiciary".[8]

Having a proper inventory of all existing open case files involving core international crimes does of course not in itself resolve the predicament of the large backlog of such cases in BiH. To deal with this overwhelming challenge, there are two main considerations that stand out.

5. Section 5 of the book considers the first of these two challenges. It concerns the need to ensure that all cases that are selected and prioritized for full investigation and prosecution within BiH are indeed the best suited cases. To serve this end, criteria for selection and prioritization have been developed in many jurisdictions. Each potential case should be measured against such criteria before a decision is made to proceed. When such criteria are applied equally in all cases, it is more likely that the selection and prioritization is more objective. Section 5 analyses such criteria in the context of the BiH, the International Criminal Tribunal for the former Yugoslavia[9] and the International Criminal

[7] For more information, see www.legal-tools.org/en/overview-of-the-tools/ and www.casematrixnetwork.org.

[8] 'National War Crimes Strategy', *op. cit.*, Annex 2, pages 166-167 below.

[9] Hereinafter the 'ICTY'.

PURL: https://www.legal-tools.org/doc/688146/

Court[10], and compares the different sets of criteria, and looks at the role played by the prosecution and the judges. It discusses strengths and weaknesses of existing criteria in BiH.

The BiH Council of Ministers adopted as one of the objectives of the National War Crimes Strategy that the authorities should "[p]rosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria". The criteria are spelled out in Annex 1 to the National Strategy. They are primarily based on an earlier document on criteria developed in 2004 in the BiH judiciary. Judges are given a role in their enforcement. This is in accordance with some of the ideas discussed in this book and at an international seminar in Oslo on 26 September 2008 on prioritization and criteria.[11]

But case selection and prioritization criteria can only assist the front end of the war crimes process. At best, good criteria, properly enforced, ensure that the best suited cases go to trial first. Behind the prioritized cases may be such a high number of pending cases that many of them can never go to full trial given the limited capacity of the system. This is regrettably the situation with the BiH war crimes process. Indications are that the inventory of open war crimes case files will show that several thousand cases can not be dealt with by normal criminal trials even with improvements in the system and its available resources, simply because suspects and witnesses will have died. Should these case files be taken out of the criminal justice system and be placed in a more political process, such as a truth and reconciliation mechanism? Or should the BiH criminal procedure regimes be amended to allow for a more rapid, abbreviated procedure for less serious war crimes cases? These may well be the main alternatives that will confront the stakeholders in the BiH war crimes process. The choice made for the BiH process will influence the handling of the war crimes issue in other conflicts, insofar as BiH remains the chief laboratory internationally and nationally for criminal justice for atrocities.

[10] Hereinafter the 'ICC'.

[11] See http://www.fichl.org/activities/criteria-for-prioritizing-and-selecting-core-international-crimes-cases/.

PURL: https://www.legal-tools.org/doc/688146/

It falls outside the scope of this book to discuss the possible anatomy of a BiH abbreviated criminal procedure for core international crimes cases. The authors have, however, taken the initiative – through the good offices of the OSCE Mission to Bosnia and Herzegovina – to commence a discussion among criminal procedure experts and others in BiH and international experts on the feasibility and possible nature of such procedures. The authors are of the view that no stone should be left unturned to see if there are ways for the criminal justice system of BiH itself to deal with the full backlog of open war crimes case files, before the authorities consider alternative ways of processing the cases outside the system. Making abbreviated criminal procedures work may also require having another look at reparations to victims.

Background

The development of institutional and legal mechanisms for the prosecution and adjudication of core international crimes committed during 1992-95 in BiH has been a long and complex process. The international effort to hold accountable those responsible for war-time atrocities began before the end of the hostilities and led to the establishment of the special tribunal at The Hague, vested with primary jurisdiction over such crimes. It soon became widely recognized that the ICTY would only be able to deal with a limited number of cases. Later, when the Tribunal announced its completion strategy, it declared that it would focus on trying the most high-ranking defendants.

The ICTY completion strategy, coupled with a strong public demand within BiH to process the high number of remaining war crimes cases, highlighted the pressing need to develop an efficient domestic justice mechanism for atrocities in BiH from 1992 to 1995. It may be noted that during and immediately after the conflicts, both civil and military courts in BiH processed war crimes cases. However, at the initial stages, the system was still weak in terms of its ability to effectively address impunity, the process being influenced by political and ethnic bias, falling short of international standards.

It order to prevent possible arbitrary arrests and unfair trials – and to a lesser extent to assist the country in developing an impartial and effective system of prosecution and adjudication of core interna-

PURL: https://www.legal-tools.org/doc/688146/

tional crimes based on the fair trial standards – the 'Rules of the Road' procedure was introduced, seeking to enable the ICTY to review case files held by domestic authorities. The procedure is discussed in subsection 4.1. below.

Comprehensive legal and institutional reforms in 2003 opened new possibilities for war crimes prosecutions in BiH. Key reforms, such as the establishment of the BiH State Court and BiH Prosecutor's Office, vested the State level judiciary with primary jurisdiction over war crimes cases in BiH from that point onwards. Increased confidence in the domestic justice system was further demonstrated by the ICTY Prosecutor's Office deferral of the Rules of the Road oversight competence to the BiH Prosecutor's Office.[12] Accordingly, as of 28 December 2004, the BiH Prosecutor's Office was responsible for overseeing the entity level war crimes prosecutions.[13] In other words, State institutions were given the role to lead and co-ordinate the domestic war crimes prosecutions in BiH. It is, however, frequently questioned whether this arrangement has, in its current form, been sufficiently effective as regards the distribution of war crimes cases within BiH.[14] There seems to be a broad expectation that there will be further clarification of the different institutional roles.

Another key reform of 2003 was the introduction of a new BiH Criminal Code, which has strengthened the capacity of BiH courts to deal with serious violations of human rights, international humanitarian law and international criminal law. The Code incorporates extensively core international crimes from the Statutes of the ICTY and ICC, including crimes against humanity and command responsibility.

---

[12] On 27 August 2004, the ICTY Prosecutor informed the BIH Presidency of this development, and subsequently, the Presidency accepted the revocation of the Rome Agreement and the transfer of competence to BiH.

[13] The Book of Rules on the Review of War Crimes Cases, Office of the Prosecutor of Bosnia and Herzegovina, 28 December 2004, Article 7.

[14] "Given all the complexity of the issue of jurisdiction over war crimes cases, difficulties were identified in finding a functional mechanism for the distribution of cases between the Court and the Prosecutor's Office of BiH and other courts and prosecutor's offices that beyond any doubt need to continue the work on a large number of these cases", see 'National War Crimes Strategy', *op. cit.*, Annex 2, page 174 below.

PURL: https://www.legal-tools.org/doc/688146/

Nevertheless, courts throughout BiH have taken different positions regarding the application of the new Criminal Code to alleged crimes committed prior to its introduction, that is, during the conflict of 1992-95. Entity courts have been applying the more lenient criminal codes in force at the time of the conflict, while the Court of BiH has insisted on applying the new BiH Code. The BiH Constitutional Court has clearly favoured the second approach.[15]

The role of entity institutions in processing war crimes cases is very important for several reasons, including local ownership in the process as well as contributing to a general public recognition of crimes committed in the name of national or ethnic groups. It may be desirable to facilitate specialization of professional skills for the processing of war crimes cases within the entities to increase the efficiency of proceedings. To this end, one may wish to establish specialised units within the main entity prosecutor's offices and district and cantonal courts.

[15] See *Abduladhim Maktouf* AP 1785/06 Decision on admissibility and merits, 30 March 2007.

PURL: https://www.legal-tools.org/doc/688146/

1

Overview of the Machinery for the Investigation, Prosecution, Defence and Adjudication of Core International Crimes in Bosnia and Herzegovina*

1.1. Introduction

This section presents an overview of the relevant actors taking part in the investigation, prosecution, defence and adjudication of core international crimes in BiH. It provides somewhat detailed information with a view to assisting the reader who is not an expert on the BiH war crimes process to understand the legal and institutional framework that has been established within BiH to deal with war crimes cases. It is important to understand the nature, capacity and formal limitations of the mechanisms that have painstakingly been developed in the country if one seeks to participate in considerations of how the system can be further improved. Readers who are already familiar with the system may proceed to the subsequent sections of the book.

Following various reforms in the justice sector since 2002-03,[1] and given the constitutional realities of BiH,[2] the country in effect con-

* This section is researched and drafted primarily by Kjetil Helvig.

1 Reform of the court system by the Independent Judicial Commission, continued by the High Judicial and Prosecutorial Council, 2002; reform of the prosecutor's offices, 2002; reform of the criminal procedure codes, 2003; and reform of the criminal codes, 2002-03.

2 According to the Constitution of Bosnia and Herzegovina Article I(3), the country consists of two entities – the Federation of Bosnia and Herzegovina (hereinafter 'FBiH') and the Republika Srpska (hereinafter 'RS') – both with their own constitution and government. According to the Constitution of FBiH, this Entity is divided into ten Cantons, each with its own constitution and government. In addition to the state level and the two entities, the country also consists of Brčko

PURL: https://www.legal-tools.org/doc/688146/

sists of four separate court systems with varying jurisdiction over core international crimes, and of four prosecution systems with fourteen prosecutor's offices and eleven prison facilities. BiH criminal law and criminal procedure law are divided into four different regimes according to the country's constitutional structure, reflecting the State level, two entities and Brčko District. Since the reform of 2003, these regimes are largely harmonized as regards regular crimes, but this is not the case when it comes to war crimes.

The following sub-section 1.2. first describes the structure of the courts in BiH, continuing with the structure of the prosecutor's offices in sub-section 1.3., registries in sub-section 1.4., defence in 1.5., and investigative and police forces in BiH in sub-section 1.6.

1.2. Structure of the Courts in Bosnia and Herzegovina

1.2.1. Court of Bosnia and Herzegovina

The Court of Bosnia and Herzegovina[3] was established by the decision of the High Representative promulgating the Law on the Court of Bosnia and Herzegovina[4] in 2000 and became operational in 2002. Both the national judges, including the President of the Court, and the international judges are appointed by the High Judicial and Prosecutorial Council.[5] Together, the judges constitute the highest body of the Court, the Plenum. The Plenum is responsible for adopting, *inter alia*, the draft budget of the Court and the Rules of Procedure governing the internal work of the Court.[6] The Plenum has competence to issue prac-

District, a self-governing administrative unit under the sovereignty of BiH which is formally part of both FBiH and RS.

3 Hereinafter the 'Court of BiH' or the 'State Court'.

4 Hereinafter the 'Law on the Court of BiH', Official Gazette of BiH, nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04 and 32/07.

5 Hereinafter the 'HJPC'. Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter 'Law on HJPC'), Article 17(1), Official Gazette of BiH, nos. 25/04 and 93/05, and the Registry Agreement of September 2006, Article 8(7).

6 Law on the Court of BiH, Article 22. Rules of Procedure on the work of the Court of Bosnia and Herzegovina.

PURL: https://www.legal-tools.org/doc/688146/

tice directives on the application of the substantive criminal law of BiH falling within the jurisdiction of the Court.[7]

The judges dealing with core international crimes are assigned to five panels in Section I of the Criminal Division and one panel in Section I of the Appellate Division. The six panels are commonly referred to as the 'War Crimes Chamber', established on 6 January 2005. At the time when this book was written, 18 judges in six panels were conducting cases involving core international crimes. Each panel currently consists of one national and two international judges, the national acting as the president of the panel.[8] One national and one international legal adviser/officer and one intern are assigned to assist each panel in, *inter alia*, the drafting of judgements and other decisions and undertaking legal research on various points of law.[9]

1.2.2. Courts in the entities and Brčko District

Regarding cases involving core international crimes within the FBiH judiciary,[10] the 28 municipal courts are courts of first instance for criminal offences with a sentence of imprisonment up to 10 years.[11] The ten cantonal courts of FBiH are the courts of first instance for criminal offences that have a minimum sentence of ten years or more, offences where long-term imprisonment can be prescribed (over 20

7 Article 13(3)(b) of the Law on the Court of BiH.

8 According to the transition plans, the panels are to consist of two national and one international judge from the end of 2007/beginning of 2008. The mandate of the international judges is to come to an end in late 2009, Registry Quarterly Report, March 2007, page 12.

9 Figure 10 ('Existing resources for trials in war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were 24 judges and 15 legal officers working on war crimes cases.

10 The courts of the FBiH are operating under the Law on Courts of FBiH (Official Gazette of FBiH, nos. 38/05 and 22/06), CC FBiH (Official Gazette of FBiH, nos. 36/03, 37/03, 21/04, 69/04 and 18/05), the former CC FBiH, CC SFRJ (Official Gazette of SFRJ, nos. 44/76 and 36/77), CPC FBiH (Official Gazette of FBiH, nos. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06 and 27/07), the former CPC FBiH (Official Gazette of FBiH, no. 43/98), and the Book on Rules on Internal Court Operations issued by the HJPC.

11 Law on the Courts of FBiH, Article 27(1)(a).

PURL: https://www.legal-tools.org/doc/688146/

years),[12] or for cases transferred from the Court of BiH.[13] The second instance courts for decisions of the municipal courts are the cantonal courts, and for decisions of the cantonal courts it is the Supreme Court of FBiH.[14] In practice, the majority of core international crimes cases are being brought before cantonal courts.

There are no specialized departments for war crimes at the courts of FBiH. At the first instance, a panel of three judges conducts the trials, or two judges and three lay judges if the former Criminal Procedure Code of FBiH[15] is applied.[16] At the Supreme Court, a panel of three judges conducts the appellate proceedings; five judges, if the former CPC FBiH is applied.[17] The judges are appointed by the HJPC and they are assisted by judicial associates and advisers, legal trainees and interns.[18]

Within the RS judiciary,[19] 19 basic courts have jurisdiction as courts of first instance for criminal offences with a sentence of imprisonment up to ten years.[20] The five district courts of RS have jurisdic-

[12] *Ibidem*, Article 28(1)(a). Long-term prison sentence is regulated by Articles 151 to 155 of the Law on the Execution of Criminal Sanctions. The provisions state, *inter alia*, that "[p]ersons who serve a long-term prison sentence shall not be granted privileges to be used outside the establishment before two thirds of the sentence have been served", see Article 153.

[13] Article 28(1)(c) in accordance with Article 27 of CPC BiH.

[14] Article 28(2)(a) and 29(1) of the Law on Courts of FBiH, respectively.

[15] Hereinafter 'CPC FBiH'.

[16] CPC FBiH Article 25(1) and the former CPC FBiH Article 21(1), respectively.

[17] CPC FBiH, Article 25(3) and the former CPC FBiH, Article 21(2), respectively.

[18] Figure 7 ('Human resources of the courts for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were 45 judges, 30 of whom worked on war crimes cases, although not full time.

[19] The courts of the RS are operating under the Law on Courts of RS (Official Gazette of RS, nos. 111/04, 109/05 and 37/06), CC RS (Official Gazette of RS, nos. 49/03), the former CC RS of 1993, the former CC RS of 2000 (Official Gazette of RS, no. 22/00), CC SFRJ (Official Gazette of SFRJ, nos. 44/76 and 36/77), CPC RS (Official Gazette of RS, nos. 50/03, 111/04, 29/07 and 68/07), and the Book on Rules on Internal Court Operations issued by the HJPC.

[20] Law on Courts of RS, Article 26(1)(a).

PURL: https://www.legal-tools.org/doc/688146/

tion as courts of first instance for criminal offences that have a minimum sentence of ten years or more, offences where long-term imprisonment of more than 20 years can be prescribed,[21] or cases transferred from the Court of BiH.[22] The second instance courts for decisions of the basic courts are the district courts, and for decisions of the district courts it is the Supreme Court of RS.[23] Similar to the other entity, core international crimes cases are being brought before district (second instance) courts in the RS.

As in the FBiH court system, there are no specialized departments for war crimes in the courts of RS. In the first instance, a panel of three judges conducts trials, or two judges and three lay judges if the former Criminal Procedure Code of RS[24] is applied.[25] In the Supreme Court, a panel of three judges conducts the appellate proceedings; five judges, if the former CPC RS is applied.[26] The judges are appointed by the HJPC.[27] They are assisted by judicial and senior judicial associates, legal trainees and voluntary interns.[28] In courts with more than seven judges, a court secretary may be appointed to undertake administrative, technical and financial responsibilities.[29]

Regarding cases involving core international crimes in Brčko District,[30] the Basic Court of Brčko District is the court of first in-

[21] *Ibidem*, Article 27(1)(a).

[22] Article 27(1)(c) in accordance with Article 27 of CPC RS.

[23] Articles 27(2)(a) and 28(1) of the Law on Courts of RS, respectively.

[24] Hereinafter 'CPC RS'.

[25] CPC RS, Article 24(1) and the former CPC RS, Article 21(1), respectively.

[26] CPC RS, Article 24(2) and the former CPC RS, Article 21(2), respectively.

[27] Figure 7 ('Human resources of the courts for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit*., Annex 2, indicates that at the outset of 2009 there were 28 judges, six of whom worked on war crimes cases, although not full time.

[28] Law on Courts of RS, Articles 49 to 59.

[29] *Ibidem*, Articles 31 and 32.

[30] The courts of the BD are operating under the Law on Courts of BD (adopted on 3 August 2000), CC BD (Official Gazette of BD, no. 10/03), CC SFRJ (Official Gazette of SFRJ, nos. 44/76 and 36/77), CPC BD (Official Gazette of BD, nos.

PURL: https://www.legal-tools.org/doc/688146/

stance.[31] It is also the court of first instance for cases transferred from the Court of BiH.[32] The second instance court is the Appellate Court of Brčko District.[33]

There is no specialized department for war crimes in the courts of Brčko District. The trials at both the Basic Court and the Appellate Court are conducted by a panel of three judges.[34] The judges are appointed by the Judicial Commission.[35] The judges are assisted by court clerks, professional assistants, interns, a court secretary, interpreters and court experts.[36]

1.3. Structure of the Prosecutor's Offices in Bosnia and Herzegovina

1.3.1. The Prosecutor's Office of Bosnia and Herzegovina

The Prosecutor's Office of Bosnia and Herzegovina[37] was established by the High Representative's decision in August 2002 announcing the Law on the Prosecutor's Office of Bosnia and Herzegovina.[38] The Office became operational in January 2003 and consists, as of June 2006,

10/03, 48/04, 6/05 and 12/07), and the Book on Rules on Internal Court Operations issued by the HJPC.

31 Law on Courts of BD, Article 17; CC SFRJ, Chapter XVI, Articles 141 to 155c.

32 Article 27(1)(c) in accordance with Article 27 of CPC BD.

33 Article 18(1) and 19 of the Law on Courts of BD.

34 Law on Courts of BD, Article 19(2) and CPC BD, Article 23(2) and (4).

35 Law on Courts of BD, Articles 6(1) and 22(1).

36 *Ibidem*, Articles 61 to 71.

37 Hereinafter the 'Prosecutor's Office of BiH' or 'State Prosecutor's Office'.

38 The functions of the Prosecutor's Office of BiH are further governed by the Criminal Code of BiH, the Criminal Procedure Code of BiH, the Law on the Court of BiH, the Witness Protection Programme Law, the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH (Official Gazette of BiH, nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04 and 61/04), the Agreement on the Establishment of the Registry, and the Book of Rules on Internal Organization and Operations of the Prosecutor's Office of BiH.

PURL: https://www.legal-tools.org/doc/688146/

of 25 prosecutors of whom fourteen are working in the Special Department for War Crimes.[39]

Both the national prosecutors, including the Chief Prosecutor and his Deputies,[40] and the international prosecutors are appointed by the HJPC.[41] As of 30 April 2006, 15 legal associates and advisers, six case co-ordinators and six investigators assisted the prosecutors at the SDWC.[42]

Led by one of the Deputy Chief Prosecutors, the SDWC itself has six regional teams[43] each headed by a national prosecutor, consisting of one additional domestic prosecutor and one international prosecutor. At the time of writing, each team consisted of two (one national and one international) legal officers, one national case manager, language assistants, typists and two interns, all in all, ten persons per team. The teams are further assisted by investigators from SIPA's War Crimes Investigation Centre (see sub-section 1.6.1. below).

[39] Hereinafter the 'SDWC'. Eight national and six international prosecutors, see 'General Budgets for the Judicial Institutions of Bosnia and Herzegovina – June 2006 Update', page 15. However, Figure 6 ('Human resources of the prosecutor's offices for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were 37 prosecutors in this office, 18 of whom worked on war crimes cases.

[40] Two deputies acting as head of each of the two departments of the Office, see Law on the Prosecutor's Office of BiH, Articles 3 and 6.

[41] Law on the HJPC, Articles 17(2) and 29 and the Registry Agreement of September 2006, Article 8(7).

[42] Figure 6 ('Human resources of the prosecutor's offices for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were nine legal officers and four investigators working on war crimes cases.

[43] The teams cover Northwest Bosnia and a part of Posavina; Central Bosnia; Eastern Bosnia (the Drina Valley) and a part of Posavina; Sarajevo and Eastern Bosnia including Foča; Western Herzegovina and the Neretva Valley; and a special team for the area of Srebrenica.

PURL: https://www.legal-tools.org/doc/688146/

1.3.2. Prosecutor's offices in the entities and Brčko District

The 11 prosecutors' offices in FBiH (the Federation Prosecutor's Office and ten Cantonal Prosecutor's Offices) are each governed by respective laws on the prosecutor's office.[44]

The Federation Prosecutor's Office in Sarajevo, with its nine prosecutors selected and appointed by the HJPC,[45] is hierarchically above the ten cantonal prosecutor's offices, with the Chief Federation Prosecutor as the supervising authority over the other offices. The Chief Federation Prosecutor, the two Deputy Chief Federation Prosecutors and the six Federation Prosecutors – governed by the Rulebook of the Federation Prosecutor's Office[46] – are all selected and appointed by the HJPC. Together, the prosecutors constitute the 'Federation Collegium of Prosecutors', which, *inter alia*, appoints the Federation Registrar. The Registrar assists the Chief Federation Prosecutor in the exercise of administrative duties.[47]

The ten Cantonal Prosecutor's Offices with two branch offices, each under the authority of a Chief Cantonal Prosecutor and a Deputy Chief Cantonal Prosecutor, consists, as of 30 April 2006, of a total of 172 prosecutors,[48] of whom 41 are dealing with war crimes cases. Five cantonal offices have a War Crimes Department composed of one Chief Prosecutor and three Prosecutors. The Federation Prosecutor's Office does not have a war crimes department. None of the Prosecutors in FBiH have judicial associates or investigators dealing with war

[44] Law on the Federation Prosecutor's Office of FBiH (Official Gazette of FBiH, no. 19/03). Additionally, each canton has its own law on prosecutor's office. Furthermore, they operate under the Law on Courts of FBiH, CC FBiH, the former CC FBiH, CC SFRJ, CPC FBiH and the former CPC FBiH.

[45] Law on the HJPC, Article 30.

[46] Issued by the Chief Federation Prosecutor and approved by the Federation Collegium of Prosecutors and the HJPC, Law on the Federation Prosecutor's Office of FBiH, Article 29(1).

[47] Law on the Federation Prosecutor's Office of FBiH, Article 31(1).

[48] Selected and appointed by the HJPC, see Law on the HJPC, Article 31.

PURL: https://www.legal-tools.org/doc/688146/

crimes cases, even though there are trainees employed in the various offices.[49]

The Law on the Prosecutor's Offices of the RS[50] governs and regulates the Republic Prosecutor's Office and the five District Prosecutor's Offices in the RS with six branch offices. The Republic Prosecutor's Office – the only prosecutor's office in BiH with constitutional status[51] – consists of the Chief Republic Prosecutor, one Deputy Republic Prosecutor and two Republic Prosecutors, selected and appointed by the HJPC.[52] The four prosecutors constitute the 'Republic Collegium of Prosecutors', appointing the Republic Registrar and approving the Rulebook of the prosecutor's offices.[53]

The five District Prosecutor's Offices, with six branch offices, each under the authority of a Chief District Prosecutor and a Deputy Chief District Prosecutor, consists, as of 30 April 2006, in total of 73 prosecutors,[54] of whom nine are dealing with war crimes cases.[55] Two of the offices have a War Crimes Department composed of one Chief Prosecutor and three Prosecutors. Similar to the FBiH system, none of the prosecutors in the RS have judicial associates or investigators dealing with war crimes cases even though there are trainees employed in the various offices.[56]

---

[49] Law on the Federation Prosecutor's Office of FBiH, Article 33.

[50] Official Gazette of RS, nos. 55/02, 85/03 and 37/06. Additionally, the prosecutor's offices operate under the Law on Courts of RS, CC RS, the former CC RS, CC SFRJ, CPC RS and the former CPC RS.

[51] The Constitution of RS, Article 128.

[52] Law on the Prosecutor's Offices of RS, Article 5(1) and (3) and Law on the HJPC, Article 30.

[53] Law on the Prosecutor's Offices of RS, Articles 8, 32 and 34, respectively.

[54] *Ibidem*, Article 27. Selected and appointed by the HJPC, see Law on the HJPC, Article 31.

[55] Figure 6 ('Human resources of the prosecutor's offices for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were 79 prosecutors, 15 of whom worked on war crimes cases.

[56] Law on the Prosecutor's Office of RS, Article 36.

PURL: https://www.legal-tools.org/doc/688146/

The Law on the Prosecutor's Office of Brčko District[57] governs and regulates the Public Prosecutor's Office of the Brčko District. There are a total of eight prosecutors in this office, six of whom work on war crimes cases.

The prosecutors are assisted by four investigators from the Ministry of Interior. The entities and Brčko District do not have the assistance of SIPA as the BiH State level, but the relevant Ministries of the Interior assist the investigations and the protection of witnesses.

Figure 9 ('Existing resources for investigations in war crimes cases') in the National War Crimes Strategy document indicates that at the outset of 2009 there were 59 prosecutors and 14 legal officer working on war crimes cases in the BiH justice system.[58]

1.4. The Registry

The Registry for Sections I and II of the Court of BiH and for the Special Departments of the Prosecutor's Office of BiH,[59] with its temporary mandate, assists the Court of BiH and the Prosecutor's Office of BiH and especially the institutions' international relations and staff by providing the administrative, legal, logistical and operational support. The mandate ends in 2009 and the Registry of BiH is now in a phase of transition, transferring staff, assets and equipment to the newly established Registry for Sections I and II of the Court of BiH and Registry of the Prosecutor's Office of BiH. The Registry Agreement of September 2006 between the OHR and the BiH Presidency, replacing the Registry Agreement of December 2004, sets out an Integration Strategy.[60]

---

[57] Additionally, the offices are regulated by the Law on Courts of Brčko District, CC Brčko District, CC SFRJ and CPC Brčko District.

[58] 'National War Crimes Strategy', *op. cit.*, Annex 2, page 189 below.

[59] Hereinafter the 'Registry of BiH'.

[60] 'Agreement between the High Representative of Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as well as on the Creation of the Transition Council, Replacing the Regis-

PURL: https://www.legal-tools.org/doc/688146/

The Strategy provides the dates for when the various staff members and offices of the Registry of BiH will be integrated into the Court of BiH, the Prosecutor's Office of BiH or other justice institutions in BiH. As of 1 August 2007, the following services were still part of the Registry of BiH: the Criminal Defence Section, Library (in co-operation with the Court of BiH), Finance and Administration. Additionally, there is also a language unit consisting of 44 nationals who will not be transferred when the mandate terminates.

1.5. Defence

1.5.1. State level

A suspect or an accused is entitled to be represented by a defence attorney throughout the criminal proceedings according to the relevant legislation.[61] The defence attorneys are assisted and trained by the Criminal Defence Section of the Registry of BiH (see the unnumbered sub-section immediately below), which also manages the list of defence attorneys entitled to appear before the Court of BiH. This list consists of 110 attorneys from the FBiH and RS bar associations as of 31 December 2006.[62]

1.5.1.1. Criminal Defence Section

The Criminal Defence Section of the Registry of BiH[63] was established in 2005 for the purpose of giving legal assistance to suspects and accused. The work of OKO, including the admission and assignment of advocates, is governed by the Additional Rules of Procedure for Defence Advocates Appearing before Sections I and II of the Criminal Division and Sections I and II of the Appellate Division of the Court of

try Agreement of 1 December 2004 and the Annex thereto', 26 September 2006, with 'Attachment A: Integration Strategy of the National Staff of the Registry into the Justice Institutions of BiH from 2006 to 2009'.

61 Criminal Procedure Code of BiH, Chapter VII, Articles 39-50 and Law on the Court of BiH, Article 12(1).

62 Registry Annual Report 2006, page 71.

63 Commonly known as, and hereinafter referred to as, 'OKO' ('Odsjek krivične odbrane').

PURL: https://www.legal-tools.org/doc/688146/

BiH.[64] The Rules set out criteria to be appointed and admitted to a list of authorized advocates.[65] Additionally, OKO also provides defence attorneys with training and legal support in the area of international criminal law and on the European Convention on Human Rights. The legal support is given through the four defence support teams, each covering a geographical part of BiH.[66] Each team is headed by a national lawyer assisted by two interns and a foreign OKO Fellow.[67]

1.5.2. Entities and Brčko District

The bar associations of FBiH and RS administer lists of all authorized attorneys in their respective entity. The attorneys are obliged to act as defence attorneys, but can reject a request if they are not competent in the relevant area of law. The bar associations do not provide the attorneys with legal training on international criminal law. The Brčko District does not have its own bar association and it is covered by lawyers registered in the associations of the entities.

1.6. Investigation and Police Forces in Bosnia and Herzegovina

1.6.1. State level

Investigation and police agencies in BiH reflect the constitutional arrangement of the country as they are mainly organized on entity and cantonal levels. In accordance with the Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina,[68] a State level Ministry of Security was established and it was foreseen that it should, *inter alia*, have an Information and Protection Agency, the competence of which is regulated by separate law.

64 Approved by the Plenum of Judges of the Court of BiH.

65 Article 3.2. See also Law on the Court of BiH, Article 12(3).

66 The teams cover Central Bosnia and the Prijedor area, Višegrad and the Neretva Valley area; Srebrenica and the Brčko District; and Foča and Sarajevo.

67 Registry Annual Report 2006, page 72.

68 Official Gazette of BiH, no. 5/03, Article 14.

PURL: https://www.legal-tools.org/doc/688146/

1.6.1.1. State Investigation and Protection Agency

The State Investigation and Protection Agency[69] deals with police and security issues at the BiH State level.[70] Among its relevant competences, the following should be mentioned: detection and investigation of criminal offences falling within the jurisdiction of the Court of BiH; assisting the Court of BiH and the Prosecutor's Office of BiH in securing information and execution of the orders of the Court and of the Chief Prosecutor of BiH; and witness protection.[71]

Within SIPA, the War Crimes Investigation Centre[72] and the Witness Protection Department[73] are of relevance to this report.[74] The WCIC has primary responsibility and authority for conducting war crimes investigations on the BiH State level. On 12 October 2005, SIPA signed a memorandum of understanding with the Prosecutor's Office of BiH, assigning a number of its investigators to assist the Office in its investigations.[75] As of February 2006, there were two SIPA investigators assigned to the Srebrenica team and one to each of the other regional teams, all in all seven investigators.[76]

Figure 8 ('Human resources of the police bodies for the work on war crimes cases') in the National War Crimes Strategy document indicates that at the outset of 2009 there were 59 criminal police inspec-

69 Hereinafter 'SIPA'.

70 The Agency is regulated by the Law on the State Investigation and Protection Agency (Official Gazette of BiH, no. 27/04) and the Law on Police Officials of BiH.

71 Law on SIPA, Article 3 paragraphs 1, 3 and 5, respectively.

72 Hereinafter the 'WCIC'.

73 Hereinafter the 'WPD'.

74 Law on SIPA, Article 11.

75 'Memorandum of Understanding between the State Investigation and Protection Agency and the Prosecutor's Office of Bosnia and Herzegovina concerning the co-operation in the area of criminal investigations of violations of international humanitarian law'.

76 HRW: Vol. 18 No. 1 (D): Looking for justice, page 13, February 2006.

PURL: https://www.legal-tools.org/doc/688146/

tors (with the possibility to increase the number to 91), seven civil servants and six general employees working on war crimes cases.[77]

The WPD of SIPA, in close co-operation with the Witness Support Section of the Registry for Sections I and II of the Court of BiH, protects the safety and welfare of witnesses (and their family members) during and after criminal proceedings, as governed by the Witness Protection Programme Law.[78] Measures include the possibility to change identity, relocation within BiH, and other physical protection measures which have rarely been used. The Department also protects nationals who are witnesses in cases conducted before courts of other countries and conducts the transfer of such witnesses. In 2006, the SIPA Witness Protection Department implemented 88 requests or orders of the Court of BiH and the Prosecutor's Office in relation to 88 witnesses.[79]

1.6.2. Entities and Brčko District

The Ministries of Interior of the entities and Brčko District are governed by legislation adopted at the respective levels and their jurisdiction is strictly separated. The FBiH Ministry of Interior is governed by the FBiH Law on Internal Affairs.[80] According to this Law, the Federation police force is in charge of prevention and disclosure of intercantonal criminal offences as well as terrorism, illicit trafficking in narcotic drugs and organized crime, detection and arrest of perpetrators and their apprehension to competent authorities as well as protecting certain persons and federal buildings. Each of the cantons in the FBiH has its own Ministry of Interior governed by a corresponding Law on Internal Affairs, while the duties and powers of the police authorities in six cantons are further regulated by separate Laws on Police Offi-

[77] See 'National War Crimes Strategy', *op. cit.*, Annex 2, pages 186-187 below.

[78] Article 2 sets out the criteria for protection.

[79] Figure 8 ('Human resources of the police bodies for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were 19 crime police inspectors (with the possibility to increase the number to 25), three civil servants and two general service staff working on witness protection issues.

[80] Official Gazette of FBiH, no. 2/96.

PURL: https://www.legal-tools.org/doc/688146/

cials. Due to strict division of territorial jurisdiction between the cantons, the flexibility and co-operation in criminal investigations is low.[81] In Sarajevo Canton, there are five officers working on war crimes related investigations.[82] The Ministry of Interior has additionally established a team of five police officers designated primarily to war crimes issues pursuant to possible future requests from the Sarajevo Canton Prosecutor's Office.[83]

In the RS, a single Ministry of Interior is established by the RS Law on Ministries[84] and governed by the Law on Internal Affairs.[85] This Ministry has jurisdiction over a centralized police administration. The main organizational units of the Ministry are the Director's Cabinet, Police Director, Administration and Services, within headquarters and several Public Security Centres.[86] On 17 May 2005, the Minister of Interior of the RS issued a decision establishing the Working Team for documenting and initiating proceedings for the prosecution of war crimes committed in BiH by members of military, paramilitary, police and other formations on territory under the control of Federal authorities. The team is mostly dealing with investigation, identification and taking witness' and victim's statements, collecting physical evidence and new findings about war crimes committed and their perpetrators.[87]

---

81 'Justice Chain Analysis Bosnia and Herzegovina', by the Swedish International Development Agency, June 2007, page 36.

82 Exhumations, re-exhumations, autopsies and victims of war identifications.

83 Figure 8 ('Human resources of the police bodies for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit*., Annex 2, indicates that at the outset of 2009 there were seven heads of departments or sections and 37 different police investigation staff working on war crimes cases.

84 Official Gazette of RS, no. 01-756/02.

85 *Ibidem*, no. 48/03.

86 *Ibidem*, Article 7(2).

87 Figure 8 ('Human resources of the police bodies for the work on war crimes cases') in 'National War Crimes Strategy', *op. cit.*, Annex 2, indicates that at the outset of 2009 there were five heads of departments and 23 different police investigation staff working on war crimes cases.

PURL: https://www.legal-tools.org/doc/688146/

The competence of the Brčko District Police is governed by the Brčko District Law on Police. There is no specialized unit for the investigation of war crimes cases.

1.7. Prison Facilities

1.7.1. State level

The execution of criminal sanctions, detention, and other measures ordered by the Court of BiH are regulated by the Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and other Measures.[88] This Law also regulates the organization and work of the competent authorities.

At the BiH State level there is one detention unit associated with the Court of BiH,[89] but no prison. The BiH Ministry of Justice has come forward with a proposal to build a State Prison with a capacity of 340 and with an estimated staff of 200-250. The SDU has a capacity of 30 detainees and has a staff of 38.[90] Detainees transferred from the ICTY and certain other defendants tried before the Court of BiH remain in this Detention Unit until completion of trial proceedings.[91]

1.7.2. Entities and Brčko District

The laws governing the system of execution of criminal sanctions in the entities and Brčko District are the Law on Execution of Criminal Sanctions of the Federation of Bosnia and Herzegovina and Law of Execution of Criminal and Offence Sanctions of Republika Srpska.

There are two so-called closed-type facility prisons for detainees sentenced to 'long term' imprisonment in BiH: one in Zenica for detainees living in the FBiH and one in Foča for detainees living in the

88 Article 1, Official Gazette of BiH, no. 13/05, 53/07.

89 Hereinafter the 'SDU'.

90 Some 33 security staff, three health care and two administrative staff, DFID: 'Examination of the Effectiveness and Efficiency of the Execution of Criminal Sanctions', April 2006, page 13.

91 Other detainees are held in custody in other detention facilities throughout BiH: Kula, Sarajevo, Doboj and Tuzla.

PURL: https://www.legal-tools.org/doc/688146/

RS. Additionally, there are four semi-open type facilities and three departments in the FBiH and five semi-open type facilities in the RS. The Brčko District does only have a detention unit associated with the Brčko Basic Court. At the moment, most of the individuals sentenced for the war crimes are serving their time in Zenica, Kula and Foča prisons. However, they are also accommodated in other detention facilities throughout BiH. All in all, the facilities of BiH have a capacity of 2,486.[92]

[92] 'Examination of the Effectiveness and Efficiency of the Execution of Criminal Sanctions', *op. cit.*, page 12.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

2

Graphical Overview of Core International Crimes Cases in Bosnia and Herzegovina

As indicated by the description in section 1 above of the machinery for prosecution and adjudication of core international crimes in BiH, the processing of these cases is conducted by different institutions in the BiH justice system. It should be noted that – at the time this book was first published in September 2009 – there was no updated centralized mechanism for collecting and maintaining all relevant statistical data regarding open case files, investigations, filed indictments and verdicts in war crimes cases in BiH.[1] The BiH Council of Ministers signalled very clearly in the December 2008 National War Crimes Strategy that this is an important objective of the State.[2]

---

[1] See BIRN's Justice Report, 27 July 2009, Denis Dzidic: 'War Crimes Strategy Faces Credibility Crisis' (http://www.bim.ba/en/177/10/21338/):

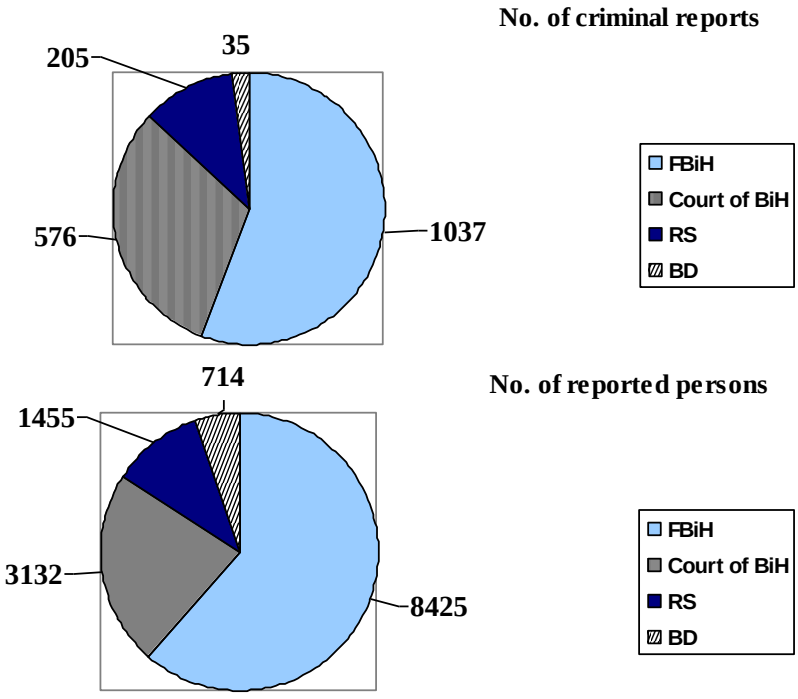
> [...] For example, the Strategy foresees the creation of a central register of all unfinished war-crime cases within 30 days of December 29, 2008, when Bosnia's Council of Ministers adopted the Strategy. This register was to establish the total number of war-crimes cases facing trial before the state and local judiciary. As matters stand, nobody knows exactly how many persons are yet to be indicted and tried. A Supervisory Board, established in March 2009 to monitoring implementation of the Strategy, expressed concern at its latest session in July over what it called "the inadequate response by entity, cantonal and regional prosecutions" in handing over the relevant information. The Board gave them a deadline of September 1 to submit all remaining required data to the Chief Prosecutor of the Prosecution of Bosnia and Herzegovina. The President of the Court of Bosnia and Herzegovina, Meddzida Kreso, has also expressed concern in public over growing delays in the implementation of the Strategy, which she says are creating a credibility crisis. Kreso says the entity prosecutions have not submitted the required data - charges that they have denied. [...].

[2] See 'National War Crimes Strategy', *op. cit.*, Annex 2, objective '1.2 b.', page 167 below.

PURL: https://www.legal-tools.org/doc/688146/

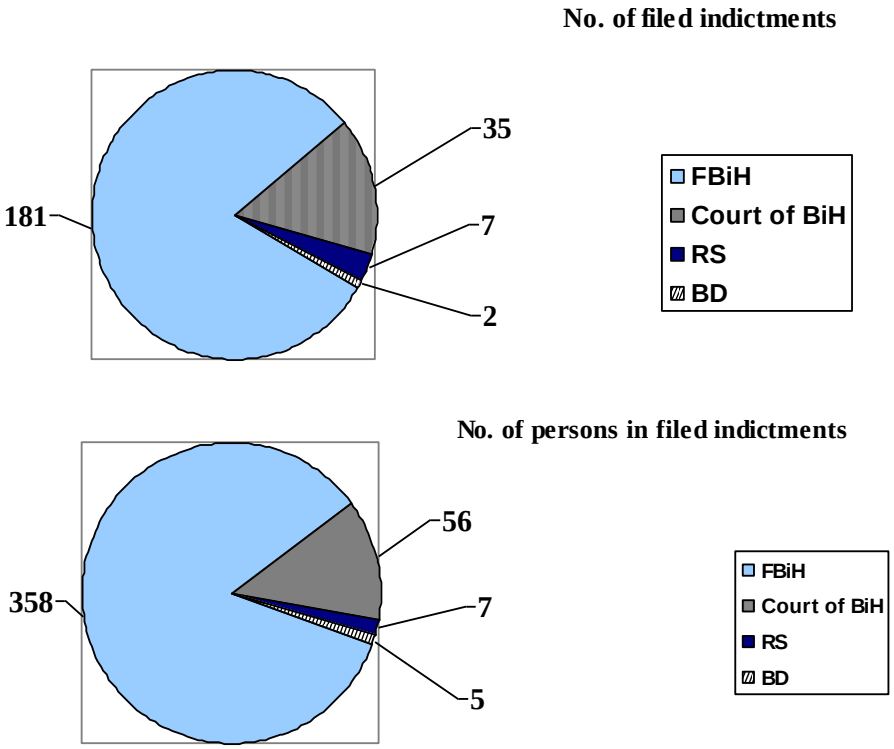
The following graphs present basic information at the time of writing regarding investigations that were pending both within the State and entity prosecutor's offices, filed indictments, final verdicts as well as the length of proceedings in war crimes cases. The statistics on which the graphs are based are taken from a variety of sources, including from relevant governmental institutions as well as through the monitoring of war crimes cases.[3] The margin of inaccuracy in the graphs reflects the sources.

Graph 1: Statistical information regarding pending investigations and filed indictments within prosecutors' offices in Bosnia and Herzegovina.



[3] The Human Rights Department of the OSCE Mission to Bosnia and Herzegovina extensively monitors the prosecution of war crimes cases on both the state and entity levels as well as in Brčko District and keeps internal statistics regarding war crimes cases pending before the courts throughout the country.

PURL: https://www.legal-tools.org/doc/688146/

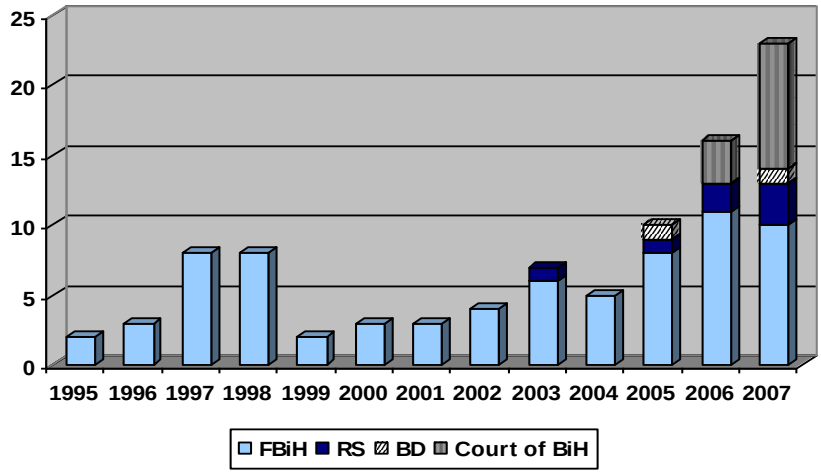


Based on available information provided by the BiH Prosecutor's Office, Graph 1 presents an overview of the situation in war crimes cases in BiH at the end of 2007. Figure 1 ('Data on the number of out-standing cases') and Annex II (page 3) of the National War Crimes Strategy document indicates that at the end of 2008, there was a total of 4,990 cases involving 9,879 suspects/accused in BiH: 1,580 cases and 3,819 suspects in the Prosecutor's Office of BiH; 76 cases and 202 suspects in the Prosecutor's Office of Brčko; 2,409 cases and 4,099 suspects in the Prosecutor's Offices in the FBiH; and 924 cases and 1,758 suspects in the Prosecutor's Offices in Republika Srpska. Figure 2 in the same document ('Data on the number of KT-RZ cases under investigation') indicates that at the same time, there were 1,285 cases involving 5,895 *known* suspects in BiH, 'KT-RZ' signifying "the war crimes cases where the perpetrator is known": 410 cases and 1,151 known suspects in the Prosecutor's Office of BiH; 25 cases and 198

PURL: https://www.legal-tools.org/doc/688146/

known suspects in the Prosecutor's Office of Brčko; 287 cases and 3,069 suspects in the Prosecutor's Offices in the FBiH; and 563 cases and 1,477 known suspects in the Prosecutor's Offices in the Republika Srpska.

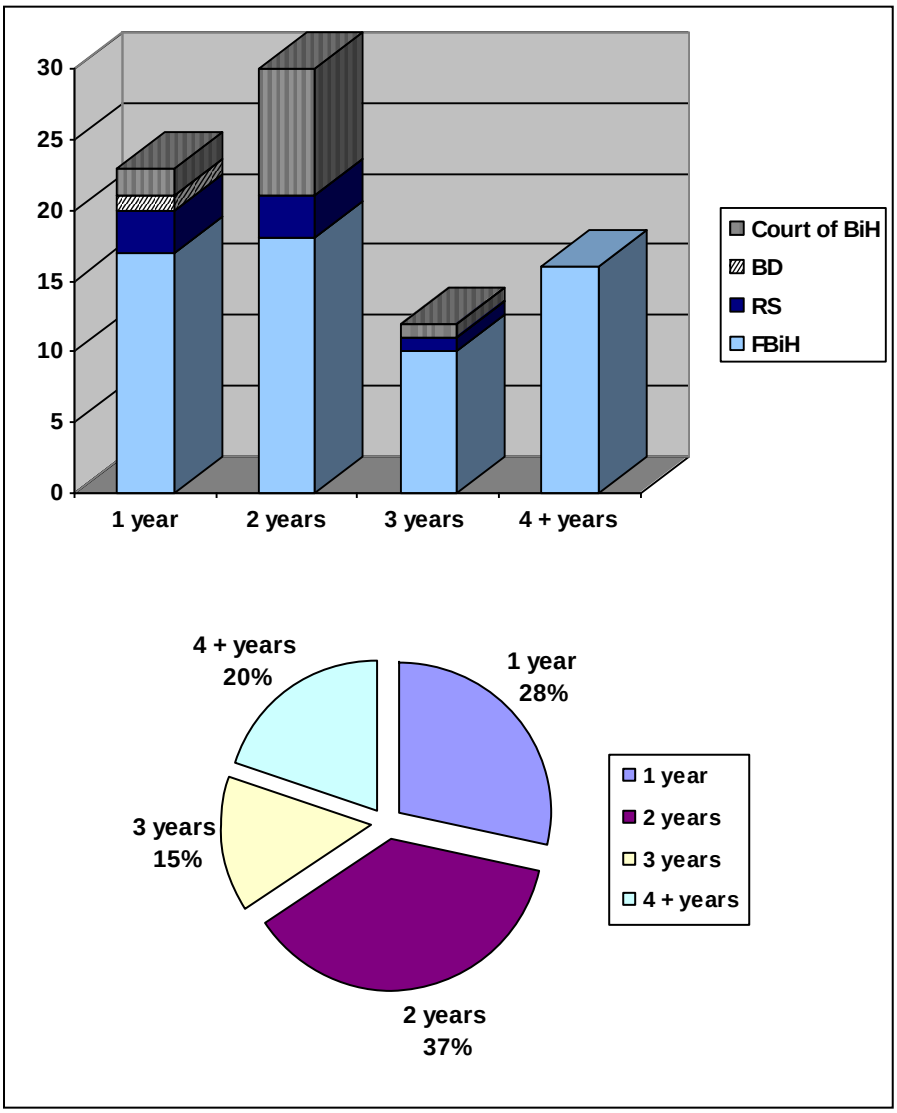
Graph 2: Final verdicts in war crimes cases in Bosnia and Herzegovina.



Graph 2 shows the number of final verdicts from 1995 until the end of 2007. As can be seen from the illustration, it is only during the later years that there has been a significant increase in the finalization of war crimes cases.

PURL: https://www.legal-tools.org/doc/688146/

Graph 3: Length of proceedings in core international crimes cases in Bosnia and Herzegovina.



Graph 3 demonstrates four average timeframe categories that the BiH judiciary is using to process war crimes cases at the entity and State levels.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

3

The Economy of the Overall War Crimes Process in Bosnia and Herzegovina*

3.1. Introduction

This section presents the economy of the processing of core international crimes cases in BiH, including past, present and available indications of future costs of the actors involved in the investigation, prosecution, defence and adjudication of the cases at the BiH State and entity levels and in Brčko District. The two-fold purpose of describing these realities in some detail is to provide the general public with a realistic picture of what we know about the costs of the BiH war crimes process – and what we do not know. It is the latter that stands out. It is very difficult to make a global assessment of the cost of the BiH war crimes process. The BiH authorities and donors may wish that to change. Some months after the paper that this book is based on was first circulated in Sarajevo, the BiH Council of Ministers stated that "[t]here are no separate accounting and budgeting items for the resources used for war crimes cases, which is why it is not possible to develop a financial framework that would indicate the resources allocated on the annual basis to resolve war crimes cases in previous years, that is, the resources to be allocated for that purpose in the future".[1]

The section gives some indication of how dependent the process is on external funding, how much of the external funding goes to international staff costs, and what the relative cost of processing of war crimes cases is in BiH compared with, for example, the ICTY. In this way, the analysis makes a contribution to the debate on the cost of local criminal justice for war crimes as opposed to international criminal justice. The description goes into quite some detail where information

* This section is researched and drafted primarily by Gorana Žagovec.

1 See 'National War Crimes Strategy', *op. cit*., Annex 2, page 202 below.

PURL: https://www.legal-tools.org/doc/688146/

was made available to the authors at the time of writing, with a view to indicating unit costs of different functions in the war crimes process, so that the reader gets a better understanding of where the larger expenses lie and how costs compare with other legal systems.

Accurate calculation of this data is difficult due to the fragmented financing of the BiH justice sector as well as lack of exact data on war crimes case processing within the budgets of the relevant justice sector institutions. The indications given in the following subsections are made on the basis of the limited data available and estimations, made by the authors, which are clearly marked as such and explained in the text or footnotes.

At the State level, funds provided for the processing of war crimes cases at the relevant justice institutions amount to some BAM 8 million, whereas international donations amount to some BAM 46 million. Finalizing the State Prison Project would require another BAM 28 million. At the entity level, the work on this book could only produce a general estimation of the average cost per war crimes case of BAM 15,000 to 30,000 due to limited public information on the financing of the war crimes prosecution process at this level.[2]

The analysis is based on available public data[3] of the various judicial institutions, primarily in the latter half of 2007, describing in sub-section 3.2. the funding of judicial institutions at the State level, and in sub-section 3.3 the entity level and Brčko District.

[2] According to available data, approximately 74 war crimes cases have been completed by the entity courts at the time of writing of this report, while up to 30 cases were pending.

[3] The exact figures for the war crimes cases have never been taken out of the cumulative budgets of the justice sector in BiH. Certain costs were not obtained as they could not be extracted from general costs. Due to different financial management of these institutions – and various responses received throughout the work on this book – different models will be used to show the relevant costs of the core international crimes machinery in BiH. It appears that the majority of these institutions have not made their own approximation of these costs.

PURL: https://www.legal-tools.org/doc/688146/

3.2. State Level

3.2.1. The Court of Bosnia and Herzegovina[4]

Due to the fragmented court system in BiH,[5] the budgets of the courts throughout the country and their financing are approved and executed by different bodies. The State Court is financed through the BiH State budget and donations to the Registry for Sections I and II of the Court of BiH from donor countries.

Effective as of 1 January 2006, judicial salaries are equalized throughout the country and guaranteed by laws on judicial and prosecutorial salaries and other benefits imposed by the Office of the High Representative[6] for the levels of BiH, the two entities and Brčko District.[7]

Table 1 presents an overview of the total budget for the costs of criminal proceedings[8] in 2007, the total expenditure and the share of war crimes cases as of 26 July 2007, as well as the projection for

[4] This sub-section presents calculations of costs paid from the State Court budget. It includes costs of criminal proceedings in war crimes cases, but it does not reproduce the exact amounts that are being paid for salaries of staff working on war crimes cases only. It was not possible to establish the exact number of judicial staff who work solely on war crimes cases as many of them work also on organized crimes cases. For this reason, only general salary rates will be introduced.

[5] See section 1 above.

[6] Hereinafter the 'OHR'.

[7] Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina, Article 6 (Official Gazette of Bosnia and Herzegovina, no. 90/05); Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions in the Federation of Bosnia and Herzegovina Article 6 (Official Gazette of Federation BiH, no. 72/05); Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions in the Republika Srpska, Article 6 (Official Gazette of RS, no. 115/05); Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions in the Brčko District, Article 5 (Official Gazette of Brcko District, no. 01/06).

[8] See Article 185 of the BiH CPC.

PURL: https://www.legal-tools.org/doc/688146/

2008.[9] Based on these numbers, as of 26 July 2007, more than *two thirds (72.57%)* of the total budget had been executed, and *70.34%* of these executed payments were war crimes related.

Table 1.

Contracted services	Total budget for 2007	Total execution on 26 July 2007	Execution on 26 July 2007 in war crime cases	Total projection for 2008
Legal services	1,076,000.00	764,291.70	544,103.86	1,560,000.00
Translation services		1,183.50	60,00	
Expert services (expert witnesses)		14,180.16	8,320.40	
Health services	17,000.00	20,708.30	15,438.80	52,000.00
Settling witnesses expenses	19,000.00	6,603.00	0.00	19,000.00
Total	**1,112,000.00**	**806,966.66**	**567,923.06**	**1,631,000.00**

As shown in Table 2, when dividing the costs of the criminal proceedings in war crimes cases, the major expenditure category is payment of defence counsel.[10]

[9] Expenditures throughout this report, if not otherwise specified, are shown in Convertible Marks (BAM), an official currency in BiH; 1 Euro corresponded to approximately BAM 1.95 at the end of 2007.

[10] In the year 2007, out of total of BAM 567,923.06 executed in war crimes cases until 26 July, BAM 544,103.86 (95.8%) went to defence counsel.

PURL: https://www.legal-tools.org/doc/688146/

Table 2.

Year	Defence counsel	Expert witnesses	Inter-preters	Health services	Witnesses	Total
2005	1,219.20	0.00	0.00	69.00	2,409.50	**3,697.70**
2006	710,929.89	1,316.40	717.00	1,288.40	120.00	**714,371.69**
2007 [11]	544,103.86	8,320.40	60.00	15,438.80	0.00	**567,923.06**
Total	**1,256,252.95**	**9,636.80**	**777.00**	**16,796.20**	**2,529.50**	**1,285,992.45**

According to the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina,[12] basic monthly salaries of certain categories of staff at the Court of BiH shall be as follows: for judges BAM 3,800, for Heads of Departments BAM 4,000, for Legal Advisers from BAM 1,900 to 2,400 and for Judicial Associates from BAM 1,200 to 2,400. It appears that, in practice, salary ranges do not fully correspond to the standards provided for in the Law.

According to the information provided by the Registry Quarterly Report, indicators relating to the trial workload show that the State Court is managing a significantly higher number of trials (as well as accused) than was forecast on the basis of the resources available to the institution. There is a caseload increase in every reporting period. This puts pressure on the Court and its staff. It is essential for planning purposes that increases in available resources match the capacity of the State Prosecutor's Office.[13]

[11] Information obtained on 6 August 2007.

[12] See Articles 3 and 17.

[13] Registry Quarterly Report, March 2007.

PURL: https://www.legal-tools.org/doc/688146/

3.2.2. Prosecutor's Office of BiH[14]

The funding of the prosecutor's offices in general is dependant on the relevant Ministry of Justice. Considerable international aid is being provided for the special departments of the State Prosecutor's Office, namely for the Special Department for War Crimes and Special Department for Organized Crime.

The Framework Budget Document[15] is prepared by the State Prosecutor's Office for the planning of resources needed for its various programmes.[16] These programmes correspond to the work of each of the departments, which made it possible to extract general information on the expenditures of the SDWC from this document, as shown in Table 3 in the appendix to this section.[17]

The different total expenditures presented, shows that, compared with 2006, the increase in expenditures in 2007 amounts to 101.8% while the planned increase for 2008, compared to 2007, may be approximated to 62.23%.

By individual summation of costs in 2007 related to witnesses, expert witnesses and translators in the SDWC, as of 30 July 2007, the total costs amount approximately to BAM 35,000.

Graph 1 in the appendix to this section presents data on cases processed in Sections I and II of the Court of BiH 2005-07 as well as

[14] The calculation of costs for the State Prosecutor's Office will involve costs of the Special Department for War Crimes that were possible to extract from the national budget of the Prosecutor's Office, while the expenditures of Registry support to this Department is to be presented in sub-section 3.2.3. of this book.

[15] 'Dokument okvirnog budžeta'.

[16] A programme here is a package of similar activities with common strategic and operational aims.

[17] Categories of costs are: employee salaries, reimbursement of costs, travel costs, costs for telephone and postal services, municipal services costs, costs for energy, purchase of materials, costs for transport and fuel, and contracted services such as printing, copying and lacing services, costs of the witnesses, services upon the order of the State Prosecutor's Office (expert witnesses, translators). Concrete information on the exact amounts for these costs in the SDWC could not be obtained.

PURL: https://www.legal-tools.org/doc/688146/

human resources at the SDWC and SDOC of the BiH Prosecutor's Office. As shown, Section II is generally processing more cases than Section I. Looking at the number of confirmed indictments, the SDOC, with one third the size of the SDWC, filed many more. Arguably, organized crime cases can not be considered less complex or politically sensitive than war crimes cases.

3.2.3. Registry funding

The Registry Office is currently funded by international donors. Following the Integration Strategy, the gradual transfer of responsibility for funding and resources has begun and is expected to be completed by the beginning of 2010, in accordance with the Agreement between BiH and the High Representative for BiH on the Registry, dated 26 September 2006. Under this Agreement, the national staff and all assets are expected to be transferred to Bosnian institutions.[18]

The total international support to justice institutions of BiH for the period of 2006 to 2009 is estimated to amount to more than 30 million Euros.[19] The total international support to the Prosecutor's Office of BiH for this period amounts approximately 9 million Euros.[20] Based on the General Budget for the Judicial Institutions of BiH released in June 2006, it should be noted that for the same period international support that was and is to be allocated to the SDWC only was estimated to nearly 7 million Euros.[21] The total international support to the Court of BiH for the same period amounts to approximately 8 million Euros.[22] Out of this amount, approximately 3.5 million are to be spent

[18] Registry Annual Report 2006.

[19] *Ibidem*, Table 2, page 111. The division of costs is as follows: national staff costs, operating costs, international staff costs, capital investments and international seconded staff costs.

[20] Out of this amount, national staff costs amount more than 1.6 million, international staff more than 3.2 million and costs of the international seconded staff are around 2 million Euros.

[21] General budget for the judicial institutions of BiH – update, June 2006, Appendix 17, page 101. Approximately 2 million Euros is spent on national staff and 4 million on international and seconded staff.

[22] Registry Annual Report 2006, *op. cit.*

PURL: https://www.legal-tools.org/doc/688146/

on international judges.[23] It can be estimated that, out of 3.5 million Euros, 2.6 million are to be spent on international judges in war crimes panels.[24] It can also be estimated that, out of the remaining 4.5 million Euros, around 3 million relate to expenditures for war crimes trials.[25]

The total international support to the Registry in the same period is estimated at approximately 13 million Euros.[26] Out of this amount, one million was and is to be spent on witness protection,[27] nearly 1.6 million on defence,[28] and half a million on prison capacity.[29] As referred to in sub-section 1.4. above, the Registry provides services for both the prosecution and the Court. The work on this book could not identify the exact breakdown with regard to the workload of the Registry. It can only be assumed that approximately two thirds of its resources are being spent for the War Crimes Section of the BiH Court and the Prosecutor's Office. When it comes to international support to capital projects in 2006, 300,000 Euro was spent on the prison project,[30] 40,000 Euro on the detention infrastructure project,[31] and 40,000

[23] 'General budget for the judicial institutions of BiH – update', June 2006, Appendix 17, page 99.

[24] Taking into account that there are ten panels at the Court of BiH, that six of them are hearing war crimes cases and the remaining four organized crime cases, and that in the war crimes panels there are two international judges and one national, while in organized crime panels it is the other way around, it can be assumed that around 75% of the funds for international judges is being spent on judges in war crimes panels.

[25] Since the number of panels is in a proportion of 6:4, the assumption is that 60% of the expenditures on Court Management, Judicial Management and Court Registry are allocated to war crimes cases while Witness Support costs might be even higher for war crimes cases.

[26] Registry Annual Report 2006, *op. cit.* National staff costs can be estimated at 6.5 million Euros, international staff costs at 1.5 million, while the costs of the seconded staff were around 250,000 Euros in 2006 and were not planned for the following years.

[27] 'General budget for the judicial institutions of BiH – update', June 2006, Appendix 17, page 104.

[28] *Ibidem*, page 105.

[29] *Ibidem*, page 112.

[30] *Ibidem*, page 115.

[31] *Ibidem*, page 116.

PURL: https://www.legal-tools.org/doc/688146/

Euros on witness protection premises.[32] It should be noted that the planned amount of international support to BiH justice institutions is decreasing in line with the Integration Strategy.

Based on available data as well as a comparative analysis, it can be estimated that international support for the processing of war crimes cases at the State level in BiH amounts to approximately 21-23 million Euros for the period 2006-09.

3.2.4. Public defence

Public defence on all levels of BiH is financed from the budgets of the courts, based on the applicable fee schedule in cases where the defence counsel was officially appointed either because defence is mandatory[33] or because the defendant does not have sufficient resources to pay for his defence – or both. Besides, defence is being paid from the court's budget when the defendant has paid for his defence himself, but was acquitted by the final judgment.

Costs related to public defence before the Court of BiH has been described in sub-section 3.2.1. above. As shown, it represents the main cost of the criminal proceedings that are paid from the Court's budget.

3.2.5. State Investigation and Protection Agency

The service for material-financial affairs of the BiH Ministry of Security provided separate information on executed payments and their structure in the War Crimes Investigation Centre (WCIC) within SIPA.[34] Total costs of the WCIC activity in 2006 are approximated to BAM 693,200.[35] Until 31 July 2007, the WCIC spent a total of BAM

[32] *Ibidem*, page 118.

[33] See Article 45 of the CPC BiH that relates to mandatory defence. In war crimes cases defence is always mandatory.

[34] Act No. 17-11-16-2-2156/07 of 21 July 2007. It should be noted that SIPA is not providing information on current expenses separately for each organizational unit and that the estimation of certain rates is based on the calculation of average costs of the Agency.

[35] For salaries and compensations, BAM 523,713.46 was paid; for official travels (daily allowances and overnight stays), BAM 52,343.26; other material costs (office material, equipment, representation), BAM 14,795.20; renting of office

PURL: https://www.legal-tools.org/doc/688146/

550,696.55.[36] The 2008 budget for war crimes activities is BAM 1,002,197 in total.[37]

3.2.6. Prison facilities

According to the reply received from the BiH Ministry of Justice,[38] it does not provide separate information on the costs of war crimes suspects' detention or war crimes convicts' imprisonment. The Ministry only has general information related to detention and imprisonment ordered by decisions of the Court of BiH. According to the 'Contract on reimbursement of costs related to execution of custody measure and imprisonment sentence ordered in criminal procedure before the Court of BiH',[39] signed by the FBiH Ministry of Justice, the RS Ministry of Justice, the Judicial Commission of Brčko District and the BiH Ministry of Justice, the latter is obliged to reimburse entity prisons for holding detainees from the Court of BiH. The BiH Ministry of Justice is also paying for the costs of the State Detention Unit (SDU) since it is organized under the Ministry. The total payment by BiH Ministry of Justice on these grounds amounts to BAM 1,357,538 for 2006 and BAM 712,866 for the first half of 2007. The costs of one detainee in the FBiH amounts to BAM 40 per day, while in RS it is BAM 34 per day.

The average number of detainees in the SDU is 20. The total costs paid by the Ministry of Justice[40] were BAM 2,044,526 in 2006 and 1,051,482 in the first half of 2007.

premises, BAM 56,160; and maintenance of vehicles (current maintenance, registration, fuel etc.) amounted to BAM 46,127.44.

36 For salaries and compensations BAM 408,312.86 was paid; for official travels, BAM 61,178.68; other material costs, BAM 5,501.54; renting of office premises, BAM 32,760; and for maintenance of vehicles, BAM 42,943.47.

37 The budget planned for salaries and compensations is BAM 869,461; for official travels, BAM 21,253; and for other material costs, BAM 111,483.

38 Act No. 04-50-10876/07 of 8 August 2007.

39 'Ugovor o naknadi troškova za izvršenje mjere pritvora i kazne zatvora izrečene u krivičnom postupku od strane Suda BiH'.

40 These costs involve salaries and compensations for prison and court police, food for detainees, medical treatment of detainees conducted in BiH health institutions

PURL: https://www.legal-tools.org/doc/688146/

3.2.6.1. State Prison Project (SPP)

International funding is currently sought for the construction of a high-security prison for up to 500 prisoners that would cater for the needs of the Court of BiH and could also provide places for high risk prisoners from throughout BiH. During 2005, an extensive effort was made to secure donor funding for the construction of a State prison.[41] However, securing funding for this project has proven to be difficult. It is estimated that the SPP will cost approximately 14 million Euros.[42]

The total number of war crimes inmates in BiH can be estimated on the grounds of information obtained through the OSCE's Justice Monitoring Programme since January 2004.[43] As of 20 August 2007, there are 41 convicts still serving their sentence and 56 in pre-trial detention; in total 97 individuals detained. Information obtained from the BiH Ministry of Justice indicates that the average accommodation cost for one detainee per day in both the FBiH and RS is BAM 37. This leads to the conclusion that daily cost for these individuals amounts to BAM 3,589.

3.2.7. The High Judicial and Prosecutorial Council

HJPC plays a significant role in the financing of courts and prosecutor's offices in general and especially in the budgetary process. The Council examines realistic needs of the judiciary and participates in the drafting of the budgets put forward by courts and prosecutor's offices. After the proposals are reviewed and sometimes amended by the Min-

outside the SDU, medicines, uniforms for prison and court police, and costs of purchase of clothes, shoes and sport equipment for detained persons.

41 Medium term strategic plan, Ministry of Justice, page 8.

42 See more on the Prison Project at http://www.mpr.gov.ba/en/str.asp?id=152.

43 In 2004, five individuals were found guilty and sentenced to prison sentences ranging from three to 15 years. In 2005, seven individuals were sentenced to prison sentences ranging from 18 months to nine years. In 2006, 22 individuals were sentenced to prison sentences ranging from one to 20 years. In 2007, nine individuals were found guilty. Given that one convict escaped from prison and that one has served the sentence, the assumption is that there are 41 convicts still serving their time. As to the number of persons in pre-trial detention, the information suggests 56 individuals.

PURL: https://www.legal-tools.org/doc/688146/

istries of Justice and subsequently the Ministries of Finance, the HJPC makes and presents further recommendations and amendments.[44] The final decision is made by the Parliament.

To date, some HJPC activities supposed to be financed from the State budget were in reality funded by donors. This is not meant to continue indefinitely, as it has been declared an objective that the HJPC be fully financed by national sources.[45] But in 2006 and 2007, resources approved by the State budget for the HJPC were insufficient for all its activities, and both years the shortfall was donated by the Government of Norway.

3.3. Entities and Brčko District[46]

3.3.1. Courts

In the FBiH, the Supreme Court is funded through the FBiH budget, while each of the ten cantonal courts is funded separately through their corresponding cantonal government. In the RS as well as in the Brčko District, courts are financed individually through their respective governmental budgets.

According to information obtained from the Cantonal Court in Sarajevo,[47] it can be estimated that the costs of criminal proceedings before this Court range from BAM 15,000 to 30,000 per war crimes case. Although each case is different, on average the first instance verdict in war crimes cases is reached within six to twelve months. In 2007, the total budget of the Cantonal Court in Sarajevo amounted to

[44] Law on the HJPC, Article 17, paragraphs 14 to 18.

[45] HJPC Strategy for 2007-20012, 2.3. "Ensure that the HJPC is fully financed from the State Budget", page 14.

[46] In the paragraphs on the FBiH and the RS, the model used to present war crimes related expenditures is to consider examples of the work by competent bodies on war crimes cases, including the Cantonal Court in Sarajevo, the Supreme Court of the FBiH, the Sarajevo Canton Prosecutor's Office, the Sarajevo Canton Ministry of Interior, the FBiH Ministry of Justice, the District Court in Banja Luka, the Supreme Court of the RS, the Banja Luka District Prosecutor's Office and the Police of the RS.

[47] Act No. 009-0-SU-07-000853 of 23 July 2007.

PURL: https://www.legal-tools.org/doc/688146/

BAM 5,822,100. Out of this amount, 3.7 million was for salaries and employee costs.[48] The requested budget for 2008 is BAM 6,423,000, while the planned budgets for 2009 and 2010 amount to more that 6 million convertible marks.

The information obtained on war crimes trials before the District Court in Banja Luka was inadequate for the purposes of this report.[49] The salaries are defined by the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions in the Republika Srpska.[50] The costs are not separately tracked by the Court itself. According to the Law, the basic monthly salaries of certain categories of staff at the district courts shall be as follows: for judges BAM 3,000, for Heads of Departments BAM 4,200, and for Judicial Associates BAM 1,200. Information on the costs of criminal proceedings in war crimes cases was not provided, except for payments to defence counsel.[51]

Furthermore, it proved not possible for the authors of this book to establish accurate information on the costs of the war crimes proceedings before Supreme Courts of the FBiH and the RS. It should be noted that proceedings at the Supreme Court are usually considerably less expensive as only a limited number of hearings is conducted and other procedural steps taken.

The courts of Brčko District have, as of 20 August 2007, finalized one war crimes case at the first instance, the Basic Court, and one at the Appellate Court. Additionally, there is currently one war crimes case active before the Basic Court, conducted by a panel of three judges.[52] The proceedings before the Appellate Court are also con-

[48] In the Cantonal Court in Sarajevo there is no exact number of judges that are constantly dealing only with war crimes cases or a war crimes organizational unit within the Court. For this reason, it was again not possible to extract costs of staff salaries related to war crimes cases only. Only general salaries could be introduced and they are as follows: a judge earns BAN 3,540, legal associates BAM 1,054, administrative staff BAM 750, and technical staff BAM 514 per month.

[49] Act No. 011-0-Su-07-000 836 of 6 August 2007.

[50] See footnote 82 on page 22 of this book.

[51] See sub-section 3.3.3. of this book.

[52] Report received from the OSCE Field Office in Tuzla on 6 August 2007.

PURL: https://www.legal-tools.org/doc/688146/

ducted by a panel of three judges. At the Basic Court,[53] in addition to the three judges, one court clerk attends the trial hearing. The Court hears fifty witnesses and one or two expert witnesses per case. Including the transfer of the defendant, the total costs of one war crimes case may be approximated to BAM 13,200.[54] At the Appellate Court, the cost of one war crimes case for the Court, consisting only of the salaries of judges, is approximately BAM 20,400.[55]

3.3.2. Prosecutor's Offices

Due to decentralization of the political and the prosecution system in the FBiH, it is the cantonal Ministries of Justice that provide budgets for the prosecutor's offices. The budgeting system in the RS is centralized with the Chief Prosecutor of the RS drafting the budget for all offices, upon consultation with district prosecutor's offices.

In Sarajevo Canton Prosecutor's Office,[56] the total annual expenditures of the War Crimes Department are estimated at BAM

[53] At the Basic Court a salary of a judge amounts to BAM 4,619 per month. Court clerks have a salary of BAM 1,072 (48.72 per day) and this person is present at all main trial hearings. The procedure before the beginning of the main trial usually takes eight hours (one working day) for one judge actively working on the war crimes case. The main trial in a war crimes case lasts approximately 15 working days (30 hearings of four hours). During this time, approximately 50 witnesses (both prosecution and defence) are heard and each of them charge BAM 30 on average for travel and lost income. Usually there are one or two expert witnesses for each war crimes case and they are paid BAM 300 for their expertise. During trial, the defendant has to be brought to the court approximately 35 times and these costs approximately amount to BAM 650.

[54] Some BAM 300,000 was spent on all court procedure expenses in both criminal and civil cases, but no calculation was made for criminal procedures only. Free legal aid exists in Brčko District, but it was not calculated in the court budget.

[55] The salary of the judge of the Appellate Court of Brčko District is BAM 5,430 (246.81 per day). The introduction to an average war crimes case lasts 100 hours (12.5 working days) and it involves one judge. A panel of three judges tend to spend 11 hours (1.37 working days) on hearings and deliberation, and, additionally, some 22 working days on writing the verdict.

[56] Hereinafter the 'SCPO'. Information contained in Act No. R-228/07 of 5 September 2007.

PURL: https://www.legal-tools.org/doc/688146/

1,330,000.[57] The SCPO budget for 2007 amounts to BAM 5,258,000 and the plan is to keep the same budget level in 2008 and 2009.

According to the written response of the Banja Luka District Prosecutor's Office to the authors,[58] it is complicated to present precise costs of the processing of war crimes cases as this amount depends on the number of suspects, witnesses, expert witnesses, exhumations etc. These figures differ from case to case, especially when it comes to expenses of the prosecutor to reach victims and witnesses within BiH and abroad. These costs are not monitored separately except those that were paid by the cashier of the Prosecutor's Office. In the two mentioned cases, the costs of witnesses ranged between BAM 300 and 600.

Furthermore, costs for salaries, office material and investigations in old, open cases are not separately tracked. Exhumation costs are recorded as total cost per each location.[59] Expenses of the RS Commission for Missing Persons regarding exhumations, identifications and other expenses, excluding salaries, are covered by the Prosecutor's Office.

In 2007, the budget of the Banja Luka Prosecutor's Office amounted to BAM 3,500,000. An increase of 10% is planned for 2008. The monthly salary of the Prosecutor is BAM 2,600, while a typist, for example, earns BAM 566 per month.

The number of war crimes investigations closed by the Prosecutor's Office is between 15 and 20. The estimate is imprecise as a result of one of the main challenges in its work on war crimes. Namely, the Office closes the investigation in more than 80% of the cases, and

[57] The total costs of the gross salaries of prosecutors and the administration of the Department amount to BAM 600,000. Operational costs (electricity, water, different expertise, postal and telephone costs, heating, equipment maintenance, insurance, travel costs, office material and similar) may be approximately one third of the total operational costs of the Prosecutor's Office, BAM 330,000. For the Department to manage exhumations within its jurisdiction, it has to engage forensic experts as well as workers and equipment. The total annual costs of exhumations are estimated to BAM 400,000.

[58] Act No. A-366/07 of 1 August 2007.

[59] For example, the costs for the 'Perna' location amounted BAM 80,000, while in the 'Zvečarka' they amounted to BAM 30,000.

PURL: https://www.legal-tools.org/doc/688146/

these cases, almost finished, are then taken over by the BiH Prosecutor's Office in accordance with the sensitivity criteria. In these situations, the prosecutor who worked to bring the investigation to an end must in the progress report indicate that the case was dealt with 'in another way'. The Chief Prosecutor estimated to the authors of this book that there were nearly 30 investigations to be closed, but pointed out that it is not possible to estimate precisely, as the Office does not know whether a case will be marked 'highly sensitive' – and thus taken over by the State Prosecutor's Office – or as 'sensitive'.

In Brčko District, the prosecutor's share of the investigation work includes the work of one prosecutor, one associate and one clerk. Taken the average number of exhumations per case into account, the cost of one war crimes investigation is approximately BAM 48,000.[60]

3.3.3. Public defence

Information provided by the Cantonal Court of Sarajevo and District Court of Banja Luka[61] indicates that the costs of providing criminal defence in war crimes cases can total up to BAM 15,000 per case.

3.3.4. Police forces

According to information obtained from the Sarajevo Canton Ministry of Interior,[62] war crimes related costs and their breakdown do not ap-

[60] Report received from the OSCE Field Office in Tuzla. In the Brčko District Prosecutor's Office, a prosecutor has a salary of BAM 4,619 (209.95 per working day). On average, a prosecutor spends 120 working days on one war crimes investigation and 45 working days on the main trial phase. It usually takes five days for closing arguments and an additional five days for appeals, but so far there was no hearing before the Appellate Court. A prosecution associate earns BAM 1,890 (85.90 working day) and works on average 58 days on a war crimes case. A prosecutor's clerk earns BAM 1,072 per month (BAM 48.72 per working day) and works on average 30 days on a war crimes case. The Prosecutor's Office estimated that the exhumation cost for one body is BAM 1,500, but this not a reliable figure. The estimation is that there are three murder victims per war crimes case. By 2007, DNA analyses were made by the RS Search Commission, but these expenses could not be established. Finally, some BAM 250 had been spent on office material in war crimes cases.

[61] See footnotes 19 and 21.

PURL: https://www.legal-tools.org/doc/688146/

pear as separate budget items. All expenses incurred, for example, by an exhumation team (prosecutor, forensic medicine expert and his assistant) – material costs as well as salaries – are covered by the Ministry of Interior's budget.[63] The salary rates and precise calculation of other costs involved were not available to the authors.

In its reply to the authors,[64] the Banja Luka District Ministry of Interior presented only salaries without indicating the number of staff working on war crimes cases. Salaries for members of the police working on war crimes cases were defined as follows: BAM 682 in 2005, 814 in 2005 and 880 in 2007.

In Brčko District the police investigation of a war crimes case includes the work of two investigators,[65] one crime scene investigator, one assistant and one police clerk. Additionally, five court police officers are present at the trial hearings. The total costs for the police involvement amounts to approximately BAM 8,900 per war crimes case in Brčko District.[66]

---

62 Act No. 02/PK-662/07 of 15 August 2007.

63 If the Ministry of Interior exhumation team conduct activities outside Sarajevo Canton, their travel and subsistence costs are refunded from the budget of the Sarajevo Canton Prosecutor's Office.

64 Act No. 01-472/07-2 of 1 August 2007.

65 One has a university degree, the other higher education.

66 An investigator with university degree earns BAM 1,966 (89.36 KM per day) and with other higher education, BAM 1,625 (73.86 per day). Operational field inquiries and questioning of witnesses usually take some 210 working hours (26.20 working days), involving one investigator. On average, 60 witnesses are questioned by the police in one war crimes case. As per requests by the prosecutor, one investigator spends one working day at the main trial assisting as may be when necessary. An investigator's assistant earns BAM 1,395 per month (63.40 BAM per day) and spends 100 hours (12.5 working days) on a war crimes case, while a crime scene investigator has the same salary, and spends one working day and approximately BAM 300 of material per case. A police clerk earns BAN 1,072 (48.72 per working day) and spends 90 working hours (11.25 working days) on an average war crimes investigation. During an investigation, approximately BAM 130 is spent on fuel, while material costs amount to BAM 400. A court police officer earns BAM 1,302 (59.18 per day). Since the hearings in war crimes cases are considered high risk, there were five court police officers present at every hearing, and the total number of hearings has taken 15 working days.

PURL: https://www.legal-tools.org/doc/688146/

3.3.5. Prison facilities

The entity ministries of justice were unable to provide exact information on costs related to war crimes detainees and convicts in the RS and the FBiH when asked by the authors of this book.[67]

The Brčko District uses the entity prisons for the execution of its criminal sanctions. In the Brčko District detention unit, defendants in war crimes cases usually spend a total of one year in custody (before and after the confirmation of the indictment). One day in custody costs BAM 50. This figure excludes possible medical expenses which could not be easily calculated, but approximately amount to BAM 100 per detainee. On 27 August 2007, there were two war crimes detainees in the Brčko District detention unit.

[67] The relevant information that could be obtained is provided in sub-section 3.2.6. above.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

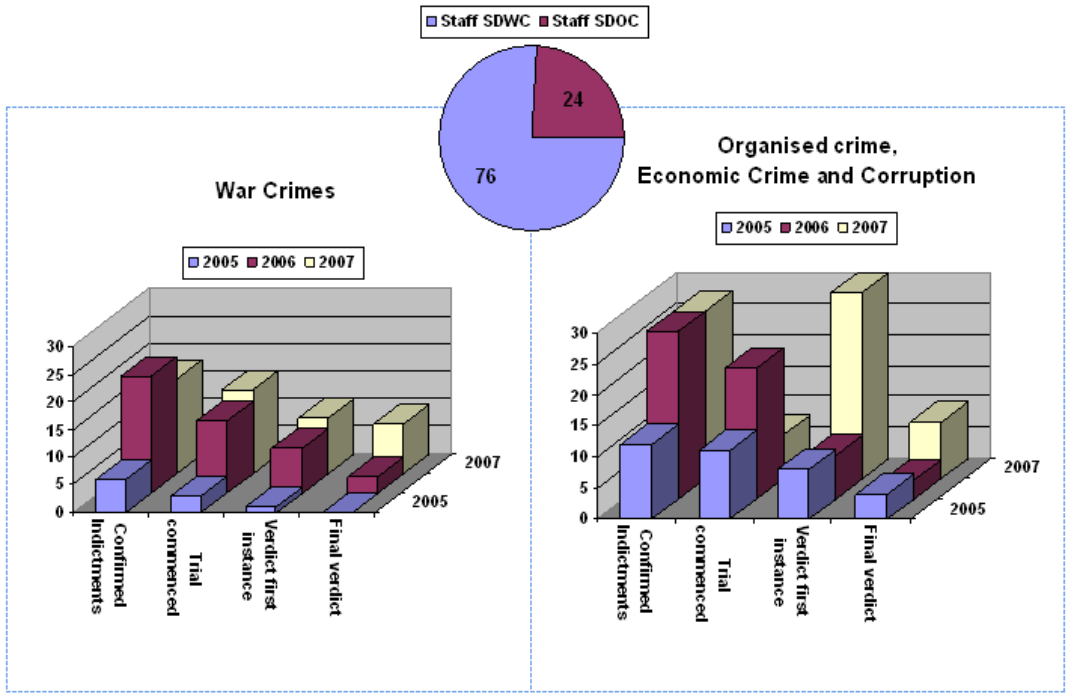
Appendix

Table 3: Expenditures of the State Prosecutor's Office.

	Programs/ Departments	No. of employees	Salaries	Compensation	Current expenses	Capital costs	Total expenditures
2006 Executed	WAR CRIMES	23	910,174.00	60,224.00	143,178.00	32,577.00	**1,146,153.00**
2007 planned[♣]	WAR CRIMES	57	1,624,403.00	197,009.00	365,958.00	127,771.00	**2,313,331.00**
2008 planned	WAR CRIMES	84	2,762,892.00	353,534.00	501,428.00	135,170.00	**3,753,025.00**

♣ The total budget for the BiH Prosecutor's Office in 2007 was BAM 5,347,583.

Graph 1: Cases at Sections I and II of the Court of BiH.



PURL: https://www.legal-tools.org/doc/688146/

4

Map of Existing Open Case Files in Bosnia and Herzegovina Involving Core International Crimes

Obtaining accurate information regarding the capacity of the BiH criminal justice system to investigate, prosecute, defend, and adjudicate core international crimes cases is an essential starting point for the development of a 'prosecutorial strategy' for core international crimes cases in BiH. Without such information, we cannot assess how many cases the system will be able to process at the State and entity levels within defined timeframes. Sections 1-3 of this book illustrate the manifest and understandable limitations of this system, both in terms of financial resources and its functional capacity to process core international crimes cases.

As regards the investigation and prosecution components of war crimes case processing ("how long it generally takes to investigate a matter in order to determine whether someone should be indicted and then to prosecute a case once it is filed"), a prominent member of the State Prosecutor's Office has indicated that it takes "*between nine and eighteen months* to do it properly, depending on the number of defendants and the complexity of a case".[1] This reasonable time estimate speaks volumes in terms of the capacity of the BiH criminal justice system to process cases.

[1] Working paper prepared by the Registry for the use of the Prosecutor's Office of BiH 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', by Mr. David Schwendiman, forwarded to the authors of this paper via e-mail message on 6 November 2007, page 4 (referred to here with permission of the author of the paper via e-mail on 22 November 2007) (italics added).

PURL: https://www.legal-tools.org/doc/688146/

4.1. Knowing the Backlog of Core International Crimes Cases

Having a clear picture of the capacity to process war crimes case in BiH is not sufficient. President Meddžida Kreso of the Court of BiH wrote in July 2007 that data from an HJPC analysis "showed that all prosecutors' offices in BiH reported **12,484** persons as possible perpetrators of war crimes in the period between 1992 and 2006".[2] Others in the criminal justice system at the State level have suggested that, whereas it is rumoured that there are 16,000 war criminals in BiH, there are in fact a total of **10,534** "named persons"; 3,259 at the State level, 5,158 in the Federation of BiH, 1,887 in Republika Srpska and 230 in Brčko District.[3] The National War Crimes Strategy of the BiH Council of Ministers stated that by the end of 2008, there were 4,990 war crimes cases involving 9,879 suspects/accused in BiH.[4]

In the event that the numbers of 12,484, 10,534 or 9,879 were definitive, it is obvious that the BiH criminal justice system cannot complete the processing of all core international crimes cases prior to the natural death of many suspects and witnesses, even with a doubling of the speed with which cases are processed by means of procedural, evidentiary, and administrative improvements of the system. To process such a high number of cases within a reasonable period would require a dramatic increase in the number of involved judges, prosecutors, investigators, and defence counsel at both the State and entity levels in BiH. The authors of this book have failed to detect a will among donors to raise the available resources to such a level. On the contrary, diplomats of key States to Sarajevo and prominent represen-

[2] HJPC, 'Proposed Solutions Regarding the Harmonization of Jurisprudence of Courts in the War Crimes Cases in Bosnia and Herzegovina', 17 July 2007, page 2 [sic].

[3] See the PowerPoint presentation 'Action Plan: Processing War Crimes Cases', 26-27 November 2007, Draft Plan, page 26, presented by Mr. Toby Cadman of the State Prosecutor's Office to a meeting of the BiH Ministry of Justice Working Group on War Crimes Prosecution Strategy on 27 November 2007. In the subsequent pages of the presentation, several charts show the ratio between cases and suspects per district. It would be useful to have the exact figures and information on how these figures are calculated.

[4] See 'National War Crimes Strategy', *op. cit.*, Annex 2, page 171 below.

PURL: https://www.legal-tools.org/doc/688146/

tatives of the international community in BiH expressed to the authors that – far from having an open-ended resource situation – there was no will to significantly increase the resources for processing core international crimes in BiH. Nevertheless, the BiH National War Crimes Strategy proposes "financial investments in material and human resources of judicial and police bodies, in order to successfully prosecute war crimes within the deadline of 15 years (7 years for the top priority cases)".[5] It goes beyond the scope of this book to analyse further the question of increased resources for the war crimes process.

Absent adequate resources to process a number of core international crimes cases which could involve as many as 12,484 suspects or more, it becomes important to know how many open case files there are in the BiH criminal justice system involving such crimes, and how many suspects they refer to. One war crimes case may involve several suspects, each one of whom may be accused of multiple violations in a number of different incidents. In other words, the number of violations and suspects is not a very precise guide to the actual volume of a caseload. There is a fundamental difference between an overall number of existing consolidated cases amounting to, for example, 800 or 5,000. With the current level of resources, the system could, with improvements, possibly be able to handle the former number, but not the latter. If it is not clear how many open case files actually exist, how can one properly prioritise the processing of core international crimes cases or define which combination of measures should be used to deal most effectively with the large backlog of such cases? Without clear statistics on existing case files, such exercises are likely to lack the focus and ability to produce practical and endurable results.

The BiH Council of Ministers conceded in the National Strategy that "centralized, precise and qualitative statistical data about the number and nature of war crimes cases currently being prosecuted" was one of the

> necessary preconditions for the development of an efficient strategic plan that will have realistic implications on the resources. It was established that this centralized ap-

[5] *Ibidem*, page 193 below (de-bolded here).

PURL: https://www.legal-tools.org/doc/688146/

> proach to the data collection and processing did not previously exist in the work on war crimes cases in BiH. There is an indisputable resolve on the part of the State of Bosnia and Herzegovina to establish a centralized record of all war crimes cases pending before [the] domestic judiciary that will be regularly updated.[6]

Core international crimes cases in BiH are frequently organised into several 'categories' of cases. Many find this confusing to understand even if it reflects jurisdictional realities. However, it is necessary to consider these categories to see if they provide more clarity as to the real numbers of open war crimes case files in BiH.

First, there is a small number of ICTY cases indicted but not tried by the ICTY where an ICTY Referral Bench has found that the criteria of Rule 11*bis* of the ICTY Rules of Procedure and Evidence are met to refer the case back to BiH. These cases are known as 'Rule 11*bis* cases'. Six such cases have been referred back to BiH, involving ten suspects. In addition, one suspect pleaded guilty at the ICTY in 2007 before being transferred.[7] Out of ten suspects, nine have been convicted by the BiH State Court,[8] whereas one suspect was still waiting for the first-instance judgement when the paper that this book is based on was written.[9] The number of Rule 11*bis* cases is expected to remain very low, but the cases have the highest priority in the BiH legal system. Prominent voices within the State Prosecutor's Office have expressed the view that these cases should be dealt with by international prosecutors.[10]

---

6 *Ibidem*, page 169 below.

7 Zelenović.

8 In almost all of these cases both first and second instance judgements have been pronounced: Radovan Stanković, Gojko Janković, Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević, Paško Ljubičić, Mitar Rašević, Savo Todović, see http://www.icty.org/sid/8934.

9 That is, the case of Milorad Trbić.

10 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 1. The reason given is that "the record is primarily in English and translation and transcription issues and costs make it much more expensive and time consuming for national prosecutors to do these cases". Furthermore, it is observed that "international prosecutors

PURL: https://www.legal-tools.org/doc/688146/

Second, there are cases which have been investigated but not indicted by the ICTY prior to the end of 2004 (which was the cut-off date under the ICTY Completion Strategy) and which are sent to BiH. These are referred to as 'category 2 cases'. The ICTY Office of the Prosecutor informed the BiH State Prosecutor's Office that 40 such cases were likely to be sent to BiH in 2007. Five such cases had been received by the State Prosecutor at the time of the completion of this report.[11] The number of category 2 cases will be higher than Rule 11*bis* cases, but it is very unlikely to be the largest category of cases. These cases are significant "because, by definition they were thought to be of sufficient value to warrant ICTY attention in the first place and because it is assumed by the ICTY that with additional investigation enough evidence can be developed or acquired for successful prosecutions".[12] It would be useful for stakeholders in the BiH war crimes process to know how many suspects these case files involve.

Third, the former ICTY Rules of the Road Unit reviewed and marked a considerable number of case files from BiH.[13] This category is known as the 'Rules of the Road cases'. The Unit gave the cases different standard markings: 'A' when the Unit deemed there to be sufficient evidence in the case file to justify prosecution; 'B' when the case required more investigation to determine sufficiency of evidence to justify prosecution; and 'C' when there was no evidence that would

and staff are needed for at least as long as there are Rule 11bis cases to finish in BiH, allowing national prosecutors to concentrate on the remaining matters in the inventory".

11 These numbers are taken from the working paper prepared by the Registry for the use of the Prosecutor's Office of BiH 'Managing domestic war crimes caseloads', by Mr. David Schwendiman, forwarded to the authors of this paper via e-mail message on 6 November 2007, page 5 (referred to here with permission of the author of the paper via e-mail on 22 November 2007).

12 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 2. The paper continues: "Many are old, however, and will require considerable investigation before proper decisions about their prosecution can be made. These are not prosecution ready cases".

13 See Article 2 of the Book of Rules on the Review of War Crimes Cases, *op. cit.*, for an explanation of the background, basis, and function of the 'Rules of the Road' process.

PURL: https://www.legal-tools.org/doc/688146/

justify prosecution. There were also markings 'D', 'E', 'F' and 'G'.[14] Some 877 violations marked A, 2,379 marked B, and 702 marked C were returned to BiH by the former ICTY Rules of the Road Unit.[15] One person may be suspected of more than one violation, so the accumulated number of A-, B- and C-marked violations (3,958) is higher than the number of suspects in these Rules of the Road case files. For example, there is one indication that the 877 A-marked cases involve "approximately 777 different suspects".[16]

Like the 'category 2 cases', all Rules of the Road cases "are old cases and require considerable investigation before a prosecutor can make a reasonably well-informed charging decision."[17] They "vary in terms of the conduct involved, the status of the offender and the amount of evidence that exists or remains from when the case was initiated at the local level in BiH during or shortly after the war. None of them are prosecution ready cases".[18] As regards the B- and C-marked cases, it has been opined that they are "by definition, cases that ought to wait, at least until the Standard Marking A cases have been resolved before resources are poured into giving them a second look. By that time, the chances of prosecuting any of them successfully will be even further reduced".[19] It would obviously be helpful for stakeholders in

[14] See *ibidem*, Article 2(2): marking 'D': "the Prosecutor of the [ICTY] seeks deferral"; marking 'E': "crime not within the jurisdiction of the [ICTY]"; marking 'F: "evidence sufficient; however, the [ICTY] considers that the suspect, accused or sentenced person may be an important witness in proceedings before the [ICTY] and requires to be informed of any possible change in the status of the suspect, accused or sentenced person"; and marking 'G': "evidence insufficient, evidence sufficient for a crime other than a violation of international humanitarian law".

[15] See 'Managing domestic war crimes caseloads', *op. cit.*, page 5. The PowerPoint presentation 'Action Plan: Processing War Crimes Cases', *op. cit.*, page 32, confirms the number of A-, B- and C-marked violations, and adds 12 D-marked, 81 E-marked, 4 F-marked and 28 G-marked cases, a total of 4,083 'Rules of the Road' cases. It provides the percentage breakdown: A-marked cases: 21.48%; B: 58.27%; C: 17.19%; D: 0.29%; E: 1.98%; F: 0.10%; and G: 0.69%.

[16] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 4.

[17] *Ibidem*, page 3.

[18] *Ibidem*.

[19] Mr. David Schwendiman, at *ibidem*, page 4.

PURL: https://www.legal-tools.org/doc/688146/

the process to know the number of suspects involved in these marked case files.

The BiH Collegium of Prosecutors adopted Orientation Criteria for Sensitive Rules of the Road cases on 12 October 2004. The Criteria were developed to classify the 877 A-marked reported violations into two sub-categories: 'Highly sensitive' violations, where the case file would remain with the State Prosecutor's Office for investigation, and 'Sensitive' violations, where the case file could be remitted by the State Prosecutor's Office for investigation and trial at the Cantonal and District levels. At the time of completion of this report, four out of some six involved teams in the BiH State Prosecutor's Office had reported 158 suspects as 'Highly sensitive' and 129 as 'Sensitive', the latter with the recommendation that the cases be retained by the Office for "further consideration".[20] This adds 287 suspects to the caseload of the State Prosecutor's Office. It has been indicated that this number may increase to perhaps 500 suspects when the review by the two other teams is included.[21] As regards A-marked cases, there was a further indication coming from within the State Prosecutor's Office: "'Highly sensitive' cases comprise about one quarter of the 877 cases and 777 suspects", with the following footnote clarification: "202 cases were considered 'highly sensitive'. A number that could neither be classified as 'highly sensitive' nor categorized as 'sensitive', cases that were in the grey area, were kept by the Prosecutor's Office of Bosnia and Herzegovina for further consideration. The additional cases increase the number of cases in the State Prosecutor's Office to more than 202 Rules of the Road matters by approximately the same number, 200".[22]

---

[20] 'Managing domestic war crimes caseloads', *op. cit.*, pages 5-6.

[21] Information originating from the State Prosecutor's Office, conveyed to the authors by the HJPC. The PowerPoint presentation 'Action Plan: Processing War Crimes Cases', *op. cit.*, page 30, provides a breakdown of 'cases' and 'persons' per team: Team 1 - 68 cases and 340 persons; Team 2 - 76 cases and 485 persons; Team 3 - 112 cases and 273 persons; Team 4 - 172 cases and 1101 persons; Team 5 - 110 cases and 852 persons; and Team 6 - 71 cases and 235 persons. It would be useful for stakeholders to know more about what is behind these figures.

[22] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 4.

PURL: https://www.legal-tools.org/doc/688146/

It would be helpful to have more clarity on the number of suspects in the Rules of the Road A-category, and an estimation of the number of cases that this could translate into. Likewise, what number of cases and suspects do the B- and C-categories entail? These are files which have been reviewed in The Hague, and a number of stakeholders may be of the view that this quantitative information should be brought into the public discussion about the large backlog of war crimes cases in BiH. Whereas 877 A-marked violations may involve as high a number as 500 suspects, it is unknown whether the 2,379 B-marked violations, which reportedly require more investigation to determine whether there is sufficient evidence to justify prosecution, will produce a similar ratio of suspects.

Fourth, new criminal reports involving core international crimes in BiH in 1992-95 have been filed with the State Prosecutor's Office since it was established. These generally concern "matters that are not covered by the three categories of cases" described above.[23] It would be informative for the debate on the war crimes backlog in BiH to have detailed statistical information on such complaints, including the number of suspects and possible cases which they could lead to. Stakeholders may also wish to know if there is a case file for every criminal report, and for how many criminal reports an investigation has been opened.

Interestingly, it has been estimated that the distribution of cases between the four first categories at the State level is as follows:

Category 1 (Rule 11*bis* cases):	1%
Category 2 (incomplete ICTY cases):	1%
Category 3 ('Highly sensitive' Rules of the Road cases):	21%
Category 4 (new cases):	77%.[24]

Fifth, there are also case files not reviewed by the ICTY Rules of the Road Unit which have been submitted by prosecutor's offices in BiH to the State Prosecutor's Office in accordance with the Book of

[23] See 'Managing domestic war crimes caseloads', *op. cit.*, pages 5-6.

[24] 'Action Plan: Processing War Crimes Cases', *op. cit.*, page 31.

PURL: https://www.legal-tools.org/doc/688146/

Rules on the Review of War Crimes Cases.[25] It would be useful if exact numbers of such case files and the suspects they entail informed the discussions on what to do with the backlog of war crimes cases in BiH. Stakeholders in the BiH war crimes process may benefit from having a sense of how large this part of the backlog of cases is.

Sixth, there are also case files originating from the entity prosecutors which were neither submitted to the ICTY Rules of the Road Unit nor reviewed under the Book of Rules. Discussions on BiH war crimes strategy should be informed of the number of suspects and possible cases in this category of cases as well.[26]

It has been observed by members of the BiH criminal justice system that some 450 cases have been "returned to BiH unreviewed by the ICTY Rules of the Road Unit", and that the "exact number of cases not previously submitted to the ICTY Rules of the Road Unit is unknown".[27]

The State Prosecutor's Office does not seem to manage actively the last two categories, but a prominent member of the Office has observed that it "is unlikely that anyone can say with certainty how many additional matters or people, not included in one of these categories, might have committed crimes during the war".[28] On an encouraging note: "It can be safely said, however, that it is highly likely that the serious offenses and offenders from the war have been identified and that the cases and offenders that already appear in the above inventory do represent most of what was done and who did it, at least as far as potential criminal prosecution is concerned".[29] Needless to say, this is what stakeholders in the war crimes process in BiH would like to conclude. The brief overview of the different categories of war crimes

[25] See Article 6(2), first alternative, of the Book of Rules.

[26] "[The] number of investigations pending before Cantonal/District Prosecutor's Offices and not submitted to the BiH Prosecutor's Office is unknown", 'Action Plan: Processing War Crimes Cases', *op. cit.*, page 34.

[27] 'Action Plan: Processing War Crimes Cases', *op. cit.*

[28] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 5.

[29] *Ibidem.*

PURL: https://www.legal-tools.org/doc/688146/

case files in BiH criminal justice system shows that more reliable statistical information on the number of case files and suspects is required for stakeholders to draw their own conclusions. It also shows that the open war crimes files are spread on three levels of jurisdiction: the international, State and entity levels, with different institutional and legal frameworks.

The need for reliable data on open war crimes case files became more widely recognized among relevant actors in the BiH war crimes discourse during the latter half of 2007. Members of the BiH Prosecutor's Office acknowledge that making reference to very high, unverified numbers of war crimes suspects in BiH is not unproblematic. Mr. David Schwendiman has pointedly observed that

> [...] it is important to avoid the kind of **numbers hysteria** that has in the past generated confusion and created a false sense of what the war crimes picture is like for the period between 1992 and 1995.
>
> The number "13,000 plus" defendants or potential cases even though it is repeated over and over again and has, because of that, come to be accepted as fact, is unreliable. There is no defensible empirical basis for that number, whether referring to defendants or potential cases. It must be presumed that there are sources for it, but they are never clearly identified and, thus, cannot be validated.[30]

Elsewhere Mr. Schwendiman has remarked the following:

> On the subject of numbers, over time I've come to believe that we have been using figures like the 13,000 or more potential war crimes cases or defendants some keep referring to without really knowing whether they are any good. I now believe that the 13,000 number is unreliable. In my opinion, repeatedly using such numbers with nothing solid to support them has the potential for doing great harm. The expectations and anxiety such numbers create and the disappointment that follows when expectations can't be met and the anxiety is left unresolved damage the public's

[30] *Ibidem*, pages 2-3.

PURL: https://www.legal-tools.org/doc/688146/

> confidence in us, in what we do and in how we do it. As the paper[31] demonstrates, the catastrophe the numbers and the workload represent was terrible enough without exaggerating it. The paper makes the point that with proper attention, planning, persistence and patience our numbers are manageable just as the workload was in Germany after 1955 and 1989. Some may not like our candor on this point, and some may disagree with our conclusions, but that should be of no consequence to us. Further, haste encouraged by worrying only about numbers will in the end prove as bad as doing nothing. Unwise pace is no friend of justice. Doing what we do right and doing it well should be our only concern.[32]

Furthermore, it is noteworthy that the High Judicial and Prosecutorial Council decided on 29 November 2007 that

> the fist part of developing a strategy is gaining knowledge about the problem which the strategy is supposed to solve. It seems clear that such knowledge is not yet available. The number of potential perpetrators to be prosecuted for war crimes cases continues to vary significantly depending on whom one asks, the number of potential persons to be indicted in the existing files of prosecutor's offices is unknown and the types of potential cases is not known.
>
> In short, at this point of time there are not sufficient facts (statistics etc) on which to develop a "tailor made" strategy. HJPC expects this issue to be addressed urgently and warn against jumping to strategic conclusions before proper facts are on the table.[33]

---

[31] This would seem to refer to the working paper 'Managing domestic war crimes caseloads', *op. cit.*

[32] Letter entitled 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report' from Mr. David Schwendiman to Chief Prosecutor Marinko Jurčević, Prosecutor's Office of Bosnia and Herzegovina, 28 September 2007, page 6 (referred to here with permission of the author of the paper via e-mail on 22 November 2007).

[33] A paper with the language of the decision is on file with the authors.

PURL: https://www.legal-tools.org/doc/688146/

4.2. Value of Mapping Open Case Files Involving Core International Crimes

As the backbone of every criminal case, the case file is linked to a web of regulations and thus exists as a matter of administrative fact. Open case files are therefore the natural starting point of any attempt to quantify and classify a large backlog of core international crimes cases. There are differences between criminal justice systems, but a case file normally exists from the moment a decision to investigate is implemented, or prior to that if a preliminary examination of whether there is a reasonable basis to proceed with an investigation takes place. The case file normally remains open until final judgement, decision to close the case on other grounds, or the death of the suspect. Depending on provisions on statute of limitation and other regulations, a case file can be kept open in a dormant condition for a long period of time. Case files are normally numbered and they may have a name. Open case files are kept by prosecutor's offices, courts, or criminal investigation services.

A quantification and classification – or mapping – of open case files in BiH involving core international crimes should be considered as the creation of an *inventory* of cases that are already in the criminal justice system. The inventory should be prepared as a database of open war crimes case files, not as an academic study or exercise. Rather, the database would serve several specific purposes.

First and foremost, the completed mapping would provide stakeholders in the investigation, prosecution, defence and adjudication of core international crimes in BiH with an accurate overview of data such as (a) how many open case files involving such crimes there actually are; (b) in which BiH jurisdictions the case files stand and at which stage of the criminal process; (c) approximately how many suspects there are in the case files; and (d) which alleged criminal incidents are covered by the existing case files. This information is essential to determine (i) the anticipated number of pre-trial, trial and appellate proceedings in core international crimes cases in BiH based on the existing case load; (ii) the distribution of such case files between different jurisdictions within BiH at the State and entity levels; (iii) the extent to which the current case load will address incidents during the

PURL: https://www.legal-tools.org/doc/688146/

armed conflicts in BiH during 1992-95; (iv) which procedural reforms should be considered to increase the capacity of the BiH criminal justice system to process core international crimes cases; and to identify (v) which, if any, alternative measures are required. Without relatively clear estimates of (i) and (ii) it is difficult to see how discussions on resource requirements and allocation for core international crimes cases can be made on an informed and realistic basis.

Secondly, the results of the mapping of open case files will also provide the BiH prosecution services with the ability to group existing cases involving core international crimes pursuant to every information category in the database which together make up its structure. This means that all existing cases can be sorted according to, for example, the gravity of the alleged crime; the rank or seniority of the suspect; whether the alleged crime concerned the violation of life, physical integrity, personal liberty, freedom of movement, property or other interests; which organization the suspect acted through to commit the alleged crime; the time or location of the alleged incident; or the estimated number of victims in the incident. Such groupings of core international crimes cases can (a) assist the prioritization of the order in which cases should be prepared and presented by the prosecutor's offices; (b) guide the distribution of cases between different levels of the BiH criminal justice system; (c) inform decision-making processes on the joining of cases with a view to reducing the case load; (d) aid considerations of whether and how to use stipulations of facts that have already been adjudicated in related cases or otherwise contribute to the harmonisation of the treatment of similar cases; and the groupings can (e) assist analysis of the need for and potential utility of abbreviated criminal procedures or alternative justice. The inventory can also serve several other functions within prosecution services.

There would therefore seem to be clear professional and political reasons why the inventory of open war crimes case files be prepared as soon as possible. The OSCE has made a survey of all existing databases concerning core international crimes cases in BiH and has concluded that none of them provide the global inventory functionality which is required in order to provide stakeholders with an authoritative overview of the war crimes caseload confronting the BiH criminal jus-

PURL: https://www.legal-tools.org/doc/688146/

tice system. A database of complaints that have come in to the State Prosecutor's Office since it was established is something quite different from a database of information in all open case files on core international crimes in the prosecution services of BiH.

It should be pointed out that the inventory does not aim to provide information on the alleged *crimes* as such that occurred as part of the armed conflicts in BiH during 1992-95. It is not – and should not try to be – a mapping or database of killed or missing persons as a matter of fact, or of reports on torture, sexual assault, unlawful detention or deportation It does not attempt to map the overall victimisation in BiH 1992-95 and hence, it does not go beyond the information that can be derived from currently existing open case files. Rather, the starting point and basis of the inventory are the open case files in the criminal justice system that contain allegations, information and evidence on core international crimes. These files are the sole object and concern of the inventory. It should therefore not be misperceived as a database or study of actual or alleged victimisation. Others have aspired to develop such databases, notably the Research and Documentation Center in Sarajevo.

The BiH State Prosecutor's Office has been conducting a demographic analysis of the conflicts in BiH between 1992 and 1995, including "assessments based in a reasoned and well informed fashion on [1] the number of confirmed civilian dead, [2] the number of internally displaced persons and the percentage impact on the region from which they were displaced, and on [3] the number, size and nature of camps in a region or community", recognizing [4] that, "[q]uestions of ethnicity are at issue".[34] Factor [2] is also described as "the number and proportion of forcibly dislocated people".[35] One seeks "quantify-

[34] Taken from the working paper prepared by the Registry for the use of the Prosecutor's Office of BiH 'Special Department for War Crimes Prosecutor's Office of Bosnia and Herzegovina. Prosecution Guidelines. 1. Charging', by Mr. David Schwendiman, forwarded to the authors of this paper via e-mail message on 6 November 2007, page 10 (referred to here with permission of the author of the paper via e-mail on 22 November 2007).

[35] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 7 (quotation debolded).

PURL: https://www.legal-tools.org/doc/688146/

ing to the extent possible, according to these assumptions [that is, [1], [2] and [3]], the relative impact of the conduct that led to these outcomes in the municipalities, cities and villages in each of five geographical regions within Bosnia and Herzegovina".[36] This analysis is intended to play an important role in the prioritization of cases to be done by the Office: "The demographic analysis of the conflict is the most objective and impartial way available to the Prosecutor's Office for sorting out which cases ought to be done first".[37] The idea at the heart of this undertaking is to map actual criminal victimisation during the conflicts, focusing on crimes such as killings and displacement as well as on detention facilities where crimes occurred, with a view to selecting from the map which emerges the cases that should be investigated and prosecuted first. As to the actual process of selecting for investigation and prosecution precise conduct and individuals responsible for the alleged crimes which emerge from the results of the map or demographic analysis, we find some guidance in the following statement:

> Analysts and investigators, working with the prosecution teams responsible for each region, can [1] **mine existing** ICTY judgments; [2] review, to the extent possible, evidence in matters pending before the ICTY; [3] examine domestic criminal reports; [4] review evidence obtained in matters already under investigation; [5] examine information and evidence used in matters already tried to verdict in BiH; and [6] tap any and all other sources of information and data *to further identify the precise conduct and identify specific individuals and groups of people who are most likely responsible for the conduct that led to the outcomes identified in the demographic analysis*.[38]

In other words, crimes and suspects will be selected from the map on the basis of the open list of sources of information, potential

[36] *Ibidem* (quotation de-bolded).

[37] 'Special Department for War Crimes Prosecutor's Office of Bosnia and Herzegovina. Prosecution Guidelines. 1. Charging', *op. cit.*, page 10.

[38] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 7 (italics and square brackets added).

PURL: https://www.legal-tools.org/doc/688146/

evidence and evidence indicated in square brackets [1] through [6] in the passage. One goes from the map of the worst killings of civilians, internal displacement and camps – quantifying to the extent possible the relative impact of the conduct on the communities – to sources of information on specific individual conduct in relation to the crimes.

The demographic analysis does not overlap with the inventory of open case files. Whereas the demographic analysis has information about certain crimes and their community impact as the basis of its knowledge base, the inventory is based on open case files involving all core international crimes. The demographic analysis aims to provide an overview of the occurrence and impact of certain crimes in BiH 1992-95 based on available factual information, whereas the inventory seeks to provide an overview of the case files which already exist in the criminal justice system. Although they may supplement one another, it is clear that the tools have different bases and objectives. These two tools could be used in tandem to ensure maximum quality in the prioritization and selection of cases in prosecutor's offices in BiH. One can, for example, go from the map produced by the demographic analysis to the systematic overview of suspects, crimes, violated interests, perpetrators and locations provided by the inventory, and on that combined basis, guided by the criteria for selection and prioritization, select the crimes and suspects to proceed with first. This would give full effect to the results of the demographic analysis and at the same time recognize the legal, administrative and political reality of the existing backlog of open war crimes case files, which will have to be addressed one way or another by the legal system of BiH.

4.3. Database for Open Case Files Involving Core International Crimes

It is against this background that a tool for making an effective inventory of open case files in the war crimes backlog in BiH has been designed. This tool is also being made available through the ICC Case Matrix.[39] The 'Database of open case files on core international crimes' (DOCF) is meant to meet the needs described in the previous

[39] See www.casematrixnetwork.org.

PURL: https://www.legal-tools.org/doc/688146/

sub-sections, alongside the other tools developed to this end by the State Prosecutor's Office. The structure of this database is explained in sub-section 4.4. below. The Norwegian Government has allocated the funds necessary to put the database into operation according to this design and the objectives explained in sub-section 4.2. above. On the basis of this donation and its own analysis, the High Judicial and Prosecutorial Council adopted the following decision on 29 November 2007:

> In this respect the HJPC underlines the importance of establishing a database at the level of BiH which provides detailed data on existing cases. Such a database has been developed through financial support provided by the OSCE and it will be ready for data entry shortly. The Norwegian Government has provided 60,000 Euro for entering of relevant data.
>
> The HJPC will urge the BiH Prosecutors' Office to implement this project as a matter of urgency in close cooperation with the District and Cantonal Prosecutors' Offices. The HJPC is aware of the effort it will take on the part of these institutions to establish and maintain the database, but taking into consideration the significant resources both national and international institutions are allocating to war crime prosecution, the HJPC is of the opinion that this work has to be prioritized in order to ensure an efficient and effective utilization of those resources.[40]

This decision is in accordance with the object and purpose of Articles 11 and 13 of the Book of Rules,[41] pursuant to which strict obligations are placed on the State Prosecutor's Office to produce statistical data on war crimes cases and collate it into a central database, regularly updated, in order to produce regular "assessments on the work of the Special Department for War Crimes as well as the Cantonal/District Prosecutor's Offices and the Public Prosecutor's Office

[40] HJPC Conclusions, 29 November 2007 (copy on file with authors).

[41] 'Book of Rules on the Review of War Crimes Cases', *op. cit.*

PURL: https://www.legal-tools.org/doc/688146/

of the Brčko District".[42] The HJPC has enforcement responsibility for non-compliance with these provisions.[43]

The question has been raised whether the DOCF ensures that confidential information in the open case files on core international crimes will be properly protected during the population of the database and the analysis of its results. The answer is affirmative, insofar as the project proposal sponsored by the Norwegian Government and condoned by the HJPC assumed that the data entry clerks would work as members of the State Prosecutor's Office and thus be subjected to the normal obligations of confidentiality and loyalty of that Office, as well as to the power of instruction of the Chief Prosecutor and, presumably, the Head of the Special Department for War Crimes Cases. The HJPC went further by urging the State Prosecutor's Office to implement the database.[44] There has therefore been no need for "prosecutors in Bosnia and Herzegovina to make their open case files available to OSCE

[42] *Ibidem*, Article 11, which reads:

> (1) The Regional Prosecution Teams shall provide monthly statistics to the Chief Prosecutor and Head of the Special Department for War Crimes on all pending war crimes cases in order to maintain sufficient records on cases reviewed and awaiting review.
>
> (2) The Regional Prosecution Teams shall be responsible for requesting details of all files on pending war crimes cases in the Cantonal/District Prosecutor's Offices and the Public Prosecutor's Office of the Brčko District that fall within their regional area and providing statistical data on those cases.
>
> (3) The Prosecutor's Office of Bosnia and Herzegovina shall collate the information and statistics provided by the Regional Prosecution Teams into a central database that shall be regularly updated in order to provide monthly assessments on the work of the Special Department for War Crimes as well as the Cantonal/District Prosecutor's Offices and the Public Prosecutor's Office of the Brčko District.

[43] *Ibidem*, Article 13.

[44] The HJPC decision dated 29 November 2007 quoted above. A paper with the text of this decision is on file with the authors.

PURL: https://www.legal-tools.org/doc/688146/

data entry people"[45] or any other person who is not a member of the State Prosecutor's Office for the DOCF to be established, populated and maintained. The prosecution service of BiH can retain full control over all confidential information contained in the open case files in question.

The confidentiality of data will also be safeguarded during the use of the *results function* of the DOCF, according to which the database can list case files that meet the search criteria selected from one or more information categories or sub-categories in the structure of the database (see sub-section 4.4. and Annex 1 for a discussion of these categories). These lists translate into statistical data which is what the stakeholders in the BiH war crimes process (external to the State Prosecutor's Office) need to have access to in order to perform their respective roles in a properly informed manner. Neither the list of such hits, nor the statistical data which it amounts to, contain any case-specific information that would normally be confidential in the criminal justice process. The HJPC could seek results from the inventory by simply requesting that a search be made for any specified combination of information criteria and sub-criteria in the generic database structure (see sub-section 4.4.). From a technical point of view, the State Prosecutor's Office could produce the results within minutes, in a manner which is not labour intensive, while retaining control over confidential information throughout the process. Therefore, the introduction of the DOCF would not necessitate any changes to the existing regulatory framework on information security, neither with respect to the process of populating the database nor to the process of obtaining results from it once it is populated.

It is, however, essential that the statistical output of the DOCF be made available to all stakeholders in the BiH war crimes process; that is, to those who stand behind the process politically, financially, and administratively. These actors need clarity as to how many cases are pending and against how many suspects, organised according to the gravity of the alleged crimes and the rank or level of responsibility of

[45] Letter entitled 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report', *op. cit.*, page 7.

PURL: https://www.legal-tools.org/doc/688146/

the suspects. This group includes the BiH Government and public, foreign donor States, representatives of the international community in BiH, and concerned civil society. The HJPC is well placed to determine which statistical data should be made available to the stakeholders, bearing in mind that there will be no need to disclose any confidential information, such as the identities of suspects, victims, or witnesses.

The generous donation made for the implementation of the DOCF by the Norwegian Government should be adequate to populate the database with the information from the backlog of open case files on core international crimes. Additional contributions should be sought later to maintain the database once the backlog of files have been entered, to ensure that the database will be kept updated and reliable. Neither the initial population nor the longer term implementation of the DOCF should therefore drain resources of the State Prosecutor's Office. In this way, the cost of implementation of the DOCF need not be a concern of the State Prosecutor's Office.

It is regrettable that the statistical data the DOCF is capable of producing was not available prior to the commencement of a public discussion on a 'war crimes strategy' in BiH in the latter half of 2007. As mentioned above, the problem of what to do with a large backlog of war crimes cases is not easy to resolve unless the nature of the backlog is clear to the discussants from the outset. Whether DOCF results become available to relevant stakeholders when the discussions on 'strategy' are still ongoing is not and cannot be a *sine qua non* for the commencement of putting the database into operation. Having the statistical data available will undoubtedly aid 'strategic' considerations concerning how to deal with the backlog. Some decisions on what to do with the backlog can probably not be made in a sound manner until this data is made available.

Beyond this, the prosecutor's offices in BiH will need strong tools to maintain as high trust as possible in their selection and prioritization of cases for prosecution. Essential among these tools are the *criteria* for case selection and prioritization (see section 5. below). The demographic analysis seems to be another important tool for the State Prosecutor's Office. The DOCF supplements these tools by providing

PURL: https://www.legal-tools.org/doc/688146/

a structured overview of all existing open case files which can increase the rational content of the selection process. But it also links the case prioritization to the reality of a large backlog of case files, ensuring that the problem which this represents is addressed in an informed manner when cases are selected for processing.

In sum, the main problem when there is a large backlog of war crimes cases is not to find out which cases warrant prosecution. A much higher number *should* be prosecuted than what a criminal justice system may be capable of doing.[46] Rather, the primary challenge is to prioritise and select cases for processing – pursuant to a set of criteria – and to do so in a way which reflects and addresses the backlog of existing case files. This prioritization of cases will normally extend over a period of several years during which the processing of cases is planned and implemented. The DOCF will therefore add value several years into the future, and should thus be operationalised even if it may take several months to populate the database and obtain the results of the statistical analysis.

4.4. DOCF Information Categories and Sub-Categories[47]

The inventory or the "database of open case files on core international crimes in BiH" – DOCF – must have a structure that reflects both the nature of war crimes case files and the need of users to have the ability

[46] "All war crimes cases are important, but for a variety of reasons, all of which we have discussed at one time or another, some ought to be done before others and some need more immediate attention than others", see letter entitled 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report', *op. cit.*, page 6.

[47] The map of core international crimes should contain only information that is available within the existing case files on core international crimes in BiH. For the purposes of this mapping, a 'case file' is considered to exist when there is a prosecutorial order to conduct an investigation pursuant to which a case file is opened or clear investigative steps are taken without such an order. In the BiH Prosecutor's Office, a case file always exists when a KT-RZ registration is made and file created. If a file is in the KTA-RZ Registry or the equivalent in the entities, it may be difficult to extract information for all database categories since it is still in its early stage and may contain limited information.

PURL: https://www.legal-tools.org/doc/688146/

to group case files along different criteria, primarily for case selection and prioritization purposes. The structure should be seen in light of how criteria for selection and prioritization of cases can be applied most effectively.

The DOCF has a simple structure of information categories and sub-categories, which are elaborated in Annex 1 to this document. This structure is an x-ray of the skeleton of the database, as it determines which search results can be derived from the DOCF once it has been populated. It has 23 information categories, most of which concern standard information about the case file and its suspect(s). It is not necessary to fill in all 23 categories for every case file, thus allowing for instances in which the information is simply not available from the case file.

The 23 information categories fall into different clusters. The **first cluster** has five information categories, each referring to formal aspects of the case files as such:

1) The number and name of the existing open case file.
2) Procedural dates, referring to facts like the dates of, for example, receipt of the report by the prosecutor's office, undertaking of first investigation action, or issuing of an order to conduct an investigation.
3) The criminal procedural stage of the case file, referring to which stage the case file is at (for example, investigative, indictment procedure, or post-indictment preliminary procedure).
4) The jurisdiction currently in possession of the original case file, meaning which prosecutor's office holds the case file.
5) The category into which the case file falls, referring to the six categories of case files discussed in sub-section 4.1. above, that is, 11*bis*, category 2, etc.

The **second cluster** concerns the suspect(s) of the case file, divided into nine information categories:

6) The name(s) of the suspect(s) in the case file, including an indication of possible suspect notoriety in the victim group.
7) The plea(s) entered by the suspect(s).

PURL: https://www.legal-tools.org/doc/688146/

8) The detention status of the suspect(s).
9) The group membership of the suspect(s) at the time of the commission of the crime, that is, the organization to which the suspect(s) belonged at the moment of the commission of the crime (for example, government, political party, or military or paramilitary formation).
10) The rank or position of the suspect(s) in his or her organization at the time of commission of crime.
11) The identity of the suspect(s), following strictly the categories employed in the 1991 census with the addition of a category of "unknown".
12) The citizenship of the suspect(s).
13) The date of birth of the suspect(s).
14) Reliable information in the case files indicating mental incapacity, considerably diminished mental capacity, or infirmity of the suspect(s).

The **third cluster** contains five information categories in the DOCF structure concerning the alleged criminal incidents, crimes, and interests violated by the crimes:

15) The incident(s) which the suspect(s) is alleged to have participated in, including the place and time of the incident(s), and the possible notoriety of the incident(s) among the victim group.
16) The suspected criminal offence(s), with reference to the relevant provisions of the Criminal Code of BiH, the Criminal Code of the Federation of BiH, the 1993 Criminal Code of Republika Srpska, the 2000 Criminal Code of Republika Srpska, and the Criminal Code of SFRY.
17) The interest(s) violated by the alleged crime(s), referring to the interests protected by the criminal offences in question, such as individual life, physical integrity, personal liberty, freedom of movement and property. Such interests are plain, commonsensical categories discussed more in detail in sub-section 5.6. below.

PURL: https://www.legal-tools.org/doc/688146/

18) The manner of participation of the suspect(s) in the crime(s), referring to the mode(s) of liability or form of participation which characterises the involvement of the suspect(s) in the crime.
19) Possible aggravating circumstances characterising the alleged conduct of the suspect(s), such as persistence in the commission of the criminal offence, commission of the offence by particularly hazardous means, commission of the offence with discriminatory motive, or abuse of power or official capacity.

The **fourth cluster** of information categories refers to the victims, consisting of three basic categories:

20) The actual or estimated number of victims.
21) The identity of the majority of victims, referring to the categories employed in the 1991 census with the addition of the category of "unknown".
22) The municipality and place where the victims resided prior to the breakout of the war in 1992.

Finally, the DOCF structure has one general information category at the end of the list:

23) Practical problems known in the case file, referring to matters such as the feasibility of evidence collection, availability of the suspect(s) and witnesses, and questions of witness support and protection.

The categories contained in the structure of the DOCF show the main features of a war crimes case file: First, formal aspects of the file itself, reflecting the fact that open case files are inescapable administrative and legal realities of a criminal justice system; second, information about the individual suspects against whom criminal proceedings are directed, which groups or organizations they operated through, and which seniority or position they had in the chains of authority when the crimes occurred; third, information about the incidents of alleged criminal conduct and the interests violated by the conduct (which is a chief indicator of the gravity of a crime); fourth, information about the victims, including the estimated number of victims, their 1991 census identity, and where they resided when the crimes began; and fifth, in-

PURL: https://www.legal-tools.org/doc/688146/

formation on practical factors which may influence the successful prosecution of the case. The sub-categories within each information category are carefully considered and designed to the extent possible on the basis of drop-down menus with a view to rationalising the data entry process.

Notwithstanding the fact that the basic structure of the database consisting of five clusters of information with sub-categories is simple and easy to use, the structure of the DOCF can accommodate the most likely criteria for selection and prioritization of war crimes cases. DOCF searches can be defined in a way which corresponds to the criteria that have been adopted by a prosecutor's office. It is easy to see how this would work if the criteria were based, for example, on the seniority or influence of the suspect, the gravity of the crime (such as killing of civilians, forcible transfer and detention camp crimes) and the impact on groups of victims. This will be discussed further in section 5. below on criteria.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

5

Case Selection and Proritization Criteria

5.1. The Need for Criteria

A prominent member of the State Prosecutor's Office at the time the paper that this book is based on was written – Mr. David Schwendiman – has described its case selection during the two years prior to November 2007 in the following stark terms:

> **decisions regarding case selection and priorities have been made mostly in response to public and political pressure** from government entities, politicians, non-governmental organizations, survivor groups and private individuals, many with agendas not necessarily related to nor concerned with the development or success of a strong, independent criminal justice system.[1]

This statement excludes the Rule 11*bis* cases, which are obligatory for the Office to prosecute. There is no reason to doubt the accuracy of Mr. Schwendiman's statement. It should be of significant concern to all stakeholders in the BiH core international crimes process. This is a process that can not in the longer term afford the existence of serious doubts about its independence and impartiality. It is questionable whether resolving war crimes cases can reach its overall goals without a general perception that it is independent. Mr. Schwendiman's statement is, therefore, alarming in and of it itself, not to mention the picture it paints. But that is not all. Mr. Schwendiman continued:

> These pressures have not been resisted as they should have been. This has resulted in opportunity costs. In many cases it meant picking low hanging fruit; selecting the easiest or most expedient cases to investigate and prose-

[1] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 5.

PURL: https://www.legal-tools.org/doc/688146/

cute regardless whether the offense or the offenders were among those most deserving of immediate attention. This has affected the ability of the Special Department for War Crimes to order its work and make best use of its resources so as to deal with individuals whose conduct during the war ought to be addressed sooner rather than later.

Coupled with this is the **false impression and unreasonable expectation** that the international community has promoted or at least failed to address properly and that national interests have also advanced; the unreasonable and dangerous expectation that every crime committed during the war, every person who committed a crime, will end up in a criminal court where the person or people charged will be found guilty and then sentenced to the maximum sentence. While this may not be the view of the general public it is, nonetheless one that is often heard expressed in meetings with survivors and victims groups. It is sometimes said by government officials in responsible positions. This kind of talk can only lead in the end to disappointment and to a general loss of confidence in the criminal justice system as a whole.

It is **unrealistic to expect** that every case will be tried or to expect that every person who should be held criminally responsible for what they did during the war will be held accountable by a court. Many things that cannot be controlled, such as time, the death of potential defendants, and the age and failing memory of witnesses, for example, conspire to make that so. It is not, however, unreasonable to expect that a person will be made to answer in a court or in some other forum in Bosnia and Herzegovina for what he or she did as an individual, for acts that had and still have great impact on the community.[2]

[...]

Time will conspire against all of the cases actually seeing the inside of a courtroom; a phenomenon that will occur notwithstanding the best efforts of the Court and the Prosecutor's Office. The challenge the caseload poses for

[2] *Ibidem*, page 6.

PURL: https://www.legal-tools.org/doc/688146/

> the Prosecutor's Office is a management challenge that can be met, in part, *by articulating criteria meant to identify the cases which should [be] done first* and adopting guidelines to help ensure that cases are charged properly with a view to using resources in the most efficient way, to preserve resources so that more cases can be done. The Prosecutor's Office must also have the political courage to tell those affected by decisions ranking cases for investigation and prosecution how and why that was done. *Case selection must be consistent, but flexible, taking into account newly acquired or developed evidence or information that may move a matter up or down on the priority lists.*[3]

Mr. Schwendiman should be commended for his honest and courageous diagnosis of the problems facing us. His statements illustrate the widely held view that the usefulness of case selection and prioritization criteria as one of several tools to deal with the backlog of core international crimes cases is not really in question in BiH. He sets the stage for resolute action to restore full confidence in case selection and prioritization in the BiH war crimes process. As will be discussed in the subsequent sub-sections, he and his Prosecutor's Office has already taken several steps to address the challenges at hand. But we will first look at an existing BiH instrument on case selection criteria.

5.2. Criteria in the Relevant BiH Legal Framework

Annexed to the earlier referenced 'Book of Rules' referred to above is a document entitled 'Orientation Criteria for Sensitive Rules of the Road cases'[4] adopted by the 'Collegium' of BiH prosecutors on 12 October 2004. The Book of Rules says that the purpose of the Orientation Criteria is "to provide a basis for the selection of cases to be heard before Section I for War Crimes of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina".[5] It declares that Sec-

[3] 'Managing domestic war crimes caseloads', *op. cit.*, pages 6-7 (italics and square brackets added).

[4] Hereinafter referred to as the 'Orientation Criteria' or 'Orientation Criteria document'.

[5] 'Book of Rules' *op. cit.*, Article 10(1).

PURL: https://www.legal-tools.org/doc/688146/

tion I shall "deal with the most serious cases, taking full account of the Court's resources",[6] and provides that the Orientation Criteria "shall form an integral part of the Rules; which shall provide guidance for the Prosecutor's Office of Bosnia and Herzegovina in the determination of the prosecutorial competence over the case".[7]

The Orientation Criteria document states that the purpose of the criteria is to "assist the Prosecutor's Office of Bosnia and Herzegovina with the selection of cases to be heard before the Special War Crimes Chamber of the Court of Bosnia and Herzegovina".[8] It observes that, "[i]n principle it is desirable that only the most serious cases be heard before the Court of BiH, as the Court will have neither the resources nor the time to try all war crimes cases".[9] The criteria are "intended to serve as guidance for the Prosecutor's Office of Bosnia and Herzegovina in the determination of the appropriate venue for trial".[10] The criteria "are not intended to be 'set in stone' or exhaustive",[11] as "it is not advisable to adopt strict criteria, more a working model that may separate the most sensitive cases".[12]

The more specific function of the Orientation Criteria must be understood in light of the different stages of the case file assessment process which they form part of. The Orientation Criteria document outlines seven components of the assessment process.[13] The first three

6 *Ibidem*, Article 10(2).

7 *Ibidem*, Article 10(3).

8 Section 1, first paragraph.

9 *Ibidem*, second paragraph (italics added). Section 2, paragraph 3 reiterates that "the War Crimes trials at the Court of BiH will be constrained by capacity, resources and limitation of time, not to mention the priority which will have to be given to cases transferred by the [ICTY] under Rule 11bis of its Rules of Evidence and Procedure" [sic].

10 *Ibidem*, third paragraph.

11 *Ibidem*, section 2, first paragraph.

12 *Ibidem*, section 1, second paragraph.

13 The components are: (a) "Assessing whether the forum for any particular case should be the Court of BiH or the Cantonal/District Courts, using the criteria [...]"; (b) "In respect of cases which appear to be suitable for trial at Cantonal/District level, before they are remitted a "second eye" i.e. a different Prosecutor or one of the legal advisors should look at the file to ensure that it is suitable

PURL: https://www.legal-tools.org/doc/688146/

of the seven components seem to require a consideration of one or more of the criteria. First, the criteria as a whole shall be used for the assessment whether the forum for a particular case should be the Court of BiH or the Cantonal/District courts, which is the first component listed in the document. Secondly, as regards cases that appear to be suitable for trial at the Cantonal/District level, the second component requires that they should be reviewed by a second lawyer to ensure that they are suitable to be remitted. This would seem to involve consideration of the Orientation Criteria as well. Thirdly, as regards the cases that are considered suitable for trial at the Court of BiH, the third component provides that their gravity shall be considered. Cases against persons in leadership positions or concerning grave crimes should normally take priority. This amounts to having a second look at one fundamental characteristic of the criteria.

The assessment process outlined in the Orientation Criteria document suggests a two-tier role for the criteria. First, they serve as a guide to the overall assessment of what is the right forum for a case, the State Court or the Cantonal/District courts. That is the main role of the criteria. Secondly, the basic criterion of gravity – both as seniority

to be remitted" [sic]; (c) "Once it has been established that a case is suitable for trial at the Court of BiH, the next part of the exercise should be an assessment of its gravity e.g. the allegations made are against a person in a leadership position, the nature of the crimes alleged; if not a leader, nonetheless is the person still in the area in which the crimes were allegedly committed and/ or still committing crimes and thereby an obstacle to reconciliation in the area. Subject to (iv) and (v) below such cases should take priority" [sic, there are no '(iv) and (v)' in the remaining part of the document]; (d) "Consideration should then be given as to the appropriate charges based on the available evidence and whether the information would seem to suggest that, with some investigation, more serious offences would come to light. If so then clearly it would lose some of its priority rating"; (e) "The next part of the exercise is to assess what work is required before a case is trial ready. This would include such considerations as the availability of witnesses, whether further statements need to be taken from the witnesses or new witnesses found, whether the witnesses are likely to need protective measures and if so to what extent, whether documents are available in translation, whether further documents are available etc" (footnote omitted); (f) "The next step is to assess the likelihood of a quick arrest, or surrender, of the accused, once an indictment has been issued"; and (g) "The final assessment to be made is the likely length of trial".

PURL: https://www.legal-tools.org/doc/688146/

of the suspect and gravity of the alleged conduct – shall be considered a second time for the cases that are found suitable for the State Court with a view to giving grave cases priority.[14]

In other words, the main function of the criteria is to guide the *distribution* of cases between jurisdictions or jurisdictional levels, that is, the State Court or the Cantonal/District courts. This can also be formulated as criteria for the *selection* of cases for different courts. In this respect, the document observes that, "[i]n principle it is desirable that only the most serious cases be heard before the Court of BiH, as the Court will have neither the resources nor the time to try all war crimes cases".[15] However, the document also guides the *prioritization* of cases before the State Court specifically. The Orientation Criteria document opens for further prioritization of cases within jurisdictions in its last paragraph:

> It may also be necessary to prioritise cases depending upon the stage of the investigation and whether individual cases are ready to proceed, and if not, to establish the likely timeframe to completion so as not to set unreasonable deadlines. *Accordingly, cases that fall into a particular category may be further divided by priority on the basis of readiness to proceed.* Until such time as the "highly sensitive" cases have been isolated and reviewed, it is impossible to state which cases should take priority. As a point of reference command responsibility and crimes committed by public officials still in office and law enforcement officials may take priority.[16]

This passage makes a two-fold statement on prioritization. First, prioritization of cases within jurisdictions may be necessary – and may be done – on the basis of the readiness to proceed with the cases. Secondly, as a general guideline, priority may be given to cases involving

[14] *Ibidem*, section 2, paragraph four.

[15] *Ibidem*, second paragraph (italics added). Section 2, paragraph 3 reiterates that "the War Crimes trials at the Court of BiH will be constrained by capacity, resources and limitation of time, not to mention the priority which will have to be given to cases transferred by the [ICTY] under Rule 11bis of its Rules of Evidence and Procedure" [sic].

[16] *Ibidem*, section 2, last paragraph (italics added).

PURL: https://www.legal-tools.org/doc/688146/

(i) the mode of liability of command responsibility, (ii) crimes committed by public officials still in office regardless of mode of liability, or (iii) by law enforcement officials regardless of mode of liability. The second point would seem to correspond to gravity as in seniority of the suspect. As such, it may not add anything new to the consideration of cases that have been found suitable for trial at the State Court (see the third component of the assessment process discussed above), but it would seem to extend this gravity consideration to all cases.

All in all, the Orientation Criteria document seems to advance two grounds for *prioritization strictu sensu* of cases within jurisdictions: gravity, broadly construed, and readiness to proceed with cases. It should be examined how these grounds are reflected in the specific criteria listed in the document.

The Orientation Criteria document organises the distribution/selection and prioritization criteria into three groups: (1) "Nature of Crime alleged ('Crime')"; (2) "Circumstances of alleged perpetrator ('Perpetrator')"; and (3) "Other Considerations ('Other')".

– Under the grouping 'Crime' (group (1)), the criteria simply consist of a list of criminal offences for both the 'highly sensitive' and 'sensitive' categories of cases, structured in what may be an order of seriousness.[17] The lists cover a broad range of offences, against life, physical integrity, personal liberty, freedom of

[17] The list for 'Category I – highly sensitive' cases contains the following crimes: (a) 'Genocide'; (b) 'Extermination'; (c) 'Multiple Murders'; (d) 'Rape & other serious assaults as part of a system e.g. in camps or after attacks'; (e) 'Enslavement'; (f) 'Torture'; (g) 'Persecutions on a widespread and systematic scale'; and (h) 'Mass forced Detention in Camps' [sic]. The list for the cases in 'Category II – sensitive' contains the following crimes: (a) 'Murder committed as part of, or subsequent to, an attack, or in a camp'; (b) 'Rape and other serious sexual offences'; (c) 'Serious Assaults committed as part of a system'; (d) 'Inhuman and degrading treatment committed as part of a system'; (e) 'Mass Deportation or Forcible transfer'; (f) 'Destruction or Damage to Religions and/or Cultural institutions on a widespread or systematic scale'; (g) 'Destruction of Property on a widespread or systematic scale'; (h) 'Denial of fundamental human rights e.g. medical care on a widespread or systematic scale'; and (i) 'Crimes which, although not within the range of gravity encompassed by Category I, are nonetheless notorious' [sic].

PURL: https://www.legal-tools.org/doc/688146/

movement, protection of religious or cultural institutions, and destruction of property. But the document makes no reference to these interests protected by the offences, much less does it discuss these interests. The document does not say what the indicated hierarchy of offences or the distinction between the offences in the two lists is based on.

– Under 'Perpetrator' (group (2)), the criteria are based on the past or present positions or roles of the suspect or the fact that the suspect is of 'notorious reputation'.[18] The listed categories cover military, paramilitary, police, political and judicial chains of authority. Even if only selected segments of these chains are included, the language is sufficiently vague to leave wide discretion when applying the relevant criteria to individual cases. The lists also cover very practical roles like camp commanders and other persons "connected with the administration of camps", and include selective thematic functions like "[m]ultiple rapists" and persons "with a present or past notorious reputation" – one refers to the important theme of sexual assault and gender crimes, the other to the reputation of the alleged suspect, presumably to a large extent in the victim group. Both bear heavily on expectations of criminal justice for core international crimes in the specific BiH context. It is fair to say that the categories included in group (2) cover the spectrum of leadership or prominent suspects very well. But again, the document does not indicate a justification for the apparent hierarchy in positions and roles listed, or for the differences between those categorised as 'highly sensitive' as opposed to 'sensitive'. There is no reference to modes of liability or forms of participation in alleged criminal conduct, but rather to clusters of positions and roles and to notoriety, all of which

[18] 'Category I' lists: (a) 'Present or past Military Commander (including paramilitary formation)'; (b) 'Present or past Political leader (including Presidents of Municipalities/Crisis Staffs)'; (c) 'Present or past members of the Judiciary'; (d) 'Present or past Police Chiefs (CSB/SJB)'; (e) 'Camp Commanders'; (f) 'Persons with a present or past notorious reputation'; (g) 'Multiple rapists' [sic]. 'Category II' lists: (a) 'Present or past police officer'; (b) 'Present member of the military'; (c) 'Persons who presently or in the past holds/held political office'; and (d) 'Persons connected with the administration of camps'.

PURL: https://www.legal-tools.org/doc/688146/

are factual categories and not notions of criminal law. Limited reference is made to the specific organizations and structures which alleged suspects belonged to and the formal hierarchies of positions in these organizations.

– In group (3) called 'Other Considerations', the criteria consist of a total of eight practical considerations,[19] again divided according to whether they indicate 'highly sensitive' or 'sensitive' cases. Some of these are uncontroversial, such as whether the case involves insider witnesses. Other criteria in this group – such as 'Difficult issues of law' or 'Cases involving perpetrators in an area which is sympathetic to him or where the authorities have a vested interest in preventing public scrutiny of the crimes' – do indeed raise questions as to their merit, but it falls outside the scope of this book to discuss these further.

The first and second groups, namely 'Crime' and 'Perpetrator', fall within the general criterion or interest of *gravity*. One of the criteria in 'Other' would seem to be covered by gravity, namely 'Crimes which may attract a lengthy prison sentence'. The general criterion of 'readiness to proceed' is not listed specifically as a criterion in the third grouping, but four of the eight criteria in the group fall within this interest (see 'Cases with "Insider" or "Suspect" witnesses', 'Allegations connected with events which have already been the subject of a previous trial at ICTY' and 'Case is document heavy', as well as the controversial 'Difficult issues of law'). According to the Orientation Criteria document, all of these criteria can be considered during prioritization of cases within jurisdictions.[20]

Of the remaining four criteria in group (3), two concern witness security: 'Realistic prospect of witness intimidation' and 'Witness Pro-

[19] 'Category I' lists: (a) 'Cases with "Insider" or "Suspect" witnesses'; (b) 'Realistic prospect of witness intimidation'; and (c) 'Cases involving perpetrators in an area which is sympathetic to him or where the authorities have a vested interest in preventing public scrutiny of the crimes'. 'Category II' lists: (a) 'Witness Protection issues'; (b) 'Difficult issues of law'; (c) 'Crimes which may attract a lengthy prison sentence'; (d) 'Allegations connected with events which have already been the subject of a previous trial at ICTY'; and (e) 'Case is document heavy'.

[20] *Ibidem*, Article 10.

PURL: https://www.legal-tools.org/doc/688146/

tection issues'; and two can be described as controversial ('Difficult issues of law' and 'Cases involving perpetrators in an area which is sympathetic to him or where the authorities have a vested interest in preventing public scrutiny of the crimes'). The Orientation Criteria document says that these four criteria can be considered when distributing the cases between the State Court and the Cantonal/District courts.

The Orientation Criteria outlines a procedure for considering the criteria when making the determination of where the Rules of the Road cases should be sent in BiH, as follows: First, the criteria shall be used to assess whether the forum for a particular case should be the Court of BiH or the Cantonal/District courts. Second, as regards cases that appear to be suitable for trial at the Cantonal/District level, they should be reviewed by a "second eye i.e. a different Prosecutor or one of the legal advisers"[21] to ensure that they are suitable to be remitted. This would seem to involve consideration of the Orientation Criteria again. Third, as regards the cases that are considered suitable for trial at the Court of BiH, the gravity of the case itself shall be considered. Cases against persons in leadership positions or concerning grave crimes should normally take priority. This amounts again to scrutinising cases based on one of the fundamental characteristics of the criteria, namely gravity.

In conclusion, it would seem that the Orientation Criteria document is a flexible and quite comprehensive instrument as regards the use of criteria for the distribution of war crimes cases between BiH jurisdictions and for the prioritization of such cases within each jurisdiction. It covers a broad range of reasonable criteria, almost all of which can be grouped under the considerations of gravity and readiness to proceed. According to the letter of the document, it appears that it can also be used after case files have been distributed between the State Court and the cantonal/district courts, that is, in the prioritization of cases within jurisdictions or, more accurately, prosecutor's offices. As such, the utility of the document should not be overlooked or underestimated in the search for appropriate tools to deal with the large

[21] *Ibidem*, section 2, paragraph four, part (b).

PURL: https://www.legal-tools.org/doc/688146/

backlog of core international crimes cases in BiH. Its existence and scope should inform discussions on selection and prioritization of cases, whatever the forum of the discourse. The authors of the Orientation Criteria and the Book of Rules deserve recognition for the foresight of formalising criteria in this way, for including their broad range of criteria, and for opening for the application of criteria also after cases have been distributed between the State Court and the Cantonal/District courts.

It is against this background that the BiH Council of Ministers based the criteria in Annex A to the National War Crimes Strategy on the Orientation Criteria document. The three clusters of criteria and most of the criteria themselves are lifted from that document with some modifications. That is significant.

5.3. Criteria in the Prosecutor's Office of Bosnia and Herzegovina

There are indications that the State Prosecutor's Office has been seeking to develop criteria above and beyond the Orientation Criteria. In the above-mentioned letter of resignation as Registrar, Mr. David Schwendiman wrote that he and his colleagues had "started what [he] hope[s] will be a meaningful effort to develop prosecution guidelines and case selection criteria".[22] He attached "recommended prosecution guidelines for charging, pleas, immunity, and investigations" and he rightly described them as "core guidelines that any well managed prosecution office must have".[23] The criteria were intended to be used in conjunction with the demographic analysis of the conflict, described in section 4 of this book,

> […] to give management a more meaningful and systematic way of selecting the cases that ought to be investigated and prosecuted. All war crimes cases are important, but for a variety of reasons, all of which we have discussed at one time or another, some ought to be done

[22] 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report', *op. cit.*, page 1.

[23] *Ibidem*, page 3.

PURL: https://www.legal-tools.org/doc/688146/

> before others and some need more immediate attention than others. Some will likely never be done. What we have been working on is a way to identify which those are and avoid the opportunity costs that come from simply picking low hanging fruit.[24]

The set of criteria can reduce the demographic analysis of the conflict "to workable lists".[25] They are "the means for making the demographic analysis operational",[26] insofar as the criteria or variations on them will be used "to nominate cases throughout Bosnia and Herzegovina that merit close and early attention".[27]

Mr. Schwendiman strongly recommended to the Chief Prosecutor of the BiH Prosecutor's Office "that you resist every effort by anyone, OSCE, HJPC, the State Court or anyone else, to dictate what your case selection criteria ought to be".[28] At the same time, he stressed the public nature of case selection criteria: "You must be forthright with the public and let them know, within limits dictated by operational and security concerns what criteria we are using to select the cases we will investigate and prosecute and the order in which we will address them".[29] As to the formulation of the criteria and how that relates to prosecutorial independence, he noted:

> You must also listen to informed and responsible people who have suggestions or criticisms about these things. Take what has value and adjust the criteria, but don't let anyone outside the office dictate what your criteria are. Selecting cases and deciding who, what and whether to investigate and prosecute is at the heart of the prosecutor's independence, for good or bad, and are core con-

[24] *Ibidem*, page 6.

[25] *Ibidem*, page 7.

[26] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 8.

[27] 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report', *op. cit.*, page 7.

[28] *Ibidem*.

[29] *Ibidem*.

PURL: https://www.legal-tools.org/doc/688146/

> cepts in the best systems of criminal justice. The court shouldn't be allowed to interfere in these central tasks. Neither should any other institution, including the press, victim's associations, or politicians. The independence of both the prosecution and the judiciary is not simply an aspiration, it is essential and must be protected.
>
> I recommend the same course when it comes to the prosecution guidelines. They are internal policies that should be informed by the best thinking, tailored to meet international standards and influenced by the best practices in other systems, but they are the business of the Prosecutor's Office. You must resist any effort by the Court, by the HJPC, or by anyone in or out of government to insert themselves into the process of deciding how you will govern the use of the authority that prosecutors enjoy in Bosnia and Herzegovina. This is also important for the protection of the independence of the Prosecutor's Office.[30]

Mr. Schwendiman is right in insisting that the formulation of case selection criteria specifically for the State Prosecutor's Office is a matter for that Office to decide, unless the legislator wants to intervene. But it may be useful to hear an articulation by Mr. Schwendiman of the need for criteria beyond the Orientation Criteria document. That would assist others who may wish to make a contribution to the discussion on criteria for the effective prioritization of core international crimes cases in BiH in general. He is also right in restating the principle of prosecutorial independence – even if the Chief Prosecutor must be eminently aware of the principle and its implications – simply because it is so important. It is also entirely reasonable and normal that prosecutorial guidelines are internally produced within prosecution services, over years of practice, with the aim of providing internal regulation where required in response to the practical realities of investigation and prosecution work processes.

The Prosecution Guidelines on Charging referred to by Mr. Schwendiman is a document which addresses important questions such

[30] *Ibidem.*

PURL: https://www.legal-tools.org/doc/688146/

as charging standards, grounded suspicion, what to charge, the public interest test in war crimes cases, and pleadings.[31] The proposed case selection factors or criteria are embedded in the section on the public interest test. They are meant to be considered if the grounded suspicion test in a preceding section of the document is satisfied.[32] If it is necessary to have case selection criteria above and beyond the Orientation Criteria, it makes good sense for the State Prosecutor's Office to place the criteria in this context. The instrument of Charging guidelines would seem to be well-suited to do just that.

The Charging document provides that with regard to war crimes cases, the "decision whether to charge should also be governed by consideration of the following factors", and then it lists three clusters: (a) 'Factors that relate to the proposed defendant', (b) 'Factors that relate to the circumstances and the impact of the crime when it was committed', and (c) 'Factors that relate to the impact of the case on victims and affected communities'.[33]

– As regards cluster (a) – '[f]actors that relate to the proposed defendant' – the document notes that "[p]riority will be given to charging the people who were in positions to order, allow, or create the conditions necessary for the conduct, or who were in a position to prevent it and consciously chose not to, and those in positions of authority or influence who participated directly in the events themselves".[34] This is a very broad formulation. It may well encompass most of the applicable modes of liability in core international crimes cases, and as such one wonders how helpful this is for the case selection process. The same subsection of the document does, however, provide elaboration:

> Despite popular belief, it is unrealistic to expect that every case will be tried or to expect that every person

[31] 'Special Department for War Crimes Prosecutor's Office of Bosnia and Herzegovina. Prosecution Guidelines. 1. Charging', *op. cit.*

[32] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 8.

[33] 'Special Department for War Crimes Prosecutor's Office of Bosnia and Herzegovina. Prosecution Guidelines. 1. Charging', *op. cit.*, pages 9-10.

[34] *Ibidem*, page 9.

PURL: https://www.legal-tools.org/doc/688146/

> who should be held criminally responsible for what they did during the war will be held accountable by a court. Many things that cannot be controlled, time, the death of potential defendants, and the age and failing memory of witnesses, for example, conspire to make that so. It is not unreasonable to expect that a person will be made to answer in some forum for what he or she did as an individual, for acts that had and still have great impact on the community. But only those as to whom the **standard criteria** can be met will be subjected to criminal prosecution.
>
> People on all sides of the conflict who planned and ordered operations, or made it possible for them to occur, those who set events in motion that led to catastrophe, and those who were simply the cadre that did the dirty work, the foot soldiers of the catastrophe, should all be candidates for criminal prosecution. To the extent resources can be committed to making it happen, they should be held to answer in a court as long as they can be identified, as long as there is legally obtained evidence that can be used in a Court in Bosnia and Herzegovina that is strong enough to lead to a conviction, and as long as they can be guaranteed a fair chance to defend themselves so that the outcomes are credible and are respected as credible in Bosnia and Herzegovina, in the region and in the world.
>
> Nonetheless, in order to conserve resources and ensure that the greatest number of those who should be held accountable through the imposition of criminal sanctions can be reached, *priority must be given to prosecuting those who exerted the greatest influence and occupied or wielded the greatest authority in relation to the crimes the evidence suggests were committed*.[35]

In other words, cluster (a) refers to the seniority or level of responsibility of the suspect. As we have seen in section 5.2. above, this criterion is covered by the Orientation Criteria, both as an express group of criteria and as a part of the general gravity

[35] *Ibidem*, pages 9-10.

PURL: https://www.legal-tools.org/doc/688146/

criterion. It may therefore be useful to hear an elaboration as to why it is necessary to include the criterion again in this context, quite apart from the fact that it is a perfectly reasonable criterion, the material merits of which need not be disputed. Such an elaboration would aid the understanding of how the State Prosecutor's Office sees the relationship between the Orientation Criteria and the Charging guidelines.

Mr. Schwendiman makes the following practical observation which invites a short comment:

> As a practical matter, it may sometimes be necessary for tactical or strategic reasons to **pursue smaller or simpler cases** against lower-level perpetrators before taking on cases against the highest level leaders. This may be the case where, for example, the trial of lower-level offenders is needed to clarify the precise extent of the crime base. It may also be necessary in order to put potential witnesses, particularly insider witnesses, in a position to testify once convicted or after entering a plea. *These should always be exceptions made for justifiable tactical reasons necessary to pursue those with greater liability*. It must be understood that the priority that is placed on higher-level offenders in no way vests a person with the right not to be investigated or tried until all his superiors have been prosecuted.

Just as Mr. Schwendiman makes the case for these exceptional "smaller or simpler cases" with persuasion, drawing on years of experience, he knows well the dangers of this kind of exceptionalism when one faces a very large backlog of cases. The case portfolio of the ICTY, with a high number of resource-demanding cases against low-level perpetrators, represents a stark warning to those who wish to pursue cases in BiH that do not meet the gravity standard. Copying the ICTY in this respect is likely to lead to a failure of the BiH war crimes process.

– As regards cluster (b) – 'Factors that relate to the circumstances and the impact of the crime when it was committed' – the document says that "in deciding which matters to do in which order, weight should be given to those cases in which the crimes had

PURL: https://www.legal-tools.org/doc/688146/

the greatest impact in the regions or communities where they were committed".[36] This is a novel criterion, the exact nature of which is elusive at first glance. How does one measure the impact of war crimes on communities? Which criteria are used for such an exercise? Mr. Schwendiman mentions an example of impact analysis:

> In eastern Bosnia and Herzegovina, for example, conduct that resulted in the reduction of the Muslim population in Visegrad Municipality from 60% to nearly zero between April and July 1992, will, in connection with consideration of the level of responsibility of the people involved, be given great weight in determining which matters and which people should be identified for investigation and prosecution by the Special Department for War Crimes.[37]

But may not forcible transfer of civilians have a greater community impact than most other crimes, including more serious crimes? The Charging document provides some further guidance:

> This determination will be based to a great extent on a credible demographic analysis of the conflict, including assessments based in a reasoned and well informed fashion on the number of confirmed civilian dead, the number of internally displaced persons and the percentage impact on the region from which they were displaced, and on the number, size and nature of camps in a region or community. Questions of ethnicity are at issue, of course, because of the nature of the conflict and the elements of two of the most significant offenses likely to be charged; that is, genocide (Article 171 of the Criminal Code of Bosnia and Herzegovina (CC)) and crimes against humanity (Article 173 of the CC). The demographic analysis of the conflict is the most objective and

[36] *Ibidem*, page 10.

[37] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 10.

PURL: https://www.legal-tools.org/doc/688146/

> impartial way available to the Prosecutor's Office for sorting out which cases ought to be done first.[38]

This is where the demographic analysis meets the criteria. The demographic analysis is meant to provide the map of where alleged crimes had the greatest impact on communities and regions. Impact of crimes on communities may be another way of describing the victimisation caused by the alleged crimes, and not only displacement. Normally the most serious crimes would cause the most serious communal impact. Prioritising cases which caused the most serious victimisation would seem to satisfy broad public acceptance insofar as this is another way of formulating the fundamental gravity consideration, here with reference to the seriousness of the alleged conduct itself.

But cluster (b) does more than reformulating the gravity criterion. By saying that those alleged crimes which caused the greatest impact on communities should be prioritised, the criterion suggests that the communities most affected should relatively speaking see more prosecutions of crimes. This entails an implied proposition of representation: there should be a representative relationship between the crimes committed or victimization on the one hand and the crimes prioritised for prosecution, or the scope of prosecutions, on the other. Simply put, the prosecution of war crimes should reflect the degree of victimisation caused by the crimes. If understood correctly, this feature of criteria under (b) is very important and will be discussed further in sub-section 5.6. below.

The demographic analysis bases its mapping of community impact on four assessments: (i) confirmed civilian dead; (ii) number of internally displaced persons and the percentage impact on the region; (iii) the number, size and nature of camps; and (iv) questions of ethnicity. Assessments (i) and (ii) would seem to correspond to core international crimes of unlawful killing and forcible displacement, with the quantitative addition of

[38] 'Special Department for War Crimes Prosecutor's Office of Bosnia and Herzegovina. Prosecution Guidelines. 1. Charging', *op. cit.*, page 10 [sic].

PURL: https://www.legal-tools.org/doc/688146/

number and proportion. Assessment (iii) is composite, but it is presumably based on the recognition that detention facilities saw an accumulation of different crimes during 1992-95, not only unlawful detention. The inclusion of assessment (iv) may require further elaboration. If it is included as a measure of accommodating a representative approach, then maybe that should be articulated.

The inclusion of assessments (i), (ii) and (iii) appears to reflect a selection of some crimes from a comprehensive catalogue of applicable core international crimes in BiH. Such selectivity would normally benefit from an explanatory justification. Why were these crimes selected and not others? Which crimes are reflected by assessment (iii)? As it stands, this selectivity may be the weakest element in the proposed approach to additional case selection criteria.

– As regards cluster (c) – 'Factors that relate to the impact of the case on victims and affected communities' – the Charging document observes that "consideration will be given to cases involving incidents or offenders where the outcomes are likely to have the greatest impact on a community, a region, or the nation as a whole".[39] Here the perspective is prospective. The criterion requires an assessment of what the likely impact of criminal justice for crimes or suspects will be on a community wide or narrow. This criterion brings a new quality to the case selection criteria and it appeals to common sense, but at the same time it raises concerns. How can one reliably make the kind of predictions required by the criterion? Are additional criteria necessary to ensure that the predictions are as objective or consistent as possible? It would be useful if these questions were addressed.

To summarise, the Charging document brings three criteria for prioritization of cases before the State Prosecutor's Office to the table: (a) gravity as in the level of responsibility of the suspects; (b) community impact of crimes based on assessments focusing on select crimes and some quantitative information linked to the crimes; and (c) com-

[39] *Ibidem.*

PURL: https://www.legal-tools.org/doc/688146/

munity impact of prosecutions. All three criteria are reasonable and seem to be carefully considered, and they are being put forward in a meaningful instrument, the charging guidelines of the Office. Criterion (a) does not seem to add much substance to the Orientation Criteria. Neither does criterion (b) with regard to its implied emphasis on gravity, but its representative approach is novel and important. Criterion (c) also adds to what is in the Orientation Criteria, but there may be some challenges linked to its consistent implementation absent further elaboration.

Although the 2008 National Strategy document of the BiH Council of Ministers[40] provides an authoritative standard for the country's war crimes process, the work done by the State Prosecutor's Office is quite innovative. As such it may well influence the broader international discourse on the topic. It represents the kind of original contribution which should emerge from the comprehensive war crimes prosecutions programme underway in BiH.

5.4. Criteria in the International Criminal Tribunal for the former Yugoslavia

The ICTY is in many ways the chief laboratory for the experiment of international criminal justice which started in 1993-94 and has since seen the establishment of numerous international(ised) criminal jurisdictions and mechanisms for core international crimes. It is therefore relevant to see how the ICTY has dealt with the issue of criteria for case selection and prioritization. It is not easy on the basis of public sources to analyse the existence and use of case selection criteria at the ICTY. Its Statute simply provides that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law".[41] After a starting phase, when the selection of cases and issuing of several indictments were governed mainly by the availability of evidence and the interest in particular cases of individual ICTY prosecutors, the ICTY Office of the Prosecutor (ICTY-

[40] 'National War Crimes Strategy', *op. cit.*, Annex 2. The document is discussed in sub-section 5.6. below.

[41] ICTY Statute, Article 1.

PURL: https://www.legal-tools.org/doc/688146/

OTP) formally adopted a set of case selection criteria in October 1995.[42] These criteria were developed to serve as a set of rational standards that should allow the Office to more effectively use its resources and enable it to fulfil its mandate.

The criteria were divided into five groups: (a) the person to be targeted for prosecution; (b) the serious nature of the crime; (c) policy considerations; (d) practical considerations; and (e) other relevant considerations. Each group has a comprehensive list of factors, amounting more to a catalogue of relevant considerations than a selective, focused set of binding criteria. These are not ranked according to weight. They were meant to be considered as a whole when evaluating the merits of potential investigations and prosecutions.

– Group (a) – 'Persons' – has the following factors listed:
  - position in hierarchy under investigation;
  - political, military, paramilitary or civilian leader;
  - leadership at municipal, regional or national level;
  - nationality;
  - role/participation in policy/strategy decisions;
  - personal culpability for specific atrocities;
  - notoriousness/responsibility for particularly heinous acts;
  - extent of direct participation in the alleged incidents;
  - authority and control exercised by the suspects;
  - the suspect's alleged notice and knowledge of acts by subordinates;
  - arrest potential;
  - evidence/witness availability;
  - media/government/NGO target; and
  - potential role-over witness/likelihood of linkage evidence.

[42] This and the 1998 document referred to later in this sub-section have been made available for consultation to one of the authors of this report. ICTY-OTP work on criteria for case selection and prioritization involved at one and the same time selection criteria and attempts to formalise the decision-making process on selection.

PURL: https://www.legal-tools.org/doc/688146/

The list represents quite a mixture of factors relevant to the suspect, including position, formal and actual authority, role and notoriety; combined with practical considerations like arrest potential and evidence availability; the policy consideration of specififc 'targets' in media, government or NGOs; and tactical considerations of an evidentiary nature ('potential roll-over witness/likelihood of linkage evidence'). The combination makes it difficult to equate the group with any particular interest, such as gravity. As a matter of fact it is not easy to see what all the factors in the group have in common.

It would seem that the second group of factors in the Orientation Criteria – 'Perpetrator' – is both a more comprehensive and precise list of criteria linked to the suspect than ICTY group (a). The formulation of the first cluster in the Charging document – seriousness of the level of responsibility of suspect – could probably benefit from reconsidering ICTY group (a), not to mention the Orientation Criteria document.

– Group (b) – 'Serious violation' – includes the following factors:
  - Number of victims;
  - nature of acts;
  - area of destruction;
  - duration and repetition of the offence;
  - location of the crime;
  - linkage to other cases;
  - nationality of perpetrators/victims;
  - arrest potential;
  - evidence/witness availability;
  - showcase or pattern crime; and
  - media/government/NGO target.

Several of the criteria deal with the gravity of the alleged conduct, such as the number of victims and the duration and repetition of the offence. It is unclear exactly what is meant by 'nature of acts', 'area of destruction' and 'showcase or pattern

PURL: https://www.legal-tools.org/doc/688146/

crime'. The 'nature of acts' may refer to the seriousness of the crimes. The location of the crimes and the nationality of perpetrators and victims may be relevant for the consideration that there should be 'representativity' between criminal victimisation and the scope of prosecutions. The list adds a new tactical consideration, 'linkage to other cases'. Three factors are simply reproduced from group (a) ('arrest potential', 'evidence/witness availability' and 'media/government/NGO target').

The first Orientation Criteria group of factors – 'Crime' – is more precise in that it attempts a two-fold, hierarchical listing of crimes, but it does not include factual categories such as the number of victims and duration and repetition of acts. The second cluster in the Charging document – community impact of the crimes – refers to the seriousness of the impact of the crimes and therefore also the seriousness of the crimes. However, as discussed in sub-section 5.3. above, the elaboration of the four fundamental assessments of crimes in the Charging document is neither comprehensive nor entirely clear. It is doubtful that this important part of the Charging document can benefit much from considering ICTY group (b), insofar as the demographic analysis informs the factual basis of this cluster, including, presumably, questions such as the number of victims and duration and repetition of the offence. The formulation of the legal component of the four assessments may benefit from further elaboration, but it is questionable whether ICTY group (b) and the Orientation Criteria can assist significantly in that process.

– Group (c) – 'Policy considerations' – involves these factors:
  - Advancement of international jurisprudence (reinforcement of existing norms, building precedent, clarifying and advancing the scope of existing protections);
  - willingness and ability of national courts to prosecute the alleged perpetrator;
  - potential symbolic or deterrent value of prosecution;
  - public perception concerning the effective functioning of Tribunal;

PURL: https://www.legal-tools.org/doc/688146/

- public perception concerning immediate response to ongoing atrocities;
- public perception concerning impartiality/balance.

Some of these factors may not be directly applicable in the BiH context. Deterrence, on the other hand, is an important consideration to many in the context of the BiH war crimes process, as well as the factors of public perception of the criminal justice system and its independence and impartiality. Policy considerations tend to be practical realities in prosecution services – they are simply made in response to practical needs in the work on cases. When such considerations are made, it may be valuable to articulate as much to the public in the interest of transparency, to the extent operational requirements allow. But whether policy factors such as those listed in group (c) should be included in a list of criteria for the prioritization of cases is another matter.

Neither the Orientation Criteria nor the Charging document contains an express reference to policy considerations among the criteria listed. The third cluster in the Charging document – community impact of the prosecution – could well be described as a policy consideration, although it has been described as "the equivalent of the public interest test used in some jurisdictions".[43] But would it add any value to label the factor 'policy consideration or criterion'? There are at least two counter-arguments. First, it would be less transparent; and secondly, the term 'policy' is itself ambiguous and will often be used synonymously with broad discretionary decision-making.

– Group (d) – 'Practical considerations' – has these factors:

[43] 'Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit', *op. cit.*, page 10. The document has a footnote on this point which refers to "Guidelines on the Role of Prosecutors, Adapted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 13(b): Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect".

PURL: https://www.legal-tools.org/doc/688146/

- Available investigative resources;
- impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready;
- the estimated time to complete the investigation;
- timing of the investigation (for example, the impact initiating a particular investigation will have on the ability to conduct future investigations in the country);
- possibility or likelihood of arrest of the alleged perpetrator;
- consideration of other work carried out in relation to the case (including a check against Rules of Road cases);
- completeness of evidence;
- availability of exculpatory information and evidence; and
- consideration of other OTP investigations in same geographical area, particularly those of "opposite ethnicity" perpetrators and victims.

Groups (a) and (b) both contained factors that amount to practical considerations. Group (d) expands this list considerably. It refers to available resources, just as the Orientation Criteria document does.[44]

Group (d) then lists three temporal factors, the second of which – 'estimated time to complete the investigation' – falls squarely within the general case 'readiness to proceed' consideration in the Orientation Criteria document. The other two – impact 'on ongoing investigations and on making existing indictments trial ready' and contextual 'timing of the investigation' – point beyond the specific case at hand, and it appears that they fall outside the scope of the Orientation Criteria document. Both may be relevant to the war crimes process in BiH, at least the former of the two. The community impact of prosecutions cluster in the Charging document may absorb one or both of these factors, depending on how it is construed.

[44] Section 1, second paragraph.

PURL: https://www.legal-tools.org/doc/688146/

Group (d) contains two factors which appear in other ICTY groups. The 'possibility or likelihood of arrest of the alleged perpetrator' appears as 'arrest potential' in groups (a) and (b), whereas 'completeness of evidence' is described as 'evidence/witness availability' in the same groups (a) and (b). Group (d) has three additional evidentiary considerations: First, 'consideration of other work carried out in relation to the case', meaning fact-finding, investigative or prosecutorial work, with a view to benefiting from such efforts; secondly – and negatively, seen from a prosecution perspective – the 'availability of exculpatory information and evidence'; and thirdly, 'consideration of other OTP investigations in same geographical area', which, it is assumed, is an evidentiary consideration broadly speaking. Is it appropriate to include evidentiary considerations in a list of case selection criteria? Or should such criteria only be considered after incriminatory and exculpatory assessments have already been made? The answer depends on the function one wants to give case selection and prioritization criteria. The role of such criteria differs between the stage when case files are distributed between jurisdictions, on the one hand, and the stage when one makes a priority between case files which have already been investigated, on the other.

– Group (e) – 'Other relevant considerations' – has the following factors:
  - The particular statutory offence or parts thereof, that can be charged;
  - the charging theories available;
  - potential legal impediments to prosecution;
  - potential defences;
  - theory of liability and legal framework of each potential suspect;
  - the extent to which the crime base fits in with current investigations and overall strategic direction;
  - the extent to which a successful investigation/prosecution of the case would further the strategic aims;

PURL: https://www.legal-tools.org/doc/688146/

- the extent to which the case can take the investigation to higher political, military, police and civil chains of command; and
- to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.

This is an interesting list of considerations. Several are legal in nature. First, the list refers to the 'particular statutory offence or parts thereof, that can be charged'. It does not explain which quality of the offence which is relevant as a criterion. We are left to speculate that it might be its seriousness, but it could also refer to the evidentiary burden of the elements of the crime. Secondly, the list includes 'the charging theories available' in the case, as echoed by the fifth factor referring to each potential suspect in the case ('theory of liability and legal framework of each potential suspect'). This may reasonably be construed as theories of criminal responsibility, which again encompasses the applicable modes of liability. Again, it is unclear whether the factor aims at the seriousness of the modes of liability which may apply in the case, or whether its inclusion is based on the differences in the evidentiary burden of the legal requirements of the modes of liability. As with the previous factor, an institution or legal system would of course be at liberty to fill either of the two factors with the content considered most relevant.

Neither the Orientation Criteria nor the Charging document contains equivalent factors. It is reasonable to suggest that either factor should be more precisely defined prior to assessing which value, if any, they could add to the interested institution or jurisdiction. Gravity is arguably already a general criterion under the Orientation Criteria, and assessing the evidentiary burden which flows from different alternative legal classifications would seem to be fairly standard procedure at a certain stage in the preparation of cases, regardless of whether there are case prioritization criteria or not.

Group (e) contains two further legal factors. Thirdly, 'potential legal impediments to prosecution' are listed. This factor has its equivalent in 'Difficult issues of law' in the third group

PURL: https://www.legal-tools.org/doc/688146/

('Other') in the Orientation Criteria. The merits of this criterion may be controversial. And, fourthly, the list also includes 'potential defences'. This does not appear in the Orientation Criteria or Charging document, but there will be differing opinions as to its suitability as a case selection criterion.

Moreover, group (e) lists four non-legal criteria on the case and its context. First, 'the extent to which the crime base fits in with current investigations and overall strategic direction', which reflects the essential aspiration to maximise the effect of the overall fact-work of the prosecution and to avoid duplication in such work. This is important in war crimes processes where there is often an accumulation of large, fact-rich cases, which consume considerable resources. Drawing on the same evidence on, for example, the context in which crimes occurred in several cases can mean time and cost savings. This factor is a pertinent reminder of the need for a proper investigation strategy – or at least several co-ordinated investigation plans – in investigation and prosecution services responsible for war crimes cases. The resource drain of every case is simply so large that it is difficult to see how one can responsibly manage such agencies without these basic tools.

Secondly, 'the extent to which a successful investigation/prosecution of the case would further the strategic aims' is also listed as a factor. It is not clear what is meant by 'strategic aims'. If such 'aims' differ from investigation strategy, it may not be an entirely uncontroversial concept. In any event, whereas the previous factor refers to the contribution of the factual crime base of a case to the broader strategy, this factor refers to the contribution of a confirmed indictment or conviction in a case to the broader strategic aims.

Thirdly, group (e) also lists the factor 'the extent to which the case can take the investigation to higher political, military, police and civil chains of command'. This may be superfluous as an independent criterion alongside the previous two criteria, insofar as it seems to restate more precisely a chief characteristic of their content. Strategic direction and aims in war crimes inves-

PURL: https://www.legal-tools.org/doc/688146/

tigations should be preoccupied exactly with how to ensure that criminal responsibility is established as high in the chains of authority as the evidence takes the work.

Fourthly, the last factor listed in group (e) is 'to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions'. This reinforces the importance of investigation strategy and plans, so that the relationship between larger investigations is clearly discussed, including the contribution of individual cases to the highest leadership cases in the same lines of inquiry.

All four factors are essential indicators of how rationally and cost-effectively an investigation/prosecution service tasked with core international crimes is managed. They should be of direct interest to stakeholders who finance and administer war crimes processes. Such processes are proving to be expensive and drawn out in most jurisdictions. The decision to proceed with a full investigation or prosecution normally turns the key for a significant resource commitment. These decisions should not be made before the case has been considered in light of the broader investigation strategy. There should be an investigation plan before a decision is made to proceed with a full investigation, and the plan should explain how the case is expected to fit the strategy.[45] Donor states will not fail to note the importance of these tools.

Neither the Orientation Criteria nor the Charging document addresses these four strategic factors explicitly. That does of course not mean that the considerations are not made within the relevant institutions. They may be reflected elsewhere in the regulatory infrastructure of the institutions or in their internal custom. This begs the question whether considerations of investigation strategy need to be included in the case selection and prioritization criteria as opposed to another instrument. It is for

[45] The Draft Regulations of the ICC Office of the Prosecutor prepared in 2002-03 contains a strict requirement for the development of investigation plans, see Draft Regulations, 3 June 2003, Book 3, Part 2, Regulation 6.

PURL: https://www.legal-tools.org/doc/688146/

each jurisdiction or institution to decide what suits its regulatory framework and work processes best. Excluding such considerations from the legal infrastructure all together risks undermining the quality of management and exposing the jurisdiction or institution to serious external criticism if the objectives or reasonable expectations are not met by the work. There must be a strong institutional self-interest in having a criterion of formal investigation strategy in connection with selection and prioritization of war crimes cases. Choosing not to formalise a requirement to consider how an investigation or prosecution will fit in with the overall investigation and prosecution agenda, may benefit from a public explanation.

As we have seen above, the four strategic factors in group (e) overlap. It may well be advisable to consolidate them into one strategic criterion when importing the general interest into a set of selection and prioritization criteria.

It would be interesting to learn more about how the demographic study of the State Prosecutor's Office may relate to considerations of investigation strategy.

Despite the repetitions and frequent overlap, the 1995 ICTY-OTP list of case-selection criteria is rich in content and accommodates many important interests in war crimes case selection and prioritization. It is almost a catalogue of relevant criteria, albeit incomplete and not particularly well edited. As such it can serve as a checklist in efforts to develop institutionalised selection criteria.

Already in 1998, there was an attempted review of the procedure for starting an investigation in the ICTY-OTP, with a view to rationalising the selection of cases. Emphasis was being placed on persons in leadership positions and notorious offenders. An internal memorandum was prepared for Chief Prosecutor Arbour pointing out that only a small percentage of ICTY indictees were persons with leadership responsibility. The 1998 guideline amounted less to criteria than a set of open-ended issues to be addressed in order to justify the selection of a specific case for investigation. A stable feature in both the 1995 and 1998 criteria are the practical issues of availability of evidence, arrest

PURL: https://www.legal-tools.org/doc/688146/

potential of the accused, and the likelihood of an effective investigation.

Quite apart from the content and formulation of the ICTY-OTP criteria, their fate within the ICTY-OTP can teach the BiH criminal justice system important lessons. It is apparent from the ICTY case portfolio that the institution did not succeed to select and prioritize cases in a strategic manner. The many indictments against low-level perpetrators – contrary to the stated policy to focus on those on higher levels – suggest that the case-selection criteria were not enforced. The high number of such cases can not be justified on tactical grounds. The criteria were not consistently adhered to in the practice of the Office, if at all explicitly referred to in the actual case-selection processes, which were controlled by investigation teams and team prosecutors, although sometimes cases were selected by the Chief Prosecutor for reasons of policy.[46]

It has been suggested that the ICTY-OTP efforts to introduce case selection and prioritization criteria and a formalised decision-making process on case selection were spearheaded by a small number of Office members not of traditional criminal justice background, and that they met resistance from some investigators and prosecutors who wanted case-selection to be fact- and opportunity-driven on the whole.

Be that as it may, the institutional danger is that one starts with random case selection, including cases against lower level perpetrators; that this practice expands and becomes the standard mode of operation; and that efforts to introduce case selection and prioritization criteria then become a reactive attempt to rationalise and justify a broad, fragmented and costly case portfolio *ex post facto*, after investigations have

[46] Such as showing that the tribunal is able to bring persons to account early in its existence (Tadić); that it can respond to crime themes such as sexual crimes (Furundžija); that it pursues particularly serious crimes (Srebrenica); and that it follows a balanced approach with regard to different parties of the conflicts (Bosnian Muslim and Bosnian Croat cases, especially during the Goldstone regime). Chief Prosecutor Arbour also played the key role in withdrawing 14 indictments in 1998 (indictments issued during the Goldstone regime), mainly because they did not satisfy the criteria of 'most responsible' or 'notorious offenders' according to the public statements by the ICTY-OTP.

PURL: https://www.legal-tools.org/doc/688146/

been conducted and indictments confirmed. At that stage, it may be too late to ensure an optimal or reasonable case selection. Donors and other main stakeholders in war crimes processes will normally only be able to address the capacity of the case portfolio to reflect the victimisation caused by the conflict at a late stage in the work of the prosecutor's office in question.

It came as no surprise that from 2001 onwards, the so-called 'completion strategy' of the ICC-OTP (which was somehow endorsed in Security Council resolutions) increasingly limited all new cases to higher-level leaders, excluding cases against notorious offenders at lower levels. This policy was explicitly endorsed by the President of the Security Council in 2002,[47] and later emphasised by Security Council resolutions 1503 (2003) and 1534 (2004).[48] The fact that the Council reaffirmed "in the strongest terms" in 2003 and 2004 that the ICTY should concentrate on the prosecution and trial of "the most senior leaders suspected of being most responsible for crimes"[49] represented in effect a shift in the political delineation of the scope of prosecutorial discretion as regards the selection and prioritization of cases before the ICTY. In 2004, the Council called on the ICTY and ICTR prosecutors "to review the case load" and, "in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)".[50] Although the Council's interference would seem to be dictated by the political 'need' to end the Tribunal's work and lifetime, it is difficult to detach the Council's action from the state of the Tribunal's case portfolio and completion in 2003-04.

---

47 Statement by the President of the Security Council of 23 July 2002, S/PRST/2002/21 (see Annex 2 to this report).

48 Security Council resolution 1503 of 28 August 2003, S/Res/1503(2003) (see Annex 3 to this report); Security Council resolution 1504 of 4 September 2003, S/Res/1504(2003); Security Council resolution 1534 of 26 March, S/Res/1534 (2004).

49 UNSC 1503 (2003), seventh preambular paragraph.

50 UNSC 1534 (2004), paragraphs 4 and 5.

PURL: https://www.legal-tools.org/doc/688146/

Moreover, subsequent to Security Council resolution 1534, the judges amended the ICTY Rules of Procedure and Evidence in 2004 to provide them with a possibility to review an indictment issued by the Office of the Prosecutor as to whether it concentrates "on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal".[51] It is very significant that the ICTY judges assigned to the Bureau the determination of whether the Security Council-endorsed criterion of "most senior leaders suspected of being most responsible" was satisfied by draft indictments, prior to the indictment confirmation procedure.

In sum, the ICTY experience with criteria for case selection and prioritization sends a strong signal that the development and implementation of such criteria are difficult to achieve by prosecution services. The risk of judicial or political interference with war crimes case selection increases significantly if one fails and a less than optimal case portfolio emerges. The cost of criminal justice for perpetrators of core international crimes is so high that rational case selection becomes a matter of general interest and concern.

5.5. Criteria in the International Criminal Court

The ICC Statute differs from that of the ICTY in several respects, notably in that it has an open-ended territorial jurisdiction enabling the Court to investigate and prosecute alleged crimes in many different countries. The Prosecutor of the ICC also has the power to initiate investigations on the basis of information received, as opposed to only in the context of a situation referred by the UN Security Council. The Court only has the power to exercise jurisdiction over "the most seri-

[51] Rule 28(A), amended on 6 April 2004, states: "On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, *concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal*. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor" (italics added).

PURL: https://www.legal-tools.org/doc/688146/

ous crimes of international concern",[52] establishing a gravity threshold for the exercise of jurisdiction by the Court.

For these and other reasons the negotiating states built some factors into the ICC Statute which must be considered by the Prosecutor prior to deciding that there is a reasonable basis to proceed with a full investigation. Article 53(1) decides that the following factors must be considered before starting an investigation: (a) Whether the "information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"; (b) whether the "case is or would be admissible under article 17"; and (c) whether there are "substantial reasons to believe that an investigation would not serve the interests of justice", taking into account "the gravity of the crime and the interests of victims". All three factors may be described as sufficient grounds considerations as well as factors relevant in case selection or prioritization. Factor (c) does, however, refer to the gravity of the alleged crime and the interests of victims. Article 53(2) lists very similar factors to be considered when deciding whether to proceed with a prosecution: (a) whether there is "a sufficient legal or factual basis to seek a warrant or summons under article 58"; (b) as (b) under 53(1); and (c) as (c) under 53(1) except it makes reference to taking into account "all the circumstances", and then mentions specifically "the age or infirmity of the alleged perpetrator" and "his or her role in the alleged crime". The list of factors under article 53(2) is in other words not exhaustive. The reference to the admissibility test in article 17 of the Statute would seem to imply an assessment of both the "gravity of the crimes" and "those bearing the greatest responsibility" for those crimes.[53] Some additional criteria may be inferred from obligations incumbent on the Prosecutor in the form of practical considerations that may have to be taken into account under article 54(1)(b).[54]

---

[52] See article 1, read in conjunction with article 5 and preambular paragraph 4, of the ICC Statute.

[53] See article 17(1)(d).

[54] Article 54(1)(b) reads: The Prosecutor shall "[t]ake the appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circum-

PURL: https://www.legal-tools.org/doc/688146/

There can be judicial review also of the way the ICC Prosecutor applies the criteria under article 53(1)(c) and (2)(c). The application of policy decisions and case selection criteria to an individual case may be scrutinised by the Pre-Trial Chamber under article 19(1) and article 53(3). This represents a limitation of the powers of the Prosecutor, similar to that of Rule 28(A) of the ICTY Rules of Procedure and Evidence. The possibility of review under the ICC Statute is wider, which is interesting in that this is not a power which the judges have given themselves, but one which has the backing of all the States Parties.

It is fair to suggest that the criteria based in the ICC Statute are four-fold: (a) gravity of the crime; (b) interests of victims; (c) those bearing the greatest responsibility; and (d) practical considerations. They enjoy higher authority in the context of the ICC than criteria that have no statutory basis. They also reflect the views of the high number of states that negotiated the Statute.

The ICC-OTP *Policy Paper* of 2003 explicitly addressed criterion (c):

> The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*[55]

The ICC-OTP 2007 *Policy Paper on Interests of Justice*[56] confirmed three of the four criteria listed above:

(a) the 'Gravity of the crime', with reference to the higher threshold of being of "sufficient gravity to justify further action" of the

stances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children".

[55] Page 7.

[56] The document was consulted by the authors on the ICC website (www.icc-cpi.int). The document is dated September 2007.

PURL: https://www.legal-tools.org/doc/688146/

Court in terms of Article 17(1)(d).[57] In "determining whether the situation is of sufficient gravity, the Office considers [(i)] the scale of the crimes, [(ii)] the nature of the crimes, [(iii)] the manner of their commission and [(iv)] their impact";[58]

(b) 'Interests of Victims', including (i) the "victims' interest in seeing justice done", but also (ii) "other essential interests such as their protection";[59] and

(c) the 'particular circumstances of the accused', explaining that this means "those bearing the greatest degree of responsibility", and noting that "[f]actors to be taken into account include [(i)] the alleged status or hierarchical level of the accused or [(ii)] implication in particularly serious or notorious crime. That is, the significance of the role of the accused in the overall commission of crimes and the degree of the accused's involvement (actual commission, ordering, indirect participation)".[60]

Both the BiH Orientation Criteria and the Charging document include the gravity of crime criterion, although the latter could benefit from a clearer elaboration of this part of its second cluster (that is, community impact of the crime). Both documents probably include factors (i)-(iii) of ICC-OTP criterion (a), whereas the second cluster of the Charging document addresses precisely factor (iv) on the impact of the crime on the community.

As regards criterion (b) – the interests of victims – witness protection is included as an 'Other' consideration in the Orientation Criteria, but not explicitly in the Charging document. It would seem, however, that the third cluster in the Charging document – community impact of prosecution – includes the 'victims' interest in seeing justice done' as well as the negative impact of harm to victims during the investigation or prosecution.

[57] Page 5 of the document.

[58] *Ibidem.*

[59] *Ibidem.*

[60] *Ibidem*, page 7.

PURL: https://www.legal-tools.org/doc/688146/

Criterion (c) – the 'particular circumstances of the accused' or 'those bearing the greatest responsibility' – is reflected in group (b) of the Orientation Criteria ('Perpetrator') and the first cluster of the Charging document. It may be useful to consider an elaboration of this factor in the latter to ensure that factors (i)-(iii) in ICC-OTP criterion (c) are duly covered.

There is in other words a limit to what the BiH war crimes process can gain from the ICC-OTP list of criteria. What stands out is the strong and unambiguous emphasis a very high number of States have placed on the gravity of the crime and the interests of victims. This sends a clear signal to other legal systems engaged in war crimes processes. It is also noteworthy that the first ICC Prosecutor has signalled clearly from the outset of his term that cases against "those bearing the greatest responsibility" will be prioritised.

5.6. Some Concluding Remarks

The inclusion of criteria for case selection and prioritization in the Charging document developed within the State Prosecutor's Office suggests that the authors did not consider the Orientation Criteria adequate for the purposes of that Office. It would have been interesting to see a full articulation of the reasons for and against developing such criteria above and beyond the Orientation Criteria document, taking into account the significance of the Orientation Criteria and the efforts that led to its adoption. The Book of Rules on the Review of War Crimes Cases – including the Orientation Criteria – is an existing instrument that "defines the duties and responsibilities of all Prosecutor's Offices in Bosnia and Herzegovina".[61] As an instrument applicable to prosecutor's offices both at the State and Cantonal/District levels, the Orientation Criteria document can be amended "by the Collegium of Prosecutors of Bosnia and Herzegovina", with effect on the day of adoption.[62] As proposals for amendments to the Rules must be submitted to the Chief Prosecutor of Bosnia and Herzegovina, his Office has presumably considered whether amendment is necessary for proper

[61] Book of Rules, *op. cit.*, Article 1(1).

[62] *Ibidem*, Article 5.

PURL: https://www.legal-tools.org/doc/688146/

application of the Orientation Criteria, especially after the stage of distribution of cases into a particular category – or to the State and Cantonal/District levels – that is, at the stage of prioritization within a prosecutor's office.[63] The Chief Prosecutor and the 'Collegium' of Prosecutors of Bosnia and Herzegovina have had front row access to assess the merits of both the Orientation Criteria and the Charging documents, as well as the advantage of having war crimes case selection and prioritization criteria that apply to all cases in a country.

The authors of this book have taken due note of Annex A on criteria to the National War Crimes Strategy document adopted by the BiH Council of Ministers on 28 December 2008. The Strategy document was adopted after wide circulation of the paper that this book is based on in BiH in 2008 and the international seminar on prioritization and criteria held in Oslo on 26 September 2008 with broad participation from the West Balkan region.[64] The Strategy document provides that one of its "Objectives and anticipated results" is to "[p]rosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria".[65] The "Criteria are [an] integral part of the Strategy and are outlined in Annex A".[66] They have been developed for a two-fold purpose: (1) "for the review and evaluation of the complexity of war crimes cases"[67] with a view to determining the jurisdictional level at which they will be prosecuted (State or entity/District); and (2) "to determine the level of priority of cases based on which the order of prosecuting the cases before the Court of Bosnia and Herzegovina would be determined".[68] "By using the stated criteria", the Court of

[63] See sub-section 5.2. above, where the last paragraph of the Orientation Criteria document is analysed, including the statement that "cases that fall into a particular category [that is, in effect, after the case is distributed to the State or Cantonal/District level] may be further divided by priority".

[64] See http://www.fichl.org/activities/criteria-for-prioritizing-and-selecting-core-international-crimes-cases/.

[65] 'National War Crimes Strategy', *op. cit.*, Annex 2, item 1.2 d., page 168 below.

[66] *Ibidem*, page 179 below.

[67] *Ibidem*, Annex A to the document, page 206 below.

[68] *Ibidem*.

PURL: https://www.legal-tools.org/doc/688146/

BiH "will review the complexity of cases *ex officio*".[69] The content of the Strategy criteria was drafted on the basis of the 2004 Orientation Criteria as well as ICTY and ICC practise.[70] The criteria fall in the same three substantive clusters as the Orientation Criteria: (1) 'Gravity of criminal offenses',[71] (2) 'Capacity and role of the perpetrator'[72] and (3) 'Other circumstances'.[73]

---

[69] *Ibidem*

[70] *Ibidem*.

[71] This cluster lists the following criteria: (a) 'Legal qualification of criminal offense – genocide, crimes against humanity (proving that there was a widespread and systematic attack), and war crimes against civilian population and prisoners of war, providing that some other criteria have been fulfilled as well'; (b) 'Mass killings (killing of a large number of persons, systematic killing)'; (c) 'Severe forms of rape (multiple and systematic rape, establishment of detention centres for the purpose of sexual slavery'); (d) 'Serious forms of torture (taking into account the intensity and the degree of mental and physical injuries, large scale consequences)'; (e) 'Serious forms of unlawful detention or other severe deprivation of physical liberty (establishment of camps and detention centres, escorting to and detention in the camps and detention centres, taking into account the large scale of or particularly severe conditions during the detention)'; (f) 'Persecution'; (g) 'Forced disappearance (taking into account the consequences, circumstances and the large scale of forceful disappearance)'; (h) 'Serious forms of infliction of sufferings upon civilian population (starvation, shelling of civilian building structures, destruction of religious, cultural and historical monuments)'; (i) 'Significant number of victims (or severe consequences suffered by the victims – degree of physical and mental suffering)'; (j) 'Particularly insidious methods and means used in the perpetration of criminal offense'; (k) 'Existence of particular circumstances', see Annex 1, pages 207-208 below.

[72] This second cluster lists the following criteria: (a) 'Duty within unit (commander in the military, police or paramilitary establishment)'; (b) 'Managing position in camps and detention centres'; (c) 'Political function'; (d) 'Holder of a judicial office (judge, prosecutor, public attorney, attorney at law)'; (e) 'More serious forms and degrees of participation in the perpetration of the criminal offense (taking part in the planning and ordering of the crime; manner of perpetration; intentional and particular commitment to carrying out the crime; the degree of intent should be taken into account)', see Annex 1, pages 207-208 below.

[73] This third cluster lists the following criteria: (a) 'Correlation between the case and other cases and possible perpetrators'; (b) 'Interests of victims and witnesses (witnesses who have been granted protective measures before the ICTY and the Court of BiH – protected witnesses; necessity to provide witness protection; witnesses included in the witness protection program; repentant witnesses)'; and (c)

PURL: https://www.legal-tools.org/doc/688146/

If nevertheless separate criteria should be developed for the BiH State Prosecutor's Office, placing them in a charging guideline seems reasonable, provided the instrument is formally adopted by the Office and consistently enforced in its work. The practice of the ICTY shows that enforcement of criteria is the main challenge. Criteria should help ensure that the selection and prioritization of cases reflect the policies of a prosecution service. If there is a challenge to its decision to select a specific case for prosecution, the service can defend its decision on the basis of rational, formal criteria. In the *Čelebici* case before the ICTY, for example, one of the accused unsuccessfully argued that he had been subjected to a selective prosecution strategy in contravention of the principle of equality enshrined in Article 21(1) of the ICTY Statute. He defined a selective prosecution as one "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience".[74] The Appeals Chamber held that, although the Prosecutor has a broad discretion with regard to the initiation of investigations and the preparation of indictments, such a power is not unlimited but may be subject to certain limitations contained in the Statute and Rules of Procedure and Evidence of the Tribunal.[75] It stated that the Prosecutor was only allowed to exercise her functions in accordance "with full respect of the law", including "recognised principles of human rights",[76] one such principle being equality before the Tribunal. It is understandable that

'Consequences of the crime for the local community (demographic changes, return, possible public and social reactions or anxiety among citizens and the consequences for the public order in relation to the perpetration or prosecution of the crime)', see Annex 1, page 209 below.

74 *Prosecutor v. Mucic et al.*, IT-96-21, Appeals Chamber judgement, 20 February 2001, para. 596.

75 *Ibidem*, para. 602.

76 *Ibidem*, para. 604: "The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights".

PURL: https://www.legal-tools.org/doc/688146/

prosecution services wish to protect themselves against such and similar challenges by using formal case selection and prioritization criteria.

As stated in sub-section 5.3. above, if the State Prosecutor's Office wants to have its case selection and prioritization criteria additional to the Orientation Criteria, Mr. Schwendiman is of course right in stressing that the Office should itself make the relevant decisions on which criteria should be adopted, as a matter of respecting the functional independence of that Office. This is what, for example, the ICC Office of the Prosecutor did when it adopted its *Policy Paper*. The ICC Prosecutor decided, however, to circulate the draft *Policy Paper* widely for comment prior to adopting it, just as he conducted two days of open hearings at the Peace Palace in The Hague on the draft *Regulations* of his Office. Both documents had high quality and the Prosecutor moved from a position of strength. The section on case selection and prioritization criteria in the Charging document also has very high quality. It is innovative and covers several essential features of such criteria, having been placed in a suitable instrument. The general discourse on selection and prioritization criteria for war crimes cases would benefit from having access to a fuller statement of the three clusters of criteria put forward in the document, and their justification. That could also generate useful feedback for the State Prosecutor's Office.

Several remarks were made or questions asked in the previous sub-sections of this book on the clusters of criteria in the Charging document. Are they necessary? Is the first cluster – '[f]actors that relate to the proposed defendant' – sufficiently narrowly defined to serve its purpose? What does it add to the 'Perpetrator' group of factors in the Orientation Criteria? Is the second cluster – '[f]actors that relate to the circumstances and the impact of the crime when it was committed' – clearly enough formulated and elaborated to be generally understood and appreciated? Does the cluster entail an assessment of the gravity of crime, and, if so, how does it relate to the 'Crime' group in the Orientation Criteria? Does the document incorporate the notion of gravity of the case, including both the gravity of the crime and the seriousness of the responsibility of the suspect? Does the demographic analysis take into account a sufficiently broad spectrum of offences? According to

PURL: https://www.legal-tools.org/doc/688146/

which rationale were its groups of assessment-offences selected? How is the community impact of crimes measured? Does this cluster involve a consideration of 'representativity' between the degree of criminal victimisation – or community impact of the crimes – and the scope of prosecution? How can the third cluster – '[f]actors that relate to the impact of the case on victims and affected communities' – be measured? To what extent does this take into account the interests of victims? Do these clusters give policy considerations enough place? Should such policy factors be more clearly visualised, like they are in the ICTY-OTP criteria? Is the relationship between a proposed case and the broader investigation strategy or aims covered by the clusters? Are practical considerations adequately addressed by the three clusters, also compared with the ICTY-OTP criteria and the Orientation Criteria?

To the authors of this book there seems to be two major pillars at the centre of the landscape of criteria for selection and prioritization of war crimes cases: (a) the gravity of the case and (b) the interest of 'representativity' between the seriousness of the victimisation caused by the crimes and the scope of prosecution; and two lesser pillars: (c) policy considerations and (d) practical considerations.

(a) The 'gravity of the case' encompasses both the gravity or seriousness of the alleged crime and the seriousness of the responsibility of the suspect, which depends, *inter alia*, on the *de jure* and *de facto* authority or role of the suspect as well as the form of participation or mode of liability. The two can be combined or presented separately. The Charging document addresses both dimensions, but there is room for some clarification.

A number of factors may serve as a basis for determining gravity of *crimes*, including: (i) the number of victims; (ii) the area of destruction; (iii) the duration and repetition of the offence; (iv) the nature of the crimes; (v) the *modus operandi* of the criminal conduct (particular cruelty, flagrant disregard for the law); (vi) discriminative motive; (vii) defencelessness of victims (combatants/non-combatants, children, women); and (viii) level of control of the alleged perpetrator.

PURL: https://www.legal-tools.org/doc/688146/

In the *ad hoc* Tribunals gravity of the crime has largely been discussed in the context of sentencing, the ICTY Statute stipulating that 'gravity of the offence' and the 'individual circumstances of the convicted person' should be considered when determining the sentence. Similarly, article 78(1) of the ICC Statute states that the 'gravity of the crime' and 'the individual circumstances of the convicted person' must be taken into account when determining the appropriate sentence. Additionally, rule 145(1)(c) and (2)(b) list the following factors that could be regarded as indicating the gravity of the crime: (i) the extent of the damage caused by the crime, in particular the harm caused to victims and their families; (ii) the nature of the unlawful behaviour; (iii) means employed to execute the crime; (iv) commission of the crime where the victim is particularly defenceless; (v) commission of the crime with particular cruelty or where there were multiple victims; and (vi) commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21(3).

Hierarchy of crimes is often indicated by the penalties that are provided for the crimes. Article 77 of the ICC Statute provides the same penalties for all the crimes within the jurisdiction of the Court. The ICTR case law has established a hierarchy in ascending order between war crimes, crimes against humanity and genocide. This has not been done by the ICTY.[77] A different basis for stratifying crimes is the interest which the offence protects (the protected interest or the '*Rechtsgut*'). The protected interest of life, for example, is greater than that of property, which makes the war crime of killing more grave than that of plunder. This appeals very broadly to common sense insofar as the interests protected by offences are plain, reasonable categories of considerations which guide legislative and judicial work in the area of substantive criminal law around the world. Every actor in the criminal justice process can distinguish between, for example, violations of individual life and physical integrity, or be-

[77] Eric Blumenson, *Factors relating to Gravity*, 26 May 2004, pages 3 *et seq.*, on file with one of the authors.

PURL: https://www.legal-tools.org/doc/688146/

tween personal liberty and property. Some ICTY jurisprudence supports such an approach.[78] The 1995 ICTY-OTP criteria document lists the 'nature of the acts' as a criterion. Although it has been criticized as too mechanistic,[79] the interest-based ranking of the seriousness of crimes is so well-established in different legal systems and in reason that it should not be disregarded. Thematic prosecutions that respect such hierarchies of crimes are less likely to be criticized than thematic selection of crimes that were not the most serious crimes in the area in question.[80]

As regards the threshold standard for the seriousness of the responsibility of the *suspect*, we have seen in sub-section 5.4. above that it is very significant that the UN Security Council has formulated it as "the most senior leaders suspected of being most responsible for crimes". This formulation carries considerable weight. The ICC Prosecutor's preferred formulation "those bearing the greatest degree of responsibility" is also noteworthy, as discussed in sub-section 5.5. above.

The Statute of the Special Court for Sierra Leone (SCSL) limits the jurisdiction of the Court to "persons who bear the greatest responsibility", reiterating Security Council resolution 1315 (2000).[81] The Secretary-General maintained that this term is "understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity

[78] See Music *et al.*, Appeals Chamber, 20 February 2001, para. 732. Eric Blumenson (*Factors relating to Gravity, op. cit.*) provides an extensive overview of the jurisprudence of the *ad hoc* Tribunals with regard to gravity.

[79] See Furundžija, Appeals Chamber, 21 July 2000, para. 246.

[80] In the context of jurisdictions with the principle of objectivity, it should be noted that thematic prosecutions can not be undertaken at the expense of objective investigations establishing the truth. Thematic prosecutions should also take the interests of victims duly into account.

[81] See Article 1(1) and 15(1) of the SCSL Statute and S/RES/1315 (2000), paragraph 3, which reads "*[r]ecommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".

PURL: https://www.legal-tools.org/doc/688146/

and scale of the crime" [sic].[82] However, he recommended that the "more general term" of "those most responsible" be used, stating that it is not only those in the most senior leadership positions that may be regarded as being most responsible, but also those lower down where their crimes are considered to be exceptionally grave or widespread.[83] He seems to have differentiated between the term 'those who bear the greatest responsibility' (limited to those in leadership positions that are guilty of particularly grave crimes) and 'those most responsible'. On this interpretation, only the latter would include so-called 'notorious offenders' that are lower down in the chains of authority.

The Agreement on the Establishment of the Extraordinary Chambers in Cambodia and articles 1 and 2 of the Law On The Establishment Of Extraordinary Chambers (ECCC) stipulate that the Chambers have jurisdiction over "senior leaders of Democratic Kampuchea and those who were most responsible" for crimes committed between 1975 and 1979.[84] In the Report of the

[82] "In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those 'who bear the greatest responsibility for the commission of the crimes', which is understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime. I propose, however, that the more general term 'persons most responsible' should be used", see *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, paragraph 29.

[83] *Ibidem*, paragraph 30: "While those 'most responsible' obviously include the political or military leadership, others in command authority down the chain of command may also be regarded 'most responsible' judging by the severity of the crime or its massive scale. 'Most responsible', therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases".

[84] "The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement", see Article 2 of the *Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian*

PURL: https://www.legal-tools.org/doc/688146/

Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 the term 'leaders' was viewed as too restrictive.[85] It recommended that the ECCC Co-Prosecutors focus – as a matter of prosecutorial policy[86] – on "those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities".[87]

Arguably, the higher the rank of the suspect and the more directly this person is responsible for the crimes in question, the higher is his or her level of responsibility. The category of notorious offender should probably not be viewed as a subcategory of those who bear the greatest responsibility; rather it should be viewed as giving more weight to the criterion of gravity of crimes based on a policy decision to address specific types of crimes or to address the concerns of specific victims. The determination of who bears the greatest responsibility should be con-

Law of Crimes Committed during the period of Democratic Kampuchea annexed to GA Resolution 57/228, A/RES/57/228 (22 May 2003).

85 The Group of Experts reasoned that top leaders may not have known of atrocities or might not have been involved in the decision-making, whereas others lower down in the chain of command might have been the real instigators, see *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, paragraph 109.

86 The recommendation of the Group of Experts stressed that the focus on those most responsible should not be phrased as a limitation of the jurisdiction of the Chambers but rather be a guidance to the Prosecutor in selecting his or her cases: "We recommend that, as a matter of prosecutorial policy, the independent prosecutor appointed by the United Nations limit his or her investigations to those persons most responsible for the most serious violations of international human rights law and exercise his or her discretion regarding investigations, indictments and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia", *ibidem*, Principal Recommendation 2. The wording adopted in the Draft Agreement between the UN and Cambodia, however, seems to establish an admissibility threshold by limiting 'the scope of investigations' and 'of prosecutions' to senior leaders and those most responsible, see articles 5 and 6 of the *Draft Agreement.*

87 *Ibidem*, paragraph 110.

PURL: https://www.legal-tools.org/doc/688146/

ducted on the basis of objective factors. It is in the interest of transparency to keep policy and practical considerations conceptually separate.

Admittedly, these different threshold standards for the seriousness of the responsibility of the *suspect* may well seem somewhat confusing. Each institution or jurisdiction working on the formulation of criteria must choose what best serves its needs. The formulation chosen should provide adequate guidance to those who will work with it; it should be sufficiently clear to the public; and it should lend itself well to serve the interest of equal treatment of all cases.

(b) The second pillar can be referred to as representative prosecutions. It simply means that at the end of a process of war crimes prosecutions, the accumulated case portfolio should reflect – or be representative of – the overall victimisation caused by the crimes in the conflict or situation at hand. The most serious crimes and the crimes that the most senior leaders are suspected of being most responsible for should have been prosecuted at the end of the day. The areas and communities most affected by the crimes should have seen more of these crimes or crime base prosecuted than in less affected communities. The most affected victim groups should have more of the crimes that caused the victimisation prosecuted than other groups. Organizations or structures causing the most serious crimes should have more of its responsible members – or more of the crimes caused by them – prosecuted than other such organizations or structures.

The reasoning behind this criterion seems rather self-explanatory. It is underpinned by concerns for the interests of victims, as well as the ability of the criminal justice for the core international crimes in question to contribute to reconciliation and deterrence. The balancing which the approach entails would seem necessary to ensure trust in the criminal justice system.

The Charging document addresses this criterion in a very interesting manner through its second cluster on the community impact of the crimes. The document may benefit from a further elucidation of what this cluster actually entails.

PURL: https://www.legal-tools.org/doc/688146/

(c) Policy considerations are almost always made in prosecution services, but they may not be so visible to the public. They should be articulated and made public to the extent possible. Transparency is in the interest of the prosecution services and their work. Policy criteria for case selection and prioritization of core international crimes cases should be formalised and enforced equally in all cases. The 1995 ICTY-OTP criteria are rich in policy factors. It may be a useful source to consult in the event there is a wish in BiH to add criteria above and beyond the Orientation Criteria. If policy considerations are regulated elsewhere than in connection with criteria for case selection and prioritization, then that should be made clear to the public.

(d) Practical considerations are the bread and butter of criminal justice. There are major practical considerations that affect the selection and prioritization of core international crimes cases. These should also be formalised and made public. That serves the interest of the prosecution services themselves. The 1995 ICTY-OTP criteria may again provide ideas.

We have seen in sub-sections 5.4. and 5.5. above that the judges both in the ICTY and the ICC can play a role in ensuring that case selection criteria are respected. This comes as no surprise if we consider the difficulties in only selecting suitable cases for prosecution in the internationalised criminal jurisdictions. It is not only the ICTY that has faced difficulties in this respect. As a matter of fact, it is not easy to point to any internationalised prosecution service that has without doubt succeeded with its case selection. This seems to be a common challenge and problem. There is no indication that the prosecutor's offices in BiH are not doing as well as other prosecution services tasked with war crimes cases. But given the size of the backlog of war crimes cases in BiH, it may be naive to expect that it will not face the problems we have seen elsewhere. Even if the regulatory framework for the BiH prosecutor's offices is modified to ensure full integration of the preferred case selection and prioritization criteria for war crimes cases, is it realistic to expect that all the criteria will be fully enforced in all cases? Would it not be in the interest of justice as well as that of the prosecutor's offices for there to be a role for the judges, as a safe-

PURL: https://www.legal-tools.org/doc/688146/

guard to ensure respect for the criteria? It may be prudent to explore the possibility to amend the relevant codes of criminal procedure so that the judges can review whether cases that are prioritised by the prosecution meet requisite case selection and prioritization criteria at the time of confirmation of the indictment or otherwise prior to trial. This is recognized by the BiH Council of Ministers in the National War Crimes Strategy.[88]

In facing what Mr. Schwendiman has referred to as "the nation's war crime predicament",[89] every stone should be turned to enable the prosecutor's offices and judges of BiH to process as many serious core international crimes cases as possible, and to do so in the right order. Mr. Schwendiman seems to be optimistic: "My conclusion is that if Germany could manage what it was faced with, even though the outcomes were not universally accepted, with careful management we could, too".[90] He is right in cautioning that "haste encouraged by worrying only about numbers will in the end prove as bad as doing nothing. Unwise pace is no friend of justice. Doing what we do right and doing it well should be our only concern".[91]

Having well-functioning criteria for the selection and prioritization of war crimes cases can significantly contribute to ensuring that the cases which are fully investigated and put forward for prosecution are the most suitable cases. This increases the likelihood that the limited resources available to the BiH war crimes process will be appropriately used. But it does not address the more fundamental problem of the very large backlog of core international crimes cases in BiH. That must be dealt with through other tools, the choice of which will determine whether the case files remain within the criminal justice system or are ultimately subjected to a political process or decision.

---

88 See Annex A of the 'National War Crimes Strategy, *op. cit.*, which is reproduced as Annex 2 to this paper.

89 'Registrar for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption; Notice of my resignation and report', *op. cit.*, page 3.

90 *Ibidem*, page 6.

91 *Ibidem.*

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

Annex 1:
The DOCF Information Structure

[ ] = indicates what is seen in the drop-down menus of DOCF

1) Number and name of the existing case file[1]

   [Case no. and name]
   [Prosecutor's office file number; second field for file name]
   [If prosecutor's data not available, court file number; second field for file name]
   [Narrative box for possible previous case number or name etc.]

2) Dates

   - Date of receiving the criminal report by the Prosecutor's Office *[yyyymmdd]*
   - Date of first investigative action undertaken *[yyyymmdd or negative]*
   - Date of issuing an order to conduct an investigation *[yyyymmdd or negative]*
   - Date of filing the indictment by the prosecutor *[yyyymmdd or negative]*
   - Date of confirmation of indictment *[yyyymmdd or negative]*
   - Date of issuance of first instance decision *[yyyymmdd or negative]*

[1] The number and name of the case refers to the current number and name, while the narrative box can be used to indicate any previously assigned number(s) and name(s). The same applies if the current case resulted from a joining or separation of the procedure as well as change of jurisdiction.

PURL: https://www.legal-tools.org/doc/688146/

- Date of reaching a final and binding decision – accused acquitted; sentenced or PBA *[yyyymmdd or negative]*

3) Procedural stage of case file

[Procedural stage]
[Drop down]

- Investigative phase[2] of the procedure [Investigation]
  - Pre-investigation assessment[3]
  - Active investigation[4]
    - Initial stage[5]
    - Substantial progress has been made[6]
    - Investigation is close to completion[7]
  - Outcome
    - Completion of investigation and issuance of indictment
    - Cessation of investigation
- Indictment procedure [Indictment]
- Post-indictment preliminary proceedings
- Main trial adjourned indefinitely [Trial]
- Main trial [Trial]
- Post first instance verdict [Post verdict]
- PBA accepted[8]

[2] Certain information entered in this category may be based on the prosecutor's understanding of progress made in concrete case.

[3] This refers to evaluation of whether or not there are grounds for suspicion that the reported person committed the criminal offence.

[4] Active investigation connotes that the order to conduct the investigation has already been issued.

[5] Main investigative actions are ordered.

[6] An investigation team is actively implementing investigative actions, meaning that the majority of the main investigative actions have been conducted (for example, all key witnesses have been examined, majority of material evidence has been collected, etc.).

[7] All the main investigative actions have been completed.

[8] A final and binding verdict has been rendered on the basis of the concluded and accepted plea bargaining agreement.

PURL: https://www.legal-tools.org/doc/688146/

- Appeal
- Re-trial
- Acquitted/Sentenced
- Extraordinary legal remedy [Review]
- Trial in absentia

4) Sentencing

[Drop down per suspect, multiple choice option]

- Dismissal of charge
- Acquittal
- Partial acquittal
- Imprisonment
- Suspended/Conditional
- Fine
- Other
- Number of years *[field to enter number of years]*

5) Jurisdiction currently in possession of the original case file

[File currently with]
[Drop down]

- BiH Prosecutor's Office
- FBiH Federal Prosecutor's Office
- FBiH Cantonal Prosecutor's Office, Bihać
- FBiH Cantonal Prosecutor's Office, Sarajevo
- FBiH Cantonal Prosecutor's Office, Goražde
- FBiH Cantonal Prosecutor's Office, Široki Brijeg
- FBiH Cantonal Prosecutor's Office, Orašje
- FBiH Cantonal Prosecutor's Office, Livno
- FBiH Cantonal Prosecutor's Office, Mostar
- FBiH Cantonal Prosecutor's Office, Tuzla
- FBiH Cantonal Prosecutor's Office, Travnik
- FBiH Cantonal Prosecutor's Office, Zenica
- RS Republic Prosecutor's Office
- RS District Prosecutor's Office, Banja Luka

PURL: https://www.legal-tools.org/doc/688146/

- RS District Prosecutor's Office, Bijeljina
- RS District Prosecutor's Office, Doboj
- RS District Prosecutor's Office, Istočno
- RS District Prosecutor's Office, Trebinje
- BD Prosecutor's Office
- Cases opened under jurisdiction of another country

[Field for name of office after categories which include more than one office]

6) BiH category of case

[Category]
[Drop down]

- ICTY Rule 11*bis* case [ICTY 11bis case]
- ICTY-OTP case without ICTY indictment ('category 2 case') [ICTY case without indictment]
- Case from the former Rules of the Road Unit [RoRU case] - > [*add field for* ICTY marking category]
- Case opened within the jurisdiction of the Prosecutor's Office of BiH [BiH-PO case]
- Case submitted by prosecutors' offices in BiH to the BiH-PO (not submitted to the RoRU) in accordance with the Book of Rules on the Review of War Crimes Cases [BoR case]
- Case originating by entity prosecutors not submitted to RoRU or under BoR [entity prosecutor case]

7) Suspect(s)[9] in the case file

[Suspect(s)]
[Field to enter name of suspect (PERIC, Enver/Unknown)]

[9] The number of suspects is to be estimated if not already specified in the case file (the suspect is always defined in order to conduct the investigation, meaning that this would only be relevant for cases that only include criminal reports 'against unknown perpetrators'). For each additional suspect, tick the 'Add suspect' box and fill in the relevant information. Notoriety of suspect refers to how the victim population perceives the suspect. The term 'suspect' will also be used to signify the 'accused person'.

PURL: https://www.legal-tools.org/doc/688146/

Notoriety of suspect in the victim group[10]
[Suspect notoriety]
[drop down]

- Highly notorious
- Notorious
- Not so notorious
- Not clear

['Add suspect' button, with field to enter additional name; should be possible to add as many names as required]
[Suspect notoriety drop down after every name]
[One database sub-file for each suspect in the case file from this point onwards]

8) Suspect plea: **[For every suspect.]**

- Not yet
- Plea of [guilty] [not guilty] [date, 19980810]
- Plea bargaining agreement: [accepted] [accepted and co-operation agreement] [not accepted]

[Tick boxes to implement for other suspects in the case file]

9) Detention status **[For every suspect.]**

[Detention]
[Drop down]

- arrest warrant issued
- pre-trial detention
- custody after confirmation of indictment (Art. 137 of CC BiH)
- custody after pronouncement of verdict (Art. 138 of the CC BiH)
- serving sentence for prior offence

[10] The prosecutor responsible for the case file should estimate how the victims perceive the suspect's notoriety, not on the basis of objective criteria but on the basis of the perception of what the victims think.

PURL: https://www.legal-tools.org/doc/688146/

- alternative measures to guarantee the presence of a suspect or accused and successful conduct of criminal proceedings

[Tick boxes to implement for other suspects in the case file]

10) Organizational belonging[11] of the suspect at the time of the commission of the crime **[For every suspect.]**

[Organization of suspect]
[Drop down]

- Territorial Defence BiH
- Army of the Republic of Bosnia and Herzegovina
- Croatian Army
- Croatian Defence Council
- Yugoslav People's Army
- Yugoslav Army
- Army of Republic of Srpska
- Paramilitary group *[and narrative box for the name of the paramilitary group]*[12]
- Interior Ministry of the Republic of Bosnia and Herzegovina
- Interior Ministry of the Serb Republic of Bosnia and Herzegovina
- Interior Ministry of the Croatian Republic of Herzeg – Bosnia
- Interior Ministry of the Autonomous Province of Western Bosnia
- Croatian Democratic Union
- Party of Democratic Action
- Serbian Democratic Party
- Other

[Tick boxes to implement for other suspects in the case file]

[11] Organizational identity of a suspect at the time of commission of crime refers to the organization to which he/she belonged at the moment of the commission of the crime (for example, government, political party, military or paramilitary formation etc.).

[12] Informal military formations or informal groups with the distinct identity within the military structures.

PURL: https://www.legal-tools.org/doc/688146/

11) Rank or position of suspect in his or her organization at the time of commission of crime **[For every suspect.]**

[Rank or position]
[Drop down]
Yugoslav People's Army/Yugoslav Army/ Army of Republic of Srpska military ranks:

- Army General
- Colonel General
- Lieutenant Colonel General
- Major General
- Colonel
- Lieutenant Colonel
- Major
- Captain 1st Class
- Captain
- Lieutenant
- Junior Lieutenant

Croatian Army/Croatian Defence Council military ranks:

- Staff General
- Colonel General
- Major General
- Brigadier
- Colonel
- Major
- Captain
- Senior Lieutenant
- Lieutenant

Army of the Republic of Bosnia and Herzegovina Military Ranks:

- Army General
- Division General
- Brigadier General
- Colonel
- Brigadier

PURL: https://www.legal-tools.org/doc/688146/

- Captain
- Lieutenant

Other: *[empty box for rank or position]*
[Tick boxes to implement for other suspects in the case file]

12) Identity of suspect[13] **[For every suspect.]**

[Suspect identity]
[Drop down based on 1991 Census]
- Bosniak
- Croat
- Serb
- Other
- Yugoslav
- Unknown

[Tick boxes to implement for other suspects in the case file]

13) Citizenship of suspect **[For every suspect.]**

[Suspect citizenship]
[Two blank text fields in case of dual citizenship]
[Tick boxes to implement for other suspects in the case file]

14) Date of birth[14] of suspect **[For every suspect.]**

[Suspect DOB]
[yyyymmdd or yyyymmxx or yyyyxxxx]

[13] 'Identity of suspect' strictly follows the 1991 Census, with one addition, the category of 'unknown', for practical purposes of populating this database.

[14] Date of birth should be filled in as follows: year/month/date [yyyy/mm/dd]. If the exact date of birth of suspect is not available, fill in 00 for the missing numbers [yyyy/mm/00; yyyy/00/00].

PURL: https://www.legal-tools.org/doc/688146/

15) Reliable information[15] in the case files indicating: **[For every suspect.]**

- mental incapacity [Suspect incapacity] *[tick box]*
- considerably diminished mental capacity [Suspect diminished capacity] *[tick box]*
- suspect infirmity [Suspect infirmity] *[tick box]*

[Tick boxes to implement for other suspects in the case file]

16) Suspect alleged to have participated in following incident(s) **[For every suspect.]**

[Incident]
[Field for name of incident]

- Municipality and place of suspected incident[16] **[For every incident.]**

  [Location of incident]
  [Drop down based on 1991 Census breakdown of municipalities and narrative box for concrete location when that is indicated in the file; multiple municipalities possible for one incident.]
  [Tick boxes to implement for other suspects in the case file]
- Year and month of suspected incident[17] **[For every incident.]**

[15] Information indicating suspect infirmity and/or mental incapacity comprises any information on the suspect's health condition in the case file that might lead to him/her to not being able to stand trial or might lead to suspension of the criminal investigation or main trial proceedings against the suspect or accused person based on lack of criminal responsibility. On the other hand, considerably diminished mental capacity means that the perpetrator is criminally liable but the state of mind may constitute grounds for the reduction of punishment.

[16] Check the municipality and enter the name of concrete locations if known in the narrative box (for example, the name of the *mjesna zejednica*, village or area, institution, factory etc.).

[17] The timeframe of the suspected crime is to show the year and month or period of time given in months during which the commission of the crime was taking place [199204; 199205-08]. If the exact month is not available, fill in 00 for the missing numbers [199200].

PURL: https://www.legal-tools.org/doc/688146/

[Timeframe of crime]
[Entered as 19920426; 199204; or 199205-08; or 199200 –; or 199204-199402]
[Tick boxes to implement for other suspects in the case file]

- Notoriety of suspected incident[18] of crime(s) in the victim group
  [Incident notoriety]
  [Drop down]
  - Highly notorious
  - Notorious
  - Not so notorious
  - Not clear

[Tick boxes to implement for other suspects in the case file]
['Add incident' button when more than one incident, with the three sub-categories above for every incident]
[Tick boxes to implement for other suspects in the case file after every incident]

17) Suspected criminal offence[19] **[For every suspect at the level of incident.]**

[Crime(s)]
[Drop down, tick list, where more than one option can be chosen; several levels of drop down: code, article, crimes within article]
CC BiH 171- Genocide
- CC BiH 2003 Article 171 (1)(a) – Killing
- CC BiH 2003 Article 171 (1)(b) – Causing serious harm
- CC BiH 2003 Article 171 (1)(c) – Inflicting conditions of life

[18] Notoriety of incidents refers to the assessment of the prosecutor responsible for the case file of how the victim population perceives the alleged crimes in the incident in question.

[19] If the legal qualification can not be stated at this stage of development of the case file, skip this part but try to fill in section 17 on interest violated by the crime.

PURL: https://www.legal-tools.org/doc/688146/

- CC BiH 2003 Article 171 (1)(d) – Imposing measures to prevent births
- CC BiH 2003 Article 171 (1)(e) – Forcibly transferring children

CC BiH 172- Crimes against humanity

- CC BiH 2003 Article 172 (1)(a) – Murder
- CC BiH 2003 Article 172 (1)(b) – Extermination
- CC BiH 2003 Article 172 (1)(c) – Enslavement
- CC BiH 2003 Article 172 (1)(d) – 1 – Deportation
- CC BiH 2003 Article 172 (1)(d) – 2 – Forcible transfer
- CC BiH 2003 Article 172 (1)(e) – 1 – Imprisonment
- CC BiH 2003 Article 172 (1)(e) – 2 – Other severe deprivation of physical liberty
- CC BiH 2003 Article 172 (1)(f) – Torture
- CC BiH 2003 Article 172 (1)(g) – 1 – Rape
- CC BiH 2003 Article 172 (1)(g) – 2 – Sexual slavery
- CC BiH 2003 Article 172 (1)(g) – 3 – Enforced prostitution
- CC BiH 2003 Article 172 (1)(g) – 4 – Forced pregnancy
- CC BiH 2003 Article 172 (1)(g) – 5 – Enforced sterilisation
- CC BiH 2003 Article 172 (1)(g) – 6 – Other sexual violence
- CC BiH 2003 Article 172 (1)(h) – Persecution
- CC BiH 2003 Article 172 (1)(i) – Enforced disappearance
- CC BiH 2003 Article 172 (1)(j) – Crime of apartheid
- CC BiH 2003 Article 172 (1)(k) – Other inhumane acts

CC BiH 173- War Crimes against civilians

- CC BiH 2003 Article 173 (1)(a) – 1 – Attack resulting in death
- CC BiH 2003 Article 173 (1)(a) – 2 – Attack resulting in grave bodily injuries
- CC BiH 2003 Article 173 (1)(a) – 3 – Attack resulting in serious damaging of people's health

PURL: https://www.legal-tools.org/doc/688146/

- CC BiH 2003 Article 173 (1)(b) – Attack without selecting a target
- CC BiH 2003 Article 173 (1)(c) – 1 – Killing
- CC BiH 2003 Article 173 (1)(c) – 2 – Torture
- CC BiH 2003 Article 173 (1)(c) – 3 – Inhuman treatment
- CC BiH 2003 Article 173 (1)(c) – 4 – Scientific experiments
- CC BiH 2003 Article 173 (1)(c) – 5 – Taking of tissue or organs
- CC BiH 2003 Article 173 (1)(c) – 6 – Immense suffering
- CC BiH 2003 Article 173 (1)(c) – 7 – Violation of bodily integrity or health
- CC BiH 2003 Article 173 (1)(d) – 1 – Dislocation
- CC BiH 2003 Article 173 (1)(d) – 2 – Displacement
- CC BiH 2003 Article 173 (1)(d) – 3 – Forced conversion
- CC BiH 2003 Article 173 (1)(e) – 1 – Rape
- CC BiH 2003 Article 173 (1)(e) – 2 – Forcible prostitution
- CC BiH 2003 Article 173 (1)(e) – 3 – Application of measures of intimidation and terror
- CC BiH 2003 Article 173 (1)(e) – 4 – Taking of hostages
- CC BiH 2003 Article 173 (1)(e) – 5 – Imposing collective punishment
- CC BiH 2003 Article 173 (1)(e) – 6 – Unlawful bringing in concentration camps
- CC BiH 2003 Article 173 (1)(e) – 7 – Other illegal arrests and detention
- CC BiH 2003 Article 173 (1)(e) – 8 – Deprivations of rights to fair and impartial trial
- CC BiH 2003 Article 173 (1)(e) – 9 – Forcible service in the enemy's army or in its intelligence service or administration

PURL: https://www.legal-tools.org/doc/688146/

- CC BiH 2003 Article 173 (1)(f) – 1 – Forced labour
- CC BiH 2003 Article 173 (1)(f) – 2 – Starvation
- CC BiH 2003 Article 173 (1)(f) – 3 – Property confiscation
- CC BiH 2003 Article 173 (1)(f) – 4 – Pillaging
- CC BiH 2003 Article 173 (1)(f) – 5 – Destruction and stealing of property
- CC BiH 2003 Article 173 (1)(f) – 6 – Taking an illegal and disproportionate contribution or requisition
- CC BiH 2003 Article 173 (1)(f) – 7 – Devaluating of domestic money or the unlawful issuance of money
- CC BiH 2003 Article 173 (2)(a) – 1 – Attack against object specifically protected by international law
- CC BiH 2003 Article 173 (2)(a) – 2 – Attack against objects and facilities with dangerous power
- CC BiH 2003 Article 173 (2)(b) – 1 – Targeting indiscriminately of civilian objects
- CC BiH 2003 Article 173 (2)(b) – 2 – Targeting of non-defended places
- CC BiH 2003 Article 173 (2)(b) – 3 – Targeting of demilitarised zones
- CC BiH 2003 Article 173 (2)(c) – Environment devastation
- CC BiH 2003 Article 173 (3) – Resettlement

CC BiH 174- War crimes against the wounded and sick

- CC BiH 2003 Article 174 (1)(a) – 1 – Murder
- CC BiH 2003 Article 174 (1)(a) – 2 – Torture
- CC BiH 2003 Article 174 (1)(a) – 3 – Inhuman treatment
- CC BiH 2003 Article 174 (1)(a) – 4 – Scientific experiments
- CC BiH 2003 Article 174 (1)(a) – 5 – Taking of tissue or organs
- CC BiH 2003 Article 174 (1)(b) – Causing of great suffering or serious injury to bodily integrity or health
- CC BiH 2003 Article 174 (1)(c) – 1 – Destruction

PURL: https://www.legal-tools.org/doc/688146/

- CC BiH 2003 Article 174 (1)(c) – 2 – Appropriation

CC BiH 175- War crimes against prisoners of war

- CC BiH 2003 Article 175 (1)(a) – 1 – Murder
- CC BiH 2003 Article 175 (1)(a) – 2 – Torture
- CC BiH 2003 Article 175 (1)(a) – 3 – Inhuman treatment
- CC BiH 2003 Article 175 (1)(a) – 4 – Scientific experiments
- CC BiH 2003 Article 175 (1)(a) – 5 – Taking of tissue or organs
- CC BiH 2003 Article 175 (1)(b) – Causing of great suffering or serious injury to bodily integrity or health
- CC BiH 2003 Article 175 (1)(c) – 1 – Compulsive enlistment
- CC BiH 2003 Article 175 (1)(c) – 2 – Deprivation of the right to a fair and impartial trial

CC BiH 176- Organizing group of people and instigation

- CC BiH 2003 Article 176 (1) – Organising a group
- CC BiH 2003 Article 176 (2) – Membership in a group
- CC BiH 2003 Article 176 (3) – Member exposing the rest of the group
- CC BiH 2003 Article 176 (4) – Instigation

CC BiH 177- Unlawful killing or wounding of the enemy

- CC BiH 2003 Article 177 (1) – 1 – Killing enemy
- CC BiH 2003 Article 177 (1) – 2 – Wounding enemy
- CC BiH 2003 Article 177 (2) – 1 – Killing perpetrated in a cruel or insidious way
- CC BiH 2003 Article 177 (2) – 2 – Killing perpetrated out of greed or for other low motives
- CC BiH 2003 Article 177 (2) – 3 – More persons have been killed
- CC BiH 2003 Article 177 (3) – No surviving enemy

CC BiH 178- Marauding the killed and wounded at the battlefield

- CC BiH 2003 Article 178 (1) – Appropriation of belongings from killed or wounded

CC BiH 179- Violating the laws and practices of warfare

PURL: https://www.legal-tools.org/doc/688146/

- CC BiH 2003 Article 179 (1) – 1 – Violation of laws and practices of warfare

CC BiH 181- Violating the protection granted to bearers of flags of truce

- CC BiH 2003 Article 181 (1) – 1 – Insults
- CC BiH 2003 Article 181 (1) – 2 – Maltreats
- CC BiH 2003 Article 181 (1) – 3 – Detains
- CC BiH 2003 Article 181 (1) – 4 – Prevents from returning
- CC BiH 2003 Article 181 (1) – 5 – Other violations of privilege

CC BiH 182- Unjustified delay of the repatriation of prisoners of war

- CC BiH 2003 Article 182 (1) – Unjustified delay of repatriation

CC BiH 183- Destruction of cultural, historical and religious monuments

- CC BiH 2003 Article 183 (1) – Destroys

CC BiH 184- Misuse of International Emblems

- CC BiH 2003 Article 184 (1) – Misuses or carries without authorization

CC FBiH 153- Genocide

- CC FBiH 1998 Article 153 (1) – 1 – Killing
- CC FBiH 1998 Article 153 (1) – 2 – Inflicting of serious bodily injuries
- CC FBiH 1998 Article 153 (1) – 3 – Inflicting of serious disturbance of physical or mental health
- CC FBiH 1998 Article 153 (1) – 4 – Forced dislocation
- CC FBiH 1998 Article 153 (1) – 5 – Inflicting conditions of life
- CC FBiH 1998 Article 153 (1) – 6 – Imposing measures to prevent births
- CC FBiH 1998 Article 153 (1) – 7 – Forcibly transferring children

CC FBiH 154- War crimes against civilians

PURL: https://www.legal-tools.org/doc/688146/

- CC FBiH 1998 Article 154 (1) – 1 – Attack resulting in death
- CC FBiH 1998 Article 154 (1) – 2 – Attack resulting in grave bodily injuries
- CC FBiH 1998 Article 154 (1) – 3 – Attack resulting in serious damaging of people's health
- CC FBiH 1998 Article 154 (1) – 4 – Indiscriminate attack without selecting a target
- CC FBiH 1998 Article 154 (1) – 5 – Killing
- CC FBiH 1998 Article 154 (1) – 6 – Torture
- CC FBiH 1998 Article 154 (1) – 7 – Inhuman treatment
- CC FBiH 1998 Article 154 (1) – 8 – Scientific experiments
- CC FBiH 1998 Article 154 (1) – 9 – Taking of tissue or organs
- CC FBiH 1998 Article 154 (1) – 10 – Immense suffering or violation of bodily integrity or health
- CC FBiH 1998 Article 154 (1) – 11 – Dislocation
- CC FBiH 1998 Article 154 (1) – 12 – Displacement
- CC FBiH 1998 Article 154 (1) – 13 – Forced conversion
- CC FBiH 1998 Article 154 (1) – 14 – Forcible prostitution
- CC FBiH 1998 Article 154 (1) – 15 – Rape
- CC FBiH 1998 Article 154 (1) – 16 – Application of measures of intimidation and terror
- CC FBiH 1998 Article 154 (1) – 17 – Taking hostages
- CC FBiH 1998 Article 154 (1) – 18 – Imposing collective punishment
- CC FBiH 1998 Article 154 (1) – 19 – Unlawful bringing in concentration camps
- CC FBiH 1998 Article 154 (1) – 20 – Other legal arrests and detention
- CC FBiH 1998 Article 154 (1) – 21 – Deprivations of rights to fair and impartial trial

PURL: https://www.legal-tools.org/doc/688146/

- CC FBiH 1998 Article 154 (1) – 22 – Forcible service in the enemy's army or in its intelligence service or administration
- CC FBiH 1998 Article 154 (1) – 23 – Forced labour
- CC FBiH 1998 Article 154 (1) – 24 – Starvation
- CC FBiH 1998 Article 154 (1) – 25 – Property confiscation
- CC FBiH 1998 Article 154 (1) – 26 – Pillaging
- CC FBiH 1998 Article 154 (1) – 27 – Destruction and stealing of property
- CC FBiH 1998 Article 154 (1) – 28 – Taking an illegal and disproportionate contribution or requisition
- CC FBiH 1998 Article 154 (1) – 29 – Devaluating of domestic money or the unlawful issuance of money
- CC FBiH 1998 Article 154 (2) – 1 – Attack against object specifically protected by international law
- CC FBiH 1998 Article 154 (2) – 2 – Attack against objects and facilities with dangerous power
- CC FBiH 1998 Article 154 (2) – 3 – Targeting indiscriminately of civilian objects, undefended places and demilitarized zones
- CC FBiH 1998 Article 154 (2) – 4 – Environmental devastation
- CC FBiH 1998 Article 154 (3) – Resettlement

CC FBiH 155- War crimes against the wounded and sick

- CC FBiH 1998 Article 155 (1) – 1 – Murder
- CC FBiH 1998 Article 155 (1) – 2 – Torture
- CC FBiH 1998 Article 155 (1) – 3 – Inhuman treatment
- CC FBiH 1998 Article 155 (1) – 4 – Scientific experiments
- CC FBiH 1998 Article 155 (1) – 5 – Taking of tissue or organs
- CC FBiH 1998 Article 155 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC FBiH 1998 Article 155 (1) – 7 – Destruction
- CC FBiH 1998 Article 155 (1) – 8 – Appropriation

PURL: https://www.legal-tools.org/doc/688146/

CC FBiH 156- War crimes against prisoners of war
- CC FBiH 1998 Article 156 (1) – 1 – Murder
- CC FBiH 1998 Article 156 (1) – 2 – Torture
- CC FBiH 1998 Article 156 (1) – 3 – Inhuman treatment
- CC FBiH 1998 Article 156 (1) – 4 – Scientific experiments
- CC FBiH 1998 Article 156 (1) – 5 – Taking of tissue or organs
- CC FBiH 1998 Article 156 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC FBiH 1998 Article 156 (1) – 7 – Compulsive enlistment
- CC FBiH 1998 Article 156 (1) – 8 – Deprivation of the right to a fair and impartial trial

CC FBiH 157- Organizing group of people and instigation
- CC FBiH 1998 Article 157 (1) – Organising a group
- CC FBiH 1998 Article 157 (2) – Membership in a group
- CC FBiH 1998 Article 157 (3) – Member exposing the rest of the group
- CC FBiH 1998 Article 157 (4) – Instigation

CC FBiH 158- Unlawful killing or wounding the enemy
- CC FBiH 1998 Article 158 (1) – 1 – Killing enemy
- CC FBiH 1998 Article 158 (1) – 2 – Wounding enemy
- CC FBiH 1998 Article 158 (2) – 1 – Killing committed in a cruel or insidious way
- CC FBiH 1998 Article 158 (2) – 2 – Killing committed out of greed or from other base motives
- CC FBiH 1998 Article 158 (2) – 3 – More persons have been killed
- CC FBiH 1998 Article 158 (3) – No surviving enemies

CC FBiH 159- Marauding
- CC FBiH 1998 Article 159 (1) – Appropriation
- CC FBiH 1998 Article 159 (2) – Appropriation in a cruel manner

CC FBiH 160- Using forbidden means of warfare

PURL: https://www.legal-tools.org/doc/688146/

- CC FBiH 1998 Article 160 (1) – The use of means or practices of warfare prohibited by the rules of international law
- CC FBiH 1998 Article 160 (2) – Several persons have been killed

CC FBiH 161- Violating the protection granted to bearers of flags of truce

- CC FBiH 1998 Article 161 (1) – 1 – Insults
- CC FBiH 1998 Article 161 (1) – 2 – Maltreats
- CC FBiH 1998 Article 161 (1) – 3 – Detains
- CC FBiH 1998 Article 161 (1) – 4 – Prevents from returning
- CC FBiH 1998 Article 161 (1) – 5 – Other violations of privilege

CC FBiH 163- Cruel treatment of the wounded, sick and the prisoners of war

- CC FBiH 1998 Article 163 (1) – 1 – Cruel treatment
- CC FBiH 1998 Article 163 (1) – 2 – Impedes or prevents from exercising rights

CC FBiH 164- Destruction of cultural and historical monuments

- CC FBiH 1998 Article 164 (1) – Destroys
- CC FBiH 1998 Article 164 (2) – Destroying of a clearly distinguishable object under special protection of international law

CC FBiH 165- Instigating an aggressive war

- CC FBiH 1998 Article 165 (1) – Calls on or instigates an aggressive war

CC FBiH 166- Misuse of international emblems

- CC FBiH 1998 Article 166 (1) – Misuses or carries without authorization
- CC FBiH 1998 Article 166 (2) – Misuses or carries without authorization within a zone of war operations

CC RS 1993 (141)- Genocide

- CC RS 1993 Article 141 (1) – 1 – Killing
- CC RS 1993 Article 141 (1) – 2 – Inflicting of serious bodily injuries

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 1993 Article 141 (1) – 3 – Inflicting of serious disturbance of physical or mental health
- CC RS 1993 Article 141 (1) – 4 – Forcible dislocation
- CC RS 1993 Article 141 (1) – 5 – Inflicting conditions of life
- CC RS 1993 Article 141 (1) – 6 – Imposing measures to prevent births
- CC RS 1993 Article 141 (1) – 7 – Forcibly transferring children

CC RS 1993 (142)- War crime against the civilian population

- CC RS 1993 Article 142 (1) – 1 – Attack resulting in death
- CC RS 1993 Article 142 (1) – 2 – Attack resulting in grave bodily injuries
- CC RS 1993 Article 142 (1) – 3 – Attack resulting in serious damaging of people's health
- CC RS 1993 Article 142 (1) – 4 – Indiscriminate attack without selecting a target
- CC RS 1993 Article 142 (1) – 5 – Killing
- CC RS 1993 Article 142 (1) – 6 – Torture
- CC RS 1993 Article 142 (1) – 7 – Inhuman treatment
- CC RS 1993 Article 142 (1) – 8 – Scientific experiments
- CC RS 1993 Article 142 (1) – 9 – Taking of tissue or organs
- CC RS 1993 Article 142 (1) – 10 – Immense suffering or violation of bodily integrity or health
- CC RS 1993 Article 142 (1) – 11 – Dislocation
- CC RS 1993 Article 142 (1) – 12 – Displacement
- CC RS 1993 Article 142 (1) – 13 – Forcible conversion
- CC RS 1993 Article 142 (1) – 14 – Forcible prostitution
- CC RS 1993 Article 142 (1) – 15 – Rape
- CC RS 1993 Article 142 (1) – 16 – Application of measures of intimidation and terror
- CC RS 1993 Article 142 (1) – 17 – Taking hostages

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 1993 Article 142 (1) – 18 – Imposing collective punishment
- CC RS 1993 Article 142 (1) – 19 – Unlawful bringing in concentration camps
- CC RS 1993 Article 142 (1) – 20 – Other legal arrests and detention
- CC RS 1993 Article 142 (1) – 21 – Deprivations of rights to fair and impartial trial
- CC RS 1993 Article 142 (1) – 22 – Forcible service in the enemy's army or in its intelligence service or administration
- CC RS 1993 Article 142 (1) – 23 – Forcible labour
- CC RS 1993 Article 142 (1) – 24 – Starvation
- CC RS 1993 Article 142 (1) – 25 – Property confiscation
- CC RS 1993 Article 142 (1) – 26 – Pillaging
- CC RS 1993 Article 142 (1) – 27 – Destruction and stealing of property
- CC RS 1993 Article 142 (1) – 28 – Taking an illegal and disproportionate contribution or requisition
- CC RS 1993 Article 142 (1) – 29 – Devaluating of domestic money or the unlawful issuance of money
- CC RS 1993 Article 142 (2) – 1 – Attack against object specifically protected by international law
- CC RS 1993 Article 142 (2) – 2 – Attack against objects and facilities with dangerous power
- CC RS 1993 Article 142 (2) – 3 – Targeting indiscriminately of civilian objects, undefended places and demilitarized zones
- CC RS 1993 Article 142 (2) – 4 – Environmental devastation
- CC RS 1993 Article 142 (3) – Resettlement

CC RS 1993 (143)- War crime against the wounded and sick

- CC RS 1993 Article 143 (1) – 1 – Murder
- CC RS 1993 Article 143 (1) – 2 – Torture
- CC RS 1993 Article 143 (1) – 3 – Inhuman treatment

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 1993 Article 143 (1) – 4 – Scientific experiments
- CC RS 1993 Article 143 (1) – 5 – Taking of tissue or organs
- CC RS 1993 Article 143 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC RS 1993 Article 143 (1) – 7 – Destruction
- CC RS 1993 Article 143 (1) – 8 – Appropriation

CC RS 1993 (144)- War crime against prisoners of war

- CC RS 1993 Article 144 (1) – 1 – Murder
- CC RS 1993 Article 144 (1) – 2 – Torture
- CC RS 1993 Article 144 (1) – 3 – Inhuman treatment
- CC RS 1993 Article 144 (1) – 4 – Scientific experiments
- CC RS 1993 Article 144 (1) – 5 – Taking of tissue or organs
- CC RS 1993 Article 144 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC RS 1993 Article 144 (1) – 7 – Compulsive enlistment
- CC RS 1993 Article 144 (1) – 8 – Deprivation of the right to a fair and impartial trial

CC RS 1993 (145)- Organizing group of people and instigation

- CC RS 1993 Article 145 (1) – Organising a group
- CC RS 1993 Article 145 (2) – Membership in a group
- CC RS 1993 Article 145 (3) – Member exposing the rest of the group
- CC RS 1993 Article 145 (4) – Instigation

CC RS 1993 (146)- Unlawful killing or wounding of the enemy

- CC RS 1993 Article 146 (1) – 1 – Killing enemy
- CC RS 1993 Article 146 (1) – 2 – Wounding enemy
- CC RS 1993 Article 146 (2) – 1 – Killing committed in a cruel or insidious way
- CC RS 1993 Article 146 (2) – 2 – Killing committed out of greed or from other base motives

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 1993 Article 146 (2) – 3 – More persons have been killed
- CC RS 1993 Article 146 (3) – No surviving enemies

CC RS 1993 (147)- Marauding

- CC RS 1993 Article 147 (1) – Appropriation
- CC RS 1993 Article 147 (2) – Appropriation in a cruel manner

CC RS 1993 (148)- Making use of forbidden means of warfare

- CC RS 1993 Article 148 (1) – The use of means or practices of warfare prohibited by the rules of international law
- CC RS 1993 Article 148 (2) – Several persons have been killed

CC RS 1993 (149)- Violating the protection granted to bearers of flags and truce

- CC RS 1993 Article 149 (1) – 1 – Insults
- CC RS 1993 Article 149 (1) – 2 – Maltreats
- CC RS 1993 Article 149 (1) – 3 – Detains
- CC RS 1993 Article 149 (1) – 4 – Prevents from returning
- CC RS 1993 Article 149 (1) – 5 – Other violations of privilege

CC RS 1993 (150)- Cruel treatment of the wounded, sick and prisoners of war

- CC RS 1993 Article 150 (1) – 1 – Cruel treatment
- CC RS 1993 Article 150 (1) – 2 – Impedes or prevents from exercising rights

CC RS 1993 (150a)- Unwarranted delay of repatriation of prisoners of war

- CC RS 1993 Article 150a (1) – Unwarranted delay of repatriation

CC RS 1993 (151)- Destruction of cultural and historical monuments

- CC RS 1993 Article 151 (1) – Destroys

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 1993 Article 151 (2) – Destroying of a clearly distinguishable object under special protection of international law

CC RS 1993 (152)- Instigating an aggressive war

- CC RS 1993 Article 152 (1) – Calls on or instigates an aggressive war

CC RS 1993 (153)- Misuse of international emblems

- CC RS 1993 Article 153 (1) – Misuses or carries without authorization
- CC RS 1993 Article 153 (2) – Misuses or carries without authorization within a zone of war operations

CC RS 2000 (432)- Genocide

- CC RS 2000 Article 432 (1) – 1 – Killing
- CC RS 2000 Article 432 (1) – 2 – Inflicting of serious bodily injuries
- CC RS 2000 Article 432 (1) – 3 – Inflicting of serious disturbance of physical or mental health
- CC RS 2000 Article 432 (1) – 4 – Forcible dislocation
- CC RS 2000 Article 432 (1) – 5 – Inflicting conditions of life
- CC RS 2000 Article 432 (1) – 6 – Imposing measures to prevent births
- CC RS 2000 Article 432 (1) – 7 – Forcibly transferring children

CC RS 2000 (433)- War crimes against civilians

- CC RS 2000 Article 433 (1) – 1 – Attack resulting in death
- CC RS 2000 Article 433 (1) – 2 – Attack resulting in grave bodily injuries
- CC RS 2000 Article 433 (1) – 3 – Attack resulting in serious damaging of people's health
- CC RS 2000 Article 433 (1) – 4 – Indiscriminate attack without selecting a target
- CC RS 2000 Article 433 (1) – 5 – Killing
- CC RS 2000 Article 433 (1) – 6 – Torture
- CC RS 2000 Article 433 (1) – 7 – Inhuman treatment

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 2000 Article 433 (1) – 8 – Scientific experiments
- CC RS 2000 Article 433 (1) – 9 – Taking of tissue or organs
- CC RS 2000 Article 433 (1) – 10 – Immense suffering or violation of bodily integrity or health
- CC RS 2000 Article 433 (1) – 11 – Dislocation
- CC RS 2000 Article 433 (1) – 12 – Displacement
- CC RS 2000 Article 433 (1) – 13 – Forcible conversion
- CC RS 2000 Article 433 (1) – 14 – Forcible prostitution
- CC RS 2000 Article 433 (1) – 15 – Rape
- CC RS 2000 Article 433 (1) – 16 – Application of measures of intimidation and terror
- CC RS 2000 Article 433 (1) – 17 – Taking hostages
- CC RS 2000 Article 433 (1) – 18 – Imposing collective punishment
- CC RS 2000 Article 433 (1) – 19 – Unlawful bringing in concentration camps
- CC RS 2000 Article 433 (1) – 20 – Other legal arrests and detention
- CC RS 2000 Article 433 (1) – 21 – Deprivations of rights to fair and impartial trial
- CC RS 2000 Article 433 (1) – 22 – Forcible service in the enemy's army
- CC RS 2000 Article 433 (1) – 23 – Forcible labour
- CC RS 2000 Article 433 (1) – 24 – Starvation
- CC RS 2000 Article 433 (1) – 25 – Property confiscation
- CC RS 2000 Article 433 (1) – 26 – Pillaging
- CC RS 2000 Article 433 (1) – 27 – Destruction and stealing of property
- CC RS 2000 Article 433 (1) – 28 – Taking an illegal and disproportionate contribution or requisition
- CC RS 2000 Article 433 (1) – 29 – Devaluating of domestic money or the unlawful issuance of money

PURL: https://www.legal-tools.org/doc/688146/

- CC RS 2000 Article 433 (2) – 1 – Attack against object specifically protected by international law
- CC RS 2000 Article 433 (2) – 2 – Attack against objects and facilities with dangerous power
- CC RS 2000 Article 433 (2) – 3 – Targeting indiscriminately of civilian objects
- CC RS 2000 Article 433 (2) – 4 – Environmental devastation
- CC RS 2000 Article 433 (3) – Resettlement

CC RS 2000 (434)- War crimes against the wounded and sick

- CC RS 2000 Article 434 (1) – 1 – Murder
- CC RS 2000 Article 434 (1) – 2 – Torture
- CC RS 2000 Article 434 (1) – 3 – Inhuman treatment
- CC RS 2000 Article 434 (1) – 4 – Scientific experiments
- CC RS 2000 Article 434 (1) – 5 – Taking of tissue or organs
- CC RS 2000 Article 434 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC RS 2000 Article 434 (1) – 7 – Destruction
- CC RS 2000 Article 434 (1) – 8 – Appropriation

CC RS 2000 (435)- War crimes against prisoners of war

- CC RS 2000 Article 435 (1) – 1 – Murder
- CC RS 2000 Article 435 (1) – 2 – Torture
- CC RS 2000 Article 435 (1) – 3 – Inhuman treatment
- CC RS 2000 Article 435 (1) – 4 – Scientific experiments
- CC RS 2000 Article 435 (1) – 5 – Taking of tissue or organs
- CC RS 2000 Article 435 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC RS 2000 Article 435 (1) – 7 – Compulsive enlistment
- CC RS 2000 Article 435 (1) – 8 – Deprivation of the right to a fair and impartial trial

PURL: https://www.legal-tools.org/doc/688146/

CC RS 2000 (436)- War crimes committed by use of forbidden means of warfare
- CC RS 2000 Article 436 (1) – The use of means or practices of warfare prohibited by the rules of international law
- CC RS 2000 Article 436 (2) – Several persons have been killed

CC RS 2000 (437)- Organizing group of people and instigation
- CC RS 2000 Article 437 (1) – Organising a group
- CC RS 2000 Article 437 (2) – Membership in a group
- CC RS 2000 Article 437 (3) – Preventing the commission or exposing
- CC RS 2000 Article 437 (4) – Instigation

CC RS 2000 (438)- Unlawful killing or wounding the enemy
- CC RS 2000 Article 438 (1) – 1 – Killing enemy
- CC RS 2000 Article 438 (1) – 2 – Wounding enemy
- CC RS 2000 Article 438 (2) – 1 – Killing committed in a cruel or insidious way
- CC RS 2000 Article 438 (2) – 2 – Killing committed out of greed or from other base motives
- CC RS 2000 Article 438 (2) – 3 – More persons have been killed
- CC RS 2000 Article 438 (3) – No surviving enemies

CC RS 2000 (439)- Marauding
- CC RS 2000 Article 439 (1) – Appropriation
- CC RS 2000 Article 439 (2) – Appropriation in a cruel manner

CC RS 2000 (440)- Violating the protection granted to bearers of flags of truce
- CC RS 2000 Article 440 (1) – 1 – Insults
- CC RS 2000 Article 440 (1) – 2 – Maltreats
- CC RS 2000 Article 440 (1) – 3 – Detains
- CC RS 2000 Article 440 (1) – 4 – Prevents from returning
- CC RS 2000 Article 440 (1) – 5 – Other violations of privilege

PURL: https://www.legal-tools.org/doc/688146/

CC RS 2000 (441)- Cruel treatment of the wounded, sick and the prisoners of war

- CC RS 2000 Article 441 (1) – 1 – Cruel treatment
- CC RS 2000 Article 441 (1) – 2 – Impedes or prevents from exercising rights

CC RS 2000 (442)- Unjustified delay of the repatriation of prisoners of war

- CC RS 2000 Article 442 (1) – Unjustified delay of repatriation

CC RS 2000 (443)- Destruction of cultural and historical monuments

- CC RS 2000 Article 443 (1) – Destroys
- CC RS 2000 Article 443 (2) – Destroys object under special protection of the international law

CC RS 2000 (444)- Instigating an aggressive war

- CC RS 2000 Article 444 (1) – Calls on or instigates an aggressive war

CC RS 2000 (445)- Misuse of international emblems

- CC RS 2000 Article 445 (1) – Misuses or carries without authorization

CC SFRY 141- Genocide

- CC SFRY Article 141 (1) – 1 – Killing
- CC SFRY Article 141 (1) – 2 – Inflicting of serious bodily injuries
- CC SFRY Article 141 (1) – 3 – Inflicting of serious disturbance of physical or mental health
- CC SFRY Article 141 (1) – 4 – Forcible dislocation
- CC SFRY Article 141 (1) – 5 – Inflicting conditions of life
- CC SFRY Article 141 (1) – 6 – Imposing measures to prevent births
- CC SFRY Article 141 (1) – 7 – Forcibly transferring children

CC SFRY 142- War crime against the civilian population

- CC SFRY Article 142 (1) – 1 – Attack resulting in death

PURL: https://www.legal-tools.org/doc/688146/

- CC SFRY Article 142 (1) – 2 – Attack resulting in grave bodily injuries
- CC SFRY Article 142 (1) – 3 – Attack resulting in serious damaging of people's health
- CC SFRY Article 142 (1) – 4 – Indiscriminate attack without selecting a target
- CC SFRY Article 142 (1) – 5 – Killing
- CC SFRY Article 142 (1) – 6 – Torture
- CC SFRY Article 142 (1) – 7 – Inhuman treatment
- CC SFRY Article 142 (1) – 8 – Scientific experiments
- CC SFRY Article 142 (1) – 9 – Taking of tissue or organs
- CC SFRY Article 142 (1) – 10 – Immense suffering or violation of bodily integrity or health
- CC SFRY Article 142 (1) – 11 – Dislocation
- CC SFRY Article 142 (1) – 12 – Displacement
- CC SFRY Article 142 (1) – 13 – Forcible conversion
- CC SFRY Article 142 (1) – 14 – Forcible prostitution
- CC SFRY Article 142 (1) – 15 – Rape
- CC SFRY Article 142 (1) – 16 – Application of measures of intimidation and terror
- CC SFRY Article 142 (1) – 17 – Taking hostages
- CC SFRY Article 142 (1) – 18 – Imposing collective punishment
- CC SFRY Article 142 (1) – 19 – Unlawful bringing in concentration camps
- CC SFRY Article 142 (1) – 20 – Other legal arrests and detention
- CC SFRY Article 142 (1) – 21 – Deprivations of rights to fair and impartial trial
- CC SFRY Article 142 (1) – 22 – Forcible service in the enemy's army or in its intelligence service or administration
- CC SFRY Article 142 (1) – 23 – Forcible labour
- CC SFRY Article 142 (1) – 24 – Starvation
- CC SFRY Article 142 (1) – 25 – Property confiscation

PURL: https://www.legal-tools.org/doc/688146/

- CC SFRY Article 142 (1) – 26 – Pillaging
- CC SFRY Article 142 (1) – 27 – Destruction and stealing of property
- CC SFRY Article 142 (1) – 28 – Taking an illegal and disproportionate contribution or requisition
- CC SFRY Article 142 (1) – 29 – Devaluating of domestic money or the unlawful issuance of money
- CC SFRY Article 142 (2) – 1 – Attack against object specifically protected by international law
- CC SFRY Article 142 (2) – 2 – Attack against objects and facilities with dangerous power
- CC SFRY Article 142 (2) – 3 – Targeting indiscriminately of civilian objects, undefended places and demilitarized zones
- CC SFRY Article 142 (2) – 4 – Environmental devastation
- CC SFRY Article 142 (3) – Resettlement

CC SFRY 143- War crime against the wounded and sick

- CC SFRY Article 143 (1) – 1 – Murder
- CC SFRY Article 143 (1) – 2 – Torture
- CC SFRY Article 143 (1) – 3 – Inhuman treatment
- CC SFRY Article 143 (1) – 4 – Scientific experiments
- CC SFRY Article 143 (1) – 5 – Taking of tissue or organs
- CC SFRY Article 143 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC SFRY Article 143 (1) – 7 – Destruction
- CC SFRY Article 143 (1) – 8 – Appropriation

CC SFRY 144- War crime against prisoners of war

- CC SFRY Article 144 (1) – 1 – Murder
- CC SFRY Article 144 (1) – 2 – Torture
- CC SFRY Article 144 (1) – 3 – Inhuman treatment
- CC SFRY Article 144 (1) – 4 – Scientific experiments
- CC SFRY Article 144 (1) – 5 – Taking of tissue or organs

PURL: https://www.legal-tools.org/doc/688146/

- CC SFRY Article 144 (1) – 6 – Causing of great suffering or serious injury to bodily integrity or health
- CC SFRY Article 144 (1) – 7 – Compulsive enlistment
- CC SFRY Article 144 (1) – 8 – Deprivation of the right to a fair and impartial trial

CC SFRY 145 - Organizing group of people and instigation

- CC SFRY Article 145 (1) – Organising a group
- CC SFRY Article 145 (2) – Membership in a group
- CC SFRY Article 145 (3) – Member exposing the rest of the group
- CC SFRY Article 145 (4) – Instigation

CC SFRY 146- Unlawful killing or wounding of the enemy

- CC SFRY Article 146 (1) – 1 – Killing enemy
- CC SFRY Article 146 (1) – 2 – Wounding enemy
- CC SFRY Article 146 (2) – 1 – Killing committed in a cruel or insidious way
- CC SFRY Article 146 (2) – 2 – Killing committed out of greed or from other base motives
- CC SFRY Article 146 (2) – 3 – More persons have been killed
- CC SFRY Article 146 (3) – No surviving enemies

CC SFRY 147- Marauding

- CC SFRY Article 147 (1) – Appropriation
- CC SFRY Article 147 (2) – Appropriation in a cruel manner

CC SFRY 148- Making use of forbidden means of warfare

- CC SFRY Article 148 (1) – The use of means or practices of warfare prohibited by the rules of international law
- CC SFRY Article 148 (2) – Several persons have been killed

CC SFRY 149- Violating the protection granted to bearers of flags and truce

- CC SFRY Article 149 (1) – 1 – Insults
- CC SFRY Article 149 (1) – 2 – Maltreats
- CC SFRY Article 149 (1) – 3 – Detains

PURL: https://www.legal-tools.org/doc/688146/

- CC SFRY Article 149 (1) – 4 – Prevents from returning
- CC SFRY Article 149 (1) – 5 – Other violations of privilege

CC SFRY 150- Cruel treatment of the wounded, sick and prisoners of war

- CC SFRY Article 150 (1) – 1 – Cruel treatment
- CC SFRY Article 150 (1) – 2 – Impedes or prevents from exercising rights

CC SFRY 150a- Unwarranted delay of repatriation of prisoners of war

- CC SFRY Article 150a (1) – Unwarranted delay of repatriation

CC SFRY 151- Destruction of cultural and historical monuments

- CC SFRY Article 151 (1) – Destroys
- CC SFRY Article 151 (2) – Destroying of a clearly distinguishable object under special protection of international law

CC SFRY 152- Instigating an aggressive war

- CC SFRY Article 152 (1) – Calls on or instigates an aggressive war

CC SFRY 153- Misuse of international emblems

- CC SFRY Article 153 (1) – Misuses or carries without authorization
- CC SFRY Article 153 (2) – Misuses or carries without authorization within a zone of war operations

[Tick boxes to implement for other suspects in the case file]

18) Interests violated by alleged crime(s)[20] **[For every suspect at the level of incident.]**

[Violated interests]

[Drop down; leave option for multiple choices of categories; after each category leave narrative box for optional specification]

- Continued existence of a group

[20] The specific conduct alleged may be elaborated in the narrative box (for example, killing, inhuman treatment, disappearance, bodily injury etc.).

PURL: https://www.legal-tools.org/doc/688146/

- Individual life
- Physical and mental integrity
- Personal liberty
- Freedom of religion
- Right to fair and impartial trial
- Freedom of movement
- Property
- Environment
- International symbols
- Other *[field for specification]*

[Tick boxes to implement for other suspects in the case file]

19) Participation of suspect in crime(s) **[For every suspect.]**

[Mode(s) of liability]
[Drop down; leave option for multiple choices of categories]

- Perpetration
- Attempt
- Joint perpetration
- Inciting/Instigating
- Aiding and abetting
- Planning
- Ordering
- Superior responsibility
- Conspiracy
- Preparation
- Associating three or more persons with an aim of perpetrating criminal offences
- Perpetration as a member of an organised criminal group
- Accessory after the fact

[Tick boxes to implement for other suspects in the case file]

20) Aggravating circumstances characterising alleged conduct of suspect **[For every suspect.]**

[Aggravation]
[Tick list, where more than one option can be chosen]

PURL: https://www.legal-tools.org/doc/688146/

- Commission of crime resulted in grave violation of interest
- Persistence in commission of the criminal offence
- Commission of the crime by particularly hazardous means
- Abuse of power or official capacity
- Commission of the crime where the victim is particularly defenceless
- Commission of the crime with particular cruelty or where there were multiple victims
- Commission of the crime for any discriminatory motive of any kind
- Other *[field for specification]*

[Tick boxes to implement for other suspects in the case file]

21) Estimated number of victims[21] **[For every incident.]**

[No. of victims]
[First empty field and then alternative from-to field]
[Tick boxes to implement for other suspects in the case file]

22) Identity of majority of victims[22] **[For every incident.]**

[Victim identity]
[Drop down based on 1991 Census]
- Bosniak
- Croat
- Serb
- Other
- Yugoslav
- Unknown

[Tick boxes to implement for other suspects in the case file]

[21] Number of victims is to be estimated if not already specified in the case file.

[22] 'Identity of majority of victims' strictly follows the 1991 Census, with one addition, the category of 'unknown', for practical purposes of populating this database.

PURL: https://www.legal-tools.org/doc/688146/

23) Municipality and place where victims resided prior to the breakout of the war in 1992 **[For every incident.]**

[Victim residency]
[Drop down based on 1991 Census breakdown of municipalities; multiple municipalities possible for one incident.]
[Tick boxes to implement for other suspects in the case file]

24) Known, particular practical problems **[For every suspect.]**

[Practical problems]
[Drop down]
- Evidence collection
- Arrest
- Custody
- Availability of suspect/accused
- Witnesses
    - General availability of witness[23]
    - Potentially required measures
        - Witness support
        - Witness protection
- Other *[fill in a blank box]*

[Tick boxes to implement for other suspects in the case file]

[23] This refers to whether the potential witness has been identified and initial contact made or whether the witness is able and willing to testify.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

Annex 2:

National War Crimes Strategy Adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008*

1. Introduction

In the period from 1992 to 1995, Bosnia and Herzegovina was the site of large-scale armed conflicts characterized by severe, systematic and mass violations of the international humanitarian law. The war consequently resulted in the loss of many lives, numerous refugees and displaced persons, a large number of people still missing and other grave violations of the fundamental human rights and freedoms. Preventing impunity and facing the events from the recent past is recognized as one of the basic preconditions for gradual reconciliation and progress of Bosnia and Herzegovina both internally and externally in the process of European integration. The first step in facing the past is the prosecution and sanctioning of persons responsible of crimes against humanity and values protected by international humanitarian law. There is a clear determination of the State of Bosnia and Herzegovina and the international community to take a more efficient and comprehensive approach to the issue of prosecution of war crimes cases.[1] In that regard, the Security Council resolutions 808 of 22 February 1993 and 827 of 25 May 1993 established the International Criminal Tribu-

* For editorial reasons, Annex B to Annex 2 has been exised in this book. The figures in Annex B may be obtained from the government of Bosnia and Herzegovina.

1 The term 'war crimes' as used in the Strategy refers to criminal offenses committed during the war in BiH (1992-1995), prescribed under Chapter XVII of the Criminal Code of Bosnia and Herzegovina 'Crimes against humanity and values protected by international law' committed in relation to the war in BiH.

PURL: https://www.legal-tools.org/doc/688146/

nal for former Yugoslavia (ICTY) with the objective of prosecuting the perpetrators of crimes against humanity and war crimes. In light of Resolution 1503 of 28 August 2003 on the completion of the work of the ICTY, departments for war crimes were established within the Court and the Prosecutor's Office of Bosnia and Herzegovina (BiH) whose task was to continue the work on war crimes cases in accordance with the highest international standards in the areas of criminal law and protection of human rights. In addition, courts and prosecutor's offices in the entities and Brčko District also have jurisdiction for the prosecution of these cases.

Given the mass character of the committed violations of international humanitarian law, numerous persons responsible for these violations remain at large and there are a large number of outstanding cases. The State of Bosnia and Herzegovina is faced with the lack of a comprehensive method in the process of resolving these issues.

In an attempt to come up with a systematic approach to the issue of resolving a large number of war crimes cases, which is the basic task of this Strategy, the Ministry of Justice of BiH established in September 2007 *the Working Group for developing the National Strategy for war crimes and dealing with the issues related to war crimes*. The judicial aspects of the issue of resolving the war crime cases are the primary focus in preparing the Strategy. The Strategy is complementary to the Justice Sector Reform Strategy adopted by the BiH Council of Ministers and will be complementary to the transitional justice strategy.

1.1. Rationale for drafting the strategy

a. Existence of a large number of outstanding war crimes cases that require systematic approach in order to prevent impunity and facilitate prosecution of all or at least most of the perpetrators in a reasonable period of time;
b. Lack of centralized, precise and qualitative statistical data on the number and nature of war crimes cases currently being prosecuted, which serve as indicators of the efficiency of prosecution and which are necessary for the purpose of planning investments in the human and material resources. It is extremely important

PURL: https://www.legal-tools.org/doc/688146/

that the Strategy sets up and updates a centralized record of all war crimes cases in the BiH judiciary;

c. The lack of harmonization of court practice in war crimes cases prosecuted before the courts in the entities, Brčko District and the Court of BiH. The absence of mechanisms for harmonizing the court practice on the territory of BiH in the area of war crimes, as well as the application of several criminal codes, resulted in different courts adopting opposing views on the same legal matters, both in relation to the substantive law applied to war crimes cases and the pronouncement of criminal sanctions for identical or similar criminal offenses of war crimes. This is a serious infringement on the constitutional principles of legal certainty and equality of citizens before the law;

d. Deficiencies in the management of war crimes cases as of 2003 when the new criminal legislation came into effect providing for an exclusive jurisdiction of the Court of BiH and the Prosecutor's Office of BiH over the prosecution of war crimes cases, while a large number of cases remained within jurisdiction of other courts and prosecutor's offices;

e. Inconsistent practice of the review, takeover and transfer of war crimes cases between the Court and the Prosecutor's Office and other courts and prosecutor's offices, and the lack of agreed upon criteria for the assessment of sensitivity and complexity of cases;

f. Unsatisfactory degree of co-operation on the regional level in the work on war crimes cases;

g. Insufficient support and protection of witnesses and victims in war crimes cases before the courts and prosecutor's offices across BiH.

1.2. Objectives and anticipated results

a. Prosecute the most complex and top priority war crimes cases within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy;

b. Centralize and update at the level of the Court and Prosecutor's Office of BiH the record of all war crimes cases pending before the BiH judiciary;

PURL: https://www.legal-tools.org/doc/688146/

c. Ensure a functional mechanism of the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities and of Brčko District that will facilitate efficient prosecution within the set timeframe;
d. Prosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria;
e. Harmonize the court practice in war crimes cases in order to ensure legal certainty and equality of citizens before the law;
f. Strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases;
g. Establish a more efficient co-operation with countries in the region concerning war crimes cases for the sake of prosperity in the whole region;
h. Provide protection, support and same treatment to all victims and witnesses in the proceedings before all courts in BiH;
i. Establish an appropriate legal framework for the implementation of measures adopted in the Strategy and the accomplishment of its objectives.

This Strategy shall have no bearing on the duty of all courts and prosecutor's offices in BiH to continue their work on war crimes cases without any delay and in accordance with the existing laws.[2]

2. Efficiency in the Prosecution of War Crimes Cases

This part deals with the mutually related issues, namely: data on the number of cases and their structure; what is the impact of the number and structure of cases on the use of the existing material and human resources in the judiciary and the need for future investment in these resources; management of a large number of cases in terms of their distribution between the state-level judiciary and judiciaries of the enti-

[2] Parts of the text in bold serve to mark a special importance of particular issues and objectives that the Strategy seeks to accomplish.

PURL: https://www.legal-tools.org/doc/688146/

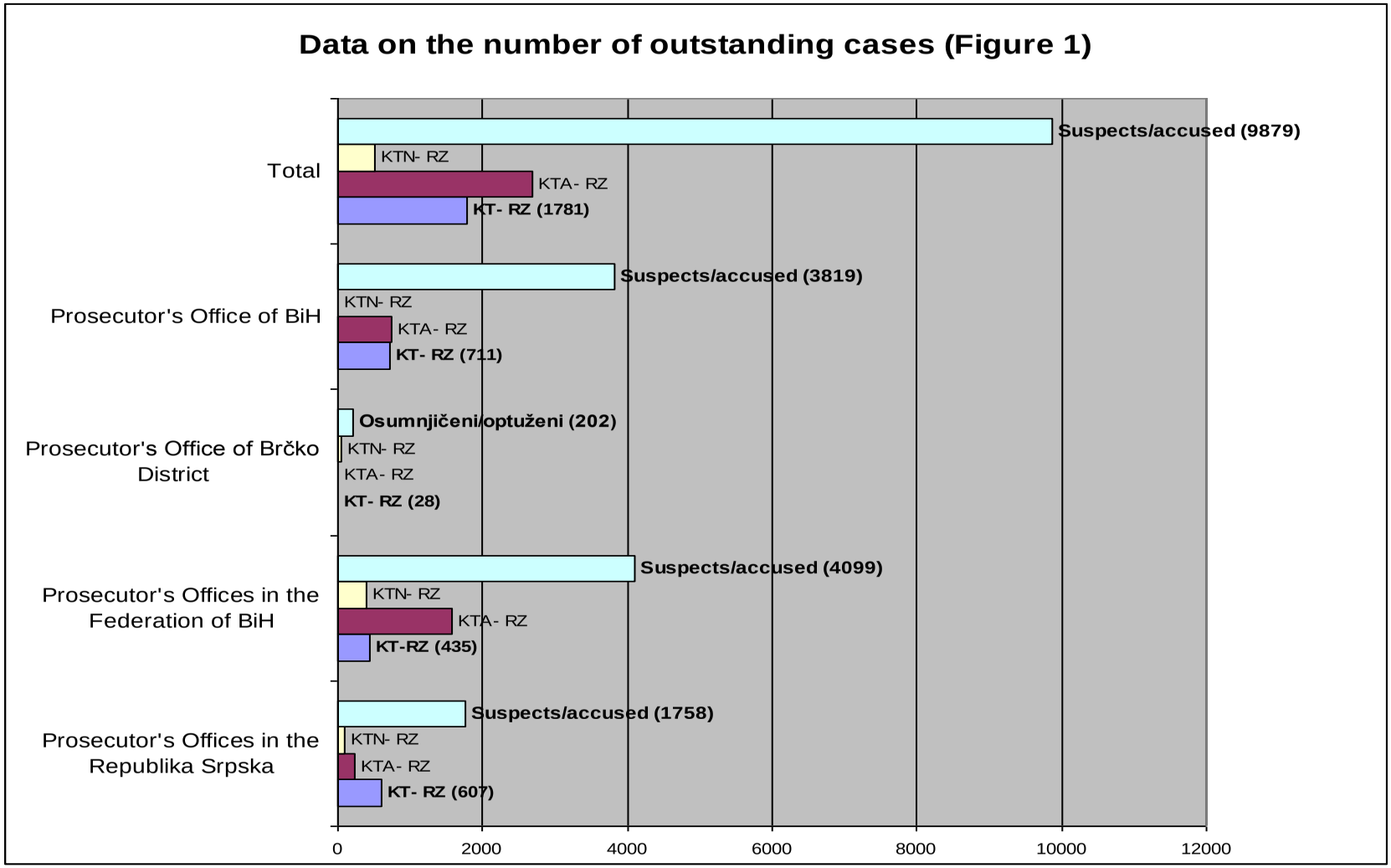
ties and of Brčko District; and harmonization of the court practice relative to the application of substantive law in war crimes cases.

2.1. Case data

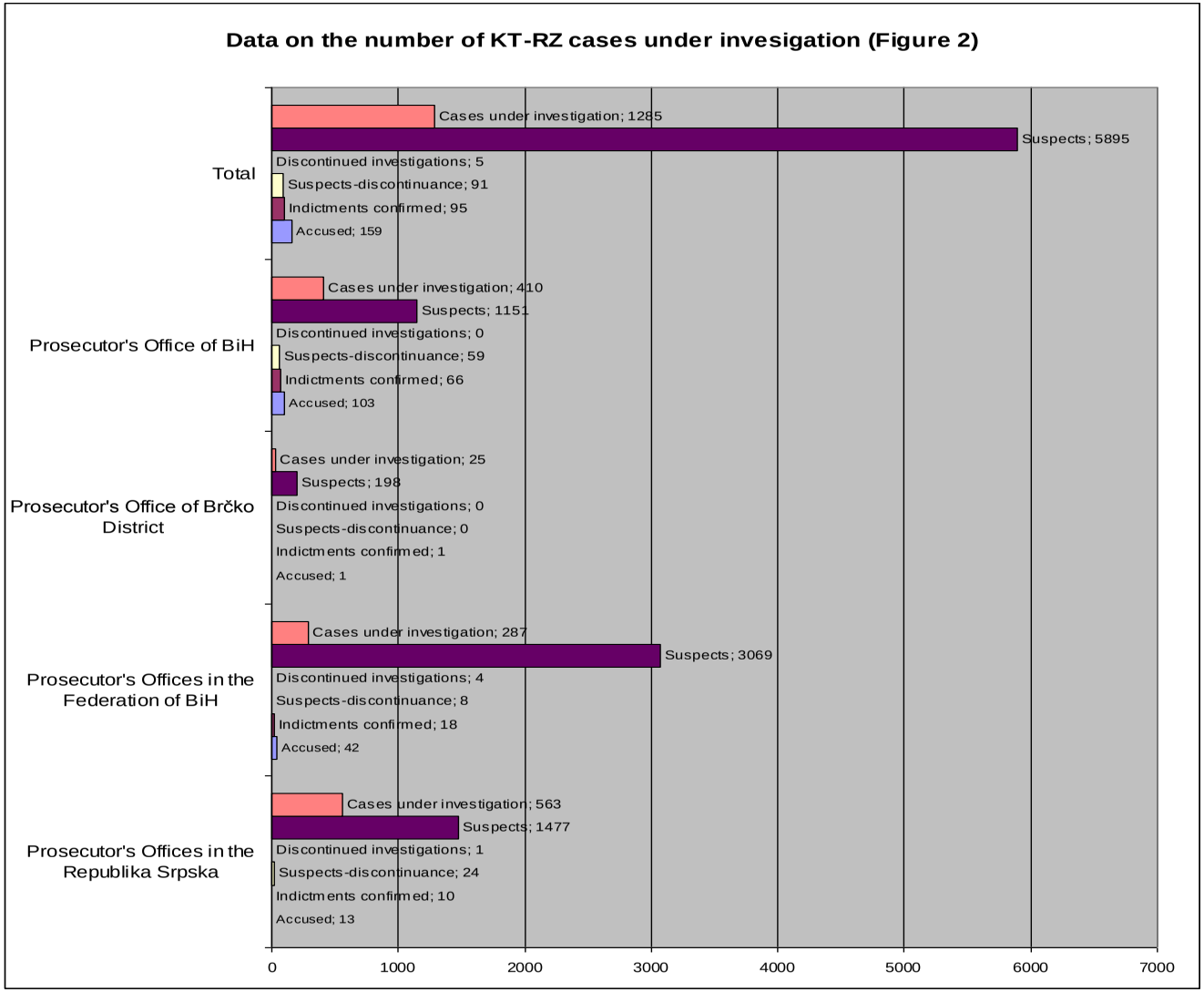
The existence of centralized, precise and qualitative statistical data about the number and nature of war crimes cases currently being prosecuted is one of the necessary preconditions for the development of an efficient strategic plan that will have realistic implications on the resources. It was established that this centralized approach to the data collection and processing did not previously exist in the work on war crimes cases in BiH. There is an indisputable resolve on the part of the State of Bosnia and Herzegovina to establish a centralized record of all war crimes cases pending before domestic judiciary that will be regularly updated. As a first step in realizing this objective, presented here is the table with the number of outstanding cases before the courts and prosecutor's offices in BiH up to 1 October 2008. The chart (Figure 1) shows a total number of outstanding war crimes cases (KTA-RZ, KTA-RZ, KTN-RZ)[3] pending before the Prosecutor's Office of BiH and prosecutor's offices in the Republika Srpska, Federation of BiH and Brčko District of BiH. Other charts that follow (Figures 2, 3 and 4) show the number of cases under investigation before the prosecutor's offices in BiH, the number of cases in which a first-instance or a second-instance verdict has been rendered within the last year, as well as the structure of outstanding cases, that is, the ratio between the cases under investigation and finalized cases.

[3] KT-RZ marks the war crimes cases where the perpetrator is known, KTN-RZ marks the war crimes cases where the perpetrators are unknown, whereas KTA-RZ marks the cases in which the existence of the criminal offense of war crimes has not been established with certainty, as well as different criminal cases related to war crimes cases.

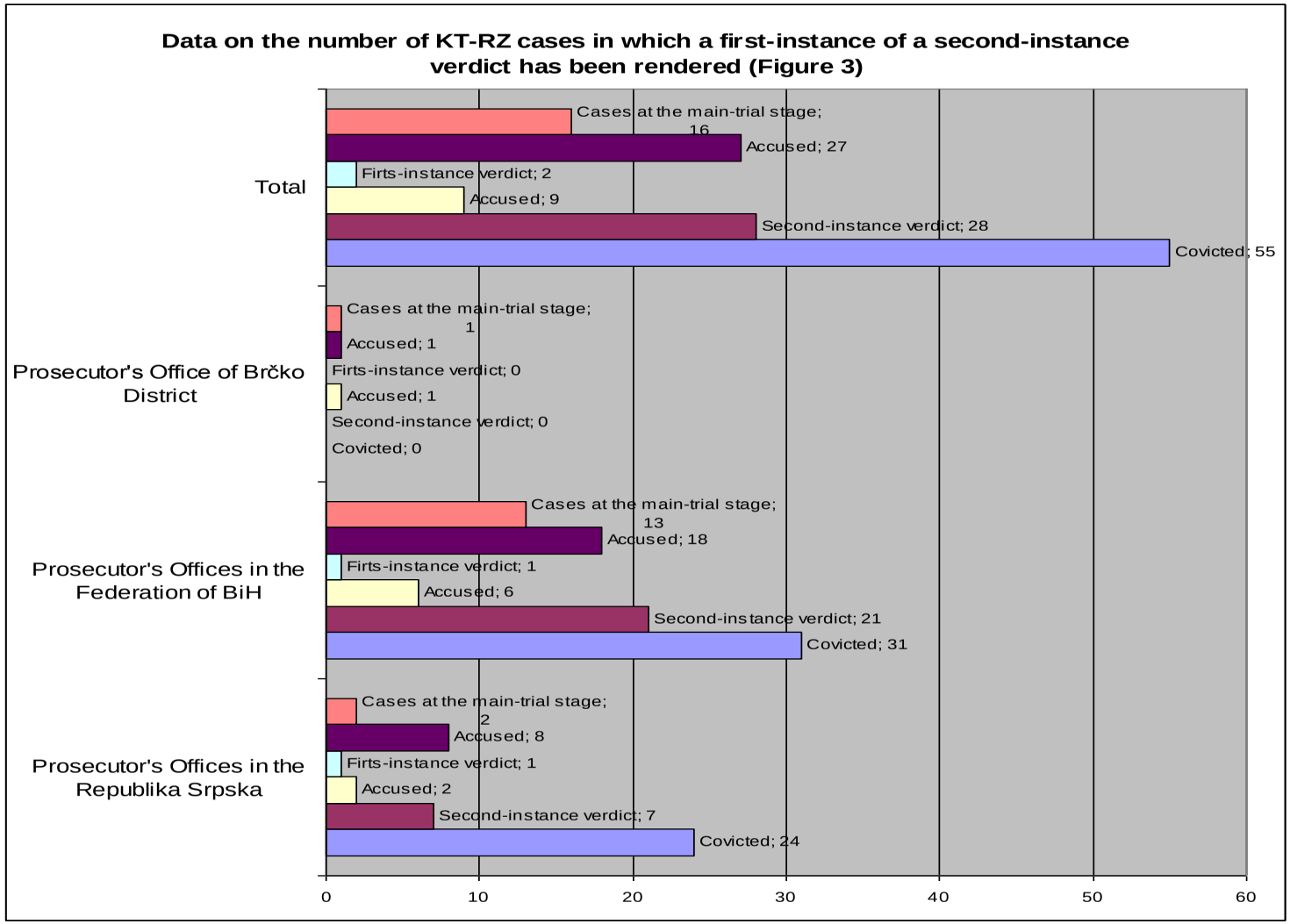
PURL: https://www.legal-tools.org/doc/688146/



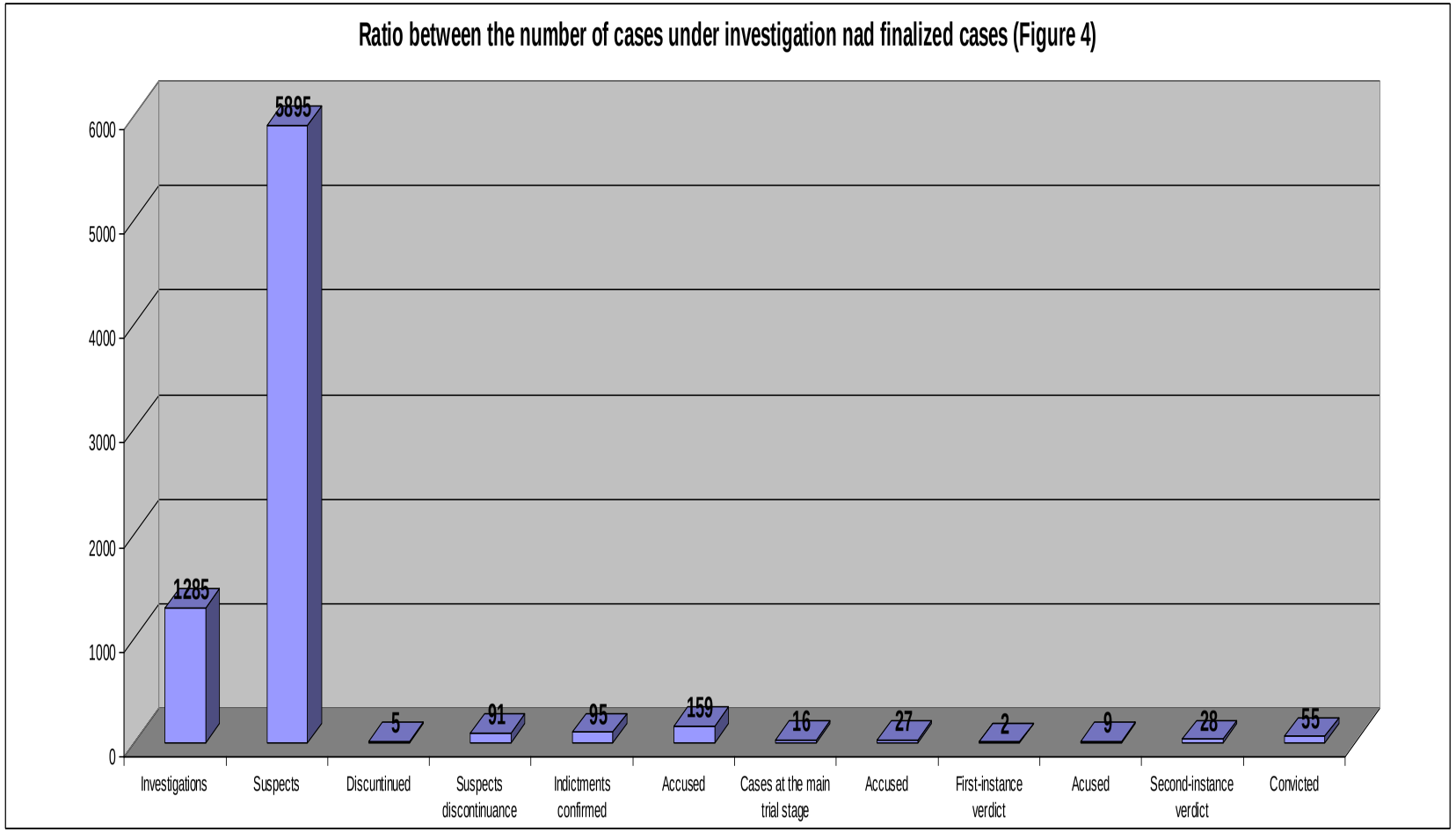
PURL: https://www.legal-tools.org/doc/688146/



PURL: https://www.legal-tools.org/doc/688146/



PURL: https://www.legal-tools.org/doc/688146/



PURL: https://www.legal-tools.org/doc/688146/

Centralized record

As the second step towards establishing a centralized record, the Prosecutor's Office of BiH shall, within 30 days from the date of the adoption of the Strategy, establish a centralized record of all outstanding war crimes cases in BiH, which will be regularly updated. The record will contain all the necessary information about the number and structure of cases to help a more efficient and complete implementation of measures from this Strategy, especially the distribution of cases between the courts and prosecutor's offices in BiH.[1] The implementation of other measures adopted in the Strategy will not depend on the development and finalization of the work on establishing the record. The centralized record is a strategic measure that is meant to reinforce the implementation of other measures defined in the Strategy. The Prosecutor's Office of BiH will ensure both permanent human and material resources for continuous work on the centralized record. All prosecutor's offices in BiH will regularly submit reports on war crimes cases to the Prosecutor's Office of BiH.

The Court of BiH will keep a centralized and updated record on the number of confirmed indictments, and first instance and final verdicts rendered in war crimes cases before the courts in BiH as of 1 March 2003, that is, since the time the Court of BiH has subject-matter jurisdiction over war crimes cases. In that regard, courts in BiH will, within 30 days from the date of the adoption of the Strategy, submit to the Court of BiH the data on war crimes cases pending before those courts and report regularly to the Court of BiH about war crimes cases, that is, about confirmed/amended indictments and rendered first instance and second instance verdicts.

2.2. Management of cases

Given all the complexity of the issue of jurisdiction over war crimes cases, difficulties were identified in finding a functional mechanism for the distribution of cases between the Court and the Prosecutor's

[1] The underlined parts of the text mark concrete measures that need to be taken in order to accomplish the goals set in the Strategy and will be listed in the table of strategic measures at the end of the text.

PURL: https://www.legal-tools.org/doc/688146/

Office of BiH and other courts and prosecutor's offices that beyond any doubt need to continue the work on a large number of these cases. Defining a functional mechanism is a necessary step to relieve the capacity of the Court and the Prosecutor's Office of BiH for them to be able to focus on the prosecution of the top priority and most complex cases. This will also ensure maximum use of the existing human and infrastructure capacity of all courts and prosecutor's offices in the country.

With respect to the structure of war crimes cases, it is necessary to distinguish between two groups of cases:

I. group includes war crimes cases that were received to be worked on following the entry into force of the new criminal legislation on 1 March 2003. All such cases, in accordance with the law, fall under the exclusive jurisdiction of the Court and the Prosecutor's Office of BiH and can be transferred to other courts and prosecutor's offices only in accordance with Article 27 of the Criminal Procedure Code of BiH (BiH CPC) (*by transfer of jurisdiction)*. Up until 1 October 2008, the Prosecutor's Office of BiH had 565 such cases on the record.

II. group, including most of the outstanding cases, includes war crimes cases that were received to be worked on by the courts and prosecutor's offices in the entities and Brčko District of BiH before the entry into force of the BiH CPC in 2003, in which the indictment did not take legal effect, that is, it was not confirmed. These courts and prosecutor's offices are obliged to complete these cases unless the Court of BiH decides to take over such a case. Up until 1 October 2008, the Prosecutor's Office of BiH had 146 such cases taken over by the Decision of the Court of BiH on the record, whereas the prosecutor's offices in the entities and Brčko District had a total of 1,070 of such cases (see the Table showing the number of cases from group I and II, Figure 5).

PURL: https://www.legal-tools.org/doc/688146/

Figure 5.

Institution	*Group I cases up to 1 October 2008*	*Group II cases up to 1 October 2008*
Prosecutor's Office of BiH	565	146
Prosecutor's offices in the entities and Brčko District		1,070

There is a clear resolve on the part of the State of BiH that the most complex war crimes cases from both of these groups be prosecuted before the Court and the Prosecutor's Office of BiH and that the cases deemed to be less complex be prosecuted before the cantonal or district courts and prosecutor's offices of the entities and the Basic Court and Prosecutor's Office of Brčko District of BiH. The criteria agreed upon and outlined in Annex A of the Strategy shall be used when evaluating the complexity of cases, based on which cases will then be distributed between the Court/Prosecutor's Office of BiH and other courts/prosecutor's offices.

Group I cases

I. Cases from group I will be ceded/transferred in such a way that the Prosecutor's Office of BiH files to the Court of BiH a proposal for the transfer of conduct of proceedings, and then the Court makes a decision on transfer based on the agreed upon case complexity criteria. The Prosecutor's Office of BiH will, at the earliest possible stage of the proceedings, apply the agreed upon case complexity criteria and based on them file to the Court a proposal for the transfer of conduct of proceedings.

A decision of the Court of BiH on the transfer of conduct of proceedings may entail an obligation of the court or the prosecutor's office to which the case is being transferred to apply in the proceedings the substantive law of Bosnia and Herzegovina, which prescribes crimes against humanity and values protected by international law.

The existing legal mechanism for the transfer of cases set out in Article 27 of the BiH CPC proved inefficient for the transfer of less

PURL: https://www.legal-tools.org/doc/688146/

complex war crimes cases. Although Article 27 provides for the possibility of the Court of BiH to transfer conduct of the proceedings for a criminal offense that falls within its jurisdiction to other courts if there are 'strong reasons', it was rarely applied in practice due to different interpretations of the legal standard 'strong reasons'. Therefore, it is necessary to significantly modify and adapt it for the purpose of the distribution of war crimes cases among the courts in BiH.

In view of the above, immediately upon the adoption of the Strategy, provisions of the BiH CPC on the transfer of conduct of the proceedings in war crimes cases will be amended in an urgent procedure in order to create an efficient mechanism to be applied in the cases of transfer of less complex cases to the entity prosecutor's offices and courts. Another matter to be considered is potential introduction of Article 27a concerning the transfer of conduct of the proceedings exclusively in war crimes cases, which will incorporate the following criteria for transfer:

a) instead of the existing standard 'strong reasons', explicitly allow for the possibility of the transfer of less complex war crimes cases to other courts and prosecutor's offices by applying the criteria agreed upon between the Court and the Prosecutor's Office of BiH;
b) explicitly allow for the possibility that the Prosecutor's Office of BiH proposes to the Court of BiH to transfer conduct of the proceedings in the investigation stage and not only after filing of the indictment;
c) provide a mechanism to be used by the Court of BiH for monitoring all war crimes cases transferred from its original jurisdiction for the purpose of harmonizing court practice on the issue of the application of substantive law to war crimes offenses.

The Ministry of Justice of BiH shall establish within 15 days a working group to include representatives of the Court of BiH and the Prosecutor's Office of BiH with a task to draft proposed amendments to the existing legislation in order to ensure the implementation of the objectives set above. The working group is obliged to submit the proposed amendments within 15 days following its establishment.

PURL: https://www.legal-tools.org/doc/688146/

In order to put in motion an efficient mechanism of oversight and supervision of cases transferred by the Court of BiH from its original jurisdiction, the courts and prosecutor's offices to which the Court of BiH transferred conduct of the proceedings will regularly report to the Court of BiH on the course of the proceedings, including: confirmation/amendment of the indictment and the rendering of the first instance and second instance verdicts.

Immediately upon the adoption of the Strategy, the Prosecutor's Office of BiH shall submit to the Court of BiH the report on Group I cases (Annex B of the Strategy) containing sufficient information for the Court of BiH to be able to have insight into the number and complexity of these cases, so as to plan the capacity required for a trial and potential rendering of a decision on transfer of conduct of the proceedings in accordance with Article 27 of the BiH CPC.

Group II cases

II. A large portion of the total number of outstanding war crimes cases belong to the second group of cases that were received to be worked on by the courts and prosecutor's offices in BiH before the entry into force of the new criminal legislation in March 2003. Some of these cases were previously subject to the assessment of their sensitivity by the Prosecutor's Office of BiH. For a certain number of cases from group II deemed as 'very sensitive', the Prosecutor's Office of BiH filed to the Court of BiH a proposal for takeover in accordance with Article 449, paragraph 2 of the BiH CPC, whereas the cases deemed as 'sensitive' as well as the cases that have not been reviewed by the Prosecutor's Office of BiH are currently being worked on by the cantonal and district courts and prosecutor's offices and the court and prosecutor's office of Brčko District.

According to Article 449, paragraph 2 of the BiH CPC, the courts with territorial jurisdiction are obliged to finalize these cases unless the Court of BiH decides to take over such a case. According to the currently available information, there were a total of 1,216 such cases up until 1 October 2008. Out of this number the Court of BiH decided on 161 requests for takeover in accordance with Article 449, paragraph 2 and in 136 cases made a decision on takeover.

PURL: https://www.legal-tools.org/doc/688146/

However, Article 449 of the BiH CPC does not entail an explicit obligation of the courts and prosecutor's offices to report to the Court of BiH on the cases that at the time of entry into force of the law were pending before these courts and prosecutor's offices. For this reason the Court of BiH, except for 161 requests for takeover, did not have insight into a large number of cases and hence it could not even consider their potential takeover *ex officio* in accordance with Article 449, paragraph 2, that is, it could take over cases only upon the proposal of the parties. Therefore, there is a possibility that a certain number of more complex cases that should be prosecuted before the Court of BiH is currently pending before the entity courts and prosecutor's offices and the court and prosecutor's office of Brčko District.

Accordingly, immediately after the adoption of the Strategy, the entity prosecutor's offices, Prosecutor's Office of Brčko District as well as the Prosecutor's Office of BiH will submit to the Court of BiH a report on cases (Annex B of this Strategy) that will contain sufficient information for the Court of BiH to have insight into the number and degree of complexity of these cases for the purpose of potentially making a decision *ex officio* in accordance with Article 449, paragraph 2.

The provision of Article 449 of the BiH CPC on takeover of war crimes cases should be amended in an urgent procedure in order to allow for the application of case complexity criteria in the same manner as is the case with the transfer of conduct of the proceedings.

Case complexity criteria

In order for the selection and assessment of complexity of cases to be done in a uniform and objective manner, informing the process of making a decision on the takeover or transfer of a case, the Court and the Prosecutor's Office of BiH, with the participation of the RS Prosecutor's Office, FBiH Prosecutor's Office, the RS Supreme Court, the Prosecutor's Office of Brčko District BiH, the FBiH Supreme Court, the Appellate Court of Brčko District BiH and assisted by the ICTY, drafted the agreed upon Case Complexity Criteria incorporating the standards that are a result of the practice of international criminal courts. These Criteria are integral part of the Strategy and are outlined in Annex A.

PURL: https://www.legal-tools.org/doc/688146/

The Court and the Prosecutor's Office of BiH shall hold regular meetings aimed at ensuring consistent application of the agreed upon criteria.

Harmonization of court practice

The State of Bosnia and Herzegovina is obliged to provide to its citizens legal certainty on its territory, which is a constituent element of the principle of rule of law in a democratic society. Over the last 15 years, which is the period of time in which the proceedings against perpetrators of war crimes have been conducted, an inconsistent court practice developed as a result of the application of different substantive regulations and opposing interpretations of temporal application of the law. There were significant discrepancies in the proceedings as to the legal qualification of identical or similar offenses committed during the war, as well as uneven sentencing and pronouncement of criminal sanctions for these offenses, which jeopardized the principle of legal certainty and equality of citizens before the law.

In the case number AP 1785/06 Decision dated 30 March 2007, the Constitutional Court of BiH ruled that the court practice in war crimes cases required urgent harmonization. The importance of this Decision lies in the principled position of the Constitutional Court of BiH on justifiability of the application of the existing Criminal Code of BiH in the prosecution and punishment of war crimes offenses based on Article 4a) and Article 7(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, and obligation of the entity courts to follow the practice of the Court of BiH in relation to these cases.

With the objective of ensuring a harmonized court practice and respect for the principle of equality of citizens before the law, Article 13 of the Law on the Court of BiH, as well as the laws on courts of the entities and Brčko District, shall be amended to include regular joint sessions of the Department for War Crimes – Appellate Division of the Court of BiH, the entity Supreme Courts and the Appellate Court of Brčko District where joint positions would be taken exclusively in relation to war crimes cases. The positions taken would be a result of the exchange of legal views from the final court decisions and although

PURL: https://www.legal-tools.org/doc/688146/

not binding, they could serve as guidelines to the courts when acting upon cases with similar facts and circumstances. In addition, harmonization of the court practice will also be facilitated by decisions of the Court of BiH on the transfer of cases, in which the court or prosecutor's office to which proceedings are being transferred may be obliged to apply the substantive law of Bosnia and Herzegovina therein.

By applying the existing provision contained in Article 13 of the Law on the Court of BiH, the Court of BiH shall issue binding directions containing the Court's interpretation in relation to the applicable substantive law in war crimes cases.

Also, for the sake of harmonization of court practice, the entity courts and the court of Brčko District will attempt when trying the war crimes cases to follow the case law of the Court of BiH, and whenever possible to apply the provisions of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Court in BiH, particularly the provision that allows for the possibility of accepting as proven facts established in the legally binding decisions of the ICTY. When investigating the war crimes cases, prosecutor's offices in the entities and in Brčko District will also use the analytical and legal support of the ICTY and the Prosecutor's Office of BiH.

2.3. Prosecution capacities

The available analyses and assessments of the High Judicial and Prosecutorial Council of BiH identified limitations in terms of the human and material-technical resources of the judicial system and police structures for the prosecution of war crimes. Figures 6, 7 and 8 show tables on human resources in the courts, prosecutor's offices and police bodies in BiH.

PURL: https://www.legal-tools.org/doc/688146/

Figure 6. Human resources of the prosecutor's offices for the work on war crimes cases

Name of the prosecutor's office	*Total number of prosecutors*	*Number of prosecutors working on war crimes cases*	*War Crimes Department*	*Total number of legal officers*	*Number of legal officers working on war crimes cases*	*Number of investigators working on war crimes cases*
Prosecutor's Office of BiH	37	9	x	24	9	4
FBiH Prosecutor's Office	9	9		0	0	0
RS Prosecutor's Office	4	3	x	0	0	0
Public Prosecutor's Office of Brčko District of BiH	8	6	It will commence operation on 1 November 2008	2	0	0
Una-Sana Cantonal Prosecutor's Office	19	2	x	1	0	0
Posavina Cantonal Prosecutor's Office	2	0		1	0	0
Prosecutor's Office of Tuzla Canton	35	4	x	1	1	0
Prosecutor's Office of Zenica-Doboj Canton	24	4	x	0	0	0
Bosnia-Podrinje Cantonal Prosecutor's Office	2	2		0	0	0
Central Bosnia Cantonal Prosecutor's Office	14	4	x	1	0	0
Herzegovina-Neretva Can-	18	4	x	1	0	0

PURL: https://www.legal-tools.org/doc/688146/

tonal Prosecutor's Office						
West Herzegovina Cantonal Prosecutor's Office	4	0		0	0	0
Prosecutor's Office of Sarajevo Canton	40	7	x	9	0	0
Prosecutor's Office of Livno Canton	5	5		1	0	0
District Prosecutor's Office in Banja Luka	35	1	x	1	0	0
District Prosecutor's Office in Bijeljina	11	2	x	2	0	0

Figure 7. Human resources of the courts for the work on war crimes cases

Name of the court	*Number of judges in the Criminal Division*	*Number of judges working on war crimes cases*	*War Crimes Department*	*Number of legal officers in the Criminal Division*	*Number of legal officers working on war crimes cases*
Court of BiH	40+1 (President of the Court)	24 (18 judges acting in the first instance and 6 judges in the Appellate Division)	x	40	16
FBiH Supreme Court	7	7		0	0
RS Supreme Court	7	2 (In general, war crimes cases may be assigned to any judge in		0	0

PURL: https://www.legal-tools.org/doc/688146/

		the Criminal Division)			
Appellate Court of Brčko District of BiH	Criminal Division has not been established	2		0	0
Cantonal Court in Bihać	4	1		0	0
Cantonal Court in Odžak	3	0 (The Court does not have any war crimes cases before it)		0	0
Cantonal Court in Tuzla	5	2		0	0
Cantonal Court in Zenica	4	4		1	0
Cantonal Court in Goražde	4	0 (The Court does not have any war crimes cases before it)		0	0
Cantonal Court in Novi Travnik	3	3		0	0
Cantonal Court in Mostar	2	2		0	0
Cantonal Court in Široki Brijeg	2	0 (The Court does not have any war crimes cases before it)		0	0
Cantonal Court in Sarajevo	7	7		2	0
Cantonal Court in Livno	4	4		0	0
District Court in Banja Luka	7	2		0	0
District Court in Bijeljina	4	0 (The Court does not have any war		0	0

PURL: https://www.legal-tools.org/doc/688146/

		crimes cases before it)			
District Court in Doboj	4	0 (The Court does not have any war crimes cases before it)		1	0
District Court in Trebinje	5 (One judge specializes in criminal cases and other judges participate in the work of the criminal panel whenever required)	1		0	0
District Court in East Sarajevo	3	1 (In general, war crimes cases may be assigned to any judge in the Criminal Division, in addition to one judge assigned to work on war crimes cases)		0	0
Basic Court in Brčko District of BiH	3	War crimes cases may be assigned to any judge in the Criminal Division		0	0

PURL: https://www.legal-tools.org/doc/688146/

Figure 8. Human resources of the police bodies for the work on war crimes cases

Name of the police body	*Organizational unit (name)*	*Number of police officers assigned to work on war crimes cases in the systematization of posts*	*Number of filled-in position of police officers assigned to work on war crimes cases - current situation*	*Number of police officers assigned to work on the protection of witnesses*
State Investigation and Protection Agency (SIPA)	Centre for Investigation of War Crimes and Crimes Punishable under International War and Humanitarian Law	Crime Police inspectors 91 Civil servants 8 Employees 7	Crime Police inspectors 59 Civil servants 7 Employees 6	Systemized 32/ filled-in 24 (Crime Police inspectors 25/19 Civil servants 5/ 3 Employees 2/2)
PSC Banja Luka	War Crimes Investigations Department	Head of Department 1 Crime Police inspectors 8	Head of Department 1 Crime Police inspectors 8	
PSC Doboj	War Crimes Investigations Section	Head of Section 1 Crime Police inspectors 4	Head of Section 1 Crime Police inspectors 4	
PSC Bijeljina	War Crimes Investigations Section	Head of Section 1 Crime Police inspectors 4	Head of Section 1 Crime Police inspectors 4	
PSC Istočno Sarajevo	War Crimes Investigations Department	Head of Department 1 Crime Police inspectors 5	Head of Department 1 Crime Police inspectors 4	
PSC Trebinje	War Crimes Investigations Section	Head of Section 1 Crime Police inspectors 2	Head of Section 0 Crime Police inspectors 1	
Sarajevo Canton MoI - Sarajevo	Section for Violent Crimes, Sexual Offenses and War Crimes[2]	Head of Section 1 Inspectors 2 Junior inspectors 6 Senior sergeants	Head of Section 0 Inspectors 0 Junior inspectors 1 Senior sergeants	

[2] Pursuant to legal authority of the cantonal MoIs, Sarajevo Canton MoI has no special organizational unit working on war crimes cases. The work on collecting the information about war crimes is done by the Section for Violent Crimes, Sexual Offenses and War Crimes of the General Crimes Department of the Crime Police Sector. The Book of Rules on Internal Organization of Sarajevo Canton MoI foresees 11 posts for authorized official persons, without a specific mention of the number of police officers assigned to work on war crimes cases.

PURL: https://www.legal-tools.org/doc/688146/

		2	1	
Tuzla Canton MoI - Tuzla	General Crimes Department[3]	Head of Department 1 Inspectors 1 Junior inspectors 4 Senior sergeants 2	Police officers 4	
Una-Sana Canton MoI - Bihać	War Crimes Department	Head of Department 1 Inspectors 2 Junior inspectors 2	Head of Department 1 Inspectors 2 Senior sergeants 1	
Herzegovina-Neretva Canton MoI - Mostar	General Crime Prevention and Detection Division[4]			
Zenica-Doboj Canton MoI - Zenica	Section for Investigation of Crimes against Humanity and Values Protected by International Law	Head of Section 1 Senior inspectors 1 Inspectors 3 Junior inspectors 3	Head of Section 1 Senior inspectors 0 Inspectors 3 Junior inspectors 0	
West Herzegovina Canton MoI - Ljubuški[5]				
Central Bosnia MoI - Travnik	War Crimes Division[6]	Head of Section 1 Inspectors 4	Head of Section 0 Inspectors 0	

[3] Tuzla Canton MoI – Tuzla has no special organizational unit working exclusively on war crimes cases. The need for a unit to work on war crimes cases saw the establishment of a team within the General Crimes Department.

[4] Crime Police Sector has no special working posts for war crimes cases foreseen in its Rulebook on Systematization. This Sector will, however, follow the HJPC recommendations and foresee in the Rulebook a section for work on war crimes cases within the General Crime Prevention and Detection Division and staff it accordingly upon the adoption of the amended Rulebook on Systematization.

[5] West Herzegovina Canton has no special organizational unit for investigation of war crimes cases, nor does it have any investigators assigned to work on war crimes issues. If need be, police officers of the Division for Prevention of General Crimes shall take over such tasks and act upon them.

[6] The process of amending the Rulebook on Systematization of MoI Travnik for the purpose of establishing War Crimes Division within the Crime Police Sector of MoI Travnik is currently underway.

PURL: https://www.legal-tools.org/doc/688146/

		Junior inspectors 3	Junior inspectors 1	
Canton Livno MoI - Livno	General Crimes Section	Team Leader 1 Inspector 1 Junior inspector 1	Crime investigator 1	
Posavina Canton MoI -Orašje	Investigations Division[7]		Head of Section Inspectors 1 Junior inspectors 3	
Bosnia-Podrinje Canton MoI - Goražde	Criminal Investigations Department	Inspectors 2[8]		
Police of Brčko District of BiH	Team for Crimes against Humanity and Values Protected by International Law		Investigators 6 Police officers 2	
Federation of BiH MoI	War Crimes Section	Head of Section 1 Investigators 4 Analyst 1		

By combining the data shown in the tables with the data related to the number of cases, the following results were obtained pertaining to the existing human resources for the conduct of investigations and trials (see Figures 9 and 10).

[7] There is no special organizational unit for war crimes cases in Posavina Canton MoI. The Investigations Division employs a Head of Division and 4 investigators who also work on war crimes cases when required.

[8] Job description for inspector/investigator posts for violent crimes in the Criminal Investigations Department includes work on war crimes cases.

PURL: https://www.legal-tools.org/doc/688146/

Figure 9. Existing resources for investigations in war crimes cases

	KT – investigations		KTA cases	Relevant police body		Judiciary	
	Case	Persons		Foreseen	Staffed	Prosecutors	Legal officers
Prosecutor's Office of BiH	410	1,151	870	106	72	18	9 (+ 4 investigators)
Tuzla Cantonal Prosecutor's Office	34	516	318	8	4	4	1
Bihać Cantonal Prosecutor's Office	74	258	463	5	4	2	0
Orašje Cantonal Prosecutor's Office	0	0	88		5	0	0
Livno Cantonal Prosecutor's Office	15	98	3	3	1	5	0
Goražde Cantonal Prosecutor's Office	1	1	31	2		2	0
Široki Brijeg Cantonal Prosecutor's Office	0	0	0				
Travnik Cantonal Prosecutor's Office	22	278	0	8	1	4	0
Zenica Cantonal Prosecutor's Office	10	125	67	8	4	4	0
Mostar Cantonal Prosecutor's Office	51	503	125			4	0
Sarajevo Cantonal Prosecutor's Office	80	1290	488	11	2	7	0
Public Prosecutor's Office of Brčko District	25	198	7		8	6	0
District Prosecutor's Office in Bijeljina	28	103	8	5	5	2	0
District Prosecutor's Office in Banja Luka	10	55	153	9	9	1	0

PURL: https://www.legal-tools.org/doc/688146/

District Prosecutor's Office in Doboj	428	514	69	5	5	3	3
District Prosecutor's Office in Trebinje	27	267	0	3	1	5	0
District Prosecutor's Office in Istočno Sarajevo	70	538	2	6	5	1	1
TOTAL	1,285	5,895	2,692	179	126	59	14

Figure 10. Existing resources for trials in war crimes cases

	Prosecutor's offices- resources			***Courts- resources***	
	Prosecutors	***Legal officers***		***Judges***	***Legal officers***
Prosecutor's Office of BiH	18	9	***Court of BiH***	24	16
FBiH Prosecutor's Office	9	0	***RS Supreme Court***	7	0
RS Prosecutor's Office	3	0	***FBiH Supreme Court***	2	0
Public Prosecutor's Office of Brčko District of BiH	6	0	***Appellate Court of Brčko District of BiH***	2	0
Una-Sana Cantonal Prosecutor's Office	2	0	***Cantonal Court in Bihać***	1	0
Posavina Cantonal Prosecutor's Office	0	0	***Cantonal Court in Odžak***	0	0
Prosecutor's Office of Tuzla Canton	4	1	***Cantonal Court in Tuzla***	2	0
Prosecutor's Office of Zenica-Doboj Canton	4	0	***Cantonal Court in Zenica***	4	0

PURL: https://www.legal-tools.org/doc/688146/

Bosnia-Podrinje Cantonal Prosecutor's Office	2	0	***Cantonal Court in Goražde***	0	0
Central Bosnia Cantonal Prosecutor's Office	4	0	***Cantonal Court in Novi Travnik***	3	0
Herzegovina-Neretva Cantonal Prosecutor's Office	4	0	***Cantonal Court in Mostar***	2	0
West Herzegovina Cantonal Prosecutor's Office	0	0	***Cantonal Court in Široki Brijeg***	0	0
Prosecutor's Office of Sarajevo Canton	7	0	***Cantonal Court in Sarajevo***	7	0
Prosecutor's Office of Livno Canton	5	0	***Cantonal Court in Livno***	4	0
District Prosecutor's Office in Banja Luka	1	0	***District Court in Banja Luka***	2	0
District Prosecutor's Office in Bijeljina	2	0	***District Court in Bijeljina***	0	0
District Prosecutor's Office in Doboj	3	3	***District Court in Doboj***	0	0
District Prosecutor's Office in Trebinje	5	0	***District Court in Trebinje***	1	0
District Prosecutor's Office in Istočno Sarajevo	1	1	***District Court in Istočno Sarajevo***	1	0
			Basic Court in Brčko District of BiH	War crimes cases are assigned to all judges sitting on the criminal division	0

With respect to the number of cases under investigation (410), the above statistics show that the only two bodies with human re-

PURL: https://www.legal-tools.org/doc/688146/

sources sufficient for the prosecution of war crimes cases are the Prosecutor's Office of BiH and SIPA, which also have the required support in terms of sufficient number of legal officers, advisors and investigators. Given the number of outstanding cases under investigation (875 cases), the capacities of other prosecutor's offices, and the police bodies in the entities are substantially lower than those of the Prosecutor's Office of BiH, for only a small number of legal officers work on war crimes cases, and the human resources in the police bodies, both in terms of the positions foreseen and those staffed are substantially lesser in number than those available to SIPA.

A similar situation is found with trial capacities. The comparison of data obtained at different levels shows marked negative discrepancy in human resources of the courts and prosecutor's offices of the entities compared with those of the Court and the Prosector's Office of BiH, where the current number of judges, prosecutors and legal officers can meet the prosecution dynamics given the current number of war crimes cases (711 cases at the state-level).

What is required is constant and planned investments in material and human resources, because the existing capacities of the judiciary at a general level can hardly meet the demands of a significantly larger number of prosecutions. Most of the courts are not equipped with proper courtrooms; the prosecutor's offices do not have adequate rooms for parallel interviews or a sufficient number of lock-up rooms. In the organizational structure of most district/cantonal courts and prosecutor's offices, as well as police bodies, there are no special departments for war crimes, nor is there a sufficient number of legal officers and advisors, that is, investigators who would assist the judges and prosecutors in the work on war crimes cases. Material resources of relevant police bodies that need to support the judiciary is also limited in terms of resources and technical equipment available to them.

Financial potential of the state and the entities is limited. Funds are projected and based on the development plans and none of these development plans included investments for the work on war crimes cases. There are no financial plans that would include costs of the proceedings, costs of the *ex officio* defense, and witness and expert-witness costs, that will increase proportionately to the increase in the

PURL: https://www.legal-tools.org/doc/688146/

number of cases prosecuted. The costs of detention and costs of serving the criminal sanction will also see a proportional increase.

An additional problem in terms of the effective use of human resources lies in the lack of specialized education in the area of domestic and international criminal and humanitarian law.

Finally, judges and prosecutors are not adequately evaluated for their work on complex and long-lasting war crimes cases. Their performance is evaluated according to the set norms that apply generally to all types of criminal offenses, without taking into consideration the criterion of complexity, length and specific nature of war crimes cases.

Based on a financial assessment of the costs and dynamics of war crimes cases completed thus far, the HJPC shall, in cooperation with relevant ministries and in joint undertaking with courts and prosecutor's offices and relevant police bodies, propose financial investments in material and human resources of judicial and police bodies, **in order to successfully prosecute war crimes within the deadline of 15 years** (7 years for the top priority cases), as envisaged by the Strategy.

By using the above-mentioned financial cost-effectiveness projections for war crimes cases, the existing organizational structures of courts, prosecutor's offices and relevant police bodies shall be reviewed, and in those entity courts and prosecutor's offices where no separate departments for war crimes existed, such departments will be set up.

Where necessary, working posts shall be forseen in organizational structures of courts and prosecutor's offices for legal officers, legal advisors and potentially investigators who will assist in the work on war crimes cases. In all courts and prosecutor's offices a sufficient number of legal officers and advisors, that is, investigators, shall be recruited so as to increase efficiency in the prosecution of war crimes cases according to the defined time frames.

Ministries of justice, Judicial Commision of Brčko District and ministries of finance, in cooperation with the HJPC and other relevant bodies shall ensure necessary material-technical resources indispensable for the work of courts, prosecutor's offices and police bodies on

PURL: https://www.legal-tools.org/doc/688146/

war crimes cases, including the resources required for implementation of witness protection and support measures, as well as additional resources for the work of the established departments for war crimes.

In order to ensure high standards in the prosecution of war crimes in BiH, the HJPC will design and implement a program of specialized education of judges and prosecutors. In co-operation with the judicial education centers, educational programs in the area of substantive and procedural laws relevant for war crimes cases will be created, which will include training on the ICTY jurisprudence, as well as practical experience from other jurisdictions.

The HJPC will change the existing quota system for the evaluation of performance of judges and prosecutors, which is currently an obstacle for the efficient prosecution of war crimes.

3. Regional Cooperation

Open questions in the field of regional cooperation between Bosnia and Herzegovina, Republic of Serbia, Republic of Croatia and Republic of Montenegro pose challenges in achieving better efficiency in conducting investigations and bringing indictments against persons charged with war crimes. Bosnia and Herzegovina has a specific position in the region when compared to other jurisdictions: a largest number of possible investigations and indictments; unresolved war crimes cases often include very complex legal and factual matters or a large number of witnesses and victims mainly residing in or with strong personal relationships with BiH. Also, judicial bodies from neighboring states conduct criminal proceedings in some cases although the crime was committed in the territory of Bosnia and Herzegovina which is where the majority of evidence and witnesses are.

Efficient regional cooperation is particularly important for war crimes cases as almost each of such cases entails a regional aspect (pertaining to the place of perpetration, location of evidence, whereabouts of victims, witnesses, suspects or accused, or where the proceedings is conducted, and similar). The absence of a legal framework for regional cooperation, such as the ban on extradition of citizens or not allowing access to case files and evidence from other states, has

PURL: https://www.legal-tools.org/doc/688146/

negative implications on establishment of a mechanism at a regional level that would ensure successful conduct of criminal proceedings, collection of evidence such as witnesses' statements and forensic reports, that is, improvement of the witness protection program.

In 2005, inter-state agreements on cooperation were signed between chief prosecutors of Serbia, Montenegro, Croatia and Bosnia and Herzegovina in an attempt to resolve complex and frequently slow bureaucratic procedures of providing international legal assistance in criminal matters by simplifying the procedure of exchange of evidence and other information in organized crime and war crimes cases. The implementation of these agreements showed that the exchange of information and evidence between the judicial bodies of BiH, Croatia Serbia and Montenegro is possible.

These positive steps forward were, however, limited as the established cooperation mechanisms did not adequately resolve the matter of transferring war crimes cases when there is a case of plurality of criminal prosecutions and extraditions of citizens in case of dual citizenship because of clear constitutional and legal limitations in the extradition of own citizens which, in essence, prompted the whole process of regional cooperation.

The Ministry of Justice of BiH, in cooperation with the Court and the Prosecutor's Office of BiH, will expedite the activities related to the adoption of the Proposal of the Law on International Legal Assistance in Criminal Matters.

The Ministry of Justice will produce a manual for international legal assistance in criminal matters with practical examples and templates that would ensure a consistent implementation of this law.

The Court and the Prosecutor's Office of BiH, with the assistance of international organizations in BiH, shall initiate periodical meetings with delegations of representatives of prosecutor's offices and courts from the region to strengthen the mechanisms of regional judicial cooperation in criminal proceedings conducted in the war crimes cases. These meetings would be the opportunity to discuss provisions of existing bilateral and other agreements, and to identify and produce proposals of solutions in relation to:

PURL: https://www.legal-tools.org/doc/688146/

- transfer of cases at any stage of the proceedings, including the investigation stage;
- extradition of own citizens in case of dual citizenship, that is, developing a mechanism to ensure efficient cooperation in relation to extradition proceedings (possibility of transferring the case to the accused's country of the origin);
- development of a centralized data base at a regional level that would ensure access to information related to the war crimes cases and evidence;
- development and adoption of framework decisions about the arrest orders and orders for submitting evidence at the regional level, modeled on the solutions developed by the European Union;
- harmonization of constitutional and legal provisions in the countries in the region in the field of transfer of cases, extraditions, and international legal assistance in criminal matters on reciprocal basis;
- protection of witnesses and their families, and the witness protection program (change of identity and relocation of witnesses as an ultimate protection measure);
- cooperation with the ICTY;
- matters related to the ICTY archives and legacy as a rich and valuable collection of evidence, jurisprudence, and other educational material for war crimes cases.

On the basis of the proposal of judicial bodies, the governments and ministries of justice of the countries in the region will have to adopt amendments to the existing instruments and to enter into new bilateral and multilateral agreements in the field of regional cooperation. These agreements should include the possibility of subsidiary application of the European Convention on Legal Assistance in Criminal Matters, European Convention on the Transfer of Proceedings in Criminal Matters and the European Convention on Extradition, and reflect the Principles of International Cooperation in detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

PURL: https://www.legal-tools.org/doc/688146/

4. Victims and Witnesses Protection and Support

Witnesses are a most significant and most widely used means of evidence used in the courts of BiH in the war crimes cases. Considering the role of witnesses in conducting the trials and the outcome of war crimes cases, which is at times of crucial importance for successful finalization of the case, it is very important to create an atmosphere in which witnesses will give evidence free of fear or threats or pressures that may pose a threat to their lives or lives of people close to them. Accordingly, this Strategy must identify problems and suggest solutions that would improve protection and support for witnesses and victims before, during and after trials which, in turn, would contribute to war crimes trials and by that the interests of the justice and fairness.

4.1. Witness protection

In Bosnia and Herzegovina, there is a legal framework regulating the field of protection of witnesses and the procedure of ordering and implementing the measures of protection. The laws on the protection of witnesses under threat and vulnerable witnesses have been adopted at the levels of BiH, the entities and Brčko District. A separate law defining the authorities of the State Investigations and Protection Agency (the Law on the Witness Protection Program in BiH) has been adopted and is applied only at the state level. Further, there are a number of conventions and international instruments that bind BiH to ensure efficient protection of witnesses from various forms of intimidation, that is, threat for bodily integrity, life and health, and providing all measures of protection and support to the families of the witnesses and persons close to them.

The practice and analysis of prosecution of war crimes cases thus far show that the Court of BiH mainly orders such measures of protection that are applied during the proceedings (testifying via technical means for transferring image and sound) which do not come under the SIPA Witness Protection Program. The Court of BiH has full capacities for the implementation of these measures.

The organizational structure of the SIPA Witness Protection Section is adjusted for tasks and assignments related to the protection of

PURL: https://www.legal-tools.org/doc/688146/

witnesses. The unit is 80% staffed with inadequate working premises, which requires additional boosting of technical capacities. There is a need for more extensive and high-quality education and training of the staff performing tasks and assignments of offering assistance under the Law on the Witness Protection Program.

Still, the key problem in this field has been identified at cantonal and district courts where the courts, due to poor capacities and lack of adequate rooms and technical conditions, often fail to arrange that witnesses testify in accordance with the entity laws on protection of witnesses. The entities have no adequate legal framework or specialized police or other structures to enforce the protection measures for witnesses as ordered by a court, as it has been established at the state level via SIPA.

Lack of sustainable source of financing in extremely complex cases, requiring granting of special protective measures to a witness, relocation of a witness abroad and change of his/her identity, represents one of the greatest challenges to efficient implementation of witness protection measures and witness protection programs at all levels.

Very often problems are encountered with witnesses giving evidence in several criminal proceedings, when they are granted various protective measures that are not adequate and proportional to the actual risk and threat, which increases the risk of unauthorized disclosure of protected information, and causes other negative consequences for the security of the witnesses and their families.

Due to the foregoing, the legislation and by-laws in the field of witness protection will be revised in order to clarify the competencies, actions, and procedural steps of all those participating in the process of protection, that is:

Activities to adopt the proposed Law on Witness Protection Program, which was sent to the parliamentary procedure in July 2008, will be expedited.

Once the Law is adopted, organizational structure of the Witness Protection Department in the State Investigations and Protection Agency will change, it will be additionally staffed and equipped with material and technical resources, and basic and specialized training and

PURL: https://www.legal-tools.org/doc/688146/

education of officers in the field of witness protection will be organized and provided.

On the model of the Rules of Procedure of the Court of BiH, which provides for an adequate use of protective measures foreseen by the law, entity and Brčko District courts will as soon as possible adopt the necessary bylaws prescribed by the entity witness protection laws.

Prosecutor's offices and courts will during the investigation, that is, court proceedings, apply provisions on the joinder of proceedings in war crime cases that are linked in terms of facts and law. Cases will be grouped in order to avoid repeated summoning of witnesses to give evidence on identical circumstances. In proceedings before courts in BiH, attempts will be made to avoid summoning witnesses who have already given evidence at ICTY if it is possible to find another witness with credibility and direct knowledge about the same circumstances, and who was not summoned before, or was not summoned often.

Coordination will be improved, as well as exchange of information between the courts and the prosecutor's offices, on application of measures in cases when one witness gives evidence before different courts and prosecutor's offices in BiH, in order to prevent unauthorized disclosure of protected information on the witness's identity and other information.

In order to implement the measure of relocation of witnesses outside the borders of BiH, bilateral and multilateral agreements will be signed with the countries of destination and additional funds will be secured for this purpose.

4.2. Victim and witness support

Effective witness and victim support program in war crimes cases is necessary for the successful conduct of such criminal proceedings. In most cases, witnesses in war crime cases are victims themselves, or members of families of the victims and the missing persons, who fall into the risk group of persons subject to emotional reactions when testifying. It is necessary to provide support to witnesses and build capacities in this field, which will also facilitate proceedings involving numerous other criminal offences.

PURL: https://www.legal-tools.org/doc/688146/

Witness Support Section of the Court of BiH is currently the only witness and victim support unit in BiH. It offers administrative, organizational, and psychological support to witnesses, and its aim is to make the experience of testifying as painless as possible and having no consequences for the witnesses' mental health.

District/cantonal courts in BiH and the Basic Court of the Brčko District of BiH do not have witness support sections. Contacts with NGOs showed that there is some sort of witness support at the entity level, but only through two non-governmental organizations and with no coordination with courts and prosecutor's offices, or support by the ministries of justice.

Previous experience in providing witness and victim support showed that there was need for a certain type of psychological support to the foregoing group to be provided in the investigation too, with special emphasis on the support while giving a statement.

In order to strengthen the witness support in proceedings conducted before district/cantonal courts and prosecutor's offices, a network of witness and victim support at the level of entire BiH will be created and developed. Witness Support Section of the Court of BiH will play a key role in coordinating activities and will serve as a model for other offices. In order to establish this support network, capacities of local non-governmental organizations that provide psycho-social support or are already professionally working with victims and witnesses, will be used. Staffing capacities of the Centers for Social Affairs, that is, centers for mental health, which will also be used for this purpose, will be advanced.

Within the support network, regional offices for witness and victim support, which will cover courts from a certain region, will be established. Non-governmental organizations and entities that can provide such type of support will be identified for the purpose of implementing this measure. Courts will appoint coordinators who will cooperate with the regional witness support offices.

In order to ensure equal treatment of witnesses, Witness Support Section of the Court of BiH will provide professional support in the

PURL: https://www.legal-tools.org/doc/688146/

process of establishment of regional offices, training, and education of staff and cooperation on witness issues.

In every court, separate room for witnesses and support staff during testimony will be provided, in order to give necessary psychological assistance and limit the witness's exposure to unnecessary contacts with public.

Psychologist who will provide psychological support to the vulnerable witnesses when giving statement during investigation and entire proceedings will be engaged in the Prosecutor's Office of BiH, as well as the cantonal/district prosecutor's offices and the courts.

5. Financial Aspects

The implementation of the Strategy has financial implications for a large number of institutions with competencies in the justice and law enforcement sectors. This chapter points to difficulties in the process of financial planning and investment in the human and material resources that are required for the accomplishment of strategic measures, implications that the Strategy will have on mid-term budgets of the relevant institutions and proposes the method for securing the funds for the implementation of the strategy.

All fourteen governments with competencies in the justice sector and in the police bodies in BiH introduced a new system of budget planning. The innovated system and budgeting process is being applied for four years already on the level of BiH, the Federation of BiH and Republika Srpska, whereas in Brčko District and the ten cantons, this budgeting system was introduced two years ago.

According to the new budgeting system, most of the budget planning takes place in the first half of the year up until 30 June, in which period all governments make projections as to the revenue forecasts and general fiscal strategy, decide on budgeting limitations for each budgetary user for the next three years and approve the Framework Budget Document (FBD). In addition, all budgetary users are obliged to submit all the relevant information in a specially designed programming format.

PURL: https://www.legal-tools.org/doc/688146/

Fourteen governments with competencies in the justice sector and in the management of police bodies in BiH have finalized the process of planning and development of FBD for the period 2009-2011, hence putting in place a framework to be used by each government as the basis for deciding on the annual budget. FDB that was approved in 2008 is a guideline for meeting the budgeting projections in the next three years.

With respect to the implementation of the Strategy, FBD – with its focus on the existing projections in terms of spending in the justice sector as a whole, gives an overview of projected costs for the prosecution of all criminal cases, including war crimes cases.

All institutions that are to work on the implementation of the Strategy will explain in detail their financial needs supported by concrete indicators in order to achieve objectives set in the Strategy. If they are to achieve the expected results, these institutions need to have access to the higher levels of financing. The accomplishment of this goal will be a serious challenge in the forthcoming period and will have implications on the next budget cycle (the period 2010-2012) that will be initiated in the first half of 2009.

From all the above, one can make two basic observations that largely portray the current financial aspect of the problem dealt with by the Strategy:

1. There are no separate accounting and budgeting items for the resources used for war crimes cases, which is why it is not possible to develop a financial framework that would indicate the resources allocated on the annual basis to resolve war crimes cases in previous years, that is, the resources to be allocated for that purpose in the future.
2. At the time of the adoption of the Strategy, the basic preconditions for the implementation of the strategic planning of investment in capacities for the purpose of realizing the objectives and measures from the Strategy within the set deadlines were not met.

PURL: https://www.legal-tools.org/doc/688146/

The courts and prosecutor's offices in BiH and the relevant ministries of finance, in cooperation with the ministries of justice and the Judicial Commission of Brčko District, shall:

- in 2009, in all judicial institutions that work on resolving war crimes cases, identify in the bookkeeping records the budgetary items that concern war crimes cases, more precisely earmark the funds for resolving war crimes cases through the bookkeeping and budgetary practice and monitoring.
- develop a plan for resolving war crimes cases that needs to be implemented through the concept of budgetary planning, which implies preparing a detailed plan on the method for fulfillment of a strategic goal or goals of the budgetary user, name of the program and operational objectives for each of these programs, a person responsible or a program manager, performance measures (final result, output, efficiency), planned activities, the legal basis for planned activities, resources according to the economic classification and the number of employees.
- develop a separate program with quantifiable objectives and results within the budget of institutions that work on resolving war crimes cases. This will facilitate the monitoring of the efficiency of the use of resources allocated for resolving war crimes cases.

In 2009, the Ministry of Justice of BiH and the Ministry of Finance and Treasury of BiH will draft the following two documents:

(a) Review and analysis of the material-technical resources available to all institutions involved in resolving war crimes cases in BiH, as well as the analysis and comparison between the capacities and funds that are realistically available and those that are required for the implementation of the Strategy within the set deadline.

(b) Projection and long-term financial framework for full implementation of measures from the Strategy in the period 2009-2024.

6. Strategy Implementation and Supervision

For the purpose of monitoring the efficiency and quality of the implementation of measures from the Strategy and evaluation of the results

PURL: https://www.legal-tools.org/doc/688146/

accomplished in relation to those that were expected, it is necessary to establish a supervisory body that will continuously follow and give direction to the work of all institutions tasked with the implementation of strategic measures.

Appointment

At the proposal of the Ministry of Justice, Council of Ministers of BiH will establish, within 30 days from the date of the adoption of the strategy, a permanent and professional Supervisory body that will monitor the implementation of the Strategy. The Supervisory body shall include representatives of the ministries of justice, finance and treasury of BiH, the Federation of BiH, Republika Srpska and the relevant institutions of Brčko District of BiH, as well as the HJPC.

Manner of operation and support to the work of the Supervisory body

The supervisory body will meet once a month.

All entities working on the implementation of measures from the Strategy, more specifically Chief Prosecutor of the Prosecutor's Office of BiH, President of the Court of BiH, Chief Prosecutor of FBiH, Chief Prosecutor of RS, Chief Prosecutor of the Brčko District Prosecutor's Office, Presidents of the Supreme Courts of FBiH and RS, and the Appellate Court of Brčko District, and the President of the HJPC will regularly report to the Supervisory body on the actions taken, at least once a month.

The Supervisory body will report on a quarterly basis to the Council of Ministers about the implementation of measures from the Strategy. The quarterly reports to be adopted by the Council of Ministers may include proposed measures to enhance the extent of realization of strategic measures.

The Supervisory body can give instructions for the improvements in implementation of the Strategy, which cannot be in contravention with the objectives of the Strategy. The Supervisory body may also decide on the manner of participation of representatives of the civil society, media and international organizations in the process of monitoring the implementation of the Strategy.

PURL: https://www.legal-tools.org/doc/688146/

Ministry of Justice of BiH will ensure professional, administrative, and financial support to the work of the Supervisory body.

PURL: https://www.legal-tools.org/doc/688146/

[Annex A:] Criteria for the review of war crimes cases:

The Working Group for the development of the National War Crimes Prosecution Strategy has identified a need to adopt criteria for the review and evaluation of the complexity of war crimes cases. These criteria have been developed for this purpose. They are a constituent part of the National War Crimes Prosecution Strategy and are included in Annex A to the Strategy.

When these criteria were drafted, in terms of contents, the orientation criteria for sensitive 'Rules of the Road' cases dated 2004 were used, with reference to the caselaw of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court in Hague.

These criteria set out the guidelines that the Prosecutor's Office of Bosnia and Herzegovina will follow in the review of war crimes cases, in order for the Court to issue a decision whether a particular case, taking into account its complexity, would be prosecuted before the Prosecutor's Office and the Court of Bosnia and Herzegovina, or before the courts and prosecutor's offices of entities and the Brčko District of Bosnia and Herzegovina pursuant to Article 27 and Article 449 of the Criminal Procedure Code of Bosnia and Herzegovina. The Prosecutor's Office of BiH will apply these criteria to determine the level of priority of cases based on which the order of prosecuting the cases before the Court of Bosnia and Herzegovina would be determined.

There is a tendency that all material and personnel resources of the Prosecutor's Office and the Court of Bosnia and Herzegovina be channelled primarily towards the prosecution of the most complex war crimes cases, the complexity of which is determined in accordance with these criteria, and that the cases assessed as less complex be prosecuted by the courts and prosecutor's offices of entities and the Brčko District of Bosnia and Herzegovina. However, the application of these criteria does not exclude the possibility that certain cases, in the event of particular circumstances (if the perpetrator holds a public or official function; if it is necessary to provide protective measures for a witness, etc.), be prosecuted by the Prosecutor's Office and the Court

PURL: https://www.legal-tools.org/doc/688146/

of Bosnia and Herzegovina, although the level of complexity of such cases would require their prosecution before other courts and prosecutor's offices.

The term war crimes case includes any case (including cases marked as: KRI, KT, KTA, KTN) brought before any court or prosecutor's office in Bosnia and Herzegovina from 1992 onwards, containing elements of the criminal offenses as set forth under Article 171 through 183 of the Criminal Code of Bosnia and Herzegovina.

By using the stated criteria, the Court of BiH will review the complexity of cases *ex officio*, or at the proposal by parties or defence attorneys, in order to issue the decision on transferring or taking over a case pursuant to the CPC BiH. When filing the motion with the Court for transferring or taking over a case, the Prosecutor's Office of BiH will use the same criteria. Also, all courts and prosecutor's offices, by using these criteria, will file motions with the Court of BiH for taking over cases pursuant to Article 449 of the CPC BiH.

If a case meets the criteria below in terms of the gravity of criminal offense and the capacity and role of the perpetrator, whether separately or in their interconnection, and taking into account other circumstances, the proceedings will be conducted before the BiH Court. Otherwise, the case will be tried before another court in BiH pursuant to legal provisions on jurisdiction, transfer and taking over of cases.

Gravity of criminal offenses:

(a) Legal qualification of criminal offense – genocide, crimes against humanity (proving that there was a widespread and systematic attack), and war crimes against civilian population and prisoners of war, providing that some other criteria have been fulfilled as well;

(b) Mass killings (killing of a large number of persons, systematic killing);

(c) Severe forms of rape (multiple and systematic rape, establishment of detention centres for the purpose of sexual slavery);

PURL: https://www.legal-tools.org/doc/688146/

(d) Serious forms of torture (taking into account the intensity and the degree of mental and physical injuries, large scale consequences);

(e) Serious forms of unlawful detention or another severe deprivation of physical liberty (establishment of camps and detention centres, escorting to and detention in the camps and detention centres, taking into account the large scale of or particularly severe conditions during the detention);

(f) Persecution;

(g) Forced disappearance (taking into account the consequences, circumstances and the large scale of forceful disappearance);

(h) Serious forms of infliction of sufferings upon civilian population (starvation, shelling of civilian building structures, destruction of religious, cultural and historical monuments);

(i) Significant number of victims (or severe consequences suffered by the victims – degree of physical and mental suffering);

(j) Particularly insidious methods and means used in the perpetration of criminal offense;

(k) Existence of particular circumstances.

Capacity and role of the perpetrator:

(a) Duty within unit (commander in the military, police or paramilitary establishment);

(b) Managing position in camps and detention centres;

(c) Political function;

(d) Holder of a judicial office (judge, prosecutor, public attorney, attorney at law);

More serious forms and degrees of participation in the perpetration of a criminal offense (taking part in the planning and ordering of a crime; manner of perpetration; intentional and particular commitment to the planning and ordering of a crime; the degree of intent should be taken into account).

Other circumstances:

The following should be taken into account:

PURL: https://www.legal-tools.org/doc/688146/

(a) Correlation between the case and other cases and possible perpetrators;

(b) Interests of victims and witnesses (witnesses who have been granted protection measures before the ICTY and the Court of BiH – protected witnesses; necessity to provide witness protection; witnesses included in the program of protection; repentant witnesses);

(c) Consequences of the crime for the local community (demographic changes, return, possible public and social reactions or anxiety among citizens and the consequences for the public order in relation to the perpetration or prosecution of the crime).

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

INDEX

A

Abbreviated Criminal Procedure, 6, 65
Alleged Criminal Incidents, 64, 75
Alternative Justice, 65
Arrest Potential, 99, 100, 104, 109

B

Backlog, 1, 4, 6, 54, 55, 60, 64, 72, 81, 126
Book of Rules on the Review of War Crimes Cases, 61, 115, 132
Brčko District
  Courts, 13, 44
  Prosecutor's Office, 18

C

Cambodia, Extraordinary Chambers of the Court, 123
Case File, 5, 56, 57, 60, 64, 65, 73, 88, 129
Categories of Cases, 56, 60, 85
Category 2 cases, 57, 58
Chief Laboratory, 5, 98
Classification, 64, 105
Collegium of Prosecutors of BiH, 59, 115
Community Impact of Crimes, 97, 101, 114, 120, 125
Community Impact of Prosecutions, 98, 102, 103, 114
Completeness of Evidence, 103, 104
Completion Strategy, 6, 57, 110
Confidentiality, 70
Constitutional Court of BiH, 8, 180
Cost, 2, 33, 34, 42, 46, 48, 50, 72, 107, 109, 111, 192, 202
Council of Ministers of BiH, 4, 5, 27, 33, 54, 55, 89, 98, 166
Court of Bosnia and Herzegovina, 10, 35, 81, 116, 206
  Criminal Defence Section, 19
  Registry, 18, 19, 22, 35, 39
  War Crimes Chamber, 11, 82
Criteria for Case Selection and Prioritization, 72, 79, 98, 111, 115, 126

D

Database, 3, 64, 66, 68, 73, 77, 133
Database of open case files (DOCF), 3, 68, 70, 71, 72, 73, 129
Defence, 19, 20, 36, 40, 41, 48, 104, 134, 207
Demographic Analysis, 66, 67, 72, 89, 95, 96, 101, 119
Distribution of Cases, 60, 65, 84, 116, 174
DOCF Information Structure, 129
Donor, 1, 3, 35, 39, 43, 44, 54, 72, 110
Draft Regulations, 119

E

Economy of the Processing of Core International Crimes Cases, 33

F

Federation of Bosnia and Herzegovina
  Courts, 11, 44
  Prosecutor's offices, 16
Formal Aspects of the Case Files, 74

PURL: https://www.legal-tools.org/doc/688146/

G

General Information Category, 76
Germany, 63, 127
Global Assessment of the Cost of the BiH War Crimes Process, 33
Gravity, 71, 76, 83, 87, 93, 96, 97, 100, 105, 112, 113, 117, 119, 120, 207
Gravity of the Case, 88, 119, 120

H

High Judicial and Prosecutorial Council of BiH, 10, 12, 13, 15, 16, 43, 63, 69, 70, 72, 90, 181, 193
Highly Sensitive Violations, 48, 59, 84, 86

I

ICC-OTP 2007 Policy Paper on Interests of Justice, 113
ICC-OTP Policy Paper of 2003, 113
Impact of Criminal Justice, 97
Impact on a Community, 97
International Criminal Court, 111, 126, 206
  Case Matrix, 4, 68
  Statute, 121
International Criminal Tribunal for the former Yugoslavia, 6, 94, 98, 126, 166, 206
  Čelebici case, 118
  Rule 11bis cases, 56, 60, 79, 132
  Rules of the Road cases, 57, 58, 60, 88, 206
  Rules of the Road Unit, 57, 60, 61, 132
  Statute, 121
Inventory, 2, 3, 4, 61, 64, 68, 71, 73
Inventory of open case files, 3, 4, 68
Investigation and Police Forces, 20
Investigation Plan, 106, 107
Investigation Strategy, 106, 107, 108, 120

J

Joining of Cases, 65

K

Kreso, Meddžida, 54

L

Legal Impediments to Prosecution, 104, 105
Level of Responsibility, 71, 93, 95, 97, 100, 124

M

Mapping Open Case Files, 64

N

National War Crimes Strategy, 1, 4, 5, 21, 27, 54, 55, 89, 98, 116, 165
Norwegian Government, 69, 70, 72
Numbers, 54, 55, 56, 58, 59, 60, 62, 64, 66, 76, 95, 96, 127, 129, 168, 174, 175, 178, 182, 191
Numbers Hysteria, 62

O

Open Case File, 3, 27, 53, 55, 64, 68
Organization for Security and Co-operation in Europe, 2, 6, 43, 65, 69, 70, 90
Orientation Criteria for Sensitive Rules of the Road cases, 59, 81, 85, 87, 89, 93, 98, 100, 101, 103, 114, 115, 120, 126
Other Relevant Considerations, 99, 104

P

Policy Considerations, 99, 100, 101, 102, 120, 126

PURL: https://www.legal-tools.org/doc/688146/

Policy Paper, 113, 119
Practical Considerations, 87, 99, 100, 102, 112, 120, 125, 126
Prioritization, 55, 73, 84, 96, 115, 127
Prison Facilities, 24, 42, 50
Prosecution Guidelines, 89, 91
Prosecution Strategy, 1, 53, 118, 206
Prosecutor's Office of Bosnia and Herzegovina, 14, 38, 89, 206
Prosecutorial Discretion, 110
Prosecutorial Independence, 90, 91
Public and Political Pressure, 79

Q

Quantification, 64

R

Rechtsgut, 121
Reliable Data on Open War Crimes, 62
Representation, 96
Representative Approach, 97, 98
Representative Relationship, 96
Representativity, 101, 120
Republika Srpska
  Courts, 12, 44
  Prosecutor's Offices, 17
Research and Documentation Center, 66
Rule 11*bis*, 56

S

Schwendiman, David, 62, 79, 89, 119, 127
Selection and prioritization criteria, 5, 81, 85, 104, 107, 109, 116, 119, 126
Selection of Cases, 68, 81, 82, 84, 98, 108
Seniority, 65, 76, 77, 83, 85, 93
Sensitive Violations, 59, 85, 87, 178
Seriousness of the Crimes, 101
Seriousness of the Responsibility of the Suspect, 119, 120, 122, 125
Sierra Leone, Special Court, 122
Sort, 65, 67, 96
Special Department for War Crimes Cases, 70
Stakeholders, 5, 57, 58, 60, 61, 64, 65, 71, 79, 107, 110
Standard Marking, 57, 58
State Investigation and Protection Agency, 15, 18, 21, 41, 186, 192
  Witness Protection Program, 197
Statistical and graphical overview, 2
Statistical data, 4, 27, 55, 69, 71, 166, 169
Statistics, 28, 55, 191
Stipulations of Facts, 65
Structure of Information Categories, 74
Structure of the Prosecutor's Offices, 14
Suspect(s) of the case file, 74

U

UN Security Council, 110, 111, 122, 165

V

Victim, 72, 74, 76, 80, 86, 91, 97, 100, 112, 114, 120, 162, 167, 194, 197, 199, 208
Victimisation, 66, 67, 96, 101, 110, 120, 125

W

Witness Security, 87

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

FICHL PUBLICATION SERIES

Publication Series Co-Editors
Mr. Morten Bergsmo
Mr. Nobuo Hayashi

Editor
Ms. Wui Ling Cheah

Editorial Assistants
Mr. Alf Butenschøn Skre, Senior Editorial Assistant
Mr. Mats Benestad
Ms. Annika Jones
Ms. Audrey Wong

Principal Scientific Advisers of the Torkel Opsahl Academic EPublisher
Professor Andreas Zimmermann, Principal Scientific Adviser for Public International Law
Professor Kai Ambos, Principal Scientific Adviser for International Criminal Law
Dr.h.c. Asbjørn Eide, Principal Scientific Adviser for International Human Rights Law

Editorial Board
Dr. Xabier Agirre, International Criminal Court
Dr. Claudia Angermaier, Austrian judiciary
Dr. Markus Benzing, Freshfields Bruckhaus Deringer, Frankfurt
Ms. Margaret deGuzman, Temple University
Ms. Cecilie Hellestveit, Norwegian Centre for Human Rights
Dr. Pablo Kalmanovitz, Columbia University
Mr. Sangkul Kim, Korea University
Dr. Jann K. Kleffner, Swedish National Defence College
Mr. Kjetil Mujezinovic Larsen, Norwegian Centre for Human Rights
Mr. Salím A. Nakhjaváni, University of Cape Town
Dr. Hector Olasolo, University of Utrecht
Ms. Maria Paula Saffon, Columbia University
Ms. Torunn Salomonsen, Norwegian Ministry of Justice
Dr. Carsten Stahn, Leiden University
Dr. Jo Stigen, University of Oslo
Ms. Philippa Webb, Legal Consultant

Advisory Board
Mr. Hirad Abtahi, Legal Adviser of the Presidency of the International Criminal Court
Professor Kai Ambos, Georg-August-Universität Göttingen and State Court Göttingen
Professor Emeritus M. Cherif Bassiouni, DePaul University
Professor Jon Bing, University of Oslo
Mr. Gilbert Bitti, International Criminal Court
Research Professor J. Peter Burgess, PRIO

PURL: https://www.legal-tools.org/doc/688146/

Judge Advocate General Arne Willy Dahl, Norway
Professor Emeritus Yoram Dinstein, Tel Aviv University
Professor Jon Elster, Columbia University and Collège de France
Mr. James A. Goldston, Open Society Institute Justice Initiative
Mr. Richard Goldstone, former Chief Prosecutor,
International Criminal Tribunal for the former Yugoslavia
Judge Hanne Sophie Greve, Gulating Court of Appeal, formerly
European Court of Human Rights
Dr. Fabricio Guarigli, Senior Appeals Counsel, Office of the Prosecutor,
International Criminal Court
Dr. Franz Guenthner, Ludwig-Maximilians-Universität
Mr. Christopher Keith Hall, Amnesty International
Professor Emeritus Frits Kalshoven, Leiden University
Judge Hans-Peter Kaul, International Criminal Court
Judge Erkki Kourula, International Criminal Court
Dr. Claus Kress, Director of the Institute for Criminal Law and Criminal Procedure,
Cologne University
Professor David Luban, Georgetown University
Mr. Juan E. Méndez, Special Adviser to the ICC Prosecutor on Crime Prevention, former President, ICTJ
Dr. Alexander Muller, Director, The Hague Institute for the Internationalisation of Law
Judge Erik Møse, Norwegian Supreme Court, former President,
International Criminal Tribunal for Rwanda
Dr. Gro Nystuen, University of Oslo and Norwegian Defence Command and Staff College
Mr. William Pace, Convener, Coalition for the International Criminal Court
Ms. Jelena Pejić, International Committee of the Red Cross
Mr. Robert Petit, former International Co-Prosecutor,
Extraordinary Chambers in the Courts of Cambodia
Maj-Gen (ret'd) Anthony P.V. Rogers, Cambridge University
Professor William A. Schabas, National University of Ireland, Galway
Professor James Silk, Yale Law School
Professor Emeritus Otto Triffterer, Salzburg University
Professor Marcos Zilli, University of Sao Paulo

PURL: https://www.legal-tools.org/doc/688146/

OTHER VOLUMES IN THE FICHL PUBLICATION SERIES

Morten Bergsmo, Mads Harlem and Nobuo Hayashi (editors):
Importing Core International Crimes into National Law
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 1 (Second Edition, 2010)
ISBN 978-82-93081-00-5

Nobuo Hayashi (editor):
National Military Manuals on the Law of Armed Conflict
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 2 (Second Edition, 2010)
ISBN 978-82-93081-02-9

Morten Bergsmo (editor):
Criteria for Prioritizing and Selecting Core International Crimes Cases
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 4 (Second Edition, 2010)
ISBN 978-82-93081-06-7

Morten Bergsmo and Pablo Kalmanovitz (editors):
Law in Peace Negotiations
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 5 (Second Edition, 2010)
ISBN 978-82-93081-08-1

Morten Bergsmo, César Rodríguez Garavito, Pablo Kalmanovitz and Maria Paula Saffon (editors):
Distributive Justice in Transitions
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 6 (2010)
ISBN 978-82-93081-12-8

PURL: https://www.legal-tools.org/doc/688146/

Morten Bergsmo (editor):
Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 7 (2010)
ISBN 978-82-93081-14-2

All volumes are freely available as e-books on the FICHL homepage www.fichl.org.
Printed copies may be ordered online at www.amazon.co.uk.

PURL: https://www.legal-tools.org/doc/688146/

PURL: https://www.legal-tools.org/doc/688146/

FICHL Publication Series No. 3 (2010, Second Edition)

The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina

Morten Bergsmo, Kjetil Helvig, Iilia Utmelidze and Gorana Žagovec

This book seeks to make a contribution to the debate on what should be done with the large backlog of war crimes, crimes against humanity and genocide cases in Bosnia and Herzegovina. The paper makes four contributions which the authors consider important elements in the discussion on the responsible management of the backlog of case files: a) basic information on the nature of the war crimes machinery established in Bosnia and Herzegovina; b) its economy; c) an analysis of the requirements of a proper inventory of open war crimes files in the criminal justice system of Bosnia and Herzegovina; and d) an analysis of criteria for selection and prioritization of war crimes cases. A generic model for the effective mapping of open war crimes files is developed. The analysis of case selection and prioritization criteria compares practise in Bosnia and Herzegovina with that of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court. It suggests four clusters of key criteria

ISBN 978-82-93081-02-9



Torkel Opsahl Academic EPublisher
Forum for International Criminal and Humanitarian Law
E-mail: info@fichl.org
www.fichl.org



PURL: https://www.legal-tools.org/doc/688146/