

## The Bosnian War Crimes Justice Strategy a Decade Later

By Jared O. Bell

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### 1. The Need to Strengthen Trust in the Legal System

In December of 2017, the International Tribunal for the former Yugoslavia ('ICTY') closed after 24 years of trying cases from across five countries. Each of these states will now be tasked with prosecuting war crimes, genocide, and crimes against humanity committed during the ex-Yugoslav wars in the 1990s, within their own judicial capacities and political realities. Prosecuting crimes after a conflict is an arduous task, wrought with emotions. It requires political will, financial and professional resources, as well as time and patience.

Despite the challenges of dealing with the crimes of the past, societies must do so in order to move on after a conflict. Ideally, prosecutions of war crimes ought not only to give closure to victims and punish perpetrators, but also go towards establishing respect for the rule of law and governance institutions in that jurisdiction. This has not been the case in Bosnia and Herzegovina ('BiH'). According to a report released in 2013 by the United Nations Development Programme ('UNDP'),<sup>1</sup> some 60.3% of Bosnians did not trust the country's judicial system. The country's complicated political system, corruption, and inability to process war crimes cases efficiently have continued to sow doubt among Bosnians as to whether they can trust their legal institutions.<sup>2</sup> For the rule of law to further materialize in BiH – some 22 years after the wars ended – the judicial system should continue to foster transitional justice and non-recurrence.<sup>3</sup> The judiciary's success cannot be isolated from the actual impact it has on the society more widely. This policy paper explores key policy recommendations for the work ahead.

### 2. Wrestling with a Backlog of Case-Files

A backlog of opened war crimes case-files may undermine transitional criminal justice programmes.<sup>4</sup> It shows that the legal

system is unable to render justice in an efficient and timely manner. Witnesses and suspects die before their day in court arrives. Victims feel that the criminal justice system fails to deliver the justice and closure they expect. Backlogs raise at least three challenges: (i) the need for a proper overview of pending cases so that the workload is clear to stakeholders in the process, and the work can be professionally planned and organized (this section); (ii) the need for criteria to prioritize the best-suited cases for full investigation and trial (Section 3); and (iii) a mechanism for processing a large number of less serious case-files which the criminal justice system may not have the capacity to address in accordance with regular procedures (Section 7).

According to the 2006 annual report released by the BiH High Judicial and Prosecutorial Council ('HJPC') the total number of unresolved cases before BiH courts totalled about 1.9 million. The specific problem of war crimes case-files was first raised by the Organization for Security and Cooperation in Europe ('OSCE') when its BiH mission commissioned an expert report on war crimes prosecution strategy. The expert held extensive consultations in BiH and wrote the report in 2007, later published as the monograph *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*.<sup>5</sup> The report had an immediate impact on the general discussion on case backlogs in BiH and on the need for a national war crimes strategy.<sup>6</sup> On 28 December 2008, the BiH Council of Ministers adopted the National Strategy for Processing of War Crimes Cases ('National Strategy'),<sup>7</sup> taking into account analysis and advice in the OSCE report.

The National Strategy sought to devise a more systematic approach to processing the large number of war crimes case-files

Opsahl Academic EPublisher ('TOAEP'), Oslo, 2010, p. 7 (the first edition was released in March 2009 already) (<http://www.legal-tools.org/doc/f5abed/>).

<sup>5</sup> See Morten Bergsmo, Kjetil Helvig, Ilija Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Second Edition, TOAEP, Oslo, 2010 (<http://www.legal-tools.org/doc/688146/>). Morten Bergsmo was the expert engaged by the OSCE to write the report.

<sup>6</sup> As early as February 2008, a report was prepared on the wider challenge of case backlogs in BiH, see "Action Plan: Reduction of Case Backlogs", 1 February 2008 (<http://www.legal-tools.org/doc/20da67/>).

<sup>7</sup> The document containing the National Strategy was reproduced as Annex 2 of *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, *supra* note 5, pp. 165-209.

<sup>1</sup> UNDP, "Facing the past and access to justice from a public perspective", Special Report, 20 April 2011 (<http://www.legal-tools.org/doc/c5c36f/>).

<sup>2</sup> The Norwegian Helsinki Committee, "Intervention on behalf of the Norwegian Helsinki Committee and the Helsinki Committee for Human Rights in *Republika Srpska*, Bosnia and Herzegovina", 2 October 2013 (<http://www.legal-tools.org/doc/b204f3/>).

<sup>3</sup> *Ibid.*

<sup>4</sup> Morten Bergsmo, "The Theme of Selection and Prioritization Criteria and Why it Is Relevant", in *idem* (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Second Edition, Torkel

in the courts and prosecution offices in BiH, at both the national (state) and regional (entity) levels. The strategy details time frames, capacity, criteria and mechanisms for the management of war crimes cases, standardization of court practices, issues of regional co-operation, protection and support to victims and witnesses, as well as financial aspects, and supervision over the implementation of the Strategy. The document emphasized the need to process the most complex and highest priority cases within seven years, and other cases within 15 years. However, war crimes prosecutions – even when most intensive – have not kept pace with the National Strategy. Mid-2015, BiH’s war crimes prosecution office announced that it would not meet its deadlines.<sup>8</sup> It was still working on 346 of the most complex war crimes cases, concerning 3,383 individuals, with an estimated 500 incomplete war crimes investigations at the state level and at least as many at the entity level.

The numbers confirmed the warnings advanced in the 2007 OSCE report.<sup>9</sup> Assessments on the efficiency of the war crimes prosecutions were conducted in 2016 by the Supervisory Body for Overseeing the Implementation of the National War Crimes Strategy as well as the OSCE.<sup>10</sup> Both claim that the authorities failed to meet the National Strategy targets due to lack of strategic planning and co-ordination, limited professional resources and manpower, as well as poor training. The lack of strategic planning and co-ordination impacted courts’ distribution of cases from the BiH State Court to lower courts, which was identified as one of the key reasons for the backlog.

A clear understanding of the capacity to process war crimes case-files was lacking in BiH even before the adoption of the National Strategy.<sup>11</sup> The President of the BiH State Court, Judge Meddžida Kreso, wrote in July 2007 that HJPC-data noted that all BiH prosecution offices reported 12,484 persons as possible war crimes suspects in the period between 1992 and 2006.<sup>12</sup> Yet, others in the criminal justice system at the state level suggested that there were around 16,000 war criminals in BiH, when there were in fact at the time 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). However, the National Strategy maintained that by the end of 2008, there were 4,990 war crimes cases involving 9,879 suspects throughout the country.<sup>13</sup> Due to this lack of overview of the actual case load, there have been parallel prosecutions at the same time for the same crime by state and entity prosecutors, as well as a lack of consistency in the classification of crimes.<sup>14</sup>

At the strong recommendation of international experts, a database of open case-files was developed to give the prosecution a better overview of all cases so that prioritization would be easier. The project was funded by the OSCE and the Norwegian Government, to ensure that the database designed by the experts

would actually be put into operation.<sup>15</sup> The HJPC pushed for the Prosecutor’s Office of BiH to implement the project urgently, in close co-operation with both District and Cantonal Prosecutors.<sup>16</sup> Nevertheless, it remains unclear whether those responsible at the Prosecutor’s Office at the time implemented the database in accordance with its design and capacity.<sup>17</sup> Consequently, the problem of parallel investigations was not properly resolved. For example, in a 2016 OSCE report, it is mentioned that one official only discovered as a result of a telephone call that an accused in a case before the Court of BiH was also to be tried for the same offence in other court proceedings.<sup>18</sup>

It would be interesting to know which database the Prosecutor’s Office of BiH implemented, when, and how consistently it has been maintained. In particular, the taxonomy developed by the OSCE expert group in 2007 was detailed and carefully thought through.<sup>19</sup> It was later implemented in the DOCF service in the CMN Knowledge Hub, for the general public to see and assess independently.<sup>20</sup>

### 3. Prioritization: Putting the Best-Suited Cases Forward First

The selection of cases can be difficult. Sometimes selection is done on a first come, first serve basis, without a proper review of all opened case-files in the backlog. Other times, cases are selected due to easier access to evidence. The manner of case selection and prioritization can make a significant impact on how the justice process is perceived by victims and others affected by the atrocities. It can also influence whether the international community views the process as legitimate. Establishing fixed criteria can aid prioritizing and processing war crimes cases in a rational and coherent manner.

The BiH practice of war crimes case prioritization has been criticized. For example, in the 2016 OSCE-commissioned report mentioned above, the criteria for determining the complexity of cases was deemed too simplistic by the author, Joanna Korner.<sup>21</sup> According to the National Strategy, war crimes include cases marked as ‘KRI’, ‘KT’, ‘KTA’ and ‘KTN’ brought before any BiH court or prosecutor’s office since 1992, containing elements of the offences laid out in the Criminal Code of BiH.<sup>22</sup> Korner claims that there is still no official policy on prioritization or closing of case-files pursuant to detailed criteria in the Prosecutor’s Office of BiH.<sup>23</sup> As long as they act in accordance with the general criteria, it is left to individual prosecutors to decide how to prioritize and close cases, as each prosecutor has his or her own professional opinion.<sup>24</sup> This could undermine continuity in

<sup>15</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, p. 69.

<sup>16</sup> *Ibid.*

<sup>17</sup> The responsible foreign prosecutor at the time was Mr. David Schwendiman.

<sup>18</sup> “Processing of war crimes at the state level in Bosnia and Herzegovina”, a report by the English barrister Joanna Korner CMG QC prepared at the request of the OSCE BiH mission, 30 June 2017, p. 19 (<http://www.legal-tools.org/doc/865f39/>).

<sup>19</sup> See Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, Annex 1 (pp. 129-163).

<sup>20</sup> See <https://www.casematrixnetwork.org/cmnm-knowledge-hub/docf/>.

<sup>21</sup> “Processing of war crimes at the state level in Bosnia and Herzegovina”, *supra* note 18, p. 35.

<sup>22</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, p. 207.

<sup>23</sup> “Processing of war crimes at the state level in Bosnia and Herzegovina”, *supra* note 18, p. 20.

<sup>24</sup> *Ibid.*

<sup>8</sup> “Bosnia to Miss War Crimes Investigations Deadline”, *Balkans Insight*, 21 May 2015.

<sup>9</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5.

<sup>10</sup> Human Rights Watch, “Bosnia and Herzegovina: Country Summary”, 1 January 2017 (<http://www.legal-tools.org/doc/f04cde/>).

<sup>11</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, p. 54.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, Annex 2.

<sup>14</sup> Nils Muižnieks, “Report by Nils Muižnieks following his visit to Bosnia and Herzegovina from 12 to 16 June 2017”, Commissioner for Human Rights of the Council of Europe, 7 November 2017 (<http://www.legal-tools.org/doc/df8cb8/>).

decision-making and possibly the integrity of the process.

In December 2008, the BiH Council of Ministers adopted a three-page text on criteria for the review of war crimes cases, as a constituent part of the National Strategy.<sup>25</sup> This was a pioneering step, one that had been strongly urged by the OSCE expert report of 2007. In comparison, the Office of the Prosecutor of the International Criminal Court only adopted such criteria in September 2016.<sup>26</sup> Both attest to the impact of the original thinking on criteria in the 2007 expert report, as reproduced in the above-mentioned monograph *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*<sup>27</sup> and further developed in a subsequent anthology.<sup>28</sup>

A decade has passed and it would be helpful to know from the BiH criminal justice system itself – and not only external advisers such as Korner – to which extent the 2008 criteria of the BiH Council of Ministers have been implemented in practice, where deviations have occurred, and whether there are any patterns of problems in the implementation of criteria. Arguably, the 2007 expert report's emphasis on a criterion of "representative prosecutions" has, in intellectual terms, not been absorbed into either the BiH or the ICC criteria.<sup>29</sup> How do we explain that practice lags so far behind independent academia in this manner? This matters, as prioritization informed by sound criteria, applied equally to all open case-files – while not reducing backlogs – can ensure that best-suited cases are brought to trial first.

#### 4. Sexual Violence: Has a Justification for Thematic Prosecution Been Developed?

During the 1992-95 wars in BiH, sexual violence was a key tactic used to subjugate, humiliate, and traumatize individuals and communities. Today, there remain over 50,000 victims of rape and other forms of sexual violence in BiH.<sup>30</sup> The overall number of indictments for these crimes has been minimal compared to their prevalence during the wars.<sup>31</sup> Less than 1% of the total estimated number of victims of sexual violence war crimes have seen indictments in their cases since war crimes prosecutions began in 2004.<sup>32</sup> Inadequate investigation, resulting in a dearth of suspects and evidence, continues to hamper prosecutions, and discourage victims from coming forward.<sup>33</sup> There is lack of gender expertise at the prosecutor's offices of BiH in relation to managing and conducting investigations on sexual violence

crimes.<sup>34</sup>

One strategy to improve the prosecutorial approach to sexual violence crimes in BiH is to pursue thematic prosecutions, which orients cases around particular themes of criminality.<sup>35</sup> Such thematic emphasis may even include the development of theme-specific institutional capacity within a criminal justice system, to bolster capacity.<sup>36</sup> This is a strategic tool that BiH does not currently utilize. Thematic prosecution of sexual violence would place a comprehensive focus on prosecuting key sexual violence crimes – as they are prioritized – by that strengthening the case for increased resources for the investigation and prosecution of such cases. The above-cited recent academic work can be relied upon to develop a proper justification for the adoption of thematic prosecution.

#### 5. The Responsibility of Political Elites

While BiH politics are divided along ethno-political lines, post-conflict justice remains even more divisive. Bosnians across ethnic groups feel that they did not get the same access to justice as others may have. Or that some sentences were too short in relation to the crimes committed. Or that justice was limited in other ways. Political elites of BiH capitalize on these sentiments and use them to further undermine the war crimes justice process.

For example, the *Republika Srpska* administration continues to regularly question the authority of federal judicial institutions, including the country's Constitutional Court, State Court and Prosecutor's Office, and HJPC.<sup>37</sup> Relevant political actors have claimed that war crimes prosecutions have primarily targeted Serbs. Some publicly support war criminals, denying that genocidal conduct took place, and attending public events that rally for war criminals. These actions collectively continue to display to the Bosnian public that there is no political will for joint co-operation among its country's political elites to prosecute war crimes effectively so that victims may have access to justice. These ongoing dysfunctions contribute to negative attitudes towards rule of law and judicial institutions in BiH.

BiH's political elites must stop criticizing and undermining judicial institutions for narrow political gain. Prosecutorial and judicial institutions must be de-politicised in order to strengthen the authority of the courts in the eyes of the general public.

#### 6. Concrete Outreach

An important missing element in the Prosecutor's Office of BiH is an outreach strategy to inform and engage the general public regularly about the work of its Special Department for War Crimes. In the above-mentioned 2013 UNDP BiH report on pub-

<sup>25</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, pp. 206-209.

<sup>26</sup> "Policy Paper on Case Selection and Prioritisation", 15 September 2016 (<http://www.legal-tools.org/doc/182205/>).

<sup>27</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, Chapter 5 (pp. 79-127).

<sup>28</sup> Bergsmo (ed.), 2010, *supra* note 4.

<sup>29</sup> Bergsmo, Helvig, Utmelidze and Žagovec, *supra* note 5, p. 125.

<sup>30</sup> "Follow-up Report on the Implementation by Bosnia and Herzegovina's of the Recommendations Issued by the Committee on the Elimination of Discrimination against Women in July 2013", 31 July 2015, submitted by multiple NGOs (<https://www.legal-tools.org/en/doc/257ecd/>).

<sup>31</sup> "Amnesty Chides Bosnia for Denying Justice to Victims of Sexual Violence", *Radio Free Europe/Radio Liberty*, 12 September 2017 (on file with the author).

<sup>32</sup> "Follow-up Report on the Implementation by Bosnia and Herzegovina's of the Recommendations Issued by the Committee on the Elimination of Discrimination against Women in July 2013", *supra* note 30.

<sup>33</sup> Human Rights Watch, "Bosnia and Herzegovina: Country Summary", *supra* note 10.

<sup>34</sup> Trial Monitoring Programme of the OSCE Mission to BiH, "Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges. An analysis of criminal proceedings before the courts of the Federation of Bosnia and Herzegovina", 30 June 2015 (<https://www.legal-tools.org/en/doc/20ebcd/>).

<sup>35</sup> Margaret M. deGuzman, "An Expressive Rationale for the Thematic Prosecution of Sex Crimes", in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012, p. 11 (<http://www.legal-tools.org/doc/397b61/>).

<sup>36</sup> Morten Bergsmo and CHEAH Wui Ling, "Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes", in Bergsmo (ed.), *ibid.*, p. 3.

<sup>37</sup> Bertelsmann Stiftung's Transformation Index (BTI) 2016, Bosnia and Herzegovina Country Report, which covers the period from 1 February 2013 to 31 January 2015.

lic views on access to justice, it is noted that almost six in ten Bosnians felt uninformed about judicial procedures, laws and regulations in BiH.<sup>38</sup>

While there has been a plethora of victims' organizations, NGOs, and initiatives by the international community, this does not obviate the need for active efforts by the prosecutorial or judicial institutions themselves to keep the general public informed. The extent of progress reached in the post-conflict justice process in BiH may not be generally known if the key institutions do not provide objective, professional information from time to time. It may be harder to negate, misconstrue or politicize information emanating from these institutions in the particular circumstances of BiH, a society characterized by significant ethno-political cleavages at all levels, perhaps justifying that the justice institutions need to play a more active role in this regard. The persistent negative views on the country's institutions must be challenged intelligently. As the BiH authorities move forward, they should develop a transparent process that engages and mobilizes a variety of actors, not limited to academics, NGOs, victims' organizations, and the international community. Developing consultations and campaigns that focus solely on engaging the general public is integral in reshaping the current attitude of distrust towards BiH legal institutions.

#### 7. Reform of the War Crimes Strategy Should Include Abbreviated Procedures

It is ultimately for Bosnians to determine how to proceed with the 2008 National War Crimes Strategy. There are limits to what outsiders can contribute, especially if their approach is hasty and fails to take into account the problems caused by foreign actors previously involved in the BiH war crimes prosecution effort.<sup>39</sup> Nevertheless, I take the liberty to make four policy recommen-

dations to the BiH authorities:

1. The National Strategy should probably be revised in light of experience during the past decade. It needs to reflect a reasonable and practical time-frame for the continued prosecution of core international crimes, based on an accurate understanding of the remaining load of case-files and capacity of the criminal justice system under the law on criminal procedure.<sup>40</sup> The BiH authorities should incisively assess and publicly disclose weaknesses in the work under the 2008 Strategy, as new goals are set.
2. The review of the National Strategy should include case-file selection and prioritization. Are the criteria included in the 2008 Strategy adequate or should they be updated in order to ensure that the best-suited cases go to trial first?
3. To increase the sense that justice is rendered for sexual violence crimes committed during the wars in the 1990s, a greater reliance on thematic prosecution of such crimes should be considered. Such prioritization will in most cases fall within the scope of prosecutorial discretion. Recent scholarship has helped to clarify the justification for thematic prosecutions.
4. Moving forward, the BiH authorities should modify the 2003 Code of Criminal Procedure to allow for abbreviated criminal procedures for less serious core international crimes. Such procedures enable the criminal justice system itself to process core international crimes cases in a more timely and cost-efficient manner, as needed. As Antonio Angotti's recent policy brief shows, such procedures exist in numerous jurisdictions, in particular in Italian law.<sup>41</sup>

*Dr. Jared O. Bell is an Assistant Professor of International Relations at the International University of Sarajevo. He holds a Bachelor's degree from Duquesne University in International Relations, a Master of Science Degree from the University of Baltimore in Negotiation and Conflict Management, and a Ph.D. from Nova Southeastern University in Conflict Analysis and Resolution.*

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<sup>38</sup> UNDP, "Facing the past and access to justice from a public perspective", *supra* note 1.

<sup>39</sup> The above-mentioned report by Komer is quite remarkable in how it criticises BiH actors, whose record makes the author depressed, she claims. One of her main recommendations is to change the alleged "ingrained practice that work starts at 8am and finishes at 4pm", see *supra* note 18, p. 44. Interestingly, in letters to the President of the State Court and BiH Chief Prosecutor dated Wednesday 5 August 2015 – simply notifying the BiH authorities that "the OSCE Mission [...] has engaged a highly experienced practitioner to carry out an independent review of the work of the Court and Prosecutor's Office of Bosnia and Herzegovina (POBH)" and that she would start her work 12 days later, on 17 August 2015 – the Deputy Head of the OSCE Mission to Bosnia and Herzegovina wrote: "In order to properly carry out her assessment, the expert and her interpreter will need unhindered access to war crimes case-files and to be able to contact relevant actors". Unsurprisingly, the Chief Prosecutor responded: "[...] unfortunately, we are not in the position to approve your request since this would result in violating the basic principles of confidentiality and impartiality of proceedings and the rights to a fair trial which would affect the integrity of cases, and, in addition, this would represent [a] violation of the rights of witnesses and suspects" (Komer report, p. 60).

<sup>40</sup> The BiH Code of Criminal Procedure is from 2003 (<http://www.legal-tools.org/doc/0a301a>).

<sup>41</sup> Antonio Angotti, "In Search of Abbreviated Criminal Procedures", FICHL Policy Brief Series No. 91 (2018), TOAEP, Brussels, 2018 (<http://www.legal-tools.org/doc/2240ae/>). See also Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, TOAEP, Brussels, 2017 (<http://www.legal-tools.org/doc/6145bc/>).