



SOLVING WAR CRIME CASES IN BOSNIA AND HERZEGOVINA

Report on the Capacities of Courts and Prosecutor Offices' within
Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases

United Nations Development Programme
Bosnia and Herzegovina

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REPORT ON THE CAPACITIES OF CANTONAL AND DISTRICT PROSECUTORS AND COURTS WITHIN
BOSNIA AND HERZEGOVINA TO INVESTIGATE, PROSECUTE, AND TRY WAR CRIME CASES

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ACRONYMS

- **BiH**
Bosnia and Herzegovina
- **Sud BiH**
Court of Bosnia and Herzegovina
- **ICTY**
International Criminal Tribunal for the former Yugoslavia
- **UNDP**
United Nations Development Program
- **HJPC**
High Judiciary and Prosecutorial Council
- **OSCE**
Organization for Security and Cooperation in Europe
- **OTPICTY**
Office of the Prosecutor of International Criminal Tribunal for the former Yugoslavia
- **EUFOR**
European Union Forces
- **SIDA**
Swedish International Development Cooperation Agency
- **NGO**
Non-governmental organization
- **OKO**
Criminal Defense Section (Odsjek krivične odbrane)
- **ICC**
International Criminal Court
- **CPC**
Criminal Procedure Code
- **FBiH**
Federation of Bosnia and Herzegovina
- **RS**
Republika Srpska
- **SIPA**
State Investigation and Protection Agency



FOREWORD

In November of 2006, the BiH State government took an additional step in the development of its war crime recovery strategy by joining UNDP Bosnia and Herzegovina in the implementation of a project entitled *Supporting National Capacities for Transitional Justice in Bosnia and Herzegovina*. In July of 2007, our Ministry created a Working Group for the Development of a National Strategy for Work on War Crimes and War Crimes Recovery (working group), and invited UNDP as an observer member in order to ensure that the Transitional Justice programme becomes an important resource for the working group as it develops a National War Crimes Strategy.

This Report represents one of the goals of the Transitional Justice programme - to provide all concerned with a well-informed, expert perspective on the challenges facing BiH as it endeavors to process remaining war crimes whenever a prosecutable case exists. Such a strategy will have to properly weigh the costs and benefits of various options related to the processing of the remainder of BiH's war crimes cases. One central concern of the Ministry is to ensure that the human rights of victims, alleged perpetrators, and witnesses are honored no matter where such trials are processed on BiH soil. Additionally, in order to deliver a holistic sense of justice to BiH citizens, the Ministry recognizes the need to look beyond war crime prosecution to other complimentary mechanisms of Transitional Justice which will require the broader support and participation of civil society.

Given the timing of this publication, I believe the observations and recommendations that follow will be of particular interest to the working group as it drafts a National War Crimes Strategy.

Bariša Čolak

Ministry of Justice of
Bosnia and Herzegovina



PREFACE

In recent years, UNDP has supported the emergence of BiH State level war crimes processing. Since 2003, Bosnia and Herzegovina has taken great strides to develop an effective criminal justice infrastructure at the State level. BiH State institutions such as the High Judicial and Prosecutorial Council, the Court of BiH, the Prosecutor's Office of BiH have played a key role in the State's ability to process war crimes in a manner approaching the standards set by the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. The Court of BiH, based in Sarajevo, now regularly presides over war crimes cases, and the BiH Prosecutor continues to investigate cases, issue indictments, and argue such cases before the Court. Although BiH's domestic prosecution of war crimes has by no means occurred without challenges, these new institutions should be credited for delivering criminal justice which inspires a significant level of public confidence.

However, the impending closure of ICTY by 2010 and plans to reduce international judicial and prosecutorial support to BiH institutions, have been juxtaposed with the current transfer of a large number of ICTY-generated war crimes investigations to the Prosecutor's Office of BiH. By all accounts, the urgent need to address this backload of sensitive cases will substantially increase the work load of BiH institutions.

In recognition of the urgent need to process these aging cases, the BiH Ministry of Justice established government working groups in the Fall of 2007 to develop a national strategy for dealing with these cases as well as the broader legacy of the BiH conflict. One such working group is currently considering the most appropriate way for lower level courts and prosecutors' offices to share the load of these cases. The various options for decentralizing war crimes case processing will create capacity building needs, as well as a range of human resource and infrastructural costs especially if BiH is to accomplish decentralization in a manner which continues to adhere to ICTY standards.

Any adopted strategy must treat victims, witnesses and the accused properly. The strategy must be comprehensive, fair, and achievable with the resources made available. Above all it must demonstrate the commitment of the Government of Bosnia and Herzegovina to bring all those to justice who committed war crimes and for whom a prosecutable case exists.

UNDP hopes that the facts, observations, and recommendations contained in this assessment will guide BiH Institutions, as well as international donors, in the dialogue about how to investigate and prosecute the remaining incidents of war crimes. The BiH government's implementation of a well-informed, workable strategy is owed to the victims, to their families, and to history. To unlock the full potential of development, Bosnia and Herzegovina must bring closure to the past.

Stefan Priesner

Deputy Resident Representative UNDP Bosnia and Herzegovina



EXECUTIVE SUMMARY

After the conflict in Bosnia and Herzegovina was brought to a close by the Dayton Agreement in late 1995, Bosnia and the international community struggled to find an effective and fair way to deal with the thousands of allegations of war crimes and crimes against humanity. The activities of the ICTY and creation of Sud BiH were part of that effort to bring justice and closure to this terrible episode of Bosnian history.

Since then however, the State of BiH has not adopted and implemented a comprehensive “national strategy” to fairly and efficiently resolve all of those allegations. The Government of BiH is now developing such a strategy through national working groups. The UNDP has commissioned this assessment to aid these efforts as well as to determine in what ways the international community can assist Bosnia in implementing the strategy ultimately adopted.

The assessment looked at the capacities of the 10 Cantons, 5 Districts and Brčko District to investigate, prosecute and adjudicate war crimes cases. The assessment involved visiting all relevant prosecutors' offices and courts; interviewing prosecutors, judges and others; viewing courthouses, courtrooms, prosecutors' offices and other facilities. It did not seek to address the competence of individuals. It did look at the capacity of offices and courts in light of their present resources and personnel.

The findings of the assessment were not surprising. Simply put no cantonal, district or Brčko prosecutors' office or court could - with its present resources - fairly, efficiently and effectively investigate, prosecute or adjudicate a substantial number of war crimes cases.

There was found an overriding theme in the interviews that Bosnia should not go forward with any plan that would provide that there be two unequal systems for handling these difficult and sensitive cases. Further, it was uniformly mentioned that the State must meaningfully commit its resources to the strategy developed.

The assessment found that many constraints exist at the level of cantonal, district and Brčko prosecutors and courts. The most important are briefly summarized:

- The lack of the ability of all courts to apply a uniform law and sentencing capacity to these cases.
- The lack of the ability of the prosecutors and the courts to provide witnesses protection under the law and support as required.
- The lack of resources to be able to dedicate full time prosecutors and judges to work solely on war crimes cases.
- The lack at the canton and district level of specially assigned and specially trained investigative staff.
- The current rating system for judges and prosecutors based on quota or norm requirements - discourages professionals from working on complex cases such as war crimes.
- The lack of court houses, court rooms and interview facilities appropriate for cases or investigations involving traumatized or protected witnesses; as well as cases involving a large number of accused persons.

- ❏ The lack of adequate resources to provide well trained defense counsel and to provide all defense counsel with assistance equal to that provided at Sud BiH by OKO.
- ❏ The lack of ability to recruit adequate numbers of prosecutors and judges to specialize in war crimes.
- ❏ The backlogs existing at most courts do not indicate that they could accept this significant additional workload without a large increase in personnel and resources.

The assessment suggested some recommendations both short and long term to address these constraints. Those recommendations cover different strategies being discussed. A few of the recommendations follow:

- ❏ First and most important is for BiH to adopt a national strategy for these cases and to commit the resources to make that strategy a success.
- ❏ To immediately begin to increase the capacity of the State Prosecutor and Sud BiH to investigate, prosecute and adjudicate these allegations.
- ❏ To use the expertise developed at the ICTY, at the Office of State Prosecutor and at Sud BiH to assist in the education of additional investigators, prosecutors and judges.
- ❏ Use and enhance the victims service personnel at Sud BiH to coordinate the work of NGOs and other agencies to provide uniform services to victims and witnesses.
- ❏ Use and enhance the resources of OKO to educate additional defense counsel and to provide services to defense counsel in war crimes cases.
- ❏ Establish a procedure to make available documentation and evidence developed at the ICTY and Prosecutor's Office of the ICTY.
- ❏ Establish a procedure for effectively identifying and resolving cases where a prosecution is impossible.
- ❏ Support regional offices established by the State Prosecutor to investigate the cases.
- ❏ Enhance court facilities in several locales or regions to enable trials involving traumatized and/or protected witnesses; and trials involving a large number of accused persons.

The assessment concludes that whatever strategy is adopted, it will require substantial commitment of additional resources. When Bosnia commits to a strategy, the international community must do its part to ensure the success of that strategy.



Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 8, Universal Declaration of Human Rights



Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 10, Universal Declaration of Human Rights



BACKGROUND

During the conflict in Bosnia and Herzegovina (BiH), 1992 – 1995, numerous and extremely serious crimes were committed against civilians, their property and against prisoners of war. These incidents have led to numerous reports to police and military authorities of possible war crimes being committed by persons of all ethnicities.

Although the conflict ended in December 1995 with the signing of The General Framework Agreement for Peace, no BiH national strategy for dealing with war crimes has been adopted. In September of 2007, the High Representative called for adoption of such a strategy noting that the families of victims cannot wait forever for justice in the courts; and that without justice the future is in question.¹ While professionals may debate the frequency with which individual criminal reports will proceed through an investigative phase and culminate in successful prosecution, it is clear that many hundreds, if not thousands, of investigations and/or prosecutions will need to be completed.² Since its establishment in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) has brought cases to conclusion against 106 individuals.³ These cases have usually involved high ranking individuals and/or those responsible for extremely serious incidents and have therefore been long and complex. Since its creation in January 2005, the War Crimes Department of the Court of BiH (Sud BiH) has had trials in 19 cases involving 20 accused resulting in at least a first instance decision. In addition, there are currently 23 cases at various stages pending in Sud BiH.⁴ It is clear that if all reports of potential war crimes are to be investigated, the current pace of prosecution will not be adequate to complete such cases in the foreseeable future. The government of BiH has formed working groups to address the issue of a national strategy that will fairly and efficiently resolve these matters.⁵

In the State of BiH, the current law enacted in 2003 places jurisdiction for war crime cases exclusively in the BiH Prosecutor's Office (BiH-PO) and Sud BiH.⁶ However, the BiH Prosecutor reviews and grades each case and under its criteria declares a case to be "sensitive" or "highly sensitive". If a case is found to be "sensitive", it can be referred by Sud BiH to a Cantonal or District Court to be investigated and/or prosecuted. As a result, some Cantonal and District Prosecutors have investigated and prosecuted war crimes cases designated "sensitive" by the BiH Prosecutor under the new Criminal Law and Criminal Procedure Code (CPC). These cases are continuing to be tried.⁷

¹ Speech of the High Representative to the Parliament of BiH, September 6, 2007. http://www.ohr.int/ohr_dept/presso/.

² The most credible reports are from the HJPC and the BiH Prosecutor. In its report of August 2006 the HJPC indicated a total of 12,034 persons reported as possible perpetrators of war crimes. In an undated letter distributed to the Working Group on Developing a National Strategy, the BiH PO indicated 16,152 persons named.

³ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, New York (August 2007) at page 4.

⁴ Provided by email by Tarik Abdulhak, Senior Advisor to Registry Sud Bih, dated December 27, 2007.

⁵ The Working groups are: "Radna grupa za pripremu prijedloga za osnivanje odjeljenja Suda i Tuzilastva BiH van sjedista Suda i Tuzilastva" and "Working Group for the National Strategy for Processing of War Crime Cases and War Crimes Recovery".

⁶ Thus any reports of War Crimes received by any other prosecutors' office or court must be immediately submitted to the BiH Prosecutor. Criminal Procedure Code of Bosnia and Herzegovina, Article 215(3). ARTICLES 173-184 Criminal Code of BiH.

⁷ What law is then to be applied by the cantonal and district courts in these cases has become problematic. In particular the criminal law to be applied and sentences that can be imposed have been decided differently depending on the court hearing the case. In addition, where an indictment has been filed for confirmation, Sud BiH must make the decision to transfer the case to the local entity court. Recently, in the case of Sretan Lazarevic, a 24/6 panel of Sud BiH has refused to grant the prosecutor's motion to transfer which was unopposed by the accused. The first instance panel cited the needs of

The UNDP has focused its capacity building programs in the area of justice primarily upon the state offices of BiH until now. As the National Strategy is developed in the context of what has become a much larger number of war crimes investigations and potential prosecutions, the capacities of District and Cantonal Prosecutors' Offices and Courts to handle these cases is in need of a fresh assessment.

Recently, the State working groups have been looking at differing strategies to handle these cases both efficiently and fairly. One concept proposed by the President of the Sud BiH is to establish satellite courts as a part of Sud BiH. The prosecutors at those satellites would presumably be drawn from local Cantonal or District prosecutors' offices. The judges likewise would be assigned to the Satellite Court from Cantonal or District courts. This would enable Satellite Courts to continue to use both the law of BiH and the jurisprudence of Sud BiH. The other proposals discussed involve identifying those local courts that would likely receive a larger number of matters or cases involving war crimes and increase their resources to enable an efficient and impartial investigation and trial of these matters.⁸

This study was commissioned by UNDP to evaluate the capacities of Cantonal and District prosecutor offices to investigate and prosecute war crimes cases and of the Cantonal and District courts to try those cases. It was designed to evaluate the resources available to those offices as well as the obstacles faced in handling what could be a large number of serious and complex cases. Thus, the primary purpose of this study is to identify the capacities of the local institutions as well as any problem areas. The study is also intended to identify strengths and weaknesses in each of the scenarios being discussed as well as to indicate where efforts could be made to strengthen the capacities of local institutions to handle these matters under whatever structure is finally decided upon.

METHODOLOGY

The evaluation began with a review of other studies that have considered the capacity of District and Cantonal Courts and Prosecutors' Offices to try war crime cases. Of particular use have been the study conducted by the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina (August 2006), the study published by OSCE regarding War Crimes in the Domestic Courts of Bosnia (March 2005), and a number of Human Rights Watch Reports.⁹ With regard to matters of general court efficiency, a recent SIDA report was particularly useful.¹⁰

A number of discussions were undertaken with staff of the HJPC, OSCE, the BiH Prosecutor's Office, Sud BiH; as well as various organizations involved in civil society.¹¹ These discussions and a review of the previous studies formed the basis for the development of a number of capacities deemed to be important for both cantonal/district courts and prosecutors' offices to investigate and try war crimes.¹² A series of suggested questions or points for discussion were established as a basis for the discussions with personnel of the entity offices.¹³ Finally, minimal capacities for the

a vulnerable witness that could best be met in the Court of BiH. This case is before the appellate panel at this time. Lazarevic, Sreten and Others, Sud BiH, X-KR-06/243 (17 December 2007).

⁸ See HJPC, "Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies In BiH for Processing War Crimes Cases", Sarajevo (June 2006) and HJPC, "Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH", Sarajevo, (December 27, 2007).

⁹ Human Rights Watch, "A Chance for Justice? War Crimes Prosecutions in Bosnia's Serb Republic", New York (March 2006), "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro", New York (October 2004), "Bosnia and Herzegovina: Looking for Justice, The War Crimes Chamber in Bosnia and Herzegovina", New York (February 2006), "Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber", New York (February 2007).

¹⁰ Swedish International Development Agency, "Justice Chain Analysis Bosnia and Herzegovina", Sarajevo (June 2007) (hereinafter SIDA Report).

¹¹ See Annex III.

¹² The term Cantonal and District Courts and Prosecutor Offices' includes in future text the Basic Court of Brcko District unless it is treated separately.

¹³ See Annex IV.

efficient and fair handling of war crime cases were drafted for both courts and prosecutors' offices.



CAPACITIES DEVELOPED

After a review of previous studies, literature on war crimes prosecution, literature on prosecutorial and court standards and after discussions with personnel at Sud BiH, the Prosecutor's Office, international experts and others, certain minimal capacities were developed for the fair and efficient investigation and prosecution of war crimes. These capacities are a minimum to ensure that such proceedings meet the expectations of European Human Rights standards.

The capacities apply to prosecutors' offices and courts and are designed to ensure that persons whose cases are referred to Cantonal or District courts do not receive a lower standard of justice than those cases that are tried before the ICTY or Sud BiH. Five principal capacities were developed, each of which having a number of component parts. The capacities are more fully set forth in Annex I to this report.

The minimal capacities for prosecutors' offices

1. Sufficient investigative resources to: identify, locate and obtain witnesses; identify, locate and obtain documentary evidence from ICTY, OTP ICTY, Bosnian State and Entity government agencies and commissions; obtain and preserve evidence from exhumations; and identify, locate and procure the attendance of suspected individuals.
2. Substantial familiarity of prosecutors and staff with war crimes law: including Customary International Humanitarian Law, Law on Transfer of Cases from ICTY, Law on Protection of Witnesses under Threat and Vulnerable Witnesses.
3. Sufficient resources to protect and to support the victims and witnesses to war crimes during the investigative stage, trial stage and post trial stage.
4. Sufficient prosecutors, prosecutorial associates and investigators specifically assigned to handle war crimes cases.
5. Transparency as to decisions to investigate and/or prosecute as well as to explain decisions to decline to seek an indictment; and a program of outreach to the community with respect to war crimes.

The minimal capacities for courts

1. Courts must have the ability to uniformly apply the law.
2. Sufficient resources must be available to protect and to support the witnesses and victims of war crimes at all stages of the proceedings and after their conclusion.
3. Sufficient resources must exist for the court to assure that adequate defense counsel is available for the accused.
4. Substantial familiarity of the judges with war crimes law: including Customary International Humanitarian Law, European Convention on Human Rights, Law on Transfer of Cases, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, as well as the use of international process to procure suspects.
5. Transparency in court decisions and verdicts as well as a program of outreach to the community with respect to war crimes cases.

These are considered minimal capacities to provide an ability to fairly and efficiently try serious and complex cases involving war crimes.



APPLICATION OF THE CAPACITIES TO CANTONAL AND DISTRICT PROSECUTORS' OFFICES AND COURTS

During the study, each office of prosecutor and each court was visited and discussions were held with chief judges, judges assigned to war crimes cases, judges heading criminal divisions, chief prosecutors, prosecutors assigned to war crimes, and others.¹⁴ Discussions were also held with a number of representatives of civil society organizations and other organizations involved in the education of participants in this endeavor.¹⁵ Facilities were observed in each Canton or District and many of the courtrooms were visited. The discussions were held based upon the questions developed previously. In many instances some of the specific questions were not asked as the subject matter was dealt with by the individual being interviewed in response to other questions. In all cases the subject matter of the minimal capacities was discussed. It is clear from the observations and discussions that none of the Cantonal or District Prosecutors' Offices has adequate resources at the present time to seriously investigate and prosecute the numerous reports¹⁶ of war crime incidents and persons likely to be submitted to them in a timely and professional manner.

Each of the entity level courts and prosecutors' offices, including those of the Brcko District, were compared against the minimal criteria established. The results of that comparison are shown in Table A as to prosecutors' offices and Table B with respect to the Courts. The results do not differ significantly with respect to the ultimate capacity to investigate/try a large number of war crime cases. This conclusion is fully supported by the evaluation completed by the HJPC published in August of 2006.¹⁷ It must be noted that in determining the issue of familiarity with war crimes laws this report does not presume to evaluate the professional capacities of the prosecutors or judges. That is a matter for the HJPC after their careful review of the work performed. This report relies upon the self-reported concerns of those interviewed.

¹⁴ See Annex II.

¹⁵ See Annex III.

¹⁶ See footnote 1.

¹⁷ HJPC, "Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies In BiH for Processing War Crimes Cases", Sarajevo (June 2006). The report suggests additional resources for the agencies studied. See also HJPC, "Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH", Sarajevo, (December 27, 2007).

TABLE A Prosecutors Offices

	1	2	3	4	5
Brčko District	N	YQ	NQ	N	YQ
Republic Srpska:					
E. Sarajevo	N	YQ	N	N	YQ
Trebinje	N	YQ	N	N	YQ
Doboj	N	YQ	N	YQ	YQ
Bijeljina	N	YQ	N	N	YQ
Banja Luka	N	Y	N	YQ	Y
Federation of BiH:					
Bihac	N	YQ	N	YQ	N
Sarajevo	N	Y	N	YQ	N
Goražde	N	YQ	N	N	N
Široki Brijeg	N	YQ	N	N	N
Orašje	N	YQ	N	N	N
Livno	N	YQ	N	N	N
Mostar	N	YQ	N	N	N
Tuzla	N	YQ	NQ	YQ	YQ
Travnik	N	YQ	N	YQ	N
Zenica	N	YQ	N	YQ	N

TABLE B Courts

	1	2	3	4	5
Brčko District	N	N	N	YQ	N
Republic Srpska:					
E. Sarajevo	N	N	NQ\$	YQ	N
Trebinje	N	N	NQ\$	YQ	N
Doboj	N	N	NQ\$	YQ	N
Bijeljina	N	N	NQ\$	YQ	N
Banja Luka	N	N	NQ\$	YQ	N
Federation of BiH:					
Bihac	N	N	N	YQ	N
Sarajevo	N	N	N	YQ	N
Goražde	N	N	N	YQ	N
Široki Brijeg	N	N	NQ	YQ	N
Orašje	N	N	N	YQ	N
Livno	N	NQ	NQ	YQ	N
Mostar	N	N	NQ\$	YQ	N
Tuzla	N	NQ	N	YQ	N
Travnik	N	N	N	YQ	N
Zenica	N	N	N	YQ	N

As to both table the following definitions apply:

Y = Meets all capacities. - YQ = Meets most capacities but could have improvement. - NQ = Does not meet capacity but could be improved. - NQ\$ = Does not meet capacity primarily because of lack of funding.
N = Does not meet capacity.

There are of course significant differences in the resources and capacities of courts and prosecutors' offices from one District or Canton to another. But even the Court and Prosecutor's Office of Brčko District where large amounts of additional support have been given, could not today fairly and efficiently process a large number of additional war crimes cases.



CONSTRAINTS

The study has identified a number of constraints which currently preclude cantonal or district level prosecutor offices and courts from proceeding in these cases:

- **LACK OF ADEQUATE NUMBERS OF PROSECUTORS.** Judicial Reform and the consolidation of prosecutors' offices caused the number of prosecutors assigned to each office to be substantially reduced from pre-reform levels. While this reform was governed by the size of cantonal/district level and municipal/basic level prosecutor's offices, it has reduced the ability of each office to commit specialized prosecutors to investigate complex cases. Prosecutor's offices must provide coverage to all municipal and cantonal or district level courts for investigation and prosecution of all criminal cases. In some areas the need to prosecute in a distant municipal court can be time consuming. As several prosecutors have noted, driving two hours to a municipal court only to find an accused has not appeared causes loss of most of a day for that prosecutor. As acknowledged by the HJPC, if significant numbers of cases are found to be "sensitive" and referred for local prosecution, cantonal and district prosecutor offices will need additional prosecutors, prosecutorial associates and other staff.¹⁸
- **LACK OF TRAINED INVESTIGATIVE PERSONNEL WITHIN PROSECUTOR'S OFFICES.** District or cantonal level prosecutors must investigate cases themselves. No offices have investigative staff specifically assigned to them. Prosecutor's offices must rely on assistance from local police agencies. Prosecutors indicated that in many cases these officers have neither received specialized training to investigate war crimes, nor have they learned how to work with traumatized victims and witnesses. Many prosecutors indicated that police agencies often have not identified officers to specialize in war crimes cases.
- **LACK OF PROSECUTORS WHO ARE SPECIFICALLY ASSIGNED TO WAR CRIMES CASES AS THEIR SOLE OR EVEN PRIMARY RESPONSIBILITY.** While certain offices have designated war crimes departments, the prosecutors assigned to those departments are also assigned other criminal cases. As one prosecutor in charge of such a department indicated "90 to 95 percent of my prosecutors work is related to general criminal cases."¹⁹
- **RATING OR PERFORMANCE STANDARDS FOR PROSECUTORS DETER PROSECUTORS FROM HANDLING COMPLEX WAR CRIME INVESTIGATIONS.** Rating of prosecutors is based in part upon meeting norms or quotas of indictments. Many prosecutors indicated that this is one consideration in their decision not to specifically concentrate on these war crimes cases. Chief prosecutors will assign additional work to the individual assigned war

¹⁸ Id.

¹⁹ Statement of a prosecutor in charge of a War Crimes Department. Individual names are not being used herein as confidentiality was assured some interviewed individuals. An endnote is only provided when it is useful to identify the work being done by that individual.

crimes so that he/she can meet the norm or quota. That of course reduces the time that can be utilized in investigating and prosecuting war crimes cases.

- **EXHUMATIONS CONSUME A LARGE AMOUNT OF TIME OF CERTAIN PROSECUTORS.** A number of prosecutors discussed the large amount of time they dedicated to exhumations. Frequently, prosecutors attend exhumations related to cases that will not be tried in their respective courts. One prosecutor indicated that this consumed more than 30% of his work time on an annual basis.
- **WITH THE EXCEPTION OF THE TUZLA PROSECUTOR'S OFFICE²⁰ THERE WERE NO VISIBLE, ORGANIZED EFFORTS FOR COMMUNITY OUTREACH BY THE PROSECUTORS' OFFICES.** Lack of personnel to do this was noted by many offices. In Banja Luka, the war crimes prosecutor performed outreach to the community by himself. Lack of staff, prosecutorial associates, investigators and victim services personnel is a consistent problem. The method of allocating staff is a problem especially in the smaller offices. Although Chief Prosecutors now have managerial freedom to hire staff in accordance with office needs, there are certain basic employees that must be hired such as cleaners, security guards, etc. thereby cutting down on the number of posts to cover these special duties.
- **LACK OF PROSECUTORS IN GENERAL.** A number of offices indicated difficulty in filling positions already authorized by the HJPC because qualified candidates had not applied. As a result, understaffed offices must perform all their responsibilities without their full staffing. Pay is considered one impediment to filling these positions. Another impediment is the need to maintain ethnic diversity limiting the applicant pool in some areas. One prosecutor pointed out that in his Canton there were a number of qualified prosecutors who were not working; but, they could not be hired due to ethnic representation requirements. His office had vacancies at the time. Other offices confirmed that this did cause problems in promptly filling positions.
- **UNAVAILABILITY OF THE SUSPECT IN A CASE TO BE INTERVIEWED BY THE PROSECUTOR PRECLUDES THAT PROSECUTOR FROM RAISING AN INDICTMENT.** Prosecutors cite the provisions of law²¹ that require that a suspect be interviewed prior to indictment as a reason that many cases can not be completed. Local prosecutors are frustrated by their inability to bring these suspects to the interviews.
- **PROSECUTOR'S OFFICES DO NOT HAVE RESOURCES TO PROVIDE PROTECTION TO, OR SUPPORT FOR, VICTIMS AND/OR WITNESSES.** In some interviews the prosecutor indicated that it was his job to convince a witness to testify without protection because otherwise there would be no evidence for the court to decide the case in a favorable manner.
- **PROSECUTORS QUESTIONED DECISIONS BY THE BIH PROSECUTOR'S OFFICE TO "SPLIT" CASES.** Several prosecutors noted that in some instances the state prosecutors would determine that 2 or 3 participants at an incident were "highly sensitive" while 25-30 other participants were "sensitive."²² The prosecutors then point out that the witnesses who have been interviewed and who may or may not have testified at Sud BiH must be re-interviewed and testify again at subsequent proceedings. Often this raises problems as the witness who has testified at Sud BiH - and may have previously testified at the ICTY - is reluctant to testify again without the protections and support offered at Sud BiH.

²⁰ In Tuzla, the Prosecutor's Office has worked to engage NGO's in the support of victims/witnesses. An agreement for funding was initialed.

²¹ Article 225, CPC of FBiH, Article 225, CPC of RS.

²² These statements have not been independently verified. The BiH Prosecutor's Office is well aware of the issue of witness "fatigue" and is committed to reducing the number of times witnesses must appear. Email from David Schwendiman dated January 21, 2008.

- PROSECUTORS CLOSE ONLY A SMALL NUMBER OF WAR CRIMES INVESTIGATIONS WITHOUT INDICTMENT. A number of prosecutors indicate that they are reluctant to close investigations of war crimes. This reluctance in some cases comes from a belief that someday evidence will come to light that allows prosecution. In other cases the reluctance comes from a desire to avoid criticism and potential complaints against the prosecutor. In some cases prosecutors have effectively closed cases and fully explained to victims and witnesses that the case could be reopened if the need arises.
- PROSECUTORS ARE SERIOUSLY CONCERNED ABOUT THE LACK OF UNIFORMITY IN APPLICATION OF THE LAW. This relates to the different interpretation of what law governs these prosecutions between the entity Supreme Courts and Sud BiH. As expressed by many prosecutors, an accused can face 40 years in prison in State Court but only 15 years in an entity court for the same offense.
- ADDITIONAL EDUCATION NECESSARY. Prosecutors have been given educational opportunities relating to war crimes issues but believe that if many cases are going to be assigned additional education is necessary. Most prosecutors involved in war crimes cases felt comfortable that their educational opportunities have helped them to become current on relevant topics. A large majority of those interviewed felt that a course of instruction that covered war crimes issues from “investigation through trial” would be very helpful. They preferred that this instruction make use of those professionals who have investigated and tried war crimes at Sud BiH and ICTY.
- MOST PROSECUTORS’ OFFICES HAVE NO ABILITY TO REVIEW FILES AND EVIDENCE OF THE ICTY AND OTP ICTY THAT RELATE TO INCIDENTS IN THEIR JURISDICTION. Currently, if a local prosecutor knows of the existence of evidence related to her investigation that is in possession of the ICTY/OTPICTY, a request can be made through the BiH Prosecutor’s Office to obtain that evidence. What is lacking is direct access to that evidence as well as any ability to search such data for relevant information. Most prosecutors are unaware of what evidence - such as military and police data - seized by EUFOR, might be available at the ICTY/OTPICTY and thus conduct their own investigation without seeking such material. Not only does this result in a waste of scarce resources as matters get reinvestigated, but more troubling is the possibility that relevant evidence in ICTY/OTPICTY possession remains undiscovered. One prosecutor related an incident of a lengthy investigation being concluded only to find that the ICTY had determined years earlier the perpetrator was deceased.
- MOST PROSECUTORS FEEL THERE IS NO NATIONAL COMMITMENT TO INVESTIGATE AND TRY THESE CASES. One prosecutor summed up the feelings of many when he said, “by national commitment, I mean more than words. If they are serious about this, they would provide the resources to do it.”²³

The Courts as well have serious constraints in fairly and efficiently trying these cases:

- SCOURTS LACK FACILITIES TO IMPLEMENT THE LAWS ON PROTECTION OF WITNESSES UNDER THREAT AND VULNERABLE WITNESSES. With the exception of Brčko District, none of the courts visited had adequate facilities to provide the minimum required under this law. In most courts, courtrooms are not designed to allow separate entrance and egress. In some courts the rooms require witnesses and accused to sit next to one another. Most courts do not have separate waiting areas for witnesses and the general public. Entrance to most courthouses is through a common entrance. One judge

²³ A prosecutor who has tried war crimes cases in entity courts.

One judge noted that during a trial “dodgy” people stood around the courthouse entrance. Many judges felt that witnesses were influenced to a degree by these shortcomings. As noted by one judge “witnesses testify differently at this level.”²⁴

- **COURTS LACK RESOURCES TO SUPPORT WITNESSES.** No court had personnel to assign to support victims/witnesses. As one judge indicated “we can offer them chai or juice.”²⁵ This is a serious impediment when dealing with traumatized victims or witnesses. In a recent study in Croatia more than 60% of all witnesses and victims felt being offered psychological or emotional support was important.²⁶
- **MOST COURTROOMS IN CANTONAL AND DISTRICT COURTS ARE TOO SMALL TO HANDLE CASES INVOLVING MORE THAN 2 OR 3 ACCUSED.** In several jurisdictions there are larger courtrooms but even those are not large enough to try 10 or more accused at one time.
- **SOME COURTS FELT THAT PROSECUTORS - WHOSE RESOURCES ARE STRAINED TO BEGIN WITH - HAVE BROUGHT WAR CRIMES CASES BEFORE THEY WERE THOROUGHLY INVESTIGATED. THOSE CASES HAVE LED TO QUASHED INDICTMENTS.** These judges then feel the pressure of the public blaming them for quashing the indictments. They note in addition that even where the indictment was poorly drafted and the case inadequately investigated, it is the court that must pay the expenses for defense counsel. One judge expressed frustration that victims groups seem to believe that convictions should issue with no direct evidence being offered.
- **JUDGES UNIFORMLY FELT THAT THEIR EDUCATIONAL PROGRAMS ON WAR CRIMES LAW HAD BEEN GOOD AND THE MATERIALS USEFUL.** Several expressed complete confidence that their understanding of these areas of the law was adequate. Many others felt that they would benefit from a program that was practical, covered war crimes from “investigation through trial”, and was presented by those who had participated in these cases at Sud BiH and the ICTY. Many expressed the belief that if new judges and prosecutors were added to handle this caseload such education would be essential and must be required.
- **JUDGES, AS DID THE PROSECUTORS, BELIEVE THAT THE CURRENT RATING SYSTEM FOR MEETING PROFESSIONAL STANDARDS DOES NOT ENCOURAGE SPECIALIZING IN WAR CRIMES CASES.** While president judges indicated that their rating took into account the complex assignments to judges, the judges believed that if they did not meet quotas or norms they would be ranked lower. In almost all cases president judges would assign easy cases as well so that judges could meet their norm. Of course, these additional cases defeat specialization as they consume a good part of the judge’s time.
- **MANY JUDGES NOTED THAT A LARGE INCREASE OF WAR CRIMES CASES WOULD LIKELY MAKE IT IMPOSSIBLE TO ADEQUATELY COMPENSATE DEFENSE COUNSEL.** In cantonal courts the money to pay counsel and experts must be obtained from the canton. This of course requires budgetary planning and advance notice of the amount needed. In the district courts this money has to be obtained from the RS budget. Again planning is required. According to a President Judge the funds expended for defense counsel and experts in war crimes cases have exceeded 10% of the entire court budget in his canton. This occurred with an extremely small number of cases. A number of judges also expressed the opinion that it was extremely difficult for them to identify and procure expert witnesses especially in the area of military science.

²⁴ A judge who has tried war crimes cases in entity courts.

²⁵ A judge currently involved in trying War Crime cases in an entity court.

²⁶ See UNDP, Support to Victims and Witnesses of Criminal Offences in the Republic of Croatia, Zagreb, (2007). More than 80% felt a need for basic information about court processes was not being met.

- LACK OF EXPERIENCE IN WAR CRIME CASES. Some judges expressed the opinion that many of the defense counsel on their appointment list have no experience in war crimes matters, little education on the subject of war crimes, and almost always lack investigative resources to defend their clients.
- NONE OF THE COURTS HAD A COMMUNITY OUTREACH PROGRAM. Again a lack of personnel to be assigned this duty was cited by many judges. As one judge noted “we don’t have typists.” Just as the prosecutors noted, the current system of allocating personnel based on the number of judges makes it impossible for smaller jurisdictions to meet the requirements of their court. Certain necessary employees must be hired and that leads to tough decisions in a small court.
- LACK OF COMMITMENT. Judges also feel that there is no real commitment on the part of the national government to try these cases; or the resources would be available to do so.
- SEVERAL JUDGES NOTED THE PROBLEM INHERENT WITH KEEPING OPEN INVESTIGATIONS WHERE PROSECUTION WAS UNLIKELY TO OCCUR. This raises a real question as to the number of cases likely to be prosecuted. As a result the victims, witnesses and suspects are left in doubt with no resolution of the matter.



GENERAL OBSERVATIONS

In addition to these constraints the survey of prosecutors and judges has led to a number of additional general observations.

- The judges and prosecutors interviewed uniformly believed that without a strong and real national commitment to investigate and prosecute War Crimes cases, any large scale transfer of these matters to the cantonal and district courts and prosecutors' offices would be a disaster. In particular, after judicial reform, the courts and prosecutors' offices are staffed to handle the routine criminal and civil case loads. In the opinion of most interviewed, they are barely staffed to be able to meet their current demands. There exists a huge backlog of civil cases in many jurisdictions. Where vacancies in judges and prosecutors exist, they cannot meet current demands. To assign a large number of complex cases to this system would completely destroy its ability to function absent substantial resources being added.
- The judges and prosecutors interviewed uniformly expressed a desire and willingness to investigate and try these cases if adequate resources were made available and if their participation would not destroy their career. Some individuals who have participated in war crimes cases expressed the belief that it has handicapped their career and their ability to do anything else, and thus worry that if their rating in their current position suffers as well, they could be severely harmed professionally.
- Almost all of those interviewed expressed a strong belief that assigning these cases to cantonal and district courts under current circumstances was totally unfair to the victims, witnesses and accused. In particular, they noted:
 - Absence of any victim/witness services,
 - Disparate sentences under the law,
 - Disparate defense counsel services,
 - Unavailability of witness protection measures,

- Courtrooms and courthouse problems.

The question posed frequently was “how can we offer two levels of justice based solely upon the prosecutor's decision as to where the case is tried?” Comments from many involved were that it would be fundamentally unfair and would probably violate the individuals' human rights.

- Facilities at cantonal and district prosecutors' offices and courts are inadequate in general to allow for a large scale increase in trials of war crimes cases. From courthouse and courtroom design, to lack of interrogation rooms, and lack of separate facilities for witnesses, modifications would have to be made. This produces a significant time constraint on when the strategy could be implemented.



MEASURES FOR IMPROVEMENT OF CAPACITIES

The constraints and observations made in this report, as well as those documented previously by SIDA, OSCE, the HJPC and Human Rights Watch suggest a number of measures that could improve the situation. This report lists such measures as either short term or long term recommendations:

Short Term Recommendations

- Using the contacts of the victim witness support group at Sud BiH, convene a conference of NGOs interested in working with courts in supporting victims and witnesses. Invite cantonal and district judges and prosecutors to discuss how these groups can cooperate in supporting witnesses and victims of war crimes (the prosecutor from Tuzla might be of assistance in discussing her arrangement with NGO's in that area).
- Using the experience of OKO, provide basic war crimes education to attorneys who wish to place that certification beside their name on court appointment lists. Such lists should, upon approval of the cantonal or district courts, list this certification as well as whether the attorney has previously represented accused at either the ICTY or Sud BiH. This would increase the information available to an accused when he/she selects an attorney.
- Begin planning for the use of video link testimony at cantonal and district courts and procure equipment to make this possible.
- Sponsor a conference for mental health professionals and NGOs to meet with victim service experts on the needs of traumatized victims and witnesses to develop an action plan to accomplish the delivery of these needs or services.
- Promote training of local police in their investigation of war crimes as well as the methods of interviewing and working with traumatized victims and witnesses.
- Provide expert assistance to the HJPC to develop a rating system that properly accounts for complexity of the cases being processed. As noted by HJPC President Branko Peric, a system that allows counting easiest cases equally with complex cases is not optimal.²⁷

²⁷ High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Judicial Reform in Montenegro – Learning from the Experiences of Bosnia and Herzegovina, Sarajevo (September 2007), page 21.

- Provide assistance to study what measures could be taken at Court of BiH to increase the number of trials conducted; and what could be done to improve capabilities at the BiH Prosecutor's office to efficiently investigate more cases.
- Provide assistance to the judicial and prosecutorial training centers to develop an organized war crimes educational program that proceeds from investigation through verdict drawing upon national and international practitioners as trainers. Require all new judges and prosecutors to attend the program.
- Create an investigation data base at SIPA. This would include incidents being investigated by any cantonal or district prosecutor or police agency as well as those investigated by SIPA and/or the BiH Prosecutor. It would need to be accessible by name of the suspect as well as by the incident reported. If possible it should integrate data from the OTPICTY.
- Support the development of outreach capabilities at cantonal and district prosecutor's offices and courts. This could be done by requesting a designation of an outreach officer and a plan in each office and sponsoring training opportunities for staff at these offices.

Long Term Recommendations

- Determine a National Strategy that demonstrates a national commitment to investigate and prosecute all war crimes within a ten year period.
- Determine if some routine criminal jurisdiction of Sud BiH could statutorily be returned to cantonal and district courts so that the additional resources could be freed up and be directed toward War Crimes.
- Increase the capacity of the BiH Prosecutor's Office by authorizing additional personnel and creation of regional offices to conduct investigations in a more efficient and coordinated fashion. This is essential to a determination as to the number of cases that will eventually be prosecuted. Some of this enhanced capacity could be on a reserve basis to investigate the backlog of matters.
- Explore the possibility of adding reserve judges to Sud BiH to increase its capacity to try war crimes cases. A specific time frame could be established during which this enhanced program would be run to eliminate this backlog. Incentives would have to be developed to encourage professionals (perhaps more senior local judges) to accept a ten year (or other limited term) appointment to Sud BiH as a reserve judge to try only war crimes. These appointments could be made on a timed or staggered basis to coincide with the development of cases by the BiH Prosecutor.
- Support the court facilities modernization program suggested by SIDA²⁸ while insisting that the renovations include provision for adapting courtrooms and courthouses to provide for witness protection measures.
- Make permanent the mandate of OKO and provide sufficient additional resources to expand its services to be available to all defense counsel defending war crimes at state or cantonal/district level.
- Make permanent the services of the victim/witness support personnel at Sud BiH and expand their mandate and resources to be able to assist witnesses at all levels of prosecution. This would necessitate regional offices.
- Work with the bar associations to establish a war crimes certification for attorneys who volunteer to be appointed in these cases at an entity level.
- Establish a repository for the evidence developed by the ICTY, OTPICTY that would be available to be researched by the BiH Prosecutor, cantonal/district prosecutors, OKO and

²⁸ See SIDA Report, at 85-87.

defense attorneys. This will have to provide protective measures for those matters where the ICTY protected witnesses and their statements. Some mechanism for modifying ICTY protective orders in appropriate cases would be needed, perhaps at the ICC. This repository is necessary as much documentary evidence that was seized from police and/or military offices is only available in these files. Further, many incidents were thoroughly investigated with no indictment being raised.

- Establish a plan to provide incentives to qualified attorneys to become judges/prosecutors with a war crimes specialization. The benefits of that specialization in efficiency are noted in the SIDA report.²⁹ This plan must address compensation and rating issues as well.
- Establish a procedure to determine the status of claims of war crimes where the incident or individual accused will not be prosecuted. For many reasons – including death, inability to locate the perpetrator, inability to identify the perpetrator – some cases will not result in prosecution. A process should be established to close these cases in a manner acceptable to the victims, relatives of victims and others concerned.
- Harmonize the law to be applied in war crimes cases by legislating that any court, state or entity, is bound to apply the law of BiH to war crimes cases.³⁰
- Amend the CPC of the FBiH and RS to remove the requirement that the Preliminary Proceedings Judge and Preliminary Hearing Judge be different judges. This would enable smaller courts to better utilize their personnel.



CONCLUDING OBSERVATIONS

Before the national strategy for investigating and prosecuting war crimes is agreed upon, the feasibility of implementing that policy must be examined in light of the realities of existing and potential resources. Likewise, it is important to determine a time frame in which the strategy could be implemented and the costs that would be incurred.

There is a strong and compelling argument voiced by the prosecutors and judges interviewed that any adopted strategy must provide for equal treatment before the courts for witnesses, victims and the accused. The National Strategy must recognize that this involves more than just the same law being applied. It includes the level of protection and support that can be provided to the victim or witness. It includes the defense services that can be provided the accused. Many have noted that the prosecution of these cases at the State level would assign a national priority or importance to them.

Many of the concerns expressed by prosecutors, judges and human rights activists support the trial of as many of the War Crimes cases as possible before Sud BiH which has been resourced to provide a significant level of protection and support to the parties involved as well as providing support through OKO to the counsel representing accused persons. It is unlikely that resources to provide such protection and support could be made available in a timely manner at all or most of the five District Courts, ten Cantonal Courts and at the Brcko District Court. Likewise, the ability to provide an equal level of assistance to all defense counsel at the entity court level would take substantial resources and time to develop.

²⁹Id. at 55-56.

³⁰As suggested by the HJPC position paper. HJPC, "Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH", Sarajevo, (December 27, 2007), Pages 2-3.



THE ROAD AHEAD

As Bosnia searches for a national strategy that will insure fair and efficient investigation, prosecution and trial of war crimes cases it must - as noted by the HJPC - base that strategy on facts, feasibility and cost analysis. It must also consider the time that would be necessary to implement that strategy.

Any of the proposals being discussed must address the constraints existing within the current situation in both prosecutors' offices and courts. These constraints would impact on the proposal's feasibility to different degrees.

The proposal to create satellite branches of Sud BiH would resolve the uniformity of law and level of service issues but it would require a substantial increase in staff (either permanent or reserve). It would also require a location or locations for the satellite trials to occur and thus require the improvement of courthouse and courtroom facilities in several local areas. It would require the ability to recruit additional judges, prosecutors and staff. The recruitment of such professionals would likely trigger a loss of judges, prosecutors and other staff from the entity courts. Thus, some method of phasing in the recruitment would be necessary.³¹ Incentives would have to be offered if the additional professionals recruited were to serve in a reserve capacity for a limited time to meet this one specific problem. A substantial number of additional defense counsels would have to be added to the court list. Additional resources would need to be added to SIPA, OKO and the witness support system program. A cost analysis for this would need to be performed. Funding would be a State responsibility.

The proposal to use existing cantonal and district courts and to refer all of these potential cases to cantonal and district prosecutors would likewise require a substantial increase in personnel at each court involved. All affected courts would need to modify their courthouses and courtrooms to allow for compliance with the law on protection of witnesses. Additional prosecutors and judges would need to be recruited. Many of these professionals would need to be recruited in areas where current vacancies exist, raising the question as to whether they could be filled in a timely fashion. Defense counsel would need to be trained on war crimes issues and added to local court lists, and funds to pay them added to the court budgets. A system for offering victim/witness protection and support would need to be created for each court affected. In addition, a decision would need to be made as to whether all of these measures would be permanent or on a term basis. Of course, the physical improvements would be permanent. The funding for all of these measures would involve the RS, the Brcko District as well as the ten Cantons.

As the HJPC states, all of these measures should be subjected to a cost analysis. Likewise, an implementation study as to time required should be done. It should determine how long it would take to begin processing investigations and cases under any of the scenarios. This is a critical issue as time is the enemy of any successful prosecution of these cases.

In conclusion, decisions as to the road ahead must be made sooner rather than later. Those decisions need to be made on the real facts and then supported by a real commitment; and that,

³¹ For example, the prosecutors office could be increased first as investigations must precede prosecutions. Perhaps, the mandate of international prosecutors (familiar with war crimes cases and able to use ICTY English language records) could be extended for several years while additional national prosecutors are being recruited. Judges could begin to be recruited at a certain number each year. Reserve judges and prosecutors could be selected for terms of 5 – 10 years to deal with these cases.

under any scenario, means funding in a substantial manner.

Once BiH's national strategy is adopted, the international community should be approached to assist in this endeavor to finally address the issue of war crimes in BiH and thus allow Bosnia to move forward toward the future.



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ANNEX I

CAPACITIES FOR TRYING WAR CRIMES

For Prosecutors' Offices the minimal capacities are:

1. Sufficient investigative resources to: identify, locate and obtain witnesses; identify, locate and obtain documentary evidence from ICTY, OTP ICTY, Bosnian State and Entity government agencies and commissions; obtain and preserve evidence from exhumations; and identify, locate and procure the attendance of suspected individuals.
 - a. This implies having individuals who are assigned the primary responsibility of locating witnesses and victims to war crimes, whether from complaints to police or military officials at some previous time, complaints or statements to commissions or agencies of government; persons mentioned in statements by other witnesses; persons mentioned in government reports; persons mentioned in records at the ICTY.
 - b. This implies having individuals who are assigned the primary responsibility of gathering of all documentation regarding incidents of war crimes that occurred within the local jurisdiction whether contained in State or Entity Ministry files, the files of Commissions or other agencies of State or Entity governments, police files, files of the Office of Prosecutor ICTY, files of the ICTY, and any other relevant origin.
 - c. This implies having forensic employees (may or may not be prosecutors) who can attend exhumations, gather and preserve physical evidence, meet with witnesses and interview persons.
 - d. This implies having personnel trained to deal effectively with traumatized witnesses and assigned to obtain the agreement and cooperation of witnesses in preparation for attendance and testimony at trial.
 - e. This implies having individuals specifically assigned the task of locating suspects who have made themselves unavailable for interview; and the task of seeking the use of process to procure their attendance.

2. Substantial familiarity of prosecutors with War Crimes Law: including Customary International Humanitarian Law, Law on Transfer of Cases from ICTY, Law on Protection of Witnesses under Threat and Vulnerable Witnesses.
 - a. This implies that the prosecutors assigned to war crimes be generally familiar with Customary International Humanitarian Law.
 - b. This implies that the prosecutors assigned to war crimes be proficient in the adversary process including cross examination, use of scientific evidence, use of documentary evidence, use of alternative means of providing testimony.
 - c. This implies that the prosecutors assigned to war crimes be familiar with the Law on Protection of Witnesses under Threat and Vulnerable Witnesses.
 - d. This implies that the prosecutors assigned to war crimes be familiar with the Law on the Transfer of Cases.

3. Sufficient resources to protect and to support the victims and witnesses to war crimes during the investigative stage, trial stage and post trial stage.
 - a. This implies that the prosecutors' office has personnel (may or may not be prosecutors) who have been trained to address the needs of traumatized witnesses and who are in touch with services that can assist those witnesses.
 - b. This implies that the prosecutor has resources to meet with the witnesses in a place other than the prosecutors' office when that is indicated as appropriate.
 - c. This implies that the prosecutor can provide protection for the witness at all stages of the investigation and prosecution as well as after the trial.
4. Sufficient prosecutors and prosecutorial associates and investigators specifically assigned to investigate and prosecute war crimes cases.
 - a. The HJPC study indicates that a minimum of between 3 to 5 prosecutors, associates and investigators should form a war crimes department in each office where more than 10 persons have been implicated in war crimes. These departments are to be supported by dedicated police resources. However, the report does not differentiate from a local entity that has 152 reported persons and one with 1638 reported persons.
 - b. It is necessary that the prosecutors be assigned to work on war crimes as their primary object, not as something to be done as an added duty.
5. Transparency as to decisions to investigate and/or prosecute as well as to explain decisions to decline to seek an indictment; and a program of outreach to the community with respect to war crimes.
 - a. It is necessary that each prosecutor's office have a plan as to how it will conduct outreach to encourage victims and witnesses to come forward and report war crime incidents.
 - b. Each prosecutor's office should have publicly available criteria as to when cases will be closed without indictment.
 - c. Prosecutors should be prepared to refer victims to appropriate services to seek relief for their injury.

For Courts the minimal capacities are:

1. Courts must have the ability to uniformly apply the law.
 - a. The law applied should be uniform without regard to the court trying the case.
2. Sufficient resources must be available to protect and to support the witnesses and victims to war crimes at all stages of the proceedings and after their conclusion.
 - a. This implies that the court has personnel who have been trained as to the needs of traumatized witnesses and who are knowledgeable of the services that can assist those witnesses and that such personnel are assigned specifically to work with witnesses.
 - b. This implies that the court has the physical resources to protect the witnesses as required by the Law on Protection of Witnesses.
 - c. This implies that the court can assure protection for the witness at all stages of the prosecution as well as after the trial.
 - d. This implies that the Court has resources to support the traumatized witness.
 - e. This implies that the court has the capacity to provide alternative means of testifying when appropriate.

3. Sufficient resources must exist for the court to assure adequate defense counsel can be obtained for the accused.
 - a. This implies that an adequate list of defense attorneys who are knowledgeable as to the issues of war crimes cases is maintained by the court.
 - b. This implies that the court has adequate funding to pay defense counsel and reimburse their investigative expenses.
4. Substantial familiarity of the judges with War Crimes Law: including Customary International Humanitarian Law, European Convention on Human Rights, Law on Transfer of Cases, Law on Protection of Witnesses under Threat and Vulnerable Witnesses, as well as the use of international process to procure suspects.
 - a. This implies that the judges assigned to war crimes be generally familiar with Customary International Humanitarian Law.
 - b. This implies that the judges assigned to war crimes be generally familiar with The European Convention on Human Rights.
 - c. This implies that the judges assigned to war crimes be proficient in the adversary process including cross examination, use of scientific evidence, use of documentary evidence, and use of alternative means of providing testimony.
 - d. This implies that the judges assigned to War Crimes be familiar with the Law on Protection of Witnesses under Threat and Vulnerable Witnesses.
 - e. This implies that the judges assigned to War Crimes be familiar with the Law on the Transfer of Cases.
5. Transparency in court decisions and verdicts, a program of outreach to the community with respect to war crimes cases.
 - a. It is necessary that each court have a plan as to how it will conduct outreach to encourage victims and witnesses to come forward and to testify at war crime trials.
 - b. Each court should have a plan on how it will work with government services and NGOs to encourage witnesses to come forward.
 - c. Courts should provide their verdicts and decisions to the public in an understandable fashion.
 - d. Courts should have a knowledgeable designated person to answer questions about its decisions from the public and the media.



ANNEX II

Judges and prosecutors interviewed

Date	Location	Institution	Person(s)
05. december 2007.	East Sarajevo	District Prosecutor's Office	Mr. Rajko Čolović
05. december 2007.	East Sarajevo	District Court	Ms. Bogdanka Dabić -Jovičić Mr. Mirko Božović
05. december 2007.	Goražde	Cantonal Court	Ms. Semija Kuljuh
05. december 2007.	Goražde	Cantonal Prosecutor's Office	Mr. Lazar Draško Mr. Mirsad Bilajac
07. december 2007.	Zenica	Cantonal Court	Ms. Zijada Alihodžić Mr. Enes Maličbegović Mr. Faik Spahić Mr. Asim Pezer
07. december 2007.	Zenica	Cantonal Prosecutor's Office	Mr. Redžo Delić
07. december 2007.	Novi Travnik	Cantonal Court	Ms. Katica Jožak-Madar
10. december 2007.	Doboj	District Court	Mr. Mladen Ružojčić
10. december 2007.	Doboj	District Prosecutor's Office	Mr. Salih Memić
10. december 2007.	Odžak	Cantonal Court	Ms. Marija Čolić
10. december 2007.	Orašje	Cantonal Prosecutor's Office	Mr. Luka Dabić
11. december 2007.	Brčko	Brčko District Prosecutor's Office	Mr. Zekerija Mujkanović
11. december 2007.	Brčko	Brčko District Basic Court	Mr. Jadranko Grčević
11. december 2007.	Bijeljina	District Prosecutor's Office	Mr. Novak Kovačević
11. december 2007.	Bijeljina	District Court	Mr. Mensur Đonlić
12. december 2007.	Tuzla	Cantonal Court	Ms. Indira Hadžimehmedović
12. december 2007.	Tuzla	Cantonal Prosecutor's Office	Ms. Alma Džaferović
13. december 2007.	Banja Luka	District Prosecutor's Office	Mr. Vitomir Soldat Mr. Branko Mitrović
13. december 2007.	Banja Luka	District Court	Mr. Senad Tica
17. december 2007.	Livno	Cantonal Prosecutor's Office	Ms. Nevenka Čorić
17. december 2007.	Livno	Cantonal Court	Mr. Nedim Begić
17. december 2007.	Široki Brijeg	Cantonal Prosecutor's Office	Mr. Tihomir Jurko
17. december 2007.	Široki Brijeg	Cantonal Court	Ms. Dragica Šimić
18. december 2007.	Mostar	Cantonal Court	Mr. Hamo Kebo
18. december 2007.	Mostar	Cantonal Prosecutor's Office	Ms. Sabina Beganović
19. december 2007.	Sarajevo	Cantonal Court	Ms. Jasmina Kosović
21. december 2007.	Trebinje	District Prosecutor's Office	Ms. Slobodanka Gaćinović Ms. Gordana Salvarica
21. december 2007.	Trebinje	District Court	Mr. Bojan Stević Mr. Duško Popić
04. january 2007.	Sarajevo	Cantonal Prosecutor's Office	Mr. Nedžad Čorović
07. january 2007.	Travnik	Cantonal Prosecutor's Office	Ms. Safija Cerić
08. january 2007.	Bihać	Cantonal Court	Mr. Fikret Hodžić
08. january 2007.	Bihać	Cantonal Prosecutor's Office	Mr. Nazif Felić



ANNEX III

Others interviewed

Date	Location	Institution	Person(s)
04. december 2007.	Sarajevo	OSCE	Ms. Meagan Hrlle Mr. Francesco de Sanctis
04. december 2007.	Sarajevo	ICTY Outreach Sarajevo	Mr. Refik Hodžić
05. december 2007.	Sarajevo	HJPC	Mr. Suen Marius Urke
11. december 2007.	Bijeljina	Helsinki Committee for HR RS	Mr. Branko Todorović Ms. Aleksandra Letić
13. december 2007.	Banja Luka	Prosecutor's Office of RS	Mr. Amor Bukić
13. december 2007.	Banja Luka	JPTC RS	Ms. Biljana Marić
18. december 2007.	Mostar	Centers for Civic Initiatives	Ms. Dalida Demirović
19. december 2007.	Sarajevo	Prosecutor's Office of FBiH	Mr. Zdravko Knežević
19. december 2007.	Sarajevo	Prosecutor's Office BiH	Mr. Marinko Jurčević
19. december 2007.	Sarajevo	JPTC FBiH	Mr. Šahbaz Džihanović Mr. Radoslav Marjanović
10. january 2007.	Sarajevo	OKO – The Registry	Ms. Jasmina Pjanić
10. january 2007.	Sarajevo	Witness Support Section – The Registry	Ms. Lucia Dighiero
10. january 2007.	Sarajevo	ICRC	Ms. Neda Dojčinović



ANNEX IV

Suggested Questions or topics for Interviews

SUGGESTED QUESTIONS OR TOPICS FOR JUDGES

Office Procedures

1. Have you processed any war crimes under the CPC?
2. How are criminal cases assigned to a judge?
3. Are war crimes assigned the same way?
4. How are cases scheduled for trial?
5. How long does the average criminal trial take? War Crimes case?
6. How are witnesses contacted to testify?
7. How many cases do judges handle on a customary or usual basis?
8. How is the effectiveness of judges measured in general?
9. Is any credit given for the complex nature of a war crimes case?
10. What resources are available to obtain witnesses attendance at trial?

11. What technical equipment do you have access to for the purpose of having evidence presented? Video or other recording? Scientific evidence? Documentary evidence?
12. Can you compensate witnesses for travel expenses?
13. Do you have the capability to use alternative means of presenting testimony?
14. Have you accepted the use of a plea agreement in war crimes cases?
15. Would you consider an agreed upon sentence recommendation in a war crimes case?

Physical Resources

1. Do you have facilities to protect witnesses/victims at court, during testimony?
2. Do you have any ability to protect witnesses in the community?
3. Do you have resources for translation of ICTY materials?
4. Do you have resources to search documentary evidence compiled at the ICTY?

Educational Opportunities

1. Have you had the opportunity for education on the Law of Protection of Witnesses?
2. Have you had the opportunity for education on the law of Transfer of Cases? Have you had
3. the opportunity for education on the use of determined facts at ICTY, and use of material evidence developed in their proceedings?
4. Have you had the opportunity for education on Customary International Humanitarian Law?
5. Have you had the opportunity for education on the issue of dealing with traumatized victims/witnesses?
6. What do you think of the quality of these presentations?
7. Do you have access to books and other materials on these subjects?
8. Do you have access to opinions, verdicts, and decisions of other courts? Of the ICTY? Texts on war crimes issues? Would this be helpful?

Other Issues

1. How do you communicate publicly your decisions and verdicts?
2. Have you discussed with other judges the uniform application of the law?
3. Do you believe the law is applied uniformly in your court?
4. Do you believe the law is applied uniformly by the appeals courts?
5. How do you deal with witnesses and victims who are reluctant to testify?

SUGGESTED QUESTIONS OR TOPICS FOR PROSECUTORS' OFFICES

Office Procedures

1. How many prosecutors do you have assigned to War Crimes
2. Have you investigated war crimes cases in your office?
3. How are criminal cases assigned to a prosecutor?
4. Are war crimes cases assigned the same way?
5. How are resources assigned, such as investigative personnel, etc.?
6. How many cases do prosecutors handle on a customary basis?
7. How is effectiveness of prosecutors measured in general?
8. Is any credit given for the complex nature of a war crimes case?
9. What resources are available to investigate war crimes cases? Locate witnesses?
10. Review evidentiary material at the ICTY?
11. What technical equipment do you have access to for the purpose of obtaining and preserving evidence? Video or other recording? Scientific evidence?

12. Do you have ability to meet with victims/witnesses off site?
13. Can you compensate witnesses for travel expenses?
14. Can you use alternative means of presenting testimony?
15. Have you considered the use of a plea agreement in war crimes cases?
16. Sentence recommendation? Cooperation of the Accused?

Physical Resources

1. Do you have facilities to protect witnesses/victims during court testimony? In the community?
2. What resources do you have for preserving testimony? Evidence?
3. Do you have resources for translation of ICTY materials?
4. Do you have resources to search ICTY documentary evidence compiled?

Educational Opportunities

1. Have you had the opportunity for education on the Law of Protection of Witnesses?
2. Have you had the opportunity for education on the law of Transfer of Cases?
3. Have you had the opportunity for education on the use of determined facts at ICTY, and use of material evidence developed in their proceedings?
4. Have you had the opportunity for education on Customary International Humanitarian Law?
5. Have you had the opportunity for education on the issue of dealing with traumatized victims/witnesses?
6. What do you feel was the quality of these opportunities?
7. Do you have access to books and other materials on these subjects?

Other Issues

1. How do you communicate a decision not to prosecute a case?
2. How do you perform outreach to the community to encourage reporting?
3. Have you discussed with other prosecutors uniform charging?
4. Have you discussed with other prosecutors uniform indictments?





Justice and Human Rights

UNDP's Justice and Human Rights Portfolio has recognized the critical period of development that Bosnia and Herzegovina has entered. In order to support the BiH in this crucial period we have developed a programme consisting of two complementary components - addressing the issues related to **transitional justice** and enhancing **access to justice**. The focus in approaching these two components has been Human Rights and capacity building. The UNDP has up until now, under the "access to justice" component, focused on capacity building of the judiciary at the levels where most citizens in BiH come into contact with court system. However, in the field of war crimes we have been working mostly at the State level and are currently expanding our activities to BiH entity level stakeholders.

Supporting National Capacities for Transitional Justice in BiH Project

While criminal justice is an important part, the challenge of dealing with the past in the current transitional context of BiH revolves around multiple dimensions of justice and human rights: how to bring war criminals to justice, how to do justice to the victims and survivors of the war, and how to bring justice to the generations that will have to live with the legacy of the past violent conflict. Some point out the many missed opportunities in BiH over the past decade. However, recent developments indicate that new momentum has built up to pursue and support comprehensive strategies for dealing with the past. Based on this understanding and given the recent developments in BiH, UNDP continues to build on the activities in the field of transitional justice through a joint UNDP/BiH project entitled Supporting National Capacities for Transitional Justice in BiH in order to develop a deeper understanding of current challenges and to support national capacities in their strive to deal with the past.