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OSCE Report Delivering Justice in BiH: An Overview of War Crimes Processing from 2005 to 2010

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Five years have passed since the Mission to Bosnia and Herzegovina of the Organization for Security and Co-operation in Europe (OSCE Mission) first published a report drawing attention to the number, nature, and importance of war crimes proceedings before the domestic courts of BiH. In the intervening period, numerous OSCE Mission reports have documented particular concerns related to war crimes processing, or findings from the monitoring of specific cases. However, important changes have also taken place in the institutional, legal, and policy framework applicable to war crimes proceedings. Most notably, the National Strategy for War Crimes Processing was developed and its implementation has been ongoing since its adoption in December 2008. It is therefore time to once again take stock of BiH's efforts to provide accountability for war crimes under its jurisdiction.

The present report provides a detailed analysis of the structural issues affecting war crimes processing and the performance of the domestic criminal justice system in the past five years, as well as efforts to implement the National Strategy in its first two years. The objective of this report is to provide an appraisal of the overall progress to date and the remaining obstacles to the delivery of effective and efficient justice for war crimes.

Executive Summary of Report

This report documents **findings from trials of individuals for genocide, crimes against humanity, and war crimes** monitored by the OSCE Mission to Bosnia and Herzegovina at both the state and entity level between **2005 and 2010**. It considers to what extent the framework for war crimes processing has served to bolster the delivery of justice in war crimes cases and the overall efficiency of the criminal justice system in Bosnia and Herzegovina (BiH). The report examines the progress of implementation of the National Strategy for War Crimes Processing, some two years after its adoption.

During the past five years, the domestic criminal justice system of BiH has completed over 200 cases related to serious violations of international humanitarian law during the 1992-1995

conflict. This demonstrates that the **authorities of BiH have not only made a significant contribution to delivering justice for those crimes**, but are seriously committed to doing so. The establishment of both the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina at the state level, which became fully operational in 2005, was an important milestone for the country's battle against impunity. Overall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings. The development and adoption of the National Strategy for War Crimes Processing is a notable effort to address systemic problems hampering effective and efficient processing of war crimes cases.

Courts and prosecutor's offices in the **Federation of BiH, the Republika Srpska, and Brčko District** have also contributed significantly to the investigation, prosecution, and adjudication of less sensitive and complex war crimes cases. The findings contained in this report confirm that certain courts and prosecutor's offices in both of the entities (**Banja Luka, Bihać, Mostar, Novi Travnik, Sarajevo, Tuzla, Trebinje, and Zenica**) and **Brčko District** demonstrated ample capacity, professionalism, and willingness to fairly and efficiently process war crimes cases, free of any indication of ethnic bias, although problems remain with some courts and prosecutor's offices.

Notwithstanding these positive steps towards delivering justice, **the report identifies numerous problems preventing the effective and efficient resolution of the outstanding backlog of war crimes cases in the BiH criminal justice system**. Chief among these problems are the challenges presented by the complex and fragmented legal framework applicable to war crimes proceedings in BiH.

National Strategy for War Crimes Processing

In this regard, the OSCE Mission to Bosnia and Herzegovina is seriously concerned that the **progress regarding implementation of the National Strategy for War Crimes Processing** is insufficient to meet the goal of resolving the top priority war crimes cases in the next five years. Implementation of the National Strategy was among the key objectives set by the Peace Implementation Council for the closure of the Office of the High Representative. Therefore, this report closely examines the core tasks connected to the National Strategy, namely the process of assessing the war crimes caseload and allocating cases to the Court and Prosecutor's Office of BiH or cantonal/district institutions according to their level of gravity and complexity. A number of problematic issues with regard to the caseload mapping process, the mechanisms for case allocation, and the application of the criteria to determine allocation are analyzed and discussed in depth.

Allocation of the War Crimes Caseload

Research conducted by the OSCE Mission shows that one of the main consequences of the problems with the **allocation of the war crimes caseload** is that the BiH Prosecutor's Office and the Court of BiH have not effectively realized the objective indicated in the National Strategy that requires them to focus on the trial of the "most responsible perpetrators" as a priority. A key element for the successful implementation of the National Strategy is therefore **the transfer of less complex cases to the entity level, which will allow the BiH Prosecutor's Office and the Court of BiH to concentrate their resources on more complex cases**.

Lack of Political Support

Another core problem addressed in the report is the **lack of political support** for war crimes processing from certain quarters, evidenced by campaigns of political attack on judicial institutions, interference in proceedings, attempts to undermine existing judicial and legal reforms, and denial of war crimes established to have occurred through binding legal decisions. While the Court of BiH and BiH Prosecutor's Office weathered and resisted these attacks and interference, their occurrence raises a broader concern about the long-term sustainability and support for the vital rule of law reforms BiH has achieved in the past several years.

In light of the report's findings, the OSCE Mission reiterates previous calls for discussion about **endowing the state level institutions with constitutional status, as well as considering the creation of a supreme court that could address the problem of non-harmonized application of law in criminal cases**. Discussion about these reforms should be framed in light of the need to ensure effective processing of war crimes cases, as well as ensuring the sustainability of the judicial reforms achieved in BiH to date.

Public Confidence

Public confidence in war crimes processing is fragile and widespread distrust in the institutions is still a feature in BiH society, according to public surveys carried out on behalf of the OSCE Mission to Bosnia and Herzegovina and detailed in the present report. This is despite the important judicial reforms and absence of evidence of bias in the conduct of proceedings, giving rise to concern that negative conditions in the public domain make it difficult for the judiciary to fend off deliberate attempts to misinform the public and to conduct adequate outreach.

Regional Co-operation

The report also details how **politicization and stalemate concerning core aspects of regional co-operation** in war crimes cases between BiH, Serbia, Croatia, and Montenegro also hampered progress in resolving these cases. Norms prohibiting the extradition of citizens in BiH and the neighbouring states represent a serious challenge not only in relation to war crimes, but for the overall performance and credibility of the judicial systems in the region. Certain cases with regional implications that gained notoriety, namely the cases of *Ilija Jurišić* and *Ejup Ganić*, were seen to significantly damage inter-state relations and co-operation in war crimes matters.

Adherence to Fair Trial Standards

Although, after years of ongoing reforms, the BiH judicial system possesses sufficient guarantees and checks to prevent or correct serious miscarriages of justice in most foreseeable instances, the OSCE Mission to Bosnia and Herzegovina has also **identified concerns with regard to the application of domestic criminal law and adherence to fair trial standards at both the state and entity level**. The report gives insights into many important issues in these proceedings, including:

- The use of plea bargaining in war crimes cases
- Interpretation of complex legal concepts such as genocide and command responsibility, and respect for the fair trial rights of the accused
- Unreasonable length of proceedings

- Problems in management and adjudication of trials, indicated by a high rate of revocation of verdicts on appeal

However, the report notes that the causes of violations of fair trials rights or criminal procedure today can rarely be traced back to factors related to the post-war environment, as was previously the case (i.e. ethnic bias). **Rather, the violations encountered today are often indistinguishable from those encountered in other functioning legal systems.** Exceptions to this general situation tend to be traceable to the complex and fragmented nature of BiH's judicial system. Thus, this report sets forth a series of recommendations, mainly addressed to the governmental and judicial authorities of BiH, to address some of these core problems and advance robust implementation of the National Strategy for War Crimes Processing. This will ensure that BiH continues to rise to the challenge of completing the process begun by the International Criminal Tribunal for the former Yugoslavia to deliver justice, as well as to meeting the goal of bolstering the rule of law in BiH.

Overall, this report documents how war crimes processing in BiH continues to face the following hurdles:

- *Low public confidence in the judiciary;*
- *Political opposition from certain quarters to an integrated and cohesive judicial system able to tackle serious crime;*
- *A fragmented legal and institutional framework applicable to war crimes cases; poor investment in human and technical resources;*
- *The lack of availability of suspects, physical evidence, and witnesses willing to testify;*
- *A caseload of unknown size and scope, scattered between prosecutor's offices around the country.*

Conclusions & Recommendations

Many of the hurdles highlighted in this report can be solved through a **more robust, consistent, and sustained approach toward the implementation of the National Strategy.** By the same token, **comprehensive solutions to some structural problems will require further progress in the implementation of the judicial reforms necessary to strengthen the rule of law in BiH.** Strengthening the independence of the judiciary in order to better resist political pressure and politicization of war crimes issues would entail giving constitutional status to the HJPC BiH, the Court of BiH and the BiH Prosecutor's Office. Ensuring that the principle of equality before the law is not constantly undermined by the lack of harmonized jurisprudence among the courts in BiH will eventually require the establishment of a supreme court of BiH. Such a court is also necessary in order to efficiently resolve the frequent conflicts of competence among the courts in BiH, which arise not only in connection with war crimes cases but in currently more serious and urgent cases, such as corruption and organized crime. Against this background, future endeavours to strengthen war crimes processing in BiH will have to be devised in a way that is consistent with and supportive of broader efforts aimed at the establishment of an independent and fully functional judiciary, capable of upholding the rule of law, ensuring equality for all BiH citizens, and preparing it for integration into the Euro-Atlantic family of institutions.

The OSCE Mission recalls the numerous recommendations delivered to both the state and entity level government authorities, members of the judiciary, and legal practitioners in the past by both the OSCE Mission and others, aimed at suggesting improvements to training, capacity-building, resource provision, and the correct application of substantive and procedural law in practice, as well as respect for fair trial standards. Despite strong efforts in several of these areas, **many of these recommendations remain partially or completely unimplemented**. As such, they remain priorities. However, in light of the findings presented throughout this report, the OSCE Mission recommends the following actions [specified in the report] be implemented without delay in order to resolve some of the core and urgent problems affecting war crimes processing in BiH.

(Please refer to full report for all 20 recommendations)

Delivering Justice in BiH: *by the numbers*

[6 war crimes cases transferred from the ICTY to BiH under Rule 11*bis* procedure] [13 years until completion of war crimes trials in BiH, according to National Strategy targets] [14 plea bargain agreements struck by BiH Prosecutor's Office in last 3 years for war crimes] [14 individuals acquitted by Court of BiH] [25 individuals brought to trial on genocide charges by Prosecutor's Office of BiH] [68 final verdicts delivered by the Court of BiH] [83 final verdicts delivered by courts in the RS, Federation BiH, and Brčko District] [89 final verdicts delivered against 125 accused by the ICTY, from 1993-September 2010] [100 war crimes trials currently ongoing throughout BiH] [198 individuals processed before BiH courts with a final verdict] [17 000 estimated numbers of unresolved war crimes cases in 2007, before caseload mapping] [1381 estimated number of unresolved war crimes cases in 2010, after caseload mapping]

*** Unless otherwise stated, figures cited concern the period January 2005 to September 2010.**