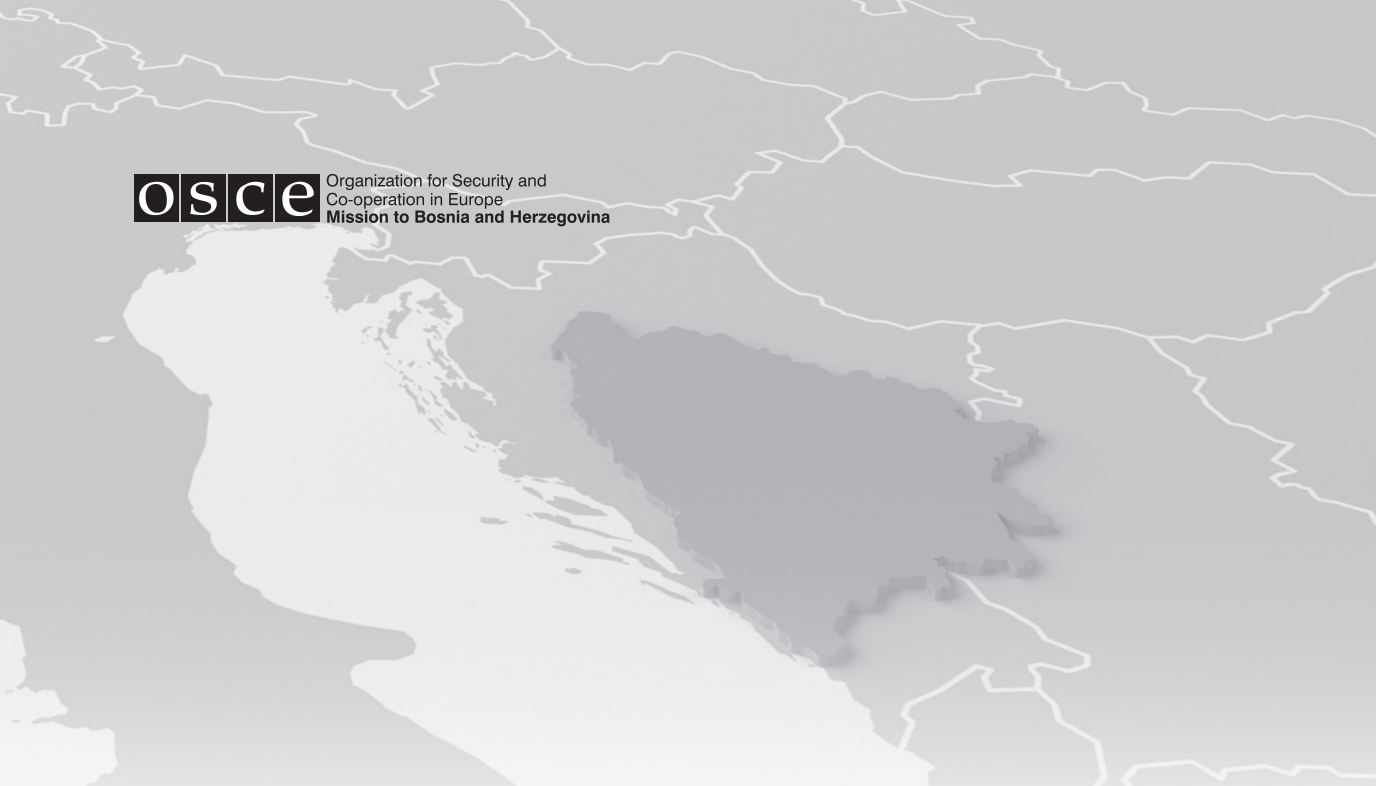

Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina

The Processing of ICTY Rule 11*bis* cases in Bosnia and Herzegovina:

Reflections on findings from five years of OSCE monitoring

A report of the Capacity Building and Legacy Implementation Project

January 2010

Published by OSCE Mission to Bosnia and Herzegovina
Fra Anđela Zvizdovića 1
71 000 Sarajevo
Bosnia and Herzegovina
www.oscebih.org

Design & Layout:
PoetaPista | www.poetapista.com

ISBN 978-92-9235-330-8

The OSCE Mission to BiH is grateful for the generous support received from the governments of France, Greece, Norway, Switzerland, and the United Kingdom for making possible the Capacity Building and Legacy Implementation Project.

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I. Introduction

The Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina has actively assisted Bosnia and Herzegovina (BiH) to implement justice sector reforms to better protect the human rights of individuals and to better administer justice. One of its focal areas has been on strengthening the capacity of the justice system to handle war crimes proceedings in a fair and efficient manner. BiH's success in prosecuting war crimes has been an indicator of its ability to begin to overcome the past, foster reconciliation, and build strong institutions.[1] With this in mind, the Mission has conducted extensive monitoring, reporting, and advocacy activities to contribute to the identification of shortcomings and the implementation of viable solutions.

From 2005 through 2009, the OSCE Mission conducted the Rule 11*bis* Monitoring and the Capacity Building and Legacy Implementation (CBLI) Projects (collectively, the 11*bis* Projects) to supplement the Mission's activities in systemic monitoring of war crimes cases and related advocacy. The 11*bis* Projects focused on monitoring and reporting on cases involving defendants indicted before the International Criminal Tribunal for the former Yugoslavia (ICTY) and referred to the Court of BiH for trial, as well as on advocacy initiatives arising from identified concerns. Throughout these five years, the 11*bis* Projects monitored six cases involving ten defendants. While no case suffered from deficiencies sufficient to warrant revocation of transfer, the 11*bis* Projects nonetheless identified multiple obstacles to the realisation of human rights and the efficient prosecution of war crimes. Principle issues have been related

1 The term "war crimes cases" or "war crimes proceedings" is used to refer to all criminal cases involving international crimes committed during the 1992-1995 conflict in BiH, namely genocide, crimes against humanity, and violations of the laws and customs of war.

to: the transfer and processing of Rule 11*bis* cases; custody; witness protection and support; transparency of proceedings; injured party compensation claims; plea bargaining; use of evidence from the ICTY; effectiveness of defence; clarity of judgments; and methodology of training and knowledge transfer. To assist the country in overcoming these identified concerns, the Projects conducted wide-scale advocacy activities, including the production of sixty reports.

The completion of the 11*bis* Projects presents a good opportunity to reflect upon the progress made by BiH in addressing the noted obstacles. This report first provides some background on the 11*bis* Projects and their goals. It then outlines the principle concerns identified by the 11*bis* Projects and maps out areas in which improvements have been made and where action is still necessary. The report also recommends actions that BiH should take to continue the country's progression in ever-increasing respect for human rights and the rule of law.

II. Background to the 11*bis* Projects

a. Origin

In 2005, as part of its completion strategy,[2] the ICTY began transferring middle and lower-level defendants indicted by it to the national jurisdictions of the countries of the former Yugoslavia for trial. Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE)[3] provided the conditions for transfers, which included that the receiving country had an adequate legal framework that foresaw criminal responsibility and an appropriate punishment for international crimes, that the country could provide a fair trial, and that it would not impose the death penalty. If a state failed to prosecute a transferred defendant in a fair and diligent manner, the ICTY could withdraw the case from that state's jurisdiction. To assess the diligence and fairness of the national prosecutions, the ICTY Office of the Prosecutor could send observers to monitor the proceedings in the national courts on its behalf.

In May 2005, the ICTY Office of the Prosecutor and the OSCE agreed that the OSCE would monitor the transferred Rule 11*bis* cases. In BiH, the OSCE's Human Rights Department[4] was already engaged in monitoring all war crimes cases prosecuted in BiH as part of a countrywide judicial reform program. To undertake the additional

2 See United Nations Security Council Resolutions S.C. Res. 1503 (2003) and S.C. Res. 1534 (2004).

3 IT/32/Rev. 43, 24 July 2009.

4 In January 2010, the OSCE Mission's Human Rights Department ceased to exist in that form, and became part of a new Human Dimension Department. The trial monitoring programme and related advocacy continues within this new structure.

tasks of 11*bis* case monitoring, since BiH would receive the most transferred cases, the OSCE Mission created the Rule 11*bis* Monitoring Project.

The Rule 11*bis* Monitoring Project's monitoring activities began on 29 September 2005 with the transfer of the first Rule 11*bis* defendant, Radovan Stanković, to BiH. Following *Stanković*, five additional cases involving nine defendants were transferred to BiH for trial. In order of their transfer, these were: the Case against *Gojko Janković*, transferred on 8 December 2005; the Case against *Željko Mejakić*, *Momčilo Gruban*, *Dušan Fuštar*, and *Duško Knežević* (Mejakić et al.), transferred on 9 May 2006; the Case against *Paško Ljubičić*, transferred on 22 September 2006; the Case against *Mitar Rašević* and *Savo Todović*, transferred on 3 October 2006; and the Case against *Milorad Trbić*, transferred on 11 June 2007.

After almost four years in operation, the Rule 11*bis* Monitoring Project was subsequently reframed as the Capacity Building and Legacy Implementation (CBLI) Project to recognise a shift in activities from those focused on monitoring to those directed toward capacity strengthening. This change occurred because, by 2009, the Court of BiH had completed most of the proceedings in the transferred cases and no additional ICTY cases were being considered for referral to BiH.[5] Because monitoring and reporting on the Rule 11*bis* cases demanded less resources, the Project became dedicated to following up on prior recommendations and engaging in other areas of advocacy. One of the areas that the CBLI Project devoted substantial resources to was the development of knowledge transfer methodology in war crimes processing, particularly from the ICTY to the national jurisdictions. In this connection, the 11*bis* Projects worked closely with initiatives to promote the legacy of ICTY in the affected region.[6]

The 11*bis* Projects were funded by the governments of France, Greece, Norway, Switzerland, and the United Kingdom.

b. Activities

Monitoring and Reporting

Each of the six 11*bis* cases in BiH was monitored from the time of a defendant's arrival in the country and focused on the adherence of treatment and proceedings

5 By that time, the Court of BiH had handed down first instance verdicts in all but one of the transferred cases: (the Case against *Milorad Trbić*). One case was pending appeal (the Case against *Željko Mejakić et al.*). In the Case against *Radovan Stanković* and the Case against *Gojko Janković*, appeals were complete, while no appeals were filed in the Case against *Paško Ljubičić*, which was settled by plea agreement on 29 April 2008.

6 *See* OSCE-ODIHR report, produced in conjunction with UN ICTY and UNICRI, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Final Report)*, September 2009, available at http://www.osce.org/documents/odihr/2009/09/39685_en.pdf

to human rights, fair trial, and rule of law principles, and on identifying gross or systemic judicial inefficiencies. To allow it to make comprehensive assessments of proceedings, the 11*bis* Projects enjoyed full access to cases, which included all court hearings (even those closed to the public), case-files, judicial and government actors, detention facilities, and the defendants and injured parties.

The 11*bis* Projects reported on each case every three months to the ICTY Office of the Prosecutor. These reports analysed identified concerns, provided a set of recommendations on how to overcome these concerns, and noted good practices that indicated an improvement in areas previously flagged. Reporting continued until the trial judgment in a case became final, which was after the completion of the appeals process or the possibility of appeals had lapsed. The ICTY Office of the Prosecutor assessed the 11*bis* reports and submitted its assessments along with the 11*bis* reports to the Referral Bench of the ICTY for consideration.

By the projects' end in December 2009, the main trials of all of the six Rule 11*bis* cases in BiH were finished. In addition, the appeals process in five of the six cases was over; only appeals in the Case against *Milorad Trbić*, whose first instance verdict was rendered on 16 October 2009, were ongoing. The OSCE Mission to BiH continues to monitor and report to the ICTY on the one case that remained pending in 2010.

In total, the 11*bis* Projects submitted fifty-five periodic case reports to the ICTY Office of the Prosecutor. The Projects also issued two confidential spot reports on exigent witness protection related issues. In addition to these case specific reports, the 11*bis* Projects finalised three thematic reports in 2009 with the intent to publish them in 2010. The first addressed the contemporary challenges in witness protection and support in relation to the first year anniversary of the adoption of the National Strategy for War Crimes Processing.[7] The second raised matters related to the clarity of judgments in war crimes cases, a topic which previously had not been examined. The third report is this present one.

The 11*bis* Projects filed all reports produced by them publicly, with the exception of the two aforementioned spot reports and two of the periodic case reports.[8] Those four reports were filed, in part or in whole, confidentially in order to protect the interests of protected witnesses. The Projects also ensured that each report was translated into a local language (Bosnian, Croatian, or Serbian) and disseminated widely to local government actors, legal practitioners, and other parties. This was done as part of the broader justice sector reform activities of the OSCE Mission to BiH.

Although 11*bis* monitoring and reporting was case specific, certain concerns identified in Rule 11*bis* cases were illustrative of the flaws inherent to the entire

7 National Strategy for War Crimes Processing (National Strategy), 29 December 2008.

8 OSCE Confidential *Third Report in the Case against Radovan Stanković*, September 2006 and Confidential Addendum of the OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, January 2008.

BiH justice system. The identified concerns reflected the needs for wide scale legal and judicial reforms and were complemented by the monitoring findings of the Mission in other war crimes cases. The work of the Projects was a segment of this greater sustained effort to improve the efficiency, effectiveness, and human rights compliance of the BiH justice system.

Follow up and other Advocacy Activities

Because of the integrated nature of the 11*bis* Projects into the Mission's judicial reform agenda, the Projects' findings, reports, and activities were often utilized as a basis for advocacy initiatives. In particular the Human Rights Department often integrated aspects of the 11*bis*-based recommendations or reports into training activities, comments to draft laws, interventions with judicial authorities to stress the need for legal reform or practice-based policy clarifications, and the development of additional concepts for capacity building projects.

To follow up on report recommendations, the Human Rights Department, including the 11*bis* Project staff, undertook a number of advocacy activities. First, OSCE staff members made use of a variety of forums to raise awareness about the Projects' findings and discuss solutions to obstacles, including expert meetings, trainings, and working groups. Additionally, several public statements were issued in support of reform and the legislative amendment process. In taking these steps, the Mission sought to advise upon and coordinate its activities with other stakeholders similarly engaged in reform activities, judicial actors, government and nongovernmental organisations, legal practitioners, and international counterparts.

In line with the evolution of the 11*bis* Project into the Capacity Building and Legacy Implementation Project, improving the methodology of knowledge transfer between different jurisdictions dealing with war crimes processing became a major focus and priority. Activities included a key role in a project jointly undertaken by the Office for Democratic Institutions and Human Rights of the OSCE (ODIHR-OSCE), United Nations Interregional Crime and Justice Research Institute (UNICRI), and the ICTY to identify best practices and lessons learned in knowledge transfer.[9]

III. Main Findings of the 11*bis* Projects

The 11*bis* Projects' monitoring, reporting, and advocacy have helped identify and raise awareness of obstacles to human rights and judicial efficiency in BiH and have contributed to the amelioration of concerns. Its findings have been cited in the local media and formed the basis for reports by organisations including the ICTY,

9 *See* OSCE-ODIHR report, produced in conjunction with UN ICTY and UNICRI, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Final Report)*, September 2009, available at http://www.osce.org/documents/odihr/2009/09/39685_en.pdf

the United Nations Human Rights Committee, Human Rights Watch, Amnesty International, and the International Center for Transitional Justice.

The concerns most frequently identified through the Projects' activities have been in ten principle areas: the transfer and processing of Rule 11*bis* cases; custody; witness protection and support; transparency of proceedings; injured party compensation claims; plea bargaining; use of evidence from the ICTY; effectiveness of defence; clarity of judgments; and methodology of training and knowledge transfer. These have not been the only areas where the 11*bis* Projects identified and reported upon concerns, but are among those which have most often arisen and have done so in more than one case. With the exception of concerns related to the 11*bis* transfer process, the noted concerns are not isolated to Rule 11*bis* cases, but are systemic in nature. That said, it is important to note that by and large the 11*bis* cases were handled in a human rights compliant manner, which is attested to by the fact that not a single case transfer to BiH was revoked by the ICTY and not a single verdict in 11*bis* cases has been held to be in violation of human rights by the Constitutional Court of BiH.

Since the time when each problem was first discussed in an 11*bis* report, there have been positive developments. Yet, in all areas, more change is needed in order to ensure that the rights of both defendants and victims are respected. Below, this report outlines the principal findings in each of these problem areas, with the exception of issues related to the 11*bis* case transfer process because those are no longer practically applicable in BiH.[10] With respect to each topic, the report then points to advocacy that has been undertaken, improvements made, and outlines some remaining challenges to the realisation of a more human rights compliant administration of justice in BiH. Comments herein are primarily focused on the Court of BiH since that court's practices have been the object of the 11*bis* Projects' monitoring activities; the discussions are meant to supplement those undertaken in the relevant 11*bis* reports, as cited or listed in the Annex of this report. That said, this report highlights certain observations that are also relevant to entity level judicial proceedings.

10 These were concerns that arose from the difficulties in aligning the two different justice systems of the ICTY and BiH. For instance, Prosecutors in BiH were uncertain about how much power they had to change and amend the confirmed ICTY indictments, although these indictments had to be "adapted" to the local criminal laws through redrafting. Actors were also uncertain whether the domestic rules preceding or following the confirmation of an indictment, which differ in terms of such things as custody limits, should be applied to the 11*bis* defendants prior to the "adaptation" of the ICTY indictment. In addition, the Court of BiH was unsure what its scope of review over the redrafted indictment should be. Other concerns related to the appropriate process for amending ICTY protective orders. See OSCE *First Report in the Case against Radovan Stanković*, February 2006; OSCE *First Report in the Case against Gojko Janković*, April 2006; OSCE *First Report in the Case against Mejakić et al.*, September 2006; OSCE *First Report in the Case against Paško Ljubičić*, December 2006; and OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007.

a. Custody

Findings

Given the fundamental right to liberty and freedom from unlawful deprivation of liberty, one of the focuses of the OSCE Mission's judicial reform activities has been on the use of custody. From its first report on the case against *Radovan Stanković* in February 2006, the 11*bis* Projects identified legal and practice-related concerns to human rights standards with respect to the deprivation of liberty. In total, out of the fifty-five periodic reports of the Projects, concerns related to custody were addressed in fourteen.[11] In those reports, the Projects reported on the failure of the Court of BiH to consider defence arguments against custody and to sufficiently justify its decisions ordering custody in a manner that meets human rights standards. In addition, the Projects noted that the Court failed to consider other restrictive measures when those might be a sufficient alternative to custody.

Particular concerns were raised in connection to the use of threat to public and property security as a ground for custody, as provided for in Article 132(1)(d) of the Criminal Procedure Code of BiH. According to a previous form of that provision, custody could be ordered "where the manner of commission or the consequence of the criminal offence requires that custody be ordered for the reason of public or property security."[12]

Through its monitoring activities, the Projects noted that the Court's custody decisions based on public order failed to meet international standards, which require evidence that the release of an accused would cause an actual disturbance to public order or, in the case of an extension of custody, that public order remained threatened. Instead of providing that necessary evidence, the Court continuously recalled the serious nature of war crimes and provided a vague and abstract account of the public's possible unease to justify custody. As would follow from such an approach, the Court ordered custody based on this perceived (hypothetical) need to preserve public order in virtually all war crimes cases. Indeed, it should be recognised that meeting the human rights standard of actual risk was extraordinarily difficult because

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11 OSCE *First Report in the Case against Radovan Stanković*, February 2006; OSCE *First Report in the Case against Gojko Janković*, April 2006; OSCE *First Report in the Case against Mejakić et al.*, September 2006; OSCE *Second Report in the Case against Mejakić et al.*, December 2006; OSCE *First Report in the Case against Paško Ljubičić*, December 2006; OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007; OSCE *Third Report in the Case against Mejakić et al.*, March 2007; OSCE *Second Report in the Case against Paško Ljubičić*, March 2007; OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007; OSCE *Third Report in the Case against Mitar Rašević & Savo Todović*, July 2007; OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007; OSCE *Fifth Report in the Case against Paško Ljubičić*, December 2007; OSCE *Sixth Report in the Case against Paško Ljubičić*, March 2008; and OSCE *Ninth Report in the Case against Mitar Rašević & Savo Todović*, January 2009.

12 Criminal Procedure Code of BiH, Official Gazette of BiH (OG BiH) 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08 (prior to the June 2008 amendments (58/08) and other subsequent amendments).

the European Court of Human Rights had set the standard for due application of this ground so high. This spoke of the exceptional circumstances in which custody could be used to preserve public order, in stark contrast to the almost compulsive manner in which it was ordered in almost all war crimes cases before the Court of BiH.

Advocacy and Progress

The OSCE Mission undertook a number of advocacy initiatives through meetings, trainings, and at judicial conferences to encourage the appropriate use of custody and alternative measures to custody, and to justify duly all decisions ordering either. The Mission also published a thematic report on *The Law and Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina*,[13] which has been widely disseminated and discussed with national actors.

In November 2006, the United Nations Human Rights Committee recommended that the authorities in BiH consider removing the concept of public security or security of property as a ground for ordering custody in the criminal procedure code.[14] In a broad review of the BiH Criminal Procedure Code in 2008, the Criminal Code Implementation Assessment Team, which was comprised of legislative experts in BiH, followed suit and made a similar proposal. Ultimately, the BiH Parliamentary Assembly chose not to remove the ground of public order from the Criminal Procedure Code. In comprehensive amendments to the Criminal Procedure Code of BiH in July 2008, the legislature did, however, amend public order as a ground for custody to state that it was only to be used in instances when "the person's release poses an actual threat to disturb public order," as required by international human rights standards.

With regard to the use of alternative measures to custody, on 9 July 2007, the High Representative in BiH imposed amendments to the BiH Criminal Procedure Code to foresee explicitly that the Court should consider alternatives to custody, such as prohibitions on travel or on meeting with certain people, to determine whether they could serve the purpose of custody under any ground, and should impose those restrictions when they would be an appropriate alternative.[15] Further, national authorities have recognised the need to enhance the use of alternatives to custody throughout the judiciary, and the Justice Sector Reform Strategy includes a specific

13 OSCE thematic report, *The Law and Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina*, August 2008, released on 23.12.2008 available http://www.oscebih.org/documents/13099-eng.pdf.

14 Concluding observations of the Human Rights Committee, Eighty-eighth session, U.N. Doc. CCPR/C/BIH/CO/1, para. 18. available http://www.universalhumanrightsindex.org/documents/825/994/document/en/pdf/text.pdf

15 OG BiH 53/07, 16 July 2007. See OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007.

strategic programme aimed at improving the use of alternative measures to pre-trial custody.[16]

In light of the foregoing, OSCE Mission trial monitors have noted that court practice has been slowly changing with regard to custody. Custody is imposed less frequently, as the Court of BiH has begun to rely on restrictive measures when those would satisfy the aims of custody. In addition, public order is not as often used as a ground to justify custodial measures. Decisions justifying custody can also be said to have become better explained.

Remaining Challenges

BiH has moved in a positive direction with regard to custody practices. It is notable, however, that throughout BiH decisions on custody that are based on public order, still often fail to evidence actual threats to public order that could justify them under international human rights standards. In addition, it is clear from the disparate approaches to custody between the Court of BiH and the entity jurisdictions that a more consistent approach to the application of restrictive measures as an alternative to custody is still needed.

The Mission continues to support the recommendations made in the report *The Law and Practice of Restrictive Measures: The Justification of Custody in Bosnia and Herzegovina*. In particular, the Mission re-emphasises the need for enhancing policy directives and tools to assist the judiciary in the speedy application of the most appropriate measure to ensure the presence of the suspect or accused.

b. Witness protection and support

Findings

Another pillar of the Mission's judicial reform program has been its advocacy on witness protection and support. War crimes prosecutions cannot be successful without giving proper protection and support to witnesses. These services are necessary to guarantee that witnesses collaborate in criminal prosecutions and to ensure that their rights are not unduly compromised by this participation.

16 Justice Sector Reform Strategy, Pillar II, Strategic Programme 2.3.5, available on http://www.mpr.gov.ba/userfiles/file/Projekti/SRSP_u_BiH_-_BJ.pdf

Several of the Rule 11*bis* reports have noted problems related to witness protection and support at the Court of BiH.[17] These have included: insufficient clarity of the Law on witness protection leading to discrepancies in its application by practitioners; *overuse* of protective measures at the Court of BiH, in contrast to their *underuse* at entity courts; failure of authorities to provide and/or uphold sufficient protection, and the absence of appropriate psycho-social support to witnesses.

Advocacy and Progress

The Mission has raised concerns and recommendations on a regular basis at judicial trainings and in meetings with government and international actors. It also has provided advice and counsel to human rights defenders on the matter and has provided media statements to publicise concerns and urge action.

In the last few years, national actors have taken some important steps toward improving the provision of protection and support to witnesses. An established judicial practice on use of protective measures, such as pseudonyms and closed hearings, has slowly evolved at the State level. This development has meant that measures are applied more consistently among judges. To add to this, in September 2008, the Court of BiH adopted long awaited rules of procedure on witness protection.[18] When followed, these rules of procedure assist judges in implementing witness protection measures in a coordinated manner that is effective and compliant with fair trial standards. The rules help to ensure that a witness can be duly protected and that protection given to that witness is not jeopardised at a later stage in the proceedings through misstep or oversight. In addition, the Special Department for War Crimes of the Prosecutor's Office of BiH began in 2009 to prepare a draft practice direction concerning the treatment of vulnerable victims and witnesses by prosecutors and staff during the investigative and prosecution phases of a war crimes case, which aims to be in line with international standards.

Another important development in the advancement of witness protection has been the adoption of the National Strategy for War Crimes Processing (National Strategy) by the Council of Ministers of BiH on 29 December 2008. The Mission has played a key role in advising upon the contents of the Strategy and facilitating its adoption. The National Strategy has set out a systemic approach to organise and better equip

17 OSCE Second Report in the *Case against Radovan Stanković*, May 2006; OSCE *Second Report in the Case against Gojko Janković*, July 2006; OSCE *Confidential Third Report in the Case against Radovan Stanković*, September 2006; OSCE *First Report in the Case against Mejakić et al.*, September 2006; OSCE *Third Report in the Case against Gojko Janković*, October 2006; OSCE *Confidential Spot Report of October 2006*; OSCE *Confidential Spot Report of December 2006*; OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007; OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, with Confidential Addendum, January 2008; OSCE *Second Report in the Case against Milorad Trbić*, January 2008; and OSCE *Eighth Report in the Case against Milorad Trbić*, July 2009.

18 Court of BiH, Rules of Procedure on Protection of Witnesses, adopted in plenary session on 29 September 2008.

the judiciary in investigating and prosecuting war crimes cases. A key measure of the Strategy is to provide the "protection, support and same treatment to all victims and witnesses in the proceedings before all courts in BiH."[19]

The Strategy has recognized the various concerns of the country's witness protection and support system. The National Strategy proposes solutions to these obstacles, but they are only general in nature. For instance, the Strategy outlines limitations of the domestic witness support system and the need to establish a countrywide network of support coordinated by the Victims and Witnesses Support Unit of the Court of BiH. The Strategy foresees that, within this support network, regional offices for support should be established and nongovernmental organisations should be involved in implementing measures.[20] At this point, it provides no guidance on how to proceed in establishing a nationwide support system or how that system should function.

To help fill this gap, the OSCE Mission organised a roundtable on Establishing a Psycho-Social Support System for Witnesses and Victims in War Crimes Cases in BiH on 3-4 December 2009. At this meeting, representatives of the judiciary, of the state and entity level ministries of justice, human rights, and social welfare, mental health centres, and civil society organisations from around BiH gathered to discuss how to implement the National Strategy's directive on witness support. This group successfully formed a set of concrete recommendations for implementation of the measures envisaged in the National Strategy.[21]

Unfortunately, the BiH government has done little throughout 2009 to implement the National Strategy and to improve the protection and support of victims and witnesses accordingly. The Government has failed to meet successive deadline set out by the Strategy. To mark the one year anniversary of the Strategy's adoption, the 11*bis* Projects produced a thematic report on witness protection and support in BiH.[22] This report revisits the issues discussed in earlier Rule 11*bis* reports and details the country's obligations to guarantee the rights of victims and witnesses to life without unjustified infringements to security or privacy, protection from acts of harassment and violence, and participation in trials with dignity.

Regrettably, BiH has not yet demonstrated enough willingness to address this nation's problems with regard to victims' and witnesses' rights and war crimes prosecutions. Despite the development and adoption of the National War Crimes Prosecution Strategy, the country's lack of urgency in implementing the strategic reforms

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19 National Strategy, Section 1.2: Introduction, Objectives and Anticipated Results.

20 National Strategy, Section 4: Witness Protection and Support.

21 See *Conclusions and Recommendations, Roundtable on "Establishing a psycho-social support system for witnesses and victims in war crimes cases in BiH,"* organised by OSCE Mission to BiH on 3-4 December 2009.

22 OSCE Capacity Building and Legacy Implementation project thematic report, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*, January 2010.

effectively noted within the Strategy renders the reforms of past years meaningless. The judiciary often does not act to determine whether threats to witnesses are legitimate or serious and often fails to institute available protective measures when they might be appropriate or apply them effectively. In 2008, a new *Draft Law on the Witness Protection Programme* was proposed by the Council of Ministers of BiH, under which SIPA would have the competence to expand its witness protection programme activities to witnesses testifying before the entity courts. The above-mentioned report on witness protection and support in BiH critically points out that, despite the need, the law was not adopted on grounds that an expansion of the role of SIPA would interfere with competencies of the entities. The report also notes that the various domestic law enforcement agencies and judicial institutions often oblige witnesses to testify about traumatic events more than once.

One important step in ensuring that victims and witnesses rights are respected is to educate those parties about their rights so that they may be active in exercising them. To contribute to this end, the OSCE Mission developed a leaflet informing victims and witnesses of their rights in criminal proceedings. The leaflet been distributed to victims and witnesses by involved actors, including prosecutors, courts police and nongovernmental organisations.[23]

Remaining Challenges

The failure to properly protect and support witnesses in BiH can result in the violation of those parties' rights. This can jeopardise the country's efforts to prevent impunity through prosecution of war criminals.

Recognising the central role of witness protection and support in successful implementation of the National Strategy, the OSCE Mission to BiH recommends that authorities and counterparts review the detailed recommendations of the 11*bis* Projects' recent thematic report on *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*. The Mission believes that implementation of these recommendations can assist BiH in moving forward on the path toward future domestic prosecution of war criminals.

c. Transparency of Proceedings

Findings

When deciding upon what form of protection to grant a witness, a court must consider the public's interest and the right of the defendant to a public trial. Transparency is

23 OSCE leaflet, *Victim or Witness of a Criminal Offence? Know your rights and duties*, 21 October 2009, available at http://www.oscebih.org/documents/15335-eng.pdf.

particularly important in BiH, where some parties openly question the impartiality of the Court of BiH for political gain. In addition to maintaining transparent proceedings, the decisions rendered by the Court of BiH must be visibly fair in order for the Court to preserve its legitimacy and for it to contribute to dispelling myths about the conflict.

When monitoring first began, the 11*bis* Projects noted several concerns regarding the transparency of proceedings. Since that time, these concerns have significantly abated. Earlier, however, these concerns related to the seemingly unnecessary exclusion of the public from hearings and the Court of BiH's refusal to grant access to public material to journalists and the general public on the basis of vague decisions.[24]

Advocacy and Progress

The OSCE Mission pointed to the need for judicial authorities to establish a concrete policy on transparency of proceedings and public materials. The Mission opined that, under international standards, this policy must respect and duly balance the rights of victims, witnesses, and defendants with the right of the public to open trials and information. The OSCE Mission has not been the only actor to criticise the Court's lack of transparency. The domestic media and other international organisations also urged the Court to become more transparent. [25]

These advocacy efforts have clearly yielded results. The Court of BiH currently seems to favour openness of trials and sparingly closes trials to the public. All judgements are disclosed to the public via the Court's website, while the Prosecutor's Office maintains a similarly transparent approach of disclosing every possible decision or material to the public on its website. The Court of BiH's rules of procedure on witness protection also reflect a preference for public trials and echo the principle that trials should be closed only when strictly necessary.

Remaining Challenges

While the strong emphasis upon transparency is welcomed, the Court must remain vigilant about balancing open proceedings against the rights and interests of witnesses. For instance, recently in the Case against *Trbić*, the 11*bis* Projects reported that the Trial Panel permitted the public to be present in a court hearing in which confidential testimony was to be given and merely asked the attendant media not

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24 OSCE *Second Report in the Case against Radovan Stanković*, May 2006; OSCE *Confidential Third Report in the Case against Radovan Stanković*, September 2006; OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007; OSCE *Fifth Report in the Case against Gojko Janković*, May 2007; OSCE *First Report in the Case against Milorad Trbić*, October 2007; and OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, with Confidential Addendum, January 2008.

25 *See* Letter of the Association of Court Reporters to the Public Information and Outreach Section of the Court of BiH of 28 October 2009, available at http://www.bim.ba/en/1/40/23238/, stating "It is manifestly in the interest of the Court of Bosnia and Herzegovina that its proceedings are transparent and open to the public, and this can only be ensured by providing appropriate access to the media."

to publish details about the confidential testimony.[26] It was noted that the Court should not have wilfully placed confidential information in the hands of the media, and should have excluded the public from the session. The report also noted that this was not the only trial panel at the Court of BiH to conduct its confidential hearings in this manner.

Moreover, from time to time the media continues to point to obstacles to transparency, particularly in relation to difficulty in obtaining access to audio-visual recordings of open sessions and photographic material from courtrooms.[27] In light of these facts, the OSCE recommends that the Court continues to revise its policy on transparency as necessary and to quickly address any problems that arise with regard to media access.

d. Injured party compensation claims

Findings

In BiH, another important right of victims is the right to file compensation claims against defendants and have those claims adjudicated in the criminal proceedings. This is a valuable time and resource-saving mechanism as it allows injured parties to avoid lengthy and expensive civil proceedings. It also empowers victims because it allows them to participate actively in seeking justice for themselves through criminal proceedings.

The 11*bis* Projects have observed that courts frequently fail to comply with their obligations to consider compensation claims when possible.[28] Pursuant to domestic law, criminal judicial actors must inform victims of their right to file claims for compensation in criminal proceedings, investigate all potential claims, and order damages when appropriate. Nevertheless, when the 11*bis* trials first began, the Projects reported that judges did not instruct injured parties about their rights to file compensation. Prosecutors similarly neglected their responsibility to gather evidence on potential claims. Up to now, the Court of BiH has not rendered compensation in any war crime cases, although the Prosecutor's Office has displayed willingness to pay attention to this issue in recent cases.

Advocacy and Progress

Through its reports, the 11*bis* Projects have tried to encourage judicial actors to acknowledge their responsibility to victims with respect to injured party compensation claims and to meet their obligations. Following report recommendations, certain

26 OSCE *Eighth Report in the Case against Milorad Trbić*, July 2009.

27 *Supra* note 26.

28 OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007; OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007; OSCE *Fourth Report in the Case against Mitar Rašević & Savo Todović*, October 2007; and OSCE *Seventh Report in the Case against Milorad Trbić*, April 2009.

trial panels at the Court of BiH began to ask victims when they testified whether they wished to file compensation claims in the criminal proceedings. Although this was an important change, trial monitors observed that injured parties often did not seem to understand the instructions given by panels and, in these instances, the trial panels did not make any effort to explain the issue.[29]

Another development of note is the BiH legislature's amendment of the Criminal Procedure Code in July 2008. The July 2008 amendments included the insertion of an obligation to gather evidence on potential compensation claims into the general "Rights and Duties of the Prosecutor".[30] These amendments did not create this prosecutorial obligation, as it already existed under other provisions of the BiH Criminal Procedure Code. They did, however, underscore the legislature's intention to compel courts to render compensation in criminal proceedings whenever possible. They also stressed the legislative policy that doing so is appropriate, significant, and desirable.

The OSCE Mission has embarked on several additional initiatives to encourage judicial actors to fulfil their legal obligations in this area. In June 2009, the Mission submitted a compilation of findings from OSCE monitoring data to the Entities' Judicial and Prosecutorial Training Centers. This submission outlined the obligations of the judiciary to address compensation claims in criminal proceedings and noted that it is important for the judiciary to meet its obligations as victims also have fair trial rights with respect to claims filed in criminal proceedings. It also noted that substantial benefits accrue from rendering compensation in criminal trials, including a contribution to the overall efficiency and effectiveness of the BiH justice sector.

To assist victims in filing claims that are clear and well-substantiated, and to help prosecutors in gathering evidence so that the Court may decide upon them easily, the Mission created a generic legal form.[31] This template instructs injured parties in a clear and easily understood manner on how to file compensation claims and on what evidence is necessary to support these claims. The Mission has urged prosecutors, courts, police, and nongovernmental organisations to distribute this template to victims and to discuss it with them. This initiative was endorsed by the High Judicial and Prosecutorial Council and subsequently both Entity Chief Prosecutors issued an Instruction on use and dissemination of the template.

Another important development occurred in the Case against *Trbić*.[32] During the main trial in this case, in 2009, the BiH Prosecution fulfilled its legal obligation to inform injured parties about their right to file compensation claims in criminal proceedings. This is the first time that the Prosecution has discharged its duty on

29 See e.g., OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007.

30 See OSCE *Seventh Report in the Case against Milorad Trbić*, April 2009.

31 OSCE template, *Petition for Property Claim*, available at http://www.oscebih.org/documents/15340-eng.pdf.

32 OSCE *Seventh Report in the Case against Milorad Trbić*, April 2009.

this matter. It did so by sending a notice on the right to file compensation to each of the injured parties in this case. Their response was overwhelming – over eight hundred injured parties submitted claims for resolution in the *Trbić* proceedings. Nevertheless, despite this show of interest and grand symbolic gesture, the Court refused to consider the claims and referred victims to civil proceedings.

Remaining Challenges

Although judicial actors have begun to comply with some of their formal obligations with respect to compensation, the reality is that compensation is not addressed by them. Prosecutors still do not investigate potential compensation claims and the Court does not deliberate on them. The Mission hopes to help change this through its ongoing advocacy activities.

In light of the substantial benefit to settling victims' compensation claims in criminal proceedings, the Mission advises judicial actors to fulfil all of their legal obligations to victims on this issue. Those include, informing victims of their right to file compensation claims in criminal proceedings, gathering evidence on claims, and deciding on those claims whenever possible. Courts should also provide well-reasoned decisions on compensation which examine the submissions, arguments, and evidence. If a court decides not to deliberate on a claim, it should explain the basis for that decision clearly and provide well-grounded reasoning.

The Mission also recommends that Chief Prosecutors and Court Presidents ensure that officials under their administration are aware of and satisfy their obligations toward victims on compensation. That Chief Prosecutors have already instructed prosecutors to disseminate the compensation template created by the Mission and to discuss its use with each potential claimant of proceedings is a positive development. Judicial and Prosecutorial Training Centers should provide information and support to judicial actors, including educational programs on how to investigate and resolve compensation claims.

e. Plea bargaining

Findings

Another legal instrument that can contribute to judicial economy is the plea bargaining agreement. Plea agreements were introduced into the domestic legal system in 2003. When concluded at an early stage in the proceedings, these agreements can save valuable judicial time and resources and relieve witnesses of the need to testify and risk re-traumatisation. Despite those advantages, plea agreements are not used frequently in war crimes cases.

There have been two plea bargaining agreements in Rule 11*bis* cases – in the Case against *Mejakić et al.* and in the Case against *Paško Ljubičić*. Both have been among

the first concluded at the Court of BiH, respectively on 27 March 2008 and 29 April 2008.[33] As can be expected by the novelty of this legal instrument, judicial actors have required time to develop a consistent and legal practice on their use. The 11*bis* Projects have noted that certain judges have been uncertain about the permissible level of their involvement in plea bargaining agreements. For instance, in the Case against *Gojko Janković*, the Trial Panel urged the parties to reach an agreement, an act which domestic law suggests jeopardises the perception of impartiality of the tribunal.[34]

The 11*bis* Projects also observed that plea agreements in the Rule 11*bis* cases were not concluded at an early stage in the proceedings, when they could most benefit the judicial system by preventing lengthy contestation of facts during trial. Instead, the agreements were concluded with the defendants at the end of the Prosecution's cases, both more than a year into the main trial. At this late stage in the proceedings, the plea agreements offered little in terms of an incentive for the Court because the Prosecution had already presented its case in full and all of its witnesses had testified. In addition to these shortcomings, the plea agreements in the 11*bis* cases exhibited several legal deficiencies.[35] First, the agreements appeared to be the product of charge bargaining, which means that the Prosecution may have dropped or altered provable charges against the defendants to induce the defendants to plead guilty. The 11*bis* reports noted that Court of BiH actors accepted charge bargaining as a permissible legal practice, although entity actors and both national and international scholars maintained that the BiH legal system does not permit it. Scholars also opined that BiH prosecutors should not charge bargain because, in BiH, the benefits of charge bargaining can be obtained through the offer of a reduced sentence. It was argued that the Court has no independent authority to sentence a defendant to a sentence that is not within the terms of an accepted agreement.

Second, the 11*bis* Projects noted that several of the provisions of the 11*bis* plea agreements – the defendants' waivers of their right to appeal and of their presumption of innocence – were inconsistent with the Criminal Procedure Code.

33 The first plea agreement in a Rule 11*bis* case was concluded between Dušan Fuštar and the Prosecution on 27 March 2008 in the Case against *Fuštar*, which was separated from the existing Case against *Mejakić et al.* The second was concluded in the Case against *Paško Ljubičić* on 29 April 2008. This agreement was the fourth such agreement at the Court of BiH.

34 OSCE *Fifth Report on the Case against Gojko Janković*, May 2007. See also, OSCE *Ninth Report in the Case against Mejakić et al.*, September 2008.

35 OSCE *Ninth Report in the Case against Mejakić et al.*, September 2008 and OSCE *Ninth Report in the Case against Paško Ljubičić*, December 2008.

Advocacy and Progress

The OSCE Mission has provided support to local actors to address these plea bargaining concerns[36]. For instance the Mission assisted the American Bar Association Rule of Law Initiative to host a roundtable on plea agreements in April 2008.[37] In June 2008, it also arranged a talk on the matter at the Court of BiH by Professor Nancy Combs, an international legal scholar on plea bargaining in war crimes cases. In May 2009, the Mission outlined important principles in plea bargaining and other considerations in response to guidelines being developed by the Prosecutor's Office of the Federation of BiH to assist that office in formulating an approach consistent with international legal norms and human rights standards.[38] Similar assistance was provided to the Prosecutor's Office of the Republika Srpska. The Mission highlighted the importance of undertaking consultations with injured parties, ensuring that defendants have legal representation during plea negotiations, and ensuring maximum consideration of established penal policy in future plea negotiations. Moreover, the need to further develop the practice of securing cooperation agreements from defendants, especially discussing with the defendant the possibility of providing a statement of facts providing information about the location of mass graves or the fate of missing persons was elaborated.

With regard to plea agreements that have been concluded at the Court of BiH, some positive changes have taken place. In the recent cases against *Gordan Đurić*[39] and *Damir Ivanković*,[40] plea agreements were concluded well before the end of the prosecution's cases, although not at the very beginning of the trials when they can most benefit the judiciary. Another positive development in these recent plea agreements has been that the defendants did not waive their right to appeal the verdicts against them, as they had done in the 11*bis* agreements inconsistently with the law, as the Projects reported.

Remaining Challenges

At a seminar held in Sarajevo on 9 October 2009 on Abbreviated Criminal Procedures for Core International Crimes Cases,[41] the President of the Court of BiH expressed

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36 The OSCE has long noted issues of practice regarding the use of plea agreements. For example it issued the thematic report, *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards in May 2006*. available at http://www.oscebih.org/documents/4278-eng.pdf

37 *Roundtable on "Plea agreements in war crime cases in BiH,"* organized by the American Bar Association Rule of Law Initiative on 15 April 2008.

38 *See* OSCE Mission to Bosnia and Herzegovina, Human Rights Department, *Principles of Plea Bargaining for Prosecutors* (May 2009).

39 Case no. X-KR-08/549-2.

40 Case no. X-KR-08/549-1.

41 Organised by the Forum for International Criminal and Humanitarian Law. *See http://www.fichl.org/activities/abbreviated-criminal-procedures-for-core-international-crimes/.*

the need to utilise all available time and resource-saving mechanisms in processing war crimes cases in BiH. She opined that plea bargaining is currently underused as an option at the Court. Because of the many positive aspects of resolving war crimes cases through plea agreements, the Mission recommends that judicial and government authorities engage in concerted dialogue to formulate a consistent policy on when plea bargaining should be considered.

An additional recommendation is to hold further discussions on plea agreements including the issue of whether charge bargaining is an acceptable practice in BiH in order to clarify policy and practices in these matters. Prosecutors should also consistently evaluate the strength of their cases, with a view toward concluding potential plea agreements as early as possible in the criminal proceedings. Recognising the importance of the right to an impartial tribunal, parties and courts should give due consideration to the right of a defendant to be tried by an impartial tribunal in the event a plea agreement is rejected.

f. Use and availability of evidence from the ICTY

Findings

The BiH Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH (Law on Transfer)[42] provides for the use by all courts in BiH of evidence that has been gathered by ICTY investigators or produced before the ICTY. Use of ICTY gathered evidence and adjudicated facts advances economy of judicial time and resources. Another benefit is to help contribute to consistent evidence and judicial findings.

As can be expected by attempts to align two procedurally and linguistically disparate legal systems, the process of accepting ICTY evidence into BiH trials has been complicated.[43] A principal hurdle has been related to language: most ICTY evidence is in English or French; languages that are not spoken fluently by the majority of national practitioners. The 11*bis* Projects noted in the *Rašević and Todović* case that the Prosecution had problems preparing its case because the written transcripts of its witnesses' testimonies before the ICTY did not exist in a local language (Bosnian,

42 OG BiH 61/04, 46/06, 53/06, 76/06.

43 OSCE *Second Report in the Case against Gojko Janković*, July 2006; OSCE *Third Report in the Case against Gojko Janković*, October 2006; OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007; OSCE *Third Report in the Case against Paško Ljubičić*, June 2007; OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007; OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007; OSCE *Fifth Report in the Case against Paško Ljubičić*, December 2007; OSCE *Fifth Report on the Case against Mitar Rašević & Savo Todović*, January 2008; OSCE *Second Report in the Case against Milorad Trbić*, January 2008; and OSCE *Sixth Report in the Case against Paško Ljubičić*, March 2008.

Croatian, or Serbian).[44] The Prosecution was unable to review its witnesses' prior testimonies and, therefore, did not have a clear idea of what each witness stated previously. The Prosecution called witnesses and prepared to examine them based only on the short statements given by each witness to ICTY investigators. This led to the provision of unfocused and irrelevant testimony and unnecessary repetition before the Court of BiH.

The 11*bis* Projects observed that defence counsel in the Cases against *Ljubičić, Mejakić et al.*, and *Trbić* also faced similar language problems.[45] Those defence counsel had a difficult time preparing for their cross-examination of prosecution witnesses because they also did not understand the English transcripts of the witnesses' previous testimonies before the ICTY.

A second impediment to the use of ICTY evidence has been the lack of domestic experience in applying the doctrine of judicial notice, i.e. accepting facts established by the ICTY as adjudicated. The 11*bis* Projects observed that the trial panels at the Court of BiH adopted different criteria on which facts adjudicated before the ICTY could be accepted and when that should be done.[46] In addition to these disparities, in the earlier 11*bis* cases, the Projects noted that adjudicated facts were not accepted by the trial panels until long after the main trial had begun, although the purpose of this instrument is to allow courts to save time by not compelling the prosecutor to present evidence on matters already proven in other cases. For instance, in the *Ljubičić* case, the Court partially granted the Prosecution's motion for judicial notice of facts adjudicated by ICTY judgments, dated 30 May 2007, eight months after it was made, on 1 February 2008. By that time, the Prosecution had almost completed its presentation of evidence, including on points it moved to have accepted as adjudicated. The Projects noted that equality of arms is also best respected when decisions on adjudicated facts are made as early as possible in the proceedings.

Monitoring by the OSCE Mission has also revealed that ICTY adjudicated facts are seldom if ever accepted by entity level courts in BiH. The main exception to this is that some entity level courts have an *ad hoc* practice of recognising "notorious" facts, such as the existence of armed conflict. Moreover, trial panels at the State Court have applied differing criteria for accepting adjudicated facts with the result that the guidance that may be derived by entity level courts handling war crimes cases to using this tool is disputable. It is also unfortunate that there is no legal provision to take judicial notice of facts established by other courts within BiH, as trial panels at

44 OSCE *Fifth Report on the Case against Mitar Rašević & Savo Todović*, January 2008.

45 OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007; OSCE *Third Report in the Case against Paško Ljubičić*, June 2007; and OSCE *Second Report in the Case against Milorad Trbić*, January 2008.

46 OSCE *Second Report in the Case against Gojko Janković*, July 2006; OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007; OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007; OSCE *Fifth Report in the Case against Paško Ljubičić*, December 2007; OSCE *Second Report in the Case against Milorad Trbić*, January 2008; and OSCE *Sixth Report in the Case against Paško Ljubičić*, March 2008.

the State Court are now developing a body of adjudicated factual findings that could be useful to other trial panels or entity level courts in future war crimes proceedings.

Advocacy and Progress

In its reports, the 11*bis* Projects advised the Court of BiH, in cooperation with the BiH Prosecutor's Office, OKO [Odsjek krivične odbrane – Criminal Defence Section] and entity level counterparts, to examine possible solutions to the use of ICTY evidence in English. Authorities should ensure that parties have effective access to witnesses' oral testimony given before the ICTY in a language that they understand, prior to when those witnesses testify before the courts. This has not yet been done, although in the meantime, trial panels at the Court of BiH have found different solutions to the language barrier of defence counsel. For instance, in the *Ljubičić* case, an additional English-speaking attorney was appointed to assist the principle defence counsel. In contrast, in the *Mejakić et al.* case, local language audio-video recordings of ICTY proceedings were used by the defence to assist in its preparation.

With respect to adjudicated facts, the 11*bis* Projects have recommended that BiH authorities train actors on the use of adjudicated facts and consider the expansion of its doctrine to include facts established through trials conducted before courts in BiH, such as in Court of BiH judgments. Trial monitors have observed that the Court of BiH in its more recent war crimes cases, such as in the Case against *Trbić*, has addressed the issue of adjudicated facts at an early stage of the proceedings.[47] In addition, with increased experience guided by the Appellate Panel, judges have begun to apply more consistent standards on the acceptance of adjudicated facts.

Remaining Challenges

The OSCE Mission reiterates its recommendation that state and entity judicial actors collectively examine possible solutions to the use of ICTY evidence in English, to ensure that parties have effective access to witnesses' oral testimonies given before the ICTY, before those witnesses testify in BiH. In this regard, a joint OSCE-ODIHR/ICTY/UNICRI project on supporting the transfer of knowledge and materials of war crimes cases from the ICTY to national jurisdictions which will make a significant number of transcripts from ICTY cases available in a local language, is to be welcomed. This project will take place in 2010 and 2011 through funding provided by the European Union. Translation of these transcripts should resolve many of the language issues that prevent the effective use of materials from the ICTY in war crimes proceedings. In the interim, courts may wish to consider some of the solutions identified in previous cases, such as to use ICTY audio-video recordings in local language.

47 OSCE *Second Report in the Case against Milorad Trbić*, January 2008

The Mission also recommends that the Judicial and Prosecutorial Training Centers offer educational programming on the standards applicable to the acceptance of adjudicated facts. In these initiatives, emphasis on the need to decide upon adjudicated facts early in order to respect the principle of equality of arms and on the advantages of doing so should be made.

g. Effectiveness of defence

Findings

The right to an effective defence is a basic fair trial requirement; furthermore a judgement rendered in a case where the defendant was well represented will be more likely to be perceived as fair and accurate by the public. Analysis of the effectiveness of the defence in Rule 11*bis* cases has been difficult because monitors are unable to possess a complete view of a defence's strategy. That being said, the 11*bis* Projects have noted various particularised aspects of the defence as concerns, in addition to the obstacles discussed in the preceding section on accessibility of ICTY evidence.[48]

One issue touched upon early in the cases against *Ljubičić* and *Rašević* was that telephone communications between lawyers and their clients at the BiH Court Detention Center were taking place within hearing range of prison personnel. As noted in reports, the right to communicate with one's legal representative in confidence is part of the basic requirements of a fair trial.

Another concern identified was the poor quality of written defence motions. In the earlier reports in the Cases against *Stanković* and *Janković*, the 11*bis* Projects noted that defence motions on custody lacked reasoning and were not timely.

Advocacy and Progress

With respect to confidential communications, the 11*bis* reports recommended that the BiH Court and the Detention Unit cooperate to ensure that the right of detainees to communicate with their counsel out of hearing of third parties is protected. The authorities immediately followed this recommendation and installed a telephone allowing for such confidential communication.[49]

To assist defence counsel in drafting well-reasoned motions, the Mission has contributed to activities undertaken by OKO and the bar associations to improve the

48 OSCE *First Report in Case against Radovan Stanković*, February 2006; OSCE *First Report in the Case against Gojko Janković*, April 2006; OSCE *Second Report in the Case against Radovan Stanković*, May 2006; OSCE *First Report in the Case against Mejakić et al.*, September 2006; OSCE *First Report in the Case against Paško Ljubičić*, December 2006; OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007; OSCE *Second Report in the Case against Paško Ljubičić*, March 2007; and OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, January 2008.

49 OSCE *Second Report in the Case against Paško Ljubičić*, March 2007.

skills of defence counsel. Those organisations have conducted trainings, discussions and presentations on matters relevant to the defence. These events have utilised the experience and expertise of defence counsel who have represented defendants before the ICTY.

Remaining Challenges

Because of the complexity of war crimes cases and the large amount of evidence involved, much still needs to be done to ensure that defence counsel have the skills and resources necessary to represent their clients effectively. Some defence counsels still appear underprepared for trial. In light of the foregoing, the OSCE Mission recommends that government authorities and relevant organisations continue to support initiatives to train defence attorneys.

The Mission also supports recommendations made on this matter by the joint ODIHR-OSCE, UNICRI, and the ICTY project on *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*. Those recommendations, which can be found in the project's final report, address in more detail the need for defence counsel to receive regular training on war crimes related matters from a defence perspective.[50] They include: defence counsel should gather regularly in intensive multi-day conferences during which they could hear presentations on a variety of relevant topics from the defence perspective; opportunities for networking and personal contacts should be provided to defence; and skills relevant to defence, including how to obtain assistance from the ICTY should be offered in training programs.

h. Clarity of judgments

Findings

As previously noted, the public will judge the fairness and integrity of proceedings from court's judgments. It follows that, if the Court of BiH wishes for the public and legal practitioners alike to understand its verdict and to recognise it as a fair and impartial institution, it must draft its judgments with those things in mind. The Court's judgments must be well-reasoned, well-balanced, and clear.

Using the second instance verdicts in the *Stanković* case and in the *Rašević* case as a starting point, the 11*bis* Projects identified problems common to sentencing verdicts

50 *See* OSCE-ODIHR report, produced in conjunction with UN ICTY and UNICRI, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Final Report)*, September 2009, available at http://www.osce.org/documents/odihr/2009/09/39685_en.pdf.

throughout BiH.[51] The Projects noted that the Court's verdicts in these cases did not provide clear reasoning on how it weighed the different factors it considered in rendering its sentences. The Projects also observed that the Appellate Panel did not clearly identify the circumstances under which it would consider intervention in a trial panel's sentencing discretion as necessary and overturn that panel's sentence.

Since then the State Court has sought to address these concerns and has improved the consistency of its sentencing policy. In particular, in the Mirko Todorović and Miloš Radić Appeals Judgement of 23 January 2009, the Appellate Panel analyzed in detail the standards under which a sentence can be appealed by the parties and revised by the Appellate Panel itself.[52]

Advocacy and Progress

The 11*bis* Projects have recommended in their reports that appropriate standards for review of first instance judgments should be established by the Appellate Panel. The Projects have also tackled this issue more comprehensively in a recent report on *Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices*. The report makes clear that while most judgments do not violate minimum human rights standards of clarity and reasoning under international and domestic standards, they would still benefit greatly from improvements in certain domains.

Recommendations in the thematic report are focused on encouraging discussion about how the courts can improve the readability and comprehensibility of their judgments. This, in turn, would allow these judgments to be more easily utilised by fellow judges and courts as reference points and case law. The Projects' thematic report aims to assist the authorities to capitalise on existing good practices and to find ways to improve in the area of judgment writing. Indeed, there have been some positive developments in the reasoning and presentation of war crimes judgments in BiH that are noteworthy.

Remaining Challenges

As acknowledged in the thematic report on judgment clarity, the organization and clarity of judgments has increased markedly over the last few years. Nevertheless, there is still much that can be done in the way of improvement. The OSCE Mission reiterates those recommendations provided in the thematic report *Reasoning in War Crimes Judgments in Bosnia and Herzegovina: Challenges and Good Practices* and urges relevant authorities to review the report and implement the recommendations provided therein. These recommendations encourage the judiciary and other involved actors engage to in dialogue, form consensus, and take action to develop

51 OSCE *Sixth Report in the Case against Radovan Stanković*, June 2007 and OSCE *Tenth Report in the Case against Mitar Rašević & Savo Todović*, April 2009.

52 OSCE Capacity Building Legacy Implementation project thematic report *On Aspects of Clarity of War Crimes Judgments*, December 2009.

standards and relevant training regimes to enhance the usefulness of written judgments. Important to these discussions is the consideration of related issues, such as the appropriate and beneficial use of domestic and international case law and the possibility of allowing dissenting opinions.

i. Methodology of training and knowledge transfer

Findings

One of the goals of the 11*bis* Projects and a frequent object of its report recommendations has been to identify best practices, to develop mechanisms for knowledge transfer, and to train judicial actors. The Projects often have noted that training methodology in connection to war crimes law and case management in BiH is lacking and that professional education needs to be improved in terms of coordination and targeted quality.[53]

Advocacy and Progress

In addition to the regular course of advocacy activities of the 11*bis* Projects, in 2009, the 11*bis* Projects, then framed as the Capacity Building and Legacy Implementation Project, set out to improve the professional capacity of justice actors through an increase in their exchange of experiences, knowledge, and skills. The Projects also sought to develop suitable mechanisms and institutions within the justice system to improve knowledge transfer.

Most notably, the Projects assisted in designing and implementing a research project undertaken in 2008-2009 jointly by ODIHR-OSCE, UNICRI, and the ICTY on *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*. This project was timed with respect to the closure of the ICTY, which seeks to transfer its knowledge. The 11*bis* Projects experts served on the coordination board of this joint project.

The Projects also successfully organised the Regional Workshop on Best Practices and Lessons Learned in Knowledge-Transfer Methodology on Processing War Crimes in May 2009. This was a major event where eighty-three practitioners dealing with war crimes from throughout the former Yugoslavia, the ICTY, and other international organization met to discuss methodology of knowledge transfer. It represented the first time that a group this large and diverse gathered to discuss these matters.

At the conference, practitioners used an interim report drafted by the joint project's research team as the basis for their discussions. The interim report critiqued previous

53 See OSCE *Tenth Report in the Case against Mejakić et al.*, December 2008; OSCE *Tenth Report in the Case against Mitar Rašević & Savo Todović*, April 2009; and OSCE *Thirteenth Report in the Case against Mejakić et al.*, October 2009.

knowledge and skills-transfer activities undertaken throughout the area of the former Yugoslavia and recommended ways forward**.** It detailed the needs of the major actors in war crimes cases – judges, prosecutors, defence counsel, and investigators – as well as in the areas of witness support and outreach. The workshop practitioners assessed the interim report and submitted new proposals, which were incorporated into the Final Report of the joint project, issued in September 2009.[54] The OSCE Mission provided extensive input on both the interim and final reports.

In addition to this event, the Mission held numerous meetings with various judicial representatives and practitioners of the State and entity jurisdictions, including with the Judicial and Prosecutorial Training Centers and other education providers, to present the 11*bis* Projects and raise awareness and support about the Regional Workshop and report recommendations. The Mission also contributed to the organisation and content of several other events hosted by national and international institutions and thus contributed to a marked improvement in the ability of the judicial institutions to meets the needs of its own staff and to adhere to human rights and rule of law principles in processing war crimes trials.

Remaining Challenges

This joint ODIHR-OSCE, UNICRI, and the ICTY *Project on Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer* detailed the obstacles to the efficient processing of war crimes cases in BiH, with respect to the skills and knowledge of judges, prosecutors, defence counsel, and investigators. The Final Report also provides recommendations on how to address identified concerns. The OSCE Mission urges involved actors to review the Final Report and implement the recommendations therein.

In particular, participants of the Regional Workshop identified and discussed many mechanisms for knowledge transfer, including case-law databases, which they believed would be useful in war crimes processing in the region. The Mission encourages authorities to consider the recommendations made at the Regional Workshop. In addition, the Mission expresses its support for ongoing projects by ODIHR and the High Judicial and Prosecutorial Council to develop knowledge transfer mechanisms in BiH.

The Mission also recommends that Judicial and Prosecutorial Training Centers and other education providers build upon the aforementioned initiatives and attempt to coordinate better their future activities on training and knowledge transfer.

54 *See* OSCE-ODIHR report, produced in conjunction with UN ICTY and UNICRI, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Final Report)*, September 2009, available at http://www.osce.org/documents/odihr/2009/09/39685_en.pdf.

j. Financial Status of the Defendant

Findings

The 11*bis* Projects also identified concern with the Court's failure to investigate the financial assets of one of the defendants who pled guilty. In the Case against *Ljubičić*, the Projects noted that, although the defendant had pled guilty over a year after the main trial had begun and at the very end of the Prosecution's case against him, the Court of BiH did not require him to pay any costs toward the proceedings that had been conducted against him. The Court of BiH made no effort to examine the financial status of Ljubičić to determine whether he could pay the costs of the proceedings, although the Court stated in its verdict that the defendant had insufficient means. What particularly struck the 11*bis* Projects was the fact that the ICTY had conducted an assessment of Ljubičić's finances while Ljubičić was a defendant before it, prior to his transfer to BiH. The ICTY had concluded that the defendant had sufficient means and required him to contribute to the costs of proceedings there. Given that this assessment of the Hague Tribunal was a matter of record, the Court of BiH should have conducted a similar evaluation. It is notable, however, that the Court of BiH did not request any assistance or information on the defendant's finances from the ICTY. With the finances of the Court being stretched so thin, it is difficult to answer the question of why this issue has not been given more attention.

Advocacy and Progress

It is important to note that although the judges in the Case against *Paško Ljubičić* failed to inquire into Ljubičić's financial status, not all judges have neglected this duty. In its Fifth Report in the Case against *Milorad Trbić*, October 2008, the 11*bis* Projects noted that the Trial Panel submitted a request to the FBiH authorities requesting information on Trbić's assets. The Projects noted that this appeared to be the first time that a trial panel had made such an inquiry. As recognized by the President of the Court of BiH, judges generally did not conduct inquiries into defendants' assets with diligence and this led to abuses of the system.[55]

Remaining Challenges

The Mission encourages the Court to be more proactive in the examination of defendants' assets and of claims of indigence by defendants. BiH authorities may

55 See, *International Judges Must Stay in Bosnia,* Interview of President Kreso with the Balkan Investigative Reporting Network, 24 April 2008, available at http://www.bim.ba/en/112/10/9651/. In this interview, the President of the Court of BiH, Ms. Meddžida Kreso, mentioned that: "By law, the financial status of all indictees should be checked. But trial chambers are not making detailed checks. I have discussed this with judges, as I have noticed we pay very high trial expenses from our budget. I think the trial chamber chairmen are wrong not to check the financial status of all indictees. I have also noticed that persons misuse the right to various specialist medical examinations. I think all these ex-officio costs must be reconsidered."

wish to engage with the ICTY Office for Legal Aid and Detention Matters to learn how it conducts efficient and thorough financial investigations. Establishment of an independent mechanism in BiH to carry out financial investigations in a coordinated manner may be the best option.

IV. Conclusion

The transfer of proceedings to the national jurisdiction of BiH by the ICTY was an enormous test for the fledgling institutions and reforms established in the domestic criminal justice system since 2003. Monitoring by the OSCE Mission to Bosnia and Herzegovina has confirmed that the national system is capable of processing war crimes cases in line with international and domestic standards. The 11*bis* mechanism has been a great success both in terms of assisting the ICTY completion strategy and demonstrating the independence, professionalism, and capacity of the Court of BiH and Prosecutor's Office of BiH, in particular. Notwithstanding this, the present report has reviewed the 11*bis* Projects' principle findings and activities and outlined concerns identified from monitoring of 11*bis* cases. Those concerns – related to ten problematic areas – have been systemic in nature and some of them have featured in non-11*bis* cases being tried at the Court of BiH and at the entity level.

In the past five years, BiH's ability to process war crimes cases in a human rights compliant manner has risen measurably as a result of the combined efforts of a number of agencies, both national and international, including the OSCE Mission to BiH. There are, however, remaining matters of concern, particularly in areas of witness protection, injured party compensation claims, and effectiveness of defence. Although five years have passed, it is only the beginning of a long and necessary growth in the country's ability to administer justice – and process war crimes cases – fairly and efficiently.

This report demonstrates that the first step in achieving a fair and efficient justice system has been to monitor and identify the barriers to such a judicial system. The next step has been to educate responsible officials about identified concerns to ensure that they understand the obstacles that exist and develop and implement appropriate solutions. Lack of a willingness and desire to implement changes, even when reform strategies have been adopted, has been a major barrier to positive reform.

The 11*bis* Projects have played an important role in achieving change through its consistent monitoring, reporting, and related advocacy activities. In detailing the advocacy, progress, and remaining challenges in each of the problem areas, the purpose of this report has been to ensure that issues are not forgotten and that the system maintains momentum to resolve those concerns. In line with its previous reports, this report has also recommended steps that BiH should take to continue the country's progression towards a more fair and efficient justice system. Further efforts, both national and international, to strengthen capacity would greatly assist

in this regard. With that in mind, a project to promote the legacy of the ICTY conducted by ODIHR-OSCE, ICTY, and UNICRI from 2010 to 2011 will serve to address many outstanding problems identified by national practitioners as well as in the present report.[56]

56 *See Final Report of Legacy Project, supra* note 54.

Annex: List of Problem Areas and Relevant 11*bis* Reports

Transfer and processing of Rule 11bis cases

1. OSCE *First Report in the Case against Radovan Stanković*, February 2006
2. OSCE *First Report in the Case against Gojko Janković*, April 2006
3. OSCE *First Report in the Case against Mejakić et al.*, September 2006
4. OSCE *First Report in the Case against Paško Ljubičić*, December 2006
5. OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007

Custody

1. OSCE *First Report in the Case against Radovan Stanković*, February 2006
2. OSCE *First Report in the Case against Gojko Janković*, April 2006
3. OSCE *First Report in the Case against Mejakić et al.*, September 2006
4. OSCE *Second Report in the Case against Mejakić et al.*, December 2006
5. OSCE *First Report in the Case against Paško Ljubičić*, December 2006
6. OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007
7. OSCE *Third Report in the Case against Mejakić et al.*, March 2007
8. OSCE *Second Report in the Case against Paško Ljubičić*, March 2007
9. OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007
10. OSCE *Third Report in the Case against Mitar Rašević & Savo Todović*, July 2007
11. OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007
12. OSCE *Fifth Report in the Case against Paško Ljubičić*, December 2007
13. OSCE *Sixth Report in the Case against Paško Ljubičić*, March 2008
14. OSCE *Ninth Report in the Case against Mitar Rašević & Savo Todović*, January 2009

Witness protection and support

1. OSCE *Second Report in the Case against Radovan Stanković*, May 2006
2. OSCE *Second Report in the Case against Gojko Janković*, July 2006

3. OSCE *Confidential Third Report in the Case against Radovan Stanković*, September 2006
4. OSCE *First Report in the Case against Mejakić et al.*, September 2006
5. OSCE *Third Report in the Case against Gojko Janković*, October 2006
6. OSCE *Confidential Spot Report of October 2006*
7. OSCE *Confidential Spot Report of December 2006*
8. OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007
9. OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, with Confidential Addendum, January 2008
10. OSCE *Second Report in the Case against Milorad Trbić*, January 2008
11. OSCE *Eighth Report in the Case against Milorad Trbić*, July 2009
12. OSCE thematic report, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*, January 2010

Transparency of proceedings

1. OSCE *Second Report in the Case against Radovan Stanković*, May 2006
2. OSCE *Confidential Third Report in the Case against Radovan Stanković*, September 2006
3. OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007
4. OSCE *Fifth Report in the Case against Gojko Janković*, May 2007
5. OSCE *First Report in the Case against Milorad Trbić*, October 2007
6. OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, with Confidential Addendum, January 2008

Injured party compensation claims

1. OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007
2. OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007
3. OSCE *Fourth Report in the Case against Mitar Rašević & Savo Todović*, October 2007
4. OSCE *Seventh Report in the Case against Milorad Trbić*, April 2009

Plea bargaining

1. OSCE *Fifth Report on the Case against Gojko Janković*, May 2007
2. OSCE *Ninth Report in the Case against Mejakić et al.*, September 2008
3. OSCE *Fifth Report in the Case against Milorad Trbić*, October 2008
4. OSCE *Ninth Report in the Case against Paško Ljubičić*, December 2008

Use of evidence from the ICTY

1. OSCE *Second Report in the Case against Gojko Janković*, July 2006
2. OSCE *Third Report in the Case against Gojko Janković*, October 2006
3. OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007
4. OSCE *Third Report in the Case against Paško Ljubičić*, June 2007
5. OSCE *Fifth Report in the Case against Mejakić et al.*, September 2007
6. OSCE *Fourth Report in the Case against Paško Ljubičić*, September 2007
7. OSCE *Fifth Report in the Case against Paško Ljubičić*, December 2007
8. OSCE *Fifth Report on the Case against Mitar Rašević & Savo Todović*, January 2008
9. OSCE *Second Report in the Case against Milorad Trbić*, January 2008
10. OSCE *Sixth Report in the Case against Paško Ljubičić*, March 2008

Effectiveness of defence

1. OSCE *First Report in Case against Radovan Stanković*, February 2006
2. OSCE *First Report in the Case against Gojko Janković*, April 2006
3. OSCE *Second Report in the Case against Radovan Stanković*, May 2006
4. OSCE *First Report in the Case against Mejakić et al.*, September 2006
5. OSCE *First Report in the Case against Paško Ljubičić*, December 2006
6. OSCE *First Report in the Case against Mitar Rašević & Savo Todović*, January 2007
7. OSCE *Second Report in the Case against Paško Ljubičić*, March 2007
8. OSCE *Fifth Report in the Case against Mitar Rašević & Savo Todović*, January 2008

Clarity of judgments

1. OSCE *Sixth Report in the Case against Radovan Stanković*, June 2007
2. OSCE *Tenth Report in the Case against Mitar Rašević & Savo Todović*, April 2009
3. OSCE thematic report, *Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices*, December 2009

Methodology of training and knowledge transfer

1. OSCE *Tenth Report in the Case against Mejakić et al.*, December 2008
2. OSCE *Tenth Report in the Case against Mitar Rašević & Savo Todović*, April 2009
3. OSCE *Thirteenth Report in the Case against Mejakić et al.*, October 2009