



BOSNIA AND HERZEGOVINA: THE INTERACTION BETWEEN THE ICTY AND DOMESTIC COURTS IN ADJUDICATING INTERNATIONAL CRIMES

BY DR YAËL RONEN

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ABOUT DOMAC

THE DOMAC PROJECT focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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EXECUTIVE SUMMARY

The International Criminal Tribunal for Yugoslavia (ICTY) was not mandated to proactively promote domestic prosecutions of war-related crimes. However, its operation may have had some impact on domestic proceedings concerning to war-related crimes in Bosnia and Herzegovina (BiH). The object of this report is to identify and explain this impact, with respect to the application of norms; rates of prosecution and trends in sentencing; and institutional legal capacities.

BiH courts and laws have undergone dramatic reforms since the end of the war, especially since the completion strategy was put in place. These reforms include the establishment of the War Crimes Chamber within the State Court, as well as the adoption of a criminal code and a criminal procedure code. International elements, including the ICTY, played a key role in promoting and shaping these reforms. Consequently, BiH has been able to share with the ICTY the burden of trying war related offences, largely in accordance with international standards. However, international influence has been, at least at the outset, a byproduct of internal concerns and goals of the international institution rather than the consequence of a conscious effort at modeling the domestic system. The establishment of the War Crimes Chamber and the transfer of cases to BiH, as well as the empowerment of domestic institutions, are the consequence of the ICTY's completion strategy and shaped by its needs.

The process of assuming responsibility by domestic authorities is not free of difficulties. In particular, the performance at Entity level is less than adequate. The impact of the ICTY on Entity courts is much more limited than its impact on the War Crimes Chamber within the State Court, on the normative, quantitative and qualitative levels. This gap is the consequence of both practical difficulties of reaching Entity courts, and political constraints, primarily the resistance of Entity institutions to international influence in meting out post-conflict justice.

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LIST OF ABBREVIATIONS

ABiH.....	<i>Armija Republike Bosne i Hercegovine</i> , Army of Bosnia and Herzegovina
BiH.....	Bosnia and Herzegovina
BiH CC.....	Criminal Code of Bosnia and Herzegovina
BSC.....	Bosnian/Serb/Croat
CPC.....	Criminal Procedure Code
ECHR.....	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR.....	European Court of Human Rights
EU.....	European Union
EUFOR.....	European Force in Bosnia
FBiH.....	Federation of Bosnia and Herzegovina
HJPC.....	High Judicial and Prosecutorial Council
HVO.....	<i>Hrvatsko Vijeće Obrane</i> , Croatian Defense Council
ICC.....	International Criminal Court
ICJ.....	International Court of Justice
IFOR.....	NATO-led Implementation Force in BiH
ICTR.....	International Criminal Tribunal for Rwanda
ICTY.....	International Criminal Tribunal for Yugoslavia
JCE.....	Joint Criminal Enterprise
JNA.....	<i>Jugoslavija Narodna Armija</i> , Yugoslav National Army
JPTC.....	Judicial and Prosecutorial Training Center
NATO.....	North Atlantic Treaty Organization
OSCE.....	Organization for Security and Cooperation in Europe
OHR.....	Office of the High Representative
OTP.....	Office of the Prosecutor of the ICTY
RoR.....	Rules of the Road
RPE.....	Rules of Procedure and Evidence
RS.....	Republika Srpska
SFOR.....	Stabilisation Force in BiH established under UN Security Council 1088(1995)
SFRY.....	Socialist Federal Republic of Yugoslavia
SFRY CC.....	Criminal Code of the Socialist Federal Republic of Yugoslavia
UNDP.....	UN Development Programme
UNPROFOR.....	United Nations Protection Force
VRS.....	<i>Vojska Republike Srpske</i> , Army of Republika Srpska
WCS.....	War Crimes Section within the State Court of BiH

1. INTRODUCTION

DOMAC's hypothesis is that international tribunals have a greater chance to end impunity in the countries they address, if their process is complemented by national atrocity-related prosecutions. Domestic courts are necessary for prosecution to be not a matter for an exclusive few while thousands of perpetrators walk free. Without large-scale prosecutions, the international community's message of ending impunity as expressed in the establishment of international tribunals, would be severely undermined.

The International Criminal Tribunal for Yugoslavia (ICTY) was not mandated to proactively promote domestic prosecutions of war-related crimes. However, its operation may have had some impact on domestic proceedings concerning to war-related crimes in Bosnia and Herzegovina (BiH). The object of this report is to identify this impact, with respect to the application of norms; rates of prosecution and trends in sentencing; and institutional legal capacities.

In the case of BiH, the distinction between international and domestic institutions is not entirely obvious. BiH is a federative entity, in which the different entities exercise a wide measure of independence, and the relationship between them is hardly hierarchical. Indeed, in some respects, the State of BiH and the Federation of Bosnia and Herzegovina (FBiH) are as foreign to Republika Srpska (RS) as are Croatia and Serbia. Moreover, the institutions of the State of BiH are eminently affected by the international administration of the country since 1995, whereas the impact of the international administration on the courts of FBiH and RS has been much more limited. For the purposes of the present report, institutions within BiH, irrespective of their provenance and composition, are regarded as domestic. As will be seen, the degree of international involvement in these institutions directly affects the degree of impact that the ICTY has had on them.

An important qualification to the scope of this report is that it does not provide a comprehensive study of the international involvement in BiH, the significance of which cannot be overstated in the context of addressing war-related crimes. Since the end of the conflict BiH has been governed by an international actor with significant powers, the Office of the High Representative (OHR). BiH is the only country in Europe, other than Kosovo to a certain extent, in which the international community holds executive powers

(the ‘Bonn Powers’). This provides the international community a greater opportunity to make an impact on domestic war-related crimes trials than in most other countries. Important international processes and actors other than the ICTY, which have undoubtedly affected the policy and practice in BiH and arguably to a much greater extent than the ICTY, are the political and economic pressure from European institutions, as well as the hands-on involvement of the international military contingencies and the European Union Police Mission in BiH (EUPM).¹ The interest of BiH in entering the European Union (EU) has also been very influential in mobilizing political support for criminal prosecutions.² However, the purpose of this study is not to map the various influences on BiH policy and practice but to identify the specific impact of the international tribunals, i.e. the ICTY, on domestic practice. The findings of the report must be read in light of this limited mandate and objective.

Section 2 of the report provides a brief background to the criminal justice system operating in BiH with respect to war-related crimes. Section 3 reviews the international response to the mass atrocities, namely the establishment of the ICTY and developments relating to its operation that have had a particular bearing on affect BiH. Section 4 reviews the response of BiH to the mass atrocities, namely the judicial institutions available for the prosecution of, and the law applicable to, war-related crimes.

Section 5 constitutes the heart of the report, and considers the impact of the ICTY on the domestic response to war-related crimes. This impact is assessed through three parameters: normative, namely the effect of ICTY on the law adopted in the different jurisdictions in BiH and on the interpretation and implementation of that law; quantitative, namely the effect of the ICTY on the volume of prosecutions of war-related crimes in the different jurisdictions, and the sentencing patterns in those jurisdictions; and qualitative, namely the impact of the ICTY on the capacity of the various prosecutorial and judicial institutions in BiH to address war-related crimes. Section 5 also attempts to explain the different types of impact it identifies. Finally, since, as explained above, the State Court of BiH, which for the most part is considered in this report as a domestic institution, also has some internationalized aspects, section 6 examines the international-domestic

¹ Eg Carla del Ponte and Chuck Sudetic, *Madame Prosecutor. Confrontations with Humanity's Worst Criminals and the Culture of Impunity: a Memoir* (Other Press, New York 2008), Prologue.

² For instance, the Establishment of a single High Judicial and Prosecutorial Council is often mentioned as a condition for the commencement of negotiations for the conclusion of a Stabilization and Association Agreement between the EU and BiH (DOMAC interview A-12).

relationship on a more nuanced level, namely the impact of the State Court of BiH on Entity courts, again under the normative, quantitative and qualitative headings.

2. BACKGROUND

2.1 THE CONFLICT IN BIH

The Paris Peace Conference at the end of World War I created the Kingdom of Serbs, Croats and Slovenes (informally referred to as Yugoslavia) on territory carved out from the Austrian and Ottoman empires. The victorious allies hoped that the Kingdom's people would forge a new common identity based on their shared status as Southern Slavs. The latter were, however, divided in various ways. Croats and Slovenes were Roman Catholic, orientated towards Western and Central Europe; Serbs, Macedonians and Montenegrins were Eastern Orthodox in religion, and were economically less developed. Bosnians were Muslims, having converted their religion in exchange for autonomy and protection from the Turks. This conversion led the Serbs, who had regularly risen against the Turks and were subsequently heavily repressed, to denigrate the Bosnian Muslims.

Following World War II, Tito reinvigorated Yugoslavia (renamed the Socialist Federal Republic of Yugoslavia (SFRY) in 1963). He followed the Soviet Union's formula of establishing a federation of national republics. These entities were given nominal sovereignty complemented by cultural and political institutions, in return for ceding actual political power to Tito and his party. Tito held the country together by maintaining a careful balance among the different national groups, particularly between the dominant ethnicities, Serbs and Croats. A hindrance to maintaining this balance was the dispute between the two ethnicities over the area between Serbia and Croatia, where a mixed population lived, and to which both dominant entities lay claims. Tito established a new republic in that area, Bosnia-Herzegovina.³ He later recognized Bosnian Muslims as a distinct nation.⁴ A new constitution adopted in 1974 increased the decentralization of governmental powers, formally giving the six national republics more political and

³ Dusko Doder, 'Yugoslavia: New War, Old Hatreds' (1993) 91 *Foreign Policy* 3, 12.

⁴ Different exact dates are provided by different sources. Bryant quotes 1961 for the grant of ethnic status and 1971 for the grant of national status, Lee Bryant, *The Betrayal of Bosnia (CSD Perspectives)* (University of Westminster Press c. 1993), 14; Doder quotes 1964 for the grant of national status and territorial republic status, *supra* note 3, 12.

economic independence. Post-war Yugoslavia was a socialist state based on four pillars: the communist party, the Yugoslav Army (*Jugoslavija Narodna Armija*, JNA), the police and the concept of 'workers' self-management'.

Tito's totalitarianism successfully repressed ethnic discord within Yugoslavia during his life time. Tito's death in 1980, combined with the end of Cold War rivalry and the decline of communist ideology in the rest of Europe in the 1980s, led to the severe weakening of the SFRY's crucial unifying factors. The deteriorating SFRY economy, increasingly suffering from the vices of socialism, compounded by a return of the masses of Yugoslav guest-workers following an economic depression in Western Europe, reignited ethnic tensions. Nationalist demands and calls for increased autonomy grew among the various ethnic groups. Separatism in Kosovo became the catalyst for the revival of Serb nationalism. In May 1986, Slobodan Milošević, a former manager of a gas company, became head of the communist party of Serbia, on a Serb ultra-nationalist platform. In March 1989 he annulled the autonomous status of Vojvodina and Kosovo, and these regions, against their collective wills, again became integral parts of Serbia.

In 1990 elections were held within Yugoslavia. Only in Montenegro and Serbia did the communist parties win, while nationalist parties came into power in the four other republics. These nationalist victories were in many ways a reaction against growing Serb power. Both Croatia and Slovenia, under new nationalist governments publicly declared their intention to secede from Yugoslavia. In BiH, most parties had not favored the dissolution of Yugoslavia; but the BiH leadership did not wish to remain in a rump Yugoslavia, and announced that if Croatia and Slovenia were to leave Yugoslavia, then BiH would be forced to follow suit.⁵ Serb and Croat expansionism were invigorated when in March 1991 Croatian president Tuđman and Serb president Slobodan Milošević secretly concluded the Karađorđevo Agreement on the redistribution of territories in BiH between Croatia and Serbia, in such a way that territories with either Croat or Serb majorities would be annexed to Croatia and Serbia respectively.⁶ On 25 June 1991 Croatia and Slovenia declared independence, but the European Community, reluctant to see Yugoslavia disintegrate, placed a three-month moratorium on the recognition of their independence, instead pursuing a cease-fire in exchange for a withdrawal of JNA troops

⁵ Steven L Burg and Paul S Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (ME Sharpe, New York 2000), 70.

⁶ *Prosecutor v Slobodan Milošević* (Initial Indictment) ICTY-IT-01-51-I (22 November 2001), paragraph 57.

from their territories.⁷ Serbia's President Milošević publicly stated that 'in case of the ruin of Yugoslavia, the borders of Serbia must be redefined, because a future Serb state must include all areas where Serbs live'.⁸ The JNA, which comprised mostly Serb and Montenegrin officers, effectively became the army of Serbia. The inheritance by Serb forces of the majority of the SFRY's weapons, and especially its heavy weapons, gave the Serbs great relative military power.

In BiH, new parties representing the three national communities gained seats in parliament that were roughly proportionate to the sizes of their populations.⁹ A tripartite coalition government was formed. Bosnian-Muslim Alija Izetbegović led a joint presidency, together with a Serb president of the parliament and a Croat prime minister. However, growing tensions both inside and outside BiH made cooperation with the Bosnian-Serb Democratic Party (SDS), led by Radovan Karadžić, increasingly difficult. In August 1991 the SDS began boycotting the BiH presidency meetings; in October it removed its deputies from the BiH assembly and set up a 'Serb National Assembly' in Banja Luka. At the same time, Croat-Serb opposition to Croatian independence led to full-scale war in Croatia. Croatian-Serb rebels, assisted by the JNA, soon consolidated their hold on extensive tracts of Croatian territory, and declared that their entities would not secede from Yugoslavia if Croatia followed through with independence. On 25 September 1991 the UN Security Council passed Resolution 713 imposing an arms embargo on all deliveries of weapons and military equipment to Yugoslavia.

In the following months, self-proclaimed Croat and Serb autonomous entities were formed throughout BiH.¹⁰ In November 1991 the Croats set up the Herceg-Bosna Community, which in 1992 proclaimed itself the Republic of Herceg-Bosna.¹¹ On 9 January, 1992 the Bosnian-Serb Assembly established the Serb Republic of Bosnia and

⁷ Brioni Declaration, 8 July 1991, www.pcr.uu.se/gpdatabase/peace/Yug%2019910712.pdf. For a detailed account of events see Alan Hanson, 'Croatian Independence from Yugoslavia, 1991-1992' in Melanie C Greenberg, John H Barton and Margaret E McGuinness (eds), *Words Over War, Mediation and Arbitration to prevent Deadly Conflict* (Rowman and Littlefield Publishers, Lanham 2000) 76, 85.

⁸ Thierry Domin, 'History of Bosnia and Herzegovina from the Origins to 1992, Chapter 6, 'From the end of WWII to 1992', www.nato.int/sfor/indexinf/122/p03a/chapter6.htm.

⁹ The Muslim Party of Democratic Action (SDA) - 34%, the Serb Democratic Party (SDS) - 30%, and the Bosnian branch of the Croatian HDZ - 18%. In the 1991 census Muslims made up more than 40% of the Bosnian population, while Serbs made up over 30% and Croats 17%.

¹⁰ Eastern and Old Herzegovina was established on 12 September, Bosanska Karjina on 16 September, Romanija on 18 September, and Northeast Bosnia on 20 September.

¹¹ *Prosecutor v Mladen Naletilić and Vinko Martinović* (Trial Judgment) ICTY-IT-98-34 (31 March 2003), [4].

Herzegovina,¹² renamed Republika Srpska in August 1992. Altogether some three quarters of BiH was claimed by either Serb or Croat nationalists.

In December 1991 the Badinter Commission, established by the European Community as part the machinery to develop and apply political solutions to the break-up of the SFRY, declared that in order to obtain recognition by the European Community under its Declaration on Yugoslavia,¹³ Bosnia-Herzegovina needed to hold a referendum of all its citizens under international supervision. Attempts by European Community negotiators to promote a new division of BiH into ethnic 'cantons' failed: different versions of these plans were rejected by each of the three main parties. At the same time, tensions between the JNA and the BiH government mounted; the Bosnian-Serb and Muslim leaderships were failing to cooperate, while the Bosnian Croats have for all practical purposes opted out of governing the republic, creating instead an autonomous entity tightly integrated with Croatia. All the while, arms were pouring into BiH. The JNA began a transfer of arms to Bosnian Serbs. Croats and Serbs returning from Croatia were bringing their weapons. According to Bosnian accounts, in February 1992 the JNA struck a deal with Bosnian-Serb leader Karadžić to create a joint Bosnian Serb-JNA command and coordinate military actions in BiH.¹⁴

Efforts at the UN to broker an effective cease-fire in Croatia succeeded in January 1992, and the UN Protection Force (UNPROFOR) was sent to Yugoslavia on the basis of Security Council Resolution 743 of 21 February 1992.¹⁵ The ceasefire and deployment of UNPROFOR saw the end of the major war in Croatia, although sporadic fighting continued throughout the next three years. However, the freezing of the front lines between Croatian and Serb forced through the deployment of UN peacekeepers gave both Croatia and Serbia added incentives to compensate for their respective territorial positions by annexing Bosnian territory.¹⁶

On February 29-1 March 1992 BiH held a referendum as called for by the Badinter Commission. The referendum was boycotted by many Bosnian Serbs. Nearly

¹² *Prosecutor v Milošević*, Dragomir (Trial Judgment) ICTY-IT-98-29/1 (12 December 2007), [18].

¹³ European Community, 'Declaration on Yugoslavia and Guidelines on the Recognition of New States' Annexes 1 and 2 (17 December 1991) UN Doc S/23293.

¹⁴ Steven L Burg and Paul S Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (ME Sharpe, New York 2000), 75.

¹⁵ Malgosia Fitzmaurice, 'Badinter Commission (for the Former Yugoslavia)', in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), online edition, www.mpepil.com.

¹⁶ Lee Bryant, *The Betrayal of Bosnia (CSD Perspectives)* (University of Westminster Press c. 1993), 23.

two-thirds of the electorate cast a vote; almost all voted for independence. Independence was officially proclaimed on March 3 by President Izetbegović. On 7 April 1992 BiH was recognized as an independent state by the US and the European Community.

Even prior to recognition of BiH's independence, large-scale violence erupted.¹⁷ When the results of the referendum were announced on 2 March 1992, Bosnian-Serb paramilitary forces set up positions around Sarajevo. Heavy bombardment of the city soon followed, gradually cutting the isolating from its surroundings. By the end of April 1992, the siege on Sarajevo's was largely established and from then on, the city of Sarajevo was surrounded for most of the war.¹⁸

At the outset, the BiH conflict was predominantly between Bosnian Muslims and Bosnian Croats backed by Croatia on one side, and Bosnian Serbs backed by Serbia and the Serb-dominated JNA on the other side. The JNA officially withdrew from BiH on 12 May 1992. However, only about 15,000 military personnel were actually withdrawn by the end of May. The remaining 80,000 troops transferred to the Bosnian-Serb Army, along with the JNA's equipment and facilities in BiH which could not be withdrawn.¹⁹ The Bosnian-Serb Army was by far the most powerful force on the field of battle. In addition, throughout the war, it was able to rely upon well-organised paramilitary formations such as the Serb 'White Eagles' and Arkan's 'Tigers'.²⁰ The Bosnian Croats organized a defensive military formation of their own called the Croatian Defense Council (*Hrvatsko Vijeće Obrane*, HVO), as the government and armed forces of the self-proclaimed Herceg-Bosna.²¹ The estimated 32,000-strong HVO force included a substantial number of Croatian Army regular soldiers.²² The Serb and Croat paramilitaries included volunteers from Serbia and Croatia, respectively, and were supported by nationalist political parties in those countries.

The Bosnian Muslims mostly organized into the Army of Republic of BiH (*Armija Republike Bosne i Hercegovine*, ABiH), which started to come together only in May-June

¹⁷ *Prosecutor v Milošević*, Dragomir (Trial Judgment) ICTY-IT-98-29/1 (12 December 2007), [22].

¹⁸ *Ibid*, [145].

¹⁹ Bryant, *supra* note 4, 36.

²⁰ Bryant, *supra* note 4, 38.

²¹ *Prosecutor v Prlić et al* (Case Information Sheet) ICTY-IT-04-74.

²² Bryant, *supra* note 4, 38.

1992. The ABiH brought together several pro-Bosnian factions under a single command. This army had around 25% non-Muslims.

During April 1992 many of the towns in eastern Bosnia with large Muslim-Bosnian populations, such as Zvornik, Foča, and Višegrad, were attacked by a combination of paramilitary forces and JNA units. Most of the local Bosnian-Muslim population was expelled from these areas, the first victims in BiH of a process described as 'ethnic cleansing'. By the end of May 1992, a coordinated offensive by the JNA, Serb paramilitary groups and Bosnian-Serb forces left roughly two thirds of BiH territory in Serb hands, under the control of the soon-to-be-named Republika Srpska.

The ABiH and the HVO held the front lines for the rest of 1992. The HVO, largely controlled by the Croatian Army, held predominantly Croat areas of the country; the ABiH controlled a small part of BiH, mostly in the central region of the country, that included the sieged capital, Sarajevo. Gradually, the power of the ABiH eroded in Eastern BiH, as the ABiH was the actor most severely affected by the UN-imposed embargo: Serbia had inherited the lion's share of the former JNA arsenal, and the Croatian army could smuggle weapons through its coast. Although BiH housed over 55% of the armories and barracks of the former Yugoslavia, many of those factories were under Serb control, and others were inoperable due to a lack of electricity and raw materials. The BiH government lobbied to have the embargo lifted but that initiative was opposed by the United Kingdom, France and Russia.

The second stage of the war began in May 1993, with the collapse of cooperation between Croats and Muslims. Full-scale war erupted between the ABiH and the HVO. The HVO attempted to take full control of the whole of the Western Herzegovina region, and expel its Muslim population. This conflict lasted until February 1994. Peace talks between the Bosnian Muslims and the Croats of BiH resulted in the Washington Agreement of 1 March 1994. Under the Agreement, the combined territory held by the Croat and Bosnian-Muslim government forces was united into the Federation of Bosnia and Herzegovina, comprising ten autonomous cantons.²³ Herceg-Bosna was dismantled and the number of warring parties in BiH was again reduced to two.

²³ Washington Agreement (1 March 1994)
www.usip.org/files/file/resources/collections/peace_agreements/washagree_03011994.pdf.

The last stage of the conflict, from early 1994 on, was marked by NATO's military intervention. It culminated in May 1995, when NATO forces launched air strikes on Serb targets, after the Serb military refused to comply with a NATO ultimatum to withdraw heavy weaponry from around the sieged enclaves. Further air strikes led to US-sponsored peace talks in Dayton, Ohio, in November 1995.²⁴ These talks led to the conclusion in December 1995 of the Dayton Peace Accords.

2.2 POST-CONFLICT ARRANGEMENTS

The Dayton Peace Accords outline the new constitutional design of BiH: The State of Bosnia and Herzegovina (BiH, or 'the State') comprises two administrative divisions ('Entities'), the Bosnian-Serb Republika Srpska ('RS') and the Bosnian/Croat Federation of Bosnia and Herzegovina ('FBiH'); and the internationally-supervised Brčko district in northeastern BiH.²⁵ The RS is a unitary Entity dominated by Bosnian Serbs, while FBiH is itself a decentralised federal Entity with power shared between Bosnian Muslims and Croats.²⁶

The BiH Constitution attached to the Dayton Agreement²⁷ delineates the division of competences between the Entities and the State. The State of BiH is vested with comparatively few powers and competences.²⁸ Residual competences lie with the Entities.²⁹ The State's institutions lack enforcement mechanisms vis-a-vis the Entities. The State does not even have the authority to raise revenue; it is dependent on the

²⁴ 'Bosnia and Herzegovina' (2010) In Encyclopædia Britannica, online edition www.britannica.com/EBchecked/topic/700826/Bosnia-and-Herzegovina.

²⁵ During the Dayton peace negotiations, the RS and FBiH could not agree on control over the Brčko District. Instead it was agreed that the dispute be submitted to final and binding arbitration. The Arbitral Tribunal for the Dispute over the Inter-Entity boundary in the Brčko Area issued its final award on 5 March 1999. The Award called for the area to be established as an autonomous district deriving its powers from the RS and FBiH. The district was formally inaugurated on 8 March 2000. It remains under international supervision until the RS and FBiH fully comply with their obligations to facilitate the establishment of the District institutions and such institutions function effectively and apparently permanently.

²⁶ European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (11 March 2005) CDL-AD (2005) 004, paragraph 7.

²⁷ Security Council, 'General Framework Agreement for Peace in Bosnia and Herzegovina' attached to Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (30 November 1995) UN Doc S/1995/999 ('Dayton Agreement'), Annex 4.

²⁸ Those are: Foreign policy, Foreign trade policy, Customs policy, Monetary policy, Finances of the institutions and for the international obligations of Bosnia and Herzegovina, Immigration, refugee, and asylum policy and regulation, International and inter-Entity criminal law enforcement, including relations with Interpol, Establishment and operation of common and international communications facilities, Regulation of inter-Entity transportation, Air traffic control. BiH Constitution, Article III.1.

²⁹ BiH Constitution, Article III.3.

Entities for the financing of its activities. Each of the Entities has a constitution (the RS adopted its constitution in 1992, and the then-Republic of BiH adopted its constitution in 1994). They have separate administrations, distinct citizenships, their own armies, and the right to form 'special parallel relationships with neighboring states' (Croatia and Serbia).³⁰

The legislature of BiH comprises two chambers, in both of which FBiH holds a two-third majority.³¹ The Presidency of BiH consists of three members: a Muslim and a Croat elected directly from the territory of FBiH, and a Serb elected directly from the territory of the RS.³²

Under the Dayton Accords, the competences of the State in the administration of justice are narrowly circumscribed. Originally there was no BiH Ministry of Justice and the only BiH-level court was the Constitutional Court. Justice policy development and the drafting of substantive and procedural laws in that field were the responsibility of the Entity Ministries of Justice or, for many issues within FBiH, the cantonal Ministries. International legal assistance continued to be handled by Entity-level ministries. In 1997, a new Ministry of Civil Affairs and Communications was established at BiH level, which was given responsibility for dealing with 'international and inter-entity criminal law enforcement', including international legal assistance. In 2003, a Ministry of Justice was created at the BiH level, and some staff from the Ministry of Civil Affairs and Communications was transferred to it. The new Ministry was given responsibility for administrative functions related to BiH-level judicial institutions, which by then included the State Court and Prosecutor's Office.³³

The Dayton Accords further established the Office of the High Representative (OHR), to 'to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement', *inter alia* by monitoring the implementation of the peace settlement; maintaining close contact with the parties to promote their full compliance with all civilian aspects of the peace settlement; facilitating, coordinating the activities of

³⁰ Caplan, 'International Authority and State Building: The Case of Bosnia and Herzegovina' (2004) 10 *Global Governance* 53, 56.

³¹ Dayton Agreement, *supra* note 27, Annex IV Article IV.

³² Dayton Agreement, *supra* note 27, Annex IV Article V.

³³ BiH Public Administration Reform Coordinator's Office, 'Functional Review of the BiH Justice Sector' (March 2005) parco.gov.ba/?id=408.

the civilian organizations and agencies; and facilitating the resolution of any difficulties arising in connection with civilian implementation of the peace settlement.³⁴

The role of the OHR was strengthened considerably in 1997 by the reinterpretation of his powers by the Peace Implementation Council – an *ad hoc* international body of 55 states and organizations overseeing the international administration of BiH. The Peace Implementation Council welcomed the High Representative's intention to use his final authority regarding interpretation of the agreement on the civilian implementation of the Dayton Accords 'in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary', *inter alia* on 'interim measures to take effect when parties are unable to reach agreement', which would remain in force until the presidency or council of ministers has adopted a decision consistent with the peace agreement on the issue concerned; and other measures to ensure implementation of the peace agreement throughout BiH, which may include actions against persons who are found by the High Representative to be in violation of legal commitments made under the Dayton Accords or the terms for its implementation.³⁵

The High Representative has used this authority extensively. His main actions have been the imposition of legislation, both at State level and within the Entities, including amendments to the Entity constitutions; and the removal from office of civil servants or elected public officials (including the president of an Entity and a member of the presidency of BiH) who failed to co-operate in the implementation of the Dayton Accords, with a particular focus on lack of co-operation with the ICTY.³⁶

Under the Dayton Accords the parties also agreed that the international community send a multinational, NATO-led Implementation Force (IFOR), to establish a durable cessation of hostilities and to establish lasting security and arms control measures, which aim to promote a permanent reconciliation between all Parties and to facilitate the achievement of all political arrangements agreed to in the Dayton Accords.³⁷ UN Security Council Resolution 1031 authorized UN member states to act through, or in

³⁴ Dayton Agreement, *supra* note 27, Annex X Articles I(2), II(2).

³⁵ PIC Conclusions, Section XI.2, www.oscebih.org/documents/61-eng.pdf.

³⁶ European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina And the Powers of the High Representative, 11 March 2005, CDL-AD (2005) 004, para. 86.

³⁷ Dayton Agreement, *supra* note 27, Annex 1A Article I.

coordination with, NATO.³⁸ The 60,000-strong IFOR was deployed in BiH for a 1-year mission on 20 December 1995. In late 1996, NATO leaders agreed to replace IFOR by a reduced military presence to provide the stability necessary for consolidating the peace. Under UN Security Council Resolution 1088(1995) a Stabilization Force (SFOR) was authorized to implement the military aspects of the Peace Agreement as the legal successor to IFOR from 20 December 1996.³⁹ The primary mission of the 32,000-strong SFOR was to contribute to the safe and secure environment necessary for the consolidation of peace.⁴⁰ In December 2004 SFOR was replaced by the European Force in Bosnia (EUFOR). While the EU assumed responsibility for peacekeeping operations, NATO maintains a headquarters in Sarajevo to assist the country with defense reform.⁴¹

BiH has been experiencing an uneasy peace since the conclusion of the Dayton Accords. It receives extensive international assistance, but the economy remains weak. No less importantly, political paralysis plagues the country's institutions; more than one senior official has suggested the country was 'dysfunctional,' with its constituent Entities disagreeing on fundamental questions of what the state should look like. This dynamic has prevented necessary constitutional reform.⁴² Dissatisfaction with the constitutional structure of the country is particularly forceful in RS, which occasionally raises the possibility of taking steps towards secession.⁴³

In a bid to encourage BiH to resolve its ethnic divisions and eventually qualify for EU membership, EU foreign ministers gave the go-ahead in late 2005 for talks on a Stabilization and Association Agreement with the country. The prospect of talks with the EU was thought to have increased pressure for the capture of two key Bosnian-Serb war crimes suspects, Radovan Karadžić and Ratko Mladić. After nearly 13 years on the run, Karadžić was arrested in July 2008 by Serb security forces in Belgrade.⁴⁴ But local elections in October 2008 had in the meantime reinforced BiH's ethnic divisions, with

³⁸ UNSC Resolution 1031(1995) (15 December 1995) paragraph 14.

³⁹ UNSC Resolution 1088(1996) (12 December 1996) paragraph 18.

⁴⁰ SFOR, 'History of the NATO-led Stabilisation Force (SFOR) in Bosnia and Herzegovina', www.nato.int/sfor/docu/d981116a.htm.

⁴¹ NATO, 'NATO ends SFOR Mission' (6 December 2004) www.nato.int/docu/update/2004/12-december/e1202a.htm.

⁴² NATO Parliamentary Assembly, '28 June 2010 - Progress Hostage to Political Blockages in Kosovo, Bosnia and Herzegovina, NATO Parliamentarians Hear in Balkans' (28 June 2010) www.nato-pa.int/default.asp?SHORTCUT=2168.

⁴³ Eg Sabina Niksic, 'Bosnian Serbs Adopt Controversial Referendum Law' (11 February 2010) www.balkaninsight.com/en/main/news/25743/.

⁴⁴ His trial opened at the ICTY in October 2009.

nationalist parties gaining support among all three ethnic groups. Only days before the Karadžić trial opened, efforts by the EU and US to break the stalemate on constitutional reform and to transform the country into a non-ethnic parliamentary democracy in preparation for eventual EU and NATO membership ended in failure, when leaders of the three main ethnic groups rejected the proposals.⁴⁵

The Bosnian-Serb leadership in particular continues to be resentful towards the authority of the OHR, giving rise to suspicions that its ultimate goal is for the RS to break the political union with FBiH.⁴⁶ Current RS Prime Minister Dodik has frequently advocated splitting BiH into independent states, sometimes using Kosovo's unilateral secession from Serbia as an example to support his case.⁴⁷

2.3 THE ATROCITIES

The conflict in BiH was characterized by the collapse of governmental order, social fragmentation, and involvement of scores of paramilitary formations and criminal gangs and shifting alliances. In view of this background, purposeful attacks against the civilian population were a useful and common military tactic.

Bosnian Serbs led by ultra-nationalist Radovan Karadžić promised independence for all Serb areas of Bosnia from the majority-Muslim government of Bosnia. To link the disjointed parts of territories populated by or claimed by Serbs, Karadžić appears to have led a campaign of systematic ethnic cleansing through killings and forced removal, primarily of Muslim-Bosnian populations. Bosnian-Serb forces, paramilitaries and JNA units that became the Bosnian-Serb Army (*Vojska Republike Srpske*, VRS) typically used overwhelming military force to crush resistance. In the course of these operations, tens of thousands of people were detained in concentration camps and in mass prison compounds, where torture and deliberate and arbitrary killings were everyday occurrences. Thousands of these detainees are still 'missing'. Many of those who survived detention were not allowed to return to their homes, but were handed over in prisoner exchanges. Civilians were often detained as hostages to be traded for prisoners of war or for the bodies of dead soldiers. By the end of 1992, 850 Muslim villages had

⁴⁵ BBC, Bosnia-Herzegovina country profile (7 April 2010) http://news.bbc.co.uk/2/hi/europe/country_profiles/1066886.stm.

⁴⁶ Ibid.

⁴⁷ Deutsche Welle, 'Political deadlock in Bosnia-Herzegovina ahead of key meeting' (24 February 2010) www.dw-world.de/dw/article/0,,5279682,00.html.

been completely destroyed by Serb forces. The most notorious massacre occurred in Srebrenica in 1995, where over 8,000 Muslim men of military age were separated from their families and executed in what was subsequently defined by the ICTY and the ICJ as genocide.⁴⁸

In early 1993, when fighting broke out between Bosnian Croats and Bosnian Muslims, another round of ethnic cleansing began, this time in central BiH. Bosnian-Croat forces, backed by Croatia, attempted to create an ethnically pure swathe of territory adjoining Croatia.⁴⁹ Ethnic cleansing was also carried out by Bosnian Muslims, who have burnt some 50 predominantly-Serb villages. Roma were also subjected to ethnic cleansing by Serb, Croat and Bosnian-Muslim forces.

Thousands of women were raped or sexually abused as part of the pattern of abuse aimed at expelling civilian populations. Male rapes also took place, although they remain under-reported because of the stigmatization which results from such violations. The large waves of expulsions and departures in the early months of the war were followed by a continual displacement of individuals, particularly from the Bosnian Serb-controlled region of northwest Bosnia. In many areas, members of minority nationalities had been reduced to a residual core long before the cease-fire of October 1995.⁵⁰

Estimates as to the number of victims of the war vary enormously, ranging from 25,000 to 329,000.⁵¹ Former ICTY Prosecutor Carla del Ponte endorsed a finding of 103,000 lives lost.⁵² In July 2006 the Bosnian Book of Dead⁵³ contained records relating to almost 250,000 individuals individual victims of war the 1992-1995 war, of which information about 96,985 is regarded as

Estimates as to the number of victims of the war vary enormously, ranging from 25,000 to 329,000.

⁴⁸ *Prosecutor v Krstić* (Trial Judgment) ICTY-IT-98-33-T (2 August 2001), [599].

⁴⁹ IDMC, 'Bosnia and Herzegovina: Broader and Improved Support for Durable Solutions Required, A Profile of the Internal Displacement Situation' (28 August, 2008), 17.

⁵⁰ Amnesty International, 'Who's Living In My House?' Obstacles to the Safe Return of Refugees and Displaced People (19 March 1997) EUR 63/01/97 Part I; Final Report of the Commission of Experts Established Pursuant to SCR 790(1992), UN Doc S/1994/674 (27 May 1994), Annex IV Section VI.

⁵¹ Ewa Tabeau and Jakub Bijak, 'War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results' (2005) 21 *European Journal of Population* 187, 192.

⁵² Former ICTY Prosecutor Carla del Ponte endorsed findings of 103,000 dead, over half of them civilians, del Ponte with Sudetic, supra note 1, 39.

⁵³ A population loss project of the Research and Documentation Centre in Sarajevo. For background see www.norveska.ba/News_and_events/Society-and-Policy/rdc_bbd/.

confirmed ('final').⁵⁴ Of those, about 36% of victims are reported as civilians and 64% as soldiers and policemen. It is assumed that civilians are underrepresented in these reports, so their actual share among the victims is larger.⁵⁵ According to the same database, reliable data suggests that over 66% of the victims were Muslim, almost 8% were Croat, and close to 26% were Serb.⁵⁶

Approximately one million citizens became refugees during the war and another one million were internally displaced. Over a third of pre-war residential dwellings were destroyed and the technical and social infrastructure was significantly damaged.⁵⁷ As a consequence, the ethnic composition of entire regions has been affected. Research indicates that in the territory of the FBiH, the share of non-Serbs had increased by 41.18%, while in the area that now forms the RS, the share of non-Serbs had fallen by 81.74%.⁵⁸

3. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES: THE ICTY

3.1 GENERAL

The international effort to try those accused of war crimes began well before the end of the hostilities. In 1991 the Security Council began adopting resolutions that expressed concern over violations of international law in the former Yugoslavia, and affirmed individual responsibility for such violations.⁵⁹ In October 1992 the Council created a commission of experts to examine these violations.⁶⁰ The commission concluded that grave breaches of the Geneva Conventions and other violations of humanitarian law had been committed in the territory of the former Yugoslavia, and recommended the

⁵⁴ Patrick Ball, Ewa Tabeau and Philip Verwimp, 'The Bosnian Book of Dead: Assessment of the Database (Full Report) HiCN Research Design Note 5 (17 June 2007), 4 www.hicn.org/research_design/rdn5.pdf.

⁵⁵ Ball, Tabeau and Verwimp, *supra* note 54, 5-6, 40.

⁵⁶ Ball, Tabeau and Verwimp, *supra* note 54, 29.

⁵⁷ OSCE Mission to Bosnia and Herzegovina, Human Rights Department, 'War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles' (March 2005), 3 ('OSCE').

⁵⁸ *Prosecutor v Biljana Plavisić* (Sentencing Judgment) ICTY-IT-00-39&40/1 (27 February 2003), [36]; Helsinki Committee for Human Rights in Republika Srpska, 'Minority Rights in Republika Srpska' (September 1999) estimates 20,000 Muslims in RS in 1999, www.minelres.lv/reports/bosnia/bosnia-rs_NGO.htm.

⁵⁹ Eg UNSC Resolution 713 (1991); For details on the events leading up to these resolutions see W A Schabas, *The UN International Criminal Tribunals* (Cambridge University Press, 2006), 13-24; M P Scharf, *Balkan Justice* (Durham, Carolina Academic Press, 1997).

⁶⁰ UNSC Resolution 780 (6 October 1992).

establishment of a special international tribunal to address these violations.⁶¹ On 25 May 1993 the Security Council unanimously adopted Resolution 827(1993), which established the ICTY under chapter VII of the UN Charter, and adopted the Tribunal's Statute as proposed by the UN Secretary-General.⁶² The Tribunal's subject-matter jurisdiction extended to war crimes, crimes against humanity and genocide.⁶³ Resolution 827(1993) made particular reference to BiH as the site of reported widespread and flagrant violations of international humanitarian law, including mass killings, massive, organized and systematic detention and rape of women, and the continuance of ethnic cleansing.⁶⁴

The establishment of the ICTY was accompanied by statements on the need for justice, deterrence, promotion of the rule of law, reconciliation and maintenance of peace.⁶⁵ But it was also motivated by less-articulated political goals, such as the appeasement of public opinion and avoidance of military intervention⁶⁶ and it is not clear that the judicial role of the Tribunal was taken seriously by Security Council Members at the time.⁶⁷

The degree to which there has been a coherent prosecution strategy and a strong vision on the part of the successive ICTY prosecutors remains a subject of debate. While the first ICTY president Antonio Cassese wanted a top-down approach, the first prosecutor Richard Goldstone preached a bottom-up strategy, first pursuing low-level perpetrators. His goal was to conduct as many trials as possible.⁶⁸ Louise Arbour, who replaced Goldstone in 1996, reversed the bottom-up strategy. But it was under third prosecutor Carla del Ponte (1999-2007) that the policy to prosecute the highest level of

⁶¹ Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780(1992), UN Doc S/25274 (26 January 1993).

⁶² Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993) UN Doc S/25704 (3 May 1993).

⁶³ ICTY Statute Articles 2-5.

⁶⁴ UNSC Resolution 827(1993), preambular paragraph 3.

⁶⁵ See the comments made by Security Council members upon the adoption of Resolution 808 (22 February 1993) and Resolution 827 (25 May 1993) which established the Tribunal, UN Doc S/PV.3217 (25 May 1993).

⁶⁶ Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (St Martin's Press, New York 1999) 146; Michael Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics' (1998) 6 *Tulane Journal of International and Comparative Law* 5, 46-49; Steven R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law* (3rd edn Oxford University Press, 2009) 212-214, Antonio Cassese, *International Criminal Law* (2nd edn Oxford University Press, 2008) 326.

⁶⁷ Davic P Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' in Roger S Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (Transaction Publishers, London 1996) 185, 187.

⁶⁸ DOMAC interview A-37.

responsibility possible on all sides was formally instated, although del Ponte herself acknowledged that at the outset, the bottom-up approach was the correct choice.⁶⁹ Del Ponte focused on dividing resources and lawyers equally over the different investigations that her office conducted.⁷⁰

3.2 DOMESTIC PROSECUTIONS IN THE DESIGN OF THE ICTY

As pointed out by the Japanese representative to the Security Council, the haste with which the ICTY was established came at the expense of a thought-out methodology, *inter alia* concerning the 'measures to establish a bridge with domestic legal systems'.⁷¹

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ICTY Statute Article 9(1) provides

nevertheless that the Tribunal shall have concurrent jurisdiction with domestic courts.⁷³

The ICTY drew up a set of rules, under which the ICTY would exercise concurrent jurisdiction with domestic courts and may even divest itself of a case when it considers that the case may be more appropriately tried by a domestic court. It was clear from the outset that the bulk of cases related to the mass atrocities in the former Yugoslavia were to be handled by national courts. Commenting on Article 9, the report of the Secretary-General stressed that⁷⁴

In establishing [the ICTY], it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.

At the same time, ICTY Statute Article 9(2) provides that the Tribunal 'shall have primacy over domestic courts', in the sense that '[a]t any stage of the procedure, the

⁶⁹ del Ponte with Sudetic, *supra* note 1, 131.

⁷⁰ DOMAC interview A-37.

⁷¹ UN Doc S/PV.3217 (25 May 1993), 24-25.

⁷² Varda Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crime Tribunals' (2004-2005) 45 *Virginia Journal of International Law* 547, 561.

⁷³ ICTY Statute Article 9(1): 'The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991'.

⁷⁴ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993), paragraph 64.

International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal'. The reasons for proclaiming the Tribunal's primacy were clear: the ongoing armed conflict and the deep-rooted animosity among the various ethnic and religious groups made domestic courts unlikely to be willing or able to conduct fair trials. It was assumed that the authorities would hesitate to bring their own people to account, whereas if they initiated proceedings against their adversaries, those would probably be highly biased.⁷⁵

The criteria for exercising primacy were not specified in the Statute. Under the ICTY Rules of Procedure and Evidence (RPE) At the request of the prosecutor, the Tribunal could assert its primacy in three cases: when the domestic authorities prosecute an offense as an ordinary criminal offense in a manner which indicates that they are either intentionally or unwittingly not cognizant of the international dimension and the gravity of the offense; when a domestic court proves unreliable; or when the case is closely related or maybe relevant to other cases being tried by the ICTY.⁷⁶ In practice, The ICTY has only made infrequent use of its primacy.⁷⁷

With respect to BiH, the jurisdiction of the ICTY was further recognized in Article IX of the Dayton Accord, with its Annex IV, in which Article II(8) provides: 'All competent authorities in Bosnia and Herzegovina shall cooperate and provide unrestricted access to... the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal)'.

The majority of indictments in the ICTY have been for crimes committed on the territory of BiH. The overwhelming majority of indictees have been Serbs and Bosnian-Serbs.

⁷⁵ Antonio Cassese, *International Criminal Law* (2nd edn Oxford University Press, 2008), 339; Paul R Williams and Michael P Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Rowman & Littlefield, Oxford 2002), 96-98.

⁷⁶ ICTY RPE Rule 9.

⁷⁷ Eg *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY- IT-94-1-AR72, (2 October 1995), [52] taking over at the investigative stage from Germany; *Prosecutor v Radovan Karadžić, Mladić, Stanišić* (Trial Chamber Decision on the Bosnian Serb Leadership Deferral Proposal) (16 May 1995), taking over from BiH; *Prosecutor v Drazen Erdemović* (Sentencing Judgment) ICTY-IT-96-22-T (29 November 1996), [2] (taking over from FRY (Serbia and Montenegro)).

3.3 THE RULES OF THE ROAD

In the aftermath of the armed conflict, Entity procedures were plagued by political interference,⁷⁸ which took the form of arbitrary arrests, detentions and harassment of ethnic groups. A particular problem was the fear of returning displaced persons and refugees of being arbitrarily arrested on suspicion of war crimes. Freedom of movement was also imperative for the success of holding free and fair municipal elections in September 1996, especially as candidates and voters were being encouraged to stand and vote in their pre-conflict constituencies.⁷⁹ To address these problems, a procedure was introduced, under which the ICTY clearance was required for prosecutions by the relevant authorities, so as to prevent unmerited arrests, abuse and restrictions on individuals' freedom of movement.

The Rules of the Road (RoR) procedure, included in the Rome Agreement signed on 18 February 1996 by President Izetbegović of BiH, President Tuđman of Croatia and President Milošević of the Federal Republic of Yugoslavia, provided that if either Entity's authorities wished to make an arrest where there was no prior indictment by the ICTY, they had to send their evidence to the Rules of the Road Unit established at the Office of the Prosecutor (OTP), in order for the Unit to advise whether or not the available evidence was sufficient by international standards to justify either the arrest or indictment.⁸⁰ The ICTY OTP was not enthusiastic about undertaking the review of files. In fact, during the negotiations of the RoR it was queried whether the

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⁷⁸ DOMAC interview A-18.

⁷⁹ 1st Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations (14 March 1996) paragraph 66, www.ohr.int/other-doc/hr-reports/default.asp?content_id=3661#3.10.

⁸⁰ Agreed Measures (18 February 1996) (Rome Agreement) Section 5 provides: 'Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action', www.ohr.int/other-doc/fed-mtng/default.asp?content_id=3568.

ICTY OTP's involvement was within the Tribunal's mandate. There was also the real concern that the OTP simply did not have the resources to undertake this type of activity. Specifically, the OTP wanted to focus its efforts on potential indictments within its own jurisdiction, rather than create a monitoring and authorization procedure for the Entities' prosecutorial exercises. After considerable pressure from the United States and other nations supportive of the Tribunal, the OTP reluctantly agreed to review the cases submitted to its office.⁸¹

Reviewed cases were returned to domestic authorities with a marking A through H, indicating their suitability for further investigation or trial. The most common category designations by the ICTY OTP were A (the evidence was sufficient by international standards to provide reasonable grounds for the belief that the accused may have committed the specified serious violations of international humanitarian law); B (evidence was insufficient); and C (the ICTY was unable to determine the seriousness from available evidence).⁸²

The OTP's guidelines for implementing the RoR speak of its 'advisory capacity', but the OHR considered the OTP's determination to be binding on domestic prosecutors.⁸³ The Human Rights Chamber in the Constitutional Court of BiH and the FBiH Supreme Court have confirmed that they viewed the RoR procedures to be applicable in domestic law. However, lack of clarity regarding the legal status of the RoR, and their lack of dissemination (the RoR were never published in any of the official gazettes in BiH) resulted in confusion among domestic authorities. In practice, a significant number of cases were heard by Entity courts in disregard of the RoR procedure. This often led to criticism by international organizations, such as the OHR and the Organization for Security and Cooperation in Europe (OSCE). In some cases such discrepancies were resolved by a retrospective designation as category A by the ICTY OTP; or by prisoner exchanges and early releases from prison.⁸⁴

⁸¹ Mark S Ellis, 'Bringing Justice to an Embattled Region - Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina' (1999) 17 *Berkeley Journal of International Law*, 1, 7-8.

⁸² Category D meant that the ICTY will have precedence over that individual as a witness, International Crisis Group, 'War Criminals in Bosnia's Republika Srpska: Who are the People in Your Neighbourhood?' (November 2000), 8 www.crisisgroup.org/~media/Files/europe/Bosnia%2039.ashx. Category G indicated] that the ICTY OTP determined that the evidence for the specified serious violation of international humanitarian law was insufficient, yet it was sufficient for a different violation of international humanitarian law. OSCE, *supra* note 57, 5.

⁸³ Ellis, *supra* note 81, 18-19.

⁸⁴ OSCE, *supra* note 57, 47-48, citing specific cases.

Anticipating the closure of the ICTY, on 1 October 2004, the ICTY OTP ceased reviewing war crimes cases.⁸⁵ Overall, from 1996 to 2004, the OTP staff had reviewed 1,419 files involving 4,985 suspects. Approval under Category A was granted for the prosecution of 848 persons.⁸⁶ Of those, 54 (11%) had reached trial stage in domestic courts by January 2005.⁸⁷

3.4 THE COMPLETION STRATEGY

In May 2000, ICTY President Jorda reported to the Security Council and the General Assembly that given the increase in the Tribunal's case load, if changes were not made, the tribunal was likely to require a considerable period of time to complete the trials of all those who were being, or were likely to be, prosecuted before it.⁸⁸ This led the ICTY to devise a 'completion strategy', in order to make sure that the Tribunal concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the region. The strategy was endorsed by the UN Security Council in Resolutions 1503(2003) and 1534(2004), which set three target dates: completion of investigations by 2004, completion of trials by 2008, and completion of all work by 2010.

The completion strategy prompted various structural and procedural changes in the work of the ICTY, such as increased reliance on *judges ad litem*, frequent resort to plea bargaining, and limitations on time and volume of evidentiary proceedings. Key measures that are particularly pertinent for present purposes were the introduction of a seniority requirement for prosecution, and the referral of cases against minor defendants from the ICTY to domestic jurisdictions.⁸⁹

⁸⁵ Since 2005 the BiH prosecutor reviews war-related cases. This review, which is sometimes mistakenly mentioned as the continuation of the RoR, concerns not the quality and sufficiency of the evidence but the allocation of cases to State or Entity instances.

⁸⁶ ICTY, 'Working with the Region', www.icty.org/sid/96.

⁸⁷ William W Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' (2008) 46 *Columbia Journal of Transnational Law* 279, 314.

⁸⁸ Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, contained in Identical Letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc A/55/382-S/2000/865, Annex I paragraph 42.

⁸⁹ www.icty.org/sid/10016.

The completion strategy entailed that the ICTY focus its efforts on ‘the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction’.⁹⁰ It also brought with it the obligation to transfer ‘intermediate and lower ranked accused’ to competent domestic jurisdictions,⁹¹ while ensuring that basic human rights standards and procedural safeguards would be met. In fact, ICTY President Pocar has noted that if one considers the Completion Strategy as a whole, then, it is not so much a strategy to ‘complete’ the work of the ICTY as it is a strategy designed to allow continuation by domestic actors of those activities that have been initially put in motion by the ICTY under the mandate of the Security Council.⁹²

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The Tribunal's RPE were amended to include Rule 11bis, allowing the transfer of cases back to domestic institutions where the domestic court was in a position to accept the case. Rule 11bis incorporated a number of safety valves to ensure the ongoing quality of domestic courts and prosecutions. *Inter alia*, the ICTY maintained the power to rescind the order for referral before a judgment was given, if there were concerns regarding the conduct of the trial in BiH (or any other state that accepted the case). These could concern the willingness of the authorities to prosecute cases diligently, or their ability to conduct fair trials.⁹³ In practice, the ICTY has never used its power to rescind an order for referral. Altogether, 13 cases have been referred from the ICTY to domestic jurisdictions. Of those, 11 were referred to BiH. Three requests for referral to BiH were denied by the ICTY referral bench, and two others were withdrawn after the defendants entered guilty pleas.⁹⁴

⁹⁰ Security Council Resolution 1503(2003) preambular paragraph 7.

⁹¹ *Ibid*, preambular paragraph 8.

⁹² Fausto Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *Journal of International Criminal Law* 655, 661.

⁹³ ICTY RPE Rule 11bis (F).

⁹⁴ www.icty.org/sid/8934.

In addition to the transfer of indicted cases under Rule 11bis cases, the ICTY also sent back cases that had been investigated by the OTP but no indictment was filed by the end of 2004. These are commonly referred to as ‘Category 2’ cases. The completion strategy also meant the return of the files sent to the ICTY pursuant to the RoR as early as in 1996. These files were sent back in essentially the same condition received by the ICTY (although it was discovered that many case files had been lost).⁹⁵

The ICTY has successfully met the first target date, namely the completion of all investigations by 31 December 2004. Estimates as of June 2010 suggest that all first-instance trials are expected to be completed by mid-2012, with the exception of the trial of Radovan Karadžić, which is expected to finish in late 2012. Most appellate work is presently expected to be completed by the end of 2013.

3.5 PERCEPTIONS OF THE ICTY AMONG DOMESTIC AUDIENCES

From the outset, the ICTY suffered from a negative reputation among the various domestic constituencies in the Western Balkans. In a comprehensive survey of the attitudes towards the ICTY in the states and entities of the former Yugoslavia (Serbia, Croatia, FBiH, RS, Montenegro and Kosovo) carried out in 2002,⁹⁶ it was found that trust in the ICTY rated 83% in Kosovo, 51% in BiH, 20% in Croatia,⁹⁷ less than 8% in Serbia,⁹⁸ and less than 4% in RS.⁹⁹

A shift began in 1998 in the approach of the ICTY towards interaction with domestic audiences, based on the understanding that the negative reputation of the ICTY was the consequence of its failure to interact, at the early stages of its operation, with domestic institutions and audiences in the region.¹⁰⁰ ICTY President Gabrielle Kirk McDonald, with the cooperation of prosecutor Louise Arbour, began to take interest in the regional impact of the ICTY and encouraged engagement with domestic

⁹⁵ BiH Prosecutor’s Office Briefing Book (Sarajevo 2009).

⁹⁶ International Institute for Democracy and Electoral Assistance (International IDEA), South East Europe (SEE) Public Agenda Survey, www.idea.int/europe_cis/balkans/see_survey.cfm.

⁹⁷ International IDEA Survey Results: International Issues: Croatia, http://archive.idea.int/balkans/results/Croatia/cro_int3.htm.

⁹⁸ International IDEA Survey Results: International Issues: Serbia, http://archive.idea.int/balkans/results/Serbia/ser_int3.htm.

⁹⁹ International IDEA Survey Results: International Issues: Srpska, http://archive.idea.int/balkans/results/Srpska/srp_int3.htm.

¹⁰⁰ DOMAC interview A-2.

authorities.¹⁰¹ Appalled by the apparent ignorance and outright denial of the facts established in the ICTY, she established the Outreach Programme within the Tribunal, in order to communicate directly with the people of the former Yugoslavia.

The main focus of the Outreach Programme is to provide information to key regional stakeholders and to the wider public about the work of the Tribunal, through the Tribunal's website and through engagement with professionals in the region – judiciary, prosecutors and academics. An office of the Outreach Programme in Sarajevo acts as a direct link between the Tribunal and the media and civil society in the region. The Outreach Programme also strengthens the Tribunal's partnership with the region and facilitates the transfer of the Tribunal's expertise to national judiciaries.¹⁰²

Nonetheless, public opinion research in the late 2000s consistently shows that opinions regarding the ICTY have not changed dramatically.¹⁰³ Research suggests that ignorance about the Tribunal's work continues to prevail among the masses. Thus, for example, survey respondents make no distinction between the ICTY and the International Court of Justice (ICJ), erroneously attributing to the former the latter's 2007 judgment in the case of *BiH v Serbia*¹⁰⁴ concerning responsibility for the genocide in Srebrenica; repeatedly criticize the ICTY for failing to arraign war criminals despite its lack of powers of arrest; have no understanding of the concept of plea bargains and thereby described the Tribunal as a 'market place' in which deals are struck. Interviewees often express total disinterest in the ICTY as an institution with minimal relevance to their difficult everyday lives. ICTY President Cassese has himself acknowledged that '... in spite of the importance of the "Outreach Programme" set up by President McDonald, regrettably the much-hoped-for beneficial impact of ICTY trials on persons and groups living in the former Yugoslavia is meagre and tardy'.¹⁰⁵

¹⁰¹ DOMAC interview A-37; Louise Arbour, 'The Crucial Years', 2 *Journal of International Criminal Justice* (2004) 396, 401.

¹⁰² Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534(2004), covering the period from 15 May to 15 November 2009, annexed to S/2009/589 (13 November 2009) paragraph 50. On capacity building see section 5.5.

¹⁰³ Janine Natalya Clark 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina' (2009) 7 *Journal of International Criminal Justice* 463, 467, 484; Mirko Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' (2009) 7 *Journal of International Criminal Justice* 89, 92.

¹⁰⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Judgment (26 February 2007).

¹⁰⁵ Antonio Cassese, 'The ICTY: A Living and Vital Reality', 2 *Journal of International Criminal Justice* (2004) 585, 595; DOMAC interview A-18, DOMAC interview A-41, DOMAC interview A-16.

The reputation of the Tribunal also appears to be directly linked to the choice of indictees. Throughout the region, the popularity of the Tribunal is inversely proportionate to the number of indictees hailing from the ethnic community in question,¹⁰⁶ while it is the minority that has a more positive view of the Tribunal. The only exception is in FBiH, where the Muslim majority has a better opinion of the Tribunal than the Croatian minority;¹⁰⁷ it is nonetheless frustrated with the small number of indictments, the slowness of the trials and the sentences which are perceived as lenient.¹⁰⁸

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The negative perception of the ICTY has permeated also Entity legal institutions, which often regard the ICTY as a hostile political body.¹⁰⁹ Domestic audiences regard the ICTY and its actions, especially those of the prosecutor, as inherently political and deserving a reaction which is predominantly ethical or moral, but decidedly not legal.¹¹⁰ Facts established by the ICTY have been contested when in conflict with each side's own victim-centered narrative.¹¹¹

The Outreach Programme may be deficient in resources; however, it has also been suggested that the Outreach Programme is misdirected, in that it does not sufficiently acknowledge and address the political dimension of the Tribunal's operation.¹¹² Public opinion - other than that of victims and their families, whose attitude towards the Tribunal is primarily a function of their desire to get some form of redress for their suffering - is influenced very little by what the prosecution and the judges are actually doing in the Hague. It is influenced to a much greater extent by the views of the domestic political, academic and cultural elites towards the ICTY and by the manner in

¹⁰⁶ Refik Hodžić, 'Bosnia and Herzegovina - Legitimacy in Transition', paper presented in Building a Future on Peace and Justice Conference (Nuremberg 25-27 June 2007) 4.

¹⁰⁷ Klarin, *supra* note 103, 91-92.

¹⁰⁸ Klarin, *supra* note 103, 90.

¹⁰⁹ DOMAC interview A-2.

¹¹⁰ Klarin, *supra* note 103, 96.

¹¹¹ del Ponte with Sudetic, *supra* note 1, 47-50, describing the situation in 1999; but see also in 2009, Clark, *supra* note 103, 483-84.

¹¹² Klarin, *supra* note 103, 90.

which the domestic media depict proceedings at The Hague.¹¹³ The inability of the Tribunal to address the communities in the languages spoken in the region has left information about the Tribunal to be filtered by domestic media. This barrier, although diminished by the effort of the ICTY to translate material into Bosnian/Serb/Croat,¹¹⁴ leaves the domestic audience in BiH exposed to the powerful and systematic propaganda efforts directed against the ICTY by the Serb and Croat political elites,¹¹⁵ which propagate the view that the ICTY is politically motivated by Western countries and is intent on undermining Serb and Croat independence.¹¹⁶ ICTY legal officers have been criticized for failing to counter this tendency because they do not acknowledge the political weight of their work.¹¹⁷

4. THE DOMESTIC RESPONSE TO THE MASS ATROCITIES

4.1 THE LEGACY OF THE ARMED CONFLICT

The post-conflict treatment of international crimes in BiH is unique among the countries of the former Yugoslavia for a number of reasons. First, the volume of potential cases relating to BiH is immense, since the overwhelming majority of crimes were committed on its territory and against its population. Second, BiH is a federal state, characterized by a weak central government (the State of BiH) and strong Entity structures (the FBiH and RS). Yet international crimes are addressed today principally at the State level. Not unique but significant for the analysis of domestic practice is the fact that the legal system in BiH is relatively new, containing both institutions and norms that have only been put in place in 2003.

During the war, the courts of BiH continued to function, but there were some substantial changes in personnel. Judges in some regions were sent to concentration

¹¹³ Ibid.

¹¹⁴ Report of the International Tribunal for the Former Yugoslavia (31 July 2009) UN Doc A/64/205-S/2009/394, paragraphs 10, 84.

¹¹⁵ *Madame Prosecutor, Confrontations with Humanity's Worst Criminals and the Culture of Impunity: a Memoir* (Other Press, New York 2009), 49-50.

¹¹⁶ Clark, *supra* note 103, 483.

¹¹⁷ Klarin, *supra* note 103, 96, citing Belgrade law professor and human rights activist Vojin Dimitrijević, that ICTY legal officers 'mostly concentrate on the technical elements of the crimes and the procedure and are concerned only with claims that some legal rules may be violated in the procedure. It appears that anything else has been regarded as 'political', and inappropriate for lawyers to deal with.

camps, some fled and others were removed from office because of their ethnicity. New judges were appointed; some from among the ranks of the legal profession, including those displaced from other regions, but others were appointed without having the requisite, or sometimes any, basic qualifications.

In the immediate aftermath of the armed conflict, the appointment process for judges in the Entities continued to be controlled by the ruling political parties. There were frequent accusations of lack of impartiality, corruption and general incompetence in respect of the judiciary. Judges were often forced to supplement their meager salaries with 'outside' work. Not only did this deprive judges of time that should have been devoted to judicial duties; it also risked compromising the judges' independent decision-making.¹¹⁸

In addition, the system lacked basic infrastructure. Computers, modern caseload management, and network systems were all but nonexistent. The situation was compounded by complexities in the legal framework and inappropriate procedural laws to effectively prosecute and defend alleged war criminals, a lack of qualified defense attorneys, and an inability to monitor trials or summon witnesses. Other obstacles were poor case preparation by prosecutors, ineffective witness protection mechanisms,¹¹⁹ and lack of cooperation between the Entities.

The international community did not intervene in the re-establishment of law enforcement institutions.¹²⁰ The Constitution of BiH, annexed to the Dayton Accords, only re-established the Constitutional Court. Although express power was given to the State government for 'international and inter-Entity criminal law enforcement', no State-level criminal federal judicial institutions were established. As a result, most law enforcement, including the domestic prosecution of war-related crimes, was left to the Entities.¹²¹

¹¹⁸ Ellis, *supra* note 81, 5-6; ICJ 2004 report 7-8.

¹¹⁹ Human Rights Watch, *Looking for Justice The War Crimes Chamber in Bosnia and Herzegovina* (February 2006) Volume 18 Issue 1(D), 4.

¹²⁰ DOMAC interview A-2.

¹²¹ Burke-White, *supra* note 87, 286-287.

4.2 DOMESTIC INSTITUTIONS

Until 2005, trials for war-related crimes were held only in the courts of the Entities. In FBiH, 174 individuals have been indicted from 1992 to September 2009, most of them of Serb ethnicity. Of these, 146 have resulted in final verdicts. During the same period, 45 individuals have been indicted in RS, the overwhelming majority of whom were of Serb ethnicity. All but five of the indictments were submitted in or after 2003. The cases of all these 45 individuals have reached the final verdict stage.

Since 2005, war-related crimes have also been tried at the BiH level. A War Crimes Chamber (WCS) began operating within the State Court of BiH (State Court) in 9 March 2005.¹²² The WCS's jurisdiction encompasses genocide, crimes against humanity and war crimes. The WCS has both trial and appeals chambers. The appellate instance may uphold a judgment, or revoke it in whole or in part, in which case it will hold a trial on the revoked part.¹²³

By September 2009, 139 individuals had been indicted for war-related crimes before the WCS at the State Court, most of them of Serb ethnicity. By the end of the same period, 72 of the defendants have received a final verdict.¹²⁴

The WCS employs both domestic and international judges. Originally, each panel comprised two international judges and a presiding domestic judge. In 2006-2007 the configuration of the judicial panels shifted to one international judge and two domestic judges, one of them presiding. At the time of writing, the WCS trial section has four first-instance court panels. Three panels are composed of four judges each, one international and three domestic. As a rule, the domestic judge is the president of the panel. The appellate division of the WCS consists of one panel composed of three judges, two international and one presiding domestic judge.¹²⁵

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¹²² BIRN, 'Pursuit of Justice, Guide to the War Crimes Chamber of the BiH Court' Vol II (undated), 7.

¹²³ BiH CPC Article 315.

¹²⁴ Yaël Ronen, with the assistance of Sharon Avital and Oren Tamir, 'Prosecutions and Sentencing in the Western Balkans' DOMAC/4 (February 2010), graphs 2.2A.1.1, 2.2A.4.1.

¹²⁵ Website of the State Court of BiH, www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e.

In FBiH, jurisdiction over war-related crimes lies with 10 cantonal courts. In RS it lies with 5 district courts, and in Brčko District it lies with the single Basic Court. Appeals on these courts' judgments are heard by the Supreme Court in the respective Entity and by the Brčko Appellate Court. Each Entity, and the Brčko district, has its own prosecutor's office.¹²⁶

Primary jurisdiction over war-related crimes lies with the WCS, which retains cases or transfers them to entity courts depending on their complexity and sensitivity.¹²⁷

4.3 THE LAW APPLIED IN DOMESTIC INSTITUTIONS

During the period 1991-1995, when most of the war-related crimes adjudicated by BiH courts occurred, the criminal code in force in BiH was the SFRY Criminal Code (SFRY CC). As part of a general overhaul of the judicial system,¹²⁸ and in order to meet the challenges of prosecuting both Rule 11bis ICTY cases and domestically-initiated cases, the OHR proposed several amendments to the BiH legal system as well as to the judicial structure, which would impact not only the cases transferred from the ICTY to the State Court, but also cases taking place before Entity courts.¹²⁹

In 2003 new criminal codes and criminal procedure codes were adopted at all jurisdictions: FBiH, RS, BiH and Brčko District. The BiH 2003 Criminal Code (BiH CC) differs significantly from its predecessor, the SFRY CC: It criminalizes crimes against humanity; provides comprehensively for command responsibility; and applies a different range of penalties for international crimes.¹³⁰ The WCS regularly applies the BiH CC to cases before it, despite the fact that the acts in question were committed prior to the enactment of the code.¹³¹ This practice is based on BiH CC Article 4a),¹³² which

¹²⁶ OSCE, *supra* note 57, 9. For simplicity, the present report refers to the Entities and their courts and prosecutions as inclusive of the Brčko District court and prosecution.

¹²⁷ State Strategy for Work on War Crimes Cases (December 2008) www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf, English translation available at www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf ('State Strategy').

¹²⁸ DOMAC interviews A-18, A-43.

¹²⁹ Lilian A Barria and Steven D Roper, 'Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY' (2008) 9 *Human Rights Review* 317, 323.

¹³⁰ OSCE, 'Moving Towards a Harmonized Application of the Law: Applicable in War Crimes before Courts in Bosnia and Herzegovina' (August 2008), 5.

¹³¹ Alfredo Strippoli, 'National Courts and Genocide: The *Kravica* Case at the Court of Bosnia and Herzegovina' (2009) 7 *Journal of International Criminal Justice* 577, 581.

¹³² BiH CC Article 4a), www.tuzilastvobih.gov.ba/files/docs/zakoni/Criminal_Code_of_BH_-_Consolidated_text.pdf; *Prosecutor v Miloš Stupar et al* (First Instance Verdict) Court of BiH Case No X-KR-05/24 (29 July 2008), 186.

prescribes that BiH CC Articles 3 and 4, which declare the principles of legality and of applying more lenient sentences in cases involving a change in the law, 'shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law'. The WCS has ruled that Article 4a) applies to the criminal offenses falling within BiH CC Chapter XVII, namely genocide, crimes against humanity and war crimes.

The 2003 criminal codes of FBiH and RS do not include crimes under international law at all. This follows the practice under the *Book of Rules on the Review of War Crimes Cases* adopted in December 2004 by the Collegium of Prosecutors,¹³³ which effectively grants the WCS primacy in exercising jurisdiction over war-related crimes.¹³⁴ However, where the WCS does not exercise primacy, it is not clear which law should apply in Entity courts. BiH institutions hold that a case channeled by the WCS to Entity Courts carries with it the BiH CC. Entity courts dispute this, and apply the SFRY CC (courts in FBiH have in a limited number of cases applied the interim 1998 FBiH Criminal Code).¹³⁵

In *Maktouf*, the BiH Constitutional Court stated that since the Entities' criminal codes do not include the offenses of crimes against humanity and war crimes, the Entity courts must apply the principles and safeguards incorporated in the BiH CPC (including European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 7 and BiH CC Article 4(a). It also ruled that the Entity courts are 'obligated to pursue the case law of the WCS, since otherwise they would breach the principle of legal certainty and the rule of law'.¹³⁶

¹³³ The Collegium of Prosecutors consists of the BiH Chief Prosecutor, Deputy Chief Prosecutors and Prosecutors; the Book of Rules regulates, *inter alia*, the organization of the Prosecutor's Office, the number of administrative-technical staff and conditions for performance of such duties; 2003 Law on the Prosecutor's Office of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 42/03) Articles 7, 14.

¹³⁴ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (International Center for Transitional Justice 2008), 29.

¹³⁵ In three indictments submitted by the Doboj District Prosecution Office, FBiH, charges were filed under the BiH CC. The Doboj District Court refused to confirm the indictments and referred the cases to the WCS on the grounds that the WCS was the only Court competent to adjudicate crimes prescribed under the BiH CC. OSCE, 'Moving Towards a Harmonized Application of the Law: Applicable in War Crimes before Courts in Bosnia and Herzegovina' (August 2008), 10.

¹³⁶ *Maktouf* (Decision on Admissibility and Merits) BiH Constitutional Court Appeal No AP-1785/06 (30 March 2007), [88], [89].

Nonetheless, Entity courts explicitly cite the retroactive criminalization of crimes against humanity and the higher BiH CC sentences, which they perceive as more detrimental to the defendant, as underlying their refusal to apply the BiH CC.¹³⁷ For this reason indictees prefer to be tried by Entity Courts.¹³⁸ In the absence of a formal dispute-settling mechanism that is binding upon the Entities, the matter remains unresolved.¹³⁹

According to the 2008 National War Crimes Strategy, war-related trials at all instances should apply the same law, namely the 2003 BiH CC.¹⁴⁰ The Strategy envisages various mechanisms to encourage such application, such as the holding of joint sessions of the various courts to adopt joint positions to serve as guidelines to the courts; as well as decisions of the WCS on transfer of cases to Entity court, with respect to which the Entity authorities would be obliged to apply substantive BiH law.¹⁴¹

The new criminal procedure codes (CPCs) of 2003 also differ significantly from their predecessor, the SFRY CPC. In particular, they moved from an inquisitorial to a composite inquisitorial-adversarial system; introduced plea bargains;¹⁴² and replaced retrials before the court of first instance by a final determination of a case by the appeal instance.¹⁴³ The CPCs of the Entities and Brčko District differ slightly from the BiH CPC, due to legislative action and technical errors.¹⁴⁴ In 2004 BiH adopted a Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts, which regulates the use in BiH courts of evidence collected in accordance with the Statute and the ICTY RPE.

¹³⁷ With respect to leniency of sentences, it is difficult to argue with the stance of the Entity courts: as defendants themselves acknowledge, they are better served by a law which permits a sentence of 5-20 years' imprisonment, than by one which permits a sentence of 10-45 years' imprisonment. The historical development of the former law, which is regularly invoked by the State Court, is of academic, rather than practical, significance.

¹³⁸ Denis Dzidic, 'Slow Transfer of Cases Undermines War Crimes Strategy' BIRN Justice Report (5 January 2010) www.bim.ba/en/200/10/24791/.

¹³⁹ DOMAC interview A-18.

¹⁴⁰ Dzidic, *supra* note 138.

¹⁴¹ State Strategy, *supra* note 127; see section 6.

¹⁴² OSCE, *supra* note 57, 12.

¹⁴³ OSCE, 'Trial Monitoring Report on the Implementation Of The New Criminal Procedure Code in the Courts of Bosnia and Herzegovina' (December 2004), 2.

¹⁴⁴ *Ibid*, 1.

5. THE IMPACT OF THE ICTY ON DOMESTIC COURTS

5.1 INTRODUCTION

In 1993, when the ICTY was established, no thought was given to cooperation with, or even assistance to, domestic jurisdictions in the former Yugoslavia. The Tribunal was busy strengthening its judicial capacity, developing procedures and ensuring that the international community provided the necessary cooperation in gathering evidence and arresting indictees.¹⁴⁵ During the first years of the Tribunal's existence, war was still raging in the region, making geographical and legal remoteness inevitable. But remoteness was also a policy choice, which continued to maintain hold after the termination of the armed conflict. It was considered that impartiality required that the Court maintain and display its distance (geographically, linguistically, politically and legally) almost to the extent of indifference to political reality on the ground. In addition, the rule of law remained suspect in all these states. Cooperation with the domestic jurisdictions was considered a potential threat to the integrity of the international process because of the danger of witness intimidation,¹⁴⁶ and there was no trust in the domestic systems' ability to carry out fair trial.¹⁴⁷

A sea change in the relationship between the ICTY and domestic jurisdiction occurred once the completion strategy of the ICTY was underway. A key moment was September 2001, when international attention – and funding - shifted from the international tribunal to issues of terrorism. 'Balkan fatigue' developed, and discussion of bringing the ICTY to a close began.¹⁴⁸ The completion strategy prompted the reforms discussed above: The establishment of domestic institutions, namely the WCS within the State Court of BiH; the domestic exercise of criminal justice powers following transfer of cases under Rule 11bis and domestically-initiated cases; normative changes, namely the adoption of new criminal codes and criminal procedure codes; and an interest in

¹⁴⁵ Hodžić, *supra* note 106, 4.

¹⁴⁶ DOMAC interview A-37; Del Ponte points out that ICTY prosecutors intentionally remained uninformed about the conflict, ostensibly so as not to compromise their impartiality, del Ponte with Sudetic, *supra* note 1, 125.

¹⁴⁷ DOMAC interview A-37.

¹⁴⁸ *Ibid.*

enhancing the capacity of domestic institutions to handle war-related cases so as to relieve the ICTY of that burden.

Yet even as late as 2008, there were doubts in the ICTY and the international community more generally, whether domestic institutions were capable of administering justice for war-related crimes effectively and in accordance with international standards.¹⁴⁹ This may explain the reluctance on the part of the ICTY to relinquish specific cases or to actively promote domestic courts (an endeavour which is also constrained by the ICTY's limited capacity). Interaction with domestic institutions has therefore been informed by the acknowledgement of the necessity of the completion strategy, combined with skepticism as to the viability of domestic processes and resource limits on both sides.

The following sections examine the impact of the ICTY and domestic courts in BiH in three areas: normative (the extent to which the ICTY has contributed to the shaping of BiH law and jurisprudence), quantitative (the extent to which the ICTY has affected the rates of prosecutions for war-related crimes and the sentencing for such crimes) and qualitative (the effect which the ICTY has had on the capacity of domestic institutions to address war-related crimes effectively and in line with international legal standards).

5.2 THE IMPACT OF THE ICTY ON THE LEGAL NORMS APPLICABLE IN BIH

5.2.1 IMPACT OF INTERNATIONAL INSTRUMENTS AND JURISPRUDENCE ON LEGISLATION

In May 2002, a report was submitted to the OHR by three consultants (Peter Bach, Kjell Björnberg, John Ralston and former ICTY judge Almiro Rodrigues) on issues relating to war-crime prosecutions that might take place in BiH.¹⁵⁰ The report recommended that existing domestic legislation should serve as far as possible as a basis for new or amended legislation. Where existing legislation required revision, amendments should also take into account developments in the law as applied in the ICTY.¹⁵¹

¹⁴⁹ Judge O-Gon Kwon, 'Discussion' (2006) 6 JICJ 681, 682; William Schabas, 'Discussion' (2006) 6 JICJ 681, 707; Thomas Weigend, 'Discussion' (2006) 6 JICJ 681, 704.

¹⁵⁰ Report of 27 May 2007, described in detail by Michael Bohlander, 'Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts' (2003) 14 *Criminal Law Forum* 59, 66, 78.

¹⁵¹ Michael Bohlander, *supra* note 150, 78.

The 2003 BiH CC incorporates the crimes of genocide, war crimes, and crimes against humanity. The definition of genocide (BiH CC Article 171) is identical to that of all the preceding international instruments criminalizing genocide.¹⁵² In contrast, the definition of crimes against humanity (BiH CC Article 172) follows closely that of the ICC Statute Article 7 rather than the ICTY Statute Article 5. Specifically, the BiH CC does not require a nexus of the act to an armed conflict, as the ICTY Statute does. The BiH CC also explicitly defines various terms employed in the definition of crimes against humanity, again following the ICC Statute (although it should be recalled that the drafting of the latter was itself influenced by ICTY jurisprudence). BiH CC Articles 173-175 define three categories of war crimes, borrowing from the SFRY CC. It distinguishes between crimes against civilians, crimes against the wounded and sick, and crimes against prisoners of war. BiH CC Articles 177-179 and 181-183 define additional war crimes and war-related crimes. BiH CC Article 180, defining the modes of individual responsibility, is modeled after ICTY Statute Article 7. Notably, it avoids the distinctions made in the ICC Statute regarding the responsibility of military commanders and civilian superiors, and it does not expressly provide for the Joint Criminal Enterprise (JCE) mode of responsibility.

The drafting of the BiH CPC was also very much guided by international standards and by the ECHR in particular. As the OHR stated when he imposed the BiH CPC,¹⁵³ the CPC was needed

for the existence of criminal procedure at the state level of Bosnia and Herzegovina which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the European Convention on Human Rights which itself forms part of the Constitution of Bosnia and Herzegovina and enjoys priority over all other law in Bosnia and Herzegovina.

The BiH CPC incorporates various provisions of the ECHR as interpreted by the European Court of Human Rights (ECtHR).¹⁵⁴ The adherence to the ECHR is perhaps the least surprising in the drafting of BiH legislation, since the ECHR forms part of the Constitution of BiH and enjoys priority over all other law in BiH.¹⁵⁵

¹⁵² Genocide Convention Article 2, ICTY Statute Article 4, ICC Statute Article 6.

¹⁵³ The High Representative's Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina ('Official Gazette' of Bosnia and Herzegovina, 3/03 (36/03)) (24 January 2003), www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094, preambular paragraph 8 (emphasis added).

¹⁵⁴ Silvia Borelli, 'The Impact of the European Convention of Human Rights in the Context of War Crimes Trials in Bosnia and Herzegovina' (DOMAC, undated draft, on file with author).

¹⁵⁵ Constitution of BiH Article II(2).

5.2.2 THE IMPACT OF ICTY JURISPRUDENCE ON THE JURISPRUDENCE OF THE STATE COURT OF BIH

The OHR's 2002 consultants' report recommended that the jurisprudence of the ICTY have persuasive authority in the interpretation of legislation by courts at both State and Entity level, in procedural and substantive matters. However, it was acknowledged that that in view of the differences between the legal systems, it would be unfeasible for domestic courts to fully follow the jurisprudence of the ICTY. The report therefore recommended the adoption of a regulation stating that the courts should take into account the jurisprudence of the Tribunal.¹⁵⁶

The WCS has followed the spirit of the OHR consultants' report, holding with respect to specific provisions in the BiH CC that as domestic law which derives from and duplicates the ICTY Statute and other international law, the BiH CC 'brings with it as persuasive authority its international legal heritage, as well as the international jurisprudence that interprets and applies it'.¹⁵⁷ The BiH prosecution considers reliance on ICTY jurisprudence an important element in providing for achieving uniformity in interpretation of principles and rules.¹⁵⁸ Although the ICTY is not the only international institution influencing the WCS in this fashion, it is the international legal source that has had the most pronounced impact.¹⁵⁹

The library of the WCS includes a complete collection of the ICTY's jurisprudence and all of the judges in the WCS have been briefed on that jurisprudence.¹⁶⁰ The WCS has relied on the jurisprudence of the ICTY and other international sources for various purposes. One such purpose was to establish that certain provisions in the BiH CC reflect customary international law, thereby confirming the WCS's own jurisdiction *ratione materiae* over prosecuted offences. For example, in *Kovacević* the WCS cited the ICTY to establish that crimes against humanity were criminalized under customary international law at the time of the defendants' acts. It also cited the International

¹⁵⁶ Michael Bohlander, *supra* note 150, 78.

¹⁵⁷ Noted with respect to BiH CC Article 171 (genocide), *Stupar* (First Instance Verdict), *supra* note 132, 53; See also *Prosecutor v. Milorad Trbić* (First Instance Verdict), Court of BiH Case No X-KR-07/386, (16 October 2009), [173]; also noted with respect to BiH CC Article 180 which duplicated ICTY Statute Article 7, *Trbić* (First Instance Verdict), [205].

¹⁵⁸ State Prosecutor Ibro Bulić, 'Application of International Sources of Law in BiH', presentation from an international conference titled 'Implementation of International Humanitarian Law in National Systems'; Budapest (29-30 October 2007), 3, www.tuzilastvobih.gov.ba/files/docs/Primjena_medjunarodnih_izvora_prava_u_BiH.pdf.

¹⁵⁹ BiH prosecutor, participant in DOMAC seminar, 19 November 2009.

¹⁶⁰ Burke-White, *supra* note 87, 343.

Criminal Tribunal for Rwanda (ICTR) and the International Committee of the Red Cross's Study of Customary International Humanitarian law.¹⁶¹ In *Pekez and others* the WCS cited the ICTY's *Kunarac, Kovacević and Vuković* to establish that Common Article 3(1) constituted customary international law at the time of the commission of the acts in question.¹⁶² In *Trbić*, the Trial Chamber cited the ICTY's *Jelisić* to establish that the Genocide Convention reflected customary international law at the relevant time.¹⁶³

ICTY jurisprudence also serves the ICC in interpreting various concepts of international criminal law. In the first war-related trial held before the State Court, ICTY jurisprudence was instrumental in the Court's characterization of the conflict in the former Yugoslavia as international.¹⁶⁴ Since then, the WCS has relied on the ICTY in the analysis of a great number of concepts, including 'widespread' and/or 'systematic' attack,¹⁶⁵ the elements of genocide,¹⁶⁶ the elements of 'persecution',¹⁶⁷ civilians,¹⁶⁸ protected persons,¹⁶⁹ the discriminatory element in crimes against humanity,¹⁷⁰ imprisonment as a crimes against humanity,¹⁷¹ the nexus between the defendant's act and the armed conflict as an element in war crimes,¹⁷² intentional infliction of severe physical or mental pain,¹⁷³ inhumane acts,¹⁷⁴ as well as the character of armed conflict,

¹⁶¹ *Prosecutor v Kovacević* (First Instance Verdict) Court of BiH Case No X-KR-05/40 (3 November 2006), 41.

¹⁶² *Prosecutor v Mirko Pekez and Milorad Savić* (Second Instance Verdict) Court of BiH Case No X-KRŽ-05/96-1 (5 May 2009), [37].

¹⁶³ *Trbić* (First Instance Verdict), *supra* note 157, [172].

¹⁶⁴ *Prosecutor v Abduladhim Maktouf* (First Instance Verdict) Court of BiH Case No K-127/04 (1 July 2005), 9, and *Prosecutor v Abduladhim Maktouf* (Second Instance Verdict) Court of BiH Case No KPŽ-32/05 (4 April 2006), citing *Blaskić and Kordić and Čerkez*.

¹⁶⁵ *Prosecutor v Petar Mitrović* (First Instance Verdict) Court of BiH Case No X-KR-05/24-1 (29 July 2008), 23, 47-50.

¹⁶⁶ *Prosecutor v Petar Mitrović* (First Instance Verdict) Court of BiH Case No X-KR-05/24-1 (29 July 2008), 23, 47-50; *Trbić* (First Instance Verdict), *supra* note 157, [177]-[202], citing *Krstić, Blagojević and Jokić, Brđanin*, as well as the ICTR's *Ndindabahizi*.

¹⁶⁷ *Prosecutor v Nikola Kovacević* (First Instance Verdict) Court of BiH Case No X-KR-05/40 (3 November 2006), 44, citing the ICTY's *Kronjelać*; *Prosecutor v Dragan Damjanović* (First Instance Verdict) Court of BiH Case No X-KR-05/51 (15 December 2006), 47-48, citing *Kupreškić and Vasiljević*; *Prosecutor v Damir Ivanković* (First instance Verdict) Court of BiH Case No X-KR-08/549-1 (2 July 2009), 10-11, citing *Kunarac, Blaskić and Stakić, Prosecutor v Momčilo Mandić* (First Instance Verdict) Court of BiH Case No X-KR-05/58 (18 July 2007), [133]-[134] citing *Naletilić and Martinović*.

¹⁶⁸ *Pekez and Savić* (Second Instance Verdict), *supra* note 162, [38], citing *Blagojević and Jokić*.

¹⁶⁹ *Mandić* (First Instance Verdict), *supra* note 167, [130], citing *Tadić*.

¹⁷⁰ *Prosecutor v Dragan Damjanović* (First Instance Verdict) Court of BiH Case No X-KR-05/51 (15 December 2006), 44-45, citing *Naletilić and Martinović*.

¹⁷¹ *Mandić* (First Instance Verdict), *supra* note 167, [134], citing *Kronjelać*.

¹⁷² *Pekez and Savić* (Second Instance Verdict), *supra* note 162, [57], citing *Kunarac; Mandić* (First Instance Verdict), *supra* note 167, [129], citing *Kunarac, Blaskić and Halilović*.

¹⁷³ *Pekez and Savić* (Second Instance Verdict), *supra* note 162, [151], citing the Commentary to the Geneva Convention IV, as well as *Kordić and Čerkez, Kunarac, Naletilić and Martinović*.

¹⁷⁴ *Prosecutor v Dragan Damjanović* (First Instance Verdict) Court of BiH Case No X-KR-05/51 (15 December 2006), 23, *Mandić* (First Instance Verdict), *supra* note 167, 136, citing *Kuperskić, Kordić and Čerkez*.

elements of ethnic cleansing, and of various violation of the laws or customs of war, including of rape and sexual abuse.¹⁷⁵ In some cases, rulings by the WCS do not mention the ICTY but mirror ICTY decisions so closely that given that they concern identical events, it is probable that ICTY case law influenced the decisions of the WCS.

As noted above, WCS judgments are also replete with references to international law in general and to international tribunals other than the ICTY, especially the ICTR but also the ICJ, the Special Court of Sierra Leone and even domestically-established courts, such as the US military tribunal at Nuremberg.¹⁷⁶

ICTY influence is also visible with respect to procedural norms. For example, the WCS has relied on ICTY when ruling on the admissibility of illegally-obtained evidence.¹⁷⁷ It also referred to ECtHR jurisprudence with respect to the same issue,¹⁷⁸ as well as with respect to admission of testimony not examined by the defendant.¹⁷⁹ It cited the jurisprudence of the ICTR and ECtHR with respect to holding trial in the absence of the defendant when the defendant chooses to absent himself.¹⁸⁰

The following sections review some of the normative issues in which international jurisprudence and ICTY jurisprudence in particular have played a significant role in the jurisprudence of the WCS.

Command Responsibility

Existence of mode: Command responsibility was not regulated under SFRY law, which governed BiH until 2003. The question that arose before the WCS was whether prosecution under this mode of liability for acts committed prior to enactment of the 2003 BiH CC was in conformity with the principle of legality. The WCS ruled that command

¹⁷⁵ State Prosecutor Ibro Bulić, 'Primjena Međunarodnih Izvora Prava u BiH' [Application of International Sources of Law in BiH], presentation from an international conference titled 'Implementation of International Humanitarian Law in National Systems'; Budapest (29-30 October 2007), 4-5, www.tuzilastvobih.gov.ba/files/docs/Primjena_medjunarodnih_izvora_prava_u_BiH.pdf.

¹⁷⁶ *Trbić* (First Instance Verdict), *supra* note 157, [177]-[202] citing, *inter alia*, the ICTR's *Ndindabahizi, Kayishema and Ruzindana, Niyitegeka, Akayesu, Musema, Rutaganda*; and [193], citing *US v. Wilhelm von Leeb* (the High Command Case).

¹⁷⁷ *Prosecutor v Zijad Kurtović* (First Instance Verdict) Court of BiH Case No X-KR-06/299 (30 April 2008). 23, relying on *Kordić and Čerkez, Brđanin; Mandić* (First Instance Verdict), *supra* note 167, [116]-[118] relying on *Kordić and Čerkez*.

¹⁷⁸ *Mandić* (First Instance Verdict), *supra* note 167, [116]-[118] relying on the ECtHR's *Khan v UK* and *PG and HJ v UK*.

¹⁷⁹ *Prosecutor v Dragan Damjanović* (Second Instance Verdict) Court of BiH Case No X-KRŽ-05/51 (13 June 2007), 14.

¹⁸⁰ *Mandić* (First Instance Verdict), *supra* note 167, [50]-[51], citing the ICTR's *Barayagwiza* and the ECtHR's *Colozza*.

responsibility had been a principle of criminal liability under domestic law, having been regulated by a presidential order of SFRY and by rules and regulations of the VRS. It also noted that command responsibility was, at the relevant time, criminalized under customary international law.¹⁸¹

Interpretation of mode: BiH CC Article 180(2) establishes command responsibility as a mode of personal criminal liability. According to the WCS, Article 180(2) derives from and is identical to ICTY Statute Article 7.¹⁸² The WCS has ruled that when international law is incorporated into domestic law, domestic courts must consider the parent norms of international law and their interpretation by international courts. Accordingly, When ICTY Statute Article 7 was copied into the BiH CC, it came with its international origins and its international judicial interpretation and definitions.¹⁸³ In searching for international judicial interpretation of the principle of command responsibility, the WCS has nonetheless declared that it was 'not bound by the decisions of the ICTY'. At the same time, it was 'persuaded that the ICTY's characterization of command responsibility, and its elements properly reflects the state of customary international law as it existed at the times relevant to the Indictment'.¹⁸⁴

The WCS found it 'helpful to review the evidentiary factors' which 'the ICTY, and other international courts have found relevant to determining whether the prosecution has successfully met its burden of establishing liability under the principle of command responsibility, as guidance in reviewing the evidence in the instant case'.¹⁸⁵ The WCS therefore relied on ICTY judgments to establish the elements of 'effective control'¹⁸⁶ and other elements of the doctrine.¹⁸⁷ It also relied on jurisprudence of the Special Court for Sierra Leone for that purpose.¹⁸⁸

¹⁸¹ *Stupar* (First Instance Verdict), *supra* note 132, 138-139, 141.

¹⁸² *Mandić* (First Instance Verdict), *supra* note 167, [150], citing *Halilović, Aleksovski* and others.

¹⁸³ *Stupar* (First Instance Verdict), *supra* note 132, 135.

¹⁸⁴ *Stupar* (First Instance Verdict), *supra* note 132, 141.

¹⁸⁵ *Stupar* (First Instance Verdict), *supra* note 132, 141.

¹⁸⁶ *Prosecutor v Momčilo Mandić* (Second Instance Verdict) Court of BiH Case No X-KRŽ-05/58, [106]-[109], citing the ICTY's *Orić, Čelebići* and *Kordić and Čerkez*.

¹⁸⁷ Eg *Mandić* (First Instance Verdict), *supra* note 167, 151 citing *Čelebići, Halilović, Blaskić, Kordić and Čerkez, Strugar* and more; *Mandić* (Second Instance Verdict), *supra* note 186, [109]; *Stupar* (First Instance Verdict), *supra* note 132.

¹⁸⁸ Eg *Mandić* (Second Instance Verdict), *supra* note 186, [109]; *Stupar* (First Instance Verdict), *supra* note 132.

The differences in views expressed in the ICTY with respect to certain elements of command responsibility are also reflected in the work of the WCS.¹⁸⁹ For example, in *Stupar* the question arose whether responsibility as a commander for acts of genocide requires a commander to share the special genocidal intent. The WCS looked to ICTY and ICTR case law to examine the state of the law. It found that ‘none of the various pronouncements by Trial Chambers of the ICTY and ICTR are particularly persuasive authority on this issue, as their conclusions were not necessary to resolve the guilt of the accused’.¹⁹⁰ The WCS, too, avoided answering the question definitively, noting that in the circumstances, it had been proven beyond reasonable doubt that the defendant in fact had the specific genocidal intent.¹⁹¹

Joint Criminal Enterprise

Existence of mode: The BiH CC provides for co-perpetration as a mode of individual liability. The WCS followed ICTY jurisprudence in accepting the existence of the JCE doctrine,¹⁹² which now co-exists uneasily with co-perpetration that is expressly provided for in the BiH CC.¹⁹³ In *Mandić*, the WCS acknowledged for the first time the existence of the JCE doctrine under BiH CC,¹⁹⁴ although it did not consider it applicable in the circumstances. In *Vuković* it stated that as at the ICTY, the concept of JCE is integral to the term ‘*perpetrating*’ contained in Article 180, which mirrors ICTY Statute Article 7.¹⁹⁵ A few weeks later, in *Rašević and Todović*, the WCS concluded that the JCE liability is incorporated in BiH CC Article 180(1) and was part of customary international law at the time when the offenses in that case were committed. It reiterated this in *Stupar* and in

¹⁸⁹ BiH prosecutor, participant in DOMAC seminar, 19 November 2009.

¹⁹⁰ Strippoli, *supra* note 131, 590-591.

¹⁹¹ *Stupar* (First Instance Verdict), *supra* note 132, 162-163.

¹⁹² *Trbić* (First Instance Verdict), *supra* note 157, [205] noting that BiH CC Article 180 which duplicated ICTY Statute Article 7, which has been interpreted as encompassing JCE. Strippoli, *supra* note 131, 586.

¹⁹³ Strippoli, *supra* note 131, 587.

¹⁹⁴ *Mandić* (First Instance Verdict), *supra* note 167.

¹⁹⁵ Strippoli, *supra* note 131, citing *Prosecutor v Vuković and Another* (Second Instance Verdict) Court of BiH Case No KRŽ-07/405 (2 September 2008), 6, note 1, and noting that no importance is given to the use of the word *perpetrating* instead of *committing*. Interestingly, in *Vuković* the Trial Chamber relied on ICTY jurisprudence to establish joint criminal enterprise as a mode of criminal responsibility in the context of BiH CC Article 29, which applies to all offenses, rather than in the context of BiH CC Article 180, which concerns modes of liability for crimes under international law. *Prosecutor v Vuković and Another* (First Instance Verdict) Court of BiH Case No KRŽ-07/405 (4 February 2008), 20.

Trbić. In these cases the WCS considered only JCE I and II (basic and systemic) but not JCE III (extended).¹⁹⁶

Interpretation of mode: in *Trbić*, the WCS emphasized that it is not bound by the decisions of the ICTY. However, it 'is persuaded that the ICTY's characterization of general JCE, its elements, mens rea and actus reus, properly reflects that state of customary international law as it existed in July 1995 and thereafter'.¹⁹⁷ The WCS also cited the Special Court for Sierra Leone's jurisprudence, noting that the latter also followed the criteria established by the ICTY.¹⁹⁸

The Criminal Procedure Code

The criminal procedure reform process was underway before war crimes trials became a reality. Nonetheless, the CPC has clear connections with the ICTY RPE, such as the move from an inquisitorial to a composite inquisitorial-adversarial system and the introduction of plea bargains. It has been argued that certain aspects of the criminal procedure reform expedited the holding of trials and enhanced the effectiveness of BiH's legal system, particularly at the State Court.¹⁹⁹ However, the positive effects of the new CPC may have been outweighed by negative ones. The new rules created confusion and frustration among domestic professionals,²⁰⁰ and there was widespread resistance among legal professionals to applying them.²⁰¹ Much of this adverse reaction was generated by the fact that several of the reforms were entirely foreign to the domestic legal traditions, and the perception was that local legal traditions were regarded with contempt by international institutions, and not properly understood.²⁰² Although the CPC

¹⁹⁶ *Prosecutor v. Mitar Rašević and Savo Todović* (First Instance Verdict), Court of BiH Case No X-KR/06/275 (28 February 2008), 111; *Prosecutor v Rašević and Todović* (Second Instance Verdict) Court of BiH Case No X-KR/06/275 (6 November 2008), 26. A further confirmation that JCE forms part of customary international law is in *Trbić* (First Instance Verdict), *supra* note 157, [206].

¹⁹⁷ *Trbić* (First Instance Verdict), *supra* note 157, [211].

¹⁹⁸ *Trbić* (First Instance Verdict), *supra* note 157, [217], citing the Special Court for Sierra Leone's *Sesay et al.*

¹⁹⁹ DOMAC interviews A-15, A-23. See also Christopher DeNicola, 'Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism', (2010) *ExpressO*, 28, http://works.bepress.com/christopher_denicola/1.

²⁰⁰ DeNicola, *supra* note 199. This confusion was certainly not helped by the Council of Europe hiring local practitioners, trained in the continental system, to draft the commentaries to these new procedural rules (*ibid*, 67).

²⁰¹ DOMAC interviews A-14 and A-22. An OSCE report based on the monitoring of over one hundred trials indicated that over 25% of judges, prosecutors, and defence attorneys were 'not accomplishing a shift' to the new procedure. OSCE, 'Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina' (2004), 27-34.

²⁰² DeNicola, *supra* note 199, citing UN Mission in BiH, Judicial Assessment Programme, Thematic Report X: Serving the Public (2000), available at www.hjpc.ba/docs/jasp/pdf/TR%20X%20delivery%20of%20justice%20-%20delays.pdf, section 6.4, noting that BiH's inquisitorial system is a product of an 'old legal philosophy'.

was drafted by a team of BiH lawyers, the code in its entirety was perceived as being internationally imposed,²⁰³ not least because it was ultimately enacted by the OHR. In 2007, 39 detainees went on a hunger strike in protest against the application of the 2003 CPC to the events of 1992-1995.²⁰⁴

Case-Channeling

The criteria used by the BiH prosecution and State Court to decide on retention or transfer of war-related crimes to Entity courts²⁰⁵ borrow heavily on the law and practice of the ICTY.

First, the 2008 National War Crimes Strategy provides a rationale for the channeling process that is similar to the completion strategy: to prosecute the most complex and top-priority war crimes cases by 2015, and other war crimes cases by 2023; this dictates and guides the process of channeling cases, similarly to the ICTY's completion strategy which prompted the transfer of cases under Rule 11bis and the encouragement of domestic institutions to undertake prosecutions. Second, The ICTY assisted in the drafting of the complexity criteria for the 2008 National War Crimes Strategy, and the criteria used by the WCS to decide on the transfer to Entity courts borrow directly from Rule 11bis of the ICTY RPE,²⁰⁶ incorporating standards that are a result of the practice of international criminal courts.²⁰⁷

Two issues that beleaguered the development of the channeling policy also duplicated ICTY concerns. One key issue was whether to pursue only high level perpetrators, with the knowledge that direct perpetrators may never be dealt with, or to expand the scope of prosecutions. A second question was whether to retain cases against high-level perpetrators in the WCS and allow the Entity courts to try only lower level perpetrators, or to divide the labor so that entity courts are involved as much as

²⁰³ DOMAC interview A-24. Our interviewees seem to disagree with DeNicola regarding the fact that local drafters were directed by international or foreign players into drafting mixed procedure (DeNicola, *supra* note 199). Rather, they suggest that many of the relevant changes were established out of personal and professional conviction.

²⁰⁴ Tarik Abdulhak, 'Building Sustainable Capacities - From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina', (2009) 9 *International Criminal Law Review* 333, 343.

²⁰⁵ BiH CPC Article 27a.

²⁰⁶ BiH prosecutor, comment made in the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (19-20 November 2009).

²⁰⁷ State Strategy, *supra* note 127.

possible so as to process as many cases as possible.²⁰⁸ On both issues, the decisions mirror those of the ICTY, namely to pursue a top-down approach, and to stagger the cases among the courts, *inter alia* according to the level of perpetrators. There was also a debate on whether to make the criteria public. Among the considerations was the fact that the non-transparency of the case selection process in the ICTY led to criticism that the Court was anti-Serb and anti-Croat. The criteria were eventually published, in general terms, as part of the 2008 National War Crimes Strategy.

5.2.3 THE IMPACT OF THE ICTY ON ENTITY LAW AND JURISPRUDENCE

An RS judge told DOMAC that while the RS courts are not bound by ICTY jurisprudence, the ICTY is an authority which the RS courts respect and to which it looks.²⁰⁹ However, the fact that ICTY jurisprudence has not been translated to Bosnian/Serb/Croat (BSC) prevents it from being directly accessible to domestic courts.²¹⁰ Parties and judges in the Entity courts do not usually cite international or foreign jurisprudence,²¹¹ and the decisions of these courts are often at odds with international jurisprudence.

An example is the interpretation of ‘war crime’ in *Mirsad Čupina and Others*, heard by the Mostar Cantonal

Court. The case concerned a combatant holding a knife against the neck of a civilian. In 2001 the court found that the act constituted inhumane treatment, but acquitted the defendant on the ground that such a single isolated incident perpetrated against one individual did not constitute a war crime against civilians. The judge held that a grave breach of the Geneva Conventions requires inhumane treatment to have resulted in ‘great suffering or serious bodily injury’ in order to be a crime under SFRY CC Article

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²⁰⁸ DOMAC interview A-16.

²⁰⁹ Judge Rudislav Dimitrijević, judge at Supreme Court of RS, comments made in the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (19-20 November 2009), comment made in the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (19-20 November 2009).

²¹⁰ DOMAC interview A-18.

²¹¹ OSCE, *supra* note 57, 21-22.

142. He took the view that this individual incident simply represented an overstepping of authority by the official. He did not take into account the surrounding circumstances, such as the on-going siege-like situation in Mostar, the ethnic cleansing and the fact that the victim's family property was simultaneously being looted. In November 2004, the FBiH Supreme Court allowed the prosecutor's appeal on various grounds and ordered a second retrial.²¹²

Another example concerns the application of the command responsibility mode of individual responsibility. As noted already, the SFRY CC did not contain a provision which replicates the definition of command responsibility contained in ICTY Statute Article 7, although the Code does state that a person who 'orders' the criminal act is guilty of an offence. Furthermore, the SFRY CC Article 30 states that an omission to act can constitute a crime.

In *Mirsad Ćupina and Others* in 2001, the defendant was found guilty by the Mostar Cantonal Court of war crimes against prisoners of war, a violation of SFRY CC Article 144. As director of a prison, he was aware that prisoners were beaten and forced to undertake hazardous work, such as digging trenches, but did nothing to stop it. The Mostar court found that although the SFRY CC technically covers only those who order or commit the offenses, it should also be read to cover the failure to prevent those same offenses, consistent with an understanding of the international law concept of command responsibility. However, when the case was retried under order of the FBiH Supreme Court, the Court ruled to the contrary and found that no punishment could be imposed under the SFRY CC for a failure to act. While the second ruling left open the possibility that a case could be brought under some other law that acknowledges command responsibility, this judgment's narrow interpretation of the provisions of the SFRY CC effectively foreclosed the prospect of finding such responsibility under this law.²¹³ WCS officials thus question whether the Entity courts properly acknowledge the validity of the superior responsibility doctrine. As a result, cases that may involve this legal doctrine tend to be treated as highly sensitive and tried at the WCS.²¹⁴

²¹² Ibid, 21.

²¹³ Human Rights Watch, 'Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts' (February 2008) www.hrw.org/en/node/62137/section/1 ('Human Rights Watch'), citing Case of Mirsad Ćupina, Verdict Number K-24/99, Mostar Cantonal Court, January 24, 2007, Case of Mirsad Ćupina, Verdict Number K-455/01, Supreme Court of Federation BiH, September 11, 2003.

²¹⁴ Human Rights Watch, supra note 213, 55.

5.3 THE IMPACT OF THE ICTY ON PROSECUTION RATES

Common wisdom has it that had it not been for the ICTY, there would not have been domestic proceedings even at the volume in which they exist.²¹⁵ A quantitative attempt to confirm or disprove this hypothesis has proven difficult. It is impossible to make definite substantive assessments of the impact of the ICTY on prosecution rates and sentencing in the BiH jurisdictions, since the number of cases is too small for any finding to be statistically significant. In other words, there are no major trends in the domestic jurisdiction that are identifiable on the basis of numbers alone, let alone attributable to the relationship with the ICTY. This does not mean that there are no trends or policies but only that they are not evident from the volume *per se* of cases before the domestic tribunals. An examination of prosecution rates from 1992 until 2009 reveals a few tentative patterns. The rate of indictment in the WCS has remained more or less constant since it began to operate in 2005.²¹⁶ However, in FBiH and perhaps in RS, a number of waves are discernible that may be attributable to changes in the direct or indirect working relationship with the ICTY.

1. Impact of the RoR: In FBiH, there was a drop in indictments from 1997 to 2000, picking up again in 2001.²¹⁷ In RS there were a handful of indictments until 1997, and none until 2003.²¹⁸ At least in FBiH, this gap may be related to the RoR (the lack of indictments in RS prior to 1997 makes it impossible to identify a similar drop or gap).

The RoR procedure undoubtedly reduced the incidence of arbitrary arrests in Bosnia,²¹⁹ and contributed to the active participation of displaced people and candidates in the early elections. However, commentators argue that the ICTY was manipulated into undertaking the RoR as part of the appeasement policy of the international community towards Serbia, and that its effect was to stifle domestic courts. The ICTY was notoriously slow in reviewing cases, in large part due to staff limitations and competing

²¹⁵ DOMAC interview A-18.

²¹⁶ Ronen with Avital and Tamir, *supra* note 124, graph 2.2A.1.1.

²¹⁷ Ronen with Avital and Tamir, *supra* note 124, graph 2.2B.1.1.

²¹⁸ Ronen with Avital and Tamir, *supra* note 124, graph 2.2C.1.1.

²¹⁹ Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina' (February 2006) Volume 18 Issue 1(D), 6.

priorities. In fact, more than 2,300 of almost 6,000 cases sent to the ICTY were never reviewed and were lost in administrative limbo.²²⁰

The slow processing of other cases and the unsystematic return of decisions on reviewed cases to the domestic authorities resulted in lost momentum on the ground. The slowness of the process was partly due to lack of resources for the review process. More importantly, it was the result of poor calculation. The files that the ICTY received were in the local language and were organized in a way that was entirely alien to international officers working at the OTP.²²¹

ICTY statistics on the work of the RoR Unit provided to the OSCE indicate that only 24% of the individuals referred to in the cases submitted by BiH authorities were categorized under classification A, i.e. 'evidence sufficient to proceed to arrest and indictment'. These figures may indicate that, in the majority of cases, the authorities in BiH were prepared to proceed to the detention of individuals when the evidence was deficient and basic international standards were not met. This supports the contention that the RoR were necessary and met their political objectives. It cannot, however, be excluded that under-investigated files were deliberately submitted in some cases in order to exonerate certain individuals.²²² The RoR were thus conducive to the interests of the legal authorities in BiH in the sense that they relieved them further of the responsibility of conducting effective prosecutions,²²³ which they tended anyway to attach to the ICTY. For example, in 2001 RS Public Prosecutor Vojislav Dimitrijević was quoted as saying that 'The RS Public Prosecutor's Office expects that the ICTY Prosecutor's Office reviews the evidence materials and indictments that the RS submitted with regards to war crimes committed against Serbs much faster'.²²⁴

However, it would be imprudent to attribute the paucity of cases in the Entities entirely to the slowness of the RoR process. The small number of cases adjudicated in FBiH from 1997 until 2001 and the absolute absence of cases in RS from 1998 until 2003 may also indicate a lack of sufficient determination among prosecutors, police and

²²⁰ Paul R Williams and Patricia Taft, 'The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?' (2003) 35 *Case Western Reserve Journal of International Law* 219, 253-254, Burke-White, *supra* note 87, 313-314.

²²¹ DOMAC interview A-30 and anonymous interviewee.

²²² DOMAC interview A-18; OSCE, *supra* note 57, 48.

²²³ DOMAC interview A-37.

²²⁴ OHR BiH Media Roundup (15 February 2001) www.ohr.int/ohr-dept/presso/bh-media-rep/roundups/default.asp?content_id=6933.

courts to see the cases through.²²⁵ Moreover, other factors need to be taken into account, such as the fact that particularly in RS, war-related crimes have often been prosecuted as ordinary crimes.²²⁶ While this is perceived as a refusal by the local authorities to come to terms with the gravity of past events,²²⁷ it does require taking a more nuanced view of the data.

2. Progress of the completion strategy: In both FBiH and RS, there was a surge in indictments in the early 2000s. In FBiH this took place in 2001, while in RS it took place in 2003. This may have been a reaction to the completion strategy of the ICTY, and in anticipation of the establishment of the WCS.

Receipt of cases under the completion strategy was a mark of prestige.²²⁸ Accordingly, as the completion strategy gained momentum, states in the region became keen to show that they could administer justice in accordance with international standards, so as to ensure that cases are transferred to them.²²⁹ In BiH, this effort focused at the State level, with the establishment of the WCS. However, it left a mark also in the Entities.

In RS in particular, there was support for special courts at the Entity level rather than the establishment of a State-level court to follow up on the work of the ICTY. There was also a strong preference in RS for the exercise of jurisdiction in the locality in which the crime took place, and not where the victims resided at the time of trial. RS authorities argued that a separate court beyond the current system would signal loss of confidence in domestic courts.²³⁰ The increase in the number of

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²²⁵ BiH Chief Prosecutor Marinko Jurčević, speech given at the Third Conference of Chief Prosecutors in BiH; Sarajevo (21-22 November 2007), www.tuzilastvobih.gov.ba/files/docs/konferencija_novembar_glavni_tuzilac.pdf; International Crisis Group, 'Who are the People in your neighbourhood? War criminals in Bosnia's Republika Srpska' ICG Balkans Report N° 103 (Sarajevo/Washington/Brussels, 2 November 2000), 2.

²²⁶ Ronen with Avital and Tamir, *supra* note 124, graph 2.2B.4.4.

²²⁷ Gordana Katana, 'Republika Srpska courts shy away from war crimes' BIRN (undated), www.bim.ba/en/50/10/2316/?tpl=30.

²²⁸ Correspondence with Mirko Klarin, 13 September 2010.

²²⁹ DOMAC interview A-37.

²³⁰ Michael Bohlander, *supra* note 150, 68-69.

indictments before RS is often attributed to the attempt to demonstrate its capacity to fulfill its role, so that cases would be adjudicated before its courts rather than before the WCS, if it were established.²³¹

3. The sensitivity review: A third tentatively-identifiable pattern in the practice of the Entity courts is the increase in indictments in 2006 in both FBiH and RS. This increase followed, chronologically, the undertaking by the WCS to channel war-related cases to the Entity courts following a review of their sensitivity and complexity. It is argued that this review process has been instrumental in getting Entity prosecutors to undertake prosecutions in a more serious and concerted manner. According to Human Rights Watch, RS prosecutors report that after the referral process was instituted, there was an improvement in the quality of indictments and case preparation that led to a more serious effort to try crimes committed during the war.²³² The ICTY is not directly involved in the sensitivity review,²³³ although as noted above, it has had an important influence on establishing the criteria for the review.

5.4 THE IMPACT OF THE ICTY ON SENTENCING IN BIH

As with respect to prosecution rates, it is impossible to make definite substantive assessments of the impact of the ICTY on sentencing patterns in the BiH jurisdictions, since the number of cases is too small for any finding to be statistically significant. Additional factors complicate further the assessment of the ICTY's impact on domestic sentencing. First, the range of sentences available to the courts is different: in the ICTY there is no minimum sentence, but the maximum sentence is life imprisonment. In BiH sentences may range from 10 to 45 years' imprisonment, while under the SFRY CC applied in FBiH and RS, the sentencing range for the more severe war-related crimes range is 5 to 20 years' imprisonment.²³⁴ Research shows that ICTY sentences are higher

²³¹ RS President Dragan Čavić emphasized that the institutions dealing with cooperation with the Hague Tribunal are making tremendous efforts to prove they are fully functional and to regain trust. Dragan Jerinic, 'We are making tremendous efforts to prove our cooperation with the Hague' *Nezavisne Novine* 4-5, in OHR BiH Weekend Round-up, 30-31/10/2004, www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/default.asp?content_id=33421.

²³² Human Rights Watch, *supra* note 213, 11-12.

²³³ And accordingly, see section 6 for an analysis of the State Court's impact on Entity courts.

²³⁴ Eg SFRY Article 142(1) regarding war crimes against civilians and Article 38 regarding sentencing, reviewed in *Prosecutor v Gojko Janković* (Decision on Referral of Case Under Rule 11bis) ICTY-IT-96-23/2PT (22 July 2005), [33]-[36].

than of domestic courts,²³⁵ but this may also be related to the different levels of perpetrators brought before the ICTY and the domestic courts.

An alternative parameter to assess whether the impact of the ICTY on sentencing levels in the domestic courts may be the existence of a hierarchy in sentencing according to the category of crimes. Although the ICTY has rejected the notion of a hierarchy of crimes, practice suggests the existence of a perception of such a hierarchy. This is evident partly from the heavy sentences in the few convictions for genocide-related crimes in the ICTY;²³⁶ it is even more apparent from a comparison of the sentences given in the ten ICTY cases where the defendant was *indicted* of genocide-related offenses with the sentences in other cases: the average sentence for genocide-related acts is 24 years, compared with 16 years' average for crimes against humanity, and 10 years' average for war crimes.²³⁷ In the domestic jurisdictions, gradation can only be examined with respect to the WCS, where there have been convictions for all three categories of crimes (genocide, crimes against humanity and war crimes) and in FBiH, where there have been convictions for genocide and war crimes (in RS, with convictions only for war crimes, there is no issue of gradation). In BiH, there is a very apparent gradation in sentencing among categories, from an average of over 40 years' imprisonment for genocide-related crimes, to an average of 14.4 and 12.7 years' imprisonment for crimes against humanity and war crimes, respectively.²³⁸ In FBiH no such gradation is discernible,²³⁹ with the average sentence for genocide being 14.7 years' imprisonment and for war crimes 12 years' imprisonment (this is a miniscule difference, particularly taking into account the small number of sentences given in each category and their distribution). The lack of gradation in sentencing may, however, be related to the fact that the range of penalties available differs among the various jurisdictions.²⁴⁰ The maximum sentence of life imprisonment in the ICTY allows for greater gradation in sentencing than in jurisdictions where the range between the

²³⁵ DOMAC interview A-37.

²³⁶ *Prosecutor v Krstić* (Appeal Judgment) ICTY-IT-98-33-A (19 April 2004), *Prosecutor v Vujadin Popović et al* (Trial Judgment) ICTY-IT-05-88 (10 June 2010), in which the defendants were sentenced to 35 years' and life imprisonment.

²³⁷ Ronen with Avital and Tamir, *supra* note 124, graph 6.4.4. This suggests that sentencing reflects the gravity of the acts rather than the formal offense for which a person was convicted, which is often a matter of prosecution-defense negotiations.

²³⁸ Ronen with Avital and Tamir, *supra* note 124, graph 2.2A.4.4.

²³⁹ Ronen with Avital and Tamir, *supra* note 124, graph 2.2B.4.4.

²⁴⁰ Ivan Ivanović, National Legal Advisor on War Crimes, OSCE Mission to Serbia, comment made in the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (19-20 November 2009).

minimum and the maximum sentence may be as small as 15 years (5-20 years' imprisonment for war crimes against civilians and genocide under SFRY CC) or even 9 years (1-10 years' imprisonment for certain other crimes against the laws of war under the SFRY CC).

Another factor distinguishing the sentencing patterns in the domestic jurisdictions from those of the ICTY is that in the absence of a *stare decisis* doctrine, the sentencing standard, if such exists, is not apparent.²⁴¹

While the influence of the ICTY on the level of sentences in domestic courts is at best small, the ICTY has definitely had some impact on the process of determining sentences in the WCS. In a number of cases, the WCS has cited ICTY jurisprudence when establishing the relevance of various factors in determining sentences. For example, in *Todorović*, the WCS relied on the ICTY judgments in *Zelenović* and *Erdemović* to determine that a plea bargain constitutes a mitigating factor in sentencing, since it is likely to save the victims from reliving the trauma through testifying. In *Todorović* the WCS relied on the ICTY's *Erdemović* also to determine that the provision by the defendant of direct evidence for facts otherwise requiring proof is a mitigating factor in sentencing, since it avoids a more lengthy circumstantial route.²⁴²

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Another type of impact that the ICTY has had on sentencing is the lesson learned by the by the WCS of the importance of adopting a sentencing template (based on BiH law) and developing a reasoned jurisprudence on sentencing.²⁴³ This trend began in *Ramić* and is visible also in *Rasević and Todović*, *Lelek*, and *Stupar*.²⁴⁴

²⁴¹ Judge David Re, State Court of BiH, and RS Judge Rudislav Dimitrijević, judge at Supreme Court of RS, comments made in the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (19-20 November 2009).

²⁴² *Prosecutor v Vaso Todorović* (First Instance Verdict) Court of BiH Case No X-KRŽ-06/180-1 (22 October 2008), 28.

²⁴³ DOMAC interview A-25.

²⁴⁴ *Prosecutor v. Niset Ramić* (First Instance Verdict), Court of BiH Case No X-KRŽ-06/197 (17 July 2007); *Prosecutor v. Mitar Rašević and Savo Todović* (First Instance Verdict), Court of BiH Case No X-KR/06/275 (28 February 2008), *Prosecutor v. Željko Lelek* (First Instance Verdict, Court of BiH Case No X-KRŽ-06/202 (23 May 2008); *Stupar* (First Instance Verdict), *supra* note 132.

5.5 THE IMPACT OF THE ICTY ON THE CAPACITY OF COURTS IN BIH²⁴⁵

5.5.1 INTRODUCTION

Initially, the ICTY lacked any interest in building the judicial capacity of the states of former Yugoslavia. Fostering the ability of domestic authorities to address international crimes was never considered one of the Tribunal's goals,²⁴⁶ and no resources were allocated towards this goal. The ICTY had a specific task to perform, and by doing it well it was making a substantive contribution.²⁴⁷ There was only one overwhelming, all-encompassing issue that was perceived as crucial issue for the existence of the ICTY: arrests.²⁴⁸ Another factor was the fact that for a long period the ICTY had significant difficulties even accessing the area of the former Yugoslavia, let alone contributing to develop domestic capacity to process war crimes cases.²⁴⁹ The ICTY has nonetheless cooperated with other international organizations such as OSCE and ODIHR, in providing expertise and support.²⁵⁰

The absence of a conscious effort to empower domestic institutions does not mean that the ICTY had no effect at all on the latter, although in view of the circumstances, such effect was not necessarily positive. For example, a 2000 Survey in BiH revealed that domestic professionals considered the RoR an indication that the international community saw them as 'intellectual inferiors who did not understand the relevant law'. Noting that ICTY officials failed to keep them informed of the status of the investigations even in response to direct enquires, these professionals viewed the ICTY as unresponsive and detrimental to the ability of BiH courts to conduct national war

²⁴⁵ This section draws extensively on Alejandro Chehtman, 'The Impact of the ICTY and the Court of BiH on Local Capacities to Process War Crimes Cases', DOMAC (forthcoming, available with the author).

²⁴⁶ David Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings' (2002) 26 *Fletcher Forum of World Affairs* 7, 12-16.

²⁴⁷ Judge Patrick L. Robinson, 'The Legacy of the International Tribunals: Exchanging experiences and transferring the knowledge to the national jurisdictions', paper presented in the Regional Conference on Promoting the Legacy of International Tribunals (Sarajevo 15-16 June 2009).

²⁴⁸ Arbour, *supra* note 101, 397; del Ponte with Sudetic, *supra* note 1, 1.

²⁴⁹ It was only in 1996, a few years after the ICTY was created that a team of the OTP was able to start on-site investigations. Concerns regarding security and the political situation have been a sensitive issue for several years after that. DOMAC interview A-37.

²⁵⁰ DOMAC interviews A-30, A-22 and A-39.

crimes trials.²⁵¹ The following sections examine a number of measures which shaped the impact of the ICTY on domestic capacities in BiH.

5.5.2 JUDICIAL REFORM

In the early 2000s the OHR initiated a comprehensive reform of the Bosnian legal system. This reform comprised both a restructuring of the judiciary in an attempt to secure its independence and normative changes.

In March 2001 the High Representative established the Independent Judicial Commission (IJC), to guide and co-ordinate judicial reform activities within BiH and to advise and assist judicial, prosecutorial and related institutions.²⁵² In the course of the reform, the courts and prosecutors' offices were restructured and sized down. In addition, the reappointment process of all judges and prosecutors commenced, aiming to promote the independence and competence of the judicial and prosecutorial services which had been compromised during the war by political interference and appointments based on ethnicity and patronage.²⁵³ The tenure of all incumbent judges and prosecutors was brought to an end and all posts were advertised. Both incumbents and external applicants were eligible to apply.²⁵⁴ At the same time, the salaries of serving judges were raised. Today the selection of judges is conducted by the High Judicial and Prosecutorial Councils (HJPCs), composed of national and international appointees. The HJPCs aims to establish an appropriate balance of judges of different ethnicities.

5.5.3 THE COMPLETION STRATEGY

Once the completion strategy was underway, the ICTY OTP concentrated its prosecutorial strategy on individuals suspected of being most responsible for crimes within the jurisdiction of the Tribunal,²⁵⁵ and began to seek alternative fora in which to try low- and mid-level perpetrators (some of whom were already awaiting trial). Domestic

²⁵¹ Human Rights Center, International Human Rights Law Clinic (University of California, Berkeley and Sarajevo), 'Justice, Accountability and Social Reconstruction', 36 and 41.

²⁵² Final Report of the Independent Judicial Commission (January 2001-March 2004) (1 November 2004), 13-14.

²⁵³ Eg Speech by the High Representative, Wolfgang Petritsch to the United Nations Security Council (9/5/2000) www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=3236: 'I dismissed 22 public officials from across the country, who had a proven track record of obstructionism, particularly of Annex 7 of Dayton, the Annex governing refugee return'.

²⁵⁴ OSCE, *supra* note 57, 9.

²⁵⁵ SC Resolution 1534(2004) paragraph 5; DOMAC interview A-36.

courts in the region of former Yugoslavia were the obvious candidates. The ICTY thus developed a strong interest in the capacity of domestic legal systems to uphold relevant criminal standards, and engaged actively in enhancing the capacity of BiH courts, and in particular, of the State Court of BiH.²⁵⁶

For its part, the BiH government has pushed strongly to have cases referred to it, in part because it recognized the legitimating effect of the referral. In the words of the State Court President: 'These cases are within our jurisdiction. It is not so much that we want them, but that we have a right to try them. And when the ICTY hands them back to us it validates our work in building this court and expands our credibility'.²⁵⁷ In submissions to the ICTY, BiH has been quick to assert how its new and reformed judicial institutions meet the targets established by the Tribunal and endorsed by the Security Council. The ICTY's 'carrot' of a case transfer allowed it to push domestic institutions to meet the benchmarks it had set for the effectiveness of a domestic judiciary.

Employment of Local Professionals in the ICTY

As part of the ICTY's initial attitude of detachment from the region, it was felt inappropriate to recruit professionals from the former Yugoslavia, particularly as judges, on the ground that this would make it difficult to maintain sufficient distance and neutrality.²⁵⁸ Security concerns were also a powerful disincentive for hiring nationals of the region.²⁵⁹

This general policy was revised, not as a result of a conscious decision to develop domestic capacity but because of the need to speed up the processes pending before the ICTY. People with knowledge of the conflict, the background, and the relevant languages were considered crucial by the ICTY Prosecutor.²⁶⁰ Later on, further steps were triggered by the notion that most of the work would have to be done in the region, and by the fact that the few people from the region who went to work at the ICTY proved to be good professionals.²⁶¹ However, this change in policy did not make a considerable

²⁵⁶ DOMAC interviews A-12 and A-36; DOMAC interview A-37.

²⁵⁷ Burke-White, *supra* note 87, 324.

²⁵⁸ DOMAC interview A-32 and A-33.

²⁵⁹ DOMAC interviews A-28, A-32, A-33, A-36, among others.

²⁶⁰ *Madame Prosecutor, Confrontations with Humanity's Worst Criminals and the Culture of Impunity: a Memoir* (Other Press, New York 2009), 127.

²⁶¹ DOMAC interview A-32 and A-33.

contribution to the actual transfer of knowledge and skills to BiH, at least in the short term, because people from the region who started working at the ICTY were unlikely to return to the region - at least not immediately.²⁶²

Establishment of the State Court of BiH

The most fundamental development in BiH with respect to domestic proceedings related to international crimes and consequently to domestic capacity enhancement, was the establishment of the WCS within the State Court of BiH. This was the outcome of a convergence of two processes, one advanced by the ICTY, and the other advanced by the OHR.

In May 2000, ICTY President Jorda reported to the Security Council and the General Assembly that given the increase in the Tribunal's case load, if changes were not made, the tribunal was likely to require a considerable period of time to complete the trials of all those who were being, or were likely to be, prosecuted before it.²⁶³ President Jorda suggested several measures that ought to be considered in order to increase the capacity of the tribunal to process its cases and complete its mission within a reasonably short period. One such measure was the transfer of cases other than those of high-ranking perpetrators to states of the former Yugoslavia to be prosecuted under domestic laws. The report added that this measure would not only lighten the Tribunal's workload, thereby allowing it to complete its mission at an even earlier juncture, but would also make war crime trials more transparent to the local population and so make a more effective contribution to reconciling the peoples of the region. However, Judge Jorda's conclusion was that this solution could not be implemented rapidly and its anticipated gains would be marginal. Accordingly he reported that the ICTY judges did not advocate this measure, at least not at that time.²⁶⁴ In November 2000 the Security Council recalled 'that the International Tribunals and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law', and noted that under the ICTY RPE a trial chamber may decide to suspend an indictment to allow

²⁶² This is also true of locals working in victims and witness support (DOMAC interview A-28).

²⁶³ Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, contained in Identical Letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc A/55/382-S/2000/865 Annex I paragraph 42.

²⁶⁴ Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, contained in Identical Letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc No A/55/382-S/2000/865 Annex I, paragraph 47-56.

for a national court to deal with a particular case. However, it still did not request the ICTY to refer cases on domestic courts, but merely requested the Secretary-General to provide a report containing an assessment of how and when the temporal jurisdiction of the ICTY could be ended.²⁶⁵

When in November 2001 President Jorda presented the Council with a further report outlining measures considered necessary for the ICTY to complete all trial activities by 2008, the attitude towards transfer of cases involving low- and mid-level accused to domestic courts had already changed. President Jorda noted that the political upheavals witnessed in the former Yugoslavia had gradually changed the perception of the ICTY held by the states of the region, and queried whether these upheavals should not also lead the ICTY to change its view as to the ability of these states to try some of the war criminals in their territory. Judge Jorda nonetheless emphasized that to make such relocation possible, the judicial systems of the states of the former Yugoslavia would have to be reconstructed on democratic foundations, so that they can accomplish their work with total independence and impartiality and with due regard for the principles of international humanitarian law and the protection of human rights. This would entail international involvement and support in training, e.g. by sending judges or international observers to participate in or be present at the trials of war criminals, and expanding existing training programmes for domestic judges.²⁶⁶

In the same meeting, ICTY Prosecutor del Ponte introduced the notion of referral of cases to domestic courts in the former Yugoslavia under Rule 11bis, although also she doubted the adequacy of domestic judicial processes existing at the time. She suggested that as the majority of the cases were from BiH, a special court should be designed in BiH that would have an international component, or an existing state court should be developed to perform this special task. That court would deal with cases referred to it by the ICTY either during or after the completion of the ICTY mandate, and it might also deal with other sensitive war crimes cases, which at the time were being submitted to the OTP for review under the RoR.²⁶⁷

²⁶⁵ UNSC Resolution 1329(2000) preambular paragraph 8, paragraph 6.

²⁶⁶ S/PV.4429 (27 Nov 2001), 4-5.

²⁶⁷ S/PV.4429 (27 Nov 2001),12.

BiH's reaction was lukewarm. It 'welcome[d] the ICTY initiative to process some of the cases by the domestic judiciary structures under the auspices of the ICTY', but added that 'the prosecution and trial of the indicted war criminals in the region should continue to be a United Nations responsibility'.²⁶⁸ This position reflected a common refrain in domestic politics, that the ICTY alone was an adequate solution, although some elements of domestic society did push for greater activity by domestic courts in the late 1990s.²⁶⁹

Another initiative advanced at about the same time by the OHR, was driven by the OHR's interest in strengthening BiH State-level institutions, including a fully independent judiciary.²⁷⁰ This included establishment of a State court to deal with the crimes that dominated the international agenda at the time, namely organized crime and terrorism. However, the ICTY intervened and called for the inclusion of international crimes in the jurisdiction of the federal institution, arguing that the perpetrators of organized crimes are largely the same persons that had earlier been engaged in the crimes committed during the armed conflict. The OHR endorsed the proposal. The authorization of the emerging State Court to address international crimes was crucial since at that stage, international funding was channeled towards the fight against organized crime and terrorism, but no longer towards trying international crimes.²⁷¹

In March and April 2002, the ICTY President, Prosecutor and Registrar met with the members of the OHR responsible for reforming the judicial system, and together they formulated a plan of action. Amongst the solutions they recommended were the establishment of a chamber at the envisaged State Court of BiH with specific jurisdiction to try war crimes suspects. They also proposed the appointment of international judges or observers to the State Court, and the provision of training in international humanitarian law to the domestic judiciary and court personnel.²⁷²

²⁶⁸ S/PV.4429 (27 Nov 2001), 18.

²⁶⁹ Burke-White, *supra* note 87, 316.

²⁷⁰ Speech by the High Representative, Wolfgang Petritsch to the United Nations Security Council (9/5/2000) www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=3236.

²⁷¹ DOMAC interview A-37.

²⁷² Michael Bohlander, *supra* note 150, 66.

By late 2002, when President Jorda presented the Council with a further report outlining measures considered necessary in order for the ICTY to complete all trial activities by 2008, the transfer of cases involving mid- and low-level accused to national courts had become an essential measure in the ICTY's completion strategy.²⁷³ The most important condition that national courts were required to satisfy was the ability fully to 'conform to internationally recognized standards of human rights and due process in the trials of referred persons'. The judicial system of BiH was considered at the time to 'display shortcomings too great for it to constitute a sufficiently solid judicial foundation to try cases referred by the Tribunal'. The report concentrated on the steps required before cases could be transferred to the courts of BiH, including the creation of a special war crimes chamber in BiH (WCS).

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This concept of the WCS was endorsed by Security Council Resolution 1503(2003) of 28 August 2003, when the Council for the first time initiated action regarding the completion strategy. Although not in the operative part of the resolution, the Council noted²⁷⁴ that

an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of BiH (the 'War Crimes Chamber') and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber

The Security Council called on the donor community to support the work of the High Representative to BiH in creating the WCS.²⁷⁵ On 30 October 2003, following a donor's conference in the Hague, it was announced that 15.6 million Euros had been pledged towards the establishment of the WCS.

²⁷³ Sarah Williams, 'ICTY Referrals to National Jurisdictions: a Fair Trial or a Fair Price?' (2006) 17 Criminal Law Forum 177, 182.

²⁷⁴ UNSC Resolution 1503(2003) preambular paragraph 11.

²⁷⁵ UNSC Resolution 1503(2003) paragraph 5.

On 26 March 2004 the establishment of the State Court was already an operative instruction of the Security Council, which encouraged all parties to continue efforts to establish the chamber expeditiously.²⁷⁶

The preparation for the establishment of the WCS was undertaken as a joint exercise, led by the OHR, with the active involvement of the ICTY, the Council of Europe and the OSCE. By 2004, ICTY President Meron reported to the Security Council that the transfer of cases to national jurisdictions was 'critical to the successful achievement of the Completion Strategy'.²⁷⁷ ICTY Prosecutor del Ponte noted the importance of ensuring that legal systems in the states of the former Yugoslavia were adequate, that proceedings would be completed before their courts in a professional way, and that international monitoring could be conducted. She stressed to the Security Council the potential difficulties with referral of cases to domestic courts in their current condition, and urged the Council and the international community to develop the capacity of domestic justice systems, and measures for cooperation and assistance between such systems.²⁷⁸

Domestic approval of the WCS was driven by the belief that, as a result of the various Security Council Resolutions endorsing the completion strategy, BiH had an obligation to accept those accused that would be transferred from the ICTY in the future.²⁷⁹ The creation of the WCS at the Court of BiH was therefore perceived as necessary to fulfill this obligation, as at the time it was clear that the entities were not in a position to provide the accused with a fair trial.²⁸⁰ State-level officials also welcomed domestic prosecutions as an alternative to the ICTY, frustration with which was growing. Moreover, through the creation of a special war crimes chamber, the State government

²⁷⁶ UNSC Resolution 1534(2004) paragraph 9.

²⁷⁷ Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc S/2004/420, Enclosure I paragraph 7.

²⁷⁸ Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc S/2004/420, Enclosure II paragraphs 27, 33.

²⁷⁹ Fidelma Donlon, 'Rule of Law: from the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina' in Dina Francesca Haynes (ed), *Deconstructing the Reconstruction: Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina* (2008) 257, 280.

²⁸⁰ Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc S/2004/420, Enclosure II paragraph 34.

could prove to both national and international audiences that the State institutions in BiH were capable of even the most demanding criminal prosecutions and that BiH had effectively recovered from the aftermath of conflict. Simultaneously, State-level officials could wrest power away from Entity-level institutions under stamp of approval by the ICTY. The result was a new and powerful domestic interest block in BiH pushing for general enhancement of domestic judicial institutions and for a State-level war crimes court in particular.²⁸¹ FBiH representatives were generally supportive of a special court to deal with war-related crimes. Most agreed that prosecuting in BiH would raise confidence in domestic institutions and raise awareness of the overall issues involved.²⁸² In contrast, the RS was resistant to endowing the State Court with jurisdiction over war-related crimes, as there was strong belief that the State Court would be biased against Serbs.²⁸³ The eventual housing of the State Court in a former camp where crimes had been committed against Bosnian Serbs was a specific source of strong resentment.²⁸⁴ Perhaps a more cynical reason for Entity support for a special State-level court was their interest in preventing ethnically-charged cases from landing on their own doorsteps.²⁸⁵

The new alignment of domestic interests in favor of a state-level war crimes chamber made possible the passage of the necessary legislation in the BiH legislature. Unlike in 2000, when he used his plenary powers to impose the legislation establishing the State Court, in 2004 the High Representative successfully sent legislation setting up the WCS directly to the BiH parliament, thereby enhancing the legitimacy of the new war crimes chamber. Six months of debate, negotiation and amendment followed, with significant pressure from the OHR and ICTY officials. The final package of legislation, including laws related to the structure of the war crimes chamber, the operation of the

²⁸¹ Burke-White, *supra* note 87, 332.

²⁸² Michael Bohlander, *supra* note 150, 69.

²⁸³ EuroBlic, Saturday, cover 'They do not trust to the Court in Sarajevo' and pg. RS2 'They do not trust to judges' by Marija Jandric in OHR BiH Weekend Round-up (31 July-1 August 2004), www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/default.asp?content_id=33044. Eg Blic, 7 (headline 'Judge Miso is a nationalist'), quoting Marko Mikerevic of Dobo, who was an assistant judge with the war-time military court at the Viktor Bubanj barracks, as saying that judge Salem Miso of the newly-created BiH Court is a nationalist responsible for crimes committed at the Bubanj prisoner camp from 1992 to 1996, in which period 5,000 Sarajevo Serbs were held there. 'During preparations for the trial of Serb soldier Goran Mrkalj from Blazuj I personally heard Miso say that Goran will be sentenced to death,' Mikerevic said. OHR BiH Media Round-up (30 January 2003), www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/default.asp?content_id=29143.

²⁸⁴ Glas Srpski, 2 (headline 'Open a court in Jasenovac'), OHR BiH Media Round-up, (30 January 2003), www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/default.asp?content_id=29143.

²⁸⁵ Burke-White, *supra* note 87, 330.

prosecutor's office, and the transfer of cases from the ICTY, was passed in the BiH parliament in November and December 2004.

The procedures and policy of the State Court avoid many of the shortcomings of the ICTY, and enhance the former's legitimacy in the eyes of domestic audiences. These include strictly-imposed deadlines for trial length; geographical proximity; the absence of a language barrier; and a willingness and intention to investigate and prosecute crimes committed against Serbs with the same dedication as all other crimes. The State Court began communicating with the public as soon as it was established. In its first year it conducted a comprehensive outreach effort, adopting the models of communication used by the ICTY, while also developing original outreach initiatives. As the number of trials increased and with it the flow of witnesses, the outreach effort was somewhat reduced.²⁸⁶

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Composition of the State Court of BiH and of the BiH Prosecution

An important element of the transfer of knowledge from the ICTY to BiH has been the employment of former ICTY personnel at the domestic level, mainly at the State level. The involvement of the first Registrar at the Court of BiH at the ICTY is often mentioned as highly influential,²⁸⁷ as was the extensive advice offered by other administrative ICTY officers in connection with the setting up the Court of BiH. This overall policy towards the State Court of BiH, however, appears to have been motivated at least partly by the need to ensure that the domestic processes would satisfy ICTY's requirements in order to enable the transfer of cases under Rule 11bis, rather than out of direct concern for the development and future of domestic institutions.²⁸⁸

²⁸⁶ Arbour, *supra* note 101, 7.

²⁸⁷ DOMAC interviews A-15 and A-25.

²⁸⁸ DOMAC interview A-38.

The international presence within the State Court of BiH and the BiH prosecution includes judges and prosecutors, defense counsel, experts in witness protection and support, as well as other officials engaged in providing substantive and administrative support. The goal has been to build on the existing expertise of international professionals within the justice sector in order to ensure a sustainable domestic capacity to address war crimes cases after international involvement has ceased.²⁸⁹ The need for international participation was even acknowledged by the RS.²⁹⁰ One of the positive attributes of involving international judges and prosecutors in the work of the domestic judiciary has been its contribution to deflecting the suspicion and mistrust of the domestic public towards the judiciary, which was seen as unprofessional, corrupt, and biased against members of the 'other' side. Foreign prosecutors and judges may also be more familiar with international crimes and jurisprudence and with applying international standards of due process.

At the same time, it was recognized from the start that the State Court had to be run and seen to function as a BiH institution, with domestic actors taking responsibility for its success early on. The appointment of domestic practitioners to the positions of the president,²⁹¹ chief prosecutor, leaders of prosecution teams and presiding judges in chambers dealing with war crimes, gave the institution a BiH face and identity.²⁹²

Structured interaction between international and domestic judges have taken the form of regular debates over both substantive and procedural issues,²⁹³ drafting of guidelines by the international judges,²⁹⁴ and special training sessions.²⁹⁵ Several domestic judges consider that the influence of their international counterparts has been

²⁸⁹ Declaration by the PIC Steering Board, (12 June 2003), www.ohr.int/pic/default.asp?content_id=30074.

²⁹⁰ Michael Bohlander, *supra* note 150, 68.

²⁹¹ Law on the Court of BiH Article 65.

²⁹² Arbour, *supra* note 101, 6-7.

²⁹³ DOMAC interview A-11.

²⁹⁴ DOMAC interview A-3. The institutionalization of some sort of guidelines seems crucially urgent given both the extremely high rate of verdicts overturned on appeal (62% for war crimes cases) and the controversial scope of the review at second instance (see Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009, submitted on behalf of ICLS by David Tolbert and Aleksandar Kotic (15 December 2008), 29-30 www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf.

²⁹⁵ DOMAC interview A-15. The Judicial College now also includes legal officers.

generally positive.²⁹⁶ These latter initiatives, however, were the product of the commitment of particular judges, and have proven difficult to institutionalize.²⁹⁷

Several elements nonetheless undermine the transfer of knowledge and skills process between international and domestic court officials. One is the selection process of international judges, which has been heavily criticized for resulting in the appointment of several judges lacking relevant experience, technical knowledge²⁹⁸ or commitment. The situation has allegedly improved with the transfer of the selection process from the judges' own countries to the HJPC.²⁹⁹ Another obstacle has been the fact that experienced domestic judges have not always been willing to be 'chaperoned' by international colleagues.³⁰⁰ There are also institutional obstacles to peer influence. Most importantly, several international judges stayed at the Court for a period of only one year, and did not have enough time to even begin to familiarize themselves with the complex nature of cases and the cultural and political background within which they took place, acquire command of the language or learn BiH procedural rules.³⁰¹ A complex issue is the policy of not having international judges preside over the panels. Some suggest that a rotation in panel presidency could have had a positive impact on the effectiveness and celerity of the Court, in particular if international judges were to introduce efficient case management techniques.³⁰² A more fruitful aspect of the informal transfer of knowledge is the working relationships established between judges and their legal officers. The younger legal professionals are also usually more receptive to mentoring and are often better able to adapt to the new legal framework.

The arrangement of international and domestic prosecutors on each team is viewed as a good method, in principle, for domestic legal professionals to increase their knowledge about the applicability of international instruments on human rights, and for

²⁹⁶ Eg DOMAC interview A-3.

²⁹⁷ The Judicial College is gradually moving from an internationally-run enterprise to a fully-nationally organized affair. DOMAC interview A-25.

²⁹⁸ DOMAC interviews A-15, A-3 and A-25. To this, some local would add 'their unfamiliarity with the domestic system, with the historical context, with the constitutional structure of BiH, and with its political context' (DOMAC interview A-11).

²⁹⁹ Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009, submitted on behalf of ICLS by David Tolbert and Aleksandar Kontic (15 December 2008), 31, www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf. They claim that this improvement is also true with respect to prosecutors (id, 37).

³⁰⁰ DOMAC interviews A-15, A-36.

³⁰¹ DOMAC interview A-21.

³⁰² DOMAC interview A-15.

ensuring compliance with international standards. The contribution of international staff to the capacity of domestic legal professionals is especially important in light of the breadth and complexity of war crimes cases, coupled with the recent reform of the BiH CPC that has made the criminal justice system in BiH more adversarial.³⁰³ It was expected that by ‘rubbing shoulders’ with international prosecutors, domestic prosecutors would learn how to prosecute war crimes cases as if by osmosis.³⁰⁴ However, there was a reported lack of trust and goodwill towards international prosecutors on the part of the first National BiH Chief Prosecutor.³⁰⁵ Combined with a post-communist institutional culture of fear of mistakes and therefore tendency not to share information,³⁰⁶ severe time constraints and heavy workload, this obviously affected peer relationships and the possibility of knowledge- and information-sharing, which depended to a significant extent on the willingness of the individuals involved.

Although it was anticipated that by 2009 there would no longer be any international judges within the WCS,³⁰⁷ in December 2009 the OHR extended that mandate of the international judicial and prosecutorial staff by three years.³⁰⁸ This extension had been strongly objected to by RS.³⁰⁹ The terms of the extension prohibit international staff in the prosecutor’s office from heading any of the sections.³¹⁰ At the time of writing, there is only one international serving prosecutor.

Transfer of Information

The transfer of cases from the ICTY to domestic courts entailed an enormous transfer of information and evidence to the domestic courts. It also required the ICTY to provide mechanisms to liaise with domestic authorities to send further relevant information.

³⁰³ Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina* (February 2006) Volume 18 Issue 1(D), 10.

³⁰⁴ DOMAC interviews A-18 and A-23.

³⁰⁵ DOMAC interview A-23.

³⁰⁶ DOMAC interview A-18.

³⁰⁷ Human Rights Watch, *‘Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina’* (February 2006) Volume 18 Issue 1(D), 7.

³⁰⁸ Dzenana Karabegovic, ‘On Dayton Anniversary, Spirit of Accord Eludes Bosnia’, *Radio Free Europe/Radio Liberty* (14 December 2009) www.rferl.org/content/On_Dayton_Anniversary_Spirit_Of_Accord_Eludes_Bosnia/1903958.html.

³⁰⁹ *Ibid.*

³¹⁰ Erna Mačkić, ‘Milorad Barasin: The Most Difficult and Complicated Job’, *BIRN Justice Report* (28 December 2009) www.bim.ba/en/199/10/24695/.

Accordingly, for instance, ICTY RPE Rule 75(H) was added, which allowed domestic courts, prosecutors and defence counsel to obtain confidential ICTY material.³¹¹

This process further contributed to the establishment of certain organic links between the ICTY and the domestic courts, particularly the Court of BiH. Domestic prosecutors and judges began travelling to The Hague with questions about concrete files or problems.³¹² These ranged from basic certification issues of evidence and organizing video links with protected witnesses, to more complex issues.³¹³ The two tribunals developed a 'common language',³¹⁴ which contributed to a greater sense of horizontal collaboration and partnership in a common task. This development is perceived by the ICTY OTP as 'healthier', since it is the authorities in the region that will need to finalize the cases.³¹⁵

In December 2008, the ICTY launched its new content-enhanced website, which enables domestic legal practitioners in BiH to access all public court records from Tribunal since 1994.³¹⁶ The ICTY is currently considering producing transcripts from the Tribunal's proceedings in BSC, which would enable direct access to domestic legal professionals who do not read English.³¹⁷

Until 2004 the admissibility in courts in BiH of evidence collected in ICTY proceedings was unclear. In a survey carried out by the OSCE, domestic prosecutors gave a variety of responses to the question whether ICTY evidence is admissible before

³¹¹ DOMAC interview A-41; Fausto Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY', (2008) 6 *Journal of International Criminal Law* 655, 662; Serge Brammertz, 'The interaction between international and national criminal jurisdictions: developments at the ICTY' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (PRIO, Oslo 2009) 173, 174-175.

³¹² DOMAC interviews A-32 and A-33. This meant signing a Memorandum of Understanding between the Office of the Prosecutor of the ICTY and the Special Department for War Crimes of the Prosecutor's Office of BiH, BiH Prosecutor's Office Briefing Book (Sarajevo 2009).

³¹³ DOMAC interview A-34.

³¹⁴ This collaboration meant also, for instance, that the local courts would be able to voice their needs in a useful way. A judge from the State Court of BiH, for instance, suggested that the Registry create a web page with instructions on how to file a request for assistance, something which was taken on board at the Hague. DOMAC interview A-34.

³¹⁵ DOMAC interviews A-42 and A-31.

³¹⁶ Report of the International Tribunal for the Former Yugoslavia (31 July 2009) UN Doc A/64/205-S/2009/394, paragraph 82. Earlier the Registry had already given BiH prosecutors and judges remote access to the internal judicial database (DOMAC interview A-34).

³¹⁷ Report of the International Tribunal for the Former Yugoslavia (31 July 2009) UN Doc A/64/205-S/2009/394, paragraphs 10, 84. This is, of course, not simply a linguistic issue. Indeed, the audio recording of many testimonies was originally in BCS. However, the material contained information given confidentially, and had first to be redacted, Tarik Abdulhak, 'Building Sustainable Capacities - From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina', (2009) 9 *International Criminal Law Review* 333, 351. Interviewees at the ICTY suggested that keeping transcripts in the local language is a hugely important lesson that any future tribunal should learn (particularly the ICC). Until June 2009 funding had not been secured for this project (DOMAC interview A-34).

BiH courts, ranging from a categorically-negative answer through a variety of different conditions such as compliance with the relevant CPC and a distinction between witness testimony and written material, to a categorical yes.³¹⁸

The 2004 Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts in BiH permits the use of evidence collected in accordance with the Statute and the ICTY RPE in proceedings before the courts in BiH. The courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY, or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.³¹⁹ It may accept transcripts of witness testimony from the ICTY in accordance with the rules of procedure and the right of the defendant to cross examination,³²⁰ transcripts of testimony made at the investigation phase,³²¹ and documents and forensic evidence collected by the ICTY.³²² However, the courts may not base a conviction solely, or to a decisive extent, on the prior statements of witnesses who did not give oral evidence at trial.³²³

The significance of permitting use of evidence established by the ICTY is self-evident: courts can avoid time-consuming and costly examination of hundreds of witnesses who have already testified in judicial proceedings about the same events; would avoid the evidentiary obstacles which 'witness fatigue' presents;³²⁴ and benefit from the investigative expertise and resources of the ICTY.³²⁵

The WCS has developed criteria for using ICTY evidence and proven facts. It did so by borrowing from ICTY RPE 94(b),³²⁶ which allows the Tribunal to take judicial notice, at the request of a party or *proprio motu* and after hearing the parties, of adjudicated

³¹⁸ OSCE, *supra* note 57, 31.

³¹⁹ Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts in BiH Article 4.

³²⁰ *Ibid*, Article 5.

³²¹ *Ibid*, Article 7.

³²² *Ibid*, Article 8.

³²³ *Ibid*, Article 3(2).

³²⁴ Human Rights Watch, *supra* note 213, 41-42.

³²⁵ Human Rights Watch, Balkans Justice Bulletin: The Trial of Dominik Ilijasevic, January 2004. Available at <http://hrw.org/backgrounder/eca/balkans0104.htm>.

³²⁶ *Prosecutor v Vaso Todorović* (First Instance Verdict) Court of BiH Case No X-KRŽ-06/180-1 (22 October 2008), 6; *Mandić* (First Instance Verdict), *supra* note 167, [59].

facts or documentary evidence from other proceedings of the Tribunal. According to these criteria, the fact must be distinct, concrete and identifiable; be relevant to the proceedings; form part of a final judgment; not be based on an agreement between the parties; and not be subject of reasonable dispute between the parties. Other criteria adopted by the WCS, although practice differs in light of controversy on interpretation, are that the facts must not be related to the acts, conduct or mental state of the defendants; and must not contain legal characterizations.³²⁷

A perusal of judgments shows extensive use by the WCS of evidence from the ICTY. Facts considered proven by the ICTY, as well as statements given to ICTY investigators, entered the trial record in many cases. A prominent example is the *Stanković* case (referred to the WCS from the ICTY), where the Court accepted the facts agreed upon in previous ICTY jurisprudence in order to establish the requisite elements of a widespread and systematic attack against a civilian population.³²⁸ In *Stupar*, the WCS relied directly upon the ICTY *Krstić* and *Blagojević* trial judgments that the Serb forces at Srebrenica committed genocidal acts with the requisite intent to destroy the protected group.³²⁹ In *Mitrović*, the WCS relied upon the findings of the ICJ and the ICTY in determining that genocide occurred in the enclave of Srebrenica during the time specified within the indictment.³³⁰ In *Mandić*, the WCS accepted as established the existence of armed conflict in BiH after 6 April 1992.³³¹ In *Trbić* (another case referred to the WCS from the ICTY), the WCS answered in the affirmative the question whether genocide occurred in BiH, citing the ICTY, the ICJ and its own earlier decisions.³³² While its reliance on facts established by the ICTY was based on the 2004 Law, it made no mention of the legal basis for accepting the findings of the ICJ. The use of the 2004 Law is not without its own challenges. For example, the material arrives in English, and its

³²⁷ *Prosecutor v Vaso Todorović* (First Instance Verdict) Court of BiH Case No X-KRŽ-06/180-1 (22 October 2008), 6; *Mandić* (Second Instance Verdict), *supra* note 186, [40] ft 2.

³²⁸ *Prosecutor v Vuković and Another* (First Instance Verdict) Court of BiH Case No KRŽ-07/405 (4 February 2008), 9-10, based on the ICTY's *Kunarac* and *Kronjelic*.

³²⁹ *Stupar* (First Instance Verdict), *supra* note 132, 103.

³³⁰ *Prosecutor v Petar Mitrović* (First Instance Verdict) Court of BiH Case No X-KR-05/24-1 (29 July 2008), 94; *Trbić* (First Instance Verdict), *supra* note 157, 84-86.

³³¹ *Mandić* (First Instance Verdict), *supra* note 167, based on *Galić*.

³³² *Trbić* (First Instance Verdict), *supra* note 157, [223]-[229].

abundance is sometimes a hindrance to domestic prosecutors' locating the evidence they need.³³³

Where the Entities are concerned, there are other obstacles to reliance on ICTY evidence. First, Entity prosecutors working under existing structures have found it difficult to shift from dealing with ordinary crimes of limited magnitude to processing a heavy load of cases of extreme severity, concerning their immediate community.³³⁴ But it is the interaction with the ICTY that is most problematic. In some instances hostility toward the ICTY has prevented prosecutors from seeking the services of the liaison offices. Some even question whether ICTY evidence would be admissible under domestic law.³³⁵ The Entity authorities know that in light of the completion strategy, unless they request information now, they might not be able to obtain it.³³⁶ Nonetheless, most prosecutors' offices have no ability to review ICTY files and evidence that relate to incidents in their jurisdiction. Currently, requests from Entity prosecutors to the ICTY are made through the BiH Prosecutor's Office. What is lacking is direct access to evidence as well as the ability to search such data for relevant information. Moreover, most prosecutors are unaware of the type and sources of evidence that might be available at the ICTY (for example, military and police data seized by EUFOR), and thus conduct their own investigation without seeking such material. This results in a waste of scarce resources as matters get reinvestigated. One prosecutor recounted an incident of a lengthy investigation being concluded only to find that the ICTY had determined years earlier that the perpetrator was deceased.³³⁷ In contrast to the interaction between the ICTY OTP and the BiH prosecution, which takes place on a daily basis,³³⁸ the ICTY OTP receives no more than 5-6 requests a year for assistance from Entity courts, mostly for evidence.

³³³ Diane Orentlicher, 'that Someone Guilty be Punished: The Impact of the ICTY in Bosnia' (Open Society Justice Initiative, International Center for Transitional Justice, New York 2010), 121.

³³⁴ DOMAC interview A-18.

³³⁵ Human Rights Watch, *supra* note 213, 29-30.

³³⁶ DOMAC interview A-43.

³³⁷ UNDP, 'Solving War Crime Cases in Bosnia and Herzegovina - Report on the Capacities of Courts and Prosecutor's Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases' (2008), 16.

³³⁸ DOMAC interview A-43.

5.5.5 TRAINING

Training has arguably been the most popular mechanism of formal capacity development in BiH.³³⁹ Yet the overall analysis indicates that the general perception is that these initiatives have not been entirely successful.³⁴⁰

Training sessions have been organized and provided by a large number of organizations, most prominently the International Committee of the Red Cross, the UN Development Programme (UNDP), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the American Bar Association and the Council of Europe. The ICTY and the Court of BiH have also been involved in providing this kind of training sessions, as were some embassies. This prolific activity provides for a variety of approaches and illustrates well the commitment of the international community and the relevant courts to have an impact on the capacity of legal actors in BiH. At the same time, the multitude of international actors has hindered coordination, coherence and planning,³⁴¹ and has undermined domestic ownership over the process and the sustainability of existing efforts.

An overwhelming majority of the individuals who were involved in formal trainings as either participants or trainers felt dissatisfied with the outcome of training efforts.³⁴² The number of training sessions organized may in fact have been counterproductive. Observers note some kind of training and conference fatigue among legal professionals in BiH.³⁴³ However there are still several difficulties. Overall, training is marked by lack of coherence and appropriate planning, and a crucial under-appreciation of the importance of self-education.³⁴⁴ These may well explain why the impact of these activities bears no appropriate relationship to the amount of resources allocated to them. Admittedly,

³³⁹ OSCE, ICTY, and UNICRI, 'Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Interim Report)', (Warsaw, The Hague, Torino: May 2009), 43, described as 'the region's most common knowledge transfer method'. Several of our interviewees in fact suggested that far too many trainings were conducted, keeping the relevant judges or prosecutors for too long away from their jobs (e.g., anonymous interviewee). On the persisting reliance on trainings for these purposes see, eg, DeNicola, *supra* note 199.

³⁴⁰ OECD, 'OECD DAC Handbook on Security System Reform: Supporting Security and Justice', (2007), 18. This is not a problem exclusively of BiH.

³⁴¹ OSCE, ICTY, and UNICRI, 'Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Interim Report)', (Warsaw 2009), 40.

³⁴² OKO's and the ICRC trainings have been generally praised.

³⁴³ DOMAC interview A-32 and A-33.

³⁴⁴ DOMAC interview A-20 and OSCE, ICTY, and UNICRI, 'Supporting the Transition Process,' 40. And yet, there are very little translations of materials such as books, journals, and even decisions of the relevant tribunals into local languages. Our interviewee wondered whether translating some of the key works in the area would not be a more sensible way of spending the available funds.

considerable improvements have been made along the years (particularly in terms of methodology).

Among the shortcomings of the training activities in terms of content, interviewees cite failure to address the topics which generated domestic interests;³⁴⁵ excessive overlap between training activities, uniform tailoring of training to individuals with different kind of knowledge and experience and insufficient emphasis on development of management skills;³⁴⁶ and disregard of the specificities of the legal regime;³⁴⁷ In addition, insufficient attention has been given to the structural aspects of training: cultural issues, such as the reluctance of judges to accept training of professionals who are not judges, have not been taken into account;³⁴⁸ the trainers themselves gave not been trained in knowledge transfer or instructed in cultural, professional issues that might impinge on the process.³⁴⁹

Most of these shortcomings can be traced to the lack of coherence and a long-term planning. This is arguably because of the lack of updated information about what issues to prioritize. It was not possible to identify many needs assessments conducted *before* a training session was provided.³⁵⁰ It would be unfair to suggest that this was exclusively the responsibility of providers. Domestic professionals, at least initially (and allegedly often out of politeness), have not been very active in expressing their needs in terms of the provision of trainings.³⁵¹ Yet even when they have been consulted and managed to get the message across about what was actually needed, training providers have not always been prepared or capable of making room for necessary modifications, often citing budgetary constraints.³⁵² A welcome development in this respect is the

³⁴⁵ DOMAC interviews A-6, A-10, etc.

³⁴⁶ DOMAC interview A-18.

³⁴⁷ DOMAC Interview A-16.

³⁴⁸ DOMAC interviews A-32, A-33.

³⁴⁹ DOMAC interviews A-30, A-33, A-39.

³⁵⁰ Wide-ranging, substantial needs' assessments research projects were conducted only in 2006-2007. UNDP, 'Solving War Crime Cases in Bosnia and Herzegovina - Report on the Capacities of Courts and Prosecutor's Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases' (2008); HJPC, 'Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH,' (Sarajevo 2007); HJPC, 'Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies in BiH for Processing War Crimes Cases,' (Sarajevo 2006).

³⁵¹ Local legal professionals often complain they are not consulted about training activities but at the same time admit that due to time constraints they are not in a position to provide detailed feedback on proposals.

³⁵² DOMAC interview A-18.

creation of the Judicial and Prosecutorial Training Centers (JPTCs) in BiH.³⁵³ Nonetheless, most foreign actors have been reluctant overall to enhance the capacity of domestic institutions to provide continuous professional development themselves. It has been suggested that this attitude is driven partly by skepticism towards domestic institutions; which contributed to some resistance against domestic authorities and institutions leading the process. Finally, it has been suggested that the JPTCs lack the relevant experience and, crucially, leadership, to effectively take a leading role in organizing formalized transfer of knowledge initiatives,³⁵⁴ instead relying largely on international actors to conduct this type of initiative.³⁵⁵

As the efforts of the international community have focused at the State level, the funding for capacity building activity is directed almost exclusively at the State Court. The ICTY has viewed judicial capacity building at Entity courts as a side benefit to its training seminars, but not a core issue. As a consequence, the interaction and relationship between the ICTY and the Entity courts is limited.³⁵⁶ Entity prosecutors have complained about this problem.³⁵⁷

In a survey conducted by OSCE in 2004 among Entity prosecutors, all prosecutors acknowledged the need for further training in relation to war crimes. Examples of topics which they suggested included command responsibility, collection of evidence, witness protection, co-operation between entity prosecutors, the relationship between the jurisdiction of the BiH Prosecutor and the entity prosecutors, methods of investigation, and the elements of the criminal acts. Among the material necessary to improve their work on war crimes cases, some listed reports of the ICTY, documents on the ECHR, and documents on international humanitarian law.³⁵⁸ According to a UNDP research in 2008, most Entity prosecutors involved in war crime cases felt comfortable that their educational opportunities have helped them to inform themselves in relevant

³⁵³ These Centers are public institutions responsible for the design and implementation of training programmes for judges and prosecutors in BiH, under the supervision of the HJPC (eg, www.hjpc.ba/edu/Template.aspx?cid=2370,1,1). There is one for FBiH and one for RS.

³⁵⁴ DOMAC interview A-16. The interviewee recognizes that they are increasingly aware of the need for them to be more proactive and take leadership. The one in the FBiH has new premises, and has been hiring new staff, and are working harder. Funding is still a major issue.

³⁵⁵ An interesting development in this respect is the inclusion of education as one an action point in the 2008 National War Crimes strategy, mainly with regards to the Entities, State Strategy, *supra* note 127.

³⁵⁶ Barria and Roper, *supra* note 129, 327.

³⁵⁷ DOMAC interview A-16.

³⁵⁸ OSCE, *supra* note 57, 45.

topics, but a large majority felt that instruction on war crimes issues from an ‘investigation through trial’ perspective would be very helpful. They preferred that this instruction be given by professionals who have investigated and tried war crimes at the State Court of BiH and the ICTY.³⁵⁹

6. THE IMPACT OF BIH INSTITUTIONS ON ENTITY INSTITUTIONS

This report considers the State Court of BiH primarily as a domestic court. However, its unique hybrid character cannot be ignored, particularly as in other regions of the world the international community has embraced the notion of hybrid courts (in personnel or in normative basis).³⁶⁰ Moreover, from its inception the State Court of BiH has been perceived to some extent a foreign imposition. The present section therefore briefly considers the impact of the State Court of BiH on Entity courts according to the same parameters considered above: normative, quantitative and qualitative.

6.1 THE NORMATIVE IMPACT OF THE COURT OF BIH ON ENTITY COURTS

As noted in section 4.3, the Entities continue to apply the SFRY CC despite the ruling of the Constitutional Court which calls on them to follow the State Court of BiH, and apply the 2003 BiH CC.

The 2008 National War Crimes Strategy lists a number of mechanisms to encourage uniform application of the BiH CC and of the jurisprudence of the State Court of BiH throughout the country, that is, also before Entity Courts. One mechanism is consultations between the BiH and Entity authorities, where joint positions would be taken exclusively in relation to war crimes cases. Although not binding, these positions could serve as guidelines to the courts when acting upon cases with similar facts and circumstances. In addition, the Strategy proposed to facilitate harmonization of practice through WCS decisions on transfer of cases to the Entities that would obligate Entity

³⁵⁹ UNDP, ‘Solving War Crime Cases in Bosnia and Herzegovina - Report on the Capacities of Courts and Prosecutor’s Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases’ (2008), 16.

³⁶⁰ This development is related, *inter alia*, to the establishment of the ICC as a generic international criminal court. However, this does not detract from the importance of evaluating, to the extent possible, the impact of the State Court of BiH over Entity courts, since the DOMAC mandate extends to a variety of international tribunals, including hybrid ones (eg in Timor-Leste and Sierra Leone).

prosecutors and courts to apply the substantive law of BiH. Finally, the strategy proposed that the WCS issue binding directions as provided in the Law on the State Court,³⁶¹ containing the Court's interpretation in relation to the applicable substantive law in war crimes cases. Entity courts would attempt to follow the case law of the WCS, and whenever possible to apply the provisions of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Court in BiH, particularly the provision that allows for the possibility of accepting as proven facts established in the legally binding decisions of the ICTY. When investigating war crimes cases, prosecutors' offices in the Entities would also use the analytical and legal support of the ICTY and the Prosecutor's Office of BiH. The Strategy does not elaborate on how to effect compliance with these measures.

The lack of a hierarchical relationship or a common appellate or Supreme Court with jurisdiction over both the State Court and the Entity courts gives little incentive for the latter to even read the key decisions by the Court of BiH, let alone to cite them as grounds for their own decisions.³⁶² The fact that Entity courts apply the SFRY CC and CPC to 'avoid retroactivity' exacerbates matters.

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6.2 THE IMPACT OF THE COURT OF BIH ON PROSECUTION RATES AND SENTENCING IN THE ENTITIES

Since 2005, the State Court has undertaken the task of reviewing war-related cases and determining whether they will be heard by the State Court or by Entity courts. This determination depends on whether the BiH prosecution considers a case 'very sensitive' (to be retained in the State Court) or 'sensitive' (to be transferred to Entity courts). At the outset, the criteria for determination were unclear.³⁶³ They were later laid out in the 'Orientation Criteria for Sensitive Rules of the Road Cases', later incorporated in the 2008 National War Crimes Strategy. Very sensitive cases, to be tried by the State Court,

³⁶¹ Under the Law on Court of BiH Article 13(3)(b).

³⁶² Notwithstanding, of course, the non-binding character that precedent has under civil law systems. On the potential benefits of a Supreme Court at the State level see, eg, DeNicola, *supra* note 199.

³⁶³ Diane Orentlicher, 'That Someone Guilty be Punished: The Impact of the ICTY in Bosnia' (Open Society Justice Initiative, International Center for Transitional Justice, New York 2010), 128.

are those that are considered most complex, and take account of the type and seriousness of the alleged crime (e.g. genocide, extermination, mass killings, rapes and other forms of sexual abuse as a part of organised criminal undertakings, plunder, torture, widespread, systematic forced evictions and large-scale detentions in concentration camps); the rank or political prominence of the defendant; and a number of other factors, such as whether the case involves 'insider' or 'suspect' witnesses, whether there is a risk of witness intimidation, and whether political conditions are such that a fair trial may be impossible.³⁶⁴ In 2008 the State Court's docket included 565 'very sensitive' cases.³⁶⁵

At the outset, the State Court and Entity courts were faced with another group of cases, namely cases that had been received by the courts and prosecutors' offices in the Entities prior to the entry into force of the BiH CPC in 2003, and in which an indictment had not been confirmed (by the ICTY). These cases remain before Entity authorities unless the WCS decides to take over them. By 1 October 2008 the WCS had taken over 146 such cases, while the Entities and Brčko District retained 1070 cases.³⁶⁶

However, with the exception of a few scattered cases, the channeling process did not result in Entity courts conducting a significant number of investigations. This was due to many factors: lack of political will; the quota system for evaluating the performance of Entity judges and prosecutors, which provided disincentive to address the complexity of war crime cases,³⁶⁷ a heavy work load; and the first BiH's Chief Prosecutor's lack of vision in developing or encouraging a systematic approach to the division of labour, which hampered the evaluation of cases.³⁶⁸ In addition, there was considerable in-fighting between staff and little overall direction provided.³⁶⁹ Entity authorities did not know how many and what kind of cases they would receive, so they could not assign the necessary

³⁶⁴ Human Rights Watch, *supra* note 213, 10-11. 2008 National Strategy, Annex A (only in BSC), State Strategy, *supra* note 127, based on Orientation Criteria from 2004, reviewed in BIRN, 'Pursuit of Justice, Guide to the War Crimes Chamber of the BiH Court', Vol. II (undated) 9.

³⁶⁵ State Strategy, *supra* note 127.

³⁶⁶ State Strategy, *supra* note 127.

³⁶⁷ DOMAC interview A-25, UNDP, 'Solving War Crime Cases in Bosnia and Herzegovina - Report on the Capacities of Courts and Prosecutor's Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases' (2008), 14-15.

³⁶⁸ DOMAC interview A-23.

³⁶⁹ Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009, submitted on behalf of ICLS by David Tolbert and Aleksandar Kontic (15 December 2008), 37, www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf.

resources to deal with them.³⁷⁰ The lack of clear information on the number of complaints has also had a negative impact on the cooperation between state and entity courts and has, at times, been a source of tension that impedes progress.³⁷¹ However, given the large number of cases already referred to Entity prosecutors after completion of review by the State Court, it is doubtful that these concerns fully explain the fact that Entity-level courts have either stopped all criminal proceedings or refrained from beginning investigations, allegedly waiting for a decision from the BiH prosecutor.³⁷² In short, the channeling process seems to manifest flaws similar to those that previously plagued the RoR, namely the creation of a significant backlog and shirking of responsibility at the lower level, resulting in a slow and protracted administration of justice.

In an effort to address these and other concerns, BiH's 2008 National War Crimes Strategy advocated legislative amendments, to facilitate the transfer of less complicated cases to Entity courts, which should be ready to conduct trials using the same laws and criteria as the State Court. In November 2009 the BiH parliament amended to the BiH Criminal Procedure Code,³⁷³ adding Article 27a to regulate the transfer of jurisdiction for proceedings for the criminal offences referred to in Articles 171 through 183 of the Criminal, namely genocide, crimes against humanity and war crimes. The State Court may transfer the proceedings to another court in the area of which the criminal offence was attempted or committed, while taking into account the gravity of the criminal offence, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case.

In practice, despite expectations, new cases are generally not transferred to Entity courts.³⁷⁴ For example, Banja Luka's county prosecutor has complained that the review process is taking too long. He is concerned that suspects escape because their names are made public.³⁷⁵ Others warn that the slow action of the WCS jeopardizes the possibility of meeting the National War Crime Strategy's goal of completing all remaining

In practice, despite expectations, new cases are generally not transferred to Entity courts.

³⁷⁰ DOMAC interview A-13. This is also explicitly provided for by the State Strategy, *supra* note 127.

³⁷¹ Human Rights Watch, *supra* note 213, 28.

³⁷² Barria and Roper, *supra* note 129, 323; Human Rights Watch, *supra* note 213, 13.

³⁷³ www.tuzilastvobih.gov.ba/files/docs/izmjena_zakona_o_kvivicnom_postupku_-_93_09_-_eng.pdf.

³⁷⁴ Human Rights Watch, *supra* note 213, 11.

³⁷⁵ Merima Husejnović, 'Banja Luka: County Prosecutor Criticises Slow State Court' *BIRN Justice Report* (29 June 2010), www.bim.ba/en/225/10/29110/.

war-related cases within 15 years.³⁷⁶ Figures of existing criminal matters, usually attributed to country prosecutor's offices, range from 13,000 to more than 16,000.³⁷⁷

Moreover, confusion over the role of the BiH prosecutor's office persists.³⁷⁸ Thus, when asked in late 2009 whether he could determine that no parallel investigations were being conducted by the Prosecution of BiH and Entity prosecutions, BiH Chief State Prosecutor Milorad Barasin responded: 'This is a complex question and I shall not give you an answer'.³⁷⁹

As noted above, the sentencing provisions of the SFRY CC and of the 2003 BiH CC are different, leading Entity courts to resist applying the 2003 BiH law.³⁸⁰

6.3 THE IMPACT OF THE STATE COURT OF BIH AND THE BIH PROSECUTION ON THE CAPACITY OF ENTITY INSTITUTIONS

Some former legal officers at the State level have been appointed to positions as prosecutors or judges at the Entity level. But informal relationships between the international judges at the Court of BiH and the Entity courts have overall been negligible.³⁸¹ It was expected that the work of the Court of BiH would have a 'spillover effect' on the domestic judiciary, but this expectation does not seem to have materialized. A number of elements explain this. First and foremost, as discussed in section 5.2, the Court of BiH and the Entity courts apply to these cases different procedural and substantive laws. Second, this kind of collaboration has not been provided for expressly by law, so any initiative would have to be developed on an informal basis.³⁸² In fact, it was suggested that it is not the role of the Court of BiH to develop capacities of other courts but of the HJPC'.³⁸³ The need to coordinate with different judiciaries with markedly divergent political allegiances makes collaboration all the more difficult. Third, the precise role of Entity courts in processing war-related cases

³⁷⁶ Dzidic, *supra* note 138.

³⁷⁷ Human Rights Watch, *supra* note 213, 17.

³⁷⁸ Human Rights Watch, *supra* note 213, 12-16.

³⁷⁹ Erna Mačkić, 'Milorad Barasin: The Most Difficult and Complicated Job', BIRN Justice Report (28 December 2009) www.bim.ba/en/199/10/24695/.

³⁸⁰ See section 4.3 above.

³⁸¹ DOMAC interview A-3.

³⁸² DOMAC interview A-11.

³⁸³ DOMAC anonymous interviewee.

was not clear, at least until the adoption of the 2008 National War Crimes Strategy.³⁸⁴ Finally, the fact that there are no Entity courts specializing in war-related crimes makes any significant financial contribution to their operation more difficult.

The 2008 War Crimes Strategy envisages greater interaction between State and Entity prosecutors to carry out different investigative activities, such as exhumations, identification of witnesses, etc., and can encourage informal relationships. The BiH prosecution has encouraged its prosecutors to become actively engaged with Entity prosecutors even before the establishment of the Strategy.³⁸⁵ It is, however, still too early to determine the impact of these initiatives on the capacity of Entity institutions.

7. CONCLUSION

BiH courts and laws have undergone dramatic reforms since the end of the war, especially since the completion strategy was put in place. These reforms include the establishment of the WCS within the State Court, as well as the adoption of a criminal code and a criminal procedure code. International elements, including the ICTY, played a key role in promoting and shaping these reforms. Consequently, BiH has been able to assume the responsibility of sharing with the ICTY the burden of trying war related offences, largely in accordance with international standards. However, international influence has been, at least at the outset, a byproduct of the ICTY's and other international institutions' concerns and goals rather than the consequence of a conscious effort at modeling the domestic system. Thus, for example, the interest in establishing the WCS and in the transfer of cases to BiH, as well as the empowering of domestic institutions, are the consequence of the ICTY's completion strategy and shaped by its needs.

BiH is a good experimentation and observation ground for modalities of interaction between international and domestic courts: Within the same country there are courts of different levels, which illustrate different models of interaction, apparently with respect to the same domestic culture. One might therefore assume that differences in domestic action are indeed a consequence of different modalities of interaction with the one and same international tribunal, the ICTY.

³⁸⁴ DOMAC interview A-13.

³⁸⁵ DOMAC interview A-18.

7.1 THE IMPACT OF THE ICTY ON THE WCS

An analysis of the impact of the ICTY on the institutions of the State of BiH, namely the WCS, and on the institutions of the Entities, reveals a significant difference in the willingness of these domestic institutions to accept external influence and to actually interact with international actors.

Broadly speaking, the ICTY has had a relatively strong impact on the WCS, which has demonstrated relatively great pliability to external influence. On the normative level, the State of BiH and the WCS have followed the ICTY in a variety of manners. First, it has adopted, through legislation and jurisprudence, various international legal doctrines. Among these one can cite certain modes of JCE and command responsibility. The WCS also interprets domestic instruments in light of ICTY jurisprudence, and follows the ICTY in procedural issues.

As for the quantitative analysis, here the impact of the ICTY is in some aspects very immediate but of little

long-term significance, and in others of more lasting value. The cases before the WCS derive directly from the ICTY: some are cases that have been referred under Rule 11bis, others have been transferred before an indictment was issued by the ICTY. At this level, one could say that the prosecution patterns of the WCS are directly related to the ICTY's work. However, one must acknowledge that this is a one-off type of impact, which does not by itself hold the promise of the WCS following ICTY prosecuting policy. A more interesting interaction is illustrated by the fact the primacy of the WCS over Entity courts, and the criteria it adopted to determine which cases should be channeled to which domestic jurisdiction, which are expressly in pursuance of the ICTY's policy.

The sentencing policy of the WCS is difficult to attribute to interaction with the ICTY. This is because the sentencing range available to the WCS differs from that of the ICTY, as is the relative gravity of indictments. Nonetheless, the WCS does emulate the ICTY in the subtle adoption of graduated sentencing depending on the characterization of crimes. Thus, genocide-related crimes result in heavier sentences than those meted out

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for crimes against humanity-related crimes, which, in turn, result in heavier sentences than those meted out for war crimes.

Finally, the qualitative impact of the ICTY on the WCS begins with the very fact that the WCS exists. The establishment of the WCS is directly, although not exclusively, related to the progression of the completion strategy. The latter has precipitated the transfer of cases and evidence, but also know-how and expertise.

7.2 THE IMPACT OF THE ICTY ON ENTITY COURTS

The impact of the ICTY on Entity institutions is much less marked. On the normative level, it is notable that parties and judges in the Entity courts do not usually cite international or foreign jurisprudence, and the decisions of these courts are often at odds with international jurisprudence. For example, important substantive legal doctrines developed by the ICTY such as command responsibility have been disregarded, if not outright rejected. ICTY jurisprudence on procedural issues has not fared much better. For example, the fundamental question on the applicability of post-conflict law has received a different analysis in Entity courts. Those consider it impermissible retroactive criminalization, thereby contradicting the jurisprudence of the ICTY on this issue.

The impact of the ICTY on Entity institutions is much less marked. On the normative level, it is notable that parties and judges in the Entity courts do not usually cite international or foreign jurisprudence, and the decisions of these courts are often at odds with international jurisprudence.

Quantitatively, too there is little correlation between the ICTY and Entity courts. On the one hand, the case load of the Entity courts is determined primarily by the WCS. On the other hand, Entity courts have been reluctant to process even those cases that have been transferred to them. Generally speaking, Entity institutions are characterized by their resistance to prosecution. The paucity of cases also makes it difficult to identify significant trends in sentencing, but it is tentatively possible to say that there is no correlation in this regard. This can be explained by various factors unrelated to the direct impact of the ICTY, such as the different sentencing range available, the different characterization and gravity of crimes adjudicated.

Finally, the impact of the ICTY on the institutional capacity of the Entities is not only limited, but mostly unintended. Very little funding is directed towards the Entities, and there is little focus on nurturing their institutions. If anything, this disregard has led to antagonism in the Entities which has impacted negatively on their capacities. The role of

the WCS in channeling cases, as it is being discharged, has also been cited as detrimental to the empowerment of Entity institutions.

7.3 EXPLAINING THE DIFFERENCE

The schism between Entity institutions and the ICTY is partly attributable to practical constraints: The ICTY is much less accessible to Entity institutions than it is to the WCS. First there is the language barrier, which only in recent years the ICTY has been laboring to overcome. In addition, there is a gap in international funding which leaves training initiative almost exclusively reserved to the WCS. It has been suggested that better results could have been obtained if the international activity directed at empowering domestic authorities had begun earlier, or if more attention had been paid both to the potential influence of the ICTY's practice on domestic authorities and to the domestic constraints which international efforts should accommodate. For example, ICTY case law and investigative material could have been accessible at an earlier stage; training initiatives could have been more accurately designed for the relevant audience's needs.

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But it may be argued that at issue is not a technical scarcity or misdirection of international resources, but a more profound issue: Particularly in RS, an Entity where there has not effectively been a post-conflict change of government, domestic institutions are not keen to undertake prosecutions, and the trickle-down effect of the international tribunal is very limited. The reluctance to engage in post-conflict criminal justice is politically-grounded. The Entities' resistance plays not only against the ICTY but also against the State Court, which despite its domestic legitimacy, has failed to impose its standards on Entity courts. The WCS's susceptibility to ICTY influence is strongly and directly related to its hybrid nature, which, in turn, cannot be severed from the circumstances of its establishment, namely through institutional and normative dictates of the High Representative. In other words, the WCS is *partner* to the international mechanism largely because it is the *product* of international intervention in BiH.

We should therefore not be blinded by the apparent success of the WCS. It was made possible by the strong international influence, which effectively circumvented the political obstacles standing in the way of accountability mechanisms. It would be more accurate to describe the international effect over domestic institutions as dependant on the capacity to impose, rather than as a spontaneous ripple effect.

When designing international tribunals as catalysts for domestic action, the limitations of extrapolating from the BiH case study should not be underestimated, while an important lesson to be drawn is the importance of engaging with potential political obstacles to preempt their obstruction of even the best-planned legal framework.

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