Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases

Critical Notes on a ‘Success Story’

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Abstract

This article provides an assessment of the initiatives aimed at developing the capacity of national courts in Bosnia and Herzegovina (BiH) to conduct war crimes cases, with particular focus on the International Criminal Tribunal for the former Yugoslavia and the Court of BiH. It critically examines both formal and informal mechanisms implemented in order to enhance the capacity of BiH courts and legal professionals to investigate, prosecute, defend and try cases for war crimes, and assesses its main strengths and weaknesses. This article advocates three interrelated claims. First, it submits that there are significant difficulties in terms of coherence, coordination and sequencing of capacity development initiatives. Second, it suggests that efforts are too focused on the transfer of knowledge or skills to individuals, and do not pay enough attention to the institutional context and culture in which these individuals work. And finally, it argues that the greatest contribution to local capacity made by the international community, and in particular the ICTY and the Court of BiH, has been connected to certain aspects of their institutional design. In particular, their contribution to the enhancement of local capacity has

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largely taken place through the information transferred to the local legal system through the sending of files, the horizontal collaborative relationships developed between the relevant professionals, and the institutional incentives towards having local courts process cases of war crimes. This article concludes, then, by advocating a shift in the focus of existing capacity development and institution-building efforts in post conflict situations.

1. Introduction

In the early 1990s, individuals in Bosnia and Herzegovina (BiH) were still being sentenced to death in absentia for events occurring during the war. As late as 2001, the President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Jorda suggested that national courts lacked the capacity to try the ICTY’s cases, and that the judicial systems of the former Yugoslav republics would have to be ‘reconstructed on democratic foundations’ before cases could be transferred from the ICTY. Since then six cases have been transferred to BiH from the ICTY under Rule 11bis, many more files have been sent for cases to be tried locally and as of September 2010, 55 final war crimes verdicts have been reached at the Court of BiH. Entity and cantonal courts are slowly dealing with their share of cases that are being transferred to them under the 2008 national War Crimes Strategy. Most commentators agree that these trials have generally been conducted in an effective and fair manner. In short, then, the progress made by BiH in terms of its capacity to deal with war crimes cases in a relatively short period of time has been impressive, even if many would still contend that these achievements are fragile.

This article explores the impact of different initiatives aimed at developing capacity to process cases of war crimes, with particular focus on the ICTY and the Court of BiH. It examines both formal and informal mechanisms implemented in order to enhance the capacity of BiH to investigate, prosecute, defend and adjudicate upon war crimes. It advocates three main interrelated claims. First, it submits that there are significant difficulties in coherence, coordination and sequencing of capacity development initiatives. Second, it suggests that efforts are too focused on the transfer of knowledge or skills to

3 Information provided by the Registry of the Court (on file with author).
individuals (i.e. training initiatives) and do not pay enough attention to the institutional context and culture in which these individuals work. Finally, the paper argues that the greatest contribution to local capacity by the international community, and in particular the ICTY and the Court of BiH, has been connected to institutional factors, such as the information transferred to the local legal system, the relationships developed between professionals, and the range of incentives offered both by national and international actors. Put differently, effective capacity development has been the result of a framework of ‘carrots and sticks’ which is ultimately connected with the urgencies both of the ICTY and the political community in BiH, rather than with the achievement of a carefully planned policy.

Two methodological points are in order. This article is based on a number of interviews conducted in BiH, The Hague and London between the end of 2008 and 2010. The selection of interviewees was aimed at obtaining as balanced a picture as possible although, for reasons of confidentiality no statements are explicitly attributed to any of them. In addition, the scope of this paper must be circumscribed in at least one respect. The analysis it provides leaves out important elements which, admittedly, contribute to the capacity (and willingness) of local authorities to conduct war crimes trials in post conflict situations. Chiefly among these are political and economic pressure and basic conditions of physical security. The willingness of BiH to seek eventual entry to the European Union has certainly been influential in generating sufficient political support for war crimes prosecutions. Also the significance of the need to provide physical security for judges, prosecutors and, most importantly perhaps, for witnesses, for effective prosecution of war crimes cannot be exaggerated. In this limited sense the efforts of the

5 Interviewees include, in alphabetical order, Ms Evelyn Anoya, Court Management and Support Section – ICTY; Ms Stephanie Barbour, OSCE; Judge Snezhana Botsusharova-Doicheva, Court of BiH; Mr Toby Cadman, POBiH; Mr Amir Cengic, Chambers – ICTY; Mr Francesco De Sanctis, OSCE; Ms Carla del Ponte, Prosecutor of the ICTY and ICTR; Ms Lucia Dighiero, Registry & Witness Support Section at Court of BiH; Ms Bozidarka Dodik, Prosecutor at the POBiH; Ms Fidelma Donlon, OHR and Deputy Registrar at the Court of BiH; Ms Neda Dojinovic, ICRC-BiH; Judge Shireen Fisher, Court of BiH; Mr Raffi Gregorian, OSCE; Mr Matias Hellman, Office of the President – ICTY; Mr Refik Hodzac, ICTY Office in Sarajevo; Mr Kevin Hughes, Legal Officer at Court of BiH; Ms Nerma Jelacic, Media Outreach – ICTY; Ms Hilda Juracic, Victims and Witness Section – ICTY; Ms Pipina Katsaris, OSCE; Mr Zdravko Knezevic, Chief Federal Prosecutor of BiH; Judge Minka Kreho, Court of BiH; Mr Aleksandar Kontic, OTP – ICTY; Ms Catherine Marchi-Uhel, Chambers – ICTY; Mr Liam McDowal, Registry – ICTY; Ms Gabrielle McIntyre, President’s Office – ICTY; Mr Gabriel Oosthuizen, Consultant ICLS; Mr Zoren Pajic, Legal Advisor – Professor of Law; Judge Branko Peric, Court of BiH; Ms Jasmina Pjanic, OKO; Judge Fausto Pocar, ICTY; Ms Biljana Potparic, Registrar – Court of BiH; Ms Elma Prvic-Bilic, UNDP; Ms Margriet Prins, OHR; Judge David Re, Court of BiH; Ms Edina Residovic, Defence Lawyer – BiH; Mr Kenneth Roberts, Chambers – ICTY; Ms Camilla Sudgen, DfID; Mr Mirsad Tokaca, President of the Research and Documentation Centre; Mr David Schwendimann, POBiH; Mr Victor Ullo, OSCE – UNICRI – ICTY Consultant; Ms Vasvja Vidovic, Defence Lawyer – BiH; Judge Patricia Whalen, Court of BiH and a few others who have requested to remain anonymous.

6 Interviews A-12, A-23 and A-35 among others.
international community have been fundamental to any attempt to conduct trials for war crimes in BiH.7

The structure of this article is as follows. Section 2 focuses on the impact of the formalized transfer of knowledge and skills. Section 3 examines the impact of the institutional design of the ICTY on developing local capacity in BiH by assessing its jurisdictional regime, applicable laws, composition and exit strategies. Section 4 examines developments in the Court of BiH. Finally, Section 5 summarizes the main findings.

2. Training and Other Forms of Formalized Transfer of Knowledge

Training has arguably been the most popular mechanism for formal capacity development in BiH.8 Yet the general perception is that it has not been entirely successful.9 An overwhelming majority of the individuals involved in formal trainings either as participants or as trainers, with few exceptions,10 felt dissatisfied with the outcome of the process. They typically report some form of training and conference fatigue.11 Although certain improvements have been made in this area along the years, there are still several important shortcomings. It has been suggested by both international and national participants and observers alike that some of the training provided did not fully address local needs and that there has been too much overlap.12 Some actors in the sector add that seminars were not sufficiently well targeted at individuals  

7 Particularly influential in these respects have been the Office of the High Representative (OHR), the Stabilization Force in BiH (SFOR/EUFOR) and the European Union Police Mission in BiH (EUPM).
10 Training sessions organized by the BiH War Crimes Chamber’s Criminal Defence Office (OKO) and the International Committee of the Red Cross (ICRC) have been generally praised.
11 Interviews A-32 and A-33.
12 Wide-ranging, substantial needs-assessments research projects were conducted only in 2006–2007. See United Nations Development Programme, Solving War Crime Cases in Bosnia and Herzegovina (Sarajevo, 2009), available online at http://www.undp.ba/index.aspx?PID=36&RID=78 (visited 9 February 2011); High Judicial and Prosecutorial Council (HJPC), Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH (Sarajevo: December 2007); HJPC, Capability Assessment Analysis of the Prosecutors’ Offices, Courts and Police Bodies in BiH for Processing War Crimes Cases (Sarajevo, June 2006).
with different kinds of knowledge and experience, and that they rarely took into consideration the specificities of the legal regime in place in BiH. Lecturers were flown in by different organizations, 'they would give a training of how they do things “back home”, and they would fly out'. There was often no effort to explain how their ideas could be adapted to the local legal system. Finally, it has been often suggested that not enough training sessions have focused on the practical aspects of how to effectively conduct war crimes cases. Some interviewees noted that almost nothing had been done in terms of developing management skills.

Most of these shortcomings can in the ultimate analysis be traced back to the lack of coherence and long-term planning and a critical under-appreciation of the importance of self-education. But they are also the result of the shortage of updated information about what was needed at any given point in time. It was often not possible to identify needs-assessments conducted before a training session was provided. Training providers claim that they have been working to resolve this issue by involving locals in the decision-making process of planning and organizing training sessions. Yet the level of information or, at least, the way in which this information was utilized has faced difficulties. It would be unfair to suggest that this was exclusively the responsibility of providers, since this is a genuinely complex issue. Nationals, at least initially, were not forthcoming in expressing their needs in terms of the provision of training. And even when they were in fact consulted, and managed to get the message across, providers were not always prepared or capable of making room for these requests. Planning for that year had already been budgeted and approved.

Training sessions have been organized and provided by a large number of organizations. This provides for a variety of approaches but creates a number of difficulties in terms of coordination, coherence and planning. Also, the fact that it is international organizations or bodies taking the lead in this area undermines the possibility of local ownership over the process and the sustainability of existing efforts. The creation of the Judicial and Prosecutorial Training Centres (JPTC) in BiH has been a welcome development in both

13 Interview A-18.
14 For example, American trainers once gave a full seminar including both plea and charge bargaining without considering that charge bargaining was not a possibility in the BiH legal system (Interview A-15).
15 Interview A-18. The amount of evidence some prosecutors were willing to present in certain cases was simply beyond the capacity of any sensible administration of justice to deal with (Interview A-15).
16 Interview A-20. There is very little translation of material in local languages, including books, journal articles and even decisions of the relevant tribunals.
17 Interview A-3.
18 Interview A-18.
19 The most relevant ones are ICRC, OSCE, UNDP, UNICRI, American Bar Association and the Council of Europe. The ICTY and the Court of BiH have also provided training and so have some embassies. OKO has organized training sessions for defence attorneys.
these respects.\textsuperscript{20} Although there had been some level of collaboration before, only somewhat recently has there been an important initiative to join efforts.\textsuperscript{21} However, the alleged strategic advantage of the joint effort is being undermined by other elements: the centres tend to resort to \textit{ex cathedra} lectures and other methods that are unanimously rejected by practitioners;\textsuperscript{22} and their mandate covers the entire spectrum of legal training and therefore lacks specialization.\textsuperscript{23} These aspects are connected to the fact that these centres are generally under-staffed and that they lack the resources and the experience and know-how that some international organizations could have provided.\textsuperscript{24}

Effective transfer of knowledge through formal training sessions requires an adequate choice of trainers. There are several concerns with the type of preparation that trainers in BiH had at the time of the sessions. Some of them suggested that they had been requested to do training with very little notice; they were simply asked ‘can you go and talk to these people about X?’\textsuperscript{25} Similarly, foreign practitioners hardly ever received specific training on how to transfer knowledge, or were provided with a formal briefing on the cultural, professional and personal issues that might impinge upon the process. At least in the context of the ICTY, the possibility to provide training arguably had to be distributed among the relevant personnel not only in a way that would minimize its impact on the good functioning of the Tribunal; it also had to take into consideration ‘personal and professional sensibilities’.\textsuperscript{26} At the same time, however, there were genuine constraints with regard to sending people abroad for these purposes, particularly due to the need to meet the deadlines established under the Tribunal’s Completion Strategy.

Another aspect often neglected in this respect is the necessity to accommodate certain cultural elements. For instance, national judges in BiH were often quite reluctant to accept training on legal issues or other aspects of their daily work from a legal professional who was not a judge herself. And yet, people in the international organizations involved in providing these training sessions did not see any problem in sending mid-level officers to train experienced judges or prosecutors.\textsuperscript{27} These shortcomings had significant negative effects over the process as a whole. Poor planning or choice of the relevant trainer would end up making the experience frustrating for all concerned. The participants of the training session would end up dissatisfied because they did not find it useful. But the trainer would also normally feel frustrated.

\textsuperscript{20} These centres are public institutions responsible for the design and implementation of training programmes for judges and prosecutors in BiH, under the supervision of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (see e.g. http://www.hjpc.ba/edu/Template.aspx?cid=2370.1.1, visited on 11 February 2011). There is one for the Federation of Bosnia and Herzegovina, and one for the Republika Srpska.

\textsuperscript{21} Interviews A-6, A-16 and A-10.

\textsuperscript{22} Interview A-3.

\textsuperscript{23} OSCE et al., supra note 8, at 20.

\textsuperscript{24} Interview A-16.

\textsuperscript{25} Interviews A-32 and A-33.

\textsuperscript{26} Interviews A-30 and A-39.

\textsuperscript{27} Interview A-33.
by the lack of positive feedback from the audience thereby creating a cycle neither party was in the position to break.\textsuperscript{28}

Training sessions have not been the only ‘direct’ mechanism for the formal transfer of knowledge to local legal professionals. In this context, we must also consider ‘study visits’. Over the last few years there have been a significant number of study trips to the ICTY.\textsuperscript{29} They have normally included a small number of professionals who have met their counterparts, attended trials, and held meetings and informal discussions. It is often claimed that study visits can be useful in terms of making individuals aware of procedures or mechanisms that are in place in a more developed jurisdiction: participants might become aware of matters ‘they did not know they ignored’. Yet although participants usually praised study visits as useful knowledge transfer tools, ‘when pressed, only a few interlocutors could articulate a practical application of the knowledge that they had gleaned during their visit.’\textsuperscript{30} Also it would be very apparent to them that due to disparities in budget and material resources many of the elements discussed might not be suitable for incorporation locally.

It is often suggested, however, that when these visits were carried out in the context of a particular investigation the situation was entirely different.\textsuperscript{31} In such cases, there were concrete concerns to discuss and practical outcomes that were sought. Moreover, this type of visit helped to create links between the relevant professionals that were used subsequently to improve collaboration in the future, and they served the purposes of discussing the terms and mechanisms for that collaboration. Thus, visits can contribute to capacity development but not in terms of transfer of technical knowledge to local professionals. Their positive outcomes would have more to do with institution building than with significantly improving the skills or knowledge of experienced lawyers.

Three important conclusions may be drawn from the above analysis. First, lack of coordination is not merely a contingent factor. It is favoured by bureaucratic elements such as funding flows, and application deadlines of different agencies.\textsuperscript{32} It seems to be the case that agencies have a vested interest in maintaining control over their own activities.\textsuperscript{33} Lord Ashdown summarized this well when suggesting that in his position as High Representative he ‘never managed to get the individual international community players, who were involved in penny-packet programmes aimed at tackling some elements of civil service reform, to combine together into a single nationwide programme.’\textsuperscript{34} Second, the international community has not wholeheartedly supported local institutions to progressively take over this process. Most foreign

\textsuperscript{28} Interview A-32.
\textsuperscript{29} Interview A-32.
\textsuperscript{30} OSCE, ICTY and UNICRI, \textit{Supporting the Transition Process, supra} note 8, at 46.
\textsuperscript{31} Interview A-23.
\textsuperscript{32} Interview A-40.
\textsuperscript{33} Interview A-41.
actors have been reluctant overall to enhance the capacity of local institutions to provide continuous professional development themselves. This may be driven by some measure of scepticism towards local institutions — international organizations and observers may feel that matters will not be implemented in a timely fashion and in a way that they would find appropriate.\(^{35}\) Finally, local institutions are usually unable to take an effective and leading role in organizing formalized transfer of knowledge initiatives.\(^{36}\) They have been largely reliant upon internationals to conduct these initiatives. The JPTCs lack individuals with the relevant experience and knowledge to organize and execute a full programme of professional development in the area of war crimes trials. But what is more important, they lack the leadership skills to take over the work of other organizations and gain overall control of the formal training sessions imparted to members of the legal profession in BiH.

3. Developing Local Capacity through Institutional Arrangements: the ICTY

The ICTY has had an impact on the capacity of the local authorities in BiH to process war crimes cases at multiple levels. At its most superficial, the impact has been negative: ‘the vast financial and human resources required by the ICTY diverted the discussion and funding away from building a domestic war crimes capacity in Bosnia.’\(^{37}\) The clearest positive impact, in contrast, has been in terms of its political influence in the region, and in particular in terms of its role in the creation of the war crimes section within the Court of BiH. In addition to these two considerations, however, its positive impact has arguably not been the result of specific initiatives designed to train local professionals, or other developments connected to the ‘legacy’ of the tribunal. Rather, it has been more connected to the transfer of cases, evidence, and the development of certain working relationships between international and local professionals.

Two background elements should be kept in mind in assessing its influence. First, the institutional culture of the ICTY was, at least initially, one of lack of interest in building relationships with the Balkans. The ICTY positioned itself ‘in some great historical narrative stretching over from Nuremberg, Tokyo and onwards to the ICC.’\(^{38}\) This culture of general detachment from the region was presented as a way to safeguard the perception of impartiality. Second, capacity development in terms of fostering the ability of local authorities to

35 Interview A-16.
36 Interviews A-6 and A-16.
38 Interview A-37.
tackle war crimes cases was never considered one of the Tribunal’s goals. They had ‘a job to do and they were doing it well, and by doing that they were making a substantive contribution.’ In the eloquent words of Louise Arbour, ‘there was only one overwhelming, all encompassing and... life threatening issue for the ICTY as it had been conceived: arrests.’ The interest in developing local capacity became a concern only as a result of the need to close down the Tribunal.

A. Institutional Position, Jurisdictional Regime and Applicable Law

Some of the relevant features of the ICTY seem to put the Tribunal in a difficult position vis-à-vis making a concrete contribution to the development of local capacity to process war crimes cases. The ICTY is an international tribunal situated in The Hague with no jurisdiction to try any individual for violations to the domestic criminal law of the countries of the former Yugoslavia. And yet, the ICTY having concurrent jurisdiction and primacy over domestic courts provided it with the capacity to impact significantly, both positive and negatively, the capacity of domestic courts. This is illustrated well by the policies followed under the Rules of the Road (RoR) Agreement, and the transfer of cases under the Completion Strategy.

The 1996 RoR Agreement marked the first direct involvement of the ICTY in the region which was arguably not in a capacity development role, but rather in a more supervisory one. It essentially accorded the ICTY the power to review case files being investigated by domestic courts before they could issue an indictment. This procedure was introduced to ensure that national courts met international legal standards in the light of growing concerns over the possibility of arbitrary arrests and unfair trials. Freedom of movement was critical to the success of the municipal elections of September 1996, particularly since ‘candidates and voters were being encouraged to stand and

41 The ICTY having concurrent jurisdiction means that both the Tribunal and the local courts can try individuals for war crimes. Primacy entails, in contrast, that ‘[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal. See Art. 9(1) and (2) ICTYSt.
42 Although the RoR technically also applied to Croatia and Serbia, the driving force behind them was arguably the situation in BiH.
vote in their pre-war constituencies. In this respect it was largely successful.

Yet, despite its important benefits in terms of preventing ill-founded arrests, this arrangement also created a backlog at the ICTY and a chilling effect both upon prosecutions by domestic authorities and upon judicial reform more generally. This was partly because of the lack of available resources, which usually entailed significant delays in the review process and often provided no answer at all. But it was, more importantly, the result of poor calculation. The files the ICTY received were in the local language and organized in a way that was entirely strange to those working at the Office of the Prosecutor (OTP).

At the same time, the OTP was extremely busy trying to sort out its own prosecutions to allocate enough resources to deal with these files. Between 1996 and 2004 the ICTY Prosecution reviewed 1419 cases against 4985 persons and gave approval for only 848 persons to be arrested on war crimes charges. But when cases were referred back to the local courts, they did not stipulate which court was supposed to try them. And even if the cases reached the relevant court it was extremely difficult to move them forward. Of the hundreds of cases that were sent back to the region with approval from the ICTY, only a small minority reached the trial stage.

Ultimately, the RoR mechanism constituted a source of disempowerment for local judiciaries. It shaped not only the formal relationship between domestic courts and the ICTY, but also the relationship between legal professionals working at the national and the international level. A 2000 Survey in BiH indicated that local legal professionals perceived ‘disrespect’ in their sporadic contact with the ICTY. They argued that ICTY officials ‘failed to keep them informed of the status of the investigations even in response to direct enquires’ and, in fact, that ‘the international community saw them as intellectual inferiors who did not understand the relevant law’.

Furthermore, although many commentators suggested that the RoR scheme could have arguably had some potential for the development of local capacity, its implementation was

47 Interview A-30.
48 ICTY, *Working with the Region*, available online at http://www.icty.org/sid/96 (visited 9 February 2011). In total, the ICTY’s RoR unit reviewed files for 5,789 cases. Only 3,489 were referred back to the entity authorities. Of these, in 2,346 the evidence was insufficient for an indictment (OSCE, *supra* note 44).
50 Interviews A-33 and A-38.
detrimental to this end. Fidelma Donlon rightly suggests that ‘expectations that the Rules of the Road process would help guarantee fair trials were misplaced’. These rules were devised at a time when the ICTY was striving for legitimacy in the eyes of the international community. They constituted an added role of a court that could not get a hold of those indicted. At the same time, the RoR were functional to the interests of the local authorities in BiH in the sense that they relieved an expectation on the local authorities to conduct effective prosecutions and shifted the responsibility off the shoulders of BiH politicians and legal professionals. After all, the cases were in fact to be returned to ‘a biased and frequently corrupt judicial system’.

The Completion Strategy, adopted in 2003, changed the relationship between the ICTY and the local judiciaries. First, it incorporated the new Rule 11bis which provided that the ICTY could transfer cases with a confirmed indictment to the domestic judiciaries of the former Yugoslav republics, subject to certain conditions: the referral bench in the ICTY needed to be satisfied that the accused [would] receive a fair trial and that the death penalty [would] not be imposed or carried out. The Tribunal also maintained the authority to recall a transferred case if any of these conditions was not met. Although it was relatively clear that the ICTY would not want to recall a case already transferred to a local court, this possibility still meant a very real threat, no state wanted to go through the political embarrassment of having a case recalled. But also, with the Completion Strategy the ICTY not only transferred to BiH Rule 11bis cases; it also transferred back cases that had not reached the stage of an indictment at The Hague. These are commonly referred to as ‘Category 2’ cases, which are cases that had been investigated by the OTP but were not indicted before the end of 2004. Finally, the Completion Strategy also meant the return of the accumulated files of the RoR, which were sent back ‘in essentially the same condition as what was sent to the ICTY as early as 1996.

These developments were not the product of a carefully designed long-term policy but rather a watershed solution out of a largely unforeseen difficulty.

52 Donlon, supra note 37, at 264.
53 Interview A-37.
54 ICTY Rules of Procedure and Evidence (RPE), Rule 11bis (B). These requirements were later specified including several procedural safeguards and a requirement that the trial process complied with international human rights standards, namely, the impartiality and independence of the tribunal, sufficient judicial experience including training in war crimes trials, adequate pre-trial detention, and so on. See UN Doc. S/2002/678, 19 June 2002, and J. Dieckmann and C. Kerll, ‘UN Ad Hoc Tribunals under Time Pressure – Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence’, 8 International Criminal Law Review (ICLR) 8 (2008) 87, at 100–101.
55 ICTY RPE, Rule 11bis (F).
57 The OTP also transferred 14 cases, involving approximately 40 suspects, to BiH (see Prosecutor’s Office, BiH (POBiH)’s Briefing Book, Sarajevo, July 2009; on file with author).
58 This was the deadline established by the Completion Strategy for ICTY indictments.
59 See POBiH, supra note 57.
At the time, there were serious concerns in relation to the rising costs of the ICTY and potential infringement of rights due to slow trials.\footnote{See e.g. R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’, 2 \textit{JICJ} (2002) 541, at 545.} Also, the 9/11 attacks had taken place, resulting in the rise of concerns with terrorism. In this context, the Security Council started putting pressure over the ICTY to devise an exit strategy.\footnote{Interview A-36.} The OTP was significantly pushed to concentrate its prosecutorial strategy on individuals, as it is currently put, ‘bearing the greatest responsibility’.\footnote{SC Res. 1534 (2004), at § 5.} This meant, that it would not be able to deal with many of the cases that had been actually investigated against middle to lower-level perpetrators (some of which were already awaiting trial) and that it would have to look for alternative \textit{fora} in which to try them. The local courts in the region were the obvious candidates. Thus, the exit strategy became a ‘completion’ strategy, and the ICTY developed a prompt and strong interest in the capacity of local legal systems being up to the relevant standards.\footnote{Interviews A-12 and A-36.}

This process proved influential in enhancing the capacity of local courts in at least three different ways. First, it meant an \textit{enormous} transfer of information and evidence to local courts, which was contained in the files. The ICTY would also have to provide for mechanisms to liaise with local authorities to send further relevant information. So, for instance, the ICTY added a new Rule 75 (H) to its Rules of Procedure and Evidence, which allowed local courts, prosecutors and defence counsel to obtain confidential ICTY material, and launched its content-enhanced website in 2008, enabling local legal practitioners in BiH, inter alia, to access all public court records from Tribunal since 1994.\footnote{Before this, the Registry had already provided legal professionals in BiH remote access to the internal judicial database so that they could search from BiH (Interview A-34). The OTP also gave electronic access to non-confidential OTP investigative material to a number of domestic war crimes prosecution offices based on a Memorandum of Understanding.} It also provided local courts with access to witnesses who were under its protection.\footnote{Interview A-36. BiH enacted the Law on Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts of BiH (2004, amended 2006) to be able to use these materials.} The impact of these materials was extraordinary. The general background was the same, and a significant part of the evidence required for these cases had hitherto been entirely out of the reach of local courts, either in Croatia (the Croatian Defence Council — HVO), in Serbia (the Army of the Republika Srpska — VRS), or due to the time that had already gone by since the events. The ICTY was therefore the only way to access this evidence. This process was still partially undermined by the fact that no attention had been paid to existing local laws while collecting, preserving and managing evidence, making it more difficult to use before local courts.\footnote{D. Schwendiman, ‘Primacy and the Accountability Gap: A View from Bosnia and Herzegovina’, 103 \textit{Proceedings of the Annual Meeting (American Society of International Law)} (March 2009) 207.}
Similarly, reluctance or impossibility by the ICTY to certify the authenticity of some of its documents has also hindered their use in court in BiH.67

Second, this process contributed to the establishment of organic links between the ICTY and the local courts, particularly the Court of BiH. Local prosecutors or judges started travelling to The Hague not only for ‘protocol’ or ‘study’ visits. They went with specific questions about concrete files or problems, ranging from basic certification issues of evidence, organizing video links with protected witnesses, to more complex issues.68 For example, with regards to Category 2 cases, the ICTY had only transferred the public materials, not the confidential ones. These were often crucially important to building the case. A system was therefore developed in which there was a designated liaison judge at the Court of BiH to deal with these requests.69 A new project started in June 2009 by which liaison prosecutors from BiH (Croatia and Serbia) were based at the ICTY for periods of six months at a time, to collaborate with investigations before the local courts.70 All this contributed to a greater sense of everyone being embarked on a common task, thereby facilitating more horizontal forms of collaboration between the institutions.

Finally, the Completion Strategy was crucial in securing adequate resources for war crimes cases. Put simply, the transfer of cases under Rule 11bis was of particular sensitivity to the Tribunal. The ICTY was keeping certain defendants in pre-trial detention for two or three years, in some cases without the commencement of their trials being even envisaged.71 This explains the commitment and urgency on the part of the ICTY to get the local system up and running. In fact, the ICTY was even concerned (as were people in BiH) that the new institution not be overburdened with RoR cases that might undermine its capacity to accept and process referrals.72 The Completion Strategy was therefore functional in getting the ICTY involved in pushing for domestic prosecutions for war crimes at the Court of BiH.73 In this respect, it was of crucial importance in helping to secure funding for the Court of BiH by presenting it as a necessary tool for the success of its Completion Strategy.74

68 Interviews A-32, A-33 and A-34.
69 This procedure was established in accordance with Rule 75(H) of the ICTY RPE.
71 Interview A-38.
72 Donlon, supra note 37, at 274–275.
Furthermore, the OHR was at the time already embarked in a comprehensive process of legal and judicial reform in BiH.\(^{75}\) However, none of these reforms were addressed specifically at enabling the investigation and trial of war crimes cases.\(^{76}\)

The different units working in the comprehensive reform were bidding for funds to conduct their own programs. The Completion Strategy and the advocacy of the ICTY meant that a much larger part of the available resources ultimately went to institutions in charge of conducting trials for war crimes cases, than otherwise would have been the case.\(^{77}\)

### B. Composition and Informal Transfer of Knowledge

As explained above, a particularly influential element of the institutional culture of the ICTY was its detachment from the region: ‘to be impartial it helped to be ignorant, to be remote, to be removed, not to have dialogue’.\(^{78}\) Irrespective of its practical advantages, it was felt as ‘inappropriate’ to have people from the region, particularly in Chambers, as this would allegedly make it difficult to have sufficient distance and be sufficiently neutral. Also, at the time there were serious security concerns which worked as a powerful disincentive to the hiring of nationals of the region.\(^{79}\) As a result, no locals were hired at the ICTY in the Prosecutor’s Office or in Chambers for the first part of its existence.\(^{80}\)

This general policy was eventually revised. But this revision was hardly connected with the ICTY making a conscious decision to contribute to developing local capacity. Initially, the shift of view was connected with the need to speed up the processes before the ICTY. People with knowledge of the conflict, the background, and the relevant languages were considered crucial by the ICTY’s Prosecutor. This contributed significantly to the work of the Tribunal, from interviewing witnesses, analysing information and power relationships between the relevant figures, to convincing key people to appear as inside-witnesses, etc.\(^ {81}\) Later on, further steps were taken triggered by the idea that most of the work would have to be done in the region anyway. The reasoning allegedly was that ‘the more you involve [locals] in the work of

\(^{75}\) A new Criminal Code and a new Criminal Procedure Code were introduced in March 2003, while the Court of BiH was being established, and the newly created HJPCs conducted the re-appointment of all judges and prosecutors.

\(^{76}\) The Court of BiH, for instance, had rather been presented mainly as a tool to combat organized crime (interviews A-25, A-35 and A-38).

\(^{77}\) Interview A-38.

\(^{78}\) Interview A-37. For strong criticisms of this view, see C. Del Ponte and and C. Sudetic, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (New York: Other Press, 2008), at 125.

\(^{79}\) Interviews A-32, A-33 and A-36.

\(^{80}\) Interview A-28.

\(^{81}\) Del Ponte and Sudetic, *supra* note 78, at 129.
the ICTY the greater the chance of getting people in the region to do this work more efficiently.82 Yet what mainly explains the consolidation of this policy was that the people from the region who went to work at the ICTY proved to be good professionals. They proved capable of putting aside their personal feelings, and they had the language skills and a much greater understanding of the years of conflict.83

In any event, this change in policy did not necessarily mean a considerable contribution in terms of the actual transfer of knowledge and skills to BiH, at least in the short term. Initially, most of the ‘locals’ hired were lawyers who were one generation removed from the region84 which made them unlikely prospects to go and practice law there. Moreover, people who went to work at the ICTY as legal officers from the region, i.e., who entered the UN system, did not normally want to return to their home countries (at least not in the short term).85 In fact, there were very few incentives for these professionals to go back. Put boldly, it is much harder to find a job in the justice sector in BiH coming from the ICTY or another international tribunal than if they had stayed there in the first place.86

The Completion Strategy of the ICTY entails that the Tribunal will be dismantled. There are a number of initiatives developed in this context allegedly directed towards having an impact on local legal capacity. The ICTY has sometimes termed these ‘Legacy’ issues. For example, the United Nations Integrated Crime and Justice Research Institute (UNCRI) and the ICTY have published a Manual of Developed Practices which covers key areas such as investigation, indictment, case and trial management, judgement drafting, appeals, victims and witness protection, etc. Similarly, a project on ‘Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer’ has been co-organized by the ICTY with the ‘overall goal of identifying best practices in the knowledge transfer arena so as to improve markedly the delivery of future professional-developmental and capacity building programmes.’87 It is too early to assess whether these specific initiatives will have an impact on the capacity of professionals in BiH (and elsewhere) to process war crimes cases. But with no real incentives to put them into practice, there are enough reasons to be sceptical about their actual potential to contribute to this goal.

82 For instance, there lately seems to be an active, though silent policy of positive discrimination in favour of young lawyers from the region to do internships at the ICTY (Interviews A-32 and A-33).
83 Interview A-33.
84 Interview A-29.
85 This is also true of locals working in victims and witness support (Interview A-28).
87 OSCE et al., supra note 8, at 3.
4. The Court of BiH: Institutional Features, Composition and Exit Strategy

The Court of BiH can be characterized as mainly a national institution with international involvement. This type of institutional design has a number of benefits in terms of its potential to help develop local capacity. First, it applies domestic BiH law. Thus, its jurisprudence, in theory at least, could influence decisions at the level of entity and cantonal courts. Second, it is a permanent institution that will last beyond international involvement. This feature allows for its local legal professionals to stay in BiH and contribute to local war crimes cases after international involvement ceases. Third, its mandate goes beyond cases of war crimes and includes other sensitive and complex cases such as, notably, organized crime. These features give the BiH Court significant potential to have a sustainable impact in terms of developing local capacity to deal with complex investigations and prima facie a decent opportunity to contribute to the (re)establishment of the rule of law.

However, this framework has not borne fruit in some important respects. Despite the fact that the Court of BiH is a national institution, it is often characterized by locals as a foreign, or internationally, driven institution. Some of the reasons for this perception are admittedly quite difficult to overcome given the context in which they exist. The Court of BiH itself, as a court whose mandate was mainly to deal with organized crime, corruption, etc., was created by the Office of the High Representative (OHR) and endorsed by the Peace Implementation Council (PIC). The creation of a war crimes section at the Court was the result of an agreement between the OHR and the ICTY and its funding, at least during the first years of its existence, was overwhelmingly from international sources. Victims’ groups and civil society in general were not really consulted (let alone involved) in the process; nor were local legal professionals.

Admittedly, many of the relevant laws were ultimately approved or ratified by the national Parliament. Yet its national approval was arguably influenced by the belief that this was internationally required. As an observer suggested, ‘[at the time] the government and many parliamentarians believed, that as a result of the various Security Council Resolutions endorsing the completion strategy, Bosnia had an obligation to accept [those] accused that would be transferred from the ICTY in the future.’

The creation of the war crimes

88 Yet the main reason for its design within the Court of BiH was allegedly financial rather than led by ‘legacy’ considerations (Donlon, supra note 37).
89 The new substantive and procedural laws are generally not in use before the entity courts for war crimes cases. The stated reason for this is to avoid retroactive application of criminal laws.
90 It is interesting to note, in this respect, that internationals work not only in war crimes cases, but also within the special division for organized crime (both in Chambers and in the POBiH).
91 See Ashdown, supra note 34, at 256.
93 Donlon, supra note 37, at 280.
section at the Court of BiH was therefore perceived as a necessary step towards fulfilling this obligation.

The influence of the Court of BiH's vis-à-vis cantonal and district courts has certain parallels with that of the ICTY on local courts. With the exception of a few scattered cases, cantonal and district courts were at least initially not involved in conducting a significant number of investigations. This can be explained on the basis of a number of elements, ranging from lack of political will by the authorities at the entity level, to the impact of the ICTY and its RoR more generally, and the quota system on which district and entity judges and prosecutors are evaluated. However, the fact that the Court of BiH retained the vast majority of cases sent back from the ICTY also generated a freezing effect on cases before district and cantonal courts, similar to that of the RoR on local prosecutions more generally. In fairness, dealing with these cases is a time consuming task that involves going through all the available files and the relevant evidence, classifying them, and making decisions as to where to send each one of them. Moreover, this had to be done while conducting investigations and trials of cases transferred under Rule 11bis. The greatest obstacle, however, was that the first 'Chief Prosecutor at the POBiH at the time lacked the vision to develop or encourage a systematic approach to the division of labour.' This created a lack of momentum within the POBiH which took considerable time to overcome.

The Special Department for War Crimes at the POBiH eventually reviewed the RoR files that had been sent back to BiH and a decision was made that the cantonal and district courts would handle a large proportion of the cases and the Court of BiH would handle the most sensitive ones. Once this revision was completed, it created both some political momentum and a significant transfer of information (sometimes originally gathered by the own local courts) for these cases to be pursued at the entity level. But elements connected to the institutional position of the Court of BiH undermined its potential influence over cantonal and district courts. Most notably, the lack of a hierarchical relationship, or a common appellate or Supreme Court with jurisdiction over both the BiH Court and the cantonal and district courts has

94 The quota system entails that judges' and prosecutors' performance is reviewed taking into consideration their prosecuting or trying a certain number of files, creating an incentive to prioritize 'easier' cases over more 'complex' ones (such as war crimes cases). This system did not apply, after serious negotiations, to the Court of BiH (Interview A-25).

95 Interview A-23.

96 Ibid.

97 Of all the files transferred back, the POBiH focused on those 877 with the greatest evidence amounting to 'reasonable grounds' to believe that the suspects of the files had committed serious violations of international humanitarian law. These files were divided between sensitive and highly sensitive. A total of 202 of them were considered highly sensitive and kept at the Court of BiH. The rest were sent for investigation to cantonal and district prosecutors in the jurisdiction where the events investigated had taken place.

98 At the time of writing it is still unclear what the impact of this will be in the years to come.
given the latter little incentive to even read the key decisions by the Court of BiH, let alone to use them as grounds for their own decisions.99

In this context it is worth examining the situation that obtained with the new procedural rules established in BiH as a capacity enhancing tool, particularly the new criminal procedure code enacted in 2003.100 The new code involved a significant departure from an inquisitorial system largely constructed along ‘heavy Austrian influences, with a veneer of socialism,’101 to a mixed system with several key institutions of the adversarial system.102 It has been argued that some of these reforms helped to speed up trials and enhance the effectiveness of BiH’s legal system, and significant progress has been made in their application, particularly at the level of the State Court.103 Nonetheless, the positive effects of this new legal framework may have even been outweighed by the negative ones.

The new rules triggered widespread resistance among local legal professionals in BiH, also creating confusion and frustration among them.104 Much of these adverse reactions had to do with the fact that several of the reforms were entirely foreign to the Bosnian legal traditions. Yet the shape these reforms ultimately took, and the lack of local ownership over them, may be traced to the way in which the new code was actually enacted. The need for a more adversarial procedure had been endorsed by most of the international actors operating in BiH in the aftermath of the conflict.105 The first project endorsed by the OHR in 2000 was drafted by a group consisting entirely of foreign lawyers and included a significant number of adversarial institutions.106

99 Notwithstanding, of course, the non-binding character that precedent has under civil law systems.
100 There are other important laws which have been introduced such as, e.g. the Law on Protection of Witnesses, or the Law regulating the use of ICTY’s evidence before local courts.
102 The main changes included the abolition of investigating judges and their roles being taken up by prosecutors, the introduction of plea-bargaining, cross-examination of witnesses, a ban on private prosecutions, and certain adversarial techniques regarding the presentation of evidence (ibid., at 41–54). This reform process was admittedly under way before war crimes trials in BiH became a reality.
103 Interviews A-15 and A-23.
104 Interviews A-14 and A-22. An OSCE report based on the monitoring of over 100 trials indicated that over 25% of judges, prosecutors, and defence attorneys were ‘not accomplishing a shift’ to the new procedure. OSCE, OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina (2004), available online at http://www.oscebih.org/documents/1079-eng.pdf (visited 9 February 2011), at 27–34. This confusion was probably not helped by the Council of Europe hiring local practitioners, trained in the continental system, to draft the commentaries to these new procedural rules (DeNicola, supra note 101, at 67).
105 The Judicial System Assessment Programme of the UN Mission in BiH recommended that BiH abolish investigative judges and adopt common law procedures. See, DeNicola, supra note 101, at 32.
106 Similarly, the new criminal procedure code enacted in the Brcko District had been almost entirely drafted by an American lawyer (M.G. Karnavas, ‘Creating the Legal Framework of the
Lord Ashdown recalls that this project ‘was a mess and paid little attention to local Bosnian traditions. So [he] brought in a former Bosnian law professor ... to assemble and coordinate a team of local lawyers to rewrite Bosnia’s legal codes, starting with the criminal code.’ 107 Interestingly, the fact that it was a team of Bosnian lawyers who drafted the new code was ultimately of little relevance. This code was entirely perceived as being internationally imposed. 108 This may be partly because of the clear connections it had with the ICTY’s Rules of Procedure and Evidence, and the fact that it was ultimately enacted by the OHR. However, the crucial element was that the local legal profession had not been substantially involved in the process. The perception was that local legal traditions were regarded with contempt by international institutions, and not properly understood. 109 Put differently, the main problem with the new criminal procedure code was what has been termed the ‘blueprint’ approach to capacity development, that is, capacities were presented as coming from the outside and applied as a set ‘fix’ to solve certain problems instead of trying to work within local rules. 110

A. Composition and Exit Strategy

The Court of BiH has had a mixed or internationalized composition in Chambers, the POBiH and the Registry. 111 The enhancement of local capacity was part of the rationale for having this kind of international involvement. Yet, the transfer of skills and knowledge to local legal professionals has not worked by simple mentoring or ‘by example’ as it was probably expected. 112 Moreover, the experience in Chambers has been distinct from that at the POBiH and therefore warrants being considered separately.

National judges generally consider that the influence of their international counterparts has been positive and that it has worked at different levels. 113 However, it is not easy to pin down exactly how this has actually worked. Initially judges met regularly to discuss relevant points of law. International judges would prepare a topic and give a talk to their colleagues. But these initiatives were the product of the commitment of a particular judge or judges,

107 Ashdown, supra note 34, at 249.
111 There is no established provision of mentoring or joint responsibilities for defence counsel.
112 Interview A-18.
113 See e.g. interview A-3.
and have proven difficult to institutionalize.\textsuperscript{114} In fact, there are other elements that seem to have undermined any ‘transfer of knowledge and skills’ process. First, the selection process of international judges has been heavily criticized, with several of them lacking the relevant experience or technical knowledge.\textsuperscript{115} In the words of an international commentator: ‘[the Court of BiH] is not a training ground for judges.’\textsuperscript{116} But not only their knowledge was put into question; their commitment was also often criticized.\textsuperscript{117} Several international judges stayed at the Court for a period of only one year. This was not enough time for them to even begin to familiarize themselves with the local legal framework, let alone with the complex nature of cases and the cultural and political background within which they took place. As a result, the financial costs of this policy were high, whereas the actual benefit of having international judges around was minimal.\textsuperscript{118} Finally, experienced local judges were not always willing to take advice from even their most knowledgeable foreign colleagues. In this context, it is only reasonable that they would be unwilling to being ‘chaperoned’ by internationals.\textsuperscript{119}

An interesting issue worth considering is the policy of not having international judges taking turns with nationals to preside over the panels. In order to enhance the sense of ownership, locals were always meant to preside. However, in some panels ‘the presiding judge ... [felt] it is his or her obligation to run the whole show, [and this] makes it difficult for [an] international to try to intervene.’\textsuperscript{120} It is suggested, then, that it may have been a positive influence on local judges to take turns to preside with international judges, particularly those with greater experience in adversarial systems. Such a policy may also have a positive impact on the effectiveness and celerity of the Court, in particular if internationals were to introduce case management techniques, restricting the amount evidence that goes into the case, and so on. This suggestion, however, is not without its critics. Most international judges would have a much weaker grasp of the BiH procedural rules and would probably interpret them in the light of their own legal traditions. This, together with their lack of command of the language and the need to strengthen public confidence in

\textsuperscript{114} Interview A-11. These meetings have come to an end within the context of the BiH Court.
\textsuperscript{115} Interviews A-3, A-15 and A-25. To this, some would add ‘their unfamiliarity with the domestic system, with the historical context, with the constitutional structure of BiH, and with its political context’ (interview A-11).
\textsuperscript{116} Interviews A-11 and A-15.
\textsuperscript{118} Interviews A-15 and A-25.
\textsuperscript{119} Interview A-36.
\textsuperscript{120} Interview A-15.
the local capacity of the Court of BiH, casts some doubts as to the actual benefits of such a policy.121

At the POBiH, the model for the peer-to-peer transfer of knowledge has been necessarily different. Prosecutors work alone with their teams with the exception of the team created to deal with the Srebrenica cases.122 The POBiH has a more hierarchical form of organization, something that can be used for these purposes (both positively and negatively). The initial approach towards transfer of knowledge among prosecutors was ‘by example or imitation’; it was expected that by ‘rubbing shoulders’ with international prosecutors, watching how they worked, and so on, local prosecutors would learn how to prosecute war crimes cases as if ‘by osmosis’.123 Moreover, this had to take place within a post-communist institutional milieu, in which ‘everyone was afraid to make mistakes’, and where there were great incentives ‘to keep to oneself’.124 Finally, the POBiH also suffered from what has been termed the ‘crowding out’ problem. Namely, the most challenging or difficult work was taken up by internationals to the expense of national prosecutors. Except for the first Rule 11bis case, the rest have been handled by international prosecutors. This can have, and arguably has had, an overall negative impact on the capacity of local prosecutors.125 This general approach to informal transfer of knowledge depended purely on the willingness of the individuals involved, who were incidentally working under severe time constraints arising out of the workload created by the legacy of the ICTY. The existing incentives hardly favoured any form of transfer of knowledge or institution building.

Nevertheless, these considerations should not lead us to conclude, with Tolbert and Kontic, that not much was actually happening at the POBiH in terms of traditional capacity development.126 Two concrete initiatives illustrate a somewhat different picture. The first one is a mechanism for reviewing indictments, which entailed that every indictment that was filed had to go through a review process by the person in charge of the office and another prosecutor. This process was not conducted on an ad hoc basis; all prosecutors needed to present and defend all their indictments. This had an obvious impact on the way in which prosecutors developed their understanding and experience with the legal and evidentiary elements of complex cases.127 But also, it meant that internationals had to adapt to the way in which indictments are drafted in BiH, even if they found it counterintuitive from the point of view of their own legal tradition.128 The second initiative is the drafting of guidelines on charging, plea-bargaining, evidence, and so on. Each of these guidelines was introduced gradually, using the feedback of local prosecutors,

121 Interview A-21.
122 This team involved a national and an international prosecutor working together.
123 Interview A-23.
124 Interview A-18.
125 Tolbert and Kontic, supra note 117, at 46.
126 Ibid., 35.
127 Interview A-18.
128 For a conflicting view, see Tolbert and Kontic, supra note 117, at 29.
rather than being altogether adopted and imposed. Working with practical guidelines on thorny or complex issues arguably has made the work of prosecutors more effective.129

These are simple albeit important ways in which the institutional capacity of the POBiH has been enhanced by the presence of internationals. The introduction of institutional mechanisms which are admittedly foreign to the local legal culture, but at the same time show respect and deference to local professionals and practices, can be of the utmost importance. In fact, the point was forcefully made that what was necessary in this context were experienced managers more than legal experts.130 Creating a progressive normative structure in the Special Division for War Crimes and instilling a more open, transparent working culture was arguably the greatest contribution of the international component of the POBiH.

In contrast, the impact of the international element of the Court of BiH over entity and cantonal courts has been negligible overall.131 It is often argued that the work of the Court of BiH would have a 'spill over effect' on the local judiciary.132 There seems to be, however, little substance behind this claim. A number of elements help to explain this. First and foremost, the Court of BiH and the entity courts apply to these cases different procedural and substantive codes. That is, while the Court of BiH is developing its own jurisprudence on issues such as plea-bargaining, crimes against humanity, joint criminal enterprise and command responsibility, the cantonal and district courts are following different patterns.133 Second, it is (again) suggested that 'it is not the role of the Court of BiH to develop capacities of other courts — that is the job of the HJPC[s].'134 In fact, there are no formal relationships between the Court of BiH and district and cantonal courts that would allow for some sort of direct influence, and any form of collaboration would have to be coordinated with three separate judiciaries with marked and divergent political allegiances.

The adoption of the War Crimes Strategy at the end of 2008 has arguably exercised a positive, albeit limited influence in this respect. Appellate sections of the entity courts and of the Court of BiH are now required to meet periodically in order to harmonise judicial practice and find solutions to common problems. As a result of it, cantonal and district courts may begin to apply the new BiH Criminal Code.135 Perhaps favoured by its function and institutional structure, the POBiH has encouraged among its Prosecutors an active policy of establishing links between them and prosecutors at the entity or cantonal level even before the establishment of the Strategy.136 The mere fact that the POBiH at the state level is liaising with prosecutors at the entity or cantonal

129 Interview A-18 and A-23.
130 Interview A-23.
131 Interview A-3.
132 Interview A-35.
133 Interview A-22.
134 Interview A-11.
135 Interview A-3.
136 Interview A-18.
level to carry out different investigative activities, such as exhumations, identification of witnesses, etc., can have a beneficial influence by creating working relationships between prosecutors at the different levels.

Finally, it is worth considering here the phasing out exit strategy selected to go from a mixed institution to an entirely national one in terms of its potential to influence the development of local capacities. The international personnel at Court of BiH were initially set up to end its involvement by the end of 2009, i.e. five years after it started functioning. This deadline was ultimately extended until 2012. The advantages of a phasing out strategy over other forms of termination have been discussed above. Among them, we may highlight the development of physical and institutional structures outliving the Court’s international involvement (and even war crimes cases) and the likelihood of local professionals staying at the Court. However, this fixed-expiry-date model seems entirely inadequate. For one, the deadline in this case might have been too short. Tolbert and Kontic have argued that there were still deficiencies in terms of adherence to international standards in issues of substantive international criminal law, or political pressure over judges and prosecutors and accusations of ethnic bias, and problems in securing adequate leadership and support with complex investigations within the POBiH, and with providing support and protection to victims and witnesses. All in all, the phasing out strategy in this kind of internationalized tribunal would probably have worked better if it attached the end of the international involvement to progress (i.e. meeting certain benchmarks) rather than to a fixed date, and if it incorporated concrete incentives for the relevant actors (often financial) to get this progress achieved in a timely fashion.

5. Conclusion

With the current approach to ‘positive’ complementarity at the International Criminal Court, the issue of capacity development is coming to the forefront of debates concerning international criminal justice. International or internationalized courts need domestic prosecutions if they are to have a meaningful impact domestically, and significant work is needed for domestic legal systems to be up to the task. Furthermore, developing the capacity of the local legal system is crucial to any feasible approach to enhancing the rule of law. However, as the case of BiH aptly illustrates the international community’s general approach to capacity development seems still excessively focused on direct forms of capacity development. Capacity development is perceived mainly as the provision of legal training to the relevant local professionals. And yet, even in this limited context efforts generally lack coherence,
coordination and adequate planning and this undermines their impact and sustainability. Providers have also proven resistant to enhancing local ownership over the process. These shortcomings are often the result of structural factors (such as vested interests of the relevant organizations, or funding flows) rather than purely contingent or ‘personality-driven’, as it is often claimed. This article argues, by contrast, that actual development of local capacities is ultimately favoured (or hindered) by institutional factors connected to the policies of the relevant international or internationalized tribunal. The institutional dynamics between the ICTY and the local judiciary, including the BiH Court, account for most of the positive and negative impacts that obtained in BiH. The support for the creation of the war crimes section at the Court of BiH, the transfer of information from the ICTY, and the building of horizontal working relationships between colleagues and institutions have notably favoured the process. Yet the engine behind it was the political need for the ICTY to transfer cases to a working domestic legal system, and the interest of the political community in BiH in reclaiming ownership over justice for war crimes perpetrated there.