

Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina

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Abstract

The development of an international criminal system to provide justice for international crimes must be complemented by national processes of prosecution and adjudication. In order to guarantee international standards of justice it is necessary to support national efforts of accountability by creating infrastructure and capacity in those countries where the atrocities took place. The War Crimes Chambers of the State Court of Bosnia and Herzegovina, and its accompanying Special Department for War Crimes of the Prosecutor's Office, represent one of the most salient examples of these complementary efforts. In their six years of existence these institutions have accumulated a solid record of prosecutions, developed a considerable practice and established themselves solidly within the Bosnian judicial system and the international network of hybrid and national tribunals. This article considers these years of practice and the lessons that can be learnt for future national processes of prosecution of mass atrocity after conflict.

Keywords

war crimes; crimes against humanity; genocide; national trials; hybrid tribunals; prosecution strategy; International Criminal Tribunal for the Former Yugoslavia (ICTY)

1. Introduction

The War Crimes Chamber of the State Court of Bosnia and Herzegovina (WCC) was established in 2005 in the context of the development of war crimes prosecutions at global level. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) wind down their activities and the International Criminal Court (ICC) increases its workload, the prosecution of war crimes on a national level has become central

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in the fight against impunity.² A consensus seems to be building that efforts to develop an international criminal system must be complemented by the creation of infrastructure and capacity for war crimes prosecutions in those places where the atrocities took place. The development of the positive complementarity process at the ICC as a tool for the strengthening of national capacities and the number of hybrid tribunals that proliferated in the past decade signal the international community's commitment in this direction. The establishment of the WCC and the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina (SDWC) are an example of institutions created within the countries which suffered mass violence to prosecute war crimes closer to home. Such institutions are meant to bring justice closer to the affected communities, especially after the criticisms of distance and lack of engagement of the ICTY and ICTR, as well as safeguarding international standards of justice.³

After six years the WCC and the SDWC have successfully prosecuted an impressive number of cases in a very politically tense environment. This article analyses some of the most salient aspects of this work. In its first section it provides an overview of the creation of the institutions and the process of developing a war crimes prosecution strategy. The second section analyses in detail the peculiarities of the three levels of prosecution and adjudication in BiH, which makes prosecution and adjudication a particularly challenging affair. The third section focuses on the role of the prosecution, including a detailed account of the difficulties of mapping the caseload and the practices developed by the SDWC, with special attention to the prosecutorial strategy to include plea bargaining for war crimes. In the fourth and final section the article discusses some of the most relevant cases in the six years of judicial practice. Prosecution and adjudication of war crimes in BiH and the institutions which do so are unique, as are all the processes of justice for mass atrocities given each unique context. However, many of the lessons that can be drawn from the experience of the WCC bring powerful insights for current and future practice of prosecuting war crimes at national level. The conclusions of this article attempt to highlight some of them.

²) This article uses the general denomination war crimes to refer to war crimes, crimes against humanity and genocide.

³) See generally, Laura A. Dickinson, 'The Promise of Hybrid Courts', 97 *American Journal of International Law* (2003) 295-301; Beth Dougherty, 'Right-sizing International Justice: The Hybrid Experiment at the Special Court for Sierra Leone', 80 *International Affairs* (2004) 311-328; Chandra L. Sriram, 'Wrong-sizing Transitional Justice? The Hybrid Tribunal in Sierra Leone', 29 *Fordham International Law Journal* (2006) 472-506; Parinaz K. Mendez, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?', 20 *Criminal Law Forum* (2009) 53-95; Chandra L. Sriram, Olga Martin-Ortega and Johanna Herman, 'Justice delayed? Internationalised criminal tribunals and peace-building in Lebanon, Bosnia and Cambodia', 11 *Conflict, Security and Development* (2011) 335-356; Olga Martin-Ortega and Johanna Herman, 'Hybrid Tribunals: Interaction and Resistance in Bosnia and Herzegovina and Cambodia', in Oliver P. Richmond and

2. Establishing Institutions and Strategies for the Prosecution and Adjudication of War Crimes

2.1. *The Creation of the War Crimes Chambers and the Special Department for War Crimes*

The main rationale behind the creation of the WCC and the SDWC was to provide the justice system with the tools and capacity to conduct war crimes trials according to international standards.⁴ The WCC was officially inaugurated on 9 May 2005, whilst the SWCD was created in January that year. The WCC was conceived as Section I of the Criminal Division of the newly established State Court of Bosnia and Herzegovina (the State Court, hereinafter).⁵ The SDWC is Department I of the, also newly established, Prosecutor's Office.⁶ The establishment of both the State Court and the Prosecutor's Office was part of a wider rule of law programme through legal and judicial reform to provide BiH with strong institutions at national level.⁷ The creation of such institutions was essential to strengthen the central government of BiH given the greatly fragmented

Audra Mitchell (eds.), *Hybrid Forms of Peace. From Everyday Agency to Post-Liberalism* (Palgrave, Hampshire, 2012), pp. 73-88; and Office of the High Commissioner for Human Rights, *Rule of law tools for post-conflict states: Maximizing the legacy of hybrid courts* (E.08.XIV).

⁴ Office of the High Representative, *War Crimes Chamber Project, Project Implementation Plan, Registry Progress Report*, 20 October 2004, <www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf>, 1 March 2012.

⁵ *Law on the Court of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina No. 29/00, Official Consolidated Version (Official Gazette of Bosnia and Herzegovina No. 49/09), <www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf>, 1 March 2012. The State Court was created by the High Representative and it became operational in January 2003. The Criminal Division has three sections: Section I –the WCC; Section II- Organised Crimes, Economic Crime and Corruption; and Section III- General Crime. Both the WCC and the Organised Crime Chamber were originally composed of national and international staff; whilst the General Crime chamber has been from the start solely national.

⁶ *Law on the Prosecutor's Office of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina No. 42/03, Unofficial Consolidated Version, <www.tuzilastvobih.gov.ba/files/docs/zakoni/zot/s_Office_BiH_-_Consolidated_text.pdf>, 1 March 2012. The Prosecutor's Office is divided into three departments: the Department for General Crimes, the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption.

⁷ Since 1998 the promotion of rule of law has been one of the main elements of the international agenda for the reconstruction of BiH. In that year UN Judicial System Assessment Programme was created. In 2002 the High Representative presented its strategy for the reform of the justice sector (*Jobs and Justice: Our Agenda*, May 2002). The most important reforms included, together with the creation of the State Court and the Prosecutor's Office, vetting and reappointment of judicial staff, the establishment of a High Judiciary and Prosecutorial Council, the passing of new Criminal and Criminal Procedure Codes at state level, and the passing of the *Law on Protection of Witnesses under Threat and Vulnerable Witnesses*, Official Gazette of Bosnia and Herzegovina No. 3/03, Unofficial Consolidated Version <www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_PROTECTION_OF_WITNESSES_-_Consolidated_text.pdf>, 1 March 2012. See generally, Lilian A. Barria and Steven D. Roper, 'Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal

institutional structure of the country established as part of the peace process that brought the conflict to an end.⁸ The territorial distribution consolidated in the Dayton Peace Agreement (DPA) established two entities, the Federation of BiH and Republika Srpska, each with its own government, legislature and judiciary, as well as an autonomous district, Brčko District.⁹

The new State Court has jurisdiction over the whole territory of BiH and over “criminal offenses defined in the Penal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina”,¹⁰ which include war crimes, crimes against humanity and genocide.¹¹ The Prosecutor’s Office has jurisdiction to investigate and prosecute perpetrators of criminal offences within the jurisdiction of the State Court.¹² The WCC and the SDWC are the Section and Department in the State Court and Prosecution’s Office which exercise jurisdiction over war crimes, crimes against humanity and genocide.¹³ Their establishment was the direct result of an agreement reached in January 2003 between the Office of the High Representative and the ICTY.¹⁴ They came as a response to the need for closure of the ICTY and therefore to provide for effective and fair national institutions to continue the prosecutorial work. The building of national capacities was a key element of the ICTY completion strategy in the whole region.¹⁵ But in

Reform beyond the Completion Strategy of the ICTY’, 9 *Human Rights Review* (2007) 317-330 and Andy Aitchison, *Making the Transition. International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina* (Intersentia, Cambridge, 2011).

⁸ *The General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995. See generally, Dina F. Haynes, ‘The *Deus ex Machina* Descends: The Laws, Priorities and Players Central to the International Administration of Post-Conflict Bosnia and Herzegovina’, in Dina F. Haynes (ed.), *Deconstructing the Reconstruction. Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* (Ashgate, Hampshire, 2008) pp. 3-28.

⁹ These will be referred to generally as entity courts.

¹⁰ Article 13.1 *Law on the Court of Bosnia and Herzegovina*, *supra* note 5.

¹¹ Chapter XVII, *Criminal Code of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina No. 3/03, Unofficial Consolidated Version <www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Code_of_BH_-_Consolidated_text.pdf>, 1 March 2012.

¹² Article 12.1 *Law on the Prosecutor’s Office of Bosnia and Herzegovina*, *supra* note 6.

¹³ This is why in many occasions it might be confusing when references are done generally to the State Court when analysing war crimes prosecutions, without specifying that they take place in Section I, the War Crimes Chambers. Prosecutions initiated by the State Court prior to the establishment of the WCC (from 2003 to 2005) were developed in the context of the State Court in general.

¹⁴ In August 2003, UN Security Council Resolution 1503 (S/RES/1503) called on “the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law”, para. 5. On 30 October 2003, following a donor’s conference in The Hague, it was announced that €15.6 million had been pledged towards the establishment of the WCC, Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy. Efforts to Achieve Accountability for War Crimes and Their Tribunals’, 3 *Journal of International Criminal Justice* (2005), p. 94.

¹⁵ UN Security Council Resolution 1503, *ibid.* and 1534 (S/RES/1534). On the process of establishment of the WCC and the ICTY involvement see Michael Bohlander, ‘Last Exit

BiH this problem was even more acute. Not only were there no institutions equipped to undertake the complex task of war crimes prosecutions, but national prosecution had so far brought serious problems in terms of international justice standards and had been a source of destabilization and increased ethnic tensions in the country.¹⁶ Nearly a decade before, the lack of impartiality of the early national prosecutions had prompted the creation of the system of supervision of national prosecutorial activity by the ICTY known as “the Rules of the Road”.¹⁷

The political manipulation that characterised the prosecutions at national level in the second part of the 1990s has now changed, but the highly politicised environment in which the State Court, and other courts conducting war crimes prosecutions, exercise their activities remains. The constant tensions between state and entity level institutions and the persistent political use of the facts and victims of the conflict for the pursuit of nationalistic agendas makes for a difficult context in which to develop the technically complex and sensitive task of war crimes adjudication. Since its instauration the State Court and the Prosecutor’s Office have had to face attacks from political leaders which accuse them of bias.¹⁸ The high profile and sensitive nature of the cases have attracted the interest of the

Bosnia- Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts’, 14 *Criminal Law Forum* (2003) 59-99; Fidelma Donlon, ‘Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina’, in Haynes, *supra* note 8, pp. 257-284 and Lara Nettelield, *Courting Democracy in Bosnia and Herzegovina. The Hague Tribunal’s Impact in a Postwar State* (Cambridge University Press, Cambridge, 2010), pp. 234-268. As part of the support for war crimes prosecution at national level the ICTY has also been involved in the setting up of specialised mechanisms and capacity building in Croatia and Serbia.

¹⁶ Prosecution for war crimes at domestic level in the early post-war years were tinged by fears of partiality especially, especially in mono-ethnic territories. National courts lacked independence from the dominant nationalistic political parties and arbitrary arrests and trial in absentia were a common feature of the early post-war prosecutions. See Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro*, October 2004, <www.hrw.org/sites/default/files/reports/icty1004.pdf>, 1 March 2012; OSCE, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina. Progress and Obstacles*, March 2005, <www.oscebih.org/documents/osce_bih_doc_2010122311024992eng.pdf>, 1 March 2012; Ulrich Garms and Katharina Peschke, ‘War Crimes Prosecution in Bosnia and Herzegovina (1992-2002). An Analysis through the Jurisprudence of the Human Rights Chamber’, 4 *Journal of International Criminal Justice* (2006) 258-282.

¹⁷ *Rome Agreement*, Signed by Presidents of BiH, Serbia and Croatia and the ICTY on 18 February 1996, <www.ohr.int/print/?content_id=6093>, 1 March 2012. See generally, Mark S. Ellis, ‘Bringing Justice to an Embattled Region- Creating and Implementing the “Rules of the Road” for Bosnia and Herzegovina’, 17 *Berkeley Journal of International Law* (1999) 1-25; Janet Manuell and Aleksandar Kotic, ‘Transitional Justice: The Prosecution of War Crimes in Bosnia and Herzegovina under the “Rules of the Road”’, 5 *Yearbook of International Humanitarian Law* (2002) 331-343; and Katie Zoglin, ‘The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?’, 27 *Human Rights Quarterly* (2005) 41-77.

¹⁸ The President of Republika Srpska, Mirolad Dodik has campaigned against the State Court and the process of war crimes prosecutions at national level, claiming that it focuses on the prosecution of Bosnian Serbs and that it is controlled by foreigners, Olga Martin-Ortega and Johanna

public and all sorts of political pressures and misreporting from the mass media. Both the State Court and the Prosecutor's Office have been praised for their capacity of resistance to these attacks and for their professionalism in conducting their activity with a high level of impartiality.¹⁹

The composition of both the WCC and the SDWC represents the main three ethnic groups in the country. The official language of the court is the national language and all the public proceedings take place in Bosnian-Croatian-Serbian (BCS), with translation into English of court proceedings and documents.

2.2. *From Hybrid to National Institutions*

Hybrid composition of judicial institutions in BiH is not limited to the WCC and the SDWC. Introducing an international element to some key institutions has been part of the rule of law strategy of the international community in the country. In this way other bodies of the State Court were also conceived as hybrid from the beginning, such as the Organised Crime, Economic Crime and Corruption Chamber and its accompanying Special Department at the Prosecutor's Office, and the Defence Office. International personnel also staffed the Registry organisational units, including the Legal Department, the Witness Support Office and the Public Information and Outreach Section. Outside of the State Court, the High Judicial and Prosecutorial Council (HJPC)-which is the body in charge of appointment and discipline of judges and prosecutors-, the Constitutional Court and the now extinct Human Rights Commission, all had international staff as a way to provide the state with stronger central institutions, helping to develop national capacity and ensuring greater ownership over the rule of law reform process.

These institutions were conceived of as national institutions with initial hybrid composition, but with a clear prospect of becoming wholly run by national personnel. In the State Court it was foreseen that international personnel would stay for 5 years.²⁰ This differentiates the WCC from other hybrid tribunals, which are inherently mixed in their nature instead of national with hybrid elements, and whose life span is predetermined, after which they will be dismantled. This way, the fourth and last phase in the establishment of the WCC was the transitional phase, from hybrid to national, and due to be concluded in December 2009.²¹

Herman, *supra* note 2; see also Janine Natalya Clark, 'The State Court of Bosnia and Herzegovina: a Path to Reconciliation?', 13 *Contemporary Justice Review* (2010) 371-390, p. 378.

¹⁹ OSCE, *Delivering Justice in Bosnia and Herzegovina. An Overview of War Crimes Processing from 2005 to 2010*, May 2011, p. 46, <www.oscebih.org/documents/osce_bih_doc_2011051909500706_eng.pdf>, 1 March 2012.

²⁰ The first judges and prosecutors were appointed by the High Representative of the international community in BiH, but since July 2006 the HJPC is in charge of the appointment, in accordance with the Registry, the President of the Court and the Chief Prosecutor.

²¹ Office of the High Representative, *supra* note 4.

The Registry of the State Court was tasked with overseeing this transition, supported by a Transition Council, composed by the representatives of the Court, the Prosecution, the government and the HJPC.²²

The phasing out of international staff in most bodies of the State Court happened relatively smoothly and according to schedule. In March 2006 a national took charge of the Registry and by December it was running with only national staff and financed by the national budget. The international director of the Defence Office was also replaced in May 2007 by a national. By March 2008 there were no internationals in the Victims Support Office and the Public Information and Outreach Office. The last to leave were meant to be the international judges, prosecutors and legal officers at both the WCC and the SDWC and the Organised Crimes Chamber and Special Department for Organised Crime of the Office of the Prosecutor. As the phasing out of international judges and prosecutors started in January 2008, and especially as their mandates were coming to an end, many called for the transition process to be slowed down and even for their mandates to be renewed. These included the Prosecutor of the ICTY, Serge Brammertz and the President of the State Court, Meddžida Kreso.²³ The main problems regarding the departure of international staff from the State Court concerned the risks of political pressures and uncertainty over the financing of activities and human resources.²⁴ Doubts over capacity of national prosecutors to fulfil their role without international assistance were also raised.²⁵ The issue became very politically charged. The national legislature failed to pass a law to prolong the mandate of international judges and prosecutors at the war and organised crimes chambers and prosecutor's departments. Finally, at the last minute, the High Representative of the international community in BiH took the executive decision to impose this measure. The mandate of international judges

²² The Transition Committee is composed by the President of the Court, the Chief Prosecutor, the Registrar, the Registrar for the Prosecutor's Office, the minister of finance and the minister of justice, the director of the Directorate for European Integration and the president of the HJPC. The design of the mechanisms to support the transition was established in the Office of the High Representative-Presidency of BiH agreement establishing a Transitional Council, on September 26, 2006 (Official Gazette of Bosnia and Herzegovina – International Agreements No. 3/07), <www.registrarbih.gov.ba/files/docs/New_Registry_Agreement_-_eng.pdf>, 1 March 2012.

²³ Address of Serge Brammertz, Prosecutor of the ICTY to the Security Council, 4 June 2008, <www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/080604_proc_brammertz_un_sc.pdf>, 1 March 2012 and Registry of the Court of Bosnia and Herzegovina, *Annual Report 2008*, p. 82, <www.registrarbih.gov.ba/files/docs/REPORT_2008_FINAL.pdf>, 1 March 2012.

²⁴ David Tolbert and Aleksandar Kontić, *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* (The Hague, International Criminal Law Services Foundation, 2009), p. 55, <www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>, 1 March 2012.

²⁵ Bogdan Ivanešević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (International Centre for Transitional Justice, New York, 2008), p. 42.

and prosecutors at the WCC and the SDWC was extended at the last minute.²⁶ International prosecutors would stay until December 2012, whilst judges would stay until the completion of the cases they were involved in at the time.²⁷ The High Representative did not however extend the mandate of the Organised Crimes Chamber and Special Department for Organised Crime of the Prosecutor's Office.

At the time of writing, most of the international staff has left both the State Court and the Prosecutor's Office. Since 2009 all the WCC first-instance panels are composed exclusively of national judges and four international judges remain in the appellate division.²⁸ That year the shortage of judges, brought by internationals leaving and the HJPC not appointing national judges to replace them, made it necessary to reduce the number of first instance panels to four, instead of the original six, even if the number of cases increased.²⁹ In December 2009 the international prosecutor who served as the head of the SDWC and Deputy Chief Prosecutor also left, and with him most of the international staff of the Department. He was replaced in his position by the national prosecutor Vesna Budimir. Four international prosecutors remain.³⁰

As expected, the departure of the international staff has put an important pressure on the institutions, both in terms of human capacity and financial support. During 2010 the State Court and the Prosecutor's Office faced important funding struggles.³¹ In 2011 a failure of the national legislature to approve the budget meant that the State Court had to operate with interim funding. The Prosecutor's Office also felt the impact as certain budget lines became exhausted.³² The main areas affected have been investigations, witness support costs and criminal defence as well as day to day running of the institutions.³³ The fact that national authorities have not been able or willing to provide with the necessary budget and

²⁶ Office of the High Representative, *Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina*, 14 December 2009, <www.ohr.int/decisions/judicialrdec/default.asp?content_id=44283>, 1 March 2012.

²⁷ Even if the mandate was extended, the late decision and the tensions over their presence in the State Court and Prosecutor's Office lead several internationals to leave before the new term of the mandate.

²⁸ Court of Bosnia and Herzegovina, *Jurisdiction, Organisation and Structure* <www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&cid=3&jezik=e>, 1 March 2012. The international judges remaining are Judge Mitja Kozmernik, Judge Carol Peralta, Judge Phillip Weiner and Judge Patricia Anne Whalen.

²⁹ Registry of the Court of Bosnia and Herzegovina, *The Registry Annual Report 2009*, p. 23, <http://www.registrarbih.gov.ba/files/docs/ANNUAL_REPORT_2009.pdf>, 1 March 2012.

³⁰ Office of the Prosecutor of Bosnia and Herzegovina, *Prosecutor's of Section I*, <www.tuzilastvobih.gov.ba/?id=63&jezik=e&kat=15&opcija=sadrzaj>, 1 March 2012. The international prosecutors that remain are Erik Larson, Jude Romano, Marjan Pogačnik and Rut Ley.

³¹ Registry of the Court of Bosnia and Herzegovina, *Registry Annual Report 2010*, <www.registrarbih.gov.ba/files/docs/annual_report_2010.pdf>, 1 March 2012.

³² Registry of the Court of Bosnia and Herzegovina, *Registry Quarterly Report*, June 2011, <www.registrarbih.gov.ba/files/docs/JUNE_QUARTERLY_2011.pdf>, 1 March 2012.

³³ *Ibid.*

impulse to replace some of the international personnel has greatly stretched the human capacity in these institutions. The departure of the internationals has also meant that certain practices might not be guaranteed to continue, in particular in the prosecution, as will be analysed when discussing the prosecutorial strategy. Overall, the management of the phasing out process has not helped to protect these justice institutions from the constant criticisms they suffer from certain political elites. Instead it has increased the vulnerability they face.³⁴

2.3. *The National War Crimes Strategy*

War crimes prosecution in BiH started without a systematic and strategic approach. In 2004 the ICTY Rules of the Road Unit sent thousands of files to the Prosecutor's Office of BiH as part of the ICTY completion strategy. In September 2005 the first full case from the ICTY was transferred. In the meantime, the SDWC initiated its investigations and proceeded with indictments. During this period thousands of investigations remained open at the entity court levels. The difficult relation between the State Court and the entity courts, the backlog of cases and lack of figures on how many cases could be prosecuted, as well as insufficient support and protection of victims and witnesses demanded a systematic approach to prosecution of war crimes at domestic level.³⁵ Drafting a national prosecutorial strategy became a pressing requirement from the international community.³⁶ The drafting process took over a year under the leadership of the Ministry of Justice, with the participation of BiH judicial and prosecutorial representatives both at state and entity level and the assistance of the international community, including the OSEC, the High Representative, the EU and UNDP. In December 2008, the Council of Ministers adopted the National War Crimes Strategy (National Strategy, hereinafter). The drafting process was not

³⁴ See OSCE, *Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*, December 2009, <http://www.oscebih.org/documents/osce_bih_doc_2010122314120729eng.pdf>, 1 March 2012 and David Tolbert, 'EU Must Protect Bosnia's War Crimes Court', *Radio Netherlands Worldwide*, 10 February 2012, <www.rnw.nl/international-justice/Article/opinion-eu-must-protect-bosnia%E2%80%99s-war-crimes-court>, 1 March 2012.

³⁵ Ministry of Justice of Bosnia and Herzegovina, *National War Crimes Strategy*, Section 1. Rationale for Drafting this Strategy, p. 120 of the English translated version, available as Annex 2 in Morten Bergsmo, Kjetil Helvig, Illia Utmelidze and Goran Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (Forum for International Criminal and Humanitarian Law, International Peace Research Institute, Oslo, 2008), <www.fichl.org/fileadmin/fichl/activities/FICHL_3_Backlog_in_BH.pdf>, 1 March 2012.

³⁶ Peace Implementation Council, *Declaration of the Steering Board of the Peace Implementation Council*, 2-3 (27 February, 2008). The adoption of the strategy was among the five objectives established for the transference from the Office of the High Representative to the European Special Representative. According to the OSCE, *supra* note 19, pp. 17-18, it was only after the PIC adopted this resolution the process moved forward and drafting sessions became regular.

easy and the final product was problematic. Some victim's associations expressed disappointment at the lack of consultation.³⁷ The then head of the SDWC, a member of the Working Group that had drafted it, abstained from voting on it.³⁸ The National Strategy was seen as a political accomplishment, however, the head of the SDWC warned that it would "do little that is meaningful to address BiH war crimes predicament either in the short or long term".³⁹

The first objective of the Strategy (a) was to prosecute the most complex crimes cases within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy. Other objectives focused on the relationship between the WCC and the entity courts dealing with war crimes: (b) to centralize and update at the level of the State Court and Prosecutor's Office of BiH the record of all war crimes cases pending before the BiH judiciary; (c) to ensure a functional mechanism for the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities and of Brčko District that will facilitate efficient prosecution within the set timeframe; (d) to prosecute as a priority the most responsible perpetrators before the State Court; (e) to harmonize court practices in war crimes cases in order to ensure legal certainty and equality of citizens before the law. Further objectives aimed at (f) strengthening the capacity of the judiciary and police in the whole of BiH to work on war crimes cases; (g) establishing a more efficient co-operation with countries in the region concerning war crimes cases for the sake of prosperity in the whole region; and (h) providing protection, support and same treatment to all victims and witnesses in the proceedings before all courts in BiH. Finally the National Strategy established the need to (i) establish an appropriate legal framework for the implementation of measures adopted in the Strategy and the accomplishment of its objectives.⁴⁰

These were very ambitious objectives, which were set within tight time frames and which were not matched with the necessary resources.⁴¹ Even if a supervisory body was appointed,⁴² implementation proved challenging from the beginning

³⁷ Nettelfield, *supra* note 5, p. 262.

³⁸ David Schwendiman, 'Prosecuting Atrocity Crimes in National Courts: Looking back on 2009 in Bosnia and Herzegovina', 8 *Northwestern Journal of International Human Rights* (2010), p. 274. During the drafting process the Head of the SDWC expressed his "disagreement with the way in which the process was being managed and how it was being influenced by individuals who were seemingly interesting only in satisfying the PIC requirement and not writing a strategy with long-term value".

³⁹ *Ibid.*, p. 274.

⁴⁰ Ministry of Justice, *supra* note 35, Section 1.2. Objectives and Anticipated Results, p. 121.

⁴¹ Nettelfield, *supra* note 15, p. 262.

⁴² The Supervisory Body was appointed by the Council of Ministers, composed by representatives of the HJPC, the state and entities Ministers of Justice, as well as the Brčko District Judicial Commission, and the state and entities Ministries of Finance. It is chaired by the President of the HJPC, *see* Ministry of Justice, *supra* note 35, Section 6, p. 146.

and most initial deadlines were missed. Some progress has been made, but as the head of the SDWC predicted implementation has not speeded up war crimes prosecutors. Even if prosecutions at state level have remained stable, there has been, according to the OSCE, an observable downward trend in the rate of prosecutions at the entity level since 2008.⁴³

The relationship between the WCC and SDWC and entity level courts and prosecutors was one of the most controversial issues considered during the drafting process. Contrary to the opinion of the head of the SDWC, the entity level courts retained jurisdiction. The National Strategy established that the distribution of cases between the state and entity level institutions would be based on complexity. The WCC and SWCD should deal with the most complex war crimes cases, and the cases deemed to be less complex should be prosecuted before the cantonal or district courts and prosecutor's offices of the entities and the Basic Court and the Prosecutor's Office of Brčko District.⁴⁴ These criteria to determine which cases should be considered more complex are studied in more detailed in the next section when analysing the relationship between these jurisdictions.

Other urgent issues considered by the National Strategy were those of victims and witness protection and support and regional cooperation. With regards to victim and witness protection the main problem remain the entity courts. The WCC has a dedicated office for the support of witnesses and victims and court practices have been developed to protect witness identity when needed, supported by the necessary technical equipment. This is not the case in entity courts. Only the entity courts of Banja Luka and East Sarajevo District Court, and only since early 2011, have dedicated witness support offices.⁴⁵ With regards to regional co-operation, this is a significant hurdle in war crimes prosecutions across all the countries in the region. In BiH a large number of the unresolved war crimes cases include a large number of witnesses and victims who reside in other countries and many of the accused are scattered around the region. Not having extradition agreements with Serbia, Croatia and Montenegro seriously hinders the possibilities of trials in BiH. In June 2009 BiH passed the Law on International Legal Assistance in Criminal Matters.⁴⁶ Collaboration with Croatia and Serbia has increased, but formal agreements are yet to be signed.⁴⁷ In fact, whilst Serbia and

⁴³ OSCE, *supra* note 19, p. 20.

⁴⁴ Ministry of Justice, *supra* note 35, p. 12.

⁴⁵ UNDP Bosnia and Herzegovina, *Witness Support Office Opens in Banja Luka and Sarajevo*, <www.undp.ba/index.aspx?PID=7&RID=658>, 1 March 2012.

⁴⁶ Official Gazette of Bosnia and Herzegovina, No. 53/09, <www.tuzilastvobih.gov.ba/files/docs/LAW_ON_MUTUAL_LEGAL_ASSISTANCE_IN_CRIMINAL_MATTERS_No_53_09.pdf>, 1 March 2012.

⁴⁷ Attempts to formalise an agreement on the execution of criminal and legal sanctions have gone on for several years now, *see* Registry of the Court of Bosnia and Herzegovina, *supra* note 29, p. 62

Croatia signed a regional cooperation agreement on war crimes prosecution in February 2012, lack of national political will prevented BiH to join them.⁴⁸

3. Advantages and Complexities of Three Levels of Prosecution and Adjudication

Unlike other national or hybrid efforts to address war crimes, BiH intends to prosecute as many crimes committed during the conflict as possible, and these run into the thousands. Prosecution and adjudication of international crimes are being developed at three levels: a) at international level at the ICTY; b) at state level at the WCC, and c) at entity level in both the 10 cantonal courts at the Federation of BiH, the 5 district level courts in Republika Srpska and the Basic Court of Brčko District. The relationship between the jurisdictions is problematic, especially as the WCC shares jurisdiction with the national courts. Criteria for case distribution have been vague and changed over the years, as will be analysed below.

The ICTY has indicted 161 persons and conducted proceedings for 126 accused. At the time of writing there are 35 ongoing cases and no fugitives remain at large. The schedule for completion of operations of the ICTY has changed several times. The latest estimate (as of December 2011), is that all the cases, with the exception of the trials of the recently arrested Ratko Mladić and Goran Hadžić, would be concluded, including the appeal stage, by the end of 2016.⁴⁹ As part of its completion strategy the ICTY has transferred 8 cases, involving 13 accused to the national jurisdictions of BiH, Croatia and Serbia under the so-called Rule 11 *bis*.⁵⁰ BiH received 6 of these cases, involving 10 accused.⁵¹

Since it opened its first trial on September 2005, the WCC has completed proceedings for 84 cases, of which 64 have already been heard on appeal. These include the 6 cases transferred from the ICTY.⁵² The initial political context and

⁴⁸ Denis Dzidic, 'Josipovic and Tadic Hatch War Crimes Deal', *Balkan Insight*, <www.balkaninsight.com/en/Article/serbia-and-croatia-to-sign-agreement-on-prosecution-of-war-crimes>, 1 March 2012.

⁴⁹ See ICTY, *Completion Strategy*, <www.icty.org/sid/10016>, 1 March 2012.

⁵⁰ Rule 11 *bis* refers to the provision of the ICTY Rule of Procedure and Evidence which enables the Tribunal to transfer cases to domestic courts for prosecution, see generally Susan Somers, 'Rule 11 Bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts', 30 *Boston College International and Comparative Law* (2007) 175-183 and Olympia Bekou, 'Rule 11 Bis: An Examination of the Process of Referrals to National Courts in the ICTY Jurisprudence', 33 *Fordham International Law Journal* (2009) 724-791.

⁵¹ See ICTY Key Figures, <http://www.icty.org/sections/TheCases/KeyFigures#> (visited February 2012). These cases were transferred after indictment, but there were dozens files transferred from ICTY Office of the Prosecutor to national courts.

⁵² See, web of the Court of Bosnia and Herzegovina, <http://www.sudbih.gov.ba/?jezik=e>.

lack of access to perpetrators and evidence, but mainly the complexity of the cases dealt with at the ICTY mean that, even if tempting, direct comparisons between the ICTY and the WCC have limitations. In any event, the significant number of prosecutions and trials at the WCC can be considered an important success.

The information relating the number of war crimes trials taking place at entity level is difficult to access but it has been estimated that entity courts have conducted trials in over one hundred cases.⁵³

This three way system has been characterised by the privileged relationship between the ICTY and the WCC and a difficult cooperation relationship with entity courts. Even with these three levels of prosecution and adjudication there is still a significant backlog of cases, perpetrators walking freely or on the run and victims awaiting retributive justice.

3.1. *Special Relationship with the ICTY*

It is important to note when analysing the work of the WCC and the SDWC, especially if considering it in comparative perspective to other hybrid courts or national efforts to prosecute war crimes, that the Bosnian institutions are in a privileged position due to their special relationship with the ICTY. The conception of these institutions as part of the completion strategy of the ICTY has meant that a significant amount of resources have gone to capacity building and information sharing.⁵⁴ Beyond the human and technical support, the impact of this special relationship has been the possibility of on the one hand, the use by all courts in BiH of evidence gathered by ICTY investigators or produced before the ICTY, and on the other, the reliance on the facts established at the international Court level. 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 in BiH (Law on Transfer, hereinafter)⁵⁵ regulates these two options.

⁵³) OSCE, *supra* note 19, p. 15. In the period between March 2005 and September 2010 the OSCE monitored 116 cases before these entity level courts. Prosecutions at entity level has mainly been concentrated on the cantonal courts of Bihać, Sarajevo, Mostar, Novi Travnik, Tuzla and Zenica in the Federation of BiH and the districts court of Banja Luka and Bijeljina in Republika Srpska, as well as the Basic Court in Brčko District.

⁵⁴) See Alejandro Chehtman and Ruth Mackenzie, *Capacity Development in International Criminal Justice: A mapping exercise of existing practice*, DOMAC/2, September 2009, <www.domac.is/media/domac-skjol/DOMAC2--Annex-Capacity-Development--AC-RM.pdf>, 1 March 2012, Rarik Abdulhak, 'Building Sustainable Capacities - From an International Tribunal to a Domestic War Crimes Chambers for Bosnia and Herzegovina', 9 *International Criminal Law Journal* (2009) 333-358; and Alejandro Chehtman, 'Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'', 9 *Journal of International Criminal Justice* (2011) 547-570.

⁵⁵) Official Gazette of Bosnia and Herzegovina No. 61/04, Unofficial Consolidated Version, <www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf>, 1 March 2012.

Use of ICTY gathered evidence and adjudicated facts has provided important economy of judicial time and resources and would likely contribute to consistent evidence and judicial findings.⁵⁶

The possibility of admitting ICTY evidence (Art. 3 Law on Transfer), includes admitting witnesses testimonies before the ICTY (Art. 5 Law on Transfer), without prejudice to the defendant's right to request the attendance of the witnesses for cross-examination. However, the Law on Transfer does not allow for a conviction to be solely, or to a decisive extent, based on the prior statements of witnesses who did not give oral evidence at trial. Defence teams have challenged the use of evidence and witness testimonies as violating the right to a fair trial and therefore contrary to Article 6 European Convention of Human Rights, to which BiH is a party and to which BiH judicial institutions are bound. The trial panels have generally rejected these arguments and sustained the suitability of the practice.⁵⁷ The main reported problem with regards to the use of evidence of the ICTY has been a language issue. As most of the evidence in the ICTY was obtained and archived in English, national prosecutors and defence lawyers have encountered problems preparing some of the cases.⁵⁸

With regards to the use of facts adjudicated before the ICTY, trial panels have saved significant resources by accepting ICTY findings about the contextual elements of the crimes charged, such as the widespread or systematic nature of attacks in a given area when adjudicating on crimes against humanity, or by accepting the genocidal nature of the events in Srebrenica. The trials therefore have been able to focus on the more-limited task of establishing the specific acts related to the specific accused and what role the accused had in the attack. The Law on Transfer does not establish the criteria for the use of adjudicated facts. It is limited to stating that any court may, at the request of a party or *proprio motu*, "decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY" (Art. 4). The trial panels have relied on Art. 94(B) of the Rules of Procedure and Evidence of the ICTY and the ICTY jurisprudence on use of adjudicated facts, understanding that although they are not binding, they provide guidance in the interpretation and application of Article 4 of the Law on Transfer. For example, the early cases of *Marko Samardžija*⁵⁹ and *Gojko Janković*⁶⁰ relied on the ICTY Decision on Adjudicated Facts in the

⁵⁶ OSCE, *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina. A report of the Capacity Building and Legacy Implementation Project*, January 2010, p. 25, <www.oscebih.org/documents/osce_bih_doc_2010122314321282eng.pdf>, 1 March 2012.

⁵⁷ See, *Gojko Janković*, Case X-KRŽ-05/161, Court of BiH, First Instance, 16 February 2007, p. 20.

⁵⁸ OSCE, *supra* note 56.

⁵⁹ *Marko Samardžija*, X-KRŽ-05/07, Court of BiH, First Instance, 3 November 2006, pp. 18-19.

⁶⁰ *Janković*, *supra* note 57, p. 19-20.

case of *Prosecutor v. Momčilo Krajišnik*.⁶¹ In both cases, the criteria used to accept the facts were those that were distinct, concrete and identifiable; were restricted to factual findings and do not include legal characterizations; had been contested at trial and form part of a judgement which has not been appealed or fall within issues which were not in disputed during the appeal; facts that did not attest the individual criminal responsibility of the accused and were not based on plea agreements in previous cases. In both cases the trial panels rejected the defence objections that the acceptance of the facts would breach Art. 6 ECHR as “adjudicated facts admitted into evidence under the notion of judicial notice do not amount to presumption *juris et de jure* or irrefutable presumptions, since they are always open to challenge, refutation or qualification” and “the institute of judicial notice is achieving judicial economy, which is consistent with the defendant’s right to be tried within a reasonable time, as foreseen by Art. 6(1) ECHR”.⁶² Latter judgements have been more restrictive and have elaborated further on the acceptance criteria.⁶³ Notwithstanding the efforts of the trial panels to systematise criteria, their practice is still inconsistent.⁶⁴ This could be due to the fact that there is lack of experience in applying the doctrine of judicial notice in the country, but also that trial panels’ criteria are not binding to other panels of the WCC.

The Law on Transfer specifies that adjudicated facts can be accepted by all the national courts, therefore including entity courts. Entity courts however have been reluctant to rely on the ICTY findings in their rulings. The fact that the practice of judicial notice is foreign to the BiH legal system and has not been introduced beyond the use of ICTY adjudicated facts means that there is no legal provision which authorises, let alone encourages, entity courts to rely on the facts that the WCC establishes, therefore not taking advantage of this opportunity at local level.

3.2. *Problematic Relationship with the Entity Courts*

3.2.1. *Distribution of Competences among National Jurisdictions*

The complex distribution of competences between state and entity courts reflects the deficiencies of the judicial system, and in a way the institutional system as a whole in BiH. There is no formal hierarchy between the state and the entity

⁶¹ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, International Criminal Tribunal for the Former Yugoslavia, Decision on Adjudicated Facts, 24 March 2005.

⁶² *Samardžija*, *supra* note 59, p. 19

⁶³ In *Željko Mejakić and others*, Case X-KRŽ-06/200, Court of BiH, First Instance, 30 May 2008, the panel elaborated further on the basis of the ICTY Decision on Adjudicated Facts in the case against *Vujadin Popović et al.*, Case No. IT-05-88-T, International Criminal Tribunal for the Former Yugoslavia, 26 September 2006, and listed 9 criteria to be followed.

⁶⁴ For further analysis on the disparities of the use of adjudicated facts *see* OSCE, *supra* note 56, p. 26.

institutions with regards to prosecution and adjudication of war crimes. The jurisprudence of the WCC is not binding on the entity level courts, nor does it act as an appeals jurisdiction. Appeals to the WCC rulings are heard by the Appeals Division of the State Court, whilst appeals to the cantonal courts of the Federation of BiH are heard by the Supreme Court of the Federation and appeals to the district courts of Republika Srpska to its Supreme Court. Equally, appeals from the Basic Court of Brčko District are heard by its Appellate Court. This obviously results an extremely complex and fragmented judicial system dealing with war crimes in BiH, which results in issues of conflict and overlap of jurisdictions. As will be analysed below, this situation brings the risk of violation of principles of fair trial and equality of all citizen before the law.

The Criminal Code of BiH passed in 2003 as part of the rule of law reform, attempted to simply this situation by establishing the State Court's exclusive jurisdiction over war crimes with the possibility of transferring jurisdiction to lower level courts in the two cases explained below. This is problematic, as cooperation and communication between courts is not fluid and therefore the transfer systems established are not working adequately. The fact that the National Strategy opted for a "centralized and co-ordinated"⁶⁵ approach to war crimes jurisdiction rather than exclusive jurisdiction of the WCC has only perpetuated these problems.⁶⁶

The National Strategy made the distribution of cases revolve of the concept of complexity. To determine the complexity of a case the elements to consider are: the gravity of the criminal offence, the capacity and role of the perpetrator and a set of other circumstances.⁶⁷ Among the criteria to consider the gravity of the criminal offense are included: the legal qualification of the offence (as genocide, crimes against humanity and war crimes against civilian population and prisoners of war); mass killings; severe forms of rape; serious forms of torture and unlawful detention; force disappearance; serious forms of infliction of suffering upon civilian population; significant number of victims; particular insidious methods and means used in the perpetrator of the criminal offence and the existence of particular circumstances. Among the criteria to consider the capacity and role of the perpetrator are his role as: deputy within unit; managing position in camps and detention centres; political function; holder of a judicial office and more serious forms of degrees of participation in the perpetration of a criminal offence. The other circumstances that should be considered are: the correlation between the case and other cases and possible perpetrators; the interest of victims and witnesses and the consequence of the crime for the local community. If a case meets

⁶⁵ OSCE, *supra* note 19, p18-19.

⁶⁶ Schwendiman, *supra* note 38, p. 274.

⁶⁷ Ministry of Justice, *supra* note 35, Annex A: Criteria for the review of war crimes cases, pp. 157-159.

these criteria the proceedings would be conducted before the WCC. Otherwise, the case should be transferred to the correspondent entity court.

The transfer procedure is regulated in the Criminal Procedural Code of BiH, in a legal provision inserted in 2009 to give development to the National Strategy. This is Article 27a. This disposition does not explicitly refer to the concept of complexity. It is not clear why this is the case. Article 27a does, however, list the three elements that the National Strategy established as conforming a complex case. If the case complies with the necessary criteria in terms of the gravity of the criminal offence and the capacity and role of the perpetrator, as well as a residual category of other circumstances, it should be transferred to the entity courts where the offense was committed or attempted. The transfer can be considered *ex officio* by the WCC or upon request of the parties. This should happen before the scheduling of the main trial.

So far Article 27a has hardly been used and the WCC has retained most cases, including the ones that could be qualified as less complex according to the established criteria.⁶⁸ Therefore this transfer mechanism has not proved a tool to establish a dynamic relationship between courts.

To further complicate the relationship between the State Court and entity courts there is another significant set of cases over which they share jurisdiction. These are the cases that were initiated by entity courts before the creation of the state institutions and the entry into force of the Criminal and Criminal Procedure Codes in March 2003. These cases go back as far as before the end of the conflict in 1995. The problems of compliance with fair standards, which provoked the agreement on the ICTY Rules of the Road in 1996, have already been described. Some of the cases started and then were processed, but mostly remain currently inactive for lack of sufficient evidence or lack of territorial competence, as they were filed where the victim was rather than where the offence was committed, due to the displacement and ethnic territorial redistribution after the conflict.⁶⁹ Most have never been officially closed. When the State Court first, and the WCC in 2005, commenced their activity, the problem of the cases that were already in process at entity courts became pressing. The Criminal Procedural Code of BiH foresaw in its transitional dispositions (Art. 449) that cases that had been initiated at entity level before its entry into force could be tried by the territorially competent entity court if the indictment had been confirmed or was in legal effect.⁷⁰ If the indictment had not been confirmed or was not legally effective the State

⁶⁸ This information is not easily available from the State Court. Up to September 2010 OSCE identified 7 transferred war crimes cases, OSCE, *supra* note 19, p. 41.

⁶⁹ See OSCE, *supra* note 16.

⁷⁰ Article 449(1), Criminal Procedural Code, Unofficial Consolidated Version, Official Gazette of Bosnia and Herzegovina No. 3/03, <www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Procedure_Code_of_BH_-_consolidated_version_dec2009.pdf>, 1 March 2012.

Court could take over the case, either *ex officio* or upon the reasoned proposal of the parties.⁷¹ The criteria to determine which of these cases would be taken over by the State Court were not initially established in the Criminal Procedural Code. Only in 2009 the amendment of the Code⁷² included, as did Article 27a, the criteria outlined in the National Strategy, but it ‘failed’ to mention the word ‘complexity’.⁷³ Up until October 2008 the WCC had taken over 136 cases through the procedure established in the transitional disposition of the Criminal Procedure Code of BiH.⁷⁴ The main problems with the pre-2003 cases, however, are not necessarily the ones that Article 449 provides the State Court with competence to take over, because they are at indictment level or legally active, but dormant open cases and where there have never been a formal indictment. There are thousands of these cases. The competence for revision of these cases relies on the SDWC and will be addressed in the next section.

3.2.2. *Impact of Jurisdiction Fragmentation*

The main impact of this situation is the lack of harmonisation of court practice, which poses serious risks for compliance with the principles of legal certainty and equality before the law. The complex distribution of competences is further complicated by the fact that there are multiple different sets of criminal law in force in BiH: the Criminal and Criminal Procedure Codes of BiH, the criminal and criminal procedure codes of each territorial entity and the Criminal Code of the Socialist Federal Republic of Yugoslavia (adopted as the current code of Republika Srpska), which was in force during the conflict.⁷⁵ Whilst the WCC applies the Criminal Code of BiH approved in March 2003, the entity courts (except some in the Federation of BiH)⁷⁶ are applying the old Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY). As the WCC and the entity courts do not apply the same criminal set of rules, the fragmentation of jurisdiction has a direct

⁷¹ Article 449(2), Criminal Procedural Code, *ibid.*

⁷² *Amendments to the Criminal Procedure Code of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina No. 93/09 <www.sudbih.gov.ba/files/docs/zakoni/en/izmjena_zakona_o_kvivicnom_postupku_-_93_09_-_eng.pdf>, 1 March 2012.

⁷³ Article 449(2), Criminal Procedural Code, *supra* note 70.

⁷⁴ OSCE, *supra* note 19, p. 39, footnote 87.

⁷⁵ The criminal and criminal procedure codes of the Federation of BiH (2003), Republika Srpska (2005, which replaced the Criminal Code of SFRY) and Brčko District (2000), <www.ohr.int/ohr-dept/legal/crim-codes/>, 1 March 2012. The Criminal Code of the SFRY was adopted by the SFRY Assembly at the session of the Federal Council held on September 28, 1976, and it was in force until 20 November 1998 in the Federation of BiH, until 31 July 2000 in Republika Srpska and until 2001 in Brčko District (*see Radmilo Vuković*, Case X-KRŽ-06/217, Court of BiH, First Instance, 16 April 2007, p. 13). The Criminal Code of SFRY is available at <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b5fe0&page=search>, 1 March 2012.

⁷⁶ In a limited number of cases before the cantonal courts of the Federation BiH, these have used the interim 1998 Federation of Bosnia and Herzegovina Criminal Code.

impact on the qualification of crimes, sentencing and even the possibilities of acquittals.

The Criminal Code of BiH was carefully drafted to reflect the advancements of international criminal law and jurisprudence. It is much more comprehensive in its definition of international crimes and the modes of individual criminal liability. For example, it specifically criminalises crimes against humanity, genocide and war crimes,⁷⁷ whilst the category of crimes against humanity is absent from the Criminal Code of SRFY. Equally, command responsibility (present in Art. 180.2 of the Criminal Code of BiH) is not explicitly recognised in the Criminal Code of SRFY. The Criminal Code of BiH explicitly excludes superior orders as a defence (Art. 180.3). It also contains specific gender violence sensitive clauses following the developments of the jurisprudence in the matter in the ICTY and ICTR and the Rome Statute, such as including sexual slavery as crime against humanity and war crimes (Arts. 172.1.g and 173.1.e, respectively) and gender as a basis of prosecution for crimes against humanity (Art. 172.g.h).

The information is not easily available but the OSCE has reported that the crimes are qualified differently and they have different penalties attached at entity level and in several cases the accused has been acquitted for acts which under the Criminal Code of BiH would have most likely been considered to generate individual criminal responsibility.⁷⁸

Entity courts that apply the Criminal Code of the SRFY have argued that the retroactive application of the Criminal Code of BiH to events that took place during the conflict violates the principle of legality. They have also argued that the principle of the most lenient law requires the application of the Criminal Code of the SRFY, as it prescribes lower mandatory maximum and minimum sanctions for war crimes. Defence teams before the WCC have also repeatedly sustained these claims. The Constitutional Court of BiH has had the opportunity to rule with regards to both arguments. The first war crime trial at state level, the case *Abduladhim Maktouf*, was appealed to the Constitutional Court of BiH on the grounds that the retroactive application of the Criminal Code of BiH violated

⁷⁷) Chapter XVII –Crimes against humanity and values protected by international law- includes the following offenses: genocide (Art. 171), crimes against humanity (Art. 172), crimes against civilians (Art. 173) and other war related crimes (Arts. 174 to 183).

⁷⁸) The rulings of the entity courts are not easily available but the OSCE describes two specific examples: the case *Cupina and others* (2007) before the Cantonal Court of Mostar, which did not consider the command responsibility of a prison warden for failing to mistreat prisoners of war, as it was not considered a criminal offence in Art. 144 of the Criminal Code of SFRY and the *Radonović* case (2007) which concluded with the acquittal by the Supreme Court of Republika Srpska in a case of illegal detention of civilians, by not considering it included in the definition of war crimes against civilians of Art. 142.1 of the Criminal Code of Republika Srpska. See, OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before the Courts of Bosnia and Herzegovina*, August 2008, <www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf> 1 March 2012, pp. 8 and 14-20.

Art. 7 of the ECHR, and the Criminal Code of SFRY should have been applied instead. The Constitutional Court rejected the appeal in 2007 on the basis that the acts of which Maktouf had been found responsible were already considered criminal offences at the time of its commission according to the general principles of law recognized by civilized nations, and this was consistent with the jurisprudence of the European Court of Human Rights.⁷⁹ The WCC has generally sustained that the application of the new Criminal Code does not violate the principle of legality of Article 7 ECHR (and Article 3 of the Criminal Code). It has made use of Article 4a of the Criminal Code of BiH which establishes that the principle of legality and more lenient sentence “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”. For example, in *Miloš Stupar and others* it considered that as genocide was already criminalised in the Criminal Code of SFRY there was no violation of the principle of legality (Art. 3 Criminal Code of BiH and 7.1 ECHR) and Article 4a prevented the application of the principle of the more lenient sentence implying that the application of the Criminal Code of SFRY, even if more lenient, would have prejudiced the trial and punishment in the case.⁸⁰ The WCC has partially departed from its own interpretation and the Constitutional Court ruling in *Maktouf* in one case, allowing the application of the Criminal Code of SFRY to *Zijad Kurtović*. The appellate panel held that when considering the minimum statutory sentence in crimes that were foreseen in both the Criminal Code of BiH and the Criminal Code of SFRY, the latter should be applied as the more lenient law.⁸¹ This has been so far the only instance in which the WCC has applied the Criminal Code of SFRY rather than the Criminal Code of BiH, but it has obviously not contributed to the clarity of the jurisprudence.

The fragmentation of jurisdiction has also had impact from a practical point of view. The disparities in human capacity and material resources at state and entity level have affected the quality of justice received at either forum. Entity courts do not have specialised personnel in the prosecution and adjudication of war crimes,

⁷⁹ *Abduladhim Maktouf*, Case AP-1785/06, Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, 30 March 2007, Constitutional Court of BiH Decisions, <www.ccbh.ba/eng/odluke/index.php?src=2>, 1 March 2012; see as well Digest of the Case Law of the Constitutional Court of Bosnia and Herzegovina (Constitutional Court of BiH, Sarajevo, 2009), <www.ccbh.ba/public/down/Digest_CCBH.pdf> 1 March 2012. For a detailed analysis of the case see Silvia Borelli, *The Impact of the European Convention of Human Rights in the context of War Crimes Trials in Bosnia and Herzegovina*, DOMAC/5, NOVEMBER 2009, pp. 30-39, <<http://www.domac.is/media/domac/DOMAC5---Impact-of-the-ECHR-on-war-crimes-prosecutions-in-Bosnia.pdf>>, 1 March 2012.

⁸⁰ *Miloš Stupar and others*, X-KRŽ-05/24, Court of BiH, First Instance, 29 July 2008, pp. 185-187.

⁸¹ *Zijad Kurtović*, Case X-KRŽ-06/299, Court of BiH, Second Instance, 25 March 2009, paras. 127-134.

have less resources for complex investigations, the police at local level may be less equipped and in some communities investigations still pose risks for those involved.⁸² As mentioned before, this has also had an effect on issues such as witness support, with unequal standards of victim protection.

The disparity described here has an immediate effect from a purely juridical perspective by questioning the principle of equality before the law. But it also has an important effect with regards to the legitimacy of the war crimes proceedings and their public perception at national level. It poses risks for the perception of fairness in the prosecution of war crimes, and on the judicial system as a whole, leaving it vulnerable to accusations of political or ethnic bias.⁸³

4. Challenges of Strategising Prosecution

The international community and the Bosnian authorities have committed to the prosecution of all war crimes that took place during the conflict, which as will be explained is simply impossible. Since the creation of the State Court and the Prosecutor's Office, great effort has been focused on the quantification of pending cases at every level. Even if it is useful to know how many cases are opened for investigation at each prosecutor's office in the country, given the thousands of complaints filed during and after the conflict all over the territory, figures do not mean much without a proper qualitative assessment. This is the only way to know whether cases could proceed to prosecution, and where this should take place. There have been different attempts to address the quantification of cases as well as their categorisation to be distributed among state or entity prosecutors. Investigation at these different levels, as has happened with regards to the distribution of cases among jurisdictions, has been characterised by tensions and limited co-operation, as is analysed below.

4.1. *Mapping the Caseload*

Since the creation of the Prosecutor's Office of BiH to the approval of the National Strategy, the Office, and from 2005 the SDWC, had the task of reviewing all the opened cases at entity level which had been initiated before the entry into force of the Criminal and Criminal Procedure Codes in 2003. Since the adoption

⁸² 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* (Sarajevo, 2008), <www.undp.ba/upload/projects/SPWCC%20Project%20Document%20ENG.pdf report>, 1 March 2012 and Human Rights Watch, *supra* note 6.

⁸³ OSCE, *supra* note 78, p. 9; Ajdin Kamber, 'One Crime, Two Lawbooks in Bosnia', *International War Crimes Reporter*, 15 February 2012, <www.iwpr.net/report-news/one-war-crime-two-lawbooks-bosnia>, 1 March 2012.

of the National Strategy the SDWC no longer reviews the cases at entity level and the capacity to take over a case remains exclusively on the WCC, through the procedure explained above. The entity prosecutors only have to inform the SDWC of the fact that the case is ongoing.⁸⁴ However, some of the legacies of the revision process have impacted the tense relationship between prosecutors that continues today.

In 2004, the Prosecutor's Office inherited thousands of files that the ICTY Rules of the Road Unit had collected over the years of overseeing national prosecutions. It then had to set up its own review procedure to review the entity prosecutor's activity as the Unit had been doing until then.⁸⁵ The College of Prosecutors of the Prosecutor's Office of BiH approved the so called Book of Rules to regulate this procedure.⁸⁶ The Prosecutor's Office would review the ICTY files and demand information to the entity courts of their pending cases. According to the Book of Rules the entity prosecutors were obliged to send their files for revision to the Prosecutor's Office, which could retain them if it considered the case to be "highly sensitive" or return them if it was simply "sensitive".⁸⁷ The State Prosecutor was not obligated to give reasons for his decision when qualifying the cases into either category, and therefore his decision to retain or return the files.⁸⁸ The revision process took place mainly in 2005 and out of 877 files, 202 were estimated very sensitive and kept at state level, whilst the rest were sent back for further investigation to entity prosecutors in the places in which the incidents took place as stated in the file.⁸⁹ As indicated before, the complaints had not always been filed in the places where the incidents took place, but where the victim was at the time of filing. Therefore, some of the files that returned to entity prosecutors did not return to the same prosecutor that had originally sent it for review.

This revision process was full of flaws, some of them attributable to the ICTY original review process and the state of the files sent from the Rules of the Road

⁸⁴ Art. 18 *Law of the Prosecutor's Office of Bosnia and Herzegovina*, *supra* note 6.

⁸⁵ According to Zekerija Mujkanovic, from October 2004 the SDWC received from the Rules of the Road Unit of the Prosecution of the ICTY e-copies of 877 files with the Standard Designation A; 2,389 files with Standard Designation B, and 702 with standard Designation C, Zekerija Mujkanovic, "The Orientation Criteria Document in Bosnia and Herzegovina" in Moren Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Cases*, (Forum for International Criminal and Humanitarian Law, International Peace Research Institute, Oslo, 2010), p. 84, <www.ficHL.org/fileadmin/ficHL/documents/FICHL_4_Second_Edition_web.pdf>, 1 March 2012.

⁸⁶ Book of Rules on the Review of War Crimes Cases- Orientation Criteria for Sensitive Rules of the Road Cases (Prosecutor's Office of BiH, 28 December 2004), cited by OSCE, *supra* note 19, p. 25.

⁸⁷ For the detailed list of the criminal offences and level of perpetrators included in each category see Mujkanovic, *supra* note 85, pp. 85-87.

⁸⁸ OSCE, *supra* note 19, p. 38.

⁸⁹ Mujkanovic, *supra* note 85, p.87.

Unit.⁹⁰ The effects of such a difficult process have had important negative effects on the quality of co-operation between prosecutors at the state and entity level.⁹¹ Among the main criticisms were the lack of clear reasoning for taking cases and the delays in the review process, which in certain cases amounted to more than a year. Entity prosecutors complaint that the Prosecutor's Office of BiH had taken the cases that were closer to completion and where evidences were more solid, letting them retain the weak cases with fewer options to prosper.⁹²

Also, this system of assuming cases initiated before 2003 at entity level, operated independently of the competence of the State Court to assume cases via the transitional provision of Article 449 Criminal Procedure Code. The lack of synchronisation and communication among the State Court and the Prosecutor's Office brought instances of the Prosecutor's Office returning a file to the entity prosecutor only for the State Court to take it back from the entity court.⁹³ According to the OSCE there are still a large number of cases initiated before March 2003 which were never sent to the Prosecutor's Office for revision under the Book of Rules Procedure.

Overall the attempts to quantify the cases are still incomplete. During the drafting of the National Strategy the working group attempted to compile an inventory of all the outstanding cases, but did not manage to complete it. Notwithstanding, the final document stated that there were outstanding cases against close to 10,000 suspects at all levels, this includes the cases in which the perpetrator is known, not known and those in which the existence of a war crime has not been established with certainty.⁹⁴ Through the first two years of the implementation of National Strategy the Prosecutor's Office of BiH coordinated a reporting system between prosecutor's offices to conclude this mapping exercise. By April 2010 the Prosecutor's Office of BiH reported a slightly lower but similar number: approximately 1381 war crimes cases files pertaining 8249 suspects

⁹⁰ *Ibid.*, pp. 87-88, according to the author, Public Prosecutor of Brčko District, the review process of the ICTY was not very reliable: many of the received files were old, the information contained in them was of poor quality and could not be authenticated and in many cases victims, witnesses or suspects were deceased or inaccessible. With regards to the difficulties faced by the staff at the SDWC in their task of reviewing the files received from the ICTY, Mujkanovic cites financial constraints that forced the processing of a large number of cases in a very limited period of time and lack of understanding as files contained statements and documents in languages that the staff could not understand.

⁹¹ OSCE, *supra* note 19, p. 38.

⁹² *Ibid.*

⁹³ *Ibid.*, p. 39.

⁹⁴ Ministry of Justice, *supra* note 35, p. 123: 9879 accused/suspects in total, out of which 3819 cases our outstanding at the Prosecutor's Office of BiH; 202 at the Prosecutor's Office of Brčko, 4099 at the prosecutor's offices in the Federation of BiH and 1758 at the prosecutor's office in Republika Srpska.

among all the jurisdictions dealing with war crimes.⁹⁵ However, the figures themselves mean little without the proper qualitative analysis. The head of the SDWC has expressed that it is baseless to assume that the number of war crimes cases is known or determinable with precision; that the number of hardcopy war crimes related files held by the prosecutors throughout BiH is a reliable measure for predicting either the workload or required resources.⁹⁶ In any event, even in a functional legal system attempting to prosecute this amount of cases is simply not realistic.⁹⁷

4.2. *Advances in Prosecution Systematisation at the SDWC*

Given the thousands of cases on the shelves around the country a systematisation of the prosecution at the SDWC was urgent from the start. David Shwendiman, an international member of staff, was appointed head of the SDWC and Deputy Chief Prosecutor of BiH in 2007, and began conceiving a strategy for war crimes prosecution and developing clear policies, as well as distributing the investigation teams.⁹⁸

During his mandate as head of SDWC David Shwendiman drafted Internal Rules which included policies and practice directions on the most relevant matters to systematise the work of the SDWC and to better prioritise the cases to be brought forward to prosecution.⁹⁹ The development of these guidelines revolve around the commitment of the SDWC to undertake a human rights based prosecution, in accordance to BiH national and international human rights obligations.¹⁰⁰ Amongst the most urgent issues to change was the way prosecutions had been undertaken until then, following a case by case basis, focusing on individual complaints, that given the great number of files opened after the war had led to duplication of investigations at different jurisdictions. Such duplication was not only negative in terms of waste of resources, but was, in the opinion of the head

⁹⁵ OSCE, *supra* note 19, p. 21, citing “Report on the Activities of the Supervisory Body for Monitoring the Implementation of the National Strategy for War Crimes Processing” (July 2010).

⁹⁶ Schwendiman, *supra* note 38, p. 274.

⁹⁷ Iva Vukušić, *An Insider's Account of Domestic Prosecutions in Bosnia-Herzegovina*, Paper presented at the Annual Meeting of the International Studies Association, New Orleans, 17 February 2010, <www.allacademic.com/meta/p414579_index.html>, 1 March 2012.

⁹⁸ The SDWC is divided into teams which cover certain geographical regions. Each team is headed a National Prosecutor: Team 1 covers the region of Northwest Bosnia and a part of Posavina; Team 2 covers the region of Central Bosnia; Team 3 covers the region of Eastern Bosnia (the Drina Valley) and a part of Posavina; Team 4 covers the region of Sarajevo and Eastern Bosnia including Foča; Team 5 covers the region of Western Herzegovina and the Neretva Valley; and Special Team 6 for the area of Srebrenica.

⁹⁹ The draft Internal Rules included a mission statement, committing the adherence to the SDWC to human rights based prosecution standards, and policies and practice directions on charging, immunity, plea-bargaining, case selection and prioritization and vulnerable victims.

¹⁰⁰ Schwendiman, *supra* note 38, pp. 284–286.

of the SDWC, costing the Department credibility with witnesses, survivors and investigators. To put an end to such duplication the SDWC undertook a detailed inventory task and created a “Strategic Inventory” of the existing criminal complaints and other files that they and some of the entity prosecutors held.¹⁰¹ Instead of a case by case, individual complaint approach, the head of the SDWC developed a policy based on a situation-event-act-actor approach. This policy encouraged prosecutors to broadly look at situations that occurred during the war and progressively narrow it down to events within the situation, criminal acts as a result of the events and actors involved.¹⁰² During his mandate David Schwendiman also took full responsibility for the forensic works associated with the recovery, exhumation and identification of human remains, as established in the Criminal Procedural Code of BiH.¹⁰³ In the development of its task the SDWC created a Digital Archive Project to recover and digitally capture all the records held by different authorities throughout BiH related to the forensic aspects of the location and identification of mortal remains. Finally, the SDWC made it possible for the first time for injured parties to file their property complaints during the criminal case, as foreseen by the Criminal Procedural Code.¹⁰⁴ It was thanks to this centralisation of data, for example, that over 3,000 Srebrenica victims were able to be identified during one of the genocide cases, *Milorad Trbić* and their families given the opportunity to file civil property claims during the proceedings. During the trial 800 parties submitted claims for damages and the WCC referred them to pursue the property claims by taking civil action.¹⁰⁵ Victims did not follow this avenue, due to lack of resources, lack of understanding of the procedure and lack of confidence that it would prosper; and at the time of writing there has been no compensation for this or any of the cases resolved at the WCC.¹⁰⁶ The failure of the WCC to grant civil compensation has been one of the main complaints of victims and civil society.¹⁰⁷ Some entity courts have

¹⁰¹ Such inventory relies on a comprehensive survey of the conflict to produce a catalogue of information of events occurred during the war that were most likely to have resulted in criminal offenses, Dr. Marko Prelec, Prosecutor’s Office of BiH, *A Crime Centred Approach to War Crime Case Selection in BiH* (June 2008), as cited in Schwendiman, *supra* note 38 p. 292, footnote 73.

¹⁰² SDWC, Prosecutor’s Office of BiH, *Prosecution Guidelines*, 5. Case Selection and Prioritisation (February 9, 2009), as cited in Schwendiman, *supra* note 38, p. 292, footnote 72.

¹⁰³ Articles 103-105, 221 and 222 Criminal Procedural Code, *supra* note 70.

¹⁰⁴ Articles 192-212 Criminal Procedural Code, *ibid.*

¹⁰⁵ *Milorad Trbić*, Case X-KRŽ-07/386, Court of BiH, First Instance, 16 October 2009, para. 873.

¹⁰⁶ Selma Ucanbarlic, ‘No Compensation for War Crimes Victims’, *Balkan Insight*, 28 November 2011, <www.balkaninsight.com/en/Article/no-compensation-for-war-crime-victims>, 1 March 2012.

¹⁰⁷ *See generally*, Carla Ferstman and Sheri P. Rosenberg, “Reparations in Bosnia and Herzegovina”, in Carla Frestman et al (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill, The Hague, 2009), pp. 486-491; and UNDP, *Facing the Past and Access to Justice From a Public Perspective; Facing the Past and Access to Justice From a Public Perspective* (2011), <www.undp.ba/index.aspx?PID=36&RID=127>, 1 March 2012.

awarded compensation to victims for war damage, to be paid by Republika Sprska, which have not been delivered. The European Court of Human Rights has considered that the failure of the Bosnian authorities to comply with the domestic courts judgements contravenes the ECHR and causes distress to the victims.¹⁰⁸

In order to increase the efficiency of prosecution the head of the SDWC implemented a practice which was sustained during 2009 by most of the prosecutors of the Department to reduce the number of counts charged in each war crimes cases and increase the number of accused included in each prosecution.¹⁰⁹ These would allow for cases to be managed more effectively with less court time, fewer witnesses and less evidence to be evaluated in court and discussed in the verdicts.¹¹⁰ During this time another significant development was the successful introduction of a practice of encouraging guilty plea. This practice is analysed below.

These developments were happening at the same time that the National Strategy was passed and was supposed to be implemented. Having expressed his dissatisfaction with it, the head of the SDWC, decided to continue with his own practices. After his departure some of the practices have been abandoned and there is currently uncertainty over their future. David Schwendiman himself has expressed concern over the fact that important developments for investigating and prosecuting war crimes and ensuring prosecution compliant with human rights standards are in jeopardy.¹¹¹ The recent decision by the Prosecutor's Office to keep the indictments secret, for data protection purposes, has further questioned some of the directions the Office is taking in the prosecution of war crimes.¹¹²

4.3. *Plea Bargaining*

Over the past 6 years, 23 cases have been resolved by plea bargain. The practice of plea bargaining has proved, as it did at the ICTY, controversial and not well received by both victims and the general public.¹¹³ The Criminal Procedure Code of BiH foresees and regulates plea bargain for the first time in the legal system of

¹⁰⁸ *Čolić and other v. Bosnia and Herzegovina*, European Court of Human Rights, no. 1218/07 *et al.*, 10 November 2009, para. 21 and *Runić and others v. Bosnia and Herzegovina*, European Court of Human Rights, no. 28735/06, para. 24. The judgements establish that BiH has violated Articles 6 ECHR and 1 of Protocol No. 1 to the Convention.

¹⁰⁹ BiH Prosecutor's Office, Special Department for War Crimes, Practice Direction No. 2, cited in Schwendiman, *supra* note 38, p. 295.

¹¹⁰ Schwendiman, *ibid.*

¹¹¹ *Ibid.*, pp. 299-300.

¹¹² 'Secret Indictments Offend Victims', *BIRN*, 16 February 2012 <<http://www.bim.ba/en/309/10/34474/>>, 1 March 2012.

¹¹³ See Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation', 10 *European Journal of International Law* (2009), pp. 415-436.

BiH.¹¹⁴ According to the Code (Art. 231) the suspect or the accused and the defence attorney may negotiate over the conditions of admitting guilt with the Prosecutor for the criminal offence with which the accused is charged and the Prosecutor may propose a lesser penalty or an agreed sentence of less than the minimum prescribed by the law. The agreement has to be sustained by a preliminary hearing judge. In order to sustain it the Court must ensure that: a) the agreement of guilt was entered voluntarily, consciously and with understanding of the consequences for the suspect or accused; b) that there is enough evidence proving the guilt of the suspect or accused. If the Court accepts the agreement it shall pronounce the sentence as envisioned in the agreement within 3 days. If the Court, however, rejects the agreement on the admission of guilt, it shall inform all the parties to the proceeding. Admission of guilt given before the preliminary proceeding judge, preliminary hearing judge, the judge or the Panel is inadmissible as evidence in the criminal proceeding. The Criminal Procedural Code also contains a clause establishing the duty of the Court to inform the injured party about the results of the negotiation on guilt.

As mentioned, the use of plea-bargaining was developed by the former head of the SWCD, who made it part of the internal policy of the Department.¹¹⁵ Plea agreements have now become now an important aspect of war crimes prosecutions at the WCC¹¹⁶ whilst at the same time one of its most controversial aspects, both from a technical perspective and a public perception of justice perspective.¹¹⁷

The fact that the practice is not yet systematised has created problems. From a procedural point of view doubt has been raised over whether the practice to date does indeed comply with the criminal procedure.¹¹⁸ In particular, the OSCE has raised concern over the practice when it has involved the prosecution amending indictments to drop charges in order to negotiate a plea agreement with the defendant, what the OSCE has called “charge bargaining”.¹¹⁹ Even if it is not

¹¹⁴ The Criminal Procedural Code of BiH has transformed the criminal procedure by including some elements of the common law system in a, otherwise, strongly rooted in the civil jurisdiction criminal procedure system. It has some elements of the adversarial system, giving an increased role to the prosecutor by eliminating the figure of the investigating judge and inserting legal tools such as plea agreements.

¹¹⁵ Prosecutor’s Office of Bosnia and Herzegovina, Special Department for War Crimes, Practice Direction No. 2 (Pleas and Plea Agreements), 11 January 2008, as cited in Schwendiman, *supra* note 38, p. 296, footnote 84. OSCE, *supra* note 19, p. 54, notes that this is an internal guideline of the SDWC and has not been adopted by the Collegium of Prosecutors.

¹¹⁶ 2011 saw an exponential increase in plea agreements, 8 were concluded in that year, Selma Ucanbarlic, *State Court Hands Down More than 400 Years for War Crimes*, BIRN, 30 December 2011, <www.bim.ba/en/302/10/34162/>, 1 March 2012.

¹¹⁷ Clark, *supra* note 18, pp. 377-378; Refik Hodžić ‘Living with the Legacy of Mass Atrocities. Victims’ Perspectives on War Crimes Trials’, 8 *Journal of International Criminal Justice* (2010) 113-136, pp. 128-131.

¹¹⁸ OSCE, *supra* note 19, pp. 54-56.

¹¹⁹ *Ibid.*, p. 55.

expressively prohibited by Art. 231, the practice of negotiating not only the type and length of the sentence to be imposed to the defendant but also the charges to be presented in the trial, seems incompatible with the obligation of the prosecution to file charges when there is evidence that a crime has been committed (Art. 17 Criminal Procedural Code).¹²⁰

Article 231 is also silent as to when in the stage of the proceedings the parties can negotiate a plea agreement. This has led to several instances of plea agreements concluded once the trial was underway,¹²¹ defeating the main benefits of this procedural figure, i.e. saving judicial time and resources, preventing the (re)traumatisation of victims through testimony, and guaranteeing further co-operation from the accused which would benefit future prosecutions. Specifically related to this last issue is the fact that the lack of specific provision on the extent of the duties of the accused to co-operate with the prosecution once a plea agreement has been achieved has greatly affected not only the efficiency but also the legitimacy of this practice. The Criminal Procedural Code does not contain any provisions on the enforcement of a co-operation clause in the plea agreement, which generates uncertainty both for the prosecution and for the accused. There is no enforcement mechanism to make the accused co-operate once the judge has confirmed the plea agreement. Some judges have developed a practice of receiving the plea but postpone the deliberation on it until the defendant has complied with the foreseen co-operation in other ongoing cases. But co-operation does not guarantee the accused that the plea agreement will still be accepted by the judge, therefore this practice is still not contributing to an effective use of this tool.

Plea bargaining is very useful in terms of the economy of prosecutorial and judicial resources. It can also provide helpful insights into further investigations; pointing at other perpetrators and providing information over missing people. This is particularly relevant in Bosnia, given the thousands of bodies that still remain in mass graves. It was also very relevant in providing information over missing people. In addition, it can provide a restorative aspect for the victims of the judicial process, when the perpetrator admits their guilt, rather than have to persistently contest this in court, and have the perpetrator ask for forgiveness or at least express remorse. However, plea bargaining in war crimes has provoked mixed reactions from the public in what is a very highly politicised environment. In the first two cases in which it was used, in 2008, in the cases against *Paško Ljubičić* and *Dušan Fuštar*, victims voiced their disappointment and their lack of trust in justice.¹²² Among the factors that explain victims' negative reactions to

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Paško Ljubičić*, Case X-KR-06/241, Court of BiH, First Instance, 25 May 2008 and *Dušan Fuštar*, Case X-KR-06/200-1 Court of BiH, First Instance, 21 April 2008, see the description of the reactions in Clark, *supra* note 18, p. 377-378. See, Merima Husejnovic, 'Victims Dissatisfied with

the guilty pleas are: the perceived low sentences handed to those who plead guilty; the lack of understanding of the benefits that the plea may bring and the perceived lack of sincerity and narrow scope of the acknowledgement of responsibility by defendants.¹²³ In his policy on plea bargaining the former head of the SDWC tried to pre-empt the reactions of victims and help reduce public criticism by requiring prosecutors to meet with victims and survivors to explain the plea and its benefits.¹²⁴ Notwithstanding these efforts, plea bargaining is still highly contested.¹²⁵ The difficulties related to plea bargaining further illustrate the complexities of satisfying the victims in the criminal law procedure. Whilst it is important in terms of legitimacy that they do not feel further victimised through the justice system it is also questionable the extent to which the Prosecutor's Office case strategy can be dictated by their demands. This generally delicate balance is more complex in the context of war crimes prosecutions.

In 2011 the WCC confirmed 8 plea agreements submitted by the Prosecution.

5. Six Years of Judicial Practice at the WCC

Despite the difficulties analysed above, the SDWC and the WCC have been quite successful in the prosecution and trial of war crimes committed during the war in BiH. As mentioned in Section 3, as of February 2012, 84 cases had been concluded and its activity continues to make progress. All the ICTY transferred cases were completed in the first 5 years of work of the WCC. The last one, the case against *Milorad Trbić*, was concluded in second instance on 21 October 2010.¹²⁶ In the last year covered by this article, 2011, the State Court issued a total of 31 verdicts for war crimes, eleven of them in second-instance.

Bosnian Court's Decisions', *BIRN*, 30 May 2008 <www.bim.ba/en/117/10/10610/?tpl=30>, 1 March 2012.

¹²³ Hodžić, *supra* note 117, pp. 128-129.

¹²⁴ Schwendiman, *supra* note 38, p. 297.

¹²⁵ Schwendiman explains how the failure to follow the policy in the case of *Damir Ivanković*, despite the outcome having been regarded as a reasonable one by the prosecutors, resulted in its not contributing to the SDWC's credibility, or to the legitimacy of plea bargaining. Despite the fact that the information provided by Ivanković as part of his plea negotiations facilitated the discovery and recovery of the remains of approximately sixty men representatives of some of the victims publicly expressed dissatisfaction with the plea. *Ibid.*

¹²⁶ The first defendant from the ICTY was transferred on 29 September 2005, Radovan Stanković. Following Stanković five additional cases involving nine defendants were transferred to BiH for trial: Gojko Janković, transferred 8 December 2005; Željko Mejakić, Momčilo Gruban, Dušan Fuštar and Duško Knežević transferred on 9 May 2006, all included in the same case (*Mejakić and others*); Paško Ljubičić, transferred on 22 September 2006; Mitar Rašević and Savo Todorović, transferred on 3 October 2006 and included in the same case, and Milorad Trbić, transferred on 11 June 2007.

The first cases before the WCC were not particularly diverse, featuring mainly Bosnian Serb accused, nor complex with regards to the level of the perpetrator or the amount of victims involved. All of the ICTY transferred cases concerned mid-level perpetrators, all of them Bosnian Serbs accused of crimes against Bosniak civilians, mostly in connection with the crimes committed in Srebrenica, Foča and Prijedor. An exception was that of *Paško Ljubičić*, a Bosnian Croat, indicted for the widespread or systematic attack on the Bosniak civilian population in the Lašva Valley by Croatian Defence Council (HVO) forces.¹²⁷

With time cases have become more diverse in terms of the ethnicity of the victims and accused, the crimes and the geographical zones. The specific issue of the ethnic balance of the accused is a very challenging and a politically charged one. The prosecutor's obligation is to conduct the investigation and charge for the most complex crimes, independently of the ethnicity of the perpetrator or the victim. However, being seen as pursuing the crimes of all the sides in the conflict has an important impact over the legitimacy and public perception of national prosecutions. The WCC and the SDWC have been under constant attack from some segments of the population and in particular from the Republika Srpska political elite. The claims of partiality have been constant from the start of the work, and since the winding down of the presence of the internationals it has increased. The accusations are so aggressive that it is difficult for the WCC and SDWC to defend themselves even if it is evident that to date they have dealt with crimes perpetrated not only by Serbian forces and paramilitary but also by the HVO and the Bosnian Army. In 2011 Mirolad Dodik, the President of Republika Srpska, even threatened to convene a referendum to terminate the state judicial institutions when the SDWC announced the termination of the investigation on the case against the Bosnian Army General Jovan Divjak and others for the Dobrovoljacka incident, where a convoy of the Yugoslav People's Army (JNA) was attacked when it was leaving Sarajevo at the beginning of the siege.¹²⁸

The initial focus on lower level perpetrators has now widened to include several commanders. The most senior official to be put on trial has been Momčilo Mandić, who was Assistant Minister of the Interior of the so-called Serb Republic of Bosnia and Herzegovina during the war.¹²⁹ In 2011 the Prosecutor's Office of BiH issued its first indictment against a woman for war crimes,¹³⁰ this is the

¹²⁷ *Ljubičić*, *supra* note 122.

¹²⁸ Claire Bigg, 'Bosnian Serbs Call off Controversial Referendum', *Radio Free Europe*, 31 May 2011, <www.rferl.org/content/bosnian_serbs_call_off_controversial_referendum/24107526.html>, 1 March 2012.

¹²⁹ *Momčilo Mandić*, Case X-KRŽ-05/58, Court of BiH, First Instance 18 July 2007, Second Instance 1 September 2009. He was acquitted of all the charges of war crimes but sentenced to five years imprisonment by Section II of the State Court.

¹³⁰ Albina Terzić was a member of the Military Police of the Croatian Defence Council and is charged with the inhumane treatment of Serb civilians.

second case in the history of prosecutions in BiH against a woman, after the ITCY trial of Biljana Plavšić, and the first one as a direct perpetrator.¹³¹

From the point of view of the substantive crimes, the majority of cases processed by the WCC included charges of war crimes against civilians and crimes against humanity. The first years saw a great focus on sexual violence crimes. Two of these first cases were transferred by the ICTY (*Radovan Stanković*¹³² and *Gojko Janković*¹³³) and the rest were brought following pressure from victims associations.¹³⁴ In these cases, the jurisprudence of the WCC so far has followed the ICTY and ICTR definitions of rape. This was an important concern of human rights associations, because the Criminal Code of BiH contained a definition which did not reflect some of the international tribunals' advancements.¹³⁵ The Criminal Code of BiH defines rape as "coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity" (Arts. 172.1.g and 173.1.e, as a crime against humanity and a war crime against civilians respectively). This definition does not take into account the jurisprudential developments which have consistently placed the emphasis on coercion rather than force or threat of force as elements of rape.¹³⁶ Four of the completed cases (*Stanković*, *Janković*, *Samardžić* and *Vuković*) have dealt with the crimes committed in the Karaman House in Foča Municipality, the detention facility for Bosniak women and girls used by Bosnian Serb forces as a rape camp.¹³⁷ In all the cases dealing with the detention of women

¹³¹) Another woman, Jelena Rašić, was sentenced in February 2012 to one year imprisonment by the ICTY for contempt, having sustained false testimony. See, ICTY Press Release, *Jelena Rašić sentenced to 12 months' imprisonment for Contempt of the Tribunal* (JKE/CS/PR1480e), 7 February 2012, <www.icty.org/sid/10910>, 1 March 2012. At the time of writing the Prosecution is preparing the indictment of Rasema Handanovic, suspected of personally taking part in execution of three soldiers who surrendered and three civilians during the attack on the village of Trusina, and extradited by the United States to Sarajevo in December 2011.

¹³²) *Radovan Stanković*, Case X-KRŽ-05/70 -, Court of BiH, First Instance, 14 November 2006 and Second Instance, 28 March 2007.

¹³³) *Janković*, *supra* note 57 and Second Instance, 23 October 2007.

¹³⁴) Ivanešević, *supra* note 25, p. 10.

¹³⁵) See, Amnesty International, "Whose Justice? The Women of Bosnia and Herzegovina are Still Waiting" (London: 2009), pp. 21–22.

¹³⁶) *Prosecutor v. Akayesu*, Case ICTR-96-4-T, International Tribunal for the Former Yugoslavia, Judgement (Trial Chamber), 2 September 1998; *Prosecutor v. Furundžija*, Case IT-95-17/1-T, International Tribunal for the Former Yugoslavia, Judgement (Trial Chamber) 10 December 1998 and *Prosecutor v. Kunarac*, Case IT-96-23 & IT-96-22/1-A, International Tribunal for the Former Yugoslavia, Judgment (Appeals Chamber), 22 March 2006.

¹³⁷) *Stanković*, *supra* note 132; *Janković*, First Instance *supra* note 57 and Second Instance *supra* note 133; *Nedo Samardžić*, Case X-KRŽ-05/49, Court of BiH, First Instance 7 April 2006 and Second Instance 29 September 2006; and *Vuković*, First Instance *supra* note 75 and Second Instance 13 August 2008.

in the Karaman House in Foča the WCC found that the circumstances were so coercive as to not require proof of consent.¹³⁸ The legal qualification of the offences in these cases however brought disparity in the WCC jurisprudence.¹³⁹ Whilst in the case of Stanković he was convicted of the crime against humanity of enslavement, Samardžić's appeals chamber convicted him for crimes against humanity, including sexual slavery. Both verdicts considered the accused exercise of powers attached to the rights of ownership over a person as an element of the crime. Samardžić based the qualification in the differentiation made by the Criminal Code of BiH between enslavement (Art. 172.1c) and sexual slavery (Art. 172.1.g). Samardžić is then consistent with the definition of sexual slavery in the Criminal Code of BiH, which in this regards mirrors the Rome Statute of the ICC, and with the ICTY jurisprudence on crimes of sexual violence committed in the context of enslavement. In this regard the Samardžić ruling reflects the evolution of international criminal law with regards to sexual violence.¹⁴⁰ The WCC has also convicted an accused for sexual violence as persecution (*Boban Šimšić*)¹⁴¹ and rape as the crime against humanity of torture (*Janković*).¹⁴²

The WCC has also followed the jurisprudence of the ICTY and ICTR with regards to other aspects of the prosecution of sexual violence, including the rules of evidence of not requiring corroboration of witness testimony,¹⁴³ not allowing the prior sexual behaviour of the victim to be taken into account (reflected in the Criminal Procedural Code, Article 86.5),¹⁴⁴ or the aggravating circumstance of the victim's young age.¹⁴⁵ An important concern expressed by the human rights community has been the reference to the morality of the victim when considering evidence, which was used by the WCC both in *Stanković* and *Šimšić*. In the second case the first instance panel excluded public testimony of the victim, who had requested to testify. The panel's decision was "guided by reason of protection of morality in a democratic society, having in mind the traditional position of a woman in the Bosnia-Herzegovina milieu".¹⁴⁶

¹³⁸ *Samardžić*, Second Instance, *ibid.*, p. 18.

¹³⁹ It was the prosecutor who brought different charges, *see*, Angela J. Edman, 'Crimes of Sexual Violence in the War Crimes Chamber of the State Court of Bosnia and Herzegovina: Successes and Challenges', 16 *Human Rights Brief* (2008) 21–28, p. 24.

¹⁴⁰ *Ibid.*

¹⁴¹ *Boban Šimšić*, Case X-KRŽ-05/04, Court of BiH, First Instance 11 July 2006 and Second Instance 7 August 2007.

¹⁴² *Janković*, *supra* notes 57 and 133.

¹⁴³ E.g. *Janković*, *supra* note 57.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Samardžić*, Second Instance, *supra* note 137, p. 38, as aggravating circumstances took into account that the offences were committed against particularly vulnerable and defenceless women and girls. According to the court raping and holding girls under 16 as sexual slaves increases the gravity of the crime. Among these girls there was one as young as 12 years old.

¹⁴⁶ *Šimšić*, First Instance, *supra* note 141, p. 9; *Stanković*, Second Instance, *supra* note 132, p. 7. For critical accounts *see* Amnesty International, *supra* note 135, p. 26, Edman, *supra* note 39, p. 22, and

Sexual violence cases continue in the WCC. In December 2011 the indictment against Oliver Krsmanović was confirmed. This is a very significant case as it will be the first time a court considers the events of the Vilina Vlas rape camp near Višegrad, after the charges relating to the detention, torture and repeated sexual violence against at least 200 women and girls were dropped in the indictment against Milan Lukić at the ICTY. Women's organizations have long campaigned for this indictment and severely criticized the previous ICTY decision.¹⁴⁷

The WCC has tried a significant number of individuals for genocide, most of them direct perpetrators. The WCC has relied heavily on the jurisprudence of the ICTY and ICTR in its judgements, with regards to issues such as the customary status of the crime of genocide;¹⁴⁸ the definition of the acts constituting the *actus reus* of the crime of genocide, including the definition of members of a group;¹⁴⁹ and the definition of the mental element of the crime, including the proof of genocidal intent.¹⁵⁰ As has been said, most of these cases relied on previously adjudicated facts by the ICTY.

Among the most complex of the cases dealing with genocide was the case *Miloš Stupar and others*¹⁵¹ which was also the first national genocide verdict in 2008. During its procedural history the case against the original 11 indicted men has been separated on several occasions, in up to three different cases. The cases dealt with the forcible transfer of Bosniak men from the Srebrenica area to the Kravica Farming Cooperative where approximately a thousand captives were executed on 13 July 1995 in the warehouse (referred to as the Kravica warehouse). This case is relevant from the point of view of the development of the WCC jurisprudence on modes of liability, as this is one of the first cases to convict foot-soldiers of

Institute for War and Peace Reporting, 'Anger at Secrecy Surrounding Foča Cases; 10 March 2006, <www.iwpr.net/report-news/anger-secrecy-surrounding-foca-rape-cases>, 1 March 2012.

¹⁴⁷ Nidzara Ahmetasevic, Nerma Jelačić and Selma Boracic, 'Visegrad: Rape Victims Say Their Cries Go Unheard', *BIRN*, 27 November 2006, <www.bim.ba/en/1/80/1745/>, 3 November 2011.

¹⁴⁸ For example, *Petar Mitrović*, Case X-KRŽ-05/24-1, Court of BiH, First Instance, 29 July 2008, pp. 44; *Miladin Stevanović*, Case X-KRŽ-05/24-2, Court of BiH, First Instance, 29 July 2008, pp.42-43; *Stupar and others*, First Instance, *supra* note 80, pp. 52-53; *Trbić*, First Instance, *supra* note 105, pp. 62-64.

¹⁴⁹ *Stevanović*, First Instance *supra* note 148, p. 44, *Stupar and others*, First Instance, *supra* note 80, p. 54; *Trbić*, First Instance, *supra* note XX, pp. 65-66.

¹⁵⁰ *Mitrović*, *supra* note 148 XX, pp. 46-49; *Stupar and others*, First Instance, *supra* note 80, p. 56; *Trbić*, First Instance, *supra* note 105, p. 66 *et seq.*

¹⁵¹ *Stupar and others*, First Instance, *supra* note 80, convicting six of the original eleven men charged in the indictment. The cases against Petar Mitrović and Miladin Stevanović were separated in March 2008 (*supra* note 148). On 19 January 2010 the Court issued a decision severing the case into: *Milenko Trifunović and others* (Case X-KRŽ-05/24), for Milenko Trifunović, Brane Džinić, Aleksandar Radovanović, Slbodan Jakovljević, Branislav Medan, Velibor Maksimović, Dragiša Živanović Milovan and Matić and the case *Miloš Stupar* (X-KRŽ-05/24-3) for this single accused. A further case dealing with the events occurred in Kravica warehouse is *Radomir Vuković and another*, Case X-KRŽ-06/180-2, First Instance, 22 April 2010, currently been heard on appeal.

genocide. The Criminal Code of BiH distinguishes between accomplices, who jointly perpetrate the criminal offence by either participating or having a decisive contribution in the crimes (Art. 29), and accessories, who merely help in this perpetration (Art. 31). Whilst not explicitly referred to by the Criminal Code of BiH, the WCC has understood that Art. 180(1) covers joint criminal enterprise when it establishes that “[a] person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence [constituting war crimes, crimes against humanity and genocide] shall be personally responsible for the criminal offence”.¹⁵² As this case and others demonstrate having the two modes of liability is problematic.¹⁵³ In the *Stupar and others* case the Prosecutor alleged that all of the accused participated in the joint criminal enterprise, but the court rejected this form of responsibility and focused on co-perpetration. The first instance panel found the accused guilty, as co-perpetrators, of genocide. Together with the individual criminal responsibility of all the accused, the commander Miloš Stupar was convicted for command responsibility, as he was found to have a superior-subordinate relationship with those who participated in the *actus reus* of the crimes, have knowledge of the crimes committed by the accused persons, and have failed to take the measures necessary under the law to punish the crimes.¹⁵⁴ The ruling controversially established that Miloš Stupar acted with genocidal intent when failing to punish his subordinates.¹⁵⁵ However, the sentences of the lower level perpetrators were reduced on appeal as the Appellate Panel considered that the Trial Panel inadequately evaluated the specific contributions of each of the accused and whether they shared the genocidal intent in the perpetration of the offence.¹⁵⁶ The Appellate Panel found that they were guilty only as co-accessories to genocide, as even if acts committed by the accused formed part of the genocide in Srebrenica the accused did not share the specific intent to commit genocide (*mens rea*) with those who planned the attack. Miloš Stupar was later acquitted of command responsibility in a separate appellate proceeding.¹⁵⁷ The Appellate Panel in the

¹⁵² *Mandić*, First Instance, *supra* note 29, acknowledged for the first time the existence of the joint criminal enterprise doctrine in the Criminal Code of BiH, but did not consider it applicable to the case; *Ranko Vuković and another*, Case X-KRŽ-07/405, Court of BiH, Second Instance, 2 September 2008, p. 6; *Mitar Rašević and another*, Case X-KRŽ-06/275, Court of BiH, First Instance, p. 111; *Trbić*, First Instance, *supra* note 105, p. 206.

¹⁵³ Alfredo Strippoli, ‘National Courts and Genocide. The Kravica Case at the Court of Bosnia and Herzegovina’, 7 *Journal of International Criminal Justice* (2009) 577–595, p. 586.

¹⁵⁴ *Stupar and others*, First Instance, *supra* note 80, p. 135.

¹⁵⁵ Strippoli, *supra* note 153, p. 593.

¹⁵⁶ *Stupar and others*, First Instance *supra* note 80 and Second Instance, 9 September 2009, paras. 563–565 and 579. The first instance verdict in *Vuković and another*, *supra* note 152, also considering the events at Karvica warehouse, followed this case in the distinction between accessory and accomplice, para. 577–580.

¹⁵⁷ *Miloš Stupar*, Case X-KRŽ-05/24-3, Court of BiH, Second Instance, 28 April 2010.

Stupar independent case (the one dealing exclusively with Miloš Stupar) understood that the accused only became a commander after the commission of the crime, and as such he could not be held criminally responsible for failure to punish his subordinates if he was not in a position of authority at the time when they committed the crime.¹⁵⁸ There have been other cases in which the appellate panel has revoked the qualification of command responsibility, which shows there is still an inconsistent practice with regards to this type of responsibility.¹⁵⁹ In most recent cases the trial panels have established clearer criteria for the consideration of command responsibility, for example in the cases of *Ferid Hodžić* and *Predrag Kujundžić*. Following the jurisprudence of the ICTY, *Hodžić* establishes that: “[a] superior or commander may be held criminally responsible for the offences of subordinates if the following legal elements are proved: (i) the existence of a superior-subordinate relationship between the commander or the superior and the alleged principal perpetrator; (ii) the superior knew or had reason to know that a crime was about to be committed or had been committed, and (iii) the superior did not take the necessary and reasonable measures to prevent such offences or to punish the perpetrators. The Prosecution must prove beyond reasonable doubt that a superior exercised effective control over a subordinate in that the superior had the material ability to prevent or punish the criminal conduct of the subordinate.”¹⁶⁰

The first genocide cases did not consider liability for participation in a joint criminal enterprise. The WCC has clearly established that this mode of liability should be reserved for those who conceived and executed the plan, while the foot soldiers should only be held responsible for the crimes they perpetrated.¹⁶¹ Several verdicts have attempted to elaborate on the distinction and level of participation required between co-perpetration and joint criminal enterprise,¹⁶² and aiding and abetting and participation in joint criminal enterprise.¹⁶³ The jurisprudence is by no means consistent.¹⁶⁴ At the time of writing two further cases dealing with accused of participating in a joint criminal enterprise to commit genocide, one as

¹⁵⁸ *Ibid*, paras. 44, 51, 56.

¹⁵⁹ See *Alić Šefik*, Case X-KRŽ-06/294, Court of BiH, Decision on the Revocation of the First Instance Verdict, 23 March 2009, paras. 13-14; *Sreten Lazarević and others*, Case X-KRŽ-06/243, Court of BiH, Second Instance, 22 September 2010.

¹⁶⁰ *Ferid Hodžić*, Case X-KRŽ-07/430, Court of BiH, First Instance, 29 June 2010, para. 63, and similarly in *Predrag Kujundžić*, Case X-KRŽ-07/442, Court of BiH, First Instance, 30 October 2009, paras. 410-452.

¹⁶¹ *Zdravko Božić and others*, Case X-KRŽ-06/236, Court of BiH, First Instance, 6 November 2008, pp. 62-66 and *Vuković and others*, *supra* note 152, para. 59.

¹⁶² *Marko Radić and others*, Case X-KRŽ-05/139, Court of BiH, First Instance, 20 February 2009, pp. 239-241.

¹⁶³ *Krsto Savić et al*, Case X-KRŽ-07/400, Court of BiH, First Instance Trial Judgment, 24 March 2009, paras. 429-430.

¹⁶⁴ For further analysis of some of these rulings see OSCE, *supra* note 19, p. 48-52.

direct perpetrator,¹⁶⁵ and the other as commanders,¹⁶⁶ were underway and it is expected that they clarify the jurisprudence with regards to this mode of liability further.

The analysis of the WCC jurisprudence is not an easy task given that, especially at the beginning of its activity, many judgements lacked clarity both at first instance and appeal level. Equally, the discrepancies between the two instances were so frequent that a great number of verdicts were overturned on appeal.¹⁶⁷ This issue was particularly problematic from a judicial efficiency and quality of justice perspective, including defendant's rights, but also with regards to the public perception and credibility of the legitimacy of the judicial procedures.¹⁶⁸ In the Bosnian legal system, once a first instance panel's verdict has been revoked, the case does not return to the first instance but instead is tried at appellate level. The grounds for appeal are established in the Criminal Procedure Code of BiH (Art. 296). A verdict may be contested on the grounds of: a) an essential violation of the provisions of criminal procedure (Art. 297); b) a violation of the criminal code (Art. 298); c) the state of the facts being erroneously or incompletely established (Art. 299); d) the decision as to the sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law and announcement of the verdict through the media (Art. 300). An alarming number of decisions have been revoked on the grounds that the wording of the verdict was incomprehensible, contradictory or unreasoned¹⁶⁹ or that the factual findings were erroneous and incompletely established.¹⁷⁰ In the early decisions of the appellate panels these did not normally explain the reasons to revoke. The Appeals panels attempted to clarify the standards of appeal in *Mirko Todorović and another*¹⁷¹ but this issue continues to demand attention to guarantee international

¹⁶⁵ *Željko Ivanović*, Case X-KR-06/180-3, Court of BiH. For information on the indictment see, Court of BiH <www.sudbih.gov.ba/?opcija=predmeti&id=207&jezik=e>, 1 March 2012.

¹⁶⁶ *Duško Jević and others*, Case S1 1 K 003417 10 KRI, , Court of BiH. For information on the indictment see, Court of BiH <<http://www.sudbih.gov.ba/?id=1502&jezik=e>>, 1 March 2012.

¹⁶⁷ See generally, OSCE, *Reasoning in War Crimes Judgements in Bosnia and Herzegovina. A report of the Capacity Building and Legacy Implementation Project*, December 2009 <http://www.oscebih.org/documents/osce_bih_doc_2010122314244699eng.pdf>, 1 March 2012.

¹⁶⁸ *Ibid*, p. 12 and OSCE, *supra* note 19, p. 61. Between 2005 and 2009, 35 per cent of the first instance panel were revoked on appeal.

¹⁶⁹ See *Mirko Todorović and another*, Case X-KRŽ-07/382, Court of BiH, First Instance 29 April 2008, Second Instance, 17 February 2009 (see paras. 15-17); *Marcko Skrobic*, Case X-KRŽ-07/480, Court of BiH, First Instance 22 October 2008, Second Instance, 22 April 2009 (see paras. 8-13), *Krešo Lučić*, Case X-KRŽ-06/298, Court of BiH, Second instance decision on revocation of the first instance verdict, 3 April 2008; *Marko Radić and others*, Case X-KRŽ-05/139, Second instance decision on revocation of the first instance verdict, 15 March 2010.

¹⁷⁰ *Samardžija*, *supra* note 59, Second Instance, 15 October 2008; *Zdravko Mihaljević*, Case X-KRŽ-07/330, Court of BiH, Second instance decision on revocation of the first instance verdict, 26 March 2009; *Sreten Lazarević and others*, *supra* note 159, Second instance decision on revocation of the first instance verdict, 21 August, 2009.

¹⁷¹ *Todorović and another*, *supra* note 169.

standards of justice. In 2011 the Appellate Chamber rendered five decisions which reversed first-instance verdicts and ordered retrials.¹⁷²

As panels continue their activity the jurisprudence becomes more consistent in general and the quality of the judgements increases. Overall, even with the inconsistencies explained and the worrisome amount of overturns in appeal, in general the work of the WCC has been of good legal quality. The OSCE, who has monitored most of the trials, has praised the work of the court as generally addressing complex international humanitarian law issues with a degree of accuracy.¹⁷³

6. Conclusions

This article has considered the experience of the WCC and the SDWC since the beginning of their operations in 2005 until the end of 2011. Overall the experience can only be considered positive. The number of cases pursued demonstrates their efficiency at the same time that the organisations monitoring the day to day prosecutorial and adjudication work confirm that these institutions are respecting the guarantees of due process and international standards of justice. The WCC and the SDWC are part of the increasing international efforts to bring justice closer to the victims and to pursue further a system of complementarity in which international institutions would only deal with the most atrocious crimes and the most serious perpetrators in those places where states are unwilling or unable to prosecute. Even with the caution that each war crimes situation is different and so are post-conflict environments in which national prosecutions can take place the experience of national prosecutions in BiH can provide some insights for future situations and guide national and international authorities when establishing and supporting their own procedures.

The first reflection over the Bosnian experience regards the nature of the institutions tasked with the prosecution and adjudication of international war crime cases. The process in BiH represents the first time a hybrid court becomes a national institution. With all the difficulties detailed here it can be considered a successful example of phasing out international staff and assumption of the full ownership of national staff. The main lesson that can be drawn from this process is the importance of having a well established strategy from the beginning so the changes in compositions and procedures are seen as legitimate and not arbitrary. But the case of the WCC, and in general de State Court, shows how it is not possible to detach these institutions from the context in which they exercise their competences. Post-conflict settings are by nature volatile and highly politicised environments which make courts conducting war crimes prosecution and

¹⁷²⁾ Ucanbarlic, *supra* note 116.

¹⁷³⁾ OSCE *supra* note 19, p. 48.

adjudication particularly vulnerable. International elements in their composition and functioning are meant to protect them, but an abrupt, unplanned and non-transparent transition to national institutions may weaken their capacity to fulfil their mandates. Equally the experience of BiH shows that, in a context where national economic resources are tight, the end of international assistance to war crimes prosecutions may provide an opportunity for national authorities and political elites to interfere in the role of courts. By not allocating the necessary resources for the reappointment of staff after the departure of the internationals difficult prioritization decisions will need to be made. It is also important to reflect on how much public involvement is necessary in this process. In the case of BiH, some analysts pointed at the issue that little debate took place among the general public and institutions on the optimal pace of the transition.¹⁷⁴ Again, given the highly politicised environment this author doubts whether national consultations of such highly technical issues are necessary or even desirable.

A second reflection over the lessons this process brings is that of the complexity of articulating multilevel justice in practice. There are parallels between the special relationship of the ICTY and the WCC and those that will be established by the ICC and national courts as national trials are encouraged to complement the work at international level.¹⁷⁵ The main lesson concerns the need to attend to how the capacity building process took place between national and international institutions in BiH. Equally, how files were managed and transferred is crucial. The use of evidentiary material in several jurisdictions is meant to be one of the great advantages of a shared process of justice, therefore training and oversight is necessary to guarantee both judicial economy and the respect of the rights of accused. The experience in BiH of the use of the doctrine of judicial notice has been extremely positive and is one of the tools which could prove instrumental to advance prosecutions at national level in situations under the jurisdiction of the ICC. In any of these interactions between national and international justice institutions the barriers relating to legal culture are less than those related to language. Careful attention to the translation needs is important at every stage of the collaboration.

The example of BiH also shows the dilemma between having justice centralised at state level or having local courts implicated in war crimes processing too. The argument for local courts to hear certain less complex cases is compelling, from the engagement of a multicity of resources which could advance prosecutions further to bringing justice to the communities involved. However, the experience

¹⁷⁴) Ivanešević, *supra* note 25, p. 43.

¹⁷⁵) There are increasing calls for trials in the Democratic Republic of Congo, *see* Human Rights Watch, *Promoting National War Crimes Trials in the Democratic Republic of Congo*, 12 January 2012, <www.hrw.org/news/2012/01/24/promoting-national-war-crimes-trials-democratic-republic-congo>, 1 March 2012.

in BiH is not too encouraging. This article has shown that in an extremely complex and fragmented judicial system there are too many issues of conflict and overlap. This is particularly so in BiH where the whole judicial system, and to an extent the institutional system in general, suffers from this malice. But it is not a unique situation in post-conflict environments in which difficult tradeoffs have had to be made in terms of institutional architecture to achieve peace. The advantages of a multilevel system in which lower level courts benefit from established evidence and adjudicated facts of higher level courts have not played out in BiH. Rather, flawed systems of case review and allocation, inconsistent application of distribution criteria, lack of respect of jurisdictional competence and poor communication among them have made this multilevel option less attractive.

This connects to a further, third reflection, over how many courts are needed to prosecute how many crimes. Ideal as it would be that no crime goes unpunished it is obvious that the horrific legacy of hundreds of thousands of criminal offences in conflict is not able to be solely addressed in a courtroom.¹⁷⁶ There are bound to be thousands of crimes which cannot be prosecuted, due to the disappearance of evidence, the lack of availability or death of victims, witnesses and perpetrators, or simply lack of resources in the judicial system. This is why it is extremely important to have a well designed and realistic prosecutorial strategy which allows for systematisation of data and prioritization of cases. There is an obvious difference between a national prosecutor, who has an obligation to prosecute all those crimes to which he or she has evidence of, and an international prosecutor, whose task is by nature to be highly selective.¹⁷⁷ Prosecutions at national level do not have as many constraints in terms of the life-span of the judicial institution as some of the international and hybrid tribunals have, however, they do with regards to the prioritisation of resources in a post-conflict environment when prosecution follow the end of the conflict and the country is immersed in reconstruction or with regards to the quality of the evidence and the age of those involved in the crimes when a significant amount of time has passed. A national prosecutorial strategy is then highly necessary, the BiH experience has shown that the case by case approach which was followed at the beginning is not efficient in prosecuting international crimes. These crimes are some of the most complex any judicial system will ever face and providing support on how to make prosecution more efficient is crucial. International assistance and knowledge exchange cannot stop at the level of transferring files. A further aspect which this article has not been able to analyse is the issue of regional co-operation and how

¹⁷⁶ For discussions over the need of complementarity measures of transitional justice in BiH see Olga Martin-Ortega, 'Transitional Justice in the Quest for Just and Durable Peace in Bosnia and Herzegovina', in Karin Aggestam and Annika Björkdahl, *Rethinking Peacebuilding: The quest for just peace in the Middle East and the Western Balkans* (Routledge, London, 2012, forthcoming).

¹⁷⁷ Louise Arbour 'Progress and Challenges in International Criminal Justice', 21 *Fordham International Law Journal* (1997) 531-535.

to articulate highly efficient communication between justice institutions across countries which share battlefields, are homes of each other's refugees, each other's victims and perpetrators. This is an important lesson that the international community needs to pay more attention to if they want to see national prosecutions progress.

A final reflection that the BiH case prompts is whether national prosecutions have the capacity to advance international criminal law through jurisprudence. The BiH case shows the difficulties that national courts may have applying concepts of international humanitarian law and how beneficial having the presence of international staff in the court room may be. Their role in the development of international law will depend on the kind of cases they are left to deal with. For example, concepts such as joint criminal enterprise might not be used very often if dealing with direct low level perpetrators. However, other figures may benefit from further use at a local level. This has been the case with sexual slavery, which only recently has been treated as an autonomous crime of enslavement,¹⁷⁸ or modes of liability for lower level perpetrators.¹⁷⁹ More research is needed on this particular aspect on how national courts apply international criminal law. Whilst development in different fora will consolidate international criminal law, it may also bring the risk of its fragmentation by multiplicity of inconsistent practice. But this is a risk that the international community inevitably faces in order to preserve international standards of justice. National prosecutions at national level is a reality of our times, and will only continue to increase. Learning from the ongoing processes is then essential.

¹⁷⁸⁾ Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', 25 *Michigan Journal of International Law* (2004) 609-651.

¹⁷⁹⁾ Strippoli, *supra* note 153, p. 578.