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## THE IMPACT OF THE ICTY ON ATROCITY-RELATED PROSECUTIONS IN THE COURTS OF BOSNIA AND HERZEGOVINA

Yaël Ronen\*

### INTRODUCTION

The establishment of international criminal tribunals since the 1990s has been part of a general move by the international community toward a clear condemnation of atrocities and an expression of a collective determination to end impunity. Yet the international tribunals cannot achieve these goals by themselves.<sup>1</sup> Domestic courts are an essential component in the enforcement of international criminal law because they help to ensure that accountability does not remain the lot of an exclusive few while thousands of perpetrators walk free. Without large-scale domestic action, the international community's message of ending impunity, as expressed in the establishment of international tribunals, would be severely undermined. This holds true for the era of the International

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<sup>1</sup> Yuval Shany, *How Can International Criminal Courts Have a Greater Impact upon National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation*, 46 ISR. L. REV. 431 (2013).

Criminal Court no less than for the experience of its ad hoc antecedents.

The international and the domestic arenas are not isolated from each other. They interact both intentionally and implicitly, including through judicial bodies. The latter interaction naturally varies from one instance to another depending on the particular circumstances. Yet because the shift in emphasis from international to domestic enforcement of international criminal law is a recurring one, the question arises whether there are characteristic patterns in the institutional interaction that allow for lessons to be learned as to best practices, or, on the other hand, as to potential pitfalls in future processes. This article concerns the experience in effecting this shift from international to domestic enforcement of international criminal law with respect to Bosnia and Herzegovina (BiH), namely the interaction between the International Criminal Tribunal for Yugoslavia (ICTY) and the courts of BiH.

In the case of BiH, the distinction between international and domestic institutions is not self-evident. While the ICTY's international character is beyond dispute, as is the domestic character of the ordinary courts of BiH, the classification of the federal-level BiH court dealing with international crimes is less straightforward. It was set up while BiH was under international administration, and it employs international, as well as national, judges and prosecutors. However, the source of authority of the court is domestic law; it applies domestic law, and, ultimately, will employ only national personnel.<sup>2</sup> Thus, while at present it is best characterised as a hybrid, its terms of reference envisage an entirely domestic mechanism. For the purposes of the present article, institutions within BiH, irrespective of their provenance and composition, are therefore regarded as domestic, although the hybrid character of the federal-level BiH court will be analyzed in context.

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<sup>2</sup> Cf. Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 J. OF INT'L L. & POL. 709, 713-14 (1999) (defining an international tribunal as one which must have been established by an international legal instrument and resorts to international law).

Sections I to III of this article are introductory and therefore brief. Section I provides a historical and institutional background to the situation in BiH; Section II recalls the international response to the mass atrocities in BiH, namely the establishment of the ICTY; and Section III reviews the domestic judicial response of BiH to the mass atrocities. Section IV constitutes the heart of the article and considers the impact of the ICTY on the domestic response to war-related crimes through qualitative, quantitative, and normative parameters. The article concludes with a tentative characterization and assessment of the ICTY's impact on the domestic response.

This article does not purport to provide a comprehensive study of the international involvement in BiH, the significance of which cannot be overstated in the context of addressing war-related crimes. Important international processes and actors other than the ICTY, such as the Office of the High Representative (OHR) and the European Union (E.U.), have undoubtedly affected the policy and practice in BiH, arguably to an even greater extent than the ICTY. While this article is nonetheless limited to the potential trickle-down effect of the ICTY in its direct interaction with the domestic legal system, there is no doubt that political stances toward the international involvement have had an impact on the reception in BiH of the ICTY and, accordingly, on its ability to impact domestic institutions—particularly the judiciary. Arguably, whatever success the ICTY has had in influencing BiH institutions was the result of the tight control that the international community has exercised over the country, and, correspondingly, limited to the state of BiH, where it enjoyed such control.

## I. BACKGROUND

BiH's descent into ethnic war in 1992 was the culmination of over seven decades of pent-up ethnic animosity among Serbs, Croats, and Bosnians, nurtured by forced political union under Yugoslav statehood in its various forms. In fact, the establishment of the Republic of BiH under Tito's Yugoslavia was itself a tool of ethnic management, aimed at maintaining a balance between the two

dominant ethnicities in Yugoslavia, the Serbs and the Croats, both of which lay claims to the territory of the Republic.<sup>3</sup>

Tito's death in 1980, combined with the end of Cold War rivalry and the decline of communist ideology in the rest of Europe in the 1980s, led to the severe weakening of the Socialist Federal Republic of Yugoslavia (SFRY)'s crucial unifying factors. The breakup of Yugoslavia in 1991-92 came as no surprise. In BiH the process was fashioned by interethnic disputes and heavy involvement of Serbia and Croatia, both acting in pursuit of their territorial aspirations. When BiH declared independence on March 3, 1992, large-scale violence had already erupted within it with the support of the kin states.<sup>4</sup>

At the outset, the BiH conflict was predominantly between Bosnian Muslims and Bosnian Croats backed by Croatia on one side, and Bosnian Serbs backed by Serbia on the other side. By the end of May 1992, two thirds of BiH territory, including the soon-to-be-named Republika Srpska, was in Bosnian-Serb hands. The second stage of the war began in May 1993 with the collapse of cooperation between Bosnian Croats and Bosnian Muslims. This conflict lasted until the spring of 1994, when the combined territory held by the Croat and Bosnian-Muslim government forces was united into the Federation of Bosnia and Herzegovina, and the number of warring parties in BiH was again reduced to two. The last stage of the conflict, from early 1994 on, was marked by NATO's military intervention. It culminated in May 1995, when, in reaction to Serb refusal to comply with a NATO ultimatum to withdraw heavy weaponry from around sieged enclaves, NATO forces launched air strikes on Serb targets in BiH and in Serbia. Further air strikes led to

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<sup>3</sup> See Dusko Doder, *Yugoslavia: New War, Old Hatreds*, 91 FOREIGN POL'Y 3, 12 (1993).

<sup>4</sup> Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1, Judgment, para. 22 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007), [http://www.icty.org/x/cases/dragomir\\_milosevic/tjug/en/071212.pdf](http://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf).

U.S.-sponsored peace talks in Dayton, Ohio, in November 1995, which produced the Dayton Peace Accords in December 1995.<sup>5</sup>

Estimates as to the number of victims of the war vary enormously, ranging from 25,000 to 329,000.<sup>6</sup> Former ICTY Prosecutor Carla del Ponte endorsed a finding of 103,000 lives lost.<sup>7</sup> Reliable data suggests that about two-thirds of the victims were Muslim, over a quarter Serb, and the remaining eight percent Croat.<sup>8</sup> Approximately one million BiH citizens became refugees during the war, and another one million were internally displaced. Over a third of pre-war residential dwellings were destroyed and the technical and social infrastructure was significantly damaged.<sup>9</sup> As a consequence, the ethnic composition of entire regions was affected. In the territory of the present-day Federation of BiH, which is predominantly Muslim-Croat, the share of non-Serbs had increased by over forty percent, while in the Serb-populated area that now forms the Republika Srpska, the share of non-Serbs had fallen by over eighty percent.<sup>10</sup>

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<sup>5</sup> Paula Pickering, *Bosnia and Herzegovina*, in ENCYCLOPEDIA BRITANNICA, [www.britannica.com/EBchecked/topic/700826/Bosnia-and-Herzegovina](http://www.britannica.com/EBchecked/topic/700826/Bosnia-and-Herzegovina) (last visited Feb. 6, 2014).

<sup>6</sup> Ewa Tabeau & Jakub Bijak, *War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results*, 21 EUR. J. OF POPULATION 187, 192 (2005).

<sup>7</sup> CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 39 (2008).

<sup>8</sup> PATRICK BALL, EWA TABEAU & PHILIP VERWIMP, HOUSEHOLDS IN CONFLICT NETWORK (HICN), THE BOSNIAN BOOK OF DEAD: ASSESSMENT OF THE DATABASE (FULL REPORT) 29 (2007), <http://www.hicn.org/wordpress/wp-content/uploads/2012/07/rdn5.pdf>.

<sup>9</sup> OSCE MISSION TO BOSN. & HERZ., HUM. RTS. DEP'T, WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA: PROGRESS AND OBSTACLES 3 (2005) [hereinafter OSCE 2005].

<sup>10</sup> Prosecutor v. Biljana Plavisić, Case No. IT-00-39&40/1, Sentencing Judgment, para. 36 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>; HELSINKI COMM. FOR HUM. RTS. IN REPUBLIKA SRPSKA, MINORITY RIGHTS IN REPUBLIKA SRPSKA (1999), [www.minelres.lv/reports/bosnia/bosnia-rs\\_NGO.htm](http://www.minelres.lv/reports/bosnia/bosnia-rs_NGO.htm) (estimating 20,000 Muslims in RS in 1999).

The Dayton Peace Accords outline the new constitutional design of BiH. The State of Bosnia and Herzegovina (BiH, or “the state”) comprises two administrative divisions (“entities”): the Bosnian-Serb Republika Srpska (RS), the Bosnian/Croat Federation of Bosnia and Herzegovina (FBiH), and the internationally-supervised Brčko district. The RS is a unitary entity dominated by Bosnian Serbs, while FBiH is itself also a federal entity, with power shared between Bosnian Muslims and Croats.<sup>11</sup> The Dayton Accords established the Office of the High Representative (OHR) to facilitate the implementation of the Accords. BiH has hosted a number of peacekeeping forces. Since 2004, the E.U. has been responsible for peacekeeping operations, while NATO maintains a headquarters in Sarajevo to assist the country with defense reform.<sup>12</sup>

The BiH Constitution attached to the Dayton Agreement<sup>13</sup> delineates the division of competences between the entities and the state. The state is vested with comparatively few powers and competences,<sup>14</sup> and residual competences lie with the entities.<sup>15</sup> The entities exercise a wide measure of independence, and the relationship between their governing bodies and those of the state, including judicial bodies, is hardly hierarchical. Indeed, in some respects, BiH and FBiH are as foreign to RS as BiH is to Croatia or Serbia. Moreover, the judicial institutions of the state of BiH are eminently affected by the international administration of the country

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<sup>11</sup> EUR. COMM’N FOR DEMOCRACY THROUGH L. (VENICE COMM’N), OPINION ON THE CONSTITUTIONAL SITUATION IN BOSNIA AND HERZEGOVINA AND THE POWERS OF THE HIGH REPRESENTATIVE, CDL-AD(2005)004, 7 (Feb. 22, 2005), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2005\)021-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2005)021-e).

<sup>12</sup> *NATO ends SFOR Mission*, NATO (last updated Dec. 6, 2004), [www.nato.int/docu/update/2004/12-december/e1202a.htm](http://www.nato.int/docu/update/2004/12-december/e1202a.htm).

<sup>13</sup> U.N. Secretary-General, General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4, U.N. Doc. S/1995/999 (Nov. 30, 1995), [http://peacemaker.un.org/sites/peacemaker.un.org/files/BA\\_951121\\_DaytonAgreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf), [hereinafter Dayton Agreement].

<sup>14</sup> CONSTITUTION OF BOSN. & HERZ., Dec. 14, 1995, art. III.1, [http://www.ohr.int/dpa/default.asp?content\\_id=372](http://www.ohr.int/dpa/default.asp?content_id=372) [hereinafter BiH CONSTITUTION].

<sup>15</sup> *Id.* at art. III.3.

since 1995, whereas the impact of the international administration on the courts of FBiH and RS has been much more limited.

BiH has been experiencing an uneasy peace since the conclusion of the Dayton Accords. It receives extensive international assistance, but the economy remains weak. No less importantly, political paralysis plagues the country's institutions; more than one senior official has suggested the country was "dysfunctional," with its constituent entities disagreeing on fundamental structural questions. This dynamic has prevented necessary constitutional reform.<sup>16</sup> Dissatisfaction with the constitutional structure of the country is particularly forceful in RS, where the possibility is occasionally raised of taking steps toward secession.<sup>17</sup> As will be demonstrated, this lack of unity has had an impact on the interaction between institutions and on the sense of a commitment to act jointly toward the achievement of common goals.

## II. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES: THE ICTY

On May 25, 1993, the Security Council unanimously adopted Resolution 827 under Chapter VII of the U.N. Charter, establishing the ICTY and adopting the Tribunal's Statute.<sup>18</sup> The Tribunal's subject-matter jurisdiction extended to war crimes, crimes against humanity, and genocide.<sup>19</sup> Resolution 827 made particular reference

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<sup>16</sup> *Progress Hostage to Political Blockages in Kosovo, Bosnia and Herzegovina, NATO Parliamentarians Hear in Balkans*, NATO PARLIAMENTARY ASSEMBLY (June 28, 2010), [www.nato-pa.int/default.asp?SHORTCUT=2168](http://www.nato-pa.int/default.asp?SHORTCUT=2168).

<sup>17</sup> Sabina Niksic, *Bosnian Serbs Adopt Controversial Referendum Law*, BALKAN INSIGHT (Feb. 11, 2010), <http://www.balkaninsight.com/en/article/bosnian-serbs-adopt-controversial-referendum-law>; *Political deadlock in Bosnia-Herzegovina ahead of key meeting*, DEUTSCHE WELLE (Feb. 24, 2010), <http://www.dw.de/political-deadlock-in-bosnia-herzegovina-ahead-of-key-meeting/a-5279682>.

<sup>18</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_re808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf).

<sup>19</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, Annex to S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), <http://www.icty.org/sid/135> [hereinafter ICTY Statute].



to BiH as the site of reported widespread and flagrant violations of international humanitarian law.<sup>20</sup>

The establishment of the ICTY was accompanied by statements on the need for justice, deterrence, promotion of the rule of law, reconciliation, and maintenance of peace.<sup>21</sup> But it was also motivated by less-articulated political goals, such as appeasement of international public opinion and avoidance of military intervention.<sup>22</sup> It is not clear that the judicial role of the Tribunal was taken seriously by Security Council Members at the time.<sup>23</sup>

Domestic prosecutions did not feature prominently on the agenda of the drafters of the ICTY Statute, but it was clear from the outset that the bulk of cases related to the mass atrocities in the former Yugoslavia were to be handled eventually by national courts. Only at a relatively late stage was it recognized that only if the ICTY succeeds in sustaining its action locally would it really meet the expectations of the Security Council's resolutions.<sup>24</sup>

At the same time, in light of the ongoing armed conflict and the deep-rooted animosity among the various ethnic and religious groups which initially made domestic courts unlikely to be willing or

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<sup>20</sup> S.C. Res. 827, preambular para. 3, U.N. Doc. S/RES/827 (May 25, 1993), <http://www1.umn.edu/humanrts/peace/docs/scres827.html>.

<sup>21</sup> See U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/PV.3217 (May 25, 1993), for the comments made by Security Council members upon the adoption of Resolution 808 (Feb. 22, 1993) and Resolution 827 (May 25, 1993), which established the Tribunal.

<sup>22</sup> YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 146 (1999); Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TULANE J. OF INT'L & COMP. L. 5, 46-49 (1998); STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 212-14 (3d ed. 2009); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 326 (2d ed. 2008).

<sup>23</sup> David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, in THE PROSECUTION OF INTERNATIONAL CRIMES 185, 187 (Roger S. Clark & Madeleine Sann eds., 1996).

<sup>24</sup> See Frederic Mégret, *The Legacy of the ICTY as Seen Through Some of its Actors and Observers*, 4 GOETTINGEN J. OF INT'L L. 1011, 1030 (2011) (quoting former ICTY President Pocar).

able to conduct fair trials,<sup>25</sup> ICTY Statute Article 9(2) provides the Tribunal with primacy over domestic courts, of which it has made only infrequent use.<sup>26</sup> The majority of indictments before the ICTY have been for crimes committed on the territory of BiH, and the majority of indictees have been Serbs and Bosnian-Serbs.<sup>27</sup>

In 2003 the Security Council adopted the ICTY-devised “completion strategy,” aimed at ensuring that the Tribunal conclude its mission in a timely way and in coordination with domestic legal systems in the region.<sup>28</sup> The completion strategy required that the ICTY focus its efforts on “the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction”<sup>29</sup> and transfer “intermediate and lower ranked accused” to competent domestic jurisdictions,<sup>30</sup> while ensuring that basic human rights standards and procedural safeguards are met. In fact, ICTY President Pocar has noted that the Completion Strategy was a strategy not so much to “complete” the work of the ICTY as it was designed to allow continuation by domestic actors of those activities that have

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<sup>25</sup> CASSESE, *supra* note 22, at 339; PAUL R. WILLIAMS AND MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 96-98 (2002).

<sup>26</sup> *See, e.g.*, Prosecutor v. Duško Tadić a/k/a/ “Dule”, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 52 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (taking over at the investigative stage from Germany); Prosecutor v. Karadžić, Mladić & Stanišić, Case No. IT-95-5-D, Trial Chamber Decision on the Bosnian Serb Leadership Deferral Proposal (Int’l Crim. Trib. for the Former Yugoslavia May 16, 1995) (taking over from BiH); Prosecutor v. Drazen Erdemović, Case No. ICTY-IT-96-22-T, Sentencing Judgment, para. 2 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) (taking over from FRY (Serbia and Montenegro)).

<sup>27</sup> Over two thirds of the indictees are of Serb ethnicity. Over three quarters of the indictments filed until 2000 were of Ethnic Serbs. YAËL RONEN, WITH THE ASSISTANCE OF SHARON AVITAL & OREN TAMIR, PROSECUTIONS AND SENTENCING IN THE WESTERN BALKANS, DOMAC/4, graph 6.2.2 (2010), <http://www.domac.is/media/domac/DOMAC-4-2010.pdf>.

<sup>28</sup> S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

<sup>29</sup> S.C. Res. 1503, *supra* note 28, at preambular para. 7.

<sup>30</sup> *Id.* at preambular para. 8.

been initially put in motion by the ICTY.<sup>31</sup> Altogether, thirteen cases have been referred from the ICTY to domestic jurisdictions. Of those, eleven were referred to BiH. The ICTY also sent back to domestic jurisdictions cases that had been investigated by the OTP but in which no indictment was filed in the ICTY by the deadline set at the end of 2004.

### III. THE DOMESTIC RESPONSE TO THE MASS ATROCITIES

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

In the immediate aftermath of the armed conflict, the appointment process for judges in the two entities continued to be controlled by the ruling political parties. There were frequent accusations of partiality, corruption, and judicial incompetence. Judges were often forced to supplement their meagre salaries with “outside” work. This not only deprived judges of time that should have been devoted to judicial duties, but it also risked compromising the judges’ independent decision-making abilities.<sup>32</sup> In addition, the system lacked basic infrastructure. The weakness of the judiciary was compounded by complexities in the legal framework and inappropriate procedural laws to effectively prosecute and defend alleged war criminals, a lack of qualified defense attorneys, and an

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<sup>31</sup> Fausto Pocar, *Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, 6 J. OF INT’L CRIM. L. 655, 661 (2008).

<sup>32</sup> Mark S. Ellis, *Bringing Justice to an Embattled Region - Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina*, 17 BERKELEY J. INT’L L. 1, 5-6 (1999).

inability to monitor trials or summon witnesses. Other obstacles were poor case preparation by prosecutors, ineffective witness protection mechanisms,<sup>33</sup> and lack of cooperation between the entities.

The international community did not intervene in the re-establishment of law enforcement institutions.<sup>34</sup> The Constitution of BiH, annexed to the Dayton Accords, only re-established the Constitutional Court. Until 1997, administration of justice was under the exclusive responsibility of the entities (with the exception of a BiH-level Constitutional Court). In 1997, a new Ministry of Civil Affairs and Communications was established at the BiH level, which was given responsibility for dealing with “international and inter-entity criminal law enforcement,” including international legal assistance.

Most law enforcement, including the domestic prosecution of war-related crimes, was left to the entities.<sup>35</sup> Only in the early 2000s did the OHR initiate a comprehensive reform of the legal system in BiH. This included restructuring and downsizing of courts and prosecutors’ offices and replacing all judges and prosecutors<sup>36</sup> in an effort to secure the independence of the judiciary and establish an appropriate balance of judges of different ethnicities. In 2003, a Ministry of Justice was created at the BiH level, which by then

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<sup>33</sup> HUMAN RIGHTS WATCH, LOOKING FOR JUSTICE: THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA (2006), <http://www.hrw.org/reports/2006/02/07/looking-justice> [hereinafter HUMAN RIGHTS WATCH 2006].

<sup>34</sup> Interview with NGO researchers in The Hague, BiH, and ICTY (Jan. 2009). Interviewees were selected based on their seniority and familiarity with the relevant justice systems. They included senior officials in various the ICTY units, international and domestic judges and prosecutors, E.U. and OSCE officials, and local NGOs. Since many of the interviewees did not want the information they provided to be attributed to them, they are referred to in generic terms.

<sup>35</sup> William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279, 286-87 (2008).

<sup>36</sup> E.g., Wolfgang Petritsch, High Representative, Speech to the U.N. Security Council (Sept. 5, 2000), [http://www.ohr.int/ohr-dept/presso/prensa/default.asp?content\\_id=3236](http://www.ohr.int/ohr-dept/presso/prensa/default.asp?content_id=3236); OSCE 2005, *supra* note 9, at 9.

included the State (federal) Court and State (federal) Prosecutor's Office.<sup>37</sup>

Until 2005, trials for war-related crimes were held only in the courts of the entities. In FBiH, jurisdiction over war-related crimes lies with ten cantonal courts, where 174 individuals, mostly of Serb ethnicity, have been indicted from 1992 to September 2009. Of these, 146 have received final verdicts. In RS, jurisdiction lies with 5 district courts, and forty-five individuals have been indicted and eventually received a verdict by 2009, the overwhelming majority of whom were of Serb ethnicity. All but five of the indictments in RS were submitted in or after 2003. Appeals on these courts' judgments are heard by the Supreme Court of the respective entity. Since 2005, war-related crimes have also been tried at the War Crimes Section (WCS) within the State Court of BiH (State Court).<sup>38</sup> The WCS employs both domestic and international judges<sup>39</sup> and exercises primary jurisdiction over war-related crimes, namely genocide, crimes against humanity, and war crimes, through both trial and appeals chambers.<sup>40</sup> It retains cases or transfers them to entity courts depending on their complexity and sensitivity.<sup>41</sup> By September 2009, 139 individuals had been indicted for war-related crimes before the WCS at the State Court, most of them of Serb ethnicity. By the end of the same period, seventy-two of the defendants had received a final verdict.<sup>42</sup>

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<sup>37</sup> BIH PUB. ADMIN. REFORM COORDINATOR'S OFF., FUNCTIONAL REVIEW OF THE BIH JUSTICE SECTOR (2005), [parco.gov.ba/?id=408](http://parco.gov.ba/?id=408).

<sup>38</sup> BALKAN INVESTIGATIVE REPORTING NETWORK (BIRN), PURSUIT FOR JUSTICE: GUIDE TO THE WAR CRIMES CHAMBER OF THE BIH COURT 7 (vol. II) (hereinafter BIRN, PURSUIT OF JUSTICE).

<sup>39</sup> For a discussion of this policy, see *infra* text accompanying notes 87-95.

<sup>40</sup> CRIM. PROC. C. BOSN. & HERZ., art. 315.

<sup>41</sup> For a discussion of this policy, see *infra* text accompanying notes 140-46; NATIONAL STRATEGY FOR WORK ON WAR CRIMES CASES (2008), [www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf](http://www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf) [hereinafter NATIONAL STRATEGY]. See also NATIONAL WAR CRIMES STRATEGY (2008), [www.adh-geneva.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf), for an English translation of NATIONAL STRATEGY.

<sup>42</sup> RONEN WITH AVITAL & TAMIR, *supra* note 27, at graphs 2.2A.1.1, 2.2A.4.1.

## IV. THE IMPACT OF THE ICTY ON DOMESTIC COURTS

## A. Introduction

When the ICTY was established in 1993, no thought was given to cooperation with, or even assistance to, domestic jurisdictions in the former Yugoslavia.<sup>43</sup> The ICTY had specific tasks to perform—arrests and trials.<sup>44</sup> It was busy strengthening its judicial capacity, developing procedures, and ensuring that the international community provided the necessary cooperation in gathering evidence and arresting indictees.<sup>45</sup> Fostering the ability of domestic authorities to address international crimes was not considered one of the Tribunal's goals,<sup>46</sup> and no resources were allocated toward it. Moreover, war was still raging in the region during the first years of the Tribunal's existence, making geographical and legal remoteness inevitable. But remoteness was also a policy choice, which continued to maintain hold after the termination of the armed conflict. The Court regarded impartiality as requiring it to maintain and display its distance (geographically, linguistically, politically, and legally) almost to the extent of indifference to political reality on the ground. In addition, cooperation with the domestic jurisdictions was considered a potential threat to the integrity of the international process because the rule of law remained suspect in all these states.<sup>47</sup>

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<sup>43</sup> Varda Hussain, Note, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crime Tribunals*, 45 VA. J. INT'L L. 547, 561 (2005).

<sup>44</sup> Louise Arbour, *The Crucial Years*, 2 J. INT'L CRIM. JUST. 396, 397 (2004); DEL PONTE & SUDETIC, *supra* note 7, at 1.

<sup>45</sup> Refik Hodžić, *Bosnia and Herzegovina - Legitimacy in Transition* 4, Presentation at Building a Future on Peace and Justice Conference, Nuremberg (June 25-27, 2007).

<sup>46</sup> David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 5, 12-16 (2002), [http://dialogueonfreedom.org/rol/publications/ceeli\\_icty\\_tolbert\\_fletcher\\_forum\\_2002.pdf](http://dialogueonfreedom.org/rol/publications/ceeli_icty_tolbert_fletcher_forum_2002.pdf).

<sup>47</sup> Interview with official from ICTY Outreach Office in Sarajevo (January 2009). Del Ponte points out that ICTY prosecutors intentionally remained uninformed about the conflict, ostensibly so as not to compromise their impartiality. DEL PONTE & SUDETIC, *supra* note 7, at 125.

From the outset, the ICTY suffered from a negative reputation among the various domestic constituencies in the Western Balkans, including BiH. Entity institutions in particular often regard the ICTY as a hostile political body.<sup>48</sup> The antagonism toward the ICTY has been attributed to ignorance among domestic constituencies as to the Tribunal's operation as well as to the dissatisfaction with its perceived bias over whom it chooses to indict. The popularity of the Tribunal throughout the region is inversely proportionate to the number of indictees hailing from the majority ethnic community in question,<sup>49</sup> while the minority within each state has a more positive view of the Tribunal. The only exception is in FBiH, where the Muslim majority has a better opinion of the Tribunal than the Croatian minority.<sup>50</sup> Nonetheless, the Muslim community is frustrated with the small number of indictments, the slowness of the trials, and the perceived leniency of sentences.<sup>51</sup> To counter this phenomenon, ICTY President Gabrielle Kirk McDonald, with the cooperation of prosecutor Louise Arbour, established in 1998 the Outreach Programme within the Tribunal to encourage engagement with domestic authorities<sup>52</sup> and to communicate directly with the people of the former Yugoslavia. The main focus of the Outreach Programme is to provide information to key regional stakeholders and the wider public about the work of the Tribunal to, *inter alia*, facilitate the transfer of expertise to national judiciaries.<sup>53</sup> Despite these efforts, opinions regarding the ICTY have not changed dramatically.<sup>54</sup> It has been suggested that the Outreach

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<sup>48</sup> Interview with NGO researcher in Sarajevo (January 2009); Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 96 (2009).

<sup>49</sup> Hodžić, *supra* note 45, at 4.

<sup>50</sup> Klarin, *supra* note 48, at 91-92.

<sup>51</sup> *Id.* at 90.

<sup>52</sup> Interview with official from ICTY Outreach Office in Sarajevo (January 2009); Arbour, *supra* note 44, at 401.

<sup>53</sup> Assessment and report of Judge Patrick Robinson, Pres. of ICTY, annexed to U.N. Doc. S/2009/589, (Nov. 13, 2009), [http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion\\_strategy\\_13nov2009\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_13nov2009_en.pdf). See also *infra* § IV.B on capacity building.

<sup>54</sup> Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT'L CRIM. JUST. 463, 467, 484 (2009); Klarin, *supra* note 48, at 92.

Programme, as well as the legal officers of the ICTY,<sup>55</sup> do not sufficiently acknowledge the influence of the domestic Serb and Croat political, academic, and cultural elites,<sup>56</sup> who propagate the view that the ICTY is a politically-motivated Western project intent on undermining Serb and Croat independence.<sup>57</sup> This opposition to the international project of state-building in BiH is reflected in animosity not only toward the ICTY itself, but also toward institutions of the state, including judicial bodies. For example, the unwillingness of entity courts to take the cue from the State Court of BiH is driven in part by its perception as an internationally imposed puppet institution.

The completion strategy of the ICTY has nonetheless brought about a sea change in the relationship between the ICTY and domestic jurisdiction. The ICTY developed a strong interest in enhancing the capacity of domestic legal systems to uphold relevant criminal standards. It engaged more proactively with the establishment of the War Crimes Chamber (WCS) within the State Court of BiH, with a view to facilitate the domestic exercise of criminal justice powers following transfer of cases under Rule 11bis<sup>58</sup> and domestically-initiated cases.<sup>59</sup> The completion strategy also played a part in the adoption of new criminal codes and criminal procedure codes. Regardless, even as late as 2008, there were doubts in the ICTY, and the international community more generally, about whether domestic institutions were capable of administering justice for war-related crimes effectively and in accordance with international standards.<sup>60</sup> This may explain the reluctance on the part

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<sup>55</sup> Klarin, *supra* note 48, at 96.

<sup>56</sup> DEL PONTE & SUDETIC, *supra* note 7, at 49-50.

<sup>57</sup> Clark, *supra* note 54, at 483. For conflicting views on the Outreach Program, see Mégret, *supra* note 24, at 1037-40.

<sup>58</sup> Rule 11bis allows the ICTY to refer cases to domestic courts in the region of the former Yugoslavia.

<sup>59</sup> Interviews with official from ICTY Prosecutor's Office and with official from the Office of the High Representative in Sarajevo (January 2009); Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).

<sup>60</sup> Judge O-Gon Kwon, *Discussion: Capacity Building under Time Pressure*, 6 J. INT'L CRIM. JUST. 681, 682 (2008); William Schabas, *Discussion: National v. International Jurisdiction*, 6 J. INT'L CRIM. JUST. 681, 707 (2008); Thomas Weigend, *Discussion: National v. International Courts*, 6 J. INT'L CRIM. JUST. 681, 704 (2008).



of the ICTY to relinquish specific cases or to actively promote domestic courts (an endeavour which is also constrained by the ICTY's limited capacity). Interaction with domestic institutions has therefore been informed by the acknowledgement of the necessity of the completion strategy, combined with skepticism as to the viability of domestic processes and resource limits on both sides. The following sections examine the normative, quantitative, and qualitative impact of the ICTY in domestic courts in BiH.

## B. The Qualitative Impact of the ICTY—Capacity of Courts

### 1. *Establishment of the WCS*

The most fundamental development in capacity enhancement in BiH with respect to domestic proceedings relating to international crimes was the establishment of the WCS. The proposal to transfer cases from the ICTY to the states of the former Yugoslavia was first tabled by ICTY President Jorda in May 2000.<sup>61</sup> However, for a long time, such relocation was perceived as premature. It was envisaged for a later stage, when the judicial systems of the relevant states were reconstructed on democratic foundations, so that they could accomplish their goal with total independence and impartiality and with due regard for the principles of international humanitarian law and the protection of human rights. This would have entailed international involvement and support in training.<sup>62</sup>

By late 2002, when President Jorda presented the Security Council with a further report outlining the completion strategy, the transfer of cases involving mid- and low-level accused to national courts had become an essential component of the strategy.<sup>63</sup> The most important condition that national courts were required to satisfy was the ability to handle transferred cases “effectively and consistently with internationally recognized standards of human

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<sup>61</sup> Report on the Operation of ICTY, Identical Letters (Sept. 7, 2000) from the Secretary-General to the General Assembly Pres. and SCOR Pres., U.N. Doc A/55/382-S/2000/865, Annex I, para. 42 (May 12, 2000).

<sup>62</sup> U.N. SCOR, 56th Sess., 4429th mtg. at 4-5, 12, U.N. Doc. S/PV.4429 (Nov. 27, 2001).

<sup>63</sup> Sarah Williams, *ICTY Referrals to National Jurisdictions: a Fair Trial or a Fair Price?*, 17 CRIM. L. F. 177, 182 (2006).

rights and due process.”<sup>64</sup> The judicial system of BiH was nonetheless still considered inadequate. The report therefore called for the creation of a special war crimes chamber in BiH, a concept which was endorsed by the Security Council.<sup>65</sup>

The initial reaction to the establishment of the WCS by BiH officials was lukewarm. BiH officially “welcome[d] the ICTY initiative to process some of the cases by the domestic judiciary structures under the auspices of the ICTY,” but added that “the prosecution and trial of the indicted war criminals in the region should continue to be a United Nations responsibility.”<sup>66</sup> This position reflected a common refrain in domestic BiH politics, according to which the ICTY alone was an adequate solution, although certain elements of domestic society did push for greater activity by domestic courts in the late 1990s.<sup>67</sup> Domestic approval of the WCS was nonetheless fuelled by the misinformed yet prevalent conception that, as a result of the various Security Council Resolutions endorsing the completion strategy, BiH was obliged to accept defendants that would be transferred from the ICTY in the future,<sup>68</sup> even though the entities were not yet in a position to provide the accused with a fair trial.<sup>69</sup> In addition, frustration with the ICTY increased, and the state government regarded a special war crimes chamber as an opportunity to prove to both national and international audiences that the state institutions in BiH were capable of performing even the most demanding criminal prosecutions and

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<sup>64</sup> U.N. Secretary-General, Letter dated June 17, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/678 (June 19, 2002).

<sup>65</sup> S.C. Res. 1503, *supra* note 28; S.C. Res. 1534, *supra* note 28.

<sup>66</sup> U.N. Doc. S/PV.4429, *supra* note 62, at 18.

<sup>67</sup> Burke-White, *supra* note 35, at 316.

<sup>68</sup> Fidelma Donlon, *Rule of Law: from the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION: HUMAN RIGHTS AND THE RULE OF LAW IN POSTWAR BOSNIA AND HERZEGOVINA* 257, 280 (Dina Francesca Haynes ed., 2008).

<sup>69</sup> Letter dated May 21, 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, Enclosure II, para. 34, U.N. Doc. S/2004/420 (May 24, 2004).

that BiH had effectively recovered from the conflict. Simultaneously, the special war crimes chamber would enable state-level officials to wrest power away from entity-level institutions under a stamp of approval by the ICTY. The result was a new and powerful domestic interest block in BiH pushing for general enhancement of domestic judicial institutions and for a state-level war crimes court in particular.<sup>70</sup>

FBiH representatives, too, were generally supportive of a special court to deal with war-related crimes as a means of raising confidence in domestic institutions and awareness of the overall issues involved.<sup>71</sup> In contrast, the RS was resistant to endowing the State Court with jurisdiction over war-related crimes, as there was strong concern that the State Court would be biased against Serbs.<sup>72</sup> Perhaps a more cynical reason for whatever support was voiced by either entity's officials was their interest in preventing ethnically-charged cases from landing on their own doorsteps.<sup>73</sup> The strength of domestic interests in favor of a state-level war crimes chamber eventually made possible the adoption of the necessary legislation in the BiH legislature in November and December 2004.

The procedures and policy of the State Court avoid many of the shortcomings of the ICTY. These include strictly-imposed deadlines for trial length; geographical proximity; the absence of a language barrier; a willingness and intention to investigate and prosecute crimes committed against Serbs with the same dedication as all other crimes; and a comprehensive outreach effort, *inter alia* adopting the models of communication used by the ICTY.

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<sup>70</sup> Burke-White, *supra* note 35, at 332.

<sup>71</sup> Michael Bohlander, *Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts*, 14 CRIM. L. F. 59, 69 (2003).

<sup>72</sup> Marija Jandric, EUROBLIC, “*They do not trust to the Court in Sarajevo*”; “*They do not trust to judges*”, cited in OHR BiH Weekend Round-up (July 31- Aug. 1, 2004), [http://www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content\\_id=33044](http://www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content_id=33044); EUROBLIC, “*Judge Miso is a nationalist*”, cited in OHR BiH Media Round-up (Jan., 30 2003), [www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content\\_id=29143](http://www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content_id=29143); Glas Srpski, “*Open a court in Jasenovac*”, cited in OHR BiH Media Round-up, (Jan. 30, 2003), [www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content\\_id=29143](http://www.ohr.int/ohr-dept/preso/bh-media-rep/round-ups/print/?content_id=29143).

<sup>73</sup> Burke-White, *supra* note 35, at 330.

## 2. *Transfer of know how*

A common means of transferring know how and expertise among institutions is joint work, either within the transferring institution or within the receiving one. In the relationship between the ICTY and institutions within BiH, the former form of interaction was almost completely absent. As part of the ICTY's initial attitude of detachment from the region, it was regarded inappropriate to recruit professionals from the former Yugoslavia, particularly as judges, on the ground that this would make it difficult to maintain sufficient distance and neutrality.<sup>74</sup> Security concerns were also a powerful disincentive for hiring nationals of the region.<sup>75</sup>

This general policy was revised, not as a result of a conscious decision to develop domestic capacity, but due to the need to speed up the processes pending before the ICTY. First, the OTP considered it crucial to acquire knowledge of the conflict and its background, and to be able to perform in relevant languages. Further steps were triggered by the notion that most of the work would have to be done in the region and by the fact that the few people from the region who went to work at the ICTY proved to be good professionals.<sup>76</sup> However, this change in policy did not make a substantial contribution to the actual transfer of knowledge and skills to BiH, at least not in the short term, because people from the region who started working at the ICTY were unlikely to return to the region—at least not immediately.<sup>77</sup>

In contrast, the employment of former ICTY personnel at the domestic level, mainly at the state level,<sup>78</sup> as was the extensive

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<sup>74</sup> Interviews with officials from the ICTY Chambers at The Hague (January 2009).

<sup>75</sup> Interviews with officials from the ICTY Chambers, Victims and Witnesses Section, Prosecutor's Office, and others, at The Hague (January 2009).

<sup>76</sup> ALEJANDRO CHEHTMAN, *DEVELOPING LOCAL CAPACITY FOR WAR CRIMES TRIALS: INSIGHTS FROM BIH, SIERRA LEONE AND COLOMBIA* 23-24 (2011), <http://www.domac.is/media/domac/Domac-9-AC-Final-Paper.pdf>.

<sup>77</sup> This is also true of locals working in victims and witness support. Interview with official from the ICTY Victims and Witnesses Section at The Hague (January 2009).

<sup>78</sup> Interviews with judges from the BiH Court in Sarajevo (January 2009).

advice offered by other administrative ICTY officers in connection with the setting up the Court of BiH, have been important elements of the transfer of knowledge from the ICTY to BiH. This overall policy appears to have been motivated at least partly by the need to ensure that the domestic processes satisfy the ICTY's requirements, in order to enable the transfer of cases under Rule 11bis,<sup>79</sup> rather than out of direct concern for the development and future of domestic institutions.<sup>80</sup>

The international presence within the State Court of BiH encompasses all units from the judiciary itself to administrative support. The need for this international participation was acknowledged even by the RS.<sup>81</sup> One of the positive contributions of this participation has been in deflecting the suspicion and mistrust of the domestic public toward the domestic judiciary, which had been seen as unprofessional, corrupt, and biased against members of the "other" side. Foreign professionals may also be more familiar with international crimes and jurisprudence and with applying international standards of due process.

At the same time, it was recognized from the start that the State Court had to be run and seen to function as a BiH institution, with domestic actors taking responsibility for early its success. The appointment of domestic practitioners to lead positions<sup>82</sup> gave the institution a BiH face and identity. One aspect of this is the exclusion of international judges from presiding over panels. However, this policy has been controversial. Some suggest that a rotation in panel presidency could have had a positive impact on the effectiveness and celerity of the Court, in particular if international judges were to introduce efficient case management techniques.<sup>83</sup> Originally, each panel was comprised of two international judges and a presiding domestic judge. At the time of writing, the WCS trial section first-

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<sup>79</sup> *Declaration by the PIC Steering Board*, PEACE IMPLEMENTATION COUNCIL (June 12, 2003), [http://www.ohr.int/pic/default.asp?content\\_id=30074](http://www.ohr.int/pic/default.asp?content_id=30074).

<sup>80</sup> Interviews with officials from the BiH Court Registry in Sarajevo (January 2009).

<sup>81</sup> Bohlander, *supra* note 71, at 68.

<sup>82</sup> Law on the Ct. of Bosn. & Herz., art 65.

<sup>83</sup> Interview with a judge from the BiH Court in Sarajevo (January 2009).

instance panels comprise four judges each, one international and three domestic. As a rule, the domestic judge is the president of the panel. The appellate division of the WCS consists of one panel composed of two international judges and a presiding domestic judge.<sup>84</sup> The participation of international judges was intended to be phased out by 2009,<sup>85</sup> but in December 2009 the OHR extended that mandate of the international judicial and prosecutorial staff for three years,<sup>86</sup> despite strong objection by RS.<sup>87</sup>

A more fruitful aspect of the informal transfer of knowledge is the working relationships established between judges and their legal officers. The younger legal professionals are also usually more receptive to mentoring and are often better able to adapt to the new legal framework.

Many other elements nonetheless undermine the process of transferring knowledge and skills between international and domestic court officials. One is the selection process of international judges and prosecutors for the WCS, which has been heavily criticized for resulting in the appointment of insufficiently qualified professionals.<sup>88</sup> The situation has allegedly improved with the transfer of the selection process to the domestic High Judicial and Prosecutorial Council.<sup>89</sup> A related problem is the short duration of international

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<sup>84</sup> STATE COURT OF BIH, [www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e](http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e) (last visited Feb. 6, 2014).

<sup>85</sup> HUMAN RIGHTS WATCH 2006, *supra* note 33, at 7.

<sup>86</sup> Dzenana Karabegovic, *On Dayton Anniversary, Spirit of Accord Eludes Bosnia*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 14, 2009), [http://www.rferl.org/content/On\\_Dayton\\_Anniversary\\_Spirit\\_Of\\_Accord\\_Eludes\\_Bosnia/1903958.html](http://www.rferl.org/content/On_Dayton_Anniversary_Spirit_Of_Accord_Eludes_Bosnia/1903958.html).

<sup>87</sup> *Id.*

<sup>88</sup> Interviews with judges from the BiH Court in Sarajevo (January 2009). To this, some locals would add “their unfamiliarity with the domestic system, with the historical context, with the constitutional structure of BiH, and with its political context.” Interview with a judge from the BiH Court in Sarajevo (January 2009).

<sup>89</sup> DAVID TOLBERT & ALEKSANDAR KONTIC, 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

judges' tenure, and the resultant lack of familiarity with the complex nature of cases and the cultural and political background within which they took place.<sup>90</sup>

Several domestic judges consider the influence of their international counterparts as generally positive.<sup>91</sup> Experienced domestic judges have not always been willing to be "chaperoned" by international colleagues.<sup>92</sup> Because there has been no institutional policy regarding the transfer of expertise, interaction between international and domestic judges, in the form of regular debates over both substantive and procedural issues, drafting of guidelines by the international judges, and special training sessions,<sup>93</sup> has always been the product of the commitment of particular judges.

In the prosecution, the mix of international and domestic professionals in case teams was also viewed as a good method for domestic legal professionals to increase their knowledge about the applicability of international instruments on human rights and to ensure compliance with international standards. The contribution of international staff to the capacity of domestic legal professionals is especially important in light of the breadth and complexity of war crimes cases. Recent reform of the BiH criminal procedure code that has made the criminal justice system in BiH more adversarial<sup>94</sup> and thus less familiar to domestically-trained professionals, has made capacity building even more critical. However, a reported lack of trust and goodwill toward international prosecutors on the part of the first BiH Chief Prosecutor,<sup>95</sup> combined with a post-communist

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BOSNIA AND HERZEGOVINA IN 2009 31, 37 (2008), [www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf](http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf).

<sup>90</sup> Interview with a Prosecutor in Sarajevo (January 2009).

<sup>91</sup> *E.g.*, interview with a judge from the BiH Court in Sarajevo (January 2009).

<sup>92</sup> Interview with a judge from the BiH Court and with an official from the ICTY Prosecutor's Office at The Hague (January 2009).

<sup>93</sup> Interview with judges from the BiH Court in Sarajevo (January 2009).

<sup>94</sup> HUMAN RIGHTS WATCH 2006, *supra* note 33, at 10.

<sup>95</sup> Interview with an official from the Office of the Prosecutor of the BiH Court in Sarajevo (January 2009).

institutional culture of reluctance to share information,<sup>96</sup> severe time constraints, and heavy workload, obviously affected peer relationships and the possibility of knowledge- and information-sharing. At the time of writing, there is only one international serving prosecutor.<sup>97</sup>

### 3. *Transfer of information*

Transfer of cases from the ICTY to domestic courts entailed an enormous transfer of information and evidence to the domestic courts. This required the ICTY to provide mechanisms to liaise with domestic authorities to obtain further relevant information. Accordingly, for instance, ICTY RPE Rule 75(H) was added in 2007 to allow domestic courts, prosecutors, and defence counsel to obtain confidential ICTY material.<sup>98</sup> This process contributed to interaction between the ICTY and the domestic courts, particularly the WCS.<sup>99</sup> The two tribunals developed a greater sense of horizontal collaboration and partnership in a common task.<sup>100</sup> The ICTY OTP

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<sup>96</sup> Interview with an official from the Office of the Prosecutor of the BiH Court in Sarajevo (January 2009).

<sup>97</sup> *Prosecutors of Department I*, THE PROSECUTOR'S OFF. OF BOSN. & HERZ., <http://www.tuzilastvobih.gov.ba/?id=63&jezik=e&kat=15&opcija=sadrzaj> (last visited Dec. 4, 2013).

<sup>98</sup> Interview with an ICTY judge at The Hague (January 2009); Pocar, *supra* note 31, at 662; Serge Brammertz, *The interaction between international and national criminal jurisdictions: developments at the ICTY*, in CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 173, 174-75 (Morten Bergsmo ed., 2009).

<sup>99</sup> Interviews with officials from the ICTY Chambers at The Hague (January 2009). This meant signing a Memorandum of Understanding between the Office of the Prosecutor of the ICTY and the Special Department for War Crimes of the Prosecutor's Office of BiH. BIH PROSECUTOR'S OFFICE BRIEFING BOOK (2009).

<sup>100</sup> This collaboration also meant that the local courts would be able to voice their needs in a useful way. A judge from the State Court of BiH, for instance, suggested that the Registry create a web page with instructions on how to file a request for assistance, something which was taken on board at the Hague. Interview with official from the ICTY Court management at The Hague (January 2009).



perceived this collaboration as “healthier” since the authorities in the region are the ones that need to finalize the cases.<sup>101</sup>

Until 2004 the admissibility in courts in BiH of evidence collected in ICTY proceedings was unclear to domestic prosecutors.<sup>102</sup> In 2004, BiH adopted a Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts. This law permits the use of evidence collected in accordance with the Statute and the ICTY RPE in proceedings before the courts in BiH. Borrowing from ICTY RPE 94(b), the WCS has developed criteria for using ICTY evidence and proven facts.<sup>103</sup> Thus the courts may accept as proven those facts that are established by legally binding decisions in proceedings by the ICTY and may accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.<sup>104</sup> However, BiH courts may not base a conviction solely, or to a decisive extent, on the prior statements of witnesses who did not give oral evidence at trial.<sup>105</sup>

A perusal of judgments reveals extensive use by the WCS of evidence from the ICTY regarding, for example, the existence of the requisite elements of a widespread and systematic attack against a civilian population;<sup>106</sup> the intent by the Serb forces at Srebrenica to

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<sup>101</sup> Interviews with officials from the ICTY Prosecutor’s Office at The Hague (January 2009).

<sup>102</sup> OSCE 2005, *supra* note 9, at 31.

<sup>103</sup> Prosecutor v. Vaso Todorović, Case No. X-KRŽ-06/180-1, First Instance Verdict, 6 (Ct. of Bosn. & Herz. Oct. 22, 2008); Prosecutor v. Momčilo Mandić, Case No. X-KR-05/58, First Instance Verdict, 52-59 (Ct. of Bosn. & Herz. July 18, 2007); Prosecutor v. Momčilo Mandić, Case No. X-KRŽ-05/58, Second Instance Verdict, para. 40, n.2 (Ct. of Bosn. & Herz. Sept. 1, 2009).

<sup>104</sup> Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, art. 4 (Bosn. & Herz), [http://www.sudbih.gov.ba/files/docs/zakoni/en/BH\\_LAW\\_ON\\_TRANSFER\\_OF\\_CASES\\_-\\_Consolidated\\_text.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf).

<sup>105</sup> *Id.* at art. 3(2).

<sup>106</sup> Prosecutor v. Vuković & Another, Case No. KRŽ-07/405, First Instance Verdict, 9-10 (Ct. Bosn. & Herz. Feb. 4, 2008) (basing decision on the ICTY’s Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23& IT-96-

destroy the protected group;<sup>107</sup> the determination that genocide occurred in the enclave of Srebrenica during the time specified within the indictment;<sup>108</sup> the existence of armed conflict in BiH after April 6, 1992;<sup>109</sup> and the fact that genocide occurred in BiH.<sup>110</sup> The use of the 2004 Law is not without its own challenges. For example, the material arrives in English, and its abundance sometimes challenges domestic prosecutors' ability to locate relevant evidence.<sup>111</sup>

Where the entities are concerned, language barriers and hostility to the ICTY are obstacles to cooperation. The ICTY's proactive engagement has almost completely overlooked the courts of the entities (as have other international bodies). The absence of a conscious effort to empower domestic institutions does not mean that the ICTY had no effect at all on the latter, although in view of the circumstances, such effect was not necessarily positive. For example, a 2000 Survey in BiH revealed that domestic professionals felt that the international community saw them as "intellectual inferiors who did not understand the relevant law."<sup>112</sup> Noting that

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23/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) and Prosecutor v. Kronjelac, Case No. IT-97-25-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002)).

<sup>107</sup> Prosecutor v. Miloš Stupar et al., Case No. X-KR-05/24, First Instance Verdict, 103 (Ct. Bosn. & Herz. July 29, 2008) (citing Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) and Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007)).

<sup>108</sup> Prosecutor v. Petar Mitrović, Case No. X-KR-05/24-1, First Instance Verdict, 94 (Ct. Bosn. & Herz. July 28, 2008) (citing Krstić, *supra* note 107 and Blagojević & Jokić, *supra* note 107); Prosecutor v. Milorad Trbić, Case No. X-KR-07/386, First Instance Verdict, 84-86 (Ct. Bosn. & Herz. Oct. 16, 2009) (citing Blagojević & Jokić, *supra* note 107).

<sup>109</sup> Mandić, *supra* note 102, at 57 (basing decision on Prosecutor v. Galić, Case No. IT-98-29-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006)).

<sup>110</sup> Trbić, First Instance Verdict, *supra* note 108, at 223-29 (basing decision on Krstić, *supra* note 107 and Blagojević & Jokić, *supra* note 107).

<sup>111</sup> DIANE ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 121 (2010).

<sup>112</sup> HUMAN RIGHTS CTR., INT'L HUMAN RIGHTS LAW CLINIC (UNIV. OF CAL., BERKELEY AND SARAJEVO), JUSTICE, ACCOUNTABILITY AND SOCIAL RECONSTRUCTION 36, 41 (2000),

ICTY officials failed to keep them informed of the status of the investigations even in response to direct inquires, these professionals viewed the ICTY as unresponsive and detrimental to the ability of BiH courts to conduct national war crimes trials.<sup>113</sup> With respect to the transfer of ICTY evidence, difficulties are exacerbated by the fact that entity officials do not know which material is available.<sup>114</sup> In contrast to the interaction between the ICTY OTP and the BiH prosecutor, which takes place on a daily basis,<sup>115</sup> requests for assistance from entity courts number no more than 5-6 a year, mostly for evidence.

#### 4. *Summary*

The ICTY was influential in bringing the WCS into existence and has been involved in its routine operation. This involvement was facilitated by, and indeed had a part in inducing, the hybrid character of the WCS. In contrast, the ICTY has displayed disinterest in entity courts, leading the latter to reciprocate and even to express resentment toward the Tribunal and a reluctance to take guidance from it.

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[http://www.law.berkeley.edu/files/IHRLC/Justice\\_Accountability\\_and\\_Social\\_Reconstruction.pdf](http://www.law.berkeley.edu/files/IHRLC/Justice_Accountability_and_Social_Reconstruction.pdf).

<sup>113</sup> *Id.*

<sup>114</sup> Interview with official from BiH Prosecutor's Office in Sarajevo (January 2009); Interview with official from the ICTY Transition Team at The Hague (January 2009); HUMAN RIGHTS WATCH, STILL WAITING: BRINGING JUSTICE FOR WAR CRIMES, CRIMES AGAINST HUMANITY, AND GENOCIDE IN BOSNIA AND HERZEGOVINA'S CANTONAL AND DISTRICT COURTS 29-30 (2008), [www.hrw.org/en/node/62137/section/1](http://www.hrw.org/en/node/62137/section/1) [hereinafter HUMAN RIGHTS WATCH 2008]; U.N. DEV. PROGRAMME (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 16 (2008).

<sup>115</sup> Interview with official from the ICTY Transition Team at The Hague (January 2009).

### C. Quantitative Impact of the ICTY

#### 1. *Prosecution rates*

The prevailing view is that had it not been for the ICTY, there would not have been domestic prosecutions even at the limited volume in which they exist.<sup>116</sup> Yet a quantitative attempt to assess the impact of the ICTY on prosecution rates and sentencing in the BiH jurisdictions has proven difficult because the number of cases is too small for statistically significant findings. In other words, there are no statistically significant findings on trends in the volume of cases in domestic jurisdictions, let alone trends that can be attributed to the relationship of these jurisdictions with the ICTY. An examination of prosecution rates from 1992 to 2009 nonetheless reveals a few tentative patterns. The rate of indictment in the WCS has remained more or less constant since it began to operate in 2005.<sup>117</sup> However, in F BiH and perhaps in RS, a number of waves are discernible that may be linked to changes in the direct or indirect working relationship with the ICTY.

#### 2. *Impact of the Rules of the Road (RoR) procedure*

In F BiH, there was a drop in indictments from 1997 to 2000, picking up again in 2001.<sup>118</sup> In RS there were a handful of indictments until 1997, and none again until 2003.<sup>119</sup> At least in F BiH, this gap may be related to the Rules of the Road (RoR) procedure introduced in 1996 (the paucity of indictments in RS prior to 1997 makes it impossible to identify a similar drop or gap).

The RoR marked the ICTY's first involvement in domestic administration of justice in BiH. It was based on an agreement among BiH, Croatia, and Serbia,<sup>120</sup> and responded to unchecked issuances of indictments for war-related crimes by entity prosecutors.

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<sup>116</sup> Interview with official from BiH Prosecutor's Office in Sarajevo (January 2009).

<sup>117</sup> RONEN WITH AVITAL & TAMIR, *supra* note 27, at graph 2.2A.1.1.

<sup>118</sup> *Id.* at graph 2.2B.1.1.

<sup>119</sup> *Id.* at graph 2.2C.1.1.

<sup>120</sup> *In* Rome Agreement, BiH-Croatia-Fed. Rep. of Yugoslavia, Feb. 18, 1996.

The policy of entities prosecuting war crimes without oversight became particularly problematic as elections in BiH neared and people traveling to their respective voting places were easy prey for unmerited arrests, abuse, and restrictions on movement. The RoR procedure introduced a requirement of ICTY clearance for prosecutions by the entity authorities. If either of the BiH's entities' authorities wished to make an arrest where there was no prior indictment by the ICTY, they had to send evidence to the RoR Unit established at the ICTY's Office of the Prosecutor (OTP) in order for the Unit to advise whether or not the available evidence was sufficient by international standards to justify either an arrest or indictment.<sup>121</sup> The ICTY OTP was not enthusiastic about undertaking the review of files and questioned whether it was within the Tribunal's mandate to do so. The OTP was also concerned that it lacked the resources to undertake this type of activity and preferred to focus efforts on potential indictments within its own jurisdiction.<sup>122</sup> Yet, after considerable pressure from states supportive of the Tribunal, the OTP reluctantly agreed to review the cases submitted to its office.<sup>123</sup> The RoR procedure undoubtedly reduced the incidence of arbitrary arrests in BiH<sup>124</sup> and contributed to the active participation of displaced people and candidates in the early elections.

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

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<sup>121</sup> *Agreed Measures – Rome, 18/2/96*, OFF. OF THE HIGH REPRESENTATIVE, para. 5 (June 18, 2006), [www.ohr.int/other-doc/fed-mtng/default.asp?content\\_id=3568](http://www.ohr.int/other-doc/fed-mtng/default.asp?content_id=3568).

<sup>122</sup> LARA J. NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE* 243 (2010).

<sup>123</sup> Ellis, *supra* note 32, at 7-8.

<sup>124</sup> HUMAN RIGHTS WATCH 2006, *supra* note 33, at 6.

insufficient); and C (the ICTY was unable to determine the seriousness from available evidence).<sup>125</sup>

Lack of clarity regarding the legal status of the RoR and the failure to disseminate the rules to relevant entity officials led to confusion among domestic authorities. As such, a significant number of cases were heard by entity courts in disregard of the RoR procedure. In some cases, such discrepancies were resolved by a retrospective designation as category A by the ICTY OTP or by prisoner exchanges and early releases from prison.<sup>126</sup>

The OTP ceased the RoR review on October 1, 2004 in anticipation of the closure of the ICTY.<sup>127</sup> OTP staff reviewed 1,419 files involving 4,985 suspects between 1996 to 2004. Approval under Category A was granted for the prosecution of 848 persons.<sup>128</sup> Of those, fifty-four (eleven percent) had reached trial stage in domestic courts by January 2005.<sup>129</sup>

Some commentators argue that the effect of the RoR was to stifle domestic courts. The ICTY was notoriously slow in reviewing cases, in large part due to staff limitations and competing priorities. The files that the ICTY received were in the local language and were organized in a way that was entirely alien to international OTP

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<sup>125</sup> The significance of the various categories has not been made public. According to various sources, Category D meant that the ICTY would have precedence over that individual as a witness. INT'L CRISIS GROUP, WAR CRIMINALS IN BOSNIA'S REPUBLIKA SRPSKA: WHO ARE THE PEOPLE IN YOUR NEIGHBOURHOOD?, 8 (2000), [www.crisisgroup.org/~media/Files/europe/Bosnia%2039.ashx](http://www.crisisgroup.org/~media/Files/europe/Bosnia%2039.ashx)). Category G indicated that the ICTY OTP determined that the evidence for the specified serious violation of international humanitarian law was insufficient, yet it was sufficient for a different violation of international humanitarian law. OSCE 2005, *supra* note 9, at 5.

<sup>126</sup> OSCE 2005, *supra* note 9, at 47-48 (citing specific cases).

<sup>127</sup> Since 2005, the BiH prosecutor has reviewed war-related cases. This review, which is sometimes mistakenly mentioned as the continuation of the RoR, concerns not the quality and sufficiency of the evidence but the allocation of cases to state or entity instances.

<sup>128</sup> *Working with the Region*, ICTY, <http://www.icty.org/sid/96> (last visited Dec. 4, 2013).

<sup>129</sup> Burke-White, *supra* note 35, at 314.

officers.<sup>130</sup> More than 2,300 of almost 6,000 cases sent to the ICTY were never reviewed and were lost in administrative limbo.<sup>131</sup> The slow processing of other cases and the unsystematic return of decisions on reviewed cases to the domestic authorities stalled momentum in the domestic jurisdiction.

ICTY statistics indicate that less than a quarter of the individuals whose files were reviewed by the OTP were categorized under classification A, i.e. “evidence sufficient to proceed to arrest and indictment.” These figures may indicate that, in the majority of cases, the authorities in BiH were prepared to proceed with the detention of individuals when the evidence was deficient and basic international standards were not met. This supports the contention that the RoR were necessary and met their political objectives. It is also possible, however, that under-investigated files were deliberately submitted in some cases in order to exonerate certain individuals.<sup>132</sup> It could be argued that the RoR was conducive to the interests of the legal authorities in BiH in the sense that they relieved them further of the responsibility of conducting effective prosecutions,<sup>133</sup> which they tended to regard as falling within the ICTY’s prerogative.<sup>134</sup>

The small number of cases adjudicated in FBiH from 1997 until 2001 and the complete absence of cases in RS from 1998 until 2003 may also indicate insufficient resolve among prosecutors, police, and courts to see the cases through.<sup>135</sup> But a more nuanced view of

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<sup>130</sup> Interview with an official from the ICTY Chambers and anonymous interviewee at The Hague (January 2009).

<sup>131</sup> Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?*, 35 CASE W. RES. J. INT’L L. 219, 253-54 (2003); Burke-White, *supra* note 35, at 313-14.

<sup>132</sup> Interview with official from BiH Prosecutor’s Office in Sarajevo (January 2009); OSCE 2005, *supra* note 9, at 48.

<sup>133</sup> Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).

<sup>134</sup> *BiH Media Roundup*, OHR (Feb. 15, 2002), [www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/print/?content\\_id=6933](http://www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/print/?content_id=6933).

<sup>135</sup> Marinko Jurčević, BiH Chief Prosecutor, Speech at the Third Conference of Chief Prosecutors in BiH at Sarajevo (Nov. 21-22, 2007), [http://www.tuzilastvobih.gov.ba/files/docs/konferencija\\_novembar-glavni\\_tuzilac.pdf](http://www.tuzilastvobih.gov.ba/files/docs/konferencija_novembar-glavni_tuzilac.pdf); INT’L CRISIS GRP., WAR CRIMINALS IN BOSNIA’S REPUBLIKA

the data is needed to account for the paucity of cases. For example, war-related crimes have often been prosecuted as ordinary crimes, particularly in RS.<sup>136</sup> On the one hand, impunity is less rampant than may appear at first sight, but this approach also reflects a refusal by the local authorities to come to terms with the gravity of past events.<sup>137</sup>

### 3. *Progress of the completion strategy*

In FBiH and RS, there were surges in indictments in 2001 and in 2003, respectively. This may have been a reaction to the completion strategy of the ICTY and in anticipation of the establishment of the WCS. Receipt of cases under the completion strategy was a mark of prestige for domestic jurisdictions.<sup>138</sup> Therefore, as the completion strategy gained momentum, states in the region became keen to show that they could administer justice in accordance with international standards so as to ensure that cases are transferred to them.<sup>139</sup> The BiH government pushed strongly to have cases referred to it, in part because it recognized the legitimating effect of the referral. The ICTY's "carrot" of a case transfer allowed it to push domestic institutions to meet the benchmarks it had set for the effectiveness of a domestic judiciary. This effort focused at the state level, with the establishment of the WCS, but left a mark also in the entities. In RS in particular, there was support for special courts at the entity level rather than the establishment of a state level court to follow up on the work of the ICTY.<sup>140</sup> RS authorities argued that a

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SRPSKA: WHO ARE THE PEOPLE IN YOUR NEIGHBORHOOD?, ICG BALKANS REPORT N° 103, 2 (2000),

[http://www.crisisgroup.org/~media/Files/europe/Bosnia%2039.pdf](http://www.crisisgroup.org/~/media/Files/europe/Bosnia%2039.pdf).

<sup>136</sup> RONEN WITH AVITAL & TAMIR, *supra* note 27, at graph 2.2B.4.4.

<sup>137</sup> Gordana Katana, *Republika Srpska courts shy away from war crimes*, BIRN (undated), [www.bim.ba/en/50/10/2316/?tpl=30](http://www.bim.ba/en/50/10/2316/?tpl=30).

<sup>138</sup> Correspondence with Mirko Klarin (Sept. 13, 2010).

<sup>139</sup> Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).

<sup>140</sup> RS President Dragan Čavić emphasized that the institutions dealing with cooperation with the Hague Tribunal are making tremendous efforts to prove they are fully functional and to regain trust. Dragan Jerinic, "We are making tremendous efforts to prove our cooperation with the Hague," *Nezavisne Novine* 4-5, cited in OHR BiH Weekend Round-up (Oct. 30-31, 2004), [www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/print/?content\\_id=33421](http://www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups/print/?content_id=33421).



separate court beyond the current system would signal loss of confidence in domestic courts.<sup>141</sup> There was also a strong preference in RS for jurisdiction to lie in the locality in which the crime took place, and not where the victims resided at the time of trial.

#### 4. *Case channelling*

A third tentatively-identifiable pattern in the practice of the entity courts is the increase in indictments in 2006 in both FBiH and RS. This increase chronologically followed the undertaking by the WCS since 2005 to channel war-related cases to the entity courts following a review of their sensitivity and complexity. The criteria for determination were unclear at the outset.<sup>142</sup> However, a National War Crimes Strategy was formulated in 2008. The Strategy provides a rationale for the channelling process that is similar to the completion strategy: to prosecute the most complex and top-priority cases at state level, with deadlines set at 2015 and 2023. The ICTY assisted in the drafting of the complexity criteria for the 2008 National War Crimes Strategy, and, incorporating standards that are a result of the practice of the international criminal courts,<sup>143</sup> the criteria used by the WCS borrow directly from Rule 11bis of the ICTY RPE.<sup>144</sup> The State Court tries “very sensitive cases,” which are considered the most complex, taking into account the type and seriousness of the alleged crime; the rank or political prominence of the defendant; and a number of other factors, such as whether the case involves “insider” or “suspect” witnesses, whether there is a risk of witness intimidation, and whether political conditions are such that a fair trial may be impossible.<sup>145</sup> In another lesson learned from the ICTY, the WCS opted for transparency of the selection criteria (in general terms), to preclude accusations of ethnic bias. Some observers argue

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<sup>141</sup> Bohlander, *supra* note 71, at 68-69.

<sup>142</sup> ORENTLICHER, *supra* note 111, at 128.

<sup>143</sup> NATIONAL STRATEGY, *supra* note 41.

<sup>144</sup> BiH prosecutor, comment made at the Roundtable on the Impact of International Criminal Courts on Domestic Proceedings, Belgrade (Nov. 19-20, 2009).

<sup>145</sup> HUMAN RIGHTS WATCH 2008, *supra* note 114, at 10-11; NATIONAL STRATEGY, *supra* note 41, at Annex A; NATIONAL STRATEGY, *supra* note 41, based on Orientation Criteria from 2004, *reviewed in* BIRN, PURSUIT OF JUSTICE, *supra* note 38, at 9.

that this review process has been instrumental in prompting entity prosecutors to undertake prosecutions in a more serious and concerted manner.<sup>146</sup>

### 5. *Sentencing patterns*

It is difficult to assess whether the sentencing patterns in the BiH jurisdictions are related to those of the ICTY. The paucity of cases is an obstacle to any quantitative analysis. Furthermore, the range of sentences available to each of the courts is different. There are no minimum sentences in the ICTY and the maximum sentence is life imprisonment. In BiH, sentences may range from ten to forty-five years of imprisonment, while under the Criminal Code of Socialist Federal Republic of Yugoslavia (SFRY CC), applied in the entities, the sentencing range for the more severe war-related crimes is five to twenty years of imprisonment and one to ten years of imprisonment for certain other crimes against the laws of war.<sup>147</sup>

An examination of sentencing against the categories of crime reveals that the average sentence for genocide-related acts in the ICTY is twenty-four years imprisonment, compared with a sixteen years average for crimes against humanity and a ten years average imprisonment for war crimes.<sup>148</sup> The notion of gradation in domestic jurisdiction can only be examined with respect to the WCS because only in that court have there been convictions for all three categories of crimes (genocide, crimes against humanity, and war crimes), and, to a limited extent in FBiH, where there have been convictions for genocide and war crimes. There is no scope for gradation in RS because there are only convictions for war crimes. In BiH, there is a very apparent difference in sentencing between an average of over forty years of imprisonment for genocide-related crimes and an

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<sup>146</sup> HUMAN RIGHTS WATCH 2008, *supra* note 114, at 11-12.

<sup>147</sup> *E.g.*, SFRY art. 142(1) (regarding war crimes against civilians); SFRY art. 38 (regarding sentencing), *discussed in* Prosecutor v. Gojko Janković, Case No. ICTY-IT-96-23/2PT, Decision on Referral of Case Under Rule 11bis, para. 33-36 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2005).

<sup>148</sup> RONEN WITH AVITAL & TAMIR, *supra* note 27, at graph 6.4.4. Arguably, sentences reflect the gravity of the acts rather than the formal offense for which a person was convicted, which is often a matter of prosecution-defense negotiations.

average of 14.4 and 12.7 years of imprisonment for crimes against humanity and war crimes, respectively.<sup>149</sup> In FBiH, no gradation is discernible,<sup>150</sup> with the average sentence for genocide being 14.7 years of imprisonment and twelve years for war crimes. The lack of gradation in sentencing may be, however, a consequence of the fact that the range of penalties available differs among the various jurisdictions.<sup>151</sup> The relative gravity of ICTY sentences<sup>152</sup> may also be related to the different levels of perpetrators brought before the ICTY and the domestic courts.

Another factor distinguishing the sentencing patterns in the domestic jurisdictions from those of the ICTY is that in the absence of a *stare decisis* doctrine in BiH jurisdictions, a sentencing standard is not apparent.<sup>153</sup> However, in a lesson learned from the ICTY, the WCS has adopted a sentencing template (based on BiH law) and has been developing a reasoned jurisprudence on sentencing.<sup>154</sup>

## 6. Summary

There are many challenges in attempting to identify a quantitative link between the national and international tribunals. The small number of cases makes any assessment tentative at best, and the looseness of the findings makes it difficult to establish any substantive or temporal correlation. Similarly, the loose linkage with respect to sentencing can be interpreted in conflicting directions. It

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<sup>149</sup> *Id.* at graph 2.2A.4.4.

<sup>150</sup> *Id.* at graph 2.2B.4.4.

<sup>151</sup> Ivan Ivanović, National Legal Advisor on War Crimes, OSCE Mission to Serbia, Remarks at the Seminar on the Impact of International Courts of Domestic Proceedings held in Belgrade (Nov. 19-20, 2009).

<sup>152</sup> Interview with official from ICTY Outreach Office in Sarajevo (January 2009).

<sup>153</sup> Judge David Re, State Court of BiH, and RS Judge Rudislav Dimitrijević, Supreme Court of RS, Remarks at the Seminar on the Impact of International Courts of Domestic Proceedings, Belgrade (Nov.19-20, 2009).

<sup>154</sup> Prosecutor v. Niset Ramić, Case No X-KRŽ-06/197, First Instance Verdict (Ct. Bosn. & Herz. July 17, 2007); Prosecutor v. Mitar Rašević & Savo Todović, Case No X-KR/06/275, First Instance Verdict (Ct. Bosn. & Herz. Feb. 28, 2008); Prosecutor v. Željko Lelek, Case No X-KRŽ-06/202, First Instance Verdict (Ct. Bosn. & Herz. May 23, 2008); Stupar, *supra* note 107. *See also* Interview with a judge from the BiH Court in Sarajevo (Jan. 2009).

may reflect a true detachment of the domestic from the international tribunals, or it may reflect the different perpetration levels considered at the ICTY and in national tribunals. However, as other sections in this article demonstrate, the domestic institutions are not oblivious to the international one. In some contexts, such as prosecutorial policy, the impact of the international judiciary may be less significant than that of political institutions. Insofar as concerns sentencing, however, the influence of the ICTY may be more significant. Whether the ICTY standard is followed or not may depend on different legal circumstances or on political objection.

#### D. Normative Impact of the ICTY—Criminal Norms

##### 1. *Impact of the ICTY on legislation*

During the period between 1991-1995, when most of the war-related crimes adjudicated by BiH courts occurred, the criminal code in force in BiH was the SFRY CC. In 2002, the OHR commissioned a report on issues relating to war-crime prosecutions that might take place in BiH<sup>155</sup> as part of a general overhaul of the judicial system<sup>156</sup> and in order to meet the challenges of prosecuting both domestically-initiated cases and cases referred to BiH by the ICTY under Rule 11bis of its Statute. The report recommended that existing domestic legislation should serve, as far as possible, as a basis for new or amended legislation, and that where existing legislation required revision, amendments should also take into account developments in the law as applied in the ICTY.<sup>157</sup>

In 2003 BiH adopted a new Criminal Code (BiH CC), which differs significantly from its SFRY predecessor. The BiH CC establishes the offense of crimes against humanity, provides comprehensively for command responsibility, and applies a different range of penalties for international crimes from that which applies to

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<sup>155</sup> See Bohlander, *supra* note 71, at 66, 78 (describing the Report of May 27, 2007 in detail).

<sup>156</sup> Interviews with an official from the BiH Prosecutor's Office and from the ICTY Transition Team in Sarajevo (Jan. 2009).

<sup>157</sup> Bohlander, *supra* note 71, at 78.

ordinary crimes under domestic law.<sup>158</sup> The WCS regularly applies the BiH CC also to pre-2003 cases on the ground that the latter codifies customary international law.<sup>159</sup>

The influence of the ICTY on BiH law is noticeable in the provisions on modes of individual responsibility which refer to military commanders and civilian superiors.<sup>160</sup> Like the ICTY Statute (and contrary to the ICC Statute), the BiH CC does not expressly provide for any joint criminal enterprise mode of responsibility. But the 2003 BiH CC is informed not only by the ICTY's jurisprudence; the definition of crimes against humanity (BiH CC Article 172) follows closely that of the ICC Statute Article 7 rather than the ICTY Statute Article 5, foregoing a nexus of the act to an armed conflict and drawing on the ICC Statute's definitions of various terms (although it should be recalled that the drafting of the ICC Statute was itself influenced by ICTY jurisprudence). The provisions on war crimes borrow from the SFRY CC.<sup>161</sup>

Unlike the BiH CC, the 2003 criminal codes of FBiH and RS do not include crimes under international law at all. Consequently, where the WCS decides not to exercise its primacy, it is not clear which law should apply in entity courts. BiH institutions, as well as the Constitutional Court, hold that cases channelled by the WCS to entity courts carry with them the BiH CC and the entity courts must apply the principles and safeguards incorporated in the BiH Criminal Procedure Code, as well as the case law of the WCS.<sup>162</sup> Entity courts

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<sup>158</sup> OSCE, MOVING TOWARD A HARMONIZED APPLICATION OF THE LAW: APPLICABLE IN WAR CRIMES BEFORE COURTS IN BOSNIA AND HERZEGOVINA 5 (2008) [hereinafter OSCE 2008].

<sup>159</sup> E.g. Stupar, *supra* note 107, at 138-41; Alfredo Strippoli, *National Courts and Genocide: The Kravica Case at the Court of Bosnia and Herzegovina*, 7 J. INT'L CRIM. JUST. 577, 581 (2009).

<sup>160</sup> CRIM. C. BOSN. & HERZ. art. 180.

<sup>161</sup> *Id.* at arts. 173-75, 177-79, 181-83.

<sup>162</sup> Maktouf, Constitutional Court Appeal No. AP-1785/06, Decision on Admissibility and Merits, paras. 88-89 (Bosn. & Herz. Mar. 30, 2007). *See also* Denis Dzidic, *Slow Transfer of Cases Undermines War Crimes Strategy*, BIRN Justice Report (Jan. 5, 2010) [http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw\\_vol04issue21.html#bih1](http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol04issue21.html#bih1); NATIONAL STRATEGY, *supra* note 41.

dispute this and, for the most part, apply the SFRY CC<sup>163</sup> on the ground that BiH CC sentences are heavier and therefore more detrimental to the defendant.<sup>164</sup> In the absence of a formal dispute-settling mechanism that is binding upon the entities, the matter remains unresolved.<sup>165</sup>

The new criminal procedure codes of 2003 also differ significantly from their SFRY predecessor. In particular, and in clear connection with the ICTY Rules and Procedure of Evidence (RPE), they replaced an inquisitorial with a composite inquisitorial-adversarial system, introduced plea bargains,<sup>166</sup> and replaced retrials before the court of first instance by final determinations of cases by the appeal instance.<sup>167</sup> The BiH Criminal Procedure Code (CPC) was also very much guided by international standards and in particular by the European Court of Human Rights (ECHR).<sup>168</sup> The adherence to the ECHR<sup>169</sup> is perhaps the least surprising in the drafting of BiH legislation because the ECHR forms part of the Constitution of BiH and enjoys priority over all other law in BiH.<sup>170</sup>

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<sup>163</sup> Courts in FBiH have in a limited number of cases applied the interim 1998 FBiH Criminal Code. OSCE 2008, *supra* note 158, at 10.

<sup>164</sup> It is difficult to argue with the stance of the entity courts: as defendants themselves acknowledge, they are better served by a law which permits a sentence of 5-20 years' imprisonment than by one which permits a sentence of 10-45 years' imprisonment. The historical development of the former law, which is regularly invoked by the State Court when explaining why its own sentencing range is less severe than that of the entities', is of academic, rather than practical, significance.

<sup>165</sup> Interview with an official from the BiH Prosecutor's Office in Sarajevo (January 2009).

<sup>166</sup> OSCE 2005, *supra* note 9, at 12.

<sup>167</sup> OSCE, TRIAL MONITORING REPORT ON THE IMPLEMENTATION OF THE NEW CRIMINAL PROCEDURE CODE IN THE COURTS OF BOSNIA AND HERZEGOVINA 2 (2004) [hereinafter OSCE 2004].

<sup>168</sup> Office of the High Representative, *Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina, No. 35/03, preambular para. 8 (Jan. 24, 2003), [www.ohr.int/decisions/judicialrdec/default.asp?content\\_id=29094](http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094).

<sup>169</sup> Silvia Borelli, *Domestic Investigation and Prosecution of Atrocities Committed During Military Operations: The Impact of Judgments of the European Court of Human Rights*, 46 ISR. L. REV. 369 (2013) (on file with author).

<sup>170</sup> BIH CONSTITUTION, art. II(2).

## 2. *Impact of the ICTY on jurisprudence*

The 2002 OHR-commissioned report recommended that the jurisprudence of the ICTY have persuasive authority in the judicial interpretation of legislation—addressing both procedural and substantive matters—at both the state and entity levels. However, it was acknowledged that, in view of the differences between the international and domestic legal systems, it would be infeasible for domestic courts to fully follow the jurisprudence of the ICTY. The report therefore recommended the adoption of a regulation stating that the courts should take into account the jurisprudence of the Tribunal.<sup>171</sup>

The BiH prosecution shared the view that reliance on ICTY jurisprudence is an important element in providing for uniformity in interpretation of principles and rules.<sup>172</sup> Although the ICTY is not the only international institution influencing the WCS in this fashion, it has had the most pronounced impact.<sup>173</sup> The library of the WCS includes a complete collection of the ICTY's jurisprudence and all of the judges in the WCS have been instructed on the Tribunal's jurisprudence.<sup>174</sup>

The WCS has followed the spirit of the OHR-commissioned report,<sup>175</sup> relying on the jurisprudence of the ICTY to: (1) establish that certain provisions in the BiH CC reflect customary international

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<sup>171</sup> Bohlander, *supra* note 71, at 78.

<sup>172</sup> Ibro Bulić, State Prosecutor, Application of International Sources of Law in BiH, Presentation at the International Conference on the Implementation of International Humanitarian Law in National Systems, Budapest, 3 (Oct. 29-30, 2007), [www.tuzilastvobih.gov.ba/files/docs/Primjena\\_medjunarodnih\\_izvora\\_prava\\_u\\_BiH.pdf](http://www.tuzilastvobih.gov.ba/files/docs/Primjena_medjunarodnih_izvora_prava_u_BiH.pdf).

<sup>173</sup> BiH prosecutor, comment made in the Roundtable on the Impact of International Criminal Courts on Domestic Proceedings, Belgrade (Nov. 19-20, 2009).

<sup>174</sup> Burke-White, *supra* note 35, at 343.

<sup>175</sup> Noted with respect to CRIM. C. BOSN. & HERZ., art.171 (genocide); Stupar, First Instance Verdict, *supra* note 107, at 53; CRIM. C. BOSN. & HERZ., art. 180, which duplicated ICTY Statute Art. 7; and Trbić, First Instance Verdict, *supra* note 108, at paras. 171-73, 205.

law, thereby confirming its own jurisdiction *ratione materiae*,<sup>176</sup> (2) to characterize the conflict in the former Yugoslavia as international;<sup>177</sup> and (3) to assist in the analysis of a great number of concepts and elements of crimes.<sup>178</sup> In some cases, rulings by the WCS do not

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<sup>176</sup> *E.g.*, Prosecutor v. Kovacević, Case No. X-KR-05/40, First Instance Verdict, at 41 (Ct. Bosn. & Herz. Nov. 3, 2006); Prosecutor v. Mirko Pekez & Milorad Savić, Case No. X-KRŽ-05/96-1, Second Instance Verdict, at para. 37 (Ct. Bosn. & Herz. May 5, 2009); Trbić, First Instance Verdict, *supra* note 108, at para. 172.

<sup>177</sup> Prosecutor v. Abduladhim Maktouf, Case No. K-127/04, First Instance Verdict, 9 (Ct. Bosn. & Herz. July 1, 2005); Prosecutor v. Abduladhim Maktouf, Case No. KPŽ-32/05, Second Instance Verdict, 9 (Ct. Bosn. & Herz. Apr. 4, 2006) (citing Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) and Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001)).

<sup>178</sup> *See* Mitrović, First Instance Verdict, *supra* note 108, at 23 (citing the ICTY's Kordić & Čerkez, Judgment, *supra* note 177) (discussing “widespread” and/or “systematic” attacks); Mitrović, First Instance Verdict, *supra* note 108, at 47-50 (citing ICTY's Krstić, Judgment, *supra* note 107; Blagojević & Jokić, *supra* note 107); Trbić, First Instance Verdict, *supra* note 108, at paras. 177-202 (citing Krstić, Judgment, *supra* note 107; Blagojević & Jokić, Judgment, *supra* note 107; Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment (Int'l Crim. Trib. For the Former Yugoslavia Apr. 3, 2007); and Prosecutor v. Nindabahizi, Case No. ICTR-2001-71-I (July 15, 2004), among others) (analyzing the elements of genocide); Prosecutor v. Damir Ivanković, Case No. X-KR-08/549-1, First Instance Verdict, at 10-11 (Ct. Bosn. & Herz. July 2, 2009) (citing Kunarac et al., Judgment, *supra* note 106; Blaskić, Judgment, *supra* note 177; Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006)) (analyzing the elements of crimes against humanity); Kovacević, First Instance Verdict, *supra* note 176, at 44 (citing ICTY's Kronjelac, Judgment, *supra* note 106); Prosecutor v. Dragan Damjanovic, Case No. X-KR-05/51, First Instance Verdict, at 47-48 (Ct. Bosn. & Herz. Dec. 15, 2006) (citing Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) and Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004)); Mandić, First Instance Verdict, *supra* note 103, at 133-34 (citing Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003)) (analyzing the elements of persecution); Pekez & Savić, Second Instance Verdict, *supra* note 176, at para. 38 (citing Blagojević & Jokić, Judgment, *supra* note 107) (discussing civilians); Mandić, First Instance Verdict, *supra* note 103, at 130, (citing Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (discussing protected persons); Damjanović, First Instance Verdict,



mention the ICTY expressly but mirror its judgments so closely that given that they concern identical events, it is probable that ICTY case law influenced the decisions of the WCS. ICTY influence is also visible with respect to procedural norms, such as when ruling on the admissibility of illegally-obtained evidence.<sup>179</sup> The ICTY has also had some impact on the factors that inform sentences in the WCS. For example, in *Todorović*, the WCS cited the ICTY judgments in *Zelenović* and *Erdemović* to determine that a plea bargain constitutes a mitigating factor in sentencing and the *Erdemović* judgment to determine that the provision by the defendant of direct evidence for facts otherwise requiring proof is a mitigating factor in sentencing.<sup>180</sup> At the same time, WCS judgments are also replete with references to international law in general and to international tribunals other than the ICTY, especially the ICTR but also the ICJ, the Special Court of Sierra Leone, and even domestically-established courts, such as the U.S.

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*supra*, at 44-45 (citing Naletilić & Martinović, Judgment *supra*) (discussing the element of discrimination in crimes against humanity); Mandić, First Instance Verdict, *supra* note 103, at 134 (citing Kronjelac, Judgment, *supra* note 106) (discussing imprisonment as a crime against humanity); Pekez & Savić, Second Instance Verdict, *supra* note 176, at para. 57 (citing Kunarac et al., Judgment, *supra* note 106) (discussing the nexus between the defendant's act and the armed conflict as an element in war crimes); Mandić, First Instance Verdict, *supra* note 103, at 129 (citing Kunarac et al., Judgment, *supra* note 106; Blaskić, Judgment, *supra* note 177; and Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct 16. 2007)); Pekez & Savić, Second Instance Verdict, *supra* note 176, at paras. 140-42 (citing Commentary to the Geneva Convention IV; Kordić & Čerkez, Judgment, *supra* note 177; Kunarac et al., Judgment, *supra* note 106; Naletilić & Martinović, Judgment, *supra*) (discussing intentional infliction of severe physical or mental pain); Damjanović, First Instance Verdict, *supra*, at 23 (discussing inhumane acts); Mandić, First Instance Verdict, *supra* note 102, at 135-36 (citing Kuperskić, Judgment, *supra*; Kordić & Čerkez, Judgment, *supra* note 177) (discussing inhumane acts); Ibro Bulić, State Prosecutor, Application of International Sources of Law in BiH, *supra* note 172, at 4-5 (discussing elements of ethnic cleansing and of various violations of the laws or customs of war, including of rape and sexual abuse).

<sup>179</sup> Prosecutor v. Zijad Kurtović, Case No X-KR-06/299, First Instance Verdict, at 23 (Ct. Bosn. & Herz. Apr. 30, 2008) (relying on Kordić & Čerkez, Judgment, *supra* note 177; Brđanin, Judgment, *supra* note 178); Mandić, First Instance Verdict, *supra* note 103, at 117-18 (relying on Kordić & Čerkez, Judgment, *supra* note 177).

<sup>180</sup> Todorović, First Instance Verdict, *supra* note 103, at 28-29.

military tribunal at Nuremberg.<sup>181</sup> With respect to procedural norms, the European Court of Human Rights has also been influential.<sup>182</sup>

An area in which international jurisprudence and ICTY jurisprudence in particular have played a significant role in the jurisprudence of the WCS is command responsibility, which was not regulated under the SFRY law which governed BiH until 2003. The WCS has ruled that command responsibility has nonetheless been regulated in some form by domestic law, and was criminalized under customary international law at the relevant time.<sup>183</sup> According to the WCS, the new BiH CC's Article 180(2), which codifies command responsibility, derives from and is identical to ICTY Statute Article 7<sup>184</sup> and must be interpreted in light of its international origins and its international judicial interpretation and definitions.<sup>185</sup> Although not bound by the decisions of the ICTY, the WCS was "persuaded that the ICTY's characterization of command responsibility, and its elements properly reflects the state of customary international law as it existed at the times relevant to the [i]ndictment."<sup>186</sup> Accordingly it found it "helpful to review the evidentiary factors" which "the ICTY, and other international courts have found relevant to determining whether the prosecution has successfully met its burden of establishing liability under the principle of command responsibility, as guidance in reviewing the evidence in the instant case."<sup>187</sup> The WCS relied on ICTY judgments to establish the elements of "effective

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<sup>181</sup> Trbić, First Instance Verdict, *supra* note 108, at paras. 177-202, (citing Ndindabahizi, *supra* note 178; U.S. v. Wilhelm von Leeb et. al. (the High Command Case), 12 LRTWC 1, 59 (1948)).

<sup>182</sup> Mandić, First Instance Verdict, *supra* note 103, at 116-18 (relying on ECtHR's Khan v. UK and PG and HJ v. UK); Prosecutor v. Dragan Damjanović, Case No. X-KRŽ-05/51, Second Instance Verdict, 14 (Ct. Bosn. & Herz. Jun. 13, 2007).

<sup>183</sup> Stupar, First Instance Verdict, *supra* note 107, at 138-39, 141.

<sup>184</sup> Mandić, First Instance Verdict, *supra* note 103, at 151 (citing Halilović, Judgment, *supra* note 178; Prosecutor v. Aleksovski, Case No. IT-95-14/t-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), and others).

<sup>185</sup> Stupar, First Instance Verdict, *supra* note 107, at 135.

<sup>186</sup> *Id.* at 141.

<sup>187</sup> *Id.*

control<sup>188</sup> and other elements of the doctrine.<sup>189</sup> The jurisprudence of the WCS also reflects the differences in views within the ICTY with respect to certain elements of command responsibility, such as whether responsibility as a commander for acts of genocide requires a commander to share the special genocidal intent.<sup>190</sup>

The WCS also followed ICTY jurisprudence in accepting the existence of the joint criminal enterprise doctrine,<sup>191</sup> which, as noted above, is not expressly established under either the ICTY Statute or the BiH CC. It now co-exists uneasily with co-perpetration that is expressly provided for in the BiH CC.<sup>192</sup>

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<sup>188</sup> Mandić, Second Instance Verdict, *supra* note 103, at paras. 106-09 (citing Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006); Prosecutor v. Mucić et al., Case No. IT-96-21, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); and Kordić & Čerkez, Judgment *supra* note 177).

<sup>189</sup> *E.g.*, Mandić, First Instance Verdict, *supra* note 103, at 151-52 (citing Mucić, Appeal Judgment, *supra* note 188; Halilović, Judgment, *supra* note 178; Blaskić, Judgment, *supra* note 177; Kordić & Čerkez, Judgment, *supra* note 177); Mandić, Second Instance Verdict, *supra* note 103, at para. 109; Stupar, First Instance Verdict, *supra* note 107, at 140-41.

<sup>190</sup> BiH prosecutor, comment at DOMAC Seminar (Nov. 19, 2009); Strippoli, *supra* note 159, at 590-91. The WCS, too, avoided answering the question definitively, noting that, in the circumstances, it had been proven beyond reasonable doubt that the defendant in fact had the specific genocidal intent. Stupar, First Instance Verdict, *supra* note 107, at 162-63.

<sup>191</sup> Trbić, First Instance Verdict, *supra* note 108, at para. 205 (noting that Article 180 of the Criminal Code of Bosnia and Herzegovina duplicated ICTY Statute Article 7, which has been interpreted as encompassing JCE); Strippoli, *supra* note 159, at 586.

<sup>192</sup> Strippoli, *supra* note 159, at 587 (citing Prosecutor v. Vuković & Another, Case No. KRŽ-07/405, Second Instance Verdict, at 6, n.1 (Ct. Bosn. & Herz. Sept. 2, 2008) and noting that no importance is given to the use of the word *perpetrating* instead of *committing*). Interestingly, in *Vuković*, the Trial Chamber relied on ICTY jurisprudence to establish joint criminal enterprise as a mode of criminal responsibility in the context of Bosn. & Herz., Criminal Code, Art. 29 (2003), which applies to all offenses, rather than in the context of Bosn. & Herz., Criminal Code, Art. 180 (2003), which concerns modes of liability for crimes under international law. Vuković, First Instance Verdict, *supra* note 106, at 20; Rašević & Todović, First Instance Verdict, *supra* note 154, at 111; Prosecutor v. Rašević & Todović, Case No. X-KR/06/275, Second Instance Verdict, at 26 (Ct. Bosn. & Herz. Nov. 6, 2008). A further confirmation that JCE forms part of customary

The impact of the ICTY jurisprudence in entity courts is much less pronounced than in the WCS. While entity courts do not consider themselves bound by ICTY jurisprudence, the ICTY is an authority that they respect and to which they look.<sup>193</sup> However, the fact that ICTY jurisprudence was not, at first, translated to Bosnian/Serb/Croat prevents it from being directly accessible to entity courts.<sup>194</sup> Parties and judges in the entity courts do not usually cite international or foreign jurisprudence<sup>195</sup> and the decisions of these courts are often at odds with international jurisprudence on issues as important as the validity of the superior responsibility doctrine<sup>196</sup> or whether a grave breach of the Geneva Conventions requires inhumane treatment to have resulted in “great suffering or serious bodily injury” in order to be a crime under SFRY CC Article 142.<sup>197</sup>

### 3. Summary

The ICTY has had a limited impact on BiH legislation. This may be explained by the development of applicable standards and models in the period between the adoption of the ICTY statute and the enactment of the BiH CC. In contrast, ICTY jurisprudence has influenced the work of the WCS. In the entities, the ICTY has had little impact on both law and jurisprudence.

Even where ICTY law has been incorporated formally into the law of BiH and its entities, its implementation has often experienced difficulties. Thus, it has been argued that certain aspects

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international law is in Trbić, First Instance Verdict, *supra* note 108, at paras. 206, 211.

<sup>193</sup> Judge Rudislav Dimitrijević, Supreme Court of RS, Remarks at the Seminar on the Impact of International Courts of Domestic Proceedings, Belgrade (Nov. 19-20, 2009).

<sup>194</sup> Interview with an official from the BiH Prosecutor’s Office in Sarajevo (January 2009).

<sup>195</sup> OSCE 2005, *supra* note 9, at 21-22.

<sup>196</sup> HUMAN RIGHTS WATCH 2008, *supra* note 114, at 55-56 (citing Mirsad Čupina, Verdict No. K-24/99 (Mostar Cantonal Ct. Jan. 24, 2007); Mirsad Čupina, Verdict Number K-455/01 (S. Ct. of Federation BiH Sept. 11, 2003)).

<sup>197</sup> OSCE 2005, *supra* note 9, at 21 (describing Čupina, Verdict by Mostar Cantonal Ct., *supra* note 196).

of the criminal procedure reform expedited the holding of trials and enhanced the effectiveness of BiH's legal system, particularly at the State Court level.<sup>198</sup> However, the new rules also created confusion and frustration among domestic professionals,<sup>199</sup> leading to widespread resistance to their application.<sup>200</sup> Much of this adverse reaction was generated by the fact that several of the reforms were entirely foreign to the domestic legal traditions, and the perception that local legal traditions were not properly understood and regarded with contempt by international institutions.<sup>201</sup> Although the Criminal Procedure Code was drafted by a team of BiH lawyers, the code in its entirety was perceived as being internationally imposed,<sup>202</sup> not least because it was ultimately enacted by the OHR.

### CONCLUSION

BiH is a good experimentation and observation ground for modalities of interaction between international and domestic courts.

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<sup>198</sup> Interviews with a judge from the BiH Court and an official in the Court of BiH Prosecutor's Office in Sarajevo (January 2009). See also Christopher DeNicola, *Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism*, DEPAUL RULE OF L. J. (2010), <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christopherdenicola>.

<sup>199</sup> DeNicola, *supra* note 198, at 67. This confusion was certainly not helped by the Council of Europe hiring local practitioners, trained in the continental system, to draft the commentaries to these new procedural rules.

<sup>200</sup> Interviews with NGO representatives in Sarajevo (January 2009). An OSCE report based on the monitoring of over one hundred trials indicated that over 25% of judges, prosecutors, and defence attorneys were 'not accomplishing a shift' to the new procedure. OSCE 2004, *supra* note 167, at 27-34.

<sup>201</sup> DeNicola, *supra* note 198 (citing U.N. MISSION IN BIH, JUDICIAL ASSESSMENT PROGRAMME, THEMATIC REPORT X: SERVING THE PUBLIC—THE DELIVERY OF JUSTICE IN BOSNIA AND HERZEGOVINA 32 (2000), <http://www.hjpc.ba/docs/jasp/pdf/TR%20X%20delivery%20of%20justice%20-%20delays.pdf>) (noting that BiH's inquisitorial system is a product of an "old legal philosophy").

<sup>202</sup> Interview with a Legal Adviser in Bosn. & Herz. (January 2009). Our interviewees seem to disagree with DeNicola regarding the fact that local drafters were directed by international or foreign players into drafting mixed procedure. Rather, they suggest that many of the relevant changes were established out of personal and professional conviction. Cf. DeNicola, *supra* note 198.

Within the same country there are courts of different levels, which illustrate different models of interaction. Because these courts appear to operate within the same domestic culture, one might assume that any differences in domestic action are indeed attributable to different modalities of interaction with the ICTY.

At the turn of the millennium, the ICTY was severely criticized for failing to have an impact on critical justice issues, including its non-provision of assistance to the reform of the justice systems in the region, and lack of involvement in preparing the local prosecutors and courts to carry out investigations and trials regarding war crimes.<sup>203</sup> A decade later, it might be fairer to say that the ICTY's engagement with domestic institutions arrived too late, but overall was, and remains, of some value.<sup>204</sup>

An analysis of the impact of the ICTY on the judicial institutions in BiH, namely the WCS and entity courts, reveals a significant difference in the extent and tone of interaction. The WCS has been much more closely associated with the ICTY than the entity courts, which have been reluctant to accept external influence and to interact with international actors.

Thus, at the BiH state level, dramatic reforms have taken place since the end of the war, especially since the completion strategy was put in place. These reforms include the establishment of the WCS within the State Court and the adoption of criminal and criminal procedure codes. International elements played a key role in promoting and shaping these reforms. The role of the ICTY has varied from one aspect to another.

First and foremost is the establishment of the WCS which is directly, although not exclusively, related to the progression of the completion strategy. The latter not only has precipitated the transfer of cases and evidence, but also know-how and expertise.

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<sup>203</sup> Tolbert, *supra* note 46, at 12.

<sup>204</sup> David Talbot & Aleksandar Kontic, *The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 135, 160 (Carsten Stahn & Göran Sluiter eds., 2009).

Consequently, BiH has been able to assume the responsibility of sharing with the ICTY the burden of trying war related offences, largely in accordance with international standards. However, international influence has been, at least at the outset, a by-product of the ICTY's and other international institutions' concerns and goals rather than the consequence of a conscious effort at modelling the domestic system. Thus, for example, the interest in establishing the WCS and in the transfer of cases to BiH, as well as the empowering of domestic institutions, are the consequence of the ICTY's completion strategy and shaped by its needs.

Quantitatively, the impact of the ICTY is in some aspects very immediate but of little long-term significance, and of more lasting value in others. An example of the former is the transfer of cases from the ICTY to the WCS under Rule 11bis, as well as the transfer of files in which no indictment had yet been issued. At this level, one could say that the prosecution patterns of the WCS are directly related to the ICTY's work. However, one must acknowledge that because this will only occur once in the lifespan of the WCS, it does not by itself hold the promise of the WCS following ICTY prosecuting policy. A more interesting influence is illustrated by the fact the primacy of the WCS over entity courts, and by the criteria it adopted to determine which cases should be channelled to which domestic jurisdiction, which is expressly in pursuance of the ICTY's policy. The WCS also emulates the ICTY in the subtle adoption of graduated sentencing depending on the characterization of crimes.

On the normative level, the state of BiH and the WCS has followed the ICTY in a variety of manners. First, they adopted, through legislation and jurisprudence, various international legal doctrines. The WCS also interprets domestic instruments in light of ICTY jurisprudence and follows the ICTY in procedural issues.

In contrast to the close links between the WCS and the ICTY, the impact of the ICTY on entity institutions has been much less marked. The impact of the ICTY on their capacity is not only limited, but also mostly unintended. Very little funding is directed toward the entities and there is little focus on nurturing their institutions. If anything, this disregard has led to antagonism in the entities that has negatively impacted institutional capacity. The

entities' resistance is directed not only against the ICTY but also against the State Court, which, despite its domestic legitimacy, has failed to impose its standards on entity courts. The role of the WCS in channelling cases, as it is being discharged, has also been cited as detrimental to the empowerment of entity institutions.

Generally speaking, entity institutions are characterized by their resistance to prosecution. On the normative level, it is notable that parties and judges in entity courts do not usually cite international or foreign jurisprudence, and the decisions of these courts are often at odds with international jurisprudence. For example, important substantive legal doctrines developed by the ICTY such as command responsibility have been disregarded, if not outright rejected. ICTY jurisprudence on procedural issues has not fared much better, as demonstrated by the fundamental controversy on the applicability of post-conflict law in entity courts.

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

It may be argued that the issue is not technical incapacity or misdirection of international resources, but, instead, a more profound issue. Particularly in RS, where there has not effectively been a post-conflict change of government, domestic institutions are not keen to undertake prosecutions and the trickle-down effect of the international tribunal has been therefore very limited. The reluctance to engage in post-conflict criminal justice is politically-grounded.



External engagement incentivises some actors and alienates others, particularly the Serb community.<sup>205</sup>

The WCS's susceptibility to ICTY influence is strongly and directly related to its hybrid nature, owing to the circumstances of its establishment, namely through institutional and normative dictates of the High Representative. In other words, the WCS is a *partner* in the international mechanism largely because it is the *product* of international intervention in BiH. We should therefore not be blinded by the apparent success of the WCS. It was made possible by the strong international influence, which effectively circumvented the political obstacles standing in the way of accountability mechanisms.<sup>206</sup> It would be more accurate to describe the international effect over domestic institutions as dependant on the capacity to impose, rather than as a spontaneous ripple effect. While the limitations of extrapolating from the BiH case study should not be underestimated, an important lesson to be drawn by those designing international tribunals as catalysts for domestic action is the importance of engaging with potential political obstacles to preempt their obstruction of even the best-planned legal framework.

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<sup>205</sup> David Kaye, External Actors and Domestic Accountability, Presentation at the First Annual Minerva Jerusalem Conference on Transitional Justice: The Potential Role of Transitional Justice in Ongoing Conflicts, Jerusalem (Nov. 13-15, 2011).

<sup>206</sup> See also Talbot & Kontic, *supra* note 204, at 160.