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The Impact on Institutional Reform

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Contents

Klaus Bachmann, Irena Ristić, Gerhard Kemp

Introduction	11
1. The ICC as a Case of “Third Party Enforcement”	13
2. The ICC as an Actor of Domestic Change	15
3. Ad Hoc ICTs as Actors of Domestic Change	16
4. Domestic Change	19
5. Measuring the Impact of ICTs on Domestic Change	22
6. Case Selection Criteria.....	24
7. Acknowledgements	27
8. Terminology and Political Disclaimer	29

I) Domestic Change and at Least Partial Compliance With ICT Decisions

Christian Garuka

Institutional Reform in Rwanda.....	35
1. An Overview of the Rwandan Conflict	35
2. The Relations Between the International Criminal Tribunal for Rwanda and Rwanda.....	37
3. Changes in Rwandan Legislation Triggered by the ICTR.....	39
3.1. Amendment of the Penal Procedure Code.....	41
3.2. Changes in State Agencies.....	41
3.3. Changes in Budget Allocations	42
4. The Efficiency of Reform	42
5. Other Possible Causes of the Reform.....	44

Jovana Mihajlović Trbovc

Collateral Impact: The ICTY’s Influence on Institutional Reform in Serbia.....	47
1. Early Relations Between the ICTY and Serbia	48
2. Change in Legislation Related to the ICTY	52
2.1. The Law on Cooperation with the Tribunal	52
2.2. The Role of EU Conditionality	57
2.3. New Legislation Relevant for War Crimes Prosecution.....	59
3. Change in Institutions Related to the ICTY.....	64
3.1. The Truth and Reconciliation Commission	64
3.2. Institutions in Charge of Cooperation with the ICTY	66

3.3. Specialised Institutions for War Crimes Prosecution.....	68
3.4. Procedural Novelties.....	70
3.5. Problems in the Conduct of the Trials	71
4. The Impact of the Scorpions Video.....	74
5. Domestic Change in Serbia.....	76
 <i>Vjeran Pavlaković</i>	
The ICTY and Institutional Reform in Croatia.....	79
1. The Croatian War of Independence and War Crimes (1991–1995)	79
2. The ICTY and Croatia: A Troubled Relationship.....	84
3. The Tuđman Era (1996–1999)	86
4. The Post-Tuđman Era and EU conditionality (2000–2013)	93
5. Institutional Changes and Domestic Trials.....	97
6. Domestic Change in Croatia.....	105
 <i>Aleksandra Nędzi-Marek, Jagoda Gregulska, Irena Ristić</i>	
The ICTY’s Impact on Institutional Changes in Bosnia and Herzegovina.....	109
1. The Conflict in BiH	109
2. The ICTY and BiH.....	114
2.1. Bosnian Responses.....	122
3. Institutional Changes	124
3.1. The War Crimes Chamber at the Court of BiH and the Special Department for War Crimes of the Prosecutor’s Office	124
3.2. Legislative Change – The New Criminal Procedure Code of BiH	129
3.3. The Reform of the Criminal Code of BiH.....	133
3.4. Witness Support	135
3.5. Beyond the Judiciary.....	138
4. Institutional Change on the Entity Level.....	141
4.1. Capacity Building and Knowledge Transfer	142
Conclusions	147
 <i>Jagoda Gregulska</i>	
The Legacy of the Judgments about the Genocide in Srebrenica.....	151
1. Locating Srebrenica	153
2. Reclaiming Srebrenica	158
3. The ICJ as an actor of Institutional Change in Srebrenica	171

List of abbreviations

AAK	Alliance for the Future of Kosovo (<i>Aleanca për Ardhmërinë e Kosovës</i>)
ACHPR	African Charter on Human and People's Rights
AI	Amnesty International
ATO	Anti-Terrorist Operation (Ukraine) (<i>антитерористична операція</i>)
AU	African Union
AUHPD	African Union High Panel on Darfur (Sudan)
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
CC	Criminal Code
ICESCR	International Covenant of Economic, Social and Political Rights
CIPEV	Commission of Inquiry on Post-Election Violence (Kenya)
CPA	Comprehensive Peace Agreement (Sudan and South Sudan)
CPC	Criminal Procedure Code
CRC	Conventions on the Rights of the Child
DDPD	Doha Peace Document on Darfur (Sudan)
DORH	State Attorney's Office (Croatia) (<i>Državno odvjetništvo Republike Hrvatske</i>)
DOS	Democratic Opposition of Serbia (party alliance) (<i>Demokratska opozicija Srbije</i>)
DPA	Dayton Peace Agreement (former Yugoslavia)
DPP	Director of Public Prosecutions (Kenya)
ECFR	European Council of Foreign Relations
ECHR	European Court of Human Rights (Council of Europe)
EU	European Union
EU SITF	European Union Special Investigative Task Force (Kosovo)
EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
GNC	General National Congress (Libya)
GOSS	Government of Southern Sudan
HDZ	Croatian Democratic Union (<i>Hrvatska Demokratska Zajednica</i>)
HJPC	High Judicial and Prosecutorial Council (BiH)
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICID	International Commission of Inquiry into Darfur

ICJ	International Court of Justice
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IPA	Instrument for Pre-Accession Assistance (EU)
JEM	Justice and Equality Movement (Sudan)
JSO	Special Operations Unit (Serbia) (<i>Jedinica za specijalne operacije</i>)
KLA	Kosovo Liberation Army
KNDRC	Kenya National Dialogue and Reconciliation Committee
KWECC	Kosovo War and Ethnic Crimes Court
KWN	Kosovo Women's Movement
LDK	Democratic League of Kosovo (<i>Lidhja Demokratike e Kosovës</i>)
MKTJ	Serb abbreviation for ICTY
MPRI	Military Professional Resources Incorporated (Croatia)
NATO	North Atlantic Treaty Organization
NCCLHR	National Council for Civil Liberties and Human Rights (Libya)
NGO	Non-Governmental Organizations
NISS	National Intelligence Security Service Act (Sudan)
NRM	National Resistance Movement (Uganda, in connection with Rwanda)
NSDC	National Security and Defence Council (Ukraine)
NTC	National Transitional Council (Libya)
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OHR	Office of the High Representative (BiH)
OPCD	Office of Public Counsel for the Defence (ICC)
OPDAT	Office of Overseas Prosecutorial Development Assistance and Training (US in connection with BiH)
OSCE	Organization for Security and Cooperation in Europe
OTP	Office of the Tribunal Prosecutor (ICTY and ICTR)
PDK	Democratic League of Kosovo (<i>Partia Demokratike e Kosovës</i>)
PEV	Post-Election Violence (Kenya)
PNU	Party of National Unity (Kenya)
PSC	Peace and Security Council (AU)
RECOM	Regional Truth and Reconciliation Commission (former Yugoslavia)
RPF	Rwandan Patriotic Forces
RS	Republika Srpska (BiH)
SAA	Stabilization and Association Agreement (EU in connection with the former Yugoslavia)

SCBiH	Special Court (for war crimes) of Bosnia and Herzegovina
SCCED	Special Criminal Court on the Events in Darfur (Sudan)
SDG	Sudanese Pound (Sudan's currency)
SDP	Social-democrat Party (BiH)
SLMA	Sudan Liberation Movement / Army
SPLM	Sudan Peoples Liberation Movement
SRSG	Special Representative of the Secretary of the United Nations
SSHRC	South Sudan Human Rights Commission
SUNA	Sudan News Agency
SWPS	Szkoła Wyższa Psychologii Społecznej
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
TRC	Truth and Reconciliation Commission (South Africa)
TRIAL	Swiss NGO
UK	United Kingdom
UN	United Nations
UNAMID	United Nations Mission in Darfur (Sudan)
UNDP	United Nations Development Programme
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNMIK	United Nations Mission in Kosovo
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
US	United States
USA	United States of America
USAID	United States Agency for International Development
VWS	Victims and Witness Section (ICTY)
WCC	War Crimes Chamber (BiH)

Aleksandra Nędzi-Marek, Jagoda Gregulska, Irena Ristić

The ICTY's Impact on Institutional Changes in Bosnia and Herzegovina

1. The Conflict in BiH

When in 1991, at the beginning of the dissolution of socialist Yugoslavia, Slovenia and Croatia declared their independence and were shortly after recognized as such by the international community, many observers and experts warned that the recognition could easily lead to a violent breakup of the republic, which was next on the road to independence – BiH.¹ In Slovenia, there were no significant ethnic minorities that could have challenged the separation of the country from the Yugoslav centre. This had already been different in Croatia, where leaders of the Serbian minority had opposed the establishment of an ethnically defined nation state, in which the Serbs would no longer be a constitutional nation, but a national minority that would naturally be disfavoured compared to the dominant ethnic Croatian majority.² In BiH, the situation was even more complicated, because there was no clear absolute ethnic majority – compared to the overall population, every ethnic group there was a minority,³ and as pre-war opinion polls show, nowhere in the former Yugoslavia did so many people stick to either overlapping ethnic identities or identify with their republic rather than with a specific ethnicity as much as in BiH.⁴

The causes of the conflict in BiH are numerous and extensively elaborated in the existing literature. Presenting and discussing them in detail would certainly go beyond the scope of this chapter. The at first sight compelling, but at

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- 1 Like already noted in the introduction Bosnia and Herzegovina will sometimes be abbreviated as BiH.
 - 2 See Vjeran Pavlaković's chapter on Croatia in this volume.
 - 3 In the overall Yugoslav perspective the three major ethnic groups of BiH could build their identities upon the belonging to the overarching Socialist Federal Republic of Yugoslavia, the Republic they had lived in – the Socialist Republic of BiH, and finally – at least the ethnic Croats and Serbs – could identify with another constituent republic of SFRY, normally Croatia or Serbia.
 - 4 In polls and censuses the citizens often declared themselves as “Yugoslavs” and also the percentage of inter-ethnic marriages was higher than elsewhere in the Yugoslav Federation. V. P. Gagnon, *The Myth of Ethnic War. Serbia and Croatia in the 1990s*, Ithaca and London 2006, 40–42.

second certainly very weak argument that the origins of the conflict are to be found in already existing ethnic hatred or tensions between the different groups inhabiting the country has been overcome. The conflict was rather the outcome of a political conflict about the procedures, according to which the institutions of the republic were to decide about the future status of BiH (staying in or leaving the Yugoslav federation). With increasing escalation and the descent into violence, all conflict parties became more and more ethnically intransigent. This process often led external observers to the conclusion that the conflict was one between Serbs, Bosniaks and Croats fighting against each other.⁵ The violence indeed facilitated mobilization along ethnic lines (replacing the political cleavages that had dominated during the late 1980s), but the hostile camps never were ethnically pure and the “ethnic argument” was certainly more exploited by the elites of the given ethnic group and the warlords than among the population.⁶

Therefore it did not come as a surprise that already the question of a referendum led to a major political conflict, during which first the leadership of the Bosnian Serbs announced a referendum on autonomy for the Serb dominated territories in BiH. This referendum, however, was declared unconstitutional by the government in Sarajevo, while this government itself called for a referendum on the independence of BiH, which was largely boycotted by the Serbian population. Those who voted (63,4 %) showed a clear preference for independence (99,7 %). However, in legal terms the referendum had failed since it did not reach the two-third majority required by the constitution. Shortly afterwards, the new state was admitted to the UN and recognized by most states in Europe. As a reaction to it, the Bosnian Serbs declared their own independence and started the siege of the capital Sarajevo, which was claimed by both conflicting parties. The following violent war that broke out throughout BiH shortly after lasted for more than three years, during which distinct cases of crimes and violations of international law took place, which later were adjudicated by the ICTY. Among these were:

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- 5 As already mentioned in the introduction, ‘Bosnian Muslim’ and ‘Bosniak’ are terms referring to the same group of people. The authors of this chapter opt for using the latter unless referring to documents that employ the first term. On a discussion of the replacement of the Bosnian Muslim term with the Bosniak, see for example B. Dimitrova, ‘Bosniak or Muslim? Dilemma of one Nation with two Names’, *Southeast European Politics*, Vol. II, No. 2, October 2001, 94–108.
 - 6 About this aspect see Caspersen, Nina, *Contested Nationalism – Serb Elite Rivalry in Croatia and BiH in the 1990s*. New York/Oxford: Berghahn Books 2010.

- The creation and maintenance of camps, with the purpose of detaining mostly men and boys, who had allegedly fought or could have done so. In these camps prisoners were abused in a sadistic manner; this included torture, random killings, starvation and sexual violence. Due to the extensive media coverage, these camps (together with the destruction of Vukovar and the attack on Dubrovnik) started to change the Western perception of the conflict from a civil war between ethnic groups to the picture of Serb aggression against outgunned Bosniaks. This shift increased the pressure on the US government and West European governments (mainly Britain and France) to intervene and support the weaker conflict party;
- The siege of Sarajevo by the military forces of Republika Srpska and the frequent sniping against civilians from the surrounding hills;
- The systematic and widespread expulsion and killing of Bosniaks by members of armed paramilitary units from Republika Srpska and Serbia. This became known as "ethnic cleansing". Such cases had already taken place during the conflict in Croatia⁷ (Croats were chased from municipalities inhabited by a Serb majority, while Serbs were expelled when these municipalities were taken back by the Croatian army), and they became much more frequent and widespread during the Bosnian conflict, due to the intermingling of the different ethnic groups, the lack of clear delimitations between them and the existence of enclaves (settlements of one group surrounded by settlements of another group);
- The siege and takeover of the enclave Srebrenica by the army of Bosnian Serbs. Subsequent to the takeover, men and boys were separated from women and girls (the latter were brought to Bosniak-held territory) and later killed in mass executions on abandoned farms outside the town. Fighters and civilians, who decided to escape through the surrounding hills, were shot by the beleaguers or died from mines. These events after the fall of the town were later adjudicated by the ICTY trial chamber as genocide.

The armed conflict that ensued after 1991 confirmed the initial attempt of the Bosnian Serb leadership: the Bosnian Serb army, supported first by the Yugoslav Army and – after the latter's dissolution – by the military, secret services, and paramilitaries of the Republic of Serbia, managed to capture a large part of the country. Its advance triggered an US-sponsored alliance between the Bosniak and the Croat forces, while the atrocities by the Bosnian Serbs committed against

7 Vjeran Pavlaković describes the cases of ethnic cleansing in Croatia in the chapter about institutional reform in Croatia.

mostly Bosniak civilians inclined the international community to consider intervening in the conflict resolutely both with diplomatic and military means in the year of 1995. Parallel to this, in the spring and summer of that year two Croat military operations against Serb-held territories in the so-called Republika Srpska Krajina and Western Slavonia took place. Together with the NATO air strikes against Serb positions in BiH, this all changed the balance of power on the ground and eventually led to a peace conference in Dayton/USA. During these negotiations, the Bosnian Serbs, on behalf of whom Slobodan Milošević was negotiating, agreed to withdraw from large swaths of territory and acquiesced to the creation of a complex political system of mutual checks and balances.

However, while the Dayton Peace Agreement (hereinafter DPA)⁸ of December 1995 brought an end to the war, it also legalized the wartime fragmentation of the country. The three major ethnic groups, Bosniaks, (Bosnian) Serbs and (Bosnian) Croats, were left to re-build their coexistence and – under the supervision of an UN plenipotentiary and an international force that was deployed throughout the country – to co-administer a postwar state which was not only shattered by horrific violence, but divided into ethnically organized territorial “entities”: the Federation of BiH (hereinafter Federation BiH), with 51 percent of the territory, Republika Srpska (hereinafter RS), with 49 percent of the territory, and the internationally administered area of the Brčko District. This division was not merely a territorial one as the entities retained most of the classical state competences, each having a government, parliament and judiciary.⁹ The complexity of this internal division of competences was further increased by the role played by the Office of the High Representative (hereinafter OHR), an international body designed to oversee the implementation of the DPA, civil

8 The peace agreement is formally titled “General Framework Agreement”. Complete text available at http://www.ohr.int/dpa/default.asp?content_id=380 For more information about the process that led to the signing of the DPA see R. Holbrooke, *To End a War*, New York 1998, *passim*.

9 Article III.3.1 of Annex 4 of the DPA lists the reduced state level competences, what is not being listed falls into the domain of the entity governments. Annex 4 is the de facto constitution of BiH. According to the power-sharing model established by the DPA, the political life in BiH remains dominated and shaped by the ethnic belonging. A three-person joint presidency includes one member from each of the major ethnic groups, while the Second chamber of the State parliament (House of Peoples) is reserved for members of the three so called constituent nationalities only. This rule was successfully challenged in front of the European Court of Human Rights, among others in the *Sejdić-Finci* case. However, until 2016 the ruling remained unimplemented. See <http://www.balkaninsight.com/en/article/another-human-rights-ruling-pressures-BiH>.

aspects of the post-war reconstruction and the democratization of BiH. As part of its function, the OHR was granted the “Bonn powers”, which allow the High Representative to override any decisions made by any government level in BiH and pass the laws independently.¹⁰ Due to these powers, media and academia until today label BiH an “international protectorate”. Considering in addition to this the complicated system of mutual checks and balances based on an ethnic key which in the postwar Bosnian society proves to be dysfunctional, some authors have even gone so far as to state that “the Bosnian state effectively does not exist”.¹¹

These complex territorial and political divisions have been mirrored, among others, in a high degree of fragmentation of the criminal justice jurisdiction of BiH, which is shared between the State of BiH, the entities (The Federation of BiH and the RS), and the Brčko District. Only in 2002 did the efforts of the international community¹² result in the establishment of the state Court of BiH (with a special War Crimes Chamber), operating in accordance with a new procedural

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- 10 The so-called “Bonn powers” were conferred onto the Office of the High Representative in 1997 by the Peace Implementation Council (international body in charge of the implementation of the DPA), in order to avoid a deadlock in its implementation. These powers in practice empower the OHR to make decisions and enact laws if the Bosnian institutions are not able to reach a compromise on one side, and to remove public officials who violate or obstruct the implementation of the DPA on the other side. The OHR can replace the legislative but it can also co-decide with the Bosnian legislative. The legal ground of the Bonn powers is somehow ambiguous and challenged, but nevertheless they were often used by the OHR, either directly by imposing a law, which did not need any further approval by another body before entering into force, or by enacting a law, which then needed to be approved by the Bosnian parliament (that again can propose changes, that need the approval of the OHR), or by empowering certain institutions with competences. For a discussion of OHR’s legitimacy see B. M. J. Szewczyk, ‘The EU in BiH: powers, decisions and legitimacy’, *EUISS Occasional Paper*, available at: <http://www.iss.europa.eu/uploads/media/OccasionalPaper83.pdf>. For a discussion about the legal ground of the so-called Bonn Powers see: T. Banning, ‘The “Bonn Powers” of the High Representative in Bosnia and Herzegovina: Tracing a Legal Figure’, in: *Goettingen Journal of International Law* 6 (2014) 2, 259–302, pp. 289–301. (http://www.gojil.eu/issues/62/62_article_banning.pdf)
- 11 J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Philadelphia 2009, 32. For other voices in the discussion on BiH’s weak statehood see Chandler, David, *Faking Democracy after Dayton*, Chicago 2000.
- 12 For the purpose of this chapter, the term international community stands for a plethora of the OHR, international organizations (governmental and nongovernmental) as well as donors and independent experts active in BiH.

and criminal code and having jurisdiction over the most severe or strategic for prosecution crimes committed in the entire state. Regardless of that, the entities and the Brčko District have retained a great part of the juridical powers, which had been exercised with various degrees of intensity since mid the 1990s. Further, the criminal jurisdiction of the Federation of BiH is divided territorially among ten cantonal courts, in the Republika Srpska among five district courts, while Brčko has one District Basic Court. Moreover, while both of the entities and Brčko District have their own Supreme Courts, the state does not have one (with the Constitutional Court filling this gap at times), yet the Court of BiH has its own Appellate Section. The situation is additionally complicated by the fact that the Criminal Code designed and pushed for by the OHR on the state level applies only to the trials before the Court of BiH, while the entities and Brčko District have their own criminal codes, which often do not overlap with the state one.

Furthermore, the state, the entities, and the Brčko District enjoy their separate ministries of justice, the Federation having ten of them – one for every canton. Moreover, the judicial institutions of BiH are often affected by the international administration of the country.

In this web of competing institutions, parallel laws and regulations weakened by a lack of definite hierarchy, trials of some of the most barbarous war crimes and crimes against humanity committed during the 1992–1995 war in BiH were and are still being conducted.

2. The ICTY and BiH

Ever since its establishment in 1993¹³, the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY) has shaped justice related to war crimes¹⁴ in BiH. As BiH has occupied a central point in the ICTY's work, various aspects of the Tribunal's impact on the Bosnian society and the state have already been subject to scholarly publications.¹⁵ From sentencing some of the most notorious war criminals responsible for atrocities committed in former Yugoslavia,

13 UN 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.

14 For the purpose of this chapter, the term “war crimes” refers to violations of international humanitarian law committed during the armed conflict, including genocide, crimes against humanity and war crimes.

15 While research has been done as well on the relationship and impact of the ICTY on the other countries in the region, certainly the vast majority of studies was devoted to BiH, given the peculiarity of wartime BiH, and especially of the post-war period.

through classifying the massacre in Srebrenica as the first act of genocide¹⁶ committed in Europe since the Second World War, to the creation of vast documentation and legal-historical accounts of the war, the ICTY has (among others) defined how the Bosnian war is perceived and talked about.¹⁷ It has been further argued that the Tribunal's legacy¹⁸ is greater than that, and that it can be credited not only with stirring the standards of war crimes trials in BiH and dramatically re-shaping the local capacities for transitional justice but, in a broader perspective, with strengthening civil society.¹⁹ Although the ICTY was not formally a part of the international administration in BiH, it did play a significant role, among other things by shaping 'how Bosnians understand justice'²⁰. And while the Tribunal's less tangible effects on Bosnian society remain a point of debate, its impact on the Bosnian judiciary is beyond question. A number of authors credits the ICTY with significantly transforming country's legal standards and

16 Prosecutor vs Radoslav Kristić <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>

17 Diane F. Orentlicher offers a nuanced analysis of the Bosnian's perceptions of the Tribunal's impact, concluding that it contributed to the society's ability to deal with its violent past in a number of ways: its path-breaking jurisprudence brought crimes of sexual violence out of the shadows, the genocide verdict helped Bosniak victims in the process of coming to terms with the July 1995 massacre, space for denial has been somewhat reduced. Diane F. Orentlicher, *That Somebody Guilty Be Punished – The Impact of the ICTY in BiH*, New York, 2010. Akhavan looks specifically at the ICTY verdicts' impact on reconciliation and inter-ethnic relations, while Meernik on the other hand finds little impact on societal peace at one- and six-month intervals following relevant judicial actions. Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' *American Journal of International Law* 95(1) (2001): 7–31. James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in BiH,' *Journal of Peace Research* 42(3) (2005): 271–289.

18 For the Tribunal's legacy beyond BiH see ICTY Global Legacy: Conference Proceedings. The Hague, 15–16 November 2011

19 Lara Nettelfield landmark study claims that the ICTY played a positive, albeit imperfect role in the processes of democratization and strengthening civil society. See Lara J. Nettelfield *Courting Democracy in BiH: The Hague Tribunal's Impact in Postwar State*. Cambridge University Press, 2010.

20 This notion came up during one of the interviews with a high-ranking justice expert in Sarajevo. It will be discussed later in the text. A similar argument is put forward by Jelena Subotić who claims that war crime trials have overtaken the BiH's post-war arena, making it difficult for other forms of transitional justice to flourish. J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Philadelphia 2009. P. 147

capacities, be that in form of norm transfer between legal professionals working in The Hague and local Bosnian judiciary²¹, fuelling OHR sponsored transit from Bosnia's former model of criminal procedure²² to a more adversarial criminal procedure,²³ often inspired by the ICTY or, broadly speaking, contributing to 'capacity building' in the form of trainings and the acquisition of skills.²⁴ Others claim, and findings presented in this chapter support this opinion, that the ICTY's interest and consequent impact were for the most part focused on the state-level judiciary institutions, overlooking entity courts.²⁵

Due to field research conducted by Jagoda Gregulska in the Federation of BiH and Aleksandra Nędzi-Marek in the RS in 2015, this study adds to the pool of empirical studies²⁶ that could detect more effective, if desired, ways international tribunals affect countries under their authority. Post-war BiH has undergone many institutional reforms and has seen the establishment of new institutions that result from the fact that it is a society dealing both with its violent past and the socialist legacy²⁷. Looking at some of the most apparent results of the

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- 21 W. B. 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 BiH", *Columbia Journal of Transnational Law* 46 (2006), 279–350, p. 335
 - 22 Common for states with post-socialist legal heritage.
 - 23 A system that most of the post-socialist states in Central Europe accepted.
 - 24 Chetman investigates 'capacity building' efforts not only by the ICTY but also other actors streaming new standards of legal practice to BiH and concluding that the focus has generally been on providing visible skills, such as specialized forms of training while less attention has been paid to the administrative and material conditions in which these new capacities should be used. See Chehtman, A. (2011). *Developing BiH's Capacity to Process War Crimes Cases. Critical Notes on a 'Success Story'*. *Journal of International Criminal Justice* (2011)
 - 25 Ronen, Y. (2014): *The Impact of the ICTY on Atrocity-related Prosecutions in the Courts of BiH*. 3 Penn. St. J.L. & Int'l Aff.113
 - 26 Thoms, Ron and Paris argued that that there is still not enough empirical data to neither support or reject positive contribution of transitional justice mechanisms' impact. Oskar N. T. Thoms, James Ron and Roland Paris 'State-Level Effects of Transitional Justice: What do we Know?' *The International Journal of Transitional Justice*, Vol. 4, 2010 p. 329–354.
 - 27 Some of the most important developments of the post-war period include unification of the formerly rival armies: BiH Army and RS Army into the Armed Forces of BiH in 2005 or the establishment of the Institute for Missing Persons. A number of laws and bills regulating the position of victims of war has been passed, many of those addressing the faith of families of missing persons or survivors of rape. Similarly, BiH entered several bilateral and multilateral agreements on international cooperation in the field of

Tribunal's approach to the Bosnian judiciary, such as the establishment of the Special War Crimes Chamber at the Court of BiH and the corresponding section at the Prosecutor's Office, through less evident yet persistent changes in investigation and trial practices of the Bosnian police forces and the local courts to the least tangible effects in the way Bosnians understand justice, the ICTY's impact on the country is a given. While overviewing different changes in BiH that can be attributed, in whole or in part, to the Tribunal's influence, the text pauses to discuss them from two angles: Firstly, to which extent were the reforms heralded as having been prompted by the ICTY in fact elements of modernization of the Bosnian judiciary that would have happened even without the Tribunal's stimulation? Especially in issues as important as changes to the criminal procedures, witness protection or position of victims of sexual violence. Secondly, are the reforms here to stay?

The origin of the relationship between BiH and the ICTY dates back to May 1993, when the ICTY was established by UN Security Council Resolution 827.²⁸ At the time, the political fragmentation along ethnic lines was massively reverberating on the judicial system of BiH, which was significantly impaired in its functioning due to the ongoing war (loss and/or emigration of skilled legal professionals, physical destruction of judicial facilities and equipment, inappropriate procedural laws, biased and unprofessional judges and prosecutors).²⁹ In those circumstances, it was almost impossible to properly address cases related to any crimes, let alone war crimes. This started to change with the establishment of the ICTY, since the Tribunal was given the juridical primacy over local Bosnian courts, which were obliged to defer cases of war crimes to the ICTY

investigating war crimes. All of these developments have been somewhat tinted by the Tribunal's work, or at least met with positive encouragement by its representatives. Yet, automatic attribution of reforms and new institutions somewhat related to transitional justice and investigation of the war crimes as being by-products of the Tribunal would be inherently wrong.

28 Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

29 Organization for Security and Co-operation in Europe – Mission to BiH, “War Crimes Trials Before the Domestic Courts of BiH: Progress and Obstacles,” March 2005, p. 4. Also see Human Watch Rights Report “BiH: Looking For Justice – The War Crimes Chamber in BiH, Volume 18, No. 1, February 2006, p. 4. There were not few cases, which were prosecuted and sentenced in absentia, not shying away from death penalties. In Sarajevo for instance, two Serbs were sentenced for death penalty for the killing of a Bosniak man who in fact was found alive (<http://www.nytimes.com/1997/03/01/world/jailed-serbs-victims-found-alive-embarrassing-BiH.html>).

upon request.³⁰ However, due to limited capacities the ICTY could of course not take over all cases of the Bosnian courts and hence these did not cease to prosecute war criminals even at the height of war violence and despite the impaired functioning mentioned above, so that as a consequence, the judiciary continued to be “an instrument of ethnic discrimination by implementing laws in a biased and politically influenced way.”³¹ This lack of satisfactory judicial standards by the local courts prompted further interventions by the ICTY and resulted in 1996 in the adoption of the “Rules of the Road”, a system of supervision of the national judiciaries.³² In accordance with the new rules, a unit within the ICTY was responsible for reviewing cases prosecuted by the domestic courts in BiH (as well as Croatia and Serbia) and deciding if indictments could be issued. This procedure was designed to prevent arbitrary arrests, particularly in the light of the post-war elections and the return of refugees. The provisions, while limiting opportunities for politically or ethnically motivated indictments in the domestic courts, also created the first wave of tensions between local legal professionals and the ICTY.³³ For one, the Tribunal did not possess capacities to process the materials submitted by the local courts in a timely manner (due to their substantial volume, the language barrier and their system of classification that was new to the ICTY’s staff) and, as a result, many cases were never reviewed. This was met with negative responses from the Bosnian law professionals, who commented that it offended their expertise and integrity. This further complicated the relationship between the local actors and the Tribunal.³⁴ This negative

30 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>.

31 O. Martin-Ortega, ‘Prosecuting war crimes at home: lessons from the War Crimes Chamber in the State Court of BiH’, *International Criminal Law Review* vol. 12, 2012, 118.

32 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). On the process see M. S. Ellis, ‘Bringing Justice to an Embattled Region – Creating and Implementing the ‘Rules of the Road’ for Bosnia and Herzegovina’, *Berkeley Journal of International Law*, 5–6 (1999), 17.

33 International Crisis Group, *Courting disaster: The misrule of law in BiH*, report 1, 2002, available at http://www.crisisgroup.org/library/documents/report_archive/A400592_25032002.pdf.

34 The Human Rights Center and the International Human Rights Law Clinic, University of Berkeley, and the Centre for Human Rights, University of Sarajevo, ‘Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutor’, *Berkeley Journal of International Law*, vol. 18, issue 1, 2000, 102–164, available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1184&context=bjil>

or, at best, neutral attitude towards the Tribunal was additionally shared by many more people who were directly involved in the procedures and who believed that the Tribunal had since its establishment worked on distancing itself from the domestic legal professionals and did not employ local professionals at the Tribunal, for fear of bias and for security reasons.³⁵

Eventually, this policy of detachment backfired at the ICTY, making its work appear irrelevant, distant and an ideal subject of local nationalist elite's populist attacks.³⁶ The remedy came in the form of an Outreach Program established in 1998 tasked with encouraging engagement with domestic authorities and communicating directly with the people of the former Yugoslavia. The Program employed people from the Western Balkans region or those who spoke the local languages, opened local offices and strove to present the Tribunal's work as objective and important to the local communities. While commentators tend to agree that when it comes to ICTY's "communication strategy", whatever came, came too late and was too little,³⁷ the launching of outreach activities targeting the public in the region was nevertheless an important step that signaled the Tribunal's, even if limited, concern with its impact on the citizens of former Yugoslavia.

But despite the Outreach program and the inclusion of local professionals, the ICTY still did not have enough capacities to comply with the provisions of the "Rules of the Road". Since the Tribunal was still facing challenges on a general level, not only in regard to BiH, it released in 2002 the "Completion Strategy".³⁸

35 Y. Ronen, 'The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of BiH', *Pennsylvania State Journal of Legal and International Affairs*, April 2014 (113), Vol. 3, Issue 1, 112–160, available at: <http://elibrary.law.psu.edu/jlia/vol3/iss1/4/>, p. 125.

36 Ronen, *The Impact of the ICTY* 112–160.; W. B. 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', *Columbia Journal of Transnational Law* 46 (2006), 279–350.

37 D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in BiH*, New York, 2010, 102–104; L. J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina. The Hague Tribunal's Impact in a Postwar State*, Cambridge 2012, 152–157.

38 <http://www.icty.org/sid/10016> The Rules of the Road program ended on 1 October 2004, after the ICTY Prosecutor informed the Presidency of BiH that it would "no longer be in a position to review war crimes cases and that the BiH Prosecutor should take over responsibility for" such reviews. See Organization for Security and Co-operation in Europe – Mission to BiH, 'War Crimes Trials Before the Domestic Courts of BiH: Progress and Obstacles,' March 2005, 5.

This strategy was a pragmatic move to comply with the requirement of the UN Security Council to concentrate on high profile cases only, and it was the result of the anticipated gradual withdrawal from political and financial support to the ICTY by the USA. This new policy of the ICTY opened the door for transfers of cases to the courts in the region, and forced the judiciaries of these states to increase their capacities and efficiency.³⁹ William Burke-White traced the process from the perspective of Tribunal's attitude and incentives provided to the local actors, arguing that those factors had the greatest impact on the process of reforms. As a result of the ICTY's Completion Strategy of 2002, the jurisdictional relationship changed from what was essentially absolute international primacy toward something far closer to a jurisdictional relationship of complementarity, and the Tribunal turned from 'freezing' of BiH's domestic reforms and capacity building to actively demanding and supporting them.⁴⁰

In the case of BiH, this was matched by the OHR's policy to spearhead a package of rule of law reforms in BiH,⁴¹ which were supposed to rely on the ICTY as a model and a partner.⁴² The reform consisted of vetting the judicial staff, the creation of the High Judicial and Prosecutorial Council (HJPC) responsible for the appointment and review of judges and prosecutors, the introduction of a new Code of Criminal Procedure and a new Criminal Code as well as the introduction of a witness protection system.⁴³ This also included the restructuring and downsizing of courts and prosecutors' offices and the replacement of all judges and prosecutors in an effort to secure the independence of the judiciary and establish an appropriate balance of judges of different ethnicities. By mid-2002, the ICTY and OHR had formulated a joint plan of action that anticipated the creation of a specialized war crimes chamber at the Court of BiH, accompanied by the Special Department for War Crimes at the Prosecutor's Office, which both

39 The proposal to transfer cases from the ICTY to the states of the former Yugoslavia was first announced by ICTY President Claude Jorda already in May 2000, however, for a long time, such relocation was perceived as premature. 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).

40 Burke-White, *The Domestic Influence*, 280.

41 Office of the High Representative: Jobs and Justice: Our Agenda <http://www.ohr.int/pic/econ-rol-targets/pdf/jobs-and-justice.pdf>

42 L.A. Barria, S.D. Roper 'Judicial capacity building in Bosnia and Herzegovina: Understanding Legal Reform Beyond Completion Strategy of the ICTY', *Human Rights Review*, vol. 9, 2007, 324.

43 Barria, Roper, *Judicial capacity building in BiH*, 325.

became fully operational in 2005. And while the creation of the Court of BiH by the OHR⁴⁴ was an expensive endeavour, the ICTY's plan to transfer cases to BiH gave the fundraising campaign a great boost.⁴⁵ Additionally, the ICTY provided political and technical support to the OHR, thereby bolstering its legal reconstruction efforts in BiH.

On the Bosnian ground, following the creation of the Court of BiH and the State Prosecutor's Office, in 2003 the High Representative Paddy Ashdown had proposed a number of criminal justice reforms that were eventually adopted by the BiH Parliamentary Assembly. One of the crucial novelties was the rewriting of Chapter 17 of the Criminal Code of BiH to include war crimes provisions that were consistent with the ICTY Statute and, for the most part, were modeled according to the ICC Statute.⁴⁶ These reforms were mandatory before the ICTY could begin to transfer cases to BiH⁴⁷ under the Rule 11*bis*.⁴⁸ In 2004, BiH adopted a transfer law concerning the admissibility of evidence collected by the ICTY, which permitted the use of evidence collected in accordance with the Statute and the ICTY's rules before the courts in BiH, an issue that had caused significant confusion among domestic prosecutors, since many of the documents made available were in English, or the trials in front of the ICTY were carried out differently.⁴⁹ The introduction of this law led to the first referral of cases to BiH and was a vote of confidence in its judiciary system.⁵⁰ In addition, a transfer of knowledge, training and material capacity building supported by the ICTY took place, which led to a visible increase in local war crime trials capacities. In dividing the cases, the three-tier judicial architecture model advocated by ICTY

44 Available at: http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=362

45 Burke-White, *The Domestic Influence*, 335–336.

The Completion Strategy and the advocacy of the ICTY meant that a much larger part of the available resources ultimately went to institutions in charge of conducting trials for war crimes cases, than otherwise would have been the case.

46 Ronen, *The Impact of the ICTY*, 148; Burke-White, *The Domestic Influence*, 338.

47 S. Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?', *Criminal Law Forum* Vol. 2006/17 (4), 177–222, 182.

48 The Rule 11*bis* regulates the referral of indictments to another court, be it to the state in whose territory the crime was committed, in which the accused was arrested or a state that is having jurisdiction and is willing and prepared to accept such a case. ICTY rules of procedure and evidence, Rule 11*bis*, available at <http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence>

49 Only later did the ICTY and OSCE help translate these documents and hence make them more widely accessible.

50 Burke-White, *The Domestic Influence*, 324.

President, Claude Jorda in his 2002 report to the Security Council, was replicated. In Jorda's words "the first tier, the International Tribunal, essentially handles the major political [...] leaders. [...] the second tier, the State Court, chiefly handles intermediary-level accused who would be referred by the International Tribunal. [...] The third tier, the local courts, handles low-ranking accused tried in accordance with the Rome Agreement. Within this structure, the International Tribunal would be responsible for overseeing the proper conduct of the second-tier trials and the State Court the third-tier trials."⁵¹ In accordance with that model, the Court of BiH started to deal with cases that were referred back to it from the ICTY, but also attempted to delegate less sensitive cases to entity courts.

2.1. Bosnian Responses

Over the years, the Bosnian state and its entities adopted a number of legal acts that have regulated its relationship with the Tribunal, among others enabling courts to use during domestic trials and investigative evidence, which was gathered for the trials before the ICTY.⁵² While the central government has never passed a law that would define BiH's relationship with the Tribunal, Republika Srpska – BiH's smaller entity – adopted such law.⁵³ This at first sight could indicate that the

51 Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002).

52 Zakon RBiH o izručenju na zahtjev MKSJ, Službeni list RBiH, br. 12/95 i 33/95; Zakon FBiH o izručenju okrivljenih osoba po zahtjevu MKSJ, Službene novine FBiH, br. 9/96; Zakon BiH o ustupanju predmeta MKSJ-a Tužiteljstvu BiH i korištenju dokaza pribavljenih od strane MKSJ-a u postupcima pred sudovima BiH, Službeni glasnik BiH, br. 61/04, 46/06, 53/06, 76/06; Memorandum o razumijevanju između Posebnog odjela za ratne zločine Tužiteljstva BiH i Ureda tužitelja MKSJ, 2.9.2005.

Also the Dayton Peace Agreement stipulated that BiH (state and its two entities Federation BiH and Republika Srpska) was obliged to cooperate with the Tribunal. The Dayton Peace Agreement, Agreement on Human Rights, Article XIII: Organizations Concerned with Human Rights: "All competent authorities in BiH shall cooperate with and provide unrestricted access to the organizations established in this Agreement; any international Human Rights monitoring mechanisms established for BiH; the supervisory bodies established by any of the international agreements listed in the Appendix to this Annex; the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning Human Rights or humanitarian law.

53 Zakon Republike Srpske o saradnji Republike Srpske sa Međunarodnim krivičnim sudom u Hagu, Službeni glasnik Republike Srpske, br. 52/01. The Law was enacted with an elaborate justification, which recalled the act's constitutional basis. Moreover the justification explicitly recalled the following acts from which it derives: Security

RS elites were somehow more inclined to cooperate with the ICTY in the early 2000s, but nothing could be less true. When it comes to the political responses of BiH to the cooperation with the Tribunal, it was the state structures and the Federation BiH that were praised for a smooth and willing approach towards the ICTY. Republika Srpska's political elites on the other side have been notorious for obstructing cooperation with the Tribunal, and passing of the 2001 Law on Cooperation of RS with the ICTY, which defined the rules of mutual cooperation as well as the bodies responsible for its implementation, was merely a sign of a "softening" of the Bosnian Serb harsh stance towards the Tribunal.⁵⁴ As part of this shift, the Tribunal was allowed to open an office in Banja Luka, the political and administrative center and the *de facto* capital of the RS entity.⁵⁵ The Law on the Cooperation with the ICTY was followed by the 2001 opening of the Office for Cooperation with the ICTY comprised of local staff within the Ministry of Justice of RS. However, as time passed, the focus of this Office was less and less on cooperation with the ICTY, but more in the vague field of research about the war and war crimes, independently from the ICTY and far from its approach. So, after many structural and organizational changes, shifts and merges, this unit and its initial mission to establish a cooperation between RS and the ICTY in fact ceased to exist only several years later.⁵⁶ During the field research, the Republic

Council Resolution 827 of 1993, the Statute of the ICTY, the Rules of Procedure and Evidence as well as the Dayton Peace Agreement. The cooperation was meant to be carried out within the frames of the ICTY Statute and ICTY Rules of Procedure and Evidence. Moreover, the Law's preamble explicitly acknowledged the supremacy of Tribunal Acts over domestic legal acts. Lastly, its introductory part acknowledged that additional budgetary means would be provided.

54 This change was carried out by Milorad Dodik, who in 1998 came to power in Republika Srpska and who was, back then, welcomed by international commentators as a more liberal, Western-oriented politician. Ever since, Dodik in particular, and the RS establishment in general, have voiced their open and strong criticism of the ICTY and its judgments, openly welcoming individuals sentenced by the Tribunal for war crimes as national heroes.

55 Orentlicher, *That someone guilty be punished*, 30.

56 By January 2003 the office was merged with the RS Documentation Centre on War Crimes (*Dokumentacioni centar za istraživanje ratnih zločina*) and the Commission of Missing Persons of the RS to give way to the newly established Secretariat for the Relations with the ICTY in Hague and the Research of War Crimes. (Republički sekretarijat za odnose sa Međunarodnim krivičnim sudom u Hagu i istraživanje ratnih zločina, Zakon o ministarstvima (Official Gazette of the RS, no. 70/02) This Secretariat then was assigned to the Centre for the Research of War Crimes in 2008. Yet again in 2013 the Operative Team for Missing Persons was merged with the Centre for the

Centre for the Research of War, War Crimes and Missing Persons in Banja Luka was visited, yet this visit only proved that its employees concentrate not on the legacy of the ICTY, but on maintaining the RS-centred narrative of the war, explaining why the numbers of missing and deceased in the conflict have been manipulated in order to present the Bosnian Serbs in an unfavourable manner.⁵⁷

After these extensive, but crucial remarks regarding the background of the conflict and the history of the relationship between the ICTY and BiH, this chapter will now take an in-depth look at the impact of the ICTY on institutional reforms in BiH. The focus will be on the changes on the state level, distinguishing between new institutions, new legislation and new procedures that were introduced subsequent to ICTY decisions or were triggered by them. In the last section, there will also be an overview of changes that took place on the entity level.

3. Institutional Changes

3.1. The War Crimes Chamber at the Court of BiH and the Special Department for War Crimes of the Prosecutor's Office

The creation of the War Crimes Chamber (hereafter WCC)⁵⁸ at the Court of BiH and the Special Department for War Crimes of the Prosecutor's Office represent the most significant direct impact of the ICTY in BiH, and probably the biggest impact of the Tribunal in regard to institution-building in the region of former Yugoslavia. Its origins go back to the establishment of the Court of BiH in July 2002 by the Parliament of BiH, in accordance with the Decision on the Law on the Court of BiH issued by the High Representative on 12 November 2000.⁵⁹ Namely, when in 2002 the President of the Tribunal, Claude Jorda, presented his report to the UN Security Council, the transfer of cases involving mid- and low-level accused to national courts under Rule 11*bis* was an essential component of the strategy. At the time, the Completion Strategy required the ICTY to finish all trials in their last instance by 2010. As a consequence, there was an urgent need for a national court in BiH to handle transferred cases “effectively

Research of War Crimes, creating a brand new administrative state organization, the Republic Centre for the Research of War, War Crimes and Missing Persons (<http://www.rcirz.org/index.php/lat/>).

57 Aleksandra Nędzi-Marek's interview with an employee of the Republic Centre for the Research of War, War Crimes and Missing Persons, February 2015.

58 The War Crimes Chamber is formally known as the Section I of the Criminal Division of the Court of BiH. More details about the division within the court follow below.

59 Decision imposing the Law on the State Court of BiH, <http://www.ohr.int/?p=67097>

and consistently with internationally recognized standards of human rights and due process⁶⁰ which eventually resulted in the creation of the WCC within the Court of BiH, supported by the international community. So, the initiative for the WCC was clearly not a domestic reform measure, but came out from an agreement reached by the OHR and the ICTY in January 2003.⁶¹

The amendment, which the Parliamentary Assembly adopted on 2 December 2004, gave the Court of BiH jurisdiction over genocide, crimes against humanity, war crimes, and violations of the laws and customs of war as it was indirectly required by the Completion Strategy. This included the concept of individual (rather than collective) criminal responsibility for these crimes. The amendment's article 8 provided for the formation of three sections within the criminal and appeal jurisdiction: section I for war crimes, section II for organized crime, economic crimes and corruption, and section III for all other crimes under the jurisdiction of the Court.⁶² With the adoption of BiH's National War Crimes Strategy in 2008⁶³, the relationship between the Court of BiH (and the Prosecutor's Office) and the entity courts was further specified. Cases previously submitted to the ICTY in accordance with the Rules of the Road were returned to the Court of BiH for evaluation and in order to decide whether the cases could be carried out at the entity-level courts, or whether their sensitivity and complexity required them to be dealt with on the state level.⁶⁴ The WCC included international judges,⁶⁵ prosecutors, and other legal professionals.

60 Judge Claude Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (July 23, 2002)

61 B. Ivanišević, *The War Crimes Chamber in BiH: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, 5–6, available at: <https://www.ictj.org/publication/war-crimes-chamber-bosnia-and-herzegovina-hybrid-domestic-court>. See also: Joint Preliminary Conclusions of OHR and ICTY Experts Conference on the Scope of BiH War Crimes Prosecutions, International Criminal Tribunal for the former Yugoslavia (ICTY) press release, January 15, 2003, <http://www.icty.org/sid/8312>

62 Sud Bosne i Hercegovine, Istorija Suda BiH, <http://www.ohr.int/?p=67097>

63 Available at http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf

64 For a critical opinion about the Strategy, see D. Schwendiman, 'Prosecuting Atrocity Crimes In National Courts: Looking Back On 2009 In Bosnia and Herzegovina, 8 *Northwestern Journal of Human Rights* 269 (2010). <http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss3/3> Schwendimann who headed the Prosecutors Office at the time of the document' elaboration, distanced himself from it, arguing that it was more of an attempt to please political actors than a feasible strategy.

65 The international judges arrived and started to play a crucial role at the WCC in 2007, whereas in March 2012, it was announced that the mandate for international actors in

The United Nations Security Council called on the international donor community to support the OHR's work to this end. The joint proposal of the OHR and the ICTY was subsequently endorsed by the Peace Implementation Council, the international body made up of 55 states and agencies charged with implementing the terms of the Dayton Peace Agreement that ended the war in BiH. Initially a hybrid model, the Court of BiH has transformed into a fully domestic institution in terms of staffing and core financing. While international actors still play a significant role in providing additional funding in BiH, the Court (as well as the Prosecutors Office)⁶⁶ have been entirely integrated into the Bosnian state-level judiciary and its budget.

Similarly to the above, also the Special Department for War Crimes at the Prosecutor's Office of BiH was created. The High Representative enacted the Law on the Prosecutor's Office of BiH by his Decision of 6 August 2002.⁶⁷ Jurisdiction over the prosecution of war crimes was given to the Prosecutor's Office of BiH at the same as to the WCC in December 2004.⁷⁵ In January 2005, the third department, the War Crimes Section, was established within the Prosecutor's Office of BiH, and similarly to the Court, the Prosecutor's Office had for some time a hybrid structure, consisting of both international and local staff.

With the establishment of the WCC and the special section for war crimes within the Prosecutor's Office, the influence of the ICTY on the entity-level courts has been to a great extent mediated through these institutions. Challenges of such multilevel justice and jurisdiction fragmentation however have been many. Technically speaking, the Court of BiH and the State Prosecutor's Office are two separate, independent institutions, and each of them has its own communication and relationship with the local courts. The transitional provision in Article 449 of the Criminal Procedural Code establishes the competences of the Court of BiH to assume cases from the entity courts.⁶⁸ This process was parallel to the

the State Court is to end. See more: F. Bywaters, 'Hybrid Courts – A Broken Promise? International Judges and Prosecutors of the War Crimes Chamber of Bosnia and Herzegovina', in: *Democracy and Human Rights in South-East Europe: Selected Master Theses for the Academic Year 2011–2012*, Sarajevo 2012, 1–90.

66 In BiH, the State Court and the Prosecutor's Office operate as independent institutions. See Law on the Prosecutor's Office of BiH (unofficial consolidated version), in Official Gazette of BiH, Nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04, available at: http://www.tuzilastvobih.gov.ba/files/docs/zakoni/zot/s_Office_BiH_-_Consolidated_text.pdf ("Law on the Prosecutor's Office of BiH"), art. 2.

67 <http://www.ohr.int/?p=66315>

68 Zakon o krivičnom postupku FBiH, available at <http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=42&jezik=b>

efforts of the State Prosecutors Office to review the cases and the files from the ICTY's Rules of the Road Unit. The lack of synchronization and communication between the Court of BiH and the Prosecutor's Office deriving from it resulted in cases in which e.g. the Prosecutor's Office would transfer a case back to an entity court only to have the Court of BiH resume it from it.⁶⁹ Consequently, international professionals, who have worked in BiH, claimed that the entity level prosecutions were unnecessary and the State Court should have taken over the cases from all over BiH. This however had been decided differently in the Rules of the Road and the Bosnian National Strategy for Processing of War Crime Cases.⁷⁰

David Schwendiman, BiH's former Deputy Chief Prosecutor, while pointing out numerous problems with the WCC, but especially with the National War Crimes Strategy, stated that one of its core downsides was to require Cantonal entity-level prosecutors and courts, despite their explicit concerns and reasonable reservations, to manage the bulk of the war crimes workload. "Responsibility for war crimes investigations and prosecutions should have been centralized at the national level in the State Prosecutor's Office and the Court of BiH instead of diluting scarce resources by trying to create the capacity to investigate and prosecute war crimes in every Canton and District."⁷¹ His view was shared by an international legal advisor working in BiH, who stated that the "whole idea of having such difficult and important cases being held at small local courts is harmful to the process."⁷² The National War Crimes Prosecution Strategy has been considered a political success rather than a feasible and meaningful judicial tool. The Strategy was meant to advance the trail efforts and help BiH deal with the past crimes, however it also had its political value as it was one of the Peace and Implementation Council's measures which prepared the closure of the Office of the High Representative.

Similarly, the EU pushed for an increase in cases transfers from the Court of BiH to its entity-level counterparts,⁷³ completely disregarding the dramatic lack of capacities for proper trials in a majority of the local courts. "They didn't care

69 Ortega, p. 123,

70 The National Strategy for Processing of War Crime Cases was developed and adopted in December 2008 by the Councils of Ministers of BiH aiming to process remaining war crime cases.

71 Schwendiman, *Prosecuting Atrocity Crime*, 274–275.

72 Jagoda Gregulski's interview with a legal expert at OHR, who requested to remain anonymous.

73 Structural dialogue on justice <http://europa.ba/Default.aspx?id=87&lang=EN>

that local courts are not able to offer adequate witness protection and that people will be more reluctant to testify at small local courts, surrounded by people who know them.”⁷⁴ The lack of adequate capacities of the local courts has been not surprising for the legal experts working on BiH. The situation, for instance in the witness protection program, is still striking, effective protection in and outside the courtroom is still not guaranteed at the necessary level and financial resources for it are lacking.⁷⁵ Where the entities are concerned, language barriers and hostility to the ICTY remains an obstacle to cooperation, and the fact that the ICTY’s proactive engagement has almost completely overlooked the courts of the entities was not beneficial to it either. Consequently, the impact of the ICTY did not go much beyond the state level, or at least not as much as there would have been potential for it. A high-ranking official at the Federal Ministry of Justice voiced his frustration with this state of affairs saying that “presidents of the Tribunal come to BiH, they meet people from the State Court, State Ministry, they go to Srebrenica and meet victim organizations but they never meet or address authorities on the entity levels. There has never been input aimed at Federal Ministry yet they expect results and commitment on the level of the entity.”⁷⁶ The feeling that entity judiciaries were overlooked, at least for a certain period of time, has been shared also by practitioners working in the courts as well as international observers. According to Federal Prosecutor Munib Halilović, a lot of time has passed before the process of strengthening entity judiciaries started and this process has in the first period had a negative impact on the war crime trials.⁷⁷ First, most resources went to the establishment and operation of the ICTY, then attention was redirected to the Court of BiH and the Prosecutor’s Office. It was only around 2008 that serious thought was given to the entity capacities. Halilović assesses the development of the state judiciary as positive, but also sees it blocking the entity courts. A legal expert at the OSCE (who requested not to be quoted) recognized that it was “very late in the day, only when there was a feeling that work at the Court of BiH was done, that sources and attention were being paid to entity judiciaries.”⁷⁸ However, Halilović, who served several years

74 Jagoda Gregulska’s interview with legal OHR expert who requested anonymity.

75 Human Rights Watch Report, Justice for Atrocity Crimes – Lessons of International Support for Trials before the State Court of BiH, March 2012, pp 28–32.

76 Jagoda Gregulska’s interview with a representative of the Federation’s Ministry of Justice in May 2015.

77 Jagoda Gregulska’s interview with Munib Halilović, August 2014.

78 Jagoda Gregulska’s interview with an OSCE expert who requested anonymity, August 2014.

as prosecutor at the State Court before becoming entity-level federal prosecutor, pointed out that despite with these institutional reforms the entity level being disregarded, the ICTY did indirectly impact the entity judiciaries: “When the Court of BiH started operating, the only place to look for guidance was the ICTY, there was no adequate training, access to the ICTY’s evidence was limited. Now, practitioners at the entity courts can look up rich jurisprudence accumulated at the Court BiH, it is much easier.”⁷⁹ The impact of the ICTY on the entity level was in that sense rather a side effect than an intended result.

3.2. Legislative Change – The New Criminal Procedure Code of BiH

In 2003, the judiciary of BiH witnessed what some commentators called a “seismic change” to its criminal trials.⁸⁰ The Criminal Procedure Code (CPC) introduced by the Office of the High Representative had replaced the country’s traditional continental law approach with more adversarial, common law procedures. Contrary to the Criminal Codes, which still differ across state and entity jurisdictions⁸¹, the new procedures governing trial economy have been the same for the whole country as compatible procedure codes were adopted also by the entity parliaments and the Brčko District parliament, even if the numbers of particular articles of the codes do not always overlap. The drafting of the new CPC was based on international standards and the European Convention on Human Rights (ECHR) in particular. As the OHR stated when imposing it, “the CPC was needed for the existence of criminal procedure at the state level of BiH which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the European Convention on Human Rights which itself forms part of the Constitution of BiH and enjoys priority over all other law in BiH.”⁸²

In 2002, the OHR’s consultants recommended that prosecutors establish investigation units within their own offices – a change resembling the ICTY’s investigative practices. While some analysts observed such a move was an unavoidable and natural part of the country’s transition to a more modern legal system rather

79 Jagoda Gregulska’s interview with Munib Halilović, August 2014.

80 C. DeNicola, ‘Criminal Procedure Reform in BiH: Between Organic Minimalism and Extrinsic Maximalism’, *express0* 2010, available at: https://works.bepress.com/christopher_denicola/1/

81 More details on the Crminal code in the next section.

82 Decision Enacting the Criminal Procedure Code of BiH, 24/1/2003 available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094

than it was prompted by the ICTY,⁸³ a set of procedures, such as plea bargaining and more broadly, adversary culture of proceedings, were in fact modelled on the Tribunal's practice and designed in cooperation with its experts.⁸⁴

The reform performed by the OHR in 2003 presenting the new CPC abolished investigative judges, made the presentation of evidence more adversarial and introduced plea bargaining, authorized cross-examination, while banning subsidiary and private prosecutions. All these changes resembled the ICTY's procedural system, which is an amalgam of common law and civil law features that favours a far more adversarial approach to criminal justice than that of BiH's prior system.⁸⁵ As such, it diverged from procedures used in BiH historically. The 2003 CPC's most significant common law transplant was its abolition of investigative judges accompanied by the authorization of prosecutorial investigations. While according to the 1976 Criminal Procedure of the Socialist Federal Republic of Yugoslavia (SFRY), investigative judges had extensive investigative capacities and held responsibility for compiling comprehensive dossiers prior to trials,⁸⁶ after the reform those activities fell into the domain of prosecutors. Today, when a prosecutor has reason to suspect the commission of a criminal offence, it is his task to investigate it and supervise the supporting efforts of authorized officials. This of course happens with the support of the Police, who act under supervision of prosecutors. The active role of judges has been further reduced by the introduction of adversarial presentation of evidence. The old judge-led system was replaced by a new, embodied in Article 261 of the new CPC, party-led (prosecutor and defence lawyer) one. Building and presenting a case fell entirely to the prosecutors who had to suddenly demonstrate both 'managerial' and 'oratory' skills to accompany their legal knowledge. One of the prosecutors recalled participating in a training organized as part of the local judiciary capacity building efforts as 'a sort of theater class': "The instructor from the US tried to convince us, Bosnian prosecutors, that the tone of voice, where we are standing while delivering the closing remarks as well as our gestures are incredibly important in the justice system. We were partly amused and partly irritated by such kind of transfer of knowledge and tried to explain to him that here in BiH, regardless

83 Jagoda Gregulska's interview with Mirsad Tokača, 15 February 2015.

84 M. Bohlander, 'Last Exit BiH – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts', in: *Criminal Law Forum* 14 (1), 2003, 77.

85 DeNicola, *Criminal Procedure Reform*, passim.

86 DeNicola, *Criminal Procedure Reform*, passim.

of the new procedures, it is the weight of the evidence and the argument that matters more than courtroom dramaturgy popularized by the American films.”⁸⁷

The reform also affected defence attorneys, who not only lacked investigative skills, but also the resources that could match those of the prosecution. In the old system, the investigative judges were the ones who used the state power and resources to gather the defence material.⁸⁸ Cross-examination was not a totally new invention because the SFRY criminal code also included it, although with differences.⁸⁹

Two important aspects of the new CPC, the introduction of plea bargaining⁹⁰ and a ban on subsidiary and private prosecutions, were those most criticized, first and foremost by victims' organizations,⁹¹ who protested against the possibility of defendants to have their sentence reduced after admitting guilt.⁹² As far as private and subsidiary prosecutions are concerned, even if the new Procedural Code from 2003 does not explicitly ban them, it only makes a few references to the rights of injured parties, thereby effectively cutting off their former powers of subsidiary and private prosecutors – acting along with the public prosecutor or instead of her/him.

Similarities and influence of the ICTY on the creation of the CPC of BiH can also be observed with regard to victims of sexual violence. Article 86, § 5

87 Interview with former Bosnian state prosecutor Munib Halilović, 3 March 2015, by Jagoda Gregulska.

88 Jagoda Gregulska's interview with a defence attorney representing defendants in war crimes at the State Court, Zvornik, February 2015.

89 DiNicola, *Criminal Procedure Reform*, 54. Lawyers in the SFRY employed techniques that contemporary Yugoslav practitioners called “cross-examination,” this was not however a separate questioning phase, but rather an adjunct to the presiding judge's questions which were the main focus of the trial inquiry.

90 Organization for Security and Cooperation in Europe, *Plea Agreements in BiH: Practices before the Courts and their Compliance with International Human Rights Standards*, May 2006, available at http://www.oscebih.org/documents/osce_bih_doc_2010122311061412eng.pdf

91 For negative voices on plea bargaining practice used at ICTY see Orentlicher ‘That Somebody Guilty Be Punished’, 57–66.

92 One of the most prominent cases of plea bargaining was the case of Biljana Plavšić, which greatly contributed to the discrediting of plea bargaining among Bosnian victims. The former president of Republika Srpska had surrendered to the ICTY, admitted guilt and had written an extensive report about her activities, after which she was given a lenient sentence. However, contrary to the prosecution's expectations, she never appeared in court as a witness against other accused and later withdrew her guilty plea.

and Article 264 of the CPC prohibit questions on prior sexual conduct or sexual orientation of victims who appear in court. Article 264 of the CPC also states that “in the case of the criminal offense against humanity and values protected by international law, the consent of the victim may not be used in favor of the defense.” This approach is very similar to the first version (proposed by judges on 11 February 1994) of Rule 96 ii of the ICTY’s Rules of Procedures and Evidence.⁹³

These changes were profound and often bewildered Bosnian trial participants and observers, especially in the first years of implementation. As one Bosnian legal expert said,⁹⁴ “Bosnian lawyers and judges had absolutely no idea how to work according to those new rules. Those who practiced at the ICTY were neither keen to share their expertise nor did they have time for it. We were left alone with this problem.”⁹⁵ The purpose of the reforms had been trial expediency, but during the first years of their implementation, proceedings were far from efficient, and at times, limited the rights of defendants. The OSCE monitored more than a hundred trials in BiH between January and August 2004 and concluded that more than a quarter of the judges, prosecutors, and defence attorneys were “not accomplishing a shift” to the new adversarial procedures.⁹⁶ These judges took an active role in the questioning of witnesses and rejected the new rules concerning the presentation of evidence, while the prosecutors relied on judges to question witnesses and lacked in confidence during the proceedings, delivering poor opening and/or closing arguments. Similarly, defence lawyers lacked direct examination skills, remained passive at trial, and lacked familiarity with the new trial procedures. However, over time the CPC ceased to be new, resistance against it got weaker and it became a more and more commonly accepted practice. And as one of the prosecutors concluded, “over a decade since the introduction of the current code, we should really stop talking about lack of training,

93 In its current version rule 96 ii says: “In cases of sexual assault [...] consent shall not be allowed as a defense of the victim.”

94 Jagoda Gregulska’s interview with an employee of the BiH Prosecutor Office Registry, 6 September 2014.

95 Ibid.

96 OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH, December 2004, p. 27–34 available at http://wcjp.unicri.it/proceedings/docs/OSCE_Trial%20Monitoring%20Report%20on%20the%20Implementation%20of%20the%20New%20Criminal%20Procedure%20Code%20in%20th%20Courts%20of%20BiH%20and%20Herzegovina_2004_ENG.pdf cited after DeNicola, C., *Criminal Procedure Reform in BiH: Between Organic Minimalism and Extrinsic Maximalism*. February 2010, Available at: http://works.bepress.com/christopher_denicola/1 p. 51.

lack of sources, lack of preparations. Who wanted to become trained, had such opportunities, who wanted to learn, did so.”⁹⁷

3.3. The Reform of the Criminal Code of BiH

Beside the CPC, the new Criminal Code (CC) of BiH also entered into force in 2003, initially to ensure its application at trials before the Court of BiH and the WCC. Certainly, the attempt was to introduce the new CC on all levels, and there have been cases in which the new code was applied at the district and cantonal courts. However, the majority of trials, which took place at the entity level, especially in Republika Srpska and the District Brčko, were still processed according to the old Yugoslav code of 1977, which was in force during the conflict. In the Federation of BiH, in addition to the Criminal Code of the Socialist Federal Republic of Yugoslavia, the Criminal Code of the Federation of BiH adopted in 1998 has been used in some cases. Naturally, as pointed out by numerous international observers, this plurality of criminal codes resulted in a lack of equality before the law,⁹⁸ since these three criminal codes differ significantly with respect to the definitions of war crimes, command responsibility, and sentencing. The SFRY Code only penalizes genocide and war crimes, while the 2003 Criminal Code of BiH contained additional provisions for crimes against humanity, a more comprehensive definition of war crimes and command responsibility. It barred perpetrators from invoking orders from superiors. The Criminal Code of BiH recognized rape and acts of sexual violence as crimes against humanity, while the Criminal Code of the Socialist Federal Republic of Yugoslavia and the Criminal Code of the Federation of BiH from 1998 recognized rape and forced prostitution only as war crimes committed against civilians and did not mention any other forms of sexual violence.

There are several parts of the Criminal Code that can be traced back to international criminal standards. While the definition of genocide in the Criminal Code (Article 171) is identical to that of all the international instruments criminalizing genocide, the definition of crimes against humanity (CC Article 172) closely follows that of the ICC Statute Article 7 rather than the ICTY Statute Article 5. Contrary to the ICTY Statute, the BiH CC does not require a nexus

97 Jagoda Gregulska's interview with Munib Halilović, February 2015.

98 See for example: OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in BiH*. 2008, available at http://www.oscebih.org/documents/osce_bih_doc_2010122311504393eng.pdf

between a punishable act and an armed conflict.⁹⁹ Also, the BiH CC explicitly defines several counts of crimes against humanity following the ICC Statute. When it comes to individual responsibility, the CC defines it in Article 180 after the ICTY Statute Article 7.¹⁰⁰ It avoids the distinctions made in the ICC Statute

99 ICTY Statute Article 5 states: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. Article 172 of the BiH CC states that Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts: Depriving another person of his life (murder); Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of BiH; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health.

100 Article 7 of the ICTY Statute states: 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

regarding the responsibility of military commanders and civilian superiors, and it does not include the concept of Joint Criminal Enterprise (JCE).¹⁰¹

3.4. Witness Support

One of the novelties transplanted from the ICTY's practice into the Bosnian judiciary, both on state and entity level, was the support offered to witnesses testifying in war crimes cases. The ICTY's Victims and Witnesses Section (VWS) was created in order to provide victims who appeared as witnesses in court with counselling, both psychological and legal, and to recommend protective measures where required. The ICTY insisted in its Annual and Completion Strategy Reports on the establishment of a witness support system in all Bosnian courts. The witness support units were first established at the Court of BiH in May 2005 while in 2010 an Investigation and Witness Support Department was established at the Prosecutor's Office of BiH, which employed a psychologist and several staff members.¹⁰²

The BiH model of supporting victims before, during and after trial, has been inspired by the one used by the ICTY. Namely, the witnesses (to a major extent survivors of war crimes themselves) are supposed to receive assistance by specialists – professional psychologists provided by the court or the office of the prosecutor respectively – at the court and in the preparatory (prosecutorial) phase of the proceedings. This model has been used by the ICTY, however not all states that are within the ICTY's scope of interest have enacted such a model.¹⁰³

Starting from 2008, the National War Crimes Strategy placed more emphasis on trials in the entity courts and the need for assistance to witnesses and victims increased. While it was the responsibility of the governments on the state and entity levels to set up such provisions, the United Nations Development Program (UNDP) took it upon itself to set up witness and victim support services. In cooperation with the High Judicial and Prosecutorial Council of BiH, as part the "Support to Processing of War Crimes Cases in BiH" project, UNDP has, until 2016, established and equipped sixteen Victim and Witness Support Offices in the Cantonal / District courts and Prosecutors' Offices in Sarajevo, Banja Luka,

101 JCE is not part of the ICC's Rome Statute. The ICC instead uses the concept of co-perpetratorship. See also: Ronen, *The Impact of the ICTY*, 155.

102 Aleksandra Nędzi-Marek's interview with the SCBiH WSD on 24 February 2015.

103 For instance the Republic of Croatia has created its own method of helping traumatized witnesses, namely through a network of volunteers.

East Sarajevo, Bihać, Novi Travnik and Travnik, Brčko District and Mostar, aiming to provide victims and witnesses in criminal cases with support before, during and after court proceedings¹⁰⁴. When the decision had been made to spread the witness support experience to the cantonal and district courts and prosecutors' offices, the SCBiH staff and the ICTY staff took part in their establishment by lending their advice and best practices. Soon the witness support services in lower courts and at the prosecutor's offices around BiH started to resemble the Witness Support Section of the SCBiH and the Investigations and Witness Support Department Prosecutor's Office of BiH, which had been established based on the ICTY model of witness support.¹⁰⁵ In the meantime, witness support and protection protocols, which were initially designed for war crimes cases, have permeated deeply into the criminal justice of BiH and are being employed for the protection of other vulnerable witness groups, such as children and victims of domestic violence.¹⁰⁶

However, the proliferation of the Court of BiH's witness and victims support experiences to cantonal and district courts has not been without problems. Monitors have frequently complained about the lack of adequate capacities and protocols.¹⁰⁷ A telling example of the lack of symmetry and institutional

104 http://www.ba.undp.org/content/Bosnia_and_herzegovina/en/home/presscenter/articles/2016/01/29/otvoren-odjel-za-podr-ku-svjedocima-u-zenici.html

105 Aleksandra Nędzi-Marek's interview with the Banja Luka District Court's Officer and her interview with the Officers at the State Court of BiH Witness Support Division in February 2015.

106 The basis of the establishment of the witness support divisions on the level of entities within the pilot project was a Memorandum of the UNDP, the Higher Judicial and Prosecutorial Council of BH, the relevant district courts/prosecutor offices, the RS Prosecutor's Office of the RS where applicable, and the Ministry of Justice of the RS. The course of the project was the following: the pilot part of the project started in 2010 and lasted for 15 months in the Cantonal Prosecutor's Office in Sarajevo and DPO in Banja Luka. In 2012, the project was launched at the District Court and District Prosecutor's Office of East Sarajevo and lasted for 9 months. After that, the RS authorities would not fund the newly established offices without a contribution from UNDP. The refusal inclined the the UNDP to assign funds from 1 June 2013 until 1 March 2014, which were then followed by the EU's Instrument for Pre-Accession Assistance (IPA) funding. At the time of the field research by Aleksandra Nędzi-Marek (mid-2015) all but one of the witness support divisions were financed from international funding, yet the office at the District Court of Banja Luka was funded from the court budget.

107 See for example OSCE: 'Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National

sustainability in the witness support endeavours on the local level could be observed in East Sarajevo. In 2012, staff members employed at the Prosecutor's Office of East Sarajevo were only allowed to lend support to the prosecution witnesses, but not to the defence witnesses in order to not undermine the adversary procedure. The latter could only get assistance from the Witness Support Services at the District Court, which was later challenged with a struggle for funding.¹⁰⁸ Also from 2012 onwards, the witness support program was deprived of stable funding, because the budget for employing qualified staff members was not approved by the entity government. The Head Judge of the East Sarajevo District Court claimed this as the possible reason for witnesses' insecurity, leading to their refusal to take part in trials.¹⁰⁹ The example shows how financial and political struggles on the ground put the internationally and locally engineered victim support sections at a high risk of ceasing to exist.

Sadly, it seems the levels of witness protection and support seem to correspond with the rank of the court offering them: the most comprehensive support is offered at the ICTY, followed by the Court of BiH, and finally by the entity courts. While the capacities of the cantonal and district courts have broadened over time, victims' organizations across BiH remain mistrustful and disappointed with the levels of protection. As one victims' organization representative complained, witnesses testifying in The Hague are lucky, and those testifying in BiH cannot hope for a comparable level of support and assistance.¹¹⁰ While the United Nations Development Program in BiH contributed to the establishment and improvement of facilities and assistance for the vulnerable witnesses and

Strategy for War Crimes Processing, January 2010, available at http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf also UNDP, Capacity Needs Assessment for enhancing provision of victim/witness support during the pre-investigative stage of criminal proceedings in BiH. 2013, available at: http://www.ba.undp.org/content/dam/Bosnia_and_herzegovina/docs/Research&Publications/Crises%20Prevention%20and%20Recovery/Capacity%20needs%20assessment%20for%20enhancing%20provision%20of%20victim-witness%20support/Izvjestaj%20ENG%20-%20WEB.pdf

108 Aleksandra Nędzi-Marek's interviews with the employees of district courts of East Sarajevo and Naja Luka and district prosecutor offices of East Sarajevo and Banja Luka in February 2015.

109 Intervju-Senaid Ibrahimfendic: Svjedoci odbijaju svjedočiti. 20 July 2015, available at <http://www.justice-report.com/bh/sadr%C5%BEaj-%C4%8Dlanci/intervju-senaid-ibrahimefendi%C4%87-svjedoci-odbijaju-da-svjedo%C4%8De>

110 Jagoda Greguljska's interview with members of victims' organizations, Srebrenica, August 2014.

victims at courts,¹¹¹ and several NGO's started offering legal and therapeutic support¹¹², still not much has been done by respective entity agencies.

As with the introduction of the 2003 Criminal Procedure Code, it can be asked to which extent setting up witness protection and support across the courts of BiH has been a result of the ICTY's influence and pressure to strengthen local judiciary capacities, and how much of it has been simply a process of modernizing the country's legal system. By now, witness protection has been recognized as an important aspect of the economy of investigations and trials in a variety of crimes, not only war crimes prosecutions. The European Commission has been supporting witness protection measures across the Balkans within IPA funded projects such as Witness Protection in the Fight against Organized Crime and Corruption.¹¹³ While such projects and standards might have eventually arrived in BiH without the ICTY's input of the early 2000s, it is clear that it was the Witness Protection unit at the Court of BiH and its evident relationship with the practices and standards established at the ICTY that provided a starting point for other actors to replicate and spread across other branches of the judiciary and across BiH. In this sense, the ICTY's impact can be seen as a spillover effect on the judiciary throughout the country.

3.5. Beyond the Judiciary

BiH has occupied a special place in the ICTY's work in a variety of ways. It was the country affected by more crimes than any other part of the former Yugoslavia, it was the object of the biggest number of trials and it was the country which received more referrals than any other under the ICTY's Completion Strategy. The latter has had a substantial impact on reforms in the country. But it has also been claimed that the Tribunal's influence went far beyond that. However, such claims are often based on assumptions that are of no particular substance. Touching upon notions of 'reconciliation', inter-ethnic dialogue or 'truth', a variety of commentators agree that albeit often limited and imperfect, the

111 Available at >http://www.ba.undp.org/content/Bosnia_and_herzegovina/en/home/operations/projects/crisis_prevention_and_recovery/project_sample1.html

112 Viva Zene Tuzla has been successfully implementing project funded by the European Commission "Ensuring access to Justice for witness/victims through strengthening existing and establishing new Witness support Networks across BH" See: <http://www.svjedocipravdapristup.com/index.php/en/o-projektu>

113 Available at >:http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2012/multi-beneficiary/pf5_ipa-2012_winpro-ii_final.pdf

Tribunal's work made a positive change in the Bosnian society.¹¹⁴ Among the changes of general societal norms, which are often attributed to the ICTY's influence, a shift in the attitudes towards victims of sexual violence has often been mentioned.¹¹⁵ While the Tribunal's contribution to gender-based jurisprudence is indisputable,¹¹⁶ Lejla Mamut, former director of Bosnian branch of the Swiss organization TRIAL who spent several years assisting victims of war-time sexual violence, acknowledges that the fact that the ICTY elevated rape to the level of a war crime has to some extent had a positive impact on Bosnian society, yet she does not want to overestimate its importance: "It gave the struggle of the rape victims some much needed publicity but I do not think that an average Bosnian would think sexual torture were less of a crime without ICTY's classification."¹¹⁷

In 2015, BiH witnessed some positive developments concerning the prosecution of conflict-related sexual violence. First, the Bosnian Parliament amended the BiH Criminal Code¹¹⁸, which now deprives accused of the possibility to invoke consensual conduct. In a civil court case a court sentenced two

114 For the latest study on the ICTY's impact on reconciliation, see Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Tribunal for Former Yugoslavia* (Routledge, 2014). On the impact of the ICTY on historical narratives, see Katarina Ristic 'Imaginary Trials: War Crime Trials and Memory in former Yugoslavia' (Leipziger Universitätsverlag, 2014). For a study dealing specifically with the issue of Tribunal impact perception, see Diane F. Orentlicher *That Somebody Guilty be Punished: The Impact of the ICTY in BiH* (Open Society Justice Initiative, 2010).

115 Contribution of the ICTY to jurisprudence related to conflict-related sexual violence is given.

116 For example, in a breakthrough judgment in 2001, the ICTY convicted two defendants of the crime against humanity of enslavement for treating two women as sexual slaves—the first time this charge had been found applicable to gender-based violence. For the impact of the ICTY's legacy on Bosnian jurisprudence related to gender-based violence, see Orentlicher, *That somebody guilty be punished*, 125; For an analysis of BiH's State Court jurisprudence in gender-based violence cases see OSCE reports 'Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges. An Analysis of Criminal Proceedings Concerning Sexual Violence Before the Court of BiH between 2005 and 2013', available at <http://www.osce.org/bih/117051> and *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges* (2004–2014) available at <http://www.osce.org/bih/171906>

117 Jagoda Gregulska's interview with Lejla Mamut, May 2014.

118 <http://depo.ba/clanak/131109/vazna-izmjene-krivicnog-zakona-odgovorni-zamucenja-silovanja-i-prisilni-nestanak-vise-teze-ce-izbjeci-pravdu>

men found guilty of wartime rape to pay financial reparations to the victims.¹¹⁹ While the first came as a late response to the recommendations made by the UN Committee Against Torture, and signalled a significant improvement in the legal framework applied to investigation and trials of sexual crimes, in practice, even prior to the change in the legal code, the BiH court ruled that ‘coercive circumstances’ exclude the possibility of invoking the consent of the victim.¹²⁰

While there has been a substantial increase in both international and national attention paid to the issue of wartime sexual crimes, Mamut attributes it more to the initiative of individuals such as William Hague and Angelina Jolie and the UK’s financial support than to the Tribunal’s impact. In a similar manner, Saliha Djuderija, who has for years been working on the issue of wartime rape victims’ rights on behalf of the State Ministry for Human Rights and Refugees, does not see much of an impact of the ICTY on the issue of sexual war crimes. “They [ICTY] offered a classification but they did not set an example of retribution.”¹²¹ Referring to the 2006 change in law in BiH Federation¹²² (the Bosniak-Croat entity), which enabled victims of wartime rape to claim benefits as civilian victims of war without the need to undergo a physical examination proving 60 % bodily harm (a condition required prior to the law amendment), Djumbrija credits local victims’ and women’s organizations with the change. Specifically, she emphasizes the importance of “Grbavica”, a Bosnian award-winning film telling the story of a woman who brought up a child born of wartime rape: “The film did more to the victims than the Tribunal did as it helped different actors to mobilize and lobby for the change of the law.” The Federation of BiH is the only post-conflict zone in the world where rape survivors are explicitly recognised as war victims and can thus claim a war pension. All of this would not have been possible without the commitment of women’s organizations in BiH and the rape survivors themselves, the very women that were supposedly silenced by shame.¹²³

119 http://trial.ba/wp-content/uploads/2015/12/Saopcenje-za-javnost_Okrugli-sto_TRIAL-1.pdf

120 OSCE, *Combating Impunity*, 6.

121 Interview with Saliha Djuderija, August 2015.

122 <http://fmrsp.gov.ba/s/images/stories/zakoni/Zakon%20o%20izmjenama%20i%20dopunama%20zakona%20o%20osnovama%20socijalne%20zastite%20sl%20novine%20FBiH%2039-%202006.pdf>

123 “... and that it does not happen to anyone anywhere in the world” *The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia*. Medica Mondiale, 2009 available at http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/

4. Institutional Change on the Entity Level

The impact of the ICTY in general, and its jurisprudence in particular, on the entity level is much less pronounced than on state level. As Ronen points out, the fact that ICTY jurisprudence was not, at first, translated to the local languages prevented it from being directly accessible to entity courts. 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.¹²⁴ For example, important substantive legal doctrines developed by the ICTY, such as command responsibility, have been disregarded, if not outright rejected. Human Rights Watch describes a situation in which “in many cases, cantonal and district court decisions do not even mention relevant ICTY verdicts. This has resulted in several decisions that are significantly out of line with international precedent.”¹²⁵ In one verdict rendered by the Federation's Supreme Court, a defendant was acquitted of the charges that, as the prison warden, he failed to prevent the prison guards from maltreating prisoners-of-war and that he failed to initiate disciplinary or criminal proceedings against these prison guards. The grounds for this acquittal were that such conduct was not a criminal offence under Article 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia.¹²⁶ Only the Criminal Code of BiH foresees provisions for crimes against humanity and only it comprehensively defines command responsibility and excludes “superior orders” as a defence. A high-ranking representative at the Ministry of Justice of the Federation of BiH defends the entity parliament's decision not to abandon the 1977 SFRY Criminal Code. While he acknowledges that the 2003 BiH Criminal Code is much more up to date with the developments in international criminal law, having integrated crimes against humanity, the fact that it was the old SFRY Code that was in power at the time of crimes being committed ought to be binding for its applicability during the war-crimes trials. As such, he considers the Federation's resistance to use the newer code a success, and he is glad that entities were not subjects of

Dokumente/English/Documentations_studies/medica_mondiale_and_that_it_does_not_happen_to_anyone_anywhere_in_the_world_english_complete_version_dec_2009.pdf

124 Ronen, *The Impact of the ICTY*, 155.

125 Human Rights Watch, *Still Waiting Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in BiH's Cantonal and District Courts*. Human Rights Watch, 2008, 55.

126 OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in BiH*. OSCE, August 2008, passim.

as much “international engineering” as the state level judiciary.¹²⁷ However, the Constitutional Court of BiH took a different, more critical standpoint in 2007, when it upheld the legality of applying the new Criminal Code in cases dealing with crimes committed during the war, arguing that in some cases the ICTY has also imposed long-term prison sentences that would not be allowed under the SFRY criminal code. At the same time, the Constitutional Court argued that that the new CC should not per se be seen as more strict or disadvantaged in comparison to the – at first sight – more lenient SFRY Code, since at the time the crimes were committed, the code from 1977 permitted the death penalty.¹²⁸

The unresolved dispute on the possibility of retroactive application of criminal codes of 2003 in war crimes cases eventually reached the European Court of Human Rights in Strasbourg (hereafter: ECHR). In the case *Damjanović and Maktouf against Bosnia and Herzegovina*,¹²⁹ the ECHR’s Grand Chamber was in line with Bosnia and Herzegovina’s entity courts’ logic. The latter had been consequently resisting the application of the 2003 reformed criminal laws to war crime cases, even though the State Court of BiH would do so. Yet, according to the ECHR, Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms prevailed over any utilitarian justification.

4.1. Capacity Building and Knowledge Transfer

As several of the international legal experts working in BiH stated: the lack of local interest or an active approach towards the improvement of war crimes trials is significant. One of the informants commented that while the lack of financial support to the entity courts has been apparent for years, he fears that even if the international community had invested more, the money would have simply been stolen.¹³⁰ Another legal professional recalled the total lack of interest on the side of the local professionals in developing the local capacities: “Everything has to be done for them”.¹³¹ Some authors believe that local institutions are, also due to a lack of their managers’ leadership skills, usually unable to take an effective

127 Jagoda Gregulska’s interview with a high-level representative of the Federal Ministry of Justice, May 2015.

128 Human Rights Watch, *Still Waiting*, 54.

129 See more: *Maktouf and Damjanović v. Bosnia and Herzegovina* (Applications nos. 2312/08 and 34179/08), Judgment of the Grand Chamber (18 July 2013)

130 Interview with a high-ranking functionary at the Federal Ministry of Justice,

131 Interview with an expert at OHR

and leading role in organizing formalized transfer of knowledge initiatives.¹³² Instead, they have been largely reliant upon internationals to conduct these initiatives. The so-called “human factor” has also been identified by several of our interlocutors, and starting from the devastation that the war wrought upon the professional legal milieu in BiH and ending with the current apathy widespread in the country, the role of the individuals involved in the war crime trials certainly cannot be overlooked. When the OHR, in cooperation with the ICTY, started its reforms of the Bosnian judiciary, the lack of local professionals became apparent. The wartime brain drain impacted the legal sphere, as most of other professions, and left the state without a great number of professionals who were either killed or relocated to other countries. Consequently, it was not a great number of lawyers and judges who responded to the internationally announced calls and openings for new legal positions in BiH. Those more capable went on to work at/with the ICTY and in many cases stayed with their international careers. The lack of adequate attitudes, skills and professional standards, while less tangible than the argument of logistical gaps, is nevertheless important for understanding the scope of the ICTY's impact on the entity-level judiciary. From the signing of the Dayton Peace Agreement, officials of the Federation of BiH supported full cooperation with the ICTY and never offered protection to any accused.¹³³ Similarly, an OSCE's legal expert confirms that anti-ICTY messages sent by the Republika Srpska's political leadership have been absent on the Federation side.¹³⁴ However, when it comes to practicalities of improving war crimes trials, both entities have offered similar responses: nobody says no to training and improving capacities. According to the OSCE expert, at this stage, the difference is mostly on the level of political publicity rather than on-the-ground cooperation. More than that, given the Federation's administrative and judiciary fragmentation (ten cantons, each with its own judiciary structures) on the one hand and RS's centralized system on the other make cooperation within the Federation more difficult as there are many more actors involved.

A to some extent local initiative in this regard came with the National War Crimes Strategy of 2008, which included setting up special capacities for the

132 J. A. Chatman, J. T. Polzer, S. G. Barsade, M. A. Neale, 'Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes', *Administrative Science Quarterly*, vol. 43, No. 4. (Dec. 1998), 749–780.

133 Nettelfield, *Courting Democracy*, 59.

134 Jagoda Gregulska's interview with an OSCE officer who requested anonymity, May 2015.

referral of war crimes cases to the entity courts.¹³⁵ The least complicated cases were to be tried on the entity levels. In the framework of the Strategy, the UNDP was charged with the capacity development *sensu stricto*, through – among others – furnishing the interiors of courtrooms and witness facilities, whereas the Office Of Overseas Prosecutorial Development Assistance And Training (OPDAT) and USAID would conduct various training activities for court and prosecutors' offices staff.¹³⁶ The OSCE, apart from dealing with the training of professionals, would also monitor cases. UNDP conducted a project facilitating access to the ICTY's digitalized archives and the exchange of experience between legal professionals through conferences and study visits.¹³⁷ Between 2009 and 2011 the ICTY, along with the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE implemented a joint project funded by the EU whose aim was to assist domestic jurisdictions of the Western Balkans region in strengthening their capacities to handle war crimes cases in an effective and fair manner, consistent with the highest international standards of due process. However, while the project was supported by OSCE field operations in Belgrade, Podgorica, Priština, Sarajevo, Skopje, and Zagreb, the OSCE Office in Banja Luka was not at all involved in it, which even more contributed to the existing mistrust towards the ICTY in the RS and bolstered the impression of a lack of ownership in the realization of the project. If the Banja Luka OSCE Office had been added to the list, it could be accused of questioning the statehood of BiH and its claim to have only one official capital – Sarajevo.

Nevertheless, the project allowed the local judicial authorities to grasp the methods of acquiring useful evidence from the ICTY and facts established by it. But still, the project left space for more training in this regard, because not all the prosecutors and legal advisors use the facts already established by the ICTY, which hinders a rapid processing of cases.¹³⁸ Within the framework of this project, 15 manuals for legal professionals in the region were drafted in English and translated into local languages. The manuals were developed by the International

135 OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges (2004–2014)', <http://www.osce.org/bih/171906>, 10.

136 Available at: http://wcjp.unicri.it/proceedings/docs/ICTJ_BiH_Court_BCS.pdf, 30–33.

137 Available at: http://www.ba.undp.org/content/dam/Bosnia_and_herzegovina/docs/Operations/Projects/CPR/Needs%20Assesment/SPWCC%20Project%20Document%20ENG.pdf, 12

138 Aleksandra Nędzi-Marek's interview with OSCE officials in June 2015.

Criminal Law Services (ICLS), an independent organization of experts of international criminal law and the related humanitarian law.¹³⁹ Moreover, a jurisprudence database of the ICTY was established in local languages in order to allow local legal professionals to develop literacy in the international standards. The deliverables of the project have been distributed to the RS district courts' principals, the district prosecutor offices (hereafter DPOs) principals, as well as to the Centre for Education of Judges and Prosecutors of the RS (hereafter: CEJP RS). However, while the judges interviewed had come across the publications, they did not show enthusiasm about the materials.¹⁴⁰

Generally, the RS is a good example to illustrate the division between adaptation and internalization, which permeates the literature on Europeanization.¹⁴¹ The EU, the OSCE, the UN, and the ICTY may be able to initiate the amendment of laws, the reform of institutions and even shifts in budget allocations, but it is up to the actors on the ground to adopt the new rules as theirs and implement them on a daily basis. When the norms that proliferate from the international institutions are not accepted as legitimate, it is unlikely that they will be channelled into everyday decisions and administrative routine. This lack of internalization in the RS is to some extent a result of the ICTY's distance from the conflict region, of its detached character, as well as the political ambient in the entity, which has been questioning the legitimacy and impartiality of the ICTY from its very beginning.

As William Burke-White claims, for the ICTY it was helpful to be ignorant, remote, to be removed, not to have a dialogue in order to remain impartial.¹⁴² When local lawyers were later encouraged to work at the Tribunal and gain understanding of its culture, there were very few incentives for these professionals to go back. "Put boldly, it is much harder to find a job in the justice sector in BiH coming from the ICTY or another international tribunal than if they had stayed there in the first place."¹⁴³ This only changed with the Completion Strategy and the new focus on developing local capacities for war crimes trials. The buzzwords of the ICTY's "capacity building" and "transfer of knowledge" should be however looked at more carefully. The development of domestic capacities should not be conflated with the mere transfer of knowledge or skills. One of the concerns is

139 Available at: <http://wcjp.unicri.it/deliverables/>

140 Aleksandra Nędzi-Marek's interviews with RS judges, conducted in February 2015.

141 See among others Kmezić, Marko, *EU Rule of Law Promotion – Judiciary Reform in Western Balkans*, London, 2017.

142 Burke-White, *The Domestic Influence*, 314.

143 Burke-White, *The Domestic Influence*, 286.

that the focus has generally been on providing visible skills, such as specialized forms of training.¹⁴⁴ Less attention has been paid to the administrative and material conditions in which these new capacities should be used.¹⁴⁵

The RS Police¹⁴⁶ has aided the ICTY Investigators working on the BiH territory.¹⁴⁷ The cooperation was at first informal. On 17 May 2005, the Minister of Interior of the RS issued a decision establishing a special unit within the RS Police called “The Working Team for documenting and initiating proceedings for the prosecution of war crimes committed in BiH by members of military, paramilitary, police and other formations on territory under the control of Federal authorities”, which would work under close supervision of the ICTY Investigators, using their methods of investigation, collecting evidence material for the ICTY as well as capturing the indictees. The cooperation had a “learning by doing” approach. The police worked with prosecutors and the ICTY investigators. In the meantime, the RS Police has undergone demilitarization and certification through vetting and various trainings including on Human Rights issues.¹⁴⁸

Due to the nature of Police tasks at that time, police work has gained a strictly regional character. BiH (including the RS) Police started to cooperate with Serbia and Montenegro for the purpose of capturing fugitives. They would hold regular meetings for the purpose of coordination, exchange of experience and knowledge. The extensive regional dimension of Police cooperation lasted from

144 Some of the critical voices regarding ICTY’s capacity building actions in the region come from Justice Richard Goldstone and Prosecutor David Schwendiman. See Mark S. Ellis, “The Legacy of the ICTY: National and International Efforts in Capacity Building”, In: R. H. Steinberg (ed), *Assessing the Legacy of the ICTY*, Leiden-Boston 2011, 141–145.

145 Ellis, *The Legacy*, 141–145.

146 The systematization of the Police in BiH is as follows: SIPA, Centar Javne Bezbednosti, MUP, see more: http://www.fichl.org/fileadmin/fichl/documents/Pre-TOAEP/FICHL_3_Backlog_in_BH.pdf, p. 23

147 *National War Crimes Strategy adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008* decided to strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases; – the agenda of the NWCS 2008, but in practice very close involvement of the RS police from 2003/2004, from when the RS started to cooperate in handing the fugitives to the ICTY.

148 Aleksandra Nędzi-Marek’s interviews with high-ranking Police officers from Banja Luka, Doboј and the ICTY investigator working on BH territory, in June 2015 and February 2015 respectively.

around 2004 until 2011. This proves that if not for the needs of the ICTY, there would be no regional cooperation in the above described manner.

At the later stage in 2013, once partial informal and formal trainings for the local Police had been concluded, the OSCE with support of several foreign embassies¹⁴⁹ published a crucial document meant to facilitate the work on war crimes investigations by the local police. The document was considered a compendium of war crime investigations and entitled: "Investigation Manual for War Crimes Against Humanity and Genocide in Bosnia and Herzegovina". It has been used as a handbook for the local police and investigators within prosecutor's offices. The manual has included exactly the experience in war crimes investigations gained – among others by the ICTY Staff – on the territory of BiH. Another handbook created at a later stage was the manual on "Investigating Wartime Sexual Violence", written in the course of the project implemented by the OSCE, yet financed by the British Embassy, in cooperation with FBIH and RS Ministries of Interior.

Both handbooks have been used in Police Academies all over Bosnia as well as in other ad hoc trainings for investigators and police professionals. The trainings were mostly conducted by Trainers of Trainers, who have undergone a set of trainings themselves in 2014 by Patricia Sellers¹⁵⁰ who previously worked at the ICTY and with ICTY investigators. The trainings not only concentrated on the technical skills, but also included the element of soft skills and gender sensitive training. The trainers have themselves been involved in working with survivors of wartime sexual violence in the years after the conflict.

Conclusions

The institutional reforms in BiH resulting from an (in)direct impact of the ICTY, which were subject of this chapter, showed the complexity of post-war BiH, not only of the judiciary, but even more of the political and social system.

A quick glimpse at BiH's post-2003 legal system is enough to notice that the country has been subject to a number of dramatic changes. Even if the institutions and procedures discussed throughout this chapter have been mostly imposed by the OHR, they have been modeled on the ICTY. It should to be stated here that several respondents contributing to this research argued that some of the reforms were inevitable for BiH with or without ICTY's impact. For instance, a move towards a more adversarial mode of conducting trials was a trend evolving

149 Switzerland, UK, US, the Netherlands, Norway, Germany, Italy.

150 <https://www.opensocietyfoundations.org/people/patricia-sellers>

in most of European countries distancing from their socialist legacy and as such should not be automatically attributed to the ICTY's influence. In a similar manner, a state-level court was also to be expected once the country advanced in the process of centralization and consolidation. The chapter also illustrated that, in comparison with other states in the region, in BiH it is more difficult to capture whether (and to what extent) reforms could be solely attributed to the ICTY, due to the fact that the state administration has been controlled and financed by the international community. In this sense, the international community (of which the ICTY can be considered, at least indirectly, a part) remains an overarching instance that impacts not only the introduction of reforms, but also its long-term functioning, since many judiciary institutions would very likely cease to function in one way or another if they were not financed or protected by the international community. Certainly, despite all difficulties in creating and internalizing these reforms, and despite all tensions that they caused, the reforms in the long run contributed to an improvement on certain levels within the judiciary of BiH. However, these reforms were not able to completely lift the existing political deadlock in BiH that is mirrored on all parts of the state, including the difficult relations between the central state and the entities (especially RS), which are still contested. 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.¹⁵¹ Many of the relevant laws were ultimately approved or ratified by the national Parliament. Yet its national approval was arguably influenced by the belief that this was internationally required. In this context, it was argued that the internationalization of the transitional process resulted in removing it from local responsibility and actors.¹⁵² At the same time, how likely would the reforms have been without the significant roles played by the international actors in a country facing such strong internal divisions? Dissatisfaction with the constitutional structure of the country is particularly forceful in RS, where the possibility of secession is occasionally raised. 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. In this context, Lara Nettelfield calls the ICTY's impact a "liberal interventionist project projected into what was fundamentally an illiberal environment."¹⁵³

151 Ronen, *The Impact of the ICTY*, 115.

152 Subotić, *Hijacked Justice*, 162–163.

153 Nettelfield, *Courting Democracy*, 56.

As a consequence of this, a formal hierarchy between the state and the entity courts is missing – rather than supervising the local courts, the Court of BiH can merely distribute the war crimes cases to them based on an assessment of their complexity and sensitivity, and recall the cases should it be established that the standard of the trial is questionable. This again is because the entity level courts are supervised by their respective entity supreme courts. The lack of a supreme court on the state level seriously undermines the justice efforts of BiH; as a local lawyer stated, without a supreme court on the state level, it is difficult to speak of equality before the law.¹⁵⁴ But while the ICTY did not attempt – nor would have had the mandate – to create a supreme court in BiH, it did certainly directly contribute to the creation of special institutions that deal with war crimes, which is – given the fragile political situation in BiH even 20 years after the end of the war and given the comparative look in the region – a remarkable impact.

Over two decades have passed since the end of the Bosnian war, nearly fifteen years since the Tribunal announced its Completion Strategy and consequently shifted efforts to support local judiciaries. While international assistance, at times coming close to direct command, has been vast, certain political forces within BiH remain sceptical, to say the least, of some of the reforms introduced to the country since the end of the war. This translates into a lack of adequate financing of services necessary for assuring fair and efficient investigations and trials, or even, as open obstructions to system of war crime trials put in place during the past decade. With international presence and leverage presumably set to decrease in BiH over the next years, one can't help but wonder how much of the ICTY's influence channelled into the country will remain.

What seems to be certain is that the ICTY has contributed to the ways in which Bosnians understand and desire transitional justice to happen: Justice means putting criminals on trial and sentencing them.¹⁵⁵ Further, with a great number of Bosnians testifying or informing the investigations, the ICTY has contributed to a certain feeling of participating in the 'justice process; it has given a sense of importance, dignity and power to the victims and witnesses.¹⁵⁶ Those testimonies and investigations resulted in the creation of an enormous archive full of documents illuminating BiH's tragic war fate. While some hoped that this archive would offer an authoritative 'truth' about the war, facts and interpretations collected there continue to be contested and challenged. The

154 Interview with an officer at the Bosnian State Court, August 2014 (who requested to stay anonymous)

155 Interview with OHR justice expert, August, 2014

156 Ibid

ICTY's contribution and cooperation with the OHR, the OSCE, UNDP, and the EU transformed the country's judicial system and improved war crimes trials standards. It has been argued that this could further positively improve the entire judiciary and provide a spillover effect on other branches.¹⁵⁷ The question of domestic ownership of those changes however remains. In a country with fairly weak central institutions, the State Court, with the War Crimes Chamber central to this chapter remains. This fact takes the impact of the ICTY beyond the judiciary and the societal – ICTY's cooperation with other international actors active in BiH has been used to strengthen state institutions, and, as claimed by some, to weaken and delegitimize the uncooperative Bosnian Serb entity in order to make calls for a unitary and centralized BiH.¹⁵⁸

157 Y. 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', *Israel Law Review* 431 (2013), 431–453.

158 Subotić, *Hijacked Justice*, 162.