

**PROSECUTIONS  
CASE STUDIES  
SERIES**

**The War Crimes Chamber in Bosnia and  
Herzegovina: From Hybrid to Domestic Court  
(2008)**



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The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

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*The Serious Crimes Process in Timor-Leste: In Retrospect* (April 2006)

*Bosnia and Herzegovina: Selected Developments in Transitional Justice* (October 2004)

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## EXECUTIVE SUMMARY

The War Crimes Chamber of the Court of Bosnia and Herzegovina (BWCC or War Crimes Chamber), which began its work 9 March 2005, has been the most significant national effort in Bosnia and Herzegovina (BiH) to investigate and prosecute persons allegedly involved in serious violations of international law during the 1992–1995 conflict. It also has given the legal community useful experience with a “hybrid” court in which international and national judges serve together.

The War Crimes Chamber was intended to give the national judiciary the capacity to conduct war crimes trials according to international standards. Its establishment was a vital component of the strategy designed by the International Criminal Tribunal for the former Yugoslavia (ICTY) to close all its proceedings by 2010, as requested by the UN Security Council. Created with strong international support, the War Crimes Chamber envisaged gradually phasing out international judges. What began as a hybrid tribunal will gradually become a court run entirely by nationals. This change is planned to be completed by December 2009.

Three years after the start of the court’s first trials, with some senior positions already transferred to national personnel, this report provides an account of the proceedings and identifies lessons for both the War Crimes Chamber and future hybrid tribunals.

The purpose of this report is to provide basic information to help guide policy-makers and stakeholders in the establishment and implementation of similar mechanisms. It is part of a series that aims to provide information on and analysis of policy and practical issues facing hybrid tribunals. The ICTJ has published similar case studies on Sierra Leone, Kosovo, and Timor-Leste.

We draw the following conclusions, based on the court’s work through mid-2008:

- *Overall impact.* The War Crimes Chamber has generally shown professionalism and discipline in its administration and commitment in its judicial undertakings. In phasing out the involvement of international jurists and absorbing the court’s overall costs into the national budget, the BWCC may serve as a promising model for hybrid tribunals in other countries. However, delay in adopting a clear strategic approach to the Court’s potentially enormous caseload has risked undermining some of the progress achieved.
- One of the main challenges is prioritizing cases. Related practical questions include maximizing the ICTY’s legacy in prosecution of war crimes cases in Bosnia. Having committed vast resources to the ICTY, the international community must ensure that the national courts can use the material generated by the ICTY.
- *Fairness of the trials.* Observers have generally considered trials before the BWCC to be fair, although in some early trials closed sessions were too frequent. There has been some level of confusion or uncertainty in the application of the law in some areas, including plea agreements. The Defense Office (OKO) has done an admirable job, but additional resources to conduct investigations may be needed.
- *Legitimacy.* Retaining public interest remains a major challenge for the BWCC. Civil society has tried to undertake outreach through a Court Support Network, but the War Crimes Chamber has taken little responsibility for conducting outreach. In particular, outreach activities have been lacking to perpetrators’ communities. Most opposition to the BWCC still comes from the Bosnian Serb community. The BWCC should be more

open to the media and present its work more frequently in the affected communities, so that it does not risk seeming remote or irrelevant to the public.

- *Legacy.* As part of a national court the BWCC offers a promising model in terms of legacy. Cooperation between international and domestic counterparts has generally been good. Phasing out international participation and having domestic actors take on full responsibility is an attractive model of domestic ownership and sustainability. However, concrete criteria must be developed to measure the effect of international involvement. In addition, complications have arisen in the relationship between the BWCC and the domestic courts in the Federation of BiH, the Republika Srpska, and the Brčko District, all of which have tried war crimes cases before and after the establishment of the State Court. The efforts of the local courts have attracted less attention both from the international community and from the BiH government. A more comprehensive approach to ending impunity is needed to make further progress in domestic criminal justice and other forms of transitional justice. These should include more-inclusive reparation schemes as well as official truth-telling mechanisms at the national and regional level.



## I. INTRODUCTION

### A. Brief Background

Slovenia's declaration of independence from the Republic of Yugoslavia in 1991, followed by Croatia's, marked the start of the dismantling of the former Yugoslavia. Bosnia and Herzegovina (BiH) followed suit, organizing a referendum in 1992 that revealed the desire of the territory's large populations of Bosnian Muslims (Bosniaks) and Bosnian Croats for an independent state. The European Community and the United States quickly recognized BiH's independence, but Bosnian Serb forces besieged Sarajevo, marking the beginning of a long and vicious war.

What resulted was the worst conflict in Europe since the Second World War, described in detail elsewhere.<sup>1</sup> Between 1992 and 1995, of a population of 4.5 million an estimated 100,000 people were killed, including 16,000 children.<sup>2</sup> Some 2.2 million became refugees; 1.3 million were internally displaced, and up to 15,000 people are still believed missing.<sup>3</sup> The conflict was characterized by appalling atrocities—massacres, widespread rape, imprisonment in concentration camps, and brutal ethnic cleansing. In a particularly notorious incident 8,000 Bosniak men were killed in Srebrenica in July 1995 in what the ICTY ruled was genocide.<sup>4</sup>

During the conflict Bosnian Croats received support from Croatia and the Bosnian Serbs received support from Serbia, which maintained one of the strongest armies in Europe, the Army of Yugoslavia (VJ).<sup>5</sup> Throughout the war civilian populations were specifically targeted. A key objective of most armed groups was to create ethnically homogeneous territories through forced displacement and other violence that came to be known as “ethnic cleansing,” which constituted crimes against humanity.<sup>6</sup>

The fighting in BiH finally halted with the brokering of the Dayton Peace Agreement in November 1995.<sup>7</sup> As a result of this agreement Bosnia consists of two main “entities” of roughly the same size, the Federation of Bosnia-Herzegovina (mainly composed of Bosniaks

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<sup>1</sup> A standard source on the causes and the beginning of the armed conflicts in the former Yugoslavia, including the conflict in Bosnia, is Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (New York, 1996). The jurisprudence of the ICTY has provided comprehensive accounts of the war crimes, crimes against humanity, and genocide committed during the Bosnian war.

<sup>2</sup> The number of victims during the recent war in BiH has been the source of controversy and political manipulation. Since 1995 international officials have accepted an estimate of 200,000 victims (see Report of the Secretary-General on the UN Mission in BiH, UN Doc S/2002/1314 (02/12/2002), as has the ICTY in the Čelebići case (*Prosecutor v Delalić and others*, case no. IT-96-21, judgment, 16 November 1998, para. 107). But independent and rigorous research under the authority of the Research and Documentation Center (RDC) in Sarajevo recently concluded that the total number of casualties was probably lower. The RDC has established identities of 97,207 persons killed or missing; 39,684 were civilians. Of this number 66 percent of victims were Bosniaks, 25.5 percent Serbs, and 8 percent Croats. See RDC, *Population Losses in Bosnia and Herzegovina '92–95*, [http://www.idc.org.ba/presentation/research\\_results.htm](http://www.idc.org.ba/presentation/research_results.htm) (accessed 24 June 2008).

<sup>3</sup> International Committee of the Red Cross news release, 7 February 2006.

<sup>4</sup> See *Prosecutor v. Krstić*, case no. IT-98-33, judgment, 2 August 2001, confirmed by Appeals Chamber judgment, 19 April 2004.

<sup>5</sup> At that time what is now Serbia was still known, together with the Republic Montenegro, as the Federal Republic of Yugoslavia.

<sup>6</sup> See, for example, *Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-A, Appeals Chamber judgment, 17 September 2003, paras. 208–23.

<sup>7</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, UN Doc. S/1995/999 (1995). The agreement was completed in Dayton on 21 November 1995, and signed in Paris on 14 December 1995.

and Bosnian Croats) and Republika Srpska (mainly composed of Bosnian Serbs). Each entity has its own government, parliament, and judiciary.<sup>8</sup> The Brčko District is a separate political entity with autonomous status. Dayton also established a tripartite shared presidency, composed of a Croat, a Bosniak, and a Serb representative, at the state level.

In addition to this unique constitutional structure, the Dayton Peace Agreement created the Office of the High Representative (OHR) to represent the international community in Bosnia. In the face of continued political obstruction by nationalist parties, in 1997 the OHR was endowed with special powers, commonly referred to as the Bonn powers, including the capacity to dismiss local officials at any level or to impose laws.<sup>9</sup> The role of the OHR made BiH a de facto protectorate where international authorities carried out nation-building and thousands of foreign soldiers guaranteed security. In addition, this situation was further complicated by the strength and following of nationalist politicians.

In the past decade BiH has been spared major outbursts of inter-ethnic violence. But deep-seated ethnic and religious divisions still shape the political life and state structures formally determined by the Dayton Agreement.<sup>10</sup> Nationalist parties continue to flourish at the entity level, and a coalition of these opposing parties governs the central state. Political elites representing the three constituent groups have made little progress toward a shared vision of Bosnia as a state. Bosnian Serb leaders generally oppose the transfer of powers, for example over police and economic matters, to the state, as favored by the Bosniaks. On several occasions the popular prime minister of Republika Srpska, Milorad Dodik, has expressed resentment against BiH as a state in which Serbs are coerced to live against their wishes.<sup>11</sup> Before Kosovo's declaration of independence in February 2008 the Bosnian Serb leadership made statements about the possibility of a referendum on self-determination of the Republika Srpska.

Despite fundamental disagreements about the shape and the future of the country, BiH made slow progress toward membership in the European Union by signing a Stabilization and Association Agreement with the EU on June 16, 2008. The drive toward membership has come in good measure from the EU itself, in the hope that this incentive might gradually pacify the ethno-nationalistic sentiments that continue to afflict the country. The high representative has also been the EU's special representative (EUSR) since 2002. The EUSR's mandate is based on the EU's policy objective in BiH, a "stable, viable, peaceful and multiethnic BiH, cooperating peacefully with its neighbors and irreversibly on track towards EU membership."<sup>12</sup>

Because of the political situation and the lack of necessary reforms, the high representative continues to use his executive powers to facilitate reform and governance. For example,

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<sup>8</sup> The Federation of BiH is divided into 10 cantons that have their own governments. Bosniak authorities dominate five, Bosnian Croats dominate three, and the remaining two have power-sharing arrangements between the two groups. See ICTJ, "Selected Developments in Transitional Justice," October 2004.

<sup>9</sup> The Bonn powers were granted by the Peace Implementation Council comprising a group of 55 countries and international organizations that have sponsored and directed the peace implementation process.

<sup>10</sup> Although the word "ethnic" is commonly used in the Bosnian context, it must be remembered that all three groups are southern Slavs.

<sup>11</sup> Most recently, on June 3, 2008, Dodik stated, "I don't like Bosnia—so what are we going to do about that!" "Dodik: 'Ja ne volim Bosnu, i šta sad da radimo!'" ("Dodik: 'I Don't Like Bosnia—So What Are We Going to Do About That!'", *Web site 24 sata*, [www.24sata.info/13500](http://www.24sata.info/13500), 3 June 2008 (accessed 24 June 2008).

<sup>12</sup> Council Joint Action 2008/130/CFSP of 18 February 2008, Extending the Mandate of the European Union Special Representative in Bosnia and Herzegovina, 19 February 2008, [www.eusrbih.eu/legal-docs/1/?cid=2370,1,1](http://www.eusrbih.eu/legal-docs/1/?cid=2370,1,1), article 2 (accessed 24 June 2008).

between 1 January and 30 September 2007, he used such powers on 31 occasions, imposing legislation and removing officials.<sup>13</sup> Despite frequent calls from Bosnian Serb politicians for termination of the OHR mandate, the international community has declared that closure is not in sight until BiH has accomplished five economic and political objectives, which include the adoption of a national strategy for processing war crimes cases.<sup>14</sup> In addition, the Steering Board must make a positive assessment of the situation in BiH before transition is possible. For this to happen BiH political leaders must comply fully with the Dayton Agreement and avoid any inflammatory statements or action that would threaten or violate the agreement.<sup>15</sup> This is the challenging political backdrop against which the War Crimes Chamber of the Court of Bosnia and Herzegovina operates.

## **B. The Creation of the War Crimes Chamber**

The War Crimes Chamber, officially inaugurated 9 March 2005, provides an important model of a hybrid war crimes tribunal.<sup>16</sup> It represents the most significant effort in BiH to investigate and prosecute those allegedly involved in serious violations of international humanitarian law at the national level. One of its defining features has been the support of international personnel in building this domestic court.

Authority for law enforcement in BiH is divided between the central state and the entities. The establishment in November 2002 of the Court of BiH, often referred to as the “State Court” and with jurisdiction over both entities, allowed for the exercise of judicial power at the center. It also coincided with the beginning of the reappointment of all judges and prosecutors in the country, implemented under the authority of the OHR and officially completed in September 2004. The subsequent creation of the War Crimes Chamber within the State Court and the Special Department for War Crimes in the State Prosecutor’s Office was part of the reforms.<sup>17</sup>

Nonetheless, the establishment of the War Crimes Chamber did not take place solely as a domestic legal reform measure. War crimes committed in BiH between 1992 and 1995 may be tried in three different venues: at the international level through the ICTY; at the state level before the BWCC; and at the entity level before the 10 cantonal courts of the Federation of BiH, the five district courts of the Republika Srpska, and the Basic Court of the Brčko District.<sup>18</sup> Growing concerns over arbitrary arrests in the aftermath of the war led to the signing on 18 February 1996 of the Rome Agreement, which introduced a procedure of

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<sup>13</sup> Commission of the European Communities, *Bosnia and Herzegovina 2007 Progress Report*, 6 November 2007, section 2.1 (Democracy and the Rule of Law).

<sup>14</sup> See Communiqué of the Steering Board of the Peace Implementation Council, 25 June 2008, [www.ohr.int/pic/default.asp?content\\_id=41874](http://www.ohr.int/pic/default.asp?content_id=41874) (accessed 28 June 2008). The remaining four objectives include resolution of the issue of apportionment of property between state and other levels of government; resolution of defense property; implementation of the Final Award for Brčko District; and fiscal sustainability.

<sup>15</sup> *Ibid.*

<sup>16</sup> The Court of BiH comprises three divisions: criminal, administrative, and appellate. The Criminal Division is subdivided into three sections: Section 1 for War Crimes; Section 2 for Organized Crime, Economic Crime, and Corruption; and Section 3 for General Crime. For ease of reference, this report will use the term War Crimes Chamber instead of Section 1 of the Criminal Division of the Court of BiH.

<sup>17</sup> The Prosecutor’s Office of BiH is divided into the Department for General Crimes, the Special Department for War Crimes, and the Special Department for Organized Crimes, Economic Crime, and Corruption.

<sup>18</sup> The Federation of BiH’s 10 cantons contain a certain number of municipalities. Republika Srpska is divided into municipalities. Municipal courts adjudicate comparatively minor crimes. Five district courts, each with territorial jurisdiction encompassing a number of municipalities, try more-serious crimes.

international oversight of prosecutions for war crimes in BiH. This oversight was carried out by the so-called “Rules of the Road” Unit of the Office of the Prosecutor of the ICTY. Authorities in BiH were required to submit to this unit every war-crimes case proposed for prosecution before national courts, to determine whether the evidence was sufficient by international standards to lead to arrest and indictment of the suspect.

The establishment of the BWCC was intended primarily to provide the national judiciary with the capacity to run war crimes trials according to international standards. But perhaps the key factor leading to the creation of the War Crimes Chamber was the necessity for the ICTY to comply with deadlines endorsed by the UN Security Council for the completion of its mandate. Under its completion strategy the Security Council required the Tribunal to finish all first-instance trials by 2008 and all appeal proceedings by 2010.<sup>19</sup> This led the ICTY Rules Committee to amend the ICTY Rules of Procedure and Evidence to enable the transfer of ICTY cases to national authorities. Rule 11 *bis* provides that after having considered the gravity of the alleged crimes and the level of responsibility of the accused, ICTY judges may refer a case to another jurisdiction. The referred cases must involve “lower- and intermediate-rank accused.” A former ICTY president said, “The transfer of certain accused to domestic jurisdictions for trial, especially to the Sarajevo War Crimes Chamber, is critical to the successful achievement of the completion strategy.”<sup>20</sup>

Indeed, the creation of the War Crimes Chamber as part of the State Court was the direct result of an agreement reached in January 2003 between the OHR and the ICTY. They jointly proposed the establishment of a specialized chamber for war crimes within the Court of BiH, a dedicated Registry, and a specialized war crimes department in the BiH Office of the Prosecutor. All were to be created with the support of the international community. According to this plan the BWCC would begin as a hybrid institution but over the course of five years would become a court run by national personnel. Originally established as a separate project under international leadership, the Registry would be absorbed into the regular Court. This was an innovation in the context of war crimes trials in neighboring Kosovo or the courts in Sierra Leone or Cambodia, and it was intended to ensure greater domestic ownership of the process.

Victims’ groups and civil society more broadly were not consulted on the establishment of the BWCC. However, this omission has not had significant negative impact on the legitimacy of the process. First, a strong appetite exists in Bosnian society for criminal prosecutions of war crimes.<sup>21</sup> Second, it is broadly accepted in BiH that the ICTY cannot try most of the war

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<sup>19</sup> See Resolution 1503, 28 August 2003, UN Doc. S/RES/1503, and Resolution 1534, 26 March 2004, UN Doc. S/RES/1534. As early as May 2005 Judge Meron, then president of the ICTY, announced that the Tribunal would not meet the 2008 deadline (see Letter dated 25 May 2005, from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, S/2005/343, para. 28). His successor, Judge Pocar, wrote in late 2005 that an end to first-instance trials was not even certain by the end of 2009. Letter dated 30 November 2005, from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2005/781, para. 45.

<sup>20</sup> Letter dated 21 May 2004, from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2004/420, para. 7.

<sup>21</sup> According to a June 2005 United Nations Development Program (UNDP) opinion poll on public perceptions of justice in BiH, 65 percent of respondents said that “individuals who caused unjustifiable harm should be held accountable, without exception.” An additional 19 percent said that “only those who

crimes suspects. Third, although the judiciaries in the entities had been trying war crimes cases for years, they had never been provided with the appropriate resources to process war crimes cases effectively. Certain doubts existed about the fairness of the proceedings they conducted. Therefore setting up a highly specialized, all-Bosnian institution was not a controversial step in such context.

### C. Structures of the War Crimes Chamber and the Prosecutor's Office

The structure, jurisdiction, and basic procedural rules under which the War Crimes Chamber operates are defined by the Law on the Court of Bosnia and Herzegovina. The Court has jurisdiction over “criminal offences defined in the Penal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina.”<sup>22</sup> The Penal Code encompasses war crimes, crimes against humanity, and genocide.<sup>23</sup> The work of the Special Department is regulated by a separate piece of legislation, the Law on the Prosecutor's Office of Bosnia and Herzegovina.<sup>24</sup> The law stipulates that the Prosecutor's Office is mandated to investigate and prosecute perpetrators of criminal offences within the jurisdiction of the Court of BiH.<sup>25</sup>

Initially the international judges and prosecutors in the State Court and the Prosecutor's Office were appointed by the high representative. Since July 2006 the High Judicial and Prosecutorial Council of BiH, which appoints the national judges and prosecutors as the highest regulatory judicial authority, has also appointed the international judges and prosecutors.<sup>26</sup> The appointment procedure takes place in coordination with the Registry and the president of the Court or the chief prosecutor. Until 2008 each of the five trial panels and the appellate panel included two international members and one national member. The balance of composition has now been reversed. Currently national judges are in a majority; the panels now include two nationals and one international. Both the international and national judges may sit simultaneously in war crimes and organized crime chambers. In contrast, international prosecutors in the Special Department for War Crimes have always constituted a minority. As of June 2008, five international prosecutors and 13 nationals worked on war crimes cases. The three main ethnic groups in BiH—Bosniak, Serb, and Croat—are all represented among the national judges and prosecutors.

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committed actual war crimes should be held accountable.” See UNDP, “Justice and Truth in BiH—Public Perceptions,” 2005.

<sup>22</sup> Law on the Court of Bosnia and Herzegovina, *Službeni glasnik Bosne i Hercegovine (Official Gazette of Bosnia and Herzegovina)*, nos. 29/00, 15/02, 16/02, 24/02, 3/03, 37/03, 61/04, and 32/07, article 13(1).

<sup>23</sup> See Penal Code of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, nos. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, and 32/07, articles 11, 12. The Penal Code, in turn, defines subject matter jurisdiction of the BiH courts as including, among other crimes, those committed in BiH or on board a Bosnian vessel or aircraft; crimes committed abroad by foreign citizens that BiH is obligated to prosecute under international agreements and rules of international law; and crimes committed abroad by a foreign citizen against foreign citizens and punishable, according to the laws of the country where the crime was committed, with a five-year sentence or more; and other crimes.

<sup>24</sup> Law on the Prosecutor's Office of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, nos. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, and 61/04.

<sup>25</sup> *Ibid.*, article 12(1).

<sup>26</sup> Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as Well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex thereto (signed 26 September 2006), article 8.

The State Court is located a few kilometers away from Sarajevo's city center. The modern premises have six courtrooms available for war crimes cases. Five of these are relatively small, with capacity to accommodate around 14 people. One courtroom has the capacity to host larger trials. Sober and functional, courtrooms are equipped with modern audio-visual equipment.<sup>27</sup>

## II. CHALLENGES OF A MASSIVE CASELOAD

One of the greatest challenges facing the BWCC is the number of cases that potentially fall within its purview. Criminal prosecutors in BiH lack discretion to discard cases; they have a legal obligation to initiate a prosecution if evidence exists that a criminal offence has been committed.<sup>28</sup> The cases before the BWCC have or will come from several different sources, depending on the origin of the investigation against a suspect or accused:

1. Those who have already been indicted by the ICTY and whose case was transferred to the War Crimes Chamber, in accordance with Rule 11 bis of the ICTY's Rules of Evidence and Procedure. Of all national courts in the region the War Crimes Chamber has received the highest number of 11 bis cases—10 indicted individuals in six cases.<sup>29</sup> However, these cases represent only a fraction of the caseload that the War Crimes Chamber faces.
2. Those whose investigations the ICTY prosecutor has not completed. The files of these so-called Category II cases would be transferred to the state prosecutor of BiH for further action. Some 40 individuals may fall into this category.<sup>30</sup>
3. Those initially investigated by local courts subject to the "Rules of the Road." Since October 2004 the process of screening and classifying war crimes cases into different categories is the responsibility of the State Prosecutor's Office. Cases that this office decided not to try before the War Crimes Chamber have been sent back to the local prosecutors with jurisdiction over the territory where the crimes were committed (as opposed to where accused persons reside or originate).
4. Those against whom an investigation began after March 2003, when legislative reform resulted in removal of provisions on war crimes from the entities' laws. Only the Penal Code of BiH now addresses war crimes, and only the State Court has the competence to adjudicate them.<sup>31</sup>

The third and fourth categories contain the largest number of potential cases. However, the Office of the War Crimes Prosecutor has not managed to produce reliable estimates of the universe of potential suspects and cases. Only in early 2008 was a comprehensive mapping exercise under way. According to the Organization for Security and Co-operation in Europe

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<sup>27</sup> All proceedings are audio- and video-recorded.

<sup>28</sup> Criminal Procedure Code, *Official Gazette of BiH*, no. 36/2003, 21 November 2003, article 17.

<sup>29</sup> The following cases have been transferred from the ICTY to BiH: *Stanković, Janković, Mejakić and Others, Ljubičić, Todović and Rašević*, and *Trbić*. One case (*Norac and Ademi*) has been transferred to Croatia, and one (*Kovačević*) to Serbia.

<sup>30</sup> Interview with members of the Special Department for War Crimes in the BiH Prosecutor's Office, Sarajevo, 7 September 2007.

<sup>31</sup> The state prosecutor can still request referral of a case to a court in the entity or in the Brčko District. The decision is to be made by the Court of BiH. See Criminal Procedure Code of BiH, *Official Gazette of BiH*, no. 36/2003, 21 November 2003, article 27.

(OSCE), the ICTY screened 3,489 individual cases and classified them in different categories.<sup>32</sup> Category A cases were deemed ready for indictment. In 2005 the State Prosecutor's Office completed its own review of 877 Category A cases. Because of their high sensitivity, it decided to try 202; the remaining cases would be transferred to local courts.<sup>33</sup> The ICTY had also identified 2,379 Category B cases where evidence was deemed "insufficient" to issue an indictment. Category C cases would require further investigation. In all, the ICTY identified 702 cases in Category C; they also were to be processed by the War Crimes Chamber.<sup>34</sup>

As mentioned, the State Prosecutor's Office has been unable to offer reliable estimates of cases, with the state prosecutor's calculations ranging from 10,750 to 16,000 possible suspects at different times. In any event, such figures are unlikely to reflect the actual numbers of perpetrators. The head of the independent Research and Documentation Center (RDC) in Sarajevo, which carried out detailed research into the number of war-related deaths in BiH, has assessed the number of actual perpetrators at below 6,000.<sup>35</sup> Even the war crimes prosecutors themselves estimated in an interview in September 2007 that the number was far below 16,000. In Republika Srpska, for example, police reports often included as suspects all or most members of the political parties representing non-Serbs in the given area.<sup>36</sup> The files did not describe the acts of the purported perpetrators nor their specific role in the alleged commission of the crimes. Consequently much of the information might be unsubstantiated and has led to inflated numbers.<sup>37</sup>

Nevertheless, thousands of individuals could be eligible to be tried before the courts in Bosnia and Herzegovina. This would mean that the BWCC and the local courts would have to try hundreds of cases. "It is the beginning of a very long process that will last for years," said Behaija Krnjić of the Special Department for War Crimes of the State Prosecutor's Office at a conference in November 2005.<sup>38</sup> The experience of other national jurisdictions attempting to try massive crimes, including Argentina, Rwanda, and Ethiopia, indicate that it is unrealistic to expect such a large number of cases to be tried.

Between 2005 and 2008 the Prosecutor's Office and international agencies in BiH have attempted to overcome the problem of a large and undefined caseload. Efforts included the development by the Prosecutor's Office of initial criteria for "sensitivity," repeated international assistance on strategic prioritization, and attempts to establish reliable figures about the number of war crimes suspects reported to various prosecutorial agencies in the country.<sup>39</sup> In the first half of 2008 the Special Department for War Crimes initiated a mapping exercise that should result in a realistic assessment of the numbers. The Special Department is also compiling a prosecutorial crime-centered study, to register and categorize the crimes

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<sup>32</sup> OSCE, "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles," March 2005.

<sup>33</sup> According to the Orientation Criteria for Sensitive Rules of the Road Cases, adopted by the Collegium of Prosecutors on 12 October 2004, and annexed to the Book of Rules on Review of War Crimes Cases (28 December 2004), highly sensitive cases must be tried at the Court of BiH.

<sup>34</sup> Interview with members of the Special Department for War Crimes in the BiH Prosecutor's Office, Sarajevo, September 7, 2007.

<sup>35</sup> Interview with Mirsad Tokača, president of the RDC, Sarajevo, 7 September 2007.

<sup>36</sup> Interview with members of the Special Department for War Crimes, Sarajevo, 7 September 2007.

<sup>37</sup> Human Rights Watch, *A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic* (March 2006), 29.

<sup>38</sup> Balkan Investigative Reporting Network (BIRN) Conference, Sarajevo, 10 November 2005.

<sup>39</sup> The assistance included a meeting in Sarajevo between an ICTJ expert and the staff of the Prosecutor's Office in December 2006.

committed during the conflict in Bosnia. These studies should serve as a basis for making a more reliable estimate of the cases eligible to be tried before the Court of BiH and establishing criteria to prioritize them.<sup>40</sup> A number of elements will determine their priority, including availability of the suspects, strength of evidence, potential impact a conviction might have on return of displaced persons to the area, and risk that key witnesses might become unavailable. The prosecutorial strategy is expected to be completed by October 2008.<sup>41</sup>

The issue of large numbers of cases is not unique to Bosnia and Herzegovina. However, what was lacking in the Bosnian context until recently was an overall response to the situation and political willingness by the Prosecutor's Office to acknowledge publicly that it would not be possible to prosecute all cases.

### III. TRIALS BEFORE THE WAR CRIMES CHAMBER

#### A. Overview of Trials

From September 2005 to June 2008, 84 accused were tried in 48 cases before the BWCC. The trial panels rendered 32 trial judgments (including 27 convictions and five acquittals). Fifteen convictions have become final.<sup>42</sup> Appendix 1 contains a summary of all cases to date.

The BWCC has processed cases much more quickly than the ICTY. However, a direct comparison has limitations. For instance, most of the BWCC's cases are less complex than those tried before the ICTY. With a few exceptions the trials mainly dealt with direct perpetrators and suspects at lower levels of the military, police, or political hierarchy. Only the *Momčilo Mandić* case is comparable to the trials of senior officials by the ICTY. In this case the accused was the former justice minister in the wartime Bosnian Serb Republic. In July 2007, after nine months of trial, the trial panel acquitted Mandić for lack of evidence that he had planned, ordered, committed, instigated, or aided and abetted crimes against Bosniak civilians in detention camps near Sarajevo and in Foča, or that he had had effective control over the direct perpetrators.<sup>43</sup>

Most of the early cases concerned Bosnian Serbs accused of crimes against Bosniak civilians from eastern Bosnia. These prosecutions did not necessarily reflect a coherent strategy; instead, they were in part the result of the transfer from the ICTY of several Rule 11 bis cases pertaining to Eastern Bosnia. The allegations frequently included gender crimes (rape and sexual slavery). For example, in two non-11 bis rape cases (*Samardžić* and *Šimšić*), an association of female victims pressured the Special Department to take the cases from district courts in Republika Srpska where they were pending.

Over time the cases have become much more diverse in terms of the underlying crimes, geographical areas where they occurred, and ethnicity of the accused. A majority of cases includes charges of crimes against humanity. Among the underlying crimes charged most frequently are murder, imprisonment, torture, deportation, and persecution. The indictments

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<sup>40</sup> Interview with the chief prosecutor of BiH, Sarajevo, July 25, 2007; interview with members of the Special Department, Sarajevo, 7 September 2007.

<sup>41</sup> Interview with a member of the Special Department, Sarajevo, 9 June 2008.

<sup>42</sup> The figures are based on the information on the Web site of the Court of BiH, [www.sudbih.gov.ba/?jezik=e](http://www.sudbih.gov.ba/?jezik=e), and the Web site of BIRN–Justice Report [www.bim.ba/en/120/?tpl=95](http://www.bim.ba/en/120/?tpl=95).

<sup>43</sup> *Prosecutor v. Momčilo Mandić*, judgment, 18 July 2007 (in Bosnian-Croatian-Serbian), 144, 151–55.



address crimes committed in various parts of the country, and the accused span all three constituent peoples (Serbs, Croats, and Bosniaks). As of June 2008, of the 27 cases that have resulted in conviction, 18 cases have involved defendants found guilty of crimes against humanity.

## **B. Functioning of Hybrid Structures of the War Crimes Chamber**

A major feature of all hybrid tribunals has been their mixed panels, which have succeeded to varying degrees in different places. The War Crimes Chamber is currently composed of six mixed trial panels and two mixed appellate panels.<sup>44</sup>

From the start senior officials advanced the policy that the War Crimes Chamber be seen as a national institution. Although the panels were composed of two international judges and one national judge, the presiding judges were from BiH. “It is good that nationals take responsibility.... In the long term it is the only way to restore public confidence in the judiciary,” explained a national judge interviewed in 2005.<sup>45</sup> Since January 2008 most of the war crimes panels have changed to two Bosnian judges and one international judge. The goal was to transform the composition of all six chambers in this fashion by mid-year.<sup>46</sup>

In general, international judges have played a behind-the-scenes role. They have refrained from interfering in the control of the public proceedings as a result of an agreed policy and because they had no necessity to intervene. Most of the international judges have also left it to the presiding judge to pose additional questions to witnesses. Through their mostly silent participation in public proceedings, international judges may have bolstered a perception of fairness and independence and helped to address any perceived ethnic bias. “Here public opinion is not ready to accept that it is an impartial court if it is only composed of national judges,” stated a BiH judge from the General Crimes Department.<sup>47</sup> One of the international judges at the War Crimes Chamber agreed that their role was “to bring the expertise of conducting trials and to give the assurance to the international community and to Bosnians that judges are not susceptible to [outside] influence or threats.”<sup>48</sup>

Unlike in other hybrid proceedings, such as Cambodia and Timor-Leste, an advantage in the BWCC trials is that key participants in the proceedings—prosecutors, defense lawyers, witnesses, and the presiding judge—share the same language.

International prosecutors have been more visible than international judges. The president of the Court and the registrar had argued that international prosecutors should have a secondary role during the hearings, which would be consistent with the Court’s transition plan as a whole. However, international prosecutors argued four of the six Rule 11 bis cases. This reflects the fact that the case records received from the ICTY were in English, which had the

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<sup>44</sup> The second Appellate Panel was created in January 2008 as a result of a significant increase in war crimes cases during 2007. There were five trial panels until June 2008, when a sixth panel was established. Interview with the Registrar for War Crimes Chamber and Organized Crime Chamber of the Court of BiH, Sarajevo, 9 June 2008.

<sup>45</sup> ICTJ interview, Sarajevo, 18 November 2005.

<sup>46</sup> Interview with the Registrar, Sarajevo, 9 June 2008.

<sup>47</sup> ICTJ interview, Sarajevo, 14 November 2005. According to a UNDP opinion poll on public perceptions on justice and truth in BiH in 2005, 47 percent of respondents said they had confidence in neither the laws nor the judges applying them. Another 20 percent said they had confidence in the laws but not in the judges. See “Justice and Truth in BiH—Public Perceptions,” UNDP, 2005.

<sup>48</sup> ICTJ interview, Sarajevo, 20 January 2006.

effect of excluding many of the national prosecutors.<sup>49</sup> In addition, the Special Department considered that “the cases transferred from The Hague were significant from the perspective of international humanitarian law” and required involvement of those with experience on the topic.<sup>50</sup> In non-Rule 11 bis trials international prosecutors have a more low-key role: They have conducted five cases while national prosecutors have conducted 34, and three cases have been conducted jointly. Two of these joint prosecutions are related to genocide in Srebrenica and involve multiple defendants.

The existence of the Registry has resulted in what is generally perceived as a well-run and professional court administration. Overall, trial proceedings thus far have reflected a well-functioning court. Hearing schedules are set in advance, are available to anyone by e-mail, and have very rarely been canceled. Technical facilities and support for interpretation and audio-recording are carefully managed. The trials tend to proceed at a good pace and in an orderly manner. So far three witnesses are heard on average each day, except in the particularly complex cases such as those involving multiple defendants or highly positioned accused, where witness examination and cross-examination last longer. The average pace is far quicker than that of other international war-crimes tribunals. The plausible explanation for the accelerated pace ranges from the relative simplicity of the cases prosecuted before the WCC and the panels’ acceptance of numerous facts already established in the ICTY judgments, to innovative procedures—such as informal status conferences—introduced by the international judges to increase efficiency of the proceedings.<sup>51</sup>

The trials are not beyond criticism, however. According to one judge, the introduction of the adversarial procedure has not led to time saving because too many witnesses testify about the same facts, and the panels cannot prevent this. Unlike in the earlier inquisitorial system, the judges do not know what the witness said during the investigation and cannot decide that the person should not testify in the trial because of the repetitive nature of the testimony.<sup>52</sup>

The OSCE Mission to BiH, which monitors war crimes trials before the BWCC and entity courts, has observed certain problems of compliance with human rights standards and efficiency of the proceedings. The Mission issues such findings in its regular reports on the cases transferred to the State Court pursuant to ICTY Rule 11 bis. For instance, the OSCE Mission has expressed concern that decisions on pre-trial custody fall short of being properly justified on the basis of human rights standards when the ground of the threat to public and property security is invoked.<sup>53</sup> Other major points to which the OSCE has drawn attention include the application of witness protection and support measures; the right to a public trial and transparent proceedings; the obligation to instruct injured parties about their right to file claims for compensation in the context of criminal proceedings; the need for courts to consider motions on accepting facts established in ICTY judgments at an early stage of the

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<sup>49</sup> Interview with a member of the Special Department for War Crimes, Sarajevo, 9 June 2008.

<sup>50</sup> Ibid.

<sup>51</sup> Although the Criminal Procedure Code does not explicitly mention status conferences, in the past two years the chambers have increasingly used this management tool, based on the good practice of the ICTY. At the conferences the parties and the panel consider trial plans of the prosecution and the defense. Interview with a member of the Special Department, Sarajevo, 9 June 2008; interview with Jasmina Pjanić, director of the Criminal Defense Office (OKO), Sarajevo, 10 June 2008.

<sup>52</sup> Interview with a BWCC judge, Sarajevo, 10 June 2008.

<sup>53</sup> OSCE Mission to Bosnia and Herzegovina, *Fifth Report in the Paško Ljubičić Case*, December 2007, 2–3; OSCE Mission to Bosnia and Herzegovina, *Seventh Report in the Željko Mejakić et al. Case*, March 2008, 2, note 8 (citing other reports by the Mission that make this argument).

proceedings;<sup>54</sup> translation of evidence into the local language and its impact on the preparation of the parties; the need for courts to discuss sentencing policies; the effectiveness of defense counsel; and the confidentiality of accused-lawyer communication at the state detention center.<sup>55</sup> However, the OSCE also notes that the concerns identified in its reports do not necessarily indicate that the trial as a whole is unfair; during its four-year existence the BWCC has made visible progress in addressing a number of highlighted issues.

From a comparative perspective, the BWCC has demonstrated a reasonably high degree of professionalism and efficiency in the conduct of its trials to date. Difficulties with its functions are primarily caused by confusion or uncertainty in the application of laws or problems arising from its being a relatively new jurisdiction.

### C. Application of the Criminal Procedure Code

In January 2003 a new Criminal Procedure Code (CPC) was introduced in BiH under the auspices of the OHR. Through this CPC key aspects of an adversarial procedure were imported into a country that had used a form of accusatorial procedure for many decades. This major change in the legal system includes a new and unique set of rules, hybrid in nature and similar to those of the ICTY.

Among the main features introduced by the CPC, the police and the prosecutor conduct the investigation, unlike the previous system in which investigations were the responsibility of a judge. The trial proceedings are conducted in an adversarial manner; prosecutors and defense counsel present their case through the introduction of evidence, examination, and cross-examination of witnesses. In the previous system the judge led the questioning of witnesses. Another new feature is that the accused can enter a plea agreement with the prosecutor.

Most international judges in the War Crimes Chamber are Europeans from countries with civil law systems. In contrast the prosecutors mainly come from a common law background. This imbalance has not been a major obstacle to the normal conduct of trials. “Everybody here is learning,” said an international prosecutor. In fact the hybrid nature of the proceedings implies that important elements of the accusatorial civil law system continue to exist alongside those of the adversarial system. For example, some articles in the CPC provide for judges to take an active role in examining witnesses.<sup>56</sup> Until recently the law also imposed a duty on the judges to ensure that the truth of the facts in the case was ascertained.<sup>57</sup>

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<sup>54</sup> For example, in the trial of Paško Ljubičić (11 bis case), eight months passed between the filing of the prosecutor’s motion for acceptance of adjudicated facts and the Court’s decision on it. OSCE Mission to Bosnia and Herzegovina, *Sixth Report in the Paško Ljubičić Case*, December 2007, 2. In another 11 bis case, *Mejakić and Others*, the prosecutor submitted motions on October 11, 2006, and February 21, 2007, and the trial panel made a decision on 22 August 2007, six months after the beginning of the trial. OSCE Mission to Bosnia and Herzegovina, *Fifth Report in the Željko Mejakic et al. Case*, September 2007, 1.

<sup>55</sup> The OSCE findings summarized in the paragraph above are based on Mission reports issued between March 2006 and February 2008 on the following 11 bis cases transferred to the State Court: *Radovan Stanković, Gojko Janković, Mejakić and Others, Paško Ljubičić, Mitar Rašević and Savo Todović*, and *Milorad Trbić*.

<sup>56</sup> See CPC, Article 261 (3): “The party who called a witness shall directly examine the witness in question, but the judge or the presiding judge may at any stage of the examination ask the witness appropriate questions”; CPC, article 262(1): “After examination of the witness, the judge or the presiding judge and members of the Panel may question the witness.”

<sup>57</sup> CPC, article 239(2): “It is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined, that the truth is found....” In June 2008 Parliament enacted amendments to the CPC. Article 239(2) no longer includes reference to a duty to find the truth.

“Erroneously or incompletely established state of facts” is one of the grounds on which a verdict can be contested.<sup>58</sup> According to a judge in the Appeals Chamber of the BWCC, interviewed before the amendment to the CPC in June 2008, “It is the panel that has to establish the facts. The principle of material truth [rather than trial truth] still applies.”<sup>59</sup> In this context the prevalence of judges with civil law backgrounds is not a disadvantage. At the same time the new system is much more prosecution-driven than in the past, making it useful to have common-law practitioners. Through practical demonstration prosecutors from common-law countries can teach other participants in the trials how the adversarial system works.

### 1. Plea Agreements

According to the president of the Court, Meddžida Kreso, the new legal framework has been an improvement. “The fact that investigations are under the responsibility of the prosecutor is very good. Today the prosecutor is fully responsible. Plea bargaining can also help speed up proceedings,” she said.<sup>60</sup> However, the trial proceedings have demonstrated uncertainty and the risk of inconsistency in application of the law and procedure in the use of plea agreements.

Before February 2008 no plea agreements had been made in the BWCC, despite the possibility under the CPC and the fact that a number of cases in the Organized Crime Chamber had been resolved by plea agreements.<sup>61</sup> The prosecutors in the war crimes cases had been generally reluctant to initiate such agreements. The reasons for this reluctance varied. According to a Bosnian prosecutor, the prosecutors were concerned that the more-lenient sentences often resulting from such agreements would provoke negative public reaction, a risk they were unwilling to take.<sup>62</sup> When such agreements have been reached at the ICTY, some in Bosnia have negatively perceived them and considered them an affront to victims. The potential benefits of plea agreements—including clearing the backlog of lower-level cases and obtaining evidence to allow higher-level prosecutions—have been largely absent from public debate in Bosnia.<sup>63</sup> There had also been concerns that defendants who pled guilty and pledged to testify in other cases, or at least to provide information about undiscovered mass graves, might avoid fulfilling this obligation, leaving the prosecutors without legal means to compel them or revoke the reduction of sentence.<sup>64</sup> Defense counsel, for their part, hesitated to suggest to their clients to plead guilty in the absence of clearer sentencing practice or guidelines.<sup>65</sup>

Between February and May 2008, however, prosecutors concluded plea agreements with four war-crimes defendants.<sup>66</sup> This development reflects a change of strategy in the Special Department, coinciding with a greater readiness to risk negative reactions.<sup>67</sup>

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<sup>58</sup> CPC, article 296, recital (c).

<sup>59</sup> ICTJ interview, Sarajevo, 9 June 2008.

<sup>60</sup> ICTJ interview, Sarajevo, 30 January 2006.

<sup>61</sup> Interview with a Bosnian judge, member of the War Crimes Chamber, former member of the Organized Crimes Chamber, Sarajevo, 26 July 2007.

<sup>62</sup> Interview with a member of the Special Department for War Crimes, Sarajevo, 25 July 2007.

<sup>63</sup> The main positive aspects of plea agreements include saving time and resources, protecting victims and witnesses from the mental anguish that testifying often entails, using information provided by the defendant in investigations and presentation of evidence at trials of other accused, and opening dialogue and reconciliation between different groups through the defendant’s expression of sincere remorse.

<sup>64</sup> Telephone interview with a legal adviser in the Special Department, 21 May 2008.

<sup>65</sup> Interview with representatives of the OSCE Mission to BiH, Sarajevo, 24 July 2007.

<sup>66</sup> In chronological order, the agreements were reached with the following defendants: Idhan Sipić (sentenced to eight years in prison, 22 February 2008); Veiz Bjelić (sentenced to six years in prison, 28 March

The victims' responses to the recent plea agreements have been mixed. In the *Ljubičić* case most victims refrained from expressions of disapproval, but one victims' group condemned the court's decision as "proof that there is no true justice for the victims of the crimes in the last war."<sup>68</sup> In the *Mejakić and Others* case, following the plea agreement with the accused Dušan Fuštar and his temporary release pending appeal, a victims' group staged a protest rally in front of the Court building. According to an organizer of the event, the victims had insisted before the plea agreement was reached that Fuštar should not benefit from provisional release right after the judgment. Despite the fact that the accused received a nine-year prison sentence, they were concerned that the public in the area where the crime was committed would perceive the trial's outcome as equivalent to his release.<sup>69</sup>

The CPC does not provide for the participation of victims in plea agreement proceedings. Given the particular seriousness of war crimes and reactions of Bosnian victims to ICTY plea agreements, it would seem advisable that victims can express their views to the prosecutors at the plea agreement stage or participate in the plea hearings held in the BWCC trial chambers. This does not mean that victims should have the right to veto a plea agreement. Despite the lack of provisions for this form of participation, the Special Department has highlighted consultation with victims in its internal guidelines on plea bargaining.<sup>70</sup>

#### IV. THE CRIMINAL DEFENSE OFFICE: A MODEL OF COOPERATION

Often the organization of the defense is an afterthought in international or hybrid tribunals. Institutional strategies defining the defense's organization and structure have varied from one court to another, with the Special Court for Sierra Leone having the most extensive duties for the Defense Office. The Statute of the Special Tribunal for Lebanon, the most recent hybrid tribunal to emerge, establishes the Defense Office as a fourth and equal organ of the court for the first time.

The War Crimes Chamber's Criminal Defense Office (known by its Bosnian acronym, OKO) has been a positive example of national-international cooperation that could be replicated elsewhere. The primary task of the office is to assist counsel appearing before the BWCC. Among its duties the OKO keeps a roster of defense lawyers, organizes their training (notably in criminal procedure, international criminal law, and advocacy), and provides for legal advice, research, and support including drafting motions. Because they cannot be members of a bar association in BiH while working for employers other than law firms, OKO's members are not entitled to represent war crimes defendants. However, they usually receive power of attorney from defense counsel, entitling them to receive case files, sit in the courtroom behind the defense, and attend closed sessions.<sup>71</sup> Payment of fees is the responsibility of the Ministry of Justice.<sup>72</sup>

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2008); Dušan Fuštar (sentenced to nine years in prison, 21 April 2008); Paško Ljubičić (sentenced to 10 years in prison, 29 April 2008).

<sup>67</sup> Interview with a member of the Special Department, Sarajevo, 9 June 2008.

<sup>68</sup> A. Džonlić, "Ahmićani ogorčeni presudom Državnog suda" ("People from Ahmići Embittered by Judgment of the State Court"), *Dnevni avaz* (Sarajevo), 5 May 2008.

<sup>69</sup> ICTJ telephone interview, 23 June 2008.

<sup>70</sup> Interview with a member of the Special Department, Sarajevo, 9 June 2008.

<sup>71</sup> Interview with Jasmina Pjanić, OKO director, Sarajevo, 10 June 2008.

<sup>72</sup> See Human Rights Watch, *Looking for Justice—The War Crimes Chamber for Bosnia and Herzegovina*, February 2006.

From the beginning OKO has employed only Bosnian staff with the exception of the director and deputy, whose appointments were intended to demonstrate the independence and impartiality of the office. In May 2007 a Bosnian lawyer was appointed director. By June 2008 the office employed five lawyers and two administrative staff. Five fellows from BiH and abroad also worked in OKO. Three international lawyers with substantive experience in the ICTY have spent a few months at OKO and shared their knowledge with the staff.<sup>73</sup>

Each defendant is allowed two defense lawyers (a lead counsel and an assisting counsel). Defense attorneys assigned to cases are mainly nationals and must have a minimum of seven years' experience to be lead counsel.<sup>74</sup> In exceptional circumstances the trial panels may allow foreign lawyers to represent the accused. In Rule 11 bis cases transferred from the ICTY, some of the defense counsel who had defended the accused there were allowed to remain on the case as lead or assisting counsel.<sup>75</sup> Other grounds on which the panels allowed the involvement of foreign counsel included fairness and the insistence of the accused.<sup>76</sup> The remuneration of the foreign lawyers is the same as for Bosnians. In practice foreign counsel tend to be nationals of one of the two neighboring countries, Croatia or Serbia.

Despite the OKO's existence, respect for the legal principle of "equality of arms" in the Bosnian trials is still a concern for the following reasons:

- *Absence of experienced lawyers.* Bosnian lawyers with extensive experience at the ICTY only sporadically appear before the War Crimes Chamber because of their continuing presence in The Hague, where fees are considerably higher.<sup>77</sup> Moreover, most Bosnian lawyers have little knowledge of international humanitarian law, ICTY jurisprudence, and foreign languages. They also lack experience in conducting direct examination and cross-examination, key elements of the new adversarial procedure introduced in 2004. In that context the assistance, including frequent, exercise-based training, that lawyers receive in war crimes trials from the young and dynamic staff at OKO is very valuable. Nonetheless, when international prosecutors—most of whom come from adversarial systems—argue cases, the two sides' unequal advocacy skills are apparent. "When it comes to examination of witnesses, only through practice will it become possible for domestic lawyers to become as skillful as the prosecutors from the adversarial system," said OKO's director.<sup>78</sup>
- *Quantity of evidence from ICTY.* "A problem that was not anticipated is that much evidence comes from the ICTY. The defense has insufficient time to prepare," acknowledged one international judge, referring to non-Rule 11 bis cases.<sup>79</sup> OKO has access to the Evidence Disclosure Suite database, used to disclose evidence to the defense before the ICTY, and the Judicial Database, run by the ICTY Registry and including nonconfidential ICTY orders, decisions, and judgments.<sup>80</sup> The difficulty is

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<sup>73</sup> Interview with Jasmina Pjanić, Sarajevo, 10 June 2008.

<sup>74</sup> In July 2007, 123 defense lawyers were on the list of authorized counsel before the WCC. OKO planned to have trained 350–400 lawyers on international criminal law by the end of 2008. As OKO's then-director said in a conference in Sarajevo in November 2005, "No other country in the world would have as many lawyers trained in war crimes law."

<sup>75</sup> Examples include the Croatian lawyer Tomislav Jonjić, who defended Paško Ljubičić in The Hague, and the Serbian lawyer Jovan Simić, the defense attorney in the *Mejakić and Others* case.

<sup>76</sup> Interview with Jasmina Pjanić, Sarajevo, 24 July 2007.

<sup>77</sup> Ibid.

<sup>78</sup> Interview with Jasmina Pjanić, Sarajevo, 10 June 2008.

<sup>79</sup> ICTJ interview, Sarajevo, 20 January 2006.

<sup>80</sup> Interview with Jasmina Pjanić, Sarajevo, 10 June 2008.

exacerbated by the fact that much of the material from The Hague is in English. If a statement also exists in an audio recording, the defense counsel can obtain it with the assistance of OKO, which approaches the ICTY Office of the Prosecutor or the ICTY Registry with a written request.<sup>81</sup>

- *Insufficient resources for defense investigation.* Serious concern has been raised about the means provided to the defense to investigate its own case. Before 2003 an investigating magistrate put together the case. An independent prosecutor now takes on this role. However, it appears that no provisions reflect the fact that the defense has to do its own investigations in an adversarial judicial system. A specific budget does not exist for defense investigation. At the end of the trial, panels are entitled to grant compensation of the “necessary expenditures” incurred by the defense attorney, but this excludes expenses related to interviews with persons who did not appear as witnesses in the trial.<sup>82</sup> According to OKO’s director, “It is reasonable to assume that defense attorneys would commit more while conducting their investigation if the law explicitly provided for reimbursement of the expenses.”<sup>83</sup> A judge commented, “I think the defense attorneys play safe and contact only those witnesses whose testimony they know in advance will benefit the defendant.”<sup>84</sup> This issue is a serious one that should have greater attention from the Bosnian authorities.

## V. VICTIMS AND WITNESSES BEFORE THE WAR CRIMES CHAMBER

### A. Witness Protection and Security Issues

Thirteen years after the end of the war in Bosnia, the risk for those involved in prosecution of war crimes appears to have diminished significantly. Risk assessment and witness protection are complex and sensitive issues that are often difficult to measure. BWCC staff may also be vulnerable. Protection for a judge has been used only in the *Stanković* case, because the convict—a fugitive from justice since his escape on 25 May 2007—had threatened judges and prosecutors during the trial.<sup>85</sup> Two prosecutors have also been protected, one in the *Stanković* and the other in the *Alić* case.<sup>86</sup> One of the national judges assessed that war crimes suspects “are less powerful today, so their cases are less risky and less sensitive.”<sup>87</sup> A staff member of the Witness and Victim Support Section (WSS) commented, “It is twelve years [since] the war is over and the question of protection is different.”<sup>88</sup> In this respect, security concerns are greater in organized crime cases, in which defendants are perceived to be more powerful and influential.

Despite generally improved security conditions, a number of witnesses appearing before the War Crimes Chamber have testified under protection. Measures have included using a pseudonym for the witness, testifying behind a screen or utilizing electronic distortion of the

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<sup>81</sup> Ibid.

<sup>82</sup> Interview with a BWCC judge, Sarajevo, 10 June 2008.

<sup>83</sup> Interview with Jasmina Pjanić, Sarajevo, 10 June 2008.

<sup>84</sup> Interview with a BWCC judge, Sarajevo, 10 June 2008.

<sup>85</sup> Ibid. Radovan Stanković, a Bosnian Serb, was convicted for crimes against humanity against Bosniak civilians in Foča and sentenced to 16 years in prison, which was increased to 20 years on appeal. Stanković was sent to serve the sentence in Foča prison, but he escaped from custody on 25 May 2007 and has been in hiding since then.

<sup>86</sup> Interview with a member of the Special Department, Sarajevo, 9 June 2008.

<sup>87</sup> ICTY interview, Sarajevo, 18 November 2005.

<sup>88</sup> Interview with a senior staff member of the Witness and Victim Support Section, Sarajevo, 27 July 2007.

witness's voice or image, or removing the public from the courtroom. Victims of sexual violence, former camp inmates, and victims of torture have often requested protection mainly because of privacy or confidentiality concerns. Other witnesses seek protective measures because they are worried about their safety or their relatives who have returned to the place where the crime took place after years of displacement.<sup>89</sup>

Written requests for protection are usually filed by the prosecutor during the investigation on the basis of security concerns expressed by the witness. The prosecutor's motion is the basis on which the judge or panel makes a decision when the proceedings reach trial stage. If a witness who did not seek protective measures changes his or her mind on the day of the trial, the panel holds a preliminary hearing about the request in private session. The session is usually closed for only 30 to 60 minutes.<sup>90</sup>

The use of protective measures varies greatly from one trial to another. Of some 70 witnesses who testified in the first two trials (*Šimšić* and *Paunović*) in 2005, only four or five needed protection. In her opening statement in the *Samardžija* trial on 1 February 2006, the prosecutor announced 44 witnesses and stressed that none of them had asked for protection.<sup>91</sup> However, in the trial of *Radić and Others* 48 of 52 prosecution witnesses requested various protective measures.<sup>92</sup> In the case *Mejakić and Others*, in the first nine months of the trial 26 of 40 witnesses testified under protection.<sup>93</sup> Most of the witnesses in both trials are former camp inmates who testified about crimes committed in detention camps.

Observers have pointed out that trial panels sometimes appear to use protective measures in an excessive manner, as when stricter measures have been ordered without explaining why less-strict ones would not suffice or without examining witnesses' circumstances on a case-by-case basis, as human rights standards and ICTY jurisprudence on the matter suggest.<sup>94</sup>

In some instances witnesses testified under protection although they did not request it.<sup>95</sup> Prosecutors explain that such instances resulted from the legal obligation to apply the protective measures the ICTY had ordered for witnesses who had testified before that tribunal in a related case. Although some witnesses felt that such protection had ceased to be necessary, the prosecutors in Sarajevo requested it to avoid a time-consuming procedure to have it revoked. The ICTY amended its Rules of Procedure and Evidence in March 2008 so that witnesses might directly approach ICTY to vary protective measures that affect them; it is too early to tell if this will remedy the situation.<sup>96</sup>

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<sup>89</sup> Ibid.

<sup>90</sup> Interview with a Bosnian judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>91</sup> The prosecutor alluded to one possible exception, based on concerns that did not seem related to security.

<sup>92</sup> Interview with a senior staff member of the WSS, Sarajevo, 27 July 2007.

<sup>93</sup> See OSCE Mission to Bosnia and Herzegovina, *Third Report in the Mejakić and Others Case*, March 2007; *Fourth Report in the Mejakić and Others Case*, June 2007; and *Fifth Report in the Mejakić and Others Case*, September 2007.

<sup>94</sup> E-mail communication with representatives of the OSCE Mission to Bosnia and Herzegovina, 10 July 2008.

<sup>95</sup> See, for example, OSCE Mission to Bosnia and Herzegovina, *First Report in the Željko Mejakić et al. Case Transferred to the State Court pursuant to Rule 11 bis*, September 2006, 4–6.

<sup>96</sup> Interview with the chief prosecutor of BiH, Sarajevo, 25 July 2007; interview with a member of the Special Department, Sarajevo, 25 July 2007. In July 2007 amended rule 75 of the ICTY Rules of Procedure and Evidence came into effect, facilitating variation of court orders protecting victims and witnesses. The new rule 75(H) allows a judge or bench in another jurisdiction or parties in another jurisdiction authorized by an appropriate judicial authority to apply to the president of the Tribunal for the variation of orders. In March 2008



Although trial panels have granted most requests for protection, in a few recent cases judges decided there was no need for protection or less-drastic measures than those requested would suffice.<sup>97</sup> One judge reasoned that “prosecutors in the Special Department for War Crimes, while giving full consideration to security concerns of the witnesses, should not on their own initiative raise the issue and thereby raise anxiety in an otherwise serene witness.”<sup>98</sup>

## B. Closed Sessions

The CPC allows judges to exclude the public from the entire trial or a part of it, notably to protect a witness.<sup>99</sup> This provision is unusual compared to other international or hybrid tribunals, which generally take a more restrictive approach to excluding the public. However, some categories of observers are usually allowed to remain in the courtroom.

In the first trials before the War Crimes Chamber—*Šimšić* and *Paunović*—the Chamber seemed to conduct most of the proceedings in public, compared to other international and hybrid tribunals. In these trials the prosecution requested closed sessions only on a few occasions because evidence of sexual violence committed against the witness was going to be presented. The trial panel always granted such requests.

This practice of open proceedings, however, underwent a serious change when the trials of *Stanković* and *Samardžić* began in late February and mid-March 2006, respectively. At the request of the prosecution judges decided to hold these trials, which dealt with sexual violence against Bosniak women in the Foča area, in camera. Local NGOs and victims’ groups protested strongly against the Court’s decision.<sup>100</sup> Even the State Court’s registrar at the time, Michael Johnson, wanted to “keep the courtrooms open.”<sup>101</sup> Concern was mainly about three issues: (1) some of the witnesses were reported not to have asked for such protection; (2) the chamber failed to explain persuasively why less-extreme protective measures (including anonymity and voice and image distortion) would not achieve the protective purpose; and (3) the decision to hold hearings behind closed doors might have been taken to protect the image of the War Crimes Chamber rather than witnesses, after the defendant *Stanković* had to be removed from the courtroom because of his disruptive behavior.

Since then the War Crimes Chamber has returned to holding fewer closed sessions. In a subsequent case involving allegations of sexual violence, most witnesses testified behind screens in the courtroom. Their identities were shielded, but the public was not excluded from the hearing.<sup>102</sup> According to a Bosnian judge, a number of witnesses in other trials have given up their requests for closed sessions. “Witnesses need the right information, and some of them

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a further change added a victim or witness for whom protective measures have been ordered by the Tribunal to the list of authorized applicants. Before the amendments came into force only parties in proceedings before the Tribunal were authorized to seek variation of protective measures

<sup>97</sup> Interview with a member of the Special Department, Sarajevo, 25 July 2007; interview with an international judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>98</sup> Interview with an international judge in the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>99</sup> See article 235 of the BiH Criminal Procedure Code, which states, “From the opening to the end of the main trial, the judge or the panel of judges may at any time, ex officio or on motion of the parties and the defense attorney, but always after hearing the parties and the defense attorney, exclude the public for the entire main trial or a part of it....”

<sup>100</sup> See BIRN Justice Report no. 1, 9 March 2006.

<sup>101</sup> See BIRN Justice Report no. 3, 17 March 2006.

<sup>102</sup> See Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia’s War Crimes Chamber*, February 2007, 33–34. The *Janković* trial took place from 21 April 2006 to 16 February 2007.

then conclude that the presence of the public is not a problem,” the judge said.<sup>103</sup> Nonetheless, journalists and trial monitors continue to believe that the frequency of closed sessions remains high, making it difficult for the public to follow the proceedings and assess how justice is being done. A trial monitor remarked that it is the prosecution that often fails to explain to witnesses what kind of safeguard each protective measure attempts to achieve. If they lack appropriate information witnesses may request closed sessions because this is the only measure with which they are familiar.<sup>104</sup>

Public attendance at the hearings before the War Crimes Chamber has remained limited. Only on a very few occasions did public attendance slightly exceed the number of seats available. Those attending the trials have been mainly relatives of the accused, witnesses, journalists, and trial monitors from various local or international organizations, including the RDC of Sarajevo, the Humanitarian Law Center of Belgrade, OSCE, the UN Office of the High Commissioner for Human Rights (OHCHR), and the International Committee for Human Rights.

Article 236 of the CPC allows the Chamber to permit “certain officials, scientists, and public officials to be present at the main trial from which the public is excluded,” as well as “the accused’s spouse or partner, and his close relatives.” In such a situation the Chamber warns all those present that they cannot write or talk to anyone about what they hear during the closed session. Any observer who remains is requested to stand and give his or her name and affiliation for the audio record of the court proceedings. The presiding judge also warns the observer about the threat of contempt proceedings in the event of disclosure of confidential material.<sup>105</sup> This stands in stark contrast to the prevailing methods before the ICTY and ICTR, where closed sessions are held only in the presence of the parties and limited court staff are duly bound by an oath of confidentiality.<sup>106</sup>

Increasingly the court has tried to reconcile security concerns with the preference for transparency by allowing the public to listen to the testimony from a separate room, with the voice of the witness altered and his or her identity protected by a pseudonym.<sup>107</sup> On the whole the Court may be said to have taken a progressive approach to recognizing the importance of transparency and trust in the process while trying to employ adequate checks to reduce security risks for witnesses.

### **C. Witness Support**

The State Court’s Witness and Victim Support Section (WSS) consists of four psychologists and two assistants. Witnesses are contacted before their appearance and asked if they need assistance and again upon arrival in Sarajevo to testify. Once at the court witnesses have their own waiting rooms. Psychological assistance is available, including inside the courtroom

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<sup>103</sup> Interview with a Bosnian judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>104</sup> ICTJ interview, Sarajevo, 10 June 2008.

<sup>105</sup> Interview with a judge of the BWCC, Sarajevo, 10 June 2008.

<sup>106</sup> Rules similar to those of the BiH War Crimes Chamber applied in East Timor, as well as before the Special Court for Sierra Leone. Article 79(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone states: “In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of monitoring agencies to remain. Such representatives should, if appropriate, have access to the transcripts of closed sessions.” In fact, until amended in 2005 this rule was even more flexible, as the Trial Chamber could also permit “representatives of the press” to remain.

<sup>107</sup> Interview with members of the Special Department, Sarajevo, 7 September 2007.

when necessary. Fifteen days after they testify, or even earlier if deemed necessary, the WSS follows up with witnesses to offer further professional support.

#### **D. Victims' Legal Representation and Compensation**

Victims are legally entitled to participate in the proceedings before the War Crimes Chamber in two capacities: either as witnesses or as injured parties who may make compensation claims during the trial.<sup>108</sup> In practice, however, they appear only as witnesses.

A provision in the BiH CPC allows for the Court to assign legal representation to witnesses, including victim-witnesses, in circumstances in which “it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.”<sup>109</sup> Yet the Bosnian model is working according to the same principles as the ICTY, where it is not possible for victims to be represented. In this respect the Court of BiH does not differ from most other international and hybrid tribunals, with the notable exceptions of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The CPC provision on legal representation of witnesses has had only very limited application because of lack of resources. The provision has been used only during two short periods in late 2006 and early 2007, when a lawyer financially supported by the UN OHCHR in Sarajevo assisted victims of torture and sexual abuse to testify before the Court. The lawyer advised the victims on which questions they could refuse to answer and on their right to seek compensation for damages. This initiative was similar to an initiative of the HLC in Serbia to allow victims to be represented in war-crimes trials.<sup>110</sup> Unlike the HLC representatives in Serbia, however, the Bosnian lawyer did not have the right to question witnesses and to introduce new evidence.<sup>111</sup> Moreover, the OHCHR closed its office in Sarajevo in June 2007 and the legal representation project was terminated. In any case most witnesses seem unaware of the possibility of engaging legal representation, and no system is in place to provide such representation.<sup>112</sup> “There should be a list available of lawyers who represent the victims,” a WSS representative remarked.<sup>113</sup>

Similarly, although the CPC provides for direct compensation to victims—both those who testify and those who only apply as injured parties—the War Crimes Chamber routinely instructs victims to take civil action after the criminal trial has ended.<sup>114</sup> The panels usually justify decisions not to address the compensation claims by pointing to the high number of injured parties and the likelihood that assessing payments for each would require significant

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<sup>108</sup> The Criminal Procedure Code defines an injured party as “a person whose personal or property rights have been jeopardized or violated by a criminal offence.” Criminal Procedure Code, Official Gazette of BiH, no. 36/2003, 21 December 2003, article 20(h).

<sup>109</sup> Ibid., article 84(5).

<sup>110</sup> For further details on the Serbian experience, see ICTJ, *Against the Current: War Crimes Prosecutions in Serbia*.

<sup>111</sup> Interview with the former head of the OHCHR in Sarajevo, 26 July 2007.

<sup>112</sup> Ibid.; interview with a senior staff member of WSS, Sarajevo, 27 July 2007.

<sup>113</sup> Ibid.

<sup>114</sup> Article 198 of the CPC states that the matter can be referred to a civil case when “the data of the criminal proceedings do not provide a reliable basis for either a complete or partial award” or if “the Court renders a verdict acquitting the accused of the charge or dropping the charges or if it decides to discontinue criminal proceedings.”

time, thus delaying the proceedings.<sup>115</sup> However, the OSCE Mission to BiH has expressed the concern that even when material damage could be assessed concretely and promptly, the trial panels refrained from addressing the compensation claim and the prosecution did not appear to try to gather such information.<sup>116</sup> Moreover, some panels reportedly failed to explain to the victim-witnesses that they had the right to seek compensation, either in the criminal proceedings or in a civil action.<sup>117</sup> The failure to instruct the victim about this right runs contrary to the explicit obligation of the prosecutor and the panel.<sup>118</sup> Even where instructions are duly given, it is not always easy for victims to understand what they need to do to pursue compensation claims. Moreover, they rarely have the financial means to hire lawyers to assist them in civil proceedings.<sup>119</sup> Their right to claim for reparations therefore remains largely unrealized.

## VI. COSTS AND FUNDING

The BWCC and the Special Department of the Prosecutor's Office have operated as cost-effective institutions, and their funding basis has been solid. The main share of financial responsibility has come from the international community, but the Bosnian authorities' role in funding the two institutions is steadily increasing. Starting in 2010 the War Crimes Chamber and the Prosecutor's Office are expected to be funded entirely from the national budget.

International funding has been channeled primarily through the Registry, which was established as a specific transitional project in 2004 under an agreement between the high representative and the BiH presidency. It is expected to close in December 2009.<sup>120</sup> International judges and prosecutors, as well as the international and Bosnian legal officers, administrative staff, and witness support personnel, whose salaries have been paid from such donations, have been employees of the Registry.

The Court of BiH has received funds from a variety of sources rather than relying on a small group of donors.<sup>121</sup> The amounts pledged and received from various donors differ significantly, from 13.05 million euros pledged and received from the United States and 3.6

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<sup>115</sup> See, for example, *Prosecutor v. Gojko Janković*, case no. X-KR-05/161, judgment, 16 February 2007 (English version), 78.

<sup>116</sup> OSCE Mission to BiH, *Fourth Report in the Case of Željko Mejakic and Others*, June 2007, 3–4.

<sup>117</sup> *Ibid.*

<sup>118</sup> According to article 86(10) of the CPC, “The injured party being examined as the witness shall be asked about his desires with respect to satisfaction of a property claim in the criminal proceedings.” Article 195(4) says, “If the authorized person has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is confirmed, he shall be informed that he may file that petition by the end of the main trial or sentencing hearing.” Similarly, article 258(4) stipulates the following: “If the injured party is present, but still has not filed the claim under property law, the judge or the presiding judge shall inform the person in question that such a claim may be filed by the closing of the main trial.”

<sup>119</sup> Interview with a member of the OSCE Trial Monitoring Team in Bosnia and Herzegovina, Sarajevo, 10 June 2008.

<sup>120</sup> Interview with a member of the Management Committee of the Registry for Section I for War Crimes and Section II for Organized Crime of the Court of BiH and for the Special Department for War Crimes and the Special Department for Organized Crime of the Prosecutor's Office of BiH (the management committee), Sarajevo, 10 June 2008. The agreement envisages five years as the duration of the Registry's mandate.

<sup>121</sup> In order of the size of their contribution, the donors to the Court of BiH and the Prosecutor's Office have been the United States, the United Kingdom, the European Commission, the Netherlands, Germany, Sweden, Spain, Austria, Italy, Norway, Ireland, Switzerland, Denmark, Belgium, Luxembourg, Greece, Turkey, and Poland. In addition Japan, Portugal, Canada, and Finland have supported the Court through benefits in kind (seconded personnel).

million euros pledged by Germany to a small contribution of 25,000 euros pledged and received from Poland.<sup>122</sup>

Raising sufficient funds for the Court has not always been easy. For instance, a donors' conference in Brussels in March 2006 resulted in pledges of 7.7 million euros for four years, although the Bosnian authorities and Court representatives had set the target at more than 20 million euros (not including large amounts requested to support construction of a state prison). In reaction to the setback at the conference, the financial director and the registrar of the Court developed the transition plan that is currently being implemented, with a timetable for phasing out of internationals, reduction of costs per trial, transfer of financial responsibility to the budgets of BiH, performance indicators, and recruitment plans. Key donors have responded positively, as illustrated by Sweden's pledge of 2 million euros in September 2006; the European Commission followed with pledges of approximately 4 million euros.<sup>123</sup>

Contributions are managed according to a detailed plan by a management committee whose members are the registrar of the Court, the registrar of the Prosecutor's Office, the financial director, and the head of administration.<sup>124</sup> There are two channels for further oversight of the use of international funds: the Transitional Council and quarterly meetings of diplomatic representatives of the donor states in Sarajevo.<sup>125</sup>

Funding arrangements for the Court of BiH seem sustainable. "We did not want to hand over a structure that BiH would not be able to pay for. We have a responsibility for a poor country, in which people earn 300 euros per month," said an international member of the management committee.<sup>126</sup> Reliance on the national budget has increased and international funding has decreased, while the Court and the Prosecutor's Office have become more effective. Between 2006 and 2007, for instance, the proportion of international to national funds shifted from almost double to almost even.<sup>127</sup> In 2008 the Bosnian government's contribution is greater than that of the international community for the first time; the forecast is that the respective figures will be 16.9 million convertible marks (KM, or 8.6 million euros) from the national budget and 5.1 million euros in international contributions.<sup>128</sup>

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<sup>122</sup> Sections I and II of the Court of BiH and Special Department for War Crimes and Organized Crime of the Prosecutor's Office of BiH, *Registry Annual Report 2007*, 125 (table 5.10).

<sup>123</sup> Interview with a member of the Management Committee, Sarajevo, 10 June 2008.

<sup>124</sup> Ibid.

<sup>125</sup> The task of the Transition Council is to assist the Registry of the Court of BiH in ensuring its transition to a fully national institution. The Council members are the president of the Court of BiH, the chief prosecutor, the registrar for the Court of BiH, the registrar for the Prosecutor's Office of BiH, the BiH finance and treasury minister, the BiH justice minister, the director of the BiH Directorate for European Integration, and the president of the High Judicial and Prosecutorial Council.

<sup>126</sup> ICTJ interview, Sarajevo, 10 June 2008.

<sup>127</sup> In 2006 the international community donated 8.9 million euros to support the work of the Court, the Prosecutor's Office, and the Registry, while the amount allocated in the national budget was 4.2 million euros. In 2007 the Bosnian government contributed 13.5 million KM (6.9 million euros), compared to 7.6 million euros provided by the international community. These figures cover not only war crimes prosecutions, but also cases of organized crime and all other offenses under the Court's jurisdiction. The bulk of the funding, however, was dedicated to war crimes cases.

<sup>128</sup> The figures for 2006 and 2007 are from the 2006 and 2007 annual reports by the Audit Office on the Institutions of BiH on the Revision of the Court of BiH and Prosecutor's Office of BiH, [www.revizija.gov.ba](http://www.revizija.gov.ba) (in Bosnian-Serbian-Croatian), and from Sections I and II of the Court of BiH and Special Department for War Crimes and Organized Crime of the Prosecutor's Office of BiH, *Registry Annual Report 2007*, 115–16 (tables 5.4 and 5.5). The forecasts for 2008 are from the Court of BiH, The Prosecutor's Office of BiH and the Registry, *The General Budgets for the Judicial Institutions of BiH* (June 2006), 56–57 (appendices 10 and 11).

The increasing share coming from the BiH budget follows the ongoing process of integration of local staff from the internationally supported Registry to the Court of BiH and the Special Department. The integration implies that the salaries of those staff are now paid from the BiH budget.

The overall costs on a per judgment basis have also been steadily decreasing, boding well for the plan that the two national judicial institutions will handle the caseload while funded by the state. The trials at the BWCC are far less costly than those of international tribunals. Between 2002 and 2007 the ICTY cost the international community 124 million euros per year. The average cost of the BWCC and the Special Department in the Prosecutor's Office for 2005 to 2009 has been 13 million euros to date. From 1994 to 2005 the average cost of each first-instance ICTY judgment by accused was 15 million euros; at the International Criminal Tribunal for Rwanda (ICTR) it was 26.2 million.<sup>129</sup> At the State Court the average cost was around 955,000 euros in 2006, around 680,000 euros in 2007, and the estimated cost for 2008 is a little less than 400,000 euros.<sup>130</sup>

The comparison with the costs at the ad hoc tribunals is imperfect because those tribunals try high-level defendants, with indictments often including numerous charges that take years to prove. In addition the trials in Sarajevo often benefit from facts adjudicated at ICTY trials, contributing to immense savings.<sup>131</sup> The trial panel in the *Mandić* trial accepted as proven no less than 396 facts established by the ICTY, which certainly contributed to savings of time and expenditure.<sup>132</sup> In any event, the costs of similar cases at the BWCC are much lower than in other tribunals. The first-instance trial at the BWCC against Momčilo Mandić, wartime justice minister of the Bosnian Serb Republic, did not cost much more than an average BWCC trial, because the duration of the trial (eight months) was slightly above the average 7.4 months.<sup>133</sup>

## VII. JUDICIAL COOPERATION

### A. Cooperation with the ICTY

The War Crimes Chamber emerged as a result of a strong push by the ICTY, and its effective functioning remains a crucial part of the ICTY's completion strategy. In a sense both institutions share a common purpose and collaboration has been extensive. Several former ICTY staff members have joined the BiH War Crimes Chamber and brought their expertise to the panels, the Prosecutor's Office, the Registry, witness protection, and other initiatives. In addition, other ICTY staff members dealing with court management and translation made short working visits to the BWCC.

Beyond the sharing of professional expertise, the BWCC has directly benefited in many ways from the work of the ICTY, especially in judicial terms.

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<sup>129</sup> The figures for first-instance judgments at the ICTY and ICTR come from the written material prepared by the Registry of the Court of BiH for the donors' conference in Brussels, 31 March 2006. Information in the relevant appendix (Comparative Statistical Analysis for the Bosnia and Herzegovina State Court and Prosecutor's Office War Crimes and Organized Crime Case Activity, 2005–2009) is based on the official information published by these institutions.

<sup>130</sup> Interview with a member of the management committee, Sarajevo, 10 June 2008.

<sup>131</sup> See below, VII, "Judicial Cooperation."

<sup>132</sup> *Prosecutor v. Momčilo Mandić*, judgment no. X-KR-05/58, 18 July 2007, 51–103.

<sup>133</sup> The trial of Mandić began November 13, 2006 and ended 18 July 2007. The total duration of the 32 completed trials (as of June 2008) has been 236 months, or 7.4 months per trial.

- *Use of adjudicated facts established by the ICTY.* Panels have saved significant resources in cases of crimes against humanity by accepting ICTY findings about the contextual elements of the crimes charged, such as the widespread or systematic nature of attacks in a given area. The trials therefore have been able to focus on the more-limited task of establishing what role the accused had in the attack.<sup>134</sup>
- *Reliance on ICTY jurisprudence for issues of substantive law.* Numerous issues of substantive law have been decided by reliance on ICTY jurisprudence, including factors determining whether an act was related to a conflict, definition of the term “civilian” to determine the status of victims, customary status of punishment of crimes against humanity and individual responsibility for their commission, determination of the elements of a crime against humanity, persecution and torture, definition of the term “other inhumane acts,” elements of the *actus reus* and *mens rea* of rape, interpretation of forms of individual criminal responsibility, and interpretation of the elements of command responsibility.<sup>135</sup>
- *Guidance from ICTY procedural decisions.* The War Crimes Chamber panels have referred to ICTY judgments to justify procedural decisions, such as determining the obligation of the prosecutor to disclose evidence or ruling on the admissibility of evidence, presentation of rebuttal evidence, and right to self-representation.<sup>136</sup>
- *Use of ICTY evidence.* ICTY witness statements are usually accepted on the condition that the accused is given an opportunity to cross-examine the witness.<sup>137</sup> Exceptionally

<sup>134</sup> Interview with an international judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007. When chambers decide about accepting facts that have been previously adjudicated, they follow the judicial criteria established by the ICTY. The accepted facts have to be distinct, concrete and identifiable, restricted to factual findings and not including legal characterizations, contested at the ICTY trial and forming part of a judgment that either has not been appealed or has been settled on appeal, and general in nature and not attesting to the individual criminal responsibility of the accused. See, for example, *Prosecutor v. Marko Samardžija*, judgment, 3 November 2006, 18–19, and *Prosecutor v. Gojko Janković*, judgment, 16 February 2007, 19–20.

<sup>135</sup> *Prosecutor v. Nikola Andrun*, judgment, 14 December 2006, 15 (definition of “civilian”) and 25 (elements of torture); *Prosecutor v. Dragan Damjanović*, judgment, 15 December 2006, 15 (definition of “civilian”), 23 (definition of “other inhuman acts”), 44 (elements of a crime against humanity), and 47–48 (elements of persecution); *Prosecutor v. Momčilo Mandić*, judgment, 18 July 2007 (in Bosnian-Croatian-Serbian), 129–30 (definition of “other inhuman acts”), 143–44 (forms of individual criminal responsibility), and 145–47 (command responsibility); *Prosecutor v. Neđo Samardžić*, Appellate Panel judgment, 13 December 2006, 29 (customary status of punishment for crimes against humanity); *Prosecutor v. Marko Samardžija*, judgment, 3 November 2006, 22–23 (forms of individual criminal responsibility); *Prosecutor v. Radovan Stanković*, judgment, 14 November 2006, 32–33 (customary status of punishment for crimes against humanity); *Prosecutor v. Boban Šimšić*, judgment, 11 July 2006, 40 (forms of individual criminal responsibility), 42–43 (elements of persecution), and 49 (elements of rape); *Prosecutor v. Radmilo Vuković*, judgment, 16 April 2007, 10 (act related to armed conflict), 10–11 (elements of a crime against humanity), and 11 (elements of rape)

<sup>136</sup> *Prosecutor v. Nikola Kovačević*, judgment, 3 November 2006, 17 (presentation of rebuttal evidence); *Prosecutor v. Momčilo Mandić*, judgment, 18 July 2007 (in Bosnian-Croatian-Serbian), 112 (admissibility of evidence); *Prosecutor v. Radovan Stanković*, judgment, 14 November 2006, 13–14 (self-representation); *Prosecutor v. Boban Šimšić*, judgment, 11 July 2006, 12–14 (disclosure of evidence).

<sup>137</sup> In July 2007, for example, the trial panel in a case of murder, persecutions, forcible transfer, and other inhuman acts against civilians from Srebrenica (*Božić and Others*) approved cross-examination of Robert Alexander Franken, the deputy commander of the Dutch battalion stationed in the area in 1995. Franken had testified before the ICTY in 2000. After cross-examination the Chamber admitted the testimony into evidence. See “Bozic et al.: Cross-examination Approved,” *BIRN*, 18 July 2007, [www.bim.ba/en/72/10/3663/](http://www.bim.ba/en/72/10/3663/) (accessed 24 June 2008). A month later the same panel refused to accept the ICTY testimony of Leenert Van Duijn, another member of the Dutch battalion, because the witness refused to be cross-examined via video link or in the

panels have admitted ICTY testimony even if the defendant did not have an opportunity to cross-examine the witness. In such cases the testimony can only be used as corroborating evidence.<sup>138</sup> Closely related to the use of ICTY evidence is the issue of access to various ICTY databases by the members of the Special Department. Until recently, the department possessed four “keys” (passwords) to access the Evidence Disclosure Suite. The limited number of passwords available to staff slowed the work of the department—albeit not significantly.<sup>139</sup> After direct requests in mid-2007 by the BiH chief prosecutor to the then-ICTY chief prosecutor and her deputy, the situation improved considerably. By June 2008 each of the six prosecutor teams had been able to access the Evidence Disclosure Suite database, although prosecutors still have only limited access to the Judicial Database, as they can use only one password.<sup>140</sup>

- *Transfer of knowledge.* Transfer of knowledge is another way judges and prosecutors in Sarajevo have benefited from ICTY expertise. Judges have traveled on two occasions to The Hague and discussed concrete matters of substantive and procedural law with ICTY counterparts. Not surprisingly there is regular communication between the ICTY prosecutor and the Special Department for War Crimes, mainly in relation to the Rule 11 bis and Category II cases transferred to Bosnia.<sup>141</sup>

However, senior officials have acknowledged for some time that “the ICTY has not been designed to help other institutions.”<sup>142</sup> Such concerns may increase as the scheduled end of the ICTY mandate approaches in 2010. The following issues may give rise to complications:

- *Access to ICTY Archives.* It is not known who will be in charge of the ICTY archives and access thereto once the Tribunal closes. Yet access to judicial archives as well as previously unused evidence gathered by the Office of the Prosecutor is likely to have a tremendous impact on judicial efforts in the former Yugoslavia in general and in BiH in particular. Given the legal and logistical complexities of organizing access, it is urgent to devise a system. This is one of the considerations of an independent Advisory Committee on Archives established by the ICTY and ICTR. Information and evidence gathered by the ICTY over the past 14 years is said to amount to approximately 7 million pages. This extensive and unique source of information will be of obvious, if not crucial, relevance in many cases that the War Crimes Chamber—as well as courts in Serbia, Croatia, Kosovo, Macedonia, and Montenegro—will handle.
- *Legal difficulties arising from shared evidence.* “Evidence gathered by the ICTY establishes the guilt of many more suspects [than it has tried],” a former ICTY prosecutor, who later joined the Special Department for War Crimes, said in 2005.<sup>143</sup>

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courtroom. See “Bozic: Prosecution Motion Rejected,” *BIRN*, 23 August 2007, [www.bim.ba/en/77/10/3926/](http://www.bim.ba/en/77/10/3926/) (accessed 24 June 2008).

<sup>138</sup> Interview with an international judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007. According to the Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Admissibility of Evidence Collected by ICTY in Proceedings before the Courts in BiH (2004), “The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial” (article 3(2)).

<sup>139</sup> Interview with an international prosecutor, Sarajevo, 7 September 2007.

<sup>140</sup> Interview with a member of the Special Department, Sarajevo, 9 June 2008.

<sup>141</sup> Interview with the chief prosecutor of BiH, Sarajevo, 25 July 2007.

<sup>142</sup> ICTJ interview, Sarajevo, 28 October 2005.

<sup>143</sup> BIRN Conference, Sarajevo, 10 November 2005.



The prosecutor emphasized the reliability and precision of such evidence, as the ICTY investigations had begun during the war when the crimes were recent. Of particular value are interviews of individuals who were part of the command structures at the time. But the sharing of such evidence and information raises a number of legal difficulties, including witnesses' willingness to testify years after speaking to the ICTY, the extent of their protection, or admission of ICTY evidence. These issues may be more difficult to resolve once ICTY winds down, particularly if judicial oversight is required.

## **B. Regional Cooperation**

Enhanced cooperation between prosecutors and investigative judges of BiH, Croatia, and Serbia, both at the investigative stage and at trial, has been one of the most encouraging signs in recent years of these countries' capacity to bring war crimes suspects to justice. The BWCC has certainly benefited from this development. The Bosnian chief prosecutor has signed protocols on cooperation with his counterparts in Croatia and Serbia, in January and July 2005, respectively.<sup>144</sup> However, lingering legal obstacles negatively affect the course of justice in the region. BiH pays the highest price when large numbers of victims and evidence remain in Bosnia while suspects across the border are protected from extradition.

The actual dimensions of the problem caused by the presence of war crimes suspects in the neighboring countries are not fully known. The high number of arrests and trials before the BWCC suggests that numerous suspects continue to live in Bosnia. The mapping exercise currently undertaken by the Special Department for War Crimes is expected to shed more light on the problem. Nonetheless, it is believed that many perpetrators of war crimes in BiH have moved to Croatia or Serbia since the end of the war and acquired citizenship there. In all three countries a ban exists on the extradition of nationals, and the trials can take place only in the country where the suspect resides. In Croatia the ban on extradition is entrenched in the Constitution, while in Serbia and BiH the respective criminal-procedure laws contain provisions to that effect.<sup>145</sup>

Serbia and Croatia have been unwilling to extradite their nationals to BiH for trials, and for its part BiH has been reluctant to transfer prosecutions to the neighboring states. This is consistent with the dominant position among Bosnian politicians and judicial officials that trials should take place in Bosnia, the territorial jurisdiction, after the suspects have been extradited.<sup>146</sup> Until June 2008 any transfer of war crimes cases was impossible under the CPC,

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<sup>144</sup> Protocol on the agreement in realizing the mutual cooperation in fighting all forms of capital crimes signed between the General Attorney's Office of the Republic of Croatia and the State Protector's Office of the Republic of Bosnia and Herzegovina, 21 January 2005, [www.tuzilastvobih.gov.ba/files/docs/MEMORANDUM\\_PROTOKOL\\_HRVATSKA-BIH\\_\(bos\).pdf](http://www.tuzilastvobih.gov.ba/files/docs/MEMORANDUM_PROTOKOL_HRVATSKA-BIH_(bos).pdf). Protocol on the agreement in realizing the mutual cooperation in fighting all forms of capital crimes signed between the State Prosecutor's Office of the Republic of Serbia and the Prosecutor's Office of the Republic of Bosnia and Herzegovina, 1 July 2005, [www.media.ba/mcsonline/bs/tekst/zakoni-i-drugi-relevantni-dokumenti](http://www.media.ba/mcsonline/bs/tekst/zakoni-i-drugi-relevantni-dokumenti) (in Bosnian-Croatian-Serbian) (accessed 24 June 2008).

<sup>145</sup> Article 415(1)(a) of the Criminal Procedure Code of Bosnia and Herzegovina does not allow the extradition of citizens of Bosnia and Herzegovina. Article 9 of the Constitution of Croatia and article 540(1) of the Criminal Procedure Code of Serbia prohibit extradition of the nationals of the respective countries.

<sup>146</sup> At a session of the BiH Parliament in April 2007 then-Chief Prosecutor Marinko Jurčević reaffirmed the stance of his office that suspected war criminals should be tried in the country where the crime was committed. He advocated "conclusion of a trilateral agreement on extradition, or some other solution. [Otherwise] we will be stuck in a vicious circle." Marinko Jurčević, Chief Prosecutor of BiH, transcript of the session of the House of Representatives of the Parliamentary Assembly of BiH, 12 April 2007.

even with respect to individuals who never had Bosnian citizenship. The CPC stipulated that relinquishment of criminal prosecution to a foreign state could not be authorized with respect to criminal offenses that carried a sentence of imprisonment of 10 years or more.<sup>147</sup>

In 2004 the OSCE missions in the three countries launched a process to facilitate multilateral consultations to enhance interstate cooperation in addressing war crimes cases. The so-called “Palić process,” named after the Serbian town where the interested parties first met, consisted of regular encounters between the chief prosecutors and chief war-crimes prosecutors from BiH, Croatia, and Serbia in the presence of OSCE officials. Although useful the process has limited potential because resolution of the issues of extradition and transfer of proceedings is beyond the competence of judicial officials who have participated in the meetings and requires involvement of the Prime Ministers or Heads of State.<sup>148</sup>

In the meantime BiH and the neighboring countries have developed other forms of judicial cooperation in war crimes matters in cases in which no conflict of jurisdiction exists. Serbia has extradited to BiH two Bosnian Serb war-crimes suspects, neither of whom had acquired Serbian citizenship.<sup>149</sup> The Court of BiH has assisted Serbia by providing videoconference facilities to hear witnesses who reside in BiH for trials that take place in Serbia and by allowing investigating judges from Belgrade to examine witnesses in the Court building. The Special Department has received or sent numerous requests for cooperation to and from the prosecutors in Croatia and Serbia, many of them concerning access to documents. Most of the requests have been heeded.<sup>150</sup>

The climate for cooperation between BiH and Serbia chilled after May 2007, when the Serbian police arrested a Bosnian citizen, Ilija Jurišić, in Belgrade on war crimes charges. A trial against Jurišić has begun at the War Crimes Chamber of the District Court in Belgrade in relation to the killings in Tuzla (BiH) of dozens of former Yugoslav People’s Army soldiers in May 1992, allegedly at Jurišić’s order and in breach of an agreement that guaranteed their safe withdrawal from the town. The arrest and the trial have caused great consternation among Bosniaks and Bosnian Croats, who consider the allegations against Jurišić frivolous.

The resolution of problems in cooperation between BiH and the two neighboring countries requires that all countries lift the ban on the extradition of nationals charged with committing war crimes. Where it is more practical to conduct trials in Croatia or Serbia, BiH should allow transfer of proceedings to the two countries. The recent amendment of the Criminal Procedure Code, removing the limitation on the type of crimes for which relinquishment of criminal prosecution to a foreign state is permissible, is a welcome step. The two processes—transfers

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<sup>147</sup> CPC, article 412(4). The amendments adopted in June 2008 removed this limitation from the text of the law.

<sup>148</sup> Ambassador Jorge Fuentes (Head of OSCE Office in Zagreb), “The Palić Process”, *OSCE Courier, Newsletter of the OSCE Office in Zagreb*, March/April 2008, 2.

<sup>149</sup> See “Gojko Kličković extradited to Bosnia and Herzegovina,” *Court of BiH press release*, 20 June 2007, [www.sudbih.gov.ba/?id=439&jezik=e](http://www.sudbih.gov.ba/?id=439&jezik=e) (accessed 24 June 2008). Gojko Kličković had applied for Serbian citizenship, and his lawyers argued that as long as his request was pending he could not be extradited. The Serbian Ministry of Justice, however, rejected this line of reasoning and transferred Kličković to BiH. The second case involved Vaso Todorović. See “Srbija izručila Vasu Todorovića BiH” (“Serbia Extradited Vaso Todorović to BiH”), *Danas* (Belgrade), 10 April 2008, [www.danas.co.yu/20080410/region1.html](http://www.danas.co.yu/20080410/region1.html) (accessed 24 June 2008).

<sup>150</sup> Presentations of Vaso Marinković, then-head of the Special Department for War Crimes, and Josip Čule, deputy state prosecutor of the Republic of Croatia, at a meeting marking the second anniversary of the signing of an agreement between the Croatian chief prosecutor and the Serbian state prosecutor on cooperation in criminal matters, Belgrade, 5 February 2007.

and extraditions—should run in parallel, with the selection of either option depending on the circumstances of each case.

### C. Relationship between the War Crimes Chamber and Local Courts

In Bosnia the cantonal courts (in the Federation of BiH), district courts (in Republika Srpska), and the Basic Court of Brčko District also have some limited power to try war crimes. Since 2003 the entities' penal codes no longer include provisions on war crimes, but three possibilities remain for a case to be delegated to a local court. These derive from the *Book of Rules on the Review of War Crimes Cases* that the Collegium of Prosecutors adopted in December 2004.

1. When the state prosecutor reviewed pre-2003 cases under the Rules of the Road categories described above and decided that a case was not “highly sensitive,” the prosecutor would send it to the local prosecutor with territorial jurisdiction over it.<sup>151</sup>
2. If the evidence in the pre-2003 cases was insufficient under the Rules of the Road system or the ICTY could not review it, cantonal and district prosecutors could continue the investigation. They are obliged to submit the file to the state prosecutor for review before requesting any order for detention or an indictment against the suspect from the competent preliminary-proceedings judge.<sup>152</sup>
3. The state prosecutor of BiH has exclusive competence to issue indictments in cases opened since 2003. If district or cantonal prosecutors receive a criminal complaint they can forward it only to the State Prosecutor's Office.<sup>153</sup> After the issuance of an indictment, however, the prosecutor can request the Court of BiH to authorize transfer of the case to a cantonal or district court.<sup>154</sup>

Despite a general lack of international attention to the local courts, they are quite active. In 2006, the first year the War Crimes Chamber performed at full capacity, it issued eight first-instance judgments, while the number of judgments rendered by the cantonal and district courts was 16. In 2007 the ratio was 10 to 19, including two judgments by the Brčko District Court.<sup>155</sup> Although trials in the local courts are often neglected by the international community, the OSCE carries out monitoring. Cooperation by the Court of BiH and the Special Department for War Crimes with the cantonal and district courts has been only sporadic. Bosnia therefore lacks an overall coherent and strategic approach to war crimes prosecutions.

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<sup>151</sup> Prosecutor's Office of Bosnia and Herzegovina, *Book of Rules on the Review of War Crimes Cases*, 28 December 2004, article 7(5).

<sup>152</sup> *Ibid.*, article 6(2).

<sup>153</sup> Telephone interview with a war crimes prosecutor in the Office of the Prosecutor of Zenica-Doboï Canton, 24 June 2008.

<sup>154</sup> Criminal Procedure Code of BiH, *Official Gazette of BiH*, no. 36/2003, 21 November 2003, article 27(1): “The Court may transfer conduct of the proceedings for a criminal offense within its jurisdiction to the competent Court in whose territory the offense was committed or attempted.... (2) The decision in terms of Paragraph 1 of this Article may also be rendered on the motion of the parties or the defense attorney for all the offenses falling within the jurisdiction of the Court except for the offenses against the integrity of Bosnia and Herzegovina.”

<sup>155</sup> Data received from the OSCE BiH, June 2008.

In practice the Court of BiH—of which the War Crimes Chamber is part—is not a superior jurisdiction to the courts in the Federation of BiH and Republika Srpska, and its jurisprudence is not binding on the cantonal and district courts.<sup>156</sup> The three systems have acted independently of one another and differ in important ways, particularly in terms of the applicable law. The Court of BiH applies the Penal Code adopted at the state level in 2003. As BiH does not have a supreme court, decisions of the trial panels at the Court of BiH are reviewed by the Appellate Chamber alone. It is also possible to challenge decisions before the Constitutional Court of BiH, but only if conformity with the BiH Constitution of a law implemented by the Appellate Chamber is at issue. In contrast, district and cantonal courts use the Penal Code of the former SFR Yugoslavia as the applicable law at the time of the commission of the crimes.<sup>157</sup>

As a result, only the Court of BiH has tried individuals for crimes against humanity and applied the doctrine of command responsibility. In March 2007 the Constitutional Court of BiH ruled that the country's Penal Code permits trial and conviction of a person whose act of omission was prohibited under the general principles of international law, even if the conduct did not constitute a criminal offence under municipal law at the relevant time.<sup>158</sup> Cantonal and district courts have refrained from doing so.

A significant discrepancy exists in sentencing at the state and entity levels, resulting from the application of different laws: The maximum penalty before the Court of BiH is 45 years' imprisonment, in contrast to 20 years in Republika Srpska and 15 years in the Federation of BiH.<sup>159</sup> The BWCC has already imposed several prison sentences of around 30 years, all far exceeding the maximum allowed in the entities.<sup>160</sup> The Constitutional Court found that imposing penalties under the Penal Code of BiH instead of the Criminal Code of the former Yugoslavia was in accordance with the European Convention of Human Rights and, accordingly, with the Constitution of BiH.<sup>161</sup> However, the accused before the Court of BiH have launched hunger strikes on two occasions in protest against the application of the Penal

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<sup>156</sup> The Law on the Court of BiH (2000) provides in article 13 that the Court “shall be competent to ... (a) take a final and legally binding position on the implementation of State Laws and international treaties on request by any court of the Entities or any court of the Brcko district entrusted to implement State Law; and ... (c) decide any conflict of jurisdiction between the courts of the Entities, and between the Courts of the Entities and the Courts of the Brcko district.” However, the Constitution of BiH does not list the judiciary as one of the areas in which institutions of BiH have responsibility. Judges in the courts in the entities have refused to accept any binding instructions from the Court of BiH. Interview with Medžida Kreso, president of Court of BiH, Sarajevo, 28 September 2007.

<sup>157</sup> Interview with a Bosnian judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007; telephone interview with a district war-crimes prosecutor in Banja Luka, June 20, 2008. See also OSCE Mission in BiH, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles* (March 2005), 12.

<sup>158</sup> Constitutional Court of BiH, application no. AP-1785/06 (*Abduladhim Maktouf*), decision on admissibility and merits, 30 March 2007, para. 79.

<sup>159</sup> Dženana Karup-Druško, “Tužilaštvo BiH i VSTV se moraju korigirati” (“BiH Prosecutor's Office and the HJPC Should Act Differently”), *BH Dani* (Sarajevo), 13 October 2006, [www.bhdani.com/default.asp?kat=txt&broj\\_id=487&tekst\\_rb=8](http://www.bhdani.com/default.asp?kat=txt&broj_id=487&tekst_rb=8) (interview with Medžida Kreso, president of Court of BiH) (accessed 24 June 2008).

<sup>160</sup> See for example the cases against *Gojko Janković*, *Niset Ramić*, *Mirko Pekez*, *Jadranko Palija*, *Željko Mejakić*. For further detail see the chart of cases listed in the appendix to this report.

<sup>161</sup> The court reasoned that the sanctions prescribed by the Criminal Code of the former Yugoslavia for perpetrators of war crimes were inadequate and failed to protect victims. This lack of protection “does not comply with the principle of fairness and the rule of law, embodied in Article 7 of the European Convention, and which ... allow this exemption from the rule set forth in paragraph 1 of the same Article.” Constitutional Court of BiH, application no. AP-1785/06 (*Abduladhim Maktouf*), decision on admissibility and merits, 30 March 2007, para. 78.

Code of BiH—first in January 2007 and again in September of that year. The discrepancies in the punishments and, more generally, the application of different laws concerning war crimes remain a crucial challenge for the BiH judiciary.

The BiH Prosecutor's Office lacks coordination with the entity offices of prosecutors. The department has served mainly as a “clearinghouse,” sorting the huge caseload of thousands of criminal reports. That arrangement was based on a December 2004 agreement between the various prosecutorial agencies in Bosnia, and it is codified in the *Book of Rules of the Review of War Crimes Cases*.<sup>162</sup> The department cannot issue binding instructions to cantonal and district prosecutors. According to a prosecutor in the department, “The law says we can issue ‘necessary instructions’ to those prosecutors. But are such instructions binding? If they are, nobody interprets them in that way. In any event, I can’t recall us issuing any such instruction.”<sup>163</sup> Indeed, the then-acting head of the Special Department told the ICTJ in September 2007: “We only give them advice and offer assistance on certain issues. For example, we can advise them on witness protection, and we can request on their behalf evidence from the prosecutors in the neighboring countries. We do that sometimes. But generally our cooperation with the ICTY prosecutor and the prosecutors in the neighboring countries is better developed than the cooperation with the cantonal and district prosecutors.”<sup>164</sup>

Despite the absence of legislative mechanisms, the relationship between the prosecutorial agencies could be more productive in practice. If a clear strategy existed at the national level, exchange of information between the agencies could be routine. In some instances adjudication of crimes involving multiple perpetrators could be divided between the State Prosecutor’s Office and offices at the cantonal and district levels, with the latter trying lower-level suspects. Where systemic crimes are under investigation, such cross-referencing is essential to elucidate networks of perpetrators and chains of responsibility. The current relationship is sometimes tense. “We conduct the investigation and then, when we submit the case to the state prosecutor for review, they decide to take it, allegedly because it is ‘highly sensitive,’ but in reality because they get a prepared case. Our work goes for naught,” one district prosecutor remarked.<sup>165</sup> This reaction illustrates the importance of working out clear criteria for the division of labor among various prosecutorial agencies in BiH. Delineating the respective areas of responsibility is one of the principal objectives the long-awaited national strategy for processing war crimes is expected to accomplish.

According to the High Judicial and Prosecutorial Council’s analysis of the capacity of the cantonal and district courts and prosecutors to handle war crimes cases, the prosecutorial offices are understaffed and under-equipped.<sup>166</sup> Less than half of the offices have specialized war crimes departments. Police in the Federation of BiH cantons and in the seats of the district courts in Republika Srpska do not have specialized departments for war crimes

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<sup>162</sup> Interview with members of the Special Department for War Crimes, Sarajevo, 7 September 2007.

<sup>163</sup> Interview with a member of the Special Department for War Crimes, Sarajevo, 9 June 2008.

<sup>164</sup> ICTJ interview, Sarajevo, 25 July 2007.

<sup>165</sup> ICTJ telephone interview with a war crimes prosecutor in the Office of the Banja Luka District Prosecutor, 20 June 2008.

<sup>166</sup> High Judicial and Prosecutorial Council of BiH, “Analiza procene sposobnosti tužilaštava, sudova i policijskih organa u Bosni i Hercegovini za postupanje u predmetima ratnih zločina” (“Analysis of the Capacity of Prosecutorial Offices, Courts, and Police in Bosnia and Herzegovina to Act In War Crimes Cases”), 5 October 2006. For an in-depth analysis of these issues in the district and cantonal courts, see Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina’s Cantonal and District Courts* (July 2008), sections IV, V, and IX.

investigations. Neither the Federation of BiH nor Republika Srpska has strategies and programs for witness protection.

It is unclear whether the current division of labor in war crimes matters at the cantonal and district level will be maintained. There is still no overall strategy for war crimes trials in Bosnia. Some donors have expressed concern that exclusive focus on the Court of BiH leaves unresolved the problem of insufficient capacity of cantonal and district courts to address war crimes adequately. Some believe it would be a better long-term strategy for Bosnia to develop the capacity of a few selected courts per entity. For instance, in Croatia the four most important courts have been designated to take responsibility for war crimes trials. The president of the Court of BiH has argued that prosecutors and judges working on war crimes cases in the entities should become employees of the Court of BiH and the Special Department for War Crimes, and apply the BiH Penal Code.<sup>167</sup> Other proposals would leave the entities' current employment structures in place, but the panels would apply the BiH Penal Code, instead of the Criminal Code of SFR Yugoslavia, in war crimes cases. Appeals would be decided at the Appeals Chamber of the State Court. In September 2007 the OHR set up a working group to examine these proposals.<sup>168</sup> The group ended its work in March 2008 without reaching consensus on a preferred model.<sup>169</sup>

#### **D. National War Crimes Strategy and Prosecutorial Strategy**

As of June 2008 a different working group, established in September 2007, was drafting a so-called National War Crimes Strategy.<sup>170</sup> It includes representatives of the Court, the Prosecutor's Office, the High Judicial and Prosecutorial Council, BiH's justice ministry, and the finance ministries of the two entities. This national strategy is expected to address the following issues: the overall number of courts, prosecutorial offices, judges, and prosecutors in BiH necessary to deal with war crimes cases, and their relationship; the allocation of funds to various courts and prosecutorial offices, depending on their caseload; the need for employment of associate legal officers in cantonal and district courts and prosecutorial offices; use of plea agreements and witness immunity in a consistent manner; outreach; coordination between the relevant ministries, judicial institutions, law enforcement agencies, penitentiaries, and civil society on investigation and prosecution of war crimes; and measures to enhance regional interstate cooperation on war crimes cases.

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<sup>167</sup> Interview with Medžida Kreso, president of Court of BiH, Sarajevo, 28 September 2007. Judgments by the newly established departments would go on appeal to the Appellate Chamber of the Court of BiH.

<sup>168</sup> The group consisted of representatives of the following institutions: High Judicial and Prosecutorial Council, Court of BiH, Prosecutor's Office of BiH, Supreme Court of the Federation of BiH, Supreme Court of Republika Srpska, Prosecutor's Office of Republika Srpska, Prosecutor's Office of the Federation of BiH, Brcko District Prosecutor's Office, Brcko District Basic Court, and Ministry of Justice of BiH. The representatives of the OSCE OHR and the UNDP attended the meetings. E-mail communication with representative of an international organization attending meetings of the working group, 23 June 2008.

<sup>169</sup> Telephone interview with representative of an international organization attending meetings of the working group, 20 June 2008. Another working group, with a similar composition, simultaneously discussed whether an appellate court at the state level should be established to review first-instance judgments of the BWCC. Some judicial officials in BiH are concerned that the current structure, in which the trial panels and the Appeals Chamber are part of the same court, may not ensure independence of the appellate body. Working group members welcomed the proposal, even if the support was not unanimous. *Ibid.*

<sup>170</sup> The aim of the National Strategy is to "find methodology and present in detail resources required to ensure that BiH will have just decisions rendered for all violations or alleged violations of International Humanitarian Law, where offenders and criminal offenses are under jurisdiction of the courts of BiH." BiH justice minister, Motion for the Establishment of Working Group for Creation of the National Strategy for War Crimes Cases and Resolving Issues Related to War Crimes, June 2007 (English translation on file at ICTJ).

Although high-level judicial officials and government representatives have been announcing the creation of the national strategy since 2006, it is unclear whether it will be completed in the foreseeable future. Its starting point is the creation of a “prosecutorial strategy” in the Special Department for War Crimes in the State Prosecutor’s Office. Work on this strategy has been ongoing since September 2007. Its key component is a study that should identify all crimes committed during the conflict in Bosnia, broken down by municipalities and months. The data used in the study originate not only from existing criminal complaints, but also from databases of Bosnian and international nongovernmental organizations, jurisprudence of the ICTY, and other sources. By June 2008 the Special Department for War Crimes had nearly completed the study. In the coming years the department will use its results to prioritize the most important cases for prosecution. Investigations will be conducted whether or not a case file or criminal complaint already exists for the crimes.<sup>171</sup>

The Special Department is simultaneously conducting a War Crimes Statistics Project, creation of a register of all existing war crimes cases under the jurisdiction of the State Court, the entity courts, and the Basic Court of Brčko District. The mapping should result in a realistic assessment of the number of war crimes suspects against whom charges exist. In addition, the Special Department may use the mapping exercise to verify whether existing files contain evidence to be used in the investigations following completion of the crime-centered study. The mapping is expected to be completed in October 2008.<sup>172</sup>

## VIII. PUBLIC PERCEPTIONS AND OUTREACH

### A. General Perceptions

There has been little scientific study of perceptions of the BWCC, but generally public interest in the trials appears limited. According to trial observers the general public is rarely present in the courtrooms.<sup>173</sup> “When groups of students from the law schools visit the court, only a few of them know something about the *Kravice* trial, although it is about genocide and involves 11 defendants,” said a representative of the court’s Public Information and Outreach Section (PIOS).<sup>174</sup>

Several factors may account for this limited interest. Bosnian society shows fatigue with war-related themes. The media has paid less attention than anticipated to the proceedings before the War Crimes Chamber.<sup>175</sup> Although the media frequently cover the trials, the reports are usually short and contain only basic information about the hearings. No television programs focus on the trials, and the print media rarely analyze a case in detail.

If public statements of political leaders and representatives of victims’ groups are indicative, Bosnian Serbs have been least supportive of the BWCC. Serb associations of former camp

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<sup>171</sup> Interview with a member of the Special Department for War Crimes, Sarajevo, 9 June 2008.

<sup>172</sup> Ibid.

<sup>173</sup> Interviews in Sarajevo, July and September 2007.

<sup>174</sup> Interview with PIOS representative, Sarajevo, 27 July 2007.

<sup>175</sup> Interview with the former head of the OHCHR in Sarajevo, 26 July 2007. The loss of interest is shown by the fact that in 2007 less than five outlets were represented at the monthly meetings of the Association of Court Correspondents, although in 2006 about a dozen attended on average. Interview with Nerma Jelačić, director of BIRN, Sarajevo, 24 July 2007. BIRN organized training sessions about war crimes trial reporting in 2005 and hosts meetings of the Association of Court Correspondents.

inmates vigorously objected to the choice of the building where the Court of BiH is seated because it was a detention facility for Serbs during the war. Between September 2005 and November 2006, in the first 13 trials against Bosnian nationals, 23 of 24 defendants were Bosnian Serbs.<sup>176</sup> Serb victims' groups have complained about the lack of prosecution of crimes committed against Serbs, especially crimes in Sarajevo and in northeast BiH. The predominance of Bosniaks among the Court staff has also been invoked as proof of ethnic bias. At the same time the unpopularity of the Court of BiH in Republika Srpska has discouraged judges from that entity from applying in greater numbers for posts on the Court.<sup>177</sup>

The perceived or real flaws in the work of the Court and the Prosecutor's Office may not reflect ethnic bias. The predominance of cases concerning crimes against Bosniaks mirrors the fact that Bosniaks constituted the majority of victims during the war.<sup>178</sup> Bosniak organizations were also particularly active during and after the war in accumulating evidence about the crimes. Since April 2006 the ethnic composition of the accused has become much more mixed. Seven trials against Bosnian Croats have taken place.<sup>179</sup> Since December 2006 nine trials against Bosniak indictees have taken place.<sup>180</sup> Moreover, a likely explanation of why most court employees are Bosniaks is their predominance in the population of Sarajevo.

Although complaints about bias have often come from politicians and associations that could be considered nationalistic, at least one leading human rights activist in Republika Srpska considers the great number of trials against ethnic Serbs and the prevalence of Bosnian Muslims on the staff a genuine problem. In his opinion, "If there aren't enough Serbs and Croats in Sarajevo to work in the court, financial incentives should be offered to those who live elsewhere, so that they move to the capital."<sup>181</sup> Currently the Serbs and Croats who live in other parts of BiH are dissuaded from temporarily moving to Sarajevo because they would not receive compensation for costs of accommodation and travel to the place of permanent residence.<sup>182</sup>

Also, the Special Department could counter allegations of bias by developing a strategy for selection of cases. Nongovernmental organizations in BiH and abroad and the OSCE, which monitors war crimes cases before the BWCC, have called on the State Prosecutor's Office to develop clear criteria for selection of cases and make them public. As explained above, the Special Department for War Crimes initiatives on a crime-centered study and a War Crimes Statistics Project are intended to provide this.

Civil society representatives have noted one encouraging development: victims' increasing interest in the status of investigations concerning them or family members.<sup>183</sup> According to one observer, "At the beginning many dismissed the court because they did not believe that it

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<sup>176</sup> The cases at issue were *Šimšić, Paunović, Samardžija, Samardžić, Stanković, Kovačević, Gojko Janković, Mitrović and Others (Kravice case), Dragan Damjanović, Ljubinac, Goran and Zoran Damjanović, and Mandić*.

<sup>177</sup> Interview with a BWCC judge, Sarajevo, 10 June 2008.

<sup>178</sup> See above, note 2.

<sup>179</sup> *Andrun, Lučić, Radić and Others, Mihaljević, Ljubičić, Vrdoljak, and Škrobić*.

<sup>180</sup> *Ramić, Alić, Karajić, Hodžić, Gasal, Kapić, Bjelić, Sipić, and Kurtović*.

<sup>181</sup> Telephone interview with a representative of a human rights organization in Republika Srpska, 10 September 2007.

<sup>182</sup> Interviews with BWCC judges, Sarajevo, 26 July 2007, and 10 June 2008.

<sup>183</sup> Telephone interviews with representatives of the Center for Civic Initiatives (Mostar) and Helsinki Committee for Human Rights in Republika Srpska (Bijeljina), September 2007.



would be impartial, but now the dominant line is, ‘We want our case to be tried before the Court.’”<sup>184</sup> A representative of one local NGO remarked that even among the majority Serb population where he lives, the Court of BiH is more trusted than the ICTY. He also warned, however, that the Special Department for War Crimes should do more to convince skeptics that justice is the only objective guiding the department’s work.<sup>185</sup>

The most active groups cooperating with the court are those that include female victims of sexual violence and former camp inmates. These associations provide critically important help to the prosecutors in the preparation of cases. At the same time members of some victims’ groups have criticized the Special Department for neglecting crimes against members of their ethnic group. The court has also been frequent target of criticism because victims consider most sentences too lenient.

## **B. The Media**

The BWCC has not enjoyed a close relationship with the media. The court does not hold press conferences. The media have requested that the court supply them with a weekly index of court documents to help journalists find a decision, an order, or a motion and request a copy. Although the Public Information and Outreach Section (PIOS) creates an index of documents, it is used only internally.

Moreover, in January 2007 the Court denied a journalist’s request to receive an audio recording of a hearing. The journalist had attended the public hearing (in the *Janković* case) a week earlier. The presiding judge denied the request because distributing the tape could “cause considerable damage to the interest of safety as well as the prevention or uncovering of crime” and jeopardize “the health or safety of certain individuals.”<sup>186</sup> The decision did not provide proof of its claims. The court had developed the capacity to redact protected information from an audio record, so this option could have been used (if any confidential information existed), instead of an outright rejection that blocked the media’s legitimate access.

## **C. Outreach**

The Court’s interaction with the general public could also be improved. Although the Court has adequate cooperation with civil society, it has not done sufficient outreach to help the public understand its work or to encourage potential witnesses to come forward. One aspect that has been particularly lacking is outreach to the communities from which the perpetrators come. Most of the Bosnian victims have some knowledge of the crimes committed in their part of the country, but perpetrators’ communities often live in a continuing state of ignorance or outright denial.

Civil society organizations have undertaken some very innovative outreach work. In the early stages of its work, the Court designed an ambitious outreach plan that consisted of setting up a national network of information offices run by local NGOs designated by the Court. In January 2006 five regional outreach centers run by NGOs were declared operational. They were located in Sarajevo, Tuzla, Mostar, Bijeljina, and Prijedor. Since then the center in Tuzla

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<sup>184</sup> Interview with Nerma Jelačić, director of BIRN, Sarajevo, 24 July 2007.

<sup>185</sup> Telephone interview with a representative of *Izvor* (Prijedor), 7 September 2007.

<sup>186</sup> OSCE, Mission to BiH, *Fifth Report in the Gojko Jankovic Case* (May 2007), annex I (unofficial translation of the presiding judge’s response to BIRN’s request, 26 January 2007).

has terminated its activities because of lack of funds. The four active NGOs represent a total of 500 member organizations comprising the Court Support Network. Most of the member organizations are in two regional centers (Mostar and Sarajevo).<sup>187</sup> There is no restriction on membership and the NGOs vary considerably, from social welfare providers to volleyball teams. The activities of the member organizations range from distributing outreach material and organizing Court visits for victims and students to posting billboards and paid advertisements about the importance of war crimes trials, holding town-hall meetings and roundtable discussions, and helping witnesses get in touch with the prosecutors and Court officials.<sup>188</sup> PIOS, the court's public information and outreach section, carries out activities related to dissemination of information—including student visits—while communication with the Court Support Network is the responsibility of the Witness and Victims Support Section, which is reportedly showing limited interest in the network.<sup>189</sup> The four NGOs in the regional centers work completely independently.<sup>190</sup> In the second half of 2005 four months of financial help went to the regional centers from the Registry. These centers are now being sponsored by various European governments.

#### **D. The Public Information and Outreach Section**

In comparison to the Court Support Network's achievement on outreach, the court itself has not made much progress in presenting its work to the communities where war crimes were committed. The PIOS employs only three persons and does not have the capacity to carry out this task. In 2006 BIRN's office in BiH received a grant to organize public presentation of final judgments in the areas in which the crimes had been committed, but it abandoned the project when the Court refused to send judges to participate.<sup>191</sup>

For the foreseeable future it is unclear if judges might become available for presentations in the areas where war crimes were committed. The explanation by a BWCC judge is simple: "We don't have time to leave here."<sup>192</sup> But even if the judges and prosecutors were willing to go into the interior to present the jurisprudence, "the PIOS staff would not have time to go through the video recordings and other material from the trial to prepare," a PIOS representative said. "If we wished to hire students to do it, there would be no space for them in the existing offices."<sup>193</sup>

During 2005 and 2006 PIOS did organize a number of visits to the Court for victims' organizations in cooperation with the International Commission for Missing Persons.<sup>194</sup>

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<sup>187</sup> Telephone interviews with representatives of *Izvor* (Prijedor), Center for Civic Initiatives (Mostar), Women to Women (Sarajevo), and Helsinki Committee for Human Rights in Republika Srpska (Bijeljina), September 2007.

<sup>188</sup> Ibid.

<sup>189</sup> Telephone interview with a representative of a nongovernmental organization, member of the Court Support Network, 21 June 2008.

<sup>190</sup> Interview with a senior staff member of the WSS, Sarajevo, 27 July 2007; telephone interviews with a representative of Helsinki Committee for Human Rights in Republika Srpska, 10 September 2007.

<sup>191</sup> Interview with Nerma Jelačić, director of BIRN, Sarajevo, 24 July 2007.

<sup>192</sup> Interview with BWCC judge, Sarajevo, 10 June 2008.

<sup>193</sup> Interview with PIOS representative, Sarajevo, 27 July 2007.

<sup>194</sup> Interview with a senior staff member of the WSS, Sarajevo, 27 July 2007. The International Commission for Missing Persons is a Sarajevo-based intergovernmental organization whose basic activities include identifying missing persons in the former Yugoslavia and bringing together victims' associations from the region.

Students from all law faculties in Bosnia visited the court in 2006 and 2007, usually in groups of 50 to 80 persons.<sup>195</sup>

The Web site of the Court of BiH is a useful tool for anyone interested in following the war crimes prosecutions in Sarajevo.<sup>196</sup> Indictments and judgments are readily available, along with detailed weekly updates on the Court's activities, daily and monthly schedules, and other information. Most of the material is available in both the local language and English.

Communication with the public will gain in importance as the jurisprudence of the War Crimes Chamber continues to grow. If the population affected by the crimes remains unfamiliar with the judgments, the Court will have missed an opportunity to contribute to the truth-telling in these judgments. This issue requires the utmost attention of the working group for the creation of a National War Crimes Strategy.

## **IX. RELATIONSHIP TO GENERAL TRANSITIONAL JUSTICE STRATEGIES**

With the exception of the police and judicial vetting programs, the lack of an overall official approach to transitional justice in BiH has meant that the BWCC has remained the primary mechanism dealing with the legacy of the crimes committed during the conflict. To an extent this primacy is demonstrated by the lack of a relationship between the BWCC and other transitional justice initiatives in Bosnia. Unlike in many other postconflict societies, no national official commission has been established in BiH with a mandate to establish facts about the violations of human rights and international humanitarian law and to provide a platform for victims to tell their stories.

In 2001 and 2006 major initiatives were launched to establish a national truth commission, but both failed. Bosnian human rights activists, assisted by the United States Institute of Peace, led the efforts in 2001 by drafting a law on a proposed truth commission and submitting the draft to the tripartite presidency. Parliament never examined the draft. In May 2006 a working group consisting of representatives of the parliamentary parties produced a similar draft law. Broad sectors of Bosnian civil society reacted unfavorably to the undertaking because victims' groups and nongovernmental organizations had not been consulted before the establishment of the working group. In the second half of 2006 and throughout 2007 the political environment in BiH deteriorated amidst political quarrels about the constitutional makeup of the state. As a result of the worsened political situation and civil society's frustration with the outcome of past initiatives to establish a truth commission, no attempts have been made to translate the May 2006 draft into legislation.

Lingering mistrust among ethnic groups has also paralyzed the work of an official fact-finding commission for Sarajevo, which the BiH Council of Ministers established in June 2006.<sup>197</sup>

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<sup>195</sup> Interview with PIOS representative, Sarajevo, 27 July 2007.

<sup>196</sup> [www.sudbih.gov.ba](http://www.sudbih.gov.ba).

<sup>197</sup> Decision to Form a State Commission for Establishing Truth on the Fates of Serbs, Croats, Bosniaks, Jews, and Others in Sarajevo in the Period Between 1992 and 1995, 25 June 2006. The decision did not specify whether the commission would hold public hearings. The impetus for setting it up came from Bosnian Serb politicians and victim groups. Their original request was that the commission look into wartime abuses against Serbs in Sarajevo. Bosniak politicians favored establishing a commission dealing with abuses against all citizens of Sarajevo, irrespective of their ethnicity. The latter approach eventually prevailed. Soon it became clear that the members of the commission were in fundamental disagreement about the mandate. Serb members argued that it should be limited to establishing lists of victims: killed, deported, detained, raped, tortured, and missing persons. Bosniak members favored also including the damage inflicted on buildings and cultural monuments. (Most of the

The only reasonably successful official fact-finding body has been the so-called Srebrenica Commission, set up in January 2004, as a result of heavy and sustained pressure by the OHR. In June 2004 the Commission issued a report stating that on 10–19 July 1995, several thousand Bosniaks were “liquidated,” and the perpetrators and others “undertook measures to cover up the crime” by moving bodies away from the killing site. The Commission also declared its discovery of 32 hitherto unknown locations of mass graves.<sup>198</sup>

All names of those allegedly involved in the killings were eventually communicated to the State Prosecutor’s Office, which will decide on further prosecutions. The Srebrenica Commission alone was clearly insufficient to address the crime committed against the Bosniak population in July 1995. But its work led to official recognition of the crime by Bosnian Serb leaders, public apologies, release of previously uncovered information, including the location of several mass graves, and some form of reparations.

There can be no doubt that the trials have contributed to establishing the truth in Bosnia. The 48 trials held before the War Crimes Chamber as of June 2008 address crimes committed in 30 locations around the country. More than 1,000 witnesses have testified about the underlying crimes and related matters.<sup>199</sup> Despite the number of adjudicated cases and the numerous testimonies, the trials do not necessarily represent a substitute for a truth commission. First, limitations are inherent in the legal process. “We establish only the legal truth, and that truth is limited by the procedural rules and the evidence presented,” a war crimes judge opined. Second, trials concentrate on crimes that occurred during the war rather than on positive actions by individuals, including heroic attempts to rescue others. Finally, the contents of the trials are not well known by the public.

In terms of institutional reform, BiH has undertaken two major vetting exercises: review of police officers and hiring and reappointment of judges and prosecutors.<sup>200</sup> The UN Mission in BiH (UNMIBH) vetted approximately 23,751 Ministry of Interior personnel between 1999 and 2002. Of these, 16,803 were granted provisional authorization to exercise police powers. Those not provisionally authorized were mainly administrative support personnel who were not subject to authorization. Of those provisionally authorized, more than 90 percent (15,786) were granted full certification, and 481 officers were denied certification, while 228 cases were pending in December 2002, when UNMIBH’s mandate ended. Although no comprehensive assessment of the certification’s impact has been carried out, Bosnian public and media do not consider the reform a success. Occasional cases in the period after 2002, in which certified policemen were indicted and convicted for war crimes, suggest that the certification process was flawed. The appraisal of the reappointment of judges and prosecutors between 2002 and 2004 has been more positive. High Judicial and Prosecutorial Councils screened the appointments of approximately 1,000 judges and prosecutors during that two-year period. About 30 percent of the incumbents who applied for their positions were

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material damage was caused by the Serb forces.) Because of disagreements the commission has not conducted any substantive work.

<sup>198</sup> See ICTJ, “Bosnia and Herzegovina: Selected Developments in Transitional Justice,” October 2004.

<sup>199</sup> In 2006 the WSS provided services to 457 witnesses testifying in war crimes trials, and in 2007 the number grew to 737 witnesses. Sections I and II of the Court of BiH and Special Department for War Crimes and Organized Crime of the Prosecutor’s Office of BiH, *Registry Annual Report 2007*, 28.

<sup>200</sup> For further detail on the vetting processes in BiH, see Alexander Mayer-Rieckh, “Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia and Herzegovina,” in Alexander Mayer-Rieckh and Pablo de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York, 2007). See also ICTJ, *Bosnia and Herzegovina: Selected Developments in Transitional Justice* (October 2004).

not reappointed. (Other incumbents did not apply, either because they retired or because they did not want to undergo the reappointment process).

Certain categories of victims of war crimes and other serious abuses in BiH have benefited from reparations programs. Both entities have enacted and implemented legislation concerning military and civilian victims of war. However, the laws have consistently emphasized military victims and family members over civilians, and members of the majority ethnic group over those from minorities. In addition, former camp inmates and raped women have long been excluded from the government-sponsored programs, or the requirements they had to satisfy to become beneficiaries of reparations programs have been unduly cumbersome. Court proceedings for compensation for human rights abuses have been rare, and in virtually all cases the applicants failed to win cases or have judgments in their favor implemented.<sup>201</sup> The War Crimes Chamber has done little to make up for deficiencies in other reparations programs in BiH by routinely instructing the victim to take civil action after the criminal trial has been completed, although the CPC provides for direct compensation for victims. The legal complexities and lack of financial resources prevent most victims from initiating civil proceedings.

## **X. LEGACY: FROM A MIXED MODEL TO A NATIONAL COURT**

After the expensive and lengthy trials at the ICTY and the ICTR, hybrid court models have generally been perceived as cheaper, with greater involvement of nationals and the potential to leave a legacy or make a lasting impact on the domestic context and legal system. The War Crimes Chamber is a unique example of a hybrid court, consisting of a special chamber in a national justice system where nationals, empowered from the start with significant authority, are to take full responsibility within five years. The cost, too, is manageable, amounting to a current annual budget of \$13 million. The sustainability of the model has much to commend it, and indeed a similar arrangement was proposed previously in Burundi.<sup>202</sup>

This is not to say that the Bosnian model can be applied easily elsewhere. Each situation is different. The creation of the War Crimes Chamber has taken place 10 years after the end of the war, in a country with a functioning infrastructure and administration, skilled human resources, a strong and powerful international presence under the political authority of the OHR, and the military presence of the EUFOR multinational force. Nonetheless, it is possible to draw some early lessons from the War Crimes Chamber as a hybrid tribunal with the potential to leave a positive legacy.

### **A. The Results of a Hybrid Composition**

The War Crimes Chamber has placed a premium on giving a prominent place to national judges and phasing out international participation over time. The dynamics of nationals' and internationals' interactions in such an institution are complex. However, the model of the War Crimes Chamber helps shed light on some of the issues that have plagued other hybrid tribunals.

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<sup>201</sup> See Humanitarian Law Center, et al., *Transitional Justice in Post-Yugoslav Countries: Report for 2006* (Belgrade-Zagreb-Sarajevo, February 2008), 43–62.

<sup>202</sup> See Letter from the Secretary-General to the President of the Security Council, 11 March 2005, also known as the “Kalomoh report.” See also Resolution 1606 of the UN Security Council, 20 June 2005.

Seconded by their governments, international judges are given short-term, renewable contracts, usually for one or two years. There is a strong preference within the Court for internationals to serve a minimum of two years.<sup>203</sup> The practice has varied: Some judges served more than two years, while others stayed a shorter time.<sup>204</sup> The short duration of their stay is not usually an advantage. An official of the State Prosecutor's Office offered two general lessons of the experience in Sarajevo:

If I can give advice for the future, the work at the Court for internationals must not be [tantamount to a] well-paid holiday. There must be a code of conduct [for internationals], a contract of two to three years minimum, and [they must be] responsible under the same laws [as nationals in the Court]. Otherwise the difference created between nationals and internationals is too big. Lesson two: Internationals should never say that they are implementing the policies of their governments. They must be responsible under the High Judicial and Prosecutorial Council.<sup>205</sup>

Monitors agree that the quality of the international prosecutors and judges varies; just because someone is an international does not mean the person knows international humanitarian law well and fully adheres to human rights standards.<sup>206</sup> Senior legal professionals, be they nationals or internationals, have tended to be reluctant to undergo training, despite the specialized nature of their duties. An international judge with experience at the ICTY said, "On protective measures we really need training here—for prosecutors, judges, and defense attorneys."<sup>207</sup> In the Bosnian national system regular training sessions are organized for national judges and prosecutors. Continued legal education is mandatory for legal professionals but is not always very demanding.<sup>208</sup> Other training programs by international organizations such as the American Bar Association have been popular because the sessions included demonstration of cross-examination and other practical skills.<sup>209</sup>

A senior international prosecutor noted that those who perform best among internationals "have made the effort to integrate national legal traditions."<sup>210</sup> According to him, there should be compulsory training on history and political background.<sup>211</sup> A national judge observed, "The most difficult part is to explain [to my foreign counterpart] the mentalities, the way things are perceived here, the historical and religious context of this conglomerate called BiH."<sup>212</sup> In practice judges and prosecutors receive short training on the applicable laws upon their arrival. Judges are also assigned mentors who are domestic judges on the Court. The

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<sup>203</sup> When recruiting its own staff, which includes internationals, the Registry explained that it applied a two-step policy to be in a position to easily end a contract with an individual deemed unsuitable for the position and to guarantee commitment to the job over time. Internationals were first given consultant contracts; then, after they showed good skills including mentoring, they would be given a two-year contract.

<sup>204</sup> Interview with BWCC judge, Sarajevo, 10 June 2008.

<sup>205</sup> ICTJ interview, Sarajevo, 14 November 2005.

<sup>206</sup> Interview with representative of the OSCE Mission to BiH, Sarajevo, 24 July 2007; e-mail exchange with head of BIRN journalists' team reporting on war crimes trials, 7 September 2007.

<sup>207</sup> Interview with international judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>208</sup> Interview with member of the Special Department for War Crimes, Sarajevo, 25 July 2005; interview with representatives of the OSCE Mission to BiH, Sarajevo, 24 July 2007.

<sup>209</sup> Interviews with members of the War Crimes Chamber and the Special Department for War Crimes, Sarajevo, 25–26 July 2007.

<sup>210</sup> ICTJ interview, Sarajevo, 14 November 2005.

<sup>211</sup> In 2003–2004 the European Union and the U.S. Department of Justice/Office of Overseas Prosecutorial Development, Assistance, and Training organized training for all national judges and prosecutors; however, it was attended by some international judges and prosecutors only.

<sup>212</sup> ICTJ interview, Sarajevo, 18 November 2005.

rolling nature of judges' employment poses a challenge to participation by both nationals and internationals in group and mixed training.

Some of the prosecutorial teams have managed to develop positive and productive relationships among Bosnian and international prosecutors. According to an international representative who follows the work of the Court of BiH, "Prosecutors work separately rather than together."<sup>213</sup> One international prosecutor, however, said that cooperation between international and national prosecutors "has been maturing quite nicely."<sup>214</sup>

The presence of international judges and prosecutors and training sessions organized for the domestic practitioners have all contributed to panels' frequent reliance on international conventions and jurisprudence. In this respect the Court of BiH differs from virtually all other courts in the territory of the former Yugoslavia that have tried war crime cases. Judges of the War Crimes Chamber, and even prosecutors writing the indictments, often refer to international instruments. References to the European Convention on Human Rights and the case law of the European Court of Human Rights are also frequent. This may also be because the European Convention on Human Rights has special standing in the BiH Constitution. Article 2.2 of the Constitution stipulates that the Convention "shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law."<sup>215</sup>

## **B. Phasing out of International Personnel**

The gradual withdrawal of the international presence is one of the defining features of the Bosnian model. In the plans for the BWCC six phases were defined, from Planning (Phase I), which ended in August 2004, to the Completion of the Transition (Phase VI), ending in December 2009. Along the way nationals are gradually replacing internationals. After some intense debate on the design of a mechanism to accompany the transition process, the OHR and the presidency of BiH signed an agreement establishing a Transitional Council on September 26, 2006. The task of the Council is to assist the Registry of the Court of BiH in ensuring a transition to a fully national institution.<sup>216</sup> The Council's members are the president of the Court of BiH, the chief prosecutor, the registrar for the Court of BiH, the registrar for the Prosecutor's Office of BiH, the BiH finance and treasury minister, the BiH justice minister, the director of the BiH Directorate for European Integration, and the president of the High Judicial and Prosecutorial Council.<sup>217</sup>

To date implementation of the scheduled transition has been reasonably successful. As early as March 2006, fifteen months after taking office, the registrar and his international deputy left their positions and a Bosnian national became the new registrar. By December 2006 the WSS and the Court management had moved from the Registry to the Court of BiH, meaning that financial responsibility for these sections was transferred from the Registry (international) budget to the budget of BiH; only Bosnian citizens were employed. The second stage, completed 15 February 2007, involved the transition of the Legal Department and PIOS to the Court. Exceptionally, three international senior advisers in the WSS, Court management, and Legal Department continued to be employed by the Registry; but by March 2008 they also

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<sup>213</sup> Interview with representative of an international organization in BiH, Sarajevo, 24 July 2007.

<sup>214</sup> Interview with international prosecutor, Sarajevo, 7 September 2007.

<sup>215</sup> *Constitution of Bosnia and Herzegovina*, Dayton Peace Agreement, annex 4.

<sup>216</sup> Interviews with representatives of the Registry, Sarajevo, 17 November 2006, and 25 July 2007.

<sup>217</sup> The position of the Prosecutor's Office Registrar was established in September 2007, as part of the implementation of the new Registry agreement of 2006.

had left. The director of OKO, who had been an international lawyer from the formation of the institution, was replaced in May 2007 by a national lawyer. Now only the head of security and the financial sector are foreigners.

The focus of the transition has therefore shifted entirely to international judges, prosecutors, and legal officers. The downsizing of the number of international judges began in January 2008. All new cases are now allocated to chambers made of two Bosnian judges and one international. A similar transition in the Special Department has not begun as of this writing. Six international prosecutors continue to work as employees of the Registry, one more than in mid-2007.<sup>218</sup>

Different views have been expressed on the continued presence of international judges and prosecutors. In interviews with the ICTJ some staff of the BWCC and the Special Department for War Crimes, as well as embassy staff of donor countries, argued that it was important to respect the transition plan so that the international judges and prosecutors would leave by the end of 2009. Implementation of the plan would demonstrate that the country is capable of taking responsibility for the important task of coming to terms with the past. In addition, it would relieve the international donors' financial burden.<sup>219</sup>

On the other hand, some domestic and international judges, prosecutors, and observers express caution with respect to the pace of transition. The new ICTY Prosecutor Serge Brammertz told the UN Security Council in June 2008 that he was "very concerned that ... international prosecutors may leave, thereby jeopardizing the work of the State Court."<sup>220</sup> The president of the Court of BiH, Meddžida Kreso, recently stated: "The unstable political situation in Bosnia and complaints of biased treatment of one ethnic group or another suggest the mandate of international judges and prosecutors needs extending. Local judges are able and ready to tackle these complex cases, but the international judges bring credibility and trust."<sup>221</sup> A Bosnian judge insisted that the experience of foreigners from the common law tradition was of great use to the domestic practitioners who were adapting to the adversarial system.<sup>222</sup> Some proponents of a prolonged presence of internationals follow the simple reasoning that as long as the Office of the High Representative stays in Bosnia, other components of the international presence should probably stay, too.<sup>223</sup>

Civil society representatives have also expressed doubts about Bosnian prosecutors' ability to work without the assistance of their international colleagues. Although the legislative reform of 2003–04 has given new and important responsibilities to prosecutors, some observers believe that five years might be too short a time for the national prosecutors to adapt to their new role.<sup>224</sup> According to an observer from the Court Support Network, "I don't see how the national prosecutors in war crimes trials can do it on their own."<sup>225</sup>

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<sup>218</sup> Interview with member of the Special Department for War Crimes, Sarajevo, 9 June 2008.

<sup>219</sup> ICTJ interviews, Sarajevo, June 2008.

<sup>220</sup> Address of Serge Brammertz, ICTY prosecutor, to the UN Security Council, 4 June 2008.

<sup>221</sup> Nidžara Ahmetašević, "International Judges Must Stay in Bosnia," *BIRN's Balkan Insight*, 24 April 2008, [www.balkaninsight.com/en/main/interviews/9661/](http://www.balkaninsight.com/en/main/interviews/9661/) (interview with Meddžida Kreso) (accessed 24 June 2008).

<sup>222</sup> Interview with Bosnian judge, member of the War Crimes Chamber, Sarajevo, 26 July 2007.

<sup>223</sup> Telephone interview with representative of an intergovernmental organization, 24 June 2008.

<sup>224</sup> Interview with Mirsad Tokača, president of RDC, Sarajevo, 7 September 2007.

<sup>225</sup> Telephone interview with representative of a regional center in the Court Support Network, 3 September 2007.



On the whole little debate has taken place among the general public and institutions in BiH about the optimal pace of the transition. Well-articulated and transparent criteria for assessing the need for continued foreign presence have been lacking.<sup>226</sup> Most recently the Registry decided to establish a risk assessment team, funded by Sweden, to look into the risks of the Court's and the Prosecutor's Office's transition to fully national institutions. The factors the assessment is expected to consider are credibility, political pressures, and physical threats. The team was being selected at the time of this writing.<sup>227</sup>

## XI. CONCLUSION

A decade after the end of the war judges and prosecutors in BiH are taking full responsibility for trying war crimes suspects in their own country. This is an encouraging development because the ICTY is winding down, and in the future national jurisdictions will acquire full ownership of efforts to establish accountability for war crimes in the former Yugoslavia. The task awaiting BiH is particularly demanding because loss of life, suffering, and destruction in Bosnia in the 1990s took on more dramatic proportions than anywhere else in the region during that period.

Although the initiative to establish the BWCC grew out of the need to complete ICTY's work, the project has become far larger than that. The caseload of the Prosecutor's Office and the Chamber is immense, potentially even overwhelming. In fact, one of the prosecutors' biggest challenges will be to select cases so that the public at large is convinced that all major crimes are addressed at the Court of BiH—in its current or expanded form—while other cases are tried in the entities. This should not lead to two-tier justice rendered by the BWCC and the entity courts, with the latter struggling to satisfy basic standards of efficiency and fairness.

Two of the strongest assets of the War Crimes Chamber and the Special Department for War Crimes are the level of domestic ownership of the process and their potential to leave a positive legacy for the broader justice system. Although the withdrawal of international personnel should not be precipitous, it should not be postponed beyond justifiable limits. The presence of foreigners has helped improve the quality of prosecutions and trials, but it has not cured the continuing problem of perception by some sectors of the public. The biggest battle may be against bias, lack of knowledge, and indifference by political elites and the general population. In that battle a well-designed outreach strategy, rather than the presence of internationals, is of decisive importance.

In the coming period the Bosnian authorities need to follow through on their commitment to back the work of the BWCC and the Special Department financially and politically. The authorities also should take most seriously the obligation to devise a viable national strategy for war crimes trials. Without such a strategy, the hopes awakened by the promising achievements in Sarajevo may soon melt because of disappointment about prosecutions perceived as insufficient or targeting some groups while sparing others.

Criminal justice in Bosnia remains an indispensable means of dealing with the legacy of the conflicts in the 1990s. It is noteworthy that Bosnia has shown itself capable of holding reasonably fair and efficient domestic trials years since its violent conflict. Prosecutions, however, should be part of a broader transitional justice strategy that would include more

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<sup>226</sup> Interview with representative of the OSCE Mission to BiH, Sarajevo, 10 June 2008.

<sup>227</sup> Interview with member of the management committee, Sarajevo, 10 June 2008.

inclusive reparations schemes than currently exist, as well as the establishment of official truth-telling mechanisms at the national and regional levels.

## APPENDIX 1: OVERVIEW OF CASES BEFORE THE WAR CRIMES CHAMBER

<b>Defendant (Ethnicity)</b>	<b>● Position ■ Location</b>	<b>Mode of responsibility</b>	<b>Crimes</b>	<b>Status of case (as of June 2008)</b>
Alić, Šefik (Bosniak)	● Assistant commander in a battalion ■ Bužim	Perpetration, instigation, aiding and abetting, command responsibility	Indicted for war crimes against prisoners of war (abuse, 4 murders)	Trial: 11 May 07 to 11 Apr. 08. Acquittal.
Andrun, Nikola (Croat)	● Deputy Camp Commander ■ Čapljina	Co-perpetration	War crimes against civilians (torture, inhumane treatment, intimidation, terror)	Trial: 22 June 06 to 14 Dec. 06. Sentenced to 13 yrs. Appeal: 24 Sep. 07 reversed. Trial App. Panel: began 26 Mar. 08.
Bjelić, Veiz (Bosniak)	● Prison guard ■ Vlasenica	Perpetration, aiding and abetting	War crimes against civilians (illegal detention and torture of civilians, 1 killing, sexual violence)	Trial: 12 Mar. 08 to 28 Mar. 08. Plea agreement, sentenced to five years. No appeal lodged.
Božić, Zdravko & 3 others (Serbs)	● Soldiers ■ Srebrenica	Perpetration	Genocide	Trial began 20 Apr. 07
Bundalo, Ratko & 2 others (Serbs)	● Police commander, commander of a military unit, camp commander ■ Kalinovik	Joint criminal enterprise	Crimes against humanity (persecution)	Trial began 26 Feb. 08
Damjanović, Dragan (Serb)	● Soldier ■ Vogošća	Perpetration	Crimes against humanity (murder, torture, persecution, rape, enforced disappearance, other inhuman acts)	Trial: 9 June 06 to 15 Dec. 06. Sentenced to 20 yrs. long-term <sup>228</sup> Appeal: 13 June 07 re-sentenced to 20 yrs

<sup>228</sup>

Long-term imprisonment indicates that the convict has to spend prison time in a closed facility under strict control; in addition, amnesty or pardon is possible only after three-fifths of the sentence has been served.

Damjanović, Goran i Zoran (Serbs)	<ul style="list-style-type: none"> <li>● Soldiers</li> <li>■ Sarajevo</li> </ul>	Perpetration	War crimes against civilians (torture)	Trial: 12 Oct. 06 to 18 June 07. Sentenced to 12 yrs long-term and 10 yrs. 6 mo. long-term. Appeal: 19 Nov. 07 re-sentenced to 11 yrs long-term and 10 yrs. 6 mo. long-term
Đukić, Novak (Serb)	<ul style="list-style-type: none"> <li>● Commander of an army unit (“tactical group”)</li> <li>■ Tuzla</li> </ul>	Ordering	War crimes against civilians (shelling civilians)	Trial began 11 Mar. 08
Gasal, Nisvet & 3 others (Bosniaks)	<ul style="list-style-type: none"> <li>● Camp commander, security commander &amp; police commander</li> <li>■ Bugojno</li> </ul>	Perpetration, incitement, aiding & abetting	War crimes against civilians (torture, 1 killing, 17 disappearances)	Trial began 6 Feb 08
Hodžić, Ferid (Bosniak)	<ul style="list-style-type: none"> <li>● Commander of territorial defense staff</li> <li>■ Vlasenica</li> </ul>	Ordering, command responsibility	War crimes against civilians (illegal detention, torture, 1 killing, sexual violence)	Trial began 12 Mar. 08
Janković, Gojko (Serb)	<ul style="list-style-type: none"> <li>● Commander of a small military unit</li> <li>■ Foča</li> </ul>	Perpetration, aiding and abetting	Crimes against humanity (7 murders, torture, forcible transfer, rape, sex. slavery)	Trial: 21 Apr. 06 to 16 Feb. 07. Sentenced to 34 yrs. long-term. Appeal: 23 Oct. 07 re-sentenced to 34 yrs. long-term
Janković, Zoran (Serb)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>■ Zvornik, Kalesija</li> </ul>	Perpetration, ordering	Indicted for crimes against humanity (persecution (murder, forcible transfer))	Trial: 26 Mar. 07 to 19 June 07. Acquittal. Appeal: 8 Nov. 07 confirmed.
Kapić, Suad (Bosniak)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>■ Sanski Most</li> </ul>	Perpetration	Indicted for war crimes against prisoners of war (4 killings)	Trial: 10 Jan. 08 to 29 Apr. 08. Acquittal.
Karajić, Suljo (Bosniak)	<ul style="list-style-type: none"> <li>● Sergeant in military police</li> <li>■ Bihać</li> </ul>	Ordering, perpetration	War crimes against civilians and war prisoners (killings, inhumane treatment)	Trial began 13 Mar. 08
Kličković, Gojko & 2 Others (Serbs)	<ul style="list-style-type: none"> <li>● Commander of crisis staff, member of municipal crisis committee, brigade</li> </ul>	Joint criminal enterprise, planning, instigation, ordering	Crimes against humanity (persecution (forcible transfer, attacks on civilians, torture of prisoners of war, rape, imprisonment, other))	Trial began 8 May 08

	<p>commander</p> <ul style="list-style-type: none"> <li>▣ Bosanska Krupa</li> </ul>			
Kovačević, Nikola (Serb)	<ul style="list-style-type: none"> <li>● Member of special unit of territorial defense staff</li> </ul> <ul style="list-style-type: none"> <li>▣ Sanski Most</li> </ul>	Perpetration, aiding and abetting	Crimes against humanity (persecution (murder, imprisonment, torture, other inhuman acts))	Trial: 20 Apr. 06 to 3 Nov. 06. Sentenced to 12 yrs. Appeal: 22 June 07 confirmed
Kujundžić, Predrag (Serb)	<ul style="list-style-type: none"> <li>● Police &amp; army commander</li> </ul> <ul style="list-style-type: none"> <li>▣ Doboј</li> </ul>	Perpetration, aiding, incitement, command responsibility	Crimes against humanity (persecution (killings, unlawful deprivation of liberty, sexual slavery, rape, other inhuman acts))	Trial began 16 Apr. 08
Kurtović, Zijad (Bosniak)	<ul style="list-style-type: none"> <li>● Military police commander in a battalion</li> </ul> <ul style="list-style-type: none"> <li>▣ Mostar</li> </ul>	Perpetration	War crimes against civilians and prisoners of war (unlawful deprivation of liberty, torture, forced labor), violating the laws of war (destruction of shrine)	Trial: 27 Aug. 07 to 30 Apr. 08. Sentenced to 11 yrs.
Lazarević, Sreten & 3 others (Serbs)	<ul style="list-style-type: none"> <li>● Deputy camp commander, guards in detention camp</li> </ul> <ul style="list-style-type: none"> <li>▣ Zvornik</li> </ul>	Perpetration, aiding and abetting, command responsibility	War crimes against civilians (torture, abuse, 1 disappearance)	Trial began 6 Mar. 08
Lelek, Željko (Serb)	<ul style="list-style-type: none"> <li>● Police officer</li> </ul> <ul style="list-style-type: none"> <li>▣ Višegrad</li> </ul>	Perpetration	Crimes against humanity (rape, illegal arrest, forced disappearance)	Trial: 2 Mar. 07 to 23 May 08. Sentenced to 13 yrs.
Ljubičić, Paško (Croat)	<ul style="list-style-type: none"> <li>● Military police commander</li> </ul> <ul style="list-style-type: none"> <li>▣ Ahmići</li> </ul>	Aiding & abetting, co-perpetration	War crimes against civilians (murder of more than 100 persons, destruction of property, expulsion, physical and psychological abuse)	Trial: 11 May 07 to 29 Apr. 08. Plea agreement, sentenced to 10 years. No appeal lodged.
Ljubinaс, Radisaв (Serb)	<ul style="list-style-type: none"> <li>● Sergeant</li> </ul> <ul style="list-style-type: none"> <li>▣ Rogatica</li> </ul>	Perpetration, aiding and abetting	Crimes against humanity (forcible transfer, other inhuman acts (beating, human shields))	Trial: 7 Sep. 06 to 8 Mar. 07. Sentenced to 10 yrs. Appeal: 4 Oct. 07 confirmed.
Lučić, Krešo (Croat)	<ul style="list-style-type: none"> <li>● Military police commander</li> </ul> <ul style="list-style-type: none"> <li>▣ Kreševo</li> </ul>	Perpetration	Crimes against humanity (unlawful deprivation of liberty, causing serious injury to body, torture)	Trial: 14 Feb. 07 to 19 Sep. 07. Sentenced to 6 yrs. Appeal: 3 Apr. 08 reversed, retrial ordered.
Maktouf, Abduladhim	<ul style="list-style-type: none"> <li>● Soldier</li> </ul>	Aiding and abetting	War crimes against civilians (taking of 2 hostages)	Trial: 20 Dec. 04 to 1 July 05. Sentenced to 5 yrs. Appeal: 23 Nov. 05 reversed. Trial App. Panel: 4 Apr. 06.

(Iraqi)	<ul style="list-style-type: none"> <li>▣ Travnik</li> </ul>			Sentenced to 5 yrs.
Mandić, Momčilo (Serb)	<ul style="list-style-type: none"> <li>● Assistant Minister of Interior, Justice Minister</li> <li>▣ Sarajevo, Foča, Ilidža, Vogošća</li> </ul>	Planning, instigating, ordering, adding and abetting	Indicted for crimes against humanity (persecution), war crimes against civilians (killings, violation of bodily integrity, illegal detention)	Trial: 13 Nov. 06 to 18 July 07. Acquittal.
Mejakić & 3 others (Serbs)	<ul style="list-style-type: none"> <li>● Camp commander, shift commander, guards</li> <li>▣ Prijedor</li> </ul>	Joint criminal enterprise, command responsibility	Crimes against humanity (more than 100 killings, torture, sexual violence)	Trial: 28 Feb. 07 to 30 May 08. Sentenced to 21 yrs. long-term, 11 yrs., and 31 yrs. long-term. One accused pled guilty 21 Apr. 08. Sentenced to 9 yrs.
Mihaljević, Zdravko (Croat)	<ul style="list-style-type: none"> <li>● Special unit commander</li> <li>▣ Kiseljak</li> </ul>	Perpetration	Indicted for crimes against humanity (persecution (killing 8 persons, torture, enforced disappearance))	Trial: 15 May 07 to 16 Apr. 08. Acquittal.
Mitrović, Petar and 10 others (Serbs)	<ul style="list-style-type: none"> <li>● 2 special police commanders and 9 special police members</li> <li>▣ Srebrenica/ Kravica</li> </ul>	Joint criminal enterprise	Genocide	Trial began 9 May 06
Nikačević, Miodrag (Serb)	<ul style="list-style-type: none"> <li>● Policeman</li> <li>▣ Foča</li> </ul>	Perpetration	Crimes against humanity (rape, imprisonment)	Trial began 29 Apr. 08
Palića, Jadranko (Serb)	<ul style="list-style-type: none"> <li>● Soldier; Military policeman</li> <li>▣ Sanski Most</li> </ul>	Perpetration, co-perpetration	Crimes against humanity, war crimes against civilians (18 killings, rape, intimidation, illegal arrests)	Trial: 28 Mar. 07 to 28 Nov. 07. Sentenced to 28 yrs. long-term
Paunović, Dragoje (Serb)	<ul style="list-style-type: none"> <li>● Officer of a minor military formation</li> <li>▣ Rogatica</li> </ul>	Ordering, perpetration	Crimes against humanity (persecution (24 killings, other inhuman acts))	Trial: 6 Dec. 05 to 22 Mar. 06. Sentenced to 20 yrs. Appeal: 23 Nov. 06 confirmed.
Pekez, Mirko & 2 others	<ul style="list-style-type: none"> <li>● Soldiers &amp; police reservists</li> </ul>	Joint criminal enterprise	War crimes against civilians (unlawful arrests, 23 killings)	Trial: 6 Feb. 08 to 22 Apr. 08. Sentenced to 29 yrs. long-term, 21 yrs. long-term, and 21 yrs. long-term

(Serbs)	<ul style="list-style-type: none"> <li>▣ Jajce</li> </ul>			
Radić & 3 others (Croats)	<ul style="list-style-type: none"> <li>● Brigade commander, prison assistant commander, and soldiers</li> <li>▣ Mostar</li> </ul>	Joint criminal enterprise, ordering, command responsibility, perpetration	Crimes against humanity (ill-treatment, beatings, killings, rape, forced labor)	Trial began 17 Apr. 07
Ramić, Niset (Bosniak)	<ul style="list-style-type: none"> <li>● Member of territorial defense staff (soldier)</li> <li>▣ Visoko</li> </ul>	Perpetration	War crimes against civilians (4 killings, violation of bodily integrity or health)	Trial: 18 Dec. 06 to 17 July 07. Sentenced to 30 yrs. long-term. Appeal: 21 Nov. 07 confirmed.
Rašević, Mitar & Todović, Savo (Serbs )	<ul style="list-style-type: none"> <li>● Deputy camp commander &amp; shift commander</li> <li>▣ Foča</li> </ul>	Joint criminal enterprise, command responsibility	Crimes against humanity (persecution)	Trial: 6 Apr. 07 to 28 Feb. 08. Sentenced to 8 yrs. 6 mo. and 12 yrs. 6 mo.
Samardžić, Neđo (Serb)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Foča</li> </ul>	Perpetration, aiding and abetting	Crimes against humanity (unlawful deprivation of liberty, rape, sexual slavery)	Trial: 6 Mar. 06 to 7 Apr. 06. Sentenced to 13 yrs 4 mo. Appeal: 5 Oct. 06 reversed. Trial App. Panel: 13 Dec. 06. Sentenced to 24 yrs.
Samardžija, Marko (Serb)	<ul style="list-style-type: none"> <li>● Commander of a company</li> <li>▣ Ključ</li> </ul>	Aiding and abetting	Crimes against humanity (murder of at least 144 persons)	Trial: 16 Mar. 06 to 3 Nov. 06. Sentenced to 26 yrs. Appeal: 25 May 07 reversed, retrial ordered.
Savić, Krsto & Mučibabić, Milko (Serbs)	<ul style="list-style-type: none"> <li>● Police commander &amp; policeman</li> <li>▣ East Herzegovina</li> </ul>	Joint criminal enterprise	Crimes against humanity (persecution (killings, torture, forcible transfer, imprisonment))	Trial began 8 May 08
Šimšić, Boban (Serb)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Višegrad</li> </ul>	Aiding and abetting	Crimes against humanity (enforced disappearance, rape)	Trial: 14 Sep. 05 to 11 Jul. 06. Sentenced to 5 yrs. Appeal: 5 Jan. 07 reversed. Trial App. Panel: 14 Aug. 07. Sentenced to 14 yrs.
Sipić, Idhan (Bosniak)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Ključ</li> </ul>	Perpetration	War crimes against civilians (1 killing)	Trial: 8 Feb. 08 to 22 Feb. 08. Plea agreement, sentenced to 8 years. No appeal lodged.
Škrobić, Marko	<ul style="list-style-type: none"> <li>● Soldier</li> </ul>	Perpetration	War crimes against civilians (1 killing)	Trial began 9 May 08

(Croat)	<ul style="list-style-type: none"> <li>▣ Kotor Varoš</li> </ul>			
Stanković, Radovan (Serb)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Foča</li> </ul>	Perpetration	Crimes against humanity (enslavement, imprisonment, torture, rape)	Trial: 23 Feb. 06 to 14 Nov. 06. Sentenced to 16 yrs Appeal: 28 Mar. 07 re-sentenced to 20 yrs. long-term
Tanasković, Nenad (Serb)	<ul style="list-style-type: none"> <li>● Policeman</li> <li>▣ Višegrad</li> </ul>	Perpetration, aiding and abetting	Crimes against humanity (killings, rape, torture, forcible transfer)	Trial: 2 Feb 07 to 24 Aug. 07. Sentenced to 12 yrs. Appeal: 23 May 08 re-sentenced to 8 yrs.
Todorović, Mirko & Radić, Miloš (Serbs)	<ul style="list-style-type: none"> <li>● Soldiers</li> <li>▣ Bratunac</li> </ul>	Co-perpetration	Crimes against humanity (persecution (unlawful deprivation of liberty, torture, 8 murders))	Trial: 1 Oct. 07 to 29 Apr. 08. Both sentenced to 17 yrs.
Trbić, Milorad (Serb)	<ul style="list-style-type: none"> <li>● Assistant brigade security commander</li> <li>▣ Srebrenica</li> </ul>	Joint criminal enterprise	Genocide	Trial began 8 Nov. 07
Vrdoljak, Ivica (Croat)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Derventa</li> </ul>	Perpetration	War crimes against civilians (inhumane treatment)	Trial began 6 May 08
Vuković, Radmilo (Serb)	<ul style="list-style-type: none"> <li>● Soldier</li> <li>▣ Foča</li> </ul>	Perpetration	War crimes against civilians (rape, violation of bodily integrity or health)	Trial: 19 Jan. 07 to 16 Apr. 07. Sentenced to 5 yrs. 6 mo. Appeal: 31 Aug. 07 reversed, retrial ordered.
Vuković, Ranko & Rajko (Serbs )	<ul style="list-style-type: none"> <li>● Soldiers</li> <li>▣ Foča</li> </ul>	Joint criminal enterprise	Crimes against humanity (persecution (2 murders))	Trial: 8 Nov. 07 to 4 Feb. 08. Both sentenced to 12 yrs.



## **APPENDIX 2: ACRONYMS**

<b>BiH</b>	Bosnia and Herzegovina
<b>BIRN</b>	Balkan Investigative Reporting Network
<b>BWCC</b>	Bosnian War Crimes Chamber
<b>CPC</b>	Criminal Procedure Code
<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia
<b>EUFOR</b>	European Union Force
<b>EUSR</b>	European Union Special Representative
<b>ICC</b>	International Criminal Court
<b>ICTJ</b>	International Center for Transitional Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OHR</b>	Office of the High Representative
<b>OKO</b>	Criminal Defense Office
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>PIOS</b>	Public Information and Outreach Section
<b>RDC</b>	Research and Documentation Center
<b>UNDP</b>	United Nations Development Program
<b>UNMIBH</b>	UN Mission in BiH
<b>VJ</b>	Army of Yugoslavia
<b>WSS</b>	Witness and Victim Support Section



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