

Conflict, Memory and Reconciliation

Bridging Past, Present and Future

Kigali, Rwanda

January 10-13, 2012

War crimes prosecution: Lessons learned from Bosnia and Herzegovina

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ABSTRACT

War crimes prosecution has been the dominant tool of addressing war crimes committed during the four-year-long conflict in Bosnia and Herzegovina (1992-1995). The prosecution has been conducted at the International Criminal Tribunal for the former Yugoslavia and in the local courts.

The paper will address the effectiveness of war crimes prosecution as a tool for combating future crimes, taking into account the accomplishments and shortcomings at all levels – international, national and local. The paper will also address other complementary mechanisms aiming at minimizing the potential for future conflicts.

The ICTY and the courts in BiH have conducted numerous trials in the past fifteen years; hundreds have been investigated and prosecuted but the question remains, can war crimes prosecutions, when conducted fairly and timely be an investment into the country's future? And if so what can we learn from the BiH experience to secure proper prosecution in similar situations.

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Introduction

Bosnia and Herzegovina (hereinafter BiH) is a country where horrendous crimes were committed during the 1992-1995 war. This article will discuss the war crimes prosecution that followed the war and will touch upon how prosecution can potentially be used as a tool against future crimes¹, especially genocide². Successes and shortcomings of the prosecution effort will be explored along with the question of what lessons can be learned from the prosecutions that followed the war in Bosnia.

The observations presented are based on several years of working in the war crimes prosecution in Sarajevo, but also regularly following the trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. The observations made are the ones of a practitioner; after interviews and conversations I have had with prosecutors and judges, journalists, human rights activists, academics and others heavily involved in the war crimes prosecution system. Academic work informed this article but the conclusions are based on practical experience.

For the past 17 years, after the Dayton Accords³ ended the war, the country has been divided, its administrative structure highly complex⁴. BiH has fourteen governments (incapacity by local authorities to form governments post-election makes this number currently lower). The country is divided into two entities and one autonomous district. There is one government for the country as a whole, one for each entity: the Federation with a majority of Bosniaks and Croats (Federation of Bosnia and Herzegovina, FBiH); Republika Srpska (RS) with a predominantly Serb population and Brcko District that does not have such a clear majority. The FBiH is further territorially divided into ten cantons, each of them with one government. This results in institutional fragmentation with a significant impact on the war crimes prosecution effort within the country.

It is estimated that the country has just over 4.5 million inhabitants but conclusive data is unavailable as the last census was conducted on the eve of war in 1991⁵. The population is ethnically diverse with the majority, just above 45 percent Bosniak (Muslim), around 35 percent Serb (Orthodox) and around 15 percent Croat (Catholic)⁶. The rest are small minority groups.

The constitutional framework is complicated and makes the decision-making process difficult, prone to being stalled⁷. Nationalist parties still have a hold in power in many communities; unemployment is around 40%⁸, economic growth is slow and poverty is

¹ The word 'tool' meaning, in this context, instrument of retribution as well as potential deterrence.

² Genocide is a legal term and I will use it only in a very narrow form, as defined by the Genocide Convention and the Statute of the ICTY; only for those cases where it has been proved beyond a reasonable doubt in relation to the war in BiH, which is, essentially, only Srebrenica.

³ The General Framework Agreement (Dayton Accords): http://www.ohr.int/dpa/default.asp?content_id=380

⁴ CIA Factbook, Government of BiH: <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html>

⁵ Ibid.

⁶ Ibid.

⁷ Office of the High Representative, Press Release to the 16th anniversary of the Dayton Peace Agreement, November 21st 2011: http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=46607

⁸ CIA Factbook, Government of BiH: <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html>

prevalent, especially in the rural areas hard hit by the violence 20 years ago. The wartime demographic changes affected the entire country and many small communities are gone. Refugee return is incomplete and dozens of refugee camps still exist.

The presence of the international community is still strong albeit, clearly, much less visible on the ground than immediately after the war. This somewhat vague term ‘international community’ includes the Office of the High Representative (OHR)⁹ and foreign governments and organizations as well as donors that contributed heavily to post-war reconstruction. These actors, mainly foreign governments through their embassies, EU offices, different international organizations such as the UNDP and the OSCE – all are relevant to the war crimes prosecution effort as they interact with the authorities within BiH, influencing the situation on the ground. Many also assisted in funding various transitional justice projects or contributed to the funds needed for setting up local trials.

The political situation in the country is often tense, rarely without references that somehow evoke the recent bloodshed. Ethnic divisions exist, although they are much more visible in smaller communities hard hit by the bloodshed.

Hopes of membership in the European Union and benefits of some security and prosperity it seems to provide (at least in comparison to the conditions in BiH) are hindered by the slowness of any progress. BiH seems to have somewhat ‘fallen off’ the priority list. It has been, after all, seventeen years since the peace agreement was signed. As a result, all the hopes for a faster approach to the free movement of people, goods and services and a higher respect for human rights are quietly being let down.

As years go by and other conflicts take center stage, it is difficult for BiH to remain a priority. Today there is a concern over the winding down of donor activities in the region and that could potentially harm the prosecution effort in the future¹⁰.

War crimes prosecution is always a challenging task, no matter the context (and, of course, each context is different). When the number of suspects is significant, even overwhelming (believed to be around 10 000 only in BiH)¹¹; where there is still ethnic tension and political pressure against prosecutions; where the crimes are so numerous and the funding so scarce; where political manipulation and denial is prevalent, any such endeavor would be difficult. However, there are lessons to be learned from the experiences we did have in BiH, where the prosecution has been conducted at both the international and the national level.

⁹ Mandate of the OHR: http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38612

¹⁰ Human Rights Watch Report: A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic, 2006: <http://www.hrw.org/reports/2006/03/15/chance-justice>

¹¹ National War Crimes Strategy, adopted in December 2008, in BCS: http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf

A controversial issue has also been the quantification of victims of the conflict¹². There are two main sources, internationally recognized as most credible, that have attempted to identify the number of victims of the war in BiH. However, after conflicts as long lasting and brutal and spread-out geographically it is impossible to have completely accurate data. We strive to have estimates, good estimates, based on reliable sources and accurate methodology. This data includes the dead and missing 'on all sides' i.e. the Bosniaks, Croats, Serbs and others that perished.

The Research and Documentation Center (RDC)¹³ in Sarajevo, an heir of the Bosnian government's Center for Researching War Crimes that was formed during the war is one of them. The other source is the International Criminal Tribunal for the former Yugoslavia¹⁴ i.e. the reports that form part of the evidence presented to its judges; expert reports made by certified, professional statisticians and demographers. Both sources put the number of deaths and disappearances around one hundred thousand. Most of the victims were Bosniak Muslims. Civilians form large part of those that were murdered or that disappeared.

It is important to note that the methodology of data collection for missing persons and interpretation of this data has been a source of much contention at the ICTY where numerous experts argued about numbers and circumstances of death and burial of thousands of victims. The Srebrenica trials are a good example because in all trials relating to the mass executions after the fall of the enclave, there were numerous testimonies about who the dead men were; how they died and how many were found and identified¹⁵.

The role of war crimes prosecution

Since the war ended in 1995, war crimes prosecution has been the dominant tool of addressing war crimes committed during the four-year-long conflict in Bosnia and Herzegovina.

The prosecution has been conducted at the International Criminal Tribunal for the former Yugoslavia, the national institutions (Court of BiH, Sarajevo i.e. the War Crimes Chamber) and the local courts (cantonal and district courts in Republika Srpska, the Federation of BiH and the Brcko District). There were also trials in several other countries such as Germany and Norway but they will remain outside the scope of this article.

Fair and impartial war crimes trials - the effective, consistent and transparent delivery of justice - can contribute to stabilizing a post-conflict society and preventing future crimes. This can be clearly seen in BiH. Because of the war crimes prosecution

¹² Lara Nettlefield, 'Research and Repercussions of Death Tolls: The case of the Bosnian Book of the Dead', Peter Andreas and Kelly M. Greenhill, eds. *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict* (Ithaca, NY: Cornell University Press, 2010)

¹³ Research and Documentation Center: <http://www.idc.org.ba/>; Bosnian War Crimes Atlas:

http://www.idc.org.ba/index.php?option=com_content&view=category&layout=blog&id=112&Itemid=144&lang=bs

¹⁴ ICTY War Demographics: <http://www.icty.org/sid/10562>; and for BiH: <http://www.icty.org/sid/10591>

¹⁵ Judgment in the case of Radislav Krstic, ICTY, 2001: www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf

system put in place as well as other measures implemented on the ground, BiH is less likely to be ravaged by war today.

There are questions over war crimes prosecution always being effective and fair (we can also question 'fairness' and what it means in this context, but that is an entirely separate topic). There are also several ways to conduct trials, internationally, nationally or within a hybrid system. There are also questions on whether retribution through trials is the best approach to dealing with the past. Maybe truth commissions are sometimes more adequate than court proceedings although recently more and more potential models of 'coexistence' of the two are being conceptualized and implemented. Nevertheless, in the case of BiH, prosecutions did produce some positive effects that minimize the potential of future conflict.

What is necessary for the prosecution system to be beneficial for a society is that it needs to work with other complementary mechanisms such as fact-finding missions, various reparation models for victims, memorials and acknowledgment of the suffering (an issue of much contention between different communities in BiH), open public discussion and fighting denial, property return, finding missing persons and giving them a proper burial, vetting within institutions, reform of the judiciary etc. All these measures need to work in concert and that was not the case in BiH. There is no political agreement on most of the above mentioned issues and therefore, the grievances of many victims remain unaddressed. The impact of the tribunals' work, even when fairly successful, is limited from the perspective of coexistence of different groups after a conflict. The justice they deliver is not perfect, and the limitations will be discussed further in this article.

After war crimes have been committed in a conflict, a well-planned assessment of the situation needs to be conducted and the most appropriate measures to implement in concert must be found. War crimes prosecution - conducted fairly and impartially, respecting established legal norms - should be part of that policy. This also includes ensuring equality of arms and the right of the accused to a fair trial. Prosecutions must be completely divorced from political pressure - that is the only way they can succeed.

What must be stressed is that trials can't do everything; they can't fix many of the problems of a post-war society. By themselves, they can't bring peace or reconciliation and expecting them to do so is making sure they fail our expectations. With the establishment of the ICTY, hopes of many were running high, too high probably. Today, almost 20 years after the historical establishment of the Tribunal, the first institution of its kind, many are disappointed even though it had significant successes. Are they disappointed because they expected too much?¹⁶

War Crimes Trials

¹⁶ Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*. (New York: Cambridge University Press, Cambridge Studies in Law and Society, 2010)

The prosecution system for crimes committed in BiH between 1992 and 1995 can be, in order to somewhat simplify matters, divided into three 'layers': the International Criminal Tribunal for the former Yugoslavia in The Hague, the State Court in Sarajevo and the local courts in BiH (ten cantonal courts in FBiH, five district courts in the RS and one court in Brcko). In total, not more than 300 people have been prosecuted for crimes during the war in Bosnia, on all levels. This is however an estimate because no official, centralized data-collection exists.

The concept that has been applied at the ICTY in relation to domestic systems in the former Yugoslavia is one of primacy (i.e. the ICTY having the 'first choice' of whom to prosecute and it 'handing down' cases to local courts). The local governments have a legal obligation to cooperate and this cooperation has been difficult throughout the years, causing much political strife in the former Yugoslavia. The national institutions in the region, in Serbia, in Croatia and BiH should also cooperate in the interest of conducting investigations and bringing suspects to trial but they often fail to do so successfully¹⁷.

The International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY is the first post-Second World War international tribunal, an *ad hoc* institution established by the Security Council of the United Nations in May 1993 by Resolution 827¹⁸. Since then, numerous practitioners, academics from various disciplines as well as activists discussed the Tribunal with varying levels of critique or enthusiasm, but its jurisprudence and impact have been widely studied and its relevance cannot be disputed.

Article 1 of the Tribunal's Statute states its competence:

*The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute*¹⁹.

Some efforts were made during the war to prosecute war crimes: criminal and investigative reports written and indictments issued against members of enemy forces or their political leaders. This was done 'on all sides', within both military and civilian prosecutorial structures. Nevertheless, it was within a highly politicized context, during a war, where political goals governed much of the behavior of prosecutors and judges. The ICTY did 'pick up' some of the cases when it 'scanned' existing war crimes files in the prosecutors' offices around the country. However, when war crimes prosecution is discussed today - a system based on the rule of law –

¹⁷ *No Bosnia-Serbia cooperation*, Radio Netherlands Worldwide article: <http://www.rnw.nl/international-justice/article/no-bosnia-serbia-cooperation>

¹⁸ UN SC Resolution 827 (May 25th 1993):

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>

¹⁹ Statute of the ICTY: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

it is about efforts that followed the establishment of the ICTY, which was indeed a groundbreaking event in international law.

From its humble beginnings the ICTY has grown into an important institution. The chief prosecutor and president of the Tribunal give regular reports to the Security Council and the European Union. Accession of the former Yugoslav states to the European block is tied with cooperation with the Tribunal and form part of the so-called 'EU conditionality' concept. This has proven to be quite a success in the former Yugoslavia as government cooperation (such as making arrests or surrendering documents) was insured through methods of rewards and pressure from Brussels.

Administering justice in The Hague is costly - the budget for 2011 is approximately 150 million US dollars²⁰. The Tribunal has now seven trials ongoing and six more on appeal²¹. Two trials are yet to begin. Since it was established, 161 individuals have been indicted, 160 men and one woman²². Earlier this year the arrests of the last two fugitives, Ratko Mladic and Goran Hadzic, took place. That is an outstanding success, one that was ensured after many years of waiting.

If we discuss cost, we need to also address the complexity of these cases. Even the least complicated trials have lasted for months and they are a result of years of investigation: interviewing witnesses across the globe, forensic examinations of mass graves, sweeping archives around the region, having experts prepare reports, doctors and psychiatrists assess the physical and psychological condition of the accused... The standard of proof is high, the procedure complex. The trials include hundreds of witnesses, thousands of documents, months in the courtroom. The accused are often charged with multiple crimes in a large area over a long period of time. Proving guilty or establishing innocence takes time and effort and many criticize the trials especially due to their length.

Initially, the ICTY was supposed to prosecute those most responsible for war crimes, crimes against humanity and genocide committed in a conflict that lasted for almost a decade. The resources were limited, the idea yet untested. Limits needed to be set on the list of potential suspects. Yet the ICTY had no police force of its own and the first arrests were difficult. The arrests remained a challenge all the way to the end, to the arrest of the last fugitive. As this institution was the first of its kind, it devised policies and approaches as it went along.

The prosecutorial strategy (i.e. case selection), outreach and other important segments of the Court's work were properly planned several years into the work of the institution. There were also difficult tasks placed in front of the Tribunal - achieving peace and security, as stated in the Statute from May 1993:

²⁰ Cost of Justice, ICTY: <http://www.icty.org/sid/325>

²¹ Ongoing cases at the ICTY: <http://www.icty.org/action/cases/4>

²² Key Figures, ICTY: <http://www.icty.org/sections/TheCases/KeyFigures>

‘... the prosecution of persons responsible for serious violations of international humanitarian law... would contribute to the restoration and maintenance of peace.’²³

The expectations were high as the ICTY was essentially the only place where the grievances of thousands of victims could be addressed at the time. There was an expectation too that the Tribunal would bring reconciliation. ‘Reconciliation’ was, and remains to a certain extent, a very popular word. Yet, today the expectations might be lower as the realities of the courts’ limitations have been exposed.

Criticism of the Tribunal and the national courts has been longstanding, relying on several arguments. Some of them are based on the concept of state sovereignty and accusations of ethnic bias (this is especially the case for Bosnian Serbs – the number of Bosnian Serb accused is larger than the number of defendants from other ethnic groups and the Bosnian Serbs are the only ones charged with genocide). Other criticism focuses on some of the weaknesses other international institutions prosecuting war crimes suffer, such as inconsistencies in sentencing, ‘overuse’ of survivor-witnesses that need to testify multiple times in different trials (and the problem of ‘witness fatigue’); issues of length of detention for some accused; criticism of some legal concepts like the ever controversial joint criminal enterprise (JCE), issues of equality of arms and disclosure of potentially exculpatory evidence etc...

Nevertheless, the importance of the Tribunal both for the region and globally cannot be ignored. The influence the ICTY had on developing jurisprudence and procedure and raising awareness on justice issues as well as the impact it had on the formation of other courts, mainly the International Criminal Court, should be recognized.

National Trials: The War Crimes Chamber and the local courts

The ICTY greatly influenced the beginning of war crimes prosecution in national institutions. The Tribunal was established because, among other reasons, the national institutions in the 1990es didn’t function properly and were not coping with the violence that erupted. The ICTY was instrumental, several years later in assisting them in building capacity to conduct fair war crimes trials. In other words, if the ICTY had not been set up national prosecutions would most likely not exist. This is one aspect in which the Tribunal was very successful – assisting the development and strengthening of national institutions that will now be discussed.

The State Court of BiH (i.e. War Crimes Chamber, WCC) sits in Sarajevo and it has jurisdiction over the same crimes as the ICTY. It is a national institution, somewhat internationalized in terms of staff and procedure. It began its work in 2005 and so far it has concluded proceedings in over 60 cases against around 100 individuals²⁴. Several of the now ongoing cases are dealing with the genocide in Srebrenica.

²³ Statute of the ICTY, Preamble: <http://www.icty.org/sid/135>

²⁴ *Spora implementacija Državne Strategije (Slow implementation of the National Strategy)*, in BCS, BIRN article: <http://www.bim.ba/bh/264/10/32147/>

It is important to stress that so far, the Prosecutor's office in Sarajevo indicted individuals belonging to all ethnic groups and has been governed by gravity of the crimes and quality of evidence as well as availability of suspects in pursuing cases. There has been no evidence of blunt political manipulations even though pressure towards the prosecutors exists. In this respect, the involvement of foreign prosecutors and judges, legal officers and investigators has proven to be a good way of fending off political pressure²⁵.

One of the positive aspects of having the State Court is the geographic proximity to the affected communities. This also means easier access to witnesses that are still in the country. The trial sessions are conducted in the local languages and the courtrooms are open to visitors.

Numerous researchers from various countries came to observe the Court of BiH and it has been judged, largely, as a success even though challenges are being faced daily. Olga Martin – Ortega lists some of the successes identified in her research:

'The experience of the WCC so far could be considered positive. A large number of cases have been prosecuted; the institution works very effectively, cooperation between national and international staff has been fluid and it is doing important work in prosecuting according to international standards. And maybe equally significant, it has managed to survive political attacks for the past five years. In this regard, the WCC could provide an interesting model for the future.'²⁶

The successes of the local courts are still humble but the situation seems to be slowly improving (e.g. establishing a Witness Protection Unit at the Banja Luka Court). The Cantonal Court in Sarajevo and the District Court in Banja Luka (both the biggest courts in their respective entity) are prosecuting war crimes regularly. Other courts have their cases too, Mostar and Tuzla being very active as well.

Some of the challenges include the lack of resources (war crimes investigations can be complex and costly even when the suspects are lower level perpetrators; some prosecutors' offices don't have prosecutors working exclusively on war crimes), trained staff (war crimes prosecution, as well as defense in those cases, requires specific expertise) and inadequate witness protection on the local level. In fact, witness protection is cited as one of the biggest problems of local courts administering justice in war crimes trials²⁷. There are still reports of threats and intimidation against witnesses²⁸.

²⁵ Delivering Justice in Bosnia and Herzegovina, OSCE, 2011:

http://www.oscebih.org/documents/osce_bih_doc_2011051909500706eng.pdf

²⁶ O. Martin-Ortega: "Hybrid Tribunals and the Rule of Law: The War Crimes Chamber of the State Court of Bosnia and Herzegovina" in Henry F. Carey and Stacey Gibson Mitchell (eds), *Trials and Tribulations of International Prosecution* (Lexington Books, forthcoming 2012) (on file with the author)

²⁷ Procjena potrebe na polju podrške svjedoka i zrtava, UNDP (Report on Witness Protection in War Crimes Trials): <http://www.undp.ba/upload/publications/Procjena%20potrebe%20na%20polju%20podrske%20svjedoka-zrtava.pdf>

²⁸ OSCE Report: Witnesses in war crimes trials in Bosnia and Herzegovina still facing threats and intimidation, 2010: <http://www.osce.org/bih/69314>

Some of these challenges were addressed in the National War Crimes Strategy²⁹ that was adopted, after much effort and political strife in late 2008. According to this document, local courts should be investigating only the less sensitive cases which are not as complicated and where the perpetrators are not high-ranking officials. A great number of cases should be prosecuted at the local level and questions remain over their capabilities to complete this difficult task. National staff has been trained³⁰, but that is not enough.

The situation was confusing and difficult before the adoption of the Strategy due to the fact that there was no centralized database of all open case files i.e. nobody really knew what the case-load was; many indictments that were still 'active' in local prosecutors' offices were filed during the war, many of which would not be accepted in a court today because they were biased and unfounded. More than anything else, what was needed (and much sooner than when it actually happened) is some order – a good idea about what the cases are, how many suspects, how many potential trials, what is the quality of evidence etc. There was also competing jurisdictions and overlap of efforts (e.g. when two or more prosecutors' offices work on the same case).

That is, without a doubt, one of the lessons that can be taken from the Bosnian experience. In order to plan prosecutions, one must know what they might include: how many suspects, how many crimes, what is the quality of evidence (this cannot be known with any certainty before the investigation is completed but prosecutors and investigators can have an idea about what might there be in terms of evidence once the work has begun).

Impact of prosecutions on the local populations

There is little confidence these days among the BiH citizens in the statement that the ICTY and local trials contributed significantly to reconciliation³¹. According to one such poll, there is also a lack of basic knowledge about the proceedings: 93% of those participating in the poll say they don't know one single case being tried at the local courts³². Another recent poll reflected results that were equally discouraging³³.

In certain areas of the country there is also a high level of denial or, at least, lack of accurate information and understanding³⁴:

'Only 20% of those interviewed in the RS believe that genocide was committed in Srebrenica or that civilians were targeted during the siege of Sarajevo'³⁵.

²⁹ National War Crimes Strategy adopted in December 2008: http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf

³⁰ War Crimes Justice Project of the OSCE included training programs for national staff: <http://www.osce.org/odhr/74803>

³¹ *Nepovjerenje u rad pravosudja, (Lack of Trust in the Judiciary)*, in BCS, BIRN article: <http://www.bim.ba/bh/265/10/32161/>

³² *Ibid.*

³³ OSCE Mission in Serbia Poll, 2011: <http://www.trcb.com/news/icty/general/poll-shows-majority-in-serbia-oppose-mladic-arrest-19579.htm>

³⁴ The educational system fosters this denial by having children of different ethnic backgrounds attend separate classes where history is taught from the perspective of an ethnic group, a simplified black and white narrative that goes against social cohesion and open, fact-based discussion.

³⁵ *Nepovjerenje u rad pravosudja, (Lack of Trust in the Judiciary)*, in BCS, BIRN article: <http://www.bim.ba/bh/265/10/32161/>

Oddly, people seem much more concerned about cases where the defendants belong to their ethnic group than when the case is against a perpetrator of another ethnicity but where the victims form part of one's own group.

There is also data on the trust in the ICTY, dating back to 2002 when the International Institute for Democracy and Electoral Assistance (IDEA) conducted research that resulted in the following numbers:

'For The Hague Tribunal (ICTY), according to the survey trust ratings are highest in Kosovo (83%) and the Bosnian Federation (51%), lowest in Serbia (8%) and RS (4%).'³⁶

All this might indicate that the positive impact the ICTY has had in international criminal law or on the establishment of the ICC might be more relevant than the one it had on the populations in the region. The justice it delivered seems not to be enough to result in significant local support, but it might also be a little bit too early to judge. Once the Tribunal completes its mandate, the assessments should continue.

Certain challenges for war crimes prosecutions

War crimes prosecution on all levels faces several challenges and has various drawbacks. Although there are no statutory limitations for war crimes cases, there is however biology at work and many of the suspects and witnesses are dying or becoming too old and weak to participate in a trial. As mentioned, there is also 'witness fatigue': the same witnesses, often survivors of the most horrible crimes, keep being asked to testify again and again in different proceedings.

Another problem burdening the national institutions is the confusion in relation to the applicable law. Five criminal codes are currently being applied within BiH³⁷: the 'old' Yugoslav Criminal Code, the Criminal Code of BiH (applied almost exclusively at the State Court), the Criminal Code of the Federation of BiH and the Criminal Code of Republika Srpska, as well as the Criminal Code of Brcko. These are different in certain formulations and definitions of crimes and they also foresee different prison terms for the same act. This creates legal insecurity and inconsistency that threatens the publics' faith in the system.

Something that has always been a point of contention, at all levels, was prosecutorial strategy. From thousands of potential suspects, and that is what the case-files in BiH suggest after careful analysis, how does a prosecutor decide which case to take on and which to leave aside. How does one prioritize cases, form a case or decide on the charges? Should the focus be on political and military leadership or lower level perpetrators (rapists, sadistic murderers and brutal paramilitaries setting people alight)? Does one take into consideration ethnicity or not i.e. do we try to 'balance' suspects by indicting members of all warring parties no matter the brutality and scale

³⁶ IDEA Survey: http://www.idea.int/europe_cis/balkans/see_survey.cfm

³⁷ *Strasbourg Case May Lead to Verdicts Overturned*, BIRN article: <http://www.bim.ba/en/265/10/32204>

of the crime or are we only guided by gravity of the crime as the criteria for prioritizing cases? All of these are important questions that need to be addressed when strategizing any prosecution of mass human rights violations.

There is no clear answer to these questions and much needs to be decided on a case-by-case basis. Nevertheless, case selection at all levels caused heated political debates and accusations of bias were frequent. Chief prosecutors have not always had a clear idea of how to approach the difficult task they were facing. That would be another important lesson of the prosecution experience in Bosnia: prosecution strategies should be as clear as possible from the beginning, followed by an open discussion with the public about the choices made.

It is difficult to measure the successes of war crimes prosecution and assess accurately if it has produced the social and public purposes we aspired to. However, the fact that war crimes prosecution survived years of political tension, problems with funding, an exceptionally large caseload; fragmentation within the judicial system within BiH and application of different criminal codes does mean that it has grown into a stable system. Many obstacles stood in the way but the prosecution continued, the jurisprudence grew and defendants were found guilty, sentenced and sent to prison after impartial proceedings were conducted. Others, on the other hand, were acquitted because their guilt was not proven beyond a reasonable doubt.

Some of the problems the prosecution faces are a consequence of the fact that the judicial system as we know it has been designed for crime as an exception and not as a rule. No judicial system can successfully deal with tens of thousands of potential suspects and thousands of case files in such a short period of time. The only way that could be achieved is by significantly changing the procedural rules and redefining how trials are conducted. No country, no matter the resources, could accomplish conducting hundreds of war crimes trials effectively, at the same time, to the highest standards, for many years, whilst at the same time dealing with other judicial tasks in non-war crimes cases. There are no investigators, prosecutors, defense attorneys, courtrooms or resources available.

War crimes prosecution after a brutal long-lasting conflict is about case selection, the quality of evidence and setting priorities. It is about focusing on certain cases and leaving others aside. Unfortunately, there will always be cases where one cannot prosecute, suspects that will not be put on trial and victims that will not receive any redress. The evidence might be lacking, the suspect is unknown or unavailable; witnesses have died or are unable to testify... The selection needs to be made on reasonable criteria (case selection is a separate matter, very complex and controversial that cannot be fully addressed here) and then the public needs to be informed on why certain cases and being pursued and others not. Clearly, in the context of BiH, this is very problematic as all decisions to pursue certain cases and not others are often perceived as made on political and not professional grounds. The prosecution effort needs to be divorced from political pressure - in reality but also in public perception.

In that sense, the institutions in BiH, on all levels, are still struggling. What is important in this context is to have clear, realistic expectations as to what war crimes prosecution can do (and communicate it to the public in a clear and transparent manner).

Reparations have not been addressed and this remains a painful matter for many victims. Recent calls to establish a Victim's Fund³⁸ are yet to result in concrete action, but disappointment by the victims is clear – they haven't received adequate reparations for their suffering³⁹. Retribution alone is obviously not enough; these people need support to rebuild their lives.

Certain accomplishments and lessons for the future

The accomplishments of the war crimes prosecution efforts include finding missing persons⁴⁰, establishing a historic record of what happened, thousands of hours of testimony have been heard... Victims have been given a chance to speak about their experience.

Establishing facts and a historic record (e.g. documents in the ICTY archives) is crucial for the long-term stability of a society where denial will be fought and respect will be given to all victims. Denial breeds resentment and mistrust that can fuel conflict. Impartial and unbiased research needs to be conducted on the causes and consequences of the crimes so that facts can be known and recognized. This is tough in any society and there is still denial in BiH but there has been progress since the end of the war.

Geoffrey Nice, former prosecutor in the trial of Slobodan Milosevic at the ICTY had this to say about the historic record at the war crimes courts, especially the Tribunal:

'You could say the verdicts in these cases are a great deal less important than the record of evidence that they leave behind. A record that would never be available but for these trials that show how things happened'⁴¹ ...

Nice continues:

'Because if we can learn from how things happen – then maybe we'll be clever enough and sensible enough to reduce their occurrence in the future'.

Where lessons can be learned is also the prosecutorial strategy: have a clear set of criteria that determine what cases are being taken on by which office and why (and then explain it to the public, in order to maintain a sense of transparency). In the prosecutors' offices teams must be made out of professionals with specific expertise

³⁸ Judge Patrick Robinson, until recently the ICTY president, speaking at the UN Security Council, calling for the establishment of the Fund. ICTY Press release: <http://www.icty.org/sid/10850>

³⁹ *Zrtve bez odštete (Victims with no reparations)*, in BCS, BIRN article: <http://www.bim.ba/bh/297/10/33880/>

⁴⁰ The war in BiH has a relatively high number of people identified and remains given back to families for proper burial and the forensic science has been advanced to assist in similar efforts in other locations in the future. Data from the International Commission for Missing Persons in Sarajevo: <http://www.ic-mp.org/about-icmp/>

⁴¹ *Geoffrey Nice: at your service*, Radio Netherlands Worldwide article: <http://www.mnw.nl/international-justice/article/geoffrey-nice-your-service>

and efforts must not be duplicated. Investigations, if quality evidence does not exist need to be closed (and properly explained to the victims' families and the public). Indicting several individuals for the same crime at the same time (within the same case) might make it easier for witnesses because they would need to testify only once.

Charging needs to be realistic. There is delicate balance to strike here: the prosecutors want to address all crimes a suspect has allegedly committed (and that can be proven with evidence in the courtroom) while at the same time having in mind judicial economy and trying to limit how much time and effort each trial requires in order to be able to work on other cases.

Plea-bargaining is a very controversial and complex matter in relation to war crimes in BiH because this practice is somewhat alien to the national judicial system. Common law countries have, in this sense, different practices than civil ones such as the one in BiH and this results in heavy criticism, even when the benefits of the plea are clear⁴². Sometimes, prosecuting a commander depends on an insider. At times, available evidence is not enough and the insiders can provide valuable information about, for example, mass grave locations (if there are no survivors and no perpetrator comes forward, many remains will never be found). Plea-bargaining remains a contested subject but it has been used in relation to the crimes in Bosnia. A lesson would be to communicate with the victim's associations and explain what the benefits of this approach are.

The future of the war crimes prosecution efforts is complex and still rather uncertain. The ICTY is set to 'transform' into the Residual Mechanism in 2013⁴³; the rest of the prosecutions need to be done by national institutions.

As mentioned, there are approximately ten thousand people that are potential suspects in BiH. The biggest number of them will never face trial or any punishment for their crimes and that is, sadly, a fact. The system is just not able to absorb so many war crimes trials. For many of these crimes, evidence might also be difficult to acquire.

However, some individuals have been held accountable and others will be as well, there just won't be 10 000 of them. It might not even be one thousand in the end. As stated earlier, no system, especially not one as politicized, fragmented and impoverished would succeed with such a daunting task. Actually, with everything that is heading against it, the war crimes prosecution effort on all three levels has been quite successful. One aspect where it could have done more is outreach – successfully communicating its successes to the local population.

Conclusion

⁴² D. Schwendiman: 'Prosecuting atrocity crimes in national courts: Looking back on 2009 in Bosnia and Herzegovina', *Northwestern Journal of International Human Rights*, Vol. 8 (3), 2010, pp. 269-300.

⁴³ ICTY Press Release on the Residual Mechanism: <http://www.icty.org/sid/10573>

BiH was ravaged by a brutal war for four years. At the end of 1995 the shooting stopped but the country remained destroyed and divided, its population traumatized, impoverished and unprepared to completely 'transition' into peace. One of the reasons why the transition was so difficult was the fact that thousands were murdered, tortured, raped, humiliated and killed. Thousands were missing (and still are today)...Unspeakable crimes were committed by all sides, albeit unequally in number of civilian deaths they resulted in and the level of planning involved. This level of perpetration of crimes and the brutality they involved required a firm approach, one that would lead to the respect for the rule of law and human rights. War crimes prosecution ended up being the prescribed solution but many still criticize its effects.

David Schwendiman, the American lawyer that headed the Special War Crimes Department of the Prosecutor's office in Sarajevo concludes:

'If war crimes are not addressed in a meaningful way, political instability in Bosnia and Herzegovina will continue and tension will persist between the sides that still battle one another socially and politically. Until a sufficient level of accountability has been reached to satisfy its legal obligations, Bosnia and Herzegovina must continue to investigate, prosecute and punish those responsible for atrocity during the conflict, provide the victims and survivors with meaningful redress, and establish enough of a reliable record, arrived at through a process that is legitimate and credible, to prevent the history of the conflict from being manipulated and exploited for political advantage by any side. If it fails to do this, atrocities committed during the war will continue to frustrate the nation's ability to provide its citizens better lives and more opportunity'⁴⁴.

What is needed is, primarily, political will. There is no political will now to properly prosecute war crimes cases in BiH. All the accomplishments I listed have, I would dare say, been achieved not because of the political leadership but in spite of it. Various human rights activists, both within the country and abroad; members of victims' associations, journalists, academics, prosecutors and defense attorneys, some diplomats and judges...They have all somehow contributed to the existence of war crimes trials and the justice they provided for the victims.

The effort to continue with the trials needs to be sustained. The government needs to commit and allocate resources to these institutions and enforce the rule of law. The victims are overwhelmingly from Bosnia and Herzegovina, they died in the territory of Bosnia and Herzegovina and the state owes them some justice.

Fair and impartial prosecution is necessary to remove those guilty of the most horrendous crimes from public space. If in prison they can no longer actively participate in political life or command armies, police forces or paramilitaries; they cannot spread hatred and promote human rights abuses. Although there is little

⁴⁴ D. Schwendiman: *'Prosecuting atrocity crimes in national courts: Looking back on 2009 in Bosnia and Herzegovina'*, Northwestern Journal of International Human Rights, 2010

empirical evidence to confirm it, some also argue that there is a strong element of deterrence in war crimes prosecution⁴⁵.

Other policy measures that should be applied are reparations for the victims, establishing fact-finding mechanisms (such as the recently formed regional RECOM initiative that should have some of the tasks usually attributed to truth commissions), building memorials and paying tribute to the victims, fighting denial, support for victims (physical, psychological and social) but also broader measures like supporting employment, property-return etc. Prosecuting crime and corruption stemming from the war is also a challenge. All these measures can assist a society in post-conflict periods to minimize the potential for future conflict and even genocide.

Years are passing; it is becoming more and more difficult to prosecute war crimes. Suspects and witnesses are dying; parents are perishing without knowing what happened to their sons and where their bones lie. That is why the efforts should now be intensified.

We can criticize prosecution for various reasons but in the context of Bosnia and Herzegovina, any solution that would not include a judicial process and a verdict would not be satisfactory⁴⁶. Relations between the ethnic groups are tense even today. What would they be like if all those that have been prosecuted and convicted were free: rapists and murderers, sadistic camp guards and hateful politicians, negligent commanders and generals that have willfully ignored the law and killed innocent civilians? The future in Bosnia and Herzegovina might look bleak today, but if it weren't for the prosecutions, it would have been bleaker.

⁴⁵ Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law*, Vol 95 (2001): p 12; Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice", *Ethics and International Affairs*, vol 24 (2), pp. 191-211.

⁴⁶ Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, 2010, http://www.soros.org/initiatives/justice/articles_publications/publications/that-someone-guilty-20100707