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GLOBAL MEETS LOCAL: INTERNATIONAL PARTICIPATION IN PRISON REFORM AND RESTRUCTURING IN BOSNIA AND HERZEGOVINA¹

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Abstract

This paper presents a case study of international participation in criminal justice reform in Bosnia and Herzegovina (BiH), taken as an example of a small, peripheral jurisdiction experiencing a number of important social, political and economic transitions. The local context is introduced and is followed with a brief discussion on broader developments in penal policy beyond BiH. This precedes a case study of the work of the Council of Europe, which focuses on the pursuit of adequate conditions of detention for forensic psychiatric patients as an example of the impact of international human rights discourse and instruments on local penal policy. The obstacles to progress towards improved conditions of detention are located in the context of political fragmentation in BiH, supporting the view that local factors can constrain or mediate the influence of broader trends in penal policy.

INTRODUCTION: LOCAL CONTEXTS AND INTERNATIONAL INTERVENTION

Bosnia and Herzegovina's (BiH) position at the periphery of a number of states in which broad patterns of penal transformation have been observed can be seen across various dimensions: physically in its location in South East Europe; historically as a former territory of the Ottoman Empire; culturally, as a meeting point of eastern and western variants of Christianity, and of Christianity and Islam; and conceptually, forming a Balkan 'other' akin to Said's analysis of the West's 'Orient' (Bakić-Hayden and Hayden, 1992; Todorova, 1997). Yet there is good reason to turn to BiH to broaden our understanding of how developments observed in western penality play out in the context of a small penal system: BiH is an aspiring member of the class of 'western' states, a member of the Council of Europe since 2002, and currently engaged in negotiations with the EU geared towards closer association; with the accession of Bulgaria and Romania to the Union, BiH no longer looks so peripheral, surrounded, along with other former Yugoslav republics and Albania, by an arc of EU states from Slovenia to Greece; finally, criminal justice policy in BiH is an area that has seen intensive and extensive involvement of agencies from a range of donor states, including countries experiencing the kinds of penal transformations summarised by McAra (2005). The paper introduces the specific context of post-war BiH before outlining and briefly expanding upon McAra's discussion of trends in penal transformation. The impact of international participation in penal policy in BiH is examined through a case study: the work of the Council of Europe, and associated bodies, in pursuit of appropriate facilities for the detention of forensic psychiatric patients. As with any case study research, there is a risk that findings form only a partial, and thereby skewed, representation of a bigger picture. The Council of Europe was chosen from four international organizations participating in penal reform in BiH during two periods of fieldwork in 2004 and 2005², as the body with the longest record of involvement in the country. The findings resonate with some of the challenges of international intervention observed in those other bodies' programmes of work, and so while the Council of Europe is presented here as a free-standing case, it might contribute to a wider body of work on the engagement of international agencies in domestic policy-making in states in transition.

This paper forms part of a larger study of international participation in criminal justice reform and reconstruction in policing, courts and prisons in BiH from 1995 to

2005 as an aspect of state-building activity (Aitchison, 2007, 2008). As such, there is a risk that it engages with the more specific complex and constantly developing field of penal policy on a shallow level. Nonetheless, in the absence of a significant body of academic work on post-war prison reform in BiH, and a relative paucity of material on prison reform in transitional countries more generally³ compared to other criminal justice sectors, it is hoped that this paper helps to address the first gap and makes a contribution to a growing literature base in the second. The wider study draws on institutional documents and on interviews with a number of consultants and secondees to, and employees of, international agencies working in BiH, and with their partners in BiH. The focus here is on those working in or alongside the Council of Europe. The paper introduces relevant aspects of the local context in BiH, before highlighting some broader transformations that may be expected to have an impact on the country. Against this background, the case study is presented and discussed.

THE LOCAL CONTEXT

While there is not the scope to develop a full analysis of the particular historical, social and cultural context of BiH, it is important to emphasize two factors which have specific relevance to how international interventions are received, how broader penal trends may be absorbed, and to the formulation of penal policy in the post-war period: fragmentation of political authority, and the legacy of a history of ideological insulation from the broader transformative pressures described in a subsequent section on global developments.

Fragmentation

Following a divisive period of conflict (1992-1995) the political landscape of BiH has been characterised by fragmentation. The wars in BiH ended with peace settlements in 1994 and 1995 and subsequent arbitration in relation to disputed areas⁴. These processes have left their mark in the form of the new political boundaries illustrated in map 1, below. The common institutions of government which cover all of BiH have been described as a ‘thin roof’ (Dahlman and Ó Tuathail, 2005: 577). A unitary entity, Republika Srpska (RS), forms an arc of territory running along BiH’s northern and eastern frontiers with Croatia, Serbia, and Montenegro. A federal entity composed of ten cantons and a federal level of government, the Federation of Bosnia and Herzegovina (FBiH), occupies the remaining territory, including a small portion

in the North East (Posavina). These two sub-state entities enjoy a broad range of governmental competencies, although since the initial settlement of 1995 there have been some significant transfers to the state-level government, most notably in the field of defence policy. In addition to the state, entity and cantonal levels of government, the territory of Brčko District, intersecting Republika Srpska, and linking Posavina to the remainder of FBiH, is governed under its own assembly and residents of the district may hold citizenship of either of the two sub state entities (Jeffrey, 2006). Over and above the authority residing in domestic bodies, the international *High Representative* in the country holds executive decision making powers under terms specified by the multi-national Peace Implementation Council and welcomed by the UN Security Council (OHR, 1997; UNSC, 1997). Between 1997 and 2004, these powers were exercised on 670 occasions to introduce legislation, make international appointments, form commissions to examine the reform and reconstruction of domestic institutions, and to remove a number of individuals from public office in state enterprises and at all levels of government from municipalities up to the state-level Presidency.

Map 1: Bosnia and Herzegovina, showing entities, cantons and special district

<<Insert Map 1 here>>

The general fragmentation and ‘thin roof’ of the state are evident in the field of criminal justice. In the immediate post war period, the state had no law enforcement bodies, criminal courts, or detention facilities. Ministries of Security and Justice at the state level were introduced as recently as 2003 (*Law on Ministries*, 2003), allowing the state-level government to exercise a degree of authority in policing and criminal justice and, alongside interventions on the part of the High Representative, facilitating the harmonisation of criminal procedure across the whole of BiH. In policing and courts, authority is currently held at cantonal, entity, state and Brčko levels, although there has been strong international pressure for policing to be brought under the authority of the state-level government. Detention facilities were initially operated only at entity level⁵, although subsequent developments have seen pre-trial facilities opened under the authority of Brčko Judicial Commission (OHR, 1999) and the state Ministry of Justice. The focus of the research programme has been on international bodies and entity- and state-level governments; as such no further reference will be made to arrangements in Brčko District.

The two entity prison systems fall under the remit of an Assistant Minister in each sub-state entity⁶. These systems also house sentenced detainees from the courts of Brčko District and the state-level Court of BiH; prior to 2005 they also held all pre-trial detainees from the state level court, and still hold those not held in the state-level Justice Ministry's own small facility. The Court of BiH is part of a series of developments in the common institutions of BiH, creating another level in the governance of detention facilities in the country. In November 2000, the High Representative, Wolfgang Petritsch, issued a decision enacting legislation to establish a court under the authority of the state-level government (OHR, 2000). Further decisions, particularly those of his successor, Paddy Ashdown, saw the court's remit expand to include panels dealing with war crimes and organized and economic crime (OHR, 2002). The operation of multiple levels of government in BiH, particularly in the field of the execution of penal sanctions, is by no means unique to the country⁷, however what marks the system out as distinctive in BiH is the recent history of conflict between entities, and the executive authority vested in an external agent.

The fragmentation of prison administration in BiH reduces the capacity for flexible responses to overcrowding and the capacity to provide appropriately for inmates with special needs or those groups of inmates entering the system in limited numbers, in particular those remanded for secure psychiatric care, and female and juvenile inmates. The pre-war administration system in BiH had one specialist facility for each of these groups, but all three now lie in Republika Srpska, and only one, the Forensic Psychiatric Unit (FPU) at Sokolac, continues to serve its original purpose (Walmsley and Nestorović, 1998). The prison population is predominantly male (98 per cent) and adult (99 per cent)⁸. In June 2004 nine juveniles were serving custodial sentences, all male, and all held at either Zenica (FBiH) and Foča (RS). These small numbers are particularly problematic due to principles of separation enshrined in European Prison Rules⁹; there are implications on resources required to provide and staff separate facilities for both young and female inmates in both entities. One observer from the Council of Europe noted the country was simply too small and too poor for such a situation to be sustainable (Interview, 24 September 2004). The report of the first visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), along with the responses of the FBiH Ministry of Justice and Zenica prison management, confirmed that while a separate unit was established for juveniles at Zenica, overcrowding elsewhere in the

facility meant that it was shared with older prisoners (CPT, 2004a; Government of BiH, 2004). Similarly, the lack of capacity to separate inmates at Zenica on the grounds of security, there being no other high security facility in FBiH, has resulted in an application to the European court of Human Rights (*Rodić and three others v Bosnia and Herzegovina*). The lack of provisions for the secure detention of psychiatric patients remanded to custody by the courts of FBiH is taken up in the example of the two cases of international participation in penal reform presented in this paper. Forensic psychiatric patients remanded to custody in FBiH have so far been housed in a separate pavilion of the penitentiary at Zenica. At the end of 2001, some 69 people were held at Zenica for mandatory psychiatric treatment in a unit with capacity for 40 (Walmsley, 2003).

Historical insulation from transformations

As a constituent republic of the Socialist Federal Republic of Yugoslavia (SFRY), BiH was, up to the late 1980s, ideologically insulated to some extent from transformations experienced elsewhere, such as the collapse of faith in rehabilitation as a penal goal. From the rupture between Stalin and Tito in 1948, Yugoslavia had developed its own model of socialism based on principles of self-management in opposition to the perceived statism of the Soviet Union (Djilas, 1967; Djordjevic, 1953; Estrin, 1982; Lapenna, 1964). Nonetheless, Yugoslav and Soviet models both shared a canon of early Communist writings. While there may be little focus on penality in these foundational texts of Communism (Garland, 1990; Spitzer, 1983), Marx pointed in the direction of the reformatory potential of labour as a criminal's 'sole corrective' (Marx, 1972: 33). The 1976 Criminal Code of Yugoslavia emphasised the rehabilitative function of punishment as well as its purpose in 'strengthening the moral fibre of a socialist self-managing society', but does not show how this would be achieved in terms of penal practice. However, the physical legacy handed on to post-war prisons in BiH indicates a penal system in which those forms of employment available in society at large were reflected in the forms of labour carried out in prisons: the steel works at Zenica; the furniture factory at Foča, and various agricultural units across the country. A number of interviewees working alongside the prison administrations of BiH discussed a Yugoslav model which drew strongly upon work as a form of therapy or social re-education (Interviews, 24 September 2004; 21 June 2005; 30 June 2005). They located this in the context of a

humane and progressive system which included enlightened legislation allowing for generous leave in order that prisoners might spend time with their families. One Council of Europe expert working closely with prison directors noted that those with a longer record of service could recall a time when they received visits from Scandinavian prison authorities interested in the progressive elements of the system (Interview, 21 June 2005).

The disintegration of Yugoslavia, impacting the various constituent republics at different times and in different ways, might be seen as something of a *critical juncture*, creating legacies for the political and institutional structures in the emerging states (see Collier and Collier, 1991). The opening of BiH to international governance through the Office of the High Representative, the presence of numerous international agencies offering financial and technical assistance, and an internationally sponsored process of general political and economic liberalisation, together serve to bring BiH into closer contact with other models of penal practice and to open the country up to a number of the transformative forces that are seen to have shaped contemporary penal policy elsewhere (see below). Working on Russia as an example of another state in transition, Piacentini (2006) has described a state of ideological vulnerability that accompanies radical transformations of society creating openings for a reorientation of the penal system. Nonetheless, visiting Council of Europe experts found that prison directors continued to value work for its rehabilitative potential (Walmsley and Križnik, 1998; Walmsley and Nestorović, 1998). While these findings were reported only three years into the post-war period, interviews conducted in 2004 and 2005 with representatives from the Council of Europe, (CIDA) and DFID working on penal reform suggested an ongoing commitment to the progressive and work based penal regimes of the Yugoslav era (Interviews, 24 September 2004; 21 June 2005; 30 June 2005). In some respects the ongoing focus on work might accompany a shift in underlying conditions necessitating a pragmatic response to resource shortages in prisons, akin to those observed in Russia (Piacentini, 2004), and to security concerns regarding unoccupied inmates, yet other progressive elements, including annual leave remain in place. Comparing the case of BiH to that of Russia, as explored by Piacentini (2004, 2006), the nature of the historical disjuncture arising from the collapse of socialist rule, and the relation of this to penal policy, is somewhat different. In the Russian case, Piacentini found that the shadow cast by the history of the Gulag meant that Russian

prisons and penal colonies were, on one level, receptive to human rights as an organising principle that distinguished the present and future from a discredited past. While the early years of socialist Yugoslavia may have been characterised by abusive regimes directed at political opponents (Lampe, 1996: 249), the Yugoslav prison regime in BiH does not carry the same historical taint as that of Russia. On the contrary, as indicated above, it was looked upon as a positive model. Those positive or progressive elements may themselves underpin a receptiveness to certain emergent transformations witnessed elsewhere, notably those which emphasis the rights and entitlements of prisoners as humans. The potential for a change in trajectory afforded by the particular critical disjuncture represented by the disintegration of Yugoslavia will be returned to after the presentation of an example of international intervention in penal policy in BiH. First, the following section builds on a foundation provided by McAra (2005) to consider the kinds of ‘global’ transformation that may be reflected in post-war penal policy in BiH.

GLOBAL AND INTERNATIONAL DEVELOPMENTS

Analysis by Lesley McAra (2005) suggests that small penal systems may resist or adapt broader patterns of change in “techniques and social functions of punishment” observed in work on the USA or England and Wales, which is taken to be a dominant strand in penological studies (p 277). In a case study of Scotland, McAra argues that an explanation for such resistance is found in the interaction of the broader shifts already observed in large jurisdictions with local political and cultural factors brought together in a penal system defined by a coherent, if somewhat permeable, boundary, internal linkages, and dynamic modes of reproduction, or autopoiesis (p 279 ff). These smaller systems, often marginal to inquiry, are seen as fruitful arena for further investigation, and it is in this spirit that the case of BiH is considered. McAra (2005; and elsewhere in Armstrong and McAra, 2006) has summarized the literature on factors precipitating penal change and emergent transformations. As such, it is not necessary to repeat the analyses of crises of faith, crises of ideology, crises within prisons, crises of governance and the growth of the ‘risk society’ as factors underlying trends towards ‘rights talk’, managerialism, actuarialism, responsabilization, and a new (and populist) punitivism (for a concise analysis see McAra, 2005: 282). Rather it is possible to add one further factor precipitating transformation which is drawn from the work of Ulrich Beck, *individualization* (Beck and Beck-Gernsheim, 2001).

Individualization has, in the past, been used to explain a shift to more punitive policies (Simon, 2001; Vaughan, 2002), yet Cavadino and Dignan (2006: 7) propose a link to discourses of rights, observing that ‘much of the juristic and political cogence of individual “human rights” can be seen as deriving from the individualization of culture associated with contemporary consumer capitalism’. This reflects the second aspect of Beck and Beck-Gernsheim’s twofold analysis of processes of individualization. The first element of the analysis encapsulates the diminishing significance of those social forms such as class, gender, family and neighbourhood that served to generate and support ‘normal biographies’; the second highlights new ‘demands, controls and constraints’ imposed upon individuals, and new ‘institutional reference points marking out the horizon within which modern thinking, planning and action must take place’ (Beck and Beck-Gernsheim, 2001: 2). Rights claimed by the individual and recognized in international treaties as well as domestic constitutions and legislation form part of this institutional framework in which individuals are located and in which they make decisions and act.

The growth of international instruments to govern the treatment of prisoners since the Second World War has been observed by Coyle and van Zyl Smit (2000) in the form of general declarations of rights and more specific rules relating to sites of detention. Morgan’s (1998; 2000) work on the CPT as one source of international custodial standards is a regional indicator of the more general trend observed by Coyle and van Zyl Smit. While McAra incorporates “rights talk” into the shifts in “techniques and social functions” of punishment in her analysis, arguably it is less a technical and functional shift and more a change in the framework which governs, limits, and legitimates techniques and functions. As BiH has emerged from conflict with a new constitution emphasising international agreements on human rights and as it engages more closely with the Council of Europe, as a member, and the European Union through a Stabilisation and Association process, these general and European trends develop greater significance for the country’s prison administrations and for those in their custody. In the context of political fragmentation, and against a backdrop of some continuity in penal ideals, we can explore the impact of interventions from outside BiH where transformations point to new directions in penal principles and policy.

THE COUNCIL OF EUROPE AND ASSOCIATED BODIES

BiH applied for membership of the Council of Europe in April 1995 while the ongoing war left the state's future in doubt. Prior to BiH's admission to the Council in 2002, cooperation began in 1996 when the Council opened offices in Sarajevo and established contact with ministries responsible for criminal sanctions. Under the framework of the *Themis* plan, experts from member states produced reports summarising the state of prisons in FBiH and RS (Walmsley and Križnik, 1998; Walmsley and Nestorović, 1998). Subsequently, a Joint Steering Group (JSG) was formed, including both entity ministries, meeting initially in October 2000 in Strasbourg (Council of Europe, 2001). This fits a pattern common to Council activities Albania, Serbia, Montenegro and a number of former republics of the Soviet Union. The Acting Head of the Council's BiH office emphasised the cooperative nature of the work, focusing on technical assistance and leaving policy decisions in the hands of domestic actors (Interview, 24 September 2004). This case study focuses on the provision of appropriate facilities for forensic psychiatric patients in BiH. This is a problem identified as a priority in the first meeting of the JSG (Council of Europe, 2001) and while it illustrates the supportive role played by the Council's local office in Sarajevo, it also illustrates the complementarity between a local presence and a more distant monitoring and enforcement role played by the Council's Secretariat, the CPT and the European Court of Human Rights.

As noted, pre-war BiH had one facility for those receiving mandatory psychiatric treatment in a closed institution. While the FPU at Sokolac continues to serve the courts of RS, FBiH has no comparable facilities. In 1996, an annexe of Zenica prison was set aside as a 'temporary solution' in 1996. When the JSG first met in October 2000, this annexe was still housing psychiatric patients; suitable facilities were then listed as the first of seven priorities drawn up by the JSG (Council of Europe, 2001). Subsequently, a report from the Helsinki Committee in 2001 underscored the fact that conditions in the annexe were inadequate (Helsinki Committee, 2001).

A second meeting, late in 2001, heard that a working group had been established to address the problem, highlighting the Council's local role in facilitating cooperation (Council of Europe, 2002a). The entities' apparent willingness to reach a joint solution broke down over matters of detail. Although RS authorities agreed to house inmates from FBiH, they noted that €1 million was required to reconstruct and adapt

the facility at Sokolac after wartime damage and part-conversion to a military hospital. They also rejected the suggestion that they employ FBiH staff, citing adequate staffing levels and differences in regulations between the two entities. Authorities in FBiH countered that RS authorities were indebted to them financially, and that in the meantime they would seek alternative solutions internally. Both entities agreed to approach the military to request the return of remaining parts of Sokolac and to approach donors for reconstruction funds, although these approaches were postponed pending a general agreement on provisions for forensic psychiatric inmates throughout BiH. Further JSG reports indicated no further progress (Council of Europe, 2002b, 2003) and at the close of fieldwork in Sarajevo in July 2005, the situation was yet to be resolved. Further communication with local Council staff was characterised by a somewhat disheartened tone indicating little in terms of concrete achievement in spite of the intervention of the European Court of Human Rights, discussed below (personal communication, 24 September 2007).

The Council's local office has worked with domestic authorities to create a forum in which common problems can be discussed, solutions proposed, and through which expertise from other member states can be transmitted. Yet the Council, in its local manifestation, does not necessarily dictate the agenda of prison reform. In this respect, the power of the Council to advance or impose a solution to the ongoing problem of secure psychiatric care is limited. Nonetheless, the Council taken as a whole, including the Secretariat, the CPT and associated bodies such as the European Court of Human Rights may have more leverage. Likewise the linking of BiH's membership commitments since joining the Council in 2002 with the basic political criteria for EU pre-accession criteria¹⁰ lends added weight to the ongoing requirements of BiH's membership of the Council of Europe.

Like the Council's more general assistance to BiH, the CPT works on the basis of cooperation, visiting detention facilities and following up with recommendations. While the body has no direct means of enforcement to back up these recommendations, the publication of findings can be used to exert pressure on national governments (Morgan, 1998). Moreover, the CPT findings can provide 'an excellent factual basis' in cases against national governments whether in domestic courts or the European Court of Human Rights (Morgan, 2000: 329). The CPT has published two reports on visits in 2003 and 2007 to a number of detention facilities in BiH, including Sokolac and Zenica (CPT, 2004a, 2007). No public report has been

issued on a separate visit in December 2004 focused specifically on psychiatric institutions and incorporating Sokolac (CPT, 2004b), but it was said to have reinforced recommendations arising from the 2003 visit (Interview, 13 May 2005). Acknowledging that Zenica was planned as a temporary solution to FBiH's immediate needs, the first report strongly criticized the insufficient living space, the use of dormitory accommodation and the inadequate number of care staff employed in the annexe. Problems were also found at Sokolac, including inadequate living space, insufficient qualified staff, and a resultant over-reliance on pharmacotherapy. The CPT findings on Zenica were echoed in a report by the FBiH Ombudsmen (Ombudsman Institution FBIH, 2004). The government of BiH could say little in reply, acknowledging the problems, but observing that the government of FBiH were unable to provide a suitable building to accommodate the inmates (Government of BiH, 2004). A proposal had been made to build on land belonging to Zenica prison, outside the main compound, but this was blocked during planning applications. While the report on the second visit remained unpublished, the outgoing Head of the Council's Sarajevo office was optimistic that it would 'initiate proper reflection' on the part of the BiH authorities. He continued:

...there's now serious discussions about the transfer of Sokolac to the state, or making it an institution for the whole country even if it doesn't come under state jurisdiction, and that seems to be now, quite on the agenda, which is positive.

(Interview, 13 May 2005)

Yet two further pieces of evidence suggest that this optimism was premature: The outcome of a case before the European Court of Human Rights (*Hadžić v Bosnia and Herzegovina*); and the most recent visit of the CPT to BiH. In the case of Fikret Hadžić, complaints were brought before the Court concerning conditions of detention at Zenica, inmate security, and poor access to medical treatment. These claims were backed up by the CPT report of 2004 and the FBiH Ombudsman's report. The court, in its final decision, endorsed a friendly settlement proposed by the government of Bosnia and Herzegovina 'to move all patients held in the Zenica Prison Forensic Psychiatric Annexe to an adequate facility as soon as possible but no later than 31 December 2005' and to pay € 9,000 to the complainant. When the CPT next visited BiH the annexe at Zenica was still in use, they were concerned to find 'no fundamental measures to improve the situation... as regards forensic psychiatric

patients' (CPT, 2007: 5). The report is critical of material conditions at both Zenica and Sokolac and of an over-reliance on pharmacotherapy as a means of treatment. The state-level Ministry of Justice focus on the Hadžić case in their response to the Committee's findings (CPT, 2007), highlighting a decision by the BiH Council of Ministers in February 2006 to form an inter-departmental working group to resolve the problem of accommodation of appropriate standards for forensic psychiatric patients (Vijeće ministara BiH, 2006). The Ministry of Justice response to the CPT has indicated the most significant steps towards resolving the situation, including a memorandum of understanding between state and entity justice ministries and the District of Brčko Judicial Commission on housing all BiH's forensic psychiatric patients at Sokolac, a contract between the relevant agencies to ensure costs are borne by the relevant governments, and the establishment and funding of a project to restore the Sokolac facility. Yet the project was held up at the time of the state-level ministry's response while the ministry waited for the government of Republika Srpska and the Municipality of Sokolac to respond regarding finalisation of details of ownership of the facility.

While the Secretary General has produced regular reports on the compliance of BiH with the commitments made upon accession to the Council of Europe, and underscoring the role these play in EU Stabilisation and Association Agreement conditionality (see, for example, Council of Europe, 2006b: para 21), these have not focused on specifics such as the treatment of forensic psychiatric patients¹¹. They have, since 2004, stressed the benefits that would be derived from a single administrative structure for prisons (see Council of Europe, 2004), and highlighted the fact that 'the internal struggle between State authorities and the Entities', and an analogous struggle between the cantons and government of FBiH, act as obstacles to reform (Council of Europe, 2005: para 12).

The slow progress on the matter of suitable conditions for the detention of forensic psychiatric patients can in part be explained by the resource implications of providing suitable accommodation; Morgan (1998) qualifies the influence that the CPT has over member states when he notes that resource neutral recommendations are more likely to receive a positive response from the relevant government. In this instance, the CPT's recommendations would require initial investment in a new or refurbished facility and an ongoing resource requirement to fund additional staff. While inter-entity differences continued to block the formation of a coherent strategy to attract

donor funding, it was not clear where such resources could come from. Equally significant is the lack of hierarchic relationship between state- and entity-level justice ministries. This sits awkwardly with the fact that obligations stemming from BiH's ratification of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 2002 rest upon the state-level government. State-level ministries are not in a position to impose solutions on entity level governments in order to meet obligations arising from international treaties¹².

Returning to the local manifestation of the Council of Europe in BiH, the JSG represents an attempt to circumvent problems stemming from fragmentation of authority by bringing all parties around the table in order to reach a common position. Regardless of this, continued fragmentation and duplication blocks a rationalization of penal structures that could free up resources to concentrate on policy development. The Council of Europe has the potential to influence the development of penal policy in BiH in line with the 'rights talk' identified by McAra (2005) and evident in work by Coyle and van Zyl Smit (2000) and Morgan (1998; 2000); but that potential influence can only be realized when the political and institutional context in BiH provides the will and capacity to absorb and act upon it. The division of powers in BiH and the lack of hierarchic relationships between state- and entity-level ministries thus stand as major impediments to the enforcement of state-level obligations arising from Council membership and European Convention on Human Rights.

The narrow focus on a specific element of the Council of Europe's work, albeit one which illustrates complementarities between the Council's local office, the Secretariat and other institutions including the CPT, European Court of Human Rights and the European Commission, obscures important developments both in terms of the Council's wider programme of work in BiH and the work of other agencies including the European Commission, OHR, the Registry at the Court of BiH, and DFID alongside the state-level Ministry of Justice. As the JSG can be interpreted as an attempt to circumvent the problems of fragmentation, a broader body of work can be seen as an attempt to eliminate the source of those problems by either harmonising or unifying the bodies responsible for delivering criminal sanctions: the Council of Europe's work on a legal framework for the execution of criminal sanctions at the state-level with a view to subsequent harmonisation across BiH (*Law of BiH on the Execution of Criminal Sanctions*, 2005); OHR and the Registry's, and subsequently

the BiH Ministry of Justice's, work on developing detention facilities at the state level, in part as a vehicle for BiH wide improvements in detention standards (OHR, 2004); and DFID's exploration of the possibility of bringing the existing prisons together under the oversight of the state-level Ministry of Justice (DFID, 2006).

DISCUSSION

International participation in penal reform in Bosnia and Herzegovina, as illustrated here through the work of the Council of Europe, involves an effort to transform discourse and practices around penal policy in the direction of the rights embodied in European instruments. Given the progressive nature of certain aspects of pre-war prison regimes in Yugoslavia, BiH might be expected to be receptive to such a direction. The willingness of members of the JSG to prioritise the improvement of living conditions of forensic psychiatric patients may be one indication of the compatibility of local ideals and the rights embodied in the European instruments and bodies with which BiH is currently aligning itself. Absent from this particular case are efforts to fundamentally adjust the *function* of penalty. Yet even within the more limited areas of penal discourses and the translation of these discourses into material improvements in conditions of detention, the slow progress towards realising a significant transformation merits some attention. McAra (2005) sought to invoke a previously implicit concept of system to facilitate her analysis of the meeting of global and local in the specific context of Scottish penal policy. The dimension of a single penal 'system' is arguably what has been missing so far from the institutional context underlying contemporary penal policy in BiH. Legal and territorial boundaries of separate prison administrations serve to create multiple small systems rather than one framework in which common problems are addressed; the internal linkages that McAra identifies are weakened in the fragmented political environment of post-conflict BiH; attempts to draw these state- and entity-level systems together have been frustrated by a lack of mechanisms for transferral of resources; the impact of broader politics in post-war BiH may be to reproduce and reinforce division as areas of entity-level competence are guarded from the expansion of state-level bodies. The Council's work through the JSG, and a wider set of international interventions focused on strengthening state level institutions represent attempts to build up elements of a common penal system in BiH with shared purposes and standards. The greater integration of prison facilities and administrations in BiH that this aspires to

might create a more coherent framework for intervention on the part of international agencies and allow for greater progress in pursuit of particular penal goals.

Notes

- 1 <<Acknowledgement footnote>>
- 2 The other organizations were the Office of the High Representative (OHR) and its spin-off 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 (the Registry), the UK Department for International Development, and the Canadian International Development Agency.
- 3 Notable exceptions to this include Jefferson (2005), King (1994), Piacentini (2004, 2006), Samara (2003), van Zyl Smit and van der Spuy (2004), and Walmsley (2003).
- 4 The Washington Agreements of 1994 concluded the conflict between the predominantly Bosniak Armija Republike BiH (ARBiH) forces and Croat Hrvatsko Vijeće Obrane (HVO) forces in Central Bosnia and Herzegovina. The Dayton Agreement of 1995 reached a general settlement between Bosnia and Herzegovina, Croatia, and Serbia, concluding hostilities between Bosnian and Croatian allies and the Bosnian Serb Vojska Republike Srpske (VRS). The fate of the strategic, hence controversial, area around the town of Brčko, remained controversial and was resolved by international arbitration, as was the path of the boundary line through the Dobrinja suburb of Sarajevo (OHR, 2001).
- 5 The Final Award specifies, in an Annex of 18 August 1999, that, pending the establishment of facilities in the District of Brčko, those sentenced to imprisonment will serve their sentence 'in the prison facilities of the entity of which he or she is a citizen', but that the District shall provide pre-trial detention facilities (OHR 1999, s.4).
- 6 Immediately after the war, divisions between Croat and Bosniak controlled areas of FBiH were manifest in unofficial fragmentation: the Austro-Hungarian era prison of West Mostar came under Bosnian-Croat control; during the war, a second prison had been established in East Mostar under the Sarajevo government;

likewise the prison at Kaonik, south of Zenica, had been established under the authority of the breakaway Croat Republic of Herceg-Bosna (HRHB). Although abolished under the Washington and Dayton Accords, HRHB legislation was still in use at Mostar West and Kaonik in 1998 (Walmsley and Križnik, 1998). The subsequent closure of East Mostar prison and incorporation of Kaonik in to the FBiH system has ended this period of informal division.

- 7 The ways in which states organised with federal or devolved structures manage their relations with, and responses to, the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) presents a fruitful opportunity for comparative research on the interaction of governmental structure and the realization of domestic obligations derived from international agreements. For example, in response to a periodic visit to the UK in 2003, the Department for Constitutional Affairs of the UK Government, as the Committee's interlocutor in the UK, presented a response covering HM Prison Service, the Scottish Prison Service and the Isle of Man Prison Service (Government of the United Kingdom, 2005). A similar response from BiH consists of a sequence of submissions from different authorities (Government of BiH, 2004), while the UK equivalent is presented as one coherent document covering all jurisdictions.
- 8 The figures are as at June 2004 and were obtained through personal correspondence with the Council of Europe Field Office, Sarajevo.
- 9 European Prison Rules, revised in 2006, cover the separation of children under 18 in specially designed facilities (rule 11.1) and applies the same condition to those suffering from mental illness (12.1) Rule 18.8 calls for the separation of males and females and young adults and older prisoners. These rules are consistent with principles established in the 1987 rules, for example rule 11 covering separation of male and female detainees, of pre-trial and convicted detainees, and seeking to protect younger prisoners from harmful influences, and rule 100 on insane and mentally abnormal prisoners (Council of Europe, 1987, 2006a).
- 10 The requirements, stated in terms of principles in Article 6.1 of the Treaty of the European Union, are developed more fully in the Conclusions of the Presidency following the meeting of European Council in June 1993 in Copenhagen. Political criteria include 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' (European Union, 1993:

- 7.A.iii). On the common pursuit of these goals by the Council of Europe and the European Commission, see Council of Europe and European Commission (2001).
- 11 The matter is raised briefly in a report on joint activities of the Council of Europe and the European Commission, but simply points out that the domestic government is aware of the need to find a solution (Council of Europe and European Commission, 2004: s. 3)
- 12 This was also evident in the case of the ‘Zenica 4’ (Ivica Baković, Zoran Knežević, Vlastimir Pušara, and Milorad Rodić), Croat and Serb inmates of Zenica prison who were attacked subsequent to the widespread screening of video evidence of Serb paramilitaries shooting unarmed and handcuffed Bosniak civilians. The ‘4’ requested a transfer from the prison and began a hunger strike in support of their claim. On 10 June they told journalists they ‘would feel better in Guantanamo’ (OHR, 2005a). The state-level justice minister Slobodan Kovač approved a transfer, but was immediately blocked by his federal-level counterpart Bojana Kristo (OHR, 2005b). An application (*Rodić and three others v Bosnia and Herzegovina*) was made to the European Court of Human Rights under articles 3 (prohibition of torture and inhuman or degrading treatment) and 13 (right to an effective remedy). In January 2006, two inmates had been transferred and two remained in segregation in Zenica (ECtHR, 2006).

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DRAFT

Insert (Map 1)



FBiH (and cantons) 

Republika Srpska 

Brčko District 