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Combating Terrorism in Bosnia-Herzegovina: Explaining and Assessing Article 201 of the Bosnian Criminal Code

Abstract

This paper explores the legal measures that have been enacted in Bosnia-Herzegovina (BiH) to counter the threat of terrorism, focusing particularly on the international and domestic political context in which the reform of the Bosnian criminal code was carried out, on the apparent origins of Article 201 of the BiH criminal code in the European Union (EU) Framework Decision on Combating Terrorism of June 2002 and on the strengths and weaknesses of this definition in the Bosnian context. The paper argues firstly that the events of 9/11, while certainly of significance, were less salient to the definition of terrorism adopted in the BiH criminal code than the enhanced engagement of the European Union with processes of law reform in BiH in recent years seems to have been. The paper also concludes that despite various shortcomings (which should be addressed) the treatment of terrorism in the BiH criminal code has a number of strengths that make it particularly appropriate in the context of BiH.

I - Terrorism in Bosnia-Herzegovina

Terrorism is a particularly emotive topic in BiH,² the term having been used to refer to organised crime generally,³ as well as historically providing a political tool to be leveraged by each of the three 'constituent peoples' of BiH against the others.⁴ At least until recently, however, BiH was not considered to be a country that either produced terrorists or that faced an identifiable terrorist threat to its citizens and/or public institutions. That said, BiH has for some time been considered a transit country for terrorists seeking to enter Europe, owing largely to the involvement of militant Islamic groups in the Bosnian war of 1992-1995.⁵

During the war, the Bosnian government⁶ accepted the help of the Iranian government and of various groups of Islamic militants to bolster its position against the Croatian and Serb factions fighting in

¹ LL.M. Candidate, University of Toronto. I am grateful to Kent Roach, Yaara Lemberger-Kenar and Chris Waters (amongst others) for their suggestions and assistance in the preparation of this article. The first version of this paper was drafted in the context of a University of Toronto Law School seminar on comparative anti-terrorism and national security law in the spring of 2006.

² For the sake of convenience, the terms 'Bosnia' and 'BiH' will also be used to refer to Bosnia-Herzegovina in this paper. The three terms can be read interchangeably.

³ This is perhaps unsurprising given the extensive scope of corrupt practices in BiH and the alleged connivance between various levels of government and organised crime. Inefficient, over-complex and weak governmental structures have also allowed organised crime to flourish in BiH. (See: Minister of Justice of Bosnia and Herzegovina, "*International Co-operation in the Fight Against International Terrorism and Implementation of the Relevant Instruments of the Council of Europe; The Response of the Justice System – Civil and Criminal – to Terrorism*", 25th Conference of European Ministers of Justice, Sofia 9-10/10/2003. Available at: http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Conferences_and_high-level_meetings/European_Ministers_of_Justice/MJU-25%282003%296E-BH.pdf.)

⁴ In discussing terrorism in BiH, one aspect of popular discourse in that country that must be borne in mind is that – as intimated above – owing to the legacy of war-time conflicts, accusations of 'terrorism' have significant political undertones. Members of each ethnic group – that is, Bosnian Croats, Bosnian Muslims and Bosnian Serbs – have, from time to time, termed the activities of its opponents 'terrorist', and in particular Bosnian Serbs have often accused Bosnian Muslims of supporting (or of being) Islamic radicals. See e.g. Woehrel, S. "*Bosnia and Herzegovina: Issues for US Policy*", CRS Report for Congress, 10/02/2005, at 12. Available at: <http://www.fas.org/srgp/crs/row/RL32392.pdf>. See also e.g. Armatta, J., "*Milosevic's Propaganda War*", Institute of War and Peace Reporting, 27/02/2003. Available at: <http://www.globalpolicy.org/intljustice/tribunals/yugo/2003/0227prop.htm>.

⁵ The assassination of Archduke Franz Ferdinand in Sarajevo by a Bosnian Serb 'freedom fighter' in 1914, however, does perhaps suggest that Bosnian authorities have had at least some historical experience of dealing with relatively home-grown terrorism.

⁶ The Bosnian 'Muslim' government, that is. During the period 1992-1995 this body can be distinguished from the Bosnian Croat and Bosnian Serb authorities. After 1995 the term 'Bosnian government' can be taken, however, as referring to the body established under the Dayton Peace Accords, and in particular to the Council of Ministers as distinct from the Parliamentary Assembly. See discussion of Bosnian governmental structures below.

Bosnia in the early 1990s. After the war, a number of these militants stayed behind, some becoming Bosnian citizens by marrying into the local population. Estimates of the numbers involved during the war vary, but have ranged up to several thousands⁷ while around 750 are estimated to have remained behind after 1995.⁸ During the war and its immediate aftermath a few areas within Bosnia also came under the effective control of these groups, including most (in)famously the town of Bocinja in central Bosnia where large numbers of ‘mujihadeen’ settled.⁹ There have also been reports that Al Qaeda were active in Bosnia during the war.¹⁰

The wartime Bosnian government also received support from Iranian and Saudi Arabian humanitarian and charitable organisations, with a number of such organisations remaining active in BiH after the war.¹¹ Over time, however, relations between the Bosnian government and these organisations changed amid suspicion that many organisations were in effect fronts for anti-Western Islamist groups seeking to foment violence and to radicalise the local Muslim community. Wartime experiences are also said to have resulted in links being developed between Bosnian intelligence services and Al Qaeda, although the credibility of these reports, as well as the extent and nature of the alleged connections, remain uncertain.¹² In 2003, however, a number of Bosnian officials did come under investigation for having helped to set up terrorist training camps in BiH in the mid-1990s.¹³

Bosnian Muslims are known for being particularly secular and ‘westernised’. Nonetheless, in the aftermath of 9/11 a number of militant Islamic organisations do seem to have become more active in promoting terrorist activities in BiH. Instances have been cited, for example, of threats being made against US military and civilian facilities in BiH, while former foreign combatants in Bosnia have also been described as providing a ‘one stop shop’ for weapons and other resources for terrorists en route to Europe.¹⁴

Commencing shortly after 9/11, the Bosnian government took steps to clamp down on the threat of Islamic terrorism in BiH. These included raiding and closing down the offices of organisations suspected of involvement with terrorism,¹⁵ as well as arrests and renditions of individuals suspected of terrorist activities.¹⁶ Among the most prominent of these incidents was the arrest in late 2001 of 6 men of Algerian and Yemeni origin – 5 with Bosnian citizenship – by Bosnian police acting alongside

⁷ See Woehrel, *supra* note 4 at 11.

⁸ Woehrel, S. “*Islamic Terror and the Balkans*”, CRS Report for Congress, 26/07/2005, at 3. Available at: <http://www.fas.org/sgp/crs/terror/RL33012.pdf>.

⁹ Some initial steps towards resolving the situation of the Islamic fighters who had remained in Bosnia were taken between July 2000 and March 2001 when, in the context of the internationally-supported Property Law Implementation Plan, many former foreign fighters were evicted from Bocinja. For an overview of the Property Law Implementation Plan see: OSCE/UNMIBH/OHR/UNHCR/CRPC, “*PLIP Inter-Agency Framework Document*”, 10/2000. See also: “*Bosnia evicts ‘holy war’ settlers*”, BBC, 24/07/2000. Available at: <http://news.bbc.co.uk/1/hi/world/europe/848808.stm>, and: “*Bosnian Serbs return to ‘holy war’ village*”, BBC, 15/03/2001. Available at: <http://news.bbc.co.uk/1/hi/world/europe/1221996.stm>.

¹⁰ See: Woehrel, *supra* note 8 at 3.

¹¹ See Woehrel, *supra* note 8 at 3. Also see e.g. “*Bosnia: Muslim Newspaper Points to Existence of Islamic Terror Camps*”, ADN Kronos International, 30/08/2005. Available at: http://www.adnki.com/index_2Level.php?cat=Security&loid=8.0.202217820&par=0. See also e.g. Pyes, C., Meyer, J. & Rempe, W. “*Terrorists Use Bosnia as Base and Sanctuary*”, Los Angeles Times, 07/10/2001. Available at: <http://www.balkanpeace.org/rs/archive/oct01/rs185.shtml>.

¹² See Woehrel, *supra* note 8 at 3.

¹³ Paraphrased from Woehrel, *supra* note 4 at 11-12. See also: “*NATO raids ‘terrorist’ camp in Bosnia*”, CNN, 16/02/1996. Available at: <http://www.cnn.com/WORLD/Bosnia/updates/9602/16/>.

¹⁴ See Woehrel, *supra* note 8 at 3. See also: Hedges, S. “*Extremism lingers After Balkan wars*”, Chicago Tribune, 25/11/2001. Available at: <http://www.balkanpeace.org/hed/archive/nov01/hed4397.shtml>.

¹⁵ For further details see “*Report of Bosnia and Herzegovina to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001*” (“CTC Report”) of 31/12/2001 (hereinafter ‘Bosnia’s First CTC Report’). Available at: <http://www.un.org/Docs/sc/committees/1373/b.htm>.

¹⁶ See Woehrel, *supra* note 8 at 4-5. See also: “*Bosnia suspects headed for Cuba*”, BBC, 18/01/2002. Available at: <http://news.bbc.co.uk/1/hi/world/europe/1767554.stm>.

NATO troops.¹⁷ The basis for the arrest was apparently that in October 2001 a call was intercepted by the US from one of the men to an alleged Al Qaeda operative in Afghanistan. At this point, western embassies in BiH shut for a time, while the caller and associates were apprehended. An investigation was opened by Bosnian courts on 30 October 2001, but in January 2002 the Supreme Court of the Federation of BiH¹⁸ ordered the detainees to be released owing to lack of evidence.¹⁹ Rather than release them, however, it appears that they were handed over to US authorities in Bosnia and ‘rendered’ to Guantanamo Bay on January 18 2002. They apparently remain in custody, notwithstanding a subsequent ruling by the BiH Human Rights Chamber²⁰ holding that the rights of these individuals had been violated.²¹ A number of raids were also carried out through 2001 and 2002 of the offices of institutions ostensibly associated with Osama Bin Laden and Al Qaeda.²²

Most recently, in October 2005, Bosnian police raided an apartment near a NATO base outside Sarajevo, finding a cache of weapons and other material. Based on the information obtained in this raid, they subsequently arrested three men who have now been charged under Article 201 of the BiH criminal code.²³ These three individuals have been in custody since then, and have now had their indictments confirmed by the Court of BiH.²⁴ A report apparently recently produced by Croatian and US intelligence services also warns of the risk of the region in and around Bosnia “becoming a platform for anti-EU terrorist attacks.”²⁵

II - Article 201 of the Bosnian Criminal Code

The main anti-terrorism provisions of current Bosnian criminal law appear to be derived almost entirely from the EU Framework Decision on Combating Terrorism of June 2002.²⁶ The relevant provisions are contained in the Bosnian state criminal code which came into force on 1 March 2003, Article 201 of which reads as follows:

¹⁷ See: Purvis, A. “*The Suspects: a Bosnian subplot*”, *Time*, 12/11/2001. Available at: <http://time-proxy.yaga.com/time/archive/preview/0,10987,1101011112-182910,00.html>.

¹⁸ Note – as will be seen below, this should not be confused with the (state) Court of BiH.

¹⁹ Apparently the court had not been allowed access to US intelligence wiretaps. Prior to this a lower court had apparently also ruled that the detainees were not to be extradited. See: “*Bosnia-Herzegovina: Transfer of six Algerians to US custody puts them at risk*”, Amnesty International, 17/01/2002. Available at: <http://web.amnesty.org/library/Index/engEUR630012002?OpenDocument&of=COUNTRIES%5CBOSNIA-HERZEGOVINA>

²⁰ For further information on the Human Rights Chamber, see: <http://www.hrc.ba/ENGLISH/DEFAULT.HTM> . Note – this body has now been incorporated into the Court of BiH.

²¹ See: “*Bosnia-Herzegovina: Human rights chambers decision in the Algerians case must be implemented by Bosnia*” Amnesty International, 11/10/2002. Available at:

<http://web.amnesty.org/library/Index/engEUR630172002?OpenDocument&of=COUNTRIES%5CALGERIA>. Amnesty also note that there had already been cases of deportations to Egypt without guarantees being obtained that the deportees would not be subjected to torture, and without court hearings being held. See Amnesty International, *supra* note 19.

²² See e.g. Pallister, D., “*Terrorist material found in Sarajevo charity raid*”, *Guardian*, 23/02/2002. Available at: <http://www.guardian.co.uk/international/story/0,3604,655717,00.html>;

²³ See below for details of Article 201.

²⁴ See: Court of Bosnia and Herzegovina, “*Confirmed indictment for terrorism*”, 13/04/2006. Available at: <http://www.sudbih.gov.ba/?id=135&jezik=E>. These charges were also the first to be brought under the new code, which came into force in March 2003.

²⁵ See: Rettman, A., “*EU faces Balkan terror risk*”, *EUObserver*, 19/04/2006. Available at: <http://euobserver.com/9/21392>. Interestingly, the information contained in the report was supposedly obtained from the ‘Algerians’ sent to Guantanamo in 2002. A copy of the report itself did not appear to be available online, and so is referred to here on the basis of secondary sources only. See also: Kole, W., “*Terrorists Recruiting ‘White Muslims’*”, *Montgomery Advertiser*, 17/04/2006. Available at:

http://hosted.ap.org/dynamic/stories/T/TERROR_RECRUITING_WHITE_MUSLIMS_LH1?SITE=ALMON&SECTION=HOME&TEMPLATE=DEFAULT

²⁶ “*Council Framework Decision of 13 June 2002 on Combating Terrorism*”, OJ L 164/3, 22/06/2002. (Hereinafter ‘the Framework Decision’) Available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf.

- (1) “Whoever perpetrates a terrorist act with the aim of seriously intimidating a population or unduly compelling the Bosnia and Herzegovina authorities, government of another state or international organisation to perform or abstain from performing any act, or with the aim of seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of Bosnia and Herzegovina, of another state or international organisation, shall be punished by imprisonment for a term not less than three years.
- (2) If the death of one or more people resulted from perpetration of the criminal offence referred to in paragraph 1 of this Article, the perpetrator shall be punished by imprisonment for a term not less than five years.
- (3) If in the course of the perpetration of the criminal offence referred to in paragraph 1 of this Article the perpetrator intentionally deprived another person of his life, he shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.”²⁷

Paragraph 4 of Article 201 then defines what is meant by a ‘terrorist act’ in the following terms:

- (4) “A *terrorist act*, in terms of this Article, means one of the following intentional acts which, given its nature or its context, may cause serious damage to a state or international organisation:
 - a. Attack upon person’s life, which may cause death;
 - b. Attack upon the physical integrity of a person;
 - c. Unlawful confinement of, keeping confined or in some other manner depriving another of the freedom of movement, or restricting it in some way, with the aim to force him or some other person to do or to omit or to bear something (kidnapping) or taking of hostages;
 - d. Causing a great damage to facility of Bosnia and Herzegovina, facility of government of another state or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
 - e. Kidnapping of aircraft, ships or other means of public or goods transport;
 - f. Manufacture, possession, acquisition, transport, supply, use of or training for the use of weapons, explosives, nuclear, biological or chemical weapons or radioactive material, as well as research into, and development of, biological and chemical weapons or radioactive material;
 - g. Releasing dangerous substances, or causing fire, explosion or floods the effect of which is to endanger human life;
 - h. Interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
 - i. Threatening to perpetrate any of the acts referred to in items a) to h) of this paragraph.”²⁸

Article 202 of the code goes on to criminalise the financing of terrorist acts.²⁹

As will be discussed below, it seems clear that the definition in Article 201 is very closely based on that adopted by the European Council in 2002. Before examining the implications of this adoption, and how well suited the definition may or may not be to the Bosnian context, however, it might be useful firstly to undertake an examination of some of the key features and history of the Bosnian legal and political system, in order to better understand the considerations which might have led to these provisions having been adopted in their current form.

III - Law-making in BiH

At the heart of the Bosnian legal system lies the constitution of BiH, which comprises Annex 4 to the General Framework Agreement for Peace (also known variously as the GFAP, Dayton Peace Accord, Dayton Accords, Dayton Peace Agreement or simply as the ‘DPA’).³⁰ Under the constitution of BiH, the state is governed by a rotating Presidency, a Council of Ministers, and a two-chamber

²⁷ Article 201, Consolidated Criminal Code of Bosnia and Herzegovina (as at 25/05/2005). (Hereinafter ‘Criminal Code of BiH’) On file with author. (A non-consolidated version of the Criminal Code of BiH is available on the web-site of the Court of BiH, at: <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=6&jezik=E>).

²⁸ Article 201, Criminal Code of BiH, *supra* note 27.

²⁹ Article 202, Criminal Code of BiH, *supra* note 27.

³⁰ These terms will be used interchangeably in this paper.

Parliamentary Assembly comprising a House of Representatives and a House of Peoples. While this may seem relatively straightforward, the state itself is split into two entities, the predominantly Muslim-Croat Federation of BiH (the Supreme Court of which was responsible for dealing with the case of the ‘Algerian Six’ in 2001-2002) and the Serb-dominated Republika Srpska, with the Federation of BiH itself being further divided into 10 Cantons (which are generally either Muslim or Croat-dominated). Each of the Cantons, as well as the two entities, has elected assemblies and governmental institutions.³¹

The governance of BiH is complicated by the fact that the central government is institutionally extremely weak relative to its two constituent entities.³² The dominant levels of government under the Constitution are the entities, with only relatively few powers and authorities evolved to the state institutions, specifically including only international and inter-entity criminal law enforcement powers.³³ Any powers or areas of responsibility not explicitly allocated to the state authorities under the constitution remain the prerogative of the entities.³⁴ Given the continuing political dominance throughout the country of explicitly nationalist political parties, generally hostile to the development of state institutions,³⁵ it is perhaps then unsurprising to note that it has been difficult to establish anything other than the most basic state level bodies. In consequence, in BiH, national politics can sometimes be considered to be the ‘continuation of war by other means’ – with potentially significant effects on national governance, including law reform.

Ethnic nationalist parties have also continued to dominate the state-level law making bodies (the Council of Ministers and bicameral Parliamentary Assembly).³⁶ Conflicting agendas within these bodies have often resulted in deadlock, as nationalist parties tend to have vested interests in maintaining the status quo prevailing in each of the entities. As such, there is often little incentive for the parties represented in the various bodies to compromise, with the result that legislative paralysis has been relatively common.

IV – Bosnia, the international community and European integration

Despite the difficulties involved in developing state level institutions, however, some progress has been made in this endeavour. In no small part this is due to the involvement of the international community in national politics, and in particular to the interventionist role of the international High Representative, the office of which was established under Annex 10 of the Dayton Accords as the “final authority in theatre regarding interpretation of... the civilian implementation of the peace settlement.”³⁷ Under the tutelage of the Office of the High Representative (OHR), for example, the number of state-level ministries increased from three to nine between 1996 and 2004, with responsibilities extending out from trade, foreign and civil affairs to include a defence ministry, a finance ministry, a human rights and refugees ministry and a security ministry.

The work of OHR is in large part underpinned by the ‘Bonn Powers’ of the High Representative, which are based on an interpretation of the High Representative’s mandate that was promulgated

³¹ Municipalities in both entities also have elected assemblies. The internationally-administered Brcko District is a *corpus separatum*, distinct from both of the entities, which has its own governmental and administrative structures.

³² According to Sumantra Bose, BiH can be described as a ‘consociational confederation’. (Bose, S. “*The Bosnian State a Decade after Dayton*” in Chandler, D. (ed.) (2006) *Peace without Politics: Ten Years of International State-Building in Bosnia*: Routledge, London at 20.)

³³ See: Dayton Peace Agreement, Annex IV, Art. III. Available at: http://www.ohr.int/dpa/default.asp?content_id=380.

³⁴ Dayton Peace Agreement, Annex IV, Art. I. *Supra* note 33.

³⁵ For a good overview of the extent to which these parties continue to dominate Bosnian politics see: Bieber, F. (2006) *Post-War Bosnia*: Palgrave, New York, NY.

³⁶ See Bieber, *supra* note 35 for further details.

³⁷ Dayton Peace Agreement, Annex X, Art. V. *Supra* note 33.

following a meeting of the Peace Implementation Council³⁸ in December 1997.³⁹ Since then, the High Representative has essentially performed the role of an international ‘proconsul’ in BiH, with the powers, *inter alia*, to impose laws and to dismiss elected officials. Various other international organisations are also involved in law-making and administration in BiH.⁴⁰

The international community, led by OHR, has thus become a key actor in law-making processes in BiH.⁴¹ Moreover, taking the view that the “rule of law is an indispensable element of democracy”,⁴² the international community under the leadership of OHR has embarked on a far reaching programme of reform – including legislative reform – designed to improve the rule of law and to bring about conditions under which Bosnia can become a “functional democratic state, able to protect human rights, facilitate the emergence of a market economy, try war criminals, and successfully combat organised crime.”⁴³ The strengthening of state institutions, including through criminal law and judicial reform, has constituted a significant element in this programme. As such, the anti-terrorism provisions in the BiH criminal code should be assessed within the broader context of the international community’s efforts to establish the rule of law in BiH.⁴⁴

That said, from 2000, the overarching aim of political and legal reform in BiH seems to have become the eventual integration of BiH into European political and economic structures. As one commentator has put it: over time “the mechanisms of regulation (have) shifted informally from the PIC to the EU and... (the Dayton Accords have) become subordinate to the requirements for eventual EU membership.”⁴⁵ In recent years, the EU has thus become increasingly closely engaged with the process of legal and institutional reform in BiH with membership in the Union (and associated bodies such as the Council of Europe) often providing the ‘carrots’ for reform, and the withholding of funds functioning as ‘sticks’ alongside OHR sanctions.⁴⁶

The ‘adoption’ of BiH by the EU seems to have begun in earnest with the announcement of a ‘Road Map’ for a Stabilisation and Association Process for BiH by the EU in March 2000, following which “discussion... moved away from the exit strategies of the international community from Bosnia towards, instead, the entry strategies of Bosnia into the international community in general and Europe

³⁸ This is the primary body to which the High Representative reports. See: <http://www.ohr.int/ohr-info/gen-info/#6> for further details.

³⁹ See PIC Bonn Conclusions, 10/12/1997, Part XI. Available at: http://www.ohr.int/pic/default.asp?content_id=5182#11.

⁴⁰ UNHCR, for example, is recognised under Annex 7 of the GFAP as the lead agency in matters related to refugee return. (See: Dayton Peace Agreement, Annex VII, Art. III. *Supra* note 33.) This provision was interpreted broadly, giving UNHCR an integral role alongside OHR in developing procedures and laws for refugee return and re-integration. Other bodies that have been similarly involved in law reform include the Organisation for Security and Cooperation in Europe (OSCE) which has been heavily involved in human rights activities, as well as the UN Mission in BiH (UNMIBH) and Office of the UN High Commissioner for Human Rights (OHCHR). National embassies have also been involved in processes of law reform.

⁴¹ Interestingly, possibly owing to the mixture of nationalities on the staff of the various organisations, and to the role of these offices in helping to design and draft bills, many of the laws adopted in BiH since the adoption of the Dayton Accords have taken on a particularly ‘internationalist’ flavour. This can be seen, for example, in the new BiH criminal procedure code, which adopts an adversarial model, despite BiH’s traditional use of the ‘continental’ inquisitorial system.

⁴² “*Human Rights / Rule of Law*”, OHR. Available at: <http://www.ohr.int/ohr-dept/hr-rol/more.asp>

⁴³ International Crisis Group (ICG), “*Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*”, 25/03/2002, at 1. Available at: <http://www.crisisgroup.org/home/index.cfm?>

⁴⁴ As put by the OSCE (which in 2002 became responsible for human rights issues in BiH): “the constitution of Bosnia and Herzegovina provides that BiH shall be a democratic State operating under the rule of law... the implementation of these objectives depends on a judiciary that is strong, effective, impartial and independent.” (“*Rule of Law*”, OSCE. Available at: http://www.oscebih.org/human_rights/rule_of_law.asp.) The ‘rule of law’ reforms that have been carried out in the criminal law sphere in BiH have included: establishing a state court and prosecutor’s office (previously the only state level courts were the Constitutional Court of BiH and the Human Rights Chamber, both established under the GFAP) and introducing new criminal procedure codes in both entities as well as at state level.

⁴⁵ Chandler, D., “*From Dayton to Europe*” in Chandler (ed.), *supra* note 32 at 35.

⁴⁶ See: Chandler, *supra* note 45.

in particular.”⁴⁷ In November 2000, the elected leaders of BiH committed themselves to the Road Map, following which a ‘Community programme of Assistance for Reconstruction, Development and Stabilisation’ was established to provide a framework for EU assistance to BiH.⁴⁸

In 2002, the Council of Ministers was also reformed by OHR, with the chairman of the Council becoming specifically responsible for “coordinating strategies and policies among state institutions and between entity governments and of ensuring the harmonization of BiH laws with the *acquis communautaire* of the EU.”⁴⁹ The European adoption of BiH was further signalled by the EU’s 2002 take-over of the processes of police reform and monitoring previously undertaken by the UN Mission in BiH (replaced by an EU Police Mission), and of the previously NATO-run military support role of SFOR (replaced by EU Force (‘EUFOR’)) in 2004. The close interest taken by the EU in BiH was re-emphasised when in 2002 Paddy Ashdown was appointed EU Special Representative in BiH (as well as High Representative) with the aim of guiding BiH towards the conclusion of a Stabilisation and Association Agreement with the EU.⁵⁰

The close engagement of EU structures with Bosnian law reform – including through the secondment of advisers to the Council of Ministers – perhaps goes some way towards explaining the ‘European’ character of Article 201. Publicly available sources, however, also indicate that there was in any event a strong ‘European’ influence in the drafting of the reformed criminal code. According to one published account, for example, OHR’s Anti-Fraud Department prepared initial drafts of the criminal code and criminal procedure code in autumn of 2001 that were based largely on German and Swedish legislation.⁵¹

There does also seem to have been some degree of purely Bosnian input into the drafting of these codes, however. An OHR press release of July 2002, for example, notes that the criminal code “was produced by domestic experts working within the Ministry of Civil Affairs and Communications”⁵² before being reviewed by OHR. The head of OHR’s Rule of Law unit at that time was Prof. Zoran Pajic, a former professor of law at the University of Sarajevo, so it can perhaps be assumed that the degree of ‘local’ (as opposed to ‘international’) involvement in the drafting of the new code was fairly high. The US embassy in Sarajevo may also have played a role in the preparation of the new legislation.⁵³

Despite the large number of ‘cooks’, however, it seems clear that the EU has played the role of ‘head chef’ in terms of legal reform in BiH since 2000. As the next section will suggest, moreover, EU involvement in legal reform in BiH may also have played a relatively greater role in the drafting of Article 201 than other potential factors, including the impact of 9/11 itself.

⁴⁷ Bildt, C. “*Is the Peace a Success?*”, Remarks to the Peace Implementation Council, Brussels, 23/05/2000. Available at: <http://www.bildt.net/index.asp?artid=176>. Cited in Chandler, *supra* note 45 at 36.

⁴⁸ See Chandler, *supra* note 45 at 36-37. As to the current state of EU ‘ownership’ see: Rehn, O. “*Perspectives for Bosnia and Herzegovina*” European Parliament, Strasbourg, 15/02/2006. Available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/100&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ Chandler, *supra* note 45 at 37.

⁵⁰ See Partos, G., “Bosnia to build on Ashdown legacy”, BBC, 31/01/2006. Available at: <http://news.bbc.co.uk/2/hi/europe/4663168.stm>.

⁵¹ See ICG, *supra* note 43 at 26.

⁵² “*High Representative forwards Draft Criminal Code to Council of Ministers*”, OHR, 09/07/2002. Available at: http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=27244.

⁵³ According to information obtained by the author in telephone interviews with OHR staff members.

V – ‘Old’ Legislation, the UN Counter-Terrorism Committee and Legislative Reform

Prior to 2003, there was no criminal legislation in place at the state level in BiH. Rather, anti-terrorism provisions were primarily contained in entity legislation. Moreover, judging by the available documentation, the anti-terrorism provisions of these codes were most likely adopted from the old Socialist Federal Republic of Yugoslavia (SFRY) criminal code. In the case of the Federation of BiH, for example, between June and September 1992, shortly after the outbreak of the war in BiH, a ‘Decree with the Force of Law’ was passed adopting and amending the then-criminal code of the SFRY into Bosnian law.⁵⁴ It seems likely that this provision would have been carried over into the post-war Federation of BiH criminal code.⁵⁵

The wording of the relevant article of the pre-2003 Republika Srpska criminal code (Article 289) also seems to have been based on the old SFRY code.⁵⁶ As such, it will be assumed for the purposes of the current discussion that the anti-terrorism provisions of both entities of BiH immediately prior to March 2003 contained wording at least approximating the following (taken from the Republika Srpska code):

“Whoever, with the intention of jeopardizing constitutional establishment or security of the Republika Srpska or Bosnia and Herzegovina causes an explosion, fire or performs some other generally dangerous action or a violent act, or threatens to use nuclear or other similar means of mass killing of people and thereby instigates feeling of personal insecurity or fear among the citizens,
shall be punished by imprisonment term ranging between three and fifteen years.”⁵⁷

This provision will be assumed to reflect the law as it stood in both entities of BiH at the time of 9/11.

Some further information as to the development of anti-terrorism legislation in BiH post-9/11, and as to the shift from entity-level definitions to the current Article 201, can be gleaned from the UN Security Council Counter Terrorism Committee (CTC) reports submitted by BiH pursuant to UN Security Council Resolution 1373.⁵⁸ What is particularly interesting to note about these reports, however, is that the BiH criminal code is barely mentioned, and that Article 201 seems to escape attention altogether.

If nothing else, this would seem to support the view that 9/11 itself does not seem to have played a significant role in the drafting and inclusion of Article 201 of the BiH criminal code. Rather, assuming the above analysis of the close involvement of the EU in legal reform in BiH is correct, the treatment

⁵⁴ Copy on file with author.

⁵⁵ It has not been possible to determine with any degree of certainty the wording of the relevant post-war provisions of the Federation of BiH criminal code, although the incorporation of the war-time (Muslim) government of BiH into the Federation of BiH suggests that the relevant SFRY provisions would have been carried over into the Federation criminal code. That said, it has been possible to obtain a copy of the Republika Srpska criminal code, as it stood immediately prior to the reform of the entity criminal codes in 2003. The current wordings of the relevant sections of the entity criminal codes are extremely similar, both apparently being based on Article 201 of the BiH criminal code. (Copies on file with the author.)

⁵⁶ Note – it is assumed here that the 2005 criminal code of the Republic of Serbia (and in particular Article 312 of that code) is also based on the old SFRY code. (See: Criminal Code of the Republic of Serbia, translated by OSCE Mission to Serbia & Montenegro, February 2006. Available at: http://www.osce.org/documents/fry/2006/02/18196_en.pdf.)

⁵⁷ Article 289, Criminal Code of Republika Srpska. (Copy on file with the author.) The relevant section of the Serbian criminal code (Article 312) reads as follows:

“Whoever with intent to compromise the constitutional order or security of Serbia or SaM (Serbia and Montenegro) causes an explosion or fire or commits another generally dangerous act or commits an abduction of a person or some other act of violence, or by threat of committing such generally dangerous act or use of nuclear, chemical, bacteriological or other dangerous substance and thereby causes fear or insecurity among citizens,
shall be punished by imprisonment of three to fifteen years.” (*Supra* note 56).

The entity criminal codes also seem to have been amended in the period between 1995 and the introduction of the ‘new’ codes in 2003. See: <http://www.freedomhouse.org/template.cfm?page=47&nit=182&year=2003&display=law>.

⁵⁸ See Para. 6 of UN Security Council Resolution 1373 (‘UNSCR 1373’). Available at: http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

of the BiH criminal code in Bosnia's CTC reports would seem to suggest that the origins of Article 201 lie less in an 'emergency bricolage'⁵⁹ undertaken in the aftermath of 9/11, and more in the general processes of legal reform overseen by the EU with the objective of integrating BiH into European political and economic structures. The fact that Article 201 was only enacted in 2003 (i.e. long after the initial 9 month deadline set by the Security Council in Resolution 1373 in September 2001)⁶⁰ as well as the apparent absence of significant amendments to entity anti-terrorism provisions in the interim,⁶¹ also lend credence to this view.

In the first of these reports, for example, submitted in December 2001, the Bosnian authorities note only that a 'Joint Anti-Terrorism Coordination Team' was established by the Council of Ministers in September 2001, including representatives of entity and state ministries as well as of the international community. The report does note that an unspecified set of amendments had been "considered and forwarded to competent institutions for consideration and adoption",⁶² mentioning in passing that these relate variously to amendments to both entities' criminal laws and to the "enactment of the Criminal Law and the Law on Criminal Proceedings of BiH".⁶³ Beyond that brief mention, however, no details are provided of these measures.

In January of the following year the High Representative adopted a decision bringing the new state criminal code into force as of March 2003.⁶⁴ Following this, Article 202 of the code was mentioned in BiH's third report to the CTC in July 2003, which confirmed that the code applied to "all those... who in the territory of BiH... perpetrate a criminal act"⁶⁵ as well as to acts committed outside BiH if BiH "according to the regulations of international law, is obliged to penalize such an act or if such an act can be subject to a sentence of five years of imprisonment or a more severe punishment."⁶⁶ There was no mention, however, of any changes (proposed or otherwise) to the definitions of terrorist activities under either the entity or state criminal codes.

BiH's fourth report to the CTC, in October 2004, did note that under Chapter XIV of the state criminal code 'legal entities' (including Bosnian national and local authorities as well as private enterprises) could be held accountable for offences committed "on behalf or for account of such legal entity".⁶⁷

⁵⁹ For a discussion of legislative 'bricolage' in response to terrorism see Section VI, below.

⁶⁰ See UNSCR 1373, *supra* note 58.

⁶¹ That is, there appear to have been minimal amendments based on a comparison between the Republic of Serbia and Republika Srpska provisions cited above. See above and *supra* note 57. Again, this assumes, however: a. that the Federation of BiH provisions reflected the Republika Srpska's, and b. that the Republic of Serbia provisions reflect the SFRY's.

⁶² Bosnia's First CTC Report, *supra* note 15 at 4.

⁶³ Bosnia's First CTC Report, *supra* note 15 at 4. No further details of the proposed legal changes are provided in this report. Bosnia's Second and Third CTC Reports (of 27/09/2002 and 22/09/2003, respectively, both available at: <http://www.un.org/Docs/sc/committees/1373/b.htm>) mention proposed asylum and immigration law reforms. As at the date of Bosnia's Third Report, however, a law regulating the residence of foreigners and asylum seekers had not yet been adopted. Following the First CTC Report, an awareness of the need to respond to the threat posed by international terrorism was, however, emphasised in a communiqué produced by the PIC Steering Board in May 2002 which noted the need "for a total, immediate and professional commitment to take further pro-active anti-terrorist measures." (*"Communiqué by the PIC Steering Board"*, PIC, 07/05/2002. Available at: http://www.ohr.int/pic/default.asp?content_id=7962.) No mention is made of the status of the BiH criminal code in BiH's Second CTC Report, despite OHR's having forwarded a draft of the code to the Council of Ministers in July of 2002. (See *supra* note 52.)

⁶⁴ The text of the High Representative's Decision enacting the criminal code in January 2003 notes that the draft code had been adopted by the Council of Ministers in December 2002, but that the House of Representatives (one chamber of the Parliamentary Assembly) of BiH had failed to adopt the draft at a session held earlier in January. See: *"Decision Enacting the Criminal Code of Bosnia and Herzegovina"*, OHR, 24/01/003. Available at: http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29095.)

⁶⁵ Bosnia's Third CTC Report, *supra* note 63 at 10. See also Art. 11, Criminal Code of BiH, *supra* note 27.

⁶⁶ Bosnia's Third CTC Report, *supra* note 63 at 10. See also Art. 12, Criminal Code of BiH, *supra* note 27.

⁶⁷ Bosnia's Fourth CTC Report, *supra* note 63 at 3.

The report also noted that while recruiting for terrorist groups is not specifically criminalised, Articles 247-249⁶⁸ of the state code provide for sanctions for conspiring to commit, preparing to commit and ‘associating’ for the purpose of perpetrating criminal offences.⁶⁹ Once again, however, there was no mention of Article 201, nor apparently of the equivalent provisions in the entity criminal codes.

As indicated above, the preceding analysis of Bosnia’s CTC reports appears to suggest that 9/11 did not have a significant independent bearing on the development of Article 201 of the BiH criminal code.⁷⁰ This also bolsters the contention that the origins of Article 201 are more likely to lie in the influence of the EU on Bosnian legal reform. That said, though, whether or not the apparent ‘European’ influence is to be welcomed remains to be determined. With that in mind, the following section will evaluate some of the strengths and weaknesses of the current wording of Article 201 in the Bosnian context.

VI - Assessing Article 201

The definition of terrorism adopted in Article 201 of the Bosnian criminal code has a number of interesting features, including the absence of any motive requirement and the broad scope of the property and infrastructure damage included within the definition. The inclusion of ‘radioactive material’ in paragraph f) of the definition is also of interest, particularly as there is no mention of such material in the EU decision that appears to have formed the basis for the definition adopted.⁷¹ Perhaps the single most interesting aspect of the definition, however, is that it appears to have been adopted – almost word for word – from the EU Framework Decision on combating terrorism of June 2002.⁷²

⁶⁸ Bosnia’s Fourth CTC Report actually refers to articles “250-274”. As there are only 252 articles in the code, however, it can fairly safely be presumed that this was an error on the part of the drafters of the report. See: Bosnia’s Fourth CTC Report, *supra* note 63 at 3.

⁶⁹ See: Bosnia’s Fourth CTC Report, *supra* note 63 at 3.

⁷⁰ Given the impact of 9/11 on the development of the EU Framework Decision it would obviously be incorrect to say that 9/11 had no impact in the development of Article 201. That said, though, it does seem reasonable to conclude on the basis of the current examination that 9/11 was of relatively less salience in BiH (in terms of the drafting of Article 201) than the engagement of the EU with Bosnian legal reform generally seems to have been.

⁷¹ As far as can be gathered, Bosnia has no nuclear facilities, civilian or military. (See: <http://www.iaea.org/inis/aws/eedrb/data/BA-elicn.html>) As Bosnia seems no more likely to be the target of a nuclear attack or of a ‘dirty bomb’ than any other European country, it seems entirely conceivable that the ‘radioactive materials’ of Article 201 have simply been carried-over from the previous SFRY definition of terrorism, especially as virtually all the other components of this previous definition have been included in the new provision. Interestingly, the only other mention of ‘radioactive material’ that seems to have arisen in the context of anti-terrorism legislation – at least as could be identified from an internet search – appeared to be in the UK’s *Terrorism Act 2006*. (See: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en.pdf.)

⁷² The wording of the relevant section of the Framework Decision (Art. 1) is as follows:

“1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organization to perform or abstain from performing any act,

or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

(a) attacks upon a person’s life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

The following analysis will therefore focus on three sets of considerations – the strengths and weaknesses of the definition as it stands; how the definition compares to some others that have been adopted elsewhere, and how appropriate the definition might be in the context prevailing in Bosnia.

Under this definition, as with many others, the ‘basic criterion’ for distinguishing a terrorist act is the element of intentionality, and in particular, the intention to influence the behaviour of public authorities (including international organisations)⁷³ or to intimidate a population.⁷⁴ As the European Commission commentary on the original draft of this definition notes, “the reasoning here is that the motivation of the offender is different (to ‘ordinary’ criminal acts), even though terrorist offences can usually be equated in terms of their practical effect with ordinary criminal offences.”⁷⁵ Moreover, as Steve Peers notes, the second part of the definition – Article 201(4) – quite neatly covers a number of acts already addressed by various UN Conventions.⁷⁶

That said, the definition does seem to give rise to a number of human / civil rights-based concerns. One concern noted by Peers, for example, is that damage to private property caused during a civil protest may result in the perpetrators being considered to have committed a ‘terrorist act’ under Article 201(4)(d). Similarly, it is conceivable that participating in a violent scuffle with police forces during a demonstration could result in charges being laid under Article 201(4)(b).⁷⁷ In short, as Kim Lane Scheppele puts it, under this definition, any number of instances can be imagined in which “political dissent might cross over into being considered a terrorist offense.”⁷⁸

Recognising these difficulties, the European Council included in the preamble to its Framework Decision a note that: “nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
(i) threatening to commit any of the acts listed in (a) to (h).” (Framework Decision, *supra* note 26.) See also Monar, J. “*Anti-terrorism law and policy: the case of the European Union*” in Ramraj, V., Hor, M. & Roach, K. (eds) (2005) *Global Anti-Terrorism Law and Policy*, CUP, Cambridge, at 433.

⁷³ Given the significant number of international organisations active in BiH, this aspect of the definition is particularly worth flagging in the Bosnian context.

⁷⁴ Paraphrased from Monar, *supra* note 72 at 433. See also Roach, K. (2004) “*The World Wide Expansion of Anti-Terrorism Laws after 11 September 2001*” *Studi Senesi*: 3, 487 at 492.

⁷⁵ “*Proposal for a Council Framework Decision on Combating Terrorism*”, Commission of the European Communities, 19/09/2001. Available at: http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0521.pdf.

⁷⁶ See Peers, S. (2003) “*EU Responses to Terrorism*”, *International and Comparative Law Quarterly*: 52, 227 at 231 for further details. Jörg Monar makes the point that the breadth of the acts covered in this section of the Framework Decision definition may be reflective of “the EU’s widened threat perception regarding international terrorism”. (Monar, *supra* note 72 at 433.) However, beyond noting that “even before 9/11, there was a consensus among (EU) Member States that international terrorism had to be regarded as a major challenge to the democratic societies of the European Union”, he does not seem to provide further details of the extents of the specific threats EU members might perceive. (Monar, *supra* note 72 at 430.)

⁷⁷ Kim Lane Scheppele, citing the work of the International Bar Association Task Force on Terrorism, adds the examples that burning “a city bus as a way of making a political point” might be considered a terrorist offence under the EU definition, as might interrupting “the process of fluoridating water to pressure the government to take the health risks of chemically treating water seriously.” (Scheppele, K. L. (2004) “*Other People’s PATRIOT Acts*”, *Loyola Law Review*: 50, 89 at 96.)

⁷⁸ Scheppele, *supra* note 77 at 96.

others for the protection of his or her interests and the related right to demonstrate.”⁷⁹ There does not appear to be a similar statement, however, in the definition of terrorism as adopted by BiH, nor elsewhere in the code. As such, there appears to be at least some risk that Article 201 could be misused by police or local prosecuting authorities. Given the continuing difficulties that have been encountered in depoliticising police forces in BiH, moreover, this risk may not be insignificant.⁸⁰

Another potential problem with the definition, as adopted, is that there does not seem to be any distinction drawn between acts committed in wartime and peacetime, nor by military rather than civilian (or at least non-military) actors. The EU Framework Decision, again in the preamble, includes an explicit recognition that: “actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.”⁸¹ The BiH code does not appear to contain any such provision in relation to terrorist acts generally, although Article 202 contains a carve-out for cases in which funds are collected and/or provided knowing that they will be used to cause death or serious bodily injury only to a person “taking an active part in the hostilities in a situation of armed conflict”.⁸² In such cases, collecting/providing funds will not be an offence under Article 202. No such exception seems to apply to offences under Article 201, however. As such, it is conceivable that members of armed forces may also find themselves held as ‘terrorists’ under the code when acting in the course of an armed conflict governed by international law. Given the generally recognised status of international humanitarian law as the *lex specialis* of armed conflict, this may be unlikely. Nevertheless, the inclusion of a carve-out in Article 202 but not 201 does suggest that this omission may simply have been due to an oversight in the drafting of these articles.

Some additional strengths and weaknesses of the definition in Article 201 might be gleaned from comparison with definitions adopted elsewhere. The influence of the UK’s *Terrorism Act (2000)*, for example, has been cited as influential in the development of definitions of terrorism in other jurisdictions in a form of ‘bricolage’.⁸³ As such, it might be worth examining how the Bosnian and British definitions compare.

The most significant difference between these two jurisdictions seems to be the absence in the Bosnian provision of a requirement for the ‘motive’ of the act in question to be political, religious or

⁷⁹ See the Framework Declaration, *supra* note 26 at Preamble, Para. 10. See also Monar, *supra* note 72 at 434 and Peers, *supra* note 76 at 237. Another possible form of words is suggested by the inclusion in Canadian anti-terrorism legislation of a specific exemption for “advocacy, protest, dissent or stoppage of work so long as they are not intended to cause death, serious bodily harm, danger to life or a serious risk to public health or safety.” (Criminal Code of Canada, S. 83.01. Available at: <http://laws.justice.gc.ca/en/C-46/267115.html#rid-267116> . See also: Roach, *supra* note 74 at 496.

⁸⁰ See e.g. “*Report of the Secretary-General and High Representative of the Common Foreign and Security Policy of the European Union on the activities of the European Union Police Mission in Bosnia and Herzegovina, covering the period from 1 July to 31 December 2004*”, 26 January 2005. Available at: <http://www.eupm.org/Documents/EUPM%20UN%20SC%20Report%20July-Dec%2004.pdf>.

⁸¹ Framework Declaration, *supra* note 26 at Preamble, Para. 11. By way of comparison, a carve-out similar to that in the Framework Decision is contained in (for example) Canada’s Criminal Code. See Criminal Code of Canada, *supra* note 79 at S. 83.01.

⁸² Criminal Code of BiH, *supra* note 27 at Art. 202. The full wording of the relevant sections of Art. 202 is as follows:

“Whoever by any means, directly or indirectly, provides or collects funds with the aim that they should be used or knowing that they are to be used, in full or in part, in order to perpetrate: ...

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel the authorities of Bosnia and Herzegovina or any other government or an international organisation to perform or to abstain from performing any act,

shall be punished by imprisonment for a term between one and ten years.”

⁸³ See: Roach, K. “*The Post 9/11 Migration of Britain’s Terrorism Act, 2000*” in Choudhry, S. (ed.) *The Migration of Constitutional Ideas*: CUP, Cambridge (forthcoming) at 2.

ideological. This requirement – present in the British definition⁸⁴ - has been criticised for going beyond the traditional liberal view that “democracies do not generally inquire into why a person committed a crime, only whether he or she acted intentionally or without some other form of culpability.”⁸⁵ The same author also notes a concern that the inclusion of a motive requirement may have a “chilling effect on those whose political and religious views are outside the mainstream.”⁸⁶

That said, a motive requirement might actually make it more difficult for the crime of terrorism to be prosecuted effectively, as it might be extremely difficult to prove the presence or absence of motive alongside the necessary intent.⁸⁷ Nonetheless, given the nature of Bosnia as a multi-ethnic emergent democracy in which public discourse is still permeated by ethnic divides, it would perhaps have been politically unwise to have required investigating forces to examine the religious or political motives of those who might be charged with the offence of terrorism. As such, the absence of a motive requirement in the Bosnian definition is very much to be welcomed.⁸⁸

One other aspect of the Bosnian definition that might be worth examining is the scope of the ‘infrastructure’ or property damage or impairment that might constitute a terrorist act.⁸⁹ The definition in the Bosnian legislation is strikingly broad, extending out to include ‘great damage’ to a wide range of property even in circumstances where there will not necessarily be any endangering of human life – under Article 201(4)(d) the likely causing of ‘major economic loss’ will be sufficient to bring an act within the rubric of terrorism.⁹⁰ Moreover, as under paragraph (4)(i) of Article 201 a threat to carry out such an act will be sufficient to constitute terrorism, there would seem to be a risk that a simple threat to damage private property in a manner that would be likely to result in major economic loss, or under sub-paragraph (h), to disrupt water or power supplies, could be sufficient to constitute terrorism.⁹¹ As Kent Roach has noted, it is entirely conceivable that “a threat to disrupt an essential service may be part of vigorous democratic debate.”⁹² As such, the unqualified⁹³ inclusion of such acts in the Bosnian definition of terrorism may also constitute grounds for concern.⁹⁴

⁸⁴ See: Terrorism Act, 2000, S.1(1)(c). Available at: <http://www.opsi.gov.uk/ACTS/acts2000/00011--b.htm>. A similar provision is included in the relevant Canadian legislation. See Criminal Code of Canada, *supra* note 79 at S. 83.01.

⁸⁵ See Roach, *supra* note 74 at 491. See also discussion in Roach, K. (2002) “*Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*” *McGill Law Journal*: 47, 893 at 903-906.

⁸⁶ See Roach, *supra* note 74 at 491. See also Roach, *supra* note 85.

⁸⁷ See: Roach, *supra* note 85 at 905. See also: Siskind, J. (2005) “*Terrorism Defined: An Impossibility or an Imperative?*” at 49-55. (Unpublished mimeograph. On file with author.)

⁸⁸ Interestingly, it has also been noted with regard to Indonesia, for example, that one of the reasons why there is no mention of religious, political or ideological motive in Indonesian anti-terrorism legislation is to avoid any hint of discrimination against Islam as Indonesia is a predominantly Muslim country and the US-led ‘war on terror’ might carry connotations of anti-Islamic sentiment. (See Roach, *supra* note 83 at 13.) BiH is not a predominantly Muslim country. However, there may be a particular sensitivity towards discriminatory treatment of Islamic activities (or indeed, of the activities of other religious communities in BiH) owing to war-time associations. Roach also notes that underlying the exclusion of motive from the definition of terrorism in Indonesian law, might lie the idea that “in the new democracy of Indonesia, people will not be prosecuted on the basis of their political motives and ideology.” (Roach, *supra* note 83 at 13.) A similar position may be taken as regards the ‘emergent democracy’ of BiH. Interestingly, ‘motive’ was also excluded from the definition of terrorism contained in the legislation of some Arab states and in the Arab Convention for the Suppression of Terrorism. (See discussion in Roach, *supra* note 83 at 14. See also: Welchman, L. “*Rocks, hard places and human rights: anti-terrorism law and policy in Arab states*”, in Ramraj, Hor & Roach (eds.), *supra* note 72 at 585-591.)

⁸⁹ Property and infrastructure damage seem to be conflated somewhat in the Bosnian / EU Framework Decision, falling as they do within the same sub-clause. (See: Criminal Code of BiH, Article 201, Para. d, *supra* note 27.)

⁹⁰ Note – the definition adopted in Article 201 would seem to go beyond the British, Canadian and Australian as regards the extent to which damage to property and/or essential infrastructure might constitute a ‘terrorist act’. See discussions in: Roach, *supra* note 83 at 3-4 and 6-10.

⁹¹ ‘Major economic loss’ is, however, not defined in the legislation.

⁹² Roach, *supra* note 74 at 498.

⁹³ i.e. by a caution or exception as discussed above.

⁹⁴ In this manner the Bosnian approach may actually be broader than the approaches taken in British and Canadian legislation. See Terrorism Act, 2000, *supra* note 84 and Criminal Code of Canada, *supra* note 79. It is arguable that the definition of terrorism under the *USA Patriot Act* of 2001 may be less open to abuse as to constitute ‘terrorism’ an act must

A number of considerations come to mind in assessing how well suited the definition of terrorism in Article 201 might be to the prevailing situation in BiH. The first of these perhaps goes some way to explaining why the origins of the Bosnian definition of terrorism lie so clearly in the EU Framework Decision.⁹⁵ This is that in Bosnia, as elsewhere within the EU, the adopting of a ‘European’ position on a phenomenon might generally be considered to play a legitimating function in terms of rendering palatable and possible domestic legal reforms that otherwise would not be politically possible. As Monar has put it: “once a measure has been agreed on at EU level... (national authorities) can use the claimed legitimacy and importance of a common EU approach to push through certain measures at the national level.”⁹⁶

This observation lends support to a number of potential explanations for why the EU Framework Decision might have provided the preferred template for Bosnian anti-terrorism legislation. Firstly, as discussed above, Bosnian political behaviour seems to have become increasingly shaped in recent years by the objective of developing a closer relationship with, and eventually of becoming a member of, the European Union. As such, ‘European’ measures would seem to provide those involved in drafting the relevant provisions – including OHR and national ministries – with a yard-stick for legislative reform as well as a basis for legislative ‘bricolage’. Second, given the ethnically-riven politics of BiH it might also be more straightforward to build cross-party support for a measure that could be seen as originating outside the main nationalist parties. An approach that built on the model maintained by the Republic of Serbia, for example, might have led to accusations on the part of Croat and Muslim-based political parties that the drafters and supporters of these provisions were pandering to Serbian concerns and preferences.⁹⁷ Moreover, given the emotive nature of the subject matter of ‘terrorism’,⁹⁸ the fact that the definition adopted did not derive specifically from the legislation of any of the major powers that were active militarily and politically in the region in recent decades⁹⁹ may well have lent the legislation an added patina of neutrality. From this perspective, indeed, it would seem as if the adoption of a ‘European’ template was, if anything, over-determined.¹⁰⁰

Moreover, for all its weaknesses (as noted above) the EU definition also has significant strengths when considered in the Bosnian context. As a multi-cultural country, with a particular sensitivity to the possibility of official or administrative prejudice against one or another ethnic group, the exclusion of

“involve acts dangerous to human life”. (USA PATRIOT Act of 2001, S. 802. Available at: <http://www.epic.org/privacy/terrorism/hr3162.html>. Note, however, that this section defines ‘domestic’ terrorism only.) Also noteworthy in the definition of terrorist acts contained in the Criminal Code of BiH is that it is sufficient for an act to be intended to influence an international organisation (rather than a government) for it to constitute terrorism. The inclusion of ‘international organisations’ in this manner may reflect the wording of the Criminal Code of Canada in this regard. (See Criminal Code of Canada, *supra* note 79 at S. 83.01. See also Roach, *supra* note 83 at 7.) It is equally possible, however, that international organisations were included in the Framework Decision owing simply to the fact that the European Union itself can be considered an ‘international organisation’. That said, as noted above, the inclusion of the term in Article 201 seems to have been particularly apt, given the prominent roles of many such organisations in the governance of BiH.

⁹⁵ These explanatory factors are perhaps best viewed as complementary and/or subsidiary to the general involvement of the EU in Bosnian legal reform, as discussed in the previous sections.

⁹⁶ Monar, *supra* note 72 at 450.

⁹⁷ This would depend, of course, on the definitions used in other countries in the region, e.g. Croatia & Slovenia.

⁹⁸ The ‘emotive’ aspects of terrorism may also, of course, help us to at least partially understand why it has been so difficult to arrive at a single internationally-agreed definition of ‘terrorism’.

⁹⁹ i.e. the US, UK, France and/or Russia. This is assuming, of course, that the Framework Definition does not derive directly from the legislation of any of these countries.

¹⁰⁰ One interesting inference that might be drawn from this conclusion is that Bosnian anti-terrorism law (and Article 201 of the Criminal Code of BiH in particular) was not put in place as part of a process of ‘emergency bricolage’. (See Roach, *supra* note 83 at 6.) Rather, the legislation would seem to have been put in place as part of the process of preparing BiH for EU entry. This could explain why there did not appear to be any sense of urgency with regard to criminal law reform in BiH’s CTC reports, as well as provide a potential explanation for why these reforms were carried out so long after the 9 month period envisaged by Para. 6 of UNSCR 1373 had expired. (See *supra* note 58.)

ideological, political or religious motive from Article 201 seems to have been particularly appropriate. Moreover, since 1995 members of the various ethnic groupings have carried out a variety of violent and/or non-violent activities in order to prevent or deter the return of refugees to their former areas of residence (largely in order to prevent the ethnic ‘dilution’ of cantons and/or entities) and, more generally, to frustrate efforts to rebuild BiH as a functioning state.¹⁰¹ With this consideration in mind, the inclusion within Article 201 of activities designed to ‘influence a population’ (such as potential minority returnees) or international organisations (such as UN agencies involved in ongoing return activities or OHR) may also provide national authorities with a useful legislative tool to combat these activities. Perhaps more importantly from this perspective, the potential inclusion of activities such as booby-trapping rebuilt houses and returnees’ cars within the rubric of ‘terrorism’ may also facilitate the ongoing efforts of the international community and many Bosnians to finally make the transition from a situation in which such activities are seen simply as continuations of the 1992-1995 war, to one in which these acts can be condemned unequivocally as criminal acts of terrorism.¹⁰²

Conclusion: Current Issues & Recent Developments

This paper has sought to examine the factors that might have been instrumental in the development of state-level anti-terrorism legislation in Bosnia-Herzegovina. Having reviewed some of the terrorism-related challenges facing BiH, therefore, the discussion moved on to examine some of the national and regional political developments that might have had an impact on the processes of legal reform in BiH and on the development of the anti-terrorism provisions of the criminal code of BiH in particular. A few potentially key factors were identified, including most significantly the enhanced engagement of the EU in guiding legislative reform in BiH in recent years. Reviews of the apparently minimal amendments made to Bosnian anti-terrorism provisions in the wake of 9/11, and of Bosnian reports to the United Nations Counter-Terrorism Committee, were also carried out, with a view towards identifying the key factors in the development of Article 201 of the criminal code of BiH. Finally, a preliminary assessment was undertaken of some of the strengths and weaknesses of current Bosnian anti-terrorism legislation.¹⁰³

This study has yielded some interesting findings. Specifically, the examinations carried out suggest firstly, that the key to understanding the make-up of Bosnian anti-terrorism provisions is likely to lie more in the influence of the EU on Bosnian legal reform processes than in any response on the part of Bosnian policy-makers to 9/11 per se. Second, however, the study has also shown that despite some weaknesses, there are a number of aspects of the current anti-terrorism provisions that make it particularly well-suited to the Bosnian context.

That said, the drawbacks to the current wording of Article 201 of the criminal code should certainly be noted, and if at all possible, addressed. In this regard, given the parlous state of law enforcement in BiH, and the continuing risks of politically-motivated prosecutions, the aspects of the current wording of Article 201 which might conceivably result in participants in peaceful demonstrations and other forms of civil protest are of significant concern. It has not been the purpose (nor has it been possible) in this brief study to determine the optimal means of amending Article 201 to address some of the civil liberties-related (and other) concerns noted above. Nonetheless, as the last section of the paper

¹⁰¹ See “*Update on Conditions for Return to Bosnia and Herzegovina*”, UNHCR, 01/2005. Available at: <http://www.unhcr.ba/publications/B&HRET0105.pdf>.

¹⁰² This is assuming, of course, that such activities could not be or were not charged as ‘terrorism’ under the previous legislation. This point must remain speculative, however, given the relative paucity of information available.

¹⁰³ The limitations of the current examination should also be noted. The paper has not, for example, investigated any anti-terrorism measures included in Bosnian immigration and/or citizenship laws. It has also been difficult to obtain accurate information on (as well as copies of) certain provisions. Limitations of this nature have, where appropriate, been indicated, and related assumptions identified accordingly. It must be noted, however, that the conclusions drawn above are necessarily dependent on the extent and accuracy of the information that has been available for this study.

indicates, legislative steps taken in other countries – including Canada – may be instructive in his regard.

The prospects for the future reform of, and indeed for the implementation of the current anti-terrorism provisions of the criminal code of BiH, remain conditioned, however, by the more general extent to which the rule of law can be said to prevail in BiH. As has been discussed above, efforts are ongoing to build BiH into a state governed in accordance with the rule of law. The current state of law enforcement (and arguably of observance), however, may well undermine the extent to which efforts to counter terrorism through legal means will be effective. The importance of the international community serving as an example of ‘best practice’ in relation to the rule of law should also be stressed – the ‘rendition’ of ‘Algerians’ to the US in 2002 is unlikely to have done much to bolster the credibility of the international community (and of the US in particular) in this regard.

One last point that might be worth considering, however, is that of the extent to which the EU Framework Decision definition of terrorism discussed above might have formed the basis for legislative reform in countries other than BiH. It seems conceivable, for example, that countries that have either recently joined or that aim to join the European Union in the future may also have been influenced by the wording of the Framework Decision in their legislative responses to the ‘war on terror’. While this has not been the subject of this paper, this may be an interesting and fruitful avenue for future research.