

Summer 2010

Prosecuting Atrocity Crimes In National Courts: Looking Back On 2009 In Bosnia And Herzegovina

David Schwendiman

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>

Recommended Citation

David Schwendiman, *Prosecuting Atrocity Crimes In National Courts: Looking Back On 2009 In Bosnia And Herzegovina*, 8 NW. J. INT'L HUM. RTS. 269 (2010).
<http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss3/3>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

PROSECUTING ATROCITY CRIMES IN NATIONAL COURTS: LOOKING BACK ON 2009 IN BOSNIA AND HERZEGOVINA

David Schwendiman* †

I. INTRODUCTION

¶1

This article grew out of the Atrocity Crimes Litigation Year-in-Review (2009) Conference convened by the Center for International Human Rights at Northwestern University School of Law on February 4, 2010. The objective of the Conference was to analyze whether and how various tribunals and courts dealing with atrocity crimes advanced international criminal and humanitarian law during 2009. What follows is a look back on a significant year

* The author is an Assistant United States Attorney in the District of Utah. He served as an international prosecutor in the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina from May 2006 to December 2009. From November 2007 to December 2009, he was Deputy Chief Prosecutor and Head of the Special Department for War Crimes. The views expressed in this article are those of the author, for which he alone is responsible. They do not reflect nor represent the views of the United States Department of Justice, the United States Attorney's Office for the District of Utah, or the Prosecutor's Office of Bosnia and Herzegovina.

† I am grateful to my national colleagues in Bosnia and Herzegovina for accepting me and giving me the opportunity to lead them for a time as the Head of the Special Department for War Crimes. A more committed, professional, and courageous group of prosecutors would be hard to find anywhere in any prosecution service. They are not often well served by their national government and the institutions in which they work, but they persist and they get the job done in spite of it all. I admire and respect them. My comments are meant especially for the prosecutors in the Special Department for War Crimes and the judges in the Court of Bosnia and Herzegovina and prosecutors and judges in the Cantons and Districts who have already caught the vision of what needs to be done to make a meaningful difference in dealing with the nation's war crimes predicament. My hope is that they will take what I write seriously, use it, adapt it, or reject it in favor of something better, but not simply ignore it.

in the life of the Prosecutor's Office of Bosnia and Herzegovina (State Prosecutor's Office) and the Court of Bosnia and Herzegovina (State Court).

¶2 National investigations and prosecutions of atrocity crimes are becoming increasingly important because of the imminent closure of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)¹ and the inherent limitations of the International Criminal Court's (ICC) jurisdiction.² As a result, war crimes prosecutions in national courts, including Bosnia and Herzegovina, will have a greater impact on the development of international criminal and humanitarian law than ever before. However, the risks to the development of the law will also be greater. For these reasons, it is appropriate to examine some of the more significant developments in atrocity crime litigation in Bosnia and Herzegovina over the last few years. These developments include responses to important issues that directly relate to the enforcement of international criminal and humanitarian law in a national jurisdiction and that have potential for affecting the overall development of international criminal and humanitarian law.

¶3 In 2007, the State Prosecutor's Office, specifically the Special Department for War Crimes (Special Department), which manages the investigation and prosecution of war crimes at the national level, and the State Court began making necessary and significant advances in war crimes case selection and prioritization, charging, plea-bargaining, and in managing the forensic aspects of locating, recovering, examining, and identifying mortal remains from the war. Unfortunately, developments in the Prosecutor's Office since the end of 2009 are jeopardizing past advances in the investigation and prosecution of war crimes cases. This is the result of the failure in 2009 of the national government, the international community, and certain international organizations to take responsibility to develop international criminal and humanitarian law and the institutions that apply that law in Bosnia and Herzegovina more seriously. The national government in Bosnia and Herzegovina is not genuinely committed to supporting the work of the State Court or the State Prosecutor's Office. Without consistent

¹ See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

² See, e.g., Rome Statute of the International Criminal Court, art. 17, Jul. 1, 2002, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

international encouragement and support and, more importantly, without consistent political and financial support from the national government, the State Court and the State Prosecutor's Office have little chance of surviving, let alone succeeding. The advances in atrocity crime jurisprudence in Bosnia and Herzegovina that have occurred since 2007 are in jeopardy of being lost. If they are lost, atrocity crime jurisprudence and practice elsewhere will be affected.

¶4

While a number of verdicts and opinions rendered in Bosnia and Herzegovina in war crimes cases over the past four years have made important contributions to the development of the country's war crimes jurisprudence,³ this article is mostly a review of policy and structural developments in the Prosecutor's Office's Special Department for War Crimes since 2008. The main advances included installing policies to better utilize the resources available for investigating and prosecuting war crimes and ensuring that the

³ From 2005 through March 2010, Section I of the State Court, which has jurisdiction over war crimes cases, reported sixty-three First Instance verdicts and thirty-eight Second Instance verdicts. A number of First Instance verdicts and appellate rulings in 2008 and 2009 made important contributions to the development of the war crimes jurisprudence in Bosnia and Herzegovina. In the case of Prosecutor's Office of Bosnia and Herzegovina v. Miloš Stupar, et al., Case No. X-KR-05/24, (Jul. 29, 2008), a trial panel returned a First Instance verdict in 2008 convicting six of the original eleven men charged with genocide in connection with the murder of over 1,000 Bosniak (Muslim) men in the warehouse of the Kravica Farming Cooperative in July 1995. This was the first national genocide verdict rendered by the State Court. Miloš Stupar was subsequently acquitted by a dubious appellate court ruling in 2009, but the sentences and convictions of the remaining parties in the case were upheld on appeal. In Prosecutor's Office of Bosnia and Herzegovina v. Milorad Trbić, Case No. X-KR-07/386, (Oct. 16, 2009), another case where the accused was found guilty of genocide, the State Court made important findings in 2009 regarding the application of the doctrine of joint criminal enterprise and the crime of genocide. In Prosecutor's Office of Bosnia and Herzegovina v. Marko Radić et. al., Case No. X-KR-05/139, (May 14, 2008), a crimes against humanity case, the State Court made important findings in 2009 regarding command responsibility and joint criminal enterprise forms of liability. In Prosecutor's Office of Bosnia and Herzegovina v. Paško Ljubičić, Case No. X-KR-06/241, (Apr. 29, 2008), Prosecutor's Office of Bosnia and Herezegovina v. Dušan Fuštar, Case No. X-KR-06/200-1 (Apr. 21, 2008), and Prosecutor's Office of Bosnia and Herzegovina v. Damir Ivanković, Case No. X-KR-08/549-1 (Jul. 2, 2009), the State Court accepted pleas of guilty entered by the accused in exchange for the prosecutor's recommendations regarding sentences. The Ljubičić and Ivanković pleas were partially predicated on their promise to assist in pending and future investigations. Both provided important assistance in pending matters, including help locating and recovering mortal remains.

human rights standards developed by the Special Department for War Crimes guided its work. These important developments are now in jeopardy and deserve the immediate attention of the international community and the national government to preserve them.

II. BACKGROUND

¶5 The 1992 to 1995 war in Bosnia and Herzegovina (the “Bosnian War”) occurred as a consequence and part of the breakup of the Socialist Federal Republic of Yugoslavia, which began in the late 1980s. In January 1991, Slovenia successfully split from Yugoslavia following a referendum on independence and a near bloodless ten-day war. Next, Croatia separated from Yugoslavia and fought a “war of independence,” that lasted from January 1992 to November 1995. In October 1991, Bosnia and Herzegovina declared its sovereignty.

¶6 Following the October declaration, tensions rose between the Muslim, Bosnian-Croat, and Bosnian-Serb constituent peoples in the newly formed Bosnia and Herzegovina. In April 1992, Bosnian-Serb forces besieged Sarajevo and hostilities began throughout Bosnia and Herzegovina.⁴ The fighting officially ended on November 21, 1995, after the parties to the conflict met in Dayton, Ohio and agreed to the terms of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords).⁵ As a result of the fighting, 2.2 million people were displaced and an estimated 97,214 people, including 39,685 civilians, were killed.⁶

¶7 Among other things, the Dayton Accords, which were concluded in Paris in December 1995, placed Bosnia and

⁴ See LAURA SILBER & ALLAN LITTLE, *THE DEATH OF YUGOSLAVIA* (Penguin Books 1995) (1996); SABRINA P. RAMET, *THE THREE YUGOSLAVIAS: STATE-BUILDING AND LEGITIMATION, 1918-2005* 341- 469 (Woodrow Wilson Center Press 2006).

⁵ The General Framework Agreement for Peace in Bosnia and Herzegovina, (Dayton Peace Agreement), Nov. 21, 1995, 35 I.L.M. 170 [hereinafter Dayton Accords]; see also, RICHARD HOLBROKE, *TO END A WAR*, (Modern Library rev. ed. 1999).

⁶ See Research and Documentation Centre, *Bosnian Book of the Dead: Assessment of the Database*, (June 17, 2007) (finding that of the 39,685 civilians who were killed by hostile action during the fighting in Bosnia and Herzegovina, 33,071 or approximately 83% were Bosniaks (Muslims), 4,075 or 10% were Serbs, 2,163 or 6% were Croats, and 376 or approximately 1% were of other backgrounds).

Herzegovina under international oversight in the form of a High Representative who was given extraordinary powers to ensure that the Dayton Accords were fully implemented.⁷ A Peace Implementation Council (PIC) made up of representatives of the international community was formed to advise the High Representative. The goal of the Dayton Accords and international involvement in Bosnia and Herzegovina is to develop and strengthen government institutions, including the courts and prosecutors, and promote economic development so that full ownership and responsibility for governance can be given over to national and local authorities. This goal has not yet been met.

¶8

In many ways, although the Dayton Accords stopped the shooting, the war never truly ended. The conflict continues to affect and influence political life in Bosnia and Herzegovina and remains just beneath the surface of public consciousness. It emerges in how states in the region use war crime allegations for political advantage and in how atrocity crimes are dealt with in the national criminal justice systems. Each state in the Balkans has addressed war crimes stemming from the 1992-1995 conflict with varying degrees of success and credibility. Of the states in the region, Bosnia and Herzegovina is saddled with the greatest challenges and war crimes workload simply because the war was fought mostly within its borders and, as a result, it suffered the most human losses and the greatest property damage.

¶9

In order for Bosnia and Herzegovina to achieve long-term political stability and economic development, it must properly deal with atrocity crimes committed during the Bosnian War. As an incentive to make this happen, the PIC required that national authorities entrench the rule of law in part through the adoption of a

⁷ See Peace Implementation Council Bonn Conclusions, art. XI, ¶ 2b (Dec. 10, 1997), available at: http://www.ohr.int/pic/default.asp?content_id=5182 (The High Representative is designated to oversee implementation of the civilian aspects of the Dayton Accords. The High Representative was given extraordinary powers (“Bonn Powers”) in December 1997 at the Peace Implementation Council Conference in Bonn, including the power to “use his final authority in theatre regarding interpretation of the Agreement on Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary,” on, among other things, “interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned.” Bonn Conclusions, XI. High Representative, ¶ 11).

national war crimes strategy.⁸ This requirement was partially met, at least on paper, when the Council of Ministers adopted the National War Crimes Strategy in December 2008.⁹ While the National War Crimes Strategy was viewed as a political accomplishment, practically speaking it is weak and will do little that is meaningful to address Bosnia and Herzegovina's war crimes predicament either in the short or the long term. This is because it relies on a number of baseless assumptions: that the number of war crimes "cases" is known or determinable with precision; that the number of hardcopy war crimes related files held by the prosecutors throughout Bosnia and Herzegovina is a reliable measure for predicting either the workload or required resources; or, finally, that the "most complex and top priority" cases can all be resolved in seven years and the rest in fifteen years. The War Crimes Strategy also makes a fundamental strategic mistake by requiring Cantonal (Bosnian-Croat Federation) and District (Republika Srpska) prosecutors and courts, despite their express concerns and reasonable reservations,¹⁰ to manage the bulk of the war crimes workload. Responsibility for war crimes

⁸ See Peace Implementation Council, *Declaration by the Steering Board of the Peace Implementation Council*, 2-3 (Feb. 27, 2008) (stating that prior to transition, Bosnia and Herzegovina must entrench the rule of law as demonstrated through the adoption of a national war crimes strategy, passage of a law on aliens and asylum, and the adoption of a national justice sector reform strategy).

⁹ The author of this article was a member of the Working Group that had the task of creating the National War Crimes Strategy. Aside from the Chief Prosecutor, who served as Chair of the Working Group, the author was the only working war crimes prosecutor on the Working Group. During deliberations on the draft War Crimes Strategy document, the author expressed disagreement with the way in which the process was being managed and how it was being influenced by individuals who were seemingly interested only in satisfying the PIC requirement and not writing a strategy with long-term value. The author gave the Chair written objections to the substance of the proposed War Crimes Strategy when it became apparent that the proposed strategy was incomplete and unworkable in practice. In the end, the author abstained from voting on the final strategy. It is the author's view that the December 2008 National War Crimes Strategy fails in significant ways to meet the spirit of the Rule of Law objective set out by the PIC. Its value came mostly in forcing the national government and the international community to seriously consider the future of war crimes investigations and prosecutions in Bosnia and Herzegovina and begin to plan concretely to deal with that future. In the end it simply fell short.

¹⁰ See Richard S. Gebelein, *Solving War Crimes Cases in Bosnia and Herzegovina: Report on the Capacities of Courts and Prosecutor Offices' within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases* (2008).

investigations and prosecutions should have been centralized at the national level in the State Prosecutor's Office and the State Court instead of diluting scarce resources by trying to create the capacity to investigate and prosecute war crimes in every Canton and District. This singular weakness will make the implementation of the National War Crimes Strategy problematic for years.

¶10 In addition to the requirement imposed by the PIC, Bosnia and Herzegovina has no choice but to properly address war crimes, as onerous as its obligation may be, because there are many people who are still deeply affected by what happened to them emotionally, physically, economically, religiously, socially, and politically. The national government has shown little will to meaningfully deal with the consequences of war crimes, but victims' demand for government action will not subside. The failure to deal with this effectively frustrates survivors' commitment to the state and is one of the reasons why so many leave the country when they can or have plans to leave in the event of renewed hostilities.¹¹

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

III. THE NATIONAL CRIMINAL JUSTICE SYSTEM

¶12 The period between the end of the fighting in 1995 and the beginning of justice sector reform in 2000 saw relatively few war crimes prosecuted in Bosnia and Herzegovina. This was principally because the ICTY Rules of the Road process throttled local

¹¹ See United Nations Development Programme: Bosnia Herzegovina, *The Silent Majority Speaks* (2007).

prosecutions. With the creation of the State Court in 2000¹² by then-High Representative Wolfgang Petritsch and the State Prosecutor's Office in 2002¹³ by then-High Representative Paddy Ashdown, a state level infrastructure began to develop that promised to be able to eventually support national prosecution of war crimes cases in Bosnia and Herzegovina. The State Court and the State Prosecutor's Office are national institutions with statewide jurisdiction over war crimes¹⁴ committed during the Bosnian War.¹⁵ The State Prosecutor is independent of the State Court.¹⁶ The State Court and State Prosecutor's Office share jurisdiction in war crimes cases with the Cantonal and District courts and prosecutors, a confusing situation that was further complicated by the National War Crimes Strategy.

¶13

In 2003, following the creation of the State Court and State Prosecutor's Office, High Representative Ashdown proposed a number of criminal justice reforms that were adopted by the Parliamentary Assembly. One change was the rewriting of Chapter 17 of the Criminal Code of Bosnia and Herzegovina to include war crimes provisions that were consistent with the ICTY Statute and, for the most part, were modeled on the ICC (Rome) Statute. These provisions were necessary before the ICTY could begin under Rule 11*bis* of the ICTY's Rules of Procedure and Evidence to return indicted cases that it could not complete to Bosnia and Herzegovina for trial. Without such substantive changes to the criminal code, Bosnia and Herzegovina's ability to prosecute war crimes according to existing and developing international criminal and humanitarian law was questionable. The reforms also implemented a common-law-like, adversarial system of criminal justice.

¹² Office of the High Representative, *Decision Establishing the BiH State Court* (Nov. 12, 2000).

¹³ Office of the High Representative, *Decision Enacting the Law on the Prosecutor's Office of Bosnia and Herzegovina*, (Aug. 6, 2002).

¹⁴ War crimes, as the phrase is used in this article, includes genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the law of armed conflict. The State Prosecutor and the State Court have jurisdiction over war crimes. *See* CRIM. CODE BOSN. & HERZ., ch. 17 (2003).

¹⁵ The State Court and the State Prosecutor's Office also have certain general crime responsibilities related to tax, customs, and terrorism cases and specific responsibility for organized crime, economic crime, and corruption cases. *See* Law on the Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 16/02, art. 13 (2004). *See also id.* art. 12.

¹⁶ *Id.* art. 2.

¶14 Under new Criminal Procedure Code provisions, also adopted in 2003, only the prosecutor in Bosnia and Herzegovina can initiate and conduct criminal proceedings, a term that includes criminal investigations.¹⁷ An investigation begins when the prosecutor issues an investigative order after finding “grounds for suspicion” that a crime has been committed.¹⁸ On the national level, once the State Prosecutor is satisfied that there is “enough evidence for grounded suspicion” that crimes over which the State Court has jurisdiction was committed, he prepares and proposes an indictment listing the person or persons accused to the Court for confirmation.¹⁹

¶15 Indictments in Bosnia and Herzegovina are complicated matters of form and substance. Article 227 of the Criminal Procedure Code describes in detail the requirements of an indictment proposed for confirmation by the State Court. Every indictment includes extensive lists of proposed witnesses and evidence, a lengthy recitation of the factual allegations in support of the charges, and a detailed summary of the results of the investigation that led to the indictment. Indictments are much more than mere notice pleadings like those commonly used in most adversarial jurisdictions, including the ICTY.²⁰ Since war crimes practice began in earnest at the state level in Bosnia and Herzegovina in 2005, the State Court has been relatively strict about holding prosecutors to the use of evidence and witnesses listed in the indictment, and proof of the allegations made in support of the counts charged in the indictment.

¶16 A preliminary hearing judge in the State Court will confirm an indictment submitted by the prosecutor if, after examining each count along with the evidence submitted by the prosecutor, he

¹⁷ CRIM. CODE BOSN. & HERZ., *supra* note 14, arts. 1, 16.

¹⁸ *Id.* arts. 17, 216, 35(2)(a), “[A]s soon as he becomes aware that there are grounds for suspicion that a criminal offense has been committed, [the prosecutor has the right and duty] to take necessary steps to discover it and investigate it, to identify the suspect(s), to guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence.”

¹⁹ *Id.* art. 226.

²⁰ ICTY Rules of Procedure and Evidence, R. 47(c): “The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.” An indictment is reviewed by the Trial Chamber to determine whether a *prima facie* case has been established before it is confirmed; Statute of the International Tribunal of the ICTY art. 19, U.N. Doc. S/RES/827 (May 25, 1993).

determines that the Court has jurisdiction, concludes that the indictment meets the formal requirements of Article 227, satisfies himself that the statute of limitations has not run, amnesty has not been granted the accused, or whether “some other obstacles preclude prosecution,” and is convinced that “grounded suspicion” exists.²¹ These determinations are made on the information contained in the indictment and in the accompanying documentation supplied by the prosecutor. Although not entirely clear from the decisions of the State Court, the standard used by the preliminary hearing judge appears to be whether the submitted materials establish a *prima facie* case.

¶17 In 2004, special divisions were created within the State Court and the State Prosecutor’s Office to handle war crimes cases.²² Section I of the State Court, also known as the War Crimes Chamber, has jurisdiction over Chapter 17 war crimes that were committed during the Bosnian War.²³ First Instance trials in Section I are conducted before a three judge panel. During proceedings, the accused is presumed innocent²⁴ and is entitled to present a defense.²⁵ The prosecutor has the burden of proving the guilt of an accused beyond a reasonable doubt. Verdicts in First Instance trials can be appealed to the Appellate Division of Section I, which conducts Second Instance proceedings and issues final and binding verdicts.²⁶ Some matters related to issues raised in war crimes cases can also be taken to the Constitutional Court, which has prescribed jurisdiction to render opinions on issues referred to it by any court concerning whether a law, “on whose validity its decision depends,” is compatible with the constitution, the European Convention on Human Rights or with the laws of Bosnia and Herzegovina.²⁷

¶18 The Special Department for War Crimes (Special Department) in the State Prosecutor’s Office was created in 2004 to investigate and prosecute Chapter 17 war crimes that were

²¹ CRIM. CODE BOSN. & HERZ., *supra* note 14, art. 228.

²² Law on the Court of Bosnia and Herzegovina, *supra* note 15, art. 24; Law on the Prosecutor’s Office of Bosnia and Herzegovina, *supra* note 15, arts. 3, 12.

²³ Law on the Court of Bosnia and Herzegovina, *supra* note 15, art. 13.

²⁴ CRIM. CODE BOSN. & HERZ., *supra* note 14, art. 3.

²⁵ *Id.* art. 7.

²⁶ Law on the Court of Bosnia and Herzegovina, *supra* note 15, art. 26.

²⁷ The Constitutional Court also has jurisdiction over disputes between the political entities in Bosnia and Herzegovina that are referred to it by the executive or the Parliamentary Assembly. *See* BOSN. & HERZ CON. art. VI; *Dayton Accords*, *supra* note 5, Annex 5.

committed during the war.²⁸ Prosecutors in the Special Department initiate war crimes investigations,²⁹ authorize arrests,³⁰ prepare and propose indictments to the State Court for confirmation,³¹ and present evidence in support of confirmed indictments in proceedings before Section I.³² Special Department prosecutors also represent the government in appeals before the Section I Appellate Division.³³

¶19

Beginning in late 2004, international prosecutors were permitted to practice in the Special Department for War Crimes.³⁴ International prosecutors have the same responsibilities, authority, and are subject to the same rules as national prosecutors. They investigate and prosecute war crimes alongside their national colleagues with full authority and privileges of audience in the State Court.³⁵ This unique situation allows international prosecutors to have a direct hand in the enforcement, application, and interpretation

²⁸ Law on the Court of Bosnia and Herzegovina, *supra* note 15, arts. 3, 12.

²⁹ CRIM. CODE BOSN. & HERZ., *supra* note 14, arts. 35, 216.

³⁰ *Id.* arts. 123, 131-147.

³¹ *Id.* arts. 35, 226-228.

³² *Id.* arts. 35, 260, 261, 277.

³³ *Id.* arts. 35, 293.

³⁴ Law on the Court of Bosnia and Herzegovina, *supra* note 15, art. 18(1); Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex Thereto, Official Gazette of Bosnia and Herzegovina-International Agreements 3/07, art. 8 (2007). *See also*, Book of Rules on the Procedure for the Selection and Appointment of International Judges and Prosecutors, High Judicial and Prosecutorial Council, Nov. 10, 2006. The Registrar for the Special Department for War Crimes, the Prosecutor's Office, and the High Representative agreed in 2005 that six international prosecutors would work in the Special Department for War Crimes. The 2006 revised Registry Agreement contemplated that the number of international prosecutors would gradually decrease over a transitional period until at the end of 2009 no international prosecutors would handle war crimes cases. It became clear early in 2008, however, that the need for continued involvement of international prosecutors in the Special Department would not end as early as predicted by the Registry Agreement, but the international community was reluctant and slow to instruct the Registry to seek the changes and make the adjustments needed to keep international prosecutors involved beyond 2009.

³⁵ *See* Law on the Court of Bosnia and Herzegovina, *supra* note 15, art. 18(1).

of international criminal and humanitarian law in war crimes cases at the national level.

¶20 In addition to international prosecutors who were practicing in Section I, in 2004 international judges began sitting on Section I trial panels and appellate panels.³⁶ The original intent of this extraordinary arrangement was to allow international judges and prosecutors to participate directly in war crimes trials and appeals for a “transition” period of no more than five years, an arbitrary deadline that ended on December 14, 2009. The High Representative exercised his extraordinary powers in December 2009 and extended the mandate of a number of international prosecutors for an additional three years.³⁷ However, the High Representative did not extend the mandate of Section I international judges beyond what was required to complete cases in progress.³⁸

¶21 The High Representative’s delay in extending international prosecutor’s mandates until the eve of expiration resulted in the loss of all but one experienced international prosecutor. Many international staff members in the Special Department for War Crimes found it necessary to leave as a consequence. This is a serious setback for ongoing cases and future investigations and prosecutions because it means the loss of experts on the use of international criminal and humanitarian law in the national criminal justice system. The true impact of the loss of international prosecutors may never be known, but it will certainly be felt as cases that were under investigation by international prosecutors begin to stall and as the Special Department attempts to find temporary replacements to cover cases in trial or to stretch already thin resources to meet critical emergencies.

¶22 The government recently authorized new national prosecutors for the Special Department and the High Judicial and Prosecutorial Council, an independent national body that selects and oversees all prosecutors and judges working in Bosnia and Herzegovina, to chose three new international prosecutors who were

³⁶ *Id.* art. 65.

³⁷ See Office of the High Representative [OHR], *Decision Enacting the Law on Amendments to the Law on Prosecutor’s Office of Bosnia and Herzegovina*, OHR Doc. 19/09 (Dec. 14, 2009). The High Representative’s did not extend the mission of international prosecutors working in the State Prosecutor’s Office’s Special Department for Organized Crime, Economic Crime and Corruption.

³⁸ See Office of the High Representative [OHR], *Decision Enacting the Law on Amendments to the Law on Court of Bosnia and Herzegovina*, OHR Doc. 18/09 (Dec. 14, 2009).

to begin working in the Special Department for War Crimes in the second quarter of 2010. Only two had accepted positions by the beginning of July 2010. However, it will be some time before the new national and international prosecutors are able to make up for the loss of knowledge, skill, and experience that resulted from the High Representative's and the national government's failure to extend the international prosecutors' mandates before December 2009. The poor handling of this issue by the national government, the High Judicial and Prosecutorial Council, and the High Representative illustrates the precarious position in which the development of international criminal and humanitarian law finds itself in Bosnia and Herzegovina.

¶23 Continued involvement of international prosecutors and judges in war crimes investigations and prosecutions is necessary to ensure that international criminal and humanitarian law is developed and applied properly by national institutions in Bosnia and Herzegovina. If this does not occur, what the ICTY began fifteen years ago will be in serious jeopardy of becoming a relic when the ICTY closes, as is expected, in less than two years. It is too early to know whether there is a reliable way to gauge when international involvement should end, and the High Representative was unwise to set another arbitrary deadline for ending international prosecutors' participation in the work in the Special Department for War Crimes.

IV. DEVELOPMENTS IN 2009

¶24 To effectively discuss advances in international criminal and humanitarian law in Bosnia and Herzegovina during 2009, it is also necessary to mention developments during 2008. As noted earlier, this article is not a comprehensive review of developments, either in policy or jurisprudence, in Bosnia and Herzegovina during 2008 or 2009. Those with an interest in substantive international criminal and humanitarian law as it has been developed and applied in Bosnia and Herzegovina ought to review the verdicts and decisions of the First Instance panels and the Appellate panels in Section I and comment on how the State Court is influencing international criminal and humanitarian law and on how the State Court's jurisprudence is developing.³⁹ Decisions of the Constitutional Court

³⁹ English translations of Section I decisions are available at www.sudbih.gov.ba. English translations of confirmed indictments of parties in war crimes cases are available at www.tuzilastvobih.gov.ba and at www.sudbih.gov.ba. The future of

should be examined for how they address war crimes related issues and, more generally, for the process by which war crimes are dealt with at all levels of the criminal justice system, particularly whether war crimes investigations and prosecutions comply with the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights.⁴⁰

¶25

Bosnia and Herzegovina is one of the principal stewards of international criminal and humanitarian law and its role in advancing international criminal and humanitarian law will become even more important as the international ad hoc tribunals close. As a member of the international community, Bosnia and Herzegovina shares an interest and responsibility with the rest of the world in ensuring that it builds upon the atrocity crimes jurisprudence that

English translation programs in the State Court and State Prosecutor's Office is uncertain. If international financial support for the State Court or State Prosecutor's Office ends or is mismanaged and translation and interpretation capacity is lost, it will become much harder for the international community to evaluate whether and how Bosnia and Herzegovina is contributing to the advancement of international criminal and humanitarian law. For this reason, the international community has an interest in preserving the language assistants and other translation and interpretation components now supporting the State Prosecutor's Office and the State Court.

⁴⁰ See, e.g., Appeal of Abduladhim Maktouf, Constitutional Court of Bosnia and Herzegovina, Ap. No. 1785/06 (2007). The decisions of the Constitutional Court are available on its website: www.ccbh.ba. See also Husković, et al. v. The Federation of Bosnia and Herzegovina, CH/02/12551, Decision on Admissibility and Merits, (Human Rights Chamber of Bosnia and Herzegovina, 2003), i.e., a general discussion of the responsibilities of prosecuting authorities in Bosnia and Herzegovina under the relevant provisions of the European Convention on Human Rights insofar as the investigation of matters related to people missing in the war and the rights of their survivors are concerned; see also, The Advocacy Center TRIAL (ACT), *Enforced disappearance of Edin Mahmuljin in June 1992*, <http://www.trial-ch.org/index.php?id=1235&L=5> (July 22, 2010); The Advocacy Center TRIAL (ACT), *Enforced disappearance of Nedžad Fazlić in June 1992*, <http://www.trial-ch.org/index.php?id=1236&L=5> (July 22, 2010). Both submissions were filed in November 2009. Both cases were filed on behalf of survivors of the two men and both assert that the two are victims of violations of the procedural aspects of Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security) in conjunction with Article 1 (obligation to respect human rights) and Article 13 (right to an effective remedy) of the European Convention on Human Rights "due to the ongoing failure of BiH authorities to conduct an ex officio, prompt, impartial, independent and thorough investigation on [their] arbitrary detention and enforced disappearance in order to establish [their] fate and whereabouts, as well as to identify those responsible for these crimes and to prosecute, judge and sanction them."

has evolved in the international ad hoc tribunals, especially the ICTY.

¶26 Compared to other countries in the region, the accomplishments in Bosnia and Herzegovina since 2006, notwithstanding shortcomings, are remarkable and significant. As mentioned, Bosnia and Herzegovina suffered the greatest losses in the 1992-1995 war and has the most work to do as a consequence. At the same time, it is the least economically developed state in the region, its resources are limited, and its political culture is not inclined to mount a sustained effort to do all it must to meet human rights standards and international expectations. Nonetheless, with international assistance, the prosecutors, judges, and investigators working on war crimes cases at the national level and in some of the Cantons and Districts have achieved more than any other nation in the region, both in numbers, quality, and credibility of cases undertaken and resolved. Prosecutors' and judges' knowledge and skill in applying international criminal and humanitarian law continues to develop with experience.

¶27 The problems that exist in Bosnia and Herzegovina are not, for the most part, at the working level. The legitimacy of what most prosecutors and judges are doing at the national level is unquestioned for now. The future, however, is uncertain. If the State Court, the Special Department for War Crimes, and the State Prosecutor's Office are managed properly, if they receive the support they need from the national government, and if they get proper support and encouragement, war crimes prosecutions in Bosnia and Herzegovina will continue to meet international standards for fairness, achieve respectable outcomes, and be the benchmark for war crimes prosecutions in the region.

¶28 The State Prosecutor and the State Court have the opportunity to influence the development of international criminal and humanitarian law in a positive way and to demonstrate its increasing worth in international and domestic affairs. The national prosecutors and judges working on war crimes cases are maturing with the task. However, they will continue to need encouragement and assistance from the international community through the direct involvement of international prosecutors and judges and from scholarly interest in the international criminal and humanitarian law jurisprudence developing in Bosnia and Herzegovina. This opportunity is too valuable to let slip by and too important for the international community to withdraw from too soon.

A. Human Rights Based Prosecution Standards

¶29 One of the most significant developments in Bosnia and Herzegovina in 2009 was the formal integration of human rights based standards into the mission of the Special Department for War Crimes and the policies implemented to help the Special Department achieve its mission.

¶30 Article II of the Constitution of Bosnia and Herzegovina makes the ECHR an integral part of domestic law.⁴¹ The standards set by the ECHR apply to war crimes work at the national, Cantonal, and District levels. Under the ECHR's Article 2 right to life provisions, as interpreted by the European Court of Human Rights (ECtHR), Bosnia and Herzegovina has a duty to investigate deaths and cases of disappeared persons,⁴² whether they occur at the hands of state agents,⁴³ private persons,⁴⁴ or persons unknown.⁴⁵ An investigation must be impartial, independent,⁴⁶ and adequate "in the sense that it must be capable of leading to a decision as to the cause and circumstances of the death, as to whether any use of force was justified under Article 2 and as to the 'identification and punishment of those responsible.'"⁴⁷ Investigations must also be initiated promptly and conducted with reasonable expedition.⁴⁸ They must be open to public scrutiny to ensure accountability and help maintain public confidence.⁴⁹ Finally, the "next of kin" must be involved "in the procedure to the extent necessary to safeguard his or her legitimate interests,"⁵⁰ which include the right to effective remedies,

⁴¹ See *Dayton Accords*, *supra* note 5, Annex 4, art. 2(2).

⁴² See *Cyprus v. Turkey* 2001-IV Eur. Ct. H.R. 40.

⁴³ See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. 97 (1995).

⁴⁴ See *Menson v. United Kingdom* 2003-V Eur. Ct. H.R. 363.

⁴⁵ See *Togcu v. Turkey* App. No. 27602/95, Eur.Ct. H.R. (2005); *Kaya v Turkey*, No. 17747/03 Eur.Ct. H.R. (2006); *Yasa v Turkey*, 1998-VI Eur.Ct. H.R.; 28 EHRR 408.

⁴⁶ See *Nachova v. Bulgaria*, App. Nos. 43577/98 and 43579/98 Eur. Ct. H.R. (2006).

⁴⁷ See DAVID HARRIS, MICHAEL O'BOYLE & CARLA WARBRICK, *Law of the European Convention on Human Rights* 50 (2009). See also *Nachova v. Bulgaria*, 2005-VII Eur. Ct. H.R.; 42 EHRR 933 para.113 GC.

⁴⁸ *Id.* at 51.

⁴⁹ See *McKerr v. United Kingdom*, 2001-III Eur. Ct. H.R.; 34 EHRR 52.

⁵⁰ See *Hugh Jordan v. United Kingdom*, 2001-III Eur. Ct. H.R.; 37 EHRR 52, para 109; *Ogur v. Turkey*, 1999-III Eur. Ct. H.R.; 31 EHRR 912; *Gulec v. Turkey*, 1998-IV Eur. Ct. H.R.; 28 EHRR 121.

such as monetary compensation,⁵¹ guaranteed by Article 13 of the ECHR in cases involving death and disappearance.⁵²

¶31 Article 2's general obligations impose a costly, overwhelming, and perhaps unrealistic burden on struggling criminal justice institutions in post-conflict Bosnia and Herzegovina. The citizens of Bosnia and Herzegovina affected by the criminal acts committed during the war have a right, however, to expect that the state will discharge its Article 2 obligations. At the same time, the international community has created unrealistic expectations by proclaiming, for example, that everyone who committed a war crime will be prosecuted, found guilty, and sentenced to the maximum extent possible under the law. Practically speaking, these high expectations simply cannot be met. Not meeting them has the potential for resulting in public disappointment that may compromise the criminal justice system as a whole. The government and international community must match expectations to Bosnia and Herzegovina's capabilities and build capacity to the extent resources permit to better enable Bosnia and Herzegovina to meet its post-conflict obligations. Since Bosnia and Herzegovina is bound by the ECHR, it must find ways to meet its obligations under the Convention, including obligations with regard to war crimes prosecutions, without promising too much or delivering too little.

¶32 In early 2008, the Special Department for War Crimes developed a mission statement that made achieving the human rights standards set out in the ECHR one of its main objectives. To encourage compliance with the ECHR's human rights standards, in June 2009, the Head of the Special Department for War Crimes gave Special Department prosecutors and staff members a memorandum that spelled out what was expected of them in the 2009 professional evaluation period. As a result, each prosecutor and staff member knew what the mission of the Special Department was and knew that meeting ECHR Article 2 and related human rights obligations was expected. They also knew that success in meeting that goal would be taken into consideration in their professional evaluations for the year. For the first time, prosecutors and staff at the national level would be graded on their human rights performance.⁵³

⁵¹ See *Kaya v. Turkey*, *supra* note 45, para. 2108; *Cobzaru v. Romania*, App. no. 48254/99 para 83 Eur. Ct. H.R. (2007).

⁵² See *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R.; 41 EHRR 325 para 148 GC.

⁵³ See David Schwendiman, Deputy Chief Prosecutor, Head, Special Department for War Crimes to Prosecutors, Special Department for War Crimes: Expectations,

¶33 The mission statement was also incorporated into the 2009 proposed Internal Rules for the Special Department for War Crimes. The Special Department is required to have internal rules, which it was supposed to develop shortly after its creation in 2004. However, the Head of the Special Department did not prepare draft rules until late 2008. In addition to the mission statement, the proposed Internal Rules included draft policies and practice directions on charging, immunity, plea-bargaining, case selection and prioritization, and vulnerable victims, which were all aimed at giving those working in the Special Department the tools they needed to meet their human rights obligations under the ECHR. The draft rules also incorporated recommended strategic staffing plans designed to ensure that the Department would have the resources and assets needed to make that possible.

¶34 In early 2009, the draft Internal Rules was circulated among the prosecutors and staff in the Special Department for War Crimes for review and comment. After drafting the rules and while they were still out for comment, the Head of the Special Department began using them to guide the Department's work. The final version of the draft rules was given to the Chief Prosecutor and the new Head of the Special Department in December 2009.

B. Investigating War Deaths and the Fate of Disappeared Persons

¶35 There were significant developments during 2009 in policies and practices related to the investigation of war deaths and disappeared persons. On January 1, 2009, the Special Department for War Crimes assumed responsibility for managing the forensic aspects of locating, recovering, examining, identifying, and returning mortal remains from the war.⁵⁴ The Special Department, together with the Missing Persons Institute, the International Commission on Missing Persons, the Cantonal and District prosecutors, and the State Court, developed protocols and

Special Department for War Crimes Mission and Goals and Objectives for 2009 (June 4, 2009)(Also accessible at <http://www.law.northwestern.edu/jihr/v8/n3/> as Annex I).

⁵⁴ The authority for the Special Department and the State Court to take on full responsibility for the forensic work associated with the location, recovery, examination and identification of human remains from the war derives from articles. 103, 104, 105, 221, 222 of the Criminal Procedure Code of Bosnia and Herzegovina (as amended in 2003).

procedures for streamlining the process for obtaining authorization from the State Court for war crimes related excavations and exhumations throughout Bosnia and Herzegovina. Cantonal and District prosecutors remained responsible for ensuring that fieldwork was completed primarily because the State Prosecutor's Office lacked the people and the appropriate resources for recovery work. However, the Special Department closely monitored fieldwork on graves sites.

¶36

The Special Department, principally the Head of the Department supported by international and national staff, took full responsibility for obtaining court orders for exhumation and excavation, for inspecting and recommending improvements in the mortuaries that received recovered remains, and for maintaining the paper records of the completed fieldwork. The Special Department also assumed responsibility for protecting and preserving the forensic value of recovered remains and for ensuring that the humanitarian purposes behind the recovery, identification, and return of mortal remains from the war were complemented by the proper investigation, prosecution, and punishment of those criminally responsible for the deaths and disappearances, and made it possible for survivors to make meaningful property claims for the loss of a family member as a part of criminal proceedings.⁵⁵

¶37

Under the Criminal Procedure Code, during criminal proceedings, parties injured by criminal acts, including war crimes, can file a "claim under property law" for, among other things, "reimbursement of damages."⁵⁶ Prosecutors are obligated to notify potential claimants of their right to file an injured party claim in conjunction with pending criminal proceedings.⁵⁷ In fact, during case investigations, prosecutors must "gather evidence regarding claims under property law relevant to the criminal offense."⁵⁸ The prosecutor or court is also required "to question the suspect or the accused in relation to the facts" relevant to injured party claims.⁵⁹

⁵⁵ See CRIM. PRO. CODE OF BOSN. AND HERZ., *supra* note 14, arts. 193–212.

⁵⁶ *Id.* art. 195(2).

⁵⁷ *Id.* art. 195(4).

⁵⁸ *Id.* art. 196(1), i.e., "The Prosecutor has a duty to gather evidence regarding claims under property law relevant to the criminal offense"; *Id.* art. 35(2)(g), i.e., "The Prosecutor shall have the following rights and duties . . . (g) to establish facts necessary for deciding on claims under property law in accordance with Article 197"

⁵⁹ *Id.* art. 197(2).

Proper integration of humanitarian and forensic intervention in the recovery of human remains is essential to the proper discharge of this responsibility.

¶38

In order to assist with the recovery and identification of mortal remains, the Special Department for War Crimes began what it called the Digital Archive Project in 2009 to recover and digitally capture crime scene, excavation, exhumation, forensic examination, and personal identification records held by various authorities throughout Bosnia and Herzegovina. Without the Digital Archive Project, these records of the deaths and disappearances of thousands of victims of the war were in jeopardy of being lost through neglect. With the assistance of the Human Rights Violators Unit of U.S. Immigrations and Customs Enforcement, by the end of 2009 over 450,000 pages of documents were located, recovered, and scanned into a searchable digital database and made available for use by the Special Department, the Missing Persons Institute, and others. Until they were included in the Digital Archive, many of the documents had never been reviewed for purposes of criminal investigation or prosecution because their existence was simply unknown to prosecutors. The project helped secure the forensic, humanitarian, and academic value of the records that were captured. Unless the project continues, hundreds of thousands of valuable documents that are not yet a part of the archive will be lost. Unfortunately, the Prosecutor's Office has not kept up the Digital Archives Project since the end of 2009. The Special Department for War Crimes did not assign staff to the project for 2010 even though the proposed Internal Rules given to the new head of the Special Department included strategic staffing plans for supporting the Digital Archive.

¶39

The head of the Special Department and the Chief Prosecutor have not yet demonstrated that they have plans to build upon the accomplishments of 2009 in locating, recovering, examining, and identifying mortal remains from the war. The human rights obligations that are implicated (e.g. the survivor's right to an investigation into the fate of persons murdered or disappeared, the right to meaningful redress) in the failure to complete and maintain the Digital Archive and to continue the work related to the recovery of mortal remains are manifold and serious. The failure to complete the Digital Archive will also impact prosecutor's legal obligations under the law of Bosnia and Herzegovina, including the obligation

to develop evidence that will allow parties injured by war crimes to file civil claims.⁶⁰

¶40

In 2009, prosecutors and staff in the Special Department for War Crimes' Srebrenica team, worked to organize and coordinate the work of the several agencies and institutions, such as the Missing Persons Institute and the International Commission on Missing Persons, who are responsible for excavation and exhumation of graves in and around Srebrenica. As a result of this work, over 3,000 survivors and family members of victims of the Srebrenica killings were given notice of their right to file injured party property claims⁶¹ in conjunction with the prosecution of Milorad Trbić.⁶² Injured parties made over 2,000 claims before the close of the main trial. On October 16, 2009, a First Instance verdict convicted Trbić of genocide and other crimes committed in connection with events in and around Srebrenica and sentenced him to thirty years in prison. As a result of the opportunity relatives of victims of the Srebrenica killings had to file claims in Trbić, the perception of and confidence in the Special Department and in the State Court increased considerably among the Srebrenica survivor and victim communities. The Special Department's work in Trbić also created the expectation that injured parties in other cases will have similar opportunities to file property claims.⁶³

¶41

The First Instance verdict rendered in Trbić will not be final and binding until the appeals process is complete. The outcome of the claims process in the Trbić case specifically, but also more generally, is uncertain. There are still serious questions as to who will pay the claims, where the money will come from, and how much will actually be paid. However, it would have been impossible for survivors to even file claims in Trbić without the work of the Special Department in coordinating the efforts to identify the remains of the Srebrenica victims. Unless each victim in a criminal proceeding can be identified⁶⁴ and brought into the courtroom as a

⁶⁰ *Id.* arts. 193–212.

⁶¹ *See id.* arts. 192–212.

⁶² Trbić, *supra* note 3; Milorad TRBIĆ X-KR-07/386 Indictment 20.07.207 (Amended Indictment, Apr. 3, 2009).

⁶³ *See* David Schwendiman, *supra* note 53.

⁶⁴ For reasons of confidentiality, to protect the sensitivity of the information regarding identification that was done by DNA analysis and comparison, and to prevent public disclosure of the identities of the dead in cases where families or survivors had not yet either been notified or had been notified but had refused to accept identification, only those people who had previously been notified and

name and not just a number, survivors will not be able to bring injured party claims.

¶42

The accomplishments of the Srebrenica team in Trbić and other cases stemming from the events in Srebrenica in identifying remains were the foundation upon which Special Department built its 2009 general policy regarding excavation and exhumation. In fact, the efforts in Trbić paved the way for general policies that were implemented and made part of the Special Department's mission statement. Also, the 2009 proposed Internal Rules, which were given to the Head of the Special Department for War Crimes and the Chief Prosecutor in December 2009, included a provision for the creation of a Forensic Section within the Special Department to continue work such as what was done in Srebrenica.⁶⁵ The Head of the Special Department and the Chief Prosecutor have yet to address the serious questions of whether these policies will continue in the future or whether the Special Department will adopt the proposed Internal Rules. Failure to continue these policies will have serious consequences in terms of Bosnia and Herzegovina's human rights obligations and public perception and confidence in the Special Department.

C. Meaningful and Reasonably Quick Investigations, Prosecution Decisions, and Prosecutions

¶43

As already noted, under Article 2 of the ECHR, Bosnia and Herzegovina must make reasonable efforts to conduct impartial and independent investigations into deaths and disappearances.⁶⁶ Investigations are adequate if they establish the cause and circumstance of death and whether any use of force was justified, and if they result in sufficient information to permit the

accepted the identification of their loved ones were sent notice of their right to file a claim. Great care was taken in building the databases used to manage the identities of the dead and the notification of family members in connection with the criminal proceedings against Trbić to ensure that all personal data collection, management, and privacy requirements were met. No victim was identified by name to the State Court whose relatives had not been notified and consented to the inclusion of the name in the submissions made to the Court. An amended indictment was filed at the close of the case identifying 3,737 victims by name. See Milorad TRBIĆ (X-KR-07/386), Amended Indictment, 04.03.2009.

⁶⁵ See Special Dep't for War Crimes, Prosecutor's Office of Bosn. and Herz., Internal Rules (Proposed) Forensic Section (Dec. 9, 2009) (Also accessible at <http://www.law.northwestern.edu/jhr/v8/n3/> as Annex II).

⁶⁶ See Nachova, *supra* note 46.

“identification and punishment of those responsible.”⁶⁷ Investigations must also be initiated promptly and conducted with reasonable expedition.⁶⁸ These obligations apply to war crimes investigations and prosecutions at all levels, and place an overwhelming and costly burden on Bosnia and Herzegovina.

¶44

What is “reasonable” in terms of these obligations is relative, and, of course, influenced by the resources the state can use to investigate and prosecute in such cases and the complexity of much of what went on during the conflict that resulted in the violent deaths of around 100,000 people.⁶⁹ Bosnia and Herzegovina is bound, nonetheless, to make genuine efforts to meet these obligations, but it has had trouble doing so in the past.⁷⁰ In 2008, it was clear that Bosnia and Herzegovina would have even greater trouble meeting its obligations in the future unless a more organized way of managing the war crimes workload was developed.

¶45

In early 2009, the Special Department for War Crimes implemented a new policy aimed at reforming war crimes case selection and prioritization.⁷¹ The new policy adopted a

⁶⁷ See HARRIS ET AL., *supra* note 47, at 50; See also Nachova, *supra* note 46.

⁶⁸ *Id.* at 51.

⁶⁹ Letter from Ewa Tabeau, Demographer, ICTY/OTP (Sept. 10, 2008); see also BOSNIAN BOOK OF THE DEAD, *supra* note 6.

⁷⁰ See, e.g., Husković, *supra* note 40 (a general discussion of the responsibilities of prosecuting authorities in Bosnia and Herzegovina under the relevant provisions of the European Convention on Human Rights insofar as the investigation of matters related to people missing in the war and the rights of their survivors are concerned); see also, Advocacy Center TRIAL (ACT), *supra* note 40 (both submissions were filed in November 2009 on behalf of survivors of the two men and both assert that the two are victims of violations of the procedural aspects of Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security) in conjunction with Article 1 (obligation to respect human rights) and Article 13 (right to an effective remedy) of the ECHR “due to the ongoing failure of BiH authorities to conduct an ex officio, prompt, impartial, independent and thorough investigation on [their] arbitrary detention and enforced disappearance in order to establish [their] fate and whereabouts, as well as to identify those responsible for these crimes and to prosecute, judge and sanction them.”)

⁷¹ Beginning as early as late 2006, then Chief Prosecutor of Bosnia and Herzegovina, Marinko Jurčević, called for a comprehensive look at the conflict from a criminal perspective, urging a more programmatic approach to selecting cases for investigation and prosecution. Jurčević’s call eventually led to the work of Dr. Marko Prelec, who was then the Head of the Research and Analysis Section in the Special Department for War Crimes, in producing the comprehensive survey of war crimes related situations and events. Chief Prosecutor Jurčević left the position in February 2008 before he could see the results of his call.

SITUATION-EVENT-ACT-ACTOR or “SEAA” approach, which enabled the Special Department to better organize itself to meet Article 2 investigation obligations. SEAA encourages prosecutors to start investigations by looking broadly at situations that occurred during the Bosnian War and then look more narrowly at the events that took place within a situation to identify criminal acts and actors. This approach helps prosecutors and managers better understand the nature of the conflict from a criminal law perspective and make more informed selections of matters to investigate and possibly prosecute.⁷² Prior to implementing SEAA, prosecutors would focus their investigative and prosecution efforts on individual complaint files that had been generated since the beginning of the war. Isolating their efforts in this fashion proved to be a wasteful and ineffective way of dealing with the war crimes workload.

¶46

An essential tool necessary for the implementation of the new case selection policy was a comprehensive survey of the conflict, which was completed by Dr. Marko Prelec in 2008. The survey was a thorough historical analysis of, among other things, ICTY indictments, judgments, and available investigative files; materials collected from military and other archives in Bosnia and Herzegovina; investigative files held by the Prosecutors Office of Bosnia and Herzegovina; information provided by witnesses and informants during Special Department investigations; and information provided by civil society, including information provided by the Research and Documentation Centre in Sarajevo. This survey of materials resulted in a catalog of information organized by where and when conduct that was most likely to have violated international criminal and humanitarian law occurred during the Bosnian War.⁷³

⁷² See David Schwendiman, “Addressing the Nation’s War Crimes Predicament: A Status Report – Special Department for War Crimes, Prosecutor’s Office of Bosnia and Herzegovina” at the 5th Conference of Chief Prosecutors of Bosnia and Herzegovina, Trebinje (October 1, 2009); *see also* Special Dep’t for War Crimes, Prosecutor’s Office of Bosn. and Herz., Prosecution Guidelines, 5. Case Selection and Prioritization (February 9, 2009) (Also accessible at <http://www.law.northwestern.edu/jhr/v8/n3/> as Annex III).

⁷³ DR. MARKO PRELEC, PROSECUTOR’S OFFICE OF BOSN. AND HERZ., A CRIME-CENTERED APPROACH TO WAR CRIME CASE SELECTION IN BOSNIA AND HERZEGOVINA (June 2008).

¶47 The survey made it possible for prosecutors to use neutral criteria, which are written into Practice Direction No. 5,⁷⁴ together with a “Strategic Inventory”⁷⁵ of existing criminal complaint files and other files held by the State Prosecutor’s Office and some of the Cantonal and District prosecutors to begin to plan and carry out investigations and prosecutions. These investigations and prosecutions enabled multiple people to be investigated and indicted together and resulted in more significant, but fewer charges in each indictment. As a result of the survey and inventory, investigations had the potential to create a more complete and comprehensible record of events, and prosecutions promised to save witnesses from having to repeatedly give the same testimony. The survey began to help eliminate unnecessary duplication of investigations, which was wasting resources and costing the Special Department for War Crimes credibility with witnesses, survivors, and investigators.

¶48 The survey, the criteria, and the inventory were improved upon in 2008 and 2009 and were in use at the end of 2009.⁷⁶ The Norwegian government supported work on the comprehensive survey and the Strategic Inventory, both of which are unique in atrocity litigation. At the end of 2009 it was clear that more work was required to capture all of the information that was needed to

⁷⁴ Special Dep’t for War Crimes, Prosecution Guidelines, 5. Case Selection and Prioritization, *supra* note 72. Prosecutors in the Special Department for War Crimes began using Practice Direction 5 to help them identify and select cases for investigation and prosecution in early 2009.

⁷⁵ The Strategic Inventory is an exercise carried out by analysts working in the Research and Analysis Section of the Special Department for War Crimes. The project is sponsored and supported by the Norwegian government. A database created by Johnathan McCaskill, an International Legal Officer working in the office of the Head of the Special Department for War Crimes, is used to manage the results of the exercise. It was being populated through the end of 2009 with information and data drawn by the analysts primarily from files held by prosecutors in the Special Department that were received from the ICTY at the end of 2004 and beginning of 2005. Well over 4000 such files were returned to Bosnia and Herzegovina when the Rules of the Road Unit at the ICTY closed at the end of 2004. The newly created Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina assumed the responsibility for vetting future cases for possible investigation and prosecution.

⁷⁶ An improved third version of the comprehensive survey of the conflict was completed in December 2009. SPECIAL DEP’T FOR WAR CRIMES, SURVEY OF WAR CRIME RELATED SITUATIONS AND EVENTS: BOSNIA AND HERZEGOVINA 1992 TO 1995 (Version No. 3) (Dec. 4, 2009). Version No. 3 was translated and left with the new Head of the Special Department for War Crimes and the Chief Prosecutor in December 2009.

make the Strategic Inventory fully useful and to establish a system to maintain the inventory once the initial entries were completed. In 2009, the Norwegian government committed to help the Prosecutor's Office of Bosnia and Herzegovina continue this work through 2010.

¶49

The comprehensive survey and the inventory also helped the Special Department assist a number of foreign prosecution and investigation services, including the U.S. Department of Justice, the U.S. Immigration and Customs Enforcement's Human Rights Violators Unit, Norwegian prosecutors, and Danish prosecutors, in conducting their own investigations to identify émigrés from Bosnia and Herzegovina who may be responsible for war crimes committed during the war. In early 2008, the Special Department initiated open cooperation policies with foreign investigators and prosecutors working on matters of common interest.⁷⁷ The comprehensive survey was used to help coordinate what foreign jurisdictions were doing so that their investigations targeted people for deportations and removal to Bosnia and Herzegovina who were of special interest to the Special Department. Among other things, this kind of collaboration helped prevent surprise deportations or removals to Bosnia and Herzegovina that might have compromised the Special Department's control over its caseload. This mutually beneficial arrangement gave the Special Department more control over what it could anticipate while also giving considerable guidance to foreign jurisdictions' investigations. The policy promised to contribute significantly to Bosnia and Herzegovina's ability to meet its Article 2 right to life obligations under the European Convention on Human Rights. These policies have not been continued into 2010.

¶50

Managing discretion in the investigation and charging of war crimes was also the subject of Practice Direction No. 1, a policy governing charging that was implemented in the Special Department

⁷⁷ Special Department's open cooperation policies did not extend to formal cooperation on the same scale with Croatia or Serbia for a number of political reasons and because of a fundamental lack of mutual trust in the region. The reasons ranged from varying legal interpretations of state responsibilities under the European Convention on Human Rights and obligations under European conventions on extradition to differing understandings of each others' responsibilities in terms of investigating and prosecuting war crimes under their national law. On the working level, however, prosecutors in the Special Department commonly cooperated and assisted their counterparts in Croatia and Serbia and their counterparts in Croatia and Serbia assisted Special Department prosecutors on occasion.

in 2008 and used by Special Department prosecutors for most of 2009.⁷⁸ The intent of the policy was, in part, to reduce the number of counts charged in each war crimes case and to increase the number of accused included in each prosecution. This was to be done while also keeping in mind the right of victims to make property claims. The goal of the policy was for cases to be managed more efficiently by requiring less court time, fewer witnesses, and less evidence for the courts to reconcile in reaching and writing their verdicts. The policy also set standards for prosecutors to use when deciding whether there was sufficient evidence to initiate an investigation and propose an indictment. It defined and gave substance to vague terms in the Criminal Procedure Code such as “grounds for suspicion”⁷⁹ and “grounded suspicion,”⁸⁰ which were susceptible to inconsistent application. The intent of the policy was to give prosecutors greater confidence in their ability to make well reasoned, more consistent, and quicker prosecution decisions.

¶51 Practice Direction No. 1 also encouraged prosecutors to consider terminating investigations when it was apparent, given the standard that was written into the policy, that they would not result in prosecutable cases. In the political environment in which war crimes prosecutors must work in Bosnia and Herzegovina, choosing to terminate an investigation can be one of the most difficult decisions a prosecutor will ever have to make. The Special Department established a review process to ensure that such decisions were made based on the best available information and the most well informed application of the law. In 2009, a number of matters, including some high profile investigations, were terminated short of prosecution after review by the Head of the Special Department. These decisions saved valuable resources, which were put to better use investigating and prosecuting more promising matters.

¶52 The policy established in Practice Direction No. 1 results in the use of less court time, fewer witnesses, and less evidence and ensures that cases that are not viable will not be brought. It makes it possible for the Special Department to do more with its limited

⁷⁸ Special Dep’t for War Crimes, Prosecutor’s Office of Bosn. and Herz., Prosecution Guidelines, 1. Charging (Jan. 13, 2009) (Also accessible at <http://www.law.northwestern.edu/jhr/v8/n3/> as Annex IV).

⁷⁹ CRIM. CODE BOSN. & HERZ., *supra* note 14, art. 216(1) (the standard for initiating an investigation).

⁸⁰ *Id.* art. 226(1) (the standard for proposing an indictment).

resources and time. Effective use of Practice Direction No. 1 will enable the Special Department to better meet its obligations to conduct expeditious investigations and prosecutions. Practice Direction No. 1 was given to the Chief Prosecutor and the Head of the Special Department in December 2009. Without this policy or something very similar, it will be difficult for the Special Department for War Crimes to manage its charging discretion in a way that will help it meet its right to life obligations under the European Convention on Human Rights.

D. Pleas and Plea Bargaining

¶53 One of the most significant developments in 2008 and 2009 was the successful introduction at the national level of a practice of encouraging pleas of guilty rather than going to trial. Beginning in 2008, in exchange for recommendations from the prosecution to the court for limited sentences, accused were required to cooperate in current or future investigations and prosecutions as well as make verifiable proffers of information and evidence, particularly information and evidence regarding the location of mortal remains.

¶54 The practice of plea-bargaining was pioneered in 2008 with pleas from Dušan Fuštar⁸¹ and Paško Ljubičić.⁸² A number of similar pleas were negotiated in 2009.⁸³ In 2008, a policy was developed and implemented to provide guidance, ensure consistency, and limit prosecutors' ability to negotiate with an accused in order to properly manage the use of pleas. The policy also set up a review process that ensured that the Special Department maintained credibility with the defense and the court and was consistent in the way it used pleas.⁸⁴ Under the policy, the Head of the Special Department for War Crimes reviewed and signed off on all pleas before they were presented to the State Court for acceptance. Before a prosecutor could even enter into plea negotiations, the Head of the Department had to approve. An important feature of the plea policy was that an agreement could not recommend a sentence below the statutory minimum for the crime

⁸¹ Fuštar, *supra* note 3.

⁸² Ljubičić, *supra* note 3.

⁸³ *See, e.g.*, Ivanković, *supra* note 3.

⁸⁴ Special Dep't for War Crimes, Prosecutor's Office of Bosn. and Herz., Prosecution Guidelines, 2. Pleas and Plea Bargaining (Jan. 11, 2008) (Also accessible at <http://www.law.northwestern.edu/jhr/v8/n3/> as Annex V).

to which the accused was charged without express authority from the Head of the Special Department.

¶55 Pleas and plea-bargaining in war crimes cases in 2008 and 2009 were met with mixed reactions from the public.⁸⁵ Plea deals in war crimes cases in Bosnia and Herzegovina are problematic because of the gravity of the crimes involved, the affect on survivors and victims, and because of the heightened political attention war crimes cases attract in the region. However, they are legally acceptable and, in most cases, practically desirable. The policy implemented in 2008 to manage plea negotiations included features that were intended to help reduce public criticism and preserve the credibility and utility of the plea-bargaining. Among the most important of these features was the requirement that prosecutors meet with victims and survivors to explain a plea, answer why it was reasonable under the circumstances, and explain why it should be advanced.

¶56 The public reacted with hostility to the prosecution's first proposal regarding the sentence in the Damir Ivanković case that was resolved in 2009.⁸⁶ Information Ivanković gave prosecutors as part of plea negotiations resulted in the discovery and recovery of the remains of approximately sixty men. The result was generally well received by those who wanted to know what happened to the men whose remains were found. At the same time, representatives of some of the victims publicly expressed dissatisfaction with the plea. Their concern was with the prosecution's recommendation regarding sentence and is attributable to the prosecutor's failure to adequately explain the plea and the fact that the original recommended sentence was less than the statutory minimum sentence for the offense with which the accused was charged. Even after the recommended sentence was increased to a term greater than the statutory minimum, the negative perception of the plea was never fully overcome. Despite what prosecutors regarded as a reasonably good outcome, the plea in Ivanković did not contribute to the credibility of the Special Department or the legitimacy of plea-bargaining as much as it might have if the plea bargaining policy that was in force had been followed.

¶57 As the Ivanković case illustrates, the practice of plea-bargaining is in its infancy in war crimes cases at the national level

⁸⁵ See, e.g., Merima Husejnović, *Victims dissatisfied with Bosnian Court's decisions*, BIRN JUSTICE REPORT, May 30, 2008.

⁸⁶ Ivanković, *supra* note 3.

in Bosnia and Herzegovina. Even if the practice becomes better accepted, it is not likely to significantly reduce the number of cases tried since most accused are unwilling to plead guilty and comply with plea conditions such as providing information and evidence regarding the crime, including information about the location of mortal remains. In addition, the prosecutor must be willing to consider a plea and be willing to inform the affected parties honestly about the plea and give them an opportunity to voice their reactions and concerns. Finally, the court must decide whether to accept the plea as being in the best interests of the accused and the affected public. Bringing all of this together will be difficult in most cases.

¶58

Presently, for a variety of reasons, including the social and political pressure an accused is likely to feel from his constituent people against admitting that he committed a war crime and lack of experience with pleas on the defense side of the equation, pleas are not routinely sought by accused or their counsel. When they do propose a plea, accused and their counsel often ask for ridiculously unreasonable terms such as sentences generally well below the statutory minimum. It is also difficult sometimes for prosecutors in war crimes cases to justify a plea deal if there is sufficient proof to convict the accused at trial and if there is limited benefit beyond saving the court and the prosecutor time and resources. Nonetheless, plea-bargaining is a useful tool that saves valuable resources even in war crimes cases. Plea-bargaining has significant value when an accused is willing to admit responsibility and, as a condition of the plea, make a profession of contrition to the victims and survivors of his or her crimes. As happened in the Ivanković case, a plea can result in the accused leading the prosecution to hitherto undiscovered mortal remains, which can have considerable humanitarian and forensic value. Also, an admission of guilt can provide a somewhat more reliable and, perhaps more acceptable factual record than a trial in which even well established facts are often disputed for political reasons well after conviction.

¶59

As with many of the developments in Bosnia and Herzegovina in 2008 and 2009, the policies implemented to manage a prosecutor's discretion in plea-bargaining, including the written policies that were promulgated by the Head of the Special Department in 2009, are at risk. If the new Head of the Special Department or the Chief Prosecutor do not continue to enforce the plea and plea bargaining policies that were implemented in 2008 and

2009, the practice of plea-bargaining will quickly lose its legitimacy and its utility.

V. SUMMARY & CONCLUSIONS

¶60 The aim of the Atrocity Crimes Litigation Year-in-Review (2009) Conference was to examine and analyze the development of international criminal and humanitarian law in 2009. While this article is not a comprehensive review of all of the significant developments in war crimes prosecutions in Bosnia and Herzegovina in 2008 or 2009, it does highlight some of the more important developments and trends, particularly those developments that have potential for affecting important policies and the progress of international criminal and humanitarian law. The intent of this article was not to condemn, but to describe, comment, and warn so that the international community and those in control of the institutions in Bosnia and Herzegovina that are responsible for addressing the nation's war crimes can more easily discharge their human rights obligations and the duty they owe to the development of international criminal and humanitarian law.

¶61 The international community is so knitted together when it comes to international criminal and humanitarian law and practice that what is being done in Bosnia and Herzegovina cannot be ignored or dismissed as irrelevant. In less than four years, the State Court has issued First Instance verdicts in over sixty cases and almost forty of those cases have final and binding verdicts. Almost all of them are translated and available for study, comment, and criticism. Since most of the decisions—good or bad, right or wrong—are likely to inform practice elsewhere, they require scrutiny.

¶62 In the new adversary system introduced in Bosnia and Herzegovina, the prosecutor enjoys the responsibility for initiating war crimes investigations and prosecuting worthy cases. The prosecutor drives the system. This article introduces practices and policies that were developed and introduced in 2007, 2008, and 2009 to help prosecutors and supervisors in the Special Department meet the daunting task of managing their immense workload. These policies systematized the use of prosecutorial discretion in order to build credibility, lower opportunity costs, and ensure that the Special Department complied with human rights standards.

¶63 War crimes work in Bosnia and Herzegovina is at a critical juncture. Policies and practices that were effective in 2009 are in

jeopardy of being abandoned. The international community's urge to declare an early victory when it comes to war crimes committed during the Bosnian War is growing and encouraged by political considerations that have little to do with the orderly development of the tools needed to fix accountability for crimes committed during the war. These include an understandable desire to end the oversight of the High Representative and deliver more responsibility for governance to national authorities in Bosnia and Herzegovina. However, the international community, of which Bosnia and Herzegovina is a part, cannot afford to allow the rich legacy of the ICTY and Bosnia and Herzegovina's potential for adding to and improving on that legacy to go to waste for lack of attention, vision, or commitment.

¶64

The international community must take its share of the blame for the situation in which Bosnia and Herzegovina now finds itself. However, the national government and the heads of the State Prosecutor and the State Court have a greater responsibility to continue the policies and improvements that the international community helped create within the Special Department for War Crimes and in Section I of the Court. Those working in the Special Department on War Crimes and the State Court must supply the vision and support for what Bosnia and Herzegovina must do to meet national and international expectations for war crimes investigations and prosecutions stemming from the war that befell the nation. The far ranging consequences of a failure to do this properly are not acceptable.

¶65

The High Representative, the ICTY, and the international community as a whole share with Bosnia and Herzegovina the stewardship of international criminal and humanitarian law and the legal legacy of the ICTY. They bear considerable responsibility for ensuring that Bosnia and Herzegovina meets those expectations and properly discharges that stewardship in the process. Bosnia and Herzegovina must accept international involvement in war crimes investigations and prosecutions to the extent it is necessary to guarantee this happens. Finally, scholars must do their part to supply both the attention and the vision that can help guide those in Bosnia and Herzegovina who genuinely understand their roles and the significance of what they are doing and who are committed to making good on the potential that exists for turning the nightmare of the war into a legal legacy that can be the envy of the world.