

MAKING THE TRANSITION
INTERNATIONAL INTERVENTION, STATE-BUILDING
AND CRIMINAL JUSTICE REFORM IN BOSNIA AND
HERZEGOVINA, 1995-2005

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Submitted for examination for the degree of PhD
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Summary

This thesis explores ten years of international intervention in criminal justice reform in Bosnia and Herzegovina (BiH) from 1995 to 2005. BiH is taken as an example of a country undergoing multiple transitions following its secession from the Socialist Federal Republic of Yugoslavia: through conflict to peace; from authoritarian government to democratic multi-party government; and from a particular model of a socialist command economy to a more open, market oriented economy.

An account is given of the state of three criminal justice sectors (policing, criminal courts, and prisons) as they emerge from a period of authoritarian, socialist government and from a period of violent conflict. Subsequently reform oriented interventions carried out by a range of international actors, including some with executive power within BiH, are examined for evidence of the role of criminal justice reform in state-building exercises and the impact of the demands of state-building objectives upon different criminal justice sectors.

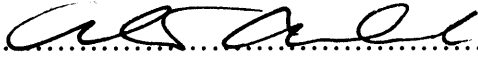
The thesis looks at the work of the United Nations, the European Union, the Council of Europe, the UK Department for International Development, and the Office of the High Representative and its associated bodies in the various sectors where they have been active. The different resources on which they can draw, and their particular working methods, are discussed in an examination of their interaction with the specific local policy context of BiH and its multiple levels and institutions of government.

Given the presence of policy actors from around the globe, consideration is given to the question of whether this facilitates policy transfer, legal transplants, or lesson drawing. Potential examples of such borrowing are examined, showing that borrowing in a context of multi-national intervention can allow for the mixing of internationally and domestically derived models of procedure and practice.

Declaration and statements

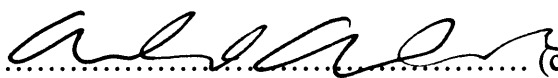
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This work has not previously been accepted in substance for any degree and is not concurrently submitted in candidature for any degree.

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This thesis is being submitted in partial fulfilment of the requirements for the degree of MPhil/PhD.

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1. Introduction

The process of the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) crystallised when Slovenia and Croatia declared independence in June 1991, and continues more than fifteen years on with negotiations over the final status of Kosovo. It has been accompanied by a series of conflicts, ranging from the short, such as the ten day war between the Yugoslav People's Army (JNA) and Slovenian territorial defence units, to the more complex and protracted, including those conflicts occurring on Croatian and Bosnian territory from 1991 through to the end of 1995 and involving the JNA, Croatian and Bosnian government forces, the armies of sub-republic breakaway entities of Serbs in Croatia and Bosnia and Herzegovina (BiH), and Croats in BiH, as well as other regional groups and irregular paramilitary units. In BiH, the war saw a complete transformation of the country; aside from the physical destruction which continues to leave its mark on town and countryside alike, the demographics of the country, its social make-up, the nature of governance had all changed fundamentally. While the war in Croatia had ended with a decisive victory by government forces against the breakaway Republic of Serb Krajina, the conflict in BiH ended without a definitive victory for any warring party.

The conflicts ended formally when, on 14 December 1995, representatives of three Yugoslav successor states gathered in Paris to sign the General Framework Agreement for Peace (GFAP). While this did not mark a decisive end to the conflicts which accompanied the dissolution of SFRY, it represented a commitment, on paper, on the part of BiH's three main ethnic communities and the country's two immediate neighbours Croatia and the rump Yugoslavia¹, to the territorial integrity of BiH, and to its ongoing claim to independent statehood. The period from December 1995 up to the summer of 2005, when the current project drew to a close, was marked by the presence of a range of foreign and international governmental and non-governmental agencies working through, alongside, and sometimes in spite of, various government bodies in BiH to rebuild the country after three and a half years of war. This rebuilding took place not only in the sense of physical reconstruction of houses, roads, bridges, railways and other key infrastructure, but in two further senses: the building of symbolic bridges between communities divided by war has been a key aim of numerous agencies; moreover, rebuilding the institutional framework for government in BiH has been a

¹ Composed of Serbia and Montenegro, who remained in a federal union until May 2006.

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task that has occupied a varying body of organisations throughout ten years of peace. It is in this last sense of rebuilding that the current work has its roots. Within this work to rebuild the physical and governmental infrastructure of BiH, a number of organisations have been active in the field of criminal justice, working not only to rebuild, but also to reform the country's policing, judicial and correctional structures.

The broadest aim of the current study is to help construct an understanding of processes of reform and reconstruction in BiH. The country is taken as an example of a post-authoritarian society, having emerged from over forty years of communist rule, and as an example of a post-conflict society, having come through nearly four years of brutal conflict between parties who continued to dominate the political life of the country. In particular, the study will proceed by exploring international interventions in three criminal justice sectors of BiH subsequent to the peace brokered in 1995. For the purpose of the study, these criminal justice sectors will be treated independently of one another in the first instance, although the concluding chapter will seek to draw together findings in all three to build upon the concept of criminal justice agencies comprising a system (see, for example, McAra 2005). Moreover, by examining examples of intervention from policing, criminal courts and prisons sectors, it will be possible to highlight similarities and differences in how reforms have advanced in each of these three areas, and what contribution these reforms have made to the overall effort to reconstruct and rehabilitate the state of BiH. Although the study is not a direct comparison as initially imagined, taking two countries and studying their paths to reform, the data on BiH will be understood against a background of other post-authoritarian and post-conflict countries.

Research questions

The project seeks to contribute to a growing international body of knowledge about the ongoing development of the criminal justice field in BiH through asking four core questions. These questions have been reformulated since the start of the project, which began as a more narrowly focused study on international involvement in prison reform, but remain true to the original motivations for such a project; they now recognise that prison reform is one small piece in a bigger picture of activity geared towards the reconstruction of the Bosnian state:

What role does criminal justice reform play in a state-building exercise, in the particular post-conflict, post-socialist, and post-authoritarian context represented by Bosnia and Herzegovina?

To what extent do the demands of state-building projects shape criminal justice reform, and how does this differ across criminal justice sectors (i.e. policing, courts, and correctional services), and how are these reforms seen to relate to one another in the context of a criminal justice *system*?

In a context which brings together a range of agencies with different backgrounds, priorities and working practices, how do different agencies approach criminal justice reforms within each sector, how do they relate to, and work with, relevant domestic political actors and institutions, and what obstacles do they meet in trying to implement reform programmes?

To what extent is the level of international intervention in BiH conducive to the ‘transfer’ of particular criminal justice policies and institutions or the ‘transplant’ of practices and models in criminal justice?

The research questions, which seek to unpick the role which is played by outside agents in shaping the criminal justice policy of contemporary BiH, are inspired by a number of authors in criminology and other disciplines to which the subject area is often allied and upon which it draws heavily. These theorists have variously attempted to explain punishment systems in terms of often specific and localised cultural, historical or economic conditions, or some combination of these (e.g. Durkheim 1984; Rusche and Kirchheimer 1939, Spierenburg 1984). Certainly, local factors will be seen to be of the utmost importance in shaping policy outcomes in BiH; the uncertain fate of police restructuring in the country, highlighted in chapter 7 being a case in point. Nonetheless, this study will also seek to explicitly locate BiH in a broader context in which the interests and objectives of outside agents, such as the European Union, might mediate, constrain or influence the entire criminal justice field. For BiH, the importance of political decisions taken outside the country’s borders is nothing new: as will be seen in chapter 2 on the country’s history, its fate has been heavily influenced by its position at the edge of empires (Ottoman and Austro Hungarian) and by decisions taken in capitals both near (Belgrade and Zagreb, Vienna and Istanbul) and far (London, Berlin, St Petersburg). In looking to international factors, the work follows other theorists who explore developments in criminal justice across various countries (Garland 2001; Shearing 1997, 2001; Shearing and Wood 2003a), and fits into a framework of policy studies that look at the constraints placed on certain states by the current international order (e.g. Deacon and Hulse 1997). Bosnia and Herzegovina has been chosen because of the direct, extensive and intensive nature of international intervention in the country. As such it must be understood as an extreme example of international influences on policy rather than a typical case of criminal justice policy formulation.

What the study does not do

Having defined certain concrete research questions, but before going on to outline the approach taken to those questions, it is worth considering what the study does not do. In part, this serves as a necessary acknowledgment of inevitable gaps and weaknesses, in part it is a matter of managing readers' expectations, and in part it foreshadows opportunities and aspirations for future research. Firstly, while the study has a comparative element, drawing on a background of post-conflict and post-authoritarian programmes of reform and reconstruction (see chapter 4), it does not seek to juxtapose the reform processes taking place within the criminal justice field in BiH with those of any other state, transitional or otherwise, with a view to saying such a reform programme is better or worse. At its worst such research often descends into a partial account that seeks to impose the policy models favoured in a dominant state on those of others. At its best it still runs the risk of a failure to account for contextual differences that explain why a policy from one country, no matter how well it works in its domestic context, may not fit into the institutional, cultural or legal framework found elsewhere.

Secondly, and in a similar vein, the project does not seek to construct a prescriptive model for intervention in other post-conflict or post-authoritarian states. It is true that BiH and Iraq are both examples of post-authoritarian states in which the politics of ethnic and religious identity has been emphasised through a history of ethnically targeted victimisation. But as the circumstances of BiH differ from those of the post-conflict and post-authoritarian states discussed in chapter 4, so those of Iraq differ from BiH. The Office of the High Representative (OHR) came to BiH with a strong mandate from the UN, backed by a multinational Peace Implementation Council, and fitted into a constitutional framework which had been incorporated into the peace settled at Dayton and signed in Paris. While the OHR may have faced several calls to withdraw from BiH, these were not calls for the withdrawal of an occupying power. Essentially, every post-conflict or post-authoritarian country will have its own specific needs and problems. BiH, and many other states, might provide lessons, ideas or cautionary tales, but not a model. From earlier experiences, we can anticipate problems, avoid certain mistakes, and find positive examples of solutions. But each new situation will bring new problems, new mistakes will be made and new solutions will need to be found. Unless this is understood, there is the risk of overlooking contextual differences meaning what was a successful and acceptable solution in BiH cannot easily be transposed to Kosovo, Afghanistan or Iraq. The recent account of personal experiences in BiH alongside an

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overview of international interventions elsewhere from former High Representative Paddy Ashdown is careful to leave the reader in no doubt that it is not intended as a prescriptive guide for subsequent international intervention in troubled states and regions (Ashdown, 2007).

Thirdly, as discussed in more detail below (see chapter 3), the study does not give a detailed survey of the work of any one organisation or in any one particular corner of the criminal justice sphere. This was a conscious decision. The international community in BiH, while often coordinated through the central organisation of the OHR, cannot be reduced to the OHR. Singling out the OHR or the EU, for example, runs the risk of failing to recognise this, and thus failing to recognise the complexity of international involvement in BiH or any other post-conflict or post-authoritarian state. Likewise, in terms of criminal justice, decisions taken in one part of the system have impacts elsewhere. The system has certain unifying features, such as notions of right and wrong and of justice, that mean that it can be understood as a whole, even if this whole can at times seem fragmented. Without providing at least an overview of international interventions across policing, courts and corrections, we cannot engage adequately with the work of an international community that makes its presence felt in the three main sectors of criminal justice: policing, courts, and prisons.

Finally, the study does not adequately situate criminal justice reforms in a comparative context within the overall project of governance within BiH. That is to say that one regrettable weakness of the study, and one highlighting the potential for future work, is that it cannot say how the reform process in the sphere of criminal justice compares to processes in the equally controversial spheres of defence, education, public broadcasting, or the sale of state enterprises. Yet the war in BiH ended only ten years ago. Many reform projects, including those in criminal justice, are still ongoing, even as the international community's role shifts more from state building to EU member-state building. Currently more and more academic studies of the reconstruction and reform programmes are being published, and using these as foundations it may be possible to situate the reform of criminal justice more soundly in a broader context of governance reforms in post-conflict and post-authoritarian reform in BiH. Indeed in terms of broader ambitions, the present study helps add to a growing body of empirically grounded and internationally focused research on policy making in the field of criminal justice.

Outline

The thesis begins by introducing the historical context in which the more specific post-war developments in criminal justice have taken place in BiH. While some of the longer term history is important to understanding the conflict surrounding the disintegration of SFRY, itself essential to understanding subsequent events in BiH, the focus will be on more recent history. While the context does necessitate a certain amount of the 'long view' of the history of BiH, this will be limited, and drawn from several published histories of the country. More important is the more immediate historical legacy of the second Yugoslavia, of the war, and of peace agreements in 1994 and 1995. These will be discussed again in relation to published histories of the country as well as key documents such as the General Framework Agreement for Peace, and the constitution of BiH. The historical section will be concluded with an introduction to the governing structures in post-war BiH, including the international High Representative who has, since 1997, enjoyed executive decision making powers in the country, causing some to compare the position with that of the Raj in India under the British Empire (Knaus and Martin 2003).

Chapter 3 describes the research programme and how it was executed. This requires a degree of attention to the historical development of the research programme and consideration of the impact of key research decisions on the research programme, in particular the decision to abandon Slovenia as a parallel research site and comparator country. The chapter then presents a discussion of the primary methods of data collection, generation and analysis employed in the study. The study has employed a range of documentary material alongside interviews with various participants in reform projects across policing, courts and prisons in BiH. The strategies for building up a collection of relevant documentary matter and interview material will be discussed, highlighting some of the challenges encountered. Subsequently, the two data collection and generation strategies will be brought together in a discussion of how the material was analysed. It should be noted that while documentary and interview evidence would generally be treated as qualitative methods of enquiry, the current project does not support such a definitive description; where necessary documentary evidence has been used to construct quantitative indicators, for example the number of decisions taken by the Office of the High Representative in a given period. Ethical considerations provide the final section of chapter 3, and focus predominantly on issues arising from studying overseas and the scope such projects have for misrepresenting study sites.

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A large and varied body of academic work exists on the question of how states move on, or fail to move on, from periods of authoritarian rule, from conflict, or from both simultaneously. Chapter 4 begins by introducing this literature on 'transition' through a focus on the relatively recent wave of democratisation in Central and Eastern Europe following the demise of Communism across the area. The field of countries is then broadened out in a survey of literature dealing with states making transitions in a range of historical and geographical contexts, including those countries of Central and Eastern Europe, but also looking at post-conflict and post authoritarian states in Europe in the wake of World War Two, and post-apartheid South Africa. The literature has been surveyed with a view to establishing not so much common patterns of activity in such transitional countries but 'recurring themes' that emerge in a number of those states; these have informed the ongoing research in BiH. Two key themes are highlighted: processes to purge public bodies of those associated with the outgoing regime; and the intervention of outside powers. In light of the latter of these two, the recently developed theme of policy transfer (e.g. Bennett 1991, 1997; Dolowitz and March 1996, 2000; Evans and Davies 1999; Jones and Newburn 2007) and the more longstanding concept of legal transplants (Watson 1974, Nelken 2001) are discussed. Following on from this discussion drawing on political science and legal studies, a further brief chapter considers the nature of the state, and how this term might be applied in the particular geopolitical context of post-war BiH.

The following six chapters (6-11) can be divided up in to three sets of two chapters. Each of the three sets handles a different sector of the criminal justice field: policing, courts and prisons; and each will follow a similar pattern. In each case, the first of the two chapters begins by drawing on a range of literature to illustrate the importance of a given sector to processes of state reconstruction and democratisation; in light of this discussion, the challenges that exist in BiH and that are perceived by individuals and agencies involved in reconstruction and reform are laid out. This draws on a range of sources including interviews, official documents, reports from human rights bodies, and records of court proceedings. The second chapter in each pairing goes on to explore the work that has been done in that particular sector. Where it has been possible, examples are given of work undertaken by different agencies, including core civilian missions supported by multilateral organisations and coordinated through OHR, and smaller unilateral bodies or bodies working directly with domestic government rather than through OHR. This will allow some comparison to be made with regards to the priorities and working methods of such organisations. In the case of court

reform, the data generated was relatively thin on agencies outside the core civilian missions, possibly reflecting the central position of OHR in the field of judicial reform; as such three different areas of reform, all undertaken under the auspices of core civilian missions are explored in chapters 8 and 9. Chapter 12 will seek to draw together the findings of the previous six chapters in to some meaningful conclusions, relating these back to the key research questions, exploring the linkages between state-building and criminal justice reform and examining the working methods employed by the particular agencies explored throughout chapters 6 to 11.

Academic context

This section briefly sets out the academic context in which the thesis is located. The research has been undertaken in a Department of Criminology, in a broader School of Social Sciences, and preliminary findings have been presented in the context of explicitly criminological and socio-legal conferences and seminars (Aitchison 2005, 2006, 2007a, b). Yet criminology itself can be located in a range of academic contexts and the reality of criminological research and theory today has perhaps outgrown definitions drawing on late 19th century usages: “the science of crime”, or “that part of anthropology which treats of crime and criminals” (*OED*). Thus the constitution of the British Society of Criminology describes the society’s purpose as being to “advance public education about crime, criminal behaviour and the criminal justice systems in the United Kingdom”. Here we see a more inclusive concept of criminology, and it is in that part of criminology dealing with criminal justice systems that the current project is located. Moreover criminology can be located in a range of academic departments, particularly those of law and the social sciences, and draws on theory developed in anthropology, sociology and other disciplines. If we take the example of the editor-in-chief and five associate editors of the *British Journal of Criminology* as a group of experienced and well respected criminologists², we can see that at the 2001 Research Assessment Exercise, their submissions were split between ‘Social Policy and Administration’ and ‘Law’ at the ratio of 2:1. Three are currently located within law schools, while two sit in schools geared towards social science (including education, social policy, sociology, social research and social work). Between them, they have published in a range of empirical, theoretical and methodological journals, which, as well as including titles with a named crime or criminal

² Pat Carlen, Jason Ditton, Chris Hale, Barbara Hudson, Suzanne Karstedt and Ian Loader.

justice element, take in mainstream sociological and socio-legal texts alongside urban and regional planning and childhood studies. The author of the current paper is presently based in the Social Policy subject group of a School of Social and Political Studies which also incorporates politics, social anthropology, social work and sociology. It is the firm belief of the author that criminology profits from entering into a conversation with these subject areas, and the thesis will attempt to reflect this. Furthermore, as the study deals with Bosnia and Herzegovina as it emerges from a destructive period of war, other subject areas, such as development studies, can provide useful insights. Finally, the author having been introduced to the world of academia through an undergraduate diet of politics and history, the thesis will attempt to incorporate elements of both disciplines.

In a sense it is fitting that a project taking BiH as its study site seeks to look across and traverse some of the traditional boundaries separating academic disciplines and sub-disciplines. BiH is often portrayed as a country of borders, bridges and crossroads. A recent drive to attract tourists to the country locates the Balkan peninsula as the bridge between East and West, the meeting point of Byzantines and Romans, and Ottomans and Austro-Hungarians, describing the country as ‘an amazing blend of East and West’ (BH Tourism undated). The bridge is a powerful symbol in BiH, although the historical associations are sometimes painful: in Nobel Prize winner Ivo Andrić’s *Na Drini ćuprija (The Bridge over the Drina, 1995)*, the bridge provides a unifying structure to the book, spanning centuries and symbolising different historic experiences of the occupants of Višegrad. The destruction of the old bridge in Mostar in 1993 was an attack on the historical legacy of the Ottoman Empire in Europe, simultaneously symbolising the division of the city between Bosniak and Croat. The reconstruction of the bridge by 2004 can likewise be taken as a symbol of attempts to heal those divisions and build bridges between divided communities. This work stands at the intersection of various academic literatures and enterprises. It attempts to find in BiH a space in which these might be meaningfully united, or at least sit together without conflict and contradiction. Thus as an effort to comprehend comprehensive reform of a criminal justice system, it draws upon authors writing in the criminological tradition; as an attempt to situate this reform in the context of a particular policy environment, the work draws on policy studies; in attempts to understand what is happening in BiH as part of a state-building programme, the work turns to political theory and political science, and draws heavily on literature dealing with democratisation and transitions. The following chapter commences

1. Introduction

this enterprise with a brief account of BiH from its early origins to its contemporary political setup.

2. Setting the scene: Bosnia and Herzegovina

This chapter seeks to lay out the historical context underlying the subsequent chapters which deal with post-war challenges to, and reforms of, police, criminal courts and prisons in Bosnia, and subsequently Bosnia and Herzegovina¹, went from being an independent territorial unit going through an apparent process of state-formation², to forming a relatively minor part of two empires and subsequently of two successive Yugoslav states. The chapter makes a few introductory remarks on BiH before the second Yugoslavia, but it is focused primarily on BiH's more recent history, particularly in relation to the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s, the progression from this initial disintegration into war and the subsequent peace settlements negotiated and signed at Washington (1994) and Dayton and Paris (1995). This sets the ground for an exposition of post-war developments in BiH in terms of the politics and structures of governance of the country and the nature of its statehood. Such a discussion is essential to understanding a country with thirteen justice ministries, thirteen regular police forces in addition to specialist Border, Judicial and other forces, ten Cantons, two entities (with different internal arrangements for governance), a special, separately governed district, three state Presidents, all overseen by a foreigner reporting to the UN and guided by a Council representing various states and supra-state bodies.

Historical background

BiH's history is punctuated by external intervention. As it was going through a process of state formation, with competing centrifugal and centripetal battles being fought by leading nobility³, it was subject to pressure from Hungary, the Catholic Church and later, the Ottoman Empire, into which it was fully absorbed after the fall of Jajce in 1528. During this formative period, from the thirteenth century onwards, BiH was home to three Christian churches: Roman Catholic, Eastern Orthodox, and a Bosnian church whose origins are somewhat controversial, but which certainly seems to have had its own distinct structure (Malcolm

¹ It is only from 1326 that Bosnia and Herzegovina can be discussed together as one political unit.

² The process bears some resemblance to the swing between centripetal and centrifugal tendencies observed in late-medieval and early-modern France by Elias (1994).

³ Centripetal forces seemed to dominate during the reigns of Ban Kulin (1180-1204), Ban Stephen Kotromanić (1322-53) and King Stephen Tvrtko (1353-91), during which Bosnia, and subsequently Bosnia and Herzegovina experienced both consolidation and expansion.

2. Setting the scene

1996). This Bosnian church continued to exist up to around 1459 when it faced persecution from King Stephen Tomaš as part of his bid to win Papal support to face the heightened threat from the ascendant Ottoman Empire. Up to this period of persecution, which resulted in the demise of the Bosnian church, representatives of the three branches of Christianity could be found at court (Fine 2002) but the lack of a unifying church in BiH, coupled with the country's mountainous terrain, was seen to contribute to localism, instability, and subsequently vulnerability to external forces (Fine 1987).

Ottoman government drew on Islamic and Byzantine influences (Shaw 1976). Different religious communities in BiH, and throughout the Empire, were recognised through the *millet* system, an Ottoman form of governance allowing religious communities to maintain their own structures of authority, law and taxation. Lory (2000) describes various millets including that of the dominant Sunni Muslims, but also Jewish and Armenian, Latin⁴, and Orthodox Christian millets. Shaw (1976) observes that Latin Christians came under the authority of the Armenian millet, but enjoyed a degree of autonomy within that structure. Jelavich (1983a) details the expanding role of the Orthodox Patriarch as head of millet and secular ruler. Duties included order maintenance; while criminal cases were the remit of the overarching imperial authority, where they involved no parties beyond the millet they were handled by ecclesiastical courts which drew on a variety of sources including custom, canon law and Byzantine statutes and with recourse to various punishments including fines, imprisonment and excommunication. At the same time, the Sublime Porte could intervene in the internal affairs of the different religious communities as seen in Porte's interference with Orthodox hierarchy in Serbia, favouring the Greek Phanariot Patriarchate at the expense of a native Serbian one (Lovrenović 2001). Moreover, specific Ottoman laws originating from the Porte, the *kanun-i-riya*, applied to only non-Muslims (Ibrahimagić 1998; Malcolm 1996). Thus while a degree of autonomy was allowed to non-Muslim populations in the Ottoman Balkans, it was not unlimited, and depended very much upon the Sublime Porte. It was during the 350 years of Ottoman rule that, through migration and conversion, the population of BiH came to include a significant number of Muslims and Orthodox Christians (Malcolm 1996). Palairret (1997) cites various figures which estimate the Muslim population of BiH between around one third and one half of the total between 1865 and 1880, suggesting that forty per cent is a probable figure.

⁴ Roman Catholic

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The final years of Ottoman rule in BiH were characterised by large changes in the nature of the authority of the Porte. The origins of these reforms lie in the period, during the reign of Mahmut II (1808-39), in which the Ottoman military-feudal system was beginning to disintegrate; the period saw the emergence of a rural aristocracy, with the formation of large privately-held estates and the threat of centrifugal tendencies (Shaw and Shaw 1977). Against such a trend Mahmut hoped to strengthen the central authority of the Porte, including central control over local judges (Inalcik 1976). Developments in the bureaucracy allowed the Empire to intervene in a number of spheres which previously existed outside its authority. Among Mahmut's reforms, penal codes were issued to bring an end to non-judicial punishments and to introduce fixed penalties regardless of an offender's social rank. Following Mahmut's death in 1839, and up to 1876, a further series of reforms, known as the Tanzimat-i Hayriye, or 'Auspicious Reorderings', were introduced. A decree in 1839 introduced open trials, a regime of limited punishments and equal rights before the law across all millets (Shaw and Shaw 1977). From 1856, criminal cases arising between Muslim and non-Muslim subjects, or between members of different non-Muslims millets were heard by mixed tribunals (Shaw and Shaw 1977). Although suggesting a greater degree of equality across the various religious communities making up the Ottoman Empire, these reforms also signalled increased central control and incursions on the long established autonomy of the millets. Further reforms in 1864 increased gubernatorial power in newly created large provincial units (*viyalets*) with an increased role for mixed-millet courts. Such reforms were fiercely opposed by notables in BiH, more so than in any other part of the Empire, but under the governorship of Ömer Lütfi Paşa their power was undermined, and from 1863-64, Ahmet Cevdet Paşa, was able to extend the Tanzimat reforms to BiH (Shaw and Shaw 1977). How the implementation of these changes might have gone on to affect BiH would be pure speculation, as events on a wider canvass ended the Ottoman rule in the territory in 1878.

Ottoman capitulation in the face of Russian advances preceded the Congress of Berlin in 1878, and saw a further shrinking of the Ottoman presence in Europe. The Austro-Hungarian Empire and Russia had agreed in 1877 that, should Vienna remain neutral during conflict between Russia and the Ottoman Empire, their occupation of BiH would go unopposed, and this was confirmed at the Congress (Macfie 1996). The Austro-Hungarian Empire ruled over BiH for forty years in total, with BiH fully incorporated into the Empire for the last ten of these. The agreement of the great powers in Berlin did not assuage resistance to Austro-Hungarian rule in BiH, as both Muslims and Orthodox Christians felt uneasy about being

2. Setting the scene

ruled by a Catholic Christian government; the Muslims risked losing their privileged position, while Orthodox Christians would lose the autonomy enjoyed under the millet system (Malcolm 1996). Towards the close of World War One, the best efforts of the weakened Austro-Hungarian Empire to convince the peoples of Slovenia, Croatia and Bosnia and Herzegovina that some continued form of union was in their best interests failed. In the wake of the war, a new map of Europe was created based on Wilsonian ideals of self-determination (Gunther 1937). BiH entered a unified Kingdom of Serbs, Croats and Slovenes, made up of parties that had recently fought on opposing sides: Serbia, on whom the Austro-Hungarian Empire had declared war in 1914, fought alongside the victorious allies; while Slovenia, Croatia and Bosnia and Herzegovina remained Austro-Hungarian territories, and some of the earliest battles involved attacks launched from north east Bosnia.

The first Yugoslavia, as the Kingdom came to be known, survived for 23 years, and again shows competing centrifugal and centripetal forces. Under the constitution of 1921, the King, a member of the ruling Serb Karadžević family, played a strong role in government enjoying, for example, the power to appoint and retire all members of the judicial branch. Thirty-three districts were established in 1922, each under the authority of a prefect appointed by the King. Against this strong centralist tendency in Yugoslavia's government and legal system, pre-unification legal systems continued to operate, with BiH, Croatia, Slovenia and the Vojvodina all operating separate variants of Austro-Hungarian legal codes (Lampe 1996). Centralising tendencies seemed in the ascendant in 1929 when King Aleksandar abolished the existing constitutional arrangements, assuming full power himself. The territory of Yugoslavia was reorganised into nine *Banovine*, cutting across established territorial divisions, and abolishing BiH as a political unit. The borders were such that Serbs formed the majority in six of the units, Croats in two and Slovenes in the other (Jelavich 1983b). Even prior to the division of Yugoslavia into Banovine, the union had been dominated from Belgrade, with only limited opportunities for non-Serbs (Fine 2002). Aleksandar was assassinated in Marseilles in 1934 and under the regency of Prince Paul a weakening of central control allowed for moves towards greater autonomy and the establishment of a Croatian territorial unit, including parts of BiH. These developments were still in their early stages when Yugoslavia was drawn into the Second World War and fell to an Axis invasion in April 1941. The war found BiH divided again, this time between zones of Italian and German interest within the Independent State of Croatia (NDH). While nominally independent, the NDH was essentially a German puppet state under the rule of Pavelić's *Ustaše* government.

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The period saw severe persecution of Serbs and Jews on NDH territory. As well as seeking to rid the Croat state of Jews⁵, in line with Nazi objectives, Ustaša policy sought to address the ‘problem’ of the territory’s 1.9 million Serbs through processes of forced conversion, expulsion and murder (Jelavich 1983b; Malcolm 1996). Leading *Četnik* ideologues and regional *Četnik* commanders, similarly advocated a process of ‘cleansing’ territory of non-Serb populations in a bid to create an ethnically pure Greater Serbia. Malcolm (1996) highlights the winter of 1941-42 as a time of widespread attacks on Muslims, and highlights a massacre of 9,000 in early 1943. Muslims in BiH adopted a number of strategies, at times working alongside the NDH, but also approaching the Germans independently in an attempt to convince them of distant ‘gothic’ origins and to seek an autonomous Bosnian state (Lovrenović 2001). Aside from nationalist movements, the communist dominated *Partisans* played an important role in the fighting, offering a strong resistance against German and Italian troops, and drawing support from, among others, Serbs within the NDH. During the war, the Partisans established government structures throughout Yugoslav territory based on local worker committees, placing them in a strong position to take over power in 1944. The following section discusses the years of socialist government in Yugoslavia, focusing in particular on questions regarding the extent to which the state could be considered authoritarian, and on questions of identity in the Yugoslav state.

Brotherhood and unity: Bosnia and Herzegovina in the second Yugoslavia

Yugoslavia was reunified under Tito’s communist Partisans at the end of World War Two. BiH took its place as one of six republics of equal status, shown in map 2.1, below. Early actions by the Partisan regime were geared towards reprisals against supporters of pro-German and Italian groups, particularly the Croatian Ustaše, and also towards stamping out political opposition. In BiH, this included close supervision of members of the Young Muslim Organization by the state security police, *Odjeljenje Zaštite Naroda* (OZNA). In 1949, one thousand arrests were made for membership of, or connections with, the group. Alija Izetbegović, a post-communist President of BiH, was among the first to be arrested in 1946 and served three years working on state construction projects; he estimated that about ninety per cent of his fellow detainees were political prisoners. Others were less fortunate and faced execution (Izetbegović 2003).

⁵ Malcolm (1996) cites estimates that 12,000 of a population of around 14,000 Jews in BiH were killed during the course of the war as a result of cooperation between German and NDH personnel.

Map 2.1 Republics of Yugoslavia



The authoritarian state

Records released in the 1980s detailed around a dozen detention camps housing political offenders during the early years of socialist Yugoslavia. One such camp, *Goli Otok*⁶, was characterised by, “a Stalinist work regimen, abominable conditions and enforced beatings of new prisoners by the inmates,” (Lampe 1996: 249). The use of political imprisonment in the late 1940s as the Communists consolidated their grasp on government in Yugoslavia supports Garland’s (1996) observation that governments in weaker positions are more inclined to resort to punitive measures. Yet during his second period of detention in the late 1980’s, a period he described as one of ‘heavy handed’ efforts at control, Izetbegović (2003) observed far fewer political detainees and far more criminal ones. The perceived decline in the use of the courts as a political tool may back up assertions elsewhere that the legal system of socialist Yugoslavia included a “relatively independent” judiciary (Dietrich et al. 2003: 1). McFarlane (1988) also asserts that interference with the courts was relatively rare when compared to other Eastern European communist states. Such assertions need to be taken with a degree of

⁶ ‘Naked Island’

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caution and cannot be taken as evidence of wholesale judicial independence. McFarlane's comparators are other authoritarian socialist regimes; charges of offences "against the people and the state", the nearest approximation to 'political' crimes, did not fall below 500 per year between 1980 and 1983 (McFarlane 1988). The authoritarian face of the Yugoslav state needs to be balanced against the distinctive Yugoslav model of self-management, adopted after conflict between Yugoslavia and the Soviet Union and subsequent Yugoslav attacks on Soviet concentration of power in central authorities (Jelavich 1983b; Lapenna 1964). The principle of self-management did not only apply to industrial and commercial enterprises (Estrin 1982; Gligorov 1982), but to other areas of public life such as local affairs (Djordjevic 1953), social courts (Hayden 1990), and public security (Davidović 1993). Further freedoms were enjoyed in relation to foreign travel and access to foreign publications (Jelavich 1983b).

Brotherhood and unity: questions of identity

Against the backdrop of bloodshed provided by Yugoslav experiences during World War Two, one of Tito's aims was to forge a solid sense of Yugoslav identity under the banner of *bratstvo i jedinstvo* (brotherhood and unity); he himself was of mixed Croat and Slovene parentage. The success of this venture appears to vary temporally and geographically. Bringa (1995) notes that it was at its strongest amongst those educated in the 1950s and 1960s, once the Communist government had consolidated its authority, and also in the cities. While education was one way in which Yugoslav identity might be constructed⁷, more forceful methods could be employed to deal with potential challenges to attempts to build a cohesive state, as highlighted below in relation to events in Croatia in the early 1970s. Public life was secular in nature, while religious identity as a defining feature was expressed domestically, through the choice of images displayed at home (Bringa 1995). In addition to an overarching Yugoslav level of identity, further distinctions were recorded in censuses as *narod*, translated as 'people' or 'nation'. From 1968, when a Muslim *narod* gained official recognition, BiH was officially home to three recognised *narodi*, Muslim, Serb and Croat, as well as Yugoslavs and others. These three levels of identity are somewhat confusing, as under the secular structures of the Communist state, they are not understood in terms of religion. While this may make sense for Bosnian Serbs and Bosnian Croats, who could express attachment to

⁷ Bringa (1995) looks at other means by which shared, albeit gendered, secular and Yugoslav identities were bolstered through the bringing together of different groups in common spaces such as the maternity ward or military barracks.

2. Setting the scene

larger national republics within Yugoslavia, the use of the word Muslim outside a religious context can be confusing. Increasingly, the word Bosniak is used to describe a Bosnian of Muslim *cultural* heritage.

The conflict in Yugoslavia, described in the following two sections has often been described in terms of long-standing ethnic rivalries, stretching back across centuries and bursting forth from under the calm surface of Yugoslavia under Tito (See, for example, Cousens and Cater 2001; Major 1992). These echo the sentiments found in an overview of Europe in the 1930s:

The basic passion of most Balkan folk is nationalism. Their primitive and turbulent energies are directed to the preservation of their own political minority or country, rather than social revolution; nationalism is the pipe through which their energies are discharged.

(Gunther 1937: 403-404)

An alternative analysis is possible, treating periods of mutual toleration as more than just a superficial calm easily disturbed to show the true divided nature of Yugoslavia, and BiH; rather, periods of conflict are taken to be the exception (Fine 1996, 2002; Mahmutćehajić 2003). Somewhere between narratives of inter-ethnic tension and inter-ethnic tolerance stands a more complete account, one which accounts for other cleavages in Bosnian society, such as urban and rural differences, not focusing solely on ethnicity as the defining feature of Bosnian history. Bose (2002) may have been right to celebrate the cosmopolitan world of urban BiH, but this can be contrasted with Bringa's (1995) study of life in a mixed Muslim-Catholic village where relations may have been neighbourly but intermarriage was rare. Whether interpreted as aberration or normality, the disintegration of Yugoslavia, and with it Tito's ideal of South Slav unity, has been an ongoing process, highly visible from the late 1980s, and continuing to the present day with the outstanding question of Kosovo's future status. The following section explores this process of disintegration, and the subsequent conflict in BiH.

The break up of Yugoslavia

Mahmutćehajić argues that the demise of communism as an ideological basis for society in the late 1980s and early 1990s created a vacuum to be filled by other structuring forces, particularly ethno-national politics (Mahmutćehajić 2003: 71). Yet evidence of divisions in Yugoslavia was apparent in the 1970s, well before the country's final dissolution; Tito intervened to warn the Croatian Communist Party of the dangers of nationalism and a number of Party officials were purged. Meanwhile, the growing Albanian population in Kosovo,

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Macedonia and Montenegro raised questions about an Albanian republic within Yugoslavia, or unification of Albanians in a separate state (Jelavich 1983b). That these earlier developments did not succeed in dividing Yugoslavia is often attributed to the power, prestige and abilities of Tito, who still participated in the collective presidency until his death at the age of 87. After his death, public and private assertion of national and religious, as opposed to Yugoslav and secular, identity increased: in BiH, attendance at religious services increased throughout the 1980's across the three main faiths, suggesting increased confidence in expressing non-secular aspects of identity (Bringa 2002); Ramsbotham and Woodhouse (1996) observe 'unscrupulous or fanatical' leaders using deep-rooted ethnic 'antagonisms' to gain power; in 1982, Kosovar Albanians demanded their own republic with status equal to the six existing republics within Yugoslavia (Prunk 1997); in the late 1980's Slobodan Milošević was instrumental in organising a tour of the remains of Prince Lazar, whose representation had previously been frowned upon as a 'symbol of reactionary nationalism' (Kaplan, cited in Volkan 2002: 92); and in 1989 the Slovenian constitution was amended to reclaim key rights from central government (Prunk 1997).

The 1989 constitutional amendment passed by the Slovenian Assembly denied federal authorities the right to declare a state of emergency within Slovenia without the support of the republic's own government. The decision was prompted by the declaration of a state of emergency in Kosovo earlier that year and was a landmark moment in the break up of Yugoslavia. The right to declare a state of emergency has been strongly linked to sovereignty (Schmitt in Dyzenhaus 1997). Slovenia's decision may be interpreted as a protective measure against federal intervention, but a broader shift towards greater autonomy and sovereignty can be seen in the accompanying declaration of the right to secede from the federation. The Yugoslav Constitutional Court found the Slovenian Assembly to be acting unconstitutionally (Cohen 1992); as developments accelerated the relevance of the judgment declined. The following year, Slovenian Communists walked out of the party congress and subsequent multi-party elections in Slovenia and Croatia returned non-communist governments (Malcolm 1996). Elections in November 1990 in BiH saw the electorate largely divided by three main parties tied to ethno-national groups: the predominantly Bosniak Party of Democratic Action (SDA) took 86 of 240 seats in the Assembly (36 per cent); the Serb Democratic Party (SDS) 72 (30 per cent); and the Croatian Democratic Union (HDZ) 44 (18 per cent). From these three parties, a national government was formed including representatives of the three main ethnic groups of BiH. In spite of their inclusion in the national government, SDS

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representatives called for secession of Serb areas from BiH, to join with self declared Serb Autonomous Regions in Croatia and create a new Republic in the framework of the Yugoslav state (Malcolm 1996).

The demise of Yugoslavia was clearly signalled with the secession of Slovenia and Croatia. By the time these were given added international legitimacy by EC recognition in December 1991, armed conflict had commenced in Croatia with the bombardment of Dubrovnik and the attacks on towns and cities in Slavonia, most notably Vukovar⁸. The departure of Croatia and Slovenia, and the Macedonian declaration of independence in September 1991, left BiH in a reduced federation in which Serbia, the largest of the Yugoslav republics, was dominant. A close identification between Serbia and Montenegro, who continued a federal union up to 2006, increased the likelihood of Serbian domination, while earlier moves to reduce the constitutional privileges of the autonomous provinces of Kosovo and Vojvodina in Serbia indicated a centralising trend within the Serbian republic. In the wake of declarations of independence from three Yugoslav republics, the BiH assembly began discussions on the republic's own sovereignty, and by a majority composed mainly of HDZ and SDA delegates, voted in favour of sovereignty. In response to BiH's approaches to the EC Badinter Commission in December 1991 concerning recognition of BiH as an independent state, a separately convened Serb Assembly declared a Republic of the Serbian People of BiH, as a unit of Yugoslavia. Over the course of 1992, and particularly after the declaration of BiH's independence, this new Serb republic came to take on many institutions of a state, including Presidency, judicial structures, police functions and an interior ministry, and armed forces (see, e.g. *Prosecutor v Krajišnik* 2006)⁹.

The escalation of conflict in BiH was gradual, and did not simply commence upon the republic's declaration of independence. As stated above, the SDS had already called for secession of 'Serb' areas of BiH in the early summer of 1991. Later that summer a recording was released of a conversation between Radovan Karadžić and Slobodan Milošević in which the distribution of weapons to Bosnian Serbs was discussed. In September, Serb areas in BiH requested the intervention of the JNA (Yugoslav People's Army) to protect them. Events in

⁸ The conflict in Slovenia lasted less than two weeks.

⁹ The Krajišnik judgment places the creation of the Ministry of the Interior ahead of the declaration of independence by BiH, with the appointment of Mićo Stanišić as minister in March 1992; the Presidency received recognition by the Assembly in May; the Army of the Bosnian Serb Republic was legislated for in June; and decisions on dismissal and appointments of prosecutors and judges took place in August.

2. Setting the scene

the town and municipality of Bosanski Šamac, as explored by the ICTY in the trials of SDS politicians Blagoje and Milan Simić and others, are illustrative (*Prosecutor v Simić et al* 2003; *Prosecutor v M. Simić* 2002). The town and municipality of Bosanski Šamac lay in the Northern part of BiH, where the river Bosna feeds into the Sava, the latter forming a natural boundary with Croatia. As such the town lay audibly close to the hostilities in Croatian Slavonia. The arrival of refugees fleeing fighting in Croatia heightened the tension in the municipality. The municipality's population was predominantly Bosnian Croat and Bosnian Serb, who together made up 87 per cent of the total, neither forming an absolute majority. Although the main parties were involved in power sharing in the municipal assembly following elections in November, evidence from the ICTY chronicles ethnic polarisation with separate governing structures being set up for each community from late 1991 onwards. A series of shootings, explosions, sabotage and other violence ensued, including the mining of the Sava crossing, and a Croat owned kiosk; the torching of a holiday home; attacks on the JNA by Croatian paramilitaries, and the mining of a Serb Orthodox chapel. In March 1992, local Serb men were being trained at Serb held positions within Croatian territory, while local Croat volunteers serving in Croatia were receiving training and arms. The escalating tension needs to be put in the context of propaganda, for example suggesting that Bosnian Muslims sought the introduction of Sharia law (Sorabji 1996), or denigrating Slavic Muslims as 'genetically deformed material', a claim made by Biljana Plavšić, former director of the Academy of Natural Sciences in Sarajevo, President of Republika Srpska, and subsequently, convicted war criminal (Sells 2002). As fighting escalated following the declaration of independence, Serbian paramilitaries arrived in the area in JNA helicopters (*Simić et al* 2003). Elsewhere, an escalation of tension and violence marked the months preceding war: In Banja Luka, Serb paramilitaries blockaded the municipal building during the referendum on independence (*Krajišnik* 2006); Helsinki Watch (1992) reported that JNA troops, stationed in BiH subsequent to their withdrawal from Croatia, were accused of harassing non-Serbs in Herzegovina; fighting began in Bijeljina in late March 1992, with the town falling quickly under Serb control.

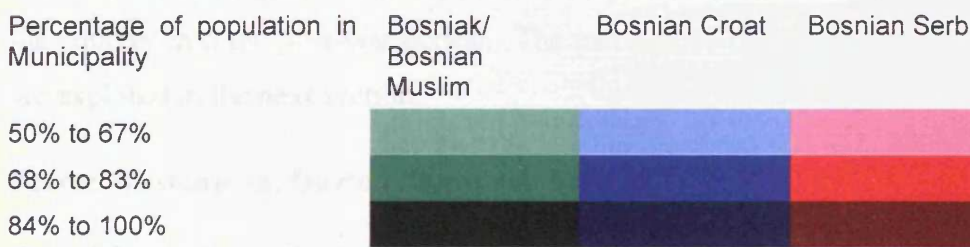
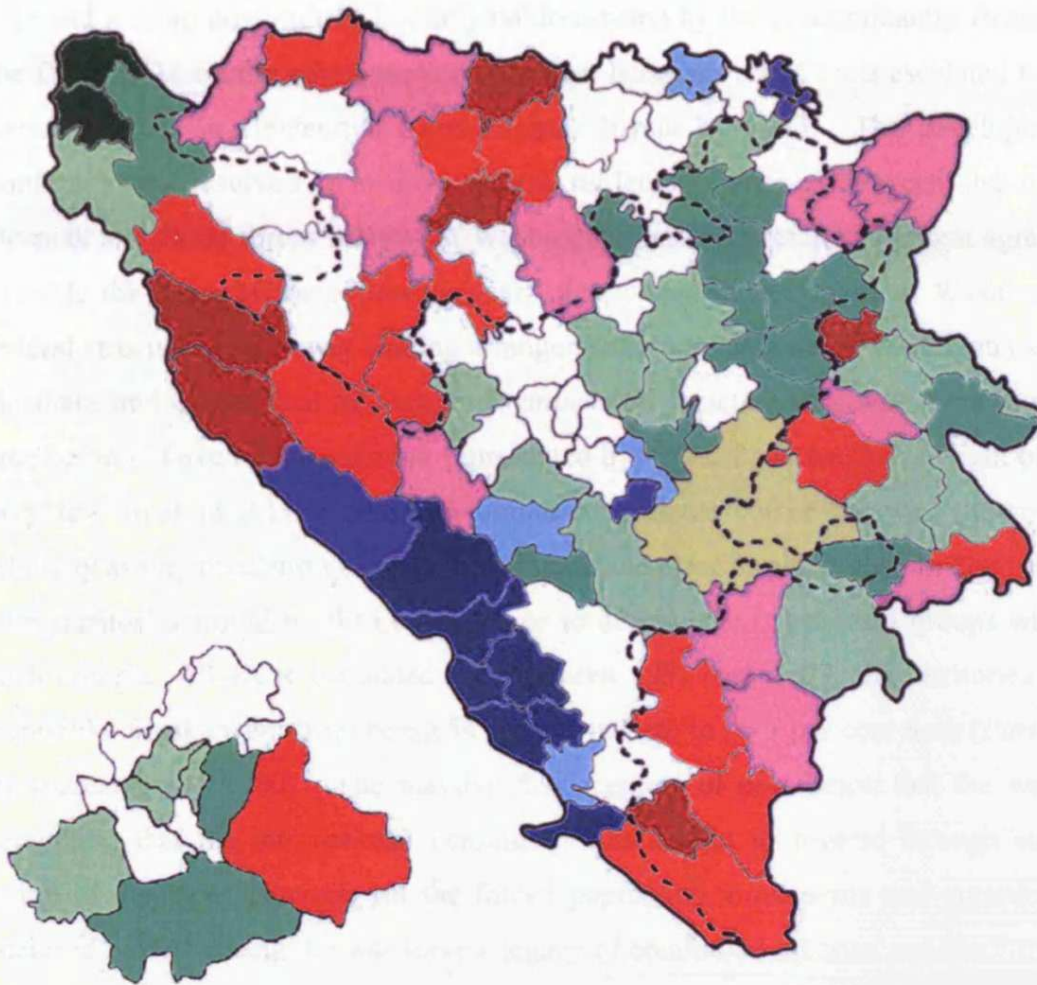
The consequences of the disintegration and the division of the population along ethnic lines were to be disastrous for BiH. While map 2.2, below, shows that a number of municipalities in BiH had sizable majorities from one or other of the country's main ethnic groups in 1991, two of the main ethnic groups, Bosnian-Serbs and Bosniaks, lived across 95 percent of the territory, and the third, Bosnian-Croats, over 70 percent (Mahmutćehajić 2003: 117). The

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white areas show the twenty-six municipalities where no single ethnic group formed an absolute majority. The remaining 83 municipalities are shown in different colours and shades to indicate which group were in the majority and the proportion of population they formed. Some areas could be described as more or less 'mono-ethnic': UNHCR analysis of census data showed 11 municipalities in which there were less than 1,000 each of the two main minority groups (UNHCR 2003a, b, c)¹⁰. Nonetheless, BiH could not easily be divided up into territories based on ethnic groups: aside from twenty-six municipalities with no absolute majority, some of those municipalities shaded in the lightest colours in map 2.2 were not far from being split evenly between two ethnic groups. Foča, on the Serbian border, was majority Bosniak but forty-five per cent of the population were Bosnian Serb. The map also shows a patchwork of majority areas. In spite of this patchwork, the fact that two of BiH's three main ethnic groups had ties to larger neighbouring republics that independence would separate them from provides some background to the wars of 1992 to 1995.

¹⁰ Cazin (less than 1,000 each of Serbs and Croats); Bosansko Grahovo, Drvar, Ljubinje, Šekovići, Srbac (less than 1,000 each of Bosniaks and Croats); Čitluk, Grude, Neum, Posušje, Široki Brijeg (less than 1,000 each of Bosniaks and Serbs)

Map 2.2 Bosnia and Herzegovina: municipalities with an ethnic majority, 1991¹



Map notes:

1. Sarajevo municipalities shown as inset, for data and sources, see appendix 2.

War in Bosnia and Herzegovina and Croatia

There is not the space to give a detailed account of the war here; rather, where relevant, later chapters will refer directly to events occurring between April 1992 and December 1995. However, two particular aspects of the conflict are worth highlighting due to their relevance to subsequent developments in politics and criminal justice in post-war Bosnia and Herzegovina: the gradual development and resolution of a three way conflict; and the ethnic

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dimensions of the conflict foreshadowed by pre-war tensions and propaganda. While the war started as a conflict between groups of Bosnian-Serbs loyal to the SDS and their allies on one side and a rump government in Sarajevo dominated by the predominantly Bosniak SDA and the Croat HDZ on the other, tensions between Bosniaks and Croats escalated to the point of armed conflict in Herzegovina and central Bosnia by 1993. The developing three-way conflict¹¹ was resolved in stages, with a settlement reached between the predominantly Bosniak and Croat forces in 1994 at Washington, and an overall settlement agreed at Dayton towards the close of the following year. The compromises made at Washington led to a federal structure with power sharing arrangements in those parts of the country dominated by Bosniaks and Croats, and fed into an asymmetrical structure of government in post-war BiH (see below). Given the patchwork represented by map 2.2, above, and in light of the fact that very few areas in BiH approached mono-ethnic status before the war, the construction of ethnicity as the foundation of geopolitical units had clear implications. In one way or another, such territories would need to be rid of, or to deprivilege, significant groups who did not fit such criteria. UNHCR estimated that between 1991 and 1997, the territories that became Republika Srpska went from being 54.3 per cent Serb to 96.7 per cent Serb (*Partial Decision: Alija Izetbegović* 2000). The massive displacement of population that the war entailed is something that the international community has sought to reverse through supporting the return of displaced persons; yet the forced population movements and mass killings which occurred in BiH during the war leave a legacy of communal mistrust and insecurity. These in turn provide a resource for those keen to perpetuate political and territorial divisions within the country into the post-war period. The institutions of government in that post-war period are explored in the next section.

Peace: Washington, Dayton, Bonn and beyond

In his novel *Death and the Dervish*, Meša Selimović described the people of BiH as the most complex in the world (Longinović 2001). If this is truly the case, post-war structures of governance have been developed to match. Between state and entity jurisdictions there are forty-one ministries. To these can be added a further tranche of ministries at the cantonal level. A brief survey of official pages of seven cantonal governments (see table 2.1) showed that they accounted for another sixty-seven ministries. Assuming that the remaining three

¹¹ A further conflict between supporters of Fikret Abdić, who declared an autonomous republic in the area around Velika Kladusa in North West Bosnia, was resolved by force in 1995.

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cantons, for whom no data could be found online, had another eight ministries each (the minimum for the seven known cantons), and adding the divisions of the government of Brčko District, this gives an estimated total number of ministries exercising executive functions in BiH of 143, around one ministry per 30,000 citizens. This section seeks to outline the structures of government in BiH, including not only the domestic governments at state, entity, district and cantonal level, but also international governing bodies, in particular the Office of the High Representative. These various bodies were either created by the Washington and Dayton accords, or have developed subsequently in response to the circumstances in BiH and among international sponsors.

Table 2.1 Ministries in Bosnia and Herzegovina¹

| Level | Government | Number of ministries |
|------------|----------------------------------|----------------------|
| State | BiH | 9 |
| Entity | FBiH | 16 |
| Entity | RS | 16 |
| District | Brčko | 11 |
| Cantonal | Una Sana | 9 |
| Cantonal | Posavina ² | 8 |
| Cantonal | Tuzla | 12 |
| Cantonal | Zenica-Doboj | 10 |
| Cantonal | Bosnian Podrinje | 8 |
| Cantonal | Central Bosnia | 8 |
| Cantonal | Herzegovina Neretva ² | 8 |
| Cantonal | West Herzegovina ² | 8 |
| Cantonal | Sarajevo | 12 |
| Cantonal | West Bosnia | 8 |
| All | Total | 143 |

Table notes

1 Sources: Vijeće Ministara undated; Vlada BD undated; Vlada BiH 2007; Vlada BPK 2006; Vlada Kantona 10 undated; Vlada RS undated; Vlada SBK 2007; Vlada SK undated; Vlada TK undated; Vlada USK 2004; Vlada Z-DK undated.

2: Conservative estimates based on the lowest known number of cantonal ministries.

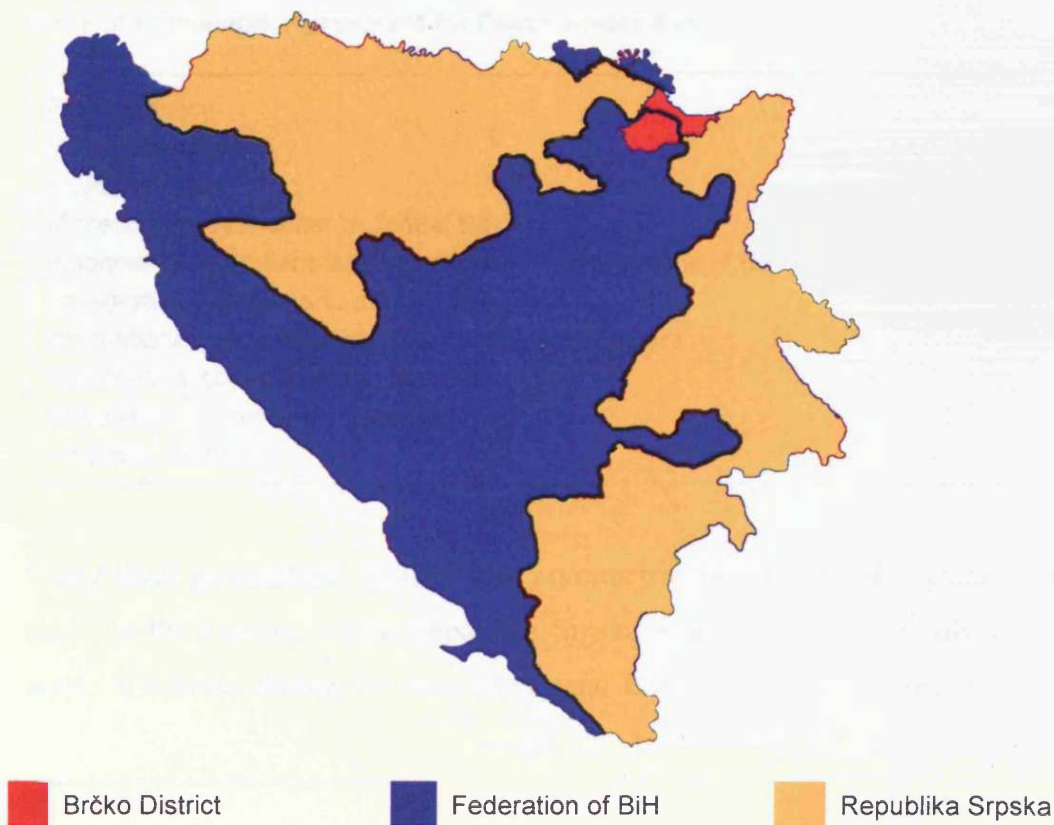
Peace agreements: the Washington and Dayton accords

Peace came to BiH in two main phases: in 1994 at Washington, a settlement was reached between the main Bosniak and Bosnian Croat parties, signed by the Prime Minister of BiH, Haris Silajdžić, Bosnian Croat representative Krešimir Zubak, and Croatian Foreign Minister

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Mate Granić. This agreement served as the foundation for the Federation of Bosnia and Herzegovina (FBiH), and allowed Bosniak, Croat and Croatian military forces to focus their efforts against the Army of Republika Srpska. This shifted the balance in the war and subsequent diplomatic negotiations against this background resulted in the Dayton Accords signed by Serbia and Croatia, as well as the government of BiH. The formula for the agreements, devised in September 1995 in Geneva “met the minimum conditions of everyone but the maximum conditions of no one” according to one negotiator (Bildt 2005). Dayton provided for an independent state in BiH, but within that framework included two largely autonomous entities, the aforementioned FBiH, in Central and Western Bosnia and Western Herzegovina, and the Republika Srpska (RS), in a crescent of territory round the Northern and Eastern parts of the country (see map 2.3 below). The Accords take the form of a General Framework Agreement for Peace (GFAP) and a series of annexes which deal with issues such as territorial division (annex 2), a constitution for BiH (annex 4), civilian implementation and the position of the High Representative (annex 10) and an international police force (annex 11). Annex 2 set up a geographical border between two entities but postponed a decision on the Brčko area, pending arbitration.

Map 2.3 Bosnia and Herzegovina: entities and Brčko District



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State and sub-state governments

The political powers attached to state-level institutions and the two geographical entities are defined in annex 4 to the GFAP, and are listed in box 2.1, below. All governmental powers and functions not explicitly mentioned in article III.3.1 (a-j) of annex 4 were reserved for entities. In effect this gave the state-level government only limited power: it remained dependent on the entities for financing on a ratio determined by the GFAP; while on paper annex 4 created state-level competence in international and inter-entity criminal law enforcement, this was not backed up with any institutional provision. It was only in 2003 that Ministries of Justice and Security were established at the state level. While Hayden may have exaggerated somewhat when he described the country as ‘essentially a customs union with a foreign ministry’ (cited in Bose 2002: 24), his comments had resonance in the years before state-level institutions were established to deal with borders and international and inter-entity criminal law enforcement. Meanwhile, sub-state governments held a wide range of powers, including the capacity to enter into “special parallel arrangements” with neighbouring states¹²; their own armies; policing. A number of these can be seen to be associated with a putative state monopoly on the legitimate use of force.

Box 2.1, Policy areas allocated to shared institutions of Bosnia and Herzegovina under the General Framework Agreement for Peace Annex 4.III

| |
|---|
| Foreign policy |
| Foreign trade policy |
| Customs policy |
| Monetary policy – under a Central Bank |
| Finances of institutions and for international obligations of BiH |
| Immigration, refugee and asylum policy and regulation |
| International and inter entity criminal law enforcement |
| International communication facilities |
| Regulation of inter-entity transport |
| Air-traffic control |

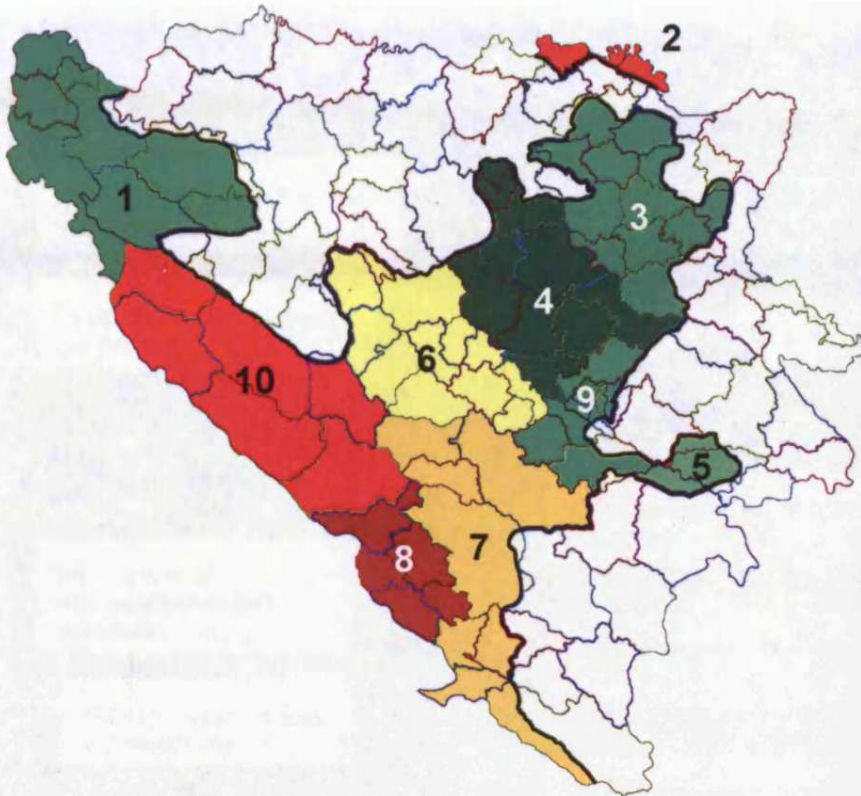
Entity-level government in BiH was asymmetric as a result of a gradual process towards peace in the country: while Republika Srpska was a unitary body, divisions between what were, or became during the war, Croat- and Bosniak-dominated areas were institutionalised

¹² That is, Croatia, and the Yugoslav federation made up of, and subsequently renamed as, Serbia and Montenegro.

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through the cantonalisation of FBiH agreed at Washington. The Federation was divided into ten Cantons, five with a Bosniak majority, three with a Croat majority and a further two in which no one group was dominant. As can be seen in map 2.4, the entity was not territorially contiguous, with the small canton of Posavina divided from the remainder of FBiH by RS. These Cantons, with their own Governors, Prime Ministers, Cabinets and Ministries retained a broad range of responsibilities, including policing and their own judicial branches. Chart 2.1, following, summarises the domestic political institutions of BiH described above. For reasons of space, Brčko District, governed separately from the two entities has been excluded from the chart. The governance structure of BiH represented in the chart can be seen as an exercise in power-sharing among three groups with a recent history of conflict and relatively high levels of mutual distrust. The difficulties of operating in such an atmosphere of mistrust were envisaged at Dayton, and account for the provision in Annex 10 of a High Representative, discussed in the following section.

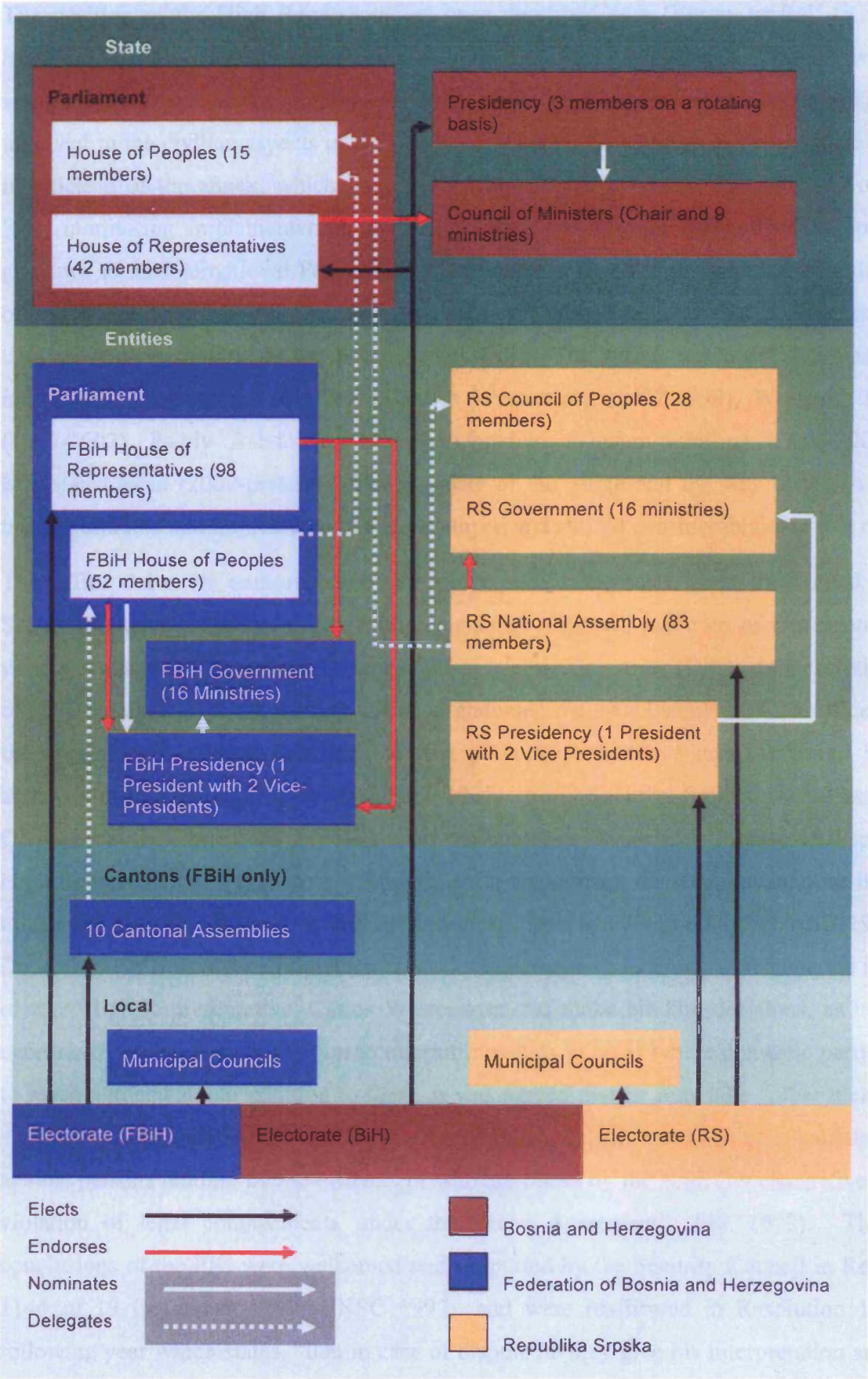
Map 2.4 Federation of Bosnia and Herzegovina: Cantons



| Number | Name | Majority |
|--------|---|----------|
| 1 | Una-Sana (Unsko-Sanski Kanton) | Bosniak |
| 2 | Posavina (Posavski Kanton) | Croat |
| 3 | Tuzla (Tuzlanski Kanton) | Bosniak |
| 4 | Zenica-Doboj (Zeničko-Dobojski Kanton) | Bosniak |
| 5 | Bosnian-Podrinje (Bosanskopodrinjski Kanton) | Bosniak |
| 6 | Central Bosnia (Srednjobosanski/Središnjebosanski Kanton) | None |
| 7 | Herzegovina-Neretva (Hercegovačko-neretvanski Kanton/Hercegovačko-neretvanska Županija) | None |
| 8 | West Herzegovina (Zapadnohercegovački Kanton) | Croat |
| 9 | Sarajevo (Kanton Sarajevo) | Bosniak |
| 10 | West Bosnia (Zapadnobosanski Kanton/Kanton 10) | Croat |

(Adapted from OHR undated)

Chart 2.1 Structures of governance in Bosnia and Herzegovina



The Office of the High Representative

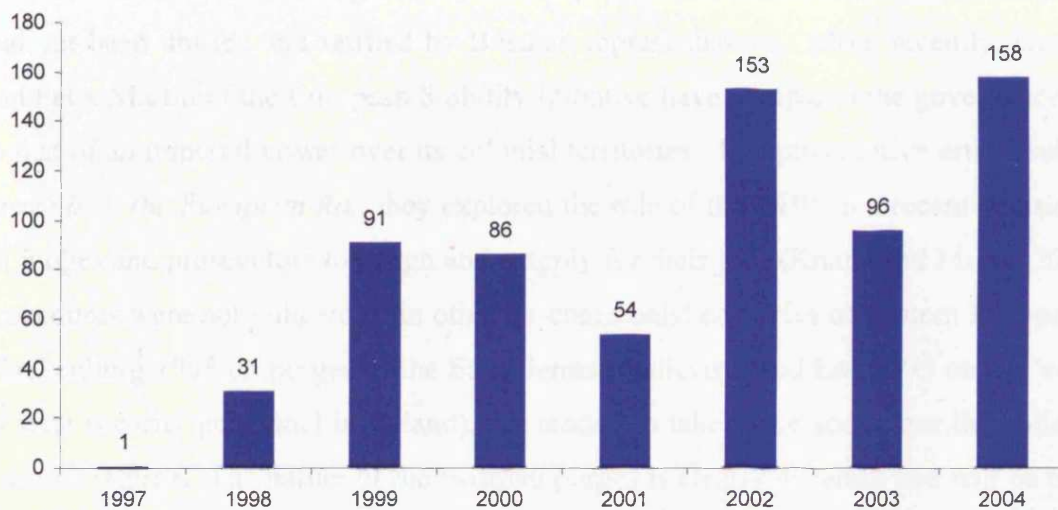
The position of the High Representative, once described as a ‘European Raj’ (Knaus and Martin 2003), was created under Annex 10 to the GFAP, to “facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement”. In addition to the mandate outlined in article 2 of the annex, which includes coordination of civilian organisations working in BiH, monitoring implementation, facilitating the resolution of difficulties and providing guidance to an International Police Task Force (IPTF), article 5 notes that the holder of the office is “the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement”. The office has been occupied by six individuals: Carl Bildt (1996-1997), Carlos Westendorp (1997-1999), Wolfgang Petritsch (1999-2002), Paddy Ashdown (2002-6), Christian Schwarz-Schilling (2006-2007), and Miroslav Lajčák (2007-present). The mandate of the office and the way in which this has been interpreted and implemented have developed and shifted considerably over this time.

The office draws its authority from the peace settlement itself, from the United Nations Security Council and from a Peace Implementation Council, made up of representatives of various states, the EU, and the Organisation of Islamic Countries (OIC). In Resolution 1031 of 15 December 1995 the Security Council endorsed the establishment of the office, agreed the appointment of Carl Bildt as the first High Representative and confirmed his final authority in interpreting Annex 10 (UNSC 1995). Early Security Council resolutions on the OHR reveal the limitations imposed upon the holder of the office. In case of disputes the High Representative was to give “his interpretation and make his recommendations including to the authorities of BiH or its entities and make them known publicly” (UNSC 1996). In December 1997, the Peace Implementation Council, meeting in Bonn, welcomed the intention of then High Representative, Carlos Westendorp, “to make binding decisions, as he judges necessary”, particularly in relation to interim measures in areas where domestic parties failed to reach agreement. In addition to these, it was agreed that he may take “other measures to ensure the implementation of the Peace Agreement... [s]uch measures may include actions against persons holding public office... or who are found by the High Representative to be in violation of legal commitments under the Peace Agreement” (PIC 1997). The Bonn conclusions of the PIC were welcomed and supported by the Security Council in Resolution 1144 of 19 December 1997 (UNSC 1997), and were reaffirmed in Resolution 1184 the following year which states, “that in case of dispute he may give his interpretation and make

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recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn” (UNSC 1998a). This series of decisions gave rise to what have become known as the ‘Bonn Powers’. Figure 2.1, based on an analysis of lists of decisions released through OHR, shows the number of decisions taken each year from the introduction of the powers in 1997 to 2004.

Figure 2.1 OHR decisions, 1997 - 2004



No particular pattern is discernable from the chart as such. It shows that the High Representatives who have had the opportunity to make use of the Bonn powers have also felt they have had cause to. In the peak years of 2002 and 2004, decisions were imposed at a rate of around three per week. Breaking the period up in terms of periods of office, we see that in the 19 months after having the Bonn powers approved, Carlos Westendorp implemented 23 decisions, roughly 1.2 per month; his successor, Wolfgang Petritsch, in office for 34 months, used the powers on 114 occasions, 3.4 times per month, while Paddy Ashdown, during the first 32 months of his tenure (to the end of 2004), utilised his powers 279 times, issuing an average of 8.7 decisions per month. A more detailed exploration of the specific nature of decisions would be more instructive, revealing, for example, that in 2004, seventy-four decisions (47 per cent) related to the removal or suspension of individuals from office. Nearly sixty of these occurred within two days in late June and early July, targeting individuals suspected of providing support to ICTY indictees Radovan Karadžić and Ratko Mladić (for example, *decisions* of 30 June and 1 July 2004). A further twelve decisions related to the High Representative’s role in making various appointments, including seven international judges and prosecutors to the state-level Court of BiH (for example, *decision* of

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7 May 2004). Forty decisions were passed which enacted legislation, or amended existing legislation, including constitutions at entity and cantonal level (*decisions* of 28 January 2004), criminal codes at state, entity and district level (*decisions* of 26 November 2004), and tax law (*decision* of 25 October 2004).

The concentration of power in one body which does not answer to the people of BiH has been subject to criticism. Chandler described the country as “a parody of democratisation” (Chandler 2000: 204), noting that by 2000 no laws put before the Parliamentary Assembly had yet been drafted and ratified by Bosnian representatives. More recently, Gerald Knaus and Felix Martin of the European Stability Initiative have compared the governance of Bosnia to that of an imperial power over its colonial territories. In a provocative article subtitled *The Travails of the European Raj*, they explored the role of the OHR in a recent decision to force all judges and prosecutors to resign and reapply for their jobs (Knaus and Martin 2003). Such procedures were not unheard of in other ex-communist countries of Eastern Europe (see, e.g., Blankenburg 1995 on purges of the East German judiciary; and Łos 1995 on the 'verification' of state security personnel in Poland), but tended to take place soon after the collapse of the socialist regime. The nature of the Bosnian purges is clearly different and will be explored in more detail in chapter 9.

The Office of the High Representative has served not only as a repository for executive powers, and mediator between parties to the Dayton agreement. As highlighted above, the role of the Office included a coordinating function in relation to agencies and organizations taking part in implementing civilian aspects of the settlement. Among other agencies, this has included the UN International Police Task Force and EU Police Mission, the Organisation for Security and Cooperation in Europe, and the UN Judicial Systems Assessment Programme, and various other bodies drawing their mandate from the High Representative, including the Independent Judicial Commission, Police Restructuring Commission, and Defence Reform Commission, all of which represent central or mainstream strands of international assistance to and intervention in BiH. Outside these mainstream organisations, there are a number of bodies who work in relation to, or in coordination with, the Office of the High Representative. International development agencies working on behalf of individual governments from Canada, Sweden, the UK and US, and the Council of Europe, have played an important role in post war criminal justice policy development in BiH. Given the dominant role of OHR in BiH, it is hardly surprising that such organisations work in ways which account for OHR's

presence, but they need to be understood separately from mainstream international organisations in BiH, in terms of their own mandates, purposes and objectives.

Post-war politics in BiH

The post-war period in BiH has seen the continued presence of strong ethno-national parties in domestic politics and the continued significance of ethnic identity in voting patterns. Bose (2002) identified the Social Democratic Party (SDP) as the only truly 'cross-national' party: it included Bosniaks, Croats and Serbs in its leadership, and successfully ran a Serb candidate for the mayor of the predominantly Bosniak Centar municipality in Sarajevo. In spite of this, it drew its support mainly from Bosniaks. In 2006 the party managed to secure one of the three positions on the rotating Presidency, but in elections to the state-level House of Representatives all five SDP members were elected by the FBiH electorate and polled less than three per cent of all votes for the RSNA (CIK [BiH] 2006a, b, m, n). Within FBiH, the party's support can be seen to be drawn from the five predominantly Bosniak Cantons (1, Una Sana; 3, Tuzla; 4, Zenica-Doboj; 5, Bosnian Podrinje; 9, Sarajevo): in elections to the remaining five Cantonal Assemblies, the SDP failed to gain more than ten per cent of the vote (CIK [BiH] 2006c-1). For much of the post-war period, those parties who shared power after the first multi-party elections in 1990 have continued to be a significant feature of the political landscape, enjoying periods of office at state and entity levels. However, there has been a recent weakening of the positions of HDZ, SDA and SDS, the former two losing power to off-shoot parties, Party for Bosnia and Herzegovina (SBiH) and HDZ 1990. The Presidency resulting from the 2006 elections was made up of the Haris Silajdžić (SBiH), Zeljko Komsić (SDP) and Nejbojsa Radmanović of the Union of Independent Social Democrats (SNSD), excluding the formerly dominant parties from one level of state-wide power. Table 2.2, below, shows the decline and relative stabilisation of the power of HDZ, SDA and SDS within the state-level legislature since the end of the war.

Table 2.2 HDZ, SDA and SDS seats in the state-level House of Representatives

| | 1996 ¹ | 1998 ² | 2000 ³ | 2002 ⁴ | 2006 ⁵ |
|----------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| HDZ | 8 | 6 | 5 | 4 | 6 ⁶ |
| SDA | 19 | 17 ⁷ | 8 | 10 | 9 |
| SDS | 8 | 4 | 6 | 5 | 3 |
| Total (of 42) | 36 | 27 | 19 | 19 | 18 |

Table notes

1. (Center on Democratic Performance undated-a)
2. (Center on Democratic Performance undated-b)
3. (Center on Democratic Performance undated-c)
4. (CIK [BiH] 2002a, b, c, d, e, f, g, h)
5. (CIK [BiH] 2006m, n)
6. Includes the HDZ-HNZ coalition (Hrvatska Koalicija) and the HDZ 1990 multi-party list, Hrvatsko Zajedništvo, both with three seats each. The formal division of HDZ occurred in April 2006.
7. SDA stood as the dominant partner in the KCD Coalition for a Unified and Democratic BiH, alongside SBiH, Liberali and the Citizens' Democratic Party, GDS.

Concluding remarks

This chapter has sought to sketch in some of the historical background to contemporary BiH, and to introduce the systems of government that developed from the 1994 and 1995 peace settlements. Later chapters on specific challenges and policy developments in relation to policing (chapters 6 and 7), courts (chapters 8 and 9) and corrections (chapters 10 and 11) will refer back to the complex and fragmented structures of governance in BiH and illustrate their importance to particular challenges of the post-war transitions in relation to the criminal justice system. The structures themselves need to be understood in light of the nature of the conflict and the often contested history of BiH before the recent war. The following chapters will move on from this historical background to give an account of the problems facing police, courts and correctional services in BiH at the end of the conflict, and the way in which international organisations have worked alongside, through, or in spite of, domestic institutions to resolve these between the end of the war and 2005. Clearly the work of such agencies represents an ongoing process and there is a continuous unfolding of new developments in BiH, the result of domestic and international political processes. Galbraith (2002), for example, suggests that the weakening of Republika Srpska, subsequent to political changes in Serbia and Montenegro, makes it more of a possibility to build up the common institutions of BiH. Within the context of the current research project, a line has to be drawn

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at which to stop, to analyse what has happened and to set it down; this line coincides more or less with the close of the fieldwork phase of the study in July 2005, nearly ten years into BiH's post-war existence.

3. The research programme: decisions, rationale and methods

Bearing in mind the core research questions outlined in chapter one, revisited and revised throughout the research process, this chapter seeks to outline the processes of data generation, collection and analysis undertaken as part of this doctoral research programme. As befits a venture into unknown territory these processes were, at the outset, relatively unpredictable. As more information is gathered, initial research questions can be shown to be naïve, unrealistic or even irrelevant. Such unpredictability, alongside the somewhat fluid nature of research questions, calls for a flexible approach to methods of generating, collecting and analysing data and also an open-minded approach to allowing early findings to guide the subsequent direction of research. In addition to this, practical limitations are prone to make themselves felt, restricting what might realistically be undertaken: time, money and linguistic ability are all factors that have had to be taken account in the current project. This chapter begins with a discussion of two key decisions that reflect the unpredictability and limitations experienced in the current research project. Following this, there is an exposition of the primary strategies of data collection and analysis, divided up into three sections: gathering documentary evidence; conducting interviews; and analysing ‘texts’. The last of these three will explore how documentary analysis and interviews complement each other. A final section reflects on ethical and political issues encountered in the course of the research.

Research decisions: shaping the questions

In the early stages of the project, two key decisions were taken: firstly, before the research project had begun in earnest, it was decided to restrict the study to Bosnia and Herzegovina (BiH). Secondly, the project expanded from its focus on sentencing and imprisonment to incorporate other areas of criminal justice reform as an aspect of state-building. These decisions are outlined in greater depth in the following sections.

Key decision 1: choice of site

The initial research scheme proposed a study of developments in penalty in post-Yugoslav Slovenia and BiH. There were numerous reasons why this might be attractive: both countries shared common historical experience as republics of the Socialist Federal Republic of Yugoslavia (SFRY), and prior to that as part of the previous incarnation of the Yugoslav state and Austro-Hungarian Empire. Against this surface of similar experience, the two countries differed in terms of economic development, ethnic homogeneity and experiences of secession

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from SFRY. Slovenia, one of the most economically advanced of the Yugoslav republics, and one of the most ethnically homogenous (Statistical Office of the Republic of Slovenia undated), left SFRY with a short conflict between local territorial defence units and the Yugoslav People's Army (JNA). In 2004, the country was part of the largest round of EU expansion to date. BiH, one of SFRY's poorer republics, and one of the most ethnically heterogeneous (see breakdown in appendix 2), entered a process of disintegration alongside its secession from SFRY. This culminated in a three and a half year war, destroying lives, homes, factories and infrastructure, and leaving the country divided along ethnic lines. The peace settlement left BiH heavily dependent on international donors and open to international interventions to rebuild the war-scarred country. The two countries seemed to offer the opportunity for a small scale comparison of the factors shaping penal policy, setting history and institutional path-dependency against economic factors, cultural differences, and susceptibility to international influences.

Before the project commenced in October 2003, it became apparent that a study of the two countries was not practical. Firstly, while Slovenian and the domestic language(s) of BiH¹ may be members of the same South Slavic language family, and speakers of those languages may be able to communicate with one another with only minor difficulties, to learn two new languages while carrying out a three year programme of training and research was unrealistic. Secondly, researching in two countries would have practical and financial implications. The research eventually involved a period of three to four months in Sarajevo learning the domestic language(s) and a further period the following year undertaking the bulk of interviews. The costs involved in arranging travel, accommodation and language tuition were funded, in part, by an award from the University of Cardiff and a further award from the Cardiff Caledonian Society. Finally, the complexity of post-war BiH, apparent from materials collected in the earliest stages of the research, suggested that the country merited more attention than would be possible in a study divided between two countries. Bearing this

¹ Formerly known as Serbo-Croat, and written and spoken in different forms throughout the former Yugoslavia, primarily in BiH, Croatia, Montenegro, and Serbia, those different forms are now distinguished more definitively. Three forms are official languages of BiH, and various official websites have versions published in Bosnian (Bosanski), Croatian (Hrvatski) and Serbian (Srpski/Српски), the latter of which is often written in Cyrillic script, which, alongside Latin is recognised as an official script in BiH. In learning the language(s), the author drew on general Serbo-Croat, Serbian and Croatian teaching materials, material written in Latin and Cyrillic scripts, and material written by authors from, or based in, different parts of the former Yugoslavia, making it difficult to say which 'language' was being learned. Rather than risk ill-informed judgment in this area, material produced in BiH for a domestic audience will be described as being in 'the language(s) of BiH' or the 'domestic language(s)'.

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in mind, the decision was taken to concentrate on BiH, dropping Slovenia as a study site, but retaining a commitment to using secondary sources to place events in BiH in context against a wider background of post-communist, post-authoritarian, and post-conflict states.

Key decision 2: from penalty to criminal justice reform and state-building

The second key decision was taken firmly in late 2004, slightly more than a year into the project, but reflected a change in emphasis signalled as early as February 2004. At that point a friend who had returned to Sarajevo to work in criminal justice, suggested that prisons were “not the issue”, and that little was happening in the field (personal communication, 2 February 2004). The chance that prison reform represented a lacuna in international interventions in BiH was interesting, but if true it would provide an insubstantial foundation for a thesis. With hindsight, there would have been more than enough material to conduct an exploration of international intervention in penal reform in BiH, as will be seen in chapters 10 and 11; yet decisions had to be taken on the basis of information available at the time. While the lack of movement on prison issues made it unlikely that prison reform alone could support a thesis, the development of penalty in a post-authoritarian and post-conflict society remains an important aim of the project. To support this element, it was decided to use the first visit to BiH, primarily focused on language tuition, to make contact and arrange interviews with individuals involved in reforms of criminal codes and procedures as well as prisons, with a view to producing a study that would locate prison reform in BiH in a broader context of criminal justice reform. It became clear during this stage that reform was taking place in this broader context and that many international agencies acted in more than one sector of the criminal justice system. Thus in the period between returning from Sarajevo in October 2004 and the second visit in 2005, documentary evidence was collected on police reform to complement that already gathered on courts and prisons. The second and third round of interviews, conducted in Edinburgh and Sarajevo, covered a range of individuals involved in policing, courts and corrections.

Assessing the impact of key decisions on the study

Bearing in mind that the study initially started out with an explicit comparative element the decision not to pursue research in Slovenia threatened the project’s comparative claims. Sartori has been particularly critical of claims of comparative study based solely on studying one country outside one’s own domestic context, as seen in his comments on American political science:

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...a scholar who studies only American presidents is an Americanist, whereas a scholar who studies only French presidents is a comparativist. Do not ask me how this makes sense – it does not.

(Cited in Nissen 1998: 401)

In spite of this seemingly damning indictment, single country studies still make a contribution to the comparative literature; Nissen (1998) cites a study of two comparative journals in which over sixty per cent of country studies deal with only one country. Charles Lees (2006) has recently noted that the single-country study has merits, particularly where findings in one country are understood in the context of existing comparative data. To that extent, the later substantive chapters on the three sectors of the criminal justice system (6 to 11) in BiH are preceded by a chapter exploring criminal justice in other examples of states undergoing transitions from states of conflict, authoritarian forms of government and command economies (chapter 4). Aside from this, there are other important roles that can be played by single-country studies, if we take them as examples of the case study strategy. Lijphart (1971: 691) has observed a close connection between case studies and comparative strategies, and sees a real advantage in the former, particularly in studies which face restrictions on the resources available for conducting research. He presents a list of six ideal-types of case study, four of which (hypothesis generating, theory-confirming, theory-infirming, and deviant) are all geared specifically towards the construction and refinement of theory. Recognising these as ideal types, Lijphart notes they need not be mutually exclusive. Locating the current work in terms of Lijphart's typology, it might at first sight appear to fall principally into his 'atheoretical' category in that much of the work is exploratory, the processes being described being relatively recent and as yet, relatively unexplored in the academic literature. As such, the work can seek to contribute to a broader comparative context by gathering and analysing data and providing some foundation for a cumulative process. Yet clearly this justification is dependent on subsequent work which may depend on a range of external conditions. Nonetheless, findings are interpreted in relation to existing theory on policing, policy transfer and penalty, meriting a claim to inclusion in a theory confirming or infirming strand of single-country study. Moreover, Bennett and Elman's (2006) review of developments in the case study might help provide a more robust justification for this particular single country study. They locate the case study research strategy firmly within qualitative methodological approaches and highlight an ontology which perceives a complex social world characterised by "path-dependence, tipping points, interaction effects, strategic interaction, two directional causality or feedback loops, and equifinality... or multifinality" (2006: 457). While this ontology need not exclude the use of

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particular quantitative methods, especially those that seek to account for multiple variables in constructing notions of causality, Bennett and Elman (2006) argue that ‘within-case’ analysis is particularly suited to looking in detail at processes and the interaction of causes, particularly in relation to such temporal phenomenon as path dependence. Taking quantitative ontologies a stage further, the opportunities afforded in the case study might problematise notions of causality by highlighting the ‘rich ambiguity’ that Flyvbjerg (2006: 237) sees as “the irreducible quality of good case narratives”.

So far, the emphasis has been on addressing the impact of the first key decision, the focus on BiH, on the study; the second decision, the expansion of the study to encompass policing, courts and prisons, holds the potential for resuscitating comparative aspirations *within* the framework of BiH. Each sector of the criminal justice process can be taken in its own right as a ‘case’, and the ways in which international interventions manifest themselves, in terms of aims, means, and timetabling might be compared to consider what role each sector is seen to play in a broader ‘state-building’ enterprise. Moreover within each sector, as far as it is possible based on available resources, different organisations within the international community can be compared and contrasted again in terms of the aims behind their interventions in criminal justice, the means they employ, and the timing of such interventions. Thus if BiH is taken as a case of a transitional state, as discussed in chapter 4, it is possible to explore ‘sub-cases’ with sectors or organisations as units of analysis.

At the same time, there may be an argument for approaching the three sectors together not as separate and independent entities, but as a system. The final concluding chapter will seek to build on the six preceding sector-based chapters to see what benefits this may have, but the understanding of criminal justice bodies as constituting some kind of system is by no means new. A number of authors have tended to deal with the penal law, courts passing sentences, and the penal institutions executing these as one unit of study, although it has been analysed alternatively as an indicator of social cohesion and social conflict (Durkheim 1938, 1961, 1984; Pashukanis 1978). This begs a set of questions: to what extent is it meaningful to speak of a system? What defines it as such? And what elements should be considered constitutive of a putative criminal justice system? At its most basic, we can understand system as ‘an organised or connected group of objects’, ‘things’ that are in some way ‘connected, associated, or interdependent, so as to form a complex unity’ (OED). Yet this is too vague to the point of defying meaningful application, while it begs further questions: how are constituent parts connected? How loosely might they be associated? In a complex social

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world, how does one separate out the interdependencies that define a coherent system? McAra (2005) turns to systems theory to construct a working definition of system, enabling her to combine macro-level social and economic change with micro-level political, cultural and institutional factors in accounting for penal change in one local context. She distils a range of theories into three key elements defining system: boundary mechanisms, whereby a system is delimited through territorial demarcation or frameworks of normative or legal rules; internal linkages, including shared vocabularies, goals, and functions, and channels for communication; and a means of reproducing themselves in shifting contexts, either by adapting to those contexts, or seeking to interpret them in ways that are consistent with other aspects of the existing system. Adapting McAra's analysis of system, while retaining a notion of interdependence, there may be strong argument for taking the core criminal justice institutions of police, criminal courts, and prisons as the heart of a system, extending to include appropriate ministries, in the case of BiH, of security (state-level) or the interior (entity and canton) and of justice (state, entity and canton).

Gathering documentary evidence

In order to explain the role of criminal justice reform in state-building and the impact of state-building projects on criminal justice reform, it is necessary to lay a descriptive foundation. The documentary output of international governmental and non-governmental organisations in BiH is vast. Documents, many publicly available, describe organisational missions and decisions taken, and evaluate specific initiatives. These can be used as a secondary source in constructing a narrative of the processes of reform taking place. As primary sources, institutional documents illustrate the ways in which particular institutions interpret and represent the world in which they act. An archive of decisions taken, plans implemented and political events is not a given; rather in any project utilising documentary analysis a strategy needs to be developed to guide what is gathered, from whom and how (Titscher et al. 2000). Documents and texts come in multiple forms (Watson 1997) although the current project has drawn on a relatively conventional set of documents: laws, policy documents, reports, press-releases, court judgments, news media, interviews and public information broadcasts.

In order to collate an archive from which a narrative could be constructed and analysed, several independent points of entry were made into a large field of documents. The Office of the High Representative (OHR), as a central actor in a number of policy areas in BiH, was the most obvious of these. Details of decisions passing laws and removing officials were

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collated; a media round-up was used with other sources to build a 'chronicle' of relevant events. Other agencies serving as useful starting points include the Council of Europe, Amnesty International and the international tribunal at The Hague. From these starting points it was possible to use a technique common in interviewing and other interpersonal data collection processes: snowballing. In interviewing, one subject can act as a source of contact with further potential interviewees (Foster 1996). The same is possible with text thanks to relations of dependence (Foucault 2000a) and intertextuality. This intertextuality is increasingly visible through web documents where hyperlinks underline and open up connections to further documents. For example, the High Representative's decisions are uniformly preceded by a series of references to the documents from which the HR draws a mandate, and therefore legitimacy. The decision of Wolfgang Petritsch to establish a state-level court in BiH refers explicitly to the following twelve documents, with those underlined being available through internal hyperlinks on the OHR website:

General Framework Agreement for Peace; the Constitution of BiH; Peace Implementation Council conclusions announced in Bonn in 1997 and declarations made in Madrid in 1998 and Brussels in 2000; the Draft Law on the State Court of October 2000; a draft text prepared by the Venice Commission in June 2000; the European Convention on Human Rights; the Law Establishing the State Court; the Official Gazettes of BiH, FBiH and RS.

(Decision Establishing the BiH State Court, 12 November 2000)

Table 3.1, below, gives illustrative examples of organisations whose websites were consulted, or who were contacted directly, and some examples of the types of texts used in analysis. Documents were also elicited from interview contacts, showing how research strategies drawing on interviews and documents can be complimentary; such documents included policy papers and meeting reports and are also included in table 3.1. Documents do not just link to other documents, but link to people, and were used to build up a list of potential subjects for interviews and encounters discussed in the following section.

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Table 3.1 Examples of organisations and documents

| Organisation(s) | Nature of Organisation | Examples of documents accessed |
|---|---|--|
| Amnesty International | Human rights INGO | Annual and thematic reports; press releases |
| Constitutional Court of Bosnia and Herzegovina | State institution | Court decisions |
| Council of Europe | International governmental organisation | Steering group reports |
| Court of Bosnia and Herzegovina | Domestic court | Court judgments |
| European Union Police Mission | International agency | Staffing lists; web-pages |
| Independent Judicial Commission | Internationally mandated agency | Final report |
| Office of the High Representative | Lead international agency | Decisions and laws; lists of decisions; reports; news summaries; project documents |
| Office of the Registrar for War Crimes and Organised Crime at the State Court | Hybrid state/international body | Policy documents |
| South East Times/Balkan Times | News provider (web-based) | Daily news reports |
| State, Entities and Cantons of Bosnia and Herzegovina | Domestic governments | Constitutions; Criminal Codes; and Criminal Procedural Codes |
| United Nations International Criminal Tribunal for former-Yugoslavia | International court | Judgments; Transcripts |
| United Nations Judicial Systems Assessment Programme | Internationally mandated agency | Area and thematic reports |
| United Nations Security Council | International governmental agency | Resolutions; Reports of the Secretary General |

Meetings and interviews

Over the course of the research programme, further data was generated through face-to-face contact with various observers of, or participants in, criminal justice reform in BiH as encounters. There was no typical encounter – they took place in various locations, private offices, meeting rooms, a police station, court rooms, a detention facility, embassies and street-side cafes. The level of formality and pre-determined structure varied, depending on the respondent, and the location and nature of the encounter. Generally discussions were conducted more or less entirely in English, although one was carried out with the use of an interpreter and some preliminary arrangements were conducted in the domestic language(s) where necessary and possible. A list of all those organisations and individuals that would be contacted to arrange meetings was made up and attempts were made to get in touch with all of

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these. Essentially, the strategy adopted was to identify actors in criminal justice reform in BiH through websites and personal recommendations. Where this was not possible, e-mails were directed to general addresses². At each subsequent meeting, the opportunity was taken to ask who else might usefully be approached. In total, meetings or interviews were conducted with 35 individuals representing 19 organisations; they include individuals from a range of levels working in organisations concerned with different aspects of criminal justice reform in BiH. Some were concerned specifically with one sector (for example the Independent Judicial Commission with courts, or the EU Police Mission with policing); others such as the Office of the High Representative, the Council of Europe, and the Department for International Development (DFID) were involved across two or more sectors. These individuals are listed in full in appendix 3. A further 17 approaches were made without success, and these are discussed below.

Successful meetings and interviews

Meetings and interviews took place in three phases: in Sarajevo and Banja Luka in autumn 2004; in Scotland in late spring 2005; and in Sarajevo throughout the summer of 2005, including four return interviews with informants from phase one. The meetings and interviews are summarised in table A3.1 in appendix 3. Respondents came from a range of countries including BiH (9), the UK (8), the US (5), the Republic of Ireland (3), the Netherlands (2), Norway (2) and one each from Belgium, Canada, Croatia, Greece, Italy and New Zealand. These informants worked across a range of domestic, hybrid and international organisations. As stated in the section on gathering documentary evidence, documents and websites were used to identify relevant individuals and organisations which were subsequently approached. Informants were also asked if they could recommend other relevant individuals with whom contact could be made. Unsuccessful approaches will be discussed in a subsequent section. Interviews and meetings were semi-structured, based on tailored prompts written in advance (see appendix 4 for an example). Verbatim recordings were made of only four interviews; these gave mixed results in terms of responsiveness and dynamics and so recording was abandoned. One interviewee, when interviewed for a second time in the second phase of Sarajevo interviews, was clearly unconcerned with the use of recording technology, but the majority of other respondents who were recorded seemed

² E-mails to individuals working in domestic organisations were sent in the domestic language(s) accompanied by an English language version.

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somewhat surprised by the request, discussions were subsequently slower to pick up, and recording had to be paused on numerous occasions while more sensitive matters were discussed. As such, most interviews were recorded in note form and written up at the earliest possible opportunity. One result of this may be a paucity of direct quotations in the findings chapters (6-11); rather their points are paraphrased.

Conducting elite interviews

There are multiple definitions of what constitutes elite interviewing in academic literature. Seldon describes “individuals selected because of who they are or what they did” (1996: 353); likewise Kezar (2003) notes that the interviewee is sought on the basis of their participation in a particular situation. Lilleker (2003) goes further in specifying what that situation might be, locating, for his purposes, elites as those with close proximity to power or policy making; the proximity need not indicate a dominant position in the exercise of power, Webb, cited in Seldon (1996), sees subordinates as a rich source of fact; the ‘privileged position’ (Richards 1996) and participation in some particular exercise of power, whether as witness or central actor, gives this elite privileged knowledge and perspective on the events in which they have been involved. Thus the interviews conducted in BiH and Scotland fall in to the category of elite interviews as established and defined in the academic literature and as commonly utilised in academic, biographical and journalistic writing. Seldon (1996), confronting the historian’s preference for the contemporaneous written record over the interview, argues that they have a number of benefits which mean that they can complement documents, or where documents are routinely withheld for a period of time, can act as a stopgap. In addition they can assist in understanding documents, and can even act as a source of additional documentation as some interviewees produce documents to illustrate or back up their statements (Seldon 1996). This was true of a number of respondents in the current project, who referred to, and sometimes handed over, additional documents in the form of reports, presentations, and photographs. Moreover, the elite interview is not simply a way to give a deeper understanding of some power event, rather it gives access to the “perceptions, beliefs and ideologies” (Richards 1996) of the interviewee, and can help in understanding certain actions and outcomes. Yet while recognising the benefit of elite interviews, the authors cited above also highlight challenges in conducting and analysing such interviews.

The challenges identified can broadly be categorised into four groups: the reliability of elite informants, particularly in light of concerns regarding partisanship or memory; achieving a

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representative sample; achieving one's objectives in the interview setting; and practical implications of interviewing people in positions that create a range of demands on their time. The issue of memory is brought up particularly in relation to matters arising in the context of political biographies (Seldon 1996) where the events in question are long since past; this was not the case in the current project, but nonetheless, recent memories are not exempt from distortion, either by still vivid impressions and feelings regarding the events and from active attempts to present oneself or organisation in a favourable manner. The challenge of achieving a representative sample is touched upon by Kezar (2003), who proposes that elite interviews are not conducted in order to create generalisations; nonetheless, where one seeks to build an adequate understanding of a particular event or set of events, it stands to reason that one would still wish to speak to a range of participants in those events. Seldon (1996) and Lilleker (2003) both note the value of systematically constructing a list of target interviewees, although it is unlikely that all will be responsive to requests for a meeting; this was the case in the current project and the unsuccessful approaches are discussed below. The issue of meeting one's interview objectives when dealing with elite individuals is a challenge that can be met by being upfront about the purpose of the interview in pre-meeting communications (Lilleker 2003), and by reference in the interview situation to pre-prepared prompts and questions; nonetheless, the literature concedes that a degree of flexibility is desirable, particularly in eliciting a respondent's personal perceptions (Kezar 2003; Lilleker 2003; Seldon 1996). Likewise the demands of interviewing those operating under time pressures and having to respond to emerging situations demands a degree of flexibility; some respondents may, from the outset, allow a limited amount of time, creating the need to prioritise central questions; others may be prone to interruptions, ranging from brief telephone calls to longer absences from the interview setting and even the abandonment and rescheduling of the interview. All of these were experienced in the project, yet were not necessarily damaging: the telephone calls created space to review and expand on notes in situ; absences created chances to speak to others in the immediate environment; and in the case of some contacts, they were willing to talk on the way to other meetings and even in meetings, allowing further insight into the contexts in which they operated. In light of the problems associated with elite interviewing, Lilleker (2003) argues that elite interviews alone do not provide a firm basis for a methodology. In the current project, different methods of data collection and generation have been used so that reliance is not placed entirely upon one source. Before going on to discuss how diverse sources were brought together in analytical

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stages, those potential interviews that never took place are discussed, illustrating some of the problems highlighted in the discussion of elite interviews.

Non-response and failed arrangements

Failed attempts to secure interviews are grouped into classes in table 3.2, below. Failures to establish adequate levels of contact can be attributed to various reasons; indicative cases are discussed in brief here. In a number of cases it can be presumed that the target interviewees did not necessarily have the time to respond, or to set aside for a meeting. In the case of the one political party which responded positively to an initial e-mail, a follow up visit to the party offices in Sarajevo indicated that the hard-pressed party organisation had few resources they could dedicate to research students' queries. Likewise in a country of roughly four million inhabitants and around 140 ministries, each ministry is limited in terms of staffing and budget, yet all face a major task in rebuilding systems damaged by three and a half years of war. Under such circumstances, it is not surprising that the state-level Ministry was the only Ministry which responded positively to meeting requests.

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Table 3.2 Examples of target interviewees not successfully contacted

| Group | Examples |
|---|--|
| Known individuals involved in criminal justice reform | The High Representative; a lecturer in law at Sarajevo University; a journalist on a BiH daily newspaper; two prosecutors involved in drafting the BiH Criminal Procedural Code. |
| Representatives of Ministries of Justice | Entity level Assistant Ministers responsible for the execution of criminal sanctions. |
| Political Parties | Seven political parties based in Banja Luka (PDP, SDS, SNSD), Mostar (HDZ) and Sarajevo (SBiH, SDA, SDP). |
| Miscellaneous others | President of an FBiH Municipal Court, Swedish International Development Agency, Helsinki Committee. |

Dupont (2006: 88) notes that academics rarely gain access to those occupying “strategic [loci] of control”. In the cases of the President of Žepče Municipal Court and the High Representative gatekeepers stood between researcher and potential informant. Through a contact at DFID a visit was arranged, but was subsequently cancelled by the Court President. In the case of the High Representative, contact was mediated through the Press Office, and it was never entirely clear whether requests for an interview were taken seriously. The initial response to an interview request was redirection to an online request facility and the advice that, unless one represented a major news organisation, the chance of an interview was minimal. Application through the online channel resulted in a further meeting with the same press officer who then agreed to put three questions to the High Representative for written answers. In spite of subsequent follow up e-mails even the written responses were not forthcoming. When working through such gatekeepers as these it can be difficult to tell the extent to which they are committed to representing the research to the target interviewee, and to what extent the interviewee is then able to make a fair judgment on allowing some form of contact. In these two instances, it would have been difficult to work around the gatekeepers: in the first instance, the gatekeeper was also essential as an interpreter, while in the second instance the gatekeeper clearly formed part of an institutional framework established to protect the time of an elite member of the organisation. The resources that could circumvent such institutional gatekeepers, including other high-level contacts, were not available.

Language formed a further barrier to arranging interviews. It was clear that, after one summer's language tuition, interviews would have to be conducted either in English (the working language of the international community in BiH) or through an interpreter.

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However, it was hoped that what language skills had been acquired could be put to use in arranging interviews. While this may have been the case with regard to e-mail contacts, unscripted telephone and face-to-face contacts tended to go less well. In one instance, attempts to contact a prosecutor in Banja Luka failed after a number of telephone calls in which, although it was possible to establish when he would next be in the office, the next step of conveying an appropriate and coherent message, without trying the patience of the secretary too far, was beyond the skills of the author. Likewise, a visit to the Sarajevo offices of the Party of Democratic Action (SDA) failed in a similarly discouraging manner.

It is to be regretted that many of those who were contacted but not subsequently available to meet, for whatever reason, were those that would have been able to offer domestic perspectives on the changes taking place in BiH and the role of the international community in these. One criticism sometimes raised with regards to international intervention in BiH (for example, Dietrich et al. 2003; Knaus and Martin 2003) is that it often excludes and alienates local people; whether or not this is the case is a question perhaps best answered by domestic politicians, practitioners, academics and commentators. Sadly their voices were not captured as fully as they might have been in this study. That said, as noted above a number of individuals from BiH working in domestic organisations and institutions, in hybrid institutions, and in international organisations were interviewed, offering useful domestic perspectives on the issue of criminal justice reform, informed by their own work and experiences.

Data analysis

The two processes of data collection through gathering documents and data generation through meetings and interviews can be seen as complementary means of creating a body of text to be analysed, including official documents, press reports, interview notes and transcripts. The papers gathered in the documentary research phases helped to identify key individuals who were subsequently approached for interview; likewise, informants referred to documents to illustrate their statements in interviews, highlighted relevant documents that would be useful in the research programme, and even handed over documents in a number of instances. There are a range of analytical approaches that can be taken to texts: content analysis seeks to summarise text into less complex forms (Bauer 2000); texts can be explored in terms of how they classify and categorise, and how they use evidence to support or refute particular arguments (Lepper 2000; Liakopoulos 2000); and techniques such as discourse

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analysis treat language as action oriented and a coloured representation of the world (Titscher et al. 2000). The current project approached the body of texts collated in a number of ways. In a number of cases documents were reduced or mined to produce categorised data, showing for example the institutional position of those found guilty of human rights abuses (see tables 6.1 and 10.3) or the number of OHR decisions taken in a given field (figure 8.1). As such, the documents were sifted for numerical data or were categorised and counted. A qualification regarding data arrived at using population statistics is given below. In categorising and counting OHR decisions, the documents are used, in part, to construct a historical account of events that have taken place, decisions made, and interventions carried out; a chronology was conducted complementing these with other sources and was used to support analysis and writing; interviews also support this, providing the perceptions of observers and participants in such processes.

As well as being used to develop an outline of key events and interventions, documents have been used as a means to understand the logic of intervention, and in this respect are supported by interviews. For example, decisions taken in the field of judicial reform can be linked to a series of UN reports (see, for example, UNJSAP 2000a); recent developments in proposed police reform can be explained in the context of the EU assessment of policing needs presented in commission documents (ICMPD and Team Consult 2004; Commission of the European Communities 2003a), statements from Commissioners (Numanović 2004) and remarks from Commission and EUPM staff in interviews. Such statements show how those intervening in BiH make sense of what they encounter in the country and show the important link between language and action at the heart of discourse analysis (Titscher et al. 2000). In this sense, documentary analysis is important not only for what it conveys about BiH, but also for what it says about the impression of BiH held by those in a position to make decisions shaping criminal justice policy. Other tasks demand a more systematic comparison of texts. A start has been made on the comparison of several criminal procedural codes in chapter 10, assessing claims of legal transplant that were encountered during fieldwork. This initial work supports a rejection of claims of a straightforward transplant of code from one US jurisdiction, but further work is required to examine the relationship between codes in BiH and elsewhere.

Interviews were subject to a further stage of analysis. Typed interview notes, written up at the earliest possible stage after interviews, and transcripts of those interviews which were recorded with an audio device, were analysed using a simple spreadsheet, dividing quotations

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and observations in to twenty-two categories, listed in table 3.3, developed through an ongoing iterative process of reading and categorising. This allowed the development of a degree of familiarity with interview material, and, through processes of cross-checking against documentary evidence, re-reading and re-checking, to develop familiarity with the broader set of data collected and generated. The spreadsheet was then referred to throughout the relevant stages of writing up. This approach was deemed to be more appropriate to the note form records of interviews than Computer Assisted Qualitative Data Analysis Software (CAQDAS) packages such as NVIVO, which are suited to handling full interview transcripts. Not every area and every project examined yielded the same amount of interview data. The mainstream United Nations civilian policing mission, for example, reached completion in December 2002, around a year and a half before the first field visit to BiH. As such, no interviewee had direct experience of the mission. In cases where interview data has been relatively thin, more reliance is inevitably placed on gathering and analysing documentary evidence.

Table 3.3 Headings for analysis of meetings and interviews

| | |
|---------------------------------------|---------------------------|
| Criminal Procedural Code | Domestic NGOs |
| International Community | Resources |
| Domestic government | War Crimes and ICTY |
| Domestic legal practitioners | Legacies of SFRY |
| Parties | Legacies of War |
| Crime | State |
| EU | Rule of Law |
| Review & Reappointment (Judiciary) | Removals (OHR) |
| Governance | Human Rights |
| Policing | Policy/Knowledge transfer |
| Prisons | Courts |

Quantitative data from documents: a cautionary note

Caution must be exercised when analysing statistical data on BiH, a point reiterated in relevant sections of this thesis. A number of figures are given in relation to BiH's population in order to facilitate comparison with other countries (see for example tables 6.2 and 10.1; and figures 10.2). The last census in BiH took place in 1991, prior to massive wartime and post-war disruption, so population estimates vary dramatically. In RS, estimates vary from 1.06 million to 1.47 million, while in FBiH figures range from 2.3 million to 2.8 million (ESI

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2004). As such, where population figures are used, or where secondary data already having used calculations including population figures are presented, the possible variation must be recognised. Likewise, difficulty was experienced in obtaining an authoritative version of the 1991 census; this is discussed in appendix 2, alongside a presentation of the census data used.

Ethical issues

As with any piece of social science research which involves interviewing or other contact with human research subjects, there are a number of ‘classical’ ethical dilemmas and questions which must be addressed, not least of these being the informed consent of subjects regarding their participation and the use of their responses (see, e.g. Israel and Hay 2006). All interviewees were briefed as to the nature of the project and purpose of meetings, and were all in a position to withdraw from, or limit their participation in, meetings and interviews, informed consent was not recorded formally. However, as some interviewees preferred not to be identified alongside their comments, and as there were only a limited number of interviews conducted, interviewees are referred to by number³; as far as is possible, the interviewees claim to validity will be indicated by a brief description of their role in BiH. The remainder of the chapter will focus on two inter-related risks in researching away from ‘home’: indulging in ‘criminological tourism’ (Zedner 1995); and presenting an essentialising portrait of the country being studied as indicative of a Balkan or Oriental ‘other’ (Said 1995; Todorova 1997).

The ‘Very Rough Guide’ to Bosnia and Herzegovina: criminological tourism

The author had many happy experiences in BiH, and greatly enjoyed the chance to see the beautiful architecture and stunning scenery found throughout the country. The chance to learn something of the history, literature, traditions and cuisine⁴ of the country was an opportunity not to be missed. These, alongside the chance to develop linguistic skills and to meet new people, are among the advantages that King (1997) outlines when he describes comparative work as fun, but Zedner notes that there is a real challenge for comparative work

³ For example “(INT25: 55)” would refer to the 55th line of typed notes in the write up of the numbered interview, 25. The numbers were randomly attributed and do not indicate when the interview took place.

⁴ This last aspect was captured in a *Vox-Pops* article on tourists in Sarajevo in the BiH daily tabloid, *San*, on 15 June 2005 under the headline ‘Britancu Endiju najviše se sviđaju bosanska jela’ [British Andy Enjoys Bosnian Food Most of All]. In the author’s defence the day was actually spent as a tourist in the company of his visiting parents.

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in maintaining high quality analytical and critical thinking and to “rise above the level of the travelogue” (1995: 13). Zedner describes the risk of misinterpretation that any researcher less than fluent in a language faces, and this need for linguistic fluency could arguably be extended to cultural fluency. She warns of the ‘duplicity of the bazaar’, which leaves the unwitting comparativist prone to “buying versions of truths which any streetwise local would recognise instantly as sham” (1995: 13), a poetic rendering of the risks of relying on potentially partisan local experts highlighted elsewhere (Nelken 1997, 2000a). Nelken argues that the detailed ethnographic approach made possible by extended field visits gives scope for greater understanding than other methods of investigating unfamiliar sites (Nelken 2000b).

Against the risks highlighted by Zedner and Nelken are the potential benefits of research conducted away from home. Pakes (2004) notes that researching outside one’s familiar environment helps challenge ethnocentrism and Feeley (1997) sees such research as a means of broadening horizons of both researcher and research audience; King (1997) also notes the potential to find new solutions to problems by looking elsewhere. The research undertaken in BiH arose from a genuine interest in what was happening in the country, this interest stemming from conversations with a friend from Cazin in North West Bosnia. This interest was rewarded with a new understanding of different approaches to imprisonment for example. Moreover as a study of criminal justice reform as an aspect of state-building, the study has relevance beyond BiH in the context of international intervention in domestic policy, whether institutional change demanded by the EU as a condition of membership; US-led interventions in Afghanistan and Iraq; and Australian activities in East Timor and the Solomon Islands. While the detailed ethnographic approach favoured by Nelken has not been employed in this study, in part because of the desire to cover three distinct sectors, but also because of a deficit of necessary linguistic and other skills, it is hoped that the thesis shows an adequate degree of rigour and critical analysis. Findings, while not presented as definitive, hopefully reflect more than just criminological travelogue. The opportunity to present these findings to a critical domestic and international audience has presented an opportunity to elicit critical feedback on the work (papers presented as Aitchison 2005, 2006, 2007a, b).

Essentialising Bosnia and Herzegovina: Balkanism and Orientalism

In 1978, Edward Said wrote that ‘the Orient was almost a European invention’ (Said 1995: 1) and set about describing centuries of European representations of the Near and Middle East, and the role of these representations in defining the Orient and Europe. Aside from the

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academic meaning of Orientalism as a field of study, Said ascribes to the word a broader sense as a “style of thought based on the distinction made between ‘the Orient’ and (most of the time) ‘The Occident’” (Said 1995: 2). These geographical categories are man-made constructs, built up through action and discourse. This ‘othering’ of the Orient is achieved through a range of techniques, and Said’s study takes in art, literature, travelogues and political statements, showing how these different modes of representation construct a justification for colonial intervention. Said describes how Orientalism thrives on generalisations presenting a static picture of an unchanging Orient, passive, and peopled by types such as ‘the Arab’, who are easily summed up and themselves serve as a representative summary of all that is ‘oriental’. Maureen Cain’s sums this up concisely:

[Orientalism] involves the discursive constitution of an often romanticized but also wayward and unknowing ‘other’ which, because of these besetting albeit (to liberals) endearing characteristics, requires the guidance and advice of the ‘us’ to find and/or accept its proper place in the world.

(Cain 2000: 71)

This notion of Orientalism has been taken on and applied by scholars working in the Balkan region. The region is ill-defined and subsequently open to construction and reconstruction through discourse. Milica Bakić-Hayden has written on the symbolic geography playing an important and divisive role in Yugoslav politics, extending a hierarchy that privileges the North-West over the South-East, with its history of Ottoman government and its adherence to Orthodox forms of Christianity and to Islam. She defines these as ‘nesting orientalisms’ (Bakić-Hayden and Hayden 1992), a theme she revisited three years later to describe how areas could be seen as being more ‘east’ and therefore more ‘other’ in symbolic and constitutive, geographies (Bakić-Hayden 1995). The notion is developed by Maria Todorova, again picking up on Said’s notion of Orientalism, but making a special case for the Balkans, “geographically inextricable from Europe, yet culturally constructed as ‘the other’” (1994: 455). In later work she argues that ‘the reductionism and stereotyping of the Balkans has been of such degree and intensity that the discourse merits and requires special analysis’ (Todorova 1997: 3), and in that analysis develops the concept of ‘Balkanism’. The key problem for Todorova is to explain the transformation of a ‘geographical appellation’ into a ‘powerful pejorative designation’ (p. 7), a designation which persists through the use of words such as balkanisation, and through a tendency to speak of individual conflicts in the Balkan region as ‘Balkan wars’ as though they were phenomena intrinsically linked to the whole peninsula, evidence of its inherent volatility and political instability.

3. The research programme

As Said saw Orientalism as being an essential part of the project of European powers to penetrate, dominate and exploit the lands of the Near and Middle East, so too is it possible that a parallel Balkanism is enlisted in attempts to penetrate and dominate the countries of the Balkan region. The parallels have been drawn explicitly by Knaus and Martin (2003) in their paper *Lessons from Bosnia: the travails of the European Raj* and by Ignatieff (2003). The UK is actively engaged in Bosnia and Herzegovina, through its Department for International Development, through its participation in the European Union, the Council of Europe, the Peace Implementation Council, and through its permanent seat on the UN Security Council. Without making any claims regarding motivations for this engagement, or its nature in terms of relationships of domination and subordination, there is a risk in writing as an outsider in BiH that one essentialises the country, *and surrounding countries*, in terms of types that fail to do justice to the diversity and dynamics of their past and present. This aspect requires a degree of sensitivity and reflexivity in analysis and writing; hopefully the text represents the care taken over this, but it is too easy to make unthinking slips, and the author has recognised some of these in previous versions which made reference to a lack of democratic experience in BiH, suggesting a need for intervention from more established democracies, while failing to recognise the debate about Yugoslav self-management as a form of democracy (Davidović 1993; Djordjevic 1953; Gligorov 1982). BiH is recognised as an area that has undergone a series of significant changes since major reforms commenced under Ottoman government in 1839, and in such an environment it makes sense little sense to produce an essentialising and static picture. While the author may face challenges as an 'outsider' in terms of domestic society in BiH, so too is the outsider role taken on in relation to the various international and hybrid organisations working in BiH. While there are distinct challenges within the role, it is recognised that it need not undermine claims of validity of the research, and can actually be used as an advantage, bringing a fresh perspective to the problems and issues studied (Merton 1972). The following chapter goes on to explore some of the concrete historical circumstances surrounding criminal justice development in states making a transition away from conflict or authoritarian rule; within this, the role of external actors in domestic policy will be explored.

4. States in 'transition'

This chapter seeks to provide a background which helps to locate Bosnia and Herzegovina (BiH) as a 'transitional' state. As will be seen, the nature of the transition in these transitional states is flexible, and the term has been applied to states making a transition away from a conflict to a period of peace and stability, from a period of authoritarian government to democratic forms of political decision making, or from a command to a market economy. Since 1990, BiH has been undergoing all three forms of transition, with multi-party elections, post-war stabilisation and peace-building, and privatisation of state assets. Drawing on experiences in a diverse range of states which have experienced one or more of these forms of transitions, from the post-war Axis powers in 1945 to the post-communist states of contemporary Europe, the chapter will seek to set a context against which events in BiH, and their similarities and differences to those in other countries, can subsequently be understood. The chapter begins with an exploration of examples of the position of law and legal systems in Europe's history of communist rule, before exploring recurring themes of transition in a broader context.

Law and communist states in Europe

In authoritarian models of communism, of the kind experienced in twentieth century Europe, courts may have little or no control over government action. On the contrary, law and the criminal justice system are used by the government (and party) as a tool, oriented towards specific goals (Łos 1996). Savelsberg's (1999) detailed study of incarceration rates in East Germany and Poland matches frequent rises in prison populations and subsequent amnesties to key political events, reflecting instrumental political motives. Party domination of state apparatus characteristic of European communist systems means that control over courts is more or less total through processes of recruitment, socialisation and organisation. A number of factors facilitate the use of courts as a tool of government policy, including control over initial access to law school; training provided at law school; the role of party and government in the election of judges; disciplinary proceedings against judges where decisions are overturned; and the direct intervention of party officials (Savelsberg 1999). Likewise a combination of a tightly controlled media and a weakened civil society can undermine bases from which any challenge to the role of courts in supporting state and party may emerge.

The strict model of state socialism applied in the USSR, as opposed to more flexible models which emerged in East and Central Europe, also resulted in a process of atrophy in civil law.

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With little in the way of private property, one of the key elements of civil law was missing and criminal law became pre-eminent (Shelley 1996). Although criminal law may have become the predominant form of law in certain communist countries, some interpretations of socialist ideology maintained that in a true communist society crime would disappear. Walmsley (1995) argues that such a belief gave little incentive for investment in the infrastructure of penal systems in terms of construction or maintenance, a legacy subsequently handed on to post-communist governments. This oversimplifies the ideological foundations of criminal justice in the socialist state. Marxist teleology anticipates a *transitional epoch*, following revolution but preceding the achievement of full communist society. Throughout this period law is deemed essential, "to ensure that the observance of law should grow into a habit with people, and that the respect for the rules of a common life should become a constituent part of their consciousness, and not a matter of coercion" (Hrnčević cited in Lapenna 1964). Moreover, once the transition to communist society is completed, and state and law have withered away, it seems that something analogous to law may still exist. While Gollunskii and Strogovich (1951) see voluntary conformity with communist morality and custom taking the place of former coercive forms of law, Pashukanis, writing before pressure from Stalinists forced him to 'correct' earlier 'errors', suggested that the end of classes may lead to "the creation of a system of penal policy which lacks any element of antagonism" (1978: 175).

Thus, Soviet Russia offered justification for ongoing penalty and the apparent strengthening of the law in communist Russia. Immediately after the Russian Revolution, the People's Commissars on the Court set up Revolutionary Tribunals by decree as part of the "struggle against counter revolutionary forces" (Matthews 1974: 233) showing a clear understanding of law as a political tool. The Corrective Labour Code introduced in Russia in August 1933 organised factory and agricultural colonies:

for the purpose of inculcating labour habits in the prisoners and raising their labour qualification; in order to bring political, educational and disciplinary influences to bear on them; and to secure their adaptation to life and work in an organised collective based on industrial labour.

(Cited in Matthews 1974: 248)

In the post-Stalin era, legislation continued to emphasise these two elements of protecting the state system and of reforming and re-educating (See Matthews 1974 on penal law under Khrushchev: 269-273). A similar emphasis on state protection was prominent in the law of the former German Democratic Republic (DDR) (Thomanek and Mellis 1989). Throughout

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periods of communist government in East and Central Europe, Marxist theory, and Soviet interpretations thereof, continued to offer a range of justifications for strong structures of law and penalty. Underinvestment in penal systems cannot be accounted for by attributing an overly simplistic interpretation of Marxism to the governments of that period. Moreover, taking the example of BiH we see ongoing investment in the republic's penal system up to its final years as part of a socialist state: the 1950s saw the conversion of old Austro-Hungarian military barracks in Foča into a penitentiary (1950), the construction of regional prisons at Bihac (1956) and Doboj (1959), and of a municipal prison at Goražde; in 1967 a further penitentiary was constructed at Kula; while reconstruction work was carried out at prisons in Sarajevo in 1975 and 1986, and Doboj in 1986 (see Appendix 6). Such programmes can be taken as an indication of an ongoing commitment to the maintenance of a strong penal apparatus.

The physical legacy of communist legal and penal apparatus may not be attributed wholeheartedly to underinvestment inspired by Marxist projections of a stateless future, yet they do owe much to the inscription of the relationship between state, law and citizen through spatial arrangements. Thus the spaces where the public encountered the law – the police station or public security centre, and the court – played a role in expressing the citizen's relative position. Glaeser's (1998) description of an East Berlin police station, in which the public approached a solitary high window along a corridor in order to speak to officers, gives an indication of the ways in which the respective position of citizen and regime were constructed and reinforced through the built environment. The remainder of this chapter goes on to discuss the countries emerging from communist rule at the end of the twentieth century, along with other countries making transitions away from authoritarian rule or conflict situations.

Post-communist Europe and transitions

Valerie Bunce (1999) suggests that there was a time when it may have seemed reasonable to expect similar outcomes across post-communist states; the socialist experience had certain homogenising effects and communism ended across such a wide area within a relatively short time span, that post-communist countries could be said to have very similar starting points on a journey away from state-socialism. But Bunce observes that, in spite of certain similarities, the overall pattern of post-communist experiences has been one of diversity. The point is emphasised by Fish's (1999) comprehensive survey of the democratisation process (or lack

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thereof) in a number of post-communist states in Europe and Eurasia. The expectation of similar outcomes highlighted by Bunce is characteristic of a 'transition paradigm' described by Carothers (2002): a range of assumptions, especially among the US 'democracy community', concerning the move from totalitarian or authoritarian rule to democratic forms of governance. These assumptions developed in response to a wave of democratisation in Southern Europe and Latin America from the 1970s onwards and have since been extended as a universal paradigm to cover all countries emerging from a period of authoritarian or totalitarian rule. At the core of these assumptions is a belief that the path to democracy is characterised by the opening of cracks in an undemocratic regime, the 'breakthrough' of democratic forces, the rapid establishment of a democratic system, and finally a period of consolidation. Certain former communist countries in Europe do fit this model; Carothers suggests Poland, Hungary, the Czech Republic, Estonia and Slovenia as leaders with Slovakia, Romania and Bulgaria as possible candidates for inclusion (2002: 9). However, such a paradigm fails to account for over 80 percent of around one hundred or so 'transitional' countries, among whom some have experienced the reconsolidation of authoritarian rule (e.g. Uzbekistan, Turkmenistan and Belarus), while others form a "political grey zone" (2002: 9), showing outward signs of democracy yet suffering from a "democratic deficit". Even within this grey zone, Carothers acknowledges diversity, highlighting two broad syndromes he describes as "feckless pluralism" and "dominant-power politics", while others remain too unstable to allow adequate classification. Essentially, Carothers argues for a more nuanced exploration of what has previously been understood in terms of a linear transition process resulting in stable democracy. The exceptions which 'regress' along this line to authoritarianism or stagnate prior to the consolidation of democratic governance represent the majority of cases and undermine the explanatory power of the transition model. Ultimately, while parallels may be drawn between certain countries, and lessons learned from democratisation programmes, each country must be understood in the context of its own history, structures and development. This is not to underestimate the value of comparative research and so the following section will seek to pick up on certain recurring themes which emerge from the literature on post-communist, post-authoritarian, post-totalitarian, and post-conflict states.

Recurring themes

As stated, BiH has been making a set of transitions away from relatively authoritarian forms of rule, an economy based in part on a socialist command model, and conflict; moreover, like

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Austria at the end of the Second World War, it faces more than one authoritarian legacy with which it must deal; BiH emerged from the centralist autocratic government of Aleksandar in the interwar period to experience a fascistic regime under the wartime government of the Independent State of Croatia (NDH) prior to a lengthy post-war period of single party socialist rule. The latter of these authoritarian experiences was somewhat softer than experiences of socialist rule elsewhere, tempered as it was by federalism, Tito's early break with Stalin, and other elements conducive to openness such as a strong tourist industry and a relatively liberal attitude to overseas travel of Yugoslav citizens themselves. Accepting the main thrust of the arguments that the paths of various post-authoritarian -totalitarian and -communist states are characterised by diversity, and do not represent a universal movement towards stable fully-functioning democracy, does not mean that one cannot find some similarities between certain post-communist, post-authoritarian, post-totalitarian or post-conflict states that may inform one's understanding of broad processes of change. Rather than engaging in an attempt to find common elements in each and every case, it is to such recurring themes that the chapter now turns, seeking to draw lessons from the literature on a diverse range of countries and historical situations to inform the understanding of developments in BiH since the peace settlement of 1995. The first theme handles procedures designed to address the impact of state-personnel associated with a former regime, while the second section explores examples of intervention by other states. These have been highlighted in particular on account of their apparent relevance to BiH.

Lustration

Numerous emergent democratic societies have engaged in efforts to purge both government and civil service of those responsible for, or complicit with, previous totalitarian and authoritarian regimes¹. In the later stages of the Second World War and its immediate aftermath, such processes took place in France and its overseas territories, Italy, Germany, Austria, Belgium and Denmark. Often these purges operated through lustration laws, designed to exclude former participants in undemocratic rule from public life, and to punish those responsible for injustices committed under these former regimes. In the wake of the

¹ One of the main alternatives to lustration, although not necessarily precluding criminal prosecution of functionaries of an ousted regime, is the Truth and Reconciliation Commission which has developed in different forms as an aspect of transition in Africa, Asia and South America. No significant moves towards such a Commission were evident in BiH during fieldwork and so the growing literature on the topic (e.g. Evenson 2004; Gibson 2004; Kingston 2006; Laplante and Theidon 2007) is not explored here.

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collapse of communism in Eastern and Central Europe, efforts to commence lustration procedures have met with varying degrees of success in Albania, Bulgaria, Czechoslovakia and its successor states, the former DDR, Hungary and Poland (Kritz 1995). Two main issues arise in the apparent success or failure of attempts to implement purge proceedings: firstly a number of constitutional and legal obstacles may need to be overcome; and secondly a number of practical problems arise in the execution of any agreed proceedings.

In this recent wave of lustration, efforts to pursue purges seem particularly vulnerable to constitutional obstacles. In Albania, law 7666 of 26 January 1993 attempted to introduce a commission to reconsider the licenses of all practising advocates and to remove for a period of five years the licenses of former state security employees, collaborators, employees of prison and internment camps, party committee members and employees, directors of state organs, and investigators, prosecutors and judges involved in staged trials. The law was struck down by the Albanian Constitutional Court on various grounds including constitutional provisions for the free practice of advocacy, and the rights to work covered by the International Convention on Economic, Social and Cultural Rights ratified by Albania in 1991 (Imholz 1995). Likewise, the Hungarian Zetenyi-Takacs law, attempting to remove the statute of limitations on offences committed between 1944 and 1990² was unanimously rejected by the Constitutional Court (Paczolay 1995). Bulgaria saw two attempts at lustration laws struck down by the Constitutional Court before a third attempt, restricted to future appointments in academic institutions, was passed successfully (Decommunization in Bulgaria 1995).

Concerns about the unconstitutional nature of lustration procedures are by no means new. When, in the wake of the demise of the Zetenyi-Takacs law, Stephen Schulhofer (1995) asked how states dedicated to the rule of law can address lawlessness of former regimes without compromising their own commitment to legality and impartiality, he echoed the concerns of Danish jurists summed up by Givskov in 1948. One of the first actions of the Danish government at the end of the Nazi occupation of their country was the introduction of two laws concerning treason. Both law 259/45 and 260/45 were supplemental to existing Danish laws, suggesting continuity with existing principles of law in Denmark; yet they breached these principles by being *retroactive* and by reintroducing the death penalty. Givskov (1948)

² This would have enabled the investigation and prosecution of crimes committed by the authorities in putting down the uprising of 1956.

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argued that, in spite of jurists' concerns, no lasting impact on the law of Denmark was intended and so the new laws were accepted. Unlike Denmark, Belgium had a government in exile throughout the country's period of occupation. As a result, it was not necessary to pass retroactive laws. However, to avoid political interference with the regular judiciary while maintaining an adequate separation of powers those collaborators put on trial were tried before courts martial (Huyse 1995).

The second major obstacle to lustration lies in implementation and is best illustrated with reference to purges in post-occupation and post-Vichy France and the defeated Axis powers at the end of World War Two. Indicative of the degree of difficulty experienced in implementing denazification programmes is the fact that in 1948, 15 per cent of the Austrian civil service were still "lesser Nazis" (Engelman 1982), while by 1952 in the Federal Republic of Germany (BRD) 66 per cent of civil service specialists (*Referenten*) had held National Socialist German Workers' Party (NSDAP) membership; this represents a greater proportion than were members in 1940, seven years into Nazi rule (Garner 1995). Central to implementing a purge are the police and the judiciary, who play an important role in investigating, apprehending and trying those associated with the injustices of former regimes. Novick summarises French concerns over the judiciary noting that "leaving the decision on prosecution to a judiciary which may be suspected of being lukewarm toward the purge would risk outbursts of popular indignation if prominent collaborators were not indicted" (1995: 91). French experiences of purges began in 1942 when the allies recaptured Algeria. In France itself, by the end of 1944, five thousand decisions had been taken to discharge, suspend or arrest police officials. All police chiefs were dismissed and of these, five sentenced to death. Within the judicial system, those in the highest positions such as prosecutors general and presiding judges were required to prove that they had been actively engaged in the resistance movement, while their subordinates were left in post unless collaboration was proven (Lottman 1995). A major problem facing the French was the sheer volume of cases to be heard. Macridis noted that, "virtually every French man and woman who had not followed de Gaulle abroad or who had not borne arms against the Germans *and* Vichy *and* its various paramilitary forces was liable to the most severe punishment" (1982: 169, emphasis in the original). He goes on to estimate that, aside from 20,000 to 50,000 extra-judicial assassinations, up to 150,000 faced internment. Novick (1995) estimates that new *cours de justice*, reduced versions of the *cours d'assises* which regularly tried felonies, heard in excess of 100,000 cases, not including the cases of *indignité nationale* heard by the attached

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chambres civiles. Indeed it was precisely because of the anticipated volume of cases and the pressure this would put on a reduced post-purge judiciary that the new courts involved only one judge and four lay jurors as opposed to the three judges and twelve jurors of the regular *cours d'assises*.

Compared to Italy and France, Germany did not have a well developed and organised resistance movement ready to take power upon the demise of the defeated regime (Herz 1982); the victorious allies found the cleansing of the judiciary to be particularly problematic as a large proportion of the judiciary had been complicit with Nazi rule. Even in Italy, in spite of an active anti-Fascist resistance movement, the demand for judges meant that judges' histories were less likely to be investigated for evidence of cooperation with the Fascist regime (Domenico 1995). The lack of investigation may also reflect the less salient role played by Western Allies in Italy compared to Austria, Germany and Japan. Indicative of the problems facing Western Allies in Germany was the fact that in certain jurisdictions nearly all court personnel were former members of either the NSDAP or its subsidiary organisations; in Westphalia for example, 93 percent of personnel fell into this category (Müller 1995). The problem was exacerbated by the flow of civil servants leaving the Soviet-controlled zone in East Germany and from territories formerly occupied by Germany further to the East and in Alsace-Lorraine. Furthermore, the fact that, in the South and West of Germany, three different powers operated with different aims limited the chance of consistent purge procedures; the British, whose zone included the industrial Ruhrgebiet, focused primarily on economic reconstruction, France was caught between a desire to maintain a weak Germany and the ongoing distraction of domestic purges, while in the American zone initial attempts at denazification were said to be more thorough (Herz 1982). One solution to the problem of finding sufficient judges uncompromised by Nazi connections was to call back members of the judiciary who had retired by 1933. When this failed to provide adequate numbers the British re-employed those who had joined the party after 1937, on the understanding that such judges had joined of necessity rather than political conviction. Again this failed to produce sufficient judges, so the British worked on the principle that for every 'untainted' judge employed, one compromised by connections to the Nazi party could also be taken on. As early as 1946, restrictions were lifted and jurists who had gone through a denazification procedure could be employed. Thus in 1948, 30 per cent of presiding judges in county courts in the British zone were former party members, as were 80 to 90 per cent of assisting judges (Müller 1995). The case of Günther Schultz starkly illustrates the impact of these policies:

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one of seventeen surviving judges implicated for their part in the Hamburg Race Law trials, Schultz was re-employed and subsequently presided over the compensation claims of the survivors of his own trials and of the relatives of those he had sentenced to death (Müller 1995).

Many accounts of purges are tales of disappointment and dissatisfaction. Herz (1982) argues that the purges in Germany were a failure, and that interest and support for the task soon vanished. International political considerations were a major factor; the desire to secure West German co-operation in the Cold War encouraged allies to grant pardons to numerous high ranking Nazi functionaries (Weinschenk 1995). Likewise in Austria, in spite of the early adoption of a strict approach by the Renner government, denazification was "uneven, formalistic and quite brief" (Engelman 1982). In France, a degree of tension between a resistance-led demand for a sweeping purge and a Gaullist 'forgive and forget' approach resulted in uneven and disproportionate sentencing (Novick 1995). Italian failure to purge the judiciary coupled with the ongoing presence of elements of the former regime in the defascistization process also ended in uneven application of punishments (Di Palma 1982; Domenico 1995).

The recent wave of post-communist lustration has likewise left many dissatisfied. In Poland, the Deputy Minister for Justice hoped that normal democratic conditions and the freedom from political pressures associated with communist rule would lead to the normal functioning of the judiciary; in turn, they could be expected to purge compromised individuals without external intervention. However there is a lack of confidence that such independent purging has actually taken place (Łos 1996). Throughout the 1990s Poland experienced a lengthy debate over lustration procedures summarised and conceptualised in terms of eight broad discourses by Łos (1995). Discourses against lustration included the paternalistic concern that the shocking nature of the truth concerning complicity and collaboration would be too much for society; the fear that procedures would be open to political manipulation³; suspicions regarding the accuracy and transparency of Security Service files; uncomfortable similarities to purges carried out by communist regimes in the past; and the concern that fixing blame on individuals amounts to a form of scapegoating, failing to address the silent complicity of the majority. "Who," asked one representative in the Polish Senate in 1992, "among those born and brought up during the past 45 years in Poland is truly without guilt?"

³ In 1992 the Olszewski government fell over the number of collaborators it contained.

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(Łos 1995). Those arguing for lustration procedures drew on three discourses. Firstly it was argued that in order to move on, in order to forgive, it was necessary to know what wrongs were being forgiven. Secondly, from the point of view of justice, it was noted that such procedures prevented rewards being enjoyed by those who have obtained them through wrongdoing. Finally, the danger of allowing people to occupy positions of power while they may be vulnerable to threats of compromised histories being revealed presented a danger to the Polish state and people. Ultimately, large scale purges did take place within Poland (Shelley 1999); under the presidency and premiership of Lech and Jarosław Kaczyński new procedures were introduced requiring declarations regarding collaboration with security services (Garton-Ash 2007a).

In spite of such dissatisfaction, lustration procedures could be seen to have achieved some of their aims in a number of post-communist states of East and Central Europe. Aims of particular relevance to the current study may be addressing crimes committed by former leaders through the courts, and the removal of 'tainted' personnel from the criminal justice system as part of a process of democratisation and renewal. East Germany, something of an exception in that its transition from socialism involved unification with an established liberal democracy, faced difficulties in the pursuit of senior and even lesser figures from the former regimes in the law courts. For example, rather than being tried for his activities as head of the DDR's Secret Service, Erich Mielke was first tried for a murder committed in 1931 on the basis of evidence found in Gestapo files (Blankenburg 1995). Of the six leadership figures eventually indicted for collective manslaughter in 1992, including Mielke and Honecker, three trials were never completed owing to the ill health of defendants, while those found guilty received milder sentences than prosecutors requested, recognising their status as "prisoners of German post-war history" (McAdams 2001: 254). Greater success was achieved in clearing the civil service, including the criminal justice system, of those implicated in injustices of the former regime. Rather than using judicial measures, this was achieved by the requirement that *all* public employees from the former DDR were required to reapply for their posts. These procedures, affecting prosecutors and judges, actually began prior to unification; subsequent to October 1990, those who originally qualified in the East were required to sit an additional examination to occupy judicial office in the enlarged BRD (Blankenburg 1995). The prison service was also affected; in Berlin only one third of prison officers from the East of the city were found to be suitable for continued employment in the service. In other post-communist countries, and indeed in the other Länder of the former

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DDR, this may have posed a problem, but Berlin was able to close all five prisons in the East of the city and relocate the reduced number of post-amnesty inmates to existing institutions in the West (Dünkel 1995).

Bulgaria has successfully used the courts to try numerous former officials including prison guards (Kritz 1995) and in 1992, at the end of a lengthy trial, ex-President Todor Zhivkov became the first former communist leader to be tried, found guilty and sentenced. He faced seven years imprisonment for the misappropriation of funds and was likely to face further charges (Engelbert and Perry 1995)⁴. Czechoslovakia was one of the first states to successfully pass lustration laws with restrictions placed on public posts for the next five years (Łos 1995). These laws were to affect the courts and the police service (Pehe 1995) and also resulted in the sacking of all prison governors (Walmsley 1996). Poland implemented verification procedures after the dissolution of the Security Service (SB) and the creation of a new State Protection Agency (UOP). Many SB functionaries took the opportunity of early retirement. Of the 14,000 of 24,000 former employees who did proceed to verification, 10,000 were verified. The regular police, however, were not subject to verification (Łos 1996). In earlier waves of lustration, the temporary disenfranchisement of collaborators and members of discredited parties was seen to have provided space for the re-establishment of liberal democracies (see Engelman 1982 on Austria; Givskov 1948 on Denmark; and Huyse 1995 on Belgium).

So far, lustration procedures have been discussed in relatively straightforward terms; failure or success has been judged on the basis of the exclusion of members of former regimes and their collaborators from public office. A broader literature suggests that such procedures also serve a symbolic function, and need to be judged accordingly. According to Durkheim, law and the government symbolise a common consciousness (1984), while the legal system provides an important outlet for the expression of blame and denunciation (1961), and in so doing it reinforces commonly held sentiments (1938). Bourdieu also explores the expressive function of the law, describing it as "the quintessential form of symbolic power of naming that creates the things named, and creates social groups in particular" (2002: 142), although to some extent this power is restricted to the recognition of "historical realities or virtualities" (2002: 144). In this sense, the law is giving support to an existing social order, defining it as

⁴ Zhivkov was subsequently acquitted by the Bulgarian Supreme Court, and charges relating to political prisoners and racial hatred towards Bulgaria's ethnic Turks were never successfully proved.

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"natural, necessary and just" (see Gordon, cited in Starr 1992: xxxv). The fact that the former leaders of the DDR were tried in conventional criminal courts as ordinary criminals symbolically denigrated not only the leaders themselves, but the regimes they represented (Blankenburg 1995). The same could be said of the trial of Zhivkov in Bulgaria on charges of fraud (Engelbert and Perry 1995). These acts fit in with Garfinkel's 'status degradation ceremonies', designed to take the public identity of an individual, and in this case an organisation, to transform it "in to something lower in the local scheme of social types" (1956: 420). The shaming of key figures from outgoing regimes can serve to degrade the regime in its entirety. Moreover, following Garfinkel's account of denunciation, the new socially constituted reality overwrites the old, the leadership and regime are revealed to the public in a new light as 'what they were all along'. In drawing on Garfinkel, we may find some suggestion as to why lustration procedures have proved so difficult to complete successfully as acts of denunciation; his first condition of a successful ceremony of degradation demands that acts and perpetrators be displayed as "out of the ordinary", this can be contrasted with an extended period of authoritarian government in the words of Timothy Garton-Ash, "much greyer, more tawdry and banal" (Garton-Ash 2007b), and the geographical scope of authoritarian socialism after 1945. Moreover, denunciation must take place in the name of 'the tribe' and by way of displaying their values; the Polish Senator's words cited earlier are again salient:

Who among those born and brought up during the past 45 years in Poland is truly without guilt?

(cited in Łos 1995)

Denouncing and degrading the leadership and the regime risks denouncing the tribe. Garton-Ash (2007a) suggests that the renewed interest in uncovering the past in Poland comes from the 'class of '89' and their successors, untainted by associations with the earlier regime. Beyond the trials of former leaders, the removal of functionaries of fallen regimes can also be seen to serve a symbolic function. The word lustration has explicitly religious or ritual overtones; it relates to rituals of purification and comes from the Latin *lustrare* meaning to purify, to brighten or illuminate, or to go around or over (again in the sense of purification rituals). Stinchcombe expresses one of these aspects of lustration trials when describing their purpose as, "drawing a ritual boundary between a new clean democratic regime and a bad old warlike, terrorist, totalitarian, and corrupt regime" (1995: 246). Likewise, when Dünkler (1995) describes prison officers of the former DDR as 'contaminated' he displays the same

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reasoning. Teitel (2000) chooses to emphasise the illuminative aspect of such rituals and their uses in constructing a legitimate historical record of a past regime.

Novick (1995) recognises two tendencies within lustration processes, each of which were represented by different movements in post-Vichy France. The first of these was *renversement*, a desire for retribution, and demanded the symbolism of justice and the punishment of participants, supporters and collaborators of the Vichy government. Such a tendency was represented most strongly within the resistance movement. The second strand of lustration is described as *renouvellement* and was associated with a Gaullist desire to see the country move on, albeit after a process of reflection. What is interesting is that the aims of both sides were able to be accommodated, and that differences in emphasis and purpose did not prevent unity in carrying out the various lustration processes, although it may have led to somewhat uneven sentencing practices. The symbolism of lustration is complex and, like many signifiers, lustration can mean different things to different audiences dependent on context; it degrades the past and while simultaneously looking to a new clean future. Perhaps this reflects its main strength, and also explains why, when it may not always appear to be successful in terms of numbers of arrests, indictments, punishments and exclusions, it still remains a strongly recurring theme in post-conflict, post-authoritarian and post-totalitarian regimes. The discourses surrounding lustration provide an outlet for the condemnation of what has gone before and underpin the legitimacy of new regimes.

BiH's nascent multi-party democracy was swiftly engulfed in conflict, and while this may have served to block lustration processes geared towards addressing past injustices and building a new future for the country, the post-war period has seen a number of forms of lustration taking place, as will be seen in chapters 7, 9, and 11 on police, courts and prisons respectively. This has involved the removal of state functionaries, including police officers and judges, and the trial of leadership figures. Notably the basis for these lustration procedures is found not in BiH's time as a republic of SFRY, rather in the war and post-war periods. Moreover, while many of the post-communist countries of Central and Eastern Europe have instigated their own purges, the international community have been instrumental to those carried out in BiH, much as international actors played a role in the purges in defeated Axis countries after 1945. Thus BiH can be explored against a historical background of post-authoritarian and post-conflict lustration elsewhere to understand its own particular lustration procedures and the role these might play in a transition towards democratic forms of

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governance. The following section picks up on the theme of foreign and international actors in transitional states.

Foreign and international interventions and influence

After the Second World War, foreign intervention was not restricted to purge processes in defeated powers, rather extended to cover a number of areas of government including criminal justice. Likewise in many current transitional states foreign intervention has been a recurring theme. Intervention can be divided into two broad areas. Firstly foreign governments, international governing organisations (IGOs) and non-governmental organisations (NGOs) offer financial support, technical assistance and advice. Secondly in post-conflict countries intervention can take a more direct, intrusive form with victorious powers engaged in the day to day business of government, including the drafting and enactment of legislation. Both are relevant to BiH as a post-communist and post-conflict state; but intervention in day to day government is not the remit of any victorious party to the conflict, rather is undertaken in the name of the international community through the Office of the High Representative. Further to these two forms of intervention, influence can also be exerted without direct intervention, for example by setting thresholds for countries wishing to join certain organisations, such as the Council of Europe or the European Union. This form of incentive may be backed up with aid programmes to assist potential member countries to meet the requirements for membership. Finally, foreign countries may also serve as models for reform processes or on which to base specific policies, providing inspiration for local policy actors.

Aid and assistance

After World War Two, the world witnessed a break with the past. Rather than being crippled by post-war reparations the defeated Axis powers received billions of dollars in grants and loans (Marshall Foundation 2002). Subsequently, aid and other forms of economic assistance have become an important feature of external intervention in post-conflict states as well as in states where regime change has occurred without large scale violent conflict. Such assistance is often necessitated by limited resources in economies coming to grips with rapid transformation or recovering from war or sanctions. Shelley's (1999) study of policing across post-socialist states found that a lack of funds to develop new models of policing was near universal, while Goldsmith (2003) noted that such shortages do not just hinder the development of democratised police forces, but that they also lead to indifference and

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corruption among officers. Within the sphere of criminal justice, policing is by no means the only area in which resource shortfalls are a problem, although prisons are less likely to attract aid, a reflection of disillusionment over the failure of such institutions to meet commonly perceived goals such as the rehabilitation of inmates (van der Spuy 2000).

Aid from foreign governments and other bodies may reflect their own priorities and interests. These may be economic, such as attempts to develop new market for goods and services offered as part of aid packages; inclusive, for example, the EU's pre-accession programmes for the countries joining in 2004 (Mahant 1995); and ideological, such as the encouragement of individual or market welfare approaches to policy as conditions of loans and aid (Deacon and Hulse 1997). However, aid programmes in a given country do not necessarily form part of a coherent structure (van der Spuy 2000); a number of different governmental and non-governmental agencies may be involved in tackling a single problem from numerous directions, and within larger organisations, such as the EU, there is room for ideological competition. In a study of social policy in Hungary, Bulgaria, Lithuania and the Ukraine, Deacon and Hulse (1997) discovered that competing orientations between *and within* different international governmental and non-governmental organisations is reflected in policy debates in recipient nations.

Van der Spuy (2000) described three stages in international aid to South Africa. She categorises the first, from 1994 to 1996, as benevolent and altruistic investment by donor states and cites as examples the Commonwealth training scheme for community police officers, a UK funded community policing project in the Western Cape and a further community policing project funded by Belgium. These schemes can be seen as attempts to address the problem of legitimacy faced by the South African Police Service (SAPS) which had served apartheid governments as a control-oriented rather than crime prevention-oriented body (Gastrow and Shaw 2001), and as part of a broader shift from authoritarian to democratic modes of governance (Marks 2000). The first community officers graduated in 1995 but entered a police force with no support structures or well-defined role to match their training, reflecting a failure of donors and recipients to address the issue of sustainability. A second phase from 1996 to 1998 saw increasing concentration on building the capacity state crime control institutions in response to rising recorded crime rates in South Africa. Explaining this shift, van der Spuy (2000) suggests that state actors became more effective at targeting donors in this period, while NGOs lost staff and expertise to the public sector. Finally, from 1998 onwards, concern with organised and global crime networks is

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highlighted. This final period coincides with harsher rhetoric on crime from the government, and opposition use of crime as a key issue in the 1999 election campaigns (Gastrow and Shaw 2001). Samara (2003) notes that the hallmarks of recent South African criminal justice reforms are increased involvement of the US, and the development of a US-style 'war on crime' resulting in a more security-oriented approach. Samara does not attribute these developments entirely to US influence; rather he sees it as one among a number of factors including the need to appear as a secure location to overseas investors and the control of print-media by a number of white-dominated multi nationals.

US involvement in direct aid to foreign police forces is tempered by memories of previous links to repressive or corrupt regimes in pre-revolution Iran, Brazil, and Mexico (Bayley 1995), and is explicitly restricted under the Foreign Assistance Act. The act does allow training of foreign officers to take place under specific circumstances:

...with respect to assistance provided to reconstitute civilian police authority and capability in the post conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy...

US Code, Title 22, Chapter 32, Subchapter III, Part III, Section 2420.

This legislation is supported by the East European Democracy Act of 1989 and the Freedom Support Act of 1992 which allow funds for the support of civilian police forces and for the development of legal and judicial systems. Marenin (1998b) notes that US police assistance has developed along two distinct tracks. The first focuses technical and managerial assistance, especially where crimes are perceived as being cross-border issues and thus threatens domestic security: drug trafficking, money laundering, terrorism and smuggling. The second track encompasses the far broader aim, where "the goal is the reconstruction of collapsed, discredited, arbitrary, brutal and ineffective police and court systems" as part of the development of the rule of law (Marenin 1998b: 157). This tradition of American aid dates back to their role in Germany and Japan in the wake of the Second World War, although under the Kennedy-instituted Office of Public Safety, its specifically anti-communist goals became more apparent. More recently, it has seen US support to police forces in Panama, Haiti, Somalia, El Salvador and BiH.

Direct intervention

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Overt and direct intervention by a foreign power, or powers, in the criminal justice system is unusual and noteworthy. The most common condition under which such intervention is experienced may be occupation by a foreign power, for example Germany after World War Two, or Iraq after the recent invasion by the USA and United Kingdom. Direct intervention by a foreign power in the domestic policy of another state, whether occupied or otherwise limited in sovereignty, to impose laws and reforms goes beyond mere promotion of institutional reform as described by Jacoby (2001). To borrow terminology from policy transfer literature, decisions taken in this manner lie at the coercive end of a continuum running from free to enforced decision making (Dolowitz and Marsh 2000). Yet even in occupied countries, the capacity of occupying forces to implement lasting change in laws and institutions may be limited. In post-Nazi Germany, efforts of the USA and UK to reform the civil service met with resistance, particularly after the Adenauer government realised West Germany's strong bargaining power as a frontline ally in the Cold War (Garner 1995). Bayley (1995) noted that the national structures of police forces were particularly resistant to change: restructuring failed in West Germany and failed to last in Japan. The Länder of the former DDR also experienced direct intervention after the collapse of the communist regime, but rather than coming from a "foreign" power this came from the established Länder of the BRD as an aspect of reunification. Prisons in the East of the reunified state were paired up with those from the West under a guardianship arrangement, with staff from older Länder travelling east to bring prisons in line with standards and practices of western counterparts.

Incentives and thresholds

With the collapse of communism in Central and Eastern Europe many countries in the region have sought membership of international organisations including the European Union, the European Court of Human Rights, the Council of Europe and NATO. Membership of such organisations may offer incentives to the peoples and politicians of former communist countries: security, prestige, economic benefits, and enhanced bargaining power as part of a larger collective unit. Eight former communist states entered the EU in the organisation's largest single enlargement in 2004; Bulgaria and Romania joined the Union in 2007. EU Commissioner for Enlargement, Olli Rehn has described the "soft power of transformation" that the Union enjoys through the criteria set for membership (Rehn 2005).

The benefits of membership require a degree of sacrifice. Brusis (2002) notes, with specific reference to the EU, that transfers of power restrict policy choices, but acknowledges that

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various European states have found ways of addressing this to retain their own distinctive take on EU policies. Before membership can be attained however, candidate countries need to meet certain conditions, or to cross certain 'thresholds' (Jacoby 2001). The Council of Europe has certain minimal standards for entry such as a bar on capital punishment. Likewise, although the European Union does not traditionally intervene in the criminal justice systems of its member states, one of the obstacles to the entry of Turkey, which currently enjoys candidate country status, is said to be its human rights record, use of torture and retention of the death penalty (Green 2000). The involvement of the European Union in the field of criminal justice has primarily been dictated by policy initiatives stemming from the Union's third pillar, which proceeds through inter-governmental negotiation and unanimous decision making (Denza 2003). As such, it might be seen to be one area where there is less demand for members, candidates and potential candidates for membership to adjust policy. However, as more policy decisions are made in this area, the demands on potential entrants remaining outside those decision making procedures increase. As will be seen in chapter 7, BiH has not been exempt from membership-related demands to reform its criminal justice structures.

Membership requirements which appear as restrictions on would be entrants or existing members of international organisations may not be viewed as such by political elites within the countries facing them. Jacoby (2001) notes that the need to cross a certain threshold may be used by local elites to push through unpopular measures, while Green (2002) notes that the Turkish government is content to accept Council of Europe pressure to shift from dormitory to single-cell accommodation in their prisons as this is seen as having the beneficial side-effect of undermining communication between groups of political prisoners. The effectiveness of thresholds as a means of influencing policy once a state has joined an organisation depends very much on the presence of protocols for ongoing monitoring. While Deacon and Hulse (1997) note that the provision for monitoring exists within the Council of Europe, the organisation's cooperative approach means that powers of sanction are limited and that resistance is frequently encountered where policy recommendations have financial implications (Morgan 1998). However in setting standards to be achieved prior to accession, and in offering assistance to states attempting to reach these standards, international, supra-state organisations certainly offer a guide to policy.

Models for reform in transitional states

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Policy transfer – the purposeful adoption of policy goals, programmes or instruments from one polity in another – is not restricted to transitional or post-totalitarian systems, but the dramatic discrediting of previous regimes in such countries may make tried and tested political solutions from other countries more attractive. Post-communist states of Central and Eastern Europe may look to a number of models reflecting different interpretations of the economic and political liberal consensus they have joined (Bunce 1999: 757). Deacon and Hulse (1997) describe an ideological 'battle' between states, organisations and consultants seeking to push their particular model of democratic governance and policy to recipient states in the former Eastern Bloc. Identity may influence the choice of model: Grad (1997) and Prunk (1997) note Slovenia's strong identification with Western Europe, influenced in part by its participation in the Austro-Hungarian empire, and suggest that it was to Western Europe that the Slovenes looked for constitutional models; Romania looked to France, a country whose culture was relatively well known and whose language had common roots (Fish 1999). Yet cultural similarities are not essential given Japan's use of Prussia as a model for legal modernisation. In this instance, Prussian military success against France, previously selected as a model-state, was important (Jettinghoff 2001). This suggests that the general success of the state from which a model is drawn may offer legitimacy to politicians advocating such policies at home, a point echoed by Karstedt (2004). While not exclusive to transitional states, the concept of policy transfer along with other accounts of the interaction between sup-national and domestic political actors seems to have a particular resonance in countries seeking to move away from a previous discredited model of governance.

The globalisation of economies, the development of Information Communication Technologies and the widening scope of supra-national and international institutions such as the European Union, European Court of Human Rights, and Council of Europe have all been cited as having an impact upon domestic politics (Jones and Newburn 2002; Morgan 1998). Brusis (2002) argues that transfers of power to the European Union restrict the policy choices available to domestic politicians. Sim and colleagues (cited in Morgan 1998) argue that the structural links being developed on a European level influence the direction and shape of domestic policy, pushing towards an illiberal and unaccountable European polity. Likewise, Melossi (1998) observes commonalities across Europe on the issue of immigration and immigrants, particularly visible through media representations, while Wacqaunt draws analogies between Europe and the USA in terms of increased reliance on incarceration, the burden of which falls most heavily on "*foreigners and quasi foreigners*" (1999: 216, emphasis

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in original). In relation to punishment systems, Coyle and van Zyl Smit (2000) highlight a number of positive developments following on from the 1948 Universal Declaration of Human Rights. The European Union, as a site of various legal frameworks, formal and informal networks of policy actors and practitioners, and overlapping institutions might be seen to be a particularly dense site of international actors sitting above the nation state, but influencing domestic policy.

While BiH remains outside the EU, those influences above the state that are particularly pertinent to members of the Union can still influence domestic policy in BiH. Indeed, it is arguable that, as an 'outsider' currently aspiring towards membership, BiH would be more keen to prove its willingness to adopt the values and standards presented as being central to the EU. From 1999, the EU and BiH have been working towards a 'Stabilisation and Association Process' bringing BiH 'closer to European standards' and ultimately geared towards BiH's full integration into the European Union (EU 2003a). In addition BiH is a member of the Council of Europe and is a contracting state of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). Governmental decisions are subject to the jurisdiction of the European Court of Human Rights in Strasbourg. Moreover, the extensive and intensive involvement of international agencies and individuals in the day to day politics, policy making and practice in Bosnia and Herzegovina across a wide range of policy areas indicates that BiH is a prime site to explore the impact of particular international influences on domestic policy. The processes through which domestic policy in BiH might be shaped, at least in part, by international factors can be discussed under the overlapping concepts of convergence, harmonisation and policy transfer.

Moving policy: convergence, transfers and transplants

Bennett (1991; 1997) has highlighted a growing literature on the theme of policy convergence and explanations for the phenomenon. The dynamic of convergence suggests countries moving from diverse positions to share a number of elements of policy: goals, content, instruments and tools, outcomes or styles (Bennett 1991). One possible explanation is that a number of countries face increasingly similar challenges. In exploring the diffusion of Ombudsmen, data protection and freedom of information legislation, Bennett (1997) highlights the issues of state-growth and democratisation. Common experiences as they relate to crime and justice policy among some advanced industrial democracies have been understood as an aspect of late modernity. Among these, Garland (1996) and Loader and

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Sparks (2007) locate crime related anxiety, although this is by no means unique to the current historical period (see, for example, Rawlings 1992). Rather, Garland and others have highlighted the combination of high crime levels as a feature of everyday life with particular media representations of crime creating a heightened sensitivity to criminality. Yet Bennett wishes to move beyond a straightforward assumption that "comparable conditions produce comparable problems which produce comparable policies" (1991: 217); such processes still depend on local social and political mechanisms through which problems are recognised, validated and acted upon. While comparable conditions may be a necessary precondition for adopting similar policy approaches, Bennett (1997) has argued that they are not sufficient in themselves. Further and potentially mutually reinforcing factors contributing to the dynamic of convergence are identified by Bennett (1991): elite networking; penetration; harmonisation; and emulation. These are discussed in further detail below, highlighting points of relevance to BiH.

Elite-networking

Bennett (1991) points to literature which highlights the existence of trans-national groups with shared motivations and a focus on a common problem. This sharing of ideas amongst a particular elite grouping builds consensus outside the context of the conflicts and competition of domestic politics, but of course any consensus built outside the domestic arena will subsequently need to be imported into that domestic context. The trans-national consensus may, in this context, serve as a support for such an import, providing a source of legitimacy. In their study of possible crime control transfers between the US and UK, Jones and Newburn (2007) describe neo-liberal think tanks as an important aspect of elite networks, promoting 'quality of life policing'. BiH's membership of regional and international organisations can facilitate such networking: BiH joined the Council of Europe in 2002, participates in various policing forums through the *Stability Pact for South Eastern Europe* (Stability Pact undated), and recently joined the Egmont Group of states cooperating in the field of financial intelligence (Egmont Group 2006). In addition to increased opportunities for domestic policy-makers and practitioners from within BiH to work alongside a range of international partners, the international community presence in BiH may highlight a further level of international elite networking. A number of interviewees had worked, or went on to work, in other countries in transition, including Mongolia, Macedonia and Albania, or worked simultaneously across a number of such countries. This might lend itself towards a 'transitions' elite, based across a number of countries, but tied together through shared

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experiences, practices and transfers of personnel; the kind of extended study of connections and actions that would be required to prove or refute such a hypothesis is beyond the scope of the current project.

Penetration

Bennett describes penetration as taking place when states are “forced to conform with actions taken elsewhere by external actors” (1991: 227). His examples are drawn primarily from relations between multi-national commercial enterprises and state governments. As highlighted earlier, in other countries that have experienced defeat in war, victorious states or allies might play a significant role in particular areas of policy making: Japan, Germany and Italy may provide examples in the wake of the Second World War; more recently the Coalition Provisional Authority in Iraq can be seen to have played this role. In the case of BiH, where a body representing a conglomerate of other states has executive decision-making powers, this penetration takes a conspicuous form.

Harmonisation

Harmonisation, according to Jones and Newburn (2007) involves the spread of policy through formal intergovernmental organizations and structures. Morgan (1998; 2000) has examined the work of the CPT as a possible source of harmonisation covering 46 countries from Iceland and Portugal in the West to Russia and Azerbaijan in the East. While the Committee operates on the basis of co-operative visits and can only recommend actions based on its findings rather than being able to enforce those recommendations, it can, in extreme situations, publish findings against the wish of a domestic government failing to respond to reported breaches of detainees' rights. Morgan observes that recommendations with no impact on resource needs generally receive a positive response, reminding the reader of the fundamental role played by fiscal policy in decision making in criminal justice as in other areas of government. At the same time he notes that recommendations questioning “fundamental cultural practices and legal traditions” meet with deeply rooted obstacles (Morgan 1998: 176). This highlights the enduring importance of local context in policy formulation. Mawby (2003) explores various models of policing, highlighting continued diversity in European policing against a background conducive to harmonisation including common challenges, formal networks and shared training, joint actions and information sharing. The highly centralised unitary forces of Sweden and Ireland contrast with France, Spain and Italy where a central militaristic force coexists with local forces, and with countries like Germany, the Netherlands and the United

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Kingdom where local police forces bear the primary responsibility for crime control, order maintenance and other policing functions. Yet the diversity in broad *structures* of policing, some of which may relate to differences in the historical experience of state formation (Bayley 1975), may obscure shifts in *practices* related to standards of police detention and the rights of suspects. That is, different structures may still give scope for the pursuit of common policy goals.

In any theory which emphasises macro-level drivers for change and convergence there is a real risk that local factors are overlooked. Moreover, by focusing on only one institution, for example the Council of Europe or the CPT, the impact of a field of numerous organisations with competing goals and rationales, each actively attempting to influence domestic policy, may be overlooked. Certainly, this has been observed in relation to certain Central and East European countries (Deacon and Hulse 1997). Following Foucault's conceptualisation, power can be taken as a feature of sets of relationships rather than the property of any one group or individual and this creates spaces in which the exercise of power can be resisted (Foucault 2000b). Governing involves complex interactions between various parties, especially when considered on a Europe-wide basis where policy may be formulated and implemented at a number of levels: supra-national; national; devolved, or other major sub-national; or local. Theorists of multi-level governance highlight situations in which governing coalitions cross the borders implied by a strictly hierarchic modelling of these levels of government (Hooghe and Marks 2003; Marks and Hooghe 2004). From discrepant interests and ambitions, tensions and conflicts arise, unintended consequences occur and what appears harmonious on the surface, or in terms of outcomes, appears discordant upon closer inspection (Kooiman 2003). Foucault's relational analysis of power, taken alongside Kooiman's sensitivity to competing governing ambitions, has a particular resonance at the level of European institutions, where there are various 'access points' for professionals and interest groups seeking to influence policy outside the framework of the nation state (Richardson 2000). Moreover, in the case of BiH, the field of international agencies can be understood as one composed of bodies with competing ideas and ambitions with regards to governing. This may open up spaces for different domestic governing actors to resist international pressure for change in one direction or another.

Within the literature that seeks to explain convergence and harmonisation there is often a tendency to concentrate on pressures and forces which limit domestic policy choices (e.g. Gourevitch 1978). Yet harmonisation might equally be seen as broadening the options

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available to policy makers through cross-system learning opportunities. Richardson (2000) argues that these can be useful opportunities to challenge entrenched policy communities by showing alternative paths. Such windows for learning about other systems have been facilitated by the Council of Europe in the case of prison administrations in BiH (see, for example *Action Plan on the Reform of the Prison System [2nd meeting of the Joint Steering Group]* 2002). Likewise the presence of large numbers of non-domestic actors in the criminal justice system, including international judges, international aid agencies, and the mainstream international community agencies, bring a diverse range of knowledge about criminal justice policy to BiH. Activities in sharing experiences and knowledge across different systems can be explored within the framework of policy transfer.

Emulation: transfers and transplants

Policy transfer has been defined by Dolowitz and Marsh (2000) as a process whereby policy goals, content, instruments, political institutions, ideologies and attitudes existing in one political context, either spatially or temporally defined, are employed in the development of such aspects in a second political context. Together they raise a range of questions that any study seeking to explore the transfer process must address: why and under what circumstances transfer takes place; who is involved; what is transferred; where lessons are drawn from; the degree of transfer; the constraining or facilitating factors; and the relationship between transfer and policy success and failure (Dolowitz 2000; Dolowitz and Marsh 1996, 2000). Their definition has been taken up, challenged and refined in subsequent work. Evans and Davies (1999) contest the temporal aspect of policy transfer, suggesting that it is normal practice for policy-makers to draw on past experiences. They also seek to distinguish between 'softer' versions of transfer involving ideas, concepts and attitudes and more concrete 'hard' transfers of particular policy programmes. Jones and Newburn (2002; 2005; 2007) develop this in the context of criminal justice and underline a distinction between *purposeful* policy transfer and vaguer patterns of convergence or diffusion. Indeed the *agency* implied in transfer could be described as one of its defining features. Factors highlighted already underlying convergence may facilitate transfers. While the EU may establish a framework for harmonisation, it has also been described as a "massive transfer platform" (Radaelli 2000: 26); likewise, Jones and Newburn (2007) have underscored the importance of elite networking in creating an informational foundation for transfer to take place.

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In addition to the literature dealing with policy transfer, there exists an established body of work based on comparative legal studies which addresses itself specifically to legal transplants (Cotterrell 2001; Legrand 2001; Nelken 2001; Watson 1974). The language of 'transplant' seems preferable to that of transfer: it suggests, based on analogy with medical science or horticulture, a grafting process that is as much dependent on the context into which the new rule, organ, or species is introduced as on its original context. It has a sensitivity to compatibility that might underpin Dolowitz's (2000) desire to use the concept of transfer as an independent variable, capable of explaining policy failure as a surgeon might seek to explain organ rejection. Watson suggests that the bulk of laws have their origins in a different context to that in which they are applied, either spatially or temporally (Watson 1974). Nelken (2001) gives a useful overview of this literature, while recognising the relationship between legal transplants and the wider context of transfer across all areas of social policy. In doing so he questions the underlying aims of transfer: is it simply the transfer of one law, rule or institution, or is there evidence of a broader project to recreate, in a new setting, the context which has served as a source? In the European post-communist states, where a shift towards market economies has accompanied political change, the broader contextual project may be of particular importance. Context and rule cannot be entirely separated, and similar rules and institutions may produce very different results in different settings; Cotterrell (2001), notes that Turkey's adoption of the Swiss civil code in 1923 produced unexpected results. Legrand (2001) would argue discrepancies between subsequent legal developments in the two countries were inevitable because there is no such thing as a legal transplant. Rather, rules have semantic content and therefore their meaning is dependent to a large extent on an interpreter predisposed to certain understandings through historical and cultural conditions. Unless donor and recipient communities are identical, the rule as written will be interpreted differently. As meaning is a function of interpretation, the rule is bound to be culturally specific, and the original rule has not been transplanted in a meaningful sense. To what extent Legrand's arguments undermine meaningful talk of 'legal transplants' is uncertain. There are degrees of homogeneity, and even within one branch of the legal profession, it might be possible to find different interpretations of what might seem on paper to be the same rule. Moreover, in the context of a broader social and economic convergence differences in historical and cultural conditions may diminish as obstacles to transplant.

In the context of wider arguments concerning globalisation, Heydebrand (2001) argues that it is reasonable to assume that, if cultural goods are being exported as a feature of the globalised

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economy, law or legal cultures may also be exported. He cites the American Bar Association Committee on Eastern European Legal Initiatives (CEELI) as an example, and the work of the Council of Europe under the heading of legal cooperation could be seen as equally relevant. Heydebrand's focus is primarily on the commercial sphere and business law, which fits well with those accounts of globalisation emphasising its economic aspects. More generally however, he also notes the expanding influence of the 'bargaining culture' found in common law. BiH, one of the countries in which CEELI are active, has recently adopted an adversarial prosecutorial system, introducing plea bargaining as a means of resolving criminal cases (see chapter 9). Grande (2000) has explored the introduction of a new criminal procedure in Italy in the late 1980s representing an attempt to shift towards an adversarial procedural model and geared towards tackling 'judicial overload' through increased efficiency. Grande sees transplant as brought about either through imposition or an attraction based on the prestige of the model, although the notion of prestige employed leaves scope for ideological commonalities. A broad international prestige, not specifically linked to the legal system, is one factor she identifies; more specifically she identifies prestige enjoyed by American legal scholarship. Grande seems to move beyond prestige when she locates the drivers for transfer not only in a dominant American culture, but in Italian distrust of the state and rejection of state intrusion into private life finding resonance with certain American ideologies. Yet at the same time, Grande notes the role of judicial traditions and practices in creating resistance to a straightforward copying, and notes that the adversarial model was not transplanted, rather "some of its features that, removed from their original context, accomplished little more than to create another type of non-adversary [sic] model" (Grande 2000: 230).

The scope of this study, which looks across three criminal justice sectors and multiple international agencies active in these sectors in BiH means that it has not been possible to investigate in detail any one example of policy that might, on the surface, be taken as an instance of transfer with the same degree of detail and rigour provided by Nellis (2000) or Jones and Newburn (2002; 2005; 2007). Indeed in a radio interview, Tim Newburn highlighted the difference between genuine policy transfer and post-hoc rationalisation on the part of political actors; after the fact it may be difficult for researchers to establish which is truly reflective of the situation (*Thinking Allowed*, BBC Radio 4, 28 January 2004). Yet at the same time, it is possible to identify practices and policies that, with further investigation, might add to the growing volume of literature on transfers or transplants within law and criminal justice: the revised criminal code could be one case, with the US and ICTY as

possible models (chapter 9); the reappointment process of judges may be based on post-reunification Länder of East Germany (chapter 9); and the day to day regime of the state-level detention unit might reflect ideas from Norway (chapter 11). These examples might help to address some of Dolowitz's (2000) questions regarding the who, what, why, whence, to what extent, with what ease, and to what end, of policy transfer. As such, the literature on policy transfer and the broader literature on patterns of convergence form an important background to the current work.

Bosnia and Herzegovina as a transitional society

From 1995, when the Dayton accords were signed, to the summer of 2005 when fieldwork was drawn to a close, BiH could clearly be described as a country in transition on several levels in several domains, without pre-judging how successful such transitions might turn out to be: military, economic, and political. The period has seen significant demobilisation of combatants in the country, a unification of former warring armies under state-level command, and a downscaling of successive international military missions⁵; economically, privatisation of state-owned assets has begun (Agencija za Privatizaciju u FBiH 2004); while politically the country has gone through a series of elections at various levels, with government having changed hands successfully at the state level. These transitions away from conflict and a command economy, along with a renewed transition towards democracy, have in the case of BiH been complicated by the inscription of the lines of conflict in the contemporary political geography of the country discussed in chapter 2. The transitions have also involved significant intervention in the terms explored above: aid and assistance from a wide range of international multilateral and bilateral sources; direct intervention by international powers through the Office of the High Representative; incentives and thresholds set by European and International bodies to which BiH seeks admission; with the possibility of policy transfer recognised by participants in reform in BiH. The circumstances of BiH are unique: it is not an occupied country in the same sense as Iraq or post-war Germany, but significant numbers of foreign troops in BiH have supported international civilian structures with executive powers; its experience of socialist authoritarian government was tempered by forms of self-management shared with other republics of SFRY; yet its experiences in leaving SFRY, its

⁵ These were, after the close of an initial war-time UN Protection Force (UNPROFOR): 1995-1996 - Implementation Force (IFOR); 1996-2005 - Stabilisation Force (SFOR); and an EU Force (EUFOR) thereafter.

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ethnic composition, and subsequent political division mark it out as significantly different from the other five republics.

The current project looks to explore how such interventions play out in the particular post-conflict, post-socialist, post-authoritarian contexts of cotemporary BiH, specifically in relation to the criminal justice systems of the country; these systems lie, as will be argued in the following chapter, at the heart of the modern state. Interventions in the criminal justice systems have come from a myriad of sources. A matrix of organisations currently active in criminal justice related programmes in BiH in August 2004, reproduced in appendix 1, lists 20 separate organisations, many involved in multiple projects. These include organisations set up specifically to work in BiH (e.g. OHR, HJPC, EUPM, CAFAO [EU]), UN organisations (UNICEF, UNDP, UN OHCHR), international organisations (EC, Council of Europe, OSCE, ICMP, IOM), the development agencies of national governments (USAID, DFID, CIDA, SIDA), Charities and NGOs (Save the Children UK, Open Society Fund BiH) and other assorted bodies with a specific interest in criminal justice (IRZ, USDoJ). The work of each and every organisation active in the field of criminal justice reform and reconstruction in BiH would provide enough material for an individual study. The approach taken here is not to focus on one individual body, although such an approach could certainly be justified. Rather than attempting to explore, for example, EU foreign and security policies through the lens of its activities in BiH, the current project seeks to focus on the processes of change and development in BiH itself. As such the study can explore the dynamics of interaction between several institutional actors, international and domestic, when they come together in one field. From this approach, it may be possible to draw conclusions about the benefits and potential pitfalls of international intervention in post-conflict or post-authoritarian states, and to develop a deeper understanding on the relationship of the state to such concerns as security and law. At the same time, such an enterprise will help to create a historical record of the changes that the criminal justice framework of BiH has gone through, facilitating future discussions of criminal justice within that country.

The overview will be presented thematically by criminal justice sector rather than on an organisation by organisation basis. This will allow the interaction of the multiple agencies and ministries to be observed and analysed and placing the subsequent case studies in an overall context of extensive and intensive reconstruction and reform. While the thematic approach has the advantage of allowing the work of multiple organisations to be explored in relation to one area of criminal justice it does create a risk that the implications of reform in

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one sector on another are overlooked (e.g. the impact of a reformed police service on the number of cases presented before the court, and in turn the implication of reform in prosecution and the courts on receptions into prisons). Where such cross-cutting issues are relevant they will be highlighted. Before this overview proceeds a further chapter explores issues around the theme of the state.

5. State, legitimacy, and Bosnia and Herzegovina

When faced with ‘the state’ we find ourselves addressing a term within which a lengthy history of forms and aims may be condensed. Thus in a discussion of criminal justice reform in Bosnia and Herzegovina (BiH), in which ‘the state’ looms large, whether as part of claims of statehood, state-building exercises, the role of non-state (international) agencies in participating in the functions of state, or in connection with the relationship between state and criminal justice system, it is a term which needs to be unpicked somewhat. Its historical variations in terms of forms and meanings must be acknowledged; its relatively permanent aspects, akin to the custom, act, drama and sequences that Nietzsche identified as making up the process, if not the meaning of punishment (1956: 211), must be identified; and finally the term ‘state’ and its possible meanings must be related to contemporary BiH. The problem is that new layers of meaning are constantly established obscuring those of earlier periods; this is as true of established states facing new challenges as it is of a relatively ‘young’ state going through a process geared towards establishment and consolidation.

Defining ‘the state’

Poggi (1990) asserts that, as the characteristics of polities existing before the early-modern period in European history did not match up to those of a state, the term ‘modern state’ is pleonastic; yet it can be argued that there is a long history of states, stretching back through time. This includes the city states of ancient Greece, and their equivalents in medieval Italy, pre-1878 Germany, and contemporary San Marino; likewise, Empires have been described as states, with early Mandarin rule described by Hall (1994) as an example of the ‘capstone state’. Hall continues to observe that, “no simple view of the state is much use, for there are different types of state in different historical and social circumstances” (1994: 20). Thus in defining the state, we need to explore what aspects of statehood remain constant throughout the ‘different historical and social circumstances’ to which Hall refers, and what makes it a meaningful unit for analysis.

Poggi starts from the work of Tilly, and he identifies a number of characteristics of the state, which can be summarised as follows:

The state operates autonomously to control a population within a bounded territory; in doing so it is differentiated from other organisations which operate in the same territory, is centralised, and features coordinated divisions internally (Adapted from Poggi 1990: 19).

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Thus we have the sense that the state manifests itself as a coherent organisation, albeit one with many parts: it is an organised body of people, occupying defined roles, gathered together for a particular purpose, in this case the control of a population. Poggi argues that the massive expansion of the modern state, and the diversity of activities it undertakes, suggests that this view of a sole coordinated organisation can no longer be supported. Personal experience evaluating a crime reduction initiative highlighted how, within the confines of one small project, occupants of different roles supported by one ministry, the Home Office, pursued different ends in relation to one convicted robber. The project drugs worker prioritised the control of substance usage, regardless of whether this took place in the community, in secure accommodation, or in prison; whereas the detective sergeant heading a proactive squad of officers clearly pushed for incapacitative imprisonment. These conflicting imperatives within one minor branch of state institutions raise questions about notions of state-coherence. However, while both were pushing for different ends, they reflect different attempts to control or govern the behaviour of the heroin-addicted offender in question, and moreover, their input into the control process is mediated by an organisational structure which channels their input to one particular decision maker and representative of the state, the magistrate or judge. This mediation may reflect the fact that state organisations do exist within an overarching framework which brings together disparate governing aims and objectives with a degree of coherence.

The differentiation of the state refers to the extent to which these state organisations perform political activities to the exclusion of other organisations. Poggi's interpretation suggests that there is a continuum of differentiation, with the highest degree of differentiation achieved when the state performs *all* and *only* political activities. The fact that Poggi sees it necessary to introduce the notion of *degrees* of differentiation into his definition of the state suggests that there is scope for argument over just how differentiated a set of organisations must be before they can reasonably be considered to be a state. Differentiation begs the question, just what is political? What is it that makes up the business of state organisations? Poggi contrasts state with a civil society, made up of individuals with non-political interests and engaged in private business, but in doing so clashes with the early etymology of the word which encapsulates that which relates to the citizen (πολίτης) of the city, or state (πόλις). The analytical isolation, or differentiation of state and civil society, is highly problematic. A long term historical survey conducted by Mann (1986) shows how the logistical inventions associated with states, for example written records to define obligations, are taken on by civil



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society and adapted to their own ends, while those of civil society are taken on by the state, thus the two cannot be separated by their modes of activity.

A functionalist definition might choose to focus on the control elements of a state's activity. Poggi highlights coercive, 'last resort' control as a specialism of the state, which, drawing on Weber's classic characterisation, retains the monopoly over the mandate for the exercise of legitimate force. But here there is a combination of function and means, the former being control, the latter being the threat or use of a particular form of force (the denial of particular privileges, restrictions on liberty, actual physical force in the form of restraint, or attacks on the body to purposefully wound or kill). The combination is essential, as if we were to limit ourselves to understanding the state in terms of functions of control, then we would find it difficult to differentiate from other organisations, especially in light of recent literature on governance and governmentality (for example, Kooiman 2003; Loader 2000; Loader and Sparks 2007; Loader and Walker 2006; O'Malley et al. 1997; Rose 2000; Rose and Miller 1992; Shearing and Wood 2003b; Wood 2004).

In trying to arrive at a working definition encompassing both function and means, we might say that a state is composed of a range of interconnected institutions and bodies, roles and positions, funded through forms of taxation (direct or indirect) or tribute, based around a central core of treasury, legislature and executive, but in the contemporary environment, extending beyond this in the form of devolved executives, bureaucracy, semi-autonomous agencies, local levels of government, geared towards exercising control internally over the conduct of all occupants of a given territory, excluding those covered by diplomatic immunity, by means of laws, regulations and rules, generated and recorded within those institutions, and ultimately backed up by sanctions enforceable through an exclusive mandate over authorised and legitimate use of physical force. Democratic forms of state claim this legitimacy from measures to facilitate the generation, granting and possible withdrawal of consent by a particular recognised population. Further characteristics of states include a range of symbols, although some of these are not unique to states, while others are not universal features of states: flags¹, banknotes and coinage², anthems³, and passports allowing those

¹ Each of the constituent parts of the UK has its own flag, while other organisations including the EU, Council of Europe and United Nations have their own flags.

² Those EU countries falling within the 'Eurozone' have their own identifiable coinage, although that of other Eurozone states is equally valid; Montenegro, while still in a federal union with Serbia, opted to adopt the Euro as its official currency; the UK is characterised by a number of 'issuing banks' including the Bank of England,

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recognised as citizens to enter or pass through certain other states⁴. Membership of certain regional or global organisations, such as the Council of Europe and UN, are open only to recognised states, with the latter having near global coverage⁵. This last point suggests that, as Poggi argues, one of the key aspects of contemporary ‘statehood’ is *recognition* by other bodies staking similar claims, possible only with the advanced development of a ‘*states system*’; it is this recognition that is the one defining feature of state not shared with non-state bodies. This rather weak form of ‘state’ label allows for all nature of polities which might be on the brink of internal collapse to be defined as a ‘state’ so long as they have achieved and continue to enjoy some form of external recognition as such by a body of other similarly recognised polities. Thus states may run from the ‘weak’ or less-developed polities described by Goldsmith (2003) to those claiming or aspiring to superpower status, although this status does not ensure citizen safety (see Garland 1996, 2001). In thinking of a continuum of states from the weaker to the stronger forms, we might also think of other continua: a continuum of sovereignty, more or less prone to being disregarded by other states; a continuum of territorial integrity, more or less porous to goods and people not sanctioned by the central authority; a continuum of symbols and authority, more or less recognised by the population. This allows a degree of definitional flexibility, recognising the need to encompass certain key elements: function (control); means (institutions, legitimacy, sovereignty, recorded laws); context (states system, recognition). This flexibility recognises the ongoing historical construction of semiotics recognised by Nietzsche, above. Having developed a concept of state as an analytical tool with some flexibility, the next step is the application of the concept to the study site, Bosnia and Herzegovina.

The state of Bosnia and Herzegovina

Chapter 2 gave a brief outline of the history of BiH as a geopolitical entity and more recently as a state, concluding with a description of post-war structures of government and governance

four more in Northern Ireland and three in Scotland. Such issuing banks need not be owned within the states where they issue currency, as is seen in the case of the Northern Bank, a subsidiary of Danske Bank, and Clydesdale Bank, belonging to the National Australia Bank Group.

³ The communist *Internationale* being one example of a non-state anthem, likewise, the Council of Europe have adopted an instrumental version of *An die Freude*, from Beethoven’s 9th symphony.

⁴ Although these are not always necessary, for example within those countries that are fully signed up to the Schengen agreement.

⁵ The exception being The Holy See, which remains an observer without voting rights. Several territories whose statehood is disputed, e.g. The Republic of China (Taiwan), are not members.

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in the country, including common-institutions, entities, a special district, cantons, and outside agents with executive powers. To apply the term state to BiH is thus to enter a complex field of institutions, constitutions, values and symbols. The war which ran from 1992 to 1995 essentially represented a contestation of the respective statehoods of BiH and a Yugoslavia which incorporated BiH; and the Dayton settlement did not necessarily represent the end of challenges to the statehood of BiH as a complete, coherent, integrated political and territorial unit. Thus while BiH received recognition as a state from other members of the state system as far back as 1992, this recognition was not necessarily matched with local recognition, either on the part of immediate neighbours or domestic population. Thus the idea of a Bosnian state has been contested, indirectly through claims to state-like status exercised by sub-state bodies such as the entities, which for much of BiH's early history maintained their own separate armed forces, and which continue to maintain state-like symbols such as flags and anthems; again indirectly in the early stages, through the circulation of other national currencies, the Croatian Kuna, German Deutschmark, and Yugoslav Dinar; and directly through challenges to the constitution such as the Mostar gathering and Croat National Assembly described in chapter 9.

When applying the word state to BiH, there are different senses in which the word might be used. In one sense, for example, the word 'state' is used in the context of 'state government' to signify the national level of government, common institutions including the State Presidency, Council of Ministers and a bicameral legislature composed of the House of Peoples and the House of Representatives; in this sense state is used in opposition to entity, district and canton as a distinct level of government with its own particular powers, competencies and agencies. At the same time and at a more general level, 'state' can be taken to refer to what Copp has referred to "the animated institutions of government", a system of offices, roles and people engaged in producing, administering and enforcing laws (1999: 7). With respect to BiH this must be taken to refer to all levels of government including those beyond the national level, such as the entities, the cantons of FBiH, Brčko District, and the municipalities. Therefore to distinguish between a general concept of 'the state' and the particular meaning of 'state' in relation to the constitutional arrangements of BiH, the noun 'state' will be reserved for the general concept while the adjective 'state', again referring to the general concept, will be used in opposition to 'state-level', the latter describing only those institutions controlled by the national government of BiH.

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In the ten years subsequent to the Dayton Accords, BiH has seen its position on various possible continua of state shift considerably, and within BiH, the dominance of particular bodies playing a role in exercising the functions of state, whether at state-, entity-, district- or cantonal-level, has also shifted considerably. In terms of sovereignty, while Croatia and the Rump Yugoslavia gave BiH *de jure* recognition in the Dayton Accords, the executive powers granted to the High Representative in 1997, and used extensively since, place BiH at the weaker end of the scale in terms of recognition as a sovereign state. This is by no means static, and the use of OHR powers to introduce judicial structures at the state level from 2000 onwards (chapter 9) can be contrasted with the refusal of two successive High Representatives, Paddy Ashdown and Christian Schwarz-Schilling, to use their powers to push through proposed reforms to bring policing under the authority of a state-level ministry. External intervention has resulted in a shift of balance between respective levels of government in BiH, and the functions which their bodies fulfil; in particular the first ten post-war years saw state-level development in the arena of criminal justice, often with significant international involvement in these areas, something that will be explored in later chapters.

Alongside these shifts in the internal dynamics of sovereignty in BiH, the immediate post-war period witnessed a low degree of territorial integrity in the country. Checkpoints along the Inter-Entity Boundary Line were seen as a major impediment to freedom of movement within BiH (see chapters 6 and 7); rail travel within BiH is interrupted at entity boundaries as one entity's engine is replaced with that of the other. This territorial division is something that has changed with the introduction of a border service at the state-level, also geared to reducing the porosity of BiH's borders to illegal penetration by people and goods. The symbols of state have also been a site of competition and contestation. Within the first year of Bonn powers, the High Representative imposed decisions in a number of areas relating to symbolic elements of the state, including the flag, coat of arms, currency, and licence plates (see *Decisions* of 3 February 1998, 27 March 1998, 2 April 1998, 18 May 1998, 20 May 1998 and 28 September 1998). In a discussion of the judicial environment in BiH in the post war years in chapter 8, the ongoing commitment to the symbols of bodies no longer recognised as playing a role in executing state-functions will be highlighted. The state-like symbols of entities have also been successfully challenged in BiH's Constitutional Court. The application of Sulejman Tihić, as chair of the state-level Presidency, resulted in a finding that the coat of arms and flag of FBiH, and the coat of arms, flag and anthem of RS, were not in line with provisions of the constitution of BiH, as they excluded respectively Serbs, and

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Bosniaks and Croats. Furthermore, article 2 of the RS Law on Use of the Flag, Coat of Arms and the Anthem, which claimed that these symbols “represent the statehood of the Republika Srpska” was annulled (*Partial Decision: Mr Sulejman Tihic* 2004).

The process of contestation arguably locates BiH at the weaker end of state continua, and might lend itself in particular to the weaker recognition of BiH’s sovereignty by other members of the state system, particularly when brought together in a ‘community’ of states. This weaker recognition of sovereignty has resulted in intensive intervention in what would often be seen as a country’s internal affairs; examples encountered in the course of this particular study include the decisions on state symbols listed above, and over who occupies particular posts in public life, from the most junior police officer to the highest office of state. But arguably, such intervention must ground claims to legitimacy in efforts to shift the state in question away from the weak end of the continuum, and thus international efforts in BiH are couched in terms of state-building. Yet given all that has been said with regards to the somewhat fluid conceptualisation of the state, state-building must be recognised as an activity that cannot be defined as neutral: a particular model of the state is being built, and in the case of BiH later chapters point towards a liberal-democratic model featuring attributes such as free and fair elections, rule of law, formal equality of citizens, and a market economy. In the context of BiH, state-building activities might be understood using a general notion of the state and thus including all levels of domestic government and administration in programmes designed to build capacity on the basis of existing institutions and competences. Yet in BiH it is also possible to see a strong focus on creating *new* and *additional* capacity at the level of common institutions. This ‘state-level’ building would suggest that the liberal-democratic model of the state that is being applied in BiH might be further qualified by a preference for a more unitary state, particularly in relation to those aspects central to maintaining legitimacy by protecting, or at least purporting to protect, the citizen from threats, whether external in the case of armed forces⁶, or internal in the case of the police and other criminal justice bodies.

State, executive power and legitimacy in BiH

As stated above, international intervention in BiH stakes its claim to legitimacy on the basis of efforts to create a stronger, more stable state in BiH. Underlying the current project has been a concern with this legitimacy. Copp has, in relation to the state, defined legitimacy as

⁶ Subsequent to a Defence Restructuring Commission chaired by Raffi Gregorian, military forces have been brought under state-level oversight in BiH.

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“the moral authority to govern” (1999: 4). While he addresses the question of legitimacy within the framework of the state, Sparks and Bottoms draw on Beetham to propose that “no governing authority can afford to disregard the problem of legitimation, no matter what manner of polity is in question” (1995: 55). Given the complexity of governing today, and cross cutting power relations this suggests that there are various non-state actors that might be identified as sharing this concern with regards to legitimation (Kooiman 2003; Rose 2000; Rose and Miller 1992). International actors in BiH are no exception, and arguably their armed presence in BiH as well as their direct intervention in criminal justice makes such legitimacy all the more important. Many discussions of *state* legitimacy have circled around the relationship between state authority to govern and state capacity to protect citizens, whether against external threats (Jettinghoff 2001) or internal (Elias 1994). While it is possible that idea of the state able to protect its citizens is a myth according to Garland (1996), and one which is increasingly brought into question in ‘high-crime’ societies, it retains some power as a myth, and continues to serve a legitimating function regardless of its empirical basis. The focus on criminal justice institutions in this paper brings concerns with legitimacy to the foreground: Mawby (2003) describes legitimacy as one of the defining characteristics of the police as an institution; Bourdieu (2002) sees a chain of legitimation running from the most minor enforcer of law to the most high interpreter of laws, removing their acts from the category of arbitrary violence, and drawing on Moore (1978) this is a chain which should be extended to include those legislators responsible for introducing the laws, in turn leading back to the social actors who together fulfil the role of “the authentic writer of the law” (Bourdieu 2002: 151). The act of punishing is especially problematic both morally and politically (Garland 1990), particularly where it seeks to locate its authority in consent rather than in brute force. Many of the levels of government to be outlined in the following chapter are engaged in policy-making and implementation in the area of criminal justice in BiH: policing is governed at state-, entity-, district-, and cantonal-level, as are courts, while prisons are managed from entity and state levels only. In addition to these domestic governing actors, members of the international community have intervened frequently in criminal justice policy in BiH, both in the role of donors and executive decision makers. Moreover, through the exercise of executive powers, the OHR has passed decisions with punitive outcomes for individuals, barring them from participation in public life in the country (see, for example, *Decision of 7 March 2001*). Thus in BiH, where state functions have been split across domestic and international actors, particularly in the field of criminal justice decision-making, one might seek to explore how the legitimacy of international actors is

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maintained, particularly in the absence of a concrete set of arrangements for the governed population to grant or withdraw consent.

As we might consider the legitimacy of various levels of governing actors, entity, state, and international, so too are there different audiences relevant to attempts to secure and maintain legitimacy. Three levels spring to mind immediately: the general population governed under the system in question, elite groups within that population, and the bodies which make up the international community. Legitimacy in one sphere may not necessarily result in legitimacy in the others. Stalin's denial of the legitimacy of Tito's regime after 1948 is a case in point: while it may have damaged Tito's legitimacy in the eyes of other communist regimes (Djilas 1967), it was beneficial to Tito in presenting the image of a strong and independent leader domestically (Lapenna 1964). Conversely the literature on policy transfer suggests that copying policies from other successful states may be one way of securing legitimacy on a number of levels (Radaelli cited in Jones and Newburn 2002). Karstedt (2004) notes that hegemonic power does not necessarily operate through imposing its own models and practise by coercive force, rather those models are attractive owing to the prestige they accumulate through association.

Divisions over legitimacy, whether of state or any other governing body, are brought to light in moments of intense controversy which serve to 'crystallise public anxieties' (Sparks 2001). As such these moments are ideal means to understanding how legitimacy is maintained. In focusing on controversy, Sparks echoes a theory of investigation outlined sixty years previously by Llewellyn and Hoebel and put to use in their ethnological study *The Cheyenne Way* (1941). They gave analytical privilege to controversial or 'trouble' cases elicited through interviews, their own and those of earlier students of Cheyenne culture, as a means of understanding better the governing norms of that particular social context:

...it is the case of hitch or trouble that dramatizes a "norm" or a conflict of "norms" which may have been latent. It focuses conscious attention; it forces the defining of issues. It colors the issues, too, as they are shaped, with the personalities which are in conflict... It forces solution in a fashion to be remembered, perhaps in clear, ringing words.

(Llewellyn and Hoebel 1941: 21)

While giving analytical privilege to these 'hitches', Llewellyn and Hoebel are not suggesting they be studied in isolation, rather that they need to be understood against a background of norms and practices in a particular social context. Indeed to do otherwise would lead the researcher to take an overly sceptical view, overlooking complicity, consensus and cohesion.

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Nonetheless, problematic cases that bring together domestic and international actors in BiH may be one way to open up a fruitful discussion of the legitimacy those respective actors enjoy and how they build and maintain it with respect to different audiences. Particular cases worth noting are the challenge to UN vetting procedures as they were applied to domestic police personnel; the trial of major political figures; and the 'Zenica 4' case regarding minority prisoners. These will be addressed in the following pairs of chapters on police, courts and prisons.

6. Post-conflict policing in Bosnia and Herzegovina

In exploring the criminal justice field, there are a number of reasons to turn first to the police. These stem from lay understandings of criminal justice, institutional frameworks, and a broader conceptual logic. The police are most likely to be the first or only point of contact between the public and the criminal justice field; this is true for victim and suspect alike. Moreover, the police are the most visible element of the field: they operate amongst the public on a daily basis; while doing so they are marked out clearly by uniforms and other signifiers. The police are easily divided from other criminal justice sectors on an institutional and conceptual level. The police are generally accountable to ministries of public safety, security or the interior, while courts and prisons answer to ministries of justice (Brodeur and Shearing 2005). The names of these ministries suggest a broader conceptual distinction underpinning the work of police, courts and prisons. The police handle matters of security, while the courts and prisons decide upon questions of justice and enact those decisions. The concepts of security and justice are not easily reconciled, thus the police stand adrift of other criminal justice agencies. This chapter begins by drawing on literature to examine the links between police and democracy before considering the impact of shifting understandings of the relationship between state, police and policing. Subsequently, documentary evidence is used to highlight challenges to democratic forms of policing in Bosnia and Herzegovina (BiH) in the years following the Dayton Accords. A further chapter will explore efforts to address these obstacles.

State, democracy and policing

Two particular aspects of police and policing have drawn frequent comment from academics and practitioners: the centrality of the police to the modern state; and the link between police activity and democracy. The word *police* reveals a close relationship between organisation, state and government: the etymology of the word goes back to the Greek polis (πόλις), the city state; the archaic meaning of the verb is to govern; while modern usage conveys a sense of control, regulation, order, and the maintenance of state law. Jones and colleagues describe it as “the most central public service in a modern state” observing that it protects fundamental freedoms underpinning democracy (1996: 187). This supports claims from Bayley (1995) that the police service is central to democratic nation building, and Marenin (1998b), who suggests that without a democratised and effective police service, political democracy is unlikely to succeed. Goldsmith (2003) adds that responsibility for citizen safety lies with the

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state rather than civil society or the commercial sector, and that the legitimacy and viability of the state are brought into question through weak policing. Foreshadowing the importance of policing decisions following contested elections in 2004 in Ukraine, Beck (2001) drew on his work in the country to observe that police play a role in either hindering or advancing democratisation. The same line of thinking can be seen at the highest levels of the international community in BiH: outgoing High Representative Carlos Westendorp observed in 1999 that policing was one of the three sectors most vital to democratisation in the country (OHR 1999a). The importance of the police in this respect arises from a combination of their activities, in particular the role these play in securing certain freedoms (Goldsmith 2003; Jones et al. 1996), and their visibility, as a tangible symbol of state authority (Jones 1995). The role of the police in upholding democracy means that they function as an indicator of the level of democratisation in a given state. Marks notes the behaviour of the police signals “a government’s operational commitment to democracy” (2000: 558). Elsewhere she develops criteria by which to judge the democratic nature of the police: structures representative of a policed population; community orientation; proactive behaviour; and a treatment of the public as clients (Marks 2003). A further scheme lists seven principles for democratic policing drawn from an analysis of normative theories of democracy: equity, delivery of service, responsiveness, distribution of power, information, redress, and participation (Jones 1995; Jones et al. 1994, 1996). The strength of this analysis lies in the prioritisation of certain principles and criteria over others; the preceding list is presented in order of Jones et al’s interpretation of their importance. Thus police responsiveness to public demands is qualified by the principle of equity, undermining opportunities for ‘tyranny of the majority’ whereby prejudicial patterns of policing against a minority enjoy the support of majority groups.

So far, the focus of this section has rested specifically on the state police and the role that they can play in supporting or undermining democracy. Yet recent developments in how the task of policing is understood in contemporary literature on police and policing must be noted. Bayley (1975) distinguishes ‘police’ as a function linked to governing from ‘police’ as a body of men (sic). This division has crystallised into a body of literature which makes a distinction between the specific institutional form represented by state police bodies (‘the police’) and a broader field of policing and the governance of security. Dupont and colleagues (2003) have put this in the context of a growing mismatch between demands for, and state capacity to provide, security. The resulting fragmentation of the field of policing creates the need to draw a clear line between the police as one provider of security, and the more general field of

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security provision in which they participate alongside other actors (Johnston and Shearing 2003; Jones 2003; Loader 2000; O'Malley 1997; Rose 2000). The increased scrutiny of states' claims to a monopoly over the provision of order and security fits in to a broader discussion of state retreat and reformulation (Müller and Wright 1994). The reconfiguration of state, particularly in the field of security provision, has been attributed to various factors. Shearing (1994) points to a growing recognition of the limits of state police when faced with private spaces. In this analysis state recognition of such limits leads to efforts to harness the capacity of other bodies to achieve order and security. Individual recognition leads down private paths to security: the recruitment of private patrols, vigilantism, or the purchase of security technologies and hardware. O'Malley and Palmer (1996) have noted the increasing dominance of a market-based paradigm in which problems of government are framed. It is in this context, accompanying the rise of consumerism, that O'Malley (1997) locates the transfer of public services to the private domain. Loader and Sparks (2007) describe the commodification of policing, while Shearing's work which tackles the conceptualisation of security as a commodity develops the implications for the marketisation of security provision, purchaser-provider relations and an accompanying redefinition of policing (Shearing 1994, 2000; Shearing and Wood 2003b).

Fragmentation of the field of policing is not simply a case of a new or resurgent market dimension in the provision of security. Loader's (2000) prepositional analysis of the relationship between policing and the state is illustrative of the multiple players involved. Policing takes place by, through, above, beyond or below the state. The dimension of policing taking place above the state, particularly through the institutions of the EU, has spawned its own body of literature (den Boer 1998, 2002; Denza 2003; Dimitrova 2004; Fijnaut 2004; Loader 2002; Loader and Sparks 2007; Melossi 1998). The recognition of a level of policing and security provision above the state has two general implications for BiH as a country of mainland Europe outside the EU, and BiH as a potential future candidate for membership of the union. As an outsider to the EU, BiH can be viewed through the lens of 'fortress Europe' as a potential threat in the form of a 'transit country', demanding, in the short term, a containment approach (Grecco 2004). As Hemmingway (2004) notes, the EU area of Freedom, Justice and Security is not conceived solely in terms of internal dynamics but involves scrutiny of the union's neighbours. The freedom associated with economic union, particularly the movement of goods and people within the union has also created demands upon EU members that lend themselves towards joint working (Mawby 2003).

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While 'home affairs' is an area, broadly speaking, where decision making proceeds primarily through intergovernmental negotiation at the EU level, any decisions taken will likely have implications for the potential future members currently outside the decision making process.

Regardless of the theoretical approach used to explain and describe the origins of these trends in policing, Shearing (1997) argues that they reflect actual developments; whether one thinks them positive or negative they have to be acknowledged and engaged with. It is at this point that Shearing engages with international policing assistance. He suggests that the assistance offered to developing or transitional countries reflects only a part of contemporary knowledge about policing in donor states; that concerning state policing bodies. Shearing's work does not necessarily challenge the validity of the content of the conceptualisations of democratic policing by state bodies outlined by Jones and colleagues (Jones 1995; Jones et al. 1994, 1996) or Marks (2003); nor does he define the ends of assistance programmes pursuing such models of democratic policing as unworthy, agreeing that there is "clearly a path that must be negotiated by emerging democracies" (Shearing 1997: 30). But an exclusive focus on state policing bodies fails to acknowledge and engage with developments taking place in policing in donor states. In his paper delivered at a National Institute of Justice conference in Washington (1997), and elsewhere with others (Dupont et al. 2003), Shearing has sought to provide theoretical and practical underpinnings for reinvigorated and progressive democratic policing assistance, accounting fully for the network of bodies engaged in security provision, public, private, or hybrid.

The observed trend towards state retreat or reconfiguration may not be universal. The shifting sands of state and policing have been examined primarily in a narrow set of developed, Anglophone states. For example O'Malley (1997) refers to developments in Australia, New Zealand and the UK while Garland (1996; 2001) draws on examples from the UK and US. Within these states, some have sought to advance a thesis of an expansion of state power and capacity in order provision (Herbert 1999). Some research has begun to redress this Anglophone bias, including Shearing's own work on new directions in security provision in South Africa (1997; also Brodeur and Shearing 2005), and Wood's (2004) analysis of community projects in Argentina. Moreover if policing is a multilateral activity, state-funded and organised policing bodies can still play a central role, reflecting in part what Bittner (1974) describes as their access to a putative state monopoly on legitimate force; he notes a defining characteristic of the police as the power and requirement to "impose or... coerce a provisional solution upon emergent problems without having to brook or defer to opposition

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of any kind” (1974: 18). Ferret (2004) describes state as ‘meta-auspice’ and ‘meta-provider’; in continental Europe it remains the dominant party in the field of security. Moreover, the recognition of security as a public good leads to the conclusion that a central role for the state in this field remains defensible (Loader and Walker 2001; Loader and Walker 2006). In spite of the fragmentation of the field of security provision across multiple public, private and hybrid formations, an enduring concern with the state as a central actor in this field is legitimate in academic research.

BiH provides a case study of democratic policing assistance in the context of a state-building exercise. Regardless of the position one takes on the democratic credentials of Yugoslav self management as theory or practice, BiH has been propelled in a new democratic direction since 1995. State militias, swollen by war-time recruitment and forming the basis of post-war police forces lacked experience in policing a liberal democratic state, and faced other challenges arising from the war and the post-war environment. Since 1995, a number of international organisations have been active in attempting to develop models of democratic and accountable policing throughout BiH. The combination of international and local influences in BiH, where policing policy being developed in line with reform agenda sponsored by various sections of the international community, means that BiH is an ideal site to explore trends in contemporary policing and the relationship between the state and policing, adding to the knowledge base created by Garland (1996), Loader and Sparks (2007), Rose and Miller (1992) and others focusing on Anglophone states, and Ferret’s work on the strong continental state (2004). The current project has an explicit focus on the interventions of the international community in BiH’s criminal justice system, and how these may manifest themselves in the form of state-building activities. As such, the natural bias of the project is towards the interface between international community, governing bodies at state, entity and cantonal level, and publicly funded and managed police forces. Nonetheless, recognition is given to the fact that security and policing are increasingly diverse fields, and one example will be given in chapter 8 where there is evidence of one bilateral development agency seeking to go beyond the state in addressing questions of security and safety. The following section draws primarily on documentary sources to explore obstacles to democratic policing in BiH in the years immediately following the war, many of which have their roots in, or even before, the war. These include legacies of Yugoslav structures of policing; the activities of police organisations during the war; new territorial divisions resulting from peace settlements;

corruption; and new challenges arising from changing patterns of crime and public perception of crime.

An unhappy inheritance: post-conflict policing in BiH

Yugoslav legacies: police-militarization and public-alienation

Given the importance of police services to state legitimacy and democracy, accountability to those being policed is essential (Jones 2003), combining principles of responsiveness, information, redress as described above (Jones et al. 1994). The former Socialist Federal Republic of Yugoslavia (SFRY) featured policing by militia, structured along military lines and with limited accountability to local populations (Kutnjak-Ivković and Haberfeld 2000). The military form taken by the militia is not necessarily incompatible with local accountability; many European states employing centralised militaristic forces under the direction of defence ministries balance these with local forces (Mawby 2003). Yugoslav principles of 'self-management' may have provided some balance: self-protection consisted of preventative measures directed against flood and fire, vandalism and violence, and providing security for factories and enterprises; yet such participatory forms of policing appear to have developed unevenly across SFRY (Davidović 1993) and did not survive the war in BiH. Rather, policing was described as 'rigid' and lacking in customer focus (INT38: 30). Policy documents from the UK Department for International Development (DFID), one of many organisations active in BiH, highlight the need for a paradigm-shift from police force to police service in post-authoritarian contexts (DFID 2002), fitting with Marks' (2003) criteria for democratic policing which involves recognition of the public as clients; this requires that authoritarian traditions and cultures embedded in police practice be challenged, yet these underlying assumptions are most resistant to change (Marks 2000, 2003). Where personnel are retained from an authoritarian regime, there is a risk that such assumptions are allowed continued influence over practice in the short term and perpetuate an occupational culture resistant to new models of police-public relations.

Dealing with a violent past: police and war crimes

The war in BiH involved breaches of human rights on a massive scale; one could anticipate that individual police officers, serving in the military, would share responsibility for such acts as much as soldiers drawn from a range of other professions. The return of such officers to civilian police duties may undermine the equitable provision of security to all in an emerging

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democracy seeking to reconstruct fragmented communities. Where the police, as a formal state institution, have been involved in acts of illegal detention, forced population transfer and massacre, the challenge to democratic policing is greater still, particularly where those with command responsibility for such acts continue to occupy senior positions. Naarden (2003: 342) sees this as a challenge to peace as well as to democracy, and as a fundamental problem for peacekeeping missions to address. Drawing on a parallel case from history, Bloxham notes that the police played a major role in the Nazi strategy to annihilate European Jews as part of an “immense complex of police, military and civilian offices” (2001: 188), although this is rarely reflected in English-language historiography, mirroring the absence of major cases from post-war international tribunals. The same elision in historiography is untenable in BiH in light of what is known. During the conflict, news media regularly highlighted the role of the police in forced evictions and population transfers (Barber 1992; Pukas 1992); on detention camps run under police authority (Traynor 1995; Vulliamy 1992); on the engagement of police in systematised campaigns of rape (Doyle 1993); and on participation in attempts to erase physical evidence of BiH’s multi-ethnic, multi-religious history (Fisk 1994). Moreover, unlike the international tribunals following World War Two, the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (ICTY) has not left the historian facing a dearth of material on police participation in war crimes. This section seeks to explore the role of police forces and police officers in violations of humanitarian law, primarily through cases tried at The Hague.

By late October 2005 The Hague tribunal had passed first instance verdicts of guilt, which still stood, on 47 individuals accused of crimes in BiH¹. Of these, eight (17 per cent) had committed crimes while serving in the capacity of regular or reserve police officers, and a further two (4 per cent) were operating as military police officers. A further twelve individuals (26 per cent) committed offences in prisons and detention camps but in roles that could not be securely attributed to the police. A number of individuals in this latter group played an ambiguous role and it was unclear whether they answered to military, police, or other civilian authorities (For example, see *Prosecutor v Sikirica* 2001; *Prosecutor v Jelisić* 1999). In spite of the blurring of boundaries here it is clear that the police played a significant

¹ Cases relating to crimes outside BiH, resulting in acquittal, withdrawn before the conclusion of proceedings, still pending at 26 October 2005, and findings of guilt reversed on appeal have been excluded.

role in operating detention camps. The Keraterm camp near Prijedor, for example, was established under police authority and employed thirty police reserves (*Prosecutor v Kvočka* 2001).

Table 6.1 Wartime role of those found guilty at ICTY. 26 October 2005.

| | Percentage | N |
|------------------|------------|-----------|
| Defence/Military | 36 | 17 |
| Camps/Prisons | 26 | 12 |
| Police | 17 | 8 |
| Politics | 17 | 8 |
| Military Police | 4 | 2 |
| Total | 100 | 47 |

Stevan Todorović, Chief of Police in Bosanski Šamac, pleaded guilty to acts of persecution, including forced transfers of the non-Serb population, beatings of detainees, and one murder (*Prosecutor v Todorović* 2001). Vladimir Šantić, a professional police officer before the war, served as a Military Police commander in the Croatian Defence Council (HVO), and was found guilty of participating in the killing and expulsion of Muslim civilians from the village of Ahmići in the Lašva valley (*Prosecutor v Kupreškić* 2001). Damir Došen was a uniformed police reservist in the staff at the Keraterm detention camp; his co-accused Dragan Kolundžija (included under camps/prisons in table 6.1) wore a military style uniform, but had been conscripted to fulfil the tasks of an unranked reserve police guard (*Sikirica* 2001). Darko Mrđa, mobilised as a police reservist, entered a guilty plea over his participation in the murder of over two hundred Muslim civilians carried out by the 'intervention squad' of Prijedor police (*Prosecutor v Mrđa* 2004).

Other cases, where the accused was not a police officer, also highlight the role played by police in military strategies and human rights abuses. They show the close working relationship of police and paramilitary groups, in particular in joint 'arrest squads' (*Prosecutor v Simić et al* 2003). Goran Jelisić, indicted on 32 counts including genocide, violations of the laws or customs of war and crimes against humanity, participated in systematic killing of Muslim civilians at the Brčko police station (*Prosecutor v Jelisić* 1999). His co-accused had been mobilised into the Bosnian Serb Territorial Defence but then joined an 'intervention platoon' in the Bosnian Serb police reserve corps (*Prosecutor v Češić* 2004). The barracks at Konjić, used to detain Bosnian-Serb civilians came under the joint authority of the HVO, territorial defence units, and police (*Prosecutor v Delalić* 2001). The tribunal also highlighted cooperation between police and military and paramilitary units outside detention

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facilities, for example at Srebrenica where over 7,000 civilians were killed (*Simić et al* 2003; *Prosecutor v Erdemović* 1996; *Prosecutor v Stakić* 2003). Ultimately, authority over the police in Serb-dominated areas lay in the hands of the Bosnian-Serb presidency (*Prosecutor v Plavšić* 2003).

The evidence highlights systematic use of public police in policies of ethnic cleansing and abuse of human rights; the ICTY cases examine events largely, although not exclusively, occurring in Serb-dominated areas of northern Bosnia (Bosanski Šamac, Brčko, Prijedor). Police complicity in military strategy may have been facilitated by the constitutional arrangements of the former Yugoslavia. Defence was a federal matter with the People's Army controlled by central government. Policing, although overseen from Belgrade, was run primarily from republic-level ministries of the interior. The Public Security Service (Služba Javne Bezbednosti) took the form of a militia, organised along military lines with commissioned and warrant officers, rank and file, and reservists. As individual republics had no 'proper' military as such, the militia took on part of this role when war broke out. The new role required a massive expansion of numbers and saw normal entry requirements and training being waived (for a description of this process in Croatia, see Kutnjak-Ivković and Haberfeld 2000). Boundaries between police and army blurred; police became part of the offensive and defensive strategies of participants in armed conflict. In turn, where participants sought to implement policies of forced transfer, ethnic cleansing or other attacks on civilians, police organisations became involved in these human rights abuses. The legacy of the conflict for policing in BiH is clear: the police in various parts of the country have been implicated in some of the worst excesses of wartime violence against civilians. As the organisation tasked with public protection they were heavily involved in acts designed to undermine public security and to harm specific sectors of society. The BiH authorities and international community faced the task of rebuilding public confidence in a service burdened by the combined legacies of authoritarianism and of its role during the war. The Hague trials might go some way towards achieving these ends, but the level of involvement of the police in war crimes was such that it demanded more large scale action, seen in the certification process carried out under UN auspices and described in chapter 7.

Separatist legacies: new divisions in policing

The Washington Agreements of 1994 signalled peace between the Sarajevo government and Bosnian-Croat separatists, yet the city of Mostar illustrated continuing division. The

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destruction of the old bridge over the River Neretva symbolised the division of the city between the Bosnian-Croat administration on the West bank and a Bosniak counterpart in the East. This pattern of division was replicated throughout the new Federation of Bosnia and Herzegovina (FBiH). In the wake of the conflict, the UNIPTF found itself faced with the task of disbanding Bosnian-Croat para-police forces and other 'special' police units throughout FBiH (UNDPI 1998). In March 1997 a joint police force was established for Mostar (OHR 1997a), but OHR reports indicate ongoing problems with the creation unified cantonal policing structures in FBiH (OHR 1997b, 1998a, b).

Even after the successful abolition of irregular police forces, the international community has argued that BiH features a high number of police forces relative to the country's size (Commission of the European Communities 2003a). In the initial post-war period police forces existed at entity and (in FBiH) cantonal level, with a further force serving Brčko district. These have since been supplemented with specialist court police and state-level agencies such as the State Border Service (SBS). The fragmentation of policing needs to be understood against the historical context of war and widespread ethnically targeted violence. The radical decentralisation of power gave each ethnic group a power base and thus some kind of guarantee of their security. The decentralisation in policing, and other sectors of government, highlighted the need to account for "the reality of division" in BiH in rebuilding a viable Bosnian state (Carl Bildt, quoted in Bose 2002: 1). Yet the European Commission in particular has been critical of the impact of such divisions being reflected in contemporary policing:

this fragmentation of competence when it comes to law enforcement actually hampers the police... as long as we have this fragmentation of competence, we don't feel that there could be any efficiency in this field

(INT8: 40ff)

One interviewee working in the European institutions in Sarajevo gave the example of their own experience of car theft:

...my car was stolen a year ago here... Most of them are taken through the Serb republic into Montenegro. So you call the police here and they call their contact in the coordination centre in the RS who will then call the station in the RS, by which time your car is a long way away. Sometimes they will have informal contacts. But what's the motivation for a police officer necessarily to use those on a regular case.

(INT3: 336ff)

The problems perceived by the international community were put bluntly in an OHR sponsored commercial, broadcast in the summer of 2005 as part of a broader public

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information campaign in support of the work of the Police Restructuring Commission (PRC). A transcript of the commercial, (OHR 2005a), is given in appendix 5. It shows police running up a glass wall, symbolising the kinds of blocks to cooperation illustrated in the example of car theft above.

In addition to the divisive impact of the war on Bosnian police forces, the conflict saw recruitment to police forces proceeding in an irregular fashion, as observed above in relation role played by the police in the war. In Republika Srpska, where authorities initially refused to cooperate with UN International Police Task Force (IPTF), the government indicated a desire to increase the size of the police force to 50,000. With population estimates ranging from 1.06 to 1.47 million (ESI 2004) this would result in one police officer for every 21 to 29 people (UNDPI 1998). At the end 2003 a figure of 17,000 was given for BiH, a ratio of 445 police staff per 100,000 head of population² (Commission of the European Communities 2003a); the European Commission report in which this figure is reported suggests that further reduction is required as part of BiH's efforts to join the union. Yet comparison with data from other European states suggests that BiH's police numbers is in a range which includes existing EU members (Aebi et al. 2006). The highest estimate for BiH of 544 officers and civilian staff per 100,000 population, based on the total of 18,295 reported in the Functional Review of Police (ICMPD and Team Consult 2004) and lowest population estimates, is similar to that of Cyprus (534) and below the Czech Republic (573) and Northern Ireland (609). The lowest estimate of 398 officers and civilians per 100,000 population is closest to England and Wales (392), France (412) and Belgium (416). The mean estimates for BiH of 445 to 479 cover a range including Lithuania (448), and Slovenia (451), and falls a little short of Portugal (492). Given the recent conflict in BiH, and also EU concerns over trans-national trafficking routes in the area, perhaps this does not represent such a high figure.

² See table 6.2 for full analysis of this figure.

Table 6.2 Police personnel per 100,000 population, EU and BiH, 2003

| | Police personnel per 100,000 population | | | |
|-------------------------------------|---|--------|------|-----|
| | Mean | Median | High | Low |
| 10 Pre 2003 EU members ¹ | 385 | 370 | 609 | 214 |
| 6 Post 2003 EU members ¹ | 375 | 399 | 573 | 310 |
| BiH estimates (1) ² | 445 | - | 506 | 398 |
| BiH estimates (2) ³ | 479 | - | 544 | 428 |

Table notes:

1. Data for EU compiled from Aebi et al (2006); pre-2003 members exclude Austria, Germany, Greece, Italy and Spain, for whom data was incomplete; post-2003 members exclude Latvia, Hungary, Malta and Slovakia, for whom data was incomplete.
2. Police numbers from Commission of the European Communities (2003a); Population estimates for BiH from ESI (2004): RS (1.06 to 1.47); F BiH (2.3 to 2.8 million).
3. Police numbers from ICMPD and Team Consult (2004); population estimates as note 2, above.

Corruption

In 2004 a Transparency International (TI) survey found that just under 15 per cent of respondents had been asked to pay a bribe to a police officer in the previous twelve months; a similar survey in 2002 found this to be the case with 22 per cent of respondents (Divjak 2004). The average bribe requested was around KM30 (€15), which compared to average salaries of KM536 (€270) in F BiH and KM434 (€215) in RS (OHR 2004a). Widespread experience of police corruption by the public conditions expectations of police behaviour: 55 per cent of respondents in the TI survey felt that ‘most’ or ‘almost all’ officers were involved in corruption while only 5 per cent felt that hardly any engaged in corrupt behaviour. Corruption goes beyond taking bribes; at least one human rights organisation expressed concern over political partisanship in policing, reflecting a legacy of political interference in law enforcement. In the late 1990s, accusations of partisan policing were levelled against police in Una Sana Canton; these included the failure to investigate crimes against opponents of the locally dominant Party of Democratic Action (SDA), illegal detention and police brutality (HRW 1997: 29).

Post-war landscapes of crime and justice

Many of the problems explored so far are primarily internal to the police: the role they played during the war; the organisational structures inherited from SFRY and developed in the conflict; and corruption. The final set of problems discussed here situates the police in BiH in

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the wider social and criminal justice contexts of the post-war and post-socialist period. The section does not offer an exhaustive discussion of all the new challenges facing the police in BiH today, but explores the area by focusing on illustrative examples: changes in patterns of crime and public perceptions of crime in the context of a transitional society, and the impact of criminal justice reforms in other sectors.

For a number of Yugoslav republics the break up of the state was accompanied by a combination of massive economic and political change and war. In particular the republics of Croatia and BiH and the rump Yugoslavia made up of Serbia and Montenegro have all experienced periods of violent conflict. Nikolić-Ristanović (1998) draws on a range of sources, including human rights reports, interviews and personal experience to explain the impact of conflict on crime. She paints a picture in which the black economy becomes essential to the continuation of everyday life, providing vital goods and employment. In such an environment, state interests in punishing criminal enterprises weaken, and ties between state and criminal enterprises may be formed. Criminogenic factors may also be exacerbated by conflict: social disorganisation; breakdown of formal/state and informal/community networks of control; and limited capacity for collective problem solving. Criminality learned through experience or association during conflict may continue into peacetime. Her point regarding the links between state and criminal enterprises was well illustrated in 2003 with the assassination of Prime Minister Zoran Djindjić of Serbia and Montenegro. This may have been a reaction to was related to attempts to separate the state from criminal groups, in particular the 'Zemun' group headed by former head of Special Police Milorad 'Legija' Luković. One observer involved in a project to examine and encourage the prosecution of organised criminal activities uncovered by investigative journalists expressed concern that the capacity, infrastructure and knowledge required to tackle organised forms of criminal activity were lacking in BiH (INT36: 90).

With specific reference to BiH, Maljević (2002) notes factors mediating public perceptions of crime and crime related risks particular to the country in the wake of the war. During the war, many lost family members who previously played a protective role, increasing their sense of vulnerability. Minority status, especially in the wake of a conflict which manipulated perceptions of ethnic difference and separateness, is also central to the perception of risk and vulnerability. Specific incidents like the murder of two elderly Bosnian-Serb returnees to the municipality of Drvar on 15 April 1998 (OHR 1998b) and scores of other return-related instances of violence such as arson, intimidation and assault increase feelings of anxiety and

insecurity among returnees in particular. Moreover, these crimes represent new forms of conventional violent crime which the police are expected to deal with.

Just as changes in policing structures and practices may have impacts elsewhere in the criminal justice system, for example in the number of cases proceeding to court, changes elsewhere in the system impact upon policing. This can be seen by looking at one aspect of changes in the country's Criminal Procedure Codes adopted across all jurisdictions. Already, changes had started to take place in FBiH as early as 1998 (Sijerčić-Čolić 2001). The ultimate abolition of the role of the investigating judge across all of BiH has put a greater investigative responsibility on police and prosecutors, who must establish a new relationship with each other (INT9: 64; INT20: 55). At a time of ongoing internal change, these wider shifts in crime and criminal justice create additional pressures on the police services of Bosnia and Herzegovina.

Conclusions

The discussion above indicates that the police forces of post-war BiH faced challenges above and beyond those shared with other emerging European democracies seeking to shed the legacy of authoritarian policing. In particular, the challenges facing BiH are exacerbated by the combinations of factors arising from the particular context of the conflict in the country and its lasting impact on police and political institutions in the country. The police services needed 'cleansing' in some way to distance and distinguish themselves from those which had engaged in or supported programmes of persecution during the war; they had to find a coherent way to police the country in spite of fragmentation; finally they had to face up to public perceptions of widespread corruption while adjusting to the challenges of policing the new BiH. This is not something that they faced alone, and the following chapter explores a number of the initiatives in the first ten years of peace which have sought to address these challenges to build a coherent and effective structure for policing in a democratic BiH: the core civilian missions of the OHR, UNIPTF and European Union Police Mission; smaller initiatives, often lead by individual aid agencies, focusing primarily on DFID; and finally the recent proposals for a radical overhaul of policing in BiH by the PRC.

7. Post-war police reform

The problems facing the police forces of Bosnia and Herzegovina (BiH), outlined in chapter 6, presented a considerable challenge to the development of a stable democratic state in which all citizens enjoyed equal access to security and justice. This chapter explores attempts to come to terms with these problems, including proposed changes to the policing structures of BiH. A large number of organisations have been active in providing policing assistance: thirteen of the twenty agencies included in an Office of the High Representative (OHR) matrix (summarised in appendix 1) were active in police reform in 2004, including three UN agencies, three national development agencies from Europe and North America, and various organs of the EU. The work of each agency is not always easy to isolate; numerous organisations work together on particular projects, or inherit mandates from one another. The present chapter begins by looking at the core civilian missions, the UN and EU. With the OHR as a co-ordinating body, major UN, and then EU, policing missions have been active in BiH since the earliest days of the peace. They are large scale, multi-lateral projects. Following on from this, the UK Department for International Development (DFID) will be examined as an example of small scale, bilateral assistance, guided by a developmental agenda. Finally, the chapter will focus on the Police Restructuring Commission (PRC), a body that combines local and international representatives, and whose work has been supported by OHR and the European Commission. This does not exhaust the range of interventions in post-war policing in BiH; for example the role of the European military mission EUFOR in supporting local law enforcement agencies in tackling illegal logging, locating illegal weaponry, and addressing organised crime, might be used to examine the blurring of boundaries between civilian police and military. However, given the limited space that can be dedicated to policing in a project encompassing the three main criminal justice sectors, boundaries have to be set somewhere. The three main areas chosen reflect an attempt to highlight elements of policing reform that illustrate different approaches. A closing discussion draws on these to explore developments in BiH in terms of democratisation, state-building, and the nature of the intervening organisations.

Core civilian missions: OHR, UNIPTF and EUPM and the police in BiH

Annex 11 of the General Framework Agreement for Peace (GFAP), introduced in chapter 2, provides for an International Police Force under the auspices of the United Nations and co-ordinated through the High Representative. The UN International Police Task Force

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(UNIPTF) was to assist two entities to meet constitutional obligations to “ensure a safe and secure environment for all persons in their respective jurisdictions” (*GFAP* 1995: annex 11, article I). The UN policing mandate ended in December 2002, prior to the start of fieldwork; New Year 2003 heralded new European Union police mission (EUPM) under the Common Security and Defence Policy (CSDP), originally scheduled to run to the end of 2005¹. The EUPM continued to locate its purpose in line with Annex 11, and aspired to “establish sustainable policing arrangements under Bosnia and Herzegovina (BiH) ownership in accordance with best European and International practise, thereby raising current BiH police standards” (EUPM 2003). This section explores the different means through which the UN and EU policing missions have worked alongside, and at times against, police forces in BiH in trying to create reformed and reconstructed policing services.

Enforcement and cooperation under the United Nations

The task force mandated under Annex 11 was headed by a UN-appointed Commissioner acting under guidance from the Office of the High Representative (OHR), and reporting to the High Representative and UN Secretary General (article 2). The initial IPTF role in BiH included monitoring and facilitating law enforcement activities, offering advice and training to police forces, advising government bodies, assessing threats and evaluating capabilities, accompanying and assisting police, and reporting human rights violations to the authorities (article 3). The role was expanded in December 1996 to include the proactive investigation of human rights abuses by law enforcement personnel (Amnesty International 1997). The mandate lasted one year in the first instance, although the task force faced extensive challenges: while return programmes struggled to reverse ethnic segregation, police forces still included officers complicit in war crimes; illegal ‘special’ police units existed; and even those police forces with official recognition could not be relied upon for the cooperation demanded by Annex 11. The UN mandate eventually ran to seven years, and was followed immediately by a similar programme under the auspices of the EU. Based primarily on UN and OHR reports it is possible to recognise a two-pronged approach to police reform encompassing both enforcement measures and cooperation, elements of which can be observed throughout the mission’s mandate: investigation and public criticism of police; disciplinary measures such as imposed probationary periods and the removal of officers from

¹ At the end of the initial mandate, the EUPM continued under a revised mandate and with reduced numbers of personnel.

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duty; direct challenges to police authority over the inter-entity boundary line (IEBL); training; and legislative and policy support. This section begins by looking at enforcement activities of UNIPTF through a range of publicly available documents.

Public critique of police on the basis of UNIPTF investigations was one of the least forceful enforcement oriented activities. Examples were witnessed when UNIPTF investigated police use of force, including firearms, at a Bajram march of Bosniaks to a West Mostar cemetery in 1997 (Amnesty International 1997); again over the use of force in the arrest of Goran Vasić; and over the failure to adequately investigate the murder of elderly Bosnian-Serb returnees in Drvar (Amnesty International 1998). UNIPTF's investigation and public rebuke over both the policing of the Mostar march and the subsequent lack of local investigation ultimately pressured domestic authorities to act. This resulted in disciplinary and criminal charges being placed against several officers, but the slow pace of the process illustrated recalcitrance among officers expected to instigate proceedings against colleagues (*OHR* 1999b).

IPTF intervened in a stronger fashion early in 1999 following an investigation of local police structures and performance in the municipality of Stolac in Western Herzegovina. All officers in the municipality were placed on a three month probationary period (Amnesty International 1999a), but the experiences of the task force during the investigations underlined a further problem. The municipality had been around one-fifth Serb, one-third Croat and a little over two-fifths Bosniak in 1991 census, but that part remaining in the Federation of Bosnia and Herzegovina (FBiH) featured a sizable Bosnian-Croat majority after the war². UNIPTF officers were attacked by local residents supportive of the mainly Bosnian-Croat police (Amnesty International 1999b). This example problematises the principle of local control over policing, especially where a majority may exercise undue influence at the expense of others. Given the nature of the recent conflict in BiH, and the desire for sustainable minority returns, there is an argument for strong checks against local abuse of police powers. In such a context it is useful to return to Jones et al's (1994; 1996) principles of democratic policing: prioritising equity over responsiveness allows responsive policing to take place within boundaries suggested by liberal democratic principles,

In 1998 UNIPTF commenced a major process of certifying police officers with authority to serve in BiH; in effect this was a programme of lustration. The process, which bears some

² Along with Mostar, Stolac had been one of two municipalities with no absolute majority separating predominantly Croat and Serb areas in southern Herzegovina.

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resemblance to schemes implemented in the defeated Axis countries in the wake of World War Two, involved three stages: all law enforcement personnel were first registered; they were then screened by means of a self-completed questionnaire; finally they underwent a period of in depth checks. The process was more targeted and rigorous than the Italian example (see chapter 4) which relied almost entirely on questionnaires. A total of 23,751 officers and other staff registered; presumably the requirements of the process acted as a deterrent to many of the estimated 44,000 officers active in the post-war period. Of those registering, 16,803 (71 per cent) were granted provisional authorisation after the second stage, of whom 15,786 (94 per cent) then received full certification (UN Secretary General 2002)³. Background checks were complemented with mandatory training in human rights, public order policing and crime related topics. The contrast between the gradual lustration process witnessed in BiH and the disbanding of the Iraqi police is marked, and in the Bosnian case shows a considered assessment of the risk of allowing ‘tainted’ officers to continue serving against the risk of removing formal structures of control in the country.

The certification project has faced, and continues to face, numerous challenges. The UN has highlighted attempts by local law enforcement agencies to circumvent certification procedures (UN Secretary General 2001). Moreover, since the certification process came to a close in 2002, summons have been issued from The Hague against two serving officers, Novo Rajak and Boban Simić, suggesting gaps in the UN’s coverage (Freeman 2004). BiH daily newspaper *Dnevni Avaz* alleged that Slavko Deronjić, one of the ‘Scorpions’ seen shooting Bosniak prisoners in footage released in the course of the Milošević trial, worked with Brčko District police up until 2003, and had received UN certification (1 August 2005, in OHR 2005b). In February and June 2004, the High Representative removed five police officials from office on account of involvement in “egregious criminal activities” and giving material or other support to indicted war crime suspect and former RS president, Radovan Karadžić (*Decisions* of 10 February 2004 and 30 June 2004). A further round of removals as part of “direct and sweeping action” against those in public office who were seen to have contributed to “institutional failure to purge from the political landscape...conditions conducive to the provision of material support and sustenance to individuals indicted [for war crimes]” in July and December 2004 saw a further eight police officials in RS dismissed from their posts and

³ These figures vary somewhat from figures provided by the UN to the Council of Europe’s Venice Commission in 2005, suggesting that 16,762 officers received provisional certification and of these 598 (3.6 per cent) were subsequently decertified (Venice Commission 2005).

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barred from public office (*Decisions* of 1 July 2004 and 17 December 2004). These removals by the High Representative all took place *after* the end of the certification process; the EU successor mission to UNIPTF had no direct power to remove serving officers, although it could make recommendations to the High Representative. A further problem emerged recently as a number of officers decertified under the UN scheme have sought to challenge the procedure on the grounds that it breached the European Convention of Human Rights (ECHR). Up to 150 officers, with support from the recently established FBiH Association of Decertified Police Officers, brought challenges in 2004 (United Nations 2004). Their calls for a review have found support from the Venice Commission and OHR (OHR 2006a; Venice Commission 2005).

UNIPTF, supported by NATO's Stabilisation Force (SFOR), directly challenged the authority of domestic police forces over freedom of movement between FBiH and Republika Srpska (RS). Against ongoing concerns over police breaches of human rights (OHR 1996a; OHR 1996b) it was observed that police conduct around the IEBL, including checkpoints at which motorists attempting to cross between entities faced intimidation and arbitrary fines, was "the single greatest obstacle to freedom of movement" in BiH (OHR 1997a: s. 85). On 15 May 1997, all IEBL checkpoints set up without the prior approval of UNIPTF were declared illegal and dismantled with support from SFOR troops. The government of RS claimed that this exceeded the terms of the UNIPTF mandate and instructed police not to cooperate. In spite of this the task force encountered little in the way of confrontation and even found some "pockets of compliance" (OHR 1997c). Ultimately, obstacles to freedom of movement were addressed with a solution outside the criminal justice sector when OHR enforced a scheme of uniform vehicle registration plates across BiH, making it impossible to identify vehicles' entity of origin (*Decision* of 20 May 1998).

In addition to such enforcement based activities, the UN task force played a wider role in developing a legislative framework for policing and in attempting to create police forces representative of BiH's multi-ethnic population. Relatively early on in their mandate UNIPTF worked alongside the OHR and domestic authorities in the Federation in order to produce a model law for Cantonal policing (OHR 1996b). In late 1998 the local United Nations mission negotiated with the OHR and RS government to produce a framework for restructuring and reform of the RS police. This included the recruitment of over 2000 officers of non-Serb ethnicities over a two-year period (making up 24 per cent of the force), and tied the RS police into IPTF protocols on selection and training. In the same period, the UN

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helped to establish working groups on minority recruitment in the cantons of FBiH (OHR 1999c). A number of different methods to develop minority representation were employed, including voluntary redeployment; selection of minority candidates for police academies; refresher training for returnee officers; recruitment campaigns targeted at women; and housing assistance for officers relocating to areas where they would be in a minority.

A UN matrix presents the vision of *competence* and *integrity* on two different levels: *individual* and *organisational*. The endpoint of the individual stream is certification of officers, while for organisations it is UN accreditation as having reached basic democratic standards in policing. In order to reach this goal police forces had to be adequately resourced, with effective management and human resource systems and show willingness to engage in inter-force cooperation (competences), while having a multi-ethnic make up inclusive of women, freedom from political interference and featuring transparency and public accountability (integrity). The introduction of Independent Cantonal Police Commissioners and Entity Directors of Policing to block political interference in 2002 was one UN initiative aimed at achieving these organisational goals (UN Secretary General 2002). Towards the end of their mandate, UNIPTF became involved in preparing for the establishment of a state-wide force tasked with the targeting of organised and high level crime, the State Investigation and Protection Agency (SIPA), a project that was picked up by EU successor mission discussed briefly in the following section.

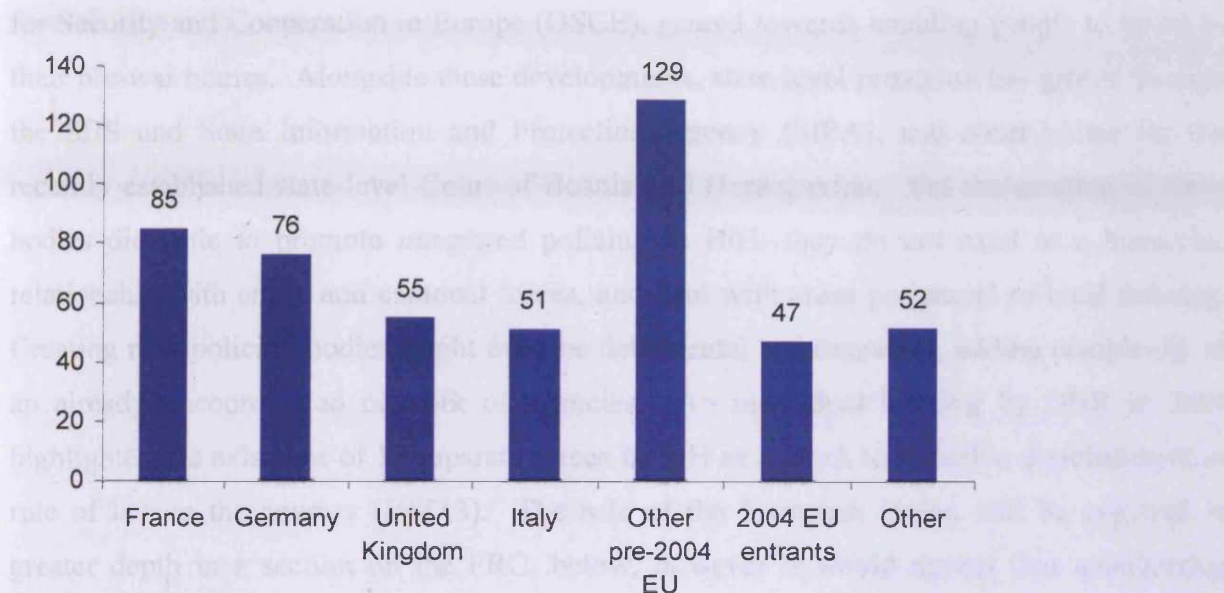
From UN to EU

The preceding section does not exhaust the work carried out under the auspices of UNIPTF and in association with the OHR; such a task is beyond the scope of the current project which seeks to include the work of various organisations across a range of criminal justice sectors. What it should offer is an indication of the multiple approaches adopted under the UN in order to work towards more democratic policing bodies in BiH, featuring a number of criteria highlighted by Jones et al (1994; 1996) such as equity, delivery of service and distribution of power. The EU Police Mission continues this work under the civilian authority of an international police commissioner and the EU Special Representative, a role filled by the High Representative since the beginning of Lord Ashdown's tenure in 2002. A sum of €35.7 million was allocated for set up and running costs in the mission's first year (Commission of the European Communities 2003b), a figure which excludes the salary costs of seconded officers. Continuity between UNIPTF and EUPM was secured by the retention of UN

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personnel by the new mission (UN Secretary General 2002), and through continued work on projects like SIPA. In respect of maintaining a sense of continuity, the coordinating role of OHR is important. Beyond this, EUPM participated in discussions on restructuring of police services in BiH preceding a full commission on the subject, discussed below (OHR 2004b). The focus of the EUPM has not been solely on the political levels of reconstruction and the organisation has continued to deploy a large number of officers in support functions throughout the country. One such Chief Co-locator was interviewed at the cantonal policing headquarters in Sarajevo: a senior officer with 28 years of policing experience in his home country, his function, along with a team of international secondees and language assistants, was to provide ongoing advice on problems and projects to senior officers in the Canton, and to monitor the implementation of EUPM directives (INT17). EUPM sought to recognise and match national areas of expertise to particular needs in BiH through the placement of particular officers (INT 24). In January 2004 nearly five hundred officers were deployed under the auspices of the EU mission (see figure 7.1, below). The bulk came from the EU, with France, Germany, the UK and Italy providing 54 per cent of the force. Around one fifth (99 officers) came from outside the EU, although nearly half of these were from countries which joined the EU in May 2004. These were complemented by 59 civilian staff, including six from non-member states. Officers are deployed throughout the country: 79 officers are spread across the four HQ departments including the commissioner's office, operations and administration; the largest single concentration of officers in the field is represented by the 65 officers working with the State Border Service (EUPM 2004a, b).

Figure 7.1 Origins of EUPM officers deployed on 31 January 2004



The remit of the IPTF and subsequently the EUPM has been, by and large, limited to working with individual police bodies in the existing institutional framework. Yet, nine years into the mandates of two successive multi-lateral policing missions to BiH, the PRC has proposed a massive restructuring of policing bodies in BiH, creating a single nationwide structure of police services. This is discussed at greater length below; in the meantime, it is worth considering why such a radical project of reform was being introduced only as the EUPM approached the final year of its original mandate. The timing may reflect the nature of the war in BiH; the importance of police to people's *sense* of security; the changing distributions of the population of BiH; and developments in BiH's relationship with the EU. The war in BiH saw the forceful division of much of the country into ethnically-based territories; this was reflected in a peace agreement dividing BiH into two ethnically-based entities each with responsibility for policing, and further, within FBiH, ten cantonal governments enjoying considerable responsibility in the field of policing. Against recent experience of violent conflict in which ethnic difference became a defining feature, and where the ethnic segregation this created is subsequently maintained, there is a risk that people will seek to retain local control of those institutions perceived to be most central to their own security to maximise the opportunity for their own group to dominate. The case of Stolac, outlined above, is illustrative here. Thus in the face of *de facto* ethnic segregation any attempt to introduce state-level policing structures is bound to experience resistance. The post-war years have seen much effort on the part of the international community to reverse this *de facto*

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segregation through a massive programme, overseen by OHR, UNHCR and the Organisation for Security and Cooperation in Europe (OSCE), geared towards enabling people to return to their pre-war homes. Alongside these developments, state-level provision has grown through the SBS and State Information and Protection Agency (SIPA), and court police for the recently established state-level Court of Bosnia and Herzegovina. Yet the creation of these bodies did little to promote integrated policing in BiH: they do not exist in a hierarchic relationship with entity and cantonal forces, and deal with areas peripheral to local policing. Creating new policing bodies might even be detrimental to integration, adding complexity to an already uncoordinated network of agencies. An individual briefing by OHR in 2004 highlighted the existence of 19 separate forces in BiH as a block to effective establishment of rule of law in the country (INT13). The role of the European Union will be explored in greater depth in a section on the PRC, below, however it would appear that membership related pressures have been a significant source of pressure for the integration of BiH's police forces.

Micro-level reform: DFID and local experimentation

The core of policing assistance and intervention in BiH took place under the auspices of major multi-lateral organisations, primarily UNIPTF and EUPM. Simultaneously, other organisations have been involved in smaller projects, either on a local scale, or in narrowly defined areas of police work. DFID have been active in particular municipalities such as Žepče and Prijedor; the Swedish International Development Agency (SIDA) have worked on specific tasks including development of particular skills (SIDA 2001a), and the policing of borders (SIDA 2001b); their Canadian counterparts, CIDA, collaborated on a project to establish a regional network of senior police officers, tying BiH into a wider framework of policing. These represent only a few examples of small scale interventions in policing in BiH; a full exploration of these and others under the auspices of OSCE, Save the Children, UNICEF and the US Department of Justice is beyond the scope of this thesis. It is possible nonetheless to take the work of one organisation as an example of small-scale unilateral policing assistance in contrast to the major missions described above. The work of DFID indicates how a smaller project attempts to help tackle many problems faced by police in BiH. It also displays how small scale projects fit into a context of larger, nationwide, multi-lateral interventions. Finally, the work of DFID on policing goes some way to addressing Shearing's (1997) desire for a reinvigorated democratic policing assistance programme going beyond the state.

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The work of DFID in BiH forms part of a larger programme, *Balkans Safety, Security and Access to Justice*, active in Albania and all former Yugoslav republics except Slovenia. Access to justice is one element of DFID's broader strategy for global poverty reduction. DFID explicitly link both security and justice to economic growth and conflict prevention: economic rights and a stable environment encourage investment in future wellbeing; non-violent conflict resolution mechanisms and measures to discourage vigilantism prevent the escalation of tensions (DFID 2002). Thus the policing assistance provided by DFID forms part of a far broader humanitarian and developmental agenda.

While DFID's work in BiH encompasses cooperation with entity level Ministries of Justice and the Interior, building capacity in the areas of strategic planning and budgetary forecasting (project *B1*), they also operate two pilot projects on a small scale in the municipalities of Žepče and Prijedor, focusing on the justice sector (project *B3*) and community policing and community safety (project *B2*). There are multiple reasons for the adoption of a limited local approach and for these two particular sites: funding-levels mean that DFID have to target resources carefully; small scale pilot schemes are seen as an economical test of the viability of broader reform programmes and success promotes wider implementation (INT9: 49ff); finally, the two municipalities were chosen because of their particular experiences of the war and post-war settlement. In 1991, the population of Žepče was predominantly Bosniak and Croat (47 and 40 per cent respectively); for several years after the end of the war, parallel ethnically-based administrations served separate Bosniak and Croat communities. Prijedor was another area in which no single group dominated before the war: the last census identified 44 per cent of the municipality's population as Bosniak and a further 42 per cent as Serb. The municipality was the site of ethnic cleansing during the war, with non-Serbs displaced north into Croatia and south to central Bosnia (see e.g. *Prosecutor v Stakić* 2003). Prijedor also hosted detention camps for non-Serb civilians (including Keraterm and Omarska). Finally, the area took in large numbers of displaced Serbs from both BiH and Croatia, who remained after the war: between 1993 and 1999 nearly 27,000 Serb refugees were thought to have settled in the municipality (*Stakić* 2003: para. 330). Fractured communities and high levels of inter-community tension are severe obstacles to the introduction community policing and community safety programmes, but if successful in such areas they will have helped to rebuild a community and can be rolled out to less challenging environments.

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Project *B2* featured two distinct components, reflecting a holistic understanding of security provision; this might go some way towards meeting Shearing's (1997) call to move beyond state-monopolised concepts of security provision in international policing assistance. The focus of the first of these components is on state agencies; primarily the police, who in the relevant municipalities would be governed at the level of Zenica-Doboj Canton (Žepče) and RS (Prijedor). DFID worked through a consultancy firm, Atos, with local officers to improve policing skills, practices and leadership, while simultaneously promoting partnership and developing communication strategies. The second component built on this notion of partnership, escaping the confines of state agencies and seeking to develop community involvement in security provision. This was developed through consultative groups, crime audits, and crime and disorder strategies, while at the same time addressing broader security concerns through conflict-resolution and a focus on returnee safety (Balkans Justice 2003). To some extent the use of consultation, audit and crime and disorder strategies all mirror developments in England and Wales subsequent to the Crime and Disorder Act 1998. A local manager acknowledged that many of the consultants employed by Atos had experience of working with the Home Office and other UK public bodies, yet there was no automatic assumption that British approaches should be applied in BiH (INT9); the recruitment of a number of local staff in management and other positions was described by a regional manager from the UK as acting as a beneficial check on any such tendency (INT4). These two components were to feed into a third component, comprising a review of lessons learned and communication of this to relevant ministries. DFID's efforts in BiH represent an attempt to ensure community involvement in decisions relating to policing priorities. They are, in this sense, a practical consequence of DFID's assertion that "[t]he state on its own cannot provide SSAJ [safety, security and access to justice]. The provision of law, order and justice is also the concern of civil society" (DFID 2002: 21). This endorses an understanding of the relationship between state and security developed by the Centre for Development Studies of the University of Wales, Swansea, with DFID support (Biddle et al. 1999; Clegg et al. 2000).

Through the use of public consultation over the role of state-provided security services such as the police, the project still appears to locate security provision as a substantially state-centred responsibility. This need not be taken as a blow to Shearing's (1997) attempts to encourage policing assistance programmes to pay greater attention to non-state actors. Shearing's arguments suggest that a defining feature of contemporary security provision is a loosening of the state monopoly in the area, not an outright abandonment of the state role.

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This clearly demands a more nuanced discussion, and allows for considerable variation of the respective role of state and non-state actors in accordance with local contexts. Thus in the municipalities of Prijedor and Žepče, DFID show a commitment to non-state action in preventative approaches to crime and disorder by encouraging communities to play an active role in conflict resolution and in addressing returnee safety. This suggests that both ‘steering’ and ‘rowing’ can be located at the local level and with non-state bodies. In the closing stages, DFID’s strategy in BiH further recognises the importance of the state in their third component: the state is to provide the means by which positive elements of local initiatives are rolled out on a wider stage.

Unlike the internationally-mandated agencies working through the OHR, DFID has no direct access to sources of executive power. The schemes in Žepče and Prijedor proceed on the basis of consultancy services and by building ‘client’ relationships (INT4); Atos is, after all, a consultancy firm. The approach clearly reflects DFID guidelines promoting local ownership of projects as a path to sustainability (DFID 2002). One perceived result of this approach is that reform advances at a slower pace compared to those programmes sponsored by core agencies; yet the flexible and co-operative approach adopted builds up relationships characterised by trust allowing new modes of thinking about policing to take root without creating resentment, and allows DFID to go beyond the state in conceptualising security provision in BiH. It may be that the experience of Yugoslav models of self-management in various areas of government and society facilitate extra-state activities in the field of policing and security provision, but the current study does not provide a firm foundation for such speculation. The balance of staffing was also seen to be of particular importance; as stated above, UK and Bosnian consultants work alongside one another. An introductory interview carried out in the course of the research was indicative of this as it took place with both the Country Programme Manager, a Bosnian consultant trained in public law, and the Regional Programme Co-ordinator, a UK consultant based in Belgrade. The recruitment of local staff helped address suspicions about British aims in funding projects in BiH, and as highlighted above, was seen as a check on any potential tendency towards uncritical attempts to transfer of UK institutional models and approaches regardless of local context. As such there was no agenda to push a model of integrated criminal justice systems under a single ministry akin to the Home Office (INT4; INT9).

While DFID’s B1 project involves work in close cooperation with higher level government agencies and core international civilian missions, the smaller projects such as B2 and B3 do

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not necessarily fit into this framework. As a result there is a risk that this work may be overlooked and nullified by broader reform strategies. Recent attempts to restructure the police in BiH driven by OHR and the EC by means of the PRC, discussed below, represent a significant risk to micro-projects like those of the DFID. While DFID has been consulted in discussions on restructuring (INT38), it is one voice among many. The creation of new units of policing and structures of management and governance could fundamentally alter the field in which DFID is engaged.

What emerges from DFID's work in BiH is a mixed picture of policing assistance to a post-conflict society and nascent democracy. The projects are illustrative of the holistic approach endorsed by DFID: the importance of policing to broader issues of peace-building and democratic consolidation is recognised, tying assistance programmes into wider aims of rebuilding divided communities, resolving local conflicts, and ensuring the safety of displaced persons returning to their pre-war homes. Likewise, the project is not limited to policing, but sees policing as part of a larger field in need of reform and reconstruction. Linked projects work with courts in Prijedor and Žepče and relevant cantonal-, entity- and state-level ministries in accordance with DFID guidelines on a sector-wide approach (Clegg et al. 2000; DFID 2002). The policing project also suggests recognition, on the part of DFID, of the complexity of contemporary security governance, wherein neither 'rowing' nor 'steering' need be monopolised by the state. In doing so, the project says something about policing in contexts beyond BiH; it points to a trend in policing observed elsewhere, where local consultative groups and crime and disorder audits attempt to identify local concerns and feed these back into local policing policies implemented by a range of partners. Finally, DFID exemplifies a particular approach to aid and assistance in transitional societies; it shows the benefits of co-operation with other major agencies involved in reform and reconstruction alongside a willingness and desire to escape the framework provided by the specific programmes of these bodies. Yet, while this approach might offer BiH's citizens an alternative vision of policing, it runs the risk of being lost in the growing pace of dramatic police restructuring in the country.

Carrot or stick? EC, thresholds and the Police Restructuring Commission

In spite of all the work described above, OHR, under the leadership of Paddy Ashdown, argued that policing in BiH required further transformation and development. Reviewing achievements so far OHR described the primary function of the UN mission as "post-conflict

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stabilisation” (OHR 2002). Given that UNIPTF worked within the political map of BiH sketched out at Dayton, and the resulting structures of policing, this can be seen as a fair assessment. Ahead of starting, the era of the EUPM was anticipated as being one of “capacity building and reform” (OHR 2002). Like UNIPTF, the EUPM worked largely within the structures of policing emerging from Dayton, and have not challenged the role of entity or canton. Where the two organisations looked beyond the existing bodies and current political divisions of the country, they have generally done so within the framework of state policing activities, for example through the formation of state-level bodies such as SBS and SIPA. Subsequent reports note that the EUPM and OHR had entered into a programme of discussions on a broad restructuring of the police in BiH (OHR 2004b), foreshadowing the creation of a Police Restructuring Commission in July 2004. These early restructuring discussions and the subsequent formation of the PRC, can be located in the context of BiH’s relations with the EU, which gave rise to a feasibility study by the European Commission, in advance of the negotiation of a Stabilisation and Association Agreement (SAA) between BiH and the EU (Commission of the European Communities 2003a), followed by an EU-funded review of policing in BiH (ICMPD and Team Consult 2004). The SAA agreement is one of the many stages on the path towards membership of the Union, and represents, as a force for reform, the ‘pull’ of the perceived benefits of joining Europe as opposed to the ‘push’ of executive powers of the OHR (Commission of the European Communities 2003a: 1.1.5).

The feasibility study explores BiH’s capacity to meet obligations in line with those expected to form part of an SAA. These relate to a number of areas, including the free movement of workers and goods, competition legislation, public procurement procedures, as well as justice and home affairs. The report acknowledges ongoing police reform in BiH, welcoming the development of state-level bodies including a Ministry of Security, SBS and SIPA. While recognising such developments as positive, the report specifically notes that “further reform and enhanced State-level enforcement capacity are needed” (Commission of the European Communities 2003a: 3.6.1.1). Beyond the need to enhance the capacity of state-level policing bodies, the report states that ‘restructuring’ and ‘rationalisation’ of police is required on grounds of efficiency and effectiveness. The number of police staff and associated costs is highlighted in the report although, as noted in the previous chapter, this is not necessarily out of line with other EU countries, especially when demands of post-conflict policing are taken

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into account⁴. In discussions with EC staff, two elements were highlighted in the call for ‘rationalisation’: firstly, the EC sought one “single interlocutor” on policing matters, able to speak for all policing bodies in BiH, and with the competence to commit the country to particular policing standards or actions; secondly, the fragmentation of policing competence between cantonal, entity, district and state levels was seen to act as an obstacle to effective policing (INT8: 40, INT3: 336). An OHR source present at key post-PRC reform talks echoed this, observing that “[j]oining Europe requires efficient police whose cracks don’t show” (INT40: 185).

The third pillar: justice, home affairs and the EU

The setting of thresholds as a precondition to commencing pre-membership negotiations is not uncommon (Jacoby 2001), yet the role of policing in supposed state monopolies over the legitimate use of force suggests that this is one area less open to limits and boundaries set by outside agencies. Nonetheless, the ‘third pillar’ of the EU, formalised by the 1993 Treaty of the European Union and amended in the 1997 Treaty of Amsterdam, adds a further level of governance in criminal justice policy with a view to creating an “area of freedom, security and justice” (EU 2002). Since 1997, the Commission directorate for Justice and Home Affairs has been responsible for work in the areas of drug addiction, international fraud, judicial, police and customs cooperation, and prevention of racism and xenophobia (Denza 2003). Within the directorate, the External Relations and Enlargement Unit is tasked “to ensure that the Justice and Home Affairs dimension is fully incorporated into the EU’s external policy in order to spread the values of justice, freedom and security to third countries” (Commission of the European Communities 2004).

Policing assistance and reform in BiH represents a cross-over between this ‘third pillar’ and ‘second pillar’ concerns with foreign and defence policy. Thus, while the EC feasibility study focuses on matching policing structures and capacities in BiH to the demands of EU membership, the police mission is based on BiH’s existence outside the EU and falls under second pillar Common Defence and Security Policy. The wider objectives of European policing assistance, as opposed to membership-related reform thresholds, are to “strengthen the national authorities’ capacity to participate in the international fight against drugs, organised crime, smuggling, money laundering and trafficking in human beings and to

⁴ As noted in the discussion of table 6.2, estimates of the ratio of police to population in BiH were lower than those in Northern Ireland.

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support the fight against corruption” (EU 2003b). These objectives relate to security concerns of the union: BiH, with weak post-conflict structures of government and policing represents a threat to EU member-states as a base or staging post for criminal enterprises with the capacity to traverse borders. Speaking to BiH daily newspaper, *Dnevni Avaz*, EU High Representative for Common Foreign and Security Policy Javier Solana expressed the Union’s fear that poorly joined-up policing in BiH allowed criminals to smuggle drugs, guns and people through the country and on to the EU (Numanović 2004).

Following on from the feasibility study, a series of EU funded functional reviews were carried out across different areas of government in BiH, including environment, agriculture, economy, refugee return, health, policing, justice and education. The policing review, produced by *Team Consult* and the International Centre for Migration Policy Development in Sarajevo, took the form of a *SWOT*⁵ analysis of policing ‘products’ and other dimensions such as organisation, finance and human resources. BiH is measured against a number of ‘benchmark’ countries, chosen as examples of either federal or decentralised states (Belgium, Germany, the Netherlands, Switzerland) or as transitional states entering into the EU (Hungary, Slovenia). A vision of reformed police in BiH is offered in which a number of tasks are delegated to state-level bodies, including the setting of standards in crowd control, coordinating forces, and holding a common information system shared by all BiH police bodies. The delegation of certain tasks upwards does not necessarily indicate a preference for exclusive state-level competence in policing: three models are presented in which state-level, entity-level and finally cantonal-level bodies (FBiH) and security centres (RS) serve as a location for decision making. Although the report recognises the importance of partnership, in particular to solve local security problems, it remains focused on police capacities and reform and does not advance the partnership agenda to any great extent.

The Police Restructuring Commission and democratic policing

Against this background the Police Restructuring Commission was established by decision of the High Representative in July 2004, drawing attention to PIC declarations on the rule of law, as well as the EC feasibility report (*Decision* of 5 July 2004). The PRC represents a potential catalyst for the most radical overhaul that policing in BiH has seen in the post-war era. The Commission met throughout the second half of 2004 in BiH and in Brussels, and

⁵ Strengths, Weaknesses, Opportunities and Threats

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reported early the following year (PRC 2005). The Commission's mandate listed twelve guiding principles, based on which they were to prepare appropriate legislation, regulations and constitutional amendments. The Commission was chaired by Wilfred Martens of the European People's Party, former Prime Minister of Belgium (1979-92). It included a number of representatives of BiH governments including state, entity and cantonal ministers, and mayors. In addition to these, a further international appointee held the position of deputy chair. The sole remaining international member was the Commissioner of the EUPM, highlighting the links between second and third pillar initiatives. Seven associate members represented the remaining law enforcement bodies of BiH: the state prosecutor's office, SIPA, SBS, Office for Cooperation with Interpol, entity-level police administrations and cantonal-level police. The twelve principles guiding the reforms stress efficiency and effectiveness, 'European best-practice', accountability and democratic standards and freedom from political interference.

The main recommendations from the final PRC report are summarised in box 7.1, below⁶. The entities of BiH and cantons of FBiH are excluded as providers of policing in BiH; a claim to the competence to provide law and order in the country is staked on behalf of the state-level institutions. Yet, in outlining a mechanism for state-level bodies to realise this claim, the PRC has sought to temper it through various levels of accountability. The PRC report was to provide the basis for discussions between domestic parties in BiH in early 2005, and these will be discussed briefly below. Before that, however, the PRC conclusions will be discussed in terms of democracy and state as outlined at the start of the previous chapter.

⁶ The PRC did not reach a full consensus on all matters; rather the report is the chair's interpretation of those areas where the commission reached an 'adequate consensus'.

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Box 7.1 PRC proposals on the future of policing in BiH

- State level competency for legislation and budgeting; a single structure composed of SIPA, SBS and new Local Police Services (LPSs) under the BiH Ministry of Security.
- An independent national inspectorate monitoring effectiveness and efficiency.
- LPSs based in Local Police Areas (LPAs), guided by principles of community policing and under the command of a commissioner, responsible for: the prevention, detection and investigation of common crimes; rapid response and intervention; traffic control and safety; crowd control; public order.
- LPAs to be established *without* reference to existing political borders between entities, cantons and districts.
- Local Police Councils of local elected officials, judges and community leaders, steering local priorities, maintaining community oversight and accountability of police.
- A National Police Area Director, ensuring cooperation and information sharing across LPAs.
- National and Local Policing Plans (LPPs).
- An accessible Public Complaints Bureau.
- A central Police Administration Agency (PAA) coordinating recruitment, promotion and transfers; common procurement of goods and services.
- A single training system.
- A central ITC system accessible to all police services.
- An independent State Forensics Service.

(Derived from Martens 2004)

It would appear that the international community in BiH has been consciously working towards achieving an ideal of democratic policing in the country. The mandate given to the PRC by OHR, outlining twelve principles for policing, included:

6. Ensuring that policing in Bosnia and Herzegovina is adequately protected from improper political interference;
7. Ensuring that policing will be discharged in accordance with democratic values, international human rights standards and best European practices...
9. Ensuring that policing will be discharged within a clear framework of accountability to the law and the community...

(Decision of 5 July 2004)

The Commission's report outlines how each of the OHR's twelve principles are met, and we can consider them against Jones and colleagues' criteria for democratic policing (1994; 1996), discussed in chapter 6. The overarching principle of equity may not be explicitly addressed, but arguably the system of balances and checks between national government, LPCs, complaints procedures and an independent inspectorate all serve as guarantees that the police services of BiH will have the equitable provision of security and policing at their core, and will be able to make such provisions free from undue political interference. *Delivery of service* is addressed through monitoring by a national inspectorate, LPC oversight, the remit

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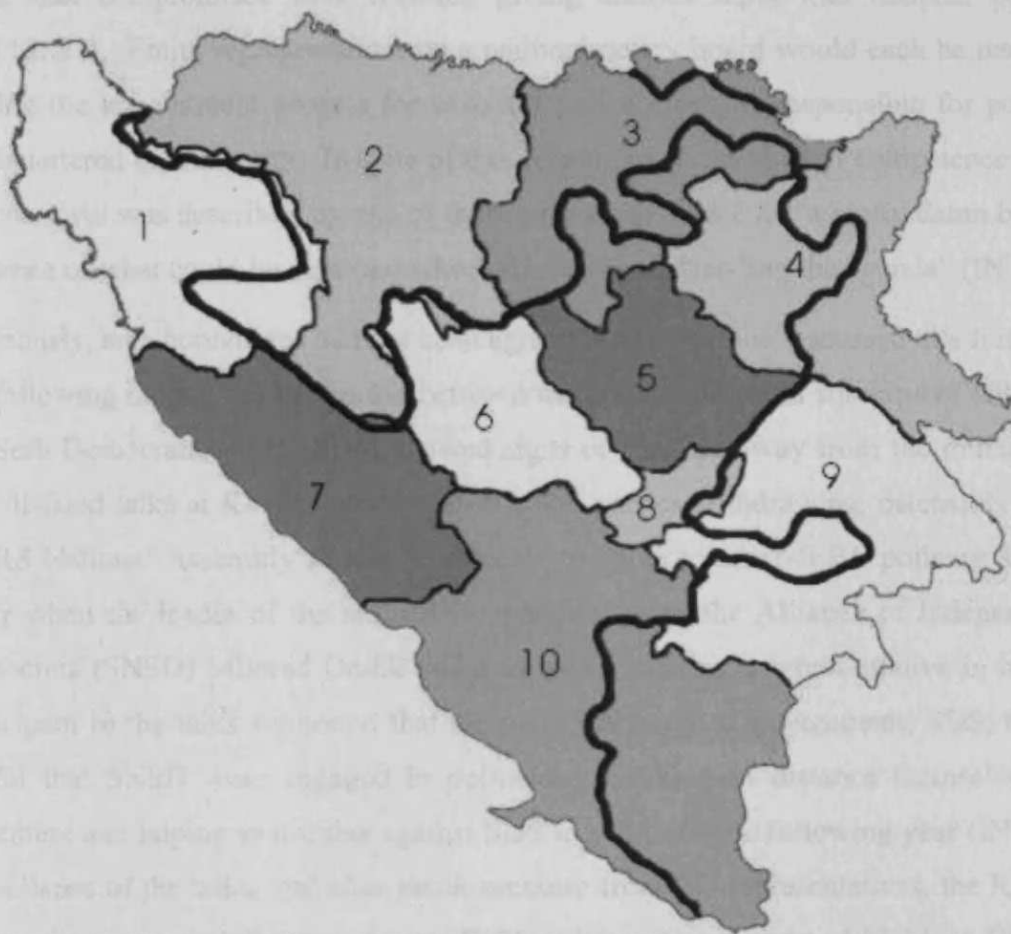
of the National Police Area Director to guarantee effective law enforcement across Local Police Areas, and finally central procurement through the PAA. LPPs seem to promise some measure of *responsiveness* to public aspirations for policing. The *distribution of power* is enshrined in a set up that balances local involvement with a national structure of oversight and inspection. While explicit reference is not made to the publication of *information*, useful in allowing the assessment of police performance, the presence of a centralised ITC framework and national inspectorate suggests some steps in this direction, as does the production of local and national policing plans, against which police achievements might be measured. *Redress* is provided for through the complaints bureau, and structures for *participation* exist through the representative bodies of the LPCs. Yet, while these reforms fit the criteria of democratic police structures outlined by Jones et al, the PRC remains, by remit and output, a police commission in the sense that, while acknowledging the need for partnership policing on a local level, the structures targeted with its recommendations are those of the state police forces. In light of the work of Shearing and others discussed in the preceding chapter, this risks creating a democratic deficit in policing. In this respect Loader's (2000) question, how best to allow considerations of public interest to shape a diverse network of policing and to encourage responsiveness from a range of policing providers, remains unanswered in BiH.

The PRC and state-level policing in BiH

Arguably, the PRC recommendations do not only represent a vision of a dominant state in policing provision but also privilege *state-level* government bodies at the expense of the entities. The move towards greater central authority suggests a particular model of state-building is taking place, and that the policing plan forms part of it. Javier Solana hinted at this, although he stopped short of making it explicit, when he stated that if the PRC's recommendations required constitutional change, this was something that the BiH constitution allows for, before going on to say that the police restructuring process was an opportunity for BiH to "break free" from unspecified "political constraints" (Numanović 2004). The structures of police governance proposed by the PRC favour state-level institutions: the state-level bodies are given competence and budgetary control over policing; policing plans are to be developed at state-level and are to guide local policing plans; the police services come under a national director; and facilities for inspection, administration, IT, training, recruitment and forensic science all move to the state-level. A further set of technical decisions further undermines the position of entities in relation to policing. The PRC presented a map of

potential policing areas, developed in line with technical criteria including geographic factors, population, local authorities and other partners, policing demands such as crime levels and traffic data, reproduced below as map 7.1, and showing a division of policing in BiH whereby nearly every policing area traverses the Inter-Entity Boundary Line (PRC 2005). The tensions between local and central providers described elsewhere by Ferret (2004) are brought to the fore by these proposals as will be seen in the subsequent discussion of the fate of PRC proposals, below. This illustrates that these tensions, in the context of particular interpretations of 'local', have very real consequences for state-provided policing in BiH.

Map 7.1 PRC proposed policing areas



Inter-Entity Boundary Line

Proposed Local Policing Area boundaries



With strong recommendations from OHR and various European Union representatives, including Javier Solana, High Representative for the Common Foreign and Security Policy, Olli Rehn, Commissioner for Enlargement, Kevin Carty, Commissioner of EUPM, and Michael Humphreys head of the EC delegation to BiH, the PRC report provided the basis for

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talks between the main political parties of BiH. The EC principles were boiled down to three key points and repeatedly stated in the run up to each of the several rounds of talks: state-level competence for police budgeting; no political interference in operational policing; and functional areas based on technical, not political, criteria. April 2005 heralded a watershed when the main parties in BiH signed up to an agreement at Mount Vlašić, transferring policing competence to a state-level ministry. The Vlašić talks were described positively by those interviewees involved: one described how they had been “pretty damned amazed about... how realistic people were being... one thing you heard a lot of people saying was ‘this is something the European Union wants, lets get on with it’” (INT40: 216); another noted that compromises were required giving entities input into national police policy (INT12: 27). Entity representatives on a national policy board would each be responsible for leading the appointment process for assistant police directors responsible for policing areas headquartered in one entity. In spite of this compromise, the shift of competence for policing to state-level was described by one of those present at Vlašić as “a pretty damn big step” and evidence of what could be achieved where Brussels was “leading the agenda” (INT40: 225).

Ominously, area boundaries had not been agreed but were to be discussed at a further meeting the following month. In the period between the Vlašić talks and subsequent talks at Konak, the Serb Democratic Party (SDS) showed signs of backing away from the initial agreement. The ill-fated talks at Konak, which ended in RS parties withdrawing, ostensibly to return to the RS National Assembly to seek a mandate to agree to cross-IEBL policing areas, started badly when the leader of the main RS opposition party the Alliance of Independent Social Democrats (SNSD) Milorad Dodik failed to show, sending a representative in his place. A participant in the talks suggested that the main RS party of government, SDS, then became fearful that SNSD were engaged in politicking, seeking to distance themselves from the settlement and hoping to use this against SDS in elections the following year (INT12). After the collapse of the talks, and after much pressure from EU representatives, the RSNA met to discuss the proposals but rejected cross-IEBL policing by a margin of 62-14 on 30 May (OHR 2005c). After a summer peppered with talks, apparently consolidating agreement around a single policing budget, a central agency for standards and a state forensics institute, a further vote of the RSNA in September rejected police reform proposals by 56 to 10 (*South European Times*, 14 September 2005). Ultimately, as the hope of negotiating an SAA with the EU seemed to be receding, agreement was reached on police reform in October 2005, and was acknowledged by the legislative bodies of BiH, FBiH and RS (OHR 2005d). Yet this

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agreement seems to have sidestepped the problem of mapping, passing the task on to an implementation directorate, and 2006 has seen BiH enter general elections with no definite path to police reform.

The importance of maps was raised in an interview with a representative of the OHR after the Konak talks had collapsed:

AA: ...but it sometimes looked like they [the maps proposed by the PRC] certainly had a large capacity to undermine the role of the entities in governance, especially because policing and security are so close to the heart of what a state does...

Resp: Yes. You see. Exactly! It's at the heart of what the state's for. *State and entity are two different things*, and this is what Paddy's been trying to get across.

(INT40: 176ff. emphasis added)

This shows that the mapping of police areas in BiH is not a matter for simple technical decision-making, rather there is a deeper political significance to the question. State and entity are perceived as being two different things, and while the entity might form part of the state, and is included in the broad definition of state, it is not legitimate in the eyes of the international community, represented by the OHR in BiH, for an entity to maintain core state competencies. At the same time, the difficulty experienced by politicians from Republika Srpska in acquiescing to a map which would see parts of RS under operational command of an assistant director of policing in FBiH, and which emphasises the irrelevance of entity structures in policing, suggests that they believe that their interests are best served by policing at entity level, and that this is a legitimate function for entities to maintain, regardless of whether or not it is seen as a pretension to the trappings of state. The 2006 general elections consolidated the position of RS parties opposed to policing areas crossing entity boundaries, as Milorad Dodik's SNSD were the largest single party in the RS National Assembly, having included such a stance in their campaign.

Discussion: policing transitional BiH

The analysis of developments in the field of policing in BiH since 1995 offers insights into a number of the issues of broader relevance raised in preceding sections. These include issues of transition and democratisation; the role of state in security provision; the aims and objectives of aid agencies; and elements related to policy transfer literature. This section builds on these issues to draw some conclusions. Given that contested processes of police reform are still ongoing in BiH, conclusions are inevitably tentative.

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In chapter 4, a number of transitional and post-conflict societies were examined, with particular reference to developments in their criminal justice systems. BiH is experiencing multiple transitions: from authoritarian government to democracy; from command to market economy; and from a period of conflict in which ethnic difference was exaggerated and translated into open hostility and physical separation towards the reconstitution of a multi-ethnic state. Yet unlike the post-conflict and post-authoritarian Axis states, BiH was not defeated in war as such and the international presence in BiH is not that of victorious powers; rather, it is made up by a number of neutral agencies sanctioned by the UN and PIC, and individual governmental and non-governmental agencies seeking to assist in reconstruction. Nonetheless, certain features noted in other transitional societies are evident in BiH. With respect to the police, we have seen a targeted project of lustration which saw nearly eight thousand officers de-authorised through the UNIPTF certification programme, with further ad hoc removals by the OHR. The exclusion of officers from service, and in the case of OHR removals, from all areas of public and political employment, is an attempt to prevent their ongoing influence over politics and policing in BiH, and to prevent backsliding into partisan policing. Like many other countries, the process has not always run smoothly. In other fields and other countries lustration programmes stalled when they threatened to reduce personnel to the point that institutions could no longer function; the large number of police officers and parallel UNIPTF training schemes in meant that this was not such a problem in BiH. In many countries, a groundswell of public dissatisfaction with lustration processes was evident; the founding of the FBiH Association of Decertified Officers and this challenge to decertification procedures signals a similar development in BiH.

Lustration programmes should not be understood in isolation, rather as part of wider programmes of reform. Bayley (1995) notes the resistance of structures of policing to change in terms of whether policing has traditionally been carried out by centralised or local forces. He proposes that such structures of policing may be related to the way in which the state was formed. In BiH, the earliest work on police reform worked within the existing political map of the country, divided as it was. It is only now, through the recommendations of the PRC, reinforced by the EU and OHR, that reform and reconstruction seek to go beyond the limits of that framework. Bayley's proposed link between state formation and policing structures is supported by evidence from BiH: contemporary BiH was formed through a period of ethnic conflict, was divided along ethnic lines and policing, and policing areas, reflected this; FBiH cantons with no clear ethnic majority were those most resistant to integrated cantonal forces.

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But BiH is still going through a process of state-formation and state-building, supported by the international community. The piecemeal construction of state-level institutions including SBS and SIPA and gradual strengthening of state-level government suggests a programme to create a more unitary state in BiH. The PRC programme for reconstruction, placing the sector under the oversight of a state-level Ministry of Security and a national inspectorate, is another step in that direction. It suggests that, while in long-established states long-term processes of state-formation shape structures of policing (Bayley 1975), the restructuring of the police plays a key part of state-formation in BiH. This twist in the discussion on the relationship between state and police leaves Bayley's suggestion of a strong link between the two intact.

Shearing's (1997) plea to reinvigorate policing assistance by recognising the weakening bond between state and policing, appears to have failed to penetrate the programmes of core civilian missions such as the OHR, UNIPTF and EUPM, whose efforts remain wedded to state police. There appear to be three reasons why this might be the case, the first structural, the second motivational and the third revisiting the conventional wisdom that Shearing seeks to move beyond. Both the UN and EU policing missions to BiH operated on the framework of secondments from state police in donor countries. In a sense, this locked them into a framework of state policing provision. Other agencies operating in the field of policing in BiH, such as aid and development agencies, might not be restricted by such a structure. Yet these structures have constrained the two core policing missions to BiH. Police officers employed by donor states were brought to BiH to work alongside, monitor and assist officers in other state services. DFID, operating outside this framework, aspires to involving communities in the governance of security. With regard to the EUPM only, the focus on state policing bodies at all levels, and particularly on state-level bodies such as SIPA and SBS, may stem from the fact that international policing assistance is not solely altruistic. During fieldwork in BiH, one respondent characterised EU interventions in policing as "self-interested generosity" (INT24: 26); the term is well illustrated when Javier Solana notes the threat of a poorly policed BiH to EU member states citing "strong indications that criminals are using the cracks in the policing management system to smuggle drugs, guns and people through BiH into the EU," representing a danger, "both to Europe's cities and to BiH's citizens" (Numanović 2004). This threat does not stem from localised disputes which threaten peace in local communities in the manner described by Brodeur and Shearing (Brodeur and Shearing 2005); rather Solana is referring to what Chris Patten, as Commissioner for External Relations, described as "those sorts of crime prone to cross borders and spread throughout

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Europe”: the smuggling of drugs, guns and people; crimes dealt with *by* and *between* states (Letter of 16 November, reproduced in PRC 2005).

Finally, to argue that the continued basis of state provision as a model for international policing assistance represents a failure of donor-democracies to synchronise international assistance with domestic practice requires an acceptance of Shearing’s views on the role of non-state agencies in contemporary policing practice across a number of jurisdictions. To engage more fully with that debate is beyond the scope of this work, but it is still a debate that ought to be acknowledged. Ferret (2004) argues that the role of non-state agencies in policing tasks is strictly limited in France and Spain, and that tensions are between local and national provision firmly within the framework of the state. Continental European states play an important role in police assistance in BiH: in January 2004, 54 per cent of EUPM officers were drawn from France, Germany and Italy. A continued emphasis on state-centred models of policing need not be taken to represent a discrepancy between domestic arrangements and international assistance; it may simply be the dominant model in a cooperative venture between states with different patterns of domestic policing.

While there has been significant evidence of outside penetration into domestic policy making in the field of policing, the current study has found little to suggest that significant and direct policy transfer has taken place. Without commonplace assumptions of transfer to evaluate in the manner of Jones and Newburn (2007), this may require a more targeted study of particular assistance programmes, for example the work of the German *Bundsgrenzschutz* (Federal Border Defence) with BiH’s SBS. The EU is a source of influence on domestic policy in BiH, although the extent to which its influence can stretch remains to be seen with any final settlement on police restructuring and subsequent progress on the Stabilisation and Association Agreement. Moreover, any influence enjoyed by any external actor can not be assumed to serve as a vehicle for the direct and unmediated transfer of particular policy goals and programmes, as will be seen in subsequent chapters. The following two chapters will revisit the question of transfer with particular reference to criminal procedures and will also examine other issues such as lustration and the strengthening of state-level bodies in the judicial sector. Before these reforms sponsored by the international community are examined in chapter 9, chapter 8 will discuss the challenges facing criminal courts in BiH at the end of the war.

8. "A judicial wreck"? Post-war courts in Bosnia and Herzegovina

Criminal courts stand at the heart of criminal justice, legitimating actions taken at earlier and later stages of the criminal justice process, particularly where these involve incursions on the liberty of the citizen. Police and prosecution seek approval of the courts for particular investigative techniques and bring completed investigations before the court. Prisons draw some legitimacy from the fact that their work represents the realisation of decisions made in the courts. Bourdieu (2002) describes a 'chain of legitimation' removing individual acts from the category of arbitrary violence. Courts are a vital link in this chain. The judicial system is said to hold the "center of ideals" of Western governments (Arnold 1965: 128); in the criminal trial itself the dignity of the state and individual are juxtaposed (Arnold 1965). As well as this symbolic significance, the trial has an important functional element as prompt to, and informer of, public debate. The criminal case, like other less formal responses to 'trouble' serves as an empirical example against which norms and values are tried and tested (Arnold 1965; Llewellyn and Hoebel 1941). The criminal courts are thus central to the legitimacy of the coercive elements of state activity and to the criminal justice agencies in which such coercive power is invested. In spite of this central position it has been observed that, with some exceptions, criminological research has tended to focus on policing and corrections; the black box of courts linking the two is left as the remit of legal scholars (Brodeur and Shearing 2005). Yet to analyse international interventions in policing and prison services without also engaging with criminal courts would leave a significant gap in understanding international intervention in criminal justice in BiH.

This chapter starts by discussing the role that courts play in society, before examining their particular role in societies undergoing transition from periods of conflict or authoritarian government. The importance of particular procedural techniques is examined through a brief discussion of plea-bargaining, underpinning a more detailed discussion in relation to BiH in chapter 9. The subject of plea bargaining is also put into the context of policy transfer and legal transplant literature, introduced in chapter 4. Following this general discussion on the role of courts, the main participants in court reform are discussed and their perceptions of the problems of the domestic courts and criminal procedures are introduced. As with the sections dealing with policing, a second chapter will then discuss interventions made by the international community. This will focus on three particular areas of reform: the restructuring of the domestic courts in BiH and the introduction of a state-level criminal court; the review

and reappointment of judges and prosecutors; and the introduction of revised criminal procedures.

Court, society and transition

Criminal courts must be understood in a broader context of criminal and procedural laws, defining the ends and means of their work, and these are considered in this and the following chapter. Yet it would be a mistake to think that their work could be understood entirely in terms of those laws (Dyzenhaus 1997). The ambiguities in written law place discretion and power in the hands of those responsible for interpreting it: a narrow interpretation may see a seemingly appropriate law being dismissed as irrelevant, while the opposite might see the application of improbable law through analogy (Bourdieu 2002). Within the juridical field, Bourdieu describes struggles to monopolise the right to determine and interpret the law; academics dominate these struggles in continental systems such as France and Germany, while practitioners are stronger in Anglo-Saxon systems. Bourdieu's analysis demands recognition that the juridical field is one among many; it sits within other fields and is subject to power shifts within those fields too. The power Bourdieu locates in the juridical field, particularly through the operation of an active discourse of 'performative utterances' which produce effects by naming, judging, and claiming to know, draws on "collective historical labor" and "announce what is in the process of developing" (Bourdieu 2002: 839). Courts, which offer prospective and retrospective legitimation to the acts of police, and prospective legitimation to prisons, draw their own legitimacy from interaction with broader fields. The acts of the court are as much acts of ratification as they are of creation. Indeed, as Moore has observed, in spite of the obvious backing of force enjoyed by the courts, they still refer to norms and values in their judgments, and seek to give their decisions a shared sense of legitimacy.

The position of the judiciary, balancing public expectations, values, and norms with evidence is well captured by Henham's description of the trial process as being "a series of sites where fact and value merge to create pathways of influence that determine sentence" (2004: 432). The necessary role of norms and values means that in divided or heterogeneous societies, courts may be aligned, or felt to be aligned, with one particular element. As such, judgment on fact and on application of law may be perceived as partisan. Such thinking may underpin the use of international tribunals to try the most controversial or high profile war crimes cases from the former Yugoslavia and Rwanda. Yet removing the trial site from the location of the

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crimes may have some impact on the capacity to communicate with particular local moral audiences. Moreover, the international community is no less heterogeneous than BiH, and Henham (2004) notes that this serves to limit global forms of moral action such as the expression of outrage and condemnation. Drawing on Shearing's work on control and governance, Henham suggests that locating trials on a global stage represents less a moral statement by a cohesive international community, rather a pragmatic attempt to govern future behaviour of states and state leaders.

In spite of the high profile of those suspects tried at the International Criminal Tribunal at The Hague, many more cases will be handled by domestic courts at state-, entity-, and cantonal-level. Thus the role of domestic courts in a post-conflict situation merits particular attention. As noted in chapter 4, the judiciary, along with the police, have been a particular focus for lustration activities in a number of transitional societies; this relates to the role that the judiciary can play as society moves away from a period of conflict or authoritarian rule. Bell et al (2004) interpret transition as a forward looking process; yet while transition implies some particular destination, embarking on such a path without an eye to the past risks leaving unresolved those problems underlying conflict. Where major crimes have been committed, individuals and the communities they make up may feel the need to call perpetrators to account. Moreover, the public nature of the trial allows witnesses the opportunity to give testimony and thus to contribute to the construction of a historical record. Yet differing interpretations of the suitability of a criminal justice paradigm in this context are possible: the focus on individual responsibility associated with criminal courts may prevent the attachment of blame to particular groups, and thus provide a basis for restoring inter-community relations. Alternatively, by fixing blame on individuals, social structures facilitating or exacerbating conflict may be overlooked. Berezin (1997) suggests the importance of such structural factors when highlighting Eckstein's emphasis on latent feelings and cultural meanings underpinning collective decision making. Zolo (2004) proposes that ICTY's use of a criminal justice paradigm in the post-conflict environment, and in particular exemplary trials of the highest ranking officials and politicians, has acted as a way of fixing blame on those communities such leaders are seen to represent rather than individualising guilt. To return to the forward facing aspects of transition, the courts can be seen to play an important role in securing transitions through their contribution to the rule of law. Although the focus of this work is on criminal courts, it has to be recognised that constitutional courts, administrative courts and other institutions of administrative justice have an important role to

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play in periods of transition. Yet in relation to questions of political corruption and abuse of office, the criminal courts clearly share responsibility for overseeing the activities of state officials at all levels of government. This is true of transitional states and established democracies alike, but this chapter should show the particular importance in the context of a state weakened by a period of conflict.

Up to this point, the criminal courts have been handled in broad terms, particularly through exploring their central role in legitimating actions by other criminal justice bodies, exploring the power of courts to interpret law and to make value statements on behalf of a political entity, be it a state, sub-state entity or a less easily defined international community, and examining the importance of these tasks in a post-conflict setting. The particular techniques employed in order to attain these goals also merit consideration, especially in light of some of procedural changes introduced into post-war BiH discussed in the following chapter. Characteristic of the criminal court is the importance of the means to the ends, a visibly just outcome being dependent on just processes. Arnold (1965) describes a fair trial as a "cornerstone of civilized government", and placed concerns of efficiency secondary to those of fairness. Indeed, were it not so, the criminal trial would be scrapped as an inefficient mechanism for dealing with disputes. Building on Arnold's arguments, May (1980) proceeds to argue that the development of plea bargaining in criminal justice is highly problematic. He focuses on the role that judge and jury play in representing ideas of fairness and openness; even in systems that do not feature a jury, the front stage nature of the trial is important to maintaining the sense that justice is being carried out properly, with nothing to hide. Plea bargaining removes much of what would normally be presented in court to the chambers beyond the public areas of the courtroom. Seifman argues that this is precisely in the name of the efficiency that Arnold rejects as secondary to the value of fairness (cited in May 1980). Alschuler (1983) condemns plea bargaining as a harmful influence on criminal justice system: it bases criminal justice decision making on tactics rather than principles; introduces 'a regime of split-the-difference' negotiations; treats liberty as a commodity to be bargained for; creates a sense that in the bargaining process, the defendant got away with something; and in relation to Arnold's perception of trial as focus for public debate, silences the voice of the defendant in this process. It is not only the voice of the defendant that is silenced, rather the backstage plea negotiations removes the opportunity for testimony from both defendant and witness alike. In a transitional context this may be of particular importance: to what extent are criminals 'called to account' when the opportunity to build an account is minimised

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through negotiation procedures. Christie (1994) also sees a negative side to the process, focusing on the coercive side of the differential between a reduced sentence arrived at by negotiation and a heavier sentence imposed at the end of a full trial.

Revisions to criminal procedural law, discussed in more detail in chapter 9, introduced plea bargaining into BiH. This may represent an example of policy transfer, or more specifically, a legal transplant. This is a theme already handled elsewhere (chapter 4), but given that a number of respondents pointed to American influence of the revised codes in BiH (see chapter 9), it is a theme worth revisiting here briefly. In Bennett's (1991) terms, plea bargaining might be described as a *policy tool* used in certain jurisdictions and available as a model to others. BiH is not the only continental European country to adopt practices more common in Anglo-Saxon legal systems. Grande (2000) explores the Italian adoption of adversarial procedures, the culmination of legislative discussions dating back to 1945 (Perrodet 2002). The extensive and intensive involvement of international agencies in BiH, including legal personnel from around the world, creates a context in which expertise can be shared in response to domestic problems. Yet the presence of such personnel raises the issue of penetration (Bennett 1991) or coercive transfer (Dolowitz 2000), particularly given the executive powers enjoyed by the High Representative. Grande's (2000) work on Italy emphasised the prestige enjoyed by the US, particularly as a result of the quality of legal scholarship in America. A broader prestige enjoyed by the US as a global superpower may also make it an attractive model in line with Karstedt's (2004) observations on hegemonic powers. Certain ideological similarities between post-war Italy and America are highlighted in terms of antipathy towards the state and its intervention in private life (Grande 2000). In spite of any ideological common-ground the transplant of adversarial forms to Italy does not seem to have resulted in a replication of US criminal procedures. Rather, judges' concepts of their own role in reaching accurate and just findings have motivated them to continue to play an active role in fact finding, thus creating a new non-adversarial procedure (Grande 2000). While this specific outcome could not be anticipated, the general Italian experience would not be surprising to Legrand (2001) who has stressed the importance of context specific conditions to the interpretation of rules. Yet Nelken (2001) suggests that transfer or transplant may not be limited to attempts to reproduce a particular law, practice or institution in a new context, rather it may be part of a broader effort to recreate the original context from which the rule is drawn. Thus plea bargaining may be only one instance of a general export of common-law legal cultures in which bargaining plays a role. Heydebrand (2001), although

focusing primarily on commercial law, notes the role of the American Bar Association Committee on Eastern European Legal Initiatives as an example of this, they are one of the many organisations active in judicial reform in BiH. Yet the fact that there are so many actors in judicial reform, and in aid and assistance more generally in BiH, means that a multitude of models are available, as Deacon and Hulse (1997) found more generally across post-communist states of Central and East European countries. The following section will draw on the UN Judicial Systems Assessment Programme, and other sources, to develop an account of the problems facing the BiH judicial systems in the wake of the war, as perceived by international agencies.

Defining the problem: the Judicial Systems Assessment Programme

Judicial reform quickly emerged as a topic of discussion after the war, and a number of reforms, such as a new procedural code in FBiH took place in the first few years of peace. Yet it took some time before a comprehensive programme of reform was pursued wholeheartedly by the international community, as indicated by the upturn in OHR activities in the area from 2002 onwards. Rule of law was understood to be an essential part of the political and constitutional arrangements that were to give BiH a new start; the Peace Implementation Conference, and the smaller Peace Implementation Council overseeing the work of the OHR, agreed on the "vital importance for achieving lasting peace, of the creation of the necessary institutions for the protection of human rights, including judicial institutions and civilian law enforcement agencies" (PIC 1995). The police task force established by annex 11 (art. 3) of the General Framework Agreement was given the task of "monitoring, observing, and inspecting law enforcement activities and facilities, *including associated judicial organizations, structures, and proceedings*" (GFAP 1995, emphasis added). Given its role as a primarily police-focused organisation, and the size of the tasks faced in monitoring and restructuring entity police forces (see chapters 6 and 7), the ability of IPTF to adequately monitor the judicial systems of BiH was limited. At the PIC meeting in Bonn in December 1997, the Council backed Carlos Westendorp, then High Representative, called upon the UN to establish a dedicated task force to monitor and assess the courts and legal professionals of BiH (PIC 1997). This meeting marked a change in the nature of international action in BiH with the HR being granted greater powers and a more proactive approach being taken to developing BiH's institutions. The High Representative had noted in his reports to the UN Secretary General that there was "an urgent need for criminal justice reform" (OHR 1998c), that the effectiveness and independence of the judiciary were compromised, but that

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reform must build upon monitoring of the existing system (OHR 1998a). The proposed task force received the backing of the UN in the summer of 1998 (UNSC 1998a, b), and became operational as the Judicial System Assessment Programme (JSAP) by November 1998.

Over its two year lifespan, JSAP produced a number of documents including interim and ad hoc reports responding to particular problems such as delays in cases where accused were held in detention, or addressing legislative developments. One final report was delivered by each regional office (Banja Luka, Bihać, Doboj, Livno, Mostar, Sarajevo and Tuzla) and in addition ten themed reports, listed in box 8.1, were produced. It can be seen that the thematic reports cover a whole gamut of topics, some relating specifically to commercial and civil procedures (iv and v), others to criminal justice (i, ii, iii and viii), and some covering cross-cutting issues (vi, vii, ix and x). Taken together, these represent an attempt on the part of the international community, operating through the UN, to produce a comprehensive summary of the challenges facing BiH's judiciaries in the years immediately following the war. These reports form the basis for much of the reform of courts that was to follow. We can narrow our focus to those cross cutting issues seen to impact upon the judiciary as a whole, for example issues relating to political influence, and to those relating to criminal procedure in particular, such as the delays experienced in a number of cases where accused were in detention awaiting a final verdict.

Box 8.1 JSAP thematic reports

- i. Minor offence courts
- ii. Public Prosecutors' Office, Livno, Canton 10
- iii. Arrest warrants, amnesty and trials in absentia
- iv. Registry for companies, Bihać, Una-Sana Canton
- v. Enforcement of civil judgments
- vi. Expert evidence
- vii. Judicial review
- viii. Prosecution of corruption
- ix. Political influence
- x. Delivery of justice

The thematic reports, other relevant documentation from agencies engaged in judicial reform, and interviews with participants in, and observers of, post-war criminal justice reform in BiH highlight a range of problems and attribute them variously to the legacy of war, the legacy of socialist authoritarian government, the territorial division of the country as determined by the Dayton Peace Accords, and ethno-political divisions and tensions underlying the conflict and

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continuing to play a role in peacetime. In this respect, the problems highlighted in ensuring that BiH's citizens have access to a judicial process that meets substantive and procedural demands of justice can be seen to share some roots with challenges experienced by other criminal justice agencies. This section will outline, based on the JSAP reports, other documents and interviews, the problems which faced the courts of BiH in the post-war years, and which the international community sought to resolve using the tools of court restructuring, judicial reappointment and procedural reform.

Territorial and political division

Like police and prison structures the court system of BiH was split by the war and subsequent peace settlement. Table 8.1, below, summarises the structure of criminal courts that emerged from the war and developed over the following years. The peace brokered between Croat separatists and the Sarajevo government in Washington in 1994 provided the nascent FBiH with a federal structure of government; Republika Srpska, which had no 'internal' conflict to settle, retained a unitary framework of government, meaning the two entity court systems display a degree of asymmetry in terms of structure and ministerial oversight. As a result of the specific histories of the two entities, the RS has emerged with the simpler of the two systems. Courts belong to a unified entity structure, under the oversight of one ministry; a Supreme Court enjoys appellate jurisdiction over five District Courts; they in turn provide appeals facilities for Basic and Minor Offence Courts. First instance criminal jurisdiction lies with Minor Offence Courts in some cases, with Basic Courts for the bulk of offences, and District Courts where the maximum penalty exceeds twenty years imprisonment. The structure in FBiH is more fragmented: the bulk of cases are handled in the first instance by municipal courts, although more serious cases¹ are heard at Cantonal Courts; cases crossing cantonal boundaries are handled by the federal-level Supreme Court. Appeals are handled at two levels: Cantonal Courts² hear appeals from the lowest tier; while in cases heard by Cantonal Courts, appellate jurisdiction lies with the Supreme Court of FBiH. Ministerial oversight is exercised by eleven ministries of justice located at cantonal and federal level. The two entity systems operate in isolation from one another. In spite of the existence of a state-level Court, first legislated for in 2000 by decision of High Representative Wolfgang

¹ Those offences carrying a maximum penalty of 10 years or more.

² Including, in six cantons, Cantonal Minor Offence Courts.

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Petritsch (*Decision Establishing the BiH State Court*, 12 November 2000), there is no provision for a superior state-wide appellate jurisdiction³.

Table 8.1 Criminal courts in Bosnia and Herzegovina

| Court | Jurisdiction - type | Jurisdiction territory | Ministerial oversight |
|---|---|--------------------------------|---------------------------------|
| Court of BiH | 1 st instance criminal jurisdiction over all of BiH through state-level criminal code; appellate jurisdiction over own 1 st instance hearings and over Brčko appellate division | All BiH | BiH Ministry of Justice |
| Brčko Appeals Court | Appellate jurisdiction over Brčko Basic Court | Brčko only | Brčko District government |
| Brčko Basic Court | 1 st instance jurisdiction in Brčko District | Brčko only | Brčko District government |
| RS Supreme Court | Appellate jurisdiction over RS District Courts | RS only | RS Ministry of Justice |
| RS District Courts | 1 st instance jurisdiction in most serious cases; appellate jurisdiction over RS Basic and Minor Offence Courts | RS only | RS Ministry of Justice |
| RS Basic and Minor Offence Courts | 1 st instances in most criminal cases and minor offences | Within RS only | RS Ministry of Justice |
| FBiH Supreme Court | 1 st instance jurisdiction in cross-cantonal cases; appellate jurisdiction over Cantonal Courts | All FBiH only | FBiH Ministry of Justice |
| Cantonal Courts and Cantonal Minor Offence Courts | 1 st instance jurisdiction in serious cases; appellate jurisdiction over Municipal and Minor Offence Courts | Individual cantons only | Cantonal Ministries of Justice. |
| Municipal and Minor Offence Courts | 1 st instances in most criminal cases and minor offences | Within individual cantons only | Cantonal Ministries of Justice |

(Adapted from IJC 2004)

This *de jure* division of the BiH courts was complicated further by *de facto* splits in judicial and governmental authority within the Federation; parallel institutions set up under the war-time Herceg-Bosna statelet continued well into peacetime. One interviewee had witnessed decisions being passed by Herceg-Bosna courts, such as the "High Court of Travnik" based in Vitez, as late as 1998 (INT29: 11). The Mostar office of JSAP reported that up to the summer of 1999, just less than five years after peace had been negotiated in FBiH, the court system was "functionally and physically divided", with the continued existence of Herceg Bosna

³ The state-level court does provide an appeals facility for cases heard in the appeals court of Brčko district.

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institutions. Mirroring the situation in other criminal justice services in Herzegovina-Neretva Canton, mono-ethnic courts and prosecutors' offices served the separate Bosniak and Croat sides of the city (UNJSAP 2000b). While the court in East Mostar had served a predominantly Bosniak population and its counterpart in West Mostar a predominantly Croat population, this did not mean that plaintiffs or defendants coming before the court would share the ethnicity of the panel of judges they faced. In instances where cases involving minorities were being heard, there was real concern that at the very least their perception of the trial process as fair would be lacking. Even after the establishment of a Cantonal Court with judges representing Bosniak, Croat and other peoples, attempts were made to subvert the revived multi-ethnic character of the service through dividing hearings so that panels remained mono-ethnic (UNJSAP 2000b).

In spite of the closure of parallel courts serving different ethno-political constituencies and interests, the ongoing use of illegal (Croat) nationalist insignia continued in certain mainstream courts, and was highlighted in JSAP reports. This was noted to be a particular problem in Canton 10, which reputedly stood alone "as the most obstructionist canton in the Federation" (UNJSAP, 2000c). Such obstructionism was attributed to a combination of factors: the Canton's physical and political closeness to Croatia under the Tuđman government; local political corruption, in particular relating to the privatisation of public assets; the lack of sustained international attention in the post-war period, during which Mostar and Herzegovina-Neretva had been the focus of international attention in FBiH; and finally the vulnerability of the status of Croats in the canton as an ethnic majority (UNJSAP 2000c). As can be seen from table 8.2 below, while Croats made up a substantial majority of the two most populous municipalities of Tomislavgrad and Livno before the war, accounting for 78 per cent of the population, they fell just short of a majority over the Canton as a whole, and formed a minority in the four remaining municipalities, each of which featured a Serb majority ranging from just over 50 per cent to a little over 97 per cent. Any developments which facilitated the return of displaced persons, in particular Serbs, would put the dominant nationalist Croat party HDZ in a far weaker position in the Canton.

Table 8.2 Population of Canton 10 municipalities, by 1991 census

| Municipality | Bosniaks | | Croats | | Serbs | | Others | | Total |
|------------------|---------------|-------------|---------------|-------------|---------------|-------------|--------------|------------|----------------|
| | N | % | N | % | N | % | N | % | N |
| Bosansko Grahovo | 12 | 0.1 | 226 | 2.7 | 7,888 | 94.9 | 185 | 2.2 | 8,311 |
| Drvar | 29 | 0.2 | 31 | 0.2 | 14,846 | 96.8 | 437 | 2.8 | 15,343 |
| Glamoc | 2,257 | 17.9 | 184 | 1.5 | 9,951 | 79.0 | 201 | 1.6 | 12,593 |
| Kupres | 802 | 9.1 | 3,812 | 43.2 | 4,081 | 46.2 | 131 | 1.5 | 8,826 |
| Livno | 5,793 | 14.3 | 29,324 | 72.2 | 3,913 | 9.6 | 1,570 | 3.9 | 40,600 |
| Tomislavgrad | 3,148 | 10.5 | 25,976 | 86.6 | 576 | 1.9 | 309 | 1.0 | 30,009 |
| Total | 12,041 | 10.4 | 59,553 | 51.5 | 41,255 | 35.7 | 2,833 | 2.4 | 115,682 |

Table notes:

Data from MHRR (BiH) (2005).

The Livno branch of JSAP observed the ongoing display and official use of the insignia of the legally abolished Herceg-Bosna entity, in defiance of rulings by the Federal Constitutional Court and OHR in 1998 and 1999 respectively. This included the coat of arms being displayed in public buildings, and its use on official documentation issued by courts. The High Representative removed the Governor, Prime Minister and two successive Ministers for Interior Affairs of the Canton⁴, listing the use of Herceg-Bosna insignia as one reason for removal (*Decisions* of 3 April 2000, 22 May, and 1 December). The continued use of non-neutral insignia can be seen as part of a larger and institutionalised effort to block or discourage the return of displaced persons. The section on policing has already highlighted the problems faced by returnees in terms of intimidation and a lack of responsiveness from police from a hostile ethno-political background. In relation to Canton 10, the 1998 murder of two elderly Serb returnees to the municipality of Drvar highlighted the vulnerability of displaced persons reclaiming their homes in areas dominated by groups resistant to such returns (OHR 1998b). The use of non-neutral insignia represents another potential stumbling block for the return process: returnees entering court buildings where the flag of Herceg-Bosna⁵ is flown are given a strong message about the ethno-political allegiance of the court, and may be discouraged to return to an area in which they feel their access to justice would be limited in cases of administrative discrimination or criminal mistreatment. Arguably, Bosniak

⁴ The Cantonal Justice Minister, Bojana Kristo, later to become FBiH Justice Minister, was cooperating with JSAP and OHR by presenting the legal case for removal of insignia.

⁵ The local government continue to identify the Canton as Hercegbosanska županija (Herceg-Bosna County) as opposed to Western Bosnia Canton or Canton 10.

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or Croat returnees to Sokolac or Skender Vakuf would be faced with the symbols of Republika Srpska, which some politicians have attacked as non-neutral and therefore discriminatory against non-Serbs (*Partial Decision Tihic* 2006). Yet these symbols have only recently been ruled against in a constitutional court and remained, up to 2006, the legitimate symbols of government. In FBiH, decisions in the Constitutional Court and by OHR clearly ruled against the use of Herceg-Bosna insignia at an early stage. The continued use of such symbols is testament to a combination of ethno-political allegiances with a disregard for the rule of law. The following section builds on this in addressing the question of the politicisation of the judiciary.

Politicisation and corruption

Cohen (1992) observes that numerous advances had been made in establishing the rule of law in the Socialist Federal Republic of Yugoslavia (SFRY) in the quarter century or so preceding the break-up of the federation. This was, Cohen states, marked by the increasing independence of the judiciary, and their role in handling conflicts between different bodies within SFRY's federal structure. But by 1992 he perceived a rising tendency towards 'ethno-political justice' accompanying declining federal authority and a new fractured political landscape. In Slovenia and Croatia, this played itself out in ways which supported the secessionist objectives of the republics' governments. The fracturing of Yugoslavia was mirrored in BiH leading to, and subsequently exacerbated by, the war. A renewed politicisation of the judiciary took place within this new ethno-political context, and new court structures were established to serve the interests of particular ethno-political hierarchies, supported by close links between political parties and the judiciary. The UN JSAP devoted a full report to the problems of corruption, and gives a number of case studies, primarily drawn from reports by their produced by their office in Dobož, indicating political influence. It has to be said that in a number of these cases, political influence is implicit, indicated by the difficulty of minority victims, or their families, to secure justice; the cases of the murders of Faruk Hadžimujić and Nermin Mulamehić are examples (UNJSAP 2000d: 29). Other cases show more obvious and direct examples of political influence, for example the case of Dr Ermin Čehić, a member of the Cantonal Assembly and Assistant Minister in Zenica Canton, representing the Liberal Democratic Party. His attempts to intervene in the work of a municipal court handling civil and criminal procedures involving him and his wife provoked judges to pass a resolution and forward it to Cantonal authorities. The report by JSAP attributes their action in part to the security drawn from the knowledge of JSAP oversight

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(UNJSAP 2000d: 35-39). Partisan intervention was not restricted to the local politics of the municipality or canton, and the case of the trial of Imad al Husein and Omar Bedjavi, two foreign fighters having taken up residence in the Donja Bocinja area near Maglaj after the war, serves as an indication. The two were charged with abduction and torture of two Serbs, and ultimately were found guilty of a lesser charge of illegal confinement. During the course of the trial the Bosniak member of the state-level Presidency, Alija Izetbegović, invited suspects and local court officials to a meeting. This was interpreted by JSAP as an attempt to indicate the high status of the suspects (UNJSAP 2000d: 27-28). Individual judges, such as Una-Sana Cantonal Court President, Hasan Pjanić, were singled out for special attention; he was described as "serving as extended arm of destructive political and economic powers in the region" (UNJSAP 2000e).

The perception of regular political interference in judicial affairs was shared by a number of members of core international civilian missions contacted in BiH. Judges were seen as being political appointees (INT6; INT13) and party loyalists (INT23), and even if not party members, many were seen to give active support to parties, for example by attending political rallies (INT1). As a result, it was felt that any process of self-cleansing by the judiciary was bound to fail (INT 23), and that political parties should be excluded from efforts to reform the judiciary, these parties being, in part, the targets of such reforms (INT 25). Among the problems perceived was the existence of numerous small local courts with little 'insulation' from the interference of locally influential politicians (INT13), as may have been illustrated by the Čehić case discussed above. While in Sarajevo, the case of senior Serb Democratic Party (SDS) politician and hospital director Dragomir Kerović was highlighted as indicative of the extent of political influence. Dragomir Kerović served as a member of the BiH House of Representatives, the directly elected state-level legislative chamber. It is alleged that in 1997 he took part in a successful plot to abduct a woman, with whom he had previously been intimately involved, and to force the termination of her pregnancy. The JSAP report dealing with the case lists a series of obstructions to justice on the part of police and the Bijeljina prosecutor, a co-founder of a local SDS branch with Kerović, and notes open support for Kerović from the top level of the SDS. Aside from the open political support offered from SDS, JSAP perceived a number of irregularities with the case that were attributed to pernicious political influence: downgrading of charges, basic procedural shortfalls in the investigation; reliance on unsafe expert testimony regarding Kerović's mental state; and missing papers (UNJSAP 2000d: 40-42).

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The conclusion of the JSAP report indicates that the prevalence of political interference in the work of the courts is rooted in the fact that pre-war BiH left the post-war state an inheritance of "a system in which there was no recognition of the concept of independence", that this was the prevailing mentality, and as something permeating the context in which courts operated could not be challenged simply through removing 'bad' judges (UNJSAP 2000d: 4-5). This runs counter to Cohen's (1992) account of the increasing independence of the judiciary in Yugoslavia from the 1960s. This might be accounted for by the fact that Cohen explored the Federal level Yugoslav courts, while JSAP principally explored courts at municipal, cantonal or entity level within BiH, citing one court president saying that in small municipalities it was difficult for judges to decide against locally popular politicians. Indeed, the examples cited by JSAP broadly come from lower courts, even if the politicians seeking to exercise influence may command popularity on a larger scale. Yet further evidence presented by the JSAP reports suggests that political influence over courts in BiH is attributable to developments *subsequent* to the break-up of Yugoslavia rather than founded in judicial cultures of SFRY. It was estimated by a wartime inspector of courts that, in Republika Srpska, 400 judges were appointed between 1992 and 1995, on the basis of ethnicity and allegiance to the ruling SDS (UNJSAP 2000d: 15). This must be taken to include lay appointments, as the total size of the RS judiciary prior to reconstruction was given as 396 in a separate international community report (IJC 2004: 87). One interviewee observed that prior to reforms promoted by the International Community in BiH, court presidents had selected lay judges from a list of candidates nominated by local mayors (INT26).

Procedural problems

While pre-reform procedures in BiH were described as being 'fine on paper' prior to major reform, the reality of law in practice was seen to be very different, with minor civil or criminal procedures becoming a major undertaking (INT23). In part it was suggested that this originated in a poorly defined standard of proof, with judges constantly trying to build on existing proofs and seeking to give (often unrepresented) participants the opportunity to present all possible evidence. This, coupled with the possibility of cases being returned to first instance courts for retrial, could lead to delays compounded by a lack of finality (INT20). Backlogs developed in a number of courts. One interviewee cited the case of the Cantonal Court at Livno, serving a population of around 100,000 but with around 14,000 outstanding cases (INT26). JSAP reports found a number of courts in both RS and FBiH which at the end of 1998 had more outstanding cases than cases resolved in the course of that year (UNJSAP

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1999). Yet at the same time, delays were not necessarily universal across BiH: a report on procedural delays found a number of inmates in Banja Luka prison had been awaiting a final verdict for over two years, while one had been in prison for seven years; yet a repeat of the study in Mostar found no such delays (UNJSAP 2000a). The actual possibilities for delay in criminal procedures were seen to facilitate corruption, with politically sensitive cases being allowed to go unheard or uncompleted through procedural mechanisms (UNJSAP 2000e).

Status and skills

The status of judges was seen to be indicated by the low salaries the position attracted (INT23). This was understood to highlight a culture in which courts were not widely respected (INT26), very few taking summonses seriously. Indeed, whilst in the country the author was jokingly chided for having signed for a court document, not knowing that the colour of the envelope indicated its origins and purpose. Alongside the low status of judges, sources indicated concern over skills of a number of members of the judiciary, and especially of lay judges. It was feared that the war had allowed the recruitment of unqualified individuals (much as the expanded police forces drew in untrained individuals), although a pilot study on skills did show all professional judges to have passed the bar examinations (UNJSAP 1999, 2000f). Lay judges, who sat alongside professionals, on the other hand were described as being 'useless' by one legal officer working for the international community (INT25: 102), more often appointed to the position on account of connections to court officials rather than particular skills they brought to the job. They were easily dominated by their professional counterparts, and often their questions had to be struck from the record (INT25), or in the experience of one international observer made little sense (INT26).

Resources

The extent to which the funding of courts was problematic was highlighted by one interviewee who cited a case where unpaid bills with the postal service left one court dependent on cleaning staff to deliver summonses (INT26). The implications of resource shortfalls also meant that some courts did not have access to the regularly published gazettes, which contain updates to legislation (INT25), while others had no access to the European Convention on Human Rights, incorporated into domestic law through BiH's constitution (UNJSAP 2000g). Resource shortfalls were seen to create a risk of courts being put in a position where they became dependent on particular interests. One example was given of a court in RS that could only continue operating thanks to funding from private sources

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(UNJSAP 1999). As noted by Goldsmith (2003) in a different context, the under-funding of public services contributes to a context in which bribery may become prevalent. While not as prevalent as the request of bribes from police officers, pre-reform data suggested that 5.1 per cent of survey respondents had been asked to pay a bribe to a judge, with this figure decreasing to 2.6 per cent in a survey carried out in 2004 (Divjak 2002, 2004). The lower prevalence of judicial requests for bribes, in comparison to police officers⁶, may reflect different opportunity structures, with far more contact between police and public than between judges and public through, for example, traffic spot checks, speed traps and so on.

Conclusion: 'a judicial wreck'?

A number of the problems highlighted above are inter-related and mutually reinforcing. The low status of judges and prosecutors, manifested through salaries, might make it difficult to attract appropriately qualified applicants, and make those already in these positions more vulnerable to corrupt financial incentives. The political control of court budgets opens another avenue for inappropriate influence over judicial decision making. Political appointments pay less attention to professional suitability of individuals and thus create an impression not only of a judiciary dependent on the political establishment, but one that does not have the competence to carry out its tasks. A politically compromised judiciary presents itself as a target for procedures to cleanse the bench of those tainted by association with political interests. The context of a procedure with gaps through which sensitive cases can be allowed to fall becomes all the more critical where there are financial and political motivations for judges and prosecutors to let such things come to pass. One respondent described the situation in BiH as being 'a judicial wreck' at the time they first came to the country in 1997-98 (INT32), and this seems to be the overriding impression of the local judiciary held by members of the international community in BiH. Whether an exaggeration or not, it was on the basis of this definition, and in light of international human rights instruments to which BiH has signed up, that international interventions in BiH proceeded. Having thus explored the ways in which the domestic judiciary was perceived by international agencies operating in BiH, through documentation and interviews, the following chapter will seek to explore some of the reforms that were subsequently pursued.

⁶ As reported in chapter 6 the same survey found that 22 per cent (2002) and 15 per cent (2004) of respondents had been asked to pay a bribe to a police officer (Divjak 2002, 2004).

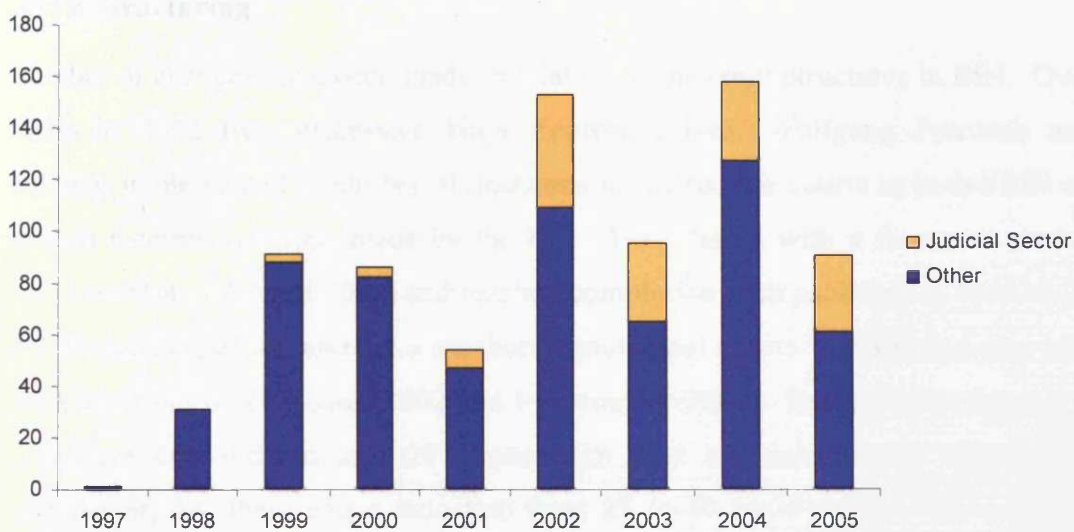
9. Strengthening the justice environment in Bosnia and Herzegovina

A matrix, produced and regularly updated by the Office of the High Representative (OHR), summarised in appendix 1, lists twenty agencies engaged in rule of law and criminal justice reform projects in BiH in August 2004. Of these, sixteen were involved in working on reform and reconstruction of the courts and associated structures in BiH. Work ranged from construction and renovation (e.g. OHR and the High Judicial and Prosecutorial Council), monitoring and commenting on the implementation of new criminal and criminal procedural codes (OHR, the Organisation for Security and Cooperation in Europe [OSCE], Council of Europe), establishing judicial police (OHR, European Union Police Mission), providing equipment (OHR, European Commission), developing legal education (Open Society Foundation [OSF], Council of Europe), developing structures for court users such as witnesses and victims (Department for International Development [DFID]) and training judges, prosecutors and private lawyers in various aspects of both civil and criminal law and European Human Rights legislation (US Department of Justice, US Agency for International Development with the American Bar Association, Council of Europe, various UN bodies, Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit [IRZ], Canadian International Development Agency/Agence canadienne de développement international [CIDA/ACDI]). This level of involvement of the international community is indicative of the importance that is placed on the courts in the post-war reconstruction of BiH.

Figure 9.1, below, gives some indication of the level of OHR interventions in the field of judicial reform. From the commencement of the High Representative's executive 'Bonn Powers' in 1997 to the start of 1999, no decisions were taken with reference to the judicial system. From 1999 to 2001, a total of fourteen decisions out of 231 (six per cent) relate to the judicial sector. The following three years see a large increase in both the number and overall proportion of decisions in this area, with 44 decisions taken in 2002, 31 decisions in both 2003 and 2004, and a further 30 in 2005. As a share of all OHR decisions, the judicial sector peaked in 2005 accounting for one third (33 per cent) of all binding decisions passed, although substantial alterations to judicial structures had been implemented by this stage, and 28 decisions related to prosecutorial and judicial appointments, including the extension of individual mandates. This figure does not take into account decisions affecting the judiciary but covered under other headings: for example the suspension of a judge or prosecutor, or of a minister thought to be interfering with the judiciary, would be categorised under removals and

suspensions from office. Of the seven removals and suspensions in 2003, none affected the courts. In the previous year, however ten judges were removed from office, three court presidents, one prosecutor and one deputy justice minister. This would take the number of decisions with an impact on the judicial sector in 2002 from forty-four to fifty-nine (39 per cent). What this makes clear is that from a relatively slow start, OHR involvement in the judicial sector has increased, and has been maintained at a sustained level from the closing weeks of Wolfgang Petritsch's mandate throughout that of Paddy Ashdown.

Figure 9.1 OHR decisions 1997 – 2004: judicial reform



These OHR interventions built on the ongoing assessment of the judicial system in BiH carried out under the auspices of the UN between 1998 and 2000 (see chapter 8). This chapter examines a package of three major transformations in the courts of BiH, each carried out by mainstream civilian missions, particularly the Office of the High Representative (OHR) and Independent Judicial Commission (IJC)¹. The first is a restructuring exercise across all courts of BiH other than the minor offence courts. This merged a number of courts within each of the two entities and introduced a state level criminal jurisdiction. The second, accompanying restructuring, is formed by two stages of procedures to remove unsuitable judges and prosecutors. Suitability was assessed in terms of a range of factors including legal qualifications, evidence of political bias, and misconduct in office. The first stage involved an internal review process carried out by judges and prosecutors themselves. This was

¹ The IJC was mandated by the OHR to promote 'rule of law and judicial reform' by a Decision of 14 March 2001.

followed by a reappointment procedure whereby sitting judges and prosecutors applied for jobs in an open competition. Finally, legislation has changed the way criminal cases are heard in BiH, moving away from inquisitorial procedures and the investigative judge to a more adversarial system. These examples illustrate how mainstream international community agencies have sought to challenge a number of the interrelated flaws in the judicial system which the Judicial Systems Assessment Procedure (JSAP) appeared to highlight, in particular matters of political influence and other forms of corruption and the procedural issues that allowed for procrastination in judicial decision making.

Court restructuring

A number of changes have been made in relation to the court structures in BiH. Over several months in 2002 two successive High Representatives, Wolfgang Petritsch and Paddy Ashdown, implemented a number of decisions to restructure courts in both F BiH and RS in line with recommendations made by the IJC. This started with a freeze on recruitment in April (*Decision* of 4 April 2002) and reached completion with packages of laws on 21 August and 1 November, which merged a number of municipal courts in F BiH and also basic courts in RS (*Decisions* of 21 August 2002 and 1 November 2002). In the Federation, 53 municipal courts were consolidated into 28 courts with four additional court branches; while in Republika Srpska, there was a reduction from 25 to 19 basic courts. The rationale for the mergers is outlined in the IJC's final report (IJC 2004)²: to reduce the number of courts where existing provision was considered excessive and unnecessary; reduce expenditure through economies of scale in consolidated courts; enhance judicial independence; create flexibility; while balancing this against the need for public access to judicial institutions. In arriving at its conclusions, IJC drew comparisons between BiH and other European countries to highlight a perceived excess of judges (IJC 2004). While restructuring was expected to be a lengthy process, IJC decided that it would be best done alongside the reappointment process (discussed below) as it made little sense to make appointments first and then to make redundancies as part of a restructuring exercise (INT23). Due to the implication of this on the timetable of restructuring, it was decided that any necessary laws, and amendments to existing laws, would be imposed by the High Representative. The internationally-backed restructuring

² The final report of the IJC was written with a view to allowing reflection on the achievements of the Commission and to prevent the 'institutional memory loss' which may have accompanied its closure, and the transfer of certain functions to the High Judicial and Prosecutorial Council (HJPC).

met resistance: for example, the merger of the municipal courts at Maglaj and Zavidovići in Zenica-Doboj Canton, and subsequent closure of the Maglaj court, were nearly reversed after the High Representative's legislation was adopted by Cantonal authorities, and thus rendered open to domestic amendments (INT23). Certainly the interaction of international and local actors in this example would make for an interesting case study, but this would require more detailed work on the local politics of Zenica-Doboj, and broader consultation with the parties involved. The remainder of this section will thus focus on the development of a criminal court at the state-level, and the involvement of the international community, particularly the OHR, in this project.

Sud Bosne i Hercegovine: a criminal court for BiH

The origins of the Court of Bosnia and Herzegovina (Sud Bosne i Hercegovine or Sud BiH), a state-level institution with criminal, administrative and electoral divisions, can be traced back to March 1998, when the High Representative, Carlos Westendorp, requested the European Commission for Democracy through Law (The Venice Commission) to give its considered opinion on the need for a state-level judicial body beyond the existing Constitutional Court of Bosnia and Herzegovina. The Commission, an independent think-tank, incorporating experts from universities, judiciaries and legislatures from Council of Europe countries and other states, responded in October 1998. Their opinion states that power to establish courts *can* rest with the state-level institutions of BiH, where the jurisdiction of such courts is not general, does not infringe upon the powers of the entities, and does address specific constitutional needs (Venice Commission 1998a). Where such need might arise was illustrated by two examples: decisions regarding electoral disputes concerning state-level elections; and judicial review of administrative decisions made by state-level bodies. The latter of the two was argued to reflect an obligation to provide a 'fair and public hearing' in determining civil rights and obligations, in line with Article 6 of the ECHR (Article cited in Venice Commission 1998a). This suggests a solid foundation for an *administrative* court at the state level, but the Commission gave a weaker endorsement of state-level involvement with criminal law. Thus, while it may be necessary for the common institutions of BiH to pass criminal legislation to enable them to fulfil their functions, it was not essential that resulting laws be enforced by a state-level criminal court. This follows on from an earlier opinion on the division of competencies between cantons, FBiH and the state-level institutions, whereby it was argued:

[BiH] may define certain acts as offences and provide for punishment insofar as it needs to use the machinery of criminal law to implement its powers and responsibilities.

9 Strengthening the justice environment

Although such competence is not explicitly provided for in any text, this is a logical consequence of the statehood of [BiH] and the tasks entrusted to it.

(Venice Commission 1998b)

The constitution allows common institutions a range of competences under article III.1, and a number of these occupy areas where the need to legislate against criminal activity is a distinct possibility. These are examined briefly in table 9.1, below. In the absence of a state-level court with the jurisdiction to enforce such laws, there would be a risk of independent entity systems interpreting and enforcing state-level criminal legislation inconsistently, resulting in disparate judicial outcomes. The Commission proposed that this might be resolved by the existing state-level Constitutional Court regulating differences where they were perceived to represent a threat to the constitution of BiH. In addition to the Commission's opinion on the need for a state-level judicial organ, such a body might draw support from the constitution of BiH. Article III.1.g outlines state-level competence for "[i]nternational and inter-Entity criminal law enforcement, including relations with Interpol", but goes no further in specifying the nature or scope of 'enforcement'.

Table 9.1 Bosnia and Herzegovina state-level competence and areas of criminal activity

| Article | Responsibility | Potential forms of criminal activity |
|---------|---|--|
| III.1.c | Customs policy | Smuggling of goods, evading customs duty |
| III.1.d | Monetary policy | Forgery of currency |
| III.1.f | Immigration | Illegal immigration and offences facilitating this |
| III.1.g | Inter-entity and international criminal law enforcement | Various forms of crime with a cross-border element, e.g. vehicle theft for resale elsewhere, distribution of narcotics, etc. |
| III.1.h | Common and international communications | Interfering with means of communication; use of means of communication to distribute illegal material |
| III.1.i | Inter-entity transportation | Sabotage or hijacking |
| III.1.j | Air traffic control | Sabotage |

Against this background, OHR convened a meeting with representatives of entity Justice Ministries and the state-level Ministry for Civil Affairs and Communication³ in October 2000, and a draft law establishing a new judicial body at the state level was subsequently developed. The court's remit was to provide judicial review of the administrative decisions and actions of state-level institutions, and to deal with criminal offences committed by public officials in the

³ With no criminal justice structures at state level, there was no Ministry of Justice among the common institutions of BiH until 2003.

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course of their work in these institutions. While the draft law went before state-level legislative bodies, they did not succeed in passing it before they were dissolved ahead of elections scheduled for November. Thus Sud BiH was established by a decision of the High Representative, Wolfgang Petritsch, on 12 November 2000 (*Decisions* of 12 November 2000). In passing these decisions, the High Representative justified his action with reference to Article II.1.d of Annex 10 of the General Framework Agreement for Peace (*GFAP* 1995), which states that the High Representative shall “[f]acilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation”. The High Representative also referred back to the Madrid declaration of December 1998 made by the PIC, from whom he draws his mandate. This proposed:

the establishment of necessary structures at BiH State and Entity levels to fulfil the requirements of the respective Constitutions, including the creation, in accordance with the opinion of the Venice Commission, of judicial institutions at the State level, whose creation meets an established constitutional need, to deal with criminal offences perpetrated by BiH public officials in the course of their duties, and with administrative and electoral matters.

(PIC 1998)

The criminal jurisdiction of the court as envisaged in the Madrid declaration was thus restricted to those crimes which might be committed by state-level officials in the course of their duties. In some ways, the law on the court suggests a relatively modest institution in line with the limited competence the court could be expected to have. It was to be composed of 15 judges, all citizens of BiH. Yet the High Representative’s law outlining the court’s criminal jurisdiction leaves open a scope greater than the PIC’s declaration might suggest:

Article 13

1. The Court shall have jurisdiction over crimes defined in the Laws of the State of Bosnia and Herzegovina, when provision is made in the said Laws that the Court has such jurisdiction.
2. The Court shall further be competent to...
 - b) decide any issue relating to International and inter-Entity criminal law enforcement, including relations with Interpol and other international police institutions, such as decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign States or International Courts or Tribunals...
 - d) decide on the reopening of criminal proceedings for crimes defined in the Laws of the State of Bosnia and Herzegovina.

Law on Court of Bosnia and Herzegovina (2000)

Assuming those ‘crimes defined in the Laws of the State of Bosnia and Herzegovina’ relate only to state-officials and crimes committed in the course of their duties, for example

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receiving bribes, embezzling public monies and so on, then the Madrid declaration and the law establishing the courts are not at odds. Should state-level criminal laws go beyond this, as well they might in order to enable the state to carry out its essential activities, the law would extend beyond the mandate issued to OHR by the PIC in Madrid in 1998. Indeed the law was challenged only months after it was imposed by the High Representative. On 25 March 2001, twenty five representatives from the RSNA challenged the Law on the State Court before the Constitutional Court of Bosnia and Herzegovina. They objected that the law breached the Dayton constitution of BiH wherein responsibilities of the state-level bodies were outlined (Article III.1a-j); judicial systems were not included in the list, and article III.3a states that, “[a]ll governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities”. Their chances of success were questionable from the outset: OHR has been cautious in clarifying the competence of the Constitutional Court over HR decisions and, while cooperating with the court in this particular case, did not acknowledge its jurisdiction. The court itself has recognised that the mandate of the OHR is derived from a range of sources beyond the court’s jurisdiction, including the General Framework Agreement for Peace, the United Nations Security Council, and the Peace Implementation Council. At the same time, while the *mandate* and the *actions* of the High Representative are not subject to control by the Constitutional Court, the court has argued that it retains competence over *domestic laws*. Were the outcome of an action by the HR a domestic law, rather than a removal or suspension, that law would subsequently be open to constitutional review by the court (*Twenty five representatives of the RSNA 2001*: para. 13). In this instance, the Constitutional Court decided that the law was in conformity with the constitution of BiH and so the law establishing Sud BiH stood (*Twenty five representatives of the RSNA 2001*: para. 27).

Since the tentative beginnings of the court in the declaration of the PIC and the opinion of the Venice Commission, focused primarily on administrative matters and corruption among state-level officials, the role of the Sud BiH has been significantly expanded and consolidated. In August 2002, the recently installed High Representative, Paddy Ashdown, enacted legislation amending the previous court law to create an Organised Crime, Economic Crime and Corruption Panel within the court (*Decision* of 6 August 2002). This amending legislation extended the jurisdiction of the court retrospectively to crimes covered by entity legislation prior to the implementation of a state-level criminal code where such crimes included “elements of international or inter-Entity crime as defined in the Criminal Code of Bosnia and

Herzegovina” (*Decision* of 6 August 2002: Art. 9). That code, along with provisions for the court to enforce it, was entered into law by the High Representative in January the following year, along with a series of other measures including a new criminal procedural code, a judicial police force for the state-level court, trial monitors and witness protection legislation (*Decisions* of 24 January 2003). Those chapters of the criminal code which detail offences and the prescribed punishment are outlined below in table 9.2.

Table 9.2 Criminal Code of Bosnia and Herzegovina

| Chapter | Title |
|---------|---|
| XV | Criminal Offences against Freedom and Rights of Individuals and Citizens |
| XVI | Criminal Offences against the Integrity of Bosnia and Herzegovina |
| XVII | Criminal Offences against Humanity and Values Protected by International Law |
| XVIII | Criminal Offences against the Economy, Market Integrity and in the Area of Customs |
| XIX | Criminal Offences of Corruption and Criminal Offences Against Official Duty or other Responsible Duty |
| XX | Criminal Offences against Administration of Justice |
| XXI | Criminal Offences of Copyright Violation |
| XXII | Conspiracy, Preparation, Associating and Organised Crime |

Certain chapters deal exclusively with the kinds of offences that might be committed by officials of BiH’s common institutions as anticipated by the PIC Madrid declaration. This can be seen particularly in those articles relating to infringements on citizens’ rights (chapter XV) and corruption (chapter XIX). Beyond this, the criminal code, and Sud BiH which draws its jurisdiction from this code, can be seen to cover a number of other areas: the protection of the state, in particular a liberal democratic model of the state featuring a market economy (chapters XVI, XVIII, XX, and XXI); the protection of human rights based on international law (chapter XVII); and organised forms of those crimes already covered within the code (chapter XXII). In introducing legislation to protect the state in terms of its integrity, its ability to generate revenue, and, in the context of market oriented legislation, to attract investment, the criminal code reflects the reasoning of the Venice Commission with regards to the need ‘to use the machinery of criminal law to implement [the state’s] powers and responsibilities’ (Venice Commission 1998b) in relation to one particular model of the state. Yet, as stated, the Commission did not conclude that state-level judicial structures were absolutely necessary to enforce such criminal laws.

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The state-level criminal code took over a number of crimes from the existing entity codes, particularly where such laws involved a significant international element⁴. Such crimes were subsequently removed from entity-level codes, or were redefined in domestic terms. For example, chapter 17 of the *Criminal Code of Bosnia and Herzegovina* introduced in 2003 is composed of thirty-three articles handling crimes against humanity and against values protected by international law. These cover crimes ranging from genocide and crimes against humanity in the context of a ‘widespread and systematic attack’ (171-2), war crimes (173-184) and various other crimes including international trafficking in persons, military equipment and narcotics. Comparing this to previous codes from the entities and Brčko District⁵ shows that of thirty-three articles, twenty four had direct equivalents in the RS code, and of these twenty two could be found stated in similar or equivalent terms in FBiH and Brčko. In the revised FBiH code of 2003 only ten articles match up to chapter 17 of the state-level code; moreover the delineation between the inter-entity and international jurisdiction of state-level institutions and the domestic scope of the FBiH bodies is clear. Articles 153 to 160 of the FBiH 1998 code, concerning genocide and war crimes, have been removed as these matters now fall under the jurisdiction of state-level institutions. Furthermore, other articles show a shift in emphasis away from international law as can be seen in the example of those dealing with the destruction of cultural and historical monuments in table 9.3, below. The table also illustrates how the state-level code has more or less directly taken on the provisions concerning international law from its entity counterpart.

⁴ For example by involving crimes committed in or across more than one country, or defined as acts prescribed by international laws and conventions.

⁵ The analysis here draws on: Criminal Code of Bosnia and Herzegovina (2003), originally published in *Official Gazette of Bosnia and Herzegovina* 3/03; Criminal Code of Brčko District of Bosnia and Herzegovina (2000), originally published in *Official Gazette of the Brčko District of Bosnia and Herzegovina* 6/00; Criminal Code of the Federation of Bosnia and Herzegovina (1998); Criminal Code of the Federation of Bosnia and Herzegovina (2003), originally published in *Official Gazette of the Federation of Bosnia and Herzegovina* 36/03; Criminal Code of Republika Srpska (2000).

Table 9.3 Example of change to FBiH criminal code subsequent to promulgation of state-level criminal code, 2003

| FBiH (1998) | State-level (2003) | FBiH (2003) |
|---|--|---|
| <p>164.1 Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural or historical monuments, buildings or establishments devoted to... science, art, education or humanitarian purpose, shall be punished...</p> <p>164.2 If a clearly distinguishable object, which has been under special protection of the international law as people's cultural and spiritual heritage...</p> | <p>183.1 Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural or historical monuments, buildings or establishments devoted to science, art, education or humanitarian purpose, shall be punished...</p> <p>183.2 If a clearly distinguishable object, which has been under special protection of the international law as people's cultural and spiritual heritage...</p> | <p>321.1 Whoever damages or destroys a cultural monument or protected natural object shall be punished...</p> <p>321.2 If the criminal offence referred to in paragraph 1 of this Article is perpetrated in regard of a cultural monument or a protected natural object of a special value...</p> |

If the Venice Commission opinion and subsequent PIC declaration suggest a somewhat limited court serving administrative functions or handling specifically those acts committed by state-level officials, and challenging the perceived immunity of powerful political actors, the court that has developed at the state level in BiH exceeds this remit and has taken on provisions for a number of offences previously handled by existing criminal codes in Brčko, FBiH and RS. Sud BiH has developed an extended scope, including criminal division handling war crimes, economic crimes and corruption and general crime. Three key rationales emerged from discussions in BiH which explain this pattern of development: Sud BiH could serve as a local successor to the International Criminal Tribunal for Yugoslavia (ICTY); Sud BiH could become a powerful body to challenge corruption in BiH and to address the 'crimes of the powerful'; and Sud BiH might serve as a flagship for judicial reform and, more broadly, for the development of common institutions in BiH.

ICTY exit strategy

The creation of a division within the state court handling war crimes was closely tied to the timetable of the ICTY in The Hague (INT2); from 2001 ICTY was actively developing a strategy to facilitate the winding down of its activities (INT2). This 'completion strategy' proposes completion of investigations by the end of 2004, of first instance proceedings by the end of 2008 and of all activities by the end of 2010, and was endorsed by the UN Security Council in August 2003. The revised timetable for ICTY was to be realised in part by:

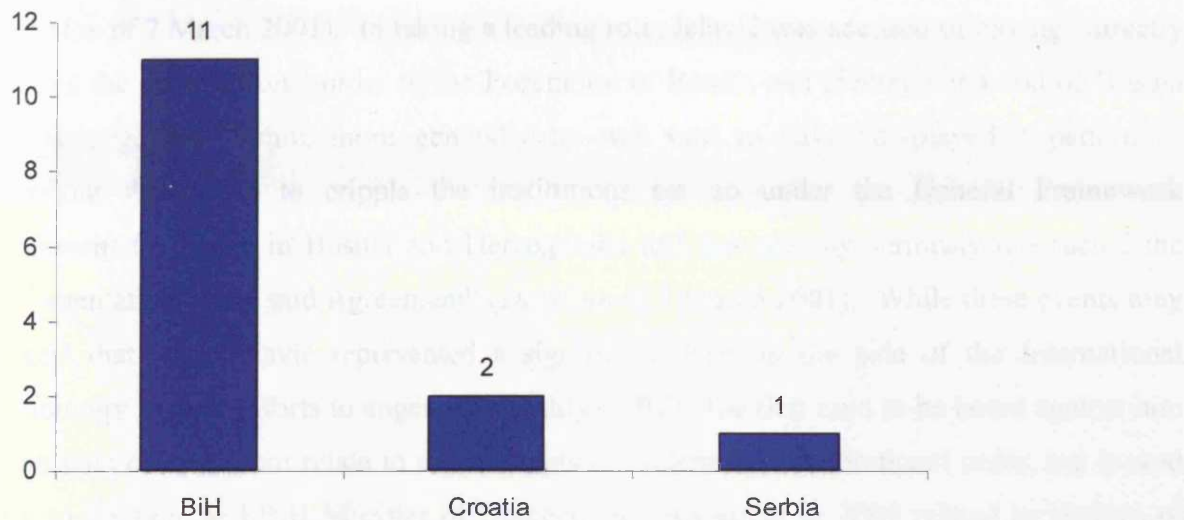
...concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national

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jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.

(UNSC 2003)

Resolution 1503 highlights the importance of this strengthening of national judicial bodies, not just to the ICTY completion strategy, but to a broader framework of enhancing the rule of law. The international community is thus called upon to support such work and the Security Council called for donations in support of the development of a special division in Sud BiH to handle serious violations of international humanitarian law (UNSC 2003). The importance of focusing on the most serious cases, or those involving the most senior leaders, was reiterated the following year in a further resolution (UNSC 2004) and the subsequent transfer of suspected war criminals to domestic courts in BiH, Croatia, and Serbia under Rule 11*bis* of the Tribunal's procedural regulations saw this call being put into action. The rules require a panel of three judges to assess the domestic conditions to satisfy themselves that any domestic trial will be fair and that the death penalty will not be imposed (International Tribunal 2006). To April 2007, seven cases, involving fourteen accused, had been passed to national jurisdictions, eleven of the accused being sent to Sud BiH (see figure 9.2, below). One critical voice in BiH noted that this exit strategy was a case of ICTY seeking to solve its own problems, generated by limits on funding and operational timetables (INT38). Certainly, the ability of ICTY to send cases to national jurisdictions under rule 11*bis* reduces the tribunal's overall caseload and enables prosecutors to focus on top-level cases, yet it also facilitates a local process of examining war crimes in a public forum, and thus addresses some of the early criticism of ICTY's limited impact in the countries where crimes had been committed (INTS22 and 32). The growing strength of domestic courts is reflected in ICTY's confidence in those bodies as capable of handling complex and controversial war crimes cases, and furthermore a willingness of national jurisdictions to bring to trial senior political figures in connection with war crimes and other forms of criminality. To this extent, the trial of Momčilo Mandić, war time Assistant Minister of the Interior and Minister of Justice in the RS, might suggest a degree of success. Although the case resulted in an acquittal on the basis of insufficient evidence of command responsibility, it is the kind of case that may have been denied a public hearing in the past through political subversion of the judicial process (*Prosecutor v Mandić* 2007).

Figure 9.2 Rule 11*bis* transfers to domestic jurisdictions to April 2007 (numbers of accused)

Challenging corruption

The earliest proposals for a state-level court in BiH reflected the hopes of the international community for a body capable of challenging corruption at the highest levels of politics in BiH. The PIC Madrid *Declaration* cited earlier (PIC 1998) made this manifest, and the subsequent development of the special judicial and prosecutorial divisions handling organised and economic crime and corruption represent the particular institutional mechanism by which these aspirations might be realised. One OHR source suggested that the reason why local politicians had been largely sidelined from the process of legal reform was that many were likely targets of the procedures and institutions under development (INT 25). One OHR representative suggested that there was a perception among the Bosnian population that the powerful were not challenged by the judiciary due to the influence they could exert over legal proceedings (INT13). Cases highlighted in the preceding chapter suggest a firm basis for such a perception.

During the first study visit to BiH in 2004, the case of Ante Jelavić was held up as just the kind of case that the state-level court could be expected to handle (INT13), and indeed the case may illustrate the kinds of ‘crimes of the powerful’ that the International Community sought to challenge. Having served as a post-war Defence Minister in FBiH, Jelavić went on to be elected as a member of the state-level Presidency in 1998. He was removed from that position by High Representative Wolfgang Petritsch in relation to a series of acts and events which led up to what the HR referred to as a “gathering” in Mostar on 3 March 2001,

described as an initiative “to undermine the constitutional order of the Federation of Bosnia and Herzegovina and establish an illegal parallel structure” (*Decision of 7 March 2001*). In taking a leading role, Jelavić was accused of having “directly violated the constitutional order of the Federation of Bosnia and Herzegovina and of Bosnia and Herzegovina”, while more generally he was said to have “displayed a pattern of behaviour that seeks to cripple the institutions set up under the General Framework Agreement for Peace in Bosnia and Herzegovina and has thereby seriously obstructed the implementation of the said Agreement” (*Decision of 7 March 2001*). While these events may suggest that Ante Jelavić represented a significant thorn in the side of the International Community in their efforts to engender stability in BiH, the first case to be heard against him at the state court did not relate to any attempts to undermine constitutional order, but looked back to his time as FBiH Minister of Defence, and his arrest in 2004 related to charges of corruption.

Ante Jelavić faced numerous counts of abuse of office, embezzlement in office and lack of commitment in office relating to his time as Defence Minister, during which he allegedly diverted Defence Ministry funds to purchase shares in two financial organisations, *Hercegovačka Banka* and *Herzegovina Osiguranje*, and abused a mandate loan programme. Evidence presented during the trial suggested that the FBiH Ministry of Defence was divided, in contravention of the constitution, into parallel Bosniak and Croat structures, and that this had facilitated the diversion of public revenue, drawn from financial assistance provided by the Croatian government to support Croat Defence Council (HVO) veterans, to provide founding capital for *Hercegovačka Banka* and *Herzegovina Osiguranje* (*Prosecutor v Jelavić 2005*). Jelavić was found guilty and subsequently sentenced to ten years imprisonment. As such the international community might feel pleased that a domestic institution had shown itself capable of standing up against corruption by public figures with connections at the highest levels of Bosnian politics. Yet while the institution was embedded in a domestic framework of law and governance, key players in the case were drawn from outside BiH. The prosecution was led by John McNair, from Canada, while the verdict was passed by a panel composed of one domestic judge, Branko Perić, and two international judges, Malcolm Simmons (presiding) and Carolyn Temin. This forms part of the transitional arrangements, whereby local judges are supported, and to some extent insulated from domestic political pressures, by international judges who are to be gradually phased out. Nonetheless, the Jelavić trial, up to this point, serves as an illustrative example of the challenge to the impunity

of the political elite from a part-domestic judiciary in BiH. Judges had not shied away from ordering Jelavić into pre-trial custody, first in Kula and subsequently in the detention unit attached to Sud BiH. Yet Jelavić was absent from court during sentencing and has remained at large ever since. Moreover, his counsel has subsequently initiated a successful appeal against the verdict on the grounds that it was, in its omission of a “full factual description of the offence”, incomprehensible and therefore violated state-level criminal procedural laws (*Prosecutor v Jelavić* 2006)⁶. Yet regardless of whether the judges in this case provided an adequate rendering of their verdict⁷, and regardless of whether the subsequent trial before the Appeals Division finds for or against Jelavić, the fact that the case was heard, that a first instance finding of guilt has been reached, and that this has been questioned by the appeals bench suggests two things. Firstly, well connected political figures like Jelavić can not avoid trial by exerting pressure on prosecutors and judges. Secondly they still enjoy the same right to a fair trial as normal citizens, including the right to appeal, and this is not constrained by political decision making outside the court. Indeed, Jelavić is not the only state- or entity-level politician to have stood before Sud BiH:

- Momčilo Mandić, wartime Assistant Minister of the Interior and Justice Minister of the RS, was found guilty of authorising illegal loans from *Privredna banka Srpsko Sarajevo* to *Spekta*, a firm owned by the Serb Democratic Party (SDS), in order to fund election campaigning. Further illegal loans went to political associates, including Gojko Kličković, former Prime Minister of Republika Srpska (*Prosecutor v Mandić* 2006). He was sentenced to a consolidated term of nine years imprisonment. Mandić also faces charges in connection with his period in office in RS over unlawful and inhumane treatment of civilians, and due to his command responsibility for crimes committed in correctional facilities in RS during the war (*Prosecutor v Mandić* 2007).
- Dragan Čović, Jelavić’s successor as Croat member of the BiH Presidency and leader of the Croat Democratic Union (HDZ), was found guilty of abuse of office

⁶ Specifically Art. 297(1)[k] and [h] of the BiH Criminal Procedural Code

⁷ The failure to do so in this instance questions the validity of the claims that international judges provide a valued source of expertise; the two international judges in this case, Malcolm Simmons and Carolyn Temin both came from countries with adversarial systems, England and the USA respectively. Indeed, while these two countries operate systems that are similar to BiH at the most general level, unfamiliarity with the specifics of the new code are likely to be as significant a hindrance to international judges as they are to their domestic counterparts.

over his failure to withdraw an unlawfully issued document bearing a facsimile of his signature which facilitated the evasion of special customs on meat products by two companies owned by his co-defendants. The damage to FBiH revenue was calculated at KM 1,866,878 (around €933,000), and Čović was sentenced to five years imprisonment (*Prosecutor v Čović* 2006).

- Miroslav Prce, Minister of Defence in FBiH at the time of the Mostar “gathering” of March 2001, was found guilty of damaging individuals and the Federation of Bosnia and Herzegovina by issuing an unlawful order for Bosnian-Croat components of the FBiH Army to stand down in support of the Croat Self-Rule movement, a decision reversed upon appeal (*Prosecutor v Prce* 2006). He is currently serving a five year sentence for a conviction in relation to the mandate loans and spending abuses described in the Jelavić case, above (*Prosecutor v Prce* 2004).
- Hasan Čengić, former FBiH Minister of Defence, was indicted and acquitted of abuse of office, a verdict upheld after prosecutors appealed (*Prosecutor v Čengić* 2005).

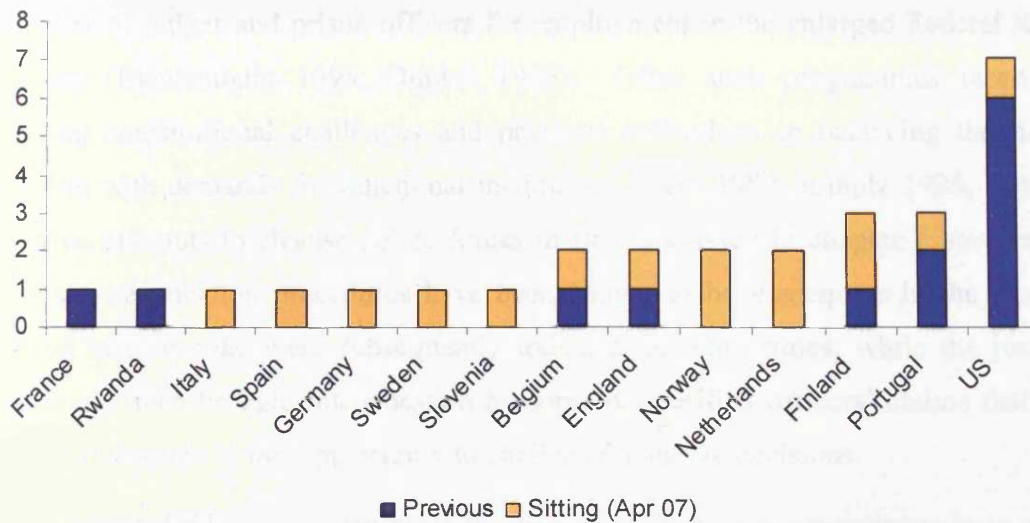
A fuller survey of the work of Sud BiH would be able to give a more accurate picture of the extent to which the court and state-level prosecutors have actively challenged criminal activity by those at the highest levels of political life in BiH, but that is a task beyond the extent of the present project.

Flagship for reforms

As will be made clear as this chapter progresses, Sud BiH represents only one of a package of structural, procedural and personnel changes which the judiciary has experienced in a relatively short period of time. Arguably a state-level court, hearing cases at the highest level could play an important role in facilitating broader processes of reform. International judges, an ongoing feature of the court, were seen as being important in bringing their experience to BiH (INT 13). Figure 9.3, below, shows that seven of twenty-eight international judges were drawn from the US, and a further three from Italy and England, these countries fitting more closely with the revised adversarial procedures adopted by BiH. Nonetheless, these ten judges still form a minority. Moreover, were Sud BiH to serve as a flagship body, leading other judicial institutions in the implementation and interpretation of criminal procedures, one would expect some mechanism whereby precedent set at the state level is subsequently

incorporated into practice in other courts in the entities and Brčko. Yet Sud BiH remains separate from entity courts and does not form the apex of a hierarchic pyramid from which it could lead other courts.

Figure 9.3 Sud Bosne i Hercegovine: International Judges



The state-level court was seen as representing not just a flagship for judicial reform and for a reinvigorated challenge to crime and corruption, but a flagship for state-level institutions (INT13). That view came from OHR, but elsewhere hopes were expressed that the development of justice bodies at state level might be followed up with further state-level bodies (INT30). In this respect, the court can be located within a set of state-building activities geared towards developing not just a functional state in BiH, but towards building up specifically those bodies located within the common institutions. Yet, among domestic respondents, there was concern that by 2005, the court was not living up to hopes and expectations that would justify this flagship status; the reliance on plea bargains and the lack of cases having been confirmed by an appellate bench were seen as problematic (INT16), although this may reflect differing expectations based on experience of a system in which judicial review of decisions was common practice (see Damaška 1986) and where plea bargaining did not feature. The ongoing development of state-level institutions will be revisited once the survey of policing, courts and prisons has been completed.

Review and reappointment

In surveying the historical experiences of post-conflict and post-authoritarian societies, chapter 4 presented a number of examples where criminal justice officials faced some form of

'lustration': removal from office often combined with restrictions on participation in public life. Such attempted purges include removal of senior police officers in France at the end of the Second World War (Lottman 1995; Novick 1995), 'denazification' procedures in Germany and Austria (Engelman 1982; Garner 1995), attempts to restrict the practice of advocacy in Albania (Imholz 1995), and post-reunification procedures to examine the suitability of judges and prison officers for employment in the enlarged Federal Republic of Germany (Blankenburg 1995; Dünkel 1995). Often such programmes faced problems including constitutional challenges and practical difficulties in balancing the demands of lustration with demands for functional institutions (Herz 1982; Imholz 1995; Müller 1995). Likewise, attempts to cleanse police forces in BiH discussed in chapter 7 have encountered problems: certification procedures have been shown to be inadequate in the case of some certified officers who were subsequently indicted for war crimes; while the justice of the process has been brought into question by some de-certified officers' claims that they were not given adequate or fair opportunity to challenge negative decisions.

Contemporary BiH is separated from the period of Yugoslav government by a war which, while limited to three and a half years, created a significant gulf between post-war and pre-war structures and circumstances. As seen in the preceding chapter the judicial sector was reconstructed in terms of territorial division and personnel; ethno-political influence over the selection of the judiciary continued into peacetime while those parties with a strong ethnic base maintained power in BiH. Thus the relevant framework for lustration of the judiciary is not restricted to the wartime record of judges and prosecutors; rather post-war records were examined for evidence of political bias, competence, and evidence of adherence to principles of Rule of Law. The purge of unsuitable personnel occurred in two phases and further illustrates some of the problems highlighted in the historical review. In the first phase, commissions made up of judges and prosecutors were tasked with examining the work of their colleagues to make decisions on removal; in the second, judges and prosecutors were removed from their posts wholesale, and were expected to reapply, shifting the burden of proving suitability away from the commissions and on to the applicants themselves. The initial process of review was seen as being limited in its impact (INT23) and is well documented elsewhere (IJC 2004). As such a detailed account will not be offered here and the remainder of this subsection will focus on the subsequent reappointment process, referring to the comprehensive review where appropriate.

The reappointment process

A report from Charles Erdmann, a US judge, foreshadowed the direction that lustration procedures were to take in BiH and may provide one indicator of processes of lesson drawing or policy transfer taking place in BiH. Erdmann (2001) was highly critical of the comprehensive review carried out by judicial and prosecutorial councils and commissions and the way in which they were undertaken. He argues that too little time was allowed for the review, it depended too heavily on the time of judges and prosecutors with other work commitments, suffered from a lack of administrative support, and by drawing exclusively on judges and prosecutors the process operated in isolation from society. Against this critique of the review, he praises the procedures for new appointments introduced at the same time, citing success in filling a number of prosecutorial positions in Zenica-Doboj Canton. Following such success he proposes that a comprehensive programme of reappointment could be developed for the entire country, citing East Germany as an exemplary model. While East Germany provides an example of the review of 6,000 judges and prosecutors, further detail is not given by Erdmann. The full extent to which the East German example, whereby judges and prosecutors were obliged to reapply for their positions with no guarantee that they would succeed in securing them (for a further discussion of this procedure, see Blankenburg 1995), provided a source of transfer is not entirely clear, and would require further research with those directly involved. Erdmann's report, which preceded the adoption of a *similar* model, whereby incumbents would reapply for jobs in an open competition, suggests that East Germany provided, at least, the inspiration for reappointments in BiH. Moreover the Brčko Law Revision Commission (BLRC) had made it explicit that they drew inspiration from Germany for a reappointment procedure that had already resulted in a series of probationary appointments in March 2001, several months before Erdmann made his recommendations (BLRC 2001; Karnavas 2003; OHR 2001). Discussions in Sarajevo provided a mixed picture; one outside observer strongly identified East Germany as the source of the process (INT20), yet a participant in the process suggested that it was carried out without reference to the German model and was developed on the ground, drawing on local experience:

AA: Was that process modelled on any process in particular? From previous experience elsewhere?

Resp: We made it up as we went along. Most of the investigators were former prosecutors and judges from here so the methodology was quite close to the Bosnian legal system; it was an ad hoc system

(INT3, 478ff.)

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This discrepancy illustrates the complexity of policy transfer; there may be various levels of detail on which a transfer can take place (Dolowitz 2000). The policy *goal* of lustration was already in place in BiH by the time that Erdmann made his proposal, evidenced by the comprehensive review procedures and the probationary appointments in Brčko. The idea of modelling a lustration process on the reappointments process having taken place in East Germany may be more an indication of a particular policy programme being transferred, by using reappointment a way of shifting the burden of proof on to the individual judge or prosecutor. What the interviewee (INT3) above highlights is the way in which specific mechanisms and methods are developed within the broad framework of that programme. Independent developments such as these may be an indicator of one level of success in transfer, in that a policy programme is implemented in line with local working practices, and shows itself adaptable to context.

The procedure attracted opposition, both within the international community and domestically. The Council of Europe was opposed to the way in which judges were dismissed, overriding the life-tenure enjoyed by some judges, a source of security which provides support for judicial independence. The Council's view was that were judges guilty of malpractice or corruption, prosecution or other disciplinary measures ought to be invoked with the appropriate safeguards for the rights of the accused (INT39); subsequent to the inclusion of a right to reply for unsuccessful applicants the Council dropped its opposition. Local political parties also objected, although these complaints were dismissed by one member of the international community as being politically motivated, arising where politically favoured candidates were not reappointed; in particular, one party's objection to an all female bench was cited, the suggestion being that the party would not have challenged the gender imbalance in an all male court so readily (INT23).

The lustration procedures in BiH faced the risk of dilution, much like the 'denazification' process in post-war Germany. The threat came from the challenge of finding enough uncompromised and adequately qualified candidates willing to take up posts in particular courts. Relatively small numbers actually applied: around 3,000 applications were anticipated for approximately 1,000 positions, but only 1,700 applied in the end (INT29). This was unexpected given the improved package of salary and benefits accompanying the review procedure. The challenge was exacerbated by the demands of matching the pool of suitable applicants with the ethnic quota of particular courts based on the 1991 census. One interviewee highlighted the difficulties of finding adequate numbers of Bosniak judges to fill

positions in the East of RS, where a number of municipalities had been majority Bosniak before the war (INT3); areas with a record of violence against minorities were difficult to attract minority judges into for obvious reasons. A further participant in the reappointment process suggested that, as the international community “were desperate to fill those gaps”, the main criteria deciding appointment to a particular position, beyond minimum qualifications, were ethnic background and a willingness to go to a particular court rather than particular relevant qualities (INT18). In spite of these challenges, the initial commitment to standards was, according to another source, maintained throughout. Principles of justice rather than pragmatism informed this position:

Towards the end, usually it was some of the international members of the HJPC that didn't understand the importance of property laws here. There were attempts to dilute the standards, but the IJC as the secretariat to the High Judicial Councils always reacted very strongly to try and stop it. Also it would be unfair. For the people at the end of the process, they'd be getting an easier ride than the people who applied to a court and happened to be considered first. In the interests of equity we couldn't do that.

(INT3)

This contrasts with an account of appointments made even at earlier stages, where it was described as a struggle to ensure all decisions were made with a commitment to routinely follow up evidence of violations with further investigation, and where international participants found it difficult to agree on interpreting criteria of suitability (INT18). Certainly this suggests that a high-level review of the procedure might have been necessary to ensure consistency. In spite of these challenges and reservations outlined above, the selection process was seen as having had a positive impact on the judiciary of BiH, and mooted as a model for Kosovo (INT29), where a key consultant to the IJC in BiH was subsequently employed.

Procedural reform

Historically, Yugoslavia drew on different legal legacies, including Ottoman and Austro-Hungarian. As a constituent republic of SFRY, BiH featured a criminal procedure following a relatively conventional ‘continental’ form, featuring an investigative judge in initial stages and subsequent inquisitorial hearings. This procedural law was inherited by BiH when it seceded from Yugoslavia, and in spite of some minor reforms in 1998, that model continued to apply throughout BiH until April 2001 when the recommendations of the BLRC, a US funded body, were implemented in Brčko District (BLRC 2001). From then until January 2003, when a package of decisions in the judicial field by the High Representative introduced new state-level criminal and criminal procedural codes to Bosnia and Herzegovina (see

Decisions 24 January 2003), Brčko was something of an anomaly: a small territory within BiH operating an adversarial system of criminal hearings while the rest of the country maintained inquisitorial procedures. Anomalous as Brčko may have been, the reforms there signalled the future direction of criminal procedure throughout BiH. The general shift from an inquisitorial to adversarial procedure resulting from the BLRC recommendations and OHR *decisions* (for example, 24 January 2003) represent a significant discontinuity in procedural law and form in BiH, with international actors playing a leading role. During fieldwork in BiH, there were suggestions that the shift in procedures represented an Americanisation of criminal procedures in BiH, and that the procedural code was heavily influenced by American forms (INT18 & 20), suggesting some kind of policy transfer or legal transplant, but equally there were those who sought to emphasise how the new codes remained grounded in European and international procedural forms (INT30 & 37).

Procedural reform in Brčko

Accusations of Americanisation of Bosnian criminal procedures draw support from the fact that adversarial procedures were first introduced to the country in Brčko district. As an area of strategic importance to both entities, forming a land bridge between Eastern and Western parts of Republika Srpska, and also linking Posavina Canton to the remainder of FBiH, the fate of Brčko was highly contentious, and remained unsettled well into the peace process. Ultimately it was to be attributed neither wholly to FBiH or RS, but is governed by a District Assembly and an international *Supervisor* playing a role similar to that of the High Representative elsewhere in BiH, with the power to issue binding orders. The five Supervisors so far have all been drawn from the USA⁸. Central to the reform of criminal procedures in Brčko was another American, Michael Karnavas, an Alaskan public defender who had previously acted as defence counsel at the International Criminal Tribunal for Rwanda (ICTR), and who went on to defend in the Blagojević and Prlić cases at the ICTY. Karnavas served as both chair and executive director to the BLRC, which recommended the reappointment procedures for judges and prosecutors in the district (see above) and the revised Law on Criminal Procedure (Karnavas 2003).

The lead role of Karnavas in producing the draft law was highlighted in interviews (INT20 & 18). One individual familiar with the new codes through their work in BiH adopted a highly

⁸ Ambassador R.W. Ferrand 1997-2000; Ambassador G.L. Matthews 2000-2001; Ambassador H.L. Clarke 2001-2004; Ms. S.R. Rockwell 2004-2006; Dr. R. Gregorian 2006-present.

critical approach to them and suggested that the outcome of Karnavas' involvement had been significant similarities between procedures in BiH and Alaska, where Karnavas was a member of the bar. This impression of Americanisation was repeated elsewhere. One international expert was quoted as having supported the shift to an adversarial system partly on the grounds that it was increasingly what the public expected to encounter in court rooms, the result of widespread availability of examples from American film and television exports (INT25). On the author's first visit to BiH in 2002⁹, *Law and Order*, the long-running NBC drama following criminal cases from police investigation through to trial, was available with subtitles in the local language. Others in BiH, including those involved in the drafting process, were keen to stress that the system in BiH was mixed, retaining inquisitorial elements in the investigative stage, albeit under the direction of a prosecutor as opposed to an investigating judge (INT30 & 37).

While there were clear suggestions from more than one source that Karnavas was responsible for a relatively straightforward introduction of an American model of procedural law into Brčko, Karnavas himself has suggested that this was not the case. Writing in *The American Journal of International Law* he notes that the BLRC consulted national and international experts and drew its inspiration from a range of sources including existing entity codes; Sweden and Germany, as examples of European countries having abandoned the role of the investigative judge; and for the actual trial procedure, the International Criminal Tribunal at The Hague (Karnavas 2003). The rules of evidence and testimony, for example show some more or less direct transplants from the ICTY Rules of Procedure to the Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina, with wording having been transferred directly from one to the other. Tables 9.4 to 9.6 below, give some examples which illustrate the point, although a full comparative analysis of the two codes has not been conducted.

In relations to Karnavas' claim that the existing legislation of BiH provided a basis for the new draft law, superficial similarities are immediately apparent from comparison between the form of the Brčko code and that of FBiH from 1998. Both documents follow the structure of a section handling general provisions, a section outlining the course of proceedings divided up into investigative or preliminary stages, the trial and judgment, and opportunities for legal

⁹ This trip did not form part of the fieldwork, rather was an opportunity to visit a friend and his family in Sarajevo and North West Bosnia.

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remedy, and finally a section handling special proceedings. Clearly there are differences between the two documents in that the first outlines the role of the prosecutor in investigations, while in the FBiH document this falls to an investigating judge, but as Karnavas notes, sections where the FBiH code has been adopted verbatim can be seen at various points. An example is provided in table 9.7 below. A final exercise was conducted in which key terms were used to search both the Alaskan Code of Criminal Procedure and the Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina: the same kind of similarities found in relation to the ICTY Rules of Procedure and the FBiH Criminal Procedural Code were not established. Key differences emerge such as the prominent role that the victim plays in sentencing decisions in Alaska through the standard use of victim impact statements in pre-sentence reports (12.55.022) and the opportunity for victims to give testimony or unsworn oral presentations at sentencing hearings (12.55.023[b]). No such provisions exist in the Brčko code. Likewise, while the Alaskan code allows for a jury, trials in BiH have moved away from lay participation in decision making, having abolished the role of the lay judge and leaving decision making in the hand of a panel of professionals.

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Table 9.4 General provisions in evidential rules in The Hague and Brčko District

| ICTY Rules of Evidence and Procedure | Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina |
|--|--|
| <p>Rule 89: General Provisions (Adopted 11 Feb 1994) [A and B are specific to the nature of the Tribunal as a body not attached to a specific national jurisdiction]</p> | <p>Article 234</p> |
| | <p>(1) Unless otherwise provided in this Law, a judge shall evaluate the evidence in a manner that will best favor a fair determination of the matter before him and is consistent with the general principles of law.</p> |
| <p>(C) A Chamber may admit any relevant evidence which it deems to have probative value.</p> | <p>(2) A judge may admit any relevant evidence that he deems to have probative value.</p> |
| <p>(D) A chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.</p> | <p>(3) A judge may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.</p> |
| <p>(E) A chamber may request the verification of the authenticity of evidence obtained out of court.</p> | <p>(4) A judge must verify the authenticity of evidence obtained out of court before it can be considered for its weight.</p> |
| | <p>(5) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is unethical to, and would seriously damage, the integrity of the proceedings.</p> |
| <p>(F) A chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.</p> | |

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Table 9.5 Witness testimony in The Hague and Brčko District

| ICTY Rules of Evidence and Procedure | Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina |
|---|---|
| <p>Rule 90: Testimony of Witnesses (Adopted 11 Feb 1994, revised 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000 and 13 Dec 2000) [(A) deals with the Oath] [(B) deals with oaths in the case of children]</p> | <p>Article 236</p> |
| <p>(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.</p> | <p>(1) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. A witness, however, who has heard the testimony of another witness shall not be disqualified solely based on that reason.</p> |
| <p>(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. (Amended 25 July 1997, amended 1 Dec 2000 and 13 Dec 2000)</p> | <p>(2) Notwithstanding Paragraph 1, upon an order of the judge, an authorized official or an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. A defense investigator may never be called as a witness by the Prosecutor to give testimony as to this evidence deemed as work-product under Article 171 of this Law.</p> |
| <p>(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. (Revised 30 Jan 1995, amended 1 Dec 2000 and 13 Dec 2000) ...</p> | <p>(3) A witness may object to making any statement which might tend to incriminate the witness.</p> |

Table 9.6 Lawyer-client privilege in The Hague and Brčko District

| | |
|---|---|
| ICTY Rules of Evidence and Procedure | Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina |
| Rule 97: Lawyer-Client Privilege (Adopted 11 Feb 1994) | Article 235 |
| All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. | All communications between lawyer and client shall be regarded as privileged and consequently not subject to disclosure at trial, unless: 1. the client consents to such disclosure; or 2. the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. |

(Adapted from International Tribunal 2006 and Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina 2000)

Table 9.7 Rendering of decisions in the Federation of Bosnia and Herzegovina and Brčko District

| Criminal Procedure Code for the Federation of Bosnia and Herzegovina (November 1998) | Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina |
|---|--|
| Article 109 | Article 70 |
| (1) The decisions of the panel of judges shall be rendered after oral decision-making and voting. The decision is made when a majority of the members of the panel have voted for it. | (1) The decisions of the panel shall be rendered after oral decision-making and voting. The decision is made when a majority of the members of the panel have voted for it. |
| (2) The verdict pronouncing an extended prison punishment may only be brought by unanimous vote. | (2) The judgment pronouncing a long-term sentence may only be brought by unanimous vote. |
| (3) The presiding judge of the panel shall direct the decision-making of the panel and the vote and shall vote last. It is his duty to see that all issues are fully examined from every point of view. | (3) The President of the Panel shall direct the decision-making of the panel and the vote and shall vote last. It is his duty to see that all issues are fully examined from every point of view. |
| (4) If the votes are divided among several different opinions on certain issues being voted on, and if none of them has a majority, the issues shall be separated and the votes will be repeated until a majority is reached. If a majority is not reached in this manner, the decision shall be rendered by adding those votes which are most adverse for the accused to the votes which come next in adversity until the necessary majority is reached. | (4) If the votes are divided among several different opinions on certain issues being voted on, and if none of them has a majority, the issues shall be separated and the votes will be repeated until a majority is reached. If a majority is not reached in this manner, the decision shall be rendered by adding those votes, which are most adverse for the accused to the votes which come next in adversity until the necessary majority is reached. |
| (5) The members of the panel may not refuse to vote on questions put by the presiding judge of the panel, but a member of the panel who has voted to acquit the accused or to revoke the verdict and who has remained in the minority shall not be required to vote on the penalty. If he does not vote, it shall be taken that he consented to the vote which was most favorable to the accused. | (5) The members of the panel may not refuse to vote on questions put by the President of the Panel, but a member of the panel who has voted to acquit the accused or to revoke the judgment and who has remained in the minority shall not be required to vote on the penalty. If he does not vote, it shall be taken that he consented to the vote which was most favorable to the accused. |

The State-level procedural code

While Brčko District was reforming its judicial institutions and procedures, OHR was pursuing a broader attempt at developing revised codes. A large group of international and domestic experts was convened and explored a number of possible models for procedural reform including Germany, Holland, England, Scotland and the USA. A draft was produced but was seen as problematic (INT30). The procedure was reinvigorated under the new High Representative, Paddy Ashdown, in 2002, with Zoran Pajić, formerly of Sarajevo University, playing a leading role within OHR (INT25). A smaller group was convened, composed of local academics and practitioners, and working under time-pressure over an intensive two month period, a draft was produced and forwarded to the Council of Europe for expert input,

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provided from Slovenia and Italy (INTS 30 & 25). This second drafting process did not involve any particular study-visits to look at other codes, but as many academics and practitioners had left BiH during the war, they had experience of legal systems elsewhere (INT30). Although the proposal was placed before domestic institutions, the government did not succeed in passing it and so the state level Criminal Code and Criminal Procedural Code were enforced by decision of the High Representative (INT25).

The decision taken to implement an adversarial model of criminal procedure in Brčko seems to have played a role in the decision to adopt adversarial trial procedures in other parts of BiH. Within OHR, there was concern that diverse systems in the entities and Brčko could lead to different standards being applied (INT25), but while this may represent an argument for harmonisation, it does not specify what must change and around which model codes should be harmonised. The fact that Brčko provided an example of a working model of a procedural code in BiH, against the critique of existing practice provided by JSAP, and at a time when earlier efforts to settle on a new procedure had failed to reach a conclusion, seems to have been influential. The delays and backlogs highlighted in the preceding chapter favoured a procedure with scope for alternative forms of resolution. The results of reform in Brčko were highlighted by interviewees, particularly early resolution through pleas, although there was no consensus on how these results should be interpreted. This was alternatively seen as cause for concern about the pressure exerted on suspects (INT26) or representing the potential to reduce backlogs (INT20). The fact that Brčko had already gone through a process of reform represented an investment of time and effort. In a sense were it acknowledged that the entity codes needed reform, and in the context of the state code being a new creation, it might make sense to pursue change which minimised disruption to what was taken to be BiH's functional model of criminal procedures. Moreover, their previous experience of working in an adversarial context meant that judicial and prosecutorial personnel from Brčko district could play a supportive role once adversarial procedures were adopted on a BiH-wide basis (INT25).

Procedural reform and policy transfer

There was clear evidence of attempts at lesson drawing in early attempts to produce a draft CPC for BiH under the auspices of OHR and the state-level Ministry of Civilian Affairs. The large group set up for this purpose explored a number of models adversarial and inquisitorial. While those efforts collapsed, the reform process in Brčko District seems to offer a further

example of lesson drawing, or of legal transplant or borrowing. Yet at the same time there are clear discrepancies between the procedures operating in BiH and those found in the US, which some saw as providing the model in this case. One of the more surprising differences is the lack of lay participation in the trial, a feature of the US system through the jury, and the previous BiH procedures in the person of the lay judges, who would accompany professional judges on the bench. Aside from the most immediately obvious differences that can be observed on paper, theories regarding legal transplants, and empirical evidence from Italy (Grande 2000), create an expectation of emerging differences in practice. Not all of these will arise from the domestic context of BiH itself, although one participant in trial monitoring did observe that local interpretations of procedural tools were beginning to emerge (INT26: 99). Differences between international judges, even when they shared Anglo-Saxon roots, suggested that they were bringing the influence of their own experience to bear on the BiH code. An interviewee observed that US judges in BiH would allow cross examination only on that which was introduced as evidence in chief; those from England and Wales were more free over cross-examination and to allow greater discretion in this area would use the section of the code that states the aim of the trial is to get at the truth (INT18: 26)¹⁰. Moreover, as indicated by Michael Karnavas, more than one source was used in developing the first adversarial code in BiH; as Dolowitz found that both Australia and the US may have informed the development of the Child Support Agency in the UK (Dolowitz 2000), so too the reforms in BiH have more than one source of inspiration, and the US is not necessarily dominant among these.

Revisiting the need for procedural change

It has been argued above that procedural reform in BiH, resulting in adversarial trial procedures in state and entity level criminal courts, stemmed from changes implemented in the first instance in Brčko. It might be worth posing the question, to what extent was it necessary to pursue such procedural change? Would it have been enough to focus on changing the composition of the judiciary? To what extent would it have been enough to ensure all judges were properly educated and trained, and were assessed on a continuous basis in terms of political or ethnic bias, or in terms of evidence of corruption? Indeed, there may

¹⁰ Article 239 of the Criminal Procedure Code of BiH outlines the duties and obligations of the judge, which include direction of the trial and a duty to “ensure that the subject matter is fully examined, that the truth is found and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter.”

be strong grounds for maintaining an inquisitorial procedure in the context of a transitional state; the role of the investigative judge, as an impartial investigator, recommends itself in a situation where few may be able to afford adequate legal representation (INT37), and would address the troubling issue of equality of arms highlighted by one respondent involved in the drafting and commentary process (INT30). As one interviewee noted, the pre-reform system had looked fine on paper (INT23) which might suggest a need for fine tuning rather than an overhaul, but of course such questions deal in counterfactuals. In the absence of post-reappointment personnel operating in context of a pre-reform procedural code, it is difficult to say how less dramatic changes may have worked. It may be the case that an exploration of other Yugoslav successor states could help to answer such a question, but the six republics have each experienced such different events and changes in the post-Yugoslav period that this may not be a fruitful line of enquiry.

Concluding remarks

The reform programme of criminal courts, judicial and prosecutorial personnel, and criminal procedures in BiH have seen a far greater use of the executive ‘Bonn’ powers of the High Representative than has been the case in police and penal reform. The large numbers of decisions taken in this area (see figure 9.1, above) is not, in itself, an accurate indicator of the level of OHR involvement. It is inflated by ‘recurring’ decisions, such as the appointment of international judges and prosecutors, or by decisions repeated across different levels or units of government¹¹. Thus rather than the sheer number of decisions, it is important to look at what the decisions and actions of the HR mean when taken as a whole. In the instance of judicial reform, it is apparent that the intervention of the OHR and associated mainstream international community bodies has been intensive and extensive, particularly during Paddy Ashdown’s time as High Representative, although it can be seen that this builds on developments during the terms of his two predecessors. BiH has experienced a thorough transformation of post-war judicial structures and procedures, alongside attempts to alter significantly the composition of the judiciary. While this is clearly an ongoing process, the state-level institutions created through this process have indicated a degree of confidence in tackling cases involving high-level politicians. It is also a process that has seen the OHR go beyond the apparent remit granted to it by the Peace Implementation Council, from which it

¹¹ The twenty two decisions cited above, from August 2002, changing court and prosecutorial laws in entities and cantons, are one example of such a ‘repeated’ decision.

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draws its mandate, and the proposals of the Venice Commission, a further source of international legitimacy, suggesting some form of ‘mission creep’. One senior international member of a mainstream civilian mission in BiH noted their concerns that this was not uncommon, and that the international community in BiH often operated in ways which obscured their mandate in a manner that would not be deemed acceptable among domestic politicians bound by particular standards of behaviour in office (INT31).

Against the apparent achievement, concerns have been raised that the legal community in Bosnia has not been engaged in the process of reform and as a result is alienated from it (Dietrich et al. 2003). The working group which produced the draft criminal procedure for the state-level court was composed of local legal scholars, judges and prosecutors, but this amounted to seven individuals drawn from the two entities and Brčko (INT30). Likewise the citizenry of Bosnia and Herzegovina is said to have little ownership over the laws which are not passed by their own elected representatives and therefore are less likely to feel committed to those laws (Dietrich et al. 2003). In a sense there is a double sidelining of the domestic population: firstly their elected representatives are excluded in a process which draws on experts as opposed to politicians; secondly where decisions are passed by the High Representative, those elected representatives are denied the opportunity to reject or accept recommendations of expert groups.

The chapter has focused on major programmes of reform conducted by mainstream civilian organisations, and to some extent has marginalised important work that has accompanied such reform, including training of judges and prosecutors and judges, the production of commentaries of new criminal procedures, and the monitoring of the implementation of new laws. These are important to the continuing development of the reform package, and highlighted certain tensions within the international community (INT 6, 23, 26, 37). As an area of continuing development, it is difficult to anticipate how such tensions will play themselves out; as the international presence in BiH winds down, the number of agencies operating in the country may decline, although some, like the Council of Europe, will continue their involvement with the country as part of BiH’s status as a member.

10. Penal provision in a fragmented land

The main characteristics of the BiH prison system is overall poverty, antiquated facilities and overpopulation in some of the institutions.

(Frank Orton, Human Rights Ombudsman for BiH, HRO 2002)

Each pair of the preceding chapters began by outlining the central importance of the criminal justice sector under consideration. The police were defined as central to the state, even in a reconfigured field of security governance, and a relationship between police practices and democracy was established on the basis of previous work. Courts were subsequently located at the heart of criminal justice, a vital link in a chain legitimating forceful acts by state institutions and personnel, and a space in which norms and values are explored and tested. Yet it is not clear that this can be said of prisons, the third sector to be explored in the current project. Alongside fines, prisons are a central form of punishment in Bosnia and Herzegovina (BiH). Under the 2003 Criminal Code of BiH, which served as a model for subsequent revisions of codes in the entities and Brčko district (see chapter 9), offenders can be punished with either a fine or up to 20 years imprisonment (Art. 40); under exceptional circumstances, this can be extended up to 45 years (Art. 42.2); and community based penalties can replace custodial sentences of below six months (Art. 43.1). While the code provides for community sanctions, the infrastructure to realise these is not in place. As such, the focus of this chapter is on prisons under the ministries of justice of the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), and on tentative developments in the direction of penal provision under the state-level Ministry of Justice.

Contrasting trends in penalty: punitivism and rights

While policing is a highly visible manifestation of the state's potentially coercive power, and while the public declarations form a significant aspect of the work of courts, prisons are very much a backstage element of the criminal justice process. It was not always so with punishment. Foucault's (1979) account of the public execution of the regicide Damiens is matched by two episodes in the historical fiction of Ivo Andrić. In *The Bridge over the Drina*, Andrić (1995) describes the public execution of a saboteur, carefully run through from anus to shoulder before being raised on the stake to die over a period of days (1995); in *The Bosnian Chronicle*, the young French Consul des Fossés joins a crowd to witness two men, accused of smuggling letters from the Bishop of Sarajevo out to Serbia, as they are throttled until losing consciousness, resuscitated and subjected to the same treatment again a second

and third time (Andrić 1996). It was not only the spectacle of suffering that attracted the onlooker, the work of Bender (1987) and Rawlings (1992) testifies to the fact that notorious or infamous detainees could attract a curious audience, a lucrative sideline for gaolers. The audience retain a role in certain enlightenment imaginings of the prison: Bentham's panopticon was not to rely solely on the guards to fix inmates in their gaze, rather the central tower was to be open to casual visitors; they would benefit from edification rather than titillation (Semple 1993). Yet in spite of this emphasis on visibility, a number of authors have given historical accounts of the removal of punishment from the public gaze and the shift in focus to the declaration in court (Elias 1994; Foucault 1979; Schader 1997; Spierenburg 1984). Robbed of the ceremonial and spectacle of suffering, punishment, as it takes place in prisons, has become one of the least public faces of criminal justice, the state and its exercise of coercive power. Nonetheless, as policing has been said to be an indicator of a government's commitment to democracy (Marks 2000), so too has the manner in which a society treats its captives, or how it punishes more generally, been taken as an indicator of the degree of civilisation it enjoys (Durkheim 1984; Winston Churchill, cited in Hawkins 1984).

Discourse surrounding imprisonment has been divided into two streams by Adler and Longhurst (1994). They identify discourses concerned with the purpose prisons serve, and discourses that focus on how such ends are achieved in the day to day running of a prison. Ends and means are not wholly separable; Durkheim (1961) links the capacity of punishment to deliver a moral message to the means by which it is delivered. Yet the prison, as an institutional form, has proved to be particularly enduring (Foucault 1979; Garland 1990), occurring in a variety of ideological, governmental and economic contexts; Garland (1990) observes the capacity of prison infrastructures to adapt to different penal purposes. As such, it is important to go beyond the general form of imprisonment to look at practices (Brown and Zdenkowski 1985). Practices, moreover, need to be understood in the context of the ideas and values which inform them. As the country is going through political and economic transition, it is reasonable to expect that these may manifest themselves in changes to practice and orienting ideas and values in the prison systems of BiH.

Garland (1990) observes that Marx and Engels offer little analytical focus on punishment in the foundational texts of communism. Spitzer also describes "an absence of an adequate treatment of law in their original writings" (1983: 104). In spite of this lack of substantive focus on punishment, their writing provides the basis for theoretical and historical discussion of the topic (Garland 1990) and it may be possible to discuss the emergence of communist

penal practices in terms of both ends and means, accepting that details may vary from country to country. Marx (1972) hints at principles for such practice when he takes to task the German Workers' Party over a 'petty demand' for the regulation of prison labour to protect free workers; he describes labour as the ordinary criminal's 'sole corrective'. The criminal is to be brought back to society, and the means to achieve this end in a workers' society is naturally work. Large economic units in BiH's prisons are the legacy of an ongoing programme of rehabilitation through work. Yet, regimes oriented towards bringing offenders back into society by preparing them for the labour market make sense only where capacity exists to absorb them (Bauman 2000). The legitimacy of penal systems geared towards releasing prisoners ready for labour market entry in BiH is fundamentally challenged by a weak labour market and an economy in transition. Prison administrations in FBiH and RS may therefore face a crisis of legitimacy and be forced to re-evaluate their central purpose through revisiting discourses of ends, or, in the absence of a broader discussion of outcomes, adopt other survival strategies such as a retreat into managerial discourses focused on output measures. This latter approach might reflect what Sparks (2001), drawing on Zimring and Hawkins, has observed elsewhere: as other justifications for punishment are eroded, so simple incapacitation becomes a default option. This fits Bauman's (2000) interpretation of the contemporary prison as an equivalent to other historical forms of isolating 'trouble prone' groups that do not fit in to a given society.

The shift away from rehabilitative forms of penalty has been observed in a number of countries outside the former communist bloc. Garland's (2001) work on the decline of the rehabilitative ideal in the US and UK locates the emergence of this trend in the last third of the twentieth century. Earlier work (Garland 1996, 2000) observed a two pronged state response to elevated crime rates: the first of these is grounded in adaptation, treating crime as a normal phenomenon to be handled through a range of techniques and by a diverse range of actors from central government down to individual citizens; the second is for the state to bare its teeth in a display of strength, seeking to convince an anxious public that it can and will react strongly to threats to public order and security. This latter strategy is picked up by Hallsworth (2000). His discussion of a new populist criminology, encouraged by political elites and the media, identifies such practices as mandatory sentencing, in particular for repeat offenders, 'lockdown' models of custody with no focus on improvement of inmates, and a resurgent death penalty in the USA as manifestations of a new 'punitive turn'. The lockdown model of custody in particular has resonance with Bauman's (2000) description of

imprisonment as a way to isolate difficult groups, and Shearing's (2001) observations on a new concern with harm reduction in penalty. The increased focus on incapacitative strategies may reflect more than simply a 'default option', rather it relates to a new emphasis on addressing 'risk' as a source of legitimacy in criminal justice observed by Sparks (2001). This concern with risk and the shift towards 'actuarial justice' has been discussed by Feeley and Simon (1992), while Simon's later work focuses on the more punitive elements of contemporary penalty (Simon 2001). There is not scope to go in to further detail here, but a range of authors, including those mentioned above, have pointed towards a number of trends towards greater use of imprisonment (Garland 2001; Hallsworth 2000; Vaughan 2001); poor or worsening conditions of imprisonment and a paring down of rehabilitative programmes within prisons (Hallsworth 2000; Simon 2001; Vaughan 2001), and increasingly expressive elements in the delivery of punishment (Pratt 2000a, b; Simon 2001). Contemporary penalty, at least in those established democracies from which these authors draw their evidence, is marked by populism and illiberality.

Against these trends towards incapacitative or retributive strategies of punishment, developments on an international level have suggested an increased level of sensitivity to the rights of those detained in penal custody. The work of Morgan (1998; 2000) on the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment will be drawn upon in the following chapter. Taken alongside the historical developments in international recognition of the rights of prisoners, summarised by Coyle and van Zyl Smit (2000) it suggests that the use of prisons as a form of punishment is not solely governed by a populist incapacitative or rehabilitative urge and is mediated by a further layer of discourse concerned with human rights. Arguably, this discourse is all the more important to prisoners on account of the reduction of their rights and their seclusion from a wider society, factors which make them especially vulnerable (Richardson 1985; Vagg et al. 1985). How these competing discourses shape the penal system in BiH, a country with its own history of authoritarian and socialist government, penetrated by actors from a range of established democracies, will be discussed in the following chapter.

Cavadino and Dignan (2006) describe a condition of 'institutionalised penal crisis' in a number of the established democracies intervening in BiH. This manifests itself in various ways: overpopulation and overcrowding; squalid and insecure conditions; demoralised staff; inmates on the point of rioting; a crisis of resources; and a broader crisis of legitimacy shared by all criminal justice institutions, seen as ineffective, inefficient and inhumane. While these

conditions were not found to be universal by Cavadino and Dignan, in some countries they had been prevalent for decades, and the problems were seen to be inter-related; high or swiftly rising populations in particular were associated with other elements of crisis (Cavadino and Dignan 2006). This chapter explores the challenges facing the prison systems of BiH in the post-war period, some of which are shared with the states examined by Cavadino and Dignan, but which may be exacerbated or experienced in particular ways due to the post-conflict, post-authoritarian and post-socialist context specific to BiH. BiH has experienced a growth in inmate numbers in the post-war period, not uncommon in Cavadino and Dignan's sample of countries, but in the case of BiH this has interacted with political fragmentation and a lack of material resources to block possible solutions to the selective overcrowding which it has produced. A crisis of penal ideologies observed in many western states (Cavadino and Dignan 2006; McAra 2005) needs to be understood in a context of a broader ideological shift in BiH. Many prison systems, not least that of the UK, face problems stemming from an ageing prison estate, in BiH this is compounded by damage to the estate in the course of the war. The question of human rights, and in particular minority rights, is something that gains heightened significance in BiH in light of the status of minorities in the recent war, and as seen through the case of the police in chapter 6, the activity of institutional actors in ethnically targeted victimisation. Finally, the fragmentation that BiH has experienced as a result of the war has specific effects on how the various prison systems of BiH interact with one another. Arguably, these are challenges that are highly significant to the work of the two criminal justice sectors explored in preceding chapters. Without a functional prison system to provide secure and well managed custodial facilities, courts may have little confidence that the defendants they sentence will be held securely and treated humanely. Likewise, without such a system there is a risk that those involved in organised forms of crime may continue their activities from behind prison walls. Thus the subsequent chapter will look at efforts to address some of these problems. Of the three sectors explored, prisons have seemingly attracted least attention from international actors, nonetheless it has been possible to explore three organisations and their approaches to the challenges described in the current chapter: the Council of Europe; the UK Department for International Development; and the Office of the Registrar for War Crimes and Organised Crime.

Post-war challenges to the correctional system

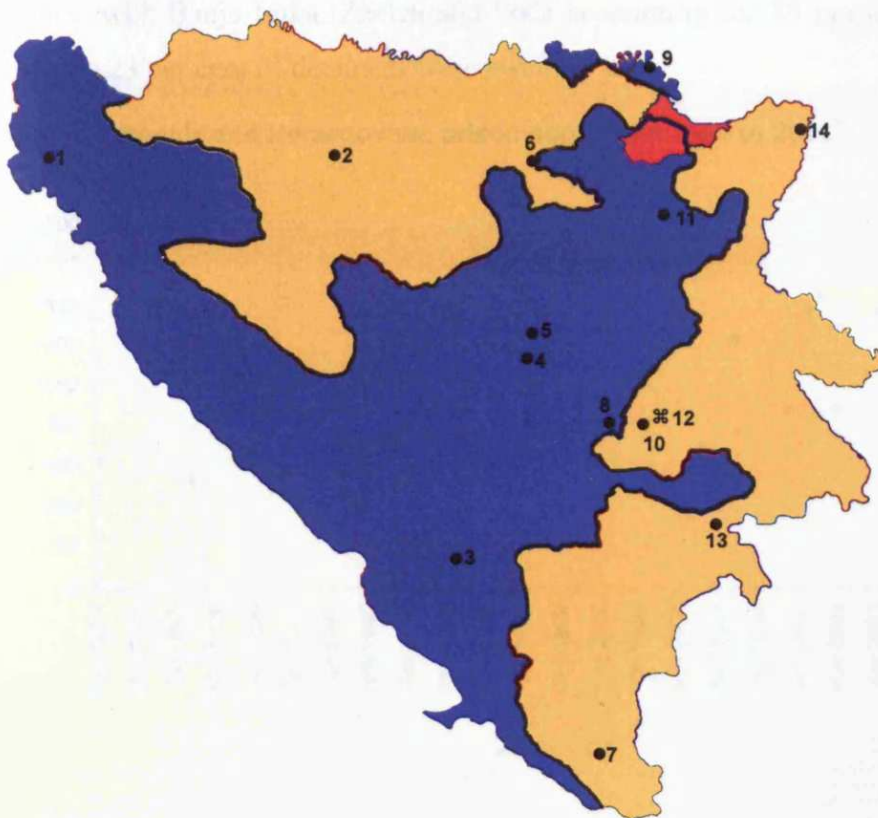
As in other sectors, many challenges facing the prison systems of BiH stem from, or are exacerbated by, conditions rooted in the war or the historical legacy of SFRY. Broadly

speaking, the prison systems of both entities share a number of problems with other divisions of BiH's criminal justice systems, including the fragmentation of authority and a wartime record of human rights violations. Widespread damage to the estate has had consequences for both security and living standards in BiH's prisons. The following sections deal with various aspects of the prison systems which emerged from socialist rule and conflict in BiH: a growing prison population; socialist penal philosophy in a post-socialist context; the physical state of prisons; the war-time role of prisons and their personnel; the division in penal systems brought about by war; and the changing composition of prison populations.

Prison population in post-war Bosnia and Herzegovina

From 1968 until the outbreak of war in 1992, prisons in BiH were run by the republic's Justice Ministry. The wartime division of the country, made official in the Dayton peace settlement described in chapter 2, left the bulk of governmental competencies in the hands of FBiH and RS. Subsequently prisons have come under the authority of an Assistant Minister in the Justice Ministry of each entity. A detailed list of entity prison facilities is provided in appendix 5, while map 10.1, below, shows their location.

Map 10.1 Bosnia and Herzegovina: Justice Ministry detention facilities



| Federation of Bosnia and Herzegovina | Republika Srpska |
|--------------------------------------|---------------------------|
| 1 Bijać | 2 Banja Luka |
| 3 Mostar | 6 Doboј |
| 4 Kaonik/Busovača | 7 Trebinje |
| 5 Zenica | 10 Kula |
| 8 Sarajevo | 12 Sokolac |
| 9 Orašje | 13 Foča |
| 11 Tuzla | 14 Bijeljina |
| ● Prison | ⌘ Secure psychiatric unit |

Prison population statistics for both entities have been gathered from a number of sources and are given in figure 10.1 below. Data flows have been somewhat irregular; no data is available for prisons in RS until 1998, but all known figures have been included. The figure shows that, from a low of 536 inmates at the end of the war, the prison population of FBiH increased by 190 per cent to reach 1556 by January 2005. In RS, numbers have risen less dramatically, with an increase of 27 per cent between November 1998 and January 2005, when 997 sentenced and pre-trial detainees were in custody. Detailed figures provided by the Council of Europe for June 2004 show that around half (48 per cent) of the 2,192 detainees in custody then were serving short to medium sentences (up to five years), while a further 29 per cent

were serving longer than this. Such long-term inmates were concentrated in specific facilities, with Banja Luka, Zenica and Foča accounting for 85 per cent of the group. The remaining 23 per cent of detainees were awaiting trial.

Figure 10.1 Bosnia and Herzegovina: prison population 1994 to 2005¹

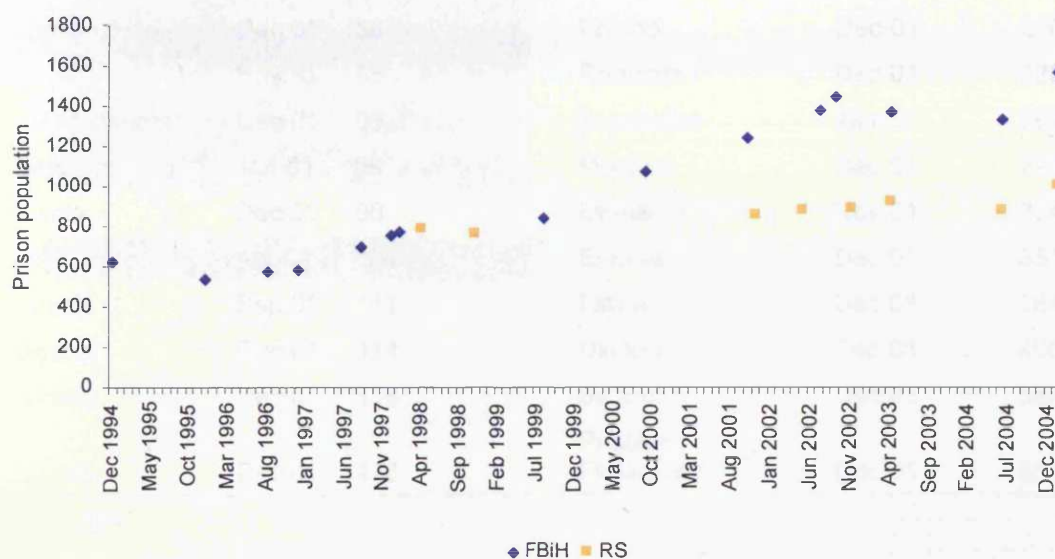


Table notes:

1. Data collated from Council of Europe (2002a); Walmsley (1999; 2000; 2002; 2003b; 2003c); Walmsley & Križnik (1998), Walmsley and Nestorović (1998); personal correspondence with Council of Europe field office, Sarajevo.

It is conventional to present data on prison populations in terms of the number of inmates per 100,000 general population; this allows comparison of detention rates across countries and across time within one country. Walmsley (2003a) does so in his second study of prison systems in East and Central Europe. He finds FBiH to have the lowest rate of imprisonment of twenty-four systems studied, while RS has the fourth lowest (see table 10.1, below). The six former Yugoslav republics account for seven of the eight systems with the lowest rates suggesting a common set of traditions and practices in the use of custody.

Table 10.1 Central and East Europe: prisoners per 100,000 population 2001¹

| Country | Date taken | Rate per 100,000 population | Country | Date taken | Rate per 100,000 population |
|---------------------|------------|-----------------------------|--------------------|------------|-----------------------------|
| BiH (FBiH) | Dec 01 | 54 | Czech Republic | Dec 01 | 188 |
| Slovenia | Dec 01 | 55 | Georgia | Dec 01 | 202 |
| Croatia | Dec 01 | 59 | Poland | Dec 01 | 206 |
| BiH (RS) | Nov 01 | 65 | Romania | Dec 01 | 223 |
| FYR Macedonia | Dec 01 | 66 | Azerbaijan | Jan 01 | 291 |
| Serbia ² | Jun 01 | 69 | Moldova | Dec 01 | 293 |
| Albania | Dec 01 | 90 | Lithuania | Nov 01 | 304 |
| Montenegro | Apr 02 | 104 | Estonia | Dec 01 | 351 |
| Armenia | Sep 01 | 111 | Latvia | Dec 01 | 364 |
| Bulgaria | Dec 01 | 114 | Ukraine | Sep 01 | 406 |
| Slovakia | Dec 01 | 138 | Belarus | Dec 01 | 554 |
| Hungary | Dec 01 | 173 | Russian Federation | Dec 01 | 681 |

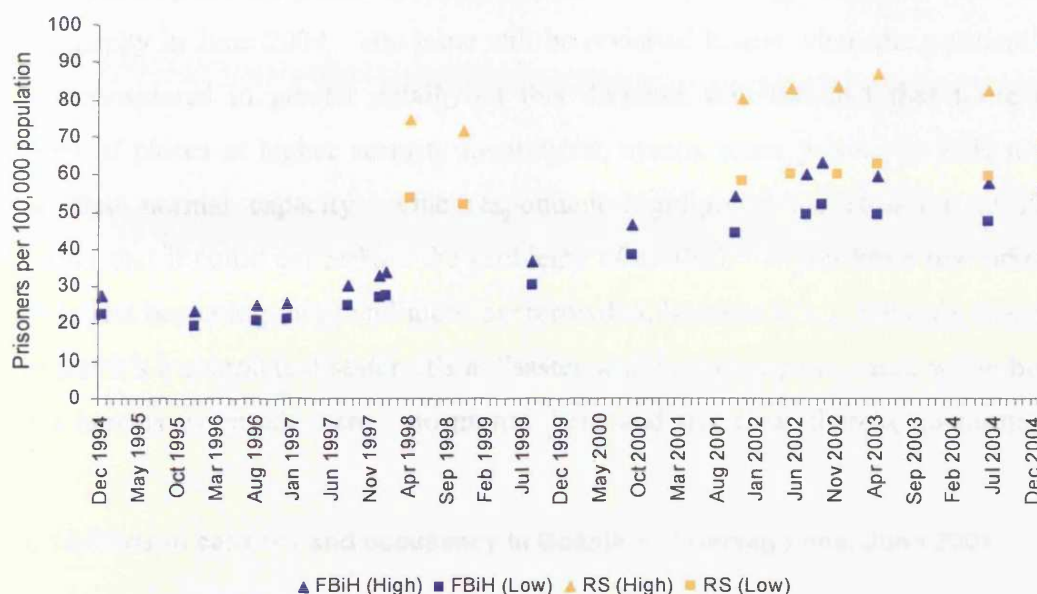
Table notes:

Shaded boxes indicate republics of the former SFRY.

1. Adapted from Walmsley (2003a).
2. Not including Kosovo.

With regard to BiH however, Walmsley issues a word of caution: population figures used to calculate the rates are based on estimates. Given that the last census in BiH took place in 1991, prior to massive wartime and post-war disruption to population distribution throughout the country, estimates vary dramatically. In RS, estimates vary from 1.06 million to 1.47 million, and in FBiH from 2.3 million to 2.8 million (ESI 2004). Taking the most recent prison populations of 1,556 in FBiH and 997 in RS, rates of imprisonment could lie anywhere from 56 up to 68 per 100,000 in FBiH and between 68 and 94 in RS. The impact of the different population estimates on imprisonment rates is displayed in figure 10.2, below. Even the highest estimates of imprisonment rates in RS and FBiH leave the entities with some of the lowest rates in Central and Eastern Europe and within the range covered by other Yugoslav successor states.

Figure 10.2 Bosnia and Herzegovina: prisoners per 100,000 population 1994 to 2005



Regardless of uncertainty about the population outside the prison gates, it is clear that prisons in both entities have, over recent years, experienced a rise in the number of inmates detained, something associated with indices of crisis outlined by Cavadino and Dignan (2006). To a degree, this pattern reflects a return to normal functioning. One feature of the war was irregular releases from prison, for example the release of all juveniles detained in Banja Luka (Walmsley and Nestorović 1998). As the significance of such releases to overall prison numbers wanes, and as reforms to police and court services take effect, the impact of anticipated improvements in efficiency at these earlier stages of the criminal justice system should come to be felt more fully in the prisons of BiH. A greater flow of both remand and sentenced inmates can be expected to reach the entity prison systems and the additional burden of war crimes detainees will need to be absorbed. Moreover, the absence of anything more than a paper provision for community sentences leaves courts with no alternative between financial and custodial sanctions. One interviewee working with prison administrations in BiH estimated that the resulting reliance of courts on imprisonment meant that between a third and a half of all inmates were incarcerated unnecessarily (INT9: 77) and that if current trends were to continue, prisons in BiH would be physically unable to take any more inmates by 2008.

The growth of prison populations is not necessarily solely attributable to the post-conflict factors existing in contemporary BiH, but the issue is certainly exacerbated by reforms elsewhere and a lack of resources invested in alternatives to custody. Moreover, with

increased prison populations comes a risk of overcrowding, although it is notable in table 10.2 below, that, overall, the prison systems of BiH were operating at around two-thirds of their 1998 capacity in June 2004. The issue will be revisited below when the political division of BiH is considered in greater detail, but this division, and the fact that there are limited numbers of places at higher security institutions, means some prisons in BiH are operating above their normal capacity. One respondent highlighted the situation at Zenica, and suggested that it could exacerbate the problems of control, "...you have one prison, Zenica, which is just becoming more and more overcrowded, because it's... the only closed prison... but in fact it's a complete disaster, it's a disaster waiting to happen... and, while building new prisons here is essential, there's no money here and it's clear there's no money" (INT39: 198).

Table 10.2 Prison capacity and occupancy in Bosnia and Herzegovina, June 2004

| Institution ¹ | Entity | Capacity (1998) ² | Occupancy (Jun 04) ³ | Percentage occupied |
|--------------------------|--------|------------------------------|---------------------------------|---------------------|
| Banja Luka | RS | 400 | 281 | 70 |
| Bihać | FBiH | 79 | 94 | 119 |
| Bijeljina | RS | 200 | 99 | 50 |
| Busovača/Kaonik | FBiH | 43 | 57 | 133 |
| Doboj | RS | 160 | 57 | 36 |
| Foča | RS | 900 | 250 | 28 |
| Mostar | FBiH | 190 | 86 | 45 |
| Sarajevo | FBiH | 200 | 214 | 107 |
| Kula | RS | 300 | 146 | 49 |
| Tuzla and Orašje | FBiH | 276 | 194 | 70 |
| Zenica | FBiH | 460 | 676 | 147 |
| Subtotal: FBiH | | 1248 | 1321 | 106 |
| Subtotal: RS | | 1960 | 833 | 43 |
| Total | | 3208 | 2154 | 67 |

Table notes:

1 Excludes Trebinje due to incomplete data.

2 Taken from Walmsley & Križnik (1998) for FBiH, and Walmsley and Nestorović (1998) for RS.

3 Adapted from personal correspondence with Council of Europe field office, Sarajevo.

Socialist ideologies and punishment

The emphasis in exploring the impact of Yugoslav legacies on policing was on the more authoritarian face of the state. Imprisonment can be an important tool for authoritarian

governments, and certainly played a role in the early years of SFRY (see chapter 2), but BiH's prison systems may owe as much to SFRY's socialist legacy. As stated above, certain comments by Marx suggest that a workers' society would seek to reintegrate offenders through the corrective value of labour. The Yugoslav Criminal Code of 1976 includes rehabilitation of offenders as one purpose of punishment, alongside influencing others not to offend and "strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline" (Article 33). Yet the code gives little indication of the specific means to be employed beyond broad categories of punishment including capital punishment, imprisonment, fiscal penalties, admonition and auxiliary 'security measures' targeted at addressing offending behaviours or limiting offending opportunities. Rather it is the economic units that feature in pre-war prisons in BiH that show a commitment to meaningful work by inmates: the foundry at Zenica; the furniture factory at Foča; the various agricultural units across the country (Walmsley and Križnik 1998; Walmsley and Nestorović 1998). A consultant working alongside entity prison administrations assessing the ongoing role of the economic units noted that they fulfilled two roles in Yugoslavia: providing inmates with the opportunity for work experience that related to forms of employment available outside the prison system; and simultaneously contributing to the economy of the country. Zenica prison, for example, was once an integral part of the Yugoslav steel processing industry (INT21: 181). The relationship between forms of work inside and outside prisons highlights a corrective, rehabilitative and reintegrative penal philosophy. Today, a number of institutions have continued to provide employment for inmates and prison administrations in both entities continued to see work as a primary element of the treatment programme for offenders (Walmsley and Križnik 1998; Walmsley and Nestorović 1998). As late as 2005, a rule of law task force in BiH was told that, in the face of large losses incurred by the economic units, "work therapy is still key" (personal correspondence, Council of Europe, Sarajevo Field Office). A number of prisons have public restaurants in which inmates may work and gain qualifications¹, while in other prisons arrangements were made for work placements outside the institution² (Walmsley and Križnik 1998; Walmsley and Nestorović 1998). This ongoing support expressed by penal practitioners in the idea of work as part of a rehabilitative programme accompanies a strong

¹ e.g. Bijeljina, Tuzla and Zenica.

² e.g. Banja Luka, Doboј and Sarajevo.

ongoing role for rehabilitation in criminal codes in FBiH (1998, Art. 33.1), in RS (2000, Art. 31.1), in Brčko in (2000, Art. 33.1) and finally at state level in (2003 Art. 6b), with which other codes were subsequently harmonised.

The ongoing commitment to prison work may well be a legacy of SFRY, yet how this feeds in to rehabilitative goals may be problematic. At the most basic level, there are practical challenges in finding meaningful work for inmates, especially in new institutions such as Busovača and Orašje established during the war with limited provision for inmate activities, and in those prisons whose economic units were lost or damaged in the war, such as Dobož and Tuzla. Of greater concern to international partners in prison reform is continued commitment to such goals alongside the demise of the political, social and economic contexts in which work became the primary therapeutic and rehabilitative tool of the penal system (INT37: 63). One international expert observed that the programmes of social re-education through work enjoy continuing support in prison administrations, yet the structures underpinning the programme's aims, primarily a centrally planned industrial economy, have collapsed in BiH (INT33: 26). As stated, regimes oriented towards fitting offenders back into society by preparing them for the labour market make sense only where capacity exists to absorb them (Bauman 2000); the two contacts cited suggest that this is no longer the case in BiH. Indeed, the European Stability Initiative record a collapse in industrial employment in BiH akin to those in the UK, Belgium and post-socialist economies in Central and Eastern Europe (ESI 2004). In August 2005, BiH media reported a figure of 44.5 per cent unemployed in a workforce of 1.1 million (OHR media round up, 7 August 2005). While an unreformed justice sector and weak rule of law are often cited as a threat to programmes of economic liberalisation, those programmes of liberalisation may represent a threat to the socio-economic context underpinning a shared penal philosophy in both FBiH and RS. The legitimacy of penal systems geared towards releasing prisoners ready for labour market entry in BiH is fundamentally challenged by a weak labour market and an economy in transition. This situation may present a crisis of legitimacy to BiH's prison administrations, forcing them to re-evaluate their central purpose or to adopt other survival strategies. Ultimately, transition should be a temporary phase, although as Carothers' (2002) has noted this is not immediately apparent from those states conventionally identified with the 'transitional' label. After a period of economic transition, it may be possible that training could be redeveloped to match a reformed and reinvigorated labour market. Thus if the commitment to work based forms of

rehabilitation can weather a short-term crisis of legitimacy it may adjust to new post-transition circumstances.

The state of the estate: wartime damage to prisons in BiH

Two factors underlie the importance of physical estate to entity prison systems. Firstly, whatever the reasoning behind a prison system, it cannot be realised in the absence of a secure environment to guarantee the presence of detainees (Coyle 1991). Secondly, in light of a constitution which gives the European Convention for the Protection of Human Rights and Fundamental Freedoms and subsequent protocols priority over all other law (*GFAP* 1995 Annex 4, Art. II [2]), inmates of BiH's prisons can expect a certain minimum standard of living. The war presented a threat to the estate and its integrity regarding both security and the provision of adequate living conditions. Prisons established during the war were not necessarily secure: the former ammunition dump at Kaonik and the converted garbage depot at Orašje were surrounded by wire fences without alarms. The director of the Orašje institution admitted escape would be easy, but a generous system of home leave meant that this was not an issue (Walmsley and Križnik 1998). A number of prisons were damaged during the war: glazing, roofing and the façade of the penitentiary at Foča all suffered heavy damage, while heating and plumbing were damaged and have remained a problem (Walmsley and Nestorović 1998). Around fifty shells fell on Sarajevo prison during the course of the war; Mostar's old Austro-Hungarian prison suffered heavy damage; and a shell damaged Kula prison and killed six inmates (Walmsley and Križnik 1998; Walmsley and Nestorović 1998). The damage inflicted during the war, the age of a number of prisons³, and the lack of resources have combined to result in an estate which at times fails to provide decent living conditions for inmates.

Human rights abuses in wartime BiH

As discussed in chapter 6, trial reports released from ICTY give a clear indication of the use of police structures and personnel in war time human rights abuses and strategies of ethnic cleansing in BiH between 1992 and 1995. The role which the regular prison estate and personnel played in these is less well documented. Of the forty-seven ICTY cases which having reached a first instance finding of guilt for crimes committed in BiH, around a quarter

³ Foča, Mostar, Sarajevo, Tuzla and Zenica were all constructed prior to the First World War, see appendix 6 for full details.

related to individuals whose crimes were committed in detention facilities of some sort (see table 10.3, below). Of these, however, ten relate to detention camps established and then abandoned during the course of the war at Celebici, Keraterm, Luka and Omarska, and only two (four per cent of the guilty findings) relate to establishments forming part of the regular prison estate: Zlatko Aleksovski, a prison officer at Zenica who became director of the Bosnian-Croat prison at Kaonik (*Prosecutor v Aleksovski* 1999; *Prosecutor v Aleksovski* 2000); and Milorad Krnojelac, warden at Foča's Kazнено-Popravni Dom from April 1992 to August 1993 (*Prosecutor v Krnojelac* 2002; *Prosecutor v Krnojelac* 2003). Both received civilians into their custody, non-Croats in the case of Aleksovski and non-Serbs in the case of Krnojelac.

Table 10.3: Wartime role of those found guilty at ICTY. 26 October 2005.

| | Percentage | N |
|------------------|------------|----|
| Defence/Military | 36.2 | 17 |
| Camps/Prisons | 25.5 | 12 |
| Police | 17.0 | 8 |
| Politics | 17.0 | 8 |
| Military Police | 4.3 | 2 |
| Total | 100.0 | 47 |

It was noted in chapter 6 that the boundary between police and military structures and personnel became blurred during the war in BiH. The trial records of Aleksovski and Krnojelac suggest the same is true of the line between prison and military authorities. Aleksovski was already employed in the BiH prison system at the start of the war, and his appointment at Kaonik is detailed in the papers of the Justice Ministry of the breakaway Bosnian-Croat statelet, Herceg Bosna. Yet the Kaonik facility was established under the authority of the military court in Travnik in the first instance, and was used to detain Croat Defence Council (HVO) soldiers awaiting trial or serving sentences imposed by courts martial. Aleksovski himself was addressed as 'commander' and wore camouflage. A colleague of his, also transferred from Zenica prison, was of the opinion that they were serving in the military police. Similarly, witnesses giving evidence at the trial noted that they had difficulty distinguishing between guards and soldiers. At Foča, Krnojelac was appointed warden by the local Municipal Assembly ('cleansed' of non-Serb deputies) and his appointment was confirmed by Momcilo Mandić, then serving as the nascent Serb entity's Justice Minister, but there seems to have been a close relationship between civil and military

authorities here too: inmates were beaten regularly not only by prison guards, but also by civilian police, military police and soldiers who came into the prison for that purpose.

The prison at Foča was said to have become “a system for subjecting the mainly Muslim, non-Serb civilian detainees to inhumane living conditions and ill-treatment... on discriminatory grounds related to their origin” (*Krnjelać* 2003: para. 118). Krnjelać’s guilt was established on account of his command responsibility as the warden of the facility, but the court heard that at least sixteen other named prison employees (two of whom, Savo Tadović and Mitar Rasević, have also been indicted by ICTY) participated in beatings and other abuses, and that at least twenty-six unlawful killings resulted from the actions of prison guards and soldiers. Serb inmates in the prison were not subject to the same regime as the non-Serb detainees. They had been sentenced in court and upon completing their sentences were released. Serb inmates were held separately with adequate living space while, in spite of the fact that the prison had capacity to spare, non-Serbs were crammed into rooms with insufficient space to lie down to sleep. Serbs had additional nutritional ingredients added to their food, while some non-Serbs lost up to one-third of their body weight while in detention. Finally, Serbs were given adequate clothing, while the mainly Muslim non-Serb inmates, most of whom had been rounded up in the summer, were punished for trying to make additional clothes from spare blankets during the winter of 1992-93. The situation at Kaonik seems to have been less extreme. Detainees were held for shorter periods of time, at most up to two months, and they received the same food as guards. Yet the Aleksovski trial also accepted evidence of beatings at that facility too. In a further case, concerning Radoslav Brđanin, a politician in northern Bosnia, it was established that the Viz Tunjice penitentiary in Banja Luka was being used for the detention of non-Serb civilian detainees while it continued to hold criminals sentenced to imprisonment prior to the outbreak of war. These civilian detainees were beaten on arrival by both prison guards and Bosnian-Serb criminal detainees and at least one inmate died as a result (*Prosecutor v Brđanin* 2004: para. 762 ff).

Outside the evidence made public through ICTY, there is further support for the claim that the prison structures of BiH were being used to illegally detain civilians – often for the purposes of prisoner exchanges with other sides in the conflict. In Resolution 771, passed in August 1992, the United Nations Security Council called on the parties to the conflict in the former Yugoslavia to allow the International Committee of the Red Cross (ICRC) and other bodies full access to prisons, camps and detention centres in BiH, and for all those states and organisations holding substantiated information on violations of international humanitarian

law to submit them for the Secretary General to collate (UNSC 1992a). A further resolution passed in October (UNSC 1992b) established a Commission of Experts to examine such information submitted under resolution 771 and to carry out further investigations “with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law”. The Commission submitted its report on 24 May 1994 and it lists a number of sites of detention for the civilian population of BiH, among them numerous prisons. Of the fourteen prisons and secure psychiatric facilities shown in map 10.1, two were not established until after the war (Orašje in FBiH, and Trebinje in RS). Of the remaining twelve, all except Bijeljina are mentioned in the report in connection with information regarding the detention of civilians (Bassiouni et al 1994). The ICRC confirmed the use of the prison at Bihać as a detention centre (Annex VII, s.A2). At Doboj, 250 male detainees were reportedly held in a room measuring 16 metres by 20 in the city centre prison, allowing 1.28m² per inmate. Many were reportedly interrogated and beaten, some dying as a result (Annex VII, s.A23). The prison at Mostar held a range of detainees including Serb prisoners of war, enemy collaborators, and civilian prisoners for exchange as well as sentenced criminals and Croat soldiers facing disciplinary charges. Here the prison was overseen by a judge and warden who would not allow prisoners to be abused but guards were said to violate this rule and there was some evidence of sexual abuse of female inmates (Annex VII, s.A55). Sokolac Psychiatric Clinic was reported to be in use for the detention and torture of civilians, although independent confirmation had not been received (Annex VII, s.A72). There were reports of JNA soldiers being abused at Tuzla prison, and of the illegal detention of Serb civilians (Annex VII, s.A81); in Zenica there were Serb civilians being detained as well as military prisoners, among whom some claimed ill-treatment at the penitentiary’s infirmary (Annex VII, s.A89); the central prison in Sarajevo reportedly held Serb civilian detainees, including women and children, and accusations were made that beatings and rapes took place in the prison (Annex VII, s.A68); and finally Kula prison held a number of Muslim detainees alongside Serbs who had refused military service. Detention at Kula was said to last little over 8 to 9 days, suggesting it functioned as a staging post in population transfers (Annex VII, s.A68). With regards to Kula, there is some ambiguity in the report as to whether the detainees were held at the prison or at a separate camp. Even after the end of hostilities there was cause for concern. In August 1997, two prisoners of war were found in secret detention at Zenica prison (UN Secretary General 1998).

Further to the evidence presented in the Krnojelac case, Human Rights Watch investigated wartime human rights abuses at Kazneno-Popravni Dom in Foča (HRW 1998). As well as allegations against Milorad Krnojelac the report includes allegations specific to his successor, Zoran Sekulović. He was said to have worn military uniform and to have called people from their rooms at the facility, following which screams were heard. In one incident, twenty-five people were removed, none having been seen since. During the Council of Europe visit in late 1998, four months after HRW published the allegations, Sekulović was still in post (Walmsley and Križnik 1998). The HRW report also includes allegations against a guard, Miro Burilo, who was said by two witnesses to remain in post at the prison in 1998 although this was uncorroborated by HRW.

There is a clear indication that the prison system of pre-war BiH was, while continuing to play a role in the detention of sentenced criminals, adapted to serve the purposes of detaining civilians on the basis of their ethnic origin. Moreover, in the case of prisons at Banja Luka, Foča and Kaonik, ICTY evidence points towards abuse beyond illegal imprisonment, in particular beatings of detainees. While not every prison in BiH necessarily saw the same kind of human rights violations described at Foča (for example, general conditions at Kaonik seemed to indicate neither a general nor long term strategy of detaining inmates in inhumane conditions) there is certainly cause for concern that vulnerable populations were subject to abuse, and that those in the prison system were in a position to participate in such abuse, or to fail to exercise their authority to prevent it. Like the police, the prison systems of BiH have been implicated in the abuse of human rights of civilians during the war, in breach of international law. Unlike the police, the prison services do not operate in a way that brings them into regular contact with the general public. The fact that what occurs within prison walls is, to a great extent, shielded from the public gaze demands enhanced measures to ensure that those that acting on behalf the state executing custodial sentences do not abuse the power bestowed on them. Such scrutiny is, as noted by Vagg and colleagues, “a matter of urgency” (1985: 2), an observation made in the context of a prison system with no immediate history of conflict. Moreover, as noted in the same volume, the loss of certain legal rights that accompanies imprisonment makes prisoners especially vulnerable to further encroachment on their rights (Richardson 1985). In the context of BiH, a further layer of vulnerability should be recognised with regards to minority prisoners. In such a situation, professional personnel with no track record of ethnically motivated abuse are vital. Scrutiny of the wartime records

of those employed in the prison is arguably every bit as important as that carried out on police personnel.

A house divided: the bisected prison system of Bosnia and Herzegovina

Post-war fragmentation in the prison system was not as extreme as that experienced in policing; divisions formally halted at entity-level, with no cantonal facilities and no separate system in Brčko. Each sub-state entity operates a prison system under their own Justice Ministry. These systems also house pre-trial and sentenced detainees from the courts of Brčko District and, up to 2005, did so for the state-level Court of BiH. Unofficial, but *de facto*, fragmentation of the FBiH prison system existed immediately after the war due to political divisions within that entity. The existing prison in West Mostar came under Bosnian-Croat control, while a second prison had been established in East Mostar under the control of the Sarajevo government. Likewise the prison at Kaonik/Busovača, south of Zenica, had been established under the authority of the breakaway Croat Republic of Hercegovina (HRHB). Although abolished two years previously at Dayton, HRHB legislation was found to be in use at Mostar West and Busovača by Council of Europe visitors in 1998 (Walmsley and Križnik 1998). The prison in East Mostar has subsequently been closed down, and while the prison at Busovača still functions it has been incorporated fully into the formal FBiH system. Although fragmentation within FBiH has been reversed, the division of BiH's prison system between the two entities has significant implications: reduced flexibility to tackle overcrowding; unsuitable facilities for mentally disordered inmates; and difficulties in dealing with small numbers of women and juvenile offenders.

Table 10.2, above, highlighted the fact that while the prison system of RS operates at less than half of its post-war capacity as assessed by the Council of Europe, prisons in FBiH have exceeded their overall capacity and that the problem is at its worst in the two central Bosnian prisons of Zenica (147 per cent of capacity) and Busovača (133 per cent). It might be suggested that a prison system encompassing the whole of BiH could better utilise spare capacity in some prisons to relieve overcrowding in others. Thus Kula, near the capital, could relieve some of the Sarajevo's overcrowding; Banja Luka might assist Bihać in reducing its population; Doboj might take more inmates from central Bosnia, currently directed to Zenica and Busovača; moreover, having more than one facility equipped to operate as a closed or high-security prison would also relieve pressure on Zenica.

Map 10.1, above, shows that BiH's only specialist secure psychiatric, Sokolac, unit lies in the territory of RS, leaving FBiH without any suitable accommodation for psychiatric patients whose detention is ordered by the courts. For now, forensic psychiatric patients remanded to custody in FBiH are housed in a separate pavilion of the high security penitentiary at Zenica. At the end of 2001, some 69 people were held at Zenica for mandatory psychiatric treatment in a unit with capacity for 40 (Walmsley 2003a). A visit by the Helsinki Committee in 2001 noted that between 25 and 30 psychiatric inmates shared one dormitory (Helsinki Committee 2001). The Committee for the Prevention of Torture, during an inspection visit to detention facilities throughout BiH was highly critical of the inappropriate conditions at Zenica, a problem recognised by state-level and FBiH governments alike (CPT 2004; Government of BiH 2004). Yet attempts to resolve the issue within FBiH have run aground in the face of cantonal resistance to development of such a facility (INT37: 99). The issue will be picked up in the following chapter in relation to the Joint Steering Group (JSG) composed of Council of Europe and domestic Justice Ministry representatives.

The bisection of the prison system limits its capacity to deal with minority groups within the prison population, particularly women and juveniles. Before the war BiH featured only one women's prison, near Foča, said to be amongst the most advanced in Europe. Constructed in 1984, the prison included a separate department for juveniles, a textile factory, and facilities for cultural and sporting activities (Walmsley and Nestorović 1998). During the war it was donated to the Serbian Orthodox Church by the RS government; along with the division of the system, this left both FBiH and RS without a separate detention facility for women. Likewise, from the late 1980's the country's sole juvenile detention unit was based at Banja Luka, now in RS. All juveniles were released at the start of the war and the institution now serves as a penitentiary for RS, thus leaving all of BiH without a specialist juvenile institution (Walmsley and Nestorović 1998). In June 2004 the prison population of BiH was overwhelmingly male (98 per cent) and adult (99 per cent) (personal correspondence, Council of Europe Field Office, Sarajevo). At this point, there were nine juveniles serving custodial sentences, all male, and all held at either Zenica (FBiH) and Foča (RS). A total population of fifteen pre-trial women were held in eight different prisons, with between one and four in each institution. The small numbers of juveniles and women in the system are problematic

when viewed alongside principles of separation in prison management⁴. This has implications on the resources required to provide and staff separate facilities for both young and female inmates in both entities. While women are held in separate units, both entity ministries have indicated their intentions to establish entirely separate prisons to house female inmates (Walmsley 2003a). Likewise, FBiH authorities list the construction of a juvenile correctional home as a current objective, while RS Assistant Minister of Justice indicated that his ministry hoped to establish a juvenile prison for males and females and a correctional home (Walmsley 2003a). Whether for women, juveniles, or inmates receiving mandatory psychiatric treatment, the ability of the two entities of BiH to support separate specialist facilities is questionable. One observer noted the country was simply too small and too poor for such a situation to be sustainable (INT37: 85).

The fragmentation of political authority outside the two prison systems also created problems, as was indicated in a report produced by the Judicial Systems Assessment Programme (JSAP) team responsible for an area of North West Bosnia including parts of both FBiH and Republika Srpska. The Bihac team reported a situation that arose from the cantonal authorities in Una Sana canton in FBiH failing to pay the federal-level Ministry of Justice for the imprisonment of prisoners sentenced by Minor Offence Courts. In March 2000, the cantonal government was reported to owe the prison in Bihac over KM 360,000 (€180,000), resulting in an instruction from the federal-level Justice Minister that no further prisoners from Minor Offence Courts were to be admitted until the debt was settled. Public knowledge of the situation meant that anyone sentenced to a fine could opt to have these converted to custodial sentences knowing that such a punishment could not be executed (UNJSAP 2000e). The division of authority for sentencing in the lower courts (at cantonal level) and for executing all custodial sentences (at entity level) was a major factor in this dispute.

The 'Zenica 4' and minorities in prison

The case of the 'Zenica 4', Ivica Baković, Zoran Knežević, Vlastimir Pušara, and Milorad Rodić, is indicative of both challenges of running a prison system in a post-conflict environment and difficulties created through the fragmentation of authority in BiH. These inmates of Zenica prison, Bosnian Croats and Bosnian Serbs, were attacked subsequent to the widespread screening of a video, shown as part of the Milošević trial, in which Serb

⁴ European Prison Rule 11 covers the separation of male and female detainees and of pre-trial and convicted detainees.

paramilitaries were seen to shoot unarmed and handcuffed Bosniak civilians. BiH media outlets reported on 7 June 2005, that two inmates at Zenica were being punished on account of the attacks, however the four victims requested a transfer from the prison and began a hunger strike in support of their claim. On 10 June, they were able to talk to the media, and claimed that they 'would feel better in Guantanamo' (OHR 2005e). Against a background of public debate, in which the state-level Ombudsman expressed concerns that there were those in authority who favoured mono-ethnic prisons, and following protests by the inmates' families outside the federal level Justice Ministry, the state-level justice minister Slobodan Kovač approved the transfer of the inmates, but this move was immediately blocked by his federal-level counterpart Bojana Kristo (OHR 2005f). An application (22893/05 Rodić and others) was made to the European Court of Human Rights under articles 3 (prohibition of torture and inhuman or degrading treatment) and 13 (right to an effective remedy). In January 2006, while two inmates had been transferred, two remained in Zenica, held in segregation in the prison's hospital unit (ECHR 2006).

The problems indicated by the case of the Zenica 4 are numerous. First and foremost is the problem of maintaining a safe and secure environment for all inmates in the wake of a conflict featuring widespread ethnically targeted violence. Where convicted perpetrators of such violence are held alongside members of groups against whom their crimes were directed, there is an additional threat to security and order within prison walls. In the case of the Zenica 4, this seems to have come to a head with the screening of evidence of war crimes in the Srebrenica area. In an informal conversation, a contact noted the admirable restraint of a colleague who worked at the state detention unit. On the day of our conversation the colleague was recently returned from re-burying several family members whose remains had been recovered from a mass grave in the Srebrenica area. Several of the inmates at the facility were being tried for involvement in the massacres that took place there. Such restraint is perhaps in line with expectations based on the professional role of a prison officer, but of course these expectations cannot be extended to inmates. Beyond the challenge of maintaining a safe and orderly environment, the case underlines the problems of a fragmentation of authority as discussed above. Obligations under the European Convention of Human Rights lay with state-level authorities, in this case the Justice Ministry, yet it can be seen that Minister Kovač's attempts to arrange a transfer were blocked at the entity level by the competent minister. In spite of this, it will again be the state-level authorities that are held to account through any legal procedures which might take place at Strasbourg. This

mismatch between ECHR responsibilities and competent authorities will be revisited in the next chapter, in a discussion of the provision of detention facilities for inmates remanded by the courts for psychiatric treatment.

A new breed of inmate

New crime problems emerging in post-socialist/authoritarian BiH, as discussed in chapter 6, present challenges to all three sectors of the criminal justice sector and were recognised as significant to prisons by a number of contacts. One expert on prisons anticipated a ‘trickle’ of more difficult prisoners that entity systems were not prepared for (INT33: 56). In particular, concern was expressed over the ability of entity systems to deal with sophisticated criminals who might continue to carry out criminal activities from within prisons (INT37, 60). One interviewee observed that the existing ‘high security’ prisons in BiH did not live up to the label (INT14, 29), while another described the system as a ‘country club’ (INT20: 127). One of the country’s highest profile inmates was described as a contemporary version of Mr Bridger from *The Italian Job*; carrying on his business from inside with internet and mobile phone until a transfer from entity facilities to the newly built state-level pre-trial detention unit put an end to such activities (INT18: 257). In addition to an anticipated increase in the presence of sophisticated, organised criminals in BiH’s prisons, domestic war crimes trials will increase the number of prisoners serving longer sentences. The threat represented by detention facilities unable to deal adequately with organised criminals of the kind most likely to engage in cross-border crimes might be expected to act as a prompt to some of the ‘self-interested generosity’ of donor states, particularly those in the European Union. Nonetheless, the following chapter will show only limited engagement of international donors in prison reform and reconstruction.

Concluding remarks

It can be seen that the prison systems of BiH faced numerous challenges that are closely related to those experienced by the country’s police forces and courts, although they may differ qualitatively and quantitatively: the shadow cast by wartime activities over the post-war police also darkens the prison systems in BiH. Other problems, such as the physical impact of the war on the prison system have effects that are very much specific to the prison system and the demands of security and humanity that accompany detention. How the situation in BiH compares to other post-conflict, post-authoritarian or post-socialist countries is less obvious, as there has perhaps been less work on prisons in such countries compared to work on police

and courts (notable exceptions are Jefferson 2005 on Nigeria; King 1994 and Piacentini 2004 on Russia; and van Zyl Smit and van der Spuy 2004 on South Africa). Many of the features of crisis highlighted by Cavadino and Dignan (2006) are in place in BiH, in particular a sharply rising prison population, overcrowding, albeit in selected institutions, poor conditions, restricted resources, and problems of order. A number of problems are common to prison systems elsewhere regardless of the problems of transition: the initial quotation from Frank Orton, Human Rights Ombudsman for BiH suggested that the prison systems faced overcrowding and an ageing estate, problems commonly reported in the UK. Nonetheless, in BiH these problems are compounded by the lack of resources highlighted by Orton, by the new political landscape of the country, and by the apparent mismatch between penal philosophy and socio-economic developments. The lack of sustained academic attention to the challenges facing penal systems in post-conflict or transitional countries is somewhat mirrored by international interventions in the field of penal policy in BiH, and it is this topic that is picked up in the following chapter. The chapter highlights the relative lack of international involvement in penal policy, and, by examining three different international approaches, considers international influences on an emerging Bosnian penalty.

11. Global meets local: three approaches to penal reform

This chapter explores the work of the international community in BiH through three examples of agencies working alongside the domestic authorities to address some of the challenges facing BiH's prison systems as described in chapter 10. In doing so, it will explore the extent to which such interventions might be designed to maximise domestic input into resolving difficulties, and to what extent the solutions favoured by particular international actors in BiH are advanced through assistance programmes. The section begins with the work of the Joint Steering Group (JSG) established by the Council of Europe with entity, and subsequently state-level, Justice Ministries; the paper then moves on to explore the work of DFID on policy development in the area of prison industries; finally the role of the hybrid international/domestic Office of the Registrar is discussed in relation to state-level provisions for the execution of criminal sanctions. A discussion section seeks to analyse the potential influence that each of these bodies has had on the prisons sector in BiH, and suggests possible constraints on such influence. A closing section will revisit the question of the role of prisons during the war in BiH and the shadow this might continue to cast over the post-conflict prison systems of the country.

In spite of the problems highlighted in chapter 10, reform and reconstruction of the prison systems of Bosnia and Herzegovina (BiH) have received neither the same degree of international attention nor investment as police and court services. The matrix of twenty agencies engaged in rule of law and criminal justice reform projects in BiH in August 2004 in appendix 1 gives a snapshot of intervention. These agencies included some with mandates specific to BiH (e.g. OHR and the European Union Police Mission), branches of the UN and EU, non-governmental organisations and charitable foundations, and nationally-run development agencies from the US and Europe. Of the twenty organisations, thirteen were involved in police reforms, sixteen in the reform of judicial systems, yet only four in prison based programmes of reform: OHR sought a site for a pre-trial detention facility to serve the state-level Court of Bosnia and Herzegovina (Sud BiH); OSCE were monitoring pre-trial detention as part of a mission to supervise the implementation of new Criminal Procedural Codes; only the Council of Europe and the UK Department for International Development (DFID) were engaged with reforms which dealt explicitly with the provision of facilities for convicted and sentenced inmates. Subsequent to the production of that matrix in August 2004, the Canadian International Development Agency/Agence canadienne de développement

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international (CIDA/ACDI) has joined reform projects in cooperation with other donors, and a newly formed Office of the Registrar for War Crimes and Organised Crime (hereon in, the Office of the Registrar) has been involved in the management of a state-level pre-trial detention unit and in planning a state-level detention facility to hold both pre-trial and sentenced inmates. Aside from such organisations actively working with BiH authorities to develop the country's prison systems, human rights NGOs such as Amnesty International, the Helsinki Committee, and Human Rights Watch have monitored and reported on conditions in BiH's prisons.

The Council of Europe: cooperation, consultation, frustration?

BiH applied for membership of the Council of Europe in April 1995 while the country was in the midst of war and when the future of the state was still uncertain. Although BiH was not admitted to the Council until 2002, a programme of cooperation, to assist BiH's two prison systems develop in line with the European Prison Rules, had commenced in the intervening years. In 1996 the Council opened an office in BiH and established contact with the ministries responsible for the execution of criminal sanctions in each entity. Both entities committed themselves to cooperate in the framework of the 'Themis' plan in 1997, and the following year Council of Europe experts from Slovenia, Sweden and the UK visited ministries and prisons in both entities, leading to two reports summarising the state of prisons in FBiH and RS (Walmsley and Križnik 1998; Walmsley and Nestorović 1998). Subsequently, a Joint Steering Group was formed, including entity ministries, meeting first in October 2000 in Strasbourg (Council of Europe 2001). This reflects a common pattern in some western Balkan states, where assessment reports by Council of Europe experts have preceded the establishment of steering groups on reform in Albania (1998), Serbia (2001) and Montenegro (2002), as well as in Armenia, Azerbaijan, Georgia, Russia and Ukraine.

In discussions with Council representatives, the cooperative nature of their work in BiH and other countries was stressed, in particular highlighting the Council as a source of technical assistance, leaving policy decisions in the hands of domestic parties (INT37: 55). The Council does not have recourse to the executive powers of the High Representative, and works exclusively *through* local authorities. The JSG was described as a forum for agreement (INT37: 92), serving as an arena in which entity prison systems could work together to establish priorities and to overcome common problems. As such it represents not only a forum for cooperation between the Council and each of the entities, but potentially between

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the entities themselves. The report on the first JSG meeting group outlines two purposes: to support and initiate reforms in the prison systems; and to act as a contact point for any groups or countries seeking to contribute to reform (Council of Europe 2001). The Council of Europe also cooperates with the entity prison systems in providing expert input from other member states in various forms: initial assessment reports were carried out by prisons experts from Slovenia, Sweden and the United Kingdom; a former prison governor and academic in Scotland has been collaborating on the development of training schemes and other matters; while visits have been arranged to Sweden, Slovenia and expert contributions have come from specific countries on recognised areas of expertise such as high security prisons and responses to overcrowding (INT37; INT33).

The cooperative approach depends largely on the will and ability of all involved to cooperate. While earlier chapters highlighted the use of positive incentives (closer association with the EU) or enforcement (OHR use of executive powers), the Council is more limited in terms of the leverage it enjoys with entity administrations. Facilities for forensic psychiatric patients provide an illustrative example. As observed in chapter 10, pre-war BiH had one facility, located at Sokolac, east of Sarajevo, for those receiving mandatory psychiatric treatment in a closed institution. While Sokolac continues to serve the courts of RS, political fragmentation in BiH left FBiH without access to these facilities. In response to this situation, authorities in FBiH set aside an annex in the high security prison at Zenica in 1996, as a 'temporary solution'. This solution still in place in October 2000, the secure psychiatric facilities were listed as the first of seven priorities drawn up by the entities and the Council of Europe at the first meeting of the JSG (Council of Europe 2001).

The second meeting, held at the coastal resort of Neum in Herzegovina, heard that a working group had been established jointly by entity authorities to address the problem (Council of Europe 2002a). In spite of this sign of cooperation, inter-entity politics intervened here. Although RS authorities expressed a willingness to cooperate by taking inmates from FBiH courts, they also needed KM 2,000,000 (€1,000,000) for reconstruction and adaptation of Sokolac, which had been damaged during the war. They also rejected the suggestion that they should take on staff from FBiH on account of differences in regulations between the two entities and because they had sufficient staff. Authorities in FBiH stated in response that RS authorities were already indebted to them financially, and that in the meantime they were looking for alternative solutions in their own entity. Both parties agreed that an approach should be made to the military for the return of those parts of Sokolac that they had retained

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after the war and also to donors for the funds required to reconstruct the facility, yet these approaches were postponed pending an agreement between the entities on how to proceed regarding provisions for forensic psychiatric inmates throughout BiH. Later steering group reports show a lack of any further substantial movement on the issue. In late 2002, it was reported that further action on the issue had been postponed pending the formation of new governments after October elections (Council of Europe 2002b). The JSG met again in May, entity governments having been formed in January (RS) and February (FBiH), but little progress was reported (Council of Europe 2003); at the end of fieldwork in Sarajevo in July 2005, the situation was unresolved.

The Council of Europe has created a forum in which common problems can be discussed, solutions proposed, and allowing expert input from other member states. Yet the Council does not necessarily dictate the agenda for prison reform, and priorities are defined and pursued by domestic authorities, in line with their own political plans and commitments. Therefore the power of the Council to advance or impose a solution to the ongoing problem of secure psychiatric care is limited. Aside from the Council's field office in Sarajevo, the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) has the potential to press for the provision of suitable facilities and more generally in encouraging reforms designed to achieve certain minimum of standards in BiH's custodial institutions. Like the Council's more general assistance to BiH, the CPT works on the basis of cooperation, visiting detention facilities and following up with recommendations. While the body has no direct means of enforcement to back up these recommendations, the publication of findings can be used to exert pressure on national governments (Morgan 1998). As stated previously, Morgan observes that resource-neutral recommendations tend to be received positively.

The CPT issued a report on a visit to a number of detention facilities in BiH, including Sokolac and the annex at Zenica prison, to the state-level government (CPT 2004). While acknowledging that the Zenica annex was only designed as a temporary solution to FBiH's immediate need to accommodate forensic psychiatric patients, the report strongly criticised the insufficient living space, the use of dormitory accommodation and the inadequate number of care staff employed in the annex. A number of problems were highlighted at Sokolac, including inadequate living space, insufficient qualified staff, and a resultant over-reliance on pharmacotherapy. The CPT findings on Zenica were echoed in a report by the FBiH Ombudsmen (Ombudsman Institution FBiH 2004). The government of BiH could say little in

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reply, acknowledging the problems, but observing that the government of FBiH were unable to provide a suitable building to accommodate the inmates, and so there was no substantial movement towards resolving the problem (Government of BiH 2004). A proposal had been made to build on land belonging to Zenica prison, but outside the main compound, but this was blocked during planning applications (INT37: 97). As stated the problem remained unresolved at the close of fieldwork in 2005, but one party felt that a solution was on the horizon. The first CPT visit was followed in December 2004 with a second inspection specifically targeting secure psychiatric units, emphasising standards so that BiH authorities “initiate proper reflection” (INT39: 292); the outcome was that:

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

INT39: 309

The example of the CPT and the lack of concrete progress on the detention of forensic psychiatric patients touch on two issues relating to obligations arising from international treaties ratified by BiH, or written in to its Dayton constitution. Firstly, as noted in chapter 10, resource-neutral recommendations from the CPT are usually welcomed and implemented, while this is less likely to be the case with those requiring additional spending (Morgan 1998). The CPT’s recommendations would require initial investment in a new or refurbished facility and an ongoing resource requirement to fund additional staff; without a coherent strategy to attract donor funding, it is not clear where such resources could come from. Secondly, the lack of hierarchic relationship between state- and entity-level justice ministries sits awkwardly with the fact that obligations stemming from BiH’s ratification of The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 2002 rest upon the state-level government. As seen in the example of the ‘Zenica 4’ in chapter 10, state-level ministries are not in a position to impose solutions on entity level governments in line with their international obligations. Moreover, any state-level minister who draws their support from RS, or Serb nationalist parties, as is the case with Kovač in the Justice Ministry, has no mandate to extend state-level powers at the expense of the entities (INT39: 494).

The JSG represents an attempt to circumvent such problems by bringing all parties around the table in order to arrive at common solutions in the absence of a single domestic framework for decision making. Regardless of this, the continued fragmentation and duplication blocks a rationalisation of penal structures that could free up resources to concentrate on policy

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development. The Council of Europe has the potential to influence the development of penal policy in BiH, pursuing a Europe-wide discourse of rights to minimum standards in custody; but that potential influence can only be realised when the political and institutional context in BiH provides both the will and capacity to absorb and act upon it. Arguably the fragmentation of authority is a major institutional block. The following section looks at the attempts of DFID to build capacity for making policy decisions in domestic justice ministries.

Developing policy skills: the Department for International Development

Another central player in prison reform in BiH is DFID, engaged in the prison reform since 2002 as part of the comprehensive *Access to Justice* programme, introduced in chapter 7, and incorporating work on legal aid, community policing, community justice and policy planning in ministries of justice and the interior. In summer 2005, DFID anticipated starting work on a feasibility study on merging the two entity prison systems, with a view to creating more flexibility to cope better with the needs of the kinds of minority or special needs inmates discussed in chapter 10 (INT38). This is an interesting development in the work of DFID, but it did not commence before the end of the fieldwork for this thesis and there was uncertainty regarding the future of DFID's presence in BiH beyond the end of its initial three year mandate in November 2005 (INT21). As such, this section focuses on an earlier example of DFID's work with entity systems: a policy study conducted on the economic units maintained by the prisons. Like the Council of Europe, DFID approach prison reform in BiH through cooperative modes of working, but focus less on specific rights and more on the management of the systems as a means to delivering overall improvement. In a sense, this reflects different organisational backgrounds: the Council of Europe was set up to realise and maintain a range of rights and freedoms, while DFID retains a clear focus on a developmental agenda, often working through consultancy firms. In their *Access to Justice* programme for the BiH and other countries of South East Europe, DFID have employed *Atos Origin UK*, a consultancy firm whose client base includes a range of financial and industrial organisations as well as government departments. The difference in approach was clearly indicated during interviews in Sarajevo: one DFID employee described the Council as viewing things very much in terms of black and white on matters of rights and standards, contrasting this with DFID's examination of resources necessary to achieve such standards (INT9, 81); another questioned an approach which attempted to develop a complaints procedures before systems were well enough resourced to adequately clothe inmates (INT21: 117).

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In contrast to DFID's view of the Council of Europe's work, there was scepticism on the Council side as to what DFID's policy study might achieve. One Council of Europe observer questioned the priorities underpinning the study, suggesting that efforts would be better spent on providing a broader range of activities than Yugoslav era industrial and agricultural facilities could offer (INT33: 28). While inmate activities would ideally be decided on criteria of desirability rather than availability, to a certain extent the interviewee misrepresented the work carried out by DFID. Firstly, DFID were working in cooperation with entity ministries, and it was these ministries that chose the economic units as the subject of the policy study. Secondly, the object of carrying out the policy study was not simply to explore options with regards to the economic units, rather analysing the particular policy problem represented by the units was a vehicle by which methods of priority setting, policy making, and resource allocation could be developed within the ministries and through which joint approaches to problem solving could be found by the entities (INT21). In this last aim, the DFID project complements the JSG in promoting inter-entity cooperation.

The findings and recommendations of the policy study, presented in September 2004, do not show a narrow reliance on the Yugoslav era work facilities, rather they show a more nuanced view of inmate activities. Essentially this is conceived of in two ways: firstly, when linked to opportunities for employment available outside prison, prisoner activity can be used to pursue rehabilitative goals; secondly, the active engagement of prisoners in work or other programmes serve the end of 'dynamic security', tackling boredom as a possible root of inmate discontent. The study group, composed of justice ministry and prison personnel from both entities, did not expect to return inmates to a buoyant labour market ready to accept them with open arms; as such reintegrative regimes in BiH's prisons seem to have adapted to the country's weakened economy. The study group identified four particular needs: the clarification of policy aims; realignment of activities with the current labour market; management guidelines to optimise productivity; and an assessment of the demands that increasing prisoner needs will place on provision of activities. In response to these they also developed four options, outlined in box 11.1, not all of which are mutually exclusive.

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Box 11.1 DFID and justice ministries policy study: options for change

- **Option 1:** Strengthen existing arrangements with improved financial management, common standards and autonomy for managers of commercial units.
- **Option 2:** Full integration of commercial units into prisons, ending central subsidies and allowing prisons to retain revenue.
- **Option 3:** Private sector involvement through selling off or contracting out commercial units.
- **Option 4:** Skills-based approach with an emphasis on training in the skills needed for a law-abiding life.

The recommendations highlight the final option as the ideal target, but as a means to reach this position, suggest realising immediate benefits from tightening up the existing arrangements for managing the commercial units (option 1), before attempting to introduce some element of private sector involvement where appropriate (option 3), particularly with reference to the foundry at Zenica. Finally, in commercial units integrated fully into prison management structures (option 2) it would be possible to pursue skills-based programmes offering relevant training to inmates (option 4). It remains to be seen how the entity systems act to implement these recommendations, one observer commented that it was relatively easy to get a 'yes' from assistant ministers or directors, but getting projects taken up by the mainstream was more difficult (INT21: 108). However, even if agenda for reform of commercial units do not advance, and Council of Europe efforts to address the issue of forensic psychiatric patients continues to be stalled, the work of DFID and the Council has contributed to bringing the entity ministries together in an effort to find joint solutions to shared problems in the penal sector. In that sense, there is a degree of continuity in DFID's proposed feasibility study for the merger of the entity prison systems. Such a merger need not squeeze out entity ministries, who might continue, through joint bodies, to provide oversight of a system that already allows a fair degree of autonomy for management of individual institutions (INT39: 374). Seven years of joint work with the Council of Europe, and joint projects such as the DFID-backed policy study suggest that the goal is not wholly unreasonable and that existing cooperative arrangements may act as a block against the kind of political intransigence on the development of cross-entity institutions witnessed in relation to policing. The merger might also make provision of specialist services, such as facilities for juveniles, women and forensic psychiatric inmates less of a challenge by creating a more diverse and flexible prison estate.

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State-level sanctions: the Office of the Registrar

The Office of the Registrar for War Crimes and Organised Crime at the State Court began as the War Crimes project of OHR's Criminal Institutions and Prosecutorial Reform Unit (CIPRU), but was made independent of OHR in January 2005. While the Council of Europe and DFID have largely worked through existing entity structures, the Office of the Registrar has sought to introduce new state-level provision of detention. As was the case with policing and criminal courts, state-level bodies played no role in penal provision in the immediate post-war years in BiH. In the absence of a state-level criminal jurisdiction prior to 2003 this seems reasonable. In other criminal justice sectors, it has been seen how, through the creation of bodies such as the State Border Service (SBS), State Investigation and Protection Agency (SIPA) and Sud BiH, existing entity, cantonal and district provision was supplemented with an additional state-level layer. The work of the Office of the Registrar follows the same pattern, albeit incrementally. It has worked mainly outside the structure of existing entity capacity, seeking to provide secure facilities for pre-trial detainees, and subsequently for sentenced inmates, appearing before the Sud BiH. In the first instance pre-trial inmates are held in a temporary detention facility adjacent to the court, capable of holding up to twenty-one. The unit was formally handed over to the State Ministry of Justice in March 2005, but remained under the management of a Norwegian prison director pending a domestic appointment (INT5). The pre-trial detention unit was followed with a project to develop a long-term solution in the form of a 300 place prison in the Sarajevo area to hold pre-trial and sentenced inmates, at an estimated cost of €15 million. This section looks at the origins of the plans to build state-level prison facilities in BiH and explores their operation in relation to the two entity systems.

The demand for state-level provision of detention facilities originates in the introduction of a state-level criminal code, the subsequent development of prosecutorial and judicial instruments to enforce that code, and the proposed closure of the ICTY at The Hague by 2010 (UNSC 2003). The Criminal Code reflects the limited competences of the state-level authorities in BiH, dealing with a number of crimes with implications at state-level and above, and includes offences committed by state-level officials. Chapters XV through to XXII (articles 145-250) deal with a number of specific offences, including crimes against state integrity, against humanity and international law, and of corruption. Prescribed maximum and minimum punishments are outlined for 215 separate offences or sub-categories of offences, and are summarised in table 11.1, below.

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Table 11.1 Minimum and maximum penalties specified by the Criminal Code of BiH

| Minimum punishment | N | % | Maximum Punishment | N | % |
|--------------------|------------|--------------|--------------------|------------|--------------|
| Fine | 48 | 22.3 | Six months | 6 | 2.8 |
| One month | 2 | 0.9 | One year | 11 | 5.1 |
| Six months | 50 | 23.3 | Three years | 33 | 15.3 |
| One year | 54 | 25.1 | Five years | 50 | 23.3 |
| Two years | 1 | 0.5 | Eight years | 1 | 0.5 |
| Three years | 18 | 8.4 | Ten years | 50 | 23.3 |
| Five years | 20 | 9.3 | Twenty years | 42 | 19.5 |
| Ten years | 22 | 10.2 | Forty-five years | 22 | 10.2 |
| Totals | 215 | 100.0 | | 215 | 100.0 |

Table notes:

Shaded boxes indicate that custody may be replaced with a suspended sentence (up to two years imprisonment), and in some cases with a fine (up to six months imprisonment).

While alternatives to custody are available for a number of offences, the court deals with a number of crimes where custody is the only sentence prescribed by the code (28 per cent of prescribed minima). Of these, twenty-two offences (or sub-categories of offence) feature a minimum sentence of ten years imprisonment and a maximum sentence of long-term imprisonment (forty-five years). Of the twenty-two offences punishable with between ten and forty-five years detention, eighteen (81 per cent) are contained in Chapter XVII, dealing with 'Crimes against Humanity and Values Protected by International Law'. Such crimes are rare in contemporary BiH, but a number of acts committed between 1991 and 1995 have yet to be prosecuted. Moreover from 2003 onwards it was clear that Sud BiH would receive a number of cases from The Hague tribunal under rule 11*bis*. For this to take place, the court in The Hague had to be satisfied that detention facilities were adequate both from a security and human rights point of view. Work has subsequently commenced on domestically initiated and processed war-crimes prosecutions, approved by prosecutorial authorities at ICTY. Provisions of the state-level Criminal Code on organised crime (Chapter XXII) also mean that high-level organised criminals will be among those detained; this was seen to be at the root of new security needs in prisons (INT39; INT14; INT33); although one expert on the matter noted a paucity of evidence as to what the actual risks might be:

that information just doesn't exist which makes it very difficult to say: well actually, what do we need to do?

(INT34: 86)

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A memorandum of understanding signed by the state and entity level justice ministries in 2003 agreed that entity prisons would detain those sentenced to custody by Sud BiH. Yet by 2005, under plans progressed by OHR, and subsequently by the Office of the Registrar, state-level authorities assumed responsibility for pre-trial detention and planned the construction of a 300 place prison in the following year. Asked why the focus was on the construction of new prison capacity at the state level, rather than developing existing entity-level facilities, one senior international member of the Office of the Registrar cited a number of reasons combining politics and pragmatism. Firstly, as has already been indicated in relation to forensic psychiatric patients, responsibilities arising from international instruments on human rights and detainees' rights fall on the state-level government, and facilities under their direct control would leave them best placed to meet obligations arising from these (INT14:19); secondly, while three prisons in BiH are currently classed as 'closed' institutions (Banja Luka, Foča and Zenica), the respondent felt they did not meet required security levels (INT14: 29). A previous report, carried out under the auspices of the Council of Europe, had examined the potential to shift from dormitory to cellular accommodation in BiH's prisons. Although the report contained no costings, it suggested that shifts to smaller units for accommodation could result in the loss of anywhere between 30 and 80 per cent of capacity, and that it was not possible in all prisons (Mumby-Croft 2002). Thirdly, in the context of *state-building* activities, it made no sense to develop capacity at the entity level (INT14: 31).

Respondents in other agencies engaged in prison reform were critical of the Office of the Registrar for concentrating solely on creating new state-level capacity at the expense of the two entity systems which hold the majority of sentenced and pre-trial inmates. One suggested that money invested in constructing a new prison might be put to better use resolving problems in under-resourced entity systems (INT38: 60). Elsewhere the project was criticised for failing to take an integrated approach to prison reform in BiH; focusing only on the state and making no real effort to ensure that the three systems worked together coherently (INT39: 62, 70). The critique of the Office of the Registrar and state-level Justice Ministry, for failing to take an integrated approach ought to be qualified. The state-level prison was to serve as a means to reform the execution of criminal sanctions: a letter signed in July 2004 by the state and FBiH Justice Ministers, the RS Assistant Minister with responsibility for the execution of criminal sanctions, the President of the State Court, and the Chief Prosecutor, states that the planned facility "will undoubtedly serve as a vehicle for continued prison reform in Bosnia and Herzegovina as well as fill an urgent need in the BiH criminal justice system"

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(reproduced in OHR 2004c). Likewise a memorandum of understanding agreed between state and entities in November of that year sees state facilities providing a quality of detention not available in the existing entity systems and that this “raises issues about standards of custody throughout the country and the suitability of the existing distribution of competence on this area to provide the quality of conditions of custody to which we aspire” (OHR 2004c). Finally, in an introductory letter to a policy paper, state-level Justice Minister Slobodan Kovač noted that the assistance of the Registry and the establishment of a state-level prison would allow the reform of the remaining prisons in BiH (Office of the Registrar 2005). In an interview carried out with the Secretary of the state-level Justice Ministry, it was made clear that the ministry recognised the potential of the project to go beyond simply constructing a prison, and that the new facility could, at least in the short term, relieve pressure on entity systems by handling their more difficult inmates, and by creating additional capacity to separate criminal associates (INT16: 26). Although some interviewees had been critical of a failure of the Office of the Registrar and their interlocutors in the state-level ministry to take an integrated approach to prison reform in BiH, they could also express the hope that the state ministry’s involvement would at least serve as a vehicle for wider reform in the entity systems:

...the whole idea that we envisaged... was to use the pre-trial detention unit as a means of reforming, or of pushing the reform of the whole system... we wanted... the secondment of staff into the unit on a three month rotation basis... we would set up new procedures there and staff from throughout the country would come in... they would also work together and... they would learn, in an appropriate environment, they would introduce modern procedures and... we would train their trainers...

(INT39: 88)

In spite of the hopes expressed by domestic ministers and international agencies alike, the enterprise did not get off to a positive start. One means by which the new pre-trial detention unit for Sud BiH was to serve as a vehicle for reform in the entities was for the unit to be staffed by personnel drawn from entity systems. These entity employees would receive training in a modern detention environment, constructed and managed in line with European Prison Rules. Using a system of staff rotation, a large number might receive such training and would be able to pass on the benefits of this training to other entity colleagues. The rotation plan seemed to offer a solution to the staffing needs of the state-level facility while providing training for entity personnel, yet the system collapsed in the absence of facilities within Finance Ministries for payments from state to entity bodies for staffing (INT21: 98). As a result, the detention unit had to recruit and train staff from scratch. While this presented some

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initial difficulties, the early days of the unit were characterised by a low demand on cell space, creating an environment conducive to training. Moreover, the international acting director of the unit found he did not have to challenge any preconceptions or working-habits picked up over long careers in the entity systems (INT5) and on the second of two visits paid to the facility during fieldwork there was a notable and positive difference in how prison officers' conducted tasks such as processing visitors¹. Yet, the fact remains that whatever quality of training is presently provided to detention facility personnel, in the absence of a mechanism for transfer between state and entity levels, it remains within the confines of the state-level unit. One member of the international community outside the Office of the Registrar suggested that the problem was that work was completed in a rush in order to be ready to receive ICTY detainees; planning and implementation were therefore not thought through as well as they might have been (INT39: 56). Certainly the failure to recognise problems in financing arrangements suggests that their analysis has a degree of truth in it.

International interventions and penalty in Bosnia and Herzegovina

The Council of Europe, DFID and the Office of the Registrar represent different forms of international involvement in BiH: the Council is a multi-national regional organisation which, since 2002, includes BiH as a member; DFID represents one country's bilateral assistance programme; while the Office of the Registrar is part of mainstream multilateral civilian assistance to BiH, but has been set up within domestic structures as a hybrid organisation with a transition plan geared towards full domestic control. Having briefly presented examples of the work of these three bodies, it is possible to move on to consider two closely related concerns: firstly, to what extent do the interventions of these agencies influence policy in BiH; secondly, if there is evidence of influence, in what direction do these interventions drive penal policy in BiH? The approaches of the three organisations vary greatly, and the leverage each body exerts may vary alongside this. Yet in a context of ongoing political change and development in BiH, it is difficult to make any definitive statement. As seen in relation to police reform, a renewed electoral mandate might give a party the strength to reject internationally sponsored proposals of reform. Nonetheless, the following discussion will make some tentative suggestions that further time and investigation might build upon. In this

¹ Visits were made on 3 June 2005, shortly after the recruitment of new staff for the unit and again on 12 July 2005.

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we can see the combination of competing trends developing outside BiH and a particular local institutional context.

The Council of Europe and CPT's attempts to develop an approach to imprisonment in BiH consistent with the norms encapsulated by the European Prison Rules have encountered constraints. The division of powers in BiH and the lack of hierarchic relationships between state- and entity-level ministries present difficulties in enforcing state-level obligations arising from Council membership and European Convention on Human Rights. As stated, the JSG attempts to circumvent the fragmentation by creating a common forum to identify and analyse problems, and develop programmes of reform. The example of secure psychiatric facilities highlighted problems with this approach: even where the JSG recognises a priority problem, and where the state-level government recognises its obligations, the problem remains unresolved. At the same time, the Council has been able to continue working in training staff and developing a reform agenda, in particular through the use of experts from and study visits to other member states.

DFID's engagement with the BiH prison systems, managed through a consultancy firm working with justice ministries at state- and entity-level, has been geared less to pursuing a particular penal goal or style. Rather, they have sought to develop management and decision-making capacity to facilitate the formulation of priorities and implementation of policy in BiH. Discussions with one member of DFID's team indicated common features of a managerialist agenda, as described by Clarke and Newman (1997): opposing professionals such as police, lawyers and prison governors with a lack of management and 'transformation' experience, with managers, and criticising rule driven officials (INT21: 40, 49, 55, 73, 233). Yet at the same time, this managerialist analysis did not sideline political and value judgments in the policy process. Political assumptions and expectations were seen as essential at the start of the policy process; after these were set, options were to be generated and tested according to initial assumptions. A clear line was drawn between identifying objectives and achieving them (INT21: 150). As such, it is difficult to argue that DFID's involvement is influencing penal provision in BiH in any one direction. An indication of some influence can be found in the ongoing collection of performance measurement data in the absence of DFID prompts (INT21: 167), but the actual impact of this on the prison systems would depend very much on how such data are used.

The impact of the Office of the Registrar, and its parent body OHR, on the prisons sector in BiH is perhaps the most easy to assess in terms of tangible outcomes. Of the three

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organisations examined, the Office and its forerunners have had the most immediately obvious short term effects, creating a new level of detention under BiH institutions, although at the close of fieldwork this remained limited to pre-trial detention. This development of state-level capacity mirrors the earlier approach of core civilian missions in policing (chapter 7) and judicial reform (chapter 9). The power of the Office of the Registrar to pursue such an agenda may be attributed to its roots in OHR. As described in chapter 2, the High Representative has been empowered to make executive decisions in BiH. The relationship of dependency this encouraged between the state-level Ministry of Justice and OHR may have been inherited by the Office of the Registrar after it was set up as a separate body; the impact of the capacity for OHR to push through difficult political decisions was seen as present in every policy issue ‘hanging in the air’ (INT39: 492). The capacity of the Office of the Registrar to dictate the agenda was evidenced by the Secretary of the Ministry for Justice describing, through an interpreter, plans for a full state-level prison. He freely observed that Michael Johnson, the Registrar, “made a firm decision for this prison to be started in October” (INT16: 139). An informal conversation revealed how expert input from the ICTY detention facility in The Hague and from Italy was overridden under the Office’s leadership (not attributed). This evidence of the Registrar’s influence is not unqualified. The international leadership of the Office, including that of the detention section, was planned as a temporary feature; all positions were ultimately due to pass into domestic hands; responsibility for detention at state-level has returned fully to the BiH Ministry of Justice. Secondly, factors beyond the relationship between the Office and state-level Justice Ministry illustrate limits on the potential for lasting influence; subsequent to the end of fieldwork the Office failed to secure donor-funding for a planned state-level prison and the project is now in the hands of the state-level Justice Ministry. Financial resources clearly matter.

In assessing the impact of the Office of the Registrar it is important to explore not only at which level of government provision and management of detention facilities is located, but also its potential to influence penal policy more generally. In spite of a visible short-term impact, it is difficult to give a definitive answer. The lasting legacy of the Office comes in the shape of one small unit with a lifespan of around 30 years, capable of housing twenty or so pre-trial detainees (INT34: 276). The unit relied heavily on technology, including centrally-controlled doors and CCTV, and on the surface this might suggest that the design team working for the Office’s detention section, and the physical security consultant assisting them, were causing a shift in penal thinking away from a system based on human contact, towards

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technological security solutions geared towards straightforward confinement. While these features were built into the unit from design stages, mainly with an eye to cost implications of installing such systems at a later stage (INT34), they did not necessarily fit with the way in which the unit was subsequently run, suggesting a lack of coherence within the Office of the Registrar. Interviews with key staff within the detention section indicated an active preference for expertise from Scandinavian systems. States such as Norway were seen to offer a positive model, enabling prison policy in BiH to develop in line with European Prison Rules and the ECHR (INT14: 113). The acting-head of the unit during fieldwork was seconded from a small high-security facility in Norway. He found a ratio of around three cameras to every inmate excessive and sought to ensure relations between staff and inmates were characterised by a degree of humanity. In spite of opportunities for remote electronic surveillance, inmates would spend their association periods in the company of staff; and staff would knock on inmates' doors before entering (INT5). The secure spaces of the prison, such as closed visiting facilities, were used in a way that circumvented the initial design to allow more human contact (INT5). As such the physical evidence of the influence of the design team is brought into question by the regime and practices implemented within the unit's walls. The extent to which the regime followed at the pre-trial detention unit influences prison regimes elsewhere in BiH is dependent on an exchange at the level of ideas and policies and practices. It has already been noted that a lack of means for the transfer of resources between state and entity-level ministries has blocked one mechanism for such exchanges to take place. Yet beyond this, it remains the fact that the legacy of OHR and Office of the Registrar involvement in prison sector reform is a pre-trial detention unit, dealing with unsentenced inmates whose innocence or guilt has yet to be proven; with this in mind the relevance of the regime to prisons elsewhere in BiH, dealing with pre-trial and sentenced inmates, adults and juveniles, men and women, remains limited.

Ultimately, all three organisations have sought to build local capacity to create penal policy in BiH: the Council of Europe has sought to create a framework for joint decision making, and has offered technical expertise; DFID have sought to develop managerial skills through a consultancy model; and the Office of the Registrar was established with a clear timetable for transition to domestic control (OHR 2004c). At the same time, during fieldwork there were clear indications that each of these organisations developed an ideal of local ownership within the context of the state-level government. The Council of Europe saw BiH as being too small and too poor to maintain two or three parallel prison systems (INT37: 85); at the close of

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fieldwork, DFID were commencing work on a study to outline the feasibility of a merger of BiH's prison system; while the detention section of the registry related the development of state-level penal provision to a broader project of state-building. This preference for state-level control may stem from frustration in dealing with a fragmented system. Arguably the fragmentation of political authority in BiH acts as the primary obstacle to internationally-driven reform agenda, particularly that of the Council of Europe and CPT. At the same time there is evidence of a lack of coherent approach *within* organs of the international community; differences multiply when one examines the international community as a whole. Unlike police and court reform, where core civilian missions have played a central role and have coordinated their activities through OHR, this has not been the case in relation to prison reform. A combination of fragmentation of political authority within BiH and a lack of coordination within the international community constrains the impact of international interventions in the country's prison sector.

Post-script: the forgotten question of war legacies

This chapter demands a post-script. The introductory comments observed the lack of international involvement in prison reform when compared to police and courts. This was not lost on state-level Justice Minister Slobodan Kovač, who acknowledged that it was an area of neglect on the part of both international and domestic authorities when introducing a report on the project to construct a state-level prison (Office of the Registrar 2005). This relative lack of intensive and extensive international attention and to the prison systems of BiH reflects a wider absence on work on penal development in transitional societies. A number of works explore policing in emerging democracies (e.g., Bayley 1995; Marenin 1998b; Shearing 1997) and the relationship between policing and democracy (e.g., Jones et al. 1996; Marenin 1998a; Marks 2000). Similarly, the position of lawyers and the judiciary in post-conflict and post-authoritarian societies has received much attention (Alivizatos and Diamandouros 2001; Blankenburg 1995; Herz 1948; Smithey and Ishiyama 2000). The same cannot be said for prison systems. A number of exceptions exist: Walmsley's two HEUNI reports (1996; 2003a); King (1994) and Piacentini (2004) on Russia; van Zyl Smit and van der Spuy's (2004) overview of post-apartheid criminal justice reform and policy-imports to South Africa; and Samara's (2003) discussion of the failure of South African prisons to secure international assistance. But on the whole, scholarly works in the area are relatively rare. Given the rich theoretical background of analyses of punishment systems this is something of a disappointment.

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Accepting that prison reform is unappealing to donors, there remains a significant lacuna in the work that has taken place in BiH. In the foregoing discussion of post-war assistance and reform programmes pursued by the Council of Europe, DFID and the Office of the Registrar, very little attention has been paid to the issue of wartime activities of prison personnel highlighted in chapter 10. In truth, this is because very little came to light in the course of the research. While reform projects relating to policing and courts have been accompanied with some form of lustration, the international community does not seem to have engaged in a widespread review of prison personnel. This gap might be understandable in certain projects: DFID worked at the level of policy formulation, rather than with day to day workings of individual prisons; staff in the Office of the Registrar were not working with existing entity systems and checks were carried out on those employed in the small SDU and were planned for the full prison too (INT14: 91; INT32: 108). There was an absence of a strong approach from the Council of Europe. For example in the report based on the Council's prison visits in RS (Walmsley and Nestorović 1998), no mention is made of the wartime role of Foča's penitentiary, nor is it recognised that the current director, Zoran Sekulović, was appointed during the war and was subsequently named in a Human Rights Watch report on abuse of detainees (HRW 1998). Likewise it seems that the UN had not taken on responsibility for carrying out checks on war records of prison officers, their mandate being restricted to looking at Ministry of Interior rather than Ministry of Justice staff. An e-mail exchange with a former head of a regional UN Human Rights Office established that, although visits were conducted to prisons, there was no screening of individual prison officers (personal communication, 28 November 2005). It can be argued that prisons were less instrumental to the wartime aims of combatants than a militarised police force, and less vital to post-war parties in support of their political agenda. Yet, as highlighted above in relation to ICTY convictions relating to detention facilities in both FBiH (*Prosecutor v Aleksovski* 1999) and RS (*Prosecutor v Krnojelac* 2002; *Prosecutor v Krnojelac* 2003), and as observed by Human Rights Watch (HRW 1998), there is evidence that the recent history of BiH's prisons and their staff ought not to escape scrutiny. In light of the vulnerability of inmates detained away from the public gaze this is all the more important.

12. Rebuilding justice, rebuilding the state? International interventions in Bosnia and Herzegovina

Having explored the three main sectors of the criminal justice field in BiH, and having examined a number of international interventions geared towards reform and reconstruction within these sectors, it is now possible to revisit the four questions defining the current research project:

What role does criminal justice reform play in a state-building exercise, in the particular post-conflict, post-socialist, and post-authoritarian context represented by Bosnia and Herzegovina?

To what extent do the demands of state-building projects shape criminal justice reform, and how does this differ across criminal justice sectors (i.e. policing, courts, and correctional services), and how are these reforms seen to relate to one another in the context of a criminal justice *system*?

In a context which brings together a range of agencies with different backgrounds, priorities and working practices, how do different agencies approach criminal justice reforms within each sector, how do they relate to, and work with, relevant domestic political actors and institutions, and what obstacles do they meet in trying to implement reform programmes?

To what extent is the level of international intervention in BiH conducive to the ‘transfer’ of particular criminal justice policies and institutions or the ‘transplant’ of practices and models in criminal justice?

This final chapter will group the first two complementary questions under the heading of state-building, asking to what extent criminal justice plays a role in state-building and turning the question around to explore the impact of the demands of state-building upon criminal justice reform. Subsequently, the chapter builds on previous chapters which have drawn on a range of agencies including core multi-lateral civilian missions (the UN International Police Task Force, European Union Police Mission, Police Restructuring Commission, UN Judicial Systems Assessment Programme, Independent Judicial Commission, Office of the High Representative, and Office of the Registrar); other non-core multi-lateral bodies (Council of Europe) and bilateral aid agencies (Department for International Development). The chapter seeks to examine how they seek to shape domestic policy given the range of different resources, powers and restrictions with which they operate in the general policy context of BiH and the particular criminal justice sectors in which they intervene. Within this, it is possible to examine fourth question regarding the scope for policy transfer or legal transplants in a context of multi-national intervention in the criminal justice policy of a particular state.

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State-building and criminal justice reform: an interactive process

Taking the mainstream bodies in Bosnia and Herzegovina (BiH) to be those that are internationally mandated, whose mandate is derived from the Office of the High Representative (OHR), or whose mandate includes a specific reference to coordination through the OHR, there is a degree of similarity across the sectors of criminal justice in terms of how mainstream civilian assistance has progressed. Initial support to, and reform in, existing criminal justice institutions at entity, district and cantonal level, has been accompanied with a gradual push for increased state-level provision, but in the first instance, this has been done in a manner which can be presented as complementing rather than replacing entity structures. Clearly this complementarity has not been universally recognised in BiH; the constitutional court case initiated by deputies from the Republika Srpska National Assembly (RSNA) against the law establishing the state court is one case in point (see chapter 9). The formation of the State Border Service (SBS) and the State Information and Protection Agency (SIPA) dealt with relatively narrow areas of policing, including borders and the protection of state-level VIPs and government buildings, and the two bodies were not placed above entity or other police forces in a hierarchic system (chapter 7). Legislation establishing the state-level court towards the end of 2000 created a body that dealt with a limited range of crimes (from 2003 onwards) and administrative matters. Again, this court did not exist at the apex of a hierarchic structure and each entity retained an independent Supreme Court (chapter 9). Finally, the state-level detention unit, established under the OHR and Office of the Registrar, is a small and temporary facility, serving only the Court of BiH and having little impact on entity prison systems, other than removing a small number of state-level pre-trial detainees from their custody. As was witnessed in the case of the Zenica four, the state-level Ministry of Justice has no authority over the entity systems (chapter 11).

Underneath this surface-level similarity of the pattern of mainstream international intervention, building up state-level criminal justice powers and responsibilities in BiH without providing a direct challenge to existing entity, district and cantonal governments, differences emerge in the intensity of interventions and in the priority placed on each area in terms of a timetable of interventions. In straightforward terms of the number of bodies involved in assistance to, and reform of, different branches of criminal justice, the snapshot provided in appendix 1 shows a greater concentration of agencies active in policing and judicial assistance compared to prisons. The difficulty currently faced by the state-level Ministry of Justice in attracting donor funds to construct a €15 million prison can be

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contrasted to set up and running costs for the EUPM of €35.7 million in its first year, this figure excluding salary costs of seconded officers. Chronologically, policing was the privileged sector, emerging as a central focus of international intervention in the Dayton accords which supported the creation of an International Police Task Force (IPTF). Throughout the post-war period, there has been sustained and significant involvement of mainstream international civilian bodies in police reform, first under the auspices of the UN and subsequently the EU, both missions coordinating closely with OHR. Lustration procedures, in the form of the UN certification procedures for officers preceded review and reappointment procedures for judges and prosecutors, while no large scale scrutiny of prison personnel has taken place. It is in the area of policing that we see the first development of active state-level capacity in criminal justice in the form of the SBS. While the UN IPTF mandate included monitoring courts, it was not fully implemented and courts did not receive the international community's full attention until 1998 when the UN Judicial Systems Assessment Programme commenced. As this programme drew to a close in 2000, OHR activity in the field of judicial reform picked up, resulting in the establishment of a state-level court, the development of new criminal procedures, and attempts to ensure judges and prosecutors were suited to their posts in terms of professional qualifications and political independence.

In contrast to these two areas, the mainstream international civilian involvement in prisons was late to emerge and was less intensive when implemented. Among mainstream bodies, little attention has been given to improving conditions in entity level custodial institutions. The development of a small pre-trial detention unit and support for planning a full state-level prison are the primary products of OHR and Office of the Registrar involvement in the sector, the construction of the proposed state-level prison now depending on the ability of the Ministry of Justice to generate sufficient funds from donors and state revenues. Notably, while there have been significant attempts at lustration in relation to the police, through the UN IPTF certification process, and of judges and prosecutors through successive processes of review and reappointment, similar procedures have not been implemented in relation to personnel in prisons. While the ICTY evidence base for abuse of human rights in BiH's prisons during the course of the war is weaker than the evidence of police participation in such crimes, it still points to a significant area of concern.

Following a timetable of reforms and attempted reforms, it is again in relation to the police that the first departure from the pattern of mainstream international intervention in criminal

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justice described above takes place. Through the OHR sponsored Police Restructuring Commission, and with the strong backing of the European Union, the entities of BiH are being urged to give up some of their competencies in the area of policing and to transfer overall control of policing to the state-level Ministry of Security. Unlike earlier reforms, the High Representative has yet to show any inclination to use the 'Bonn powers' to enforce the necessary legislative changes. Indeed as the Dayton agreement explicitly placed policing competencies with the entities, the High Representative would, by enacting any legislation to shift these to state-level, be exceeding the Office's mandate to assist the parties in the implementation of the Dayton accords. Thus the reform is left in the hands of domestic institutions, in particular the domestic legislatures and executives. After a difficult period in the summer of 2005 during which disputes over boundaries seemed to derail progress, further advances seem stymied by the strong showing of the Alliance of Independent Social Democrats (SNSD) in elections to the RSNA in late 2006 after a campaign which included an explicit rejection of the removal of policing competencies to state-level institutions. The limits of the Bonn powers do not leave the international community in BiH entirely without leverage, and the binding together of requirements for police reform with progress towards closer association with the EU has been used to attempt to overcome selective domestic resistance to a robust state-level role in policing, an issue to be revisited in a subsequent section on the working methods of the international community.

Accounting for priorities

The initial focus on policing is understandable, particularly in the context of a desire to create the conditions necessary for sustainable returns of displaced populations and the consolidation of a fledgling democracy. The UN challenge to police on the Inter Entity Boundary Line (1997), rebukes following police behaviour in Mostar during a Bajram march (1998), investigative failures in Drvar (1998) and a failure to maintain order and protect civilians in Banja Luka at the laying of the foundation stone for the reconstruction of the Ferhadija mosque (2001) all highlight concerns held by the international community with regards to the capacity and willingness of police to protect groups forming a minority in particular entities and cantons, and exercising basic rights such as freedom of conscience, assembly and movement. The international community has clearly located the public police service at the heart of providing citizen security. Yet as seen in chapter 6, during the war and post-war period, state police forces have all too often taken on the roles of 'partisan' and 'bully' as described by Loader and Walker (2006) in their survey of critiques of the state. Therefore,

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much of the work of the international community in BiH took the form of creating distance between contemporary policing bodies and those past actions: purging police personnel; introducing human rights training; acting as a neutral monitor and highlighting partisanship; and even restructuring in ways which shift control over policing away from entities and cantons where local ethno-politics may prevail to the state-level bodies where power-sharing takes place. Yet it would be naïve to suggest that the focus of international agencies is entirely on the pressing security needs of the population of post war BiH. Comments coming from Senior EU representatives such as Javier Solana and Chris Patten highlight the “self-interested generosity” that one interviewee highlighted (chapter 7). The EU clearly has a strong interest in supporting the State Border Service in BiH, to create further barriers to the kinds of criminal flows that EU security policy concerns itself with: drugs, arms, people, and stolen vehicles. As such the EU could be seen to pursue a strategy of risk containment. The strong EU pressure for the centralisation of responsibility for policing in BiH is couched in terms of creating structures to allow for coherent and effective policing within BiH, and may be interpreted as risk management. Finally, the Commission’s strong preference for a single interlocutor, able to commit police institutions in BiH to joint actions with the EU and other partners suggests risk sharing behaviour.

Of the criminal justice sectors agencies examined, the police are the most visible as providers of security; the desire to create a stable environment for state-building, to contain wider security risks within the borders of BiH, and subsequently to address those and other Europe wide security risks alongside BiH demand police forces committed to service provision and professionalism. Arguably they also demand courts and prisons function with the same commitments. This calls for thinking in terms of a criminal justice system, drawing meaning from shared functions, as opposed to three separate sectors within an ill-defined field. The division between concepts of security and justice explored by Brodeur and Shearing, and highlighted in chapter 6 stands, but as a source of division between those services traditionally located under a Ministry of Security or of the Interior and those under a Ministry of Justice it may be overstated. The police are not exclusively concerned with security but contribute significantly to the justice function of the system through investigations and evidence gathering, and the execution of arrests and warrants. Likewise courts may stress both procedural and substantive justice as aspects of their overarching justice function, but sentencing principles of incapacitation, deterrence and rehabilitation all contribute to security and to citizens’ sense of security in different ways: placing restrictions on the movement and

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liberties of offenders; discouraging offending; and creating conditions where individual reoffending is less likely. By executing sentences, prisons support such principles.

The failure to engage fully with the courts from the earliest stages of peace, may, with the benefit of hindsight, be seen to have been an unfortunate mistake. The recent reflection on peace-keeping and peace-building missions by former High Representative Paddy Ashdown (2007) recognises this. The interlinked problems outlined in chapter 8 including fragmentation, politicisation and corruption, procedural problems and delays, and gaps in skills and material resources may have created a climate whereby economic and political corruption could continue with a damaging impact on the process of building a stable and sustainable state in BiH. When the heightened period of court restructuring and reform began, following reports from UNJSAP (see, for example 2000a-g) and heralded with the creation of a state-level court, one of the key roles for that court was to be the processing of cases of corruption among officials and politicians in common institutions at the state level. This recognises a need identified by the Peace Implementation Council, informed by the Venice Commission as early as 1998 (PIC 1998, Venice Commission 1998 a, b, see chapter 9). The role of prison reform in supporting state-building enterprises is less clear, although holes in a system may be exposed by inmates who find that being imprisoned need not act as a block on offending (see chapter 11). Nonetheless, if the exercise in question is not simply a case of state-building, but building a particular form of state, then prison reform may take on an important role.

Security, justice and building a liberal democratic state

As noted in chapter 5, the concept of the state is a broad one, encompassing the city state, the empire, authoritarian and democratic, and centralised and decentralised forms. When considering the inter-relationship between state-building and criminal justice reform it is important to recognise that the activity of state building is very rarely limited to putting in place or reconstructing the most fundamental elements of state, defined in chapter 5 as interconnected institutions, gathered around bodies for revenue generation, law-making and enforcement. Rather, the way in which these fundamentals are put into place will reflect a particular idea or set of ideas about the nature of the state that is desirable and feasible within a given context. The process of state-building in BiH has been geared towards creating a liberal democratic state, based upon principles of equality of citizens and rule of law; a substantive degree of decentralisation existed from the birth process of the nascent state with

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agreements on federalisation in Bosniak and Croat controlled territories in Washington in 1994 and on the primary role of the entities in governing at Dayton and Paris the following year. The following section will return to the theme of decentralisation, but first the role of criminal justice in building a liberal democratic state will be explored.

Chapters 6, 8 and 10 each commenced by considering the role that the specific criminal justice sectors play in the state, and moreover, sought to relate this to democratic state forms. Thus the analysis of the relationship between broader democratic principles and policing in democratic states by Jones and others (Jones 1995, 2003; Jones et al 1994, 1996) was drawn upon to show how the coercive powers enjoyed by the police necessitated a set of governing principles to ensure that these did not interfere with citizens' legitimate participation in, and expectations of, a democratic society: equity, delivery of service, responsiveness, distribution of power, information, redress, and participation. Arguably, the coercive power enjoyed by the police is not unique to that sector alone; rather it is woven throughout the fabric of the entire criminal justice system, and depends upon other elements of that system for its legitimacy. Chapter 8 highlighted the 'chain of legitimation' observed by Bourdieu (2002) and giving the criminal courts a pivotal position in the criminal justice system, and courts more generally a pivotal position in state and society. Indeed the courts can be seen to function as the overseers and guarantors of the rule of law, whether in their constitutional, criminal, civil or family divisions. From this stems the importance of the independence of the courts from a range of partisan interests, and restructuring and reappointment has been geared towards securing that independence, particularly from politicians. The cases cited in chapter 9 show that the new state-level court in BiH has begun to examine a number of cases whereby high-ranking politicians have been implicated in criminal acts which could have been detrimental to BiH financially (*Prosecutor v Čović* 2006; *Prosecutor v Prce* 2004) or in terms of the integrity of the state and its sub-units (*Prosecutor v Prce* 2006). The closed and hidden nature of prisons makes it difficult to stake the same claim to centrality on behalf of prisons. Nonetheless, in a liberal state grounded on principles of human rights and rule of law, the means and procedures by which penal objectives are pursued are important and the treatment received by prisoners, made vulnerable through the loss of liberties and their low visibility, can indicate a commitment to those foundational principles. While noting this, and observing the inclusion of the European Convention of Human Rights (ECHR) into BiH's constitution, illiberal elements were observed in mixed penal trends in other states governed by the ECHR with or without longstanding legislation to protect rights (chapter 10). Moreover, where

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criminal justice sectors are understood as a system, the overall functionality of that system draws on the functionality of individual elements.

Capacity building and polity building: institutions of state and state-level institutions

As part of the overall set of international interventions in BiH, two interlinked processes can be described. On a general level there is a process of capacity building taking place whereby international institutions work alongside, through, and sometimes against existing institutions at state-, entity- and cantonal-level, while remaining within the framework that those institutions provide. The work of DFID with police in Prijedor and Žepče, the work of the Council of Europe with entity prison systems, UN work with entity and cantonal police forces, and the review and reappointment of judicial and prosecutorial personnel all fit into this category. Taken alone, these reform efforts can be seen as part of a broader effort, matched by work in other sectors, to reconstruct BiH as a liberal democratic state, under the rule of law, with an independent judiciary, and operating in a framework of human rights; this could be taken to incorporate much of the work presented in chapters 7, 9 and 11. A second strand is apparent from 2000 onwards as the ongoing work with entity and cantonal level criminal justice bodies was supplemented with the development of a number of new state-level organs under the control of the state Presidency and Council of Ministers: the State Border Service and then the Court of BiH in 2000, the State Information and Protection Agency in 2001, renamed and reinvigorated in 2004 as the State Investigation and Protection Agency, and in 2005 the state-level detention unit, serving the criminal panels of the Court of BiH, which had commenced operating in 2003. Indeed there were those among the international community who saw that a programme of state building in BiH was not about building capacity across all state institutions in the broadest sense of the term (Copp 1999), rather that it was about developing and reinforcing state-level institutions (INT 14); it was about building up BiH and its shared institutions as a polity, not just about creating enhanced criminal justice capacities within the country and under the authority of the various levels of government. The fragmentation of authority reflected in the various levels of government and administration developed in BiH at, and subsequent to, peace settlements at Washington and Dayton was seen to be unsustainable in a relatively small and poor state. Judged against this background, the development of *new* and *distinct* state-level institutions runs counter to one line of international community discourse in BiH by adding new pieces to the fragmented picture of governance and criminal justice provision in the country. Were these new

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institutions viewed as stepping stones to the integration of all criminal justice services under state level ministerial oversight, this contradiction disappears.

Developments in police restructuring, noted above and in chapter 7, highlighting a new or emergent direction in criminal justice reform projects, suggest that this is indeed the aim of the international community in BiH, particularly as represented by the OHR and EU. Yet already at the end of the fieldwork phase in the summer of 2005 it was clear that efforts to draw all public police services in BiH under the control of one state-level ministry were running into trouble, particularly over the issue of policing areas which cut across the existing inter-entity boundary line. The strong showing of SNSD at elections in 2006 in RS, where they came close to achieving an absolute majority in the National Assembly, followed a campaign position explicitly opposed to state-level oversight of policing. And it is Republika Srpska that is the real sticking point with regard to the police reforms advocated by the EU and OHR. At this point it is worth considering the fact that capacity building and polity building exercises do not take place in a vacuum, and the immediate political and historical context in Republika Srpska is vastly different from that of the Federation of Bosnia and Herzegovina. Even prior to BiH's declaration of independence and the subsequent hostilities, SDS plans were in place to establish a separate Serb ministerial structure (*Prosecutor v Krajišnik* 2006, see chapter 2). During the war, it was possible for Republika Srpska to develop into a unitary state-like entity with its own legislature, executive and judiciary, and bodies commonly associated with state monopolies on the legitimate use of force. Regardless of the position taken on the legitimacy of this entity formed through a process of violent conflict, it still represents a concrete set of political institutions. Those institutions in RS are on a firmer footing than their counterparts in the federal structures of FBiH. Here the uneasy coexistence of centrifugal forces, which saw the entity close to division around events such as the Mostar "gathering" and Croat National Assembly in 2001, with centripetal ambitions amongst those seeking the development of BiH as a whole into an integrated political community, have hindered the development of entity institutions up to and beyond the Dayton settlement. The intransigence experienced over attempts to strengthen the BiH polity at the expense of entities, primarily from within Republika Srpska, suggests that while capacity building as a general aim might be able to work towards functional criminal justice institutions and a functional, if not unitary state; where such efforts then become more explicitly geared at polity building at the level of central state institutions, it is clear that the threat this represents to existing state-like bodies at other levels will trigger resistance. This

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supports Bayley's (1995) observation on the importance of state-formation to criminal justice structures, in particular policing (chapter 7).

The three criminal justice sectors, defined as a system, clearly have an important role in state-building, whether understood as the creation or recreation of functional institutions at any level of a given state, or the creation of a more unitary state than currently exists in BiH. Moreover, as the state-building project develops, it creates specific demands on the shape that criminal justice reforms take. The following section brings the thesis to a close by examining the working methods of the different agencies engaged in such projects, looking at how they pursue their ends and how this might relate to a range of resources available to them, and where they draw their reform plans from, returning to themes of policy transfer explored in chapters 4, 9 and 11.

Working methods

Resources: money, power, legitimacy

The thesis has presented the work of different international agencies in BiH across different sectors, focusing on a range of core-civilian missions clustered around the Office of the High Representative, and also on other bodies such as the Council of Europe and the UK Department for International Development (DFID). Each of these bodies commands or maintains a range of different resources, and this influences their working methods accordingly. This section will draw on the findings of the previous six chapters to discuss these resources in terms of financial support, power and legitimacy, and to explore their impact on the way in which international agencies interact with their partners in BiH.

Financial resources

The mainstream international civilian missions draw on a wide donor community and have the financial backing to deploy large numbers of personnel in BiH. The case of the EUPM has been cited already; the OHR has, at the time of writing, maintained a significant presence in the country for nearly 12 years, and while scaling down, still has an annual budget of €6.6 million and 250 staff (OHR 2006b). As multilateral reform efforts, these are bodies capable of drawing on a wide range of sources for financial support and can be contrasted with a bilateral aid agency such as DFID. The impact that this has on the work of the different agencies can be seen in relation to policing in particular, where subsequent UN and EU missions, coordinated through the OHR, could tackle policing on a countrywide basis, and

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could look to develop new state-level policing capacity over time. DFID has sought to focus its efforts at a local level, piloting projects in community policing in two particular municipalities where the history of conflict has suggested that they will face their greatest challenge. In the case of success, such models can be used to advocate broader processes of change. Nonetheless, in a field where major interventions are taking place with a view to amending the fundamental structures of policing, there is a real risk that such small scale projects fail to have a lasting impact. However, differences in financial resources exist between mainstream interventions in different sectors as well as between mainstream and non-mainstream agencies. The experience of the Office of the Registrar in trying to attract sufficient donors in order to commence construction of a new state-level prison shows that funding is by no means guaranteed for projects emerging from OHR and its offshoots. There is a question here as to how much of a priority prisons are perceived to be by the international community. It has already been seen in the preceding section that mainstream agencies were relatively late in turning their attention to prisons. The difficulty in attracting funding likewise suggests that the prisons sector is a low priority in spite of a general awareness, domestically and among international bodies, of the pressing problems and challenges facing the prison sector in BiH including selective overcrowding, poor conditions and security issues.

Power resources

The financial resources that separate OHR and associated multilateral missions from more minor and bilateral agencies are mirrored in terms of power resources. As seen throughout chapters 7 and 9 in particular, the Office of the High Representative has had, since 1997, executive power in Bosnia and Herzegovina, drawn from the decision of the multinational Peace Implementation Council. This power has been used extensively, excluding individuals from public appointments and elected office, introducing new legislation, establishing and then amending new bodies, particularly at the state-level, and creating commissions to explore further changes in the framework of the police (PRC, see chapter 7), judiciary (see chapter 9), and beyond the scope of the current project, the military. In addition to direct executive power, the European Union can serve as a source of 'soft power', a degree of leverage exercised by an organisation with which BiH seeks closer association. The EU has been a driving force in recent efforts to restructure the police. Nonetheless, in the face of domestic contradictions whereby a desire for closer association coexists with the electoral success of a party in RS standing against the preconditions for association, it is difficult to assess the likely

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outcome. Where such power resources are not available, organisations such as the Council of Europe and DFID have had to find other ways of working, focusing on partnership models, and through the Committee for Prevention of Torture, through a model of oversight. These models depend very much on the legitimacy enjoyed by the different agencies, as explored in the subsection, below.

Legitimacy

The power resources of the OHR and leverage of other organisations may stem in part from differences in sources of, and ways of maintaining, legitimacy, highlighted earlier as “the moral authority to govern” (Copp 1999: 4) and applied across a range of bodies contributing to governance of criminal justice in BiH. The Office of the High Representative draws its legitimacy from the provisions of the General Framework Agreement for Peace (GFAP), signed by representatives of the wartime Bosnian government, and on behalf of BiH’s Croat and Serb population by the leaders of Croatia, Franjo Tuđman, and Serbia, Slobodan Milošević. The power to make executive decisions and to introduce legislation in BiH is grounded in further decisions by the UN and the Peace Implementation Council, representing a broad range of individual countries and multinational bodies such as the EU and Organisation of Islamic Countries (OIC). This combination of domestic consensus from governing bodies in BiH, and at Dayton, around BiH, with multilateral support also underpins the power enjoyed by the UN in relation to certifying police officers as fit for service. At the same time, the GFAP does not give the High Representative unlimited power, and in spite of strongly advocating police restructuring, in partnership with the EU, the High Representative would arguably be overstepping the bounds of his Dayton and Bonn powers were he to enforce legislation creating the single policing framework proposed by the Police Restructuring Commission. This redistribution of power between entity- and state- levels of government would run counter to the provisions of article III of the GFAP, which outlines the remit of the common institutions, the expansion of which requires the consent of entity governments with whom remaining competencies remain by default.

For a bilateral agency such as DFID, there was no basis for legitimacy to be found in treaty, law or in the support of an international coalition. As such a significant part of the work explored in chapters 7 and 11 consisted of working in the capacity of consultants and building relationships with government agencies as clients. As DFID worked primarily through a professional consultancy body, Atos, this was in line with an established operational model.

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Those interviewees working with DFID stressed the importance of local personnel to maintaining legitimacy in the eyes of the domestic community. This was not unique to DFID and various agencies have undergone processes of ‘nationalisation’ where jobs are increasingly open to domestic candidates, or in the case of the Office of the Registrar, have incorporated a clear transition plan from their inception, whereby all posts are ultimately occupied by domestic employees.

The different sources of legitimacy, in particular a broad international community, and the instruments and treaties they sponsor, and a local elite audience in the criminal justice agencies with and through whom international agencies have worked suggests different audiences that play an important part in constructing legitimacy; as stated in chapter five, an increase in legitimacy in the eyes of one set of actors may diminish perceptions of legitimacy elsewhere. These complexities and contradictions have been highlighted at moments when substantial bodies of domestic opinion in BiH have diverged from that of the international community and its representatives. The crisis around the Mostar gathering and Croat National Assembly is one such example; currently more pressing is the status of the Inter-Entity Boundary Line as a definitive border in policing terms. The agencies outside the core of civilian implementation of the GFAP, such as the Council of Europe and DFID, work through elected bodies in order to influence policy. Therefore any influence they have is ultimately subject to some electoral mechanism for granting or withdrawing the consent of a general public in BiH. This facility does not exist with regards to the decisions of the OHR, yet arguably through the intensive and extensive intervention of OHR, particularly through removals of police personnel, amendments to state level policing bodies, the introduction of a state-level court and the wholesale reform of criminal procedure, it is the Office of the High Representative and associated bodies that have had the greatest impact on the criminal justice system in BiH. There is a certain, but perhaps unavoidable, irony in a democratic state-building exercise performing without mechanisms for democratic delivery or denial of consent.

Policy transfer and lesson drawing

The drawing together of international personnel in one policy making context could be seen as a possible catalyst for lesson drawing and policy transfer. Without the kind of previous assumptions of transfer utilised by Jones and Newburn in their 2007 study, it has not been possible to utilise the current study to test particular claims of transfer other than where they

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may have emerged during the course of the research. One such emerging claim was that of the Americanisation of the Bosnian criminal procedure, particularly in codes adopted in Brčko in 2000 and across the rest of the country in 2003 (chapter 9). It has also been possible in relation to prisons to enter in to a discussion of the potential for transfer (chapter 11), where elements exist that might facilitate transfer, based on assumptions drawn from Dolowitz and Marsh regarding agents for transfer (1996, 2000). While international aid and assistance to BiH may have brought numerous potential agents for transfer into the country, the multitude of nations represented within the international community suggests that the process of policy learning is complicated in these circumstances: the first efforts of OHR to convene a large group of international and domestic experts to formulate a criminal procedure for state-level institutions explored various models, but was unable to compromise on a satisfactory compromise. The second attempt consisted of a smaller group of domestic academics and personnel, who then consulted international experts, and were able to produce a draft that the High Representative was then able to impose. Moreover, a simple line cannot be drawn between the country of origin of a particular expert and the model they advocate, even though respondents in the field sought to suggest that this was so. The case of US lawyer Michael Karnavas, chair of the Brčko Law Revision Commission, and the first adversarial code to be introduced into BiH showed that inspiration was drawn from Germany and Sweden, while particular rules were drawn from existing Bosnian legislation and from the international tribunal at The Hague. Thus while a large international presence may facilitate the exchange of policy ideas and models, it may in turn create a dynamic and multi-dimensional version of lesson drawing where policy and laws are not transferred or transplanted from one particular source country, but in which the local is merged with various different models according to perceived needs and available resources. The terminology of lesson drawing seems far more appropriate to this process than that of transfer or transplant.

Afterword

The extent to which BiH could be described as a post-conflict society in 2000 and 2001 when the seeds of this project were planted can be debated. While it had certainly entered a period in which armed conflict between government troops had ceased, events suggested that conflict was still present. The events surrounding attempts of Bosniaks to rebuild the Ferhadija mosque in Banja Luka and the extra-constitutional attempts by HDZ politicians to create a third Croat entity are two of the more dramatic illustrative examples. The five years from 2000 to the close of fieldwork in 2005 have seen numerous important developments in criminal justice, including the growth of state-level provision, lustration processes geared towards addressing the risk of unreformed services and ongoing scope for political interference. The current time is a frustrating one in which to draw to a close the current project, on account of ongoing developments in criminal justice and politics in BiH: the negotiations for a Stabilisation and Association Agreement with the European Union continue, suggesting that hope has not been given up that conditions on police reform, on which the agreement is contingent, will be met; the long-running problem of secure psychiatric detention was the subject of optimistic comments in one of the last Council of Europe interviews; while the future of state-level detention capacity remains dependent on the generation of funds; a new High Representative. Along with the excitement of studying contemporary developments, and the insights gained by speaking with those engaged with them on a day to day basis, comes the challenge of knowing when to draw a line and to pull together a disparate array of sources, interviews and experiences into something meaningful. That decision is contingent on a range of factors, often more practical than intellectual in origin. The line drawn, the findings presented, I look forward to taking the next steps beyond the line.

A1. Criminal justice reform agencies

Appendix 1 Criminal justice reform agencies

Table A1.1 Organisations active in criminal justice reform, August 2001

| | Policing | Courts | Prisons |
|--|-----------|-----------|----------|
| Canadian International Development Agency (CIDA) | ✓ | ✓ | |
| Council of Europe | | ✓ | ✓ |
| Customs and Fiscal Assistance Office (EU) | ✓ | | |
| Department for International Development (DFID) | ✓ | ✓ | ✓ |
| Deutsche Stiftung für internationale rechtliche Zusammenarbeit (IRZ) | | ✓ | |
| EU Police Mission | ✓ | ✓ | |
| European Commission | ✓ | ✓ | |
| High Judicial and Prosecutorial Council | | ✓ | |
| International Organisation for Migration | ✓ | | |
| Office of the High Representative (OHR) | ✓ | ✓ | ✓ |
| Open Society Fund | | ✓ | |
| OSCE | | ✓ | ✓ |
| Save the Children UK | ✓ | | |
| Swedish International Development Agency (SIDA) | ✓ | | |
| UN Development Programme | | ✓ | |
| UN High Commissioner for Refugees | ✓ | ✓ | |
| UN Office of the High Commissioner for Human Rights | ✓ | ✓ | |
| UNICEF | ✓ | ✓ | |
| US Department of Justice | ✓ | ✓ | |
| USAID | | ✓ | |
| Count | 13 | 16 | 4 |

Adapted from OHR Excel files, August 2004, provided in personal communication.

Appendix 2 Population data

The data used to produce map 2.2, which shows the distribution of ethnic majorities in the 109 pre-war municipalities of Bosnia and Herzegovina in 1991 are shown below. It has been difficult to find one complete and reliable source for the distribution of population in BiH, and so these data are not drawn exclusively from one source. The majority of data are drawn directly from a publication by from the Ministry of Human Rights and Refugees (MHRR 2005). However, as the data presented in that document are divided by current municipal boundaries, and a number of boundaries were altered as a result of the war or subsequent administrative changes, the population figures needed to be worked back to 1991 boundaries. Moreover, the sum of populations on a municipal level does not match overall totals as printed in the Ministry's report. Figures included in the judgment of *Prosecutor v Krajišnik* for cover 35 of the 109 municipalities, and were used as a check and as a means of working figures back from current municipal boundaries. A further source is an unattributed listing by municipality on Wikipedia (*Popis stanovništva* 2007), which matches the figures found in *Prosecutor v Krajišnik*, in unchanged municipalities in the Ministry's report and the printed totals for BiH in the Ministry's report. By comparing the three sources together it was possible to establish that, in the case of the Federation of Bosnia and Herzegovina came from missing data in the Konjic and Mostar municipalities. In the case of the discrepancy in RS it was not possible to locate the source, and so 11 municipalities which border each other in North and East Bosnia could not be worked back to 1991 figures in the same way (Doboj, Tešanj, Maglaj, Žepče, Zavidovići, Lukavac, Tuzla, Olovo, Kladanj, Vlasenica and Han Pijesak); as such, these are not broken down to show how they are made up in terms of today's municipalities. Figures are drawn from *Prosecutor v Krajišnik* for Doboj and Vlasenica, while the remainder, with the exception of Zavidovići, have been checked against a UN report (Bassiouni et al. 1994: Annex VIII), to ensure that there is no difference that would be material to the presentation of the data in map form. In the case of Zavidovići, no independent corroboration of the Wikipedia figure has been found, but given the congruence of the Wikipedia data and other official sources in other respects, this one figure has been included nonetheless.

Table A2.1 Population by ethnic/national category in Bosnia and Herzegovina 1991

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|--------|------|---------|------|--------------------|------|---------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Banja Luka | 28,558 | 14.6 | 29,026 | 14.8 | 106,826 | 54.6 | 31,282 | 16.0 | 195,692 | |
| Banovići | 19,162 | 72.1 | 550 | 2.1 | 4,514 | 17.0 | 2,364 | 8.9 | 26,590 | |
| Bihac | 46,737 | 66.1 | 5,580 | 7.9 | 12,689 | 17.9 | 5,726 | 8.1 | 70,732 | |
| - Bihac | 46,737 | | 5,580 | | 12,689 | | 5,726 | | 70,732 | |
| Bijeljina | 30,229 | 31.2 | 492 | 0.5 | 57,389 | 59.2 | 8,878 | 9.2 | 96,988 | |
| Bileća | 1,947 | 14.7 | 39 | 0.3 | 10,628 | 80.0 | 670 | 5.0 | 13,284 | |
| Bosanska Dubica (Kozarska Dubica) | 6,440 | 20.4 | 488 | 1.5 | 21,728 | 68.7 | 2,950 | 9.3 | 31,606 | |
| Bosanska Gradiska | 15,851 | 26.4 | 3,417 | 5.7 | 35,753 | 59.6 | 4,953 | 8.3 | 59,974 | |
| Bosanska Krupa | 43,104 | 73.9 | 139 | 0.2 | 13,841 | 23.7 | 1,236 | 2.1 | 58,320 | |
| - Bosanska Krupa | 26,362 | | 129 | | 11,053 | | 1,060 | | 38,604 | |
| - Bužim | 16,680 | | 5 | | 91 | | 164 | | 16,940 | |
| - Krupa na Uni | 62 | | 5 | | 2,697 | | 12 | | 2,776 | |
| Bosanski Brod | 4,088 | 12.0 | 13,993 | 41.0 | 11,389 | 33.4 | 4,668 | 13.7 | 34,138 | |
| - Bosanski Brod | 4,087 | | 13,986 | | 11,105 | | 4,601 | | 33,779 | |
| - Odžak/Vukosavlje | 1 | | 7 | | 284 | | 67 | | 359 | |
| Bosanski Novi | 14,040 | 33.7 | 403 | 1.0 | 25,101 | 60.2 | 2,121 | 5.1 | 41,665 | |
| Bosanski Petrovac | 3,288 | 21.0 | 48 | 0.3 | 11,694 | 74.9 | 591 | 3.8 | 15,621 | |
| - Bosanski Petrovac | 3,288 | | 46 | | 11,322 | | 590 | | 15,246 | |
| - Petrovac | | | 2 | | 372 | | 1 | | 375 | |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|--------|------|--------|------|--------------------|-----|--------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Bosanski Šamac | 2,233 | 6.8 | 14,731 | 44.7 | 13,628 | 41.3 | 2,368 | 7.2 | 32,960 | |
| - Odžak/Vukosavlje | 3 | | 1,144 | | 31 | | 115 | | 1,293 | |
| - Šamac | 2,223 | | 7,456 | | 13,307 | | 2,129 | | 25,115 | |
| - Šamac-Domaljevac | 7 | | 6,131 | | 290 | | 124 | | 6,552 | |
| Bosansko Grahovo | 12 | 0.1 | 226 | 2.7 | 7,888 | 94.9 | 185 | 2.2 | 8,311 | |
| Bratunac | 21,535 | 64.1 | 40 | 0.1 | 11,475 | 34.1 | 569 | 1.7 | 33,619 | |
| Brčko | 38,617 | 44.1 | 22,252 | 25.4 | 18,128 | 20.7 | 8,630 | 9.8 | 87,627 | |
| Breza | 13,079 | 75.5 | 851 | 4.9 | 2,122 | 12.3 | 1,265 | 7.3 | 17,317 | |
| Bugojno | 19,697 | 42.0 | 16,031 | 34.2 | 8,673 | 18.5 | 2,488 | 5.3 | 46,889 | |
| Busovača | 8,451 | 44.8 | 9,093 | 48.2 | 623 | 3.3 | 712 | 3.8 | 18,879 | |
| Čajniče | 4,024 | 44.9 | 5 | 0.1 | 4,709 | 52.6 | 218 | 2.4 | 8,956 | |
| Čapljina | 7,672 | 27.5 | 14,969 | 53.7 | 3,753 | 13.5 | 1,488 | 5.3 | 27,882 | |
| Cazin | 61,693 | 97.3 | 139 | 0.2 | 778 | 1.2 | 799 | 1.3 | 63,409 | |
| Čelinac | 1,446 | 7.7 | 76 | 0.4 | 16,554 | 88.5 | 637 | 3.4 | 18,713 | |
| Čitluk | 111 | 0.7 | 14,823 | 98.3 | 19 | 0.1 | 130 | 0.9 | 15,083 | |
| Derвента | 7,086 | 12.5 | 21,952 | 38.9 | 22,938 | 40.6 | 4,513 | 8.0 | 56,489 | |
| Donji Vakuf | 13,509 | 55.0 | 662 | 2.8 | 9,533 | 38.8 | 820 | 3.3 | 24,544 | |
| - Donji Vakuf | 13,509 | | 662 | | 9,364 | | 817 | | 24,372 | |
| - Travnik | | | | | 169 | | 3 | | 172 | |

| Municipality (1991) | Bosniak/Muslim | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|------------------------------------|----------------|-------|--------|------|--------|--------------------|-------|-------|--------|
| | | N | % | N | % | N | % | | |
| - new municipalities (where split) | | | | | | | | | |
| Drvar | 33 | 0.2 | 33 | 0.2 | 16,608 | 97.0 | 452 | 2.6 | 17,126 |
| - Bihac | 3 | | 2 | | 1,702 | | 15 | | 1,722 |
| - Drvar | 29 | | 31 | | 14,846 | | 437 | | 15,343 |
| - Istočni Drvar | 1 | | | | 60 | | | | 61 |
| Foča | 20,790 | 51.3 | 94 | 0.2 | 18,315 | 45.2 | 1,314 | 3.2 | 40,513 |
| - Foča (RS)/Foča-Ustikolina (FBiH) | 20,790 | | 94 | | 18,315 | | 1,314 | | 40,513 |
| Fojnica | 8,024 | 49.2 | 6,623 | 40.6 | 157 | 1.0 | 1,492 | 9.2 | 16,296 |
| Gacko | 3,858 | 35.8 | 29 | 0.3 | 6,661 | 61.7 | 240 | 2.2 | 10,788 |
| Glamoč | 2,257 | 17.9 | 184 | 1.5 | 9,951 | 79.0 | 201 | 1.6 | 12,593 |
| Goražde | 26,296 | 70.0 | 80 | 0.2 | 9,843 | 26.2 | 1,354 | 3.6 | 37,573 |
| - Goražde | 22,676 | | 76 | | 9,071 | | 1,282 | | 33,105 |
| - Ustiprača | 3,620 | | 4 | | 772 | | 72 | | 4,468 |
| Gornji Vakuf-Uskoplje | 14,063 | 55.8 | 10,706 | 42.5 | 110 | 0.4 | 302 | 1.2 | 25,181 |
| Gračanica | 42,599 | 72.0 | 132 | 0.2 | 13,558 | 22.9 | 2,845 | 4.8 | 59,134 |
| - Gračanica | 42,518 | | 77 | | 2,817 | | 2,315 | | 47,727 |
| - Petrovo | 81 | | 55 | | 10,741 | | 530 | | 11,407 |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|--------|------|--------|------|--------------------|-----|--------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Gradacač | 33,856 | 59.8 | 8,613 | 15.2 | 11,221 | 19.8 | 2,891 | 5.1 | 56,581 | |
| - Gradacač | 33,838 | | 2,369 | | 3,544 | | 2,025 | | 41,776 | |
| - Pelagićevo | 18 | | 6,244 | | 7,677 | | 866 | | 14,805 | |
| Grude | 4 | 0.0 | 16,210 | 99.1 | 9 | 0.1 | 135 | 0.8 | 16,358 | |
| Iliđza (Sarajevo) | 29,337 | 43.2 | 6,934 | 10.2 | 25,029 | 36.8 | 6,637 | 9.8 | 67,937 | |
| - Sarajevo-Iliđza | 29,337 | | 6,934 | | 25,029 | | 6,637 | | 67,937 | |
| Ilijaš (Sarajevo) | 10,585 | 42.0 | 1,736 | 6.9 | 11,325 | 45.0 | 1,538 | 6.1 | 25,184 | |
| - Kasindo & Sarajevo-Iliđza | 423 | | | | 26 | | 2 | | 451 | |
| - Sarajevo-Ilijaš | 10,162 | | 1,736 | | 11,299 | | 1,536 | | 24,733 | |
| Jablanica | 9,099 | 71.7 | 2,291 | 18.1 | 504 | 4.0 | 797 | 6.3 | 12,691 | |
| Jajce | 17,380 | 38.6 | 15,811 | 35.1 | 8,663 | 19.2 | 3,153 | 7.0 | 45,007 | |
| - Jajce | 16,685 | | 15,691 | | 7,581 | | 3,093 | | 43,050 | |
| - Jezero | 695 | | 120 | | 1,082 | | 60 | | 1,957 | |
| Kakanj | 30,528 | 54.6 | 16,556 | 29.6 | 4,929 | 8.8 | 3,937 | 7.0 | 55,950 | |
| Kalesija | 33,137 | 79.3 | 35 | 0.1 | 7,659 | 18.3 | 978 | 2.3 | 41,809 | |
| - Kalesija | 29,334 | | 31 | | 4,042 | | 934 | | 34,341 | |
| - Osmaci | 3,803 | | 4 | | 3,617 | | 44 | | 7,468 | |

| Municipality (1991) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL |
|------------------------------------|----------------|------|--------|------|--------|------|--------------------|-----|--------|
| | N | % | N | % | N | % | N | % | |
| - new municipalities (where split) | | | | | | | | | |
| Kalinovik | 1,716 | 36.8 | 17 | 0.4 | 2,826 | 60.6 | 108 | 2.3 | 4,667 |
| - Foča (RS)/Foča-Ustikolina (FBiH) | 25 | | | | 9 | | | | 34 |
| - Kalinovik | 1,342 | | 17 | | 2,803 | | 104 | | 4,266 |
| - Konjic | 349 | | | | 14 | | 4 | | 367 |
| Kiseljak | 9,778 | 40.5 | 12,550 | 51.9 | 740 | 3.1 | 1,096 | 4.5 | 24,164 |
| Ključ | 17,696 | 47.3 | 330 | 0.9 | 18,506 | 49.5 | 859 | 2.3 | 37,391 |
| - Ključ | 17,636 | | 324 | | 9,862 | | 788 | | 28,610 |
| - Ribnik | 60 | | 6 | | 8,644 | | 71 | | 8,781 |
| Konjic | 23,815 | 54.3 | 11,513 | 26.2 | 6,620 | 15.1 | 1,930 | 4.4 | 43,878 |
| - Konjic | 23,287 | | 11,513 | | 6,595 | | 1,927 | | 43,322 |
| - Unattribued | 528 | | | | 25 | | 3 | | 556 |
| KotorVaroš | 11,090 | 30.1 | 10,695 | 29.0 | 14,056 | 38.1 | 1,012 | 2.7 | 36,853 |
| Kreševo | 1,531 | 22.7 | 4,714 | 70.0 | 34 | 0.5 | 452 | 6.7 | 6,731 |
| Kupres | 802 | 8.3 | 3,813 | 39.6 | 4,864 | 50.6 | 139 | 1.4 | 9,618 |
| - Kupres (FBiH) | 802 | | 3,812 | | 4,081 | | 131 | | 8,826 |
| - Kupres (RS) | | | 1 | | 783 | | 8 | | 792 |
| Laktaši | 408 | 1.4 | 2,565 | 8.6 | 24,176 | 81.0 | 2,683 | 9.0 | 29,832 |
| Livno | 5,793 | 14.3 | 29,324 | 72.2 | 3,913 | 9.6 | 1,570 | 3.9 | 40,600 |
| Ljubinje | 332 | 8.0 | 39 | 0.9 | 3,748 | 89.8 | 53 | 1.3 | 4,172 |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|--------|------|--------|------|--------------------|------|---------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Ljubuški | 1,592 | 5.6 | 26,127 | 92.2 | 65 | 0.2 | 556 | 2.0 | 28,340 | |
| Lopare | 11,990 | 36.9 | 1,263 | 3.9 | 18,243 | 56.1 | 1,041 | 3.2 | 32,537 | |
| - Lopare/Čelić | 11,990 | | 1,262 | | 18,030 | | 1,035 | | 32,317 | |
| - Ugljevik/Teočak | | | 1 | | 213 | | 6 | | 220 | |
| Modriča | 10,375 | 29.1 | 9,805 | 27.5 | 12,534 | 35.2 | 2,899 | 8.1 | 35,613 | |
| Mostar | 43,856 | 34.6 | 43,037 | 34.0 | 23,846 | 18.8 | 15,889 | 12.5 | 126,628 | |
| - Istočni Mostar | 299 | | 155 | | 95 | | 3 | | 552 | |
| - Mostar | 38,628 | | 32,592 | | 18,844 | | 11,863 | | 101,927 | |
| - Unattributed | 4,929 | | 10,290 | | 4,907 | | 4,023 | | 24,149 | |
| Mrkonjić Grad | 3,272 | 11.9 | 2,139 | 7.8 | 21,057 | 76.9 | 927 | 3.4 | 27,395 | |
| - Jajce | 930 | | 120 | | 1 | | 7 | | 1,058 | |
| - Mrkonjić Grad | 2,342 | | 2,019 | | 21,056 | | 920 | | 26,337 | |
| Neum | 190 | 4.4 | 3,792 | 87.7 | 207 | 4.8 | 136 | 3.1 | 4,325 | |
| Nevesinje | 3,313 | 22.9 | 210 | 1.5 | 10,711 | 74.1 | 214 | 1.5 | 14,448 | |
| - Konjic | 528 | | 17 | | 38 | | 3 | | 586 | |
| - Nevesinje | 2,785 | | 193 | | 10,673 | | 211 | | 13,862 | |
| Novi Grad (Sarajevo) | 69,430 | 50.8 | 8,889 | 6.5 | 37,591 | 27.5 | 20,706 | 15.2 | 136,616 | |
| - Lukavica (RS) & Novo Sarajevo (FBiH) | 440 | | 21 | | 397 | | 180 | | 1,038 | |
| - Sarajevo-Noví Grad | 68,990 | | 8,868 | | 37,194 | | 20,526 | | 135,578 | |
| Novi Travnik | 11,625 | 37.9 | 12,162 | 39.6 | 4,097 | 13.3 | 2,829 | 9.2 | 30,713 | |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL |
|---|----------------|------|--------|------|--------|------|--------------------|------|---------|
| | N | % | N | % | N | % | N | % | N |
| Novo Sarajevo (Sarajevo) | 33,902 | 35.7 | 8,798 | 9.3 | 32,899 | 34.6 | 19,490 | 20.5 | 95,089 |
| - Novo Sarajevo | 33,902 | | 8,798 | | 32,899 | | 19,490 | | 95,089 |
| Odžak | 6,220 | 20.7 | 16,338 | 54.4 | 5,667 | 18.9 | 1,831 | 6.1 | 30,056 |
| - Odžak/Vukosavlje | 6,220 | | 16,338 | | 5,667 | | 1,831 | | 30,056 |
| Orašje | 1,893 | 6.7 | 21,308 | 75.1 | 4,235 | 14.9 | 931 | 3.3 | 28,367 |
| - Donji Žabar | 14 | | 1,490 | | 2,636 | | 76 | | 4,216 |
| - Orašje | 1,879 | | 19,818 | | 1,599 | | 855 | | 24,151 |
| Pale (Sarajevo) | 4,364 | 26.7 | 129 | 0.8 | 11,284 | 69.0 | 578 | 3.5 | 16,355 |
| - Pale | 2,958 | | 125 | | 10,763 | | 562 | | 14,408 |
| - Pale-Prača | 1,406 | | 4 | | 521 | | 16 | | 1,947 |
| Posušje | 6 | 0.0 | 16,963 | 99.0 | 9 | 0.1 | 156 | 0.9 | 17,134 |
| Prijedor | 49,351 | 43.9 | 6,316 | 5.6 | 47,581 | 42.3 | 9,295 | 8.3 | 112,543 |
| Prijavaor | 7,143 | 15.2 | 1,721 | 3.7 | 33,508 | 71.2 | 4,683 | 10.0 | 47,055 |
| Prozor | 7,225 | 36.6 | 12,259 | 62.0 | 45 | 0.2 | 231 | 1.2 | 19,760 |
| Rogatica | 13,209 | 60.1 | 19 | 0.1 | 8,391 | 38.2 | 359 | 1.6 | 21,978 |
| - Pale-Prača | 22 | | | | 75 | | | | 97 |
| - Rogatica | 13,187 | | 19 | | 8,316 | | 359 | | 21,881 |
| Rudo | 3,130 | 27.1 | 5 | 0.0 | 8,150 | 70.4 | 286 | 2.5 | 11,571 |
| Sanski Most | 28,136 | 46.7 | 4,322 | 7.2 | 25,363 | 42.1 | 2,486 | 4.1 | 60,307 |
| - Oštra Luka | 295 | | 1,482 | | 3,263 | | 121 | | 5,161 |
| - Sanski Most | 27,841 | | 2,840 | | 22,100 | | 2,365 | | 55,146 |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|--------|------|--------|------|--------------------|------|--------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Sarajevo - Stari Grad | 39,410 | 77.7 | 1,126 | 2.2 | 5,150 | 10.1 | 5,058 | 10.0 | 50,744 | |
| - Istočni Stari Grad | 63 | | 4 | | 1,033 | | 12 | | 1,112 | |
| - Sarajevo - Stari Grad | 39,347 | | 1,122 | | 4,117 | | 5,046 | | 49,632 | |
| Sarajevo-Centar | 39,761 | 50.1 | 5,428 | 6.8 | 16,631 | 21.0 | 17,466 | 22.0 | 79,286 | |
| Sarajevo-Hadžići | 15,392 | 63.6 | 746 | 3.1 | 6,362 | 26.3 | 1,700 | 7.0 | 24,200 | |
| Sarajevo-Trnovo | 4,790 | 68.5 | 16 | 0.2 | 2,059 | 29.5 | 126 | 1.8 | 6,991 | |
| - Sarajevo-Trnovo | 2,703 | | 2 | | 663 | | 58 | | 3,426 | |
| - Trnovo (RS) | 2,087 | | 14 | | 1,396 | | 68 | | 3,565 | |
| Sarajevo-Vogošća | 12,499 | 50.7 | 1,071 | 4.3 | 8,813 | 35.8 | 2,264 | 9.2 | 24,647 | |
| Šekovići | 326 | 3.4 | 10 | 0.1 | 9,030 | 93.8 | 263 | 2.7 | 9,629 | |
| Šipovo | 2,965 | 19.0 | 31 | 0.2 | 12,333 | 79.2 | 250 | 1.6 | 15,579 | |
| ŠirokiBrijeg | 9 | 0.0 | 26,864 | 98.9 | 148 | 0.5 | 139 | 0.5 | 27,160 | |
| Skender Vakuf | 1,071 | 5.5 | 4,770 | 24.6 | 13,263 | 68.3 | 314 | 1.6 | 19,418 | |
| - Kneževo (RS)/Dobretići (FBiH) | 1,071 | | 4,770 | | 13,263 | | 314 | | 19,418 | |
| Sokolac | 4,493 | 30.2 | 19 | 0.1 | 10,195 | 68.5 | 176 | 1.2 | 14,883 | |
| Srbac | 940 | 4.3 | 140 | 0.6 | 19,382 | 88.7 | 1,378 | 6.3 | 21,840 | |
| Srebrenica | 27,572 | 75.2 | 38 | 0.1 | 8,315 | 22.7 | 741 | 2.0 | 36,666 | |
| Srebrenik | 30,528 | 74.6 | 2,752 | 6.7 | 5,308 | 13.0 | 2,308 | 5.6 | 40,896 | |
| Stolac | 8,101 | 43.4 | 6,188 | 33.1 | 3,917 | 21.0 | 475 | 2.5 | 18,681 | |
| - Berkovići | 715 | | 646 | | 2,111 | | 38 | | 3,510 | |
| - Stolac | 7,386 | | 5,542 | | 1,806 | | 437 | | 15,171 | |

| Municipality (1991) | - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---------------------|------------------------------------|----------------|------|--------|------|--------|------|--------------------|------|---------|---|
| | | N | % | N | % | N | % | N | % | N | % |
| Testić | | 12,802 | 21.4 | 9,525 | 15.9 | 32,962 | 55.1 | 4,565 | 7.6 | 59,854 | |
| - Testić | | 12,802 | | 9,525 | | 31,690 | | 4,555 | | 58,572 | |
| - Zenica | | | | | | 1,272 | | 10 | | 1,282 | |
| Tomislavgrad | | 3,148 | 10.5 | 25,976 | 86.6 | 576 | 1.9 | 309 | 1.0 | 30,009 | |
| Travnik | | 31,813 | 45.0 | 26,118 | 36.9 | 7,777 | 11.0 | 5,039 | 7.1 | 70,747 | |
| - Kneževo/Dobretići | | | | 173 | | 646 | | 10 | | 829 | |
| - Travnik | | 31,813 | | 25,945 | | 7,131 | | 5,029 | | 69,918 | |
| Trebinje | | 5,571 | 18.0 | 1,246 | 4.0 | 21,349 | 68.9 | 2,830 | 9.1 | 30,996 | |
| - Ravno | | 21 | | 800 | | 917 | | 33 | | 1,771 | |
| - Trebinje | | 5,550 | | 446 | | 20,432 | | 2,797 | | 29,225 | |
| Ugljevik | | 10,241 | 40.0 | 56 | 0.2 | 14,468 | 56.5 | 822 | 3.2 | 25,587 | |
| - Ugljevik/Teočak | | 10,241 | | 56 | | 14,468 | | 822 | | 25,587 | |
| Vareš | | 6,714 | 30.2 | 9,016 | 40.6 | 3,644 | 16.4 | 2,829 | 12.7 | 22,203 | |
| VelikaKladuša | | 48,305 | 91.3 | 740 | 1.4 | 2,266 | 4.3 | 1,597 | 3.0 | 52,908 | |
| Višegrad | | 13,471 | 63.5 | 32 | 0.2 | 6,743 | 31.8 | 953 | 4.5 | 21,199 | |
| Visoko | | 34,373 | 74.5 | 1,872 | 4.1 | 7,471 | 16.2 | 2,444 | 5.3 | 46,160 | |
| Vitez | | 11,514 | 41.3 | 12,675 | 45.5 | 1,501 | 5.4 | 2,169 | 7.8 | 27,859 | |
| Zenica | | 80,359 | 55.2 | 22,510 | 15.5 | 22,433 | 15.4 | 20,215 | 13.9 | 145,517 | |
| - Zenica | | 80,359 | | 22,510 | | 22,433 | | 20,215 | | 145,517 | |
| Živinice | | 44,017 | 80.3 | 3,976 | 7.3 | 3,525 | 6.4 | 3,265 | 6.0 | 54,783 | |

| Municipality (1991) - new municipalities (where split) | Bosniak/Muslim | | Croat | | Serb | | Yugoslav and other | | TOTAL | |
|---|----------------|------|---------|------|-----------|------|--------------------|------|-----------|---|
| | N | % | N | % | N | % | N | % | N | % |
| Zvornik | 48,102 | 59.2 | 122 | 0.2 | 30,863 | 38.0 | 2,208 | 2.7 | 81,295 | |
| - Sapna | 10,145 | | 15 | | 3,198 | | 142 | | 13,500 | |
| - Zvornik | 37,957 | | 107 | | 27,665 | | 2,066 | | 67,795 | |
| Doboj | 41,164 | 40.1 | 13,264 | 12.9 | 39,820 | 38.8 | 8,301 | 8.1 | 102,549 | |
| Han Pijesak | 2,543 | 40.1 | 7 | 0.1 | 3,674 | 57.9 | 124 | 2.0 | 6,348 | |
| Kladanj | 11,621 | 72.3 | 36 | 0.2 | 3,952 | 24.6 | 461 | 2.9 | 16,070 | |
| Lukavac | 38,080 | 66.7 | 2,159 | 3.8 | 12,169 | 21.3 | 4,662 | 8.2 | 57,070 | |
| Maglaj | 19,569 | 45.1 | 8,365 | 19.3 | 13,312 | 30.7 | 2,142 | 4.9 | 43,388 | |
| Olovo | 12,699 | 74.9 | 642 | 3.8 | 3,193 | 18.8 | 422 | 2.5 | 16,956 | |
| Tešanj | 34,941 | 72.1 | 8,929 | 18.4 | 3,071 | 6.3 | 1,539 | 3.2 | 48,480 | |
| Tuzla | 62,669 | 47.6 | 20,398 | 15.5 | 20,271 | 15.4 | 28,280 | 21.5 | 131,618 | |
| Vlasenica | 18,727 | 55.2 | 39 | 0.1 | 14,359 | 42.3 | 817 | 2.4 | 33,942 | |
| Zavidovići | 34,198 | 59.8 | 7,576 | 13.3 | 11,640 | 20.4 | 3,750 | 6.6 | 57,164 | |
| Žepče | 10,820 | 47.1 | 9,100 | 39.6 | 2,278 | 9.9 | 768 | 3.3 | 22,966 | |
| Total | 1,902,956 | 43.5 | 760,852 | 17.4 | 1,366,104 | 31.2 | 347,121 | 7.9 | 4,377,033 | |

Appendix 3 Meetings and interviews

Table A3.1 Meetings and interviews 2004-2005

| Name | Organisation | Location | Phase | Contacts |
|-------------------------------|--|------------|-------|----------|
| Branković, Nina | Registry of the State Court (Public Information) | Sarajevo | 3 | 1 |
| Cappelle, Pim | EUPM | Sarajevo | 3 | 1 |
| Chetwynd, Hugh | Council of Europe | Sarajevo | 1, 3 | 2 |
| Dedić, Alma | UNDP | Sarajevo | 3 | 1 |
| Donlon, Fidelma | Registry of the State Court | Sarajevo | 3 | 1 |
| Doyle, Michael | OHR | Sarajevo | 3 | 1 |
| Halilagić, Jusuf ¹ | State Ministry of Justice | Sarajevo | 3 | 1 |
| Hein, David | Registry of the State Court | Sarajevo | 3 | 1 |
| Hodžić, Refik | Registry of the State Court (Public Information) | Sarajevo | 3 | 1 |
| Horn, Chris | Atos/DFID (independent consultant) | Sarajevo | 3 | 1 |
| Houchin, Roger | Council of Europe (expert) | Sarajevo | 3 | 1 |
| Johnson, Michael | Registry of the State Court | Sarajevo | 3 | 2 |
| Jorstad, Hans Inge | Registry of the State Court (Detention) | Sarajevo | 3 | 1 |
| Macphail, Stephanie | IJC | Sarajevo | 1 | 1 |
| Milisić, Oleg | OHR (Press Office) | Sarajevo | 1, 3 | 2 |
| Miraščija, Mervan | OSF BiH | Sarajevo | 1 | 1 |
| Mustović, Mirsad | Registry of the State Court | Sarajevo | 3 | 1 |
| Nazou, Paraskevi | EC Delegation to BiH | Sarajevo | 3 | 1 |
| Neubauer, Laura | US State Department | Sarajevo | 1 | 1 |
| O'Malley, Michael | HJPC | Sarajevo | 1 | 1 |
| Orsini, Dominique | EUPM | Sarajevo | 3 | 1 |
| Paproski, Peter | CIDA | Sarajevo | 3 | 1 |
| Pedrick, Tom | Atos/DFID | Sarajevo | 1 | 1 |
| Roche, Ralph | EC Delegation to BiH | Sarajevo | 3 | 2 |
| Rose, Bridget | EUFOR | Sarajevo | 3 | 1 |
| Sarandrea, Lucio Valerio | OSCE | Banja Luka | 1 | 1 |
| Sheehan, Lynne | HJPC | Sarajevo | 3 | 1 |
| Sijerčić-Čolić, Hajrija | Faculty of Law, Sarajevo University | Sarajevo | 1 | 1 |
| Simmons, Malcolm | IJC, HJPC, State Court | Sarajevo | 1, 3 | 2 |
| Sinclair, Bill | Scottish Prison Service | Edinburgh | 2 | 1 |

¹ Conducted with interpretation from Mr Miroslav Strovlah, State Ministry of Justice, BiH.

A3. Meetings and interviews

| Name | Organisation | Location | Phase | Contacts |
|-------------------|---|-----------------|--------------|-----------------|
| Smith, Mark | Registry of the State Court (Detention) | Sarajevo | 3 | 1 |
| Sporer, Andreja | OHR (Legal Office) | Sarajevo | 1 | 1 |
| Traljić, Sead | Atos/DFID | Sarajevo | 1, 3 | 2 |
| Urke, Sven Marius | HJPC | Sarajevo | 3 | 1 |
| Vračić, Alida | ESI | Sarajevo | 3 | 1 |

Appendix 4 Sample interview prompt

Interviewee: Roger Houchin (Glasgow Caledonian University/Council of Europe Expert)

Location: Sarajevo/Ferhadija

Time and Date: 19:00, 21 June 2005

1. Where, when and how he became involved with Council of Europe and BiH.
2. Present role in BiH; extent of involvement.
3. Current state of prison systems in BiH: positives and negatives/needs.
4. Possible future directions for BiH prisons.
5. Experience of working alongside domestic authorities (state and entity level?).
6. European Standards in BiH/European Court of Human Rights.
7. Changes since 1st experience of BiH prisons.
8. Impact of Office of the Registrar

Appendix 5 Police advertising campaign ‘Staklo’ [Glass] (OHR 2005a)

The advertising campaign ran during the second period of fieldwork in 2005, and was reproduced on the OHR website. The following is a summary of one of two television adverts.

Armed uniformed police officers emerge from behind a railway wagon, calling to criminals in balaclavas. The criminals make scornful gestures, and the police continue their approach until stopped several metres short of their target by an invisible wall. The police struggle against the unseen obstacle

Voiceover: Policija u BiH je ograničena u kretanju [police in BiH are limited in their movement].

Voiceover: Tu situaciju koriste kriminalci [Criminals use this situation]

Cut to a blue background, the sound of braking glass is heard.

Voiceover: Granice za kriminalce, bez granica za policiju [Borders for criminals, without borders for police]

We return to the police officers who, assisted by heavily armed colleagues in SWAT style uniforms, are putting the criminals into a police car.

Voiceover: Jedinstvena policijska struktura u BiH [A single police structure in BiH].

Appendix 6 Prisons in Bosnia and Herzegovina

Table A6.1 Post-war prison estate in Bosnia and Herzegovina

| Institution | Entity | Construction/ Reconstruction | Purpose Built | If no, previous use | Capacity [occupancy -1998] | Work facilities (1998) |
|---------------------|--------|---------------------------------|-----------------|-------------------------------------|-------------------------------|---|
| Banja Luka | RS | 1970s | Yes | | 100/300 [85/189] | Furniture factory, metal work, mechanical workshop, prison bakery and kitchen. Work outside the prison in construction. |
| Bihac | FBIH | 1956, 1997 | repairs Yes | | 24/55 [40/8] | Domestic work only – plans to re-open economic unit. |
| Bijeljina | RS | Pre-1941 | No | Industrial complex to 1992 | 100/100 [42/97] | Farm complex and public restaurant. Others work for local firms and in prison workshops. |
| Busovača/ Kaonik | FBIH | Adapted war | during No | Ammunition store | 28/15 [5/12] | Domestic work only. |
| Doboj | RS | 1959, reconstruction 1986 | Yes | | 44/116 [17/36] | Agricultural work and employment with local firms. |
| Foča | RS | 1892, 1950 | adapted No | Military barracks | 900 [13/232] | Agricultural work, furniture factory, workshops, public restaurants; shops selling prison produce. |
| Mostar | FBIH | 1895, reconstruction | post-war Yes | | 70/120 [12/42] | Domestic work and economic unit. No education available. |

| Institution | Entity | Construction/ Reconstruction | Purpose Built | If no, previous use | Capacity [occupancy -1998] (Pre-trial/ Sentenced) | Work facilities (1998) |
|-------------|--------|--|---------------|------------------------|--|--|
| Orašje | FBiH | Adapted 1997 | No | Refuse depot | 15/10 [11/5] | Domestic work only. |
| Sarajevo | FBiH | 1912, reconstruction 1975 & 1986 | Yes | | 140/60 [75/55] | Work available outside the prison and domestically. |
| Kula | RS | 1967, reconstruction 1986 | Yes | | 100/200 [19/61] | Agricultural work, public restaurant, construction group, repairs and other domestic tasks. |
| Trebinje | RS | | | | | |
| Tuzla | FBiH | 1892, reconstruction 1998 | Yes | | 100/160 [49/78] | Seeking return of economic unit including agricultural facilities and motel. Work in prison's restaurants and outside for skilled inmates. |
| Zenica | FBiH | 1886-1896, reconstruction 2000 | Yes | | 110/350 [41/349] | Work in agricultural production, in prison's restaurant, in gas production or maintenance and a foundry. |

Adapted from Walmsley and Križnik (1998) and Walmsley and Nestorović (1998).

Abbreviations

| | |
|------------|---|
| BiH | Bosnia and Herzegovina |
| BLRC | Brčko Law Revision Commission |
| BRD | Federal Republic of Germany |
| CAFAO [EU] | Customs and Fiscal Assistance Office |
| CAQDAS | Computer Assisted Quantitative Data Analysis Software |
| CIDA/ACDI | Canadian International Development Agency/Agence canadienne de développement international |
| CIPRU | Criminal Institutions and Prosecutorial Reform Unit |
| CPT | Committee for the Prevention of Torture and Inhuman or Degrading Punishment |
| DDR | German Democratic Republic |
| DFID | Department for International Development |
| EUPM | European Union Police Mission |
| FBiH | Federation of Bosnia and Herzegovina |
| GDS | Citizens' Democratic Party |
| GFAP | General Framework Agreement for Peace |
| HDZ | Croatian Democratic Union |
| HJPC | High Judicial and Prosecutorial Council |
| HRHB | Croat Republic of Herceg-Bosna |
| HVO | Croat Defence Council |
| ICMP | International Commission on Missing Persons |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 |
| IEBL | Inter-entity Boundary Line |
| IGO | International Governing Organisation |
| IOM | International Organization for Migration |
| IPTF | see UNIPTF |
| IRZ | German Foundation for International Legal Cooperation |
| JNA | Yugoslav People's Army |
| JSAP | See UNJSAP |
| KCD | Coalition for a Unified and Democratic Bosnia and Herzegovina |
| KM | Convertible Mark |
| NDH | Independent State of Croatia |
| NGO | Non Governmental Organisation |
| NSDAP | German National Socialist Workers' Party |
| OHR | Office of the High Representative |

Abbreviations

| | |
|----------|---|
| OSCE | Organisation for Security and Cooperation in Europe |
| OSF | Open Society Fund |
| PIC | Peace Implementation Council |
| PRC | Police Restructuring Commission |
| RSNA | Republika Srpska National Assembly |
| SBiH | Party for Bosnia and Herzegovina |
| SBS | State Border Service |
| SDA | Party of Democratic Action |
| SDP | Social Democratic Party |
| SDS | Serb Democratic Party |
| SFOR | Stabilisation Force |
| SFRY | Socialist Federal Republic of Yugoslavia |
| SIDA | Swedish International Development Agency |
| SIPA | State Investigation and Protection Agency (from 2004 onwards – prior to 2004 <i>State Information and Protection Agency</i>) |
| SNSD | Alliance of Independent Social Democrats |
| TI | Transparency International |
| UN OHCHR | United Nations Office of the High Commissioner for Human Rights |
| UNDP | United Nations Development Programme |
| UNICEF | United Nations Children's Fund |
| UNIPTF | United Nations International Police Task Force |
| UNJSAP | United Nations Judicial Assessment Programme |
| USAID | US Agency for International Development |
| USDoJ | US Department of Justice |

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