

**BOSNIA AND HERZEGOVINA:  
SELECTED DEVELOPMENTS IN TRANSITIONAL JUSTICE<sup>1</sup>***October 2004***I. INTRODUCTION**

Almost a decade has passed since the signing of the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (better known as the Dayton Agreement)<sup>2</sup> ended the war in the former Yugoslavia. The financial and human costs of the wars devastated the region, but especially Bosnia and Herzegovina (BiH), where by the end of 1995 an estimated 250,000 had died and one million became displaced.

The Dayton Agreement established a complex political structure to accommodate BiH's various warring factions: Serbs, Croats, and Bosnian Muslims (Bosniaks). BiH comprises two so-called "entities": the Federation of Bosnia and Herzegovina (the Federation) and the Republika Srpska (RS).<sup>3</sup> The Federation is predominantly Bosniak and Bosnian Croat, while the RS is predominantly Bosnian Serb.<sup>4</sup> The Constitution (Annex 4 of the Dayton Agreement) established a central government with a bicameral legislature, a three-member presidency (consisting of a Bosnian Croat, a Bosniak, and a Bosnian Serb), a council of ministers, a constitutional court, and a central bank.

The Dayton Agreement requires the Office of the High Representative (OHR) to coordinate and supervise the implementation of the agreement's civilian provisions. The tasks related to civilian implementation were divided between different international organizations, including the OHR, the Organisation for Security and Cooperation in Europe (OSCE), the UN Mission in Bosnia and Herzegovina (UNMIBH), and the UN High Commissioner for Refugees (UNHCR). Along with the International Criminal Tribunal for the former Yugoslavia (ICTY), established by the UN

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<sup>2</sup> Available at [www.ohr.int](http://www.ohr.int).

<sup>3</sup> In the north, the contested town of Brcko is an autonomous district under international "supervision." The Brcko final award (March 1999) created a special district whose territory belongs to both entities.

<sup>4</sup> In the Federation, authority was devolved to 10 "cantons" in order to create a delicate balance of power between Bosniaks and Bosnian Croats. See Art. II of the Washington Agreement 1994 (available at [www.usip.org](http://www.usip.org)). The cantons have all responsibility not expressly assigned to the Federation government. Of the 10, Bosniak authorities dominate 5, Bosnian Croats dominate 3, and the remaining 2 have power-sharing arrangements between the two groups.

Security Council in 1993, all of these institutions play important, if overlapping, roles in the transitional justice arena.

In November 2003, the European Commission acknowledged that BiH had made progress toward EU accession and set 16 conditions that it must fulfill before considering whether to start negotiations to draw up a “stability and association agreement.” Among those conditions are improvements in human rights.<sup>5</sup> Although the economy continues to be very weak and unemployment very high, the prospect of future EU admission, however distant, could provide BiH’s citizens with some badly needed hope. By all accounts, they suffer from an excess of government and administration with few inspiring results, including in the area of transitional justice.

The purpose of this paper is to provide an overview of some of the major issues and recent developments in transitional justice in BiH. In particular, it examines the ICTY, local trials, the proposed Truth and Reconciliation Commission, the Srebrenica Commission, a draft Law on Missing Persons, reparations, and the vetting of police, judges, and prosecutors.

## **II. TRIALS**

### **A. The ICTY**

The ICTY’s impact in BiH has been profound, not least because the majority of its judgments have dealt with war crimes, crimes against humanity, and acts of genocide committed on its territory.<sup>6</sup> At the same time, its impact has been perceived very differently in the Federation and the RS. In the Federation, particularly among Bosniaks, the ICTY has achieved a certain level of trust; in the RS, where some of the most notorious war criminals are believed to be hiding,<sup>7</sup> the ICTY is widely perceived as a biased, anti-Serb body.<sup>8</sup> Although the RS Parliament passed a law on cooperation with the ICTY in September 2001, in practice there has been continuous resistance. The RS is the only authority within the former Yugoslavia that has not handed over a single war crimes suspect to the Tribunal.

Because of the extensive nature of the ICTY’s BiH-related jurisprudence, it is not possible to examine it in any detail here.<sup>9</sup> However, certain cases are particularly noteworthy for the purposes

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<sup>5</sup> See “Bosnia and Herzegovina: Commission Approves Feasibility Study,” available at <http://europa.eu.int>.

<sup>6</sup> The remoteness of the proceedings has, however, limited their impact on local populations. Belated outreach by the ICTY in BiH may help to improve understanding of its work. Outreach sessions were recently held in various towns that were the subject of Tribunal proceedings. With the assistance of local NGOs, in each town senior Tribunal staff involved in the trials met with community leaders and the public.

<sup>7</sup> One of the two most-wanted indictees, wartime Bosnian Serb leader Radovan Karadzic, is reported to be hiding in the RS under the protection of local security forces. The other, former Bosnian Serb military commander Ratko Mladic, is purportedly hiding in Serbia or the RS.

<sup>8</sup> According to a comprehensive survey based on 10,000 face-to-face interviews conducted during January and February 2002, trust in the ICTY is at 51 percent in the Federation and only 4 percent in the RS. See International IDEA, “South East Europe Public Agenda Survey” (2002), available at [www.idea.int/press/pr20020404.htm](http://www.idea.int/press/pr20020404.htm). The survey did not disaggregate levels of trust in the Federation between Bosniak and Bosnian Croat populations, but by all accounts the level of trust in the ICTY is higher among Bosniaks.

<sup>9</sup> For a useful account of the jurisprudence, see Human Rights Watch, “Genocide, War Crimes and Crimes against Humanity: Topical Digests of the Case Law of the ICTY and the ICTR” (Feb. 2004), available at [www.hrw.org](http://www.hrw.org). See also [www.icty.org](http://www.icty.org).

of this paper. The first concerns Biljana Plavsic, the former RS President. Plavsic pleaded guilty to the charge of persecution for her criminal role in the Bosnian conflict. In exchange, the Office of the ICTY Prosecutor agreed to move to dismiss “with prejudice” the remaining counts against her. Although controversial, the importance of Plavsic’s guilty plea and her acknowledgments of responsibility at the sentencing hearing in late 2002 should be recognized. As a Serb nationalist and former political leader, her actions helped to clarify and confirm important truths about the conflict, which the majority of Bosnian Serb leaders still deny. Her decision not to take the extra step of providing information about or testifying to the role of other senior Serb officials limited the legal and moral value of her gesture, but her expressions of remorse during and after the hearing, combined with her decision not to appeal her 11-year sentence, may have contributed to the process of justice and reconciliation.<sup>10</sup>

Another recent and noteworthy case concerned the infamous killing of some 7500 Bosniak men and boys at Srebrenica in 1995. In *Prosecutor v. Krstic*,<sup>11</sup> a landmark ruling that should put to rest any doubts about the legal character of the massacre, the ICTY Appeals Chamber unanimously ruled that it was an act of genocide. As the Chamber’s judgment states:

By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the 40,000 Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general...The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.<sup>12</sup>

The judgment will likely affect the fate of others charged with genocide, including Slobodan Milosevic, the former Yugoslav President, whose high-profile trial recently resumed.<sup>13</sup>

Other important BiH-related cases in recent years include a trial dealing with the bombardment of the civilian population of Sarajevo,<sup>14</sup> the trial of a prominent Bosnian Croat leader for crimes perpetrated against the Muslim population of the Lasva valley,<sup>15</sup> and a trial of the commanders at a Bosniak concentration camp established to detain and mistreat Bosnian Serbs.<sup>16</sup>

Over the next few years, the ICTY will wind down its operations as part of its “completion strategy,” on a timeline largely imposed by the Security Council. The Tribunal will be completing

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<sup>10</sup> Note, however, that many victims condemned her sentence as too lenient. See N. Coumbs, “International Decisions: *Prosecutor v. Plavsic*,” 97 *American Journal of International Law* 929 (2003), at 936. Other guilty pleas made at the ICTY have received similarly mixed reactions from victim groups.

<sup>11</sup> *Prosecutor v. Krstic*, Appeals Chamber Judgment, April 19, 2004.

<sup>12</sup> *Id.* at para. 37. Although the Tribunal ruled that the main staff of the Bosnian Serb army had intended to commit genocide, it found no evidence that Krstic personally ordered the killings or directly participated in them. Krstic was found guilty of “aiding and abetting” genocide and his sentence was reduced from 46 to 35 years.

<sup>13</sup> Part of the allegations against Milosevic includes his attempts to build a “Greater Serbia,” encompassing parts of BiH, and his general support for the Bosnian Serbs. On the *Milosevic* trial, see “Serbia and Montenegro: Selected Developments in Transitional Justice,” available at [www.ictj.org](http://www.ictj.org).

<sup>14</sup> *Prosecutor v. Galic*, Trial Chamber Judgment, Dec. 5, 2003.

<sup>15</sup> *Prosecutor v. Kordic*, Trial Chamber Judgment, Feb. 26, 2001.

<sup>16</sup> *Prosecutor v. Delalic et al. (Celebici)*, Appeals Chamber Judgment, April 8, 2001.

its investigations by the end of this year, and should complete all first instance trials by 2008 and appeals by 2010. As a result, the ICTY is taking steps to transfer cases to local courts in the former Yugoslavia. In BiH, the ICTY, the OHR, and the BiH government have begun to make preparations for the transfer of some mid-level cases. These fall into two categories: so-called Rule 11*bis* cases, where the indictment has already been issued and confirmed,<sup>17</sup> and cases still under investigation in which no indictment has been issued.<sup>18</sup> In the latter cases, local prosecutors will have to finish the investigations and, where appropriate, issue the indictments.

These cases will be transferred to the State Court of Bosnia and Herzegovina, which was established by law in November 2002 and has jurisdiction over both entities of BiH. Within the State Court, efforts are under way to set up a special War Crimes Chamber, which will include international judges and prosecutors. It will hear ICTY transfer cases, as well as a limited number of cases initiated in BiH but reviewed by the ICTY under the “Rules of the Road” procedure.<sup>19</sup> To ensure a smooth transition, the ICTY, the OHR, and the BiH government have established a variety of working groups on various topics, including:

- Legal framework (to ensure harmony between international and national substantive and procedural law);
- Review and transfer of ICTY cases (to decide on the selection of eligible cases, the issuance of national indictments, and arrest and detention issues);
- Staffing (to discuss issues such as secondment and funding of international judges and prosecutors, and selection and training of national judges and prosecutors);
- Witness protection (at the state level); and
- Facility renovation and construction.

Although there is widespread support for the transfer of appropriate ICTY cases to local courts, some human rights groups have criticized the proposed War Crimes Chamber and the process leading to its establishment. For example, Amnesty International asserts that the proposed Chamber “appears to be based on short-term planning aiming to effect the quickest and cheapest possible withdrawal of the international community [from the ICTY]” and “reveals a totally unrealistic and insufficiently detailed plan.”<sup>20</sup> It argues that the international community must take a broader approach that invests attention and resources in other, local courts, not just into the

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<sup>17</sup> As of this writing, there are approximately six such cases.

<sup>18</sup> As of this writing, there are approximately 15 such cases involving about 45 suspects.

<sup>19</sup> Early on in the work of the ICTY, the Office of the Prosecutor established a procedure whereby case files from BiH were reviewed by the ICTY Prosecutor and evaluated on whether they should proceed. The Rome Agreement of February 18, 1996, commonly referred to as the “Rules of the Road,” requires that:

[p]ersons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.

Over the past eight years, the Tribunal has approved proceeding in the cases against approximately 865 individuals under the system, 728 of which were initiated by BiH authorities. Less than 100 of those have been tried in BiH. The strengths and weaknesses of the Rules of the Road procedure strongly influenced the ICTY’s decision to support the establishment of the War Crimes Chamber and the transfer of Rule 11*bis* cases.

<sup>20</sup> Amnesty International, “Bosnia-Herzegovina: Shelving Justice—War Crimes Prosecutions in Paralysis” (Nov. 2003), AI Index: EUR 63/018/2003.

Chamber. It also observes that the Chamber will try only a few war crimes cases each year even under optimal conditions, whereas the country's other courts will be required to try the majority.<sup>21</sup> So far, however, international funding is being directed almost exclusively to the Chamber; donors, as well as local authorities, are less interested in funding trials of lower-level perpetrators.

Another NGO criticism focuses on the need for greater victim participation in the planning for the proposed Chamber, as local human rights organizations and victim groups were not invited to participate in deliberations and negotiations. However, the OHR has indicated that once the technical and logistical issues are sorted, it will consult more widely on issues of outreach and training.

Despite these challenges, the international community appears to view the Chamber as a necessary interim measure, given the impending closure of the ICTY and the local justice system's perceived weakness in the area of war crimes. The War Crimes Chamber is expected to begin hearing cases in early 2005.

## **B. Local Trials**

The state of BiH presents the classic dilemma in the area of transitional justice: it is a context marked by an unusually high demand for justice and an unusually low capacity or willingness to deliver it. In such cases, imperfect justice is a virtual certainty because of a wide range of factors, including relatively scarce human and material resources, very large numbers of perpetrators and victims, and a weak or vulnerable judiciary. At the same time, criminal justice efforts, especially at the domestic level, are an essential component of any comprehensive transitional justice strategy. Criminal trials can contribute to specific and general deterrence, provide a direct form of accountability for perpetrators and justice for victims, and express public denunciation of criminal behavior—all of which, in turn, can contribute to greater public confidence in the state's ability and willingness to enforce the law.

With international attention focused on the ICTY for so long, BiH's justice system has suffered from neglect. Although there has been a recent, wholesale vetting of the country's police, prosecutors, and judges,<sup>22</sup> there remains a sense of urgency and concern about ensuring a higher quality of local justice. The challenges are manifold, especially in the RS, which did not conduct its first (and only) war crimes trial until the fall of 2003. The judiciary remains subject to influence by nationalist elements, political parties, and the executive branch, and the vast number of case files the Federation and RS police and prosecutors are managing have not been put to full use in generating prosecutions.<sup>23</sup> Other problems, ranging from ethnic bias to inadequate witness protection to underutilization of ICTY evidence, also undermine the quality of justice.<sup>24</sup> But, in the former Yugoslavia, with its abundance of national and sub-national jurisdictions, the blame rarely can be placed on any single government. Lack of cooperation between authorities in the

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<sup>21</sup> At the same time, it must be acknowledged that one of the main reasons the Chamber is being established is the lower courts' lack of ability or will to try war crimes cases.

<sup>22</sup> See "Vetting of Public Officials," below.

<sup>23</sup> See generally International Crisis Group, "Courting Disaster: the Misrule of Law in Bosnia and Herzegovina," Balkans Report No. 127 (March 2002), available at [www.crisisweb.org](http://www.crisisweb.org), and reports of the UNMIBH Judicial System Assessment Program, available at [www.unlos-bih.org](http://www.unlos-bih.org). However, at the entity level, things have begun to improve over the past six months.

<sup>24</sup> There is the additional problem that many war crimes investigations were conducted by intelligence agencies (FOSS and AID) and the collected evidence will never be admissible before domestic courts.

various countries (and, in the case of the BiH, between the two entities and between Bosnian Croat cantons and the Federation) makes it difficult for prosecutors and judges to obtain documents and access victims and witnesses. Some of these challenges have been highlighted in the failed *Ilijasevic* trial.<sup>25</sup>

There are some relatively positive stories in the area of justice. BiH's now-defunct Human Rights Chamber was generally well regarded during its many years of operation. The Chamber, which the public often mistook for a criminal court, was set up as part of the Human Rights Commission under the Dayton Agreement and included both national and international jurists. Its jurisdiction covered cases involving violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms and other human rights treaties (albeit only where discrimination was involved). Its decisions were final and binding upon all three levels of BiH government.

During its lifetime, the bulk of the Chamber's caseload involved human rights violations related to property,<sup>26</sup> but it also issued important decisions in cases of unresolved disappearances in which the relatives of the disappeared were denied information on their loved ones' fate and whereabouts.<sup>27</sup> The Chamber also dealt with many cases of employment discrimination and violations of due process in local war crimes trials.

The Dayton Agreement provided that five years after its signing, responsibility for the continued operation of the Human Rights Commission, including the Chamber, would transfer to BiH institutions.<sup>28</sup> Acting in pursuance of that provision, in June 2003 the OHR proposed disbanding the Chamber and transferring its backlog of approximately 10,000 cases to the Constitutional Court. The Chamber challenged the proposal as unconstitutional and a violation of the Dayton Agreement, but ultimately it was forced to close down on December 31, 2003.<sup>29</sup> The decision to disband the Chamber may have occurred prematurely, as the Constitutional Court had problems in appointing judges and many of the individual applications concerned wartime violations that the local courts and administrative tribunals had been unable or unwilling to resolve. Indeed, the constant rise in applications during the Chamber's years of operation suggests that, for many in BiH, the Chamber represented the best or last recourse for obtaining some form of justice. It is too early to judge whether the new arrangements for handling cases of human rights violations will vindicate the OHR's decision to disband the Chamber.<sup>30</sup>

### III. TRUTH-SEEKING

This section examines three local initiatives in the area of truth-seeking: a proposed truth commission, an RS inquiry into the events of Srebrenica, and a draft law on missing persons.

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<sup>25</sup> See Human Rights Watch, "Balkans Justice Bulletin: The Trial of Dominik Ilijasevic" (Jan. 2004), available at [www.hrw.org](http://www.hrw.org). This case was recently stayed because the trial judge was not re-appointed in the vetting process, described below.

<sup>26</sup> See "Reparations," below.

<sup>27</sup> See "Truth-seeking," below.

<sup>28</sup> Annex 6, Art. 15.

<sup>29</sup> The Human Rights Commission within the Constitutional Court exercises jurisdiction over pending cases received by the Human Rights Chamber on or before December 31, 2003. The Constitutional Court exercises jurisdiction over cases received after that date.

<sup>30</sup> However, the Commission has already indicated that it cannot meet the imposed deadline for clearing the Chamber's backlog of cases.

## A. Proposed Truth Commission

A short time after the signing of the Dayton Agreement, discussions around establishing a truth commission in BiH commenced, initially at a US Institute for Peace (USIP) conference and later among local human rights actors. In 2000, the Association of Citizens for Truth and Reconciliation was established. The USIP and the Association developed a proposal to establish a Truth and Reconciliation Commission (TRC), which, they hoped, could help establish the facts about the nature and scale of past violations and serve as a safeguard against nationalist or revisionist accounts. They also envisioned a potential vehicle for recommending reparations measures and legal and institutional reforms, furnishing a public platform for victims to directly address the nation, and cultivating reconciliation and tolerance at the individual and national level.

The USIP and the Association shared their proposal with the ICTY. Initially, ICTY officials expressed strong concern about the establishment of a TRC. They seemed to view the proposal both as a threat to, and a partial duplication of, the Tribunal's own efforts. They also argued that the political circumstances in BiH—particularly the degree to which ethnic tensions persisted—were not conducive to such an initiative. But, over time, decision-makers at the ICTY became persuaded of the potential benefits of a truth commission (albeit one with a more limited mandate than originally proposed).

The ICTY's revised position was expressed in a speech delivered in May 2001 in Sarajevo by former Tribunal President Claude Jorda.<sup>31</sup> Jorda argued that the work of a truth commission in BiH should complement, and not conflict with, the ICTY's work. He identified four areas of action more suited to a BiH truth commission: dealing with "lower ranking executioners," victim reparations, historical analysis, and "the work of undiluted memory." At the same time, Jorda cautioned that the proposed TRC mandate was too similar to that of the ICTY, particularly in the area of investigative powers. He concluded by acknowledging that a truth commission in BiH could make a contribution to the process of national reconciliation, but added:

Bear in mind, however, that its mission of reconciliation would be seriously compromised if the highest political and military accused were not arrested and tried by the International Tribunal before the completion of its work. Therefore, it is imperative that the commission and the Tribunal accomplish their respective mission jointly, which renders necessary the prompt arrest and transfer of all accused to the Tribunal. Above all, may the establishment of the truth and reconciliation commission in Bosnia and Herzegovina mirror the concerns of every facet of Bosnian society and allow all the victims to understand that they have a place in its activities so that they, once again, find the will to live together and see a reason to construct a common future.

Following Jorda's speech and several months of follow-up negotiations, a law to establish the TRC was drafted.<sup>32</sup> The law contemplates a seven-member commission comprising national commissioners acting with the assistance of an international advisory board. Its mandate would be to examine events in BiH and the former Yugoslavia from the elections of November 19, 1990, to the conclusion of the Dayton Agreement on December 14, 1995. The purpose of the

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<sup>31</sup> The full text of the speech is available at [www.icty.org](http://www.icty.org).

<sup>32</sup> Copy on file with the ICTJ.

examinations would be “to shed light, as far as possible, on the nature, causes and extent of human rights violations committed during the conflict.” The proposed TRC would operate for two years, and would have no court-like attributes or powers and no amnesty-granting power. As to its relation with the ICTY and courts generally, the draft law provides:

The function of the TRC is revelation of truth, it is not a judiciary body. It is to complement the juridical processes undertaken or those that will be undertaken and not to interfere with them. Since the primary role of the ICTY is the establishment of criminal accountability of individuals, the TRC will not carry out investigations for the purpose of criminal prosecution and the final report of the TRC will not determine the criminal responsibility of individuals, in respect of the rights of the accused and to avoid prejudices related to the court procedure. Statements made by the citizens to the TRC will not be used at any state, entity or any other lower court in the territory of Bosnia and Herzegovina without their consent.

For better or worse, almost three years later there is still no TRC in BiH. The obstacles to its creation seem to lie at the national level. There has not been a national debate on the utility of a truth commission or on the draft law’s strengths and shortcomings. Past and current governments, still dominated by nationalist parties, have been unwilling to introduce the draft law before parliament. In addition, it is not clear that local NGOs, particularly victim groups, support the law, not least because they were not adequately consulted. In addition, there is a public misperception that a truth commission would be an instrument to allow war criminals to escape responsibility.

Although Association members may remain confident that a truth commission will one day be established in BiH, that confidence could wither if no forward momentum is gathered. If a truth commission is ever established in BiH, greater local support is critical to its success. But even if one is established, it is not clear that it would be credible outside of the country, no matter what its composition. The real challenge in the former Yugoslavia is how to devise a mechanism for truth-telling that will be credible across the region.

## **B. Srebrenica Commission**

At its December 25, 2003, session, the RS National Assembly, acting under pressure from the OHR, established the “Commission for Investigation of the Events in and around Srebrenica between the 10th and 19th of July, 1995” (Srebrenica Commission).

The Commission was formed in accordance with a groundbreaking decision the Human Rights Chamber rendered earlier that same year, in which it ordered the RS to disclose the full truth concerning the massacre at Srebrenica. In its decision, the Chamber found that the failure of RS authorities “to inform the applicants about the truth of the fate and whereabouts of their missing loved ones,” including their failure to conduct a “meaningful and effective investigation into the (Srebrenica) massacre,” violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>33</sup> The Chamber concluded that the failure to disclose information concerning the approximately 7500 missing men and boys also violated the

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<sup>33</sup> Cases Nos. CH/01/8365 et al., Decision on Admissibility and Merits, para. 220(4); see also para. 191 (March 7, 2003). Article 3 of the European Convention guarantees the right to be free from inhuman and degrading treatment.



applicants' Article 8 right to respect for their private and family lives.<sup>34</sup> The Chamber recognized the continuing pain and suffering of the victims' families, and noted that the RS had done "almost nothing" to clarify the fate of the missing or assist surviving family members.<sup>35</sup> Ultimately, the Chamber ordered the RS authorities "to conduct a full, meaningful, thorough, and detailed investigation" into the events surrounding the Srebrenica massacre in order to establish its own role to victims, family members, and the general public.<sup>36</sup>

The Srebrenica Commission, which began operations in early 2004, comprised seven members: five appointed by RS authorities and two by the High Representative after consulting victim organizations. The RS-selected members were mostly Bosnian Serb lawyers and judges; the OHR-selected members (i.e., individual experts) were Gordon Bacon, the former Chief of Staff at the International Commission on Missing Persons, and Smail Cekic, the Director of the Institute for Research on Crimes Against Humanity and International Law and a representative of the Srebrenica survivors. Marko Arsovic, a lawyer from Banja Luka and a former BiH Constitutional Court judge, was named Commission Chairman. The Commission's work was monitored by two international observers—one from the ICTY and one from the OHR.

The Commission was required to submit monthly reports to RS authorities. Initially there were reporting delays because of conflicts about the appointment of commissioners, the absence of any preparatory phase, the lack of state cooperation, and the insufficiency of financial and human resources. When the Commission finally delivered its first interim report on April 15, 2004, the High Representative decried it in the following terms:

The interim report by the Srebrenica Commission that I received yesterday is a scandalous indictment of the RS institutions who were legally and morally bound to cooperate fully with the Commission, and yet according to this report have failed to. When the Commission was established last year, I asked them to provide a report within six months containing information of a hitherto unrevealed nature on the fate of those still missing from Srebrenica. The Commission has been unable to submit that report. Instead, their interim report sets out a catalogue of unbelievable difficulties and obstructionism. It is simply not acceptable that nearly a decade after the shocking crimes of Srebrenica there are still individuals or institutions in the RS who are trying to cover up these crimes, as this report suggests...The implications of the interim report are of such a serious nature that I will be forced to take direct action to underline that the RS authorities have no alternative but to cooperate fully and genuinely on Srebrenica and other ICTY issues.<sup>37</sup>

Shortly thereafter, several RS officials were removed from their duties,<sup>38</sup> and Milan Bogdanic, another commissioner, was appointed the new Commission Chairman.<sup>39</sup>

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<sup>34</sup> Id. at paras. 181 and 220(3).

<sup>35</sup> Two prior reports on the events of Srebrenica prepared by RS authorities (including one conducted in 2002) were widely derided. Among other things, both reports vastly understated the number of persons killed.

<sup>36</sup> Id. at para. 212.

<sup>37</sup> OHR press release, April 15, 2004.

<sup>38</sup> Among those removed were Dejan Miletic as head of the RS Secretariat for Relations with the ICTY and General Cvetko Savic of the RS General Staff and the RS Army.

<sup>39</sup> Marko Arsovic, former Chairman, did not remain a commissioner.

These actions appear to have paid off. The Commission's final report was published on June 11, 2004.<sup>40</sup> The conclusion states in unambiguous terms that on July 10–19, 1995, several thousand Bosniaks were “liquidated” and the perpetrators and others “undertook measures to cover up the crime” by moving bodies away from the killing site. The Commission also declared its discovery of 32 hitherto unknown locations of mass graves, four of which were “primary sites.”<sup>41</sup> Although the report is critical of RS authorities for lack of cooperation in the delivery of evidence, it also credits the discovery of new mass graves to information “provided exclusively by the sources from the RS.” The report notes, “This was the first time that such information was obtained in this manner.” After noting the passage of almost nine years of RS inactivity in the area of war crimes investigation, the High Representative welcomed the Commission's report. He stated, “Provided that this continues through the remaining stages of the report, it may be possible to say that a dynamic of obstructionism on war crimes issues is being replaced by a dynamic of greater cooperation.”<sup>42</sup>

### C. Draft Law on Missing Persons

Disappearances and abductions on a mass, systematic scale were a major part of the 1990s wars in the former Yugoslavia. The largest percentage of such cases occurred in BiH between 1992 and 1995, and most of those killed were buried there. Conservative estimates indicate that up to 20,000 persons in BiH are still recorded as missing. Almost a decade later, the responsibilities of the authorities remain undefined, the legal status of family members of the missing is unclear, and the right to minimum social benefits continues to be insecure.

Associations of families of missing persons in BiH jointly raised these concerns to members of the BiH joint presidency. As a result, in 2003, the BiH Ministry for Human Rights and Refugees began drafting a “Law on Missing Persons.” A small working group was formed with the participation of government officials, the International Committee on Missing Persons, the International Committee of the Red Cross, and the governmental Commission on Missing Persons. The group conducted consultation meetings with representatives of associations of families of missing persons from across BiH. Recently, a final draft of the law was submitted to the Council of Ministers for further review and, it is hoped, enactment.<sup>43</sup>

The draft law includes detailed provisions on the right to know, the status of missing persons, the rights of families of the missing (including the right to nondiscriminatory and financial support), and the records of missing persons. A “missing person” is defined as an individual “about whom his family has no information and/or is reported missing on the basis of reliable information as a consequence of the armed conflict that happened on the territory of the former SFRY” and “who disappeared in the period from 30<sup>th</sup> April 1991 to 14<sup>th</sup> February 1996.”<sup>44</sup> BiH authorities would be “obliged to provide families of the missing and relevant institutions in charge of tracing the missing persons with available information and to give all necessary assistance in order to improve the tracing process and the process of resolving the cases of persons disappeared in/from Bosnia and Herzegovina.”<sup>45</sup> BiH authorities would also be required to establish a “Missing

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<sup>40</sup> Available online at [www.ohr.int](http://www.ohr.int). An addendum to the Commission's final report is also expected to be submitted.

<sup>41</sup> The report includes the precise locations of the mass graves.

<sup>42</sup> N. Wood, “Bosnian Serbs Admit Responsibility for the Massacres of 7,000,” N.Y. Times, June 12, 2004.

<sup>43</sup> Copy on file with the ICTJ.

<sup>44</sup> Art. 1.

<sup>45</sup> Art. 4.

Persons Institute” to carry out most of the responsibilities under the law.<sup>46</sup> If enacted, the draft law would be the first of its kind in the region.<sup>47</sup>

#### IV. REPARATIONS

The issue of reparations for victims is receiving increased attention in BiH. While there are wartime victims and families in all parts of the former Yugoslavia, the greatest number reside in BiH. But, as BiH is divided by ethnicity, victims and perpetrators may find themselves living in different entities. This issue—combined with factors such as lack of political will, denial of wrongdoing, and scarcity of resources—makes it extremely difficult to develop a comprehensive reparations program. To date, none exists.<sup>48</sup>

Thus far, reparations have been pursued through the courts, rather than through any broad, state-sponsored compensation program.<sup>49</sup> At the interstate level, in 1993 BiH filed a case before the International Court of Justice against the FRY (now Serbia and Montenegro) for alleged violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>50</sup> It has claimed billions of dollars for damages to persons, property, the economy, and the environment. The case remains pending on the Court’s docket, and it is difficult to predict when, how, or if these cases will ultimately be decided.<sup>51</sup>

Within BiH, the lack of comprehensive governmental reparations has led individual victims and families to local courts for relief.<sup>52</sup> For the most part, these cases face the same limitations as any other in the country’s weak justice system. The largest number of reparations claims were filed with the Human Rights Chamber; so many, in fact, that a massive backlog was created, as discussed above. This occurred despite the fact that the range of eligible claims before the Chamber was very limited: only violations occurring after December 14, 1995, or involving a “continuing violation” after that date (e.g., the case of a disappeared person whose fate remains undetermined) were admissible.

Examination of the Chamber’s broad-ranging jurisprudence on reparations is beyond the scope of this paper. However, in the *Srebrenica* case, discussed above, the Chamber made its largest reparation award to date. The RS was ordered to pay compensation for the collective benefit of all 49 original applicants, as well as the families of all other Srebrenica victims. The compensation is

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<sup>46</sup> Art. 7.

<sup>47</sup> See the ICMP website at [www.ic-mp.org](http://www.ic-mp.org) for future updates on the progress of the draft law.

<sup>48</sup> There is, however, an elaborate mechanism to deal with claims for property restitution. See “A Casualty of Politics: An Overview of Acts and Projects of Reparation in the Former Yugoslavia” (July 2002), available at [www.ictj.org](http://www.ictj.org).

<sup>49</sup> Under international (and usually national) law, states have an obligation to compensate victims of grave human rights violations. Some states (e.g., Brazil, Chile, and Malawi) have enacted laws establishing compensation programs. These laws, which designate the class of beneficiaries and the scope of benefits, can help the state avoid potentially costly litigation, but states do not always recognize this fact. Where that is the case, victims tend to pursue individual or group claims by initiating civil suits before any court that is able to exercise jurisdiction in the matter.

<sup>50</sup> Arguably, BiH’s case has been strengthened by the ICTY’s *Krstic* judgment, discussed above.

<sup>51</sup> The case’s lengthy history includes two provisional measures hearings and orders in 1993, hearings and a judgment on preliminary objections in 1996, withdrawal of counterclaims in 2001, and a refused request to revise the 1996 judgment in February 2004.

<sup>52</sup> Many victims and families have also filed applications to the European Court of Human Rights. Those cases are not reviewed here.

to be paid in the form of a lump sum of two million Konvertible Marks (approximately US\$1.2 million) to the Foundation of the Srebrenica-Potocari Memorial and Cemetery. In the next four years, the RS is required to make four additional payments of 500,000 Konvertible Marks (approximately US\$300,000) to the Foundation.

According to some local observers,<sup>53</sup> the reaction of victim groups to the judgment was swift and, for the most part, negative. The groups criticized the fact that the Chamber chose not to award individual compensation despite being a court of individual petition, and that the award was earmarked for the construction of a monument, rather than for victims' social and economic needs. These concerns were compounded when the Chamber rejected 3000 additional Srebrenica-related suits, claiming that its previous decision had addressed all cases. A number of family members of the missing have now begun to prepare cases against the UN and the Dutch government for their responsibility in the fall of Srebrenica as a "safe area," which preceded the massacre.

## V. VETTING OF PUBLIC OFFICIALS

In recent years, BiH has been the site of some of the most comprehensive vetting efforts in recent decades. Two experiences stand out: the review of police officers and the hiring and re-appointment of judges and prosecutors. In the former case, the UNMIBH vetted approximately 24,000 police officers between 1999 and 2002. In the latter case, three High Judicial and Prosecutorial Councils screened the appointments of approximately 1000 judges and prosecutors between 2002 and 2004.

Police officers were deployed as soldiers during the 1990s, often serving at the front lines of ethnic cleansing alongside military and paramilitary battalions. A thorough review of the country's police forces was necessary at the end of the war. The Dayton Agreement provided that civilian law enforcement agencies would have to operate "in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms."<sup>54</sup> It also required the parties to the Agreement to ensure the "prosecution, dismissal or transfer" of police officers and other civil servants responsible for serious violations of minority rights.<sup>55</sup>

By the end of the war, there were tens of thousands of police officers in the Federation and the RS, far more than at the beginning of the wars and well in excess of what is needed in a democratic state the size of BiH. In the early post-Dayton years, police officers continued to operate with relative impunity in ethnically homogeneous forces that served nationalist agendas. Although the UNMIBH made some early efforts to vet police in the Federation, the results were disappointing and ended by 1998. In the RS during the same period (i.e., 1995–1998), there was essentially no vetting at all because of resistance by RS authorities.

Subsequent vetting efforts were far more successful. The UNMIBH established a 50-member Local Police Registry Section in the Human Rights Office. The Section comprised international police officers, local lawyers and administrators, and two UN professional staff, all of whom were supported by regular Human Rights Office staff, plus two ICTY liaison officers. The vetting

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<sup>53</sup> Based on private interviews.

<sup>54</sup> Annex 4, Constitution of Bosnia and Herzegovina (Art. III, Para. 2(c)) and Annex 11, Agreement on the International Police Task Force (Art. I, Para. 1).

<sup>55</sup> Annex 7, Art. I, Para. 3(e).

process consisted of three steps: mandatory registration (involving completion of a detailed registration form), pre-screening (which, in most cases, resulted in provisional authorization to continue law-enforcement work), and certification (which involved more extensive background checks, performance monitoring, and a final determination on whether there were “grounds for suspicion” of wartime violations). Anyone not certified was barred from serving in law enforcement anywhere in BiH. Decertification decisions were subject only to an internal appeal and no oral hearing was provided. In the end, approximately two-thirds of those vetted were granted provisional authorization to exercise police powers. Of those provisionally authorized, more than 90 percent were granted full certification.<sup>56</sup>

Although generally regarded as successful—the police forces are smaller and more diverse now, and attacks on minority returnees are less common—public perceptions of the process appear to be mixed. The process was criticized for being too slow and too closed, and for failing to institutionalize the procedure for future use.<sup>57</sup> Within the police service itself, opinion is even less charitable. Many, but particularly those decertified, question the fairness of the procedures, and as many as 150 former police officers challenged their decertification in domestic courts after the departure of the UNMIBH.<sup>58</sup> Regrettably, the UNMIBH’s vague and nonlegislated criteria, and the fact the vetting files were sent for storage to UN offices in the United States, have complicated the resolution of these cases. In discussing the legal challenges to certification at his March 2004 briefing to the Security Council, High Representative Lord Ashdown stressed that there was a danger that the UNMIBH’s vetting efforts could unravel and endanger the rule of law. It is, however, rather late to sound such an alarm. The vetting procedure needed greater scrutiny during its operation.

The other major vetting process in BiH concerned the appointment of judges and prosecutors. In the early post-Dayton years, the state of the judiciary was especially weak, given the absence of an independent judiciary during the prior communist era, the ensuing years of war, and the continuous influence of organized crime and nationalist leaders. In May 2000, the High Representative promulgated laws on judicial and prosecutorial services to improve the independence of both.<sup>59</sup> These laws established commissions comprising Bosnian judges and prosecutors who assessed the performance of their peers over a period of 18 months, but the process was never adequately resourced and ended in failure. The vast majority of complaints were dismissed as unsubstantiated.

In late 2001, the Independent Judicial Commission, the lead international agency on judicial reform, developed a new strategy for reform. It aimed to reduce the number of judges, ensure their competence and integrity, and make the judicial and prosecutorial services more ethnically diverse through a formal re-application and appointment process. In 2002, the High Representative created three High Judicial and Prosecutorial Councils—one for BiH, the

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<sup>56</sup> Report of the Secretary-General, U.N.S.C., U.N. Doc. S/2002/1314, Para. 11 (Dec. 2, 2002). A number of suspected war criminals remain in the police force. In recent months, there have been arrests and summons for arrest of at least two certified police officers (Novo Rajak and Boban Simsic) on war crimes charges.

<sup>57</sup> New police recruits are not put through an equivalent vetting process to scrutinize wartime activities. The European Union Police Mission, which replaced the UNMIBH in 2003, has indicated no interest in creating a new vetting process.

<sup>58</sup> OHR, Speech by the High Representative for BiH Paddy Ashdown at the United Nations Security Council (March 3, 2004), available at [www.ohr.int](http://www.ohr.int).

<sup>59</sup> Available at [www.ohr.int](http://www.ohr.int).

Federation, and the RS. The Councils are permanent bodies comprising, for the most part, elected and appointed members from the legal and judicial professions. The High Representative also appointed international members to serve during a transitional period. The Councils have jurisdiction to appoint, transfer, train, remove, and discipline judges and prosecutors.

Under the re-application and appointment process, judges and prosecutors were required to submit detailed application and disclosure forms that included, among other things, questions about wartime activities. The police also received a considerable number of complaints from the public. Once a file was considered complete, a Council nomination panel would review the application, interview the applicant, and make a recommendation. Unsuccessful applicants could file requests for reconsideration.

Because the re-appointment process concluded only recently, it is too early to assess its true impact, but some initial concerns may be noted. The goal of restoring the multi-ethnic character of the judicial and prosecutorial services has not been fully achieved, particularly in the RS, where there was an insufficient pool of minority candidates. In addition, the investigations conducted into applicants' alleged or suspected wartime activities were limited in nature, leaving some doubt about the sufficiency of the review. On the positive side, however, the procedure has the virtue of permanence. With the completion of the re-appointment process, the Councils continued to operate as the standing appointment and discipline bodies for judges and prosecutors, and are run entirely by nationals of BiH.

## **VI. CONCLUSION**

The Dayton Agreement set out a broad framework for building the new state of BiH. What it lacked, however, was a comprehensive vision in the area of transitional justice. As a result, transitional justice efforts in BiH—particularly in the areas of truth-seeking and reparations—have been ad hoc and incomplete. While there has been some progress in the areas of trials and vetting, there continues to be excessive reliance on the OHR, which has often intervened and imposed solutions in place of recalcitrant authorities.

Ultimately, however, the OHR and other international institutions will need to pull back from BiH and let the country run its own affairs. Only when that happens will it be evident whether the tremendous investment of attention and resources in BiH has effectively advanced the causes of justice and reconciliation.