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Morten Bergsmo (editor)

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The Orientation Criteria Document in Bosnia and Herzegovina

Zekerija Mujkanović*

8.1. Introduction

"The war raged on for four blood-stained summers and three long brutal winters throughout my country, Bosnia and Herzegovina, between 1992 and 1995". When the fighting stopped, at least 97,000 soldiers and civilians of all ethnicities had, by then, lost their lives in the violence[1] and over one million people were displaced. The lack of trust had severed the relations of old neighbours and hostilities could not be covered up. State institutions, including the police, the prosecution and the courts, among others, were unable to operate as was expected and no longer enjoyed the trust of the citizens they served.

Thus, it is no surprise that during the first post-war years that very little was achieved on any side towards resolving the legacy left due to war crimes. After the war (even during various periods of the war), the police, the prosecution, investigative judges and the courts selected cases themselves to investigate and to criminally prosecute their enemies. Rarely was there any re-examination regarding the accountability of anyone from the same ethnic group. Due to divisions in

* **Zekerija Mujkanović**, Public Prosecutor of Brčko District of Bosnia and Herzegovina; Member of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina since March 2005. Graduated from the Law Faculty, University of Sarajevo, in 1984, passed the bar exam in 1997. His professional career in the justice sector started in 1994 as a judge in Municipal Court of Brčko. He was President of the Municipal Court of Brčko 1997-2001. He became Public Prosecutor of Brčko District in 2001. Mujkanović is also member of the Steering Board and Deputy President of the Association of Prosecutors of Bosnia and Herzegovina.

1 Correspondence with Ewe Tabe, demographer, ICTY Prosecution, 10 September 2008.

the State and the continued insecurity of free movement through the sometimes invisible internal borders of post-war Bosnia and Herzegovina, few of them were able to collect sufficient evidence for any given case. To make things worse, complete archive materials were secretly carried out of the country. Large segments of valuable evidence that could have been used in local case processing were delivered to The Hague, while the victims had moved on to all parts of the world.

Huge efforts were made with the aim of reforming the judicial sector, which began in 2002, and in part started to resolve some of these issues. Due to the Exit Strategy the UN Security Council imposed on ICTY in 2003,[2] even more was tried to be done so as to deal with the war crimes issues of Bosnia and Herzegovina.

This paper is prepared against the background of these chains of events.

8.2. "War crimes"

To begin with, it is important to clarify what is to be understood with the term "war crimes". Whenever I use the term "war crimes" in this paper, I mean genocide, crimes against humanity and violation of the customs of war. I also mean conventional and common international criminal law.

However, I also view the term "war crimes" through the prism of domestic law, i.e., crimes as defined in the Criminal Code of Bosnia and Herzegovina which came into effect in 2003 as part of the reform of the judicial sector I mentioned earlier,[3] as well as the law that was in effect in Bosnia and Herzegovina prior to 2003.

Some confusion still exists regarding the application of domestic law in war crimes cases, i.e., whether to apply the laws that were in effect at the time of the conflict[4] or apply the 2003 Criminal Code of

[2] See resolution 1503 of the UN Security Council (28 August 2003); resolution 1534 of the UN Security Council (26 March 2004).

[3] Articles 171-184 of the Criminal Code of Bosnia and Herzegovina (2003).

[4] See, e.g., Chapter 16, Criminal offences against humanity and international law, Criminal Code of the Socialist Federative Republic of Yugoslavia (1976).

Bosnia and Herzegovina. This is a very significant issue, though I will not address it here.

I foresee roles of both conventional and customary international criminal law in the practice of Bosnia and Herzegovina in defining "war crimes", both in the practical and conceptual sense.[5] I am also aware of the potential influence to be had on the development of customary international criminal law through the hundreds of cases which we will ultimately investigate and prosecute in Bosnia and Herzegovina.[6]

I am aware that international law requires Bosnia and Herzegovina to punish perpetrators of war crimes and genocide. This duty encompasses in my opinion a responsibility to as best as possible identify, investigate, prosecute and punish the most serious crimes and their perpetrators.[7] In this regard, this paper addresses decision-making as to what needs to be done in this regard, by whom.

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[5] See Article 4a of the Criminal Code of Bosnia and Herzegovina (2003); also see Article 7 of the European Convention on Human Rights (1950) which is applied through the application of Article 2 of the Constitution of Bosnia and Herzegovina (1995); Article 15 of the International Covenant on Civil and Political Rights (1966). Also, Bosnia and Herzegovina is the successor to the conventions, including the Geneva Convention (1949) and the Protocols for which the signer was the former Yugoslavia which ratified it.

[6] E.g., Article 171 of the Criminal Code of Bosnia and Herzegovina (2003) defines the crime of genocide, using terms almost identical to those used in Article 6 of the Rome Statute of the International Criminal Court. We have already tried one exceptionally important domestic case for genocide, dealing with the *Kravice* warehouse in Srebrenica 1995, in which convictions were rendered at the main hearing in August 2008. Article 172 of the Criminal Code of Bosnia and Herzegovina (2003) defines crimes against humanity, again using terms almost identical to those used in Article 7 of the Rome Statute. We have held trials and verdicts have been passed, including a certain number of final verdicts in cases qualified as crimes against humanity. These first and second instance verdicts have been published. They provide domestic interpretation of the law and the way it was applied in each case. They are a potential source for commentaries on international criminal law, as will be the ever growing number of decisions from Bosnia and Herzegovina.

[7] See, e.g., the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948/12 January 1951).

8.3. What Has Been Done to Date

A book published recently states that local courts throughout Bosnia and Herzegovina, in the ten years between 1995 and 2005, rendered 55 final verdicts in war crimes cases.[8] During the same period, the ICTY issued indictments against approximately 100 individuals for crimes committed during the conflict in the former Yugoslavia.

Apart from this, the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina (BiH), in a little less than three months, issued indictments against 99 individuals charged with war crimes in 45 cases. We have achieved major success in these cases in a relatively short period and we are getting better and more efficient.

8.4. Historical Context

The topic I have been invited to address has to be positioned in a brief historical context. When the Dayton Peace Accord was signed in 1995, there were probably a couple of hundred *major war criminals* at large in Bosnia and Herzegovina. At the same time, there were even a greater number of *war criminals who had committed serious crimes* who were also at large. Of course, there were also many *common soldiers* who had committed separate brutal offences. There were those who had participated in these offences on all levels.

They all, of course, require attention. No one should go unpunished for their unlawful ways. However, in practical terms, it is not possible to reach all perpetrators on every level. Even with the availability of more assets than we currently have at our disposal it would be wrong, and still is, to create a feeling of expectation that investigations and criminal prosecution will be brought against all those who have committed war crimes and that they will be convicted and punished severely. This would, quite definitely, lead to disappointment which would diminish confidence in the institutions that are responsible for processing war crimes as well as the whole criminal justice system.

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[8] *War Crimes in Bosnia and Herzegovina: Legally Effective Criminal Sentences in Bosnia and Herzegovina, 1992-2005*, Sarajevo: ABA/ROLI, 2007.

At the same time, everything can not be done at once. And there is no point in processing one case at a time, something I will explain. A more regulated method is needed so as to take on the task of applying both domestic and international criminal law to process the crimes that were committed during the war.

The Special Department for War Crimes of the Prosecutor's Office of BiH, as well as the prosecutors of the cantonal and district prosecutor's offices, are tasked with investigating and prosecuting war crimes. I will describe this task and what the Special Department has done to bring order to the processing of these cases. There are questions that still need to be answered, such as whether the division of tasks between the Special Department and the cantonal and district prosecutor's offices still makes sense and whether new measures need to be developed.

I will elaborate on some tools that we currently use to give the process sense, though the decision basically on who will do what is a political one and one which has yet to receive a satisfactory answer. The National War Crimes Strategy which is currently being discussed will give answers to this and other questions, though we knew over a year ago that we could not wait for the development of a National War Crimes Strategy to achieve better methods to organise our workload. I believe we have a doable way to complete the work, a method which will continue to be valuable regardless of which political decision is made.

8.5. Task

In 2004, when the Rules of the Road Unit of the ICTY closed down, electronically scanned copies of materials from Unit files were returned to Bosnia and Herzegovina for review. The Rules of the Road files are cases which, according to the Rome Agreement that was reached in 1996[9] between the countries of the region and the ICTY,

[9] Rome Agreement, Rome, 18 February 1996; see paragraph 5: Cooperation on War Crimes and Respect for Human Rights.

were sent to the ICTY for review and approval to be processed by the local authorities.[10]

There is a background to the Rules of the Road. But the files that existed at the time of the Rome Agreement were packed and sent, which also happened for the new files that were compiled between 1996 and the end of 2004, when the Unit close down. The files that were returned to the Special Department for War Crimes in 2004 were, in principle, in the same state as when ICTY received them in 1996. No additional investigation had been undertaken in the mean time.

The Rules of the Road Unit of the ICTY Prosecution had assigned a "standard designation" to each file:

- **Standard Designation "A"** was given to files which the ICTY review team considered contain sufficient "evidence" pursuant to international standards to provide probable cause to conclude that the individuals named as potential suspects or accused had committed serious violations of international law;
- **Standard Designation "B"** was given to files which the ICTY review team considered *did not* contain sufficient "evidence" for the rendering of such conclusion;
- **Standard Designation "C"** was given to cases which the ICTY review team considered did not contain sufficient information to be able to make a decision; and
- **Standard Designations "D", "E", "F" and "G"** were given to cases for a variety of other reasons which did not necessarily refer to "quality" of the information contained.

From October 2004, the Special Department for War Crimes started receiving e-copies of 877 files that received the Standard Designation "A". Electronic copies of materials from 2,389 files with Standard Designation "B" were ultimately returned. Standard Designation "C" was given to 702 files that were also returned to Bosnia and Herzegovina.

[10] See Procedures and Guidelines for Parties for Delivering Cases to the International Criminal Court for the Former Yugoslavia in accordance with the agreed measures of 18 February 1996 (Rules of the Road).

8.6. Deciding Who Will Do What

The Special Department for War Crimes was tasked to sort out the returned files. A decision was made to focus on those files which standard designation was ″A″. The decision was primarily based on the available funds.

Similar to what had been done by the ICTY staff tasked with the case review, the review initiated by the Special Department in 2005 was based only on what had been received. Additional investigations were not carried out.

Once a strategic decision was made that both the cantonal and district prosecutor's offices and the Prosecutor's Office of BiH would be engaged in the processing of returned cases, the Special Department adopted rules regulating the review of files designated ″A″.[11] The rules were used to divide files which standard designation was ″A″ into the categories VERY SENSITIVE and SENSITIVE.

VERY SENSITIVE category

(a) CRIMINAL OFFENCE
   (i) Genocide[12]
   (ii) Extermination
   (iii) Multiple murders
   (iv) Rapes and other sexual acts being part of the system (e.g., in concentration camps or during the attacks)
   (v) Enslavement
   (vi) Torture
   (vii) Persecution, widespread and systematic
   (viii) Mass, unlawful detention in concentration camps

(b) PERPETRATOR
   (i) Current or former commander (including paramilitary forces)

[11] The Prosecutor's Office of BiH, KTA-RZ-47/04-1, Book of Rules on the review of war crime cases, 28 December 2004; Addendum, A-441/04, Guiding criteria for sensitive cases of the Road Map, 12 October 2004.

[12] This should be considered as an accusation in every Srebrenica-related case.

(ii) Current or former political leaders (including municipal presidents/crisis headquarters)
(iii) Current or former judicial office holders
(iv) Current or former heads of police forces
(v) Concentration camp commander
(vi) Notorious persons
(vii) Multiple rapist

(c) OTHER

(i) Cases in which witnesses are ″members of a smaller group of people″ or ″accused″
(ii) Realistic chances for intimidation of witnesses
(iii) Cases including perpetrators in the territory which is benevolent to them or where the interest of the authorities is to prevent public investigation of crimes.

SENSITIVE category

(a) CRIMINAL OFFENCE

(i) Murder committed as part of or post the attack or in the camp
(ii) Rapes and other serious sexual criminal offenses
(iii) Serious attacks committed as part of the system
(iv) Inhuman and degrading treatment committed as part of the system
(v) Mass deportations or forcible transferring of people
(vi) Destruction or damage made to religious or cultural institutions on a large scale and systematically
(vii) Destruction of property on a large scale and systematically
(viii) Deprivation of fundamental human rights like medical treatment on a large scale and systematically
(ix) Crimes belonging to notorious crimes, although not classified under Category I

(b) PERPETRATORS

(i) Current or former police officials
(ii) Current member of the army
(iii) Persons holding or who used to hold political function
(iv) Persons affiliated with the camp management

(c) OTHER
   (i) Witness protection issue
   (ii) Difficult legal issues
   (iii) Crimes for which a potential long-term prison sentence could be imposed
   (iv) Allegations connected with events that were already tried before the ICTY
   (v) Cases with extensive documentation

Out of 877 files, 202 are estimated as VERY SENSITIVE and have been kept by the Special Department for War Crimes. The remaining files are estimated as SENSITIVE and have been sent for further investigation to the cantonal and district prosecutor's offices in places in which these incidents took place as stated in the files.

The rules and criteria used to carry out this review used to be the best way to share the work among one small unit for processing war crimes in the Prosecutor's Office of BiH and cantonal and district prosecutors.

We have learned over time that the original review process carried out by the ICTY was not very reliable. Many of the received files were ″old″. The information contained in the electronic copies that had been returned was often of poor quality, by all relevant standards, and as such could not be authenticated. In many cases it turned out that victims, witnesses or suspects had deceased or were inaccessible. Using an analytical approach, it was established that even the files which the ICTY gave the standard designation "B" contain information which, when cross-referenced against other information, lead to suspects and evidence which can be instrumental in criminal prosecutions in Bosnia and Herzegovina.

We have also learned that in 2005 the cantonal and district prosecutor's offices did not fully adopt the criteria set by the Special Department for War Crimes and the presuppositions they were based on. Even though they were reasonable at the time, these criteria are still not fully adopted.

Some deficiencies were noted in the review process as well. In order to be able to complete the assignment, the staff engaged in the

review had to take the information from the files as reliable, while time and experience showed that it was actually not. Furthermore, due to financial constraints, the staff conducting the review in 2005 was forced to process a large number of cases in a very limited period of time. The files were not only incomplete, but they also contained statements and other documents in languages which the staff could not understand. The review and decisions were made on the basis of hastily prepared summaries and translations.

The review made in 2005 was the best possible that could be done under the circumstances, but the presumptions deriving from the review could not be justified. That is particularly true if you take into account the number of disputed cases. The review did not adequately address the issue of unnecessary documents contained in the files. A number of those refer to the same cases, events or situations, but it is almost impossible to detect or anticipate the overlapping without a thorough analysis. If you disregard the unnecessary documents,[13] numerous consequences can be expected in terms of investigation and criminal prosecution.

I will not go deeper into the method in which the cases had been selected prior to 2007, nor will I dwell further on the messy discussion on whether war crimes should be prosecuted at the state or cantonal and district levels. Rather, it is important what we have done over the past 18 months to improve our work and better organize the process of identification and selection of cases requiring investigation and prosecution, irrespective of the level at which the cases are processed.

Precious experience acquired in conducting investigations and preparing cases for prosecution – starting with the cases bearing "A" designation and classified as VERY SENSITIVE and retained in the Prosecutor's Office of Bosnia and Herzegovina, as well as the experience from the field – have shown that a case-by-case prosecution is neither efficient nor effective. Such an approach did not lead us in the desired direction and only deepened the ongoing mess about what, who and how things should be done.

[13] Including minutes of numerous, well-intentioned but useless hearings of the same witnesses and victims by prosecutors and investigators who operated independently of each other, at the state, cantonal and district levels.

Whatever the term "core international crimes" might imply, the mere focusing on the existing files in order to determine what needs to be done, what can and must be done and who will do it, simply did not work in Bosnia and Herzegovina. Neither was it promising in terms of fulfilling expectations from the courts and prosecutor's offices. The databases were not very useful in that sense (except for identification of potential sources of evidence pertaining to the committed war crimes), partly due to the condition in which the documents were returned from the ICTY. The databases themselves can never offer specific assessments or functions required by prosecutor. They are not an adequate replacement for smart and focused exercise of a discretionary right which each prosecutor should use in the public interest. Databases can be used for collecting and sorting information, but they can not "make decisions".

Two years ago it became clear that we need a new approach to the issue of war crimes prosecution in Bosnia and Herzegovina. The response to this was the analytical approach treating the cases, events and situations instead of files. This approach aims at addressing the issue of prioritization of war crimes cases in the Prosecutor's Office of BiH.

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Morten Bergsmo (editor)

This volume contains papers presented at a seminar of the Forum for International Criminal and Humanitarian Law in Oslo on 26 September 2008 with the same title as the publication. It has 24 contributions by some of the leading practitioners and experts in international criminal justice and policy. Armed conflicts tend to generate too many war crimes and crimes against humanity for all persons responsible to be held criminally accountable. This volume does not address what should be done with cases which probably can not go to trial due to limited capacity in criminal justice systems. That is the subject of FICHL Publication Series No. 9. Rather, this volume concerns the best way to select and prioritize the cases that should be investigated and prosecuted first. This is a question of the quality of discretion in the management of criminal justice for atrocities. The Forum seeks to start a debate on the role of criteria in case selection and prioritization through this volum

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