STATE RESPONSIBILITY FOR ENFORCED DISAPPEARANCE AND PROSECUTORIAL DISCRETION IN CASE SELECTION POLICIES[1]

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PART 2: PROSECUTORIAL DISCRETION – A NECESSARY EVIL

I. INTRODUCTION

This is the second part of a paper on the competing interests to provide (direct and indirect) victims of crime with sufficient redress. In the first part the broad nature of state responsibility was examined. In this second part the duty to investigate, prosecute and punish gross violations of human rights, a matter which is fundamental to ensuring the effective protection of individuals' rights and key to the notion of State responsibility, will be discussed. Despite the fact that the notion is not explicitly pronounced in human rights treaties it has emerged through commentaries to the International Covenant on Civil and Political Rights (hereinafter: ICCPR) and through the jurisprudence of the various regional human rights bodies.

II. Universal Level

General Comment No. 20 on Article 7 of the ICCPR[3] provides that it is not sufficient to merely implement Article 7 (prohibition of torture) of the ICCPR, it further requires the implementation of

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[1] This paper is taken from the author's LL.M (International Criminal Law) thesis entitled "*The incompatibility of the State duty to investigate, prosecute and punish the crime of enforced disappearance as measured against the prosecutorial discretion to select cases*" published in February 2009.

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[3] UN Compilation of General Comments, p.140, para. 8. In particular the Committee drew reference to the lack of horizontal effect of Article 2(1) as regards the State's positive obligations, but noted it will only be fully discharged if individuals are protected, not just against violations of ICCPR rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of such rights.

legislative, administrative, judicial and other measures to prevent prohibited forms of ill-treatment. In looking at this duty, the UN Human Rights Committee (hereinafter: Committee) noted that there may be circumstances in which a failure to ensure observance of rights would give rise to violations by States Parties of those rights, as a result of permitting or failing to take appropriate measures to prevent, or importantly, to exercise due diligence to investigate, punish, or redress the harm caused by such acts non-state actors.

Accordingly, in this regard, the Committee has adopted the position that the two rights held under the ICCPR, the right to be protected from human rights violations and the right to reparation, are closely related and have to be applied in concert if they are to have any effect.[4] This is an important point and one that must be applied if human rights instruments are to serve any meaningful purpose, particularly as regards the crime of enforced disappearance.

To further advance this position, in the *Chongwe Case*,[5] the Committee concluded that the duty under Article 2(3)(a) of the ICCPR included the duty to provide an effective remedy and to take 'adequate measures' to protect an individual's personal security. Moreover, it was held that the State was required to carry out an independent investigation and to expedite proceedings against any known perpetrators. Finally, it was noted that if an identified perpetrator was found to be acting in an official capacity the victim was to be awarded damages.[6]

As regards the duty to investigate deaths caused by agents of the state the Committee has observed that where extra-judicial execution of prisoners formed part of a State practice and one of impunity the State was to take urgent steps to remedy this matter to comply with its obligations.[7]

The UN Committee against Torture (hereinafter: CAT) has adopted a similar position in a number of reports, stating that the failure to investigate allegations of torture and to conduct prompt, impartial and full investigations is not in conformity with Articles 12 and 13 of the Torture Convention.[8]

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[4] *Ibid.*

[5] Communication No. 821/1998, R. *Chongwe v. Zambia* (*Views adopted on 25 October 2000*), UN doc. GAOR, A/56/40 (vol. II), p. 142, para. 5.3. In *Chongwe* the Committee observed that Zambia refused to carry out an independent investigation into the shooting (and near death) of a civilian by a police officer and the investigation which was initiated failed to be concluded within a reasonable time and made public after more than three years,

[6] *Ibid.* para. 7. Recently the UN Human Rights Committee upheld this view in *Lalath Rajapakse v. Sri Lanka* Communication No. 1250/2004**,** CCPR/C/87/D/1250/2004, views adopted on 14 July 2006, para. 9.5**.** See also Case No. 213/1986, *H.C.M.A. v. the Netherlands*, adopted 30 March 1989; Case No. 275/1988, *S.E. v. Argentina*, adopted 26 March 1990; Case Nos. 343-345/1988, *R.A., V.N. et al. v. Argentina*, adopted 26 March 1990.

[7] UN doc. GAOR, a/56/40 (vol. 1), p.55, para 8. The Committee observed the practice of the Dominican Republic law enforcement and military authorities tasked with investigating drug trafficking enjoyed considerable immunity from prosecution for the use excessive of force.

[8] *See e.g.* Third Periodic Report of Belarus (UN doc. GAOR, A/56/44, p. 21, para. 45(e) and paras. 46(b) and (d)).

As regards disappearances in Guatemala the CAT expressed concern about the lack of an independent commission "*thereby continuing the existence of impunity as a result of a repeated dereliction of duty by government bodies responsible for preventing, investigating and punishing*" [9] the crime of enforced disappearance. The CAT recommended that an independent commission be established in this regard.[10]

As to the notion of the establishment of a 'fact-finding' or 'investigative' commission this is, in this author's view, troubling, as one must enquire into what it purports to achieve; if it is merely to get to the truth then it arguably serves its purpose. However, more often than not it is used as a pressure mechanism to force prosecutions with little consideration as to the evidentiary merit of the information it uncovers. Whilst it must be recognised that the right to know the truth is a recognised right under international law, it should at the same time be noted that a fact-finding or investigative commission is *not* a truth and reconciliation commission and the results of such a commission do not necessarily path the way to a successful prosecution or for that matter establish truth and reconciliation.[11]

It must also be noted that the standard of proof adopted by an investigative commission (distinct from a full criminal investigation) and a human rights monitoring body, when analysing evidence and testimony, is not to the *criminal* standard of proof.[12] This is not to say that the establishment of a commission is without foundation, as this would seem to fly in the face of universal human rights principles. However, one must clearly recognise the limitations of such a process and recognise that it does not necessarily promote truth or reconciliation when expectations are set too high. By this it is meant that where a commission uncovers criminal conduct and directs such findings to the prosecutorial authorities it must recognise that the commission's role is to uncover and make known the truth of conduct. It is not necessarily the intention to elicit evidence to a criminal standard of proof or to compel the authorities into conducting a criminal prosecution. These matters must be borne in mind when considering to what extent the right unquestionably extends.

III. Inter-American Court of Human Rights

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[9] UN CAT (UN doc. GAOR, A/56/44) Report of Guatemala, p. 33, paras 73(b).

[10] *Ibid.* p. 33, paras 73(e).

[11] See for example the experiences of the Srebrenica and Sarajevo Commissions in BiH that were established to investigate crimes rather than get to the truth.

[12] See *Velasquez-Rodriguez*, paras. 127-128. See also International Court of Justice, *Corfu Channel Case*, Merits, Judgment, I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60. In *Velasquez-Rodriguez* the Court held (para. 134):

> "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

The Inter-American Court has adopted a similar position by confirming the obligation to investigate and punish acts amounting to violations of international law.[13] This position was made quite clear in *Velasquez-Rodriguez* in which the Inter-American Court held that the starting point is that the State is duty-bound to investigate *every* situation involving a violation of the rights protected by the American Convention on Human Rights (hereinafter: ACHR) and the same principle applies as regards the acts of non-state actors as to do otherwise would allow individuals and groups to act freely and with impunity.[14] However, the Court also qualified the foregoing that the duty is not breached merely because an investigation fails to produce a satisfactory result; it is breached rather because it is either not undertaken in a serious manner or not undertaken at all.[15]

In this regard the Inter-American Court has recognised the inherent difficulties in investigating *every* complaint and dispelling the expectation that every investigation will result in the successful prosecution and consequently punishment of a defendant. This is of course, as already alluded to, an impossible expectation and one that ultimately fosters distrust in the system; this is particularly so in BiH. In *Velasquez-Rodriguez*, however, the Inter-American Court concluded that the procedures in Honduras, although theoretically adequate offered little or no prospect of success and lacked fairness in practice.[16] Additionally, the Court noted that the duty exists for as long as uncertainty remains as to the person's fate.[17] In the *Street Children Case*[18] irrespective of any judicial action or decision taken by the authorities on the facts if it fails to investigate a *crime* it will nonetheless be in breach of its positive duty. This final point is particularly important and refers back to notion that the criminal act must be the subject of the inquiry.

IV. European Court of Human Rights

The approach of the European Court is that although not explicitly provided in the ECHR, the Court has held the duty to exist most prominently as regards to the right to life. This position is set out in a number of cases, most notably in *Cyprus v. Turkey*[19] and *Avsar v. Turkey*.[20] In *Avsar* the European

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[13] *See* I-A Court HR, *Villagran Morales et al.* (The "Street Children" Case), pp.194, para. 225). It should also be noted that the Inter-American Court, unlike the European Court, is entitled to consider treaties other than the ACHR in making its determination and therefore in this regard may consider rights and obligations arising under international humanitarian law (see Article 29(b) of the ACHR).

[14] *Op. cit. Velasquez-Rodriguez*, para.176.

[15] *Ibid,* para.177.

[16] *Op. cit.* para. 178.

[17] *Op. cit.* para. 179.

[18] *Op. cit.*

[19] *Op. cit.*

[20] Eur. Court HR, Application no. 25657/94, at 391, ECHR 2001-VII.

Court held that Turkey had violated the victim's rights under Article 2 of the ECHR by failing to conduct a meaningful investigation, within a reasonable time, aimed at uncovering the circumstances behind his death. In particular, the European Court summarised its previous jurisprudence in that the essential purpose of an investigation is to secure the effective implementation of domestic laws,[21] that the authorities must act upon their own motion once aware of the occurrence,[22] that an investigation is carried out promptly and expeditiously,[23] that it is of vital importance that the investigation be carried by persons independent of the act itself,[24] and capable of leading to a determination of whether the conduct was justified.[25] In regard to the latter test it should be borne in mind that this is not a test of result, but means employed, i.e., whether the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.

Accordingly the European Court clearly recognises the existence of the duty and the role it plays in ensuring the rule of law, but also recognises that circumstances may exist that hinder an effective investigation.

V. Bosnia and Herzegovina

In a number of cases brought by the victims of enforced disappearances in BiH the Human Rights Chamber (hereinafter: Chamber) was compelled to address the right against the background of an armed conflict in which several thousand persons remain missing[26] and approximately one hundred thousand persons lost their lives.[27] In this regard, the Chamber reviewed the complaints under Articles 3, 5 and 8 of the ECHR, and in each case declined to additionally examine the complaints under Article 13.[28]

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[21] *See e.g.* Eur. Court HR, McCann and Others v. the United Kingdom p. 49, § 161; Kaya v. Turkey, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105; *İlhan v. Turkey* [GC] no. 22277/93, para. 63, ECHR 2000-VII; Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, paras. 81-82; *Öğur v. Turkey* [GC], no. 21954/93, paras. 91-92, ECHR 1999-III;

[22] Eur. Court HR, *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, para. 109; *Gül v. Turkey*, no. 22676/93, (Sect. 4), para. 89, judgment of 14 December 2000

[23] *See e.g.,* Eur. Court HR, Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, para. 102-104.

[24] *Op. cit Avsar*, para. 394.

[25] Eur. Court HR, Kaya v. Turkey judgment, cited above, p. 324, para. 87

[26] For up to date statistics see the International Committee for the Red Cross in BiH (see http://www.icrc.org/web/eng/siteeng0.nsf/html/bosnia_herzegovina!Open)

[27] *See* Research and Documentation Centre (Istraživačko dokumentacioni centar), *Human Losses in BiH 1991-1995* (Bosnian Book of the Dead).

[28] The HRC was precluded from examining the right to life complaints under Article 2 as acts arising before the entering into force of the GFAP, 14 December 1995, fell outside of its competence *ratione temporis*.

The first two cases to deal with enforced disappearance concerned a disappearance in August 1995 of Father Matanovic and his elderly parents[29] and more commonly known, in July 1995, the disappearance of Colonel Avdo Palic.[30] In both matters the HRC held that they were enforced disappearance under the UN Declaration and applying the jurisprudence of the Committee[31] that the authorities were required to: (a) carry out immediately a full investigation capable of exploring all the facts regarding the disappearance; (b) to release the person, if still alive, or otherwise, to make available his mortal remains to the family; and (c) to make all information and findings relating to the fate and whereabouts known.[32]

In addressing cases of *mass* disappearance, mostly concerning Srebrenica, the HRC adopted a consistent, albeit restrictive approach.[33] It considered that the only effective remedy to a violation of the right to know the truth under Article 3 of the ECHR in matters of mass disappearance was the

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[29] *See* HRC Case no. CH/96/1, *Josip, Bozana & Tomislav Matanovi*c, decision on the merits of 11 July 1997, paragraph 64, Decisions on Admissibility and Merits March 1996-December 1997. See also Amnesty International Report: BiH – "The "Disappeared" Father Tomislav Matanovic and his parents". AI Index: EUR 63/006/2002. On 24 August 1995, Bosnian Serb police took Father Tomislav Matanovic to the police station in Prijedor, allegedly for security reasons. He was returned to his parents' home the next day, and was kept there under house arrest, guarded by the police, until 19 September. On 19 September 1995, both Father Tomislav Matanovic and his parents were taken from their home to the Urije police station in Prijedor. Since then the Bosnian Serb authorities have neither openly acknowledged that Father Tomislav Matanovic or his parents were detained nor given any reasons for their arrest. In fact, the authorities of the Republika Srpska attempted to conceal the disappearances by claiming the victims had left the country (see para. HRC Decision). According to Dragan Bulajic (then President of the Republika Srpska State Commission for the Exchange of War Prisoners and Missing Persons) Father Matanovic was one of 12 persons included on a list of prisoners to be exchanged between the Republika Srpska and Bosnian Government authorities on 21 December 1995. The Bosnian Government reportedly did not accept this offer, and the exchange did not take place. Other unconfirmed reports suggest that Father Matanovic was offered for exchange on 30 March 1996, but again, the Bosnian Government did not accept the offer.

[30] *See* HRC Case no. CH/99/3196, *Avdo & Esma Palic*, decision on admissibility and merits of 9 December 2000, Decisions on Admissibility and Merits July-December 2000. Colonel Palic was scheduled to meet with General Rupert Smith of UNPROFOR (UN peacekeeping mission in Bosnia) and members of the Republika Srpska Army (General Ratko Mladic and General Zdravko Tolimir, both later indicted by the ICTY) in order to broker a peace deal. Unfortunately, the UNPROFOR representatives did not show up and Colonel Palic was forcibly removed from the meeting and sent to a detention area in Vlasenica and then a military detention centre in Biljeljina in Northeast Bosnia. Witness testimony has confirmed his detention during the latter half of 1995, but he has not been seen since that time. His wife, Esma Palic, has fought fearlessly since his disappearance but to no avail. The matter in currently under investigation by the Bosnian State Prosecutor's Office but it is believed that the suspects, if any can be identified, are hiding in the Republic of Serbia under the protection of the non-extradition of nationals clause in the Constitution. Esma Palic has recently filed a complaint with the European Court of Human Rights due to lack of an enforceable remedy in the State of BiH. The matter remains pending.

[31] *See Elena Quinteros v. Uruguay,* Communication No. 107/1981 of 17 September 1981, Reports of the Human Rights Committee (1983), paragraph 16; *Celis Laureano v. Peru* of 25 March 1996, Communication No. 540/1993, Reports of the Human Rights Committee (1997), Volume II, paragraph 8.5; and *Katombe L. Tshishimbi v. Zaire* of 25 March 1996, Communication No. 542/1993, Reports of the Human Rights Committee (1997), Volume II, paragraph 7).

[32] *Op. cit., Avdo and Esma Palic v. Republika Srpska*, para. 89.

[33] There is much criticism of the HRC approach to dealing with mass claims in particular the decision to strike out a large number of applications dealt with after the first Srebrenica decision. There is also room to criticise the HRC for its inconsistent approach in ordering pecuniary remedies in cases of single disappearances but not in mass disappearances. However, that is not the subject of debate in this paper.

ordering of an investigation.[34] Later, in *Huskovic & Others* the HRC went a step further as this matter was already the subject of a trial at the ICTY[35] and an investigation at the local level had been initiated. However, it was considered that the local investigation was superficial and politicised, i.e. not aimed at getting to the truth. Accordingly, the Chamber held that the mere conduct of criminal proceedings do not amount to an effective investigation and any attempt to undertake a superficial investigation merely aggravates the violations further.[36] This is a particularly important point because again it highlights that although the success of the investigation is not conclusive, it must be undertaken seriously.

VI. Discussion of the Human Rights Policy Approach

The notion of seriousness in the undertaking of an investigation is crucial, as any investigation must be deemed to be *effective* and aimed at *uncovering* the truth. However, this process, as mentioned already, needs to be distinguished from a truth telling process. What is being discussed here is a criminal investigation aimed at bringing perpetrators to justice and is less concerned with the needs of society to know the truth of what happened. Obviously, there is at times a fine line drawn between the two, but it must be remembered that a criminal trial, particularly in an adversarial law legal system, is less concerned with determining the truth in a societal context, and more at determining beyond reasonable doubt whether a particular individual or a group of individuals committed the criminal acts alleged. Such a determination may serve of course to healing victims' wounds if the criminal process is successfully concluded, but the truth of the matter is that it may do little to assist if unsuccessful, even if the authorities carried out an effective investigation aimed at getting to the truth. In this light, victims need to be aware of the limitations of the process and that a criminal investigation may be properly carried out but nonetheless unsuccessful. It may also be successful in terms of having an individual perpetrator convicted, but do little as regards a particular victim unrecognised in the criminal process.[37] Finally, it may do little to bring the government to account that bears responsibility for allowing the crimes to be committed and doing little by way of remedial action.

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[34] *See* HRC Case No, CH/02/12551 et al. Decision on Admissibility and Merits of 22 December 2003, Decisions July-December 2003. However, in *Huskovic & Others* the Human Rights Chamber also ordered the payment of approximately 50,000 EUR for the collective benefit of all families affected by the events of 10 May 1993 in which 13 members of the Army of BiH were abducted by members of the Croatian National Defence ("HVO"). However, this award of compensation was to be used under the Statute of the State Missing Persons Institute for the purpose of ascertaining the fate of the 13 missing members of the Army of BiH (para. 94).

[35] *See* ICTY, Case no. IT-98-34-T, *Prosecutor v. Mladen Naletilic & Vinko Martinovic ("Tuta and Stela").*

[36] *Op. cit. Huskovic & Others,* para. 70

[37] One of the problems associated with this so-called healing process is that an investigation may be limited to certain criminal conduct, but this does not uncover the totality of crimes committed. This may see a particular victim not forming part of the investigation.

VII. Selective Justice

In the process of prosecuting mass disappearances the notion of 'selectivity' is an unavoidable reality in international justice and operates on two fronts. Firstly, as to those matters characterised as 'war crimes' and secondly as to those matters in which there is a preparedness or will to prosecute.[38] Naturally, this impacts upon the rights of victims in the sense of seeing that justice is done. For example, a decision not to prosecute or decision not to prosecute all criminal conduct may deprive a victim of their right, particularly their right to an effective remedy.[39]

There are many reasons why criminal matters will not be dealt with. The constraints may be financial, political or at the most rudimentary practical impossibilities, *i.e.* no viable defendant, no accessible defendant, or no surviving evidence. At the ICTY the basis of selection was always based on the principle that its purpose was to target the most senior leaders and this was reinforced by a UN Security Council Resolution.[40] One further area that requires discussion in the Bosnian context and that is the notion of transfer of criminal proceedings through international instruments and bi/multi-lateral agreements. As regards war crimes prosecutions there has been much debate in recent times on proceedings being transferred to neighbouring states due to constitutional bars in extraditing nationals and other complications. The problem that this causes is that it cannot be said that the State has conducted an effective investigation which raises serious doubts as to the rights of victims and their families to seek redress for violations of Articles 2 and 3 of the ECHR. This is clearly a matter that will need further consideration over time.

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[38] *See* McCormack, T. L. H., *Selective Reaction to Atrocity*, (1996-1997), 60 Albany Law Review, 681, 683. See also McCormack, T. L. H., and Simpson, G., *The Law of War Crimes: National and International Approaches* (The Hague: Martinus Nijihoff, 1997), p.1, pp.8-9 in which the position of selectivity is discussed in relation to why some war crimes remain unpunished. Simpson notes that "each war crimes trial is an exercise of partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia, why not Somalia, if Rwanda, why not Guatemala?"

[39] By way of example, recently the Swiss NGO 'Trial' recently filed a series of complaints with the European Court against BiH for its failure to investigate a number of disappearances and extra-judicial killings in Koricankse Stijene in Central Bosnia. See Balkan Investigative Reporting Network, *Koricanske Stijene Case in Strasbourg*, 20 October 2008 (http://www.bim.ba/en/138/10/14118/). In the application to the European Court it is stated:

> "…civilians were taken from Trnopolje detention camp in order to be released. On their way more than 200 men were separated from the rest of the group and taken to Koricanske stijene on mount Vlasic. After having being taken off the buses, the detainees were told to kneel down by the cliff edge. Serbian policemen then shot them. Only 12 persons survived. Shortly after that, the crime scene was cleaned and the victims' bodies disappeared from it. They have still not been found…"

Interesting the matter has been the subject of a trial at the ICTY. Darko Mrdja (see case no. IT-02-59 Prosecutor v. Mrdja, Sentencing Judgment of 31 March 2004) who following a guilty was convicted for the same events and sentenced to 17 years imprisonment. Further, subsequent to the publication of this the Bosnian State Prosecutor's Office arrested and indicted four persons.

[40] UN Security Council Resolutions 827 of of 25 May 1993 *et. seq.*, and 1481 (2003) of 19 May 2003. See also *Prosecutor v. Delalic & Others ("Celebici")*, Judgment, IT-96-21-A, 20 February 2001, para. 611.

In order to address a massive caseload it is obvious that a clear, transparent and systematic approach is needed, one that determines priorities and selects matters for prosecution in a fair and transparent manner and one that serves society as a whole. This was one of the guiding principles in addressing the war crimes problem in BiH.

In the context of BiH, in July 2007, the State Minister of Justice, at the request of the ten Chief Prosecutor, formed an expert working group to draft a 'National Strategy for the Prosecution of War Crimes Cases'.[41] The draft strategy was adopted by the BiH Council of Ministers on 30 December 2008. [42]

One of the principal aspects of the national strategy became the issue of prosecutorial independence and the discretion to select cases. In this regard, the former Head of the Special Department for War Crimes of the Bosnian State Prosecutor's Office (hereinafter: SWDC), Mr. David Schwendiman, frequently stated that decisions made in response to external pressures damage the credibility of the process[43] and that this results in 'opportunity costs' in the ability to prosecute those cases deemed the most important. It is noted that the often repeated rhetoric that all cases of war crimes will be brought before the courts, as many individuals in BiH both national and international have stated, is most unrealistic and places unreasonable expectations on a weakened criminal justice system. Naturally, this opens the forum to alternative justice that would arguably be more in the interests of the public. The approach of the SDWC in prosecuting only those matters deemed the most important was a brave and much needed statement as it sought to address the unreasonably high expectations that had been set. Naturally, such a statement shows the impact on victims' rights of not properly selecting matters for prosecution. It also arguably impacts upon the transitional justice efforts of a nation.

In BiH the national war crimes strategy took a novel approach to case selection by on the one hand recognising the independence of the prosecutor, but on the other determining that, as with the

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[41] The National War Crimes Strategy adopted by the BiH Council of Ministers on 30 December 2008 recognises that it will take 15 years to prosecute all war crimes cases and 7 years to prosecute the most serious cases.

[42] Upon its adoption the BiH Prime Minister noted that the strategy was vital as it represented a systematic approach to the war crimes issue and provided the guidelines for the resource requirements to prosecute *all* war crimes cases (Cited in report of the Balkan Investigative Reporting Network, Alic, A., 30 December 2008, http://www.bim.ba/en/147/10/15826/), thereby further perpetuating the problem by creating an expectation that *all* war crimes would be prosecuted. Further disappointingly, just one month after making the broad statement of support for the national strategy, the Bosnian Government reduced the budget of the institutions dealing with adjudicating war crimes by 1 million Euros, approximately one sixth of its overall budget (http://www.sudbih.gov.ba/?id=1139&jezik=e).

[43] Schwendiman, D.J.S., Selecting war crimes cases for investigation and prosecution: avoiding the opportunity costs of picking low hanging fruit, open letter, page 5:

> "…decisions regarding case selection and priorities have been made mostly in response to public and political pressure from government entities, politicians, non-governmental organizations, survivor groups and private individuals, many with agendas not necessarily related to nor concerned with the development or success of a strong, independent criminal justice system."

International Criminal Court, the ultimate decision maker as to jurisdiction is that of the Court.[44] There are of course two sides to this argument because on the one hand a Prosecutor is required to make decisions in the public interest that only he is in a position to make; by this it is meant that only he has sufficient knowledge of events under investigation to know what is, on the evidence, a more graver crime or more pressing matter as compared to another. However, on the other hand there must be a form of judicial accountability for the decisions he makes to ensure it they are not arbitrary and to ensure that they are in the interest of victims of crime. The question remains whether the Bosnian system will address sufficiently this balance.

VII. General Principles of Prosecutorial Discretion

It is fully recognised that in order to properly discharge of one's responsibilities when making a charging decision, a Prosecutor must be subject to transparent criteria and standards that govern such decisions.[45] Guidelines and standards that apply to charging decisions made must be available to the public, to the extent necessary, and guidelines must take into account international standards[46] and take advantage of proven practices in well established criminal justice systems elsewhere.[47] They must also be consistent with and conform to domestic law and practices in the region in which they operate.

However, the problem that the obligation to investigate and prosecute creates, when burdened with large-scale criminal conduct, is that there must be recognition that not *every* crime or allegation of a crime will be addressed.[48] This is where one returns to the issue of addressing society's needs and not the individual's.

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[44] *See* Articles 17-19 of the ICC Statute on the question of admissibility that confers on the Court the power to determine 'gravity'. See also, Clark. P., *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*: (http://se1.isn.ch/serviceengine/FileContent?serviceID=47&fileid=44088345-F8EF-EC46-767A-014D987BB3FD&lng=en).

[45] *See e.g*, Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 17:

In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

[46] *See e.g.,* Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; International Association of Prosecutors, Standards of professional responsibility and statement of the essential duties and rights of prosecutors (23 April 1999)

[47] *See e.g.*, Council of Europe, Committee of Ministers, Recommendation (2000) 19 on the Role of public prosecution in the criminal justice system (6 October 2000); Crown Prosecution Service, *Charging Standards* (London: Oxford University Press, 2005); American Bar Association, ABA Standards on Criminal Justice, Prosecution Function (3rd Edition – 1993); United States Department of Justice, United States Attorney's Manual, 9-27.00, Principles of Federal Prosecution (January 2007); Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales (20 October 2003); The Federal Prosecution Service Deskbook (Canada) (01 March 2006)

[48] National War Crimes Strategy, State Prosecutor's Office, draft version 29 May 2008, p.2, f/n 1.

It must be acknowledged that a system of selecting cases for investigation is necessary and one that recognises that the perception of 'selective justice', albeit well intended, rarely fails to take full account of individual victims even if it pertains to address the needs of society as a whole.[49] Any system of applying objective and subjective criteria[50] raises the question as to whether victims will see justice in having a full and effective investigation where cases are selected on the basis of their apparent complexity.[51]

In order to address this subjectivity prosecuting authorities *must* adopt internal guidelines on Charging which recognise that each case is unique and must be considered on its own merits,[52] but some fundamental principles govern *all* decisions. This is a means of ensuring that the Prosecutor carefully weighs the evidence before charging so that individuals are not unfairly or unnecessarily charged and that have less than a reasonable chance of success.[53] As noted earlier, Prosecutors must also protect the public interest[54] and must not initiate or continue a prosecution, or should make every effort to stay proceedings, when an impartial investigation or developments in the evidence at or before trial show a charge to be unfounded[55] and prosecutors must always act in the interests of justice, not solely for the purpose of obtaining a conviction.[56]

The discretion to charge a person with a criminal offence, a considerable exercise of authority must be exercised in as objective and open a manner as possible. The exercise of the discretion must be impartially applied with a view to establishing what happened, how it happened and the accurate identification of the person or persons who bear legally responsibility. This is particularly so as regards the prosecution of war crimes and charging decisions *must* take account of the public interest. This is linked back to the societal right to know the truth, as matters in war crimes cases the role of the Prosecutor as an independent and impartial selector of facts is vital as this undoubtedly contributes to uncovering the truth for victims in the larger sense.

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[49] *Ibid.*

[50] The criteria for reviewing war crimes cases at the Bosnian State Prosecutor's Office adopted in 2004 are based on three considerations: (a) gravity of the criminal offence; (b) capacity and role of the perpetrator; and (c) other circumstances. Clearly in this regard the emphasis is on *subjective* criteria.

[51] In this regard the question is often raised as to the issue of complex as measured against what? Is it a test of complexity as measured against all known crimes or is it complex as measured against sample crimes. It is here where the subjectivity of the decision maker is at its most dangerous and a lack of clear principles and an oversight procedure means that the system is subject to abuse.

[52] *See e.g.*, Crown Prosecution Service, Section 2: General Principles, 2.1, p. 4.

[53] *See* Crown Prosecution Service, *Charging Standards* p. 4; 2. General Principles, 2.2, p. 4. *See also*, Guidelines on the Role of Prosecutors, para. 13(a).

[54] *See e.g.*, Guidelines on the Role of Prosecutors, para. 13(b):

> "Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect."

[55] *See e.g.*, Guidelines on the Role of Prosecutors, para. 14:

[56] *See* Crown Prosecution Service, *Charging Standards* (London: Oxford University Press, 2005), 2. General Principles, 2.3, p. 4.

However, despite any finding by a human rights body that the authorities must investigate a disappearance, in making such decisions the Prosecutor *must* be authorised only when he is satisfied that legally admissible evidence is sufficient in quality and quantity to be likely to result in a conviction that will survive on appeal.[57] Further, the Prosecutor must decide whether and when to prosecute even if there is evidence to convict and, if the decision to charge is made, what to charge to best conserve the resources of the office.[58] It is this subjectivity of the decision to prosecute that most needs standards to guide the Prosecutor, as this directly affects the rights of victims and society as a whole.[59]

One of the guiding principles must be the starting point that it is unrealistic to expect that every case will be tried or to expect that every person who should be held criminally responsible will be brought before a Court. It would be disingenuous to victims and misleading to the public to uphold such a notion and both the national and international community must bear fault for perpetuating such unrealistic expectations generally. However, by focusing on a small number of the most *significant* matters in a short space of time the possibility of restoring order is all the more likely. Nonetheless, there must come a time when the nation will become fatigued with dealing with war crimes and alternative mechanisms will be required. In making this assessment consideration of the needs of society as a whole rather than the needs of an individual then need to be addressed.[60]

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[57] *See* Crown Prosecution Service, *Charging Standards*, p. 6.The charging standards for the Crown Prosecution Service list a number of questions the prosecutor must ask to determine whether these standards have been met, including whether the evidence the prosecutor would have to use to secure conviction might be excluded by the court (5.4(a)), whether identification of the defendant is likely to be challenged and whether the evidence the prosecutor must rely on for identification is strong enough (5.4(e)), whether there are concerns about the accuracy or credibility of a witness the prosecution must use (5.4(f)). *See also* ABA Standards for Criminal Justice: Prosecution Function (1993), Standard 3-3.9(a), Discretion in the Charging Decision; United States Department of Justice, United States Attorney's Manual, 9-27.00, Principles of Federal Prosecution (January 2007), 9-27.220 – Grounds for Commencing or Declining Prosecution; Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales (20 October 2003). 4 – The Decision to Prosecute, i.e., a prima facie test (whether admissible evidence is available the is capable of establishing each element of the offence), taken together with a determination whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law (weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings); and, a decision whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest; The Federal Prosecution Service Desk Book (Canada) (01 March 2006), 15-Decision to Prosecute, 15.2 Statement of Policy.

[58] *See e.g.*, Council of Europe, Committee of Ministers, Recommendation (2000) 19 on the Role of public prosecution in the criminal justice system (6 October 2000).

[59] In making a determination the Prosecutor may need to consider practical matters such as the resources made available. However, both the European Court (see e.g. Eur. Court HR, *Ledonne (No. 2) v. Italy*, judgment on the merits of 12 May 1999, paragraph 23) and the HRC (see e.g. HRC, *Zoran Basic and Zeljko Cosic v. Federation of BiH,* Case Nos. CH/02/11108 and CH/02/11326, decision on the merits of 5 May 2003, Decisions Jan-June 2003, para.183),[59] the latter applying the jurisprudence of the former, have consistently upheld that it is the responsibility of the State to organise its judicial system in such a way as to ensure the reasonably expeditious conduct of individual cases and to organise their legal system so as to allow the Courts to comply with the requirements of the European Convention.

[60] In making such an assessment on what and how much should be done the starting point is rightly set at the perpetrator. In the context of BiH individuals on all sides of the conflict who planned and ordered operations, or made it possible for them to occur, those who set events in motion that led to catastrophe, and those who were simply the cadre that did the dirty work, the foot soldiers

Accordingly, as has been advocated on numerous occasions by prosecuting authorities, the position is advanced that in order to conserve resources and ensure that the greatest number of those who should be held accountable, priority must be given to prosecuting those who exerted the greatest influence and occupied or wielded the greatest authority in relation to the crimes the evidence suggests were committed.[61] This of course impacts on the rights of a victim, as it is ordinarily the case that those who exert the greatest influence during a conflict are rarely direct perpetrators. They may be far removed from the victims and survivors.

Further, in deciding which matters to do in which order, weight should be given to those cases in which the crimes had the greatest impact in the regions or communities where they were committed. In order to meet this objective the key factor is knowledge. The one common understanding of all prosecutorial authorities tasked with investigating and prosecuting war crimes is that without knowing what happened during a conflict, without knowing the level of victimisation and who the key players were any selection will be purely subjective.[62]

VIII. Final Conclusion

At the outset of the first part of this paper the question was raised as to what extent the two notions discussed are mutually compatible. The overriding conclusion is that they are not compatible and in fact conspire against each other. In the simplest terms it is the rights of the individual versus the rights of society and one is arguably less concerned with the other.

The problem that has been identified and discussed in this paper is that the fundamental right of a victim to reparation is only partially achievable. A direct or indirect victim of crimes prohibited under international law requires individualisation and it is the State's aim to redress problems of conflict in a more global context addressing the more general approach impacting on the rights of society. In order to redress mass crimes, such as experienced in BiH, the response has to be measured, deliberate and

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of the catastrophe, should all be candidates for criminal prosecution; to the extent resources can be committed to making it happen, they should be held to answer in a court as long as they can be identified, as long as there is legally obtained evidence that can be used that is strong enough to lead to a conviction, and as long as they can be guaranteed a fair chance to defend themselves so that the outcomes are credible and are respected as credible.

[61] This is the position adopted by most of the *ad hoc* international tribunals (see e.g. Address by Carla Del Ponte, Prosecutor of the ICTY to the UN Security Council on 23 November 2004 (CDP/P.I.S./917-e) http://www.un.org/icty/pressreal/2004/p917-e.htm) in targeting the most senior leaders.

[62] In the Bosnian context this determination was based to a great extent on a credible demographic analysis of the conflict conducted by the Research and Analysis Unit of the State Prosecutor's Office in 2007-2008, including assessments based in a reasoned and well informed fashion on the number of confirmed civilian dead, the number of internally displaced persons and the percentage impact on the region from which they were displaced, and on the number, size and nature of camps in a region or community. The demographic analysis of the conflict is the most objective and impartial way available to a prosecution service for sorting out which cases ought to be done first.

consistent. This approach naturally impacts upon individual victims' right to full reparation, but the State must measure its resources against how much it can address mass claims. This naturally leads the State open to further punitive action for its failure to investigate, prosecute and punish the crime of enforced disappearance, but it remains unrealistic to expect every crime and every perpetrator to be brought to justice.

It is noted that many of the matters raised is here will come as little comfort to victims wishing to discover the fate and whereabouts of missing family members. It matters little to the surviving family members of crimes throughout the territory of the Former Yugoslavia that many of those who perpetrated the most egregious crimes since the Holocaust will never be brought to justice. It matters not to the victims that a judicial process has exposed the crimes committed during the conflicts and exposed the political and military apparatus responsible for those crimes. If a political or prosecutorial process seeks to select aspects of those tragic events and leave to one side a large number of victims 'in the interest of justice' it is difficult for victims to understand what justice has been served. Selectivity remains a necessary evil in this process. One thing that is quite clear is that human rights institutions will continue to be flooded with complaints of the kind highlighted in this paper for many years to come.