

MAKING THE TRANSITION

SERIES ON TRANSITIONAL JUSTICE

The Series on *Transitional Justice* offers a platform for high-quality research within the rapidly growing field of transitional justice. The research is, of necessity inter-disciplinary in nature, drawing from disciplines such as law, political science, history, sociology, criminology, anthropology and psychology, as well as from various specialised fields of study such as human rights, victimology and peace studies. Furthermore, the research is international in outlook, drawing on the knowledge and experience of academics and other specialists in many different regions of the world.

The series is aimed at a variety of audiences who are either working or interested in fields such as crime and justice; human rights; humanitarian law and human security; conflict resolution and peace building. These audiences include academics, researchers, students, policy makers, practitioners, non-governmental organisations and the media.

All books published within the series are subject to a double-blind peer review by recognized authorities in the field.

The General Editors of the Series are:

- Prof. Stephan Parmentier (Catholic University of Leuven, Belgium)
- Prof. Jeremy Sarkin (United Nations Working Group on Enforced or Involuntary Disappearances)
- Prof. Elmar Weitekamp (University of Tübingen, Germany)

The general editors receive the support from an Editorial Committee and an Advisory Board, consisting of internationally renowned academics and practitioners.

Published titles within the series:

1. Stephen Peté & Max Du Plessis, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007), 978-90-5095-492-1
2. Laura Stovel, *Long Road Home, Building Reconciliation and Trust in Post-War Sierra Leone* (2010), 978-94-000-0028-5
3. Andy Aitchison, *Making the Transition. International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina* (2011), 978-94-000-0140-4
4. Stef Vandeginste, *Stones left unturned. Law and Transitional Justice in Burundi* (2010), 978-94-000-0115-2
5. Antoine Buyse (ed.), *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict* (2011), 978-94-000-0157-2

MAKING THE TRANSITION

International Intervention,
State-Building and Criminal Justice
Reform in Bosnia and Herzegovina

Andy AITCHISON



intersentia

Cambridge – Antwerp – Portland

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinerstraße 42/6
1040 Vienna
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Making the Transition. International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina
Andy Aitchison

© 2011 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com

Artwork on cover: Author Jan Jordaan, title 'Hurt', medium Linocut, 1999. From the *Universal Declaration of Human Rights – International Print Portfolio, Article 5*, published by Art for Humanity, South Africa, 1999

ISBN 978-94-000-0140-4
D/2011/7849/35
NUR 828



No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

To Margaret Aitchison
14 August 1942 to 26 July 2005

ACKNOWLEDGMENTS

There is a long list of people who have made significant contributions throughout the project. Among these I owe a particular debt of thanks to the many individuals committed to supporting the ongoing development of criminal justice institutions in Bosnia and Herzegovina who took the time to share their experiences and views with me; to a wider circle of friends and supporters in Sarajevo, including Ramiz, Fatima, Orhan and Mirjana; to those at Cardiff who make the School of Social Sciences such a positive working environment, notably Mike Maguire and Trevor Jones, whose supervision allowed me to 'carry on' and Mike Levi who sent me back to Edinburgh; numerous colleagues at Edinburgh for intellectual and moral support; and Cardiff University and the Cardiff Caledonian Society for the funding that allowed me to conduct the research. Last, but far from least, I owe my thanks to Louise, who has been a remarkable and wonderful constant in times of upheaval.

ABOUT THE AUTHOR

Since 2006, Andy Aitchison has lectured at the University of Edinburgh School of Social and Political Science, where he now co-directs the MSc programme in Global Crime, Justice and Security. He holds degrees from the University of Edinburgh and Cardiff University and has previously worked as a researcher for the UK Home Office and Cardiff University. His research interests focus on international participation in criminal justice reform in post-conflict environments and on the participation of police in war crimes.

PREFACE

At the risk of being accused of being voyeuristic, one must admit that countries that have gone through a period of major conflict are of considerable interest to students of criminal justice. In the course of the conflict atrocities are often committed, which evoke strident calls for 'justice', both from the parties to the conflict and, increasingly, from the international community. Much can be learnt by studying these responses and the grand attempts by the international community to make use of ad hoc international criminal tribunals and, more recently, the International Criminal Court as mechanisms for bringing a measure of justice into dealing with the aftermath of the conflicts.

Equally interesting, however, is the impact that major conflict has on the national criminal justice apparatus of the society in which it takes place. The pattern is that legitimacy of the national criminal justice apparatus is undermined and its efficacy greatly reduced. This provides an opportunity for the international organisations, national governments and non-governmental organisations to assist by 'engaging in capacity building', while using the opportunity, often from the best of motives, to impose on the post-conflict society their idea about what criminal justice should entail.

The provision of such assistance is never a simple process. The tension between the internal old system and externally driven reforms often provokes substantive debates about underlying principles, which are avoided in less disputed systems. The reform process is influenced not only by the ideas and ideals of the aid-givers, but also by the relative political strength of the parties involved and, crucially, by the existing criminal justice system that may have continued to operate throughout the conflict. The careful student of criminal justice should pay particular attention to this last factor, for in the process of reconstruction much is revealed also about the pre-existing system and the claims that it made, and may continue to make, about embodying universal values of justice.

Dr. Andy Aitchison is that careful student of criminal justice. Bosnia-Herzegovina is the exemplar of a sophisticated society in which a pre-existing criminal justice system with a clear set of values (which were already under partial threat with the demise of Yugoslav socialism) was confronted, after a major conflict, by a large and diverse international aid effort. The focus on one country allows him to explore complex resultant interactions in considerable

depth. By conducting thorough empirical research into three major elements of criminal justice – the police, the courts and the prisons – and interviewing major international and local participants, he is able to show that the impact of outside intervention varies from element to element.

In all, the single country focus is a strength of this book. It allows detailed analysis of differences within Bosnia-Herzegovina. This reveals how the entities that comprise its complex political structure, both for ideological reasons and because of their varying abilities to absorb or resist outside influences, respond differently to pressure for change in their criminal justice systems. At the same time, it shows how the wider political objective of state-building remains a concern of the foreign donors, if not of the local politicians with their varying degrees of commitment to the promotion of criminal justice as an element of the development of a single national state. Moreover, while the substance of the book deals with a single country, there are more than enough references to other post-conflict societies, such as South Africa and Northern Ireland, where similar complex processes have played themselves out.

Making the transition should appeal to a range of audiences. Those with a particular interest in the recent history of the Balkans will learn from the thorough investigation of one key aspect of a post-conflict reconstruction process. ‘Experts’ on criminal justice reform should read it as a cautionary tale about the difficulties of introducing change into a society that already has a sophisticated, if much weakened, criminal justice system. The widest general audience, however, should be those who want to read it as a study of the elusive search for post-conflict justice, not only in the high profile international tribunals but also in the day to day operation of criminal processes at the national level.

Dirk VAN ZYL SMIT
Professor of Comparative and International Penal Law
University of Nottingham

CONTENTS

<i>Acknowledgments</i>	vii
<i>About the author</i>	ix
<i>Preface</i>	xi
<i>List of figures, maps and tables</i>	xvii
<i>List of cases</i>	xix
<i>Abbreviations</i>	xxi

PART I

INTRODUCTION AND CONTEXTS	1
---------------------------------	---

Chapter 1

Introduction: criminal justice and transition	3
I. Research questions	5
II. Data generation, collection and analysis	8
III. Plan of the book	13
IV. Transitional states: recurring themes	14
A. Lustration	15
B. International influence: intervention, thresholds, models	19
1. Intervention and assistance	19
2. Setting standards: thresholds and conditions	21
3. Models for reform in transitional states: transfer and transplant	22
V. State and state-building	27

Chapter 2

Setting the scene: history and transition in Bosnia and Herzegovina	35
I. Bosnia and Herzegovina in Tito's Yugoslavia	37
II. The break-up of Yugoslavia	40
III. Peace: Washington, Dayton, Bonn and beyond	44
A. Peace agreements: the Washington and Dayton accords	45
B. State and sub-state governments	46
C. The Office of the High Representative	50
IV. Political parties in post-war Bosnia and Herzegovina	53
A. The entities: Republika Srpska	54
B. The entities: the Federation of Bosnia and Herzegovina	55
C. The Cantons	56

D. Municipal elections 2008	57
E. The Prud Process	59
V. Bosnia and Herzegovina as a transitional state	60

PART II

POLICE, COURT AND PRISON REFORM.	63
--	----

Chapter 3

Post-conflict policing in Bosnia and Herzegovina	65
I. State, democracy and police	66
II. An unhappy inheritance: post-conflict policing in Bosnia and Herzegovina	69
A. Yugoslav legacies: police-militarisation and public-alienation	69
B. Dealing with a violent past: police and war crimes	70
C. Separatist legacies: new divisions in policing	73
D. Corruption	75
E. Post-war landscapes of crime and justice	76
III. Conclusions.	80

Chapter 4

Post-war police reform	81
I. Core civilian missions and the police in Bosnia and Herzegovina	81
A. Enforcement and cooperation under the United Nations	82
B. From UN to EU	86
II. Micro-level reform: the Department for International Development and local experimentation	89
III. Carrot or stick? European Union, thresholds and the Police Restructuring Commission	93
A. Thresholds and threats: EU, Copenhagen and policing between two pillars	94
B. The Police Restructuring Commission and democratic policing	96
C. The Police Restructuring Commission and state-level policing	98
IV. Discussion: policing transitional Bosnia and Herzegovina	102

Chapter 5

‘A judicial wreck’? Post-war courts in Bosnia and Herzegovina	107
I. Court, society and transition	108
II. Defining the problem: the Judicial Systems Assessment Programme.	112
A. Territorial and political division	114
B. Politicisation and corruption	118
C. Procedural problems	120

D. Status and skills	121
E. Resources	121
III. Conclusion: ‘a judicial wreck’?.	122
 Chapter 6	
Strengthening the justice environment in Bosnia and Herzegovina.	125
I. Court restructuring.	127
A. Sud Bosne i Hercegovine: a criminal court for BiH.	128
B. Explaining the development of Sud BiH	134
1. International Criminal Tribunal for Yugoslavia exit strategy . .	134
2. Challenging corruption	136
3. Flagship for reforms	138
II. Review and reappointment	139
III. Procedural reform	143
A. Procedural reform in Brčko.	144
B. The state-level Procedural Code	148
C. Procedural reform and policy transfer	150
D. Revisiting the need for procedural change	150
IV. Concluding remarks	151
 Chapter 7	
Penal provision in post-war Bosnia and Herzegovina.	153
I. Post-war challenges in the correctional sector	156
A. Prison population in post-war Bosnia and Herzegovina	156
B. Socialist ideologies and punishment	161
C. The state of the estate: wartime damage to prisons in BiH.	163
D. Human rights abuses in wartime BiH	164
E. Fragmentation of the prison system.	168
F. The ‘Zenica 4’ and minorities in prison.	170
G. A new breed of inmate	171
II. Concluding remarks	172
 Chapter 8	
Global meets local: three approaches to penal reform.	173
I. The Council of Europe: cooperation, consultation, frustration?	174
II. Developing policy skills: the Department for International Development	180
III. State-level sanctions: the Office of the Registrar.	182
IV. Discussion: international interventions and penal policy in Bosnia and Herzegovina	186
V. Post-script: the forgotten question of war legacies.	190

PART III	
CONCLUSION.....	193
Chapter 9	
Rebuilding justice, rebuilding the state? International interventions in Bosnia and Herzegovina	195
I. State-building and criminal justice reform: an interactive process.	196
A. Accounting for priorities	198
B. Security, justice and building a liberal democratic state.....	200
C. Capacity building and polity building: institutions of state and state-level institutions	202
II. Working methods	204
A. Resources: money, power, legitimacy.....	204
1. Financial resources	204
2. Power resources	205
3. Legitimacy	205
B. Policy transfer and lesson drawing.....	207
<i>Appendix 1. Meetings and interviews</i>	<i>209</i>
<i>Appendix 2. Criminal justice reform agencies</i>	<i>211</i>
<i>High Representative decisions cited</i>	<i>213</i>
<i>References</i>	<i>219</i>
<i>Index.....</i>	<i>245</i>

LIST OF FIGURES, MAPS AND TABLES

Figure 2.1. Structures of government in Bosnia and Herzegovina	49
Figure 2.2. High Representative decisions, 1997–2008	51
Figure 2.3. SDS and SNSD: percentage of vote and seats, presidential and assembly elections 1996–2006.	55
Figure 2.4. Percentage of seats won in the Federation of Bosnia and Herzegovina House of Representatives 1996–2006	56
Figure 4.1. Origins of European Union Police Mission officers deployed on 31 January 2004	87
Figure 6.1. High Representative decisions 1997–2008: judicial reform.	126
Figure 6.2. Rule 11 <i>bis</i> transfers to domestic jurisdictions to April 2007 (numbers of accused)	135
Figure 6.3. Sud Bosne i Hercegovine: international judges at March 2009 ...	139
Figure 7.1. Bosnia and Herzegovina: entity prison populations 1994 to 2005. .	158
Figure 7.2. Bosnia and Herzegovina: prisoners per 100,000 population 1994 to 2005	159
Map 2.1. Republics of the Socialist Federal Republic of Yugoslavia	36
Map 2.2. Bosnia and Herzegovina: municipalities with an ethnic majority, 1991	40
Map 2.3. Bosnia and Herzegovina: entities and Brčko District	46
Map 2.4. Federation of Bosnia and Herzegovina: Cantons	48
Map 7.1. Bosnia and Herzegovina: entity-level Justice Ministry detention facilities	157
Table 1.1. Examples of organisations and documents	9
Table 2.1. Ministries in Bosnia and Herzegovina	44
Table 2.2. Use of ‘Bonn’ Powers by High Representative, 1997–2008	52
Table 2.3. HDZ, SDA and SDS seats in the state-level House of Representatives.	54
Table 2.4. Control of cantonal assemblies 1996–2006	57
Table 2.5. Party strength in voting for municipal assemblies 2008.	58
Table 3.1. Wartime role of those found guilty of crimes in Bosnia and Herzegovina at the International Criminal Tribunal for Yugoslavia, 27 February 2009.	71

Table 3.2. Police personnel per 100,000 population, European Union and Bosnia and Herzegovina, 2003	75
Table 5.1. Criminal courts in Bosnia and Herzegovina	115
Table 5.2. Population of Canton 10 municipalities, by 1991 census	117
Table 6.1. Bosnia and Herzegovina state-level competence and areas of criminal activity	129
Table 6.2. Criminal Code of Bosnia and Herzegovina.	132
Table 6.3. Example of change to Federation of Bosnia and Herzegovina Criminal Code subsequent to promulgation of state-level Criminal Code, 2003	133
Table 6.4. General provisions in evidential rules in The Hague and Brčko District.	146
Table 6.5. Witness testimony in The Hague and Brčko District.	147
Table 6.6. Lawyer-client privilege in The Hague and Brčko District.	147
Table 6.7. Rendering of decisions in the Federation of Bosnia and Herzegovina and Brčko District	148
Table 7.1. Central and East Europe: prisoners per 100,000 population 2001 . .	159
Table 7.2. Prison capacity and occupancy in Bosnia and Herzegovina, June 2004.	161
Table 7.3. Wartime role of those found guilty of crimes in Bosnia and Herzegovina at the International Criminal Tribunal for Yugoslavia, 27 February 2009	164
Table 8.1. Minimum and maximum penalties specified by the Criminal Code of Bosnia and Herzegovina	183
Table A1.1. Meetings and interviews 2004–2005	209
Table A2.1. Organisations active in criminal justice reform, August 2004 . . .	211

LIST OF CASES

All cases heard by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 unless otherwise stated.

Hadžić v Bosnia and Herzegovina. European Court of Human Rights 11123/04 (11 October 2005).

Partial Decision: Alija Izetbegović, U5/98 (Constitutional Court of Bosnia and Herzegovina, 1 July 2000).

Partial Decision: Mr Sulejman Tihić, U-4/04 (Constitutional Court of Bosnia and Herzegovina, 31 March 2006).

Prosecutor v Aleksovski, IT-95-14/1-T, 25 June 1999.

Prosecutor v Aleksovski, IT-95-14/1-A, 24 March 2000.

Prosecutor v Brđanin, IT-99-36-T, 1 September 2004.

Prosecutor v Čengić, KPV-03/05 (The Court of Bosnia and Herzegovina, 29 June 2005).

Prosecutor v Čengić, KPŽ-35/05 (The Court of Bosnia and Herzegovina, 6 October 2005).

Prosecutor v Češić, IT-95-10/1-S, 11 March 2004.

Prosecutor v Čović, X-K-05/02 (The Court of Bosnia and Herzegovina, 17 November 2006).

Prosecutor v Delalić, IT-96-21-A, 20 February 2001.

Prosecutor v Erdemović, IT-96-22-T, 29 November 1996.

Prosecutor v Jelavić, KPV-10/04 (The Court of Bosnia and Herzegovina, 4 November 2005).

Prosecutor v Jelavić, KPŽ-10/04 (The Court of Bosnia and Herzegovina, 4 July 2006).

Prosecutor v Jelisić, IT-95-10-T, 14 December 1999.

Prosecutor v Krajišnik, IT-00-39-T, 27 September 2006.

Prosecutor v Krnojelac, IT-97-25-T, 15 March 2002.

Prosecutor v Krnojelac, IT-97-25-A, 17 September 2003.

Prosecutor v Kvočka, IT-98-30/1-T, 2 November 2001.

Prosecutor v Kupreškić, IT-95-16-A, 23 October 2001.

Prosecutor v Mandić, KPV – 02/06 (The Court of Bosnia and Herzegovina, 27 October 2006).

- Prosecutor v Mandić*, X-KR-05/58 (The Court of Bosnia and Herzegovina, 18 July 2007).
- Prosecutor v Mrđa*, IT-02-59-S, 31 March 2004.
- Prosecutor v Plavšić*, IT-00-39 & IT-00-40-1-S, 27 February 2003).
- Prosecutor v Prce*, KPV-13/04 (The Court of Bosnia and Herzegovina, 30 September 2004).
- Prosecutor v Prce*, KPV-17/04 (The Court of Bosnia and Herzegovina, 24 February 2006).
- Prosecutor v Prce*, KPŽ-20/06 (The Court of Bosnia and Herzegovina, 22 June 2006).
- Prosecutor v Sikirica*, IT-95-8-S, 13 November 2001.
- Prosecutor v Simić et al.*, IT-95-9-T, 17 October 2003.
- Prosecutor v M. Simić*, IT-95-9/2-S, 17 October 2002.
- Prosecutor v Stakić*, IT-97-24-T, 31 July 2003.
- Prosecutor v Todović and Rašević*, X-KRŽ -06/275 (The Court of Bosnia and Herzegovina, 6 November 2008).
- Prosecutor v Todorović*, IT-95-9/1-S, 31 July 2001.
- Rodić and three others v Bosnia and Herzegovina*. 22893/05 (European Court of Human Rights, 27 May 2008).
- Twenty five representatives of the RSNA*, U26/01 (Constitutional Court of Bosnia and Herzegovina, 28 September 2001).

ABBREVIATIONS

ASDA	Party of Democratic Activists for a European BiH
BiH	Bosnia and Herzegovina
BLRC	Brčko Law Revision Commission
BRD	Federal Republic of Germany
CEELI	American Bar Association Committee on East European Legal Initiatives
CIDA	Canadian International Development Agency
CPT	Committee for the Prevention of Torture and Inhuman or Degrading Treatment
DDR	German Democratic Republic
DFID	(United Kingdom) Department for International Development
DNS	Democratic People's Alliance
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUFOR	European Union Military Force in Bosnia and Herzegovina
EUPM	European Union Police Mission
FBIH	Federation of Bosnia and Herzegovina
GDS	Citizens Democratic Party
GFAP	General Framework Agreement for Peace
HDZ	Croat Democratic Union
HDZ 1990	Croat Democratic Union 1990
HJPC	High Judicial and Prosecutorial Council
HKDU	Croat Christian Democratic Union
HPB	Croat Right Bloc
HRHB	Croat Republic of Herceg Bosna
HRW	Human Rights Watch
HSP	Croat Party of Rights
HSS	Croat Peasant Party
HVO	Croat Defence Council
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991)
IEBL	Inter-entity Boundary Line

IFOR	UN Implementation Force
IJC	Independent Judicial Commission
IPTF	UN International Police Task Force
JNA	Yugoslav People's Army
JSAP	UN Judicial Systems Assessment Programme
JSG	Joint Steering Group
KM	Convertible Mark
LPA	Local Police Area
LPP	Local Policing Plan
LPS	Local Police Service
NDH	Independent State of Croatia
NHI	New Croat Initiative
NSDAP	German National Socialist Workers' Party
NSRB	People's Party, Working for Improvement
OHR	Office of the High Representative
OIC	Organisation of Islamic Countries
OZNA	Department for the Protection of the People
PAA	Police Administration Agency
PDP	Party for Democratic Progress
PIC	Peace Implementation Council
PIFWC	Person Indicted for War Crimes
RS	Republika Srpska
RSNA	Republika Srpska People's Assembly
SAA	Stabilisation and Association Agreement
SAPS	South African Police Service
SBiH	Party for Bosnia and Herzegovina
SBS	State Border Service
SDA	Party for Democratic Action
SDP	Social Democratic Party
SDS	Serb Democratic Party
SFOR	NATO Stabilisation Force
SFRY	Socialist Federal Republic of Yugoslavia
SIDA	Swedish International Development Agency
SIPA	State Investigation and Protection Agency (formerly State Information and Protection Agency)
SNS	Serb People's Alliance
SNSD	Alliance of Independent Social Democrats
SP	Socialist Party
SSAJ	Safety, Security and Access to Justice
Sud BiH	Court of Bosnia and Herzegovina
TI	Transparency International
VRS	Army of Republika Srpska